



**IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA**

**Case No: CT007FEB2018**

**In the matter between:**

**LEON AMIAL BUSSACK**

**APPLICANT**

**And**

**DAVID BARRY DAVIES**

**RESPONDENT**

**Presiding Member of the Tribunal: Kasturi Moodaliyar**

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**DECISION (Reasons and Order)**

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**INTRODUCTION**

[1] In 2015, Leon Amial Bussack (Applicant) and David Barry Davies (Respondent) became directors of a company they formed called Wavelength Connections (Pty) Ltd, a company duly incorporated within the company laws of South Africa with registration number 2015/190647/07, which has its place of business at 54 Excelsior Avenue, Reiger Park, Boksburg, Gauteng.

[2] In this matter the Applicant is seeking to remove the Respondent as director of the company Wavelength Connections (Pty) Ltd in terms of section

71(8)(b)<sup>1</sup> and Regulation 142(1)<sup>2</sup> of the Companies Act (“the Act”), alleging that the Respondent had been neglectful for derelict in the performance of his duties as director.

[3] On 8 February 2018 the Applicant applied for a default order in terms of Regulation 153 of the Companies Regulations<sup>3</sup> (the Regulations”), in respect of the relief sought in the initial application.

[4] The Tribunal notes that the Respondent, through his attorneys, filed a notice of intention to oppose dated 18 July 2018. It was indicated in the covering letter that the Respondent did not initially receive a copy of the original application which was served on 8 February 2018. The Respondent was subsequently correctly served with the application.

[5] In terms of Regulation 143(1) a Respondent who wishes to oppose the complaint or application must serve a copy of its answer on the initiating party and file the answer with proof of service thereof with the Companies Tribunal within twenty (20) business days after being served with a compliant referral, or an application, that has been filed with the Companies Tribunal.

[6] As a result of the Respondent’s failure to serve on the Applicant and file with the Companies Tribunal, a copy of his answer together with the proof of service, and an application for condonation with the Companies Tribunal, the Tribunal will thus proceed with this matter on a default basis.

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<sup>1</sup> Section 71 (8) (b) reads as follows: “If a company has fewer than three directors – in any circumstance contemplated in subsection (3), any director or shareholder of the company may apply to the companies Tribunal, to make a determination contemplated in that section.”

<sup>2</sup> Regulation 142(1) of the Companies Regulations, 2011 reads as follows: “A person may apply to the Tribunal for an order in respect of any matter contemplated by the Act, or these Regulations, by completing and filing with the Tribunal’s recording officer (a) an Application in Form CTR 142; and (b) a supporting affidavit setting out the facts on which the application is based.”

<sup>3</sup> GN R351 in GG 34239 of 26 April 2011.

## **BACKGROUND**

[7] The Applicant and Respondent are the only two directors and shareholders of the company with the Applicant holding 51% of the shares and the Respondent having 49% of the shareholding.

[8] The core business of the company is to survey, design and install fibre optic services to mobile service providers.

[9] The Applicant alleges that the Respondent had entered into a written agreement with another party, Cell C (a potential client) on behalf of the company when he was not given the mandate to that.

[10] The Applicant alleges that that the secured work was based on profit sharing and this was not agreed to by the company and that such agreements would disadvantage the company financially.

[11] Further the Respondent is said to have entered into an agreement with an entity named Novelto, and in this case as well, he was acting without a mandate.

[12] The Applicant submitted that the Respondent had asked him for money to compensate him to resign as a shareholder, and when the Applicant failed to give it to him, the Respondent filed for liquidation of the company at the Gauteng High Court, on 29 September 2017, under the case number 36949/2017.

[13] The shareholders did not agree to the liquidation, as according to the Applicant, the company had options from private investors to fund and grow the business to profitability. The company is challenging the liquidation application.

[14] It is stated that the company had decided to take on an investment opportunity presented by a private investor named Mavuso. The Respondent refused to sign the Mavuso offer and the company is now at a

deadlock. The Applicant states that this has caused financial pressure from various funders as well as staff members. The company is in arrears in terms of its loan agreements and have not paid staff members for almost 12 months.

[15] The Applicant believes that the company was placed in a compromised position when the Respondent informed a client, Neotel (now Liquid Telecom) that the Company is undergoing liquidation. The work with that client has been suspended until the matter between the Respondent and the Company has been resolved and the Company provides a plan of action with regard to the operational capital going forward.

[16] It was agreed by the two directors that Respondent would fund the operations of the company until such time that the company was stable and able to sustain itself. In exchange for him funding the company, the Respondent was offered a shareholding. The Applicant states that the Respondent failed to fund the business not only as a director, but also as a shareholder. The Respondent failed to grow the business and secure new contracts. The Applicant states that to date, the Respondent has made numerous commitments regarding pending deals, and has not managed to secure any new work for the company.

[17] The Applicant also made submissions that the Respondent incurred unauthorized expenditure by purchasing wheels for a vehicle and filling petrol, for the Respondent's benefit.

[18] The Applicant has thus approached the Tribunal to apply for the removal of the Respondent as director of the Company alleging that the Respondent has been neglectful or derelict in the performance of her duties as a director.

## **APPLICABLE LAW**

[19] Section 71 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) 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.*

*(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**

[20] In terms of subsection 71(8), the provision empowers this Tribunal to make a determination which would otherwise have been made by the board of directors of a company if Company did not have fewer than 3 directors.

[21] It is clear that where a company has fewer than three directors, the Tribunal enjoys jurisdiction to determine the removal of a director upon the application of either a director or shareholder.<sup>4</sup>

[22] 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.<sup>5</sup>

[23] Should this Tribunal be satisfied that indeed the Respondent has either neglected or been negligent or derelict in the performance of her functions as a director, it will have to order her removal as director of Company.

[24] Neethling-Potgieter's "Law of Delict" stated the following on negligence "In the case of negligence, a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions, he failed to adhere to the standard of care legally required of him. The criterion adopted by our law to establish whether a person has acted carelessly and thus negligently is the objective standard of the reasonable person, the *bonus paterfamilias*".

[25] Section 76 provides for the standards of directors conduct and the relevant subsections are ss76(3) and (4) and read as follows:

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<sup>4</sup> Section 71(8)(b).

<sup>5</sup> See *Spineco Medical International (Pty) Ltd And Another V Webb, Janice Lilian*, CT021NOV2014.

“(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...”

[26] Section 76(3) deals with what is expected of the director and section 76(4) deals with what the director has to satisfy in order to show that she acted in accordance with her duties.

[27] Each director has duties, i.e. the fiduciary duties and the duties of care and skill, the duty of “bona fides” is a separate overarching duty – in addition to “objective duties”.<sup>6</sup>

[28] This is explained in “New Entrepreneurial Law” as follows<sup>4</sup> : “6.2.2.1 ‘Bona fides’ (good faith) This is a subjective overarching duty applying to the exercise of any and all of the powers in the company. In essence it requires that the director must act honestly.<sup>7</sup> Apart from the duty of (subjective) honesty, there are also objective standards, which are not subservient to the duty of honesty. Therefore, the objective duties apply, and noncompliance will not be excluded if the director avers that he acted honestly (*bona fide*).

[29] The objective standards are –

(a) ‘Interests of the company’ : The duty must be exercised in the interests of the company.<sup>8</sup> The question will then be who the company is, as there is a multiplicity of ‘stakeholders’ inside the company, (for example, the shareholder/s) as well as ‘outside’ the company (such as, to name a few, the creditors, employees, the state and the community). The basic principle is that the company must be used for profit maximisation in favour of the shareholders, and the shareholders as body will therefore be the ‘company’ in this sense. This viewpoint has been questioned by two opposing alternatives: the one is that the directors can, under certain circumstances, ignore the interests of the shareholders in favour of the interests of the other stakeholders (‘pluralist approach’) and the other one is that the interests of another stakeholder must also be taken into account if it promotes the interests of the shareholders (‘enlightened shareholders approach’) with the latter being the most accepted”.<sup>9</sup>

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<sup>6</sup> Extract taken from the CT021NOV2015

<sup>7</sup> *South African Fabrics Ltd v Millman NO 1972 (4) SA 592 (A)*; *Da Silva v CH Chemicals (Pty) Ltd* [2009] 1 All SA 216 (SCA); 2008 (6) SA 620 (SCA).

<sup>8</sup> *Da Silva v CH Chemicals (Pty) Ltd* [2009] 1 All SA 216 (SCA); *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC).

<sup>9</sup> See in general ‘South African Company Law for the 21st century – Guidelines for Corporate Law Reform’ (policy paper) (GG 26493 of 23 June 2004).

(b) 'Do not exceed powers': This entails that the directors must not exceed the limits of their powers (that is, perform acts outside the capacity of the company or their agency or the restrictions in the Act), irrespective of whether the act will be valid/binding in respect of third parties.<sup>10</sup>

(c) 'Use powers for a proper purpose': The test is firstly what the power was conferred for, and secondly whether it was exercised for that purpose,<sup>11</sup> such as that the power to issue shares must be used to obtain capital, not to entrench or change control.<sup>12</sup> This duty actually also serves as a test, and therefore is not a separate duty in that sense, to determine if the act was for the benefit of the company. "<sup>13</sup>

[30] The Tribunal was presented with evidence that the Respondent failed to fund the company's operational requirements, concluded agreements without the mandate of the company, and in the instance of the Cell C agreement, secured work based on profit sharing which was not mandated. It appears that the Respondent did not bring in any work to the company which was apparently one of his duties as director. The Respondent in addition used company funds to pay for wheels and petrol. The Respondent caused the company financial harm by firstly attempting to liquidate the company without any agreement with the Applicant or the Company, and informing a client, Neotel of such liquidation, which caused Neotel to suspend any work. The Respondent has caused the company to miss out on investment opportunities which would allow the company to grow. It also appears that by the Respondent not signing on the Mavuso investment, it has caused further financial distress to the company. There is no evidence to the contrary presented to the Tribunal.

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<sup>10</sup> See e.g. s 20 in respect of acts ultra vires the company that will be valid in respect of third parties but which were outside the authority of the directors because it was ultra vires the company

<sup>11</sup> *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC).

<sup>12</sup> *Punt v Symons & Co Ltd* [1903] 2 Ch 506; *Piercy v S Mills & Co Ltd* [1920] 1 Ch 77.

<sup>13</sup> *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 All ER 1126 (PC).

[31] The Tribunal finds that the Respondent has failed to exercise his duties as director in good faith and in the best interest of the company.

[32] The Tribunal is satisfied that the Respondent has neglected his duties as a director as contemplated in the Act.

[33] In the premises, the Tribunal is satisfied that Applicant has shown good cause as to why he should be entitled to the relief sought.

## **ORDER**

[34] The Respondent be removed as a Director of Wavelength Connections (Pty) Ltd in terms of Section 71(8) of the Companies Act 2008.

[35] The Companies and Intellectual Property Commission is to assist the Applicant in the removal of the Respondent from the board of the Wavelength Connections (Pty) Ltd.

[36] There is no order as to costs.

DATED on THIS THE 11 DAY of JANUARY 2019.

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KASTURI MOODALIYAR  
COMPANIES TRIBUNAL: MEMBER