



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT010MAR2017

In the matter between:

DENNIS MUANGA CHABABA

Applicant

and

ARMSTRONG TIRO MBONDE

Respondent

[application for the removal of the respondent as a director of *Divine Asset Management (Pty) Ltd* (Registration Number: 2001/016704/07)]

Presiding Member : Khashane La M. Manamela (Mr.)

Date of Decision : 28 April 2017

DECISION (Reasons and an Order)

Khashane La M. Manamela

Introduction

[1] The applicant and respondent are the only directors of a company known as Divine Asset Management Proprietary Limited (the company).¹ The applicant seeks, in terms of this application, the removal of the respondent as director of the company. This type of application is what is contemplated by section 71(8) of the Companies Act 71 of 2008 (the Companies Act).²

[2] The following grounds are advanced for the relief sought: neglect of duties; causing the company potential loss of income; lack of co-operation on “serious company decisions” and disadvantaging of the company due to negative credit record or credit bureau listings.³ The applicant sought the urgent hearing of this matter for the reasons stated under background, which is discussed next.

Brief background and submissions

[3] Other than being directors, both the applicant and respondent are shareholders of the company. The applicant is the majority shareholder with 51% of the shares in the company and the respondent holds 5% of the shares, whilst the remainder is held by a number of other individuals.⁴ holder and the rest of the 1000 ordinary par value shares of the company.

¹ See certificate issued by the Commissioner of Companies & Intellectual Property Commission dated 11 March 2016 included as part of the papers.

² Section 71(8) reads as follows: “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.”

³ See Form CTR 142 dated 24 March 2017.

⁴ Copies of the share certificates are included as part of the papers.

[4] The company is said to hold a wholesale licence from the Department of Energy of the Government of the Republic of South Africa (the department). It is submitted that the company is in a non-operational state and this may constitute non-compliance with relevant legislation governing the issuing of petroleum licences of the type held by the company. It is submitted that the company's licence may be withdrawn.

[5] According to the applicant, the company has to urgently secure a business loan or an investor, including business premises. The respondent's negative credit status is said to frustrate efforts to secure premises as directors are required to sign as sureties or guarantors for the company in respect of the lease agreement.⁵

[6] It is further stated that the respondent had previously agreed to voluntarily resign from the company due to the break-down of the working relationship with the applicant. It is also alleged that the respondent neglected his duties as director; does not add any value to the company and is never available for the important decisions pertaining to the company. And all these, it is submitted, hindered progress in the company.

[7] Also, the applicant alleges that the respondent's conduct is negatively affecting his personal life, more so, due to the inability of the company to generate income from which salaries can be paid.⁶

Application for default order

⁵ See Form CTR 147 dated 04 April 2017.

⁶ See supporting affidavit dated 24 March 2017.

[8] There is no opposition to this application. The respondent appears to have been served with the papers by registered post to a street address in Waterkloof Glen, Pretoria and electronic mail. The date of service for both methods was the 28 March 2017. Although, there is no explanation as to the source of both addresses, at face value it appears that the respondent received notice of the application. Therefore, the application for default order may be determined, but this would not be decisive to the outcome of this application

Analysis of the submissions

[9] As already indicated above, this application is premised on the provisions of section 71 of the Companies Act, which reads in the material part:

“(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.”

[underlining added for emphasis]

[10] The removal of a director in terms of section 71(8) of the Companies Act depends on the existence of the circumstance(s) contemplated in section 71(3) of the Companies Act. The material circumstances concern ineligibility or disqualification in terms of section 69⁷ and incapacitation (in terms of sections 71(3)(a)(i) and (ii)) and where a director is alleged to have “neglected, or been derelict in the performance of, the functions of director” (in terms of section 71(3)(b), also of the Companies Act). Determination in terms of section 71 of the Companies Act is premised on reasonableness and sufficiency of the allegations made against the impugned director.

[11] The standards of directors conduct are set out in section 76 of the Companies Act. Sections 76(3) and (4) are the most relevant in this regard and read as follows in the material part:

“(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

(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-

⁷ Section 69(8)(a) is specifically excluded and reads as follows: “A person is disqualified to be a director of a company if- (a) a court has prohibited that person to be a director, or declared the person to be delinquent in terms of section 162, or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984)”.

- (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...”

[12] The aforesaid legal principles are to be applied against the facts of any given matter. However, save for the bare allegations stated above, this application lacks any specifics as to the respondent’s conduct, be it acts or omissions, which it is contended justify the removal of the respondent as a director.

Conclusion

[13] There are no facts sustaining the allegations made in this application. For example, it is not clear why it is alleged there is break-down in the working relationship between the applicant and the respondent; why it is said that the respondent neglected his duties as director or as to how the respondent failed to add value to the company or when the respondent failed to take part in the decisions of the company, including the nature of those decisions. Further, the inability of the company to generate income and the respondent’s negative credit status do not *per se* constitute conduct justifying removal of a director from the company.

[14] This Tribunal has to be placed in a position in which it is able to determine what the respondent, as a director, has done or failed to do, which amounts to neglecting, or being derelict in the performance of his or her functions as a director, as contemplated in section 71(3)(b) of the Companies Act. This application suffers from a paucity of details and will thus fail due to this shortcoming.

Order

[15] Therefore, I make the following order:

- a) the application is refused.

Khashane La M. Manamela

Member, Companies Tribunal

28 April 2017