

**COMPANIES TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case: CT002apr2017

In the matter between;

Vicky van Wyk

Applicant

And

Steven Raymond van Wyk

Respondent

In re Roxchem (Pty) Ltd Registration number 2016/035123/07

DECISION (Reasons and Order)

Presiding Member of the Tribunal: Lucia Glass

- 1) This is an application made on affidavit by the Applicant requesting the Tribunal to remove the Respondent as a director and to appoint two others as directors, David Ortlepp and Anathi Pasiwe.
- 2) The applicant does not mention in terms of what section of the Companies Act she makes this application.
- 3) It appears, that it is in terms of Section 71 of the Companies Act 71 of 2008 (the Act).
- 4) The applicant avers in her affidavit inter alia, that on the 8th September, 2016 the Respondent withdrew R500,000 cash from a bank teller at FNB without

her knowledge or permission and this placed the company's bank account in an overdraft.

- 5) She alleges that she was advised by her attorney to resign as a director so that she will not be held liable for the overdraft of R500000.
- 6) She avers that she resigned as a director of Roxchem (Pty) Ltd and the necessary documentation was sent to CIIPC via an accountant Neil Gove.
- 7) On the 28th October 2016 the applicant issued an affidavit to CIPC requesting CIPC to not process the request to remove her as a director.
- 8) CIPC did remove the respondent as a director on the Disclosure Certificate; Companies and Close Corporations" document dated 27 January 2017.
- 9) The applicant alleges that she is still a 49% shareholder and the Respondent a 51% shareholder of Roxchem (Pty) Ltd.
- 10) The Applicant applied to the Companies Tribunal on a form CTR 142 in April 2017 to have the respondent removed as director.
- 11) In her affidavit the applicant avers that she notified the respondent of her intention to have the respondent removed as a Director via email on 11 April 2017.
- 12) The applicant avers that there has been no response in this regard from the Respondent and therefore wishes to apply for a default order to remove the Respondent as Director of Roxchem (Pty) Ltd Registration number 2016/035123/07 and nominates David Ortlepp and Anathi Pasiwe as Directors.
- 13) It is further alleged that the respondent is currently under investigation for alleged fraud and theft committed through the business and to this end evidence in the form of inter alia bank statements is attached to the papers.

14) Before the Tribunal can make any decision on the allegations made in the applicant's affidavit, it is imperative to establish whether it has the necessary jurisdiction to remove a director.

15) In terms of Section 71 of the Act a director may be removed under certain circumstances and I quote this Section in full;

16) "*Removal of directors 71.*

17) (1) *Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).*

18) (2) *Before the shareholders of a company may consider a resolution contemplated in subsection (1)— (a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and (b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.*

19) (3) *If a company has more than two directors, and a shareholder or director has alleged that a director of the company— (a) has become— (i) ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69(8)(a); or (ii) incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or (b) has neglected, or been derelict in the*

performance of, the functions of director, the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.

20) (4) Before the board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given— (a) notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and (b) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.

21) (5) If, in terms of subsection (3), the board of a company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be, the director concerned, or a person who appointed that director as contemplated in section 66(4)(a)(i), if applicable, may apply within 20 business days to a court to review the determination of the board.

22)(6) If, in terms of subsection (3), the board of a company has determined that a director is not ineligible or disqualified, incapacitated, or has not been negligent or derelict, as the case may be— (a) any director who voted otherwise on the resolution, or any holder of voting rights entitled to be exercised in the election of that director, may apply to a court to review the determination of the board; and (b) the court, on application in terms of paragraph (a), may— (i) confirm the determination of the board; or (ii) remove

the director from office, if the court is satisfied that the director is ineligible or disqualified, incapacitated, or has been negligent or derelict.

23) (7) *An applicant in terms of subsection (6) must compensate the company, and any other party, for costs incurred in relation to the application, unless the court reverses the decision of the board.*

24)(8) **If a company has fewer than three directors— (a) subsection (3) does not apply to the company; (b) in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection; and 140 5 10 15 20 25 30 35 40 45 50 55 (c) subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Companies Tribunal.** (highlights added)

25)(9) *Nothing in this section deprives a person removed from office as a director in terms of this section of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for— of being removed as a director.*

(10) *This section is in addition to the right of a person, in terms of section 162, to apply to a court for an order declaring a director delinquent, or placing a director on probation. Board committees “(highlights added)*

Evaluation

26)Section 71 (8) of the Act states that *If a company has fewer than three directors and in circumstances where a director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or (b) has neglected, or been derelict in the performance of,*

the functions of director, then in these circumstances, any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection; and 140 5 10 15 20 25 30 35 40 45 50 55 (c) subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Companies Tribunal.

27)The Companies Tribunal must make a determination as to whether *the respondent director is “unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or (b) has neglected, or been derelict in the performance of, the functions of director”.*

28)The tribunal is not to weigh up whether fraud and theft was committed by the respondent, which are both criminal actions.

29)The tribunal is to weigh up whether the respondent director was *‘unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or has neglected, or been derelict in the performance of, the functions of director’.*

30)There is no doubt in my mind that the criminal case, which is in the docket of the forensics investigator, is not what the tribunal has to contemplate. Even if the tribunal was to contemplate the criminality of the respondent it can not do so until it is finalized and it is proved that fraud and theft was committed. I am of the view that the director can not be removed in this instance.

ORDER

The application to remove the respondent as director is not granted.

No order as to costs.

A handwritten signature in cursive script, appearing to read 'Glass'.

LUCIA GLASS

(MEMBER OF COMPANIES TRIBUNAL OF SOUTH AFRICA)

Dated this 25.5.17