

**IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA  
(‘THE TRIBUNAL’)**

**Case No.: CT012SEP2016**

In the matter between:

**STEVEN ALLAN LOWERY**

Applicant

and

**ROLAND VIVIAN DEALE**

First Respondent

**LITTLE OFFICE PROPERTIES (PTY) LTD**

Second Respondent

**Date of hearing: 20 January 2017**

**Order delivered: 23 MARCH 2017**

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**DECISION (Reasons and Order)**

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**INTRODUCTION**

[1] Little Office Properties (Pty) Ltd (Little Office), the second respondent, is a property holding company, which owns one property.<sup>1</sup> The directors of Dimensions Contract Employment (Pty) Ltd trading as Dimensions Marketing<sup>2</sup> (Dimensions Marketing) established Little Office in 2003 in order to control Dimensions Marketing rental

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<sup>1</sup> See para 12 of the founding affidavit; See also annexure SAL 4

<sup>2</sup> See para 14.3 of the replying affidavit.

commitments.<sup>3</sup> Little Office primary purpose was to rent out its property to Dimensions Marketing.

[2] The applicant and first respondent, at the time, were directors of Dimensions Marketing and are currently the only directors of Little Office.

[3] The applicant is an independent director and 25 percent shareholder of Little Office<sup>4</sup> and the first respondent is the executive director and 75 percent shareholder of Little Office.

[4] The applicant brought the application for the removal of the first respondent as director and cited Little Office as second respondent merely as an interested party.<sup>5</sup> Accordingly, the applicant seeks no relief against Little Office.

## **NATURE OF THE APPLICATION**

[5] The applicant seeks the removal of the first respondent as director of Little Office in terms of section 76(3) of the of the Companies Act 71 of 2008 (the “Act”) on the grounds that the first respondent has been derelict in the performance of his director functions and has failed to –

[5.1] Act in good faith and for a proper purpose;

[5.2] In the best interests of Little Office;

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<sup>3</sup> See para 13 of the founding affidavit.

<sup>4</sup> See paras 6 to 8 of the founding affidavit.

<sup>5</sup> See para 5 of the founding affidavit.

- [5.3] Act with a degree of care, skill and diligence that may reasonably be expected of a person in carrying out the same function in relation to Little Office as those carried out by that director and having the general knowledge, skill and experience of that director.<sup>6</sup>
- [6] Section 76 of the Act deals with the standards of director's conduct and section 71 of the Act empowers the Tribunal to remove a director.
- [7] It is important to note that whether or not a director has been negligent or is guilty of dereliction of duty under section 71 of the Act, will be determined in accordance with the criteria laid down in section 76 of the Act, which codifies standards for directors' conduct, which is in accordance with common law.<sup>7</sup>

## **PRELIMINARY ISSUES**

- [8] In the answering affidavit, the first respondent purported to be acting on behalf of Little Offices and indicated that the first respondent was duly authorized to do so.<sup>8</sup>
- [9] At the hearing, the applicant objected that the first respondent was duly authorized to act on behalf of Little Offices because the first respondent did not call a meeting in order to pass a resolution to authorize the first respondent to act on behalf of Little Offices as is required in terms of section 66(1) of the Act and the memorandum of association.

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<sup>6</sup> See para 9 of the founding affidavit; see also Form CTR 142.

<sup>7</sup> See page 42 of *"You're fired! The removal of directors under the Companies Act 71 of 2008"* SA Law Journal 33.

<sup>8</sup> See para 3 of the answering affidavit.

[10] The first respondent was unable to provide me with a resolution to show that he was duly authorized and subsequently conceded that he was not acting on behalf of Little Office.

[11] The first respondent, also raised his counterclaim as a point *in limine*. During the hearing he indicated that he realized that he needed to bring a formal application and consequently abandoned the point.<sup>9</sup>

[12] The first respondent also raised the issue that the applicant, with reference to the documentation provided, did not make out a proper case for negligence or to show a sufficient course of action. The first respondent latter agreed to deal with this issue as part of the main application and not as a point *in limine*.<sup>10</sup>

## **MATERIAL FACTS**

[13] In addition to what has been set out above, the relevant background to the matter is as follows:

[14] During 2013, the applicant and the first respondent had personal differences due to the first respondents management of Little Offices and consequently, the applicant decided to sell his shareholding in Little Offices and exit Little Officers as a director.

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<sup>9</sup> See line 14 to 21 page 3 of the transcript.

<sup>10</sup> See line 23 page 4 to line 8 page 6 of the transcript.

[15] During these negotiations, the first respondent in arriving at a price for the applicant's shareholding commissioned a forensic report<sup>11</sup> on the business of Little Offices. Subsequent to these findings, the first respondent offered the applicant R160 434,61 for his 25% shares.

### *Statutory Affairs*

[16] On perusal of the forensic report, the applicant was concerned on how Little Offices were being run, in particular:

[16.1] Several tax returns for Little Offices were not submitted and provisional tax was not paid;

[16.2] the financial record keeping is not in line with any accounting standards;

[16.3] Little Offices has two tax numbers;

[16.4] These issues are currently being dealt with at the SARS legal unit and there are possible penalties and interest that will be levied on the outstanding amounts; and

[16.5] Trading under these circumstances amounts to technical insolvency because Little Offices are not in a financial position to set off such debt and this amounts to a contravention of company laws.

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<sup>11</sup> See SAL9 "Lindsay & Associates Professional Accountants and Tax Consultants"

[17] The consultants were of the view that “this will be regarded as reckless and negligent trading”.

[18] The applicant noted that Little Offices would be in such a concerned state considering that the only business of Little Offices is the rental of one property and the first respondent should have had the required skill and expertise as executive director of the company to sufficiently comply with the legal requirements of Little Offices.

#### *Lease Contract*

[19] The applicant further perused the lease agreement Little Offices entered into with Dimensions Marketing on 4 March 2014.<sup>12</sup> The following terms of the agreement are relevant:

[19.1] The first respondent represented Little Offices<sup>13</sup> and the first respondent also represented Dimension Marketing<sup>14</sup>;

[19.2] The lease period was for a minimum period of two years, i.e. 1 April 2014 to 31 March 2016;

[19.3] The rental amount is R11 400.00 for the two-year period;

[19.4] Dimensions Marketing (lessee) will provide administrative services to Little Offices (lessor) which will include the use of equipment, bookkeeping services, secretarial and management fees,

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<sup>12</sup> See SAL10 to the founding affidavit.

<sup>13</sup> First respondent, second respondent and applicant as the lessor to the agreement.

<sup>14</sup> Lessee to the agreement.

consumables, telephone rental, internet and computer data management for a rental fee of R6 400,00.

[20] The applicant indicated that the R 6 400,00 rental fee would be deducted from the lease fee of R11 400,00 and the only amount due would then be the R5 000,00 lease fee.

[21] The terms of the agreement was accepted by the first respondent on behalf of Dimension Marketing in a letter dated 11 March 2014.

[22] In this regard, the applicant was concerned that the first respondent was leasing the property to himself on terms that he negotiated with himself and had not involved or included the applicant in the transaction.

[23] The applicant was also concerned that similar property in the area was leased for R35 000,00 a month.

[24] From the financial statements<sup>15</sup> compiled by the first respondent, there is no line item dealing with the rental fees of R6 400,00.

### *Loans*

[25] The applicant noticed from the financial statements<sup>16</sup> compiled by the first respondent that there were large amounts loaned to the Little

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<sup>15</sup> See SAL 15 of the founding affidavit.

<sup>16</sup> See SAL 15 of the founding affidavit.

Office by the first respondent and at no point was the applicant made aware of these loans prior to the loans being granted.

[25] In the first respondents answering affidavit, he does not sufficiently deal with each of the allegations listed in the applicant's founding affidavit and set out above. What the first respondent does is deny the allegations and fails to set the basis of the denial. This was very similar to the hearing proceedings.

### **THE RELEVANT STATUTORY PROVISIONS**

[26] As stated above, this application is primarily grounded on the provisions of section 71 of the Act. This section reads as follows in the relevant area:

*"71. Removal of directors*

*(1) ...*

*(2) ...*

*(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.*
- (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.*
- (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.*

*(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.*

*(7) ...*

*(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*

*(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.*

*(9) ...*

*(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.”*

[27] It In terms of subsection 71(8), the provision empowers this Tribunal to make a determination which would otherwise have been made by the board of directors of a company if Little Offices did not have fewer than 3 directors.

[28] A determination by this Tribunal is required when it is alleged by either a director or shareholder of the company that the circumstance(s) contemplated in section 71(3) exist(s) for the removal of the director, and in particular section 71(3)(b) where a director is alleged to have “neglected, or been derelict in the performance of, the functions of director”.

[29] The process to removal of a director requires reasonableness and sufficiency in the allegations made by a director, and affords the

impugned director the right to be heard before a determination is made.<sup>17</sup>

[30] Should this Tribunal be satisfied that indeed the first respondent has either neglected or been negligent or derelict in the performance of his functions as a director, it will have to order her removal as director of Little Office.

[31] Neethling-Potgieter Law of Delict stated the following on negligence “In the case of negligence, a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions, he failed to adhere to the standard of care legally required of him. The criterion adopted by our law to establish whether a person has acted carelessly and thus negligently is the objective standard of the reasonable person, the *bonus paterfamilias*”.

[32] Section 76 provides for the standards of directors conduct and the relevant subsections are ss76(3) and (4) and read as follows:

*“(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-*

*(a) in good faith and for a proper purpose;*

*(b) in the best interests of the company; and*

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<sup>17</sup> See CT021NOV2014

*(c) with the degree of care, skill and diligence that may reasonably be expected of a person-*

*(i) carrying out the same functions in relation to the company as those carried out by that director; and*

*(ii) having the general knowledge, skill and experience of that director.*

*(4) In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company-*

*(a) will have satisfied the obligations of subsection (3)(b) and*

*(c) if-*

*(i) the director has taken reasonably diligent steps to become informed about the matter;*

*(ii) either-*

*(aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or*

*(bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and*

*(iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis*

*for believing, and did believe, that the decision was  
in the best interests of the company...”*

[33] Section 76(3) deals with what is expected of the director and section 76(4) deals with what the director has to satisfy in order to show that he acted in accordance with his duties.

[34] Each director has duties, i.e. the fiduciary duties and the duties of care and skill, the duty of “bona fides” is a separate overarching duty – in addition to “objective duties”.<sup>18</sup>

[35] This is explained in New Entrepreneurial Law as follows<sup>19</sup>:

“6.2.2.1 ‘Bona fides ’ (good faith)

This is a subjective overarching duty applying to the exercise of any and all of the powers in the company. In essence it requires that the director must act honestly.<sup>20</sup>

Apart from the duty of (subjective) honesty, there are also objective standards, which are not subservient to the duty of honesty. Therefore, the objective duties apply, and non-compliance will not be excluded if the director avers that he acted honestly (bona fide).

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<sup>18</sup> Extract taken from the CT021NOV2015

<sup>19</sup> Extract taken from the CT021NOV2015

<sup>20</sup> *South African Fabrics Ltd v Millman* NO 1972 (4) SA 592 (A); *Da Silva v CH Chemicals (Pty) Ltd* [2009] 1 All SA 216 (SCA); 2008 (6) SA 620 (SCA).

The objective standards are –

(a) 'Interests of the company'

The duty must be exercised in the interests of the company.<sup>21</sup>

The question will then be who the company is, as there is a multiplicity of 'stakeholders' inside the company, (for example, the shareholder/s) as well as 'outside' the company (such as, to name a few, the creditors, employees, the state and the community). The basic principle is that the company must be used for profit maximisation in favour of the shareholders, and the shareholders as body will therefore be the 'company' in this sense. This viewpoint has been questioned by two opposing alternatives: the one is that the directors can, under certain circumstances, ignore the interests of the shareholders in favour of the interests of the other stakeholders ('pluralist approach') and the other one is that the interests of another stakeholder must also be taken into account if it promotes the interests of the shareholders ('enlightened shareholders approach') with the latter being the most accepted".<sup>22</sup>

(b) 'Do not exceed powers'

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<sup>21</sup> *Da Silva v CH Chemicals (Pty) Ltd* [2009] 1 All SA 216 (SCA); *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC).

<sup>22</sup> See in general 'South African Company Law for the 21st century – Guidelines for Corporate Law Reform' (policy paper) (GG 26493 of 23 June 2004).

This entails that the directors must not exceed the limits of their powers (that is, perform acts outside the capacity of the company or their agency or the restrictions in the Act), irrespective of whether the act will be valid/binding in respect of third parties.<sup>23</sup>

(c) 'Use powers for a proper purpose'

The test is firstly what the power was conferred for, and secondly whether it was exercised for that purpose,<sup>24</sup> such as that the power to issue shares must be used to obtain capital, not to entrench or change control.<sup>25</sup> This duty actually also serves as a test, and therefore is not a separate duty in that sense, to determine if the act was for the benefit of the company.<sup>26</sup>

## FINDINGS

[36] The core business of Little Offices is to rent out its only asset.

[37] The first respondent as executive director (an only employee) was therefore the director that was tasked with conducting the business of Little Office.

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<sup>23</sup> See e.g. s 20 in respect of acts *ultra vires* the company that will be valid in respect of third parties but which were outside the authority of the directors because it was *ultra vires* the company.

<sup>24</sup> *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC).

<sup>25</sup> *Punt v Symons & Co Ltd* [1903] 2 Ch 506; *Piercy v S Mills & Co Ltd* [1920] 1 Ch 77.

<sup>26</sup> *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 All ER 1126 (PC).



[38] Core to exercising this function was the lease agreement and ensuring that the companies' statutory obligations were complied with.

[39] With reference to section 76(3) of the Act and the explanation in the New Entrepreneurial Law, the first respondent did not act in good faith for a proper purpose and in the best interest of the company (shareholders) or acted with the required care, skill and diligence needed from a director, for the following reasons:

[39.1] The lease agreement was negotiated and concluded with himself, not in the best interest of the company (in the interest of both shareholders) but rather in his interest as director and shareholder of Dimensions Marketing and on terms not discussed with his fellow director.

[39.2] The loans provided to his company were similarly concluded as set out in paragraph 39.1 above.

[39.3] Even though Dimensions Marketing was contracted to provide administrative and bookkeeping services for Little Offices and the first respondent as executive director was responsible to ensure that Little Office is compliant with its statutory obligations, according to the forensic report this was not done. In fact, the forensic report is short of saying that the affairs of the company are in a dire state.

[40] The first respondent was unable to show, in its answering papers and during the hearing:

[40.1] That he took reasonably diligent steps to become informed of what was required in order to comply with the statutory obligations;

[40.2] That he had no material financial interest when making the decisions;

[40.3] That he made the decisions and when making the decisions had a rational basis for believing that the decision was in the best interest of the company.

## **ORDER**

I make the following order:

- a) The applicant's application is granted.
- b) The first respondent is removed as a director of the company.
- c) The first respondent should comply with this order within 60 days of receipt of hereof.
- d) This Decision must be served on the Applicant, Respondent and the Registrar of Commission.
- e) Each party to bear the own costs.

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**ADV LIZELLE HASKINS**

MEMBER OF THE COMPANIES TRIBUNAL

DATED: 23 MARCH 2017