**COMPANIES TRIBUNAL**

**REPUBLIC OF SOUTH AFRICA**

**IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA**

**CASE NO: CT00818ADJ2021**

**In the matter between:**

| | |
|---|---|
| **Hendrik Theodore Smit Buurman** | **Applicant** |
| **and** | |
| **Martin Johan Dutoit** | **1st Respondent** |
| **BDGA Holding (Pty) Ltd. (2016/466938/07)** | **2nd Respondent** |
| **BDGA Academy (Pty) Ltd. (2016/466974/07)** | **3rd Respondent** |
| **BDGA Coaching (Pty) Ltd. (2016/46699107)** | **4th Respondent** |
| **BDGA (Pty) Ltd. (2014/200950/07)** | **5th Respondent** |
| **BDGA Golf (Pty) Ltd. (2016/466974/07)** | **6th Respondent** |
| **BDGA Golf Inc. incorporated Delaware** | **7th Respondent** |

DECISION

Date of Decision: 8th April 2022

Member of the Tribunal: Dr. Mohamed Alli Chicktay

INTRODUCTION

[1] This is an application in terms of sections 71(8)(b) of the Companies Act No. 71 of 2008 (''the Act'') for an Administrative Order determining the removal of the First Respondent as a director.

PARTIES

[3] The Applicant is **Hendrik Theodore Smit Buurman an** adult male person, residing at 3 Saleha Katode Street Radiokop Roodepoort Johannesburg Gauteng South Africa.

[4] The First Respondent is **Martin Johan Dutoit** , an adult male person, residing at 15 Swaeltjie Street, Bokskruin Gauteng South Africa; The Second Respondent is **BDGA Holding (Pty) Ltd.** The Third Respondent is **BDGA Academy (Pty) Ltd. .** The Fourth Respondent is **BDGA Coaching (Pty) Ltd.** The Fifth Respondent is **BDGA (Pty) Ltd.** The Sixth Respondent is **BDGA Golf (Pty) Ltd.** The seventh Respondent is **BDGA Golf inc. incorporated Delaware.**

**APPLICATION**

[5] In its application the he Applicant seeks the following relief:

*''Removal of the First Respondent as director' of the 2nd to 6th Respondent and Further and or alternative Relief'*
*'*

[6] From the papers and by the time the matter was heard the First Respondent had resigned as Director from Respondents 2 to 6. The only issue for me to determine was whether or not to grant a cost order.

[7] This application was heard on 8th April 2022 online by the Companies Tribunal (''the Tribunal'').

**ARGUMENTS**

[8] The Applicant argued that:

8.1Only after the application did the first respondent resign. It was to avoid being held liable
8.2 As the allegations made are unanswerable the cost should follow as a result
8.3The Applicant gave two examples to show the Respondents conduct e.g. the first respondent blackmailed the applicant and the 2nd to 6th respondents by not making payments that was due to them. This was to ensure that respondents 2 to 6 fail the insolvency test to bring it to its knees. This is a breach of its fiduciary duties
8.4The first respondent also breached his fiduciary duty to the 2nd to 6th respondent by using the IP to further the 7th Respondents interest from which he drew a salary for which he was not entitled. He was also paying his wife money for office space for which she was not entitled.
8.5The applicant submitted that the 1st respondent violated his fiduciary duty to the 2nd to 6th Respondents. He could not refute this and thus resigned. Therefore the cost must follow.
8.6In terms of regulation 156 a cost order must be taxed on a party to party scale at High court tarrifs.
8.7 Even though the Applicant did not ask specifically for costs this is covered by the use of the words “further and alternative relief”
8.8In Clifford Harris Pty Ltd v SGB building Equipment Pty Ltd (1980) 2 SA 141(TPD) at p152 the court said that “the absence of a claim from costs does not prevent a court from granting costs to the successful claimant”
8.9This case was defended. In the Applicants replying affidavit at paragraph 16 costs were raised by the Applicant. The Respondents 1 and 7 were aware of the fact that the matter was set down for costs and the lack for a formal prayer for costs does not prevent the Tribunal from granting a costs order.

[9] The Respondents argument:

9 The Respondent made the following arguments
9.1The Respondent argued that the Applicant did not ask for costs and it thus cannot claim costs. It argued that the words “Further alternative relief” does not include costs.
9.2The Respondent denied the allegations that it used Respondent 7 to blackmail Respondents 2 to 6.
9.3The Respondent argued that the Tribunal has no jurisdiction to deal with Respondent 7 and that the Applicants case lay mainly with the manner in which the First Respondent is dealing with the seventh Respondent.
9.4The First Respondent indicated that he resigned because he could not work with the Applicant and not because he admits guilt
9.5 The First Respondent indicates that the Applicant did not raise costs as a remedy and thus cannot claim costs
9.6The First Respondent argues that a cost order be made against the Applicant for the days hearing.

**APPLICABLE LAW**

[10] Section 71 (removal of directors) is the applicable section of the Act.

[11] Section 71 of the Act provides as follows:

**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) *<u>If a company has fewer than three directors</u>*

a) *<u>subsection (3) does not apply to the company;</u>*

b) *<u>in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies</u>*

*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.*

**EVALUATION**

[12] After hearing lengthy arguments, the Tribunal examined the relevant sections and addresses the crisp issues before it and the relevant Law and its Powers. Since the First Respondent had resigned I only had to make an order as to costs.

[13] The main issue is whether or not to grant a cost order. The Applicant argued that it should be granted a cost order even though the First Respondent had resigned. The First Respondent argued that the Applicant cannot raise costs as a remedy since it did not claim it in its application. In terms of the case Clifford Harris Pty Ltd v SGB building Equipment Pty Ltd (1980) 2 SA 141(TPD) the High Court indicated that the absence of a claim for costs does not prevent a court from granting costs to the successful claimant. Regulation 156 of the Companies Regulations indicates that "Upon making an order, the Tribunal may make an order for costs "I am thus empowered to make such an order even though it is not in the application form.
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[14] As a result of the First Respondents Conduct the Applicant had to incur costs. Even though the First Respondent had resigned this was primarily due to the application that was made. It was due to the First Respondents conduct that the Applicant had to make

this application and I see no reason why a cost order should not be granted. Had this application not been made there would be no incentive for the Respondent to resign.

**ORDER:**

In the result the following order is made:

a) The First Respondent is to pay the Applicants cost on a party to party scale at High Court

   Tariffs.

Dr. MOHAMED ALLI CHICKTAY

MEMBER OF COMPANIES TRIBUNAL OF SOUTH AFRICA

Date: 8th April 2022.