



**COMPANIES TRIBUNAL OF SOUTH AFRICA**

**Case Number: CT00604ADJ2021**

In the matter between:

**MYRAN ANDRE SUKHA**

**Applicant**

and

**SESHMA SUKHA**

**Respondent**

*in respect of the removal of the respondent as director of Ambanc (Pty) Ltd*

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Presiding Member : Khashane La M. Manamela (Mr.)

Date of Hearing : 11 June 2021

Date of Decision : 12 July 2021

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**Summary:** Application for the removal of the respondent as the director of the company called Ambanc (Pty) Ltd in terms of section 71(8) of the Companies Act 71 of 2008. The respondent is alleged – on the basis of several grounds - to have been in derelict of or to have been neglectful in the performance of her functions as the director of the company, including by misappropriating monies of the company for her personal gain, and establishing a separate business in competition with the company. Held, that the application is granted (with costs) and the respondent is removed as the director of the company. The respondent is also held liable for costs relating to the postponement of the previous hearing of the matter.

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**DECISION (Reasons and an Order)**

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**Khashane La M. Manamela**

## ***Introduction***

[1] Mr Myran Andre Sukha (the Applicant) and Mrs Seshma “Ramona” Sukha (the Respondent) share with each other three forms of relationship. At a personal level, they are married to each other and are therefore husband and wife. Their relationship at a business level is two-fold: they are the equal shareholders and the only directors of the private company known as Ambanc (the Company or Ambanc). The marriage between the Applicant and the Respondent appears to be heading to a halt, as divorce proceedings are already under way in the high court. And the divorce appears to be acrimonious, to say the least. The divorce proceedings appear to have precipitated or contributed to other skirmishes between the parties in the high court.

[2] Before this Tribunal, the Applicant seeks to sever one of the business relationships he has with the Respondent. He seeks in terms of this application the removal of the Respondent as the director of the Company. This application is in terms of section 71(8)<sup>1</sup> of the Companies Act 71 of 2008 (the Companies Act). The application is opposed by the Respondent. The grounds of opposition include a preliminary objection or a point in *limine* that this Tribunal lacks jurisdiction due to other pending litigation for the same relief in the high court.

[3] The matter was initially set down for hearing on 27 May 2021. But on 14 May 2021 the Respondent advised the registrar of this Tribunal that she would not be able to proceed with the hearing. She cited – in the main - the subsequent unavailability of her

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<sup>1</sup> See footnote 13 below, for the reading of section 71(8) of the Companies Act.

counsel. Eventually, the hearing did not proceed and I directed that the parties address the issue of liability for costs occasioned by the postponement. I deal with this issue, below.

[4] The matter was heard on 11 June 2021. Mr R Pottas appeared as counsel for the Applicant and Ms C van Reenen appeared as counsel for the Respondent. Both counsel had filed heads of argument. I am grateful for this. I reserved this decision after listening to oral submissions by counsel. The submissions included those relating to the Respondent's point in *limine*. I decided also to reserve my decision on the point in *limine*, although the point in *limine* could potentially be dispositive of the matter.<sup>2</sup> I considered as sound the approach to have a wholesale (than a piecemeal) hearing of all issues in the matter. I deal first with the point in *limine*.

***Preliminary objection or point in limine: Lis alibi pendens***

*Respondent's case*

[5] According to the Respondent this Tribunal lacks jurisdiction to adjudicate this application. There is a pending litigation in the high court by the Applicant for the same relief. The Respondent raised this defence by way of a preliminary objection of *lis alibi pendens* (Latin for “*suit pending elsewhere*”).<sup>3</sup>

[6] The Respondent's grounds in support of her objection are essentially as follows. An application for her removal as the director and shareholder of Ambanc was brought in the High Court of South Africa (Gauteng Local Division, Johannesburg) (the

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<sup>2</sup> Harms, LTC. 2018. *Amler's Precedents of Pleadings*. 9<sup>th</sup> ed. LexisNexis (online version) at p 251.

<sup>3</sup> *Trilingual Dictionary*, Jutastat e-publications.

Johannesburg High Court) under case number 12630/2017 (the Interim Relief Application). Ismail J granted orders in the Interim Relief Application on 25 April 2017.<sup>4</sup> The orders were for interim relief and future conduct of the matter. The orders included that a separate application was to be launched by the Applicant (within 60 days from the date of the interim relief) for the removal of the Respondent as a director and shareholder of Ambanc and a related entity. The separate application has been brought but it is still to be heard, the Respondent contends. There is or was other litigation between the parties.<sup>5</sup> Therefore, the interim orders in the Interim Relief Application are still operative.

#### Applicant's case

[7] The preliminary objection is opposed by the Applicant. Basically the Applicant denies that there is currently pending litigation between the parties for the removal of the Respondent as the director of Ambanc. It is pointed out by the Applicant that the Interim Relief Application under case number 12630/2017 in the Johannesburg High Court concerns the sale of the shareholding belonging to the Respondent in Ambanc and nothing else. No relief is sought for the removal of the Respondent as the director of

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<sup>4</sup> The actual order of 25 April 2017 by Ismail J was in the following terms: “1. The main application succeeds with costs, to include the costs of two counsel. 2. The counter application is dismissed with costs, such costs to include the costs of two counsel. The costs referred to in (1) and (2) above are to be paid by [Seshma Sukha] on an attorney client scale. In addition thereto the Court makes an order in terms of the draft marked “X” with the following addition ...” See indexed p 120. And from the draft marked “X” the following is material for current purposes: “5. The orders in paragraph 2, 3 and 4 above shall operate as an *interim* mandatory interdict pending the hearing of an application to be instituted by [Ambanc and other cited companies] within 60 days from the granting of this order for: the removal of [Seshma Sukha] as Director and Shareholder of [Ambanc and another cited company]; and further and / or alternate relief.” [underlining added for emphasis] See indexed pp 124-125.

<sup>5</sup>The Respondent sought the variation of the orders in the Interim Relief Application. On 19 January 2021 she brought her own application also under the case number (i.e.12630/2017) of the Johannesburg High Court to vary the orders in the interim relief (the Variation Application). She also sought her own further relief. There is also reference to other litigation against the Respondent in the form of action proceedings by the Applicant on behalf of Ambanc also in the Johannesburg High Court, under case number 0022460/2017.

Ambanc in the Interim Relief Application. Also that no such relief is sought against the Respondent in the other paraphernalia of applications and interlocutory applications between the parties before the high court. The preliminary objection ought to be dismissed with costs, the Applicant concludes.

### Conclusion / Ruling

[8] The Honourable L T C Harms in *Amler's Precedents of Pleadings*<sup>6</sup> explains that the elements or requirements for the plea of *lis pendens* are (a) pending litigation;<sup>7</sup> (b) between the same parties or their privies;<sup>8</sup> (c) based on the same cause of action (the requirement of the same cause of action is satisfied if the other proceedings involve determination of a question that is necessary for the determination of the present case and substantially determinative of its outcome);<sup>9</sup> and (d) in respect of the same subject matter (but, this does not mean that the form of relief claimed must be identical).<sup>10</sup>

[9] It became common cause between the parties or beyond contest that there is no pending litigation for the removal of the Respondent as a director. There may – in fact - be such litigation for the removal of the Applicant as a director and the Respondent from her position as the shareholder of the Company. Ms Van Reenen, for the Respondent, appeared to cast a blame at the condition of the Respondent's papers in this regard. The

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<sup>6</sup> *Amler's Precedents of Pleadings* at p 251.

<sup>7</sup> *RSA Faktors Bpk v Bloemfontein Township Developers (Edms) Bpk en Andere* 1981 (2) SA 141 (O); *Van As v Appollus en andere* 1993 (1) SA 606 (C).

<sup>8</sup> *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA).

<sup>9</sup> *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) at par [16] *et seq.*

<sup>10</sup> *Williams v Shub* 1976 (4) SA 567 (C). Whether the subject matter is the same is determined by the issues as defined in the pleadings. The fact that the same evidence may be led in both cases is beside the point. See also *Marks & Kantor v Van Diggelen* 1935 TPD 29.

papers ought to have referred to the removal of the Applicant as director and of the Respondent as shareholder of Ambanc, she submitted.

[10] Ms Van Reenen further submitted that the defence of *lis pendens* should hold as the other “pieces of litigation” - between the parties pending in the high court - deal with “substantially the same issues”. But – with respect – the correct requirement or element of the plea of *lis pendens* is that the pending litigation is based on the same cause of action or that the other proceedings involve determination of a question that is necessary for the determination of the present case and substantially determinative of its outcome.<sup>11</sup> This appears to accord with the choice of words of Ms Van Reenen for the Respondent at the hearing of this matter.

[11] But nowhere in the so-called “pieces of litigation” in the high court is the removal of the Respondent as the director of Ambanc sought. As already indicated, this was conceded by counsel on behalf of the Respondent. With respect the concession was well made and overdue.

[12] The issue of the removal of the Respondent as a shareholder (which actually ought to be in the form of a share purchase or buyout) or the removal of the Applicant is irrelevant. It does not make any difference how the issue is crafted in the papers or whether or not it forms part of the issues in the papers.

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<sup>11</sup> *Nestlé (SA) (Pty) Ltd v Mars Inc* [2001] 4 All SA 315 (A), 2001 (4) SA 542 (SCA).

[13] I also respectfully agree with Mr Pottas for the Applicant that this Tribunal is cloaked with the exclusive jurisdiction for the removal of a director “[i]f a company has fewer than three directors”.<sup>12</sup> This is the case with Ambanc.

[14] Therefore, the Respondent’s preliminary objection fails and will be dismissed with costs. Next, I turn to the issues in the merits, preceded by a brief narration of the issues in the background of this matter.

***Brief background***

[15] What appears under this subheading is either common cause between the parties or in my view not seriously contested by the opposing party. This brief background will be followed by a discussion of each party’s case.

[16] In 1987 the Applicant began trading as what eventually became the company Ambanc. Ambanc was registered on 16 September 1988 with the Applicant as the sole director and shareholder until 2006. The Respondent was appointed the director of Ambanc on 31 August 2006. It is unclear when she acquired half the shares in Ambanc, but nothing turns on this for current purposes.

[17] In its early days Ambanc’s business comprised sales of air conditioning units. But from 2013 Ambanc’s business evolved to focus on service and maintenance of air conditioning systems, mainly in respect of industrial Italian brands. Ambanc has a related but independent company called Hi-Ref (South Africa) (Pty) Ltd (Hiref SA). Hiref SA

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<sup>12</sup> Section 71(8) of the Companies Act.

was established in 2013 on the request of Hiref Italy. The Applicant is the sole director of Hiref SA. Hiref SA and Ambanc share a close working relationship and operational facilities. They both rely on the supply of air conditioning units from Hiref Italy.

*Applicant's case (merits)*

[18] The Applicant says that he established and built Ambanc from “very humble beginnings”. He was initially responsible for the operational management of Ambanc, but since April 2017 he is responsible for all aspects of the management of Ambanc. The Respondent was - until April 2017 - responsible for the management of Ambanc’s finances, including payment of invoices and creditors; preparation of management reports and financial statements. The Respondent has not participated in the management of Ambanc since the orders in the Interim Relief Application were granted.

[19] The Applicant seeks the removal of the Respondent as the director of Ambanc. He accuses the Respondent of the following: (a) misappropriation of Ambanc’s funds for her personal gain; (b) wilful misconduct and breach of fiduciary duties; (c) misappropriation of Ambanc’s assets for her personal gain; (d) attempt to place Ambanc in business rescue without a legitimate or lawful cause; (e) having poor credit profile to the prejudice of Ambanc’s operations and financing; (f) not providing the Applicant access to the SARS e-Filing profile to the prejudice of Ambanc; (g) conducting business in competition with Ambanc, and (h) unnecessary increment of litigation costs.

[20] An application for the removal of a director in terms of section 71(8) of the



Companies Act is facts-sensitive. Therefore, it is necessary to discuss the above listed allegations in more detail. I will do so under self-explanatory subheadings, but will avoid complete restatement of the facts or issues.

*Misappropriation of funds*

[21] The Applicant states that the Respondent paid to her erstwhile personal attorneys an amount of R521 802.08. Also that the Respondent paid an amount of R1 266 079.12 on 16 January 2017 to her own personal bank account. None of these payments were authorised by Ambanc nor made in the ordinary course of its business. Ambanc has since issued summons in the Johannesburg High Court for the recovery of these unlawful withdrawals. The withdrawals are said to have created a serious cash flow problem in Ambanc. In March 2017, a disciplinary process was started against the Respondent. The Respondent unsuccessfully attempted to halt the process through an urgent application to the Labour Court. The urgent application was dismissed with costs. The Respondent was ultimately dismissed on 15 June 2017 following a disciplinary process.

*Willful misconduct and breach of fiduciary duties*

[22] Prior to April 2017 the Respondent had sole access to Ambanc's banking facilities. She was solely responsible for making payments to suppliers, creditors and employees. But in March 2017 the Respondent refused to sign any payment instructions. This, according to the Applicant was entirely without a valid reason, but meant to increase her leverage in the divorce and chances of her buy-out from Ambanc. The Respondent's conduct had a detrimental impact on Ambanc and its operations, including

in respect of a major project in Tygerburg, Western Cape. The Respondent refused to make payments to a subcontractor in the project and the latter vacated site leading to delays in the project. This was notwithstanding Ambanc's possession of sufficient funds to make the relevant payments. The Applicant again attributes this conduct on the part of the Respondent to be aimed at leveraging her personal bargaining power in the divorce against the Respondent. The Respondent's conduct was halted by the order granted on 25 April 2017 under the Interim Relief Application.

*Misappropriation of company assets*

[23] Apart from the alleged misappropriation of monies or funds of Ambanc, the Respondent is also accused of misappropriation of the assets of Ambanc for her personal gain. It is said that luxury vehicles, including Mercedes Benz, two Maserati Coupe and a motorcycle purchased by Ambanc between January 2014 and July 2017, are either in the unlawful possession of the Respondent or unlawfully registered in her name. The Respondent has failed to return the vehicles to Ambanc, despite demand.

*Failed business rescue application*

[24] The Respondent sought to counter the Interim Relief Application by her own application. She sought that Ambanc be placed in business rescue. The counter-application was dismissed, due to a material dispute of fact unresolvable on the papers. The Applicant says that the Respondent has not subsequently done anything to resuscitate the business rescue process, as there were always no good grounds for business rescue. Ambanc was a solvent company at the material times. The business rescue application

was intended as a bargaining chip in the divorce, the Applicant again charges.

*Bad credit profile and refusal to resign*

[25] Ambanc has a small fleet of light commercial vehicles for its servicing and maintenance operations. The Applicant says the fleet is dated and requires replacement. Attempts to acquire bank finance for a new fleet was thwarted by the Respondent's bad credit profile. The Respondent has a judgment noted against her credit profile for unpaid credit card debt. Two banks have refused to extend credit to Ambanc whilst the Respondent remains a director due to her credit profile. This is adversely affecting Ambanc's operations. The Respondent has resisted attempts for her to resign as director of Ambanc.

*Unauthorised competing business*

[26] The Respondent has established her own business, trading under the name Ramone's Airconditioning. This appears to be in the same business area as Ambanc. The Applicant contends the new rival business presents the Respondent with a clear conflict of interest in respect of her fiduciary duties to Ambanc. Further, the Respondent did not disclose her interest in the rival business. She also did not obtain authority prior to starting the rival business.

*Preventing access to SARS e-filing profile*

[27] Part of the orders granted in the Interim Relief Application was for the appointment of Ms Tammy Green as an accountant for Ambanc. Ms Green left Ambanc

during November 2020 apparently due to disagreements with the Applicant over her fees; her accounting work and failure to resolve a dispute with the South African Revenue Service (SARS) over value added tax (VAT). Ms Green was replaced with Mr Denver Govender, as the accountant for Ambanc. Upon her departure Ms Green gave the access credentials to Ambanc's SARS e-filing profile to the Respondent. The Applicant says between 25 November 2020 and 16 February 2021 the Respondent refused to provide the necessary credentials to the SARS e-filing profile. The credentials were provided only after an urgent application was threatened by the Applicant on 17 February 2021. But the Respondent claimed that the Applicant and Ambanc had long been provided with the necessary credentials in November 2020. This conduct on the Respondent's part is said to have led to penalties and interest charged to Ambanc by SARS. The cumulative effect of this is that Ambanc cannot tender for new contracts due to a non-compliant status with SARS.

*Financial strain and vexatious conduct*

[28] The Applicant requests the removal of the Respondent as the director of Ambanc also on the ground that her conduct is vexatious and for causing Ambanc and/or the Applicant financial strain. This conduct includes the refusal by the Respondent to return the vehicles and to repay the monies she allegedly misappropriated. It is submitted that the impugned conduct exacerbates Ambanc's already strained financial position, following the exceptionally difficult year of lockdowns imposed to combat the COVID-19 pandemic. The Applicant repeats (as with other allegations under this ground) the alleged refusal by the Respondent to provide access details to the SARS e-filing profile.

[29] Further, it is submitted that the conduct of the Respondent in pending litigation between the parties has unnecessarily raised costs of litigation. Also the flurry of litigation between the parties – which is attributed to the Respondent’s conduct – has strained Ambanc financially. The Respondent has refused or ignored overtures aimed at curtailing some of these proceedings. Her conduct is in disregard of the interests of Ambanc.

***Respondent’s case (merits)***

[30] Further from the unsuccessful preliminary objection above, the Respondent opposes her removal essentially on the following grounds. The subheadings in the Applicant’s case are repeated for the Respondent’s case or opposition.

***Misappropriation of company funds***

[31] The Respondent says she was the chief financial officer of Ambanc. But the transactional duties were performed by the employees in Ambanc’s accounting section. The transactions were approved by the Applicant. The Respondent also performed her duties duly assisted by the auditors.

[32] The Respondent and the Applicant as director/shareholder had a loan account in the books of Ambanc. The loan account was for recording the personal and family expenses paid for by Ambanc. Also, Ambanc’s bank accounts were used for personal expenses and purchases. This included the purchase of several luxury vehicles. Therefore, as a co-director, shareholder and a senior official of Ambanc the Respondent contends

that she was at all material times “empowered and authorised to deal with the funds [of Ambanc] in the manner in which she did”. This included the financial transactions during January and March 2017.

[33] The Respondent also states that during 2016 she made several deposits into Ambanc’s bank account of substantial sums of money totaling [in my calculation] an amount of R6 580 000.00. The deposits were made from personal funds. They were aimed at reducing the parties’ respective loan accounts and to ensure continued positive cash-flow in Ambanc. Therefore, when the Respondent on 16 January 2017 transferred the amount of R 1 266 079.12 from Ambanc’s coffers to her personal account this was due to a positive balance in her credit account. The latter amount had been calculated by a financial/accounting employee of Ambanc and entered into the Respondent’s loan account.

#### *Misappropriation of assets*

[34] Regarding the charge that she misappropriated the assets of the company in the form of vehicles, the Respondent responds as follows. She says that the Mercedes Benz was purchased “at the instance of the [A]pplicant as a Christmas gift to [her]”, when he purchased a new Range Rover for himself. When the two vehicles were purchased the Applicant suggested that the vehicles be purchased in the parties’ respective names, as they “did not have substantial movable assets registered to [their] name”. The Respondent offers substantially the same explanation with regard to one or more of the other vehicles. She also says that the fact that the vehicles were purchased in cash should

explain why they are registered in her name. This is in contrast with the Applicant's vehicles which were purchased using financing obtained through Ambanc.

*Bad credit profile*

[35] The Respondent admits the bad credit profile. She explains that this was unavoidable because after her dismissal she went for an extended period of time without an income. Her situation only improved following an order for the Applicant to make monthly payment to her as interim maintenance pending the finalisation of the divorce. She also points out that by virtue of their marriage in community of property her debts belong to the joint estate.

*Unauthorised competing business*

[36] The Respondent – under this ground – states that since March 2017 the Applicant has prevented her from having any interaction with Ambanc. The Applicant ordered that she be shut out of the business of Ambanc in contempt of a court order. Therefore, she finds it “disingenuous of the [A]pplicant to, at this stage, some 4 years after Ambanc dismissed me to allege that [the Respondent is] competing with Ambanc”. Consequently, she denies that there is any conflict of interest.

*Preventing access to SARS e-filing profile*

[37] The Respondent denies that she refused to provide the Applicant with details to access the SARS e-filing platform. She relied on what is stated in her pending application

for the appointment of forensic accountants. Ms Green provided her with confirmation in that application.

*Financial strain and vexatious conduct*

[38] The Applicant’s complaints under this subheading are said to be without merit. The Respondent simply denies that her conduct is vexatious. She explains the reason for the litigation she instituted. She asks the question - poignantly it would appear – why “when the applicant litigates, it is essential, but when [she] litigate[s] it is vexatious?”. She ventures an answer to the question and states that the Applicant resorted to this application before this Tribunal to quell his frustration at the speed with which the high court matters are progressing. This application is nothing more than forum shopping, the Respondent concludes.

***Applicable legal principles and the submissions (discussed)***

*Statutory provisions*

[39] This application is based on section 71(8) of the Companies Act.<sup>13</sup> It is common cause between the parties that they are the only two directors of Ambanc. Also that the application is made by the Applicant as a director and/or a shareholder of Ambanc.

[40] Section 71(8)(b) provides that the application for removal be made to this Tribunal “in any circumstances contemplated in [section 71(3) of the Companies Act]”.

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<sup>13</sup> Section 71(8) of the Companies Act reads as follows: “If a company has fewer than three directors- (a) subsection (3) does not apply to the company; (b) in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection; and (c) subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Companies Tribunal.”



Upon such application being made, this Tribunal is empowered to make a determination contemplated in section 71(3).<sup>14</sup>

[41] According to section 71(3) the removal of a director of a company is possible under circumstances stated under its subsections (a) and (b). Subsection 71(3)(a) refers to when a director has become “ineligible or disqualified in terms of section 69”. It is common cause between the parties or uncontested that the Applicant does not seek the removal of the Respondent on any other basis but section 71(3)(b).

[42] Section 71(3)(b) provides for the removal of a director where such director “has neglected, or been derelict in the performance of, the functions of director” and the director has been “determined to be ... negligent or derelict”. The latter determination is the task currently facing this Tribunal. What is to be determined is whether the Respondent was “negligent or derelict” in the performance of the functions of director.

[43] But, what entails being “negligent or derelict” in the performance of one’s functions as a director of a company is not explained in the Companies Act. In *Spineco Medical International (Pty) Ltd and another v Webb*<sup>15</sup> this Tribunal attempted to define

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<sup>14</sup> Section 71(3) reads as follows in the material part: “If ... a shareholder or director has alleged that a director of the company- (a) has become- (i) ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69(8)(a); or (ii) incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or (b) has neglected, or been derelict in the performance of, the functions of director, the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.”

<sup>15</sup> *Spineco Medical International (Pty) Ltd and another v Webb*, Companies Tribunal, Case Number: CT021NOV2014, per Manamela, Delpont and Haskins, 11 August 2015.

or explain the two concepts: “negligent” and “derelict”. I rely on the following from the decision:

“[54] ... My understanding of the aforesaid is that “derelict” means either deserting or abandoning. In fact it has similar meaning to failure or omission to do something (and dereliction being verwaarlosing or nalatigheid in Afrikaans). However, in my view, derelict has an element of being deliberate or purposeful or intentional about it, whereas neglect is more an omission than an act.

[55] ...

[56] In our case ... the word “neglect” could be equated to “lack of expedition, fault, negligence” and therefore conduct which fall short of what a reasonably careful person in the circumstances would have done.”

[quoted without the accompanying footnotes]

[44] In *Spineco Medical International v Webb* it was concluded that when the definitions (derived outside of the Companies Act) are applied “to the context of section 71(3)(b) a director would be neglecting to perform ... her functions as a director of a company if ...she had given insufficient attention to ... her actions”.<sup>16</sup> The applicable gauge to determine whether the impugned director has failed to adhere to the standards legally required of her are those under section 76<sup>17</sup> of the Companies Act and generally the fiduciary duties of directors.<sup>18</sup> I discuss these alongside the allegations made against the Respondent in this matter and utilise, once more, the subheadings under the Applicant’s case.

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<sup>16</sup> *Spineco Medical International v Webb* at par [57].

<sup>17</sup> Section 76 generally provides for the standards of directors’ conduct.

<sup>18</sup> *Spineco Medical International v Webb* at par [57].

Misappropriation of funds

[45] The Respondent is accused of misappropriation of monies paid to her erstwhile attorneys (i.e. R521 802.08) and herself (i.e. R1 266 079.12). The Applicant says both these payments were unauthorised and labels them “unlawful withdrawals”. The Respondent says that she was “empowered and authorised to deal with the funds” in the manner she did. I disagree.

[46] The funds or assets of the company - as a separate juristic entity - do not belong to the directors or shareholders of the company in their respective individual rights but the company.<sup>19</sup> The same applies to the liabilities of the company.<sup>20</sup> Directors and shareholders of a company are not by virtue of their positions in the company liable for its liabilities.<sup>21</sup> The exception to the latter statement is with regard to the personal liability companies;<sup>22</sup> where the memorandum of incorporation states otherwise<sup>23</sup> or directors have bound themselves to the obligations of the company or found to be so liable. Therefore, absent authority by Ambanc, the payments made by the Respondent directly to herself and to her attorneys are in breach of the standards of directors under section 76. It does not matter that the Respondent may have made deposits into Ambanc’s bank account, which fact is obviously disputed by the Applicant. The conduct of a director of a company also ought to be mindful of the rights of other stakeholders, such as creditors of the company.

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<sup>19</sup> Delpont, P. 2021. *Henocheberg on the Companies Act 71 of 2008*. LexisNexis (online version) at 54(6), 82.

<sup>20</sup> *Ibid.*

<sup>21</sup> Section 19(2) of the Companies Act provides: “A person is not, solely by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company, except to the extent that this Act or the company’s Memorandum of Incorporation provides otherwise.”

<sup>22</sup> Section 19(3) of the Companies Act.

<sup>23</sup> Section 19(2) of the Companies Act.

*Willful misconduct and breach of fiduciary duties*

[47] Under this subheading the Respondent is accused of failing or neglecting to make payments to suppliers, creditors and employees in order to increase her bargaining position in the divorce proceedings and for her shareholding to be bought out. The Respondent furnished no direct answer to these allegations. But the situation was dealt with in terms of the court order in the Interim Relief Application in which the Respondent was interdicted from making payments on behalf of Ambanc and Ms Green was appointed for this function. I do not consider it justified to determine this application on the basis of this ground. This is not the same as saying that a director may not be removed on the grounds which have already formed the basis of another application.

*Misappropriation of company assets*

[48] The Applicant accuses the Respondent of misappropriation of the assets of Ambanc. She is accused of being in the unlawful possession and/or to have unlawfully registered in her name vehicles belonging to Ambanc. The Respondent explained her possession and registration of the vehicles in her own name. She says it was in terms of arrangements or agreement between her and the Applicant. On the basis of the decision in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*<sup>24</sup> I find that what is raised by the Respondent justifies that this ground not be considered for purposes of her removal as director of Ambanc.<sup>25</sup>

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<sup>24</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

<sup>25</sup> In *Plascon-Evans* the Appellate Division (as the Supreme Court of Appeal was then known) set or expanded and qualified the rule dealing with disputes of fact in motion proceedings. See *Plascon-Evans* at 634H-635.

*Failed business rescue application*

[49] Under this ground the Respondent is said to have attempted to place Ambanc in business rescue without good cause and despite Ambanc being in a solvent position. The Respondent's application was dismissed, due to existence of dispute of fact. In this Tribunal the Respondent did not respond to this ground of her removal.

[50] But, I am unable - without more - to agree with the Applicant that the dismissal of the application due to a dispute of fact, equates to the dismissal of the application for lack of merits. Further the requirements for a successful court order to begin business rescue proceedings does not only revolve around the prevailing solvency of the company, but more.<sup>26</sup> Therefore, I find that this ground cannot pivot the removal of the Respondent as director of Ambanc.

*Bad credit profile and refusal to resign*

[51] The Applicant says that the fact that the Respondent has a bad credit profile adversely affects the company in that it cannot access bank financing. The Respondent whilst admitting to her bad credit profile, explained why this is so. Her business and personal dilemmas led to her being without income and defaulting in her commitment to the bank. During the trial I explained that I do not consider this to be relevant for removal of a director. I still hold this view. Having a bad credit profile is not within one's performance of the functions of a director. This is not the same as being disqualified from

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<sup>26</sup> See ss 128 to 155 of the Companies Act, particularly s 131 dealing applications to court to begin business rescue.

being a director due to being an unrehabilitated insolvent within the context of section 69(8)(b)(i).<sup>27</sup>

*Unauthorised competing business*

[52] It is common cause that the Respondent has established her own business. This business is said to be in the same business area as Ambanc: air conditioning. The Respondent explained that she was forced into this situation by the Applicant unlawfully (i.e. in contempt of a court order) preventing her from participation in Ambanc. The Respondent denies that there is a conflict of interest. I disagree.

[53] By establishing the rival company whilst still a director of Ambanc, the Respondent placed herself in a situation where she has to choose between the interests of the new company and those of Ambanc. It is also not unreasonable to imagine that given an election to choose between the two rival companies she would prefer promoting the interests of the new company where she is probably the sole shareholder. This is clearly in breach of her fiduciary duties to Ambanc.<sup>28</sup> It is also breach of the standards of directors' conduct envisaged in section 76(3).<sup>29</sup>

*Preventing access to SARS e-filing profile*

[54] This ground occupied counsel's submissions at the hearing for a considerable time. The same amount of attention was given to the issue in the papers filed. I find it

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<sup>27</sup> Section 69(8) lists the disqualifications from being a director of a company, including where the person is "an unrehabilitated insolvent".

<sup>28</sup> *Henochsberg on the Companies Act 71 of 2008* at 295 *et seq.*

<sup>29</sup> *Ibid.*

difficult to decide on paper which version to accept and which to reject, and therefore consider the allegations under this ground unproven.<sup>30</sup>

*Financial strain and vexatious conduct*

[55] The Applicant complains also about the conduct of the Respondent which he considers vexatious and the financial strain to Ambanc due to the flurry of litigation in legal battles with the Respondent. It is impossible for this Tribunal to determine in general terms whether a party's conduct is vexatious or not. The Applicant - to its credit - has already stated above (under other grounds) what conduct of the Respondent ought to be considered for purposes of this application. Therefore, it was unwarranted to repeat such conduct under a generic or umbrella subheading for purposes of this application. As for the financial strain which may be caused or have been caused by the litigation between the Respondent and Ambanc, the best forum to determine whether such litigation was necessary or not will be the same forum determining the merits of such application. Also such determination is beyond what is required of this Tribunal for purposes of section 71 of the Companies Act.

***Conclusion***

[56] I have considered the allegations against the Respondent as indicated by my findings or comments appearing above. It is my view that only the findings made in respect of two of the allegations against the Respondent are relevant for the determination to be made in this matter.

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<sup>30</sup> *Plascon-Evans* at 634H-635.

[57] Firstly, I have found that the Respondent was not entitled to appropriate the amount of R521 802.08 paid to her attorneys or the amount of R1 266 079.12 paid directly to herself. The payments were without authority of Ambanc and in breach of the standards of directors under section 76 of the Companies Act.

[58] Secondly, I have also found that by establishing a rival business to Ambanc the Respondent has placed herself in a position of conflict of interest and is in breach of her fiduciary duties to Ambanc and the provisions of section 76.

[59] Consequently, I find that the Respondent's conduct in those two respects, whether considered jointly or severally, amounts to what is envisaged by section 71(3)(b) and justify her removal as the director of Ambanc. I will make an order in this regard, inclusive of costs in favour of the Applicant.

***Postponement of the hearing and costs***

[60] The outstanding issue to determine is who is liable to pay the costs of postponement of the hearing which was scheduled to take place on 27 May 2021.

[61] The brief facts regarding this issue are as follows. On 30 April 2021 the registrar of this Tribunal notified both parties that this matter is enrolled for a hearing on 27 May 2021. This was almost a month's notice. On 14 May 2021 the Respondent's attorneys advised that the Respondent's legal representatives "are no longer available" for the hearing and that the hearing must be re-scheduled. The Respondent's attorney responsible



for the matter had inadvertently forgotten about his other “engagement” on 27 May 2021, whilst the Respondent’s counsel had a two-day trial around the 27 May 2021. The trial had been allocated in January 2021 already. This was exactly two weeks after the registrar’s notice and just less than two weeks from the date of hearing. On 18 May 2021 the registrar advised the Respondent to file by no later than 20 May 2021 an application for postponement of the hearing. The Respondent filed an affidavit which was neither signed nor commissioned on 20 May 2021. On 24 May 2021 the Respondent was directed through the office of the registrar to file a proper affidavit. This direction was complied with on the same date. Facing this turn of events, this Tribunal through its registrar on 25 May 2021 concluded that a postponement of the hearing of this matter on 27 May 2021 has now been rendered unavoidable. The hearing indeed did not go ahead. The Tribunal directed the parties to file affidavits dealing with liability for costs of postponement. This was done.

[62] The Respondent says that she should not be held liable for costs of the postponement. Her reasons for the contention included the following. She points out that this matter is related to the contentious divorce proceedings and a plethora of litigation between the parties. Counsel for the Respondent is or was retained also in these other proceedings. Bringing on board a new counsel would have been prejudicial to the Respondent. Further, that there are no costs which have gone to waste since the matter was immediately re-enrolled for hearing on 11 June 2021. The Respondent had actually provided sufficient notice of postponement and complied with all directives by this Tribunal regarding postponement.

[63] The Applicant says the Respondent should be held liable for costs occasioned by the postponement, among others, for the following reasons. The need for a postponement of the hearing would have been immediately apparent to the Respondent's legal representatives when they received the notice from the registrar, rather than two weeks later. The Respondent obtained a postponement "by default". This is so as postponement of the matter occurred without consideration of the merits of the Respondent's application for postponement. Also, the Applicant was not given an opportunity to respond to her application, except only with regard to costs. Further, the Respondent had failed to serve and file a proper application for postponement, whilst not complying with the timeframes imposed in the Tribunal's directives. There is no merit in the grounds proffered by the Respondent for postponement.

[64] My view is that the Respondent is liable for costs occasioned by the postponement. There is no merit in the reasons given by the Respondent to the contrary. I agree that the Respondent or her own legal representatives could have acted sooner, but failed to do so. Besides, postponement is always an indulgence of the requester, such as the Respondent in this instance. It does not matter when notice of such postponement is communicated. Notice ought to be accompanied by a tender of costs. The taxing master would determine the *quantum* of the costs that would have been incurred by the time the notice is given. The party liable (i.e. the requester) would have an opportunity to take part in the taxation and argue what costs should be precluded or that so costs have gone to waste. All that is required from the Tribunal for current purposes and in the absence of a tender of the wasted costs by the Respondent is liability for such costs.

***Order***

[65] I therefore proceed to make an order in the following terms:

- a) that, the Respondent, Seshma Sukha be and is hereby removed from the office or position of the director of Ambanc (Pty) Ltd (Registration Number: 1988/005296/07);
- b) that, the Applicant, Ambanc (Pty) Ltd or any person acting on behalf of the Applicant or Ambanc (Pty) Ltd is hereby authorised to take all steps necessary for the removal of the Respondent as the director of Ambanc (Pty) Ltd from the records of the Companies and Intellectual Property Commission;
- c) that, the Companies and Intellectual Property Commission is requested to assist in respect of giving effect to a) and b) of this order.
- d) that, the Respondent is liable to pay costs of this application, as well as the costs occasioned by the postponement of the hearing of the matter on 27 May 2021, both costs at the scale of party and party in terms of the tariffs applicable to the High Court of South Africa.

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**Khashane La M. Manamela (Mr)**  
**Member, Companies Tribunal**  
**12 July 2021**

**Appearances:**

For the Applicant	:	Mr R Pottas
Instructed by	:	JWL Attorneys Franklin Roosevelt Park, Johannesburg
For the Respondent	:	Ms C van Reenen
Instructed by	:	Pravda & Knowles Attorneys Durban