

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GUATENG DIVISION, JOHANNESBURG

Case No: 21/58226

Delta Property Fund Limited v Nomvete & 2 Others

SUMMARY

Flynote:

Company Law – Directors’ fiduciary duties – Breach of fiduciary duty, reckless management, and financial misconduct – Gross negligence and abuse of position under section 162(5) of the Companies Act 71 of 2008 – Directors’ liability for company losses under section 77 – Pactum de non petendo considered and rejected for lack of mutual agreement – Costs principles in complex litigation.

This case involves Delta Property Fund Ltd (Delta) suing its former employees and directors, Sandile Nomvete, Shaneel Maharaj, and Otis Tshabalala, and asking that they be declared delinquent directors under section 162(5) of the Companies Act 71 of 2008 and held liable for damages, losses, and costs under section 77 of the Act. Delta's claims were based on four causes of action, each involving wrongful conduct by the defendants and was largely supported by forensic investigations conducted by Deloitte and Mazars.

Delta’s claim was complicated by the defendants’ argument that they entered into an agreement (*pactum de non petendo*) with Delta, which resulted in an agreement that no legal action—specifically civil action—would be pursued against the defendants if they resigned. In addressing the claim of a pactum, the Court evaluated whether the necessary elements of a contract were met, including an offer with *animus contrahendi*; clear terms; unequivocal acceptance; and mutual awareness of the agreed terms.

The defendants' evidence included transcripts of recorded virtual meetings and *viva voce* testimony. The Court scrutinised the transcripts and concluded that the recorded conversations showed no intent to create a binding agreement regarding civil litigation. The offer was focused solely on employment-related matters, specifically disciplinary action. The Court further found that the defendants’ failure to reference the alleged pactum in their resignation letters or earlier pleadings further weakened their case. They only raised the issue of a pactum shortly before the trial, suggesting it was a last-minute attempt to avoid accountability for their actions.

Ultimately, the Court found that no valid pactum was concluded by any of the defendants and this claim was dismissed.

Regarding Delta's first cause of action, the Court addressed a series of improper extensions of a loan initially granted by Nedbank and later transferred to the Bank of China (BoC). Delta, relying on loans for property acquisitions, had a fixed-term loan from Nedbank in 2012, which was partially sold to BoC in 2016. The loan was extended multiple times, but during the third and fifth extensions, improprieties arose. Messrs Nomvete and Maharaj, Delta's representatives, engaged Mr Van Wyk, an employee of BoC, in a private capacity to facilitate the loan extensions in exchange for a fee. The payments to Mr Van Wyk, disguised under different entities (Striving Mind and Mazaleni), were processed without due diligence and were found to be unlawful.

The Court found that the conduct of Messrs Nomvete and Maharaj constituted a breach of their fiduciary duties to Delta and amounted to unlawful conduct. Specifically, it was determined that the payments made to Mr Van Wyk were bribes, an act of corruption, under the Prevention and Combatting of Corrupt Activities Act 12 of 2004. The secrecy around the transactions; the involvement of entities not part of the agreement; and the misrepresentation of the payments to Delta, all pointed to deliberate efforts to conceal the true nature of the transactions. The Court criticised the actions as dishonest, corrupt and ultimately, criminal.

Regarding the second cause of action, Delta is a company primarily involved in leasing properties to government departments, including the Department of Public Works (DPW). Delta entered into mandate agreements with two entities, Mhlandla and Zimzin, to broker the renewal of 59 lease agreements with DPW. The mandates, signed by Mr. Nomvete, with the knowledge of Messrs Maharaj and Tshabalala, were subject to specific conditions, including the requirement for the brokers to hold a Fidelity Fund Certificate. Several payments were made to Mhlandla and Zimzin for commission on lease renewals, but there were significant irregularities, including payments for leases concluded outside the mandate period, approval of invoices without proper documentation, and the involvement of non-registered brokers.

The Court found that Messrs Nomvete, Maharaj, and Tshabalala breached their fiduciary duties to Delta through financial misconduct and reckless decision-making in relation to the mandate agreements with Mhlandla and Zimzin. The defendants failed to disclose these agreements to Delta's Board; conducted no due diligence before committing Delta to unreasonable contracts; and authorised unlawful commission payments without proof of entitlement. Their conduct was reckless, as they approved payments to unqualified brokers without verifying their credentials. Mr Nomvete was found to have engaged in dishonest conduct by receiving a secret profit in violation of the no-conflict rule. The Court concluded that all three defendants acted in bad faith and held them liable for their misconduct.

In addressing the third cause of action, the Court considered Mr. Nomvete's involvement in a series of lease agreements between EPF, a company he had a role in, and Delta, represented by Mr. Nomvete. The agreements prohibited EPF from subletting the properties at higher rental rates than Delta. However, EPF subleased to the eThekweni Municipality at inflated rates without Delta's consent, breaching the terms of the lease. Evidence indicated that EPF overcharged the Municipality by approximately R6.4 million. The Court found that Mr. Nomvete failed in his fiduciary duty to Delta, acted dishonestly, and violated provisions of the Companies Act, particularly by not acting in good faith and for a proper purpose.

The fourth cause of action involved Mr. Nomvete's private company, Shameless Way, which contracted with Delta for chartered flights. Delta argued that these contracts violated its internal travel policies. Mr. Nomvete, along with Mr. Maharaj, failed to follow necessary procedures, including securing competitive quotes and approval from the Board Chairman, as required by Delta's policy. The Court concluded that Mr. Nomvete's actions exposed Delta to allegations of nepotism, which could damage its reputation. His failure to ensure compliance with governance protocols breached his fiduciary duty, and Mr. Maharaj's negligence as CFO further compromised Delta's interests.

During the hearing, Mr Nomvete handed in a written statement and asked that this statement be accepted as part of his evidence and that it be taken into account in the determination of the matter. The Court noted his partial acceptance of responsibility but found his remorse insufficient in light of the gravity of his misconduct. He later attempted to withdraw his sworn statement made under oath which the Court rejected. Despite his claim that it was incorrect, the Court held that his statement remained part of the evidence, as he was asked and affirmed his understanding and satisfaction with it. His attempt to withdraw it was deemed legally impermissible without a formal request to testify and explain the change of heart.

The Court held that sub-section 162(5)(c) of the Companies Act mandates a declaration of delinquency if a director engages in conduct such as grossly abusing their position; taking personal advantage of company opportunities; causing harm through gross negligence; or breaching the trust relationship inherent in their duties. The Court emphasised that while serious misconduct is required to establish delinquency, gross negligence—equated with recklessness—is sufficient, and the assessment involves both an objective standard of reasonable directorship and a subjective consideration of the director's knowledge, skill, and experience.

Applying these principles, the Court found that the conduct of Messrs Nomvete, Maharaj, and Tshabalala warranted declarations of delinquency. Mr Nomvete's actions led to repeated failures to uphold his fiduciary duties; exposing Delta to legal risks, and breaches to corporate governance protocols. He also demonstrated a complete lack of remorse and an inability to recognise his criminal conduct, leading the Court to conclude that he was incapable of rehabilitation. As a result, he was declared delinquent for life. Mr Maharaj, while acknowledging negligence, failed to appreciate the gravity of his misconduct. The Court rejected his request for a limited declaration and imposed a delinquency period of fifteen years. Mr Tshabalala's misconduct, being restricted to the second cause of action, warranted the statutory minimum of seven years. The Court underscored that these declarations served the purpose of protecting the public from directors who engage in serious misconduct and breach the trust placed in them.

The Court held that under subsection 77(2)(a) of the Companies Act, directors are liable for losses sustained by the company due to breaches of fiduciary duty, while subsection 77(3)(c) imposes liability for losses resulting from fraudulent acts or omissions. Applying these provisions, the Court found that the misconduct of Messrs Nomvete, Maharaj, and Tshabalala caused Delta to suffer significant financial losses.

Messrs Nomvete and Maharaj were held liable for R2.1 million paid unlawfully to Mr Van Wyk. All three defendants were jointly and severally liable for R26.7 million in improper payments to Mhlandla and Zimzin. Additionally, Messrs Nomvete and Maharaj were held liable for R863,692.94 paid to Shameless Way. Beyond these direct losses, Delta also incurred

costs amounting to R3.7 million for forensic investigations, management resources, and public relations expenses due to the fallout from the defendants' misconduct. The Court found that these costs were a direct result of the breaches but determined that liability should correspond to each defendant's involvement. Mr Nomvete, implicated in three of the tainted transactions, was held liable for all related losses. Mr Maharaj, involved in the same three transactions, bore similar liability. Mr Tshabalala, implicated in only one cause of action, was held liable only for losses arising from that transaction. However, all three were held jointly and severally liable for the costs incurred in the forensic investigations conducted by Deloitte and Mazars.

The defendants were ordered to pay the costs of the application, including the costs of two counsel. Delta, given the complexity of the case, employed the use of three counsel which was deemed justifiable by the Court however, it found that it would be fair and just for Delta to be compensated for the costs of two counsel.