



**IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA**

**Case No: CT00639/ADJ/2021**

**In the matter between:**

**DAVID SCHALK VENTER**

**APPLICANT**

**AND**

**EUREKA LTD**

**RESPONDENT**

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Coram: ISHARA BODASING

Dates of Hearing: 9<sup>th</sup> and 28<sup>th</sup> July 2021

Date of Decision: 06 August 2021

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**DECISION** (Reasons and an Order)

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**1. INTRODUCTION**

1.1 Applicant is David Schalk Venter, an adult male shareholder of Respondent, and residing at Farm Dikdoorn, district Garies, 8220

1.2 Respondent is Eureka Ltd., an unlisted public company duly incorporated in accordance with the company laws of South Africa with registration number 2016/348067/06, having its registered address at 8 Wolhuter Street, Welgemoed, 7530.

1.3 On 18 March 2021 Applicant lodged the CTR142 form seeking relief from this Tribunal for the removal of Respondent's Directors in terms of S71(8) of the Companies Act 71 of 2008 ("the Act").

1.4 Respondent's Director, Deon Harmse deposed to an affidavit opposing the application, and the matter was set down for hearing.

1.5 I requested the parties to file heads of argument. This step was taken to allow them to address the crisp issue of whether or not this Tribunal has jurisdiction to order the relief sought by Applicant. This issue, being one of law and not fact, was *mero motu* raised by me as the presiding member.

## **2. ISSUES**

2.1 The first issue to be determined is whether or not this Tribunal has jurisdiction to preside over the dispute. Applicant contends that it does on the basis that, when the application was launched, Respondent had only two directors. Applicant refers to certain meetings held, during which directors were allegedly irregularly appointed. Applicant contends that because of this, there are only two properly elected directors of Respondent.

2.2 During the hearings, there were many accusations back and forth regarding Applicant's conduct and that of Respondent's directors. Although the matter may turn only on the issue of jurisdiction, I consider it important, to briefly discuss a few allegations by way of background to the matter, without repeating the details.

2.3 The basis for the main relief sought is that Respondent's previous and current directors have failed to perform their duties in good faith, and in the best interests of Respondent. In particular, Applicant refers to him being denied access to Respondent's annual financial statements, and other company records, such as the shareholders' register. Applicant therefore seeks the removal of Respondent's directors.

2.4 Respondent's representative denies the allegations, stating that it is Applicant's fault that company records have been poorly kept, since he and his team were initially managing Respondent's projects. Respondent also submits that since there are more than two directors, the Applicant is before the incorrect forum.

### 3. APPLICABLE LAW

3.1 The jurisdiction of the Companies Tribunal to deal with the current application is to be found through conducting a thorough examination of the papers placed before me in this matter. Such a process also requires me to explore the applicable provisions of the Act.

3.2 Section 71(8) of the Act enables this Tribunal to make a determination in circumstances contemplated in S71(3) - (6) read within the applicable context, in terms of which this Tribunal may remove a director of a company. I include the following relevant provisions of S71 and S76, some of which are underlined for emphasis.

3.3 S71 of the Act deals with **Removal of Directors:**

(3) If a company has more than two directors, and a shareholder or director has alleged that a director of the company-

... (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.

(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.

### 3.4 Section 76 of the Act deals with **Standards of Directors' Conduct**

3.5 Part F of the Act is titled: "**Governance of companies**" and **section 57(3)** thereunder states:

(3) If a profit company, other than a state-owned company, has only one director-

(a) that director may exercise any power or perform any function of the board at any time, without notice or compliance with any other internal formalities, except to the extent that the company's Memorandum of Incorporation provides otherwise; and

(b) sections 71(3) to (7), 73 and 74 do not apply to the governance of that company.

## 4. EVALUATION

4.1 I now proceed to determine if the Companies Tribunal does have jurisdiction to entertain the current application. I do so while mindful of the fact that the Companies Tribunal is a creature of statute and should therefore derive all its powers from the enabling legislation.

4.2 It is common cause that as at 29 February 2020, Respondent had only one Director. In terms of clause 5.2.2 of Respondent's Memorandum of Incorporation (MOI), which aligns with S57(3) of the Act, this director was entitled to call a special general meeting (without notice or compliance with any other internal formalities) for purposes of appointing additional directors. On a perusal of the minutes of this meeting, it is clear that three additional directors were properly elected.

4.3 Following on this, it appears that an Annual General Meeting (AGM) was held on 12 September 2020. According to the minutes of this meeting, a quorum was confirmed, and it was unanimously agreed that the current directors should remain. An additional director was elected to replace one of the directors who had passed on, thus retaining the number of directors at four.

4.4 According to the Companies and Intellectual Property Commission (CIPC) records reflecting the period 29 May 2020 to 23 June 2021, it appears that Respondent has always had more than two Directors. Applicant contends that the resignation of one director, despite only being captured on the CIPC records as at 23 June 2021, actually occurred well before this. Even if this is so, according to my calculations, this would still leave three active directors as at the date when this application was lodged.

4.5 I am not persuaded that this Tribunal has jurisdiction to adjudicate upon this matter. I hold this view against the backdrop of the filed written heads of argument, oral submissions made at the hearing by the parties and their legal representatives, other available information and legal principles.

## **5. FINDINGS**

Against the backdrop of all stated above, I find that the Companies Tribunal does not have jurisdiction to make a determination in the circumstances where there are more than two directors of a company. Therefore the matter cannot proceed towards a determination of the merits of the application.

## 6. ORDER

- a) The application is struck off.
- b) Each party to pay its own costs.



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**ADV. ISHARA BODASING**

For Applicant: Adv H. P. van Staden, instructed by Vezi & De Beer Incorporated

For Respondent: Walter Niedinger of WNA Attorneys Incorporated