IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case no.: **CT02010ADJ2024**

In the matter between:

GODFREY JOHN GILES	Applicant
and	
BRIAN ERNEST SMITH	First Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Second Respondent

Presiding member: Richard Bradstreet

Date of hearing: 17 June 2025

Date of decision: 1 August 2025

DECISION (Reasons and Order)

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1. This matter concerns an application brought before the Companies Tribunal in terms of section 71(8) of the Companies Act 71 of 2008 ("**the Act**"), in which the Applicant, Mr Godfrey John Giles, seeks the removal of Mr Brian Ernest Smith as a director of the non-profit company known as the SA Legion (JHB Branch) Soldiers Housing Organisation NPC (registration number 1944/016877/08) ("**SHO**").

2. The application is rooted in allegations of misconduct and dereliction of fiduciary duty, and brought in terms of section 71(8)(*b*) read with section 71(3) of the Act, which provide for the removal of a director where there are less than three directors on the board of a company. In such circumstances, an application to the Tribunal is necessitated by the fact that a majority vote would typically be impossible, unless the director whose removal is sought essentially resigns voluntarily.

3. The Applicant alleges that Mr Smith has committed a series of breaches of fiduciary duty, and the application is supported by a substantial body of documentation, including email and WhatsApp correspondence, financial records, meeting minutes and the like. A hearing was held on 17 June 2025 at which both parties were present and gave oral submissions.

BACKGROUND

4. At the core of this dispute lies a governance failure. SHO is a company that owns and manages a residential complex comprised of 41 flats and 3 shops, established to provide subsidised accommodation to military veterans – some of whom, it was noted, are well into their nineties. The Memorandum of Incorporation of SHO requires a minimum of three directors. Following the resignation of the previous chairperson, Mr Pieter Williams, in or about 2020, the company has operated with only two directors – Mr Giles and Mr Smith. The current application arises from a continuing deadlock and deteriorating relationship between these two remaining directors.

5. Efforts to appoint a third director have faltered. The parties were unable to agree on suitable candidates, and no resolution has ever been passed to fill the resulting vacancy. The Applicant has alleged that Mr Smith has actively

obstructed this process. For his part, the First Respondent maintains that the individuals proposed lacked the military background and understanding necessary for the stewardship of an organisation tasked with the care of veterans. This raises an important thematic tension running through the dispute: whether the board of an NPC such as SHO should be comprised of persons with relevant business expertise, or whether experience in and alignment with the veteran community is equally if not more important.

6. In my view, while the Act does not prescribe minimum qualifications for directors of non-profit companies, it is plainly arguable that an appreciation for the lived realities of military veterans – many of whom are the intended beneficiaries of the company – may be just as valuable as, if not inseparable from, a sound business acumen. In a context such as this, neither consideration ought to be discounted.

7. It became apparent during the hearing that, notwithstanding the continued observance of civil and respectful engagement between the parties, the relationship between them has, for all practical purposes, broken down. Although the First Respondent indicated a willingness to consider the appointment of an entirely independent third director to act as an "umpire" in the company's governance deadlock, the Applicant made clear that he had reached the end of his tether. The removal of the First Respondent, rather than further efforts at conciliation, seemed to have become the only solution from the perspective of the Applicant. The question for determination is accordingly whether grounds exist for the removal of the First Respondent as contemplated by section 71 of the Act.

8. In the course of the hearing, the parties were invited to provide supplementary evidence to assist the Tribunal in forming a view that is both fair and properly informed.

LEGAL FRAMEWORK

9. Section 71(3) of the Act permits the removal of a director by the board or by shareholders if that director either:

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

    9.2. has become 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

    9.3. has neglected, or been derelict in the performance of, the functions of director (this being the relevant ground for the Applicant to establish in the present case).

10. Where, as here, the company has only two directors who are also the only shareholders, section 71(8) permits application to the Tribunal for relief. The Tribunal must be satisfied that the evidence establishes conduct falling within section 71(3), warranting removal.

11. It is required – in terms of section 71(8)(*b*) read with 71(4)(*b*) – that the director facing removal be given a reasonable opportunity to make a presentation before the decision is made, and this has been done at the hearing of the matter, and further opportunity to produce evidence was given thereafter.

DISCUSSION / ANALYSIS

Evidence before the Tribunal

12. Despite having ample opportunity to do so, the First Respondent elected not to place further formal evidence before the Tribunal in answer to the serious and specific allegations made against him. While he was present at the oral hearing held on 17 June 2025 and had agreed – together with the Applicant – to a timetable for the filing of post-hearing evidence, he chose not to submit any affidavit, explanatory annexures, or witness statement in support of his version of events. What was received instead was a short document styled "Tribunal Response", which dealt in general terms with grievances unrelated to the company's governance and made no attempt to answer the factual allegations raised by the Applicant.

13. In the absence of competing evidence, it falls to the Tribunal to scrutinise the evidence that is before it with particular care. The fact that the allegations are uncontradicted does not relieve the Tribunal of its obligation to assess them objectively and to consider whether they are sufficiently probative. That said, the evidence presented – including emails, board minutes, financial records, and WhatsApp messages – is extensive, detailed, and in many instances generated by the First Respondent himself.

14. The conduct complained of is set out under seven headings in the founding affidavit. Before turning to the merits of each allegation, it is necessary to mention the evidentiary standard applicable to the present proceedings. The Applicant bears the onus of establishing his case on a balance of probabilities, which means that he must satisfy the Tribunal that it is more likely than not that

the grounds for removal under section 71 of the Companies Act are met, and that the First Respondent's conduct justifies his removal as director.

15. In approaching the evidence, I am mindful not to too readily draw sweeping conclusions about the credibility of either party in its entirety. A party's mistaken recollection of events, or even their misunderstanding of the extent of their duties at a particular time, may well constitute evidence of a failure to discharge those duties. But that same misunderstanding, where honestly held, should not automatically lead to a broader finding that the party's evidence overall is unreliable or untruthful. In other words, factual errors or misapprehensions that are themselves relevant to whether a director has acted appropriately must not be double-counted as indicia of general bad faith.

16. I mention this because it was my impression during the hearing that both parties, despite their evidently strained relationship, appear to hold what they regard as the best interests of at least the *organisation underlying the company* at heart. Yet beneath that surface (one of apparent shared purpose) runs a deep and persistent current of disagreement around foundational assumptions about the company's role within the organisation, which may seem to colour their respective perceptions of one another.

17. It must now be determined whether there is evidence to support the Applicant's case for the First Respondent's removal. This requires a consideration of each allegation levelled against the First Respondent, and in each case, a determination as to whether the conduct as pleaded occurred and, if so, whether it amounted to a breach of duty on the evidence presented.

Allegation of Conflict of Interest and Obstructive Behaviour

18. The first complaint levelled against the First Respondent serves as the central thread running through the remainder of the allegations – both constituting the principal grievance and subsuming aspects of the others. It functions, in effect, as the linchpin of the Applicant's case. The complaint is that he has, on several occasions, acted in a manner giving rise to conflicts of interest, and that he has adopted positions which were obstructive to the company's interests. Among these is the allegation that while serving as National President of the South African Legion, he supported complaints made by the Legion – a tenant of SHO – against the very company of which he was a director. The Applicant contends that this rendered the First Respondent conflicted and unable to discharge his duties to SHO impartially.

19. The founding affidavit records that Mr Smith, while National President of the Legion, supported complaints by tenants against the company. In doing so, he directly undermined the company's position as landlord and impaired its ability to resolve disputes neutrally. This is evidenced in the minutes of a board meeting held on 29 November 2019, during which the then Chairman Pieter Williams recorded his concern that the First Respondent had become conflicted. Mr Williams is minuted as asking Mr Smith directly: "*Are you on the board of directors or are you on the side of the Legion?*", to which Mr Smith replied that he was "*the conduit between the two*" – an answer Mr Williams rejected, stating that "*there is no such thing as a conduit between the two . . . they have declared a dispute*".

20. Mr Williams went on to advise Mr Smith to recuse himself, concluding: "*You can't wear two hats . . . You need to go back and sort out the issues*". This

exchange is significant not only for its substance, but for what it reveals about the nature of the dispute: the Legion had declared a formal dispute with SHO, and Mr Smith – rather than asserting SHO's interests – sought to straddle the divide. Minutes from the same meeting reflect that Mr Smith eventually did recuse himself from the meeting.

21. In the months that followed, according to the founding affidavit, Mr Smith supported complaints by the Legion about SHO's treatment of tenants and staff. The Applicant states that Mr Smith "aligned himself with the Legion in its dispute with CIPC," and even "requested that certain SA Legion staff, although not veterans, should get subsidised rates on the residential units," despite this allegedly being contrary to company policy. The First Respondent disputes this but no legible copy of the First Respondent's MOI has been provided, although this is states in an email from Mr Williams.

22. These actions cumulatively go to the heart of the director's duty to avoid conflicts of interest. They reveal a consistent failure by Mr Smith to separate his responsibilities to SHO from his personal and institutional loyalties to the Legion. The matter was raised, discussed, and acknowledged by the parties at board level. The First Respondent's divided loyalties appears from the evidence and is not merely speculative.

Obstruction of the Annual Financial Statements

23. Another significant complaint raised by the Applicant is directed at the First Respondent's alleged refusal to cooperate in finalising the company's annual financial statements. According to the Applicant, the First Respondent has refused to sign a banking resolution which would allow auditors to independently confirm account balances – a routine requirement for any audit – thereby stalling

the finalisation of statements stretching back several years. The First Respondent disputes this and alleges that the Applicant had refused to provide him with financial statements since 2016. He provides an extract of a WhatsApp conversation between him and the Applicant, which seems to indicate clear tension between the parties, but it is not clear that the Applicant is being obstructive: the conclusion of the conversation seems to be that the First Respondent must follow up at the bank, and the Applicant "*will look into it*".

24. In an email dated 15 May 2023, the First Respondent, when asked to sign resolutions, replied simply: "*Please send me the financials have been asking for years*", which may have been a valid request, but was also clearly obstructive. In a WhatsApp conversation two days later on 17 May 2023, the Applicant appears to have responded to having been "grey ticked" since the 10th, saying "*I see that you have not read any messages yet*" (referring to ones warning of the risk of deregistration without the First Respondent's co-operation), the response to which was "*Sorry Godfrey, I have been asking for access to the bank since 2016, you did not want to grant it, you opened the investment accounts on your own. Now it's my problem because you have not done your reconciliation for 6 years. I don't want your friends to do the audit.*" The First Respondent then became non-responsive again. What is particularly striking about this message is the First Respondent's apparent indifference to the continued existence of the company. His response reflects no concern for the consequences of deregistration, nor any recognition of his role in averting it.

25. It is not permissible for a director to deliberately frustrate the company's governance processes as a means of coercing compliance or concession from a fellow director. Even if another director's conduct were open to legitimate criticism, the appropriate response lies in lawful resolution, not obstruction.

Holding the company's operations to ransom in pursuit of personal or strategic advantage constitutes a breach of the fiduciary duty to act in the best interests of the company as a whole. A WhatsApp exchange from April and May 2023 illustrates that even after being expressly informed that SHO faced the risk of deregistration, the First Respondent remained uncooperative. The gravity of the warning did not prompt any remedial action on his part, further underscoring his indifference to the company's compliance obligations.

26. The obstruction seems to have persisted into 2024 where the First Respondent appears to have not attended a meeting on 16 May 2024 with First National Bank (to which he was invited), pursuant to which the Applicant recorded in an email that the First Respondent had been unable to benefit from certain interest on the funds in its account due to the First Respondent's "*profile not being up to date and [being] unusable*". The First Respondent had therefore, as a result of the First Respondent's inaction, effectively lost money.

27. Even if these consequences were not apparent to the First Respondent before, one would reasonably have expected that, once alerted to the them, he would have taken prompt steps to regularise his profile. His continued failure to do so – even after the implications were explained – casts doubt on the bona fides of his stated intention to fulfil his responsibilities.

28. Subsequent correspondence confirms that the matter remained unresolved for some time thereafter. Over June and July 2024, it is apparent that the First Respondent was non-responsive for some time on WhatsApp when the Applicant made attempts to facilitate the his meeting with First National Bank to get his banking profile in order, apparently for the purposes of an upcoming audit, but certainly also for the effective management of the company.

29. On 10 July 2024, Mr Giles wrote to the First Respondent, noting that "*FNB is still awaiting a meeting with you so that the account can be normalised*". Mr Smith's response again reflected the entrenched stalemate approach he has adopted throughout: while purporting to act in accordance with his fiduciary duties, he failed to meaningfully engage with the reasons provided to him or the practical need to regularise his banking profile.

30. This strongly suggests that his professed intention to comply was not genuine. Ultimately, it was the Applicant, and not the First Respondent, who took lawful and transparent steps to resolve the matter by approaching this Tribunal. The First Respondent, by contrast, resorted to inaction and implicit pressure, rather than exercising his duties through proper channels.

31. These exchanges paint a consistent picture of stonewalling and obfuscation. Despite being given multiple opportunities, including a direct approach by FNB, the First Respondent failed to cooperate, thereby frustrating compliance with legal requirements for audited statements and triggering knock-on governance failures, including the eventual deregistration of SHO.

Deregistration of the Company

32. The Applicant alleges that the First Respondent's conduct has materially contributed to the deregistration of the company by the Companies and Intellectual Property Commission ("**CIPC**") in January 2024. This, it is said, was a consequence of overdue annual returns – returns which could not be prepared or submitted without the cooperation of both directors.

33. Here too, and in view of what has already been set out above, the chain of causation is persuasive. As stated in the affidavit, SHO was deregistered

because its annual returns were outstanding – a direct consequence of the stalled financials. The returns required supporting documents and balances, which in turn depended on the resolution and access discussed above. The First Respondent's refusal to finalise these steps was not only obstructive but predictably damaging.

34. The impression that emerges is not simply of delay or neglect but of a sustained refusal to engage – one that ultimately caused real prejudice to SHO. The statutory effect of deregistration is that the company ceases to exist as a legal person until reinstated. This not only undermined the company's continuity but also placed it in breach of the Act, an outcome which – as the evidence demonstrates – was both foreseeable and avoidable. The chain of events leads back to the First Respondent's intransigence on a matter of corporate compliance that fell squarely within his duties as director. In my view this constitutes a clear dereliction of duty by the First Respondent.

Obstruction of Board Expansion and Trading Illegally

35. The Applicant alleges that the First Respondent has obstructed the appointment of additional directors, thereby contributing to SHO trading in contravention of its MOI. It is argued that the First Respondent's conduct has prevented the regularisation of the board, and that attempts to appoint suitably qualified professionals have been unreasonably blocked or undermined.

36. When the evidence is considered as a whole, a similar pattern of passive resistance emerges in relation to the proposed appointment of an additional director. The Applicant's efforts to advance this process have been repeatedly frustrated by the First Respondent's non-attendance and last minute

cancellations, while giving no clear indication of a willingness to engage constructively or bring the matter to resolution.

37. The cumulative effect of these actions was to prevent the appointment of qualified candidates, leaving the board in breach of its own MOI. The minimum required number of directors under the MOI is three; yet, since the resignation of Pieter Williams in 2020, the company has operated with only two directors. The First Respondent's refusals and delays thus not only undermined governance but perpetuated a state of illegality.

38. While the First Respondent suggested that candidates should come from within the military veteran community, this was not a statutory requirement, but a divergence of opinion between him and the Applicant. Although his opposition may have been rooted in genuine concern, the refusal to convene meetings, failure to provide information, and rejection of proposed professionals are all conduct that reflect the same obstructive posture which taken by the First Respondent in general, and which – over time – has created the current deadlock in the company's governance.

Legal Threats and Meeting Cancellations

39. It is also alleged that the First Respondent has undermined the functioning of the board through repeated threats of litigation, and by failing to follow through on agreed meeting dates. Particular reliance is placed on an instance in 2024 when a meeting was scheduled with the agreement of both directors, only for the First Respondent to withdraw at the last minute – after which no further engagement occurred despite follow-up attempts. These events bear the same character as other instances of the First Respondent's obstructive conduct –

marked by what may seem to be strategic delay, and a pattern of (limited) engagement that appears more tactical than candid.

40. These actions, individually inconvenient, cumulatively amount to obstruction. In sum, the record paints a picture not merely of delay or poor communication, but of conduct calculated to undermine corporate governance by avoiding deliberation and disrupting consensus. The Applicant's allegations in this regard are convincingly supported by documentary evidence.

41. The general allegation of non-participation in management appears from what is already set out above.

FINDINGS

42. On a conspectus of all the evidence, as discussed at length above, it appears that there are a number of bases on which one might find the First Respondent to have neglected, or been derelict in the performance of, the functions of director. Considering the number of instances in which this has been shown to have taken place, there can be little room for doubt that the First Respondent has in fact neglected and/or been derelict in the performance of the functions of director.

43. The Applicant's allegations are substantiated by documents that speak for themselves, the WhatsApp conversations being particularly telling. In many cases, the documentary evidence would require persuasive rebuttal if a different interpretation were to be sustained. In the absence of such rebuttal, and given that the First Respondent had fair notice of the allegations and an agreed procedural pathway to respond, the Tribunal must consider the case on the evidence presented, which, viewed holistically, is both credible and compelling.

ORDER

44. Accordingly, it is ordered that:

a) Mr Brian Smith is removed as a director of South African Legion (Johannesburg Branch) Soldiers Housing Organisation (registration no. 1844/016877/08) with immediate effect.

b) The Companies and Intellectual Property Commission is directed to update the company's records to reflect the removal.

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Richard Bradstreet

Member of the Companies Tribunal

1 August 2025