IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

("THE TRIBUNAL")

CASE NUMBER: CT007JUN2015

In the matter of:

PHILIP NYANYABO MAKAPANA **APPLICANT**

ESSACK ABDULLAH **RESPONDENT**

IN RE: PRECIOUS HEART INVESTMENTS (PTY) LTD

Coram: PJ Veldhuizen
Order delivered 21 September 2015

ORDER & REASONS

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1. THE PARTIES

1.1. The Applicant is an adult male director of **PRECIOUS HEART INVESTMENTS (PTY) LTD** who resides at No 57 Block D Mabopane, Tshwane.

1.2. The Respondent is an adult male director of **PRECIOUS HEART INVESTMENTS (PTY) LTD** of No 5 Palm Sands, Windemere Road Humewood, Port Elizabeth.

2. THE APPLICATION

2.1. This is an application purportedly for the removal of a director in terms of presumably Section 71(8) of the Companies Act No 71 of 2008.

2.2. I use the words “purportedly” and “presumably” as the Applicant fails, in this application, to comply with Regulation 142(3)(a), which I quote:

“(3) An application in terms of this regulation must –
(a) indicate the basis of the application, stating the section of the Act or these Regulations in terms of which the Application is made;”

2.3. Although the Applicant fails to identify the section upon which he intends to rely, save a glancing reference to Section 71 in general by his attorneys in an email to the Respondent dated 25 May 2015 and attached to the application marked “B”, the only section that the application could have been brought in terms of is Section 71(8) and I shall consider the matter further from that premise.

2.4. Caroline B Ncube, in the article entitled - “YOU’RE FIRED! THE REMOVAL OF DIRECTORS UNDER THE COMPANIES ACT 71 OF 2008 - The South African Law Journal Volume 128, Issue 1, 2011, pages 33-51 sets out the current law succinctly:

“The purpose of s 71(8) seems to be the provision of an alternative mode of removal for companies where removals by the board are unavailable. This is evident from the restriction of removals by the Tribunal to companies that have only one or two directors and the restriction of removals by the board to companies that have at least three directors (s 71(8) and s 71(3) respectively). In every other respect removals by the Tribunal are the same as removals by the board. Sections 71(8)(b)–(c) provide that any shareholder or director may apply to the Tribunal to make a determination whether a director should be removed on the grounds listed in s 71(3). These are the same grounds on which a removal by the board must be based.

In addition, all the procedural requirements and the rights to apply for a review that apply to removals by the board are extended to removals by the Tribunal.

Removals by an enforcement or administrative agency are not unique to South Africa. Canadian provincial securities legislation provides for the removal of directors by securities commissions (Jassmine Girgis 'Corporate directors' disqualification: the new Canadian regime?' (2009) 46 Alberta LR 677 at 698–9; for example see s 127 of the Ontario Securities Act, 1990, s 198 of the Alberta Securities Act, 2000, and s 161 of the British Columbia Securities Act, 1996). Similarly, s 206F of the Australian Corporations Act gives the Australian Securities and Investments Commission (ASIC) powers to disqualify a director for a maximum period of five years. Such a disqualification is, in effect, a removal from office. The grounds for such disqualification are improper or illegal 'conduct in relation to the management, business or property of any corporation' and 'whether the disqualification would be in the public interest'. The section also empowers the ASIC to consider other factors, if it deems it to be appropriate…

Similarly Canadian companies' legislation also provides for judicial removal as part of the 'oppression remedy' (Girgis op cit at 679; s 241 of the Canada Business Corporations Act, 1985). Under the Australian Corporations Act, 2001 there is no express provision for judicial removal of directors. However ss 206C, 206D and 206E provide for judicial disqualifications of directors which effectively remove the affected directors from office.

Section 71 of the 2008 Act does not provide for judicial removal at the first instance without initial efforts to secure a removal by the board or Tribunal. Rather, judicial removal is achieved through an application for the review of a board or Tribunal decision…

The introduction of removals by boards and the Tribunal is attributable to the adoption of the provisions of United States, Canadian and Australian companies' legislation…

Removal of directors by shareholders is limited to elected directors whilst removal by the board and Tribunal may be used for any category of directors. Removal of directors by a board is applicable only where the company concerned has at least three directors; in all other cases, removal must be referred to the Tribunal. No grounds for removal are stipulated in the 2008 Act for removals by shareholders. The same grounds are stipulated in the 2008 Act for removal by the board and the Tribunal. These grounds relate to ineligibility, disqualification and an inability to perform in accordance with a director's duties.

Procedurally, there is a distinction between removal by shareholders, on the one hand, and removal by the board and the Tribunal, on the other hand. Directors are required to be given notice and an opportunity to orally present a case for their retention at a shareholders' or board meeting or Tribunal hearing where their dismissal is to be decided upon. However, the notice periods are prescribed for removal by shareholders while there is no prescription for removal by the board or the Tribunal.

However, as s 71 expressly requires that the concerned director be given a 'reasonable opportunity' to make an oral presentation to the shareholders, board or Tribunal before a decision on his removal is made, it seems that directors still retain a meaningful right of representation.

3. THE APPLICANT'S ARGUMENT

3.1. The Applicant argues that the Respondent should be removed as a director, *inter alia,* as he has allegedly failed:

3.1.1. to be available to take the Applicant's calls and the Applicant alleges that this amounts to a failure of corporate governance and good business practice;

3.1.2. to permit the Applicant's agreed retention of a motor vehicle and has subsequently dispossessed the Applicant of same;

3.1.3. to make monthly payments required to the Applicant.

3.2. The Applicant alleges that the Respondent has been duly served with this application and has failed to respond timeously.

3.3. The Applicant alleges that due to this failure, he is entitled to a Default Order.

4. **FINDINGS**

4.1. In the light of the above and having read the papers filed by the Applicant, it is the finding of this Tribunal that the Applicant has failed to make out a case for the relief sought and the Application should be dismissed.

4.2. In any event, the relief sought by the Applicant and the reasons for the removal of the Respondent as a Director fall outside the jurisdiction of the Tribunal in that the grounds Applicant relies upon are not within the stated grounds upon which the Tribunal may exercise a discretion to remove a director.

5. **ORDER**

The Application is dismissed.

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PJ VELDHUIZEN

MEMBER OF THE COMPANIES TRIBUNAL

CAPE TOWN