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

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Oaker and Others v Kriel NO (118/2021); *Rockland Group Holdings (Pty) Ltd v Kriel NO and Others* (185/2022) [2023] ZASCA 68 (17 May 2023)

Today, the Supreme Court of Appeal (SCA) dismissed with costs, including the costs of two counsel, two applications to stay an appeal and cross-appeal. It further dismissed the appeal and upheld the cross-appeal with costs, including the costs of two counsel.

Foundational to the matters before the SCA was the placing under curatorship of two bewind trusts, Rockland Targeted Development Investment Fund (TDI) and Rockland Property Investment Fund (PIF), and their fund manager, Rockland Asset Management and Consulting (Pty) Ltd (RAM). The respondent in the appeal, Pierre du Plessis Kriel NO (the Curator), was appointed as the curator of the business of these three entities. In his capacity as curator of TDI and PIF, he instituted various claims against the appellants and other defendants in the Western Cape Division of the High Court, Cape Town (the high court), flowing from their conduct in relation to the management and control of funds and trust property controlled by the trusts for the benefit of pension and provident funds.

The first appellant, Wentzel Oaker (Oaker), was the key player behind various entities and a family trust, the Johnny Bravo Trust (Johnny), and was involved in several transactions that formed the subject matter of the proceedings. He was the sole director and Chief Executive Officer (CEO) of RAM prior to its being placed under curatorship and the sole director of the second appellant, Global Pact Trading 151 (Pty) Ltd (Global Pact). RAM and Global Pact are wholly owned subsidiaries of Rockland Group Holdings (Pty) Ltd (RGH), which, in turn, is wholly owned by Johnny. Although Oaker was not a beneficiary in Johnny, his children and wife were. His wife, Rochelle Oaker N O, the fourth appellant, was his co-trustee in Johnny. Oaker was also the sole director of RGH. Oaker's cousin, Clint Oaker (Clint), the fifth appellant, was employed by RAM as its Chief Operating Officer (COO), while the sixth appellant, Daren Pillay (Pillay), was the Chief Investments Officer (CIO). Pillay performed various accounting and financial functions within the group of companies.

The claims in the high court pertained to: (a) the diversion of a corporate opportunity; (b) the excessive payment for shares; (c) the excessive payment of management and performance fees; and (d) the irregular charging of fees. Another action, described as the 20% action, had been launched against the fourth and fifth appellants, the trustees of Johnny, the second appellant, Global Pact, Rapicorp 122 (Pty) Ltd (Rapicorp 122) and Rapicorp 123 (Pty) Ltd (Rapicorp 123), under case number 1534/2013, for cancellation of an option in Johnny's favour to acquire shares in PIF. The two actions were consolidated for the purposes of trial. Central to the actions was the acquisition of various erven in Schaapkraal, which is part of the Philippi Horticultural Area (PHA) near Cape Town.

In respect of the first claim being for the diversion of a corporate opportunity, the Curator contended that Oaker, Clint, Pillay and RAM breached their fiduciary obligations in respect of TDI and PIF, by failing to acquire the properties, and which fell within the bewind trusts' investment mandate, for the benefit of these trusts, but instead devised and participated in or acquiesced in a scheme whereby Johnny, Schuster's River Trust No 5 (Schuster) and Merlot 13 Trust (Merlot) (alternatively, Lauren Horton (Horton), a trustee of Merlot) acquired the properties through Rapicorp 122 and Rapicorp 123 for their own benefit. These properties were acquired at a considerable discount to their market value. Further, the properties were acquired using funds entirely provided by TDI and/or PIF.

In regard to the claim for excessive management and performance fees, the Curator contended that RAM caused TDI to pay to it management fees and performance fees higher than contractually stipulated for the period during which TDI held the Rapicorp properties. These excessive amounts were paid on inflated values of the shares in the Rapicorp companies, which in turn were based on inflated values of the properties.

In respect of the claim for other fees irregularly charged, the Curator's contention was that RAM had irregularly charged TDI amounts as 'transaction fees' or fees over and above the management fees or performance fees as provided for in the management agreement.

As to the further claim, the Curator sought restoration of PIF's 100% shareholding after 20% of the shares in the Rapicorp companies were purportedly transferred to Johnny in settlement of a R150 million liability assumed by PIF in Johnny's favour under a second option cancellation agreement concluded on 16 August 2010. He further sought a reversal of the creation of a loan account under which PIF purportedly owed Johnny R6,7 million, and to also reclaim R500 000 paid by PIF to Johnny in February and March 2012 in purported reduction of the said loan account.

The stay application arose from an urgent application brought by RGH in December 2019 in the Western Cape Division of the High Court, seeking an order terminating the Curator's curatorship of RAM, alternatively of all the Rockland entities, and replacing them with another curator.

In regard to the stay application, the SCA held that it had no merit. The SCA found that it was difficult to resist the inference that the application was an opportunistic and perhaps even

cynical attempt to delay finalisation of the matter. The SCA found further that it would unjustly delay the finalisation of the appeal process and it had to therefore fail.

In regard to the appeal and cross-appeal, the SCA found as follows. In respect of the first claim, the SCA found that two important questions arose, namely, whether the Curator had established that the properties were an investment opportunity for PIF and TDI and, if so, was he entitled to one third or 100% of the opportunity?

The SCA found that the high court correctly concluded that, on the facts, the properties did not appear to be of as high a risk as Oaker had sought to make out. Further, that had there been no diversion, TDI and/or PIF would have become, as either it or they should have, the shareholder or shareholders of the Rapicorp companies. Therefore, the SCA found that the conclusion reached by the high court that there was a diversion of a corporate opportunity and hence breach of fiduciary duties by the respective appellants, excluding Pillay, could not be faulted.

The SCA found further that the high court erred in not granting the Curator the full claim as pleaded. The evidence revealed ample basis for the high court to have concluded that there was a collusive relationship between Johnny, Merlot and Schuster to profit from an opportunity which fell squarely within the TDI/PIF investment mandate. Further, that Heinrich Badenhorst (a trustee of Schuster) and Horton had no claim to and were not entitled to insist on a share of ownership. Thus, the high court was incorrect in awarding only one third of the claim.

In respect of the valuations, the SCA found that the high court's findings that the correct value to be applied in the circumstances was Veldsman's valuation of R160 million had to be confirmed, and that no sand value was to be added.

With regard to the excessive management and performance fees claim, the SCA found as follows. Given their fiduciary responsibilities, the appellants could not escape liability by pointing to the acceptance of the values by auditors in the annual financial statements. There was accordingly no reason to interfere with the high court's finding that RAM, Global Pact, Oaker, Clint and Pillay breached their duties to PIF. The SCA found further that it mattered not that Johnny did not directly have fiduciary responsibilities towards PIF and TDI and did not have a direct hand in managing and controlling RAM, it was evident that it was used as a conduit to channel profits made from the scheme orchestrated by its trustee, Oaker, together with the other appellants, which included the charging of inflated management fees and performance fees. The breaches were aimed at ultimately enriching Johnny, which to all intents and purposes operated as Oaker's alter ego. Accordingly, it was befitting that Oaker and Johnny be ordered to disgorge the profits made from the investors' funds, and to be jointly and severally liable to do so with RAM and the other appellants.

With respect to the other fees irregularly charged claim, the SCA found as follows. There was clearly no basis established for charging these additional fees. The finding that these mandates were designed to extract value for the benefit of RAM and, in the end Johnny, was inescapable. The SCA found that the high court correctly concluded that these agreements were in breach

of the appellants' fiduciary duties, because they were disadvantageous to TDI and did not reflect an arm's length fee.

In regard to the 20% action, the SCA found as follows. The SCA agreed with the high court's finding that, based on the evidence tendered, it had not been shown that Johnny at the relevant time possessed the financial resources to exercise the option. Further, the appellants were found to have misinformed the Financial Services Board and the Curator as to the circumstances under which Johnny came to be a 20% shareholder in the two Rapicorp companies. They were found to have peddled lies by trying to cover the option cancellation and that in itself pointed towards the fact that there was never any intention to exercise the option in the first place. Moreover, the second option cancellation was baseless, the cancellation fee payment of R150 million illegitimate and the creation of the loan amount of R6,7 million unlawful. The SCA thus found that the high court was justified in nullifying the agreement.

Lastly, the SCA directed that a copy of its judgment be forwarded to the National Commissioner of the South African Police Service and the National Director of Public Prosecutions for investigation and, if so advised, prosecution. This, give the seriousness of the conduct of the appellants, which involved a pattern of self-enrichment at the expense of PIF and TDI and most importantly TDI's beneficial owners, which had entrusted the appellants with their invested funds.

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