



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT15AUG2017

In the matter between:

RIYADH HOUSEN

PRESTIGE VERIFICATION

T/A PREMIUM BEE VERIFICATION

THE COMPANIES TRIBUNAL
2018 -01- 3 0
Received by: <i>[Signature]</i>
Time: <i>09:00</i>
SOUTH AFRICA

FIRST APPLICANT

SECOND APPLICANT

AND

ZIYAAD AHMED

RESPONDENT

Coram: ISHARA BODASING

Date of Hearing: 11 January 2018

Date of Decision: 29 January 2018

DECISION (Reasons and an Order)

1. INTRODUCTION

1.1 First Applicant is Riyadh Housen, former Director and current 49% shareholder in Second Applicant. He was legally represented at the hearing.

1.2 Second Applicant is Prestige Verification (Pty) Ltd. T/A Premium Bee Verification, a company duly incorporated in accordance with the company laws of South

Africa with registration number 2013/207835/07, having its registered address at
□Office 2, 295 Florida Road, Morningside, KZN.

1.3 Respondent is Ziyaad Ahmed, Director and 51% shareholder in Second Applicant.

1.4 First Applicant seeks relief from this Tribunal to declare Respondent delinquent in terms of S162 of the Companies Act 71 of 2008 ("the Act"), and for his removal as Director of Second Applicant (the relevant section of the Act is not cited). □

1.5 The following grounds are advanced for the relief sought:

1.5.1 In terms of S162(5)(a) of the Act, Respondent was not entitled to act as Managing Director of an external company whilst gainfully employed by a full-time employer against whose policy it is to be a director of an external company;

1.5.2 In terms of S162(5)(c)(i) and (ii) of the Act, Respondent grossly abused his position as a Director of the Second Applicant because he used the latter's name and information that he has access to, for self-enrichment and to syphon monies lawfully due to the Second Applicant, into his personal account; and

1.5.3 Respondent is intentionally inflicting harm on the Second Applicant by holding business funds and refusing to pay company expenses.

1.6 Respondent answered in detail to deny the allegations, claiming that Applicant himself should be declared a delinquent Director.

2. ISSUES

2.1 This Tribunal has no jurisdiction to declare a Director delinquent in terms of S162 of the Act. I am thus confined to deal with the application to remove Respondent as a Director of Second Applicant.

2.2 The basis for this relief sought is that during April 2017, Respondent transferred funds from the Second Applicant's account into his personal account, and failed to pay expenses timely.

2.3 First Applicant concedes that he also withdrew funds from Second Applicant's account without informing Respondent, but contends that this was not unusual.

2.4 Respondent states that this was not the practice, and that First Applicant failed to respond to his enquiry about the withdrawal. On further investigation, it came to his attention that First Applicant had unilaterally transferred monies from the bank account of another company of which they are both Directors, into his personal account. Respondent contends that he placed the monies into a trust account pending further investigation into these matters.

2.5 During the hearing, First Applicant admitted that the Second Applicant's expenses were paid by Respondent during the following month, albeit tardily.

2.6 It also emerged during the hearing, that in September 2017 First Applicant sent out correspondence to Second Applicant's clients, that the latter was no longer trading.

2.7 Both parties agree that Second Applicant has not traded since around May 2017, but can not reach settlement as regards the assets of the Second Applicant. Furthermore, there are High Court cases pending as regards the disputes between these two directors.

3. APPLICABLE LAW

3.1 S71(8) of the Act enables this Tribunal to make a determination in circumstances contemplated in S71(3) - (6) read within the applicable context, in terms of which this Tribunal may remove a director of a company. I include the following relevant provisions of S71 and S76, some of which are underlined for emphasis.

3.2 S71 of the Act deals with **Removal of Directors**:

(3) If a company has more than two directors, and a shareholder or director has alleged that a director of the company-

... (b) has neglected, or been derelict in the performance of, the functions of director, (c)

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. (c)

(8) If a company has fewer than three directors-

(a) subsection (3) does not apply to the company; (c)

(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)

(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. (c)

3.3 Section 76 of the Act deals with **Standards of Directors' Conduct**

(2) A director of a company must-

(a) not use the position of director, (c)...

(ii) to knowingly cause harm to the company or a subsidiary of the company; and (c)

(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director- (c)

(i) reasonably believes that the information is-

(aa) immaterial to the company; or

(bb) generally available to the public, or known to the other directors; or ...

(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-

(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;

4. EVALUATION

4.1 At the outset, I must express my disappointment that the parties did not consider mediation as the first option to resolve their dispute. However, that door is not closed to them.

4.2 More importantly, as stated earlier, this Tribunal enjoys no jurisdiction in terms of Section 162 □ of the Act.

4.3 Therefore this application can only be considered in terms of Section 71(8) □ of the Act, which provides inter alia that if a company has fewer than three (3) directors that a director may apply to the Tribunal for an Order removing a director on the basis contemplated in Section 71(3)(b) [presumably the section upon which the Applicant relies] in that such a director:

"has neglected, or been derelict in the performance of, the functions of director."

4.4 In order to succeed in proceedings as per S71 of the Act, First Applicant bears the onus to establish that the prescribed procedural and substantive requirements are met.

4.5 The process for the 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.¹

4.6 As to the meaning of "neglected" and "derelict" used in S71(3)(b), I defer to the ordinary interpretation as adopted by my learned brother Manamela, a fellow Member of this Tribunal in the *Idada Trading* matter²:

*The Oxford Large Print Dictionary (New Edition) explains the meaning of **neglect** as "(verb) 1: pay no attention or not enough attention to; 2: fail to take proper care of; 3 omit to do something, e.g. through carelessness or forgetfulness. ...*

*... **Derelict**: this word is explained as "(adjective) deserted and left to fall into ruin; (noun) 1: an abandoned property, especially a ship.*

4.7 It has been suggested that "derelict" has an element of being deliberate, purposeful or intentional about it, whereas "neglect" is more an omission than an act.³ In applying this to the context of section 71(3)(b), a director neglects to perform his functions as a director of a company if he gives insufficient attention to his actions. As regards the standards of directors' conduct and the fiduciary duties of directors, the particular director fails to adhere to the standards legally required of him, when a reasonable person under the same circumstances would have acted to the contrary.

Standards of Directors' Conduct

¹ See S71(4)(a) and (b) and S71(2)(a) and (b) of the Act.

² CT008MAR2014 at paras 20 & 21. See also *Spineco Medical International* matter CT021NOV2014 at paras 53 - 56

³ See generally Van der Walt JC and Midgley JR *Principles of Delict* (3rd ed.) (LexisNexis Butterworths Durban 2005 on pp 166 to 167.

4.8I now turn to whether or not the alleged conduct of First Respondent breached any of the standards set out in section 76 of the Act⁴.

4.9First Respondent's defence or ground of justification may include what is contemplated in section 76(4). He satisfies the relevant obligation if he shows that he took "reasonably diligent steps to become informed about the matter". This appears to be subjective in nature. Otherwise, he has to show that his performance of his functions was not below the requisite standard. Should it be determined that his conduct was below standard, Respondent would have acted negligently or in dereliction of his duties.

4.10 There are two basic "sets" of duties: the fiduciary duties and the duties of care and skill. If one does not comply with the fiduciary duties, it is not an automatic non-compliance with duties of care and skill, and vice versa. The duty of "bona fides" is a separate overarching duty – in addition to "objective duties".

4.11 The problem *in casu* is that there is no evidence that Respondent, in not making payment of company expenses during April 2017, caused harm or potential harm to the company [s 76(2)(a)(ii)], or that it was not in the best interests of the company [s 76(3)(a)]. In fact, First Applicant concedes that expenses were in fact paid the following month because Respondent was concerned about First Applicant's unauthorized withdrawal of funds from Second Applicant's bank account.

5. FINDINGS

5.1This Tribunal has to be placed in a position in which it is able to determine what 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. First Applicant has not shown a causal link between Respondent's actions in not paying expenses during April 2017, and the current dormant status of Second Applicant.

⁴ For a crisp enunciation of standards of director's conduct in terms of the Act, a reading of Manamela's dictum in *Spineco* is insightful. See note 7 *supra* at paras 66 – 77.

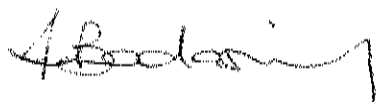
5.2 Given the circumstances and turn of events faced by Respondent, I can not find that a reasonable person would have acted to the contrary.

5.3 Against the backdrop of all stated above, I find that the respondent has not been derelict or neglected the performance of his functions as a director of the Company.

6. ORDER

6.1 The application is refused.

6.2 No order as to costs



ADV. ISHARA BODASING

For First Applicant: GLODEAN BRIJLAL ERASMUS ATTORNEYS

For Respondent: IN PERSON