IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case no.: **CT01446ADJ2023**

In the matter between:

BRIAN FRANCIS DALTON Applicant

and

RODNEY KENNETH BARTMAN First Respondent

ANTON NORTJE Second Respondent (Intervening)

ROBERT MACFARLANE Third Respondent (Intervening)

In re:

POLANOCOL (PTY) LTD

Presiding member: Richard Bradstreet

Date of decision: 1 November 2023

DECISION (Reasons and Order)

INTRODUCTION

1. This application concerns the removal of the First Respondent as director of the company Polanocol (Pty) Ltd ("Polanocol") in terms of section 71(8) of the

Companies Act 71 of 2008 ("the Act") on the alleged basis that the First Respondent had neglected, or been derelict in the performance of his functions as a director. The application was brought on an urgent basis.

2. Polanocol has purchased a 1172 hectare farm on the West Coast known as "Pampoenkraal" for the purpose of creating a self-sustaining community known as "Dalbarton". It is envisaged that residents on the property are to be bound by certain rules that purportedly apply to the exclusion of the laws of the Republic of South Africa. The Applicant and the First Respondent were the driving force behind this enterprise, having purchased Pampoenkraal as a shelf company with a view to achieving this goal, with each holding 50% of the company's shares. The parties were at this time Polanocol's two directors, the Applicant has since resigned, leaving the First Respondent as the sole director. Subsequently, both the shareholding and board membership were unlawfully changed, this being the subject matter of a previous dispute between the parties that was adjudicated by the Western Cape High Court in September 2022.

3. Underlying the dispute between the parties is an alleged claim in excess of R2.5 million held by PayApp (Pty) Ltd ("PayApp"), of which the Applicant is sole director and shareholder. PayApp and the Applicant have unsuccessfully sought the liquidation of the First Respondent on the basis that it is unable to pay its debts as envisaged by section 344(f) read with section 345(1)(c) of the Companies Act 61 of 1973.

4. The two liquidation applications were brought by PayApp and the Applicant, the respondents being Polanocol, the First Respondent, and Carlo Johann Viljoen (who was previously an unlawfully appointed director, and legal advisor to the First Respondent). Although Henney J granted a provisional liquidation order on 23 September 2022 (in *PayApp (Pty) Ltd and Brian Francis Dalton v Polanocol (Pty) Ltd, Rodney Kenneth Bartman and Carlo Johann Viljoen* (case no 6482/2022)), Meer J dismissed the application for final liquidation,

discharging the provisional order, and awarding costs against the Applicants (*PayApp (Pty) Ltd and Brian Francis Dalton v Polanocol (Pty) Ltd, Rodney Kenneth Bartman and Carlo Johann Viljoen (Trevor Hulett and 16 Others Intervening)* (case no 6482/2022)). These two judgments shall be referred to as "the Henney judgment" and "the Meer judgment" respectively.

5. In order to substantiate the allegations of reckless carrying on of the business of Polanocol, and illegal actions performed by the First Respondent, the Applicant relies on the findings of the Western Cape High Court in the Henney judgment, which not only sought the provisional winding up of Polanocol, but also a declaratory order confirming the Applicant's rights as a shareholder of Polanocol, rectifying the harm committed to him as a shareholder, the rectification of Polanocol's memorandum of incorporation and securities register, and the removal of unlawfully appointed directors of Polanocol.

6. The Second and Third Respondents have been granted leave to intervene on the basis that they have a material interest in the present matter, arising from the Act, and not being adequately represented by other parties to the dispute.

7. The issues for determination by the Tribunal in the present case relate to urgency, the removal of the First Respondent from office as director of Polanocol, and costs. In relation to the main question concerning the removal of the First Respondent as director of Polanocol, a further issue arises which is ancillary to the merits of the Applicant's claim – namely, whether it is possible for the dispute to be decided on application in view of what the First Respondent considers to be a dispute of fact necessitating action proceedings. The Applicant has also asked the Tribunal to consider the impact of the potential vacancy on the board caused by the removal of the First Respondent, and the possibility of the Tribunal referring the matter to the Commission in order for the latter to take steps in terms of sections 22(2) and (3), and section 81(1)(f) of the Act. The question of the Tribunal's power to make such a referral will be

considered after the primary question relating to whether the Applicant has made out a case for the removal of the First Respondent as director.

8. It may seem as though the issues arising would be best dealt with in terms of section 163 of the Act, which gives a court a wide discretion to make an order that could resolve all issues at once. These issues are not within the scope of the question that must be determined in the main application – namely, whether the Applicant has established grounds for the removal of the Respondent as director.

URGENCY

9. The First Respondent has opposed the present application being brought on an urgent basis, and makes the submission that it should be dismissed for lack of urgency. Reliance is placed on the previous decision of the Companies Tribunal in *Michael Motaung v Peter Rameno Motia* CT00282ADJ2020 (6 March 2020).

10. It should be noted at the outset that the applicable Regulations do not provide for the bringing of urgent applications before the Companies Tribunal. This notwithstanding, as was noted in the *Motaung* decision (at para 21):

> *"There are . . . unique disputes that give rise to circumstances that would result in grave prejudice and harm to a party if such party was to be required to follow the normal time periods strictly. In such circumstances, time is a critical factor and the applicant cannot follow the normal time periods due to the harm that the applicant will suffer if it were to do so. In such an instance, a party can approach a court / tribunal by way of an urgent application in terms of which an urgent relief is sought."*

11. In *Motaung*, where an application for the removal of a director was also brought on an urgent basis, the Companies Tribunal, having regard to the provisions of regulation 154(1)(b), considered it appropriate to have regard to the Uniform Rules of Court dealing with the launching of urgent applications in the High Court (specifically, Rule 6) and the guidelines set out in cases such as *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms)*

Bpk 1972 (1) SA 773 (A) at 782A-G, *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makins Furniture Manufacturers)* 1977 (4) SA 135 (W) and *Sikwe v SA Mutual Fire & General Insurance* 1977 (3) SA 438 (W) at 440G-441A.

12. Although the Companies Tribunal is not bound to follow its previous decisions, there is certainly a clear advantage to doing so for the sake of certainty. The decision to depart from an approach previously taken and brought to the attention of the presiding member should therefore not be taken lightly. That said, I have some difficulty with the approach taken in *Motaung* in that Rule 6 appears to me to be premised on there being a departure from ordinary timelines for filing of papers.

13. Rule 6(12)(a) provides that: "In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet." The procedure, and timelines, followed in the present application are the same as they would have been had the application not been brought on an urgent basis, and it may therefore seem that the application was brought only on a notionally urgent basis. Moreover, there has been no departure from the relevant regulations regarding service, and both parties were able to prepare detailed heads of argument prior to the hearing of the application.

14. Subrule (12)(b) goes on to say that "[i]n every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the *circumstances which he avers render the matter urgent* and the *reasons why he claims that he could not be afforded substantial redress at a hearing in due course*" (emphasis added), which clearly envisages the court having dispensed with the ordinary timelines.

15. In the circumstances of the present case, I cannot see any departure from the ordinary procedure that would necessitate a consideration of whether such departure would be justifiable. Mr Truter, acting for the First Respondent, described the short time allowed for the preparation of heads of argument as unacceptable in the circumstances, but there are no timelines prescribed for the filing of heads of argument for Companies Tribunal hearings. A closer analysis of this issue would therefore, in my view, be an academic exercise – I agree with this submission made by Mr Van Breda, acting for the Applicant.

APPLICATION OF CLEAN HANDS DOCTRINE

Alleged mala fides on the part of the Applicant

16. It was argued for the First Respondent that the clean hands principle finds application in the present matter, and that the litigious history of the dispute between the Applicant and First Respondent "betrays the Applicant's ulterior motive in bringing this application, which is to take advantage of the opportunity he created for himself while in a position of trust as a director of the company and to unashamedly enrich himself at the expense of [Polanocol], the [First] Respondent and the investors/shareholders of the company".

17. Highlighting that "there is no shortage of bad blood between the Parties", the further submission was made that it is "incumbent on this Tribunal to determine whether the [application] has been for the proper purpose of dispute resolution, as envisaged by the Act and Regulations, or with the ill-intent of self-enrichment and retribution thorough an abuse of process".

18. In support of the submission that such intent exists, and the conclusion that the Applicant has conducted himself in bad faith, attention is drawn to a various conduct by the Applicant – namely, (i) signing of the loan agreement with PayApp while he was a director of Polanocol on behalf of both companies, which is alleged to have been done in breach of his duties as director, (ii)

initiating liquidation proceedings without regard for the reasonably foreseeable disputes of fact and the interests of the company and its investors/shareholders, (iii) seeking to appeal the Meer decision rather than have regard for the investors, (iv) bringing the present application on an urgent basis while factual averments submitted to be necessary to prove the application are *pendende lite*, which is alleged to be an attempt to circumvent the courts, (v) bringing the present application while intending to appeal the Meer decision, allegedly knowing that the result would be a management deadlock and another liquidation application on the same set of facts on which Meer J found it would be unjust and inequitable to grant a final winding up order.

19. In the Respondent's heads of argument, the Tribunal's decision in *McDoman Industries Limpopo (Pty) Limited v McDoman Chemical (Pty) Limited* (CT00890/ADJ/2022) [2022] COMPTRI 21 (11 May 2022) is referred to, where it is stated (at para 5.12) that:

"A lawsuit seeking the removal of a director is an equitable remedy and the party bringing such an action must do so with clean hands. This means that the party seeking the director's removal must not be wrongfully responsible for the circumstances leading to the application."

20. Although I do not consider the Tribunal's role in this application to be analogous to that of a court granting equitable relief, application of the clean hands principle must be justifiable based on public policy. As stated by Botes AJ in *Du Plessis v Bonnox Proprietary Limited and Another* (A695/2016, 48111/2014) [2019] ZAGPPHC 515 (18 April 2019) (at para 37):

*"Trite and obviously necessary as this equity principle may be, it must not be thought of as being of universal application. If the rigid application of the clean hands principle would work manifest unfairness on one of the parties, a departure would be justified on the grounds that 'public policy should properly take into account the doing of simple justice between man and man.' (*Jajbhay v Cassim *1939 AD 537)"*

21. Furthermore, for the clean hands doctrine to disentitle a party to relief being sought, there must be some indication of dishonesty, and illegality is not enough. Van Zyl J, in *Mgoqi v City of Cape Town and Another; City of Cape Town v Mqoqi and Another* 2006 (4) SA 355 (C) at para 140, stated the following about the clean hands principle in South African law:

> *"The so-called defence of unclean hands appears to have been imported into our law from English law. It has been applied primarily in the field of unlawful competition and its effect is that relief is refused to a competitor who is guilty of unlawful conduct. It seems clear, however, that the relief is restricted to instances where there has been fraud, dishonesty or mala fides on the part of a claimant."* (emphasis added)

22. The learned judge then quoted the following dictum from *Cambridge Plan AG and Another v Moore and Others* 1987 (4) SA 821 (D) at 842F-H:

> *"Thirdly, and in any event, I am of the view that illegality of the type alleged in the contract is not of such a nature that it would disentitle the applicants to relief. The principle relied upon by the respondents, which is referred to in trade mark law as 'the doctrine of unclean hands' has been considered in several cases in this country, most of which are conveniently collected in the judgment of* Tullen Industries Ltd v A de Sousa Costa (Pty) Ltd and Others *1976 (4) SA 218 (T). As was made clear in that case, it is not enough to disentitle a party to relief that the conduct whereby he acquired the requisite reputation was illegal: such illegality must have taken the form of fraud or, at the very least, dishonesty. (See at 221H.) The conduct of the second applicant in concluding the contracts in question cannot, in my view, be stigmatised as fraudulent or even dishonest."*

23. Although it is clear that the Applicant seeks to protect his financial interests by bringing the application, I am not convinced that the specific conduct referred to in argument (set out above) is sufficient to find that there was dishonesty – if indeed the Tribunal has the power to exercise its discretion to apply the clean hands doctrine in the first place (the role of the Tribunal in applications for removal of the director will be dealt with later). In my view, the Applicant seeks to have the Tribunal remove the First Respondent as director, because this is the only way in which a sole director can be removed where grounds for removal are alleged, and it is necessary for this matter to be determined. The application of the principle to the present case would make it impossible for a determination

to be made as to the presence of grounds for removal of the incumbent director, the Applicant being the only person able to approach the Tribunal in terms of section 71(8). This would be manifestly unfair to Polanocol and the interests of the company as a whole in that there would be no other way to determine whether the First Respondent ought to be removed as director.

24. In the case of *Klokow v Sullivan* 2006 (1) SA 259 (SCA), the Supreme Court of Appeal (per Cachalia AJ) considered the origin and application of the clean hands doctrine in South Africa. Although this case dealt with the enforcement of an illegal contract, the following passage of the judgment (at 266E-H) is relevant:

"*The 'clean hands doctrine', derived from English law, is similar in effect to the Roman law maxim* in pari delicto potior est conditio defendentis*, which operated as an absolute bar to the grant of relief to the plaintiff. As a general rule, a plaintiff who was found to be* in pari delicto *was hence unable to recover any money paid or property handed over to a defendant pursuant to it, and if a plaintiff based his case on such a contract in formulating his pleading, he would fail on this basis alone.*"

25. The court made reference to the decision of *Jajbhay v Cassim* 1939 AD 537, where the court recognised that the principle underlying the *in par delictum* rule (that courts must discourage illegal transactions), but recognised that the rule's strict enforcement may sometimes case inequitable results between parties to an illegal contract. According to Cachalia AJ, the *Jajhbay* decision "enunciated the principle that the rule must be relaxed where it is necessary to prevent injustice or to promote public policy" (266G-H).

26. More recently, in *Mostert and Others v Nash and Another* 2018 (5) SA 409 (SCA), the Supreme Court (per Wallis JA) considered the unclean hands principle in relation to abuse of process, which is what is alleged in the present case before the Tribunal. At para 25, the learned judge held the following:

"While courts are entitled to prevent any abuse of process, it is a power that should be sparingly exercised. The starting point is the constitutional guarantee of the right of access

to courts in s 34 of the Constitution. That right is of cardinal importance for the adjudication of justiciable disputes. But, where the procedures of the court are being used to achieve purposes for which they are not intended, that will amount to an abuse of process."

Role of the Tribunal in section 71(8) applications

27. The question that arises is whether the Tribunal, as a statutory administrative tribunal, grants relief in terms of section 71(8) of the Act on the basis of equity, or whether its role is simply to determine what cannot be determined by a majority of directors of a board, there being less than three.

28. The Tribunal is established by the Act and must act in accordance with its powers conferred on it for the purposes for which they are conferred. In the present circumstances, it appears to me that the function of the Tribunal is to act in place of the board of directors to, *inter alia*, protect the interests of the company. It is relevant that the purposes of the Act include encouraging high standards of corporate governance (section 7(b)(iii)), balancing the rights and obligations of shareholders and directors within companies (section 7(i)), and encouraging the efficient and responsible management of companies (section 7(j)). The grounds for removal set out in section 71(3) relate to reasons why a director should not hold office, and where any of the grounds are present, it may be appropriate for such director to be removed.

29. If one reflects on section 71(3), what is envisaged is that once a shareholder or director alleges that any of the grounds for removal are present in respect of a director, the remaining directors *must determine the matter by resolution*, and *may remove a director* when the relevant grounds are present.

30. Section 71(8), similarly, provides for where there are less than three directors, envisaging the same parties who would bring the allegation to the attention of the board (a shareholder or director) to approach the Tribunal. In this sense, the Tribunal's role is to exercise its powers in the place of the board.

31. It is clear that section 71(8) provides for the situation where a determination by the board to remove a director in terms of section 71(3) is impossible. In effect, the Tribunal must make the decision that cannot otherwise be made by the board. In circumstances where a director ought to be removed on one or more of the grounds set out in section 71(3) (and would likely be removed by a board consisting of three or more directors acting in accordance with their fiduciary duties to the company), if the doctrine of unclean hands were to preclude an application being made to the Tribunal, this would negatively impact the interests of the company.

32. In my view, once the allegation is made in an application brought before the Tribunal that there are grounds for removal of a director on the grounds set out, the Tribunal is duty bound to determine the matter, and where any of the grounds set out in section 71(3) have been established, remove the director in question. In the present case, the First Respondent has been afforded the opportunity to make representations, as required by section 71(4) read with section 71(8)(c), and in the event that he is removed, would be entitled to approach the court to review the decision in terms of section 71(5) read with section 71(8)(c).

33. The Tribunal is therefore obliged to make a determination of whether any of the grounds set out in section 71(3) are present. This aligns with the purposes of the Act and the necessity of the Tribunal's involvement to protect the interests of a company and its stakeholders.

DISPUTES OF FACT

34. In the First Respondent's heads of argument, it was correctly stated that the Tribunal is obliged to apply the test set out in *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623, and that the Applicant is charged with the onus of satisfying the Tribunal of the inherent credibility of his factual averments. Accordingly, if the respondent is able to show a *bona fide* dispute

of fact against the factual grounds upon which the applicant's relief is sought, the order cannot be granted.

35. Mr Truter, for the First Respondent, submitted that, the First Respondent has disputed each and every allegation made by him by the Applicant, as well as critical factual averments made by the Applicant, and has actively grappled with each and every aspect in his 200-page answering affidavit. These factual disputes include (i) whether the Applicant is a 50% shareholder, (ii) whether shares were sold and whether share certificates were issued to investors prior to 2 March 2021, (iii) whether the First Respondent and/or the company engaged in fraudulent or illegal activity, (iv) whether the First Respondent's actions have at all times been in line with the objective of the furtherance and continued existence of the Company, (v) whether the First Respondent was at all times *bona fide* in his belief that he was acting in terms of a valid memorandum of incorporation, and that the legal advice obtained from Advocate Carlo Viljoen was accurate and reliable, and (vi) the existence of the PayApp loan which formed the basis of the liquidation application.

36. Reference is made to the following dictum from para 52 of the Meer decision, and in oral argument the question was rhetorically posed as to why the Applicant would have brought an application in the first place in view of the learned judge's finding that there was a "myriad" of disputes of fact:

"Given the breakdown in the relationship between Dalton and Bartman, and the denial of the debts, the myriad disputes should have been foreseen and the application should not have been proceeded with."

37. The submission was made that, although the Tribunal is entitled to summon witnesses, in view of the its obligation to "conduct its adjudication proceedings contemplated in this Act expeditiously and in accordance with the principles of natural justice" in terms of section 180(1)(a) of the Act, it would be impossible for the Tribunal to hear oral evidence on each and every dispute of fact while simultaneously complying with this obligation.

38. In determining whether the relief granted by the Tribunal would be effective or nullified by a deadlock between shareholders, a decisive factor, according to Mr Truter, would be the determination of the issue of shareholding in Polanocol. It was further submitted that this issue is *lis pendens* given that the Applicant states that he has sought leave to appeal the Meer decision.

39. With regard to the First Respondent's denials, although he may have denied all the allegations made by the Applicant, some of these are untenable. It was submitted on his behalf that the content of his explanations should be taken into account in order to distinguish true denials from disagreement, and that *Plascon-Evans* ought to only be applied where there is meaningful *bona fide* engagement with the facts. This would require the Tribunal to consider whether each denial is backed up with engagement.

40. The rule in *Plascon-Evans* precludes final relief from being granted unless the facts averred in the applicant's affidavit, which have been admitted by the respondent, and the facts alleged by the respondent, taken together justify such an order. In some instances, however, a denial by the respondent does not generate a *bona fide* dispute of fact. It is only a *bona fide* dispute of fact that cannot be satisfactorily determined without the aid of oral evidence.

41. According to *Room Hire v Jeppe Street Mansions* 1949 (3) SA 1155 (T), a *bona fide* (or "genuine") dispute of fact arises in one of three ways – namely, where (i) the respondent denies all material allegations made on behalf of the applicant and either produces, or will produce, positive evidence to the contrary, (ii) the respondent admits the applicant's affidavit evidence, but alleges other facts which the applicant disputes, or (iii) the respondent concedes that he has no knowledge of the main facts stated by the applicant, but denies them, putting the applicant to the proof thereof, and gives, or proposes to give, evidence to show that (a) the applicant and his deponents are biased or untruthful, or

otherwise unreliable, *and* (b) certain facts upon which the applicant relies are untrue.

42. In view of the above, according to Back AJ's decision in *Soffiantini v Mould* 1956 (4) SA 150 (E), it must be borne in mind that a robust, common sense approach must be taken to a dispute on motion, and the adjudicator of the dispute must not hesitate to decide on an issue on affidavit merely because it may be difficult to do so. That said, a dispute should not be settled solely on probabilities without giving due consideration to the advantages of oral evidence.

43. In the present matter, the Tribunal must consider the relevant facts only in so far as they relate whether or not there exist grounds for removal of the First Respondent as director of Polanocol. It is therefore necessary to establish whether or not the Applicant has made out a case for the removal of the First Respondent, based on the papers placed before the Tribunal, or whether there exists – in relation to the *specific claims* made by the Applicant – a *bona fide* dispute of fact arising would preclude the Tribunal from making an order for his removal. The specific claims made by the Applicant to justify removal in terms of the relevant provisions of the Act. The onus of showing that the First Respondent's conduct amounts to any of the grounds for removal obviously rests on the Applicant.

REMOVAL OF THE FIRST RESPONDENT AS DIRECTOR

44. Section 71(8), read with subsection (3)(b) of the Act prescribes that where a company has fewer than three directors, any director or shareholder may apply to the Companies Tribunal to make a determination as to whether a director of the company in question has neglected, or been derelict in the performance of, the functions of director. On the basis of such determination, the Tribunal may order the removal of such director.

45. The Applicant submits that the First Respondent's conduct runs counter to his obligations in terms of the Act – namely to exercise the powers and perform the functions of director – (a) in good faith and for a proper purpose; (b) in the best interests of the company; and (c) with the degree of care, skill and diligence that may reasonably be expected of him. When assessing the First Respondent's conduct in relation to the latter, it is relevant that one must consider what may reasonably be expected of a person (i) carrying out the same functions in relation to the company as those carried out by that director; and (ii) having the general knowledge, skill and experience of that director".

46. In the Henney decision, the court found that – while the First Respondent was Polanocol's only director lawfully occupying a position on the company's board – the company's MOI was unlawfully amended, shares were unlawfully issued and allocated, another director was unlawfully appointed.

47. Before considering whether the First Respondent has neglected the functions of director, or been derelict in the performance thereof, it is necessary to consider whether the findings of the High Court can be treated as evidence in the present application.

Admissibility of findings of the High Court as evidence

48. The Applicant relies heavily on the findings of the High Court in the Henney decision, which gives rise to the question of whether and to what extent the Tribunal ought to rely on the findings of another adjudicative body. The rule in *Hollington v F Hewthorne & Co Ltd* [1943] KB 587 (CA), [1943] 2 All ER 35 (CA) famously established that criminal convictions cannot be used as evidence of wrongdoing in a subsequent civil case. According to Goddard LJ, such conviction is merely the opinion of another court – in that case, the court's opinion that the driver of a motor vehicle had driven carelessly. The court thus found that on the trial on the issue in the civil court, the opinion of the criminal court is equally irrelevant as the opinion of a bystander (at 595; 40).

49. It should be noted that this rule is not uncontroversial, and whereas it has been abolished in England, it continues to exist in South African law, having been accepted by the Supreme Court of Appeal in the case of *Malaudzi v Old Mutual Life Assurance Company (South Africa) Limited* 2017 (6) SA 90 (SCA) at para 40. In that case, Ponnan JA also made reference to the court's previous decision of *Hassim (also known as Essack) v Incorporated Law of Society of Natal* 1977 (2) SA 757 (A) at 764E-765G, and the Constitutional Court's decision in *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) at para 42, where it made reference to *Hollington*'s case, appearing to tacitly approve of the rule, albeit in a criminal context.

50. More recently, in *Institute for Accountability v Public Protector* 2020 (5) SA 179 (GP), Coppin J found that the rule did not apply to prior findings of a civil court in subsequent civil proceedings. This decision has been the subject of academic criticism in PJ Schwikkard and TB Mosaka *Principles of Evidence* 5ed (2023) given that the learned judge did not, according to the authors, fully engage with the source of the rule and its rationale (see p 107). It is the authors' view that the statutory repeal of the rule in *Hollington* is long overdue (p 108), notwithstanding that the South African Law Commission was not prepared to recommend statutory repeal in its report on *Review of the Law of Evidence: Project 6* (1986), where it claimed (at para 18.5) that attaching probative value to the first court's decision would effectively be to declare something irrelevant to be relevant.

51. The English Law Reform Committee's 15th Report (*The Rule in Hollington v F Hewthorne & Co Ltd)* Cmnd 3391, however, stated the following (at para 4):

> *"It is in a sense true that a finding by any court that a person was culpable or not culpable of a particular offence of civil wrong is an expression of opinion by the court. But it is of a different character from an expression of opinion by a private individual. In the first place, it is made by persons, whether judges, magistrates or juries, acting under a legal duty to form and express an opinion on that issue. In the second place, in forming their opinion they are aided by a procedure, of which the law of evidence forms, part, which has been*

evolved with a view to ensuring that the material needed to enable them to form a correct opinion is available to them. In the third place, their opinion, expressed in the form of a finding or verdict of guilty or not guilty in criminal proceedings or a judgment in civil proceedings, has consequences which are enforced by the executive power of the state."

52. According to Schwikkard and Mosaka (ibid) the decision of Coppin J in *Institute for Accountability v Public Protector* "can be used as authority for the proposition that the *Hollington* rule does not apply when the finding of a civil court is sought to be admitted in subsequent civil proceedings".

53. Notwithstanding the continued existence of the rule in a South African context, it appears, therefore, that the findings of Henney J may be taken into account as evidence of the First Respondent's conduct in the assessment of whether he has neglected, or been derelict in the performance of his functions as a director.

54. Accepting, therefore, the finding of illegality in the Henney decision, what remains is to consider whether the First Respondent's illegal conduct falls within the scope of section 71(3)(b) of the Act (and whether the Applicant has discharged the onus of proof, having regard for any *bona fide* disputes of fact arising on the papers in relation to the conduct in question).

Assessment of First Respondent's conduct

55. Bearing in mind the onus of proof resting on the Applicant to establish that the relevant grounds for the First Respondent's removal have been established in the founding papers, it is also relevant to note that the answering papers serve the function of allowing the director those removal in being considered to make representations in terms of section 71(4)(b) of the Act, before the decision is taken. In this regard, the rationale for the director's right to be afforded "a reasonable opportunity to make a presentation" before the decision is taken is relevant.

56. In *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC), the Constitutional Court held that subsection 71(2) of the Act (where

the director is afforded this right before a vote for his/her removal is taken by shareholders) requires compliance with the rules of natural justice. With reference to this case, the Western Cape High Court has held that "rules of natural justice and the fundamental principle of *audi alterem partem* presupposes the right to place facts and evidence before the decision maker" and that "[a] prelude to the exercise of the right includes the right to obtain information, particulars or documents so as to place the affected person in a position to meet the case that need be answered".

57. It is therefore necessary for the founding affidavit in the present application to have set out the relevant grounds with sufficient particularity for the First Respondent to provide a meaningful answer. Although the answering affidavit was replete with counter-allegations and blanket denials, Mr Truter submitted that the Tribunal should bear in mind that the First Respondent is a layperson, and that his denials should accordingly be considered substantively to determine the nature of the denial. Mr Van Breda's view was that a denial in this context could only be a denial.

58. Mr Truter argued that the First Respondent's reliance on the advice of Advocate Carlo Viljoen was reasonable in the circumstances, and that the illegalities arose as a result of such reliance. It is relevant that Viljoen was a legal professional, and that he is alleged to have been the driving force behind the company, particularly during his time that he was purportedly acting as a director, albeit one that was illegally appointed.

59. A distinction must be drawn between the duty of care that the First Respondent owes to Polanocol, and the duties owed on the basis of his fiduciary relationship with the company. The relevant duty of care is found in section 76(3)(c) of the Act, which requires that a director of a company, when acting in that capacity, exercise the powers and perform the functions of director:

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

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

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

60. The above provision clearly has an objective, and subjective element, which must take into account the objective minimum standard required of a director of a company like Polanocol. The authors of the *Commentary on the Companies Act 2008* state the following (at 2–1324):

"It is arguable whether, in terms of these statutory criteria, the prior common-law principle has survived, in an unqualified and general form, that a director is not liable for 'mere errors' . . . [n]or is it clear whether, in general terms, the prior common-law principle has survived that a director is not required 'to have special business acumen or expertise, or singular ability of intelligence, or even experience in the business of the company'."

61. In so far as he is required to act with reasonable care, skill, and diligence in performance of his obligations as director (as set out above), a director will have discharged this duty if he – in relation to any particular matter – complied with the provisions of section 76(4)(a). In terms of the latter provision, the question turns of whether:

"(i) the director in question has taken reasonable diligent steps to become informed about the matter;

(ii) either –

(aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or

(bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and

(iii) the director made the decision . . . with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company . . . "

62. The Second and Third Respondents submit that "Carlo Viljoen purported himself to be a professional legal practitioner and where Rodney Bartman relied on his advice, such reliance is reasonable in the circumstances". Mr Truter made much of the First Respondent's reliance on Viljoen's legal knowledge, and there does not appear to be any compelling evidence to suggest the contrary.

63. It is not clear from the evidence before the Tribunal whether the First Respondent took the necessary steps to inform himself about the various actions taken that have been found to be illegal and set aside by the Western Cape High Court. In so far as reliance was placed on Viljoen, section 76(4)(b)(i) of the Act provides for instances where a director may rely on professional persons in certain circumstances, but in the present case, the First Respondent appears to have been under the impression that Viljoen had lawfully been appointed to the board, and had thus relied on who he believed to be another member of the board, to take primarily responsibility for legal matters, given his specialised legal knowledge. This would, in my view, be reasonable, provided that the First Respondent has not failed to exercise his own independent judgment in relation to the general management of the company, the responsibility for which vests in the board as a whole. A layperson relying heavily on a legal practitioner for advice of a legal nature cannot, in my view, be considered a dereliction of duty.

64. With regard to the First Respondent's fiduciary duties, the above so-called "business judgment rule" does not apply. In so far as the First Respondent may have breached his duty to act in good faith and for a proper purpose, and in the best interests of the company, the defence in section 76(4) has no application.

65. The task of the Tribunal in the present matter is to determine whether the allegations proved by the Applicant support a finding that the First Respondent has neglected, or been derelict in the performance of his duties as a director of Polanocol. It is accordingly necessary to consider the specific conduct alleged

by the Applicant to support such a finding, and the answers given by the Respondents that may show the contrary.

66. Before considering each of the allegations in turn, it should be noted that a general difficulty arises in relation to ascertaining what actions can properly be attributed to the First Respondent, from the point in time at which he believed Viljoen to have been validly appointed to the board. There is no reason to find that he did not genuinely believe that the appointment was valid, nor that he did not trust Viljoen's advice on legal matters where his own knowledge was lacking. There are no minimum requirements for someone to be a director, and it is quite acceptable for a lay person to be a director; it is also quite acceptable for a lay person to rely on the advice of a professional, and would be diligent to do so where he or she believes that this would assist with the proper management of the company.

67. Accordingly, the First Respondent's own independent conduct must be considered, bearing in mind that the transgressions highlighted by the Applicant may be attributable to Viljoen acting as a *de facto* director, and the First Respondent cannot be guilty by mere association. If it can be shown that the First Respondent engaged in conduct that indicates a dereliction or neglection of his duties to Polanocol, then the Tribunal should remove him as director.

<u>Specific conduct giving rise to the grounds for removal</u>

68. The unlawful amendment (replacement) of Polanocol's MOI, and issue and allocation of shares (including shares issued to directors) appear to have been done while the First Respondent relied on Vijoen, whom he thought to have been validly appointed to the board. Viljoen's appointment was most likely also pursuant to the First Applicant having received his advice and believed the appointment to be in the best interests of the company. I cannot find that there is necessarily any lack of good faith, nor dereliction of duty. Although section 76(5)(b)(i) requires that Viljoen was *retained* by Polanocol in order for the First

Respondent to rely on his advice, no evidence has been placed before the Tribunal to suggest that this was not the case.

69. With regard to the issuing of shares to new shareholders, and to the First Respondent as an existing shareholder, it is relevant that the exercise of the power to issue shares must be for the purpose of raising capital for the company, and not to dilute shareholding, or for another ulterior purpose. Clause 3.2.2 of Polanocol's memorandum provides for shares to be "for cash, *indebtedness*, securities or other property" (emphasis added), which may seem to envisage an issue of shares for ulterior purposes contrary to the fiduciary duties of the directors, which cannot be negated by the company's MOI.

69.1. The Applicant contends that an additional 1040 shares had been issued to the First Respondent and a further 1820 to Viljoen in their capacity as directors as the purchase price of R79,000 per share. These transactions were found to be in contravention of section 41 of the Act, having not been authorised by special resolution, and set aside by Henney J. The Applicant states that "[t]his would have amounted to a loss of R225,9400,000 to the company", which seems to imply that the directors did not pay for the shares (and that the shares were paid for by "indebtedness"), and therefore that the purpose for which they were issued was not to raise share capital. No evidence has been placed before the Tribunal to suggest that Polanocol received payment for these shares.

69.2. Another curious provision of Polanocol's MOI is clause 5.2(2), which provides that "[e]ach director will have one vote, by number of shares thus, the director with 2 shares will have 2 votes and the director with 1 share will have 1 vote". This is inconsistent with governance by the board in terms of the Act, but part of the intended purpose may have been to alter control, not only as shareholders, but also as directors.

69.3. Although it may well be possible that the First Respondent acted in breach of his duty to act in good faith and for a proper purpose in so doing, I am not convinced that this conduct can be attributed to him independently of Viljoen so as to amount to his neglecting or being derelict in the performance of his functions as director. Particularly given his reliance on legal advice reasonably sought from Viljoen.

70. Perhaps the most concerning conduct complained of is the unlawful expropriation of the Applicant's shares, which was rectified by the Western Cape High Court (per Henney J). The First Respondent denies the relevant averment, and states that the Henney J had erred in his finding, because "all the facts were unable to be presented as per addendum A1-10". The relevant annexures do not give any justification for the illegal expropriation of the Applicant's shareholding. In the first High Court application, Henney J found (at para 41) that:

"No such shareholders agreement was placed before the court, to indicate the respondents' entitlement, in terms of provisions of that agreement, to terminate it. Furthermore, even if there had been such an agreement in place, they failed to show the court that such an agreement expressly provided for the termination of such an agreement between Polanocol and Dalton. They also failed to provide any basis on which they could lawfully strip Dalton of his shareholding."

70.1. The version of the shareholders' agreement placed before the Tribunal also contains no such clause. On the basis of the findings in the Henney decision, without any evidence being presented to the contrary, I accept that the First Respondent, while the sole *de jure* director of Polanocol, attempted to expropriate the Applicant's shareholding in the company, the effect of which was to unfairly prejudice the Applicant.

70.2. The basis for the expropriation was that the Applicant was a "rogue shareholder", but there is no such recognised concept in company law. A shareholder, as an owner, has the right to participate in the

management of the company to the extent permitted by law, and is not required to agree with other shareholders, nor with members of the board. Where any deadlock arises, resolution must also be in accordance with the law.

70.3. The Second and Third Respondents make the submission that "[d]espite Judge Henney finding that Rodney Bartman's conduct was prejudicial to a single shareholder, nothing in the judgment states that his conduct was prejudicial to the company". Although this conduct is clearly illegal, it appears (from the Henney decision) that Viljoen espoused the view that this was a common law right of the company. Had the First Respondent been similarly advised, he would – unlike Henney J – have naturally been inclined to believe this to be true.

70.4. Reliant on the advice of Viljoen, it is not clear that the court's findings imply that the First Respondent acted contrary to his fiduciary duties owed to Polanocol.

71. With regard to Polanocol's illegal trading (as found by Meer J), it seems as though Polanocol is operating as a share block company in contravention of the Share Blocks Control Act 59 of 1980. Section 5A(1) of that Act provides as follows:

"If shares in a company which is to be formed will in any manner whatsoever confer a right to or an interest in the use of immovable property, no person shall, before the company has been incorporated under the Companies Act as a share block company, receive any consideration in respect of any right to a share in the company from any person other than a person who will be a share block developer in relation to the company."

71.1. Contravention of the above provision is a criminal offence in terms of section 21 of the same Act. Mr Truter submitted that the Tribunal does not have the power to make a finding on illegality, which may be correct in that the question of compliance is in relation to legislation other than the Companies Act. What is relevant is that the First Respondent

appears to be aware of the need for Polanocol to be brought into compliance with the relevant law, and has been from at least 6 July 2023, when he addressed a letter to the Minister of Agriculture, Land Reform and Rural Development seeking guidance. It is not clear whether he had knowingly issued shares in contravention of either the Share Blocks Control Act, or the Subdivision of Agricultural Land Act 70 of 1970 (of which the company is also, according to the Applicant, in violation).

71.2. Again, in spite of the illegality (which is clearly cause for serious concern), the Applicant has not established that the First Respondent has neglected or been derelict in his duties as director.

72. The Applicant makes the general allegation that, based on the case made out, and the findings of the Western Cape High Court, the First Respondent clearly "has a wilful disregard of the rule of law". For the present matter, it is relevant whether any such wilful disregard is in relation to the First Respondent's duties and functions as director of Polanocol. The First Respondent would have become aware that his reliance on Viljoen was perhaps unwarranted when the Henney decision was handed down. Since then, despite what may be some misunderstandings about the legal consequences of the Meer decision on the findings made in the Henney decision, the only conduct that can be attributed to the First Respondent is the alleged "selling off [of] the assets of the farm Pampoene Kraal, wholly owned by [Polanocol] with no consultation or approval from its shareholders". This, however, is disputed by the First Respondent, and there is insufficient evidence before the Tribunal to make any determination as to whether such dispositions would require shareholder approval in terms of section 112 of the Act.

73. It may seem that the complexity of the dispute between the parties, and the range of interests involved, would justify an application (whether urgent or otherwise) to the High Court to grant a wider range of relief than the Tribunal is

empowered to grant. The Second and Third Respondent also allege that they are entitled to be reflected as shareholders of Polanocol, which would mean that a deadlock would likely not arise in the event that the First Respondent is removed, but this presupposes that non-compliance with section 5A(1) of the Share Blocks Control Act would not invalidate such right. This determination could also be made by a court, but not by the Tribunal.

FURTHER RELIEF SOUGHT

74. The relief sought in the Applicant's founding affidavit included an order that Polanocol cease reckless trading, and an order for compensation to the company for loss and damages or costs sustained as a consequence of the carrying on of its business in a manner prohibited by section 22(1) of the Act.

75. Although Mr Van Breda did not pursue the above in argument, conceding that such relief was beyond the scope of the Tribunal's powers, he maintained that the Tribunal should refer the matter to the CIPC for investigation. This would have been necessary in the event that an order for the suspension of the First Respondent, pending such investigation, was granted. The Act does not provide for the suspension of a director in the context of an application for his/her removal, and nor is it clear that the Tribunal is empowered to refer matters for investigation. In any event, as was submitted by Mr Truter, this matter is at least to some extent moot in that Meer J has already referred the issues arising in the final liquidation application for such investigation.

COSTS

76. Both sides presented argument to support a punitive costs order against the other, pointing to the voluminous papers and repeated denials by the First Respondent on the one hand, and lack of urgency on the other.

77. Although the Applicant has not been substantially successful in this matter, it is clear that the application for the removal of the First Respondent was brought based on a genuine and legitimate concern for the way in which the affairs of Polanocol are being conducted. I therefore do not consider it to be in the interests of justice to make an award of costs against the Applicant.

ORDER

78. It is accordingly order that:

(a) The application for removal of the First Respondent is refused.

(b) Each party is to pay its own costs.

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Richard Bradstreet
Member of the Companies Tribunal

1 November 2023