

**IN THE DISCIPLINARY HEARING
HELD AT 717 TETRA AVENUE, MORELETA PARK, PRETORIA ON 6 SEPTEMBER 2017**

In the matter between:

ANTOINETTE MURRAY

CLAIMANT

And

THOMAS HENDRICK SAMONS

DEFENDANT

DETERMINATION BY THE DISCIPLINARY COMMITTEE

1. INTRODUCTION:

The Disciplinary Hearing was held at 717 Tetra Avenue, Moreleta Park, Pretoria on 6 September 2017 at 11:00 AM.

2. NOTICE:

Proper Notice of the Disciplinary Hearing was given to all parties by e-mail.

Notwithstanding various emails sent to the defendant on *inter-alia* the following dates; 26 July 2017, 31 July 2017, 01 August 2017, 04 August 2017 and 17 August 2017, the defendant failed to provide dates, convenient to him, for the hearing to be scheduled. In consequence, and in order to move this matter to finality, the disciplinary committee unilaterally set the date for the disciplinary hearing, and duly advised the claimant and the defendant accordingly.

Neither the claimant nor the defendant objected to the above and the disciplinary hearing therefore proceeded on 6 September 2017 at 11:00 AM.

3. PRESENT:

George Rautenbach - Disciplinary Committee Member;

Neville Bosman - Disciplinary Committee Member;

Jonique Fourie – Candidate Attorney with George Rautenbach Attorneys Inc;

Antoinette Murray - the claimant and 50% member of the Close Corporation in business rescue, LE RENDEZ-VOUS CAFÉ CC acting in her capacity as claimant and (pro forma) prosecutor;

Kenton Murray - the other 50% member of the Close Corporation in business rescue, LE RENDEZ-VOUS CAFÉ CC;

4. PROCEEDINGS:

In accordance with paragraph 23.4 of the TMA Disciplinary Code, "The Disciplinary Committee will observe the rules of natural justice but will not be bound by any enactment or rule of law relating to the admissibility of evidence in proceedings before a court of law." In accordance with paragraph 24.17 of the TMA Disciplinary Code, "Apart from the procedural aspects contained herein, the Chairperson may determine the procedure to be followed at a hearing whilst ensuring that the proceedings remain procedurally fair and under the principles of natural justice.

On this basis, the proceedings in this matter were held on an inquisitorial basis and format, in accordance with the mandate provided to the disciplinary committee by the TMA's Board of Directors in accordance with the TMA's disciplinary code as adopted on or about July 2016.

The claimant and the defendant were requested to provide their respective submissions to the disciplinary committee in affidavit form as a means to expediting the actual disciplinary hearing on the day, which request both the claimant and the defendant duly complied with.

5. CHARGE 1:

5.1 Charge 1.1: The defendant failed to pursue a claim against the landlord for the overcharging of services.

Having duly considered the circumstances of the business rescue proceedings and the challenges typically faced by a business rescue practitioner, the defendant is found not guilty on charge 1.1.

5.2 Charge 1.2: The defendant refused to pay UIF and Bargaining Council contributions despite deductions having been made from staff salaries.

This charge relates primarily to a matter that falls under the auspices and control of the Department of Labour and is therefore, in the opinion of the disciplinary committee, outside of the scope of the TMA code of conduct. For purposes hereof, the defendant is therefore found not guilty on charge 1.2.

5.3 Charge 1.3: The defendant failed to inform the members of the Le Rendez Vous Café CC t/a News Café Bedfordview (“the CC”) of the liquidation application.

In a letter from BDK attorneys dated 19 September 2016, which is attached hereto as Annexure “A”, Mr RC Krause advises Mrs Christodoulou & Mavrikis Inc that the Close Corporation’s liquidation is scheduled before the Gauteng division, Pretoria, on 3 October 2016. The claimant has no knowledge as to the status of the liquidation application and whether the Court has granted the relevant Court Order in this regard.

This charge represents an oversight on the side of the Business Rescue Practitioner (“BRP”) and does not represent any form of serious misconduct in terms of the Companies Act 71 of 2008 (“Companies Act”).

5.4 Amended Charge 1.3: The failure by the defendant to properly secure the assets and equipment of the Close Corporation and his further failure to liquidate the Close Corporation.

The charge sheet was found to be defective in respect of the original Charge 1.3 and the Disciplinary Committee allowed the claimant as (pro forma) prosecutor to amend the charge sheet at the disciplinary hearing in accordance with paragraph 24.18 of the TMA Disciplinary Code. The disciplinary hearing thereafter proceeded with the alternative and more serious charge of the failure by the defendant to liquidate the Close Corporation at the point where he no longer believed that there was a reasonable prospect to rescue the Close Corporation.

The failure by the defendant to properly secure the assets and equipment of the Close Corporation and his further failure to liquidate the Close Corporation is a serious dereliction of his duties as BRP and he is found guilty thereof.

5.5 Charge 1.4: The Defendant failed to invoke provisions of Section 136 (2)(a) of the Companies Act (Act No. 71 of 2008) which would have prevented the cancellations of the lease and franchise agreements.

This charge relates to failure by the defendant to properly exercise his discretion as a BRP. While the disciplinary committee recognises the failure by the BRP to properly exercise his discretion, the charge relates primarily to discretion and the BRP can therefore not be found guilty of this charge.

5.6 Charge 1.5: The Defendant failed to issue a Business Rescue Plan within 25 days of appointment as per Section 150 (5) of the Companies Act (Act No. 71 of 2008), and further failed to obtain an extension for the publication of the Business Rescue Plan from the affected parties.

In considering the relevant facts of this matter, it is clear that BRP failed to publish a Business Rescue Plan within 25 days of his appointment. It is however common practice in the business rescue environment, and specifically provided for in Section 150 of Chapter 6 of the Companies Act, that the publication date for a Business Rescue Plan may be extended beyond the 25-day period. The defendant is guilty of not having published the Plan in accordance with Chapter 6.

5.7 Amended Charge 1.5: Failure by the defendant to timeously obtain the requisite consent for an extension for the publication of the Business Rescue Plan.

The charge sheet was found to be defective in respect of the original Charge 1.5 and the Disciplinary Committee allowed the claimant as (pro forma) prosecutor to amend the charge sheet at the disciplinary hearing in accordance with paragraph 24.18 of the TMA Disciplinary Code.

The disciplinary hearing thereafter proceeded with the alternative and more serious charge of the failure by the defendant to timeously obtain the requisite consent for an extension for the publication of the Business Rescue Plan. As a result of the

defendant's failure to engage with the creditors and timeously obtain their consent to an extension for the publication date of the Business Rescue Plan, the defendant elected to embark on an unnecessary costly court process, to obtain the requisite extension, which he could have obtained by active engagement with the creditors.

The defendant is found guilty of the amended charge in so far as he failed to properly exercise his duties as a BRP by not having obtained the requisite extension for the publication date of the Business Rescue Plan, and thereafter having engaged a legal team for purposes of an unnecessary, costly legal application.

6. CHARGE 2:

6.1 Charge 2.1: The defendant failed to uphold his fiduciary duties to exercise care, skill and diligence by having failed to:

Secure the liquor licence of the CC;

The defendant is found not guilty;

Protect the assets of the CC;

In an email, which is attached hereto as Annexure "B", from Mr Michael Berman at Stupel & Berman Inc, which was sent to Ethne Olivier, acting on behalf of the BRP, on Monday, 8 August 2016, he clearly states that the equipment belonging to the Close Corporation had to be removed from the premises of the landlord as a matter of urgency. In point 3 of the email, Mr Berman states that should the BRP fail to advise them by close of business on Wednesday, 10 July 2016, as to when the equipment will be removed, the landlord shall have the equipment removed and stored at the cost of the Close Corporation. It appears from the submissions made by the claimant, that the defendant had failed to take any further action in this regard, which failure had resulted in financial loss to the Close Corporation and its creditors. Therefor the defendant is found guilty of failure to protect the assets of the Close Corporation; and

Maintain a fixed asset register and stock inventory resulting in an inaccurate and undervalued valuation.

The defendant is found guilty.

During the disciplinary proceedings, it became evident from the claimant's submissions that the defendant had a tendency to only communicate with the members of the Close Corporation when convenient for him. The defendant alleged in his affidavit that he actively communicated with the claimant's husband and that the claimant's lack of information was as a result of insufficient communication between the claimant and her husband. The aforementioned was contradicted by the claimant.

From the evidence presented, it is submitted, that the defendant had failed to properly communicate with the members of the close corporation. It is inappropriate for the defendant to rely on his alleged communication with the claimant's husband to exonerate him from having duly communicated with the claimant and the other member of the Close Corporation. The defendant's failure to properly communicate is further evident from his level of engagement, or lack thereof, in the disciplinary proceedings.

The disciplinary committee wishes to draw attention to a letter from Stupel & Berman Inc. to the BRP and to the Close Corporation, dated 18 March 2016 and attached hereto as Annexure "C". The content of this letter is particularly disturbing with regards to the conduct of the defendant. Messrs Stupel & Berman Inc. specifically states in paragraph 3.3 of their letter that there has been a total disregard and failure by the BRP to adhere to the business rescue procedures as set out in the Companies Act, where after they continue to list the failures of the BRP under points 3.3.1 to 3.3.3 thereof.

7. CHARGE 3

7.1 Charge 3.1: The defendant failed to provide a reconciliation of fees and disbursements with supporting documentation when requested by the Complainant.

The defendant is found not guilty of having failed to provide a reconciliation of fees and disbursements when requested by the claimant to do so, as this specific obligation is not prescribed in Chapter 6 of the Companies Act, nor in the TMA's Code of Conduct.

7.2 Charge 3.2: In terms of Section 18.4, the defendant is obliged to fully disclose all relevant invoices, receipts and information pertaining to the fee or expense and the TMA-SA will then make a final determination.

The defendant was requested by the disciplinary committee in an email dated 26 July 2017 to provide a reconciliation of fees and disbursements with supporting documentation in accordance with paragraph 18.4 of the TMA's Code of Conduct. The defendant has failed and neglected to comply with this request and is therefore found guilty of the charge.

8. FINDINGS OF THE DISCIPLINARY COMMITTEE

The disciplinary committee has undertaken a detailed investigation and concluded its hearing into the complaints lodged and charges brought by the claimant against the defendant.

For ease of reference, the charges brought against the defendant and the findings of the Disciplinary Committee is summarised hereinafter:

CHARGE 1:

Charge 1.1: The defendant failed to pursue a claim against the landlord for the overcharging of services.

The defendant is found not guilty.

Charge 1.2: The defendant refused to pay UIF and Bargaining Council contributions despite deductions having been made from staff salaries.

The defendant is found not guilty.

Charge 1.3: The defendant failed to inform the members of the Le Rendez Vous Café CC t/a News Café Bedfordview ("the CC") of the liquidation application.

Amended Charge 1.3: The failure by the defendant to properly secure the assets and equipment of the Close Corporation and his further failure to liquidate the Close Corporation.

The defendant is found guilty.

Charge 1.4: The defendant failed to invoke provisions of Section 136 (2)(a) of the Companies Act (Act No. 71 of 2008) which would have prevented the cancellations of the lease and franchise agreements.

The defendant is found not guilty.

Charge 1.5: The defendant failed to issue a Business Rescue Plan within 25 days of appointment as per Section 150 (5) of the Companies Act (Act No. 71 of 2008), and further failed to obtain an extension for the publication of the Business Rescue Plan from the affected parties.

Amended Charge 1.5: Failure by the defendant to timeously obtain the requisite consent for an extension for the publication of the Business Rescue Plan.

The defendant is found guilty

CHARGE 2:

Charge 2.1: The defendant failed to uphold his fiduciary duties to exercise care, skill and diligence by having failed to:

- secure the liquor licence of the CC;

The defendant is found not guilty.

- protect the assets of the CC;

The defendant is found guilty.

- maintain a fixed asset register and stock inventory resulting in an inaccurate and undervalued valuation.

The defendant is found guilty.

CHARGE 3:

Charge 3.1: The defendant failed to provide a reconciliation of fees and disbursements with supporting documentation when requested by the Complainant.

The defendant is found not guilty.

Charge 3.2: In terms of Section 18.4, the Defendant is obliged to fully disclose all relevant invoices, receipts and information pertaining to the fee or expense and the TMA-SA will then make a final determination.

The defendant is found guilty.

The disciplinary committee is deeply concerned by the lack of engagement, replies and attendance by the defendant. The aforementioned actions, or lack thereof by the defendant, indicates a disregard by the defendant for the code of conduct of the TMA, an association which the defendant voluntarily requested and elected to be a member of.

CONCLUSION AND PUNISHMENT IMPOSED:

As a member of the TMA, and in light of the guilty findings of the disciplinary committee as set out above, exacerbated by the failure of the defendant to attend the disciplinary hearing, the disciplinary committee hereby imposes the following punishments on the defendant in accordance with paragraph 25.2 of the TMA's Code of Conduct:

- The defendant is fined an amount of R10,000.00, payable to the bank account of the TMA within 14 days from date of notification hereof;
- The defendant is suspended from the Association for a period of three months subject to the condition that during the period of suspension the defendant is not found guilty of a further serious breach of the Disciplinary Code. The disciplinary committee proposes to use this period of suspension to further investigate the conduct of the defendant as a BRP in other business rescues where the defendant has been involved and/or appointed as BRP; and
- The disciplinary committee further imposes that the detail of the defendant's suspension be published on the TMA's website with a recommendation that the defendant should not receive further appointments as a turnaround professional for the duration of the suspension, and pending the outcome of the further investigation to be conducted by the disciplinary committee.

SIGNED ON THIS 11th DAY OF OCTOBER 2017



**GEORGE F RAUTENBACH
DISCIPLINARY COMMITTEE
MEMBER**



**NEVILLE BOSMAN
DISCIPLINARY COMMITTEE
MEMBER**