



COMPANIES TRIBUNAL

REPUBLIC OF SOUTH AFRICA

CASE NO: CT04NOV2016

In the matter between:

JACQUELINE FRANCES GRADWELL

APPLICANT

AND

JANE MERLE MARQURET LEWIS

RESPONDENT

IN RE: DATA CENTRE CENTRAL PROPRIETARY LILITED

IN AN APPLICATION IN TERMS OF SECTION 71 (3) (b) OF THE COMPANIES ACT.

Decision handed down on 27 JANUARY 2017

DECISION

INTRODUCTION

[1] This is an application in terms of section 71 (3) (b) of the Companies Act No. 71 of 2008 ("the Act").

[2] The Applicant is JACQUELINE FRANCES GRADEWELL, an adult female, director of Data Centre Central Proprietary Limited and residing at No. 44 Stonewood, Macbeth Avenue, Gauteng.

[3] The Respondent is JANE MERLE MARQARET LEWIS, an adult female, director of Data Centre Central Proprietary Limited and residing at No. 16 Martha Road, Robin Hills, Randpark Ridge, Gauteng.

[4] Applicant seeks the following relief:

"Removal of Director"

BACKGROUND

[5] For better understanding of the issues in this application, a brief background of the relevant facts is necessary. The Applicant brought an application in terms of section

71 (3) (b) of the Companies Act No. 71 of 2008, as amended ("The Act") for the removal of the Responded as director of Data Centre Central Proprietary Limited.

[6] In terms of the Certificate of Confirmation obtained from the Companies and Intellectual Property Office dated 14 April 2014 the Applicant and Responded are recorded as the two directors of Data Centre Central Proprietary Limited.

[7] Further, in terms of the aforementioned Certificate of Confirmation both the Applicant and the Responded were appointed as directors of data Centre Central Proprietary Limited on 02 March 2015.

[8] The Applicant in an affidavit dated 13 December 2016 states that:

"I would like to continue with the application by the companies tribunal for the removal of a director Jane Merle Margret Lewis ID 8203070210085 as per companies Act 71 of 2008, section 71, subsection (3) (b) has neglected or been derelict in the performance of the functions of director case no. CT004NOV2016."

APPLICABLE LAW

[9] Before I deal with the application filed, I wish to highlight what I believe to be the relevant provisions of the Act.

Section 71 of the Act.

Removal of directors

- 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).*
- 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.*
- 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) *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.*

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) *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*

a) *loss of office as a director; or*

b) *loss of any other office as a consequence 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.*

[Own emphasis and underlining]

EVALUATION

[10] The Applicant argues that the Respondent should be removed as director for the following reasons:

- *Misuse of company funds*

- *Mismanagement of the company*
- *Dereliction of duty as director*

FINDING

[11] In terms of section 71 of the Act, a director may be removed by shareholders or the board of directors.

[12] Further, in terms of section 71 (1) a director may be removed by the shareholders at a meeting of shareholders despite anything to the contrary in a company's memorandum of Incorporation, or an agreement between a company and a director, or even an agreement between any shareholders and a director.

[13] Statutory removal of a director by shareholders provides that a director has to be given notice of the meeting as well as the proposed resolution to have him removed, before the resolution is considered by the shareholders. And the director has to be afforded an opportunity to make representation to the shareholders prior to the resolution being considered.

[14] The board of directors may remove a director if there are more than 2 (two) directors in terms of section 71 (3) of the Act.

[15] 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.

ORDER:

[16] The following order is therefore made.

a) The Application is dismissed.

MMOLEDI MALOKANE

(MEMBER OF COMPANIES TRIBUNAL OF SOUTH AFRICA)

Date: 27 JANUARY 2017