



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 14 November 2024

Status: Immediate

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Smuts v Kromelboog Conservation Services (Pty) Ltd and Another (511/2023) 2024 ZASCA 156 (14 November 2024)

Today the Supreme Court of Appeal (SCA) dismissed an appeal with costs, including the costs of two counsel, where so employed. The appeal, instituted by the appellant, Dr Boudewyn Homburg De Vries Smuts, emanated from the Western Cape Division of the High Court, Cape Town (the high court) and was directed to an order granted by that court in favour of the first respondent, Kromelboog Conservation Services Pty (Ltd) (Kromelboog), declaring Dr Smuts a delinquent director in terms of s 162 of the Companies Act 71 of 2008 (the Act). The issue on appeal was whether the order issued by the high court was justified.

In 2015, Dr Smuts, a nature conservationist, was appointed as Kromelboog's sole director until his removal on 7 July 2021. Kromelboog is a company that engages in livestock farming. It was solely owned by a trust named Tamarisk Trust (Tamarisk). At relevant times Mr Timothy Allsop was its trustee. Dr Smuts was also a trustee and an 'executive officer' of a not-for-profit charitable trust, the Landmark Foundation Trust (Landmark), which he founded in 2004. Landmark conducted a research project known as Shepherding Back Bio-diversity Project (SBBP). The aim of the project was to re-introduce traditional herding or human shepherding as a conservation initiative in semi-arid rangeland livestock agricultural areas.

On 27 May 2016, Tamarisk, Landmark and Kromelboog concluded a written management agreement in terms of which Landmark was appointed as a manager of four adjacent farms in Beaufort West, Western Cape (the properties), purchased by Tamarisk in 2015. Kromelboog later purchased another farm, Kambro.

Given that Landmark was a not-for-profit charitable trust and had specific tax requirements, Kromelboog was incorporated as the management and operations arm of the farming activities in the properties. It was averred on behalf of Kromelboog that, it was responsible for all commercial farming activity on the properties. Dr Smuts disputed this, asserting that Kromelboog was established because Landmark could not trade, and that Landmark managed the properties and the farming operations while Kromelboog was merely the financial vehicle to address the constraint of Landmark not being permitted to trade as a not-for-profit organisation.

Dr Smuts further asserted that a Joint Venture oral agreement (JV) was concluded in 2013, with Mr Allsop and Tamarisk in terms of which Mr Allsop agreed to acquire suitable farm property on which Landmark could have generational tenure of 25 years to fulfil SBBP. Dr Smuts contended that Mr Allsop repudiated the JV in January 2021 by instructing him and Landmark to vacate the farms, and the management agreement by placing the farms under new management. He averred that he and Landmark accepted such repudiation.

By January 2021, it was clear that a dispute had arisen between Landmark, Kromelboog and Tamarisk. As a result, the parties engaged in protracted settlement negotiations, which fell apart in June 2021. On 22 June 2021, Dr Smuts was served with Tamarisk's notice of intention to remove him as a director in terms of s 71 of the Act. The reasons stated for his removal included a breakdown in trust between himself and Tamarisk; the insolvency position of Kromelboog; and a clear conflict of interest that had arisen as a result of the two positions he held, as a director of Kromelboog and as a trustee of Landmark. On 7 July 2021, after making representations at the meeting against his removal, Dr Smuts was removed as a director of Kromelboog, which decision he did not challenge.

Kromelboog brought an application in the high court to declare Dr Smuts a delinquent director in terms of s 162(5) the Act. The basis of this application was that, shortly before and following his removal as a director, Dr Smuts embarked on a personal crusade to strip Kromelboog of its business. He conducted himself in a manner that caused harm to the company as its director and abused his position as a sole director, placing his own interest above those of Kromelboog. It was alleged that he did this by: (a) rendering invoices to Kromelboog for his personal benefit, while the company was in a state of insolvency; (b) causing legal fees to be paid by Kromelboog for personal litigation to the detriment of the company; (c) clearing Kromelboog's funds from its bank account, minutes before the shareholders' meeting set to consider his removal as a director; (d) causing Kromelboog to pay a donation to Landmark without the approval of the shareholders; and (e) usurping Kromelboog's business by claiming possession of the farming properties, requesting registration documents pertaining to vehicles owned by Kromelboog and enticing employees to leave Kromelboog and join Landmark and/or his newly formed entity Shepherding Back Co (Pty) Ltd.

The high court found that grounds (c) and (e) did not meet the requirements of delinquency in s 162(5) of the Act. It, however, found in favour of Kromelboog on the remaining grounds and declared Dr Smuts a delinquent director in terms of that section.

The SCA held that the high court erred in assessing the two grounds in isolation from the others. It held that a holistic approach had to be adopted in assessing Dr Smuts' conduct and such had to be done by applying the principles applicable when determining facts in motion proceedings.

In analysing the facts, the SCA found that Dr Smuts had admitted the occurrence of the events but denied that they were sufficiently egregious to warrant the declaration of delinquency sought or justified them. The SCA found that the facts overwhelmingly showed that Dr Smuts conducted himself delinquently. This was because as a director Dr Smuts owed fiduciary duties to Kromelboog. The conduct of the director in relation to the affairs of the company is strictly regulated by the Act. If a person commits serious misconduct of the sort described in s162(5)(c) of the Act, that person must be declared a delinquent director. The court has no discretion in that regard.

The SCA further found that Dr Smuts was clearly in a conflicted position. He was a sole director, but rendered to Kromelboog invoices for his personal financial interest, without obtaining authorisation from its shareholder; he demanded documents as part of the scheme to accept possession of the properties belonging to Kromelboog shortly before he was removed as a director; he caused Kromelboog's bank account to be frozen; used its funds to be paid for legal fees, while the company was in a dire financial position; he caused a donation to be paid to Landmark (where he had a personal financial interest) without the shareholder's authorisation; and transferred funds belonging to Kromelboog to Landmark.

It found that conduct to clearly amount to gross abuse of the position of a director and infliction of harm on Kromelboog as contemplated in ss 162(5)(c)(i) and (iii) of the Act. In addition, it found Dr Smuts' actions to also amount to gross negligence, wilful misconduct, and breach of trust within the contemplation of s 162(5)(c)(iv). Dr Smuts was intent on protecting the SBBP project at all costs to the detriment of Kromelboog whose interests he ought to have protected as a director. He acted as if he was entitled to treat Kromelboog as merely a vehicle to pursue his project, instead of a separate juristic entity, the interests of which he had a statutory duty to protect.

Even after receiving the notice on 22 June 2021, indicating that he was acting in a conflict of interest, so found the SCA, objectivity escaped Dr Smuts. He continued with his actions regardless. No matter how disconcerted he might have been about the JV fallout, he was not released from the fiduciary duties he owed Kromelboog. For these reasons, the SCA upheld the high court's order declaring Dr Smuts a delinquent director within the contemplation of s 162(5) of the Act.

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