

SOUTH AFRICA / JUDGMENT

Stilko Security (Pty) Ltd and Another v Mooikloof Home Owners Association NPC (42948/2013) [2017] ZAGPPHC 311 (7 July 2017) [2017] ZAGPPHC 311

COURT

North Gauteng High Court, Pretoria

BEFORE

D S Molefe

CASE / FILE NUMBER

42948/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO.: 42948/2013

Not

reportable

Not

of interest to other judges

Revised:

Yes

7

July 2017

STILKO

SECURITY (PTY)

LTD First

Plaintiff

BRINANT

SECURITY SERVICES PTY

(LTD) Second

Plaintiff

and

MOOIKLOOF

HOME OWNERS ASSOCIATION

NPC Defendant

JUDGMENT**MOLEFE J**

[1] The first and second plaintiffs are security companies. The defendant is a non profit company and a home owners association for the Mooikloof residential estate. The plaintiffs issued summons against the defendant in terms of which they claimed contractual damages in the amount of R1 941 546.50 and R596 050. 00 respectively based on breach of contract. By agreement between the parties, the merits and quantum of the claims were separated and the trial proceeded in respect of merits only, and the issue of the quantum was postponed sine die.

[2] The plaintiffs in their amended particulars of claim allege that:

2.1 on or about 8 June 2012, they concluded two service level agreements ("the agreements") [1] with the defendant;

2.2 during November 2012, the defendant, duly represented by Mark Swart ('Swart'), alternatively another authorised representative, repudiated the agreements by informing the plaintiffs that it intends to appoint another service provider to provide the services forming the subject matter of the agreements and that it will not comply with the obligations in terms of the agreements;

2.3 pursuant to the repudiation and during November 2012, the plaintiffs accepted the repudiation as a result of which the agreements terminated.

[3] The defendant in its plea:

3.1 admits the conclusion of the agreements ;

3.2 alleges that the agreements are invalid, void, and further alternatively voidable for the following reasons:

3.2.1. noncompliance with defendant's delegation structures ("delegation structure defence");

3.2.2. noncompliance with section 75 of the Companies Act, 71 of 2008 ("the section 75 defence");

3.3 alleges that in the event of the delegation structure and section 75 defences failing, the plaintiffs waived their rights to claim damages from the defendant ("the waiver defences").

The facts alleged by the defendant in substantiation of the abovementioned defences are as follows:

Delegation Structure Defence

[4] The defendant alleges that Mr. Ben Venter ('Venter') was at all relevant times a director of the first plaintiff and during 2011 until approximately October 2011, Venter was a director of the defendant. At all relevant times, Mr. Anton Niewoudt ('Niewoudt') was a director of the second plaintiff and from October 2011 until 31 May 2012, Niewoudt was a director of the

defendant. At all relevant times, Mr PP Hattingh ('Hattingh') was the general manager of the defendant and until 29 February 2012, alternatively 19 June 2012, Hattingh was a director of the first plaintiff.

[5] During or about March 2011, defendant approved a delegation structure which includes a procurement policy and procedure. At the time of the conclusion of the agreements, Venter and Niewoudt were aware that they were subjected to the imperatives and requirements of the delegation structure. The agreements were however entered into without the defendant's Board approval, and the agreements also failed to comply with the provisions of process flow of the due process.

[6] Furthermore, to the knowledge of both the first and second plaintiffs, the agreements did not comply with paragraph 4.2.2 of the defendant's procurement policy in that:

6.1 requests for quotation were not issued to a selected group of potential suppliers to be delivered back to defendant's office in a prescribed time frame;

6.2 the plaintiffs were advantaged above other suppliers because both Niewoudt and Hattingh were on 3 May 2012 appointed to be on a committee which investigated the shortcomings of the existing supplier, Protea Coin and were further appointed by the defendant's Board to make proposals of future suppliers;

6.3 the plaintiffs gained or had information of the other suppliers' quotations alternatively, the previous tender of Protea Coin;

6.4 the plaintiffs unfairly made use of the Protea Coin's quotation as a basis to calculate their quotation.

[7] Without having been mandated by the Board, Hattingh motivated the granting of the agreements to the first and second plaintiffs. At the Board meeting of 31 May 2012, Hattingh failed to advise the Board that the other suppliers were disadvantaged as set out above and falsely informed the Board that Protea Coin requested that the defendant not put the request for an alternative supplier out on tender. As a result, the Board failed to adhere to the provisions of the delegation structure.

Section 75 Defence

[8] Niewoudt and Hattingh were at a Board meeting on 3 May 2012, appointed as members of a committee to investigate the services of Protea Coin and whether the services should be terminated the committee's further purpose was to look at other future service

providers. Venter and Niewoudt were appointed as members of a committee to make proposals for future suppliers. As a result of

this, Niewoudt, Hattingh and Venter were 'persons' as contemplated in section 75(1)(a)(iii) of the Companies Act ('the Act') and at all relevant times Hattingh was a "prescribed officer" as contemplated in section 75(1)(a)(ii) of the Act.

[9] On 17 May 2012, Niewoudt advised the chairman of the Board of his resignation as from 31 May 2012 and in his resignation letter, made false and misleading statements in that:

9.1 Niewoudt received no instruction from the Board to prepare a joint tender with Venter for a security contract for the defendant;

9.2 Niewoudt was aware that his quotation was to be delivered to Hattingh prior to 31 May 2012 and that such quotation was to be used by Hattingh in his recommendation to the Board at its meetings of 31 May 2012.

[10] At the Board meeting of 31 May 2012, the Board decided that the Protea Coin's contract will be terminated and that the defendant will negotiate with the plaintiffs to take over the security in Mooikloof. This, according to the defendant, is contrary to the provisions of section 75(5) of the Act.

[11] Hattingh failed to disclose to the Board that he had a financial interest in respect of the agreements and failed to disclose material information relating to the matter including failure to comply with the delegation structure. Furthermore, Hattingh failed to leave the meetings and took part in the considerations of the matter as contemplated in section 75(5) (d) and (e) of the Act.

[12] Niewoudt as a director of the Board, failed to disclose to the Board his financial interest in respect of the agreements and failed to disclose material information relating to the matter, including the failure to comply with the delegation structure.

Waiver Defence

[13] The fact alleged by the defendant in substantiation of the waiver defence is that on 16 November 2012 the plaintiffs advised the defendant that they have agreed that the security contracts will go out unconditionally on a tender process.

[14] In the first and second plaintiffs' replication they:

14.1 assert that Hattingh was a director of and 50% shareholder in the first plaintiff up and until 29 February 2012 and that he resigned as director on this date and transferred his shareholding in the first plaintiff to Venter's BM Trust;

14.2 admit that Venter was aware of the imperatives and requirements of the delegation structure, but deny that Niewoudt was aware thereof;

14.3 assert that they have no knowledge of and to what extent the agreements were entered into without due compliance with the imperatives and requirements of the delegation structure;

14.4 deny that the agreements were entered into without the Board's approval alternatively allege that if this was the case, the Board at its meeting on 3 July 2012, ratified the conclusion thereof;

14.5 allege that at the Board meeting on 3 May 2012, Hattingh and Niewoudt were tasked to investigate the security needs of Mooikloof and the shortcomings of Protea Coin and allege that it was suggested at that meeting that Venter and Niewoudt should make proposals, together with other potential future suppliers;

14.6 admit that Hattingh prepared a motivation for the granting of the security contracts to the first and second plaintiffs;

14.7 point out that any failure by the Board to comply with defendant's internal procedures for the conclusion of the agreements, specifically the provisions of the delegation structure has no effect on the validity of the agreements ;

14.8 deny that Hattingh had a personal financial interest in respect of the appointment of a new security provider and pleads that the provisions of section 75(5) of the Act are not applicable;

14.9 asserts that on or about 22 November 2012, the plaintiffs in an attempt to mitigate the damages suffered by them as a result of the defendant's repudiation of the agreements, advised the defendant that they would partake in a tender process subject to a reservation of their rights to claim damages suffered by them.

[15] Defendant's counsel in his opening address submitted that the onus to prove the valid agreements rests on the plaintiffs.

[16] The principle is that where a defendant relies on a defence that constitutes more than a denial of the plaintiffs' cause of claim (special defence), it bears the onus of proof in respect thereof. The locus classicus in this regard is the decision in *Pillay v Krishna and Another*[2], where Davis AJA held the following :

"Where the person against whom a claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it."

[17] The defendant in casu admits the conclusion of the agreements but alleges additional facts in substantiation of a conclusion that the agreements were invalid, void and/or voidable. In addition, the defendant raises special defences and a waiver . In my view, the defendant then bears the onus of proof in respect of these special defences. I however agree with plaintiffs' counsel that a finding in respect of onus of proof will have no bearing on the outcome of the trial.

[18] Defendant's counsel further submitted as follows in his opening address:

"... at the closing of the case the defendant will submit that there was a takeover well planned of the security services to be rendered on behalf of the second defendant [sic]. It started off when Mr. Venter was a director of both the plaintiff and the defendant. In other words he is playing a dual role there. He knows exactly what the position is in regard to security services because his company does that. They render security services.

Then Mr. Venter realized that it would be better for him if he would resign as a director of the defendant he would obviously still

endeavour to takeover the contract. His position was then taken over by Mr. Niewoudt who is in fact a director of the second plaintiff,

Brinant Security Services. We first had Mr. Venter there until October 2011 and then we had Mr. Niewoudt there from October 2011

until 31 May 2012.

Further... The court will see that the allegation there which is also common cause is that at all relevant times Mr. Hattingh was the general manager alternatively the estate manager of the defendant. The submission at the closing will be that he played a significant role in assisting the two plaintiffs to take over the security contract."

Evidence led at the trial

[19] Mr. Mark Swart ('Swart') was the defendant's first witness. He testified that he only became involved in the dispute pertaining to the agreements around 18 July 2012 when he was appointed on a committee to negotiate the agreements with the plaintiffs. The

agreements were concluded on the 8 June 2012. Swart had no firsthand knowledge of the facts that transpired prior to the conclusion of the agreements. He testified that he obtained possession of Hattingh's computer, Mooikloofs former estate manager and that he retrieved most of the documents that have been incorporated in the defendant's trial bundle. His evidence pertaining to the delegation structure and section 75 defences were entirely based on documents contained in the trial bundles and his conclusions in respect thereof.

[20] Defendant's case was thus that, there was as far back as 29 September 2011[3], an underhand conspiracy in existence between Venter, Niewoudt and Hattingh to take over the security contracts at Mooikloof. To substantiate this theory, Swart referred to the minutes of a Mooikloof Board meeting of 29 September 2011, wherein it is recorded that Venter requested that the other Board members should look out for someone to take over his position on the Board, as he was considering resigning as a result of other business commitments.[4] When Swart was asked in his examination in chief what other business activities Venter was involved in, Swart responded that it was his security company Stilko Security.

[21] Under cross examination, Swart could not identify any facts for the basis of the theory of a "wellplanned takeover" since September 2011. He however confirmed the suggestion that Venter and Hattingh disingenuously or dishonestly misrepresented that Hattingh resigned as director of the first plaintiff on 29 February 2012 and that his 50% shareholding in the first plaintiff would be transferred to the BM Trust with effect from 1 March 2012. In this regard, he relied on the fact that until 23 July 2012, Hattingh was still reflected as a director of the first plaintiff in the Companies and Intellectual Property Commission (CIPC) records. The

source of Swart's knowledge in this regard is the report of an audit committee appointed by the defendant to investigate the circumstances surrounding the conclusion of the agreements dated 2 September 2012.[5] In paragraph 8.4 of the audit report, the following is recorded:

"Mr. Hattingh was at least until February 2012, a director of Mr. Venter's company Stilko Security. It should be noted that the resignation of Mr. Hattingh as director of Stilko was only received by CIPC in June 2012 and processed during July 2012. The reason for the delay (4 months) could not be adequately explained as an independent company secretary confirmed that the standard delay period at CIPC for processing changes in directorship is only 3 weeks."

- [22] Swart was under cross-examination referred to an email sent by Mr. Venter to Ms. Elize Pretorius, one of the defendant's three person audit committee, and at all relevant times, first plaintiff's bookkeeper. The email was sent on 23 May 2012, requesting written confirmation from Ms. Pretorius that the changing in directorship requested on 24 February 2012 has been done. The email appears to be a perfect explanation for the 4 months delay caused by Ms. Pretorius in making the necessary amendments. Swart reluctantly conceded that the finding of the audit committee was, in this regard dishonest, as Ms. Pretorius (an audit committee member) knew that she caused the delay when the abovementioned report was made.
- [23] To substantiate the assertion in the defendant's plea that at the time of the Board meeting of 31 May 2012, Hattingh had a financial interest in the first plaintiff, Swart relied on inferences drawn by him from two documents extracted from Hattingh's computer, specifically emails commencing on 24 July 2012 ending 26 July 2012 from Hattingh's wife to Mr C. Wortmann[6] When Swart was confronted with his reliance on inferences drawn from Hattingh's alleged financial interest, he responded that the document is "quiet self-explanatory."
- [24] In my opinion Mr. Swart was an argumentative witness who repeatedly had to be reminded to answer the questions addressed to him. He did not make a good impression and in my opinion, was not a reliable witness.
- [25] Mr. Ralph Nortje ("Nortje") the defendant's witness, was a Board member of the defendant at all relevant times during

2012. He testified that he did not attend the Board meeting of 3 May 2012 but did attend the Board meeting on 3 July 2012. He initiated the process regarding the delegation structure.

[26] Paragraph 7 of the minutes of the meeting, held on 3 July 2012, records the following:

"7. SECURITY: CHRISTO SCHOLTZ

7.1 CK raised his unhappiness on the way the final decision was made about the appointment of security providers. He felt that more

information must have been given through to the other directors before the final signing of the contracts. CS discussed the contents

of the contracts with the Board. The Service Level Agreement was very well set out to ensure that MOA benefits from the move. The

director's [sic] concerns were put to rest after the contents of the contracts were discussed.

The Board agreed that in future all directors should have insight of contract and an opportunity in clarifying any concerns before

contracts of this nature are concluded. After the discussion the meeting confirmed the support and concurrence of all the Board

members for the appointment of the new security service providers.

CK still felt that the tender process was done incorrectly but content about incontents [sic] of the contract."

[27] Notwithstanding this recording, Nortje testified that he agreed with Carel Krog ("CK") that the tender process regarding the plaintiffs' agreements was not handled properly but that they did not accept that the plaintiffs' contracts were finalized.

[28] In his crossexamination, it was pointed out to him that the minutes, in unequivocal terms , record that the contracts had been signed at the time of the meeting of 3 July 2012 . He denied that he had seen any contracts at that stage even though he confirmed that the minutes are correct.

[29] Although Nortje was in my opinion an evasive witness, he finally admitted that the Board members present at the meeting of 3 July 2012, confirmed their support and concurrence for the appointment of the plaintiffs as the new security providers.

[30] Mr Anton Niewoudt, the plaintiffs' witness and the second plaintiff s representative testified that he served on the defendant's Board as a security director from October 2011 until he resigned on 17 May 2012, with effect from 31 May 2012. He attended the Board meeting of 3 May 2012 and explained with reference to paragraph 7.1.3 of the aforementioned minutes that it was suggested at that meeting that he and Venter should make proposals for security services with other potential suppliers. He testified that notwithstanding that the chairman of the board Mr Scholtz was comfortable that he could partake in the process whilst still a Board member, he felt uncomfortable therewith, as a result he tendered his resignation in writing on 17 May 2012. As a result of his decision to partake in the tender process, he was not part of Hattingh's investigation in respect of potential future suppliers. After they got the tender, there was some dissatisfaction amongst some of the defendant's members. Niewoudt further testified that he has agreed to take part in the new tender process on condition that their rights were reserved.

- [31] Under crossexamination, Niewoudt confirmed that the delegation structure was to have an open and transparent tender process. In my opinion, Niewoudt was a credible witness.
- [32] Mr Benjamin Venter, the plaintiffs' witness and the first plaintiffs representative testified that he resigned as the defendant's Board director on 29 September 2011 due to his other business commitments namely, a glass and aluminum business, scaffolding company and rental business. He denied that his resignation was part of a takeover. He explained that Hattingh got involved in the first plaintiff to assist him in acquiring the Private Security Industry Regulatory Authority ("PSIRA") certificate as Hattingh had a Grade A certificate. For this purpose, Hattingh became a director of the first plaintiff and was allocated 50% shareholding in the first plaintiff without paying for the shares. When the PSIRA certificate was obtained by the first plaintiff in December 2011, Hattingh's involvement in the first plaintiff was no longer necessary. This resulted in the meeting of 24 February 2012 and the minutes recording that Hattingh will resign as director of the first plaintiff with effect from 29 February 2012 and his shareholding was transferred to the BM Trust, a trust being controlled by Venter. Hattingh was not paid for the transfer of his shareholding.
- [33] Venter confirmed in his testimony that Ms Elize Pretorius, one of the defendant's audit committee members, served as the first plaintiffs bookkeeper and that he repeatedly requested her to effect the necessary changes at the CIPC offices, confirming Hattingh's resignation as director of the first plaintiff. The first request was made on 24 February 2012 but Ms Pretorius delayed in having the changes effected.
- [34] Venter further testified that the first time he saw the emails commencing on 24 July 2012 to 26 July 2012, relied upon by Swart that Hattingh had a financial interest in the first plaintiff, was during a meeting in October 2012 when Swart and the plaintiffs were attempting to resolve their differences in relation to the security tender. He told Swart at that meeting that he knew nothing about the emails. He denied that he was ever appointed as the defendant's committee member and further denied that he was involved in the processing of quotations. He also testified that at another meeting with Swart on 16 November 2012, he and Niewoudt agreed to participate in the new tender process unconditionally and without waiving their rights.
- [35] Venter was challenged under crossexamination that it was highly improbable that Hattingh would have business cards as a director of the first plaintiff without having any interest in the first plaintiff company. It was also suggested to him that he dishonestly misled PSIRA by having Hattingh as a director only for the purpose of acquiring the PSIRA certificate.
- [36] In my view, Venter was an impressive witness and his evidence was not challenged in any material respect.

[37] Based on the evidence of both parties' witnesses, it is in my opinion absurd that Hattingh became a shareholder in the first plaintiff on 27 October 2011 (and presumably also a director[7], which after the "wellplanned takeover" was already in existence. He resigned as a director on 29 February 2012. It is nonsensical to suggest that Hattingh would be given shares in October 2011 because on the defendant's theory, the conspirators to the takeover plan would have been aware at that time that Hattingh could not be seen to have an interest in the first plaintiff.

[38] Defendant's counsel submitted that the plaintiff should not have based their claims on repudiation and acceptance thereof but on consensual cancellation. Counsel argued that the plaintiffs agreed to cancel the agreements and to participate in a tender process and by implication this means that the parties agreed to cancel the agreements made on 8 June 2012. It is contended by the

defendant's counsel that had the consensual agreements of cancellation not been entered into, it was the intention of the defendant to request the shareholders at a general meeting to ratify the agreements[8]. The record relied upon in support of this argument is paragraph 3 of the document titled:

"The Board of Directors Report Back to Members of the Mooikloof Owners Association at the General meeting of 4 December 2012"[9]

The Board agreed that an independent opinion be obtained from Senior Counsel . . . regarding the appointment of the two new security

companies by the previous Board of Directors. According to the Senior Counsels' opinion the agreements were irregular and that neither the previous Board nor the current Board had the authority to ratify the decision. This decision could only be ratified by the shareholders at a General meeting. The Board then held numerous meetings with the relevant parties and an agreement was reached whereby the two Security companies would cancel their contracts and participate in a proper tender process. . . ."

[39] It appears clearly from the abovementioned document that the Board adopted the attitude that the agreements were void and that they would not perform in terms thereof. In my opinion this is a clear repudiation by the defendant. Even if the defendant's version of consensual cancellation is accepted and having regard to the evidence in respect of the reservation of the plaintiffs' rights, the plaintiffs are still entitled to claim damages suffered as a result of defendant's repudiation.

[40] Repudiation is a form of breach of contract and arises where the conduct of a party evinces an intention to no longer be bound by the contract[10]. The test for repudiation is objective and is aptly described as follows in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*[11]:

"[16] ...The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves at the criterion for determining the nature of the threatened actual breach".

[41] Repudiation entitles the innocent party to cancel the agreement and to claim damages suffered as a result of the breach of contract[12].

[42] The first issue to be determined by this Court regarding the defendant's submission is whether the defendant's stance that it would not perform in terms of the agreements constituted repudiation. There can be no doubt on the evaluation of the evidence that it did. Having determined this, the next question is whether the plaintiffs elected to accept the repudiation by cancelling the agreements or whether they chose to hold the defendant thereto. The evidence is overwhelmingly that pursuant to the discussion with Swart, they elected to cancel the agreements and to hold over their claim for damages pending the outcome of the new tender process. For the reasons aforesaid, I am of the opinion that the defendant's assertions in respect of the repudiation have no legal or factual foundation and should fail.

The delegation structure defence

[43] The delegation structure defence is based on noncompliance with the defendant's internal delegation structure. Counsel for the defendant relied on the Turquand rule[13] which states that although a bona fide third party who contracts with a company is presumed to be aware of any requirement which in terms of its public documents must be observed "internally" ie as between the company and its members, in order that the company should be effectively bound by the contract, he is neither presumed to know, nor bound, for the purpose of holding the company to the contract, to ascertain whether it has in fact been observed. It is submitted that on the facts, both Venter and Niewoudt knew or reasonable ought to have known of the failure by the defendant to comply with the requirements as set out in the delegation structure and addendum. Significantly, Swart agreed that it is the Board's responsibility to ensure that the defendant's procurement policy is complied with.

[44] The starting point in order to analyse this defence is to appreciate that a bona fide party who contracts with a company is not presumed to know, nor bound, for the purpose of holding the company to a contract, to ascertain whether the company's internal procedures have been observed[14].

- [45] It appears from the defendant's plea[15] that the defendant was aware of this because it alleges that the first and second plaintiffs, represented by Venter and Niewoudt, were aware that the delegation structure was not complied with, in order to make the point that they do not qualify as bona fide third parties. Niewoudt's undisputed evidence was that he and Venter were requested to submit bids, together with other potential suppliers. This is confirmed in paragraph 7 of the minutes of the Board meeting of 3 May 2012.
- [46] It is alleged by the defendant that the plaintiffs were advantaged above other suppliers as they were in the committee that investigated the shortcomings of the previous supplier, Protea Coin. The undisputed evidence of Niewoudt however, is that in light of his decision to partake in the tender process; he resigned on 17 May 2012 and did not partake in Hattingh's investigation. Evidence has already shown that on 3 May 2012 Hattingh had no interest of any nature in the first plaintiff. It is further alleged that the plaintiffs "unfairly made use of the previous supplier's quotation". Similarly, no evidence was adduced in support of this allegation.
- [47] Hattingh's alleged failure to advise the Board that other suppliers were disadvantaged and that he falsely informed the Board that Protea Coin requested the defendant not to put the request for another supplier out on tender might have relevance if Hattingh had a financial interest in the first plaintiff at that time, which he did not have.
- [48] The allegation by the defendant that the agreements were entered into without the Board's prior approval is directly contradicted by the aforementioned paragraph 7 of the minutes of the Board meeting of 31 May 2012. It appears unequivocally from the minutes that the Board ratified the decision and confirmed the appointment of the plaintiffs as the new security service providers. This meeting was also attended by Nortje.
- [49] I do not agree with the submission made by the defendant's counsel that due to the fact that paragraph 7 of the minutes of 3 July 2012 is not a resolution taken by the Board of directors, it does not ratify the plaintiffs' agreements. In my view, the minutes clearly show an express and/or implied ratification of the agreements by the Board of directors. ("...the meeting confirmed the support and concurrence of all the board members for the appointment of the new security service providers").[16]

Section 75 of the Companies Act defence

- [50] The defendant further relied on the noncompliance of section 75 of the Act which regulates directors' personal financial interests. For purposes of this section 'director' includes a 'prescribed officer'. [17] It is common cause that at all relevant times, Hattingh was a 'prescribed officer' as contemplated in the Act. [18]
- [51] Section 75 (5) provides as follows:

"(5) If a director of a company. . . has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a financial interest in the matter, the director

- (a) must disclose the interest and its general nature before the matter is considered at the meeting;
- (b) must disclose to the meeting any material information relating to the matter, and known to the director;
- (c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;
- (d) if present at the meeting, must leave the meeting immediately after making any disclosure contemplated in paragraphs (b) or (c);
- (e) must not take part in the consideration of the matter, except to the extent contemplated in paragraphs (b) and (c)".
- (f) . . .
- (g) . . .

Section 75 (7) furthermore provides as follows:

"A decision by the board, or a transaction or agreement approved by the board. . . is valid despite any personal financial interest of a director . . . only if

- (a) it was approved following disclosure of that interest in the manner contemplated in this section; or
- (b) despite having been approved without disclosure of that interest, it
- (i) has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest; or
- (ii) has been declared to be valid by a court in terms of subsection (8)"

[52] It was argued on behalf of the defendant that Hattingh's resignation as the first plaintiffs director and the decision that all shares would be held by the BM Trust was a smokescreen to conceal his financial involvement with the first plaintiff. This financial interest was concealed and not disclosed to the board before the matter of the appointment of the plaintiffs as service providers was considered. It was also not approved by the board following the disclosure of Hattingh's financial interest, or ratified by an ordinary resolution of the shareholders following disclosure of his interest. It was argued therefore that the Board's decision

accordingly remained invalid. Accordingly, in view of the fact that the plaintiffs' contracts were dependent on each other, as a result of the invalidity of the first plaintiffs contract, both contracts are void.

[53] In my opinion, the allegation pertaining to Hattingh can only have relevance if, as a fact, Hattingh held a personal financial interest in the first plaintiff at the time of the meeting of 31 May 2012. It has already been demonstrated and I am satisfied that Hattingh held no such interest at the time of the meeting and the section 75 defence is in my view, devoid of merit.

The Waiver Defence

[54] As already pointed out, the defendant bores the onus to prove its waiver defence. The standard exposition on the onus of proof in cases on waiver is *Collen v Rietfontein Engineering Works*[19] where Centlivres JA said:

"...it should be pointed out, as Innes CJ, stated in *Laws v Rutherford* (1924 AD 261 at p. 263), that the onus proving waiver is strictly on the party alleging it. . .".

The defendant pleads in its amended plea that both the first and second plaintiffs agreed that the security contracts will go out

"unconditionally on a tender process".

[55] The starting point to evaluate the waiver defence is the email forwarded by Swart on 14 November 2012 to the plaintiffs' attorney,

Van Huyssteen[20] which records the following:

"We confirm that the subcommittee who met with you and your clients. . . yesterday, are prepared to recommend to the board to accept your personal proposal that your clients agree to a new tender process . but subject to reserving their rights to claim damages. . . . If your clients are prepared to accept your proposal, the subcommittee will have no other choice as to advise that the contracts with your clients are void. Your clients will then be requested to vacate the premises". (Own emphasis).

Swart confirmed in cross-examination that on 14 November 2012 he was prepared to make the aforesaid recommendation that the plaintiffs can partake in a new tender process with reservation of their rights.

[56] It is common cause that Swart met with Venter and Nieuwoudt on 16 November 2012 and on 19 November 2012, Swart forwarded emails to the plaintiffs and significantly recording the alleged agreement of 16 November 2012 that the plaintiffs would partake "unconditionally" in a new tender process. On 22 November 2012 both plaintiffs responded with emails recording the following:[21]

"Writer confirms Brinant's willingness to take part in the tender process as suggested and as agreed in the meeting with the subcommittee. Writer confirms that this will be subject to reserving our rights to claim damages should Brinant not be successful in their tender."

[57] The defendant did not respond to the plaintiff's emails in order to refute the proclaimed right of the plaintiffs to claim damages in the event of them not being successful in the new tender process. In my view, the defendant failed to prove that the plaintiffs waived their rights to claim damages when they took part in the new tender process.

[58] For the reasons aforesaid, all three of the defendant's defences must fail, and the plaintiffs must succeed on merits.

Costs

[59] Plaintiffs' counsel submits that the defendant should be ordered to pay the costs pertaining to the merits on a scale as between attorney and client, for the following reasons:

59.1. defendant's baseless accusation of an underhand and dishonest attempt by the plaintiffs to take over the existing contracts;

59.2. the dishonest finding of the audit committee that there was no explanation why Hattingh was still registered as a director of the first plaintiff in 2012;

59.3. the baseless assertion that on 31 May 2012 Niewoudt failed to disclose his financial interest in respect of the security contracts to the board.

[60] The award of costs is a matter wholly within the discretion of the court and this is a judicial discretion which must be exercised on reasonable grounds. Even the general rule, viz that costs follow the event, is subject to the overriding principle that the court has a judicial discretion in awarding costs. An award of attorney and client costs will not be granted lightly as the court looks upon such orders with disfavor and is loath to penalize a person who has exercised a right to obtain a judicial decision on any complaint such party may have.[22]

Order

[61] In the premises the following order is made:

1. It is declared that the defendant repudiated its obligations in terms of the agreements 'S1' and 'S2' to the particulars of claim.
2. Defendant is liable to compensate the plaintiffs' proven or agreed damages suffered as a result of the repudiation.
3. The defendant is ordered to pay the costs pertaining to the adjudication of the merits of the action on a party and party scale.

D S MOLEFE

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for Plaintiffs

: Adv. BH Swart SC

Instructed by

: Van Huyssteens Commercial Attorney

Counsel for Defendant

: Adv. M Helberg SC

Instructed by

: Ferreira Attorneys

Date Heard

: 24,25,26,27 October 2016

Date Delivered

: 7 July 2017

Date of filing heads of arguments : 17 February 2017

[1] Bundle pages annexures's ' and 's2'.

[2] 1946 AD 946 at 952.

[3] Venter's date of resignationtrial bundle 7 pages 51 and 52.

[4] Trial Bundle 1pages 5156.

[5] Trial bundle 2 pages 152a 159a.

[6] Trial bundle 2 pages 126127.

[7] Bundle 7 page 76: Share certificate.

[8] Record vol 3 pages 233: 12234.5.

[9] Trial bundle 2 pages 189193.

[10] Schlinkmann v Vander Walt and Others 1947 (2) SA 900 (E) at 919.

[11]

[2000] ZASCA 82; 2001 (2) SA 284 (SCA) at [16].

[12] Datacolor supra paragraph [17]

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- [13] Royal British Bank v Turquand [1856] EngR 470; (1856) 119 ER 886 (6 E & B 327).
- [14] See this discussion in Henochsberg on the Companies Act (the former Companies Act, 61 of 1973) on section 69, p 131 and the authorities referred to.
- [15] Paragraph 2.5.4.
- [16] Trial bundle 2 page 118.
- [17] Section 75 (1) (a) (ii).
- [18] Plea par 2.6.3; pleadings p62 replication.
- [19] 1948 (1) SA 413 (A) at 436.
- [20] Bundle 2 pages 177 a and b.
- [21] Trial bundle 2 pages 182 and 183.
- [22] Pienaar v Boland Bank and Another 1986 (4) SA 102 (O) at 116 BC.
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