



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT015OCT2017

In the matter of:

Ricardo Daniels

APPLICANT

vs

Starkcor (Pty) Ltd

RESPONDENT

DECISION (Reasons and Order)

1. INTRODUCTION

In this application the applicant applies for the removal of a director of Starkcor (Pty) Ltd in terms of s 71 of the Companies Act 71 of 2008 ("Companies Act" / "Act").

2. BACKGROUND

2.1 The applicant and one Philip Nieuwoudt (ID 8507065083087) ("Nieuwoudt") are the directors of and equal shareholders in Starkcor (Pty) Ltd (reg no

2013/003122/07). I shall refer to the company as “Starkcor” and not as the respondent as indicated in the application.

2.2 In January 2017 the applicant submitted a COR 39 to the Companies and Intellectual Property Commission (“CIPC”) removing Nieuwoudt as director. The CIPC refused, rightly so, to effect the change and referred the applicant to the Companies Tribunal (“Tribunal”).

2.3 The Tribunal has the power to effect the removal of a director in terms of, under these circumstances, s 71(8) of the Companies Act.

2.4 The processes then became confusing and drawn out.

2.5 The applicant apparently applied to the Tribunal for the removal of Nieuwoudt in August 2017 (CT005Aug2017).

2.6 The present application was submitted to the Tribunal on 17 October 2017 and the applicant applies for “substituted service” because Nieuwoudt is “uncontactable” as he is in Nigeria, and also for the removal of Nieuwoudt as director due to “neglect or derelict” in terms of s 71 of the Companies Act.

2.7 The applicant indicated that he tried various avenues to contact Nieuwoudt, including email, Facebook and various other electronic social media platforms, and also enquiring from friends of Nieuwoudt.

2.8 Use of the CIPC registered address of Starkcor to contact Nieuwoudt is ineffective as it is also the residential address of the applicant.

2.9 On 2 November 2017 the Tribunal notified the applicant by email that he should provide the Tribunal with “information about the attempts to contact the respondent. We need to know where you got the contact details and what contact details are and this applies to the other efforts as well facebook, friends. This information should be in the form of an affidavit and will assist Tribunal member to

finalise this matter. This information should be submitted by not later than 09 November 2017.”

2.10 This information was only provided, on 20 November 2017 and did not address the queries as in the email.

2.11 The attempts to “contact” Nieuwoudt were not clarified, ie were these attempts to ensure that he complies with his duties as director or whether these attempts were to serve the application on Nieuwoudt.

2.12 Be that as it may, the Tribunal could only properly adjudicate this matter after the information as in para 2.9 above were obtained on 20 November 2017.

3. APPLICABLE LAW

3.1 Section 71 of the Companies Act provides, as far as it is relevant here, as follows:

“(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.

...

(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.”

3.2 A copy of the application must be served on the respondent in terms of reg 142 of the regulations under the Companies Act (GNR 351 of 26 April 2011) (“Companies Act regulations” / “regulations”) within the time and in the manner as provided for in s 220 of the Companies Act and Table CR 3 of Annexure 3 of the regulations.

4. EVALUATION

4.1 Two issues are important here. In the first instance the question is whether Nieuwoudt “has neglected, or been derelict in the performance of, the functions of director” in terms of s 71 of the Companies Act. Secondly, whether the provisions of s 71 of the Companies Act and the regulations in respect of notice and the rights of Nieuwoudt have been adhered to.

4.2 It is patent that a director who does not give attention to the business of a company, is not complying with his/her duties in terms of, at least, ss 66 and 76 of the Companies Act. There is therefore a neglect by Nieuwoudt to comply with the duties and/or a dereliction of these duties: See, *inter alia*, *Henochsberg on the Companies Act 71 of 2008* at 274(2) *et seq.*

4.3 The attempts to contact Nieuwoudt seem to be misdirected and ineffective. The reason for this is also that the respondent is indicated as Starkcor. The respondent is Nieuwoudt and Starkcor is not involved in this matter.

4.4 The application is therefore defective in respect of a number of issues. However, the Tribunal has, in terms of regulation 154 under the Companies Act, the power to condone irregularities.

6. FINDINGS

6.1 It is found that Nieuwoudt neglected or was derelict in his duties as director of Starkcor.

6.2 The respondent in this matter is not correct.

6.3 Notice to the actual respondent, ie Nieuwoudt was not effective, as there is no indication that what was attempted was to serve Nieuwoudt with the application as submitted to the Tribunal.

7. ORDER

7.1 The applicant must lodge a proper and correct application to the Tribunal.

7.2 A copy of the application can be served on Nieuwoudt at his known email address, as provided for in Table CR 3 of Annexure 3 of the regulations under the Companies Act.

7.3 The applicant must submit a proper affidavit about the veracity of that email address and how it was verified.

7.4 The applicant can then submit an application for a default order as provided for in reg 153 upon the effluxion of the period of 20 business days as provided for in reg 143(1).

Prof P.A. Delport

COMPANIES TRIBUNAL: MEMBER

DATE: 27 December 2017