IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE Number: 8239 / 2018

(1) REPORTABLE: **YES**/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: **YES**/~~NO~~

(3) REVISED: **YES**/~~NO~~

16 February 2026

In the matter between:-

CORE LOGISTIX (PTY) LTD **Plaintiff**

and

FRANCES SUSAN ROOKS **Defendant**

<u>Summary</u>:

Postponement – principles considered – good cause for postponement must be shown – defendant failing to show good cause – postponement application stratagem to avoid trial – defendant failing to make timeous application for postponement – postponement refused

Mediation Protocol – objectives considered – Protocol not intended to secure postponement – postponement on the basis of Protocol refused

Fiduciary duties – nature of duties and principles considered – defendant as director and employee having duty of good faith and trust towards plaintiff –

defendant conducting herself in breach of fiduciary duty – plaintiff suffering prejudice – defendant liable towards plaintiff

Companies Act – s 75(6) and s 76 considered – statutory duty of good faith and trust on director – external financial interests by director and related person prohibited without full disclosure – breach of such duties renders director liable – defendant liable under these provisions.

Companies Act – s 162(5)(c) considered – declaring director delinquent – Serious misconduct required – breach of fiduciary duties, particular duty of trust, fraudulent / unlawful transactions and serving personal interests constituting egregious misconduct – defendant declared to be delinquent director

Claims for damages – plaintiff proving defendant liable to pay plaintiff damages for breach of trust, breach of fiduciary duties and / or fraudulent unlawful transactions – judgment given against defendant

Counterclaims – defendant failing to prove counterclaims – claims not competent and not supported by evidence – counterclaims dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] What in my view is sadly lacking in the commercial world of today is the lack of integrity. Especially where it comes to senior members of management in the corporate environment, integrity should form the cornerstone of all transactions embarked upon by such persons. But unfortunately, the meaning of integrity seems to have been lost. So, and as a point is departure in this matter, it is perhaps appropriate to establish what it means.

[2] A number of apposite sayings identify what is meant by '*integrity*', in the specific context of the case *in casu*. First, '*integrity gives you real freedom because you have nothing to fear since you have nothing to hide*'. And importantly, '*integrity is not something you show others, but it is how you behave behind their back'*. In a similar vein, Oprah Winfrey said that '*integrity is doing the right thing knowing that nobody knows whether you did it or not*'. In finally tying it all together, John D Rockefeller expressed the view that: '*I believe that every right implies a responsibility, every opportunity an obligation, every possession a duty*'. These anecdotes should inform all senior management members in any business on how to conduct themselves, lest situations like the one *in casu*, arises.

[3] The above being said in introduction, I turn to the case at hand. The plaintiff issued summons against the defendant on 28 February 2018. This summons was preceded by substantial earlier litigation between the parties, which I will deal with later in this judgment. Following an amendment of the plaintiff's particulars of claim on 27 May 2021, the plaintiff ultimately postulated a number of individual claims against the defendant. Generally said, these claims arise from a breach by the defendant of her fiduciary duties with plaintiff as well as several unlawful transactions and serious misconduct perpetrated by her. The plaintiff also seeks an order that the defendant be declared a delinquent director in terms of the Companies Act[1]. All of the plaintiff's claims have been defended by the defendant.

[4] The defendant has also brought a number of counterclaims in an amended plea and counterclaim filed on 24 November 2022. These counterclaims relate to the defendant claiming the following sums: (1) R2 534 666.40 as purchase price for her shares in the plaintiff; (2) R630 350.35 in respect of her pension benefits; (3) R2 674 275.60 for past loss of earnings; and (4) R1 000 000.00 for defamation. In turn, the plaintiff has opposed these claims.

[5] This matter came before me for trial on 11 August 2025, and continued for that entire week. The plaintiff was represented by Advocate J Kaplan, and the

[1] Act 71 of 2008 (as amended).

defendant represented herself. At the commencement of the trial, the defendant sought a postponement of the trial, which I refused to grant, for the reasons dealt with below. At the conclusion of the trial, the plaintiff presented oral closing argument, however the defendant indicated she was not ready to present oral closing argument. I then afforded the defendant until 5 September 2025 to submit written closing argument, which she then did only on 7 September 2025. The plaintiff submitted written argument in reply on 19 September 2025.

[6] As the proceedings have concluded, I now turn to deciding the parties' respective claims, first by setting out the relevant background facts. These backgrounds facts have been ascertained from substantial documentary evidence, which included a judgment by Keightly J on 11 July 2018, in earlier litigation between the same parties. Secondly, there was the testimony of six witnesses for the plaintiff, as well as the testimony by the defendant herself, and one witness who testified on her behalf. But before I get to the background facts, the defendant's postponement application must be dealt with.

[7] For ease of reference in this judgment, I will refer to the plaintiff as '*Core*' and the defendant as '*Rooks*', throughout.

<u>The postponement application</u>

[8] This matter has quite some history. It all started with an urgent application brought by Core on 23 June 2017 under case number 22449 / 17 to enforce a restraint of trade and confidentiality undertaking against *inter alia* Rooks. An interim order was granted on 18 July 2017, affording Core the relief sought. What followed was an extensive exchange of affidavits between the parties, and the matter finally came before Keightly J, with the learned Judge, by way of a comprehensive written judgment handed down on 11 July 2018, found against Rooks. Some findings in this judgment are significant to this matter, and will be dealt with later in this judgment. Rooks then sought to challenge this judgment on appeal, ultimately by way of a petition for leave to appeal to

the Supreme Court of appeal (SCA), when leave to appeal was refused by Keightly J. The petition to the SCA was also not successful. The judgment by Keightly J thus stands.

[9] Whilst the aforesaid proceedings were ongoing, the current action proceedings were instituted, and continued in the normal course. In the end, the matter was set down for trial on 21 November 2022. On 18 November 2022, Rooks, as represented by HJW Attorneys at the time, brought a substantive application that the trial be postponed *sine die*, in order for Rooks to amend her plea, in terms of a notice of intention to amend only filed earlier that same month. This postponement application was opposed by Core.

[10] In support of the postponement application, Rooks sought to rely on an alleged lack of funds, which according to her resulted from unlawful conduct of Core towards her. This lack of funds allegedly caused her to be unable to properly instruct her attorneys in filing a plea, and when dealing with further process filed by Core where it was asking for further particulars. She stated that she was not aware that she could amend her earlier plea, because her attorneys had withdrawn when Core convened pretrial proceedings, in which proceedings it became apparent that the deficiencies of the plea was an issue. Rooks also contended that she was unrepresented since November 2019 when her attorneys withdrew and was still unrepresented when Core sought to amend its particulars of claim in March 2021. Rooks then did seek to amend her plea later in 2021, however her next attorney then also withdraw in January 2022 due to a lack of funds. New attorneys were appointed on 21 June 2022, however a lack of funds continued to plague their ability to properly assist her. At the end of August 2022, Rooks's attorneys were in position to properly advise her and then advised her that a substantive amendment to her plea, and the proper formulation of a counterclaim, was required. It is all the aforesaid that then led to the postponement application.

[11] Ultimately, the trial did not proceed on 21 November 2022, as it was *inter alia* agreed, on that date, that the trail be postponed *sine die* and that Rooks would deliver her amended plea and counterclaim by 24 November 2022. The

reason why reference needs to be made to why Rooks requested a postponement at this time, as summarized above, will become apparent below.

[12] Ultimately, and after further legal process was exchanged between the parties in the course of 2023, Core, by way of notice given on 3 June 2024, set the matter down for trial on 11 August 2025. On 31 March 2025, Core's attorneys wrote to Rooks's attorneys, referring to the matter being set down for trial on 11 August 2025, and requesting that a further pre-trial be conducted between the parties to ensure that the trial proceeds. On 4 April 2025, Rooks's attorneys indicated that they would take instructions and revert. However, and on 10 April 2025, Rooks's attorneys withdrew as attorneys of record. Clearly anticipating the same possible action of Rooks then seeking a postponement of the upcoming trial, Core acted proactively to ensure that the trial proceeds.

[13] In a letter by Core's attorneys to Rooks's attorneys on 16 April 2025, in which it was *inter alia* indicated that the notice of withdrawal on 10 April 2025 was defective, Core's attorneys specifically pointed out that the mandate of the Rooks's attorneys has been terminated by her so as to scupper the pre-trial proceedings. Reference was made to the two previous attorneys that withdrew in 2019 and in 2022 in similar circumstances, when action was required to bring the matter to trial. Rooks was accused of engaging in delaying tactics. Also on 16 April 2025, Core's attorneys sent a letter directly to Rooks herself, calling upon her to attend a pre-trial conference and to discover the documents listed in her discovery affidavit.

[14] On 24 April 2025, Rooks answered that she was unable to attend a pretrial, because she was without 'council' (sic), and she would respond once she finds such 'council'. When Core's attorneys heard nothing from Rooks for about a month, a further letter was sent to Rooks on 6 June 2025, indicating that she by then had six weeks to find alternative representation, which was more than enough time considering the looming trial date, and that she was 'plainly' obstructing the process. Again, Rooks responded on 6 June 2025 that

she was ‘sorting out’ the problem with regard to her representation and that she would respond by 25 June 2025.

[15] Clearly not trusting Rooks’s *bona fides*, Core’s attorneys on 11 June 2025 requested the Registrar to convene a pre-trial in terms of Rule 37(3)(b) of the Uniform Rules. The Registrar then indeed convened a pre-trial to be held virtually on 23 June 2025, by way of notice to the parties on 11 June 2025. Rooks answered that she would ‘disadvantage’’ herself by attending the pre-trial without representation, which representation she only expected to secure by 25 June 2025. The Registrar then moved the pre-trial to 30 June 2025.

[16] On 26 June 2025, Rooks then made her true intentions clear. In an e-mail to the Registrar and Core’s attorneys, she stated that she does not have legal representation, and was not willing to continue with the matter without legal representation. She stated that her mother was ill and bedridden, and she could not leave her mother unattended, as her mother was not capable of helping herself. She even contended that as far as she was concerned the matter was not ready for trial, as she wanted ‘further discovery’ to happen. She also contended that formal mediation was required before the matter could proceed to trial. She requested a postponement of the matter coupled with a demand for mediation.

[17] On 30 June 2025, Core’s attorneys sent a comprehensive response to Rooks, setting out all the preceding events referred to above. It was stated that the conduct of Rooks was ‘plainly obstructive’ and aimed at delaying the commencement of the trial. It was also stated that mediation was not required before trial in this matter. Core’s attorneys indicated that the matter would proceed to trial, despite Rook’s failure to co-operate. Rooks replied the same day, reiterating that she was not willing to proceed without legal representation and that the matter was not ready for trial because ‘*my questions or requests were not answered honestly or relevant material provided*’.

[18] The next action by Core's attorneys was on 16 July 2025, when they requested Rooks to participate in the drawing up of a joint practice note, which had to be submitted at least seven days prior to trial. Rooks was provided with a draft of a joint practice note to consider, and to provide her comments to. It was recorded that if Rooks did not participate in this, the practice note would be submitted as is, with a covering note to the Registrar. A response was forthcoming from Rooks on the same day, and once again, in the same terms as before. She yet again indicated she was not willing to proceed without a legal representative, that the matter was not ready to proceed to trial, she had to attend to a pending criminal case against her brought by the plaintiff, that her mother required constant care, and that she wanted 'more discovery' and mediation.

[19] Core's attorneys replied on 17 July 2025. It was pointed out that Core's attorneys had no knowledge of documents requested, nor of questions that remained unanswered. It was pointed out that the insistence on mediation was incorrect. Rooks was referred to her continuous attempts to obstruct the pre-trial proceedings, and so prevent the trial from proceeding. This solicited a reply from Rooks on 18 July 2025 repeating what she had already said. She however now added that she does not have money as a '*civil case is all about money'*. She indicated that she would present her case in this regard '*to the judge*'. Rooks even went so far, in an e-mail on 22 July 2025, of intimating that the Core's attorneys had perpetrated some impropriety in obtaining trail dates 'quickly', despite this matter having been set down as far back as June 2024. The response by Core's attorneys came on 23 July 2025, simply repeating part of what has already been said, above, which need not be repeated.

[20] On 23 July 2025, Rooks sent an e-mail to Core's attorneys indicating that she 'stood firm' in her position that the matter was not ready for trial. She reiterated her earlier view as to why this was purportedly the case. She stated that she would appear at Court when the matter is set down to convey this to the presiding Judge. On 25 July 2025, Core's attorneys sent an e-mail to Rooks indicating that since she refused to provide comments to the joint

practice note, it will be filed as is, together with the note to the Registrar as intimated earlier. It was indicated that Rooks was free to represent herself at Court and she would be kept informed of the allocated Judge and courtroom. The practice note was then filed on 28 July 2025 on this basis, with a note to the Registrar. This yet again solicited a response from Rooks on 28 July 2025, that she was not ready to proceed with the matter, for the reasons already dealt with above.

[21] And finally, on 28 July 2025, Core's attorneys wrote to Rooks, indicating that if she intended seeking a postponement, as she was clearly intimating she would do, she needed to bring a substantive application for a postponement, as she had done in 2022. She was informed that this application had to set out the grounds for seeking the postponement, supported by evidence. It was indicated the application would be opposed. Rooks was requested by Core's attorneys to file such an application by 4 August 2025, so Core would have a proper opportunity to file an answering affidavit. This letter went unanswered. And needless to say, no substantive application for a postponement was brought.

[22] On 1 August 2025, when the matter came before me for trial, Rooks indeed applied for a postponement, from the bar, and without submitting a substantive application. She in essence raised the same reasons for seeking the postponement, as set out in all the correspondence referred to earlier. But now, her focus had shifted slightly, to an insistence that the matter be postponed for mediation. What is clear to me is Rooks was receiving legal advice somewhere, and was seeking to rely on the Mediation Protocol for the Gauteng Division issued by the Judge Present of the Gauteng Division of the High Court in April 2025 (the Mediation Protocol). It is true that the Mediation Protocol is intended to compel the parties to attempt mediation in the course of civil trial proceedings, before the matter is adjudicated. Rooks was effectively arguing that the matter be removed from the trial roll so that mediation first be conducted under the Mediation Protocol.

[23] Core's counsel indicated that the Mediation Protocol did not apply in this instance. I believe this submission is premised on the fact that summons in this case was issued as far back as 2018, prior to Rule 41A of the Uniform Rules coming into effect on 9 March 2020.[2] The Mediation Protocol reflects that process is initiated by a notice in terms of Rule 41A, which notice must be delivered in every new action by virtue of Rule 41A(2). The plaintiff had no such duty when it issued summons in 2018.

[24] Nonetheless, I believe there are other more pertinent reasons why any application of the Mediation Protocol should not lead to a postponement of this case. First, it simply cannot lie in the mouth of Rooks to seek to rely on the lack of mediation as a basis for seeking a postponement, considering her own delinquent, if not deliberate, conduct. There was nothing standing in the way of her delivering her own notice in terms of rule 41A, if she believed mediation was needed, especially where there was a trail date already allocated as far back as June 2024. The issue could have been addressed in pre-trial proceedings, or in the joint practice notice, which Core effectively begged her to participate in, and which she spurned.

[25] Second, the Mediation Protocol itself does not prescribe postponement of the trial where no Rule 41A notice is filed, as required by clauses 4.5 and / or 4.6 thereof. The enforcement mechanisms for compliance is found in clause 4.10. This includes adverse costs orders (section 4.10.1), no new allocation of trial dates to the parties (clause 4.10.2.1), or that legal practitioners may be guilty of professional misconduct, with all its consequences (clause 4.10.2.3). But nothing in the Mediation Protocol prescribes that a matter that is ready for trial in all respects, has been properly set down, and where the parties are before Court to conduct the trial, must be postponed or removed from the roll just because there is no Rule 41A notice and / or mediation minute / report. In fact, and to adopt such an approach would be counterproductive to what is sought to be achieved by way of the Mediation Protocol itself, in which one of the primary objectives is reflected to be to '*Promote the efficient*

[2] Rule 41A was instituted by GN R107 in *GG* 43000 of 9 March 2020.

administration of justice in the Gauteng Division whilst also transforming access to justice and the availability of the courts to the litigating public'.[3]

[26] In my view, the Mediation Protocol is intended to avoid matters from coming to trial in the first place by facilitating settlements, and so relieve congestion of the trial roll. It has the same objective as the obligatory process of conciliation in employment law disputes under the Labour Relations Act (LRA).[4] Considering the large volume of disputes that are referred for example to the Commission for Conciliation, Mediation and Arbitration (CCMA) under the LRA, if it was not for the mediation imperative, where the bulk of disputes are indeed settled, the system would not cope where it came to arbitration of those disputes. If an obligatory system of mediation applies to civil litigation disputes, it may have such results, however I must confess that having regard to the nature of civil litigation, I believe not nearly to the extent of success of this process where it comes to the CCMA. Nonetheless, one case settled through third party intervention, such as a mediation, is a spot that opens for another case that cannot be settled. But where the dispute is already at trial, is properly set down and ready to proceed to trial, it would be foolish to effectively lose the date, which is already unavailable where it comes to allocating it to someone else, just because there is no compliance with the Mediation Protocol. As said in *Adams v National Bargaining Council for the Road Freight and Logistics Industry and Others*[5]:

> 'Although it is highly desirable for good order that rules be complied with on their own terms, the function of the rule is the paramount consideration and, where it can be safely found that the purpose of the rule is achieved, it is highly undesirable to approach the matter in a literalist way. Mechanical thinking is anathema to our law: cessante ratione legis cessat et ipsa lex. ...'

[27] Accordingly, I do not believe that the fact that no mediation between the parties took place *in casu*, as well as the fact that there was no Rule 41A

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[3] Clause 2.1.2.2.

[4] Act 66 of 1995 (as amended). This process is found in section 135 as read with section 191 of the LRA.

[5] (2020) 41 *ILJ* 2051 (LAC) at para 16.

notice filed, constituted proper cause for the postponement of this matter. I believe that Rooks's reliance in this was simply opportunistic, and she was clearly informed by someone with knowledge in Court process to attempt to invoke the Mediation Protocol, in a manner that was not appropriate.

[28] I now turn the other grounds Rooks sought to base her postponement application on. But first, I will deal with the requirements applicable to applications for postponement before this Court. These requirements were neatly articulated in *National Police Service Union and Others v Minister of Safety and Security and Others*[6] as follows:

> '… The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed by the Court to determine whether it is in the interests of justice to grant the postponement.
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> What is in the interests of justice will in turn be determined not only by what is in the interests of the parties themselves, but also by what, in the opinion of the Court, is in the public interest. The interests of justice may require that a litigant be granted more time, but account will also be taken of the need to have matters before this Court finalised without undue delay …'

[6] 2000 (4) SA 1110 (CC) at paras 4 – 5.

[29] So, and in sum, a number of considerations apply where it comes to the Rooks's application for a postponement.[7] First, I have a discretion as to whether the application for postponement should be granted or refused, which discretion must be exercised judicially. Second, I would be required to consider all the facts, which includes the facts leading up to the postponement request and what is advanced in the postponement application itself. Third, I must consider if the application for postponement was made timeously, meaning that it was brought as soon as possible after the circumstances which would substantiate a postponement become known to the applicant for postponement. Fourth, it must be considered whether applying fundamental fairness and justice, in the particular circumstances, would justify a postponement. Fifth, the application for postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage which would otherwise not be available. Sixth, it is a matter of public interest that there should be an expeditious end to litigation.[8] And finally, an important consideration is the issue of prejudice, namely whether any prejudice caused by a postponement to the other party could be fairly compensated for by an appropriate order of costs or any other ancillary mechanisms. This necessarily also involves the weighing off of the prejudice to the two respective parties, if a postponement is refused on the one hand, or granted on the other. All these factors must be weighed, in totality, to decide whether, in the end, it would be in the interests of justice to grant the postponement.

[30] As to the reasons to be provided for justifying a postponement, the Court in *Absa Bank Limted v Baloyi*[9] said that '*good and strong reasons*' for the postponement must be given, meaning there must be a full and satisfactory explanation for the circumstances that gave rise to the application. By way of an apposite comparison on the facts to the case *in casu*, the Court in *Standard Bank of South Africa Limited v Khewija Engineering and*

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[7] See *Insurance and Banking Staff Association and Others v SA Mutual Life Assurance Society* (2000) 21 ILJ 386 (LC) at para 44; *Standard Bank of South Africa Limited v Khewija Engineering and Construction (Pty) Ltd and Others* 2025 JDR 0245 (GJ) at paras 11 – 14.
[8] *Mc Carthy Retail Ltd v Shortdistance Carriers CC* 2001 JDR 0168 (SCA) at para 28.
[9] 2021 JDR 1021 (GP) at para 3.3.

Construction (Pty) Ltd and Others[10] refused a postponement application because the application was not brought timeously and was only brought shortly before the set down date, the application was not brought *bona fide* but simply as a delaying tactic founded on a contention that the respondent party wanted to instruct new attorneys, the history of this matter reflected numerous instances where the respondents engineered delays to avoid the finalisation of the application and the explanation given for the postponement was '*far from full and satisfactory*'. In the end, the Court in *Khewija Engineering supra* said the following, which I believe neatly describes why the current postponement application by Rooks had to fail:

> **'...** the Respondents failed to provide a full and satisfactory explanation or compelling justification in the application which would have enabled this Court to exercise its discretion in favour of the Respondents and grant the relief sought by them; the application is *mala fides* and an abuse of process. On the facts of the present matter, it is clear that it is nothing more than a delaying tactic. In addition thereto, it appears that the First Respondent is no stranger to the utilisation of these tactics ...'

[31] When applying the principles discussed above to the complete factual exposition preceding Rooks's application for a postponement, I held the view that Rooks had no made out proper cause for a postponement which would justify my exercising of a discretion to grant it. The reason why a complete consideration of all the facts is necessary is because Rooks, despite all the invitations and warnings extended to her by Core beforehand, did not even bother to bring a substantive application for a postponement. She simply arrived at Court, and in essence demanded a postponement on the basis that she wanted to get legal representation and that the matter was as far as she was concerned not ripe for hearing because of the mediation issue. There was no other cause or reason put forward for the postponement. There simply exists no good cause for a postponement, on the facts. With a modicum of due care, Rooks could have been ready for trail. But instead, she adopted an

[10] 2025 JDR 0245 (GJ) at para 15.

obstructive and obstinate attitude. This kind of approach is most unhelpful in convincing this Court to exercise its discretion in her favour.

[32] It must also be considered that whenever Rooks was required to participate in steps needed to prosecute the trail further, she would procrastinate and on several occasions, changed attorneys at the moment action needed to be taken and then seek a delay to obtain new attorneys. With regard to the pre-trial proceedings, she refused to participate, and yet again suggested that she needed to find alternative legal representation at her own leisure. She had no regard for the interests of Core. This matter could have been concluded in 2022. Mainly as a result of the conduct of Rooks, it took some three years to again come to trail. It is not in the interest of justice to allow this matter to procrastinate further. In the end, and on the facts, I am convinced that the postponement application was not *bona fide*, and was nothing more than a stratagem to scupper the commencement of the trial, yet again. Rooks had ample time to arrange for legal representation, and her failure to have done so cannot serve as an excuse, especially considering the history of this case. Insofar as she may suffer prejudice, it was of her own doing. All said, I was not satisfied that Rooks has made out a proper case for the matter to be postponed further, and I therefore refused Rooks's postponement application.

<u>The relevant background</u>

[33] Before setting out the background facts in this matter, something must be said about Rooks as a witness. Overall, her testimony was entirely unsatisfactory and lacking in credibility. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*[11] the Court said:

> '... the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external

[11] 2003 (1) SA 11 (SCA) at para 5.

> contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. ...'

[34] Applying the aforesaid, my first reference is to Rooks's performance in the witness box. She was evasive, argumentative, and would often make sarcastic and unfunded statements about Value and her fellow directors. She would avoid answering direct questions, directly. She simply failed to acknowledge or recognize any wrongdoing on her part, despite, in several instances, it being quite obvious that it existed. A pertinent example would be where she admitted to authorising transactions without further approval, where it was required in terms of the policy of Core (as part of the Value group) where the transaction was in excess of a specified amount, but was unable to accept that she did anything wrong, and fabricated a version to cover herself. In several instances, her testimony was never put to any of Core's witnesses, which I will deal with in more detail later in this judgment. I only mention one pertinent example, being the instance where she authorised payment for flight tickets for her boyfriend, who had nothing to do with the business of Core, and then suggested some kind of barter arrangement where he would pay for some of her flight tickets and she would pay for some of his. There were further several material contradictions in her testimony, which I will also deal with later. And lastly, some of the propositions she offered to contradict the claims by Core were so farfetched or unlikely, that it could only be palpably false. But even more importantly, Keightly J made a number of pertinent factual findings in the judgment given on 11 July 2018, which Rooks, despite these factual findings standing, continues to contradict.

[35] Rooks's amended plea cements her complete lack of credibility. Despite all the past litigation, she persists in denying the undeniable. She even denies her employment contract transferred to Core, because Nucleus did not 'countersign' it. She continues to deny wrongdoing with regard to Windsor Logistics and the fraudulent alleged sale of furniture issue (discussed below),

despite the outcome of the past litigation, where Keightly J pertinently found that wrongdoing on her part existed in these respects.

[36] Where it comes to the testimony by Core's witnesses, I am not saying the testimony by such witnesses were entirely without blemish. There were some contradictions, but overall, these witnesses fared substantially better than Rooks. Importantly, these witnesses' testimony supported each other in all material respects, where applicable. And considering the undisputed documentary evidence, the testimony by Core's witnesses made sense, and were supported by these documents.

[37] But it is not just about credibility.[12] It is also essential to consider the probabilities. The determination of probabilities entails an inference to be drawn from the evidence as a whole, on the basis of what the Court said in *SA Post Office v De Lacy and Another*[13]*,* as followings:

> 'The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be 'consistent with all the proved facts. If it is not, then the inference cannot be drawn' and it must be the 'more natural or plausible, conclusion from among several conceivable ones' when measured against the probabilities.'

[38] Therefore, where I set out the relevant factual matrix in this matter, as expanded on below, it is arrived at applying the aforesaid principles relating to the evaluation and determination of such evidence.

[39] Rooks is a self-made entrepreneur in the transport and logistics sector, and founded and conducted a business known as Nucleus Chain Store (Pty) Ltd (Nucleus), where she was a shareholder along with four other shareholders, each of them having a 20% shareholding in that business. She also

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[12] In *Stellenbosch Farmers Winery* (*supra*) at para 5, the Court held: *'…To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities...*',

[13] 2009 (5) SA 255 (SCA) at para 35. See also *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co* 1985 (3) SA 916 (A) at 939I-J; *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B-D; *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A-C.

concluded a written contract of employment with Nucleus on 20 August 2008, and effectively ran the business, operationally, as managing director.

[40] At the end of 2014, Value Logistics Ltd (Value) acquired the business of Nucleus. Value is a substantial business in the transport and logistics sector and was listed at the time on the Johannesburg Strock Exchange. For the purposes of the transaction, Core was established to hold the acquired business. By virtue of the transaction, Value held 80% of the shares in Core, whilst Rooks remained as 20% shareholder in Core. What was then sold by Nucleus to Core was the business of Nucleus consisting of an outsource supply chain partner, specialising in chain store deliveries, including front door deliveries, same day express, overnight express, bulk loads, cross border deliveries, inter-branch deliveries and airfreight services. The transaction was embodied in a written sale agreement signed on 14 December 2014 (the sale agreement).

[41] In terms of the sale agreement, the other fellow shareholders of Rooks in Nucleus received a cash payment each for their shares, and then exited the business. Rooks however remained behind, and her employment was transferred to Core. In addition, together with the sale agreement, a shareholders’ agreement was concluded between Rooks and Value as the two shareholders in Core, on 15 December 2014 (the shareholders agreement). The shareholders agreement confirmed that 80% of the shareholding In Core belonged to Value, and 20% to Rooks. In terms of the shareholders agreement, Rooks would manage the business of Core to the best of her ability, exercise her best endeavours in creating value for all shareholders, and be responsible, subject to the board's overriding control, for the day-to-day management of Core. She was also required to keep the board continuously and fully appraised of her actions in managing Core's operations, its results and of any other matter which is, or which is likely to be, material to Core's business. And lastly, she was expected to ensure that Core complied with good corporate governance principles.

[42] Rooks was appointed as a director of Core under the Companies Act. The other directors were Steven Gottschalk (Gottschalk), Clive Sack (Sack) and Mano Padiyachy (Padiyachy), all from Value. Gottschalk was the CEO of Value. Rooks was also, by virtue of the shareholders agreement, subject to a 36 months' restraint of trade in the event of her termination of employment with Core. And as touched on above, her employment contract with Nucleus was transferred to Core with effect 1 March 2015. Core started operating the Nucleus business as from 1 March 2015.

[43] Rooks was having some difficulty integrating into the corporate environment of being part of the Value group. From her testimony, it appeared she was quite unhappy about the fact that all her fellow shareholders in Nucleus were paid out and left, whilst she remained behind, even though she was an actual party to the transaction. Rooks also explained that Value and Core had different operating systems, being that Core used Winfreight which Value did not use. Rooks insisted that the Winfreight system remain operational in Core, which Gottschalk agreed to. In his testimony, Gottschalk acknowledged the difficulties Rooks had where it came to operating as part of the group, and he decided to give her a lot of leeway in running the business of Core without interference, provided she only operated within the parameters of the clear operational rules set in the group. Both Rooks and Gottschalk were ad idem that Core was operationally ringfenced. However, this leeway afforded to Rooks came with a particular obligation of trust.

[44] When the facts of this matter are overall considered, it is apparent that Rooks proceeded to manage the business of Core as if it was her own family business. She transacted with family members without disclosure, when this was not permitted. She further transacted far in excess of her transacting limit, without obtaining approval from Gottschalk, as required by the group rules. Some transactions were simply fraudulent. She further tried to feather her own nest, in anticipation of securing an exit of Core out of the Value group. The details of all these transactions and events became apparent in an investigation conducted from May 2017, as will be set out below.

[45] In May 2017, Gottschalk's suspicions were aroused when he came to know about what he considered to be substantial commission paid to Sharon Butler (Butler), one of the proprietors of Expressnet (a service provider to Core), and another person by name of Gary Rahme (Rahme), who appeared to be some sort of independent sales agent, out of Core. These commission payments were all authorised by Rooks. As a result of these suspicions, Gottschalk had meetings with Butler and Rahme in the course of May 2017, followed by a meeting with Rooks on 4 June 2017. Added to this, and on 29 May 2017 Gottschalk received an email from Rooks emanating from an unknown email address reflected as *f[...]*. This email concerned Gottschalk, as he was unfamiliar with Windsor Logistics. In the meeting Rooks had with Gottschalk, she was unable to explain this email address, and when giving her testimony suggested that it had simply been set up by Butler's son, Ross, of his own accord, which is simply unlikely. What emerged from these meetings and this email caused Gottschalk to initiate an investigation.

[46] It turned out in the course of the investigation that Windsor Logistics reflected in the email address was a corporate entity called Windsor Logistics (Windsor), which basically operated the same business as Core. The evidence shows that Rooks was instrumental in establishing the business of Windsor. She approached Butler, who conducted the business of Expressnet which was based only in Kwa-Zulu Natal together with Daryl Ouzman (Ouzman). Expressnet had no office or presence in Polokwane and Mbombela, however Rooks proposed to them to open a business identical to Core in Polokwane and Mbombela. According to Butler and Ouzman, Rooks informed them that the previous service provider used by Core in these areas liquidated, opening this opportunity, which business would also then be a service provider to Core. Rooks, on behalf of Core, would then in essence refer customers that needed services in these areas to Windsor. And worse, as discussed in more detail below, Rooks would get 50% shareholding in Windsor. Rooks never disclosed nor reported this transaction to Gottschalk nor sought approval for it.

[47] When giving her evidence, Rooks contended that she never approached Butler, but it was Butler that approached her, expressing an interest to establish a business in the areas referred to, however Butler told her she did not have enough volumes herself to make it work. According to Rooks, the idea was then that they would do ‘reciprocal business’. She also said that she never would get 50% of the business, and only mentioned to Butler that she would consider a small token shareholding. The problem is that this version was never put to Butler or Ouzman, when they testified that it was Rooks that sought to use them to establish the new business and that she would have a 50% share in it, as discussed further below. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[14] it was held as follows:

> ‘The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.

It follows that the version offered by Butler and Ouzman as to the establishment of the business of Windsor, as opposed to any contrary version of Rooks, must be accepted.

[48] In terms of the proposal made by Rooks, Butler and Ouzman would establish Windsor to operate in Polokwane and Mbombela, with Butler and Ouzman each having 50% of the shareholding in Windsor at that point in time. This proposal and discussion occurred at the end of 2016. Ouzman testified that

[14] 2000 (1) SA 1 (CC) at para 61.

he actually told Rooks that he was not interested in getting involved in a business outside Kwa Zulu-Natal. However, Ouzman was needed to provide collateral for the bank account of the new business. After discussion, he relented and agreed that Rooks and Butler could start the Windsor business, and Rooks could then take over his share in Windsor in due course. Ouzman further testified that Rooks informed him that she could not take over his membership interest at that stage, but would be able to do so in the future, once she acquired the Core business back from Value, which was her intention. In fact, Rooks admitted that she was in the process of attempting to buy the Core business from Value. In an e-mail on 17 February 2017, Butler informed Rooks that as they had discussed, Rooks and Ouzman would sign a share transfer document to be kept by Butler until Rooks was ready to take transfer of the shares. In her evidence, Rooks confirmed that she was negotiating with Gottschalk to purchase Core back from Value at the time, and there is e-mail correspondence to this effect.[15]

[49] Ultimately, and because of intervening events, Rooks never took transfer of the membership interest in Windsor from Ouzman, however she was certainly instrumental in establishing the business of Windsor, off the back of her position at Core, so to speak. First, Rooks implemented the owner / driver method of operation conducted at Core, which both Butler and Ouzman were not familiar with. Further, Rooks actively assisted in setting up the business. She travelled to Polokwane and Mbombela to meet with clients and scout for premises for the business. Rooks also conceded in her evidence that Core would pay half the rental for the business premises. She undertook to provide equipment and furniture from Core to the business. She also utilised the services of Amy Singh (Singh) and Shona Johnson (Johnson), two of the senior employees in Core, to assist in the setting up of the business. Johnson set up the operating program for the business (the Winfreight system). Core paid for the travel and accommodation expenses of Singh and Johnson in this regard. And finally, Rooks deployed Lebong Nkwata (Nkwata), another Core employee, to travel to the two offices of Windsor in order to provide training to

[15] The offer by Rooks to purchase the Core business from Value was ultimately declined.

the Windsor employees on the Winfreight system. Nkwata spent five weeks doing his, with Core covering all his costs associated with the same. In the end, Rooks admitted all the above, but simply answered it was ‘a normal business transaction’, showing that she was simply unwilling to accept any responsibility for her wrongdoing.

[50] It was clear from the evidence that but for the efforts of Rooks and the deployment of Core resources and staff to assist, the business of Windsor would never have come about. And as said, all this happened without the knowledge or consent of the majority shareholder in Core, being Value, and in particular, Gottschalk. Rooks did offer an explanation for this conduct. According to her, this entire Windsor transaction, for the want of a better description, was nothing more than giving effect to a so-called ‘common practice’ in Core of establishing what she called ‘branches’ in outsourced service providers of Core. She referred to the example of one Gita Muller (Muller), which operated as a Core subcontractor in Bloemfontein in the Free State, where Core resources and equipment, was well as training, were also deployed. Importantly however, Rooks, even on her own version, was never involved in setting up this business of Muller at the outset and certainly would not have shares in it.

[51] Gottschalk testified that he was unfamiliar with any practice in Core where a branch would be operated in a service providing contractor to Core. There were instances where Core would conduct operations within a customer, but this was not the case with Windsor or even the operations of Muller. He considered the strategy propagated by Rooks to exist to be questionable. But in particular, he was dissatisfied that all this happened with him having any knowledge of it, or it even being reported to him by Rooks, as she was actually required to do in terms of the shareholders agreement. He considered it to be dishonest and a material breach of Rooks’s fiduciary duty.

[52] The aforesaid is not where the issues of impropriety on the part of Rooks, which came out in the investigation initiated by Gottschalk, ended. What was also discovered is that in November 2016, Rooks requested Butler to increase

an invoice for commission owed by Core to Butler in the sum of R8 340.75, to a total sum of R38 340.75, giving an additional R30 000.00 not owing by Core to Butler at all. Core then paid Butler the sum of R38 340.75 on 11 November 2016. Once the payment was made, Rooks telephoned Butler and asked her to pay over the additional sum of R30 000.00 into a Nedbank account, which was in fact the bank account of Rooks's mother. Butler on 12 November 2016 duly paid the sum of R30 000.00 into the account designated by Rooks. When this came out in the investigation, Rooks informed Butler not to be concerned, as she (Rooks) would arrange for her mother to send Butler an invoice for R30 000.00 for goods ostensibly purchased by Butler from Rooks's mother, which Rooks then did. Butler confirmed the invoice was fraudulent, as she never bought anything from Rooks's mother. In the end, Rooks was unable to offer a cogent or truthful explanation for this transaction.

[53] The investigation also revealed a variety of travel expenses paid by Core for various persons, which was authorised by Rooks. This investigation revealed a number of instances where Rooks had approved travel expenses for Core employees deployed in terms of the Windsor transaction. There were also travel expenses that clearly had nothing to do with the business of Core, such as travel expenses for her boyfriend and mother. She also authorised travel expenses for Singh which appeared to a holiday for Singh in Cape Town, and had nothing to do with the business of Core. And finally, there were travel expenses for Ross, the son of Butler, who was not a Core employee. A complete exposition of these expenses will be dealt with later in this judgment.

[54] According to Rooks, all these travel expenses were legitimate and lawfully approved by her. She explained that the travel expenses incurred relating to the Windsor transaction was in the normal course of business of Core. She also explained that Singh's travel expenses to Cape Town was because Singh has been deployed to substitute at the operations of Core in Cape Town during the festive season. She suggested that the travel expenses for her boyfriend was part of some kind of barter arrangement. But some of the transactions she could not explain. The explanations she did offer will also be dealt with later in this judgement.

[55] As touched on above, one of the first instances that spiked the interest of Gottschalk was all the commission payments made to Rahme, which appeared excessive. In fact, and during the period 1 March 2015 to 9 June 2017, Rooks authorised payments to be made by Core to Rahme in an amount of R467 927.59, ostensibly in respect of commissions earned by him. It turned out that these commission payments were irregular and not legitimately earned by Rahme.

[56] Johnson testified on behalf of Core. She was involved in the commission payments to Rahme, on the instruction of Rooks, and she confirmed all these payments were authorised by Rooks. Despite Rooks contending that Nucleus had a commission agreement in place with Rahme even before the sale to Value, Johnson testified that she was instructed by Rooks to prepare a commission agreement for Rahme in 2017. This agreement was prepared on a Core letterhead, and then back dated on instructions of Rooks to 1 March 2015. It is apparent that was backdated to coincide with the Nucleus business being taken over by Core. In terms of this agreement, it appears that Rahme earned perpetual commission on a customer, despite him not even making actual sales to the customer. Rooks did not challenge Johnson on this evidence she had given, however she stated in her testimony that Rahme had a contract in Nucleus and that the contract referred to above was just an ‘update’. But this other alleged Nucleus contract was never produced by her.

[57] According to Johnson, there were irregularities where it came to commissions payable to Rahme. Johnson explained that at the end of every month, she did the commission calculations for all commission earners, and then generated invoices for the commissions due. The information for the commission payments to Rahme came from Rooks. Further, and where it came to three of the latest invoices for Rahme, they were actually done by Rooks, and not her (Johnson), which then did not balance to the sales figures. At the instance of Rooks, Johnson was approached by Jeanine Muller, the finance manager, and was asked to allocate other sales to the invoices for Rahme, so it could balance. Johnson however refused. In the course of April 2017, Johnson also

did a full account reconciliation for all commissions paid to Rahme. This reconciliation showed a number of irregularities where it came to commissions paid to Rahme, which will be dealt with later in this judgment. And finally, the investigation initiated by Gottschalk revealed that part of these commission payments made to Rahme found its way back to Rooks, as will also be dealt with further below.

[58] Next, and during the period of May to September 2016, Rooks authorised the conducting of renovations purportedly to be carried out at the premises of Core in Johannesburg and Durban. She appointed MR Property Maintenance Services (MR) to conduct the renovations. Unbeknown to Value and Gottschalk, MR is owned by Rooks's mother. Rooks never reported the relationship between MR, as a service provider to Core, and her mother (Mercia Rooks). According to a number of invoices rendered by MR to Core for supposed renovations and other services, work to the value of R438 042.70 had been carried out. None of these expenses were reported to or approved by Value, or in particular Gottschalk, despite several invoices being excess of Rooks's level of authority. According to Core, what the investigation revealed is that these invoices were largely fraudulent, and the supposed renovations were never carried out. But more importantly, according to Core, such transactions with a relative like Rooks's mother, was at odds with her fiduciary duties and at the very least, the appointment of such a service provider needed to have been specifically brought to Gottschalk's attention and approved by him.

[59] Rooks in her evidence disagreed that the renovations were not carried out. She was adamant that all the work reflected in the invoices were done. She also could see nothing wrong in utilising the services of MR (her mother), as she would often use her mother in the past at Nucleus for such kind of services. However, this was before the acquisition of the business by Core (Value).

[60] The next instance of impropriety involves an entity known as Infinity Wood (Pty) Ltd (Infinity). The proprietor of Infinity was the husband of Cindy van Zyl,

an employee of Core, being Pieter Van Zyl (Van Zyl). According to Core, Rooks caused an invoice to be rendered by Infinity in May 2016 for work purportedly carried out and furniture purportedly supplied by Infinity, in the sum of R80 200.00, when that was never the case. Again, the version of Rooks was that all this work was carried out as a result of a flood at the office which damaged furniture. She was adamant the furniture was supplied. This transaction will be elaborated on later in this judgement.

[61] Core further accused Rooks of 'stealing' moveable assets from Core in the period February 2017 to 9 June 2017, to the value of R544 290.17. However, and will be discussed below, there was little evidence to support this claim. Rooks has explained that it will be impossible for such an amount in assets disappearing over such a short period, without substantial effort and anyone noticing. In effect, she said what Core was accusing her of was impossible.

[62] And lastly, Core contends that in September 2016 Rooks informed Johnson that Core was indebted to an entity known as Eva-Last, in the sum of R40 175,55, and instructed her to prepare a credit note in favour of Eva-Last in the said sum. Johnson informed Rooks that Eva-Last was not on Core's system and there was no amount reflected that was owing. Rooks then gave Johnson the details of Eva-Last, and instructed her to do a manual credit note, as Johnson could not process it through the accounting system. It appeared that Rooks intended to utilize the credit note to pay Eva-Last for a debt owed personally by her to Eva-Last in respect of wooden decking supplied by Eva-Last to her.

[63] Following the outcome of the investigation, Rooks was suspended on 9 June 2017. A disciplinary process was instituted against her in which she was charged with misconduct relating to dishonesty, in respect of all the aforesaid events. The hearing commenced on 10 July 2017. Rooks however refused to participate in the disciplinary hearing and resigned with purported immediate effect on the same date. Nonetheless, Core continued with the disciplinary

hearing, as it was entitled to do[16], and Rooks was found guilty of several charges against her. Following the conclusion of the disciplinary hearing, she was then summarily dismissed on 28 July 2017.

[64] With Rooks having been dismissed for misconduct relating to dishonesty, Value gave effect to a call-option clause in the shareholders' agreement which entitled it to acquire Ms Rooks's 20% shareholding and loan accounts in Core for R1 per share. Rooks was duly presented with payment in the sum of R24.00 for such shareholding, and this issue forms the subject matter of one of Rooks’s counterclaims, to be further addressed below.

[65] Based on the aforesaid background facts, I will now turn to deciding the claims brought by Core against Rooks in terms of the amended particulars of claim, by first dealing with the fiduciary duties owed by Rooks to Core, both under statute and the common law, especially considering she was a director and shareholder of Core, and managed the business.

<u>The defendant’s fiduciary duties</u>

[66] Rooks is not an ordinary employee of Core. She was effectively its managing director, specifically tasked with all aspects of the running of the business. In addition, she had to specifically answer to the majority shareholder of Core, being Value. The shareholders agreement between Rooks and Value specifically provided for her duty not to conduct herself in any manner that works against the interest of Core and its business, and to fully report to Value on all her activities. Added to the aforesaid, Rooks was appointed as a director in terms of the Companies Act.

[16] As held in *Standard Bank of SA Ltd v Chiloane* (2021) 42 ILJ 863 (LAC) at para 22: ‘*In the circumstances, where a contract prescribes a period of notice the party withdrawing from the contract or resigning is obliged to give notice for the period prescribed in the contract. The contract and the reciprocal obligations contained in it only terminate or take effect when the specified period runs out … In this matter, the employee’s narration that her resignation was with ‘immediate effect’ was of no consequence because it did not comply with the contract which governed her relationship with her employer and the employer was thus correct to read into the resignation a four-week notice period …*’.

[67] As I have discussed above, it became apparent as the case went along that Rooks was quite unhappy with having to continue on with the former business of Nucleus, but now under the auspices of Core, with Value being her majority partner. She always had a distrust of Gottschalk, who she believed was prone to working people out of the Value businesses. She appeared unable to come to grips with how a business must be conducted in a corporate group, and all the duties of good faith and accounting to a board that went with it. Overall, she continued to conduct the business as if she was its sole owner, when that was obviously not the case. This culminated in her seeking to buy out the business from Value at about the same time as when she sought to establish the Windsor business.

[68] Nonetheless, Gottschalk permitted Rooks to operate the business as a 20% shareholder, believing that she would promote the interests of the Group. Gottschalk did perceive the difficulties experienced by Rooks where it came to integrating into Value, and as such, sought to accommodate her by allowing her a freer rein than normal. But he always expected of her to manage and conduct the business subject to the prescripts of Value, and keep him appraised of any material decisions she made. He conceded that she was allowed to approve expenses and transactions, without seeking his approval, where it came to the permissible amounts under the Value authorisation framework. In essence, and considering the approach adopted by Gottschalk towards Rooks, she had a particular position of trust where it came to the Core business.

[69] The position of trust clearly occupied by Rooks compelled her not to work against the interests of Core and her majority fellow shareholder in the business, Value. This duty flows, in the first instance, from her contract of employment in terms of which she was effectively employed as the managing director of the business. I will start with refence to the following apposite

dictum in *Ganes and Another v Telecom Namibia Ltd*[17], where the Court decided:

> 'As an employee of the respondent and in the absence of an agreement to the contrary the first appellant owed the respondent a duty of good faith. This duty entailed that he was obliged not to work against the respondent's interests; not to place himself in a position where his interests conflicted with those of the respondent … '

[70] In *Bonfiglioli SA (Pty) Ltd v Panaino*[18] the Court applied the aforesaid *dictum* in *Ganes*, and concluded:

> '… at common law, the employee owes the employer a duty of good faith. In *Ganes & another v Telecom Namibia Ltd*, it was said that the duty of good faith entails that an employee is obliged not to work against the interests of his/her employer and not to place himself/herself in a position where his/her interests conflict with those of the employer.

And in *Sappi Novoboard (Pty) Ltd v Bolleurs*[19] the Court said the following:

> '… It is an implied term of the contract of employment that the employee will act with good faith towards his employer and that he will serve his employer honestly and faithfully … The relationship between employer and employee has been described as a confidential one … The duty which an employee owes his employer is a fiduciary one 'which involves an obligation not to work against his master's interests' …'

[71] The fiduciary duty as aforesaid contemplates that the employee concerned must not make a secret profit at the employer's expense, or that the employee must not place himself or herself in a position that his or her interests is in conflict with those of the employer. If this happens, it is a violation of the fiduciary duty. In *Robinson v Randfontein Estates Gold Mining Co Ltd*[20] the

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[17] (2004) 25 ILJ 995 (SCA) at para 25. See also *Volvo (Southern Africa) (Pty) Ltd v Yssel* (2009) 30 ILJ 2333 (SCA) at paras 16 – 17; *Stoop and Another v Rand Water* (2014) 35 ILJ 1391 (LC) at para 99.
[18] (2015) 36 ILJ 947 (LAC) at para 26.
[19] (1998) 19 ILJ 784 (LAC) at para 7.
[20] 1921 AD 168 at 177

Court explained what is known, in this context, as the '*no profit*' and '*no conflict*' rules as follows:

> 'Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. ...'

[72] It is not even necessary to establish fault on the part of the employee where it comes to the '*no profit*' and '*no conflict*' rules, in order to sustain a claim for damages as a result of the breach of the fiduciary duty. This was explained in *Du Plessis NO v Phelps*[21] as follows:

> 'In my judgment it is correct to state that a breach of fiduciary duties does not necessarily involve fault. For example, if a director were to obtain a secret profit, the company could claim such profit from him without alleging fault. An action of that kind could be described as *sui generis*. The claim would arise merely by virtue of the fact that the director, in breach of his fiduciary duty, obtained for himself a secret profit which he should have obtained for the company.
>
> Where damages are claimed for a breach of a fiduciary duty, the position is different. In such a case, even though the claim is not based on fault, it is necessary for the company to allege and prove the causal connection between the damages claimed and the breach of a fiduciary duty giving rise thereto. ...'

[73] The following summary in *Grancy Property Ltd and Another v Gihwala and Others*[22] is in my view a succinct and apposite exposition of the position where it comes to the '*no profit*' and '*no conflict*' rules:

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[21] 1995 (4) SA 165 (C) at 171B-D

[22] 2025 (2) SA 76 (SCA) at paras 191 – 192. The Court was referring to *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) at para 31.

> ‘The no-profit rule and the no-conflict rule were reaffirmed by this court in *Phillips*. These are strict rules that allow little room for exception. They extend to both actual conflicts of interest and to cases in which there is a real, sensible possibility of conflict. The defences open to a fiduciary who breaches trust are extremely limited: only the free consent of the principal after full disclosure will suffice. Once the breach of a fiduciary duty is established, the fact that the company has suffered no loss or damage, or that the profit was not made at the expense of the company, is irrelevant.
>
> The term 'profits' in relation to a claim for disgorgement of secret profits does not refer simply to a financial profit on an investment. Instead, the term is a 'wide one' and 'is not confined to money, but covers every gain or advantage made by a wrongdoer'. Once the scope of the fiduciary duty and a breach thereof are established, the wrongdoer will be responsible for disgorgement of all such profits made within the scope of that duty.’

[74] Turning then to the position of Rooks as a director, without specific reference even being made to provisions in the Companies Act (as will be dealt with below), the Court in *Da Silva and Others v CH Chemicals (Pty) Ltd*[23] succinctly described the position in the following manner:

> ‘It is a well-established rule of company law that directors have a fiduciary duty to exercise their powers in good faith and in the best interests of the company. They may not make a secret profit or otherwise place themselves in a position where their fiduciary duties conflict with their personal interests (*Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177). A consequence of the rule is that a director is in certain circumstances obliged to acquire an economic opportunity for the company, if it is acquired at all. Such an opportunity is said to be a 'corporate opportunity' or one which is the 'property' of the company. If it is acquired by the director, not for the company but for himself, the law will refuse to give effect to the director's intention and will treat the acquisition as having been made for the company. The opportunity may then be claimed by the company from the delinquent director.

[23] 2008 (6) SA 620 (SCA) at paras 18 – 19. See also *Mthimunye-Bakoro v Petroleum and Oil Corporation of South Africa (Soc) Ltd and Another* 2015 (6) SA 338 (WCC) at para 59, where it was held: ‘*Under common law a director may not place herself in a position in which she has, or can have, a personal interest which conflicts or possibly conflicts with her duties to the company. …*’.

> Where such a claim is no longer possible, the company may in the alternative claim any profits which the director may have made as a result of the breach or damages in respect of any loss it may have suffered thereby (see Blackman, Jooste & Everingham *Commentary on the Companies Act* vol 2 p 8-161 to 8-162).
>
> It is of no consequence that in the particular circumstances of the case the opportunity would not or even could not have been taken up by the company ... Ultimately, the inquiry will involve in each case a close and careful examination of all the relevant circumstances, including in particular the opportunity in question, to determine whether the exploitation of the opportunity by the director, whether for the director's own benefit or for that of another, gave rise to a conflict between the director's personal interests and those of the company which the director was then duty-bound to protect and advance.'

[75] So therefore, there can be little doubt that the conduct of Rooks where it came to the Windsor transaction was a material violation of her fiduciary duties towards Core. She was effectively feathering her own nest, in anticipation of exiting Core from Value. She identified an opportunity for a business identical to Core in areas that Core was not operating, and used her existing relationship with Butler (Expressnet) as a service provider to Core to seize upon such opportunity outside Core. She then utilised the expertise, business model and *modus operandae* of Core to assist Butler in establishing a new business, which did exactly the same as Core, in Mpumalanga and Polokwane. She deployed Core personnel to assist with this establishment, covered their expenses out of Core, and even provided equipment and furniture out of Core to Windsor. Although she did not have actual shareholding in Windsor when the bomb burst, it was clearly contemplated that she would simply take over 50% of the shareholding in Windsor from Ouzman when the time was right, because Ouzman made it clear that he had no interest in operating a business outside Kwa-Zulu Natal.[24] And all the

[24] Compare *Princess Springs VW (Pty) Ltd v Roberts* 2018 JDR 2191 (GJ) at para 55, where the Court considered the following facts to constitute a breach of fiduciary duties: 'T*he Defendant was an active participant with Allen in setting up IBP, and Logivest. They attended various seminars together where the opportunity, which ought to have been created for the Plaintiff or the Princes Group of*

while, she simply continued to assert that she did what she did in the interest of Core and was simply giving effect to her duties as the managing director of Core, when that was clearly not the case. And all the while, she was bestowed with a particular position of trust and a hands-off approach by Value, which makes all of this worse. It must follow that all expenditure incurred by Rooks relating to the business of Windsor falls to be repaid by her to Core as damages suffered by Core in breach of her fiduciary duties.

[76] The conduct of Rooks has many comparisons with what transpired in *Volvo (Southern Africa) (Pty) Ltd v Yssel*[25]. In particular, the following factual considerations in that case are pertinent, which in the view of the Court considered a violation of the fiduciary duties of the employee concerned:[26]

> ‘Yssel occupied the most senior position in Volvo's information technology division. That there was no contractual privity between him and Volvo seems to me to be of little consequence. It was the position to which he was appointed, rather than the nature of the contractual relationship, that defined what Volvo could expect of him. He had not been brought into its offices so as to provide him with an opportunity to hawk his own wares but had been brought there in the interests of Volvo. That his functions might not have included recruiting, employing and acquiring staff does not seem to me to be material. No doubt he could not be compelled to accept instructions to engage himself in matters of that nature. But the fact is that he did engage himself in arranging matters between Volvo and its staff. And in doing so he did not purport to be doing so as a stranger who was conducting his own affairs. He did so as an incident of his function as manager of the division. Indeed, there can be no doubt that Yssel was well aware that it was precisely because he was the manager of the division that Volvo could be induced to 'relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger'.

Companies, was conceived. The Defendant was both shareholder and director of IBP and Logivest. He did not hold the shareholding on behalf of the Plaintiff. This was done without the written consent of his employer, the Plaintiff …’.

[25] 2009 (6) SA 531 (SCA).

[26] Id at paras 19 – 20.

> Yssel was well aware that Van Eeden had made no independent enquiries relating to the arrangement with Highveld and was acting entirely upon what she was told by him. That he found it necessary to secure an agreement of secrecy from Pieterse makes it abundantly clear that he was well aware that Van Eeden believed that he was arranging matters pursuant to his ordinary managerial duties and not for his own account. In short, he was well aware that Van Eeden did not consider herself to be dealing at arm's length with an independent broker who was arranging matters on his own account, but was dealing with the manager of the division concerned. It was only because Yssel was the manager that the transaction came about at all. I have no doubt that Yssel was in a position of trust when he engaged himself in the matter and was not entitled to allow his own interests to prevail over those of Volvo. He is obliged in those circumstances to disgorge his secret commissions.'

[77] I am also convinced that the utilisation by Rooks of her mother's business (MR) constituted a conflict of interest and a violation of her fiduciary duty under common law.[27] The point is that she utilised her particular position in Core to channel that business to her mother, even accepting it was genuine business in the first place. Robert Paxton (Paxton), the group audit manager for Value, who testified for Core, explained that the three quote system applied in the Group, and for work such as the work purportedly performed by MR, three quotes was necessary. Despite a belated and obviously false suggestions by Rooks that she did obtain three quotes, the evidence shows that Rooks never complied with this. As such, Rooks would equally be liable to repay these costs as a result of the violation of her fiduciary duty. In *Atlas Park Holdings (Pty) Ltd v Tailifts South Africa (Pty) Ltd*[28] the Court described '*conflict of interest'*, in this context, in the following manner:

> 'A director has a fiduciary duty to prevent a conflict of interest arising between his or her own interests and those of the company's. Conflict of interest is an

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[27] Compare, for example, *Impala Platinum Ltd v Jansen and Others* (2017) 38 ILJ 896 (LAC at para 20 where it was said: '*… it would be unfair to expect the appellant to retain Jansen in its employ where Jansen had not only displayed gross misconduct in failing to comply with statutory regulations but also contravened the duty to act in good faith by promoting his wife's business to appellant's service providers thereby compromising fairness and honesty within the appellant's business relationships …*'.

[28] 2022 (5) SA 127 (GJ) at para 66.

umbrella term which includes a duty to disclose any interest in a contract with the company, a duty to account for secret profits, a duty not to improperly compete with the company and, most importantly for present purposes, a duty not to misappropriate corporate opportunities.'

[78] This brings me to the Companies Act. First, and in terms of section 76(3), a director of a company when acting in that capacity, must exercise the powers and perform the functions of director in good faith and for a proper purpose, in the best interests of the company and with the degree of care, skill and diligence that may reasonably be expected of a person in such a position. Further, and in terms of section 77(2), a director of a company may be held liable in accordance with the principles of the common law relating to breach of a 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 sections 75, 76(2) or 76(3)(a) or (b). Therefore, the liability Rooks for the conduct complained of in this case, in terms of the principles discussed above, is statutorily circumscribed as well. As said in *Venator Africa (Pty) Ltd v Watts and Another*[29]:

'Section 76(3) imposes duties upon the directors to, inter alia, act in common-good faith and in the best interests of the company. These are law principles which have now been entrenched in the Act. These duties are owed to the company. In the event of a wrong done to the company in terms of any of the provisions of the section, the company can sue to recover damages.'

[79] Next, Section 75(6) of the Companies Act bears specific mention, and reads:

'If a director of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest, or knows that a related person has acquired a personal financial interest in the matter, after the agreement or other matter has been approved by the company, the director must promptly disclose to the board, or to the shareholders in the case of a company contemplated in subsection (3), the

[29] 2024 (4) SA 539 (SCA) at para 31. See also *Hlumisa Investment Holdings Rf Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA) at para 50; *Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd* 2014 JDR 1229 (GJ) at para 42.

nature and extent of that interest, and the material circumstances relating to the director or related person's acquisition of that interest.'

[80] In section 75(1)(b) it is provided that for the purposes of section 75, '*related person*', when used in reference to a director, has the meaning set out in section 1. In turn, and in section 1, it is provided that: '*... related, when used in respect of two persons, means persons who are connected to one another in any manner contemplated in section 2(1)(a) to (c)*'. Section 2(1)(a) would be applicable *in casu*, which reads: '*For all purposes of this Act - (a) an individual is related to another individual if they - (i) are married, or live together in a relationship similar to a marriage; or (ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity ...*'

[81] From the aforesaid, there can be no doubt that Rooks's mother is a related person as contemplated by the Companies Act. As such, by virtue of section 75(3), Rooks was compelled to have disclosed all the transactions between Core and MR (as her mother's company) to the board of Core, which would include Gottschalk. That never happened, and as such, it would be another violation of her fiduciary duties. In the end, the following summary in *Atlas Park Holdings supra*[30] is apposite:

> 'As indicated earlier, while s 76 includes breaches of a fiduciary duty, its provisions are directed not only at directors, but also at those who the law has not previously treated as subject to the identical set of fiduciary duties to which directors are subject. In my view s 76(2), either independently or with reference to ss 76(3) and (4), as well as ss 77(2) and (3), covers conflict-of-interest situations, which are a species of the fiduciary-duty obligations owed by a director. Section 76(2)*(a)* is concerned with the misuse of confidential corporate information which is an asset of the company, not of a director or shareholder. …
>
> Section 76(2)*(b)* adequately covers situations where information comes to the knowledge of a director or certain identified members of management who have a duty to impart that information, provided it is material to the company

[30] Id at paras 59 – 60.

and is not in the public domain (see the qualifiers). Such information by definition would include information about a corporate opportunity. The difference between the way s 75(3) and s 76(3) handle the non-disclosure of material information is that, in the case of s 75(3), it is elevated to a conflict of interest by a director resulting in the voiding of a transaction if the director has a financial interest in it (or knows that a related party has such an interest), whereas s 76 imposes a duty to disclose which, even though it may amount to a conflict of interest for purposes of s 75, also constitutes a failure to disclose a corporate opportunity, thereby rendering the director or member of management civilly liable under s 77(2) ...'

[82] Everything considered, I have little hesitation in concluding that Rooks, in her capacity of a director and as an employee of Core, materially breached her fiduciary duties towards Core. She exploited a business opportunity for her own benefit and was instrumental in setting up a competing business to Core, using the business model, resources, funds, personnel and assets of Core to do so. She did all of this behind the back of the board of Core, who was at all times entirely unaware of what was happening. And where it came to transacting with her mother, Rooks had a clear conflict of interest, which she needed to disclose to the board of Core and seek approval for it. Her failure to do so is similarly a breach of her fiduciary duties. It is not even necessary to consider what Rooks's motives may have been or whether she was at fault. It must follow that Rooks is liable to repay to Core any expenditure incurred by Core at the instance of Rooks, where it comes any transactions relating to Windsor and MR. One can actually do no better than to refer to the following finding made by Keightly J in the judgement of 11 July 2018:[31]

'The applicants have succeeded in establishing that Ms Rooks had an undisclosed personal interest in the establishment of Windsor. Albeit that she had not yet formally taken transfer of Mr Ouzman's member's interest, Ms Butler and Mr Ouzman's affidavits establish that this was Ms Rooks' intention. Without disclosing this interest to her co-directors, she instructed that Core's resources be used to facilitate the establishment of Windsor, and she participated in the activities of Windsor by, for example, vetting depots, and meeting potential

[31] See para 54 of the judgment.

> clients. She disclosed, or caused to be disclosed, price lists to Windsor. She did not disclose to her co-directors any of this involvement, nor did she disclose to them that Core's resources were being extensively used to support Windsor. Even after allegations arose with the investigations by the applicants, at the board meeting on 26 June 2017, Ms Rooks again denied that she had any interest in Windsor. She attempted to paint them as a '*pathetic'* outfit', implying that Core should not be concerned by their activities. This was patently misleading given her extensive involvement in trying to get Windsor off the ground. This was conduct amounting to an egregious breach of the fiduciary duties owed by Ms Rooks to Core and her co-directors …'

[83] I will now turn to each of the individual claims as articulated by Core in the amended particulars of claim, applying all of the above considerations to such claims, where appropriate.

<u>Claim A</u>

[84] As I have touched on above, I believe Core has difficulty in sustaining this claim. This difficulty arises from the manner in which Core itself chose to plead and bring this claim. In particular, it is pleaded as follows in the amended particulars of claim:

> 'During at least the period February 2017 to 9 June 2017 (the date of suspension of Rooks prior to her dismissal), <u>Rooks stole movable assets</u> belonging to Core to the Value of R544 290.17.' (emphasis added).

[85] However, Core never presented any testimony that Rooks stole the assets. There as in fact no evidence at all that establishes a nexus between what Core considered to be missing assets, and conduct by Rooks. In fact, what Core did to seek to establish this claim was testified to by Paxton. Paxton testified that as part of the investigation carried out into Rooks, a physical asset check was done of all of the assets of Core, and a final list of assets was then produced pursuant to this check. This list of assets found to exist was then compared to the list of assets taken over into Core when the sale agreement was concluded. This take on asset list, at the time when the

business was transferred to Core, was verified and confirmed by Rooks herself at the time, and was thus correct. Based on the comparison between the final list and the take on list, and also accounting for depreciation, a list of missing assets was generated. According to Paxton, assets to the value of R544 290.17 was missing out of a total take on asset value of some R1.1 million. But none of this proves that Rooks '*stole*' these assets. At best, it simply proves that assets are missing.

[86] With regard to this claim, Rooks's explanation that it would be impossible for her steal about half the assets of Core without anyone ever noticing, makes sense. Such a wholescale looting of assets would have been patently apparent to anyone in the business, and it would take considerable effort to steal such an amount of assets. As Rooks points out, multiple delivery trucks would be needed. Added to this, it turned out to be common cause that there several armed robberies at the premises, where a substantial amount of assets were stolen, in addition to the customer stock in the warehouse.

[87] I believe that proper asset control in the Core business was lacking. This led to the movement and / or any loss of assets due to external factors, not being recorded. Because Rooks was to large extent left to her own devices to manage the business, this would not be apparent to any loss control department in Value. Thus, and in the end, the missing assets may have arisen because Rooks did not carry out her duties properly and did not manage her employees properly where it came to asset control. But this by no stretch of the imagination means she stole the assets. That is simply a leap too far.

[88] But Core has chosen to rely on theft. It has chosen not to plead a case based on dereliction of duty or negligence on the part of Rooks relating to asset control and management. If that was Core's case, it needed to be specifically pleaded. However, Core specifically pleaded a case of theft and is bound by

such case.[32] The Court in *Imprefed (Pty) Ltd v National Transport Commission*[33] made the following clear:

> ‘At the outset it need hardly be stressed that:
> 'The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.' *(Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082.)
>
> This fundamental principle is similarly stressed in Odgers' *Principles of Pleading and Practice in Civil Actions in the High Court of Justice* 22nd ed at 113:
> 'The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.' ...’

[89] And in *Knox D’Arcy AG and another v Land and Agricultural Development Bank of South Africa*[34] the Court said:

> ‘It is trite that litigants must plead material facts relied upon as a basis for the relief sought and define the issues in their pleadings to enable the parties to the action to know what case they have to meet. …’

[90] But overall considered, it can hardly be better said than to refer to the following *dictum* in *Molusi and Others v Voges NO and Others*[35]:

> ‘The purpose of pleadings is to define the issues for the other party and the court. And it is for the court to adjudicate upon the disputes and those disputes alone. Of course there are instances where the court may of its own accord (mero motu) raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its

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[32] See *Naidoo v Minister of Police and Others* [2015] 4 All SA 609 (SCA) at para 30; *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at para 11; *First National Bank of Southern Africa Ltd v Barclays Bank PLC and Another* 2003 (4) SA 337 (SCA) at para 6; *Absa Bank Limited v IW Blumberg and Wilkinson* 1997 (3) SA 669 (SCA) at 681G-H*; Roman Catholic Church (Klerksdorp Diocese) v Southern Life Association Ltd* 1992 (2) SA 807 (A) at 816D-F.
[33] 1993 (3) SA 94 (A) at 107C-H.
[34] 2013 JDR 1358 (SCA) at para 35.
[35] 2016 (3) SA 370 (CC) at para 28.

consideration on appeal involves no unfairness to the other party against whom it is directed. In *Slabbert* the Supreme Court of Appeal held:

'A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.''

[91] Thus, and based on the case as pleaded, Core needed to prove the elements of theft, in particular that Rooks had actually appropriated the assets and had done so with the intention to permanently deprive Core of such assets. As held in *Chetty v Italtile Ceramics Ltd*[36]:

'... The law requires for the crime of theft —

'not only that the thing should have been taken without belief that the owner ... had consented or would have consented to the taking, but also that the taker should have intended to terminate the owner's enjoyment of his rights or, in other words, to deprive him of the whole benefit of his ownership''.[37]

[92] The difficulty is that Core failed in two respects where it comes to the claim that Rooks stole the assets. First, it never proved that Rooks actually took the assets. Second, Core did not prove any intention on the part of Rooks to terminate Core's benefits arising from its ownership of the assets. As I have said, what was proven was more akin to a case of Rooks failing to discharge her duties where it came to management of assets, causing the same to be lost. The assets could have been taken by other employees over time or have deployed elsewhere, without it being recorded. Or it could have gone missing in the robberies. Or it could have been sold or written off. The mere comparison of an opening assets list to a closing asset list, and then concluding that assets were lost, falls far short of drawing any inference that it was Rooks that stole aal these assets. In simple terms, proving assets are missing does not prove Rooks stole it. Therefore, and overall considered,

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[36] 2013 (3) SA 374 (SCA) at para 10.

[37] The Court was referring to *R v Sibiya* 1955 (4) SA 247 (A) at 257B – D; *S v Van Coller* 1970 (1) SA 417 (A) at 424G – F.

there is insufficient evidence to prove that Rooks stole the assets. By way of comparison, the Court in *Chetty supra*, where the claim was based on theftuous use (*furtum usus*), decided that theft could not be proven considering the following facts:[38]

> 'I do not agree that the conduct complained of constituted the use of another's property. What Mr Chetty did was to post false entries to the accounts to mislead Italtile. This could well have amounted to fraud, inasmuch as it would have caused an increase in Mr Chetty's profits, but it is not use of the stock. Most of the stock, in any event, went missing prior to the false entries so that no use of it was possible. The question is rather whether Mr Chetty's conduct was calculated to conceal any unlawful taking of the stock. There is no direct evidence of theft, nor of Mr Chetty's participation in theft. Nor is such an inference the most plausible or the most likely one to be drawn from the proven facts.'

[93] I thus conclude that it was not proven that Rooks stole any of the missing assets. This claim by Core must therefore fail, and is dismissed.

<u>Claim B</u>

[94] This claim relates to travel and accommodation expenditure incurred by Core at the instance of Rooks, in the period 24 February 2017 to 15 May 2017, relating to various persons, which expenditure Core contends was unlawfully incurred by Rooks in contravention of her fiduciary duties. The claim is sought to be substantiated by a schedule of such travel expenses (with supporting documents), in the total amount of R91 839.22.

[95] There is substance in most of this claim. First, the schedule reflects travel and accommodation expenses involving Rooks, Singh and Nkwana, which all formed part of establishing the business of Windsor. As already discussed in full earlier in this judgment, this expenditure was incurred by Core and

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[38] Id at para 12.

approved by Rooks in contravention of her fiduciary duties, and as such, she would be liable to repay the same.

[96] Second, there is expenditure incurred on behalf of several persons that have nothing to do with the business of Core. One is Ross, who is the son of Butler, and who was not a Core employee nor involved in the business of Core. Next is Rooks's mother, Mercia Rooks, who was also not a Core employee and equally had nothing to do with the business of Core. Rooks explained that the payment of her mother's travel expenses was a 'system error' which she gave instructions to remedy, but the simple answer to this is that if it was true, then why was such expenses not immediately refunded when the so-called error was discovered. Also, the expenses for Mercia Rooks were incurred in February, August and September 2016, and surely all of this cannot be 'system errors'. Then there Rooks's boyfriend, Dave Lester (Lester), who is equally not involved in the Core business at all, and who conducts his own business of supplying soap to wash trucks. Travel expenses were also incurred for Sonia Singh, who is the daughter of Singh, but Sonia is not a Core employee nor was she fulfilling any duties for Core. Rooks's attempts at explaining this expenditure for these persons is unsustainable, as it is simply false. There is simply no legitimate basis for Rooks to have authorised this expenditure, and she would be liable to repay the same.

[97] There is an instance where Rooks approved travel expenses for one Theresa Coertzen (Coertzen), who is a spirit medium not employed by Core. Rooks explained that she decided to utilise the services of Coertzen, in fact at the behest of staff at the Johannesburg and Durban branches of Core, due to supernatural happenings at these branches. Coertzen was employed to conduct what can perhaps best be described as a spiritual cleanse of the offices. As strange as this may sound, it does not follow that this expenditure is unlawful. Rooks genuinely believed it was in the interest of the business, as did her staff, and her approval of the expense fell within the parameters of what she could approve. The simple point is that unlike all of the other transactions under this claim, the expenses for Coetzen is not of the same unlawful character and in breach of fiduciary duty considerations, that were

attached to the other items of expenditure. The explanation for this expense is at least plausible. The conduct is thus not unlawful, albeit strange, and as such, Core cannot succeed with this part of the claim. It means that s sum of R6 419.09 must be subtracted from the schedule referred to above.

[98] And lastly, there is travel and accommodation expenditure approved for Singh and her family, in respect of a trip to Cape Town. There is no legitimate basis upon which it can be said that Singh had to travel to Cape Town as part of her duties with Core, especially with her family. It was patently apparent that this was effectively a Core sponsored holiday for her. Rooks sought to explain that Singh was deployed to substitute in the Cape Town branch for the festive season, but not only would there be no operational need for this, it is also clear the travel dates were at the end of January 2017 which does not correspond with the festive season. In any event, this explanation was never put to any of Core's witnesses to answer. Thus, Rooks remains liable to repay these expenses.

[99] I therefore conclude that Rooks is liable, under this claim, to pay Core the sum of R85 420.13, being the balance of the claim of R91 839.22, after the sum of R6 419.09 is deducted.

Claim C

[100] This claim related to Rooks's holiday residence in Kwa-Zulu Natal known as '*Lazy Lizzard'.* In the amended particulars of claim, it was alleged that during March and April 2016, Rooks fraudulently claimed payment from Core of an amount of R3 000.00 (from petty cash), in respect of accommodation for herself whilst staying at Lazy Lizzard, ostensibly in the course of business of Core. but in fact it was for her own private purposes. No evidence was however presented on this claim by any of the witnesses of Core, and it seems to have been abandoned. This claim is refused.

Claim D

[101] The claim in this instance concerns the commission payments to Rahme, which have been dealt with to some extent above, and involves a total payment of R467 927.59 over the period 1 March 2015 to 9 June 2017, when Rooks was finally suspended. In addition to what I have already said, and for the reasons to follow, I consider that there is force in this claim, and that it smacks of impropriety.

[102] In my view, the evidence showed that the commission payments made to Rahme were irregular. In addition to the evidence by Johnson referred to earlier in this judgment, Paxton testified that when first investigating the issue of the commission payments to Rahme, no contract with him could be found, and it was Rooks who later produced the contract purportedly signed in March 2015. Paxton explained that the contract was fraudulent, as the letterhead on which the contract was produced only came into existence in August 2017, yet the contract was purportedly dated and signed in March 2015. Paxton also explained that it did not make business sense to continue to pay commissions to sales agents for as long as a customer merely places orders, even though the agent does not make sales. Rooks in answer suggested that there was an actual earlier agreement with Rahme concluded in Nucleus, in the same terms contained in the aforesaid agreement, but she was unable to produce a copy of it. Gottschalk testified that when he interviewed Rahme together with Sack when this whole matter was investigated, Rahme appeared nervous and was unable to say exactly what he did that would entitle him to earn the commissions paid to him.

[103] Paxton further testified that it appeared that some of the commission earnings of Rahme found its way back to Rooks. He referred to statements of income and expenses sent by Rooks to Louis Fourie (Fourie) in Value's loss control department in May 2017. In particular, the statements from October 2016 to April 2017 all reflected monthly payments by Rahme to Rooks, reflected as 'sundry income'. In her testimony, Rooks sought to explain this as Rahme being a family friend, and she assisted him with a new vehicle, which was being paid off by him. This version was never put to any of the witnesses for Core, and in particular Paxton, under cross examination. The version further

directly contradicts what is contained in Rooks's plea, where she pleaded that it was her boyfriend, Lester, that was a friend of Rahme, who lent Rahme money because he was struggling financially, and Rahme was paying back Lester from the income he was earning. The explanation offered by Rooks, these anomalies and contradictions considered, is obviously false.

[104] Considering the commissions reconciliation schedule of Rahme prepared by Johnson, Johnson indicated that there was a number of instances where Rahme was paid a so-called flat rate in commission, without any profit calculation being made to determine the commission and without there being any sales reflected. She considered this to be irregular, and testified this was on instruction from Rooks. Johnson also pointed that the last three invoices on the schedule were what she considered to be the fraudulent invoices created by Rooks, and which she (Johnson) refused to match to other sales to make it balance, as she was instructed by Rooks to do.

[105] Therefore, three things stand out. The first is the obvious fabrication and back dating of Rahme's purported commission agreement, which was done when it became clear to Rooks that the commission payments to Rahme had become an issue for Gottschalk, and he was looking for an agreement. The second is the conduct of Rooks relating to the three invoices of Rahme prepared by her, and then requesting Johnson to apply other sales to those invoices to make them balance. And third, there is the clearly false explanation for the monthly payments by Rahme to Rooks, which certainly required proper explanation. All of this is simply not forthright behaviour, and simply dishonest conduct.

[106] In her own testimony, Rooks suggested that she had in fact explained to Gottschalk who Rahme was, how his commission payments worked, and that Gottschalk had in fact approved this arrangement by signing off on it all along. She even suggested that Gottschalk did a similar 'deal' with her previous partners relating to a customer Heineken. Again, this entire version was never put to Gottschalk under cross examination when he testified. And if this was so, why fabricate an agreement to attempt to justify the commissions payments to Rahme. In any event, I accept the testimony of Gottschalk that

he was completely unfamiliar with Rahme and the payments made to him, which is one of the main reasons why he initiated the investigation in the first place.

[107] It was clear that Rooks decided on the commissions that were paid to Rahme. It is clear that Rahme was a close friend, either of her, or of Lester. There was no evidence of any sales actually made by Rahme to substantiate those commission payments. Instead, it was apparent, in my view, that Rahme had introduced a few customers to Core in the past, and was then being paid commissions of 30% calculated on any transactions coming from those customers *as infinitum*, without Rahme in any manner being involved in the sales. As Gottschalk explained, this kind of arrangement with an independent sales agent would simply not make any business sense, and such a transaction would never be approved. In effect, Rahme did not earn the commissions at all by way of executing any sales activity. It also cannot be ignored that Rooks appeared to share in these commissions.

[108] Therefore, I am satisfied that Core has made out a proper case for this claim to be sustained. What Rooks did with regard to the commission payments to Rahme is a material violation of her fiduciary duties and simply dishonest. Rooks is accordingly liable to pay the sum of R467 927.59 to Core.

Claim E

[109] This claim is about Rooks having requested Butler to inflate her commission invoice by R30 000.00, and then arranging for payment of this amount to made into the bank account of Rooks's mother. This claim also specifically featured in the earlier proceedings before Keightly J, and the learned Judge concluded that this transaction constituted '*strong evidence of fraud committed by Ms Rooks against Core*'.[39] But what makes matters worse is that Rooks, when this impropriety was discovered, sought to conceal what happened by having her mother generate a false invoice to misrepresent that Butler paid the funds into her mother's account for goods purportedly

[39] Para 32 of the judgment.

purchased by Butler from her mother, which never happened. It may be added that the false invoice was generated seven months after the fact, when the payment was queried. Considering this invoice itself, it cannot be ignored that it was dated 12 November 2016, but only sent to Butler on 29 July 2017, after the investigation had been initiated. I have little hesitation in concluding that this entire transaction was fraudulent, and Rooks sought to unlawfully conceal it.

[110] Rooks has no defence to this claim. Her persistence that it was a genuine transaction is lamentable. In her testimony, she sought blame Johnson for the transaction, and suggested that Johnson was to blame and Johnson was just covering for herself. This explanation is obviously patently false, considering what happened to the additional R30 000.00 paid to Butler, which is entirely inconsistent with an eventuality of Johnson just covering for herself. Rooks even persisted with the version that Butler paid the R30 000.00 to Rooks's mother for furniture allegedly bought by Butler from her mother, when Butler made it clear this never happened and the invoice to this effect from Rooks's mother was fabricated at the instance of Rooks. Rooks suggested yet another version to Butler under cross examination, suggesting that the invoice of R8 340.75 was increased as Rooks wanted it to cover both September and October 2016 commissions due to Butler, which version, despite being denied by Butler, was obviously false, as the September and October 2016 invoices was for a total of R17 500.00, and not R38 340.75.

[111] It is my view that with regard to the transaction discussed above, Rooks clearly committed fraud resulting in Core paying a sum of R30 000.00 which was never due and owing, and which landed up, due to her efforts, in her mother's bank account. Rooks is therefore liable to repay this sum of R30 000.00 to Core by virtue of this claim.

<u>Claim F</u>

[112] Where it comes to this claim, the purported services and renovations carried out by MR at the premises of Core in Johannesburg and Durban in the period May to September 2016, to the total value of R438 042.70, forms the basis of the claim. I have already dealt with this claim to some extent earlier in this judgment.

[113] Paxton testified that where it came to MR, there was no disclosure to the board of Core that MR was owned by Rooks's mother. He added that in the course of the investigation, he could find no service agreement between Core and MR, despite that being required in terms of applicable procedure. He added that the three quote requirement was never applied where it came to the work given to MR by Rooks. In fact, no quotes at all could be found to substantiate the invoices rendered. And lastly, he pointed out that MR was not an approved vendor on the group's systems, which was also required, and that the general cash account was misused to make the payments to MR, rather than a specific vendor account. In the end, and to add insult to injury so to speak, a reconciliation showed that MR was paid R2 000.00 more than what was actually invoiced in total.

[114] In the course of the testimony by Paxton about these invoices, he stated that in any event, several of the invoices exceeded the amount limit Rooks would be able to authorise without approval. In reaction, Rooks put to him that her limit was R150 000.00 per transaction. Paxton disputed this, and stated that her authority limit was R20 000.00 per transaction. Rooks ultimately conceded this, but changed tack and then suggested that Gottschalk had approved all these invoices. There was however no evidence of such approvals having been granted by Gottschalk or even that the invoices had been submitted to him for approval. Once again, Rooks was not being forthright.

[115] In challenging Paxton under cross examination, and in giving her own evidence, Rooks suggested that she in fact obtained three quotes for the work done on the warehouse and offices, and she gave those to the group financial director, Sack. She stated that Sack and Gottschalk gave permission to her to proceed with the work. Gottschalk, when he testified, denied this. Added to

this, Rooks was unable to produce any of the alleged quotes, and could not even produce the quote from MR, which is questionable, considering she could have easily obtained it from her mother. Rooks also suggested that there was some book that gave details of the work provided, but yet again, she was not able to produce this book. Rooks was actually unable to produce any documents to substantiate her version.

[116] As to the question whether the purported renovations / work was even done, Core sought to lead evidence that the work and / or renovations were never done, and in particular, no painting happened at the Durban warehouse. Testimony was given by Sebastian Pretorius (Pretorius), a loss control officer at Value, who was tasked to investigate whether the work had in fact been carried out. He stated that he inspected the buildings and compared what he saw against the invoices by MR, and found that the repairs referred to were not done. He also interviewed staff, who informed him that they did not have knowledge of repairs. He also confirmed with the letting agent that no such work was done.

[117] Rooks disputed the aforesaid, and contended that all the work was indeed done, and everything on the invoices was supplied. She referred to the fact that she had evidence of this, but never produced such evidence. I however do not think it is even necessary, where it comes to deciding Rook's liability under this claim, to finally resolve this factual dispute, even though I do believe that it is certainly in doubt that the work was done.

[118] The invoices themselves, as they stand, are questionable. There is no proper description of the work done, and as said above, the invoices are not backed up by quotes, which could perhaps reflect the particulars of the work to be done. In the end, and that one has, are vague and general references to work purportedly done.

[119] Overall considered, the fact is that on the basis of all of the material and patent irregularities relating to the transactions with MR, Rooks would be

liable to Core. Therefore, she is liable to repay the sum of R438 042.70 to Core.

Claim G

[120] This claim relates to the Infinity Wood transaction. It appears that there was an incident in 2016 where the Core offices had flooded, resulting in damage to some of the office furniture and fittings. In May 2016, Infinity Wood gave a quote for R103 700.00 for various items of furniture, and was subsequently paid a sum of R80 200.00 on the authorisation of Rooks for such items of furniture allegedly supplied to Core.

[121] Paxton testified that when this matter was investigated, it was found that none of the furniture had in fact been supplied. He stated that the furniture found in the offices was in fact the original (old) furniture, still bearing the corresponding asset tags. He was of the view that if this furniture was indeed provided, it was certainly not provided to Core.

[122] According to Rooks, Sack actually approved the quote by Infinity Wood. But then she said that Infinity Wood only supplied new couches, and refurbished the other furniture. Paxton disputed this, stating that the asset tags could not survive any refurbishment, and the furniture was found with asset tags.

[123] The national loss control officer for Value, being Louis Fourie, testified about this issue as well. He explained that what he found at the premises were exactly the same assets as reflected in the asset list of 2015. In particular, there was no new furniture. He in fact said that he took those assets away and stored them, as proof that it was the original old assets.

[124] The proprietor of Infinity Wood, Peter Van Zyl (Van Zyl), was called by Rooks to testify. Ironically, he had little to say about the items of furniture that was reflected on the quote. He did concede that the server table was not refurbished, as suggested by Rooks, but was in fact replaced. He could not explain why, if that was so, the server table still had an original asset tag.

Importantly however, he conceded that money has been paid from the account of Infinity Woods to Rooks at this time, but he could remember what it was for. Van Zyl also stated that he did a lot of work on the whole reception area and reception desk, which work is not reflected on any invoice or quote. This certainly raises a question mark over the furniture reflected in the quote as being supplied, and which was what the sum of R80 200.00 purportedly paid for.

[125] On the grounds as discussed earlier in this judgment, I in any event prefer the evidence of Paxton and Fourie. It follows that the furniture supplied by Infinity Wood was either not supplied at all, or certainly not supplied to Core. That renders Rooks liable to pay the sum of R80 200.00 to Core.

Claim H

[126] This claim related to Rooks allegedly stealing wine belonging to Core and selling it to a third party. Core elected not to pursue this claim, and led no evidence on it.

Claim J

[127] There is little to be added to what has already been discussed earlier in this judgment about this claim, which concerns the credit note to Eva-Last. But what must be emphasised is that it difficult to understand why Core would need to process a credit note for Eva-Last, considering it had no account with Core, and there was no evidence about what the transaction that allegedly needed to be credited was all about. That is why, as Johnson testified, she had to create a manual credit note. And all this happened on the direct instruction of Rooks.

[128] Rooks admitted that she purchased product from Eva-Last, and offered a convoluted explanation that she would pay for the truck to offset the product she purchased. How this relates to the credit note is unclear. Rooks even went so far as to suggest that she had no idea how Johnson handled the

transaction, and Johnson did all this of her own accord, a version never put to Johnson under cross examination. Considering that it was undisputed that Eva-Last had no account at Core, and it was Rooks that directly dealt with Eva-Last, all the information Johnson used to prepare the credit note could only have come from Rooks. And lastly in this respect, what appears to be an often repeating pattern, what Rooks pleaded contradicted her version. In her amended plea, she disputed the credit note *per se* and said she only asked Johson to prepare a spread sheet for her for her personal expenses, as she had actually paid Eva-Last for the products she purchased from it. This pleaded version is entirely incompatible with the version that came out in evidence.

[129] I believe that what Rooks effectively did was to, in exchange for her own personal purchase from Eva-Last, give Eva-Last a credit that it could use to arrange for the transport of its goods by Core, instead of Rooks paying Eva-Last for her own purchase. This state of affairs is in my view further apparent from an e-mail exchange on 10 August 2016, reflecting such scenario. This is clearly an irregular transaction, which is nothing else but fraudulent. Rooks is thus liable to pay the sum of the sum of R40 175,55 to Core.

<u>The delinquent director claim</u>

[130] According to Core, Rooks, during her tenure as a director of Core, exhibited a pattern of serious (egregious) misconduct which is entirely inconsistent with what is expected of her as a director under the Companies Act. This pattern of misconduct included setting up a competing business for her own benefit using the resources of Core, misusing the assets and personnel of Core, and committing a number of transactions for her own account and benefit which often was nothing short of fraudulent behaviour. As far as Core is concerned, Rooks's misconduct was of a significant magnitude for her to be declared a delinquent director under the Companies Act, and made application, in terms of section 162(2), for such an order.[40]

[40] Section 162(2) provides: '*A company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another*

[131] In terms of section 162(5)(c) of the Companies Act:

> 'A court must make an order declaring a person to be a delinquent director if the person- ...
> (c) while a director-
> (i) grossly abused the position of director;
> (ii) took personal advantage of information or an opportunity, contrary to section 76(2)(a);
> (iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76(2)(a);
> (iv) acted in a manner-
> (aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or
> (bb) contemplated in section 77 (3)(a), (b) or (c) ...'

[132] If such a declaration of delinquency is made under section 162(5)(c), such declaration may be made subject to any conditions the Court considers appropriate, and subsists for seven years from the date of the order, or such longer period as determined by the Court at the time of making the declaration.[41]

[133] Section 162(5)(c) has attracted the attention of the SCA in *Gihwala and Others v Grancy Property Ltd and Others*[42]. In that case, the factual basis for seeking to declare directors delinquent had many comparisons to the case *in casu*. In particular, it was contended that those directors had violated their fiduciary duties under an agreement, appropriated benefits for themselves

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representative of the employees of a company may apply to a court for an order declaring a person delinquent or under probation if - (a) the person is a director of that company or, subject to subsection (2A), within the 60 months immediately preceding the application, was a director of that company; and (b) any of the circumstances contemplated in - (i) subsection (5) (a) to (c) apply, in the case of an application for a declaration of delinquency …'.

[41] See Section 162(6)(b).

[42] 2017 (2) SA 337 (SCA).

and for their own personal enrichment, and the Court said the following, having due regard to such case:[43]

> 'This conduct falls squarely within s 162(5)*(c)* of the 2008 Act. It involved gross abuses of the position of a director. Grancy was excluded from the benefits of an investment, which it had substantially financed, while Mr Gihwala and Mr Manala took those benefits for themselves. In four instances they sought their own personal enrichment …'

[134] The Court in *Gihwala supra* then turned to a specific consideration of the purpose of section 162(5)(c), and held that:[44]

> '... it is not a penal provision. Its purpose is to protect the investing public, whether sophisticated or unsophisticated, against the type of conduct that leads to an order of delinquency, and to protect those who deal with companies against the misconduct of delinquent directors. What is that conduct? It is helpful to examine some of the other provisions of the section. Under ss 5*(a)* consenting to serve as a director, or acting in that capacity or in a prescribed office, while ineligible or disqualified from doing so, attracts delinquency. Under ss 5*(b)* acting as a director while under a probation order in terms of s 162, or the corresponding provision dealing with close corporations, results in delinquency as both orders are directed at preventing that very conduct.
>
> Turning to ss 5*(c)*, one starts with a person who grossly abuses the position of director, conduct of which I have found Mr Gihwala and Mr Manala guilty. We are not talking about a trivial misdemeanour or an unfortunate fall from grace. Only gross abuses of the position of director qualify. Next is taking personal advantage of information or opportunity available because of the person's position as a director. This hits two types of conduct. The first, in one of its common forms, is insider trading, whereby a director makes use of information, known only because of their position as a director, for personal advantage or the advantage of others. The second is where a director appropriates a business opportunity that should have accrued to the

[43] See paras 137 – 138 of the judgment.
[44] Id at para 142 – 143. See also *Smuts v Kromelboog Conservation Services (Pty) Ltd and Another* 2024 JDR 4913 (SCA) at para 29.

> company. Our law has deprecated that for over a century. The third case is where the director has intentionally or by gross negligence inflicted harm upon the company or its subsidiary. The fourth is where the director has been guilty of gross negligence, wilful misconduct or breach of trust in relation to the performance of the functions of director or acted in breach of s 77(3)*(a)* – *(c)*. That section makes a director liable for loss or damage sustained by the company in consequence of the director having — '*(a)* acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so; *(b)* acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1); *(c)* 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 ...'

[135] In *Lewis Group Ltd v Woollam and Others*[45] the Court appositely described what would be serious misconduct as contemplated by section 162(5)(c), holding that:

> 'It follows that for a company or any of its shareholders to succeed in obtaining a declaration of delinquency in respect of any of the company's directors or former directors they must demonstrate very serious misconduct by the person concerned. The relevant causes of delinquency entail either dishonesty, wilful misconduct or gross negligence. Establishing so-called 'ordinary' negligence, poor business decision-making, or misguided reliance by a director on incorrect professional advice will not be enough.'

[136] In conducting the aforesaid assessment, the particular circumstances and responsibilities of the director in the business may be considered, which includes issues like the particular role of the director, and his or her level of responsibility. It could further include considering factors like the particular knowledge the director may have of the business and its operations, as well as the kind of access the director may have to business information. And

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[45] 2017 (2) SA 547 (WCC) at para 18.

lastly, another valid consideration would be what level of operational trust is bestowed on the director in conducting the operations of the business. This was made clear in *Pillay v Stokes and Others*[46] where the Court said:

> 'It is therefore clear that the court is only mandated to declare a director delinquent if the evidence establishes conduct that warrants such a finding. It also follows from the above discussion that the the court may take into account the individual director's circumstances including but not limited to his role, functions, knowledge, access to information and participation in the company's business in its assessment of that director's conduct, the seriousness thereof and concomitant blameworthiness …'

[137] Once delinquency as contemplated by section 162(5)(c) is established, and of particular application to the case *in casu* serious misconduct on the part of the director is shown to exist, then the Court must grant an order declaring such delinquency. The Court has no discretion to decide otherwise. In *Smuts v Kromelboog Conservation Services (Pty) Ltd and another*[47] the Court held as follows in this respect:

> '... The term 'egregious misconduct' entails serious misconduct. Conduct is either trivial or egregious. In this regard, once a court finds a misconduct serious, as described in *Gihwala*, it has no discretion but to declare a person to be a delinquent director. There are no degrees of egregiousness that the court is required to consider.'

[138] And in *Pillay supra* it was said:[48]

> 'If any of the grounds set out in section 162 are established, a court is obliged to make an order declaring a person to be a delinquent director, thereby disqualifying him or her from office. This is made clear by the word 'must' in section 162(5).'

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[46] 2025 JDR 3307 (GJ) at para 56.
[47] 2024 JDR 4913 (SCA) at para 32.
[48] Id at para 42.

[139] So, and the above principles considered, what do the facts *in casu* show? I believe the answer is straight forward, namely that Rooks committed the kind of egregious misconduct contemplated by section 162(5)(c), to substantiate her being declared as a delinquent director. She completely failed to discharge the duties of good faith and reporting that was directly bestowed on her in the terms of her shareholders agreement with Value. Her was position was effectively the managing director of Core, left to large extent to her own devices to run the business as she deemed fit, bit always in the interest of all the shareholders. As such, she occupied a particular position of trust. She had detailed knowledge of all information relating to the operating of the business of Core, which is how she identified the lacuna in operations which led to her seeking to establish the competing business of Windsor, for her own personal benefit. In then seeking to establish the business of Windsor, she deployed personnel, resources and assets of Core, all completely without any knowledge of her fellow directors or Value as the main shareholder. All this was a material violation of her fiduciary duties. And added to all this, there are many examples of what was nothing else but unauthorised, fraudulent and questionable transactions, all designed to benefit her and her family / friends. If this is not egregious misconduct, it is difficult to understand what would be. Thus, all the boxes as contemplated by section 162(5)(c) have been ticked.

[140] In *Smuts supra*, the Court had the opportunity to consider an issue of the declaration of delinquency of a director, in circumscribes quite comparable to the case *in casu*, especially considering that Rooks was the sole director running the business of Core. The Court came to a finding that such declarator of delinquency was justified and warranted, based on the following reasoning:[49]

> 'The facts outlined above overwhelmingly show that Dr Smuts conducted himself delinquently. His counsel seeks to suggest that Dr Smuts found himself in a predicament, because being the sole director of Kromelboog was inextricably linked to his implementation of the SBBP. This cannot be used as an excuse. The position of the director is that of trust. The director owes

[49] Id at paras 75 – 76.

> fiduciary duties to the company. The conduct of the director in relation to the affairs of the company is strictly regulated by the Act. If a person commits serious misconduct of the sort described in *Gihwala*, that person must be declared a delinquent director. The court has no discretion in that regard.
>
> Dr Smuts was clearly in a conflicted position. He was a sole director but rendered to Kromelboog invoices for his personal financial interest without obtaining authorisation from its shareholder. He demanded documents as part of the scheme to accept possession of the properties belonging to Kromelboog shortly before he was removed as a director. He caused Kromelboog's bank account to be frozen; used its funds to be paid for legal fees, while the company was in a dire financial position; he caused a donation to be paid to Landmark (where he had a personal financial interest) without the shareholder's authorisation; and transferred funds belonging to Kromelboog to Landmark. That conduct clearly amounts to gross abuse of the position of a director and infliction of harm on Kromelboog as contemplated in ss 162(5)*(c)*(i) and (iii) of the Act.'

The comparisons to the case *in casu* are clear.

[141] In the end, it is my conclusion that Rooks committed egregious misconduct and a breach her fiduciary duties towards Core and her fellow shareholder (Value), as contemplated by section 162(5)(c), by grossly abusing her position as director of Core, taking personal advantage of information or an opportunity, contrary to section 76(2)(a), and intentionally inflicting harm upon Core, also contrary to section 76(2)(a), by way of all the irregular and unlawful transactions discussed in detail in this judgment, above. Further, Rooks also acted in a manner that exhibits wilful misconduct or breach of trust in relation to her performing the functions of a director of Core. As such, this Court has no discretion. Rooks must be declared to be a delinquent director for a period of seven years from date of this judgment.

<u>The Counterclaims</u>

[142] I now consider the counterclaims made by Rooks in her amended plea. I can readily say that none of these counterclaims have any substance at all. In

fact, very little evidence was led by her on the same. But worse still, much of what she needed to prove to sustain these counterclaims was not proven at all. I will deal with this in more detail below.

[143] I will first deal with the counterclaim by Rooks relating to the purchase price for her shares in Core. In this regard, the shareholders agreement between Rooks and Value speaks for itself. Rooks has never challenged the validity and application of this agreement, which stands. On the facts, Value sought to apply the terms of this shareholders agreement and in terms thereof, paid Rooks an amount of R24.00 for the value of her shares and loan account. Rooks found this insulting and unacceptable, and did not even cash the payment. Hence the counterclaim.

[144] According to Rooks, and pursuant to the sale agreement, the agreed purchase price of the business in 2015 was an amount of R12 673 452.00. Rooks contends that as 20% shareholder, she would be entitled to 20% of his amount, being R2 534 690.40. But already in this respect, Rooks faces a considerable difficulty. The business was purchased in 2015. When the events given rise to the current case happened, it was two years later. The value of the business would obviously have changed, especially considering Gottschalk's evidence that the business was now either only breaking even or running at a loss. In order to sustain this claim, Rooks needed to prove the value of the business, as the shareholders agreement provides that the purchase price for her shares if a call option is exercised under the agreement is entirely based on '*fair market value*' at the time.[50] It follows that Rooks must prove fair market value, and not just rely on a past purchase price. She made no attempt at all to establish fair market value. She must thus be non-suited on this basis alone.

[145] Rooks has another difficulty where it comes to this claim relating to the purchase price for the shares. The claim does not lie against Core. Core is not the party that acquired her shares. Her shares were acquired by Value pursuant to the shareholders agreement. If Value wrongfully and irregularly

[50] See clause 15.4.2 of the shareholders agreement.

determined the purchase price it paid for the shares, which is what Rooks is contending, then that claim lies against Value, and not Core. As a result, the claim against Core in this respect is not competent.

[146] But even if the merits of this claim is considered, it was common cause that Rooks was dismissed for misconduct based on charges relating to dishonesty, resulting from all the earlier events discussed in this judgment. She was actually summarily dismissed on 28 July 2017 for this misconduct, and that dismissal stands, having never been successfully challenged under section 191 the LRA. Because Rooks was dismissed, regard must be had to Clause 15 of the shareholders agreement, which contains a specific definition of what is called a '*Fault Employment Termination Event*'. In terms of this definition, such an event would be *inter alia* triggered by a dismissal of Rooks on the grounds of misconduct, which is exactly what happened *in casu*. It is this dismissal of Rooks for misconduct that also constitutes a '*Trigger Event*' contemplated by clause 15.2 of the shareholders agreement, in terms of which Value is then entitled, in terms of clause 15.2.1, to acquire Rooks's shares. Then, and in the case of a Trigger Event as contemplated by clause 15.2.1, clause 15.4.1 prescribes that the purchase price for her shares and loan account shall be the sum of R1.00 per share.

[147] On the facts, Value applied clause 15.2.1 as read with clause 15.4.1, and acquired Rooks's shares and loan account for the sum of R24.00, as specifically prescribed in and determined by the shareholders agreement. As said, this agreement stands, and Rooks has made out no case why it should not be applied. It follows that Rooks's counterclaim in this regard, even if the merits are considered, is entirely lacking in substance.

[148] The next counterclaim is based upon Rooks being a member of the eFund Umbrella Pension Fund, administered by Sanlam (the Pension Fund). In her counterclaim, Rooks pleads that her interest in the Pension Fund as at June 2022 was a sum of R630 350.35. She then pleads that Core unlawfully communicated to the Pension Fund that it must not deal with her as she was accused of theft. She also refers to the fact that Core has under false

pretences opened a criminal case of theft against her. Based on these facts, it then Rooks's case that the Pension Fund refuses to deal with her or even speak to her whilst the criminal case is ongoing. For these reasons, Rooks claims her pension benefit from Core.

[149] The pension fund claim by Rooks is still born. She actually led no evidence on the same. She did not even prove what her pension benefit was, meaning there was no evidence to even substantiate the quantum she claimed. She led no evidence of any interaction between her and the Pension Fund, and the reasons why the Pension Fund was not paying out her benefit. In any event, it is not the case that Rooks would somehow forfeit that benefit, and it remains due to her by the Pension Fund, and not Core, subject to the legal processes being completed. The claim will always lie against the Pension Fund, and claiming this benefit from Core is simply not competent.

[150] I may add with regard to this pension fund claim that Rooks in fact stated in her counterclaim that Core obtained a ruling from the Pensions Ombudsman confirming that the Pension Fund was within its rights not to deal with her whilst the criminal case is ongoing. Even though no evidence on this was presented, I have difficulty in understand how this fact, considered as it stands, can sustain any claim against Core. In essence, it is, as pleaded, destructive of the claim, and it shows the claim does not lie against Core.

[151] Next, Rooks claims for a loss of income over five years as a result of what she described as unlawful conduct on the part of Core that deprived her of this income. Yet again, no evidence was led on this claim. Rooks pleads that Core spread false rumours to her clients and colleagues that she was going to go to jail for 15 years for fraud. No evidence was led to this effect. There was no evidence that Core, or anyone on behalf of Core, even made those statements. There is no indication when and by whom these statements were made. Rooks did not even prove her income or any basis to sustain the quantum of her claim. In short, there is absolutely nothing in evidence to back up this claim.

[152] Rooks further pleads, in substantiation of her loss of income claim, that as a result of the unlawful conduct of Core, her reputation in the logistics industry which was built up over 30 has been irreparably harmed and she has been unable to secure employment in the industry ever since being dismissed. But yet again, no evidence was presented by Rooks in support of this contention. She never establishes any connection between the fact that she may be unemployed, or unemployable, and any conduct of Core. In short, the claim was simply never proven.

[153] And finally, based on the same contention that Core allegedly publicly spread untrue rumours about her, Rooks contends that her reputation and good name has been defamed, and that the extent of the defamation is such that she cannot work in the industry ever again. She claims damages in the sum of R1 000 000.00 for defamation, as a result.

[154] This is however yet another instance of an entirely unproven claim, for which no evidence was presented at all. Critically, it was never proven that Core even published false rumours or to whom it was supposedly published. A general contention of false rumours 'in the industry' is wholly inadequate to sustain a defamation claim. What the content of these rumours may have been was also never proven. And lastly, there was no evidence about what Core may have said about her was in fact defamatory. In *Khumalo and Others v Holomisa*[51] the Court held as follows:

> 'At common law, the elements of the delict of defamation are:
> *(a)* the wrongful and
> *(b)* intentional
> *(c)* publication of
> *(d)* a defamatory statement
> *(e)* concerning the plaintiff. ...'

[155] Properly considered, Rooks fails on all counts. She did not prove the publication of any statement in the first place. And second, she did not even

[51] 2002 (5) SA 401 (CC) at para 18.

prove that any statement that may have been made was defamatory. As held in *Waldis and Another v Von Ulmenstein*[52]: '*... the point made is that to defame someone is to make probable one or more of a particular set of consequences by performing conduct of a particular kind or nature (Fagan at 402). Expressed differently, speech must contain a specific form of assertion before it can be regarded for the purposes of the law as being defamatory ...*'. Rooks's defamation claim therefore has zero substance, and thus cannot succeed.

[156] In summary, and for all the reasons as set out above, all the counterclaims raised by Rooks must fail. She is not entitled to the purchase price she claims for her shares, considering the clear terms of the shareholders agreement, and in any event, she has simply failed to prove the claim and has brought the claim against the wrong party. Where it comes to her pension fund claim, the claim also remains entirely unproven, is not competent, and is brought against the wrong party. The loss of income claim is similarly unsustainable as there simply exists no evidence to substantiate it. And lastly, the defamation claim does not even get out of the starting blocks, in the absence of proving the existence of the publication of a defamatory statement. The counterclaims thus fall to be dismissed.

Conclusion

[157] In conclusion, I am satisfied that Core has proven claims B, D, E, F, G and J as articulated in the amended particulars of claim against Rooks. It follows that Rooks is liable to pay Core the following amounts in respect of these claims: (1) claim B the sum of R85 420.13; (2) claim D the sum of R467 927.59; (3) claim E the sum of R30 000.00; (4) claim F the sum of R438 042.70; (5) claim G the sum of R80 200.00; and (6) claim J the sum of R40 175.55. This gives a total amount of R1 141 765,97 which Rooks is liable to pay Core, and judgment will accordingly be given against Rooks for this total amount.

[52] 2017 (4) SA 503 (WCC) at para 25.

[158] Where it comes to the issue of interest, interest accrues from date of summons to date of payment. Summons was issued on 28 February 2018. The applicable mora interest rate at that time is 10.25%.

[159] Core did not pursue the claims under claims C and H, and it is my view that claim A must be refused. Thus, no judgment is given under these claims.

[160] I am also satisfied that Core has made out a proper case for Rooks to be declared to be a delinquent director for a period of seven years from date of this judgment, by virtue of section 162(5)(c) of the Companies Act. I see no reason to deviate from this prescribed period.

[161] And finally, Rooks has failed to prove her counterclaims, which are all dismissed.

Costs

[162] This only leaves the issue of costs. Core was, overall considered, substantially successful in its claims. It should thus be entitled to costs, and nothing has been advanced by Rooks to indicate otherwise. Core has prayed for costs on scale C. But I do not believe such a costs order is justified. As held in In *Makasi NO and Others v Radebe and Another*[53] in comparable circumstances to the case *in casu*: '*… It is trite that the matter of costs remains in the discretion of the court. In exercising such discretion, the court has to weigh carefully the issues, the conduct of the parties and the unique circumstances of this matter, which may have a bearing on the issue of costs to ultimately make an order that would be fair, and reasonable. The resources of the litigants must also be taken into consideration ...*'. All considered, and exercising the wide discretion that I have where it comes to costs, I believe a costs order on the party and party scale B is justified and fair.

[163] In all the circumstances as set out above, the following order is made:

[53] 2025 JDR 2274 (GJ) at para 13.3.

Order

1. Judgment is granted in favour of the plaintiff and against the defendant in the total amount of R1 141 765.97 (one million one hundred and fourty one thousand seven hundred and sixty five Rand ninety seven Cents).

2. The defendant is ordered to make payment to the plaintiff of the amount of R1 141 765.97 (one million one hundred and fourty one thousand seven hundred and sixty five Rand ninety seven Cents) within 10(ten) days of date of this order.

3. The defendant is ordered to pay simple interest on the sum of R1 141 765,97, at the rate of 10.25% per annum, calculated from 28 February 2018 to date of final payment.

4. The defendant's counterclaims are dismissed.

5. The defendant is declared to be a delinquent director under section 162(5)(c) of the Companies Act 71 of 2008 for a period of 7(seven) years from date of this judgment.

6. The defendant is ordered to pay the plaintiff's costs, on the party and party scale B.

SNYMAN AJ

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

Appearances:

Heard on:	11 to 15 August 2025
Heads of Argument:	7 and 19 September 2025
For the Plaintiff:	Adv J Kaplan
Instructed by:	Ian Levitt Attorneys
For the Defendant:	In person
Date of Judgment:	16 February 2026