IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT01531ADJ2023

In the matter between:

FRANCOIS DENTON **APPLICANT**

and

LUKE MONROE OVERSTREET **RESPONDENT**

Presiding Member of the Companies Tribunal: MINAH TONG-MONGALO
Date of Decision: 1 FEBRUARY 2024

DECISION (Reasons and an Order)

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1. INTRODUCTION

1.1. The Applicant is Francois Denton, the director and shareholder of Executive Aircraft Refurbishment Pty Ltd, registration number 2018/020902/07, with its registered address Lanseria International Airport, Airport Road, Lanseria, Gauteng, 1748.

1.2. The Respondent is Luke Munro Overstreet, director of Executive Aircraft Refurbishment Pty Ltd, registration number 2018/020902/07, with its

registered address Lanseria International Airport, Airport Road, Lanseria, Gauteng, 1748.

2. **BACKGROUND**

2.1. Around 2019/2020, the Applicant approached the Respondent to secure the necessary funding to extend his business to include the refurbishment of aircrafts.

2.2. The Respondent proposed a 50% shareholding; in return, he would invest $400 000.00 and a further $50 000.00 annually.

2.3. The Applicant drafted the agreement to incorporate this arrangement, but the parties did not sign it. Despite this, the Applicant registered the Respondent as a director of the company in anticipation of the conclusion of the agreement and the financial contribution to the business.

2.4. Despite several attempts by the Applicant to engage the Respondent, the Respondent did not engage in the issues the Applicant raised.

2.5. The Applicant referred the matter to the Companies Tribunal to have the Respondent removed as a director of Executive Aircraft Refurbishment Pty Ltd (“EAR”).

2.6. The Applicant served the Respondent through an email, which they communicated during their engagements, and the Respondent failed to respond. Proof of communication using the emails to which the Applicant served the Respondent is attached to this application. Consequently, this application is procedurally compliant with Regulation 53 of the Companies Act 71 of 2008 (“the Act”).

2.7. The Applicant has applied for a default order against the Respondent.

3. **THE APPLICATION**

3.1. The Applicant is not legally represented and does not explicitly state in terms of which section of the Act he is applying. However, his stated request is for the Companies Tribunal to grant an order removing the director, Luke Munro Overstreet, as the director of EAR.

Reasons for Removal

3.2. Following the verbal agreement wherein the Respondent had agreed to fund the business with an upfront payment of $400 000.00 and a further $50 000.00 annually, the Applicant proceeded to register the Respondent as the director in anticipation of such payment. But such a payment promise did not materialise. Consequently, the registration as a director was an error that must now be rectified by removal as a director.

3.3. The Respondent is not involved in the company's management and failed to engage the Applicant.

3.4. The Respondent has utilised EAR's services through his other entity but has failed to ensure payment of such services, causing financial distress to EAR.

3.5. Given the registration of the Respondent as a director and his lack of interest in securing the needed overdraft, this has jeopardised the running of the business. The banks require the signatures of all directors to extend funds to the company, and the banks are also concerned about the lack of a permanent residential address of the Respondent in South Africa.

The Companies Tribunal's Jurisdiction

3.6. The relief sought falls within the Companies Tribunal's jurisdiction because the company has only two directors (S 71 (8)).

3.7. S 71(8) (b) of the Act states that:

"in any circumstances contemplated in subsection (3)," (removal of a director by the board), "any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection".

3.8. S 71(8) (b) of the Act states that:

"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."

Subsection 4 concerns the procedure the board must follow when contemplating issuing a resolution proposing the removal of a director, giving the director sufficient time to prepare.

Subsection 5 concerns the right to have a removal decision reviewed by the court.

Subsection 6 concerns the rights of any voting person entitled to elect that director may apply to the court to have a decision reviewed by the court.

4. APPLICABLE LAW

4.1. Section 71 of the Companies Act, 71 of 2008

4.2. Section 76 of the Companies Act, 71 of 2008

"(2) A director of a company must—

(a) not use the position of director, or any information obtained while acting in the capacity of a director—

(i) to **gain an advantage for the director**, or for another person other than the company or a wholly-owned subsidiary of the company; or

(ii) to **knowingly cause harm to the company** or a subsidiary of the company. "

(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 25 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."

5. **EVALUATION**

5.1. The Respondent did not oppose the application.

5.2. The Respondent is not involved in the business's operations, and his continued stay as a director is obstructive to the efficient management of the company.

5.3. The Respondent failed to prioritise the company's interests despite having been registered before fulfilling his verbal undertaking.

5.4. The Applicant informed the Respondent that the business requires funding to operate but failed to cooperate with the Applicant to ensure that funding is secured so the company can operate.

5.5. The Respondent compromised the business's financial viability by using the services of EAR but failed to ensure payment for those services, thereby affecting the business's cash flow. Consequently, the Respondent has failed to protect the interests of EAR. This conduct is in breach of his director's duty to not cause harm to the company in terms of S 76 (2) (ii) in that his actions directly affected the company's liquidity.

5.6. Considering the unresponsiveness and indifference of the Respondent, further engagements with him and an attempt to arrange a meeting to discuss the matters would have yielded no results. The Respondent's failure to respond when served with the application proves this view. Nevertheless, before this application, the Applicant did inform the Respondent of the need to remove him as a director and furnished a reason for such a request. Thus, whether the Applicant is acting as a director or as a shareholder, the Applicant substantially complied with S 71 in that assuming that he acted as a shareholder, it is not required that the shareholder give a statement stating the reasons for removal because the shareholders are entitled to remove a director they no longer support.[1] On the other hand, the directors must give advance notification and

[1] *Miller v Natmed Defence (Pty) Ltd and others* [2021] JOL 51233 (GJ)

the proposed resolution.[2] The Applicant has satisfied both requirements in that the notice sent to the Respondent before this application is deemed satisfactory under the circumstances. That notification stated the intention to remove the Respondent as a director and the reason thereof. As a shareholder, it sufficed that the Applicant made it clear to the Respondent that his stay as a director no longer serves the company.

6. **FINDINGS**

6.1. The Respondent has breached his fiduciary responsibilities to the company.

6.2. Sufficient evidence exists to justify the Respondent's removal as the company's director. Moreover, the facts support the argument that the Respondent has neglected or been derelict in the performance of the functions of the director.

7. **ORDER**

7.1. Luke Munro Overstreet is hereby removed as the director of Executive Aircraft Refurbishment Pty Ltd, registration number 2018/020902/07.

7.2. There is no order of costs.

MINAH TONG-MONGALO

[2] Ibid. See also S 71 (3) and (4) of the 2008 Companies Act.