IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

CASE NO: CT01937/ADJ/2024

In the matter between:

Samuel Makume Applicant

and

Kabelo Phineas Seageng Respondent

Date of Decision: 10 October 2024

DECISION

INTRODUCTION

1. The Applicant is **Samuel Masia Makume,** a director of **TIRO Engineering & Project Management Limited (Pty)** a duly incorporate South African company with registration number (2014/134671/07) and with its business address at: G7, 63

Peter Place, Bryanston, Gauteng Province, 2191.

2. The Respondent is **Kabelo Phineas Seageng,** a major male Residing at 21 Mimosa Road, 31 Lake Xanadu, Midrand, Gauteng Province.

3. The Applicant applies to the Companies Tribunal in terms of Section 71 of the Companies Act 71 of 2008 ("the Act"), for the removal of the Respondent as a director of the Company.

APPLICANT'S SUBMISSIONS

4. The Applicant stated, in his founding affidavit, that on 20 April 2024 he received a phone call from the Respondent requesting a meeting for the 21 April 2024. At the meeting the Respondent informed him that he had accepted a one year contract at Murray and Roberts in the Eastern Cape. This would necessitate him (Respondent) to relocated from Gauteng to the Eastern Cape.

5. Applicant requested that Respondent to communicate what he had told in writing. The Respondent duly emailed the letter to the Applicant on 24 April 2024. Respondent duly emailed the Applicant what he had stated at the meeting.

In the email Respondent states that;

(i) he was not resigning;

(ii) he was prepared to continue working for the Company after hours and on weekends; and

(iii) suggested that someone be brought in so that the office did not remain unattended during working hours.

6. The Applicant responded by outlining how the Respondent's absence would affect the company's operations. Among the concerns raised by the Applicant the following are the most noteworthy:-

(a) Relations with partners have to be maintained.

(b) Supervision of employees at projects would be untenable without the Respondent.

(c) The nature of the company's business requires compliance with safety standards and that supervision could only be done during working hours.

(d) Tendering for work would be compromised by the Respondent's absence.

(e) The notice period of 10 days before assuming work at Murray and Roberts, given by the Respondent is too short for any measures to be taken to safeguard the business of the company.

7. The Applicant, in the same letter, suggests that Respondent resign.

8. After not receiving a response to the letter, within the 5 days stipulated in the letter, Applicant requested a virtual meeting for the 11 July 2024. Respondent did not honour the appointment and, instead, sent a letter from his lawyers, Chimeromombe Attorneys, detailing what his expectations were if he were to resign.

9. Applicant requested a further meeting in order to deal with the Respondent's demands. Again Respondent and his attorneys did not honour that appointment.

10. On 16 August 2024 Appellant referred the matter to the Companies Tribunal for relief, as he felt that Respondent had neglected his fiduciary duty to the company. Further, the Applicant stated that Respondent did not act with care and good faith when accepting the Murray and Roberts appointment while still employed by the company. Applicant was particularly aggrieved by the10 day notice given by Respondent.

In view of the aforegoing, Applicant requests that Respondent be removed as a director of the Company.

APPLICABLE LAW

11. Section 71 (removal of directors) is the applicable section of the Act and provides as follows:

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 ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69(8)(a); or 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. (Emphasis added)

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.

EVALUATION

12. The main issue to be determined is whether the Respondent has

neglected or been derelict in the performance of his functions as director.

13. Having considered the provision of sections 71 of the Act, I am of the considered view that the Respondent has neglected his functions as a director of the Company. The Respondent accepted an appointment at another company on 10 days notice to the Company. It is untenable that a replacement can be found to replace him within this period. His behaviour shows a lack of loyalty and care to the company. Not only has he been derelict but he has put his own interests ahead of those of the company. This has tremendous financial and operational consequences for the company. I am persuaded that Applicant has given cogent reasons for the Respondent to be removed as a director at the Company.

ORDER

14. In the result the following order is made:

14.1 The relief sought by the Applicant is granted.

14.2 The Respondent is removed as a director of in terms of Section 71(8) of the Act.

14.3 The Companies and Intellectual Property Commission is Hereby ordered to deregister **Kabelo Phineas Seageng** (the Respondent), as director **TIRO Engineering & Project Management (Pty) Ltd** within a period of 10 (ten) days from date of receipt of this order.

14.4 The Registrar of the Tribunal is hereby directed to deliver a copy of this order to the Commissioner of Companies and Intellectual Property Commission within 5 (five) days from date of handing down of this order.

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MEMBER OF THE COMPANIES TRIBUNAL