

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Reportable: Yes
Of Interest to other Judges: Yes
21 Jan 2025 [Signature] Vally J

CASE NO 21/58226

In the matter between:

DELTA PROPERTY FUND LIMITED

Plaintiff

And

SANDILE NOMVETE

First Defendant

SHANEEL MAHARAJ

Second Defendant

OTIS TSHABALA

Third Defendant

Judgment

Vally J

[1] The defendants, Sandile Nomvete (Mr Nomvete), Shaneel Maharaj (Mr Maharaj) and Otis Tshabalala (Mr Tshabalala), are former employees and directors of the plaintiff, Delta Property Fund Ltd (Delta). Delta instituted this action asking that each of them be declared to be delinquent directors in terms of s 162(5) of the Companies Act 71 of 2008 (Act), and that they be held liable in terms of s 77 of the Act for certain damages, losses and costs it incurred as a result of their actions. The matter was designated a commercial one. A number of pre-hearing meetings were held with the parties to make the matter hearing-ready and to ensure that the hearing ran

smoothly. Unfortunately, the objective was often thwarted by lack of co-operation from some of the defendants. The hearing lasted a few weeks but could have been finalised sooner: it was marred by avoidable turbulence caused by some of the defendants' conduct. Nevertheless, all said and done, it has been finalised and a judgment can now be rendered.

[2] Delta's case in both claims is pivoted on four episodes of wrongdoing by the defendants. Delta refers to each of the episodes as a cause of action. Delta is correct. Each episode has all the elements required for the establishment of a cause of action. Each on its own, if proven, would place the defendant(s) implicated in the wrongdoing at risk of being declared a delinquent director, and of being made liable for the damages Delta suffered as a result of that particular episode. The four episodes/causes of action are: two Bank of China (BoC) transactions; transactions involving Mhlandla Solutions (Pty) Ltd (Mhlandla) and Zimzin (Pty) Ltd (Zimzin); a lease agreement with the eThekweni Property Fund (EPF); and, a Shameless Way (SW) transaction.

[3] Delta led the *viva voce* evidence of the following witnesses: Mfundiso Johnson Ntabankulu Njeke (Mr Njeke), Keeran Madhav (Mr Madhav), Marelise de Lange (Ms de Lange) and Paula Nel (Ms Nel). Each of the defendants testified on her/his own behalf. Mr Nomvete called one witness, Muziwandile Nzimande (Mr Muzi Nzimande). The facts relayed below are derived from the testimonies of all the witnesses that testified on the particular issue under discussion.

Background

[4] Delta is a Real Estate Investment Trust, popularly known as a REIT. A REIT falls into a special investment and tax category. Delta holds a property portfolio of about R7.5bn. It is a public company, which commenced as a black-owned company. The defendants were executive directors of Delta for some years. Mr Nomvete was the Chief Executive Officer (CEO) as well, while Mr Maharaj was the Chief Financial Officer (CFO) and Mr Tshabalala the Chief Operating Officer (COO). Mr Nomvete has served in this capacity since 2009, Mr Maharaj since December 2015 and Mr Tshabalala since June 2016.

[5] In 2019 Delta's company secretary, Ms Nel, received a telephone call from an anonymous person informing her that Delta was involved in irregular payments to an employee of BoC. The caller claimed to have received the information from a Mr Philip Dube (Mr Dube), an Uber driver. The information was brought to the attention of the Board of Directors (Board). On 13 August 2019 Delta engaged Deloitte Risk Advisory (Deloitte) and tasked it with conducting an initial investigation into the allegation. The findings by Deloitte prompted the Board to resolve that a detailed forensic investigation be undertaken, which was conducted by Mazars Forensic Services (Mazars). In September 2020 Mazars presented its final report which was tabled at a Board meeting. The report detailed evidence of serious irregularities occurring at the instance of Mr Nomvete and Mr Maharaj. Further investigations were undertaken, and in August 2021 even more irregularities at the instance of the three defendants were uncovered, which were detailed in another report.

[6] The delivery of the report to the Board resulted in three virtual meetings:

- a. a meeting between the Chairperson of the Board, Mr Magwaza, a member of the Board, Mr Njeke, representing Delta, and Mr Nomvete;
- b. a meeting between Mr Magwaza, Mr Njeke representing Delta, and Mr Tshabalala; and
- c. a meeting between Mr Magwaza, his deputy-Chairperson (Ms Langeni), Mr Njeke representing Delta, and Mr Maharaj.

[7] The conversations during these meetings are crucial for an issue that for a moment occupied centre stage in the proceedings, and for that reason are dealt with in greater detail below. The issue itself is of crucial importance to the outcome of the matter. According to the three defendants the conversations form the bedrock of an agreement between them and Delta, which prevents Delta from initiating and proceeding with any civil action – such as the present litigation – against them. They claim that a *pactum de non petendo* (*pactum*) – an agreement between parties whereby one party agrees not to institute legal proceedings against the other party, either temporarily or permanently – was concluded between each of them and Delta. Following the conversations, each of the defendants resigned with immediate effect from their employment and their positions as directors of Delta. The conversations took place on Friday, 21 August 2020 and they all resigned on Monday, 24 August 2020. It

bears mentioning that Mr Maharaj had already resigned on 1 July 2020 and was busy serving his notice period when he had the meeting with the representatives of Delta. On 24 August 2020, he resigned again, this time with immediate effect.

Application for a postponement

[8] The trial was scheduled to commence on Monday, 22 January 2024. At 14h00 on Sunday, 21 January, the defendants sent Delta a notice of intention to amend their plea. The notice came to my attention only when the matter was called in court. The amendments raised the defence of the *pactum*. After some deliberation, the application was not opposed and the amendment was effected. Taken by surprise at Delta's decision not to oppose the application, the defendants applied for the matter to be postponed in order for them to apply properly for their new defence. The application was dismissed with costs of two counsel to be paid jointly and severally the one paying the other to be absolved. It is now necessary to relay some of the historical facts which underlie the decision to refuse the application for postponement.

[9] Delta instituted the action in December 2021. The matter was designated a commercial one. Commercial matters are per the Practice Directive of this court, case managed and finalised expeditiously. Case management involving extensive judicial time and resources was undertaken. It encountered avoidable difficulties. Eventually, the matter was set down. The hearing, as per the estimate of the parties, was scheduled for two weeks. Delta had prepared its case, including having arranged for all the witnesses to be able to testify during the scheduled two-week period. The defendants were fully apprised of Delta's case. They had been furnished with Delta's witness statements months earlier. They had refused to furnish their witness statements in the time they were directed, by myself, to do so. This prompted a delay in securing a set-down date. Eventually, the matter was set down without the witness statements of the defendants being furnished. Shortly before the hearing commenced, they furnished their witness statements. Until then they were fully aware of the case they had to meet and the case they intended to make. Apart from the new plea of a *pactum* being concluded, their defence remained unchanged. On the first day of the hearing when they sought to apply for the amendment, they also asked for authorisation to introduce new documents into the bundle of documents for trial. The bundle had been prepared months ago. They were allowed to do so.

Reasons for refusal of the application for postponement

[10] The defendants could not explain with sufficient particularity as to why they could not mount their new defence should the matter not be postponed. They vaguely referred to seeking out new evidence and possibly issuing a subpoena *duces tecum* on the former chairperson of the Board, Mr Magwaza. The defence of Messrs Nomvete and Tshabalala was based on a single discussion each of them had with Mr Magwaza and another member of the Board, Mr Njeke, referred to above. In the case of Mr Maharaj his defence was based on a single conversation he had with Messrs Magwaza, Njeke and the former deputy chairperson of the Board, Ms Langeni.

[11] There are no factual complexities involved in the conversations: they were single-issue based, to the point and concise. The legal issue arising, and the conclusions to be drawn from the factual allegations each of them made in their now amended plea, invite no unique or complicated considerations. It is straightforward and can be captured in a single sentence-question: did the conversations result in an agreement between the parties that no civil action, such as the present one, would be taken against them? Finally, the postponement would have to be without a date (*sine die*), which effectively meant that it would be anything between nine to twelve months before the matter could resume. This would have a substantial impact on the witnesses of Delta. A cost order would not have compensated it for the loss it would have suffered.

[12] In any case, the defendants could easily deal with all the other evidence that Delta was ready to lead during the first week of the hearing. As for the issue of the *pactum*, it could be addressed later as the trial unfolded over the two weeks that it was set down for.

[13] For these reasons, the application for postponement was denied. The issue of costs was left for consideration at the end of the proceedings when all parties presented their closing submissions. Given the conclusion I have reached in this matter there is no need for any further consideration of this issue. These costs will be incorporated into the overall costs order that I make at the end of the judgment.

The pactum

[14] A *pactum* is a normal contract¹ binding the parties to the agreed terms. For a contract to be concluded the following has to be established:

- a. An offer intended to create binding and enforceable obligations on both the offeror and the offeree as soon as the offeree accepts the offer. The offeror must intend to make an offer.² The offer must be clear and unambiguous that once accepted the offeror intended to bind herself to the terms. In other words, there must be *animus contrahendi*.³
- b. All the terms of the proposed agreement must be agreed to.⁴
- c. The acceptance must itself be complete, unequivocal and with *animus contrahendi*. The acceptance must correspond with the offer.⁵
- d. The parties must be aware that they have agreed to the material terms of the contract.

[15] Having claimed that there is a *pactum* in place, the defendants bore an onus to prove that all the four requirements set out above were met. In the case of Messrs Nomvete and Tshabalala they set out to do so by producing a transcript of two recordings made by themselves of virtual meetings they each held with Messrs Magwaza and Njeke, and by the *viva voce* evidence each of them presented at the hearing. In the case of Mr Maharaj, he set out to do so by *viva voce* evidence only, as he did not record the meeting he had with Messrs Magwaza and Njeke and Ms Langeni.

[16] Mr Nomvete and Mr Tshabalala each recorded the meeting without the knowledge and consent of Mr Magwaza or Mr Njeke. The virtual meetings were held on Friday 21 August 2020. They resigned on Monday 24 August 2020. They had forgotten the recording until the weekend before the trial was to commence on 22 January 2024.

¹ *Coral Lagoon Investments 194 (Pty) Ltd and Another v Capitec Bank Holdings Limited* [2023] 1 AllSA 1 (SCA) at [29].

² *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A) at 963D

³ *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 991G. *Kgopana v Matlala* (1081/2018) [2019] ZASCA 174 (2 December 2019) at [9].

⁴ *OK Bazaars v Bloch* 1929 (WLD) 37 at 44-45; Christie *The Law of Contract* (3rd Ed.) at 37.

⁵ *Boerne v Harris* 1949 1 SA 793 (A) at 799-800; *Saambou-Nasionale Bouvereniging*, fn 3.

[17] In both Mr Nomvete's and Mr Tshabalala's case the conversations commenced with Mr Magwaza relaying the purpose of the meeting. He told each of them that the purpose was for him and Mr Njeke to inform them of some of the contents and conclusions in the Mazars' report. They informed each of them that very serious allegations of impropriety on each of their part were raised against them in the report; that the Board had deliberated on the contents of the report and was of the view that disciplinary action against each of them should be taken. Thereafter, they apprised each of them of his options, and gave him until Monday 24 August 2020 to convey his decision to them.

Mr Nomvete's account of the *pactum*

[18] The relevant portions of the transcript of the conversation between Mr Nomvete and Messrs Magwaza and Njeke read:

'MAGWAZA: Sandile, Sandile, thank you very much for having this chat with JJ and myself. This is a sequel to a number of meetings that have happened between the board members, amongst board members following the investigation that you are aware of, that took place started when the Deloitte Group and the ended up being picked up by Mazars and this meeting has been called with you without prejudice and is definitely off the record meeting to discuss the outcome of the forensic investigation which I have just referred to.
NOMVETE: Yes sir.

MAGWAZA: As you know Mazars was charged by the board with the investigating alleged misappropriation of funds the company senior executives and one of those executives is yourself.

NOMVETE: Yes.

MAGWAZA: The board recently received the report from Mazars. I am not going to go to the details of this report at this stage except that Mazars has identified alleged untoward contacted by all of you guys, that is Shaneel, Otis, and yourself to varying degrees and these allegations are extremely serious, and the board has taken legal advice and we are getting ready to commence with formal disciplinary processes to ventilate these very serious allegations against you or all of you guys. Our advice is if pursuant to this disciplinary hearing you are found guilty these allegations are serious enough to justify summary dismissal. The board is already getting prepared to follow this formal process but before doing so however we wanted to give you the forewarning of what is to come and the likely consequences which at the very least would be protracted process on public litigation.

We understand that you decided, you decide to resign, that if you decide to resign with immediate effect the company will no longer have authority to take disciplinary action against you. This is of course solely at your discretion and this really Sandile is the fundamental message that [Mr Njeke] and I have been asked by the board to convey to you, ja

NJEKE: Can I add [Mr Njeke] to what you have just said, I think Sandile when this matter came at the board, the Chairman and I were obviously quite sensitive to the fact that, I mean you are a young family person and I mean we thought of other instances where people have gone to disciplinary hearings and the negative publicity that gets associated with that and we then requested an opportunity to engage with you and say there is another tool, but this option is up to you. You must reflect on it and whether you wish to go one way where the company engages, you know, in a process of you know, ventilating charges and all those things against you guys or you move on with your life and the company moves on with its life. I think that is really the essence of this, I mean it is up to you, but we felt that we should have this opportunity to, engage with you, instead of going through all the other processes and it is not an easy thing but acrimonial [sic] ... [intervenes]

NOMVETE: No, thank you, thank you very much for the feedback and I must thank both of you for your consideration. Obviously, I have not had sight in terms of the what the report is saying, but I trust both of you explicitly and have done for a number of years, in fact for most of my life to be honest so I have no doubt to question what you are advising. I think you, if I understand it correctly, one is been given the opportunity to resign with immediate effect, immediate effect being today or Monday or Tuesday or when?

MAGWAZA: Sandile I would say timing wise between now and Monday, say 10:00 in the morning, we would appreciate and you send of course your response to [Mr Njeke] and myself, you will copy the same response to me as the Chairman and you will copy [Mr Njeke].

NOMVETE: Okay.

MAGWAZA: We will then [indistinct] the proper process which I am sure is familiar to you.

NOMVETE: Yes, yes, okay no, I think thank you, thank you for that, I think the other question I have is that obviously where one to go that route, I mean there is some administrative issues that one would have to consider like who would be my contact person in that regard should one consider that, *i.e.* unpaid leave, do I get a salary next week or not? These are all the things that one obviously one need to contemplate.

MAGWAZA: Look Sandile under the circumstances what happens is that you will be paid effectively until the end of this month.

NOMVETE: Yes?

MAGWAZA: That is one, secondly in terms of the law you will be entitled to your accumulated sick leave, sorry not sick leave.

NOMVETE: Annual leave.

MAGWAZA: Annual leave, that basically I would thing [sic] that you will be entitled to and of course you will be expected to return all company properties that is with you, that is your computers, whatever including access keys.

...

NOMVETE: No it certainly it is not, it is certainly not gentlemen but, I think you are right brother JJ, this business has been my life and I think one has indeed sacrificed a lot for, I think it has been, my mindset, I mean obviously not having the hindsight of maybe consulting one or two people, I equally would not want to 10 have a long drawn out litigation matter on a personal matter, I know we still have other matters that we are disputing but, those are not personal, those are contractual matters in terms of Jabu, myself and other people, but I think those will probably conclude because those are not personal, but at a personal

level I would also not want to bring the company into disrepute.’ (Quotation is verbatim).

[19] Mr Nomvete insisted that the above record of the conversation evidences the conclusion of an agreement to the effect that no legal action at all, not only legal action relating to his employment contract, would be taken against him by Delta. Mr Njeke testified that this is not so. He insisted that it was clear to all parties to the conversation that the offer only related to an undertaking that no disciplinary action would be instituted against Mr Nomvete.

Mr Tshabalala’s account of the *pactum*

[20] The relevant portions of transcript of the conversation between Mr Tshabalala and Messrs Magwaza and Njeke read:

‘And the Board has decided that they would like to go down the disciplinary hearing process and lay charges and all that but the Board, considering your age and your position said that [Mr Njeke] and I [Mr Magwaza] should engage with you and put this to you and say the other option that you have is to resign with an immediate effect in which event there would be no purpose in following any disciplinary action against you guys. We are saying this to you without any prejudice and should not in anyway be construed as putting pressure on you.

...

But you have between now and Monday, 10 am to tell us what your view is, which if you say you want to resign with immediate effect we will change your situation to no longer going to work in the middle of your notice period that would be sufficient for us just to say look let’s not pursue these guys because the implication for you guys in terms of your careers is bad if the disciplinary enquiry ends up with all the publicity that it has during the process and also if it comes up with the decision to confirm that you need to be dismissed so we are putting that to you and Tshabalala to say that if you could let myself and JJ know no later than 10 on Monday whether you want to resign immediately and leave immediately or you prefer to sit and go through the process of a disciplinary hearing.

...

If you resign that would be the end of it from our side. you would have to hand over company property and that kind of stuff at your last day of work which would be Monday and that is it.’ (Quote is verbatim)

[21] Mr Tshabalala testified that he understood the offer made to him to cover any and all legal steps Delta could take, and not just the disciplinary action that the Board deliberated on. He claims that the last sentence in the quotation above conveyed that message to him. Mr Njeke testified that the only action the Board was contemplating at the time was disciplinary action. It had no idea that it could take any other steps against the three defendants. The only offer made to them was to resign, or face disciplinary action. He said that the transcripts do not evidence any other offers being made to Mr Tshabalala.

Mr Maharaj's account of the *pactum*

[22] Mr Maharaj's testimony was that the meeting was very short. Mr Magwaza opened the meeting, informed Mr Maharaj that the meeting was without prejudice, that Deloitte had completed a forensic investigation into allegations of wrongdoing by some staff, that a further forensic investigation on the same issue was conducted by Mazars, that Mazars had issued a detailed report of its investigation, that the conclusions reached by Mazars included a finding that he was personally implicated in some of the wrongdoing. The Board, having regard to the contents of the report, had decided to institute disciplinary proceedings against him, but had tasked himself, his deputy-Chair and Mr Njeke to advise him that if he voluntarily resigned, it would not proceed with its intention. He was alerted to the risks he bore should he elect not to resign. In particular, Messrs Magwaza and Njeke told him that should the Board carry out its intention, ugly public litigation would ensue which was not in his or Delta's interest. He informed them that he was in the middle of his notice period, and that he should be allowed to complete serving his notice period. This would allow him to complete all the tasks he was engaged in, and ensure that there was a smooth handover to the other staff members so they could continue performing their duties without any disruption. Mr Magwaza informed him that that was not an option. He was told that the resignation would have to take immediate effect and that he had until Monday to inform them of his decision. He handed his resignation letter in on Monday. His testimony was met with the testimony of Mr Njeke, which was that there was no *pactum* concluded with Mr Maharaj.

Conclusion on the *pactum*

[23] Objectively assessed, the transcripts read as a whole reveal that the only offer *animo contrahendi* made by Mr Magwaza and Mr Njeke was that Delta would not proceed with disciplinary action against them should they voluntarily resign. The transcripts bear no reference to any other legal process(es). Neither Mr Magwaza nor Mr Njeke made any reference to any other legal action. In the cases of Mr Nomvete and Mr Tshabalala, neither of them asked if the Board was contemplating taking any other legal steps. It is clear from the relevant passages of the transcripts that the minds of all three parties to each of the conversations was focussed on the employment relationship between Delta and Mr Nomvete in the one case, and between Delta and Mr Tshabalala in the other. Nothing else was even contemplated by any of the parties to the conversation. Therefore, no other offer could have been made to or be accepted by Messrs Nomvete and Tshabalala.

[24] Put differently, there was no offer *animo contrahendi* that no civil action would be taken against each of them should they voluntarily resign from their employment. They were only offered the opportunity to voluntarily resign and avoid cumbersome disciplinary proceedings, which would be uncomfortable, inconvenient and would attract adverse publicity for each of them and for Delta. That was the only offer made to them and that was the only one they accepted. All of them were only concerned with the future of Messrs Nomvete's and Tshabalala's employment with Delta. In particular, there was no offer that Delta would desist from taking any civil action, such as the present one, should they resign. That, in my view, explains why they did not record in their resignation letters that their resignations were subject to Delta desisting from taking any civil action against them. It is also why they did not initially raise the existence of the *pactum* in their original plea. Messrs Nomvete and Tshabalala knew, or at the very least ought to have known, that the transcripts of the recordings do not advance their case for the *pactum*.

[25] Their decision to introduce it on the morning that the trial was to commence - one year and nine months after the original pleas were delivered - was a last-minute attempt at preventing Delta from holding them to account for their conduct. It was not a genuine case of exercising a right in terms of a contract.

[26] The same conclusion has to be reached in relation to the contention of Mr Maharaj on this issue. He is unable to produce any credible, weighty evidence to support his contention that the *pactum* was concluded. His version of the conversation he held with Delta's representatives was brief, terse and to the point. It referred only to the intention of the Board to proceed with disciplinary action against him, and in that regard he was offered an opportunity to avoid the negative fallout that would emanate if the Board carried out its intention by resigning with immediate effect. The reference to litigation during this conversation was a reference to the disciplinary action, nothing else. Nothing else was discussed or even contemplated by the parties. In addition, the transcripts of the recorded conversations of Messrs Nomvete and Tshabalala are instructive. If they show that no *pactum* was concluded with each of them, it is most improbable that a *pactum* would have been concluded with Mr Maharaj alone.

The first cause of action – the BoC transactions

[27] There is no material dispute of fact regarding the transactions. They concern the rolling over of a loan which originated with Nedbank but was bought by BoC. It was for the sum of R200m. Taking large loans from commercial banks is normal for Delta. It relies on these loans for the acquisition of properties.

[28] It took a fixed-term loan from Nedbank in 2012. In 2016 Nedbank decided to reduce its exposure to Delta and accordingly 'sold down' a portion of its loans, called Tranche O and valued at R200m, to BoC. BoC became the new lender, but Nedbank remained as a 'facility agent', thus retaining a role in future negotiations regarding the extension or the repayment of the loan. The loan was not repaid on the repayment date. It was extended on five occasions. Each extension resulted in the conclusion of 'an addendum', which would cover any new terms, including the new settlement date. Two of the five extensions secured from BoC implicate Messrs Nomvete and Maharaj in malfeasant conduct.

[29] The conclusion of the first and second addenda went smoothly with, and because of, Nedbank performing the role of facility agent. The third addendum was concluded with the involvement of Mr Alfred Van Wyk (Mr Van Wyk) who was an employee of BoC at the time. He was the relationship manager between BoC and

Delta. The second addendum extended the loan to December 2018. In November, Nedbank approach BoC by email for an extension. The email was sent to many persons employed by BoC. The official from Nedbank who sent the email received a response from Mr Van Wyk informing him that it was unacceptable for him to have included other people in the email and requested that 'in future the email should be sent to me [Mr Van Wyk] 'only'. A few days later Mr Van Wyk wrote to Nedbank and informed it that the facility would not be extended, as BoC was promised that the loan would be repaid upon expiry of the extended date. He said, further, that BoC required 'three months to request an extension for the client'. This led to Messrs Nomvete and Maharaj meeting with Mr Van Wyk. They met him at Delta's offices. Mr Van Wyk informed them of the difficulties they faced in securing a further extension. He then said that 'while there was a small possibility of obtaining a short term roll over ... this required careful preparation and insight into BOC's process.'⁶ As the discussion unfolded, he informed them that he, in addition to his employment duties, was privately engaging in the business of 'assisting with and facilitating loans and Bank facilities during his personal time and that he was doing so in a separate capacity and not as a representative of the BOC.'⁷ He invited them to engage him in this capacity, and told them that if they did so he would charge Delta a fee calculated at 0.1% per month for each of the months that the loan was extended. They agreed there and then to engage him. This they did without any further thought about the contract they were concluding with Mr Van Wyk on behalf of Delta. There is no record of a mandate agreement between Delta and Mr Van Wyk setting out the scope of his work, or the fee that he was to earn. It was simply an oral agreement between Mr Van Wyk and Messrs Nomvete and Maharaj.

[30] Soon after, they were informed by Mr Van Wyk that the loan was extended for three months. Before the formal notice informing Delta of the extension was received, on 12 December 2018, Mr Van Wyk sent Delta an invoice for R600 000.00 in the name of a company, Striving Mind Trading 175 (Pty) Ltd (Striving Mind). Mr Maharaj approved the invoice and had it processed for payment. Neither Mr Maharaj nor Mr Nomvete undertook any investigation into Striving Mind. The forensic investigations

⁶ Mr Maharaj's witness statement at para 46.4. Mr Nomvete incorporated the statement as part of his own evidence.

⁷ Ibid at para 46.5.

undertaken by Mazars revealed that the sole active director of Striving Mind was Mr Dube, the Uber driver who blew the whistle alerting Delta to the impropriety of the transaction. The payment was recorded on Delta's system as a payment to the trade union, NEHAWU.

[31] The next addendum, the fourth one, seems to have been concluded without issue. The fifth one though was not. It commenced with Nedbank seeking the extension, and BoC indicating an unwillingness to extend the loan any longer. Mr Van Wyk reappeared in his private capacity and offered to arrange for the extension for a higher fee than the one previously agreed. The new arrangement was acceptable to Messrs Nomvete and Maharaj. Mr Maharaj sent a letter to Mr Dube on 26 May 2019 confirming the appointment of Striving Mind at a 'fee equal to 1.5% of the value successfully raised for' Delta. According to Mr Maharaj this was because the contract was to have been concluded between Delta and Striving Mind. There was, it is worth recalling, no dealing between Messrs Nomvete and Maharaj and Mr Dube prior to this letter. The agreement was reached with Mr Van Wyk, who, according to the oral mandate, was to assist Delta in his personal and private capacity.

[32] On 23 July 2019 Mr Van Wyk, using his official BoC email, sent a message to Delta informing it that BoC had decided to grant the extension of the R100m loan for three months and R100m refinancing for three years. Later, on the same day, using his private email Mr Van Wyk wrote to Mr Maharaj providing his private banking details. Mr Maharaj issued a purchase requisition for 'approval on invoice' in favour of an entity, Mazaleni Projects (Pty) Ltd (Mazaleni), for a 'facilitation fee'. On 26 July 2019 Mazaleni, a legal entity different from Striving Mind, issued an invoice for R1.5m (the R1.5m is calculated as 1.5% for the refinanced R100m). The question that immediately poses itself is why is Mazaleni issuing an invoice for payment that is due to Striving Mind? Mr Maharaj's answer is that they are one and the same company. The fact that they are two separately registered private companies seems to have eluded Mr Maharaj, who, it must be remembered, is a fully qualified chartered accountant. On the same day, Messrs Nomvete and Maharaj approved the invoice for payment.

[33] Faced with the anomaly of receiving invoices from Striving Mind and Mazaleni in relation to a contract concluded with Mr Van Wyk in his personal capacity, Mr Nomvete decided to break ranks with Mr Maharaj and placed all blame on him. According to Mr Nomvete, Mr Maharaj failed in his duty by allowing the payments to be made to these entities. He, on the other hand, is completely free of any blameworthy act or omission. His explanation as to why he signed off on the invoice of Mazaleni was that he believed Mr Maharaj had, or at least should have, scrutinised the invoice before presenting it to him for his approval. He signed it believing that Mr Maharaj had verified it. Hence, the oversight or error that occurred by a failure to query why the invoice came from Mazaleni and not Mr Van Wyk lies entirely at the feet of Mr Maharaj and not himself. By this claim, Mr Nomvete admits to have thoughtlessly rubber-stamped the invoice. The admission does not absolve him of any blameworthy conduct. On the contrary, it makes him culpable of gross negligence. But, as I show below, this is not just a case of gross negligence, admitted or not.

Conclusion of the BoC transactions

[34] Neither Mr Nomvete nor Mr Maharaj were able to dispel the general thrust of Delta's case, which is that the payments flouted basic business banking practice, business ethics and Delta's own internal controls. In the circumstances, the conclusion that both of them failed badly in carrying out their fiduciary⁸ duties towards Delta is not

⁸ A director owes the company a fiduciary duty. The Act, in ss 76(2) and (3) spell out some of the elements of this duty. They read:

'(2) A director of a company must-

(a) not use the position of director, or any information obtained while acting in the capacity of a director-

(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or

(ii) to knowingly cause harm to the company or a subsidiary of the company; and

(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director-

(i) reasonably believes that the information is-

(aa) immaterial to the company; or

(bb) generally available to the public, or known to the other directors;

or

(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.

(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity must exercise the powers and perform the functions of director-

(a) in good faith and for a proper purpose;

(b) in the best interests of the company; and

open to doubt. Fiduciary 'is a protean term, capable of covering a wide range of different rights and obligations'⁹ and in this regard the Act provides valuable guidance of what it entails. But this is not just a case of failing in carrying out a fiduciary duty. It is a case of engaging in unlawful conduct.

[35] The payments were unlawful. They constitute acts of corruption as defined in ss 3 and 12 of the *Prevention and Combatting of Corrupt Activities Act 12 of 2004* (PRECCA).¹⁰ The entire transactions with Mr Van Wyk were clouded in mystery and secrecy. There was a deliberate and definite intention on the part of all three persons

(c) with the degree of care, skill and diligence that may reasonably be expected of a person-

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.'

⁹ *Wood v Commercial First Business Ltd and Others* [2012] EWCA Civ 471 at para 36.

¹⁰ Sections 3 and 12 of PRECCA provides as follows:

'Any person who, directly or indirectly-

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-

(i) that amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules,

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corruption.'

And:

'12 Offences in respect of corrupt activities relating to contracts

(1) Any person who, directly or indirectly-

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of that other person or of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person-

(i) in order to improperly influence, in any way-

(aa) the promotion, execution or procurement of any contract with a public body, private organisation, corporate body or any other organisation or institution; or

(bb) the fixing of the price, consideration or other moneys stipulated or otherwise provided for in any such contract; or

(ii) as a reward for acting as contemplated in paragraph (a),
is guilty of the offence of corrupt activities relating to contracts."

to conceal the payments to Mr Van Wyk. So determined were Messrs Nomvete and Maharaj to conceal their interactions with, and the payment to, Mr Van Wyk that they had one of them recorded as a payment to the trade union, NEHAWU. The secrecy was necessary because all three of them knew that he was not entitled to the payment. In my judgment, this is the only inference that can be drawn from their conduct. The characterisation of it as a 'commission' was nothing short of a deliberate dishonest attempt to conceal the true nature of the transaction, and to justify the unjustifiable. It was, in two words, a bribe. That is the only rational explanation for the payment. In terms of the common law, a bribe would be a person (Messrs Nomvete and Maharaj and Delta, as they acted on Delta's behalf) giving or promising a gift, or compensation to an agent or employee (Mr van Wyk) of another person (BoC) without the agent's principal or employer (BoC) knowing about it, for the sole purpose of influencing the agent (Mr van Wyk) to obtain a benefit for the donor (in this case only Delta) in relation to the affairs of his principal or employer (BoC).¹¹ The facts allow for no other conclusion. They are these: (a) a surreptitious oral contract is concluded on an unknown date and place, (b) on undefined terms, (c) with the payments made to entities not involved in the contract concluded with Mr van Wyk, in order to conceal the fact that Mr van Wyk was the true recipient, (d) with the payments being deliberately concealed from the payer (Delta) and the employer (BoC) and (e) for which Delta benefitted by securing the extension of the loan. The transactions reek of duplicity and deceit. In short, Messrs Nomvete and Maharaj committed a crime and they did so in the name of Delta.

[36] Sadly, neither of them appreciated, and still do not appreciate, the gravity of their criminal conduct. Until the very end, they both pleaded that they acted in the best interest of Delta. Only at the very end of a long trial were they willing to acknowledge their wrongdoing, and even then, it was a half-hearted acknowledgement. All they were willing to say was that 'in hindsight' they can see that their actions constitute 'gross negligence'. They do not admit to engaging in malfeasant conduct, but that is exactly what they did: they unlawfully and intentionally had Delta pay Mr Van Wyk R2 100 000.00, which he was not entitled to.

¹¹ *Plaaslike Boeredienste (Edms) Bpk V Chemfos Bpk* 1986 (1) SA 819 (A) at 845A-B. See *Exxel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA) at 724D-F for a more detailed exposition of the elements of the crime of commercial bribery.

[37] It needs be said though that in the case of Mr Nomvete the situation is much worse. He pleaded that at all material times he acted in the best interests of Delta. During his cross-examination, he presented the half-hearted acknowledgement of gross negligence, and then at the end of the hearing, during his final submissions, he tried to withdraw this acknowledgement. He is quite simply not able to recognise his wrongdoings. This makes it impossible for me to find that he could at some point in the future avoid re-committing the offences he is found to have committed.

The second cause of action – the Mhlandla and Zimzin transactions

[38] It is Delta's case that all three defendants engaged in wrongful conduct by the actions or omissions which justify the relief it seeks against each of them.

[39] Delta's business focusses largely on letting property to government departments (departments). The main government department that it deals with is the Department of Public Works (DPW). It owns or leases immovable property and leases these properties to the departments. It engages the services of brokers to secure leases or renewal of leases with the departments.

[40] In 2018 Mr Nomvete, with the knowledge of Messrs Maharaj and Tshabalala, negotiated brokering agreements with Mhlandla and Zimzin. On 18 February 2019 he signed a mandate agreement with the two entities. Mhlandla was represented by Mr Mbuso Nzimande and Zimzin was represented by Mr Anele Mabalene (Mr Mabalene), while he represented Delta. Mr Mbuso Nzimande is the cousin of Mr Muzi Nzimande. He granted them the mandate to negotiate a renewal of 59 lease agreements with DPW. The mandates terminated on 29 March 2019, but would be extended for a further 15 days should they have succeeded in securing renewals for 85% of the properties before that date. The commissions to be paid to them would be calculated in terms of the South African Property Organisation (SAPO) schedule. For them to qualify for these commissions, they were required to show that they were the effective cause of the renewals, and legally entitled to them. Should any renewal of the lease agreements be signed before the commencement of the mandate or after the expiry thereof, or the brokers were not able to show that they were the effective cause of the lease renewal,

then they would not be entitled to claim any payment from Delta. Also, to be legally entitled to the commissions they each had to be in possession of a Fidelity Fund Certificate (Certificate) as required by the Estate Agency Affairs Act, 112 of 1976. The Board was not informed of the mandate agreements. On the contrary, the Board was made to believe that Messrs Nomvete and Tshabalala were negotiating with DPW over the renewals.

[41] A total of 37 leases were concluded between Delta and the DPW between 2018 and 2019. The majority, 31 of them, were concluded outside the mandate period.

[42] Between December 2018 and February 2020, Delta paid Mhlandla a total of R23,094,415.54 in respect of ten invoices for leasing commissions. The records of the payments made to Mhlandla revealed that all three defendants had a hand in them. In particular, (a) Mr Nomvete gave sole approval for two invoices, Invoices 102 and 106, and further approved the purchase requisition and payment in respect of those invoices, (b) Mr Tshabalala gave sole approval for one invoice (Invoice 101), (c) Mr Nomvete and Mr Tshabalala jointly approved six invoices (Invoice 107, 113, 131, 132, 140 and 136), (d) Mr Nomvete and Mr Tshabalala approved the purchase requisition and payment in respect of two of those invoices, (Invoices 131 and 132), and (e) Mr Maharaj approved payment in respect of one invoice (Invoice 109).

[43] Between June and September 2019 Delta paid Zimzin a total of R3 620 835.52 in respect of four invoices. An additional payment totalling R1 233 876.69 was made to Mhlandla. A breakdown of the payments revealed the following irregularities (a) a total of eight invoices were for leasing commissions and one for the sale of a property, (b) an invoice for the sale of the property described as 'Erf 1227 Marshalls Town' for the amount of R1 750 000.00, was approved by Mr Tshabalala in circumstances where no proof of a sale was provided, and (c) another invoice (Invoice 132), amounting to R2,216,773.00, issued on 9 October 2019 – which was after the mandate terminated – was for the renewal of a lease for a property (Shell House) in Durban, and was concluded with the eThekweni Metropolitan Municipality and not with DPW, when the mandate agreement was restricted to bulk lease renewals with DPW. Messrs Maharaj and Tshabalala claim that the executive team, which includes Mr Nomvete, were under pressure to secure the renewal of the leases. They, however, fail to say why this left

Mr Nomvete with no choice but to conclude the mandate agreements with Mhlandla and Zimzin. None of the three defendants can, nor did they, deny that even if it was necessary to engage a third party to negotiate the renewals with DPW, the third party should be one that is legally entitled to undertake the task and earn the commission. There should be a clearly defined role for the third party, as well as a mechanism in place to ensure that the third party was the effective cause of the renewals justifying it receiving the commission.

[44] Records of the payments made to Zimzin reveal that Mr Nomvete and Mr Tshabalala were centrally involved in effecting them by jointly approving four invoices (Invoices 2369, 2370, 2376, and 2371), and by further approving the purchase requisition and payment in respect of one invoice (Invoice 2371).

[45] In addition to his implication in the above irregularities, Mr Nomvete was implicated in further acts of misconduct in the following respects:

- a. He is the sole director of Mesismart (Pty) Ltd (Mesismart), and on or about 29 March 2019 (the same day that the mandate agreement was to terminate), Mhlandla effected a payment of R300,000.00 to Mesismart. The version Mr Nomvete presented to Mr Madhav who conducted the investigation for Mazars, was that this was a payment Mhlandla had to make for a trip to Uganda where Mr Muzi Nzimande, as representative of Mhlandla, had accompanied him on his private jet. The trip was undertaken because the two entities were planning a future business relationship, and the trip to Uganda was part of that plan. However, no evidence of any representative of Mhlandla accompanying him on the trip was found or could be provided by Mr Nomvete. In addition, the private jet is owned by his company, Shameless Way, making it the entity that was entitled to the payment and not Mesismart. Mr Nomvete's explanation prior to the hearing for the payment being deposited into Mesismart's account, and not that of Shameless Way, was that the bank accounts of the two entities are used interchangeably. At the hearing, Mr Nomvete's version changed. It was that a Phumlani Dlamini (Mr Dlamini) of Mhlandla had travelled with him and several other businesspersons to Uganda. Mesismart made payment for

and on behalf of Mr Dlamini's travel. The payment was reimbursement by Mhlandla for the cost of Mr Dlamini's travel. There is no supporting evidence for the *ipse dixit* (unverified assertion) of Mr Nomvete. The entire trip cost R900 000.00 and Mhlandla paid one third of this for the travel of one person on a flight where, according to Mr Nomvete, many businesspersons travelled together. Thus, submitted Delta, correctly in my view, that even on Mr Nomvete's latest explanation the only conclusion to be drawn from all the facts is that the R300 000.00 was 'a secret profit on the lease of Delta's properties' shared with Mr Nomvete.

- b. Mr Nomvete is the sole director of Dariobex (Pty) Ltd (Dariobex) as well as Mesismart. Both Mr Mbuso Nzimande (the sole director of Mhlandla) and Mr Muzi Nzimande (a long-time personal friend of his) are on the payroll of Dariobex. As the sole director of both Messismart and Dariobex, he is deemed in terms of s 75(1)(b) of the Act to be a 'related person' to these companies with 'personal financial interest' in them.

[46] In sum then, the case against all three defendants, which on the evidence has been clearly established, is that:

- a. they failed to disclose to the Board that these brokering agreements were concluded. On the contrary they unreservedly informed the Board that they, as the management team, were conducting the negotiations themselves with DPW. This occurred after Delta experienced difficulties with DPW in late 2018, which is about the time Mr Nomvete commenced negotiations with Mhlandla and Zimzin;
- b. they failed to perform a due diligence on the two entities;
- c. they committed Delta to agreements which no reasonable person would have concluded;
- d. they paid each of the two entities a large sum of money despite the fact that, (i) there was little to no evidence that the entities were the effective

cause of the renewals of the leases, (ii) neither of the two entities was in possession of a Certificate and neither was lawfully entitled to the commissions and, (iii) much of the commissions were for renewals that were concluded outside the mandate period.

[47] On a conspectus of the above facts,

- a. all three defendants breached their respective fiduciary duties towards Delta as well as their duties to act 'in good faith and with proper purpose'¹², in the best interest of Delta¹³ and 'with the degree of care, skill and diligence'¹⁴ required from each of them;
- b. all three were reckless in their conduct. By conducting simple checks which they could have asked their juniors to do in some cases, they would have come to learn that neither Mhlandla nor Zimzin (a) were in possession of a fidelity fund certificate entitling them to earn a commission, (b) were not the effective cause of the leases being concluded:
- c. Messrs Nomvete and Tshabalala are guilty of dishonest conduct;
- d. Mr Nomvete breached the 'no conflict' rule by failing to extricate himself from any dealings involving Mhlandla and Zimzin, as he had strong and long-standing relationships with the two key individuals of these entities, Messrs Mbuso Nzimande and Muzi Nzimande. In terms of this rule Mr Nomvete should not have placed himself in a position where his duty towards Delta conflicted with his self-interest¹⁵;
- e. Mr Nomvete is guilty of receiving a secret profit from Mhlandla.

The third cause of action – the EPF transactions

¹² Subsection 76(3)(a) of the Act.

¹³ Subsection 76(3)(b) of the Act.

¹⁴ Subsection 76(3)(c) of the Act.

¹⁵ *Modise and Another v Tladi Holdings (Pty)Ltd* [2020] 4 All SA 670 (SCA) AT [35]; *Atlas Park Holdings (Pty) Ltd v Tailifts South Africa (Pty) Ltd* 2022 (5) SA 127 (GJ) at [66].

[48] This transaction implicates Mr Nomvete only.

[49] Mr Muzi Nzimande is the sole director of EPF. In 2017, EPF, represented by himself, entered into four written lease agreements with Delta represented by Mr Nomvete. The agreements were in respect of properties owned by Delta. Three of them relate to different floors in the property, Embassy Building, while the other relates to the property, Delta Towers. It was a term of the lease agreements that EPF would not sublet the properties, or part thereof, at a rental higher than the amount it pays Delta. EPF was required to secure the consent of Delta before it concluded any sub-letting agreement and was required to furnish Delta with the full details of the potential sub-lessee. Apart from having a right to refuse consent for a sub-lease, Delta could also terminate the lease with effect from the date of the proposed sub-lease and enter into a direct lease agreement with the potential sub-lessee.

[50] Before the lease agreements were concluded with Delta, EPF had already concluded sub-lease agreements with eThekweni Municipality (Municipality). The rentals charged by EPF to the Municipality were, without Delta's consent, higher than what it paid to Delta.

[51] According to Delta the rentals charged by EPF to the Municipality were much higher. This resulted in the Municipality paying an extra R9.9m over a five-year period had EPF not breached the lease agreements. Mr Nomvete initially put up no evidence to indicate what the EPF actually charged the Municipality. However, on the evening before Mr Nomvete was to testify his attorney uploaded some documents in the court files located on Caselines. This should not have occurred without my consent. It is disruptive of the proceedings, disrespectful of Delta's legal representatives and of myself. It is, unfortunately a common practice. The new documents were supposed to be documentary proof of what EPF actually charged the Municipality. It shows an amount lower than the amount Delta says the Municipality was charged.

[52] During his evidence in chief Mr Nomvete began dealing with these documents as if they were admitted as part of his evidence. Delta's lead counsel, Mr Bham, objected to this on the ground that the introduction of the documents into the record without first securing the consent of the court, and without providing Delta with copies

beforehand, was prejudicial to it. For the sake of the trial progress they were provisionally entered into evidence.

[53] There was no application, not even from the bar, for them to be introduced into evidence. No explanation has been provided by Mr Nomvete as to why these documents were introduced at such a late stage, what their source was, and what the foundation for their authenticity was. Delta was not able to attend to any of these issues. It was presented with a *fait accompli* of them being introduced into evidence without any forewarning or due process being followed. The documents were, therefore, disallowed.

[54] In any event, the documents he intended to introduce did not rebut the claim of Delta that overall EPF charged a higher rental rate to the Municipality than the amount it paid to Delta. By his own version, supported by his new documents, EPF charged the Municipality more than the amount paid to Delta for the same premises.

[55] Mr Nomvete called Mr Muzi Nzimande to testify on this issue. His evidence was to the effect that the claims made by Delta as to what EPF charged the Municipality were incorrect. He said the actual charge was much lower. He mentioned the amounts charged, but these were still higher than the amounts Delta charged EPF. Thus, on the evidence of Messrs Nomvete and Mr Muzi Nzimande EPF had overcharged the Municipality an amount of R6.4m over a five-year period.

[56] Both Messrs Nomvete and Muzi Nzimande conceded that the lease agreements were breached. They attempted to justify this by claiming that EPF had introduced the Municipality as a tenant to Delta. But this does not explain why the main leases were concluded with EPF and not with the Municipality directly. An explanation was proffered by Mr Muzi Nzimande. According to him, the Municipality faced an urgency in finding premises for some of its operations, and was not in a position to secure them in time had it followed the lawfully required tendering process. It was also not willing to give any landlord it contracted with an undertaking that it had complied with its legal requirements before leasing property from that undertaking. Mr Nomvete devised a scheme to bring EPF in as an intermediary – a sub-lessor. EPF did not require the

undertaking from the Municipality so it concluded the sub-lease agreement with it. Delta was shielded from any consequences that might flow from the Municipality being called to account for engaging in unlawful conduct by not following the legally required processes. On this version, it appears that the sub-leases were already considered even before the main leases were concluded. More importantly, Messrs Nomvete and Muzi Nzimande were willing to assist the Municipality in contravening its legal obligations to follow the tendering process. Mr Nomvete did this in his capacity as CEO of Delta. He had no difficulty in assisting EPF to handsomely profit from this unlawful conduct of the Municipality. In fact, he was the architect of it.

[57] As the main leases were with EPF, Delta would have had to be satisfied that EPF was a party that it could rely upon for meeting its obligations in terms of the leases. For this, a due diligence on EPF should have been undertaken. It was not done and ultimately EPF defaulted. As a result, it is indebted to Delta in the amount of R42 713 552.51. Delta is pursuing legal action against EPF to recover the monies owed to it.

[58] The conclusion of the sub-lease between EPF and the Municipality resulted in the Municipality being fleeced by EPF. It occurred with the direct connivance of Mr Nomvete representing Delta. By so doing he implicated Delta in malfeasant conduct. The sub-lease bore all the hallmarks of a corrupt transaction: (a) EPF could only conclude this contract if it was certain that it would secure the lease with Delta – the only inference therefore being that Mr Muzi Nzimande knew in advance that Mr Nomvete was going to secure the lease for EPF; (b) the sub-lease was concluded without the Municipality complying with its obligatory procurement process; (c) the Municipality paid more than it should have; (d) EPF added no value to the entire transaction – it was simply an intermediary that profited handsomely therefrom.

[59] There can be no doubt that on the facts set out above Mr Nomvete failed in his fiduciary duty towards Delta. He implicated Delta in the unlawful conduct of officials of the Municipality and Mr Muzi Nzimande. He admitted that he knew that EPF breached the lease agreement with Delta by charging the Municipality more than it paid to Delta, and he knew that EPF would breach the agreement at the time he concluded the agreement. He abused his position in Delta by providing a commercial opportunity to

his childhood friend, Mr Muzi Nzimande, to profit from the Municipality and by so doing exposed Delta to being party to malfeasant conduct. Mr Nomvete was also dishonest in his dealings with the Board of Delta by leading them to believe that he was engaging directly with the Municipality and by concealing the role of EPF. He contravened ss 66(3) of the Act – he did not act ‘in good faith and for a proper purpose’, he did not ‘act in the best interests of Delta’ and lastly, he did not ‘act with the degree of skill and diligence’ expected of a director in his position.

The fourth cause of action – the Shameless Way transaction

[60] Mr Nomvete, together with his wife, is a director of Shameless Way. It is a ‘related person’, as defined in s 75(1)(b) of the Act, in relation to him. Shameless Way owns a private aircraft. It is in the business of providing private chartered flights to clients. Shameless Way concluded three contracts with Delta, wherein Delta hired aircraft from Shameless Way for three trips undertaken by Mr Nomvete and other staff of Delta. Delta paid Shameless Way (a) R251,575.15 on 13 July 2018 in respect of ‘Delta roadshows for June 2018 results’, (b) a payment of R360,543.79 on 20 February 2019 in respect of ‘Delta Africa roadshows’, and (c) R251,574.00 on 2 July 2019 for ‘Roadshows for Delta results’. Delta paid a total of R863 692.94 for these trips. Mr Nomvete presented the relevant invoices to Delta and Mr Maharaj approved them for payment. Delta contends that the conclusion of the contracts contravened its business travel policy which was that (i) the use of personal aircraft by any employee could only be undertaken if an employee had obtained two comparative quotes from commercial airlines; (ii) a schedule of the comparative quotes had to be maintained, and (iii) the Chairperson of the Board had to give written consent for the use of the personal aircraft. In this case, the aircraft of Shameless Way would be treated as the personal aircraft of Mr Nomvete. A record of all employees using a personal aircraft should be kept and furnished to the Board on a quarterly basis. The record is, amongst others, to detail the costs incurred, the costs saved and the year-to-date totals. None of this was done in these three cases. Messrs Nomvete and Maharaj denied that such a policy was adopted.

[61] Delta presented the evidence showing that Mr Nomvete had a discussion with Mr Magwaza, Ms Nel, a Ms Corbett (Ms Corbett) the former COO and CFO of Delta on 14 November 2014 on this issue. The crucial aspects of the discussion were

recorded in an email sent to him amongst others. The relevant portions of the email read:

'The Board is advised that Sandile Nomvete has invested in the purchased a plane. The intention is that the business that owns and operates this plane will charter it out to clients. Given the significant amount of travel that is required by the Delta Executives it may be that from time to time the plane is chartered by Delta Property Fund.

Sandile has requested that his interest be declared.

In addition, aware that any transactions between this company and Delta would be deemed a related party transaction, given Sandile's investment, Sandile, Bronwyn, the Board Chairman and myself have had discussion and would like to advise the Board of the processes to be followed should Delta charter the plane.

1. Each time Delta wants to use the plane [an employee referred to as Staci] (at the Delta offices) will obtain two comparative quotes from a Commercial Airline. The Chairman will need to sign off the approval prior to the travel taking place.
2. Staci will maintain a schedule of these comparative quotes/costs
3. The Chairman will receive a monthly reconciliation of the schedule in process 2 as well as the total costs for the month and a running YTD total.
4. The Board is to receive a quarterly report in their Board packs detailing costs, cost savings and YTD totals.
5. Full and appropriate disclosure will be made in the Integrated Report of the relationship and the costs.

The Chairman is of the view that in the interest of transparency and of being accountable to unitholders the Board (specifically Sandile) needs to be able to withstand any scrutiny on this matter.' (Quote is verbatim).

[62] His contention that the policy was not in place at the time is contrary to the contents of the email. He does not deny receiving the email. And, he complied with the procedures set out above in October 2015. It is not disputed that the procedures set out in the email were not followed in the case of the three transactions in 2018 and 2019 in two important respects: Mr Nomvete did not secure written approval from Mr Magwaza and comparative quotes from commercial airlines were not obtained. Mr Nomvete's version is that he secured oral approval from Mr Magwaza and there is no logical purpose in seeking a quotation from commercial airlines since whatever price(s) they charge cannot be compared with that of a private chartered airline. The difficulty with his explanation is that he, a related person, had exposed himself and Delta to allegations of nepotism, a form of corruption as pernicious as any other. It fails to recognise that Delta, a public company in charge of private investors' money, has to avoid any reputational damage caused by an allegation that it allows its CEO to profit from its operations by contracting with his private company without establishing that

the contract is in the best interest of Delta. This is precisely what the procedures were designed to ensure, and what Mr Magwaza was referring to when he said at the meeting that they had to be in place since they were 'in the interest of transparency', ensured that the Board remained 'accountable to unitholders' and were directed at ensuring that 'the Board [and] specifically [Mr Nomvete were] able to withstand any scrutiny on this matter.' The failure by Mr Nomvete in his capacity as CEO to ensure that they were followed, when he had a personal interest in the matter, is a breach of his fiduciary duty towards Delta. Mr Maharaj too failed Delta by not protecting its interests in ensuring that the policy was adhered to and its reputation protected by avoiding even the slightest hint that its senior executives engage in nepotistic behaviour. He did not act with the due skill and diligence required of him as a CFO.

[63] During his cross-examination, Mr Nomvete's erstwhile counsel, Mr Rome¹⁶ asked for the matter to stand down and to be allowed to consult with Mr Nomvete. Delta had no objection to Mr Nomvete being allowed to consult with his legal representatives despite it being an unusual practice. Upon resumption of the hearing Mr Nomvete handed in a written statement. While still under cross-examination he asked that his statement be accepted as part of his evidence, and that it be taken into account in the determination of the matter. The statement in full reads:

1. I **SANDILE NOMVETE** in my capacity as the CEO of the Plaintiff from 2012 to 2020 and which period includes the events in respect of the first, second and third causes of action in the Plaintiff's particulars of claim under case number: 58226/21 (South Gauteng High Court) state as follows.
2. At all times and in respect of the periods and events concerning me pertaining to the factual events described in the first, second and third causes of action. I believed, that I sincerely was acting in the best interest of the plaintiff. In respect of the events referred to under the said causes of action I did not at the time receive and have never received any financial benefits.
3. I accept however that during the periods pertaining to the above causes of action
 - 3.1. the corporate governance controls at the plaintiff were remiss;

¹⁶ Mr Rome together with Ms Phama-Sihunu represented both Mr Nomvete and Mr Maharaj until all evidence was received and Delta had submitted its written submissions. Just prior to the deadline for the written submissions from the three defendants, Mr Rome withdrew as representative of Mr Nomvete.

3.2. the failures in corporate governance were my responsibility and I am blameworthy therefor;

3.3 that my conduct (in my dealings on behalf of the plaintiff), with regard to the matters dealt with under especially the first of the above causes of action, and also possibly the other of the above two causes of action, was that of negligence rising to the level indicated in subsection 162(5)(c)(iv)(aa) of the Companies Act, and in particular with that level of negligence indicated in the opening clause of the sub-section.

4. I express my remorse.
5. I have learnt from the experience and I would ensure that should I ever again be privileged to be in an executive director position of public or publicly listed company, that the appropriate corporate controls would be put in place and that I would not act in a negligent manner in regard thereto.
6. I accept that my conduct as referred to caused significant reputational damage to the plaintiff.
7. I however do not accept that the plaintiff has suffered ordinary contractual or delictual damages as a result of my conduct.
8. I nevertheless accept responsibility for the plaintiff's costs of the action which I understand are substantial.
9. I accept my conduct warrants a 7 year delinquency declaration under section 162(5).
10. I would submit that the application of the declaration be restricted to publicly listed companies and not to private companies.'

[64] Delta contends that the statement is inadequate, and ambivalent on his accepting of full responsibility for his misconduct which has been established by the evidence presented against him and which he has been unable to rebut. The evidence, it contends, has established on a preponderance of probabilities that he is a malfeasant whose failure to appreciate the gravity of his offences is testament to his incorrigibility.

Mr Nomvete's statement

[65] In the closing submissions made on behalf of Mr Nomvete it was said that the court should disregard the statement as Mr Nomvete no longer holds that the statement is true. He maintained that it was incorrectly made and entered into evidence. He is, he said, innocent of all charges levelled against him, and that he at all times acted in

the best interests of Delta. The statement was made under oath. He was specifically asked by myself if he understood it, and if he was satisfied that it be part of the evidence. He answered affirmatively to both questions.

[66] It was submitted on his behalf that he was entitled to withdraw the statement, despite it being part of his evidence. He could have applied to the court to be recalled as a witness and to explain his change of heart. He would have had to subject himself to cross-examination and thereafter his entire evidence, including his *volte face*, would have been assessed as whole. Evidence cannot be altered by submissions by counsel. Submissions by counsel are not testimony and counsel is not allowed to testify from the bar. This is trite. As he did not ask for an opportunity to testify on his change of heart, this court has no choice but to ignore the submission. What Mr Nomvete attempted to do is not just irregular it is legally impermissible.

[67] In any event, given the findings in this judgment, his attempt to withdraw his admission of guilt is of no moment. It makes no difference to the outcome of the case he was required, but failed, to meet.

[68] All of the above establishes that the defendants engaged in dishonest conduct, or were so grossly negligent in the execution of their duties, that a declaration of delinquency is warranted. They should each be held accountable for the loss suffered by Delta because of their actions or omissions. The transactions resulted in the Municipality being fleeced by EPF. This occurred with the direct connivance of Mr Nomvete representing Delta, and by so doing implicated it in the malversation that public institutions in the country as a whole find themselves entrapped in.

Delinquency

[69] Sub-section 162(5)(c) of the Act compels¹⁷ a court to declare a director to be a delinquent if that director has, (i) 'grossly abused the position of a director', (ii) 'taken personal advantage of information or opportunity' for herself or another person, (iii) intentionally or by gross negligence caused harm to the company, or 'acted in manner that amounted to gross negligence' and, (iv) 'wilfully committed a misconduct, or

¹⁷ *Ghiwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA) at [140].

breached the trust relation with regard to the performance of her functions or duties as a director’.

[70] For each of the four grounds to be established there must be ‘serious misconduct’ on the part of the director.¹⁸ For the conduct to constitute ‘serious misconduct’ it need not be wilful. Gross negligence is sufficient. Gross negligence is equivalent to ‘recklessness’¹⁹. To determine whether a conduct is grossly negligent, the court should have regard to the provisions of subsection 76(3)(c) which requires a director to:

‘... exercise the powers and perform the functions of a director-

(c) with the degree of care, skill and diligence that may reasonably be expected of a person-

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.’

[71] The assessment as to whether the conduct constitutes gross negligence has a subjective as well as an objective element to it.²⁰ The objective element being the standard expected from a reasonable director, while the subjective element requires taking note of the ‘general knowledge, skills and experience’ of the specific director whose conduct is being assessed.

[72] The declaration of delinquency would result in the director being disqualified from acting as a director of any company for a minimum of seven years, with the court having the power to extend it to a longer period.²¹ The purpose of the section is to protect the public from directors ‘who engage in serious misconduct’ or who ‘breach the bond of trust between themselves and shareholders’, and ‘who show themselves to be unworthy of that trust’.²²

¹⁸ Id at [143].

¹⁹ Id at [144].

²⁰ *OUTA and Another v Myeni* [2020] 3 All SA 578 (GP) at [16].

²¹ Subsection 162(11)(a).

²² *Ghiwala*, n 2 at [144].

[73] The findings above leave this court with no option but to declare each of the defendants delinquent directors. Neither Mr Nomvete nor Mr Maharaj seized the opportunity to acknowledge the gravity of their wrongdoings. They do not recognise that they committed crimes and made Delta a party to their crimes. Mr Nomvete was simply unrepentant. He, I hold, does not possess the moral or ethical character required of one that assumes the office of a director of a company – public or private. A declaration of delinquency applicable for life in his case can, in my judgment, be the only response of the civil law to his conduct. He is not even able to appreciate that he was a party to criminal conduct. He is incapable, in my view, of rehabilitation. Mr Maharaj on the other hand was ambivalent. He denied that his actions and omissions constituted serious misconduct warranting a declaration of delinquency, but said, in the alternative, that if the court were to find against him then he requested that the declaration of delinquency be restricted to the statutorily imposed minimum period of seven years, and be restricted to public companies only. There is no basis to accommodate the request. His approach, I find, demonstrates an inability to appreciate the grossness of engaging in criminal activity for and on behalf of Delta. To the extent that he showed some remorse it was not on the recognition that he, together with Mr Nomvete, acted unlawfully. He was only willing to accept that he acted negligently by ‘dropping the ball’, when in fact his actions and omissions were far more serious. A declaration of delinquency applicable for a period of fifteen years would be appropriate in his case. In the case of Mr Tshabalala, given that his malfeasance was restricted to the second cause of action only, the declaration of delinquency should be restricted to the minimum period of seven years prescribed in subsection 162(6)(b)(ii) of the Act.

The damages claim

[74] Subsection 77(2)(a) of the Act makes directors liable ‘in accordance with the principles of the common law relating to breach of fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75.’ Subsection 77(3)(c) of the Act makes a director liable ‘for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose.’

[75] Delta suffered the following losses as a result of the conduct of the three defendants:

- a. R2,100 000.00 in respect of payments to Mr Van Wyk. Messrs Nomvete and Maharaj are the cause of Delta's loss and are liable thereto.
- b. R23,094,415.54 in respect of payments to Mhlandla and R3,620 835.52 in respect of payments to Zimzin. The total loss is R26,715,251.06. All three defendants are jointly and severally liable to Delta for this loss;
- c. R863 692.94 in respect of payments to Shameless Way. Mr Nomvete and Mr Maharaj are liable to Delta for this loss.

[76] Delta alleges that the defendants' actions caused Delta to suffer further loss, damages and costs in the amount of R3,744,082.00, consisting of the cost of the forensic investigation into their conduct, amounting to R908,554.00; management time and resources devoted to the investigation, in the amount of R2,699,678.00; and public relations expenses in the amount of R135,850.00. All three defendants dispute that their actions were the cause of Delta incurring the damages claimed. Delta presented detailed evidence of the damages by tabulating them individually. In the case of the costs incurred for management time and resources and for public relations, Delta tabulated all the time and resources spent by management. It claimed that only a proportion of these should be allocated to actual time and resources expended by attending to the acts of misconduct on the parts of the three defendants. The claim for public relations is based on the public relations costs incurred because of the fall-out experienced in the public arena by the disclosures that Delta, being a public company, was forced to make to the Johannesburg Stock Exchange in particular, and to the public at large, concerning the allegations of misconduct against the three defendants in the Deloitte's and Mazars' reports.

[77] The evidence of Delta in regard to these damages – their incurrence as well as the amounts - like all of its other evidence, was not discredited. The plaintiff would not have incurred them had Messrs Nomvete, Maharaj and Tshabalala not breached their fiduciary duties. However, it would be unjust and unfair to hold that they are all equally liable for the damages. They should each be held liable for the loss suffered in the particular cause of action where they were implicated. Mr Nomvete is found to have committed very serious acts of misconduct in all four of the tainted transactions.

However, Delta only suffered losses in three of them. He should be held liable for all three of them. Mr Maharaj is found to have been implicated in three of the four causes of action. He should be held accountable for all three. Mr Tshabalala is found to have been implicated in only one of the four causes of action. He should be held accountable only for the loss referred to in that cause of action. They should all be held liable for the costs incurred by Delta for having been forced to engage Deloitte and Mazars to conduct the forensic investigations. Wherever two or more of them are to be held accountable the liability should be joint and several.

Costs

[78] The defendants should pay the costs of the application. Delta engaged three counsel. The defendants collectively engaged four counsel. Given the voluminous documentary evidence, the employment of this many counsel was justified. However, it would only be fair and just that Delta be compensated for the costs of two counsel. The costs of the application for postponement, too, should be borne by the defendants. Their liability should be joint and several. The costs incurred prior to the enactment on 24 April 2024 of the new rule 67A of the Uniform Rules of Court should be taxed on what prevailed normally prior to 12 April 2024. All costs incurred thereafter by Delta should be taxed on the C scale.

Order

[79] The following order is made:

1. The first, second and third defendants are declared to be delinquent directors in terms of section 162(5) of the Companies Act 71 of 2008.
 - 1.1. In respect of first defendant, the declaration of delinquency is to apply for his lifetime.
 - 1.2. In respect of the second defendant, the declaration of delinquency is to apply for a period of fifteen years from the date of this order.
 - 1.3. In respect of the third defendant, the declaration of delinquency is to apply for a period of seven years from the date of this order.
 - 1.4. Such declarations are subject to the possibility of suspension under sections 165(10) and (11) of the Companies Act;
2. In respect of the first cause of action, the first and second defendants are jointly and severally liable to the plaintiff for:
 - 2.1. Payment of the sum of R2,100,000.00;

- 2.2. Interest on the above amount at the prescribed rate, from date of judgment to date of payment;
3. In respect of the second cause of action, the first, second and third defendants are jointly and severally liable to the plaintiff for:
 - 3.1. Payment of the sum of R26,715,251.06;
 - 3.2. Interest on the above amount at the prescribed rate, from date of judgment to date of payment;
4. In respect of the fourth cause of action, the first and second defendants are jointly and severally liable to the plaintiff for:
 - 4.1. Payment of the sum of R863,692.94;
 - 4.2. Interest on the above amount at the prescribed rate, from date of judgment to date of payment;
5. In respect of the further loss, damages and costs incurred by the plaintiff, the first, second and third defendants are jointly and severally liable to the plaintiff for:
 - 5.1. Payment of the sum of R3,744,082.00;
 - 5.2. Interest on the above amount at the prescribed rate, from date of judgment to date of payment.
6. The first, second and third defendants are jointly and severally liable for the costs of suit, on a party and party scale, including the costs of two counsel with costs incurred after 12 April 2024 to be taxed on the C Scale, as contemplated in Rule 67A.



 Vally J

Gauteng High Court, Johannesburg

Dates of hearing: 22 - 25 Jan, 18 - 22 Mar, 21, 28 April, 13 and 20 Oct 2024
 Date of judgment: 21 January 2025

For the plaintiff:	A Bham SC with C McConnache and M Kritzinger
Instructed by:	Webber Wentzel Attorneys
For the first defendant:	G Rome SC with K Phama for part of the hearing and K Phama for the entire hearing.
Instructed by:	Davids Attorneys Inc.
For the second defendant:	G Rome SC with A Myers
Instructed by:	Assheton-Smith Ginsberg Inc.
For the third defendant:	S Nelani
Instructed by:	Brian Kahn Inc