

**REPUBLIC OF SOUTH AFRICA**



**COMPANIES TRIBUNAL**

**Case/File Number: CTR006/08/2013**

In the matter between:

**BASIL HOLFORD**

**Applicant**

and

**THE BOARD OF DIRECTORS, WESTLAKE COUNTRY  
& SAFARI ESTATE HOMEOWNERS ASSOCIATION**

(Registration Number: 98/019006/08)

**Respondents**

in respect of:

**VARIOUS ALLEGATIONS CONCERNING CONTRAVENTION OF THE  
COMPANIES ACT 71 OF 2008 AND FRAUDULENT ACTIVITIES**

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Presiding Member of the Tribunal

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Khashane Manamela

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**DECISION (Reasons and Order)**

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[1] Mr. Basil Holford is a homeowner and resident at Westlake Country and Safari Estate (Westlake). He is also a former member of the board of directors of Westlake's Homeowners Association (the Westlake HOA). He was elected as a board member at Westlake HOA's annual general meeting held on the 04<sup>th</sup> of December 2011, together with Messrs. Charles Joseph Payne, Victor Lawrence Jee and Michael de Melo. He resigned as board member and left the three other gentlemen as members of the board of directors of the Westlake HOA for all times material to this application.<sup>1</sup>

[2] The application contains very serious allegations against Messrs. Payne, Jee and De Melo (conveniently referred to as the respondents) imputing criminal conduct and corporate governance breaches as members of the board of directors of the Westlake HOA. There has since been an election of a new board of directors which replaced the respondents.<sup>2</sup>

[3] Quite notable from the citation above is the fact that, the respondents seem to have been named in the application collectively as the board of directors of the Westlake HOA, but yet the Westlake HOA is not party to these proceedings.<sup>3</sup> One would have thought that, their roles as directors of the Westlake HOA would mean that they were acting as functionaries of the

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<sup>1</sup> A certain Mr Leon Lombard was co-opted to the board of directors, but his participation appears not to be relevant for purposes of this application.

<sup>2</sup> At an annual general meeting held on the 23<sup>rd</sup> February 2014.

<sup>3</sup> This was even recently confirmed in correspondences with the registrar of this Tribunal and seems to have been accepted by the persons involved in the application.

Westlake HOA. Therefore, the company<sup>4</sup>, being Westlake HOA should have been cited rather than its board of directors. This is only logical, unless the respondents are considered not to have acted on behalf of the company in their alleged conduct. The latter would mean that, they have to serve before this Tribunal in their personal capacities.<sup>5</sup> The citation of the board of directors of the Westlake HOA, as opposed to the Westlake HOA was erroneous, to say the least. This is confirmed [or exposed if you will] by the current turn of events, where the change in the office of the board of directors affects the integrity of the application before this Tribunal. The parties were alerted to this at the pre-hearing conference held on the 31<sup>st</sup> March 2014. They were actually requested to specifically address this and other issues to be dealt with later herein. This issue will definitely be one of the decisive issues in this application, but for now the respondents remain the three gentlemen mentioned above: Payne; Jee and De Melo.

[4] A good start to the adjudication of the issues herein should be with a brief background of the relevant issues to this application. I would sift through the various issues raised by the parties to deal with only those I deem vital for the outcome of this application, as follows:

4.1 the Westlake HOA held an annual general meeting on the 04<sup>th</sup> December 2011. Among other issues dealt with at the meeting was the election of

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<sup>4</sup> Section 66(1) of the Companies Act 71 of 2008 provides that “*the business and affairs of the company must be managed by or under the direction of its board...*”

<sup>5</sup> Although I will deal with this later, suffice it to also state that, the applicant attempted to amend its papers to the effect that the respondents are cited in their personal capacities.

members of the board of directors. The applicant and the respondents were elected to office as directors by their co-homeowners.

4.2 on the 07<sup>th</sup> February 2012 the applicant resigned as a director due to differences with the other co-members, particularly Mr. De Melo;

4.3 the applicant became a member of a group of dissatisfied homeowners calling themselves “Concerned Homeowners”;

4.4 the complaints of the applicant and the Concerned Homeowners group are jointly [and in the main] regarding the following:

4.4.1 registration, collection and payment of Value Added Tax;

4.4.2 accounting records and financial statements;

4.4.3 procurement process in respect of a perimeter fence;

4.4.4 budget and expenditure;

4.4.5 distribution of a register of members;

4.4.6 general conduct of [or governance by] the directors.

4.5 The Concerned Homeowners Group tried to resolve the aforesaid dispute within the perimeters of the Westlake HOA, but in vain. The matter was then reported to the commercial crimes unit of the South African Police Service; the Companies and Intellectual Property Commission (the CIPC) and these proceedings were also initiated with this Tribunal.

[5] Being aware of the possible parallel process with the CIPC<sup>6</sup>, the registrar of this Tribunal wrote<sup>7</sup> to the CIPC in February 2014 enquiring about the status or outcome of the CIPC process. No response appears to have been received from the CIPC in that regard. The process before this Tribunal appears to have been initiated in August 2013<sup>8</sup> and the relief sought was primarily the removal of directors on grounds of their alleged contravention of the Companies Act [presumably Act 71 of 2008] and fraud. I was assigned to the matter also in February 2014. After reviewing the documents filed, I arranged through the registrar a pre-hearing conference<sup>9</sup> in an attempt to curtail the issues to be determined in the disputes between the parties.

[6] The purpose of the pre-hearing conference was an attempt to curtail the issues to be decided at the hearing; remove any procedural and technical hurdles before the hearing and determine whether there will be a hearing or the matter is capable of been decided upon on paper, without any *viva voce* evidence. The following was agreed upon at the pre-hearing conference and for that I am thankful to the parties:

6.1 that, the applicant (stated as Mr. Holford for the rest of this paragraph) was to furnish a resolution or any applicable proof to the effect that, he is authorised to bring and pursue the proceedings or application on behalf of

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<sup>6</sup> Documents lodged to initiate the Companies Tribunal process included Form CoR 137 (a Notice of Complaint) dated August 2013 issued in terms of section 169(1)(c) of the Companies Act 71 of 2008 in terms of which the Commissioner of the CIPC appears to direct a certain Mr Victor Makau to investigate a complaint by involving Westlake HOA.

<sup>7</sup> Through a letter dated the 25<sup>th</sup> February 2014 and sent electronically to the Commissioner of the CIPC.

<sup>8</sup> Form CTR 142 of the application bears the date stamp of the 21<sup>st</sup> August 2013.

<sup>9</sup> The pre-hearing conference was attended by the applicant and the respondents, and took place on the 31<sup>st</sup> March 2014 at the DTI Campus, Sunnyside, Pretoria. I facilitated the activities at the conference.

the concerned homeowners. The document to be furnished would include the identities and perhaps stand or erf numbers of the affected homeowners. Flowing from this would be an application for amendment of the applicant as cited herein to either be *Mr. Basil Holford on behalf of the Concerned Home Owners* or the *Concerned Home Owners*. Mr. Holford was advised that, perhaps he should consider including the application for amendment or formal change of the parties in a supplementary affidavit.

- 6.2 that, Mr. Holford was to file a supplementary founding affidavit by not later than 16h00 on Monday, 07<sup>th</sup> April 2014 with the registrar of this Tribunal restating the issues or disputes from his already [as at the time] filed papers requiring a determination by the Tribunal and the reasons therefore, including the affected relevant provisions in the Companies Act 71 of 2008 (the Act) or the Companies Regulations, 2011 (the Regulations).
- 6.3 that, Mr. Holford was to furnish reasons why the Tribunal has jurisdiction on each of the issues identified in terms of 6.2 above, in the same supplementary founding affidavit to be filed.
- 6.4 that, Mr. Holford would also include in the supplementary affidavit grounds or submissions on why the Tribunal can and should adjudicate upon this matter concurrently with the CIPC process.

6.5 that, Messrs. Payne, De Melo and Jee, either jointly or severally, were to file supplementary opposing affidavit(s) by not later than 16h00 on Monday, 14<sup>th</sup> April 2014, in terms of which they respond and deal with the issues, as raised in the supplementary founding affidavit of Mr. Holford or in respect of the issues stated above.

6.6 that, Mr. Holford was to file by not later than 16h00 on Monday, 21<sup>st</sup> April 2014, if he regards this as necessary, a replying affidavit to any issue stated in the supplementary opposing affidavit(s) of the respondents, which he deemed requiring attention not already given in terms of his supplementary founding affidavit.

6.7 that, this Tribunal will thereafter give a written decision with reasons on the issues stated above or any other issues, before the matter proceeds to a hearing. The aforesaid decision may affect the future dispensation of the matter.

6.8 that, should the decision of the Tribunal envisaged in terms of 6.7 above not be the end of the matter, the Tribunal would provide directives as to the hearing and issues related thereto.

[7] The parties filed the papers substantially as agreed and directed. I am again grateful to the parties for the aforesaid. However, to the extent that any of

the parties may have filed papers not strictly within the time frames stated in 6. above, I hereby condone such and I therefore consider all papers to be regularly before me. This is necessary to avoid any diversion by procedural issues or technical objections by the parties. I do not think anyone was prejudiced by the aforesaid and I do not foresee any prejudice flowing from my aforesaid ruling.

[8] The applicant's submissions as deduced from his supplementary papers are as follows. He has the right as a member of the Westlake HOA and a concerned home owner in terms of sections 156 and 157 of the Act to bring the proceedings before this Tribunal. He further submits that, he followed an opinion by representatives of the CIPC and this Tribunal that he should lodge a complaint with this Tribunal, concurrently with the CIPC process. He sees no cause of complaint in this regard. He persists in his submissions as stated in the original founding papers.

[9] The applicant further provided a resolution dated 16<sup>th</sup> May 2013 signed by other 14 home owners. Whilst, the resolution refers to the review of a report prepared by the applicant [and is also signed by the applicant], it authorises a certain Mr. Charlton Forsyth "to institute proceedings against the current board of Westlake Homeowners Association in terms of the findings of the reports with the Commercial Branch of the South African Police Services."<sup>10</sup> Therefore, to the extent that, the applicant would have preferred to act in these proceedings "as a

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<sup>10</sup> Introductory paragraph to the resolution.

member of, or in the interest of, a group or class of affected persons...” as contemplated in section 157(1)(c) of the Act, he has consequently not succeeded to appropriately qualify himself in this regard. The applicant appears to be quite alive to this. He submits that, it was not possible to acquire the required resolution within the time-period set for the filing of the supplementary founding papers<sup>11</sup> and appears to have wanted additional time.<sup>12</sup> I am not aware that, the applicant did request additional time to acquire the relevant resolution, but I think this may be water under the bridge as the applicant seems to have acquiesced the fact that, he may have to continue these proceedings in his own name. He always had the necessary standing to bring the proceedings in his own name. Therefore, no amendment is required in respect of the applicant as the initiator of these proceedings as section 157(1)(a) of the Act contemplates this.

[10] The applicant however filed new Forms CTR 142 reflecting the respondents in their individual names and as an amendment of his original Form CTR 142 referred to above<sup>13</sup>, which cited the Board of Directors of the Westlake HOA. The applicant explained that, this was due to the fact that, the respondents are no longer directors of the Westlake HOA. He also bemoaned the delay in the adjudication of this matter.

[11] Regarding the relief claimed, the applicant asserts that, the respondents are guilty of contraventions of sections 26(1); 28; 30; 75 and 76(3) the Act as

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<sup>11</sup> See paragraph 6.2 above read together with paragraph 3.

<sup>12</sup> Paragraph 4 [second paragraph from below on the first page] of the supplementary founding affidavit.

<sup>13</sup> Paragraph 5 and footnote 8 thereto.

backed by details set out in the original founding affidavit. The applicant argues that, the fact that the respondents are no longer directors of the Westlake HOA “does not absolve them of their responsibilities as directors at the time and their failure to act in the best interests of the company in terms of Sects. [sic] 75 and 76 of the Companies Act”.<sup>14</sup> This appears to be a shift from the original relief which sought the removal of the respondents as directors of the Westlake HOA. This shift – logical as it may seem under the circumstances, since the respondents are no longer directors – may constitute new relief. But for reasons that will become clearer in a moment, I do not intend dwelling much on this. Besides, the removal of the three directors would in any way have been beyond the jurisdiction of this Tribunal. For, in terms of section 71(8) of the Act, this Tribunal can only deal with matters involving removal of directors where “...a company has fewer than three directors...” The Westlake HOA always had more than three or more directors at all times material hereto.

[12] I have assessed the complaint as set out in paragraph 4.4 above and the statutory provisions in 11 above. I have done so jointly and severally in respect of the aforesaid. Unfortunately, I find that, this Tribunal does not have jurisdiction to deal with any of the matters complained of or the matters contemplated in those statutory provisions. The matters fall squarely outside the jurisdiction of this Tribunal. It should be borne in mind that, this Tribunal doesn't have inherent powers and therefore in accordance with the constitutional principle of legality, it

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<sup>14</sup> Last paragraph on the first page of the supplementary founding affidavit.

has to act within the powers conferred upon it by the enabling or founding piece of legislation (*Senwes v Competition Commission* (118/2010) [2011] ZASCA 99 and *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 CC (at 56-59)). The respondents or at least some of them were very alive to this issue and raised very laudable contentions in this regard.

[13] Therefore, I am precluded from determining the merits or demerits of the application. However, I do not think that, the applicant, even as a retired chartered accountant and currently a business rescue practitioner, lacked the necessary *bona fides* in bringing this application. He evidently did not do so for his own personal benefit and therefore he should not be mulcted with costs of this application, further from those relating to his own efforts and for his own account.

[14] I therefore proceed to make an order in the following terms:

- a) to the extent necessary, the late serving and filing of the supplementary affidavits by any party is condoned;
- b) the application is dismissed, and
- c) there will be no order as to costs.

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**Khashane Manamela**

**Member, Companies Tribunal**

**08<sup>th</sup> May 2014**