

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 48702/2020

DOH: 02 August 2021

(1)	REPORTABLE: YES <input checked="" type="checkbox"/> NO
(2)	OF INTEREST TO OTHER JUDGES: YES <input checked="" type="checkbox"/> NO
(3)	REVISED.
<p>.....</p> <p>SIGNATURE</p>	
<p>17/3/2022</p> <p>.....</p> <p>DATE</p>	

LEBOGANG MAKGALENG
SUSANNA TINTIGER

1ST APPLICANT2ND APPLICANT

And

GOLDEN WEST SOCIAL HOUSING NPC
MILTON TSEKISO MARITE
MELUSI CHRISTIAN NTUMBA
JOSEPH BILA
WILLIE MOLEFE MAKHOANA
THE SOCIAL HOUSING REGULATORY AUTHORITY

1ST RESPONDENT2ND RESPONDENT3RD RESPONDENT4TH RESPONDENT5TH RESPONDENT6TH RESPONDENT

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 16 MARCH 2022

MALI J

1. This application turns on the removal of the second to fifth respondents as directors of the first respondent amongst others, because of maladministration of the first respondent. The first respondent is a social housing institution accredited under *Social Housing Act 16 of 2008* ("*Social Housing Act*") established for the purpose of developing rental housing units for low to medium income households. It is a nonprofit company incorporated in terms of section 21 of the *Companies Act 61 of 1973* as a company not having share capital and its existence is by virtue of the provisions of the *Companies Act 71 of 2008*. In simple terms the first respondent is non-profit company.
2. Applicants who are non-executive directors of the first respondent seek a relief to protect the assets and funds of the first respondent from the hands of the second, third, fourth and fifth respondents who are also directors of the first respondent.
3. The notice of motion is fashioned as follows:

"1. The Second to Fifth Respondent are declared delinquent as provided for in section 163(2)(f)(ii) of the Companies Act.

2. The Second to Fifth Respondent are removed as directors of the First Respondent as is provided for in section 163(2)(f)(i).

4. The Social Housing Regulatory Authority ("SHRA") is authorised and directed to appoint four new directors in place of the directors mentioned in prayer 1 above as is provided for in section 163(2)(f)(i).

5. In the alternative to prayer 2 and 3 above, that SHRA be authorised and directed to appoint two additional directors to the directors to the board of directors of the First Respondent, who shall have a casting vote, as is provided for in section 163(2)(f)(i).

6. In the alternative to prayer 1-4 above, that SHRA be authorised and/or directed to place the First Respondent under administration as envisaged in section 12 of the Social Housing Act 16 of 2008.

7. The First Respondent is prohibited to make any payment relating to salaries and/or any benefit to its directors contrary to the provisions of Schedule 1 of the Companies Act read with regulation 4(a) of the regulations to the Social Housing Act and clause 5.1 of the Memorandum of Incorporation of the First Respondent.

8. That the First Application be granted full access- to the First Respondent's operational bank account.

9. That no payments be made from any accounts of the First Respondent without the authorisation of both the First Application and the Second Respondent.

10. Second Respondent is ordered to forthwith submit amended VAT returns to the South African Revenue Services ("SARS") to rectify the incorrect VAT returns previously submitted to SARS.

11. *First Respondent is ordered to keep the funds in the amount of R 390, 794.50 in the Trust account of Tintingers Attorneys Inc pending the finalisation of the re-evaluation of the VAT returns by SARS.*
 12. *Cost of the application to be paid by the Second to Fifth Respondents, jointly and severally, the one to pay the other to be absolved, on a scale as between attorney and client.*
 13. *Further and/or alternative relief'*
4. The first applicant is a business woman and non-executive director of the first respondent. The second applicant is an adult female practicing attorney, conveyancer and non-executive director of the first respondent.
 5. The second respondent is a businessman the founding member and the Chief executive of the first respondent. The third respondent is a Chartered Accountant by profession, a non-executive member and the Chairperson of the Board of the first respondent. He was appointed on 24 January 2020. The fourth and fifth respondents are businessmen and executive and non- executive directors respectively. The fifth respondent resigned after this application was launched.
 6. The sixth respondent is the regulatory authority established under Social Housing Act for among other to finance the first respondent. The relief sought against the sixth respondent is that it must be authorized to place the first respondent under administration in terms of section 12(1) of the Social Housing Act, 16 of 2008 ("*Housing Act*"). The sixth respondent has not opposed the application. It is apparent that the sixth respondent is a major role player in the first respondent.

7. It is appropriate to quote section 12 (1) of the Housing Act. It reads thus:

“Powers of intervention of Regulatory Authority

12. (1) If the Regulatory Authority is satisfied on reasonable grounds that there has

been maladministration by a social housing institution, the Regulatory Authority must—

(a) prepare a report to that effect;

(b) provide the social housing institution with a written notice of the Regulatory

Authority's intention to intervene, and must specify in that notice what

remedial action must be taken by the social housing institution;

(c) instruct the social housing institution to take the remedial action specified in

the notice, and may request the institution to obtain specified support in order

to rectify such maladministration.”

8. Sections 12 (4,5,6 and 7) provide as follows:

“(4) The Regulatory Authority may, after consultation with the providers of any debt finance to the institution and upon notice to affected parties, including the providers of finance to the institution—

(a) apply to the High Court for the suspension of the chairperson, members of the board, manager or executive or senior staff of the institution for the period of the investigation; and (b) appoint suitably qualified persons to manage the institution's affairs in their place pending the findings of the forensic audit report.

(5) The forensic audit report must make a finding on whether the social housing institution has been managed in a manner which constitutes maladministration.

(6) If the forensic audit report does not make a finding of maladministration, the suspended persons are automatically re-instated as from

the date of such report and the Regulatory Authority must review its previous instructions to the institution.

(7) If the forensic audit finds maladministration, the Regulatory Authority must request the members of the social housing institution to replace any suspended person or person associated with the maladministration with a person acceptable to or recommended by the Regulatory Authority.”

9. It is common cause that the first applicant is a non –executive Director of a company called Crimson King (“Crimson”), a company that was appointed before 31 August 2018 as the turnkey developer of block of flats with 582 units for rental on behalf of the first respondent. It is also not in dispute that Crimson is a strategic partner and had injected a sum of R 7,5 million in the form of loan to the first respondent for its operating expenses.
10. The second applicant is a non-executive director of the first respondent among other duties, she advises on contracts entered into by the first respondent and other parties. Her law firm also does conveyancing work for the first respondent.
11. An entity called Zelri Property Administrators is the rental agent on behalf of the first respondent. Further that the first respondent has two accounts, one for capital receipts from the sixth respondent and the second one for operating expenses. On 7 October 2019 the first applicant was made a co-signatory with the second respondent for the business or expense operating account. The resolution was as a result of the meeting held by the Directors to discuss the operations of the first respondent in

particular the unauthorized payments made by the second respondent who was the only signatory at the time.

12. The dispute is centered around the alleged maladministration of the first respondent, by the second, third, fourth and fifth respondents in total disregard of their fiduciary duties. I repeat the first respondent is non-profit organization. The objects of the *Non-Profit Organization Act section 2*

*“The Act is aimed at creating an environment which will enable NPOS to flourish. Thus it will establish a regulatory framework within which NPOs can conduct their affairs and encourage NPOs to maintain adequate standards of **governance, transparency, and public accountability** (own emphasis)*

13. Furthermore, the memorandum of association at paragraph 5.1 provides as follows:

“The income and property of the company whenever derived shall be applied solely towards the promotion of its main object, and no portion thereof shall be paid or transferred, directly or indirectly, by way of dividend, bonus or otherwise howsoever, to the members or directors of the company, or to its controlling or controlled Company, provided that nothing herein contained shall prevent the payment in good faith for reasonable remuneration to any officer or servant of the company or to any member in return for any services actually rendered to the company”.

14. The applicants' complaint is that on 9 May 2019 the second respondent unilaterally entered into an agreement with a company called VAT IT

South Africa, without being authorized by the board. The agreement pertains to the appointment of VAT IT to attend to the filing of Value Added Tax ("VAT") returns on behalf of the first respondent. The remuneration for the services of VAT IT would be 40 to 50% of the VAT refunds paid by the South African Revenue Services ("SARS") to the first respondent.

15. Applicants further state that when the second applicant advised against the abovementioned VAT contract because among others the rate was too high. The second respondent promised to negotiate a better rate which would result in cancellation of the first contract. To the applicants' surprise they soon found out that SARS had paid a refund in the sum of R 5 011 136.00 to the first respondent and that a sum of R 2 305 123.04 from the refund was paid to VAT IT for the services it rendered having been authorized by the second respondent.

16. At that stage the first respondent's business account had a shortfall due to the VAT payment made to Crimson. It is further averred that the second respondent continued to pay 40% of VAT refunds to VAT IT still without authorization by the board of the first respondent. There are further allegations against the second respondent including the unauthorized purchase of property on behalf of the first respondent. What made matters worse is that the seller of the property is and was married to one Anja Hendrikse who was a director of the first respondent. Later the agreement was cancelled but not without paying legal fees to the seller's attorneys. The payment is clearly detrimental to the first respondent.

17. The first respondent's submission to the allegations is that the applicants as non-executive board members are not involved in the day to day running of the business of the first respondent. The third to fifth respondents are the ones who carried out day to day management of the first respondent. In that regard the three of them are of the view that the VAT IT agreement with the first respondent is not to the detriment of the first respondent.
18. In *CyberScene Ltd and others v iKiosk Internet and Information (Pty) Ltd 2000 (3) SA 806 (C)* the court confirmed that a director stands in a fiduciary relationship to the company of which he or she is a director, even if he or she is a non-executive director.
19. It also submitted on behalf of the applicants that the second respondent also made various unauthorized payments from the business account to Zinoro of FZ auditors. Zinoro in turn made several payments to second, fourth and fifth respondents. Subsequent to the abovementioned transactions on 17 September and 7 October 2019 respectively took place. It was at the meeting of 7 October 2019 wherein it was resolved to appoint the third respondent, I repeat a Chartered Accountant. As indicated above he was appointed on 24 January 2020.
20. It is submitted on behalf of the second to fifth respondents that the members of the board had been actively running the first respondent for over 13 years without any reasonable remuneration. The VAT refund payments presented an opportunity for the long overdue remuneration. In

respect of the first and second applicant's remuneration respondents argue that they were with first respondent for few years and were handsomely remunerated by Crimson King. There is no evidence pertaining to the agreement regarding the remuneration of directors.

21. From the application it is glaring that the first respondent is not being run efficiently. There is a lot of infighting among the directors. I mention few examples. At paragraph 160 of the founding affidavit there is an email written by the second applicant on 30 June 2020 advising other board members about governance issues. On 1 July 2020 the first applicant responding to the email of the 30 June 2020 sent email correspondence, amongst its contents proposing a board meeting. On 4 July 2020 both emails were met with the following response by the third respondent:

"Good day Susan and Milton

Susan thank you for the lecture below although I think it's irrelevant and uncalled for. It's interesting to note how suddenly you are so prepared to lecture everybody about the duties of the chairman. A meeting was called where this matter of vat was initially discussed and I was deliberately excluded by your friend Lebo, if you are such astute governance person that you are portraying yourself to be you were going to register a concern as to how a meeting was convened that excluded myself as the chair person. SO that meeting in my view was an illegal meeting and I regard it as null and void. Secondly my understanding of the company structure is that all of us with the exception of Milton we are non-

executive directors, but it looks like you all want to be operationally involved in the affairs of the company. You seem to want to control the CEO space who also happens to be a founding of this company. You are not giving the CEO peace and time to run the day to day affairs of the because you were deployed you and Lebo to try and manage Milton and you can't even hide it. That is unfortunately going to come to an end. You and Lebo are not in this structure to look at the best interest of Golden West, you are serving the interest of the people that are not part of this company and that needs to stop. We can't keep on having board meetings to discuss operational issues. It is now my instruction as a chairman of Golden West that the funds belonging to Golden West needs to come back to Golden West, they were not supposed to be transferred from the first place. You have no right or power to keep the funds of the company against the will of the company. The resolutions that were taken were null and void. I need this done by close of business on Monday, 6th June 2020.

Regards,"

22. It is not in dispute that on 6 July 2020 that the third respondent was informed that the second applicant would procure legal advice regarding the abovementioned correspondence. On 7 July 2020 the third respondent replied as follows:

"Morning

We will be waiting for your legal documents. You are refusing with the funds of the company that do not belong to you, when you are

being challenged then you threaten us with legal action. It is clear that my observation are correct. You are not working in the best interest of Golden West. Maybe you have been so used to having your knee against the neck of black people and you can't take it anymore when you are being challenged. Bring it on we will be waiting.

Regards

Melusi"

23. From the above it is clear there is acrimonious relationship between the applicants and the second to fifth respondents to the detriment of the efficient operation of the first respondent. This is borne from the management of the funds. In the answering affidavit it is submitted that the second applicant was not authorized to manage contracts and transfer properties to Crimson. This allegation is met with a bare denial in the replying affidavit of the applicants. The court is not referred to any resolution or neither form of authority regarding the second applicant's law firm conveyancing role in the first respondent, whilst being director. It is a clear conflict of interest in terms of section 75 of the *Companies Act, 2008*.

24. Furthermore, the notice of motion is couched in such that the sixth respondent must skip steps. To be precise, the applicants do not want the sixth respondent to follow the steps prescribed in section 12 of the *Housing Act*. This is very suspicious taking into account that the first applicant has financial interest in the first respondent through Crimson, and the second applicant's law firm is a beneficiary. I am not implying that the

payments to Crimson are illegal, but I am of the view that launching an investigation against the first respondent involving all the directors is prudent under the circumstances.

25. There is no prohibition per se in removing the directors in terms of the companies Act. Nevertheless, the circumstances of this case are unique, public funds are involved for the social benefit of the citizens of this country. There is a need for the sixth respondent to carry investigations in the first respondent and or carry the regulatory functions accordingly. In the result the following order is granted;

ORDER

1. The sixth respondent is ordered to conduct investigations into the affairs of the first respondent within 21 days of granting of this order.
2. The application is dismissed; costs are reserved pending the final determination of the forensic report and outcomes of the Investigation by the sixth respondent.



N P MALI
JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

For the Applicants-

Adv. A Mare

Instructed by Tintingers Incorporated.

For the 1st - 4th Respondents-

Adv. S Swiegers

Instructed Kruger Attorneys & Conveyancers

c/o Van Stade Van Der Ende Inc