



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT008SEP2017

In the matter between:

DHARMALINGUM MOONISAMI

APPLICANT

AND

MANIVASAN PALANI

FIRST RESPONDENT

BLENDRITE CHEMICALS (PTY) LTD

SECOND RESPONDENT

Coram: ISHARA BODASING

Date of Hearing: 24 November 2017

Date of Decision: 18 December 2017

DECISION (Reasons and an Order)

1. INTRODUCTION

1.1 In 1997 **Dharmalingum Moonisami** (Applicant) and **Manivasan Palani** (First Respondent) established **Blendrite Chemicals (Pty) Ltd.** (Second Respondent – “the Company”). They are brothers-in-law, the only two Directors of the Company, and the only Trustees of its shareholder: Kenti’s Financial Trust

("the Trust").¹ There is a Shareholders' Agreement between the Trust and the Company.²

1.2 Applicant is Managing Director of the Company and its CEO on the Board. First Respondent is Financial Director of the Company and Chairperson of its Board.

1.3 Applicant seeks the removal of First Respondent as Director of the Company in terms of S71(8) of the Companies Act 71 of 2008 ("the Act"), alleging that First Respondent has been neglectful or derelict in the performance of his duties as a Director, as per S71(3)(b) of the Act. Applicant contends that, as a consequence thereof, the Company has been, and continues to be, exposed to operational and financial risks.

1.4 The following grounds are advanced for the relief sought:

1.4.1 Abdication of First Respondent's functions as Financial Director;

1.4.2 Mismanagement of the Company's finances; and

1.4.3 Failure on the part of First Respondent to perform the functions of a director.

1.5 First Respondent answered in detail to deny the allegations, claiming that Applicant himself should be removed as a Director.

2. BACKGROUND

2.1 Since 2001 First Respondent has resided both in Canada and South Africa, and has appeared to fulfil his functions as Director of the Company. He was supported in this role by a team, which included Praveen Naidoo ("Naidoo") who was appointed during 2007 as Financial Manager of the Company.

2.2 Naidoo held this position until his resignation in mid-2017. However, according to Applicant, Naidoo was dismissed in October 2016. I touch on this issue in more detail further on.

¹ See pp 32 – 38 of indexed bundle for CACP and other information on 2nd Respondent.

² See pp 39 – 61 of indexed bundle.

2.3 As the only shareholders and Directors of the Company, Applicant and First Respondent enjoyed a cordial working relationship for almost two decades. However, the internecine strife between them seems to have been sparked during the first quarter of 2016 when First Respondent reminded Applicant of the need to appoint additional directors, and for succession planning in light of the provisions of their *Special Resolution Regarding the Roles of CEO and Chairman of Blendrite Chemicals and Kenti's Financial Trust*.³

3. ISSUES

3.1 At the hearing First Respondent's attorney raised an *in limine* objection to allegedly new matters raised in Applicant's reply, particularly as regards insinuations of fraud against First Respondent. I refused to entertain further sets of affidavits or an application to strike out certain matters, and therefore disregarded all new matters in reply.

3.2 There are two bases for Applicant's allegation that First Respondent abdicated his responsibilities as Financial Director of the Company:

3.2.1 The first is that he works between South African and Canada. In response, First Respondent pointed out that it is not disputed that this has been the situation for over a decade. He added that this appeared to have been in order up until last year. Applicant did not dispute this.

3.2.2 The second reason advanced by Applicant is that Naidoo has not been at work since his dismissal in October 2016. First Respondent stated that as Chairperson of the Board, and in terms of clause 8 of the Shareholder's Agreement, his prior written approval was required for the dismissal of a senior manager.⁴

3.2.3 Having been excluded from the decision to subject Naidoo (who reports to First Respondent) to a disciplinary enquiry (which was held in Naidoo's absence) and from the decision to dismiss Naidoo, First Respondent over-

³ See P163 of indexed bundle, or Annexure MP00A of First Respondent's affidavit: they will continue to hold their respective roles until the age of 65 years. Applicant

⁴ See p190 of indexed bundle

rode that decision. He allowed Naidoo to continue his work from home because Applicant barred Naidoo from re-entry to the premises.

3.2.4 Furthermore, Applicant conceded that he was aware that First Respondent found himself in the invidious position of needing to spend more time in Canada during the following months because his wife had been diagnosed with cancer, and was undergoing treatment. Given that the operational and financial year-ends were looming, First Respondent contends that there was an increased reliance on Naidoo's competence.

3.3 There are two bases for Applicant's allegation that First Respondent mismanaged the Company's finances:

3.3.1 The first is that he continued to pay Naidoo a salary in the intervening months from his purported dismissal leading up to his resignation. Upon his resignation, Naidoo was paid out his accumulated leave. According to Applicant, Naidoo was not entitled to this because it was not the Company's policy. However, Applicant does not dispute First Respondent's answer that most employees had accumulated leave, as evidenced by an annexed schedule.⁵

3.3.2 The second reason is that First Respondent over-paid Naidoo by almost R9 000 as part of his pro rata bonus on resignation. Applicant disputes that this was performance-based, and claims that it was an irregular expenditure by First Respondent.

3.4 The basis for Applicant's allegation that First Respondent failed to perform the functions of a director is that he has a supporting team, the members of which are paid more than other staff on a similar level. Applicant also takes umbrage with the flexi-time arrangements that two of the staff members have been afforded.

3.5 Applicant contends that First Respondent's abdication of his functionary role to staff is manifest in his inability to answer a certain query from the auditors. In

⁵ See p285 of indexed bundle, Annexure MP24A-C of First Respondent's affidavit. The accumulated leave of some members of Applicant's team exceeds that of Naidoo's.

response, First Respondent clarified that it was not unusual for the auditors to communicate with Applicant as Managing Director of the Company. Furthermore they were aware that Applicant had dismissed Naidoo, and that the relationship between the two Directors was strained. This was not disputed.

4. APPLICABLE LAW

4.1 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.

4.2 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,

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.

(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.

4.3 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, ...

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

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

(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; and

(b) is entitled to rely on-

(i) the performance by any of the persons-

(aa) referred to in subsection (5); or

(bb) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and

(ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).

(5) To the extent contemplated in subsection (4)(b), a director is entitled to rely on-

(a) one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;

5. EVALUATION

5.1 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.

Removal of Directors

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

5.3 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.⁶

5.4 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 matter⁷:

*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*

⁶ See S71(4)(a) and (b) and S71(2)(a) and (b) of the Act.

⁷ CT008MAR2014 at paras 20 & 21. See also Spineco Medical International matter CT021NOV2014 at paras 53 - 56

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.*

5.5 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.⁸ 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

5.6 I now turn to whether or not the alleged conduct of First Respondent breached any of the standards set out in section 76 of the Act⁹.

5.7 First 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, First Respondent would have acted negligently or in dereliction of his duties.

5.8 Section 76(4) introduced the “business judgment rule” into South African law and therefore a director is not liable for mere errors of judgment. He is not required “to have special business acumen or expertise, or singular ability or intelligence, or even experience in the business of the company”, but has to meet the test for the

⁸ See generally Van der Walt JC and Midgley JR Principles of Delict (3rd ed.) (LexisNexis Butterworths Durban 2005 on pp 166 to 167.

⁹ 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.

“reasonable” director.¹⁰ However, the business judgment rule has various restrictions that must be complied with in addition to the requirements of the Act. The decision must be informed otherwise the rule will not apply.

5.9 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”.

5.10 The problem *in casu* is that there is no evidence that First Respondent as Chairperson of the Board, in over-riding the decision to dismiss Naidoo, and permitting him to continue working from home, 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)]. Mere conjecture that it may have that effect is not enough.

5.11 Both Applicant and First Respondent manage the company. The underlying structure is actually that of a partnership and it was run *de facto* as a partnership. The Applicant mentions expenditure and the fact that, unbeknownst to him, Naidoo continued his duties as Financial Manager. This cannot be seen as that it was First Respondent who placed the Company in jeopardy. This possible consequence was in any case not proved by proper evidence. In fact, it seems that Applicant placed the Company in jeopardy by contributing to a qualified audit, which had a rippling effect (overdraft facility withdrawn by the bank, no BEE certificate, SARS penalty). Up to and including this set of facts there is no evidence of a dereliction of duty on the part of First Respondent.

5.12 The fact that Applicant purported to exclude First Respondent from management of the company in his capacity as director, and to remove Naidoo as financial manager prompted the actions by First Respondent in respect of Naidoo. This and ensuing actions by First Respondent, while he is *de jure* a validly appointed director, is then used by Applicant as a ground for approaching the Tribunal for an order in terms of s 71(8). The fallacy of this process is patent.

¹⁰ Delport P and Vorster Q Henochsberg on the Companies Act 71 of 2008 on p 298(7) (Lexisnexis online version May 2016)

Unclean Hands Principle

5.13 The doctrine of unclean hands is popular in trademarks infringement or passing-off cases and it actually constitutes a defence in those matters.¹¹ One of the maxims in this regard, *in par delicto potior est conditio defendentis* was described by Stratford CJ in *Jajbhay v Cassim* 1939 A.D. 537. It curtails the right of a delinquent to avoid the consequences of his performance or part performance. It is based in moral principle aimed at discouraging illegality and immorality, and to advance public policy.

5.14 In this matter we have directors who have taken steps, which upon scrutiny may fail to pass the muster of good corporate governance or are even in breach of the law. I have dealt with the conduct of both parties, even though the current application is for the removal of First Respondent as director. Although Applicant's conduct is not a subject of determination in this application, under the circumstances is it irrelevant or does the unclean hands principle apply?

5.15 Modern equity law is relevant to fiduciary relationships, such as that of the parties to this dispute.¹² A lawsuit seeking the removal of a director is an equitable remedy and the party bringing such an action must do so with clean hands. This means that the party seeking the director's removal must not be wrongfully responsible for the circumstances leading to the application.

5.16 What is also striking about this application is that Applicant seems to be oblivious of the fact that First Respondent is an equal holder of equity or shareholder in the Company. I imagine that this would entitle First Respondent to continue to have an embedded financial interest in the Company, and cannot lose these rights and interests by removal as a director.

5.17 It is clear from the papers and from arguments during the hearing that

¹¹ *Tullen Industries Ltd. v A de Sousa Costa (Pty) Ltd & Others* 1976 (4) SA 218 (T)

¹² See generally, JD Heydon, MJ Leeming, PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrine and Remedies* (LexisNexis, 5th ed., 2015); McGhee (ed.)

Applicant's conduct in removing Naidoo, alleging irregularities that were never investigated, and delays in signing off on the annual financial statements with the resultant SARS penalties, were aimed at casting First Respondent as a bad executive director of the Company, without regard to their potential effect on the interests of the Company.

5.18 Given the impasse between the parties, it may be in the best interests of the Company that it is dissolved. Two of the broad categories of just and equitable grounds for the winding up of a company are deadlock (between members or directors) and grounds analogous to those that allow the dissolution of partnerships. However, these are only my comments *en passant* and they are not necessarily decisive of this matter.

6. FINDINGS

6.1 What is still outstanding after a discussion on the applicable law and the circumstances of the dispute is a determination on whether or not the conduct of First Respondent breached any of the standards set out in section 76 of the Act.

6.2 For First Respondent's conduct to fall below par of the standards set in section 76, it must also be disqualified in terms of subsections 4(b) and 5(a). In my judgment, First Respondent's conduct does not fall foul of this in his capacity as a director of the Company. As executive director, First Respondent was entitled to rely on Naidoo for the day-to-day financial management of the Company. There was tacit acceptance by Applicant that First Respondent sometimes performed his functions remotely. There is no evidence that this was prejudicial to the Company.

6.3 This Tribunal has to be placed in a position in which it is able to determine what First 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. Applicant has not shown a causal link between First Respondent's decision to permit remote functioning and recent overdue debts. This application suffers from a paucity of

evidence in this regard, and thus fails due to this shortcoming.

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

6.5 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.

7. ORDER

7.1 The application is refused.

7.2 No order as to costs

ADV. ISHARA BODASING

For Applicant: ADV I. VEERASAMY, instructed by MACGREGOR ERASMUS
ATTORNEYS

For First Respondent: ATTORNEY JAY REDDY