



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT00890/ADJ/2022

In the matter between:

McDOMAN INDUSTRIES LIMPOPO (PTY) LIMITED
(Registration Number: 2017/383132/07)

First Applicant

MARIUS ANTON PRETORIUS
(Identity Number: 830108 5058 08 3)

Second Applicant

and

McDOMAN CHEMICAL (PTY) LIMITED
(Registration Number: 2021/10/05)

First Respondent

LIMATKATSO (JULIA) PSHATLELLA
(Identity Number: 851001 1448 18 0)

Second Respondent

DONALD TAPFUMANEYI MAGOCHA
(Passport Number: FN368779)

Third Respondent

Coram: ISHARA BODASING

Date of Hearing: 05 May 2022

Date of Decision: 11 May 2022

DECISION (Reasons and an Order)

1. INTRODUCTION

1.1 During July 2017 **MARIUS ANTON PRETORIUS** (Second Applicant) and **LIMATKATSO JULIA PSHATLELLA** (Second Respondent) registered **McDOMAN INDUSTRIES LIMPOPO (PTY) LIMITED** (First Applicant – “the Company”). They are the only two Directors of the Company, holding 90% and 10% of the shareholding respectively.

1.2 Third Respondent is a Director of First Respondent and the life partner of Second Respondent.

1.3 Second Applicant seeks the removal of Second Respondent as Director of the Company in terms of S71(8) of the Companies Act 71 of 2008 (“the Act”), alleging that Second Respondent has been neglectful or derelict in the performance of her duties as a director, as per S71(3)(b) of the Act. He contends that, as a consequence thereof, the Company has been, and continues to be, exposed to operational and financial risks. [L
SEP]

1.4 The main reason advanced for the relief sought is that Second Respondent failed to prevent the actions of Third Respondent, which compromised the management and business of First Applicant.

1.5 Second Respondent answered in detail to deny the allegations, claiming that the conduct of Second Applicant himself was prejudicial to First Applicant.

2. BACKGROUND

2.1 Since the establishment of the First Applicant, it was agreed among Second Applicant, Second Respondent and Third Respondent that:

2.1.1 First Respondent shall be the sole stock supplier to First Applicant;

2.1.2 First Applicant would be the sole provider of the products to consumers and clients in Limpopo;

2.1.3 First Respondent would conduct its similar business in Gauteng;

2.1.4 First Applicant would use the First Respondent's McDomano Logo, websites and/or domain and would be on the marketing portfolio of the First Respondent.

2.2 During or about December 2020, disputes began to erupt between Second Applicant and Third Respondent regarding the supply, delivery, decreasing quality and increasing prices of stock.

2.3 According to Second Applicant, matters came to a head a few months later when Third Respondent allegedly denied him access to First Applicant's SAGE-software and business emails.

2.4 Second Respondent claims that Second Applicant excluded her from the affairs and financial information of the First Applicant. She also alleges that Second Applicant misrepresented to stakeholders that he was acting on behalf of First Respondent, and that such conduct was prejudicial to First Applicant.

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3. ISSUES

The main question to be decided is: has Second Applicant advanced cogent reasons for the removal of Second Respondent as Director? His reasons are that Second Respondent:

(a) was conflicted in that her co-Directors in both First Applicant and First Respondent were embroiled in a dispute, which severely compromised First Applicant's ability to do business;

(b) failed to engage with the conflicting parties in an attempt to resolve the dispute for the benefit of all, in particular that of the First Applicant;

- (c) failed to attend a Directors' Meeting and a Shareholders' Meeting, despite being given notice to that effect;
- (d) failed to act in a manner that would protect the First Applicant against the prejudicial actions of the Third Respondent.

4. APPLICABLE LAW

4.1 S71(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.

4.2 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-

... [REDACTED] (b) has neglected, or been derelict in the performance of, the functions of director, [REDACTED]

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. [REDACTED]

(8) If a company has fewer than three directors-

(a) subsection (3) does not apply to the company; [REDACTED]

(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 [REDACTED]

(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.

[REDACTED]

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

(2) A director of a company must-

(a) not use the position of director, [REDACTED]...

(ii) to knowingly cause harm to the company or a subsidiary of the company; and [REDACTED]

(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director- ^[1]_{SEP}

(i) reasonably believes that the information is-

(aa) immaterial to the company; or

(bb) generally available to the public, or known to the other directors; or ...

(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 ^[1]_{SEP}

(ii) having the general knowledge, skill and experience of that director.

^[1]_{SEP}

(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; ^[1]_{SEP}

(ii) either- ^[1]_{SEP}

(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; and

(b) is entitled to rely on-^[1]_{SEP}

(i) the performance by any of the persons-

(aa) referred to in subsection (5); or

(bb) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and

(ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).

(5) To the extent contemplated in subsection (4)(b), a director is entitled to rely on-

(a) one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided; [SEP]

5. EVALUATION

5.1 There is clearly a loss of trust and a breakdown of the relationship between the shareholders in this company. Second Applicant and Second Respondent did not manage the First Applicant as a partnership.

Removal of Directors

5.2 In order to succeed in proceedings as per S71 of the Act, Second Applicant bears the onus to establish that the prescribed procedural and substantive requirements are met.

5.3 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.¹

5.4 As to the meaning of "neglected" and "derelict" used in S71(3)(b), I defer to the ordinary interpretation as adopted by my learned brother Manamela, a former Member of this Tribunal in the Idada Trading matter²:

*The Oxford Large Print Dictionary (New Edition) explains the meaning of **neglect***

¹ See S71(4)(a) and (b) and S71(2)(a) and (b) of the Act.

² CT008MAR2014 at paras 20 & 21. See also Spineco Medical International matter CT021NOV2014 at paras 53 - 56

as “(verb) 1: pay no attention or not enough attention to; 2: fail to take proper care of; 3 omit to do something, e.g. through carelessness or forgetfulness. ...

... **Derelict:** this word is explained as “(adjective) deserted and left to fall into ruin; (noun) 1: an abandoned property, especially a ship.

5.5 It has been suggested that ‘derelict’ has an element of being deliberate, purposeful or intentional about it, whereas ‘neglect’ is more an omission than an act.³ In applying this to the context of section 71(3)(b), a director neglects to perform his functions as a director of a company if he gives insufficient attention to his actions. As regards the standards of directors’ conduct and the fiduciary duties of directors, the particular director fails to adhere to the standards legally required of him, when a reasonable person under the same circumstances would have acted to the contrary.

Standards of Directors’ Conduct

5.6 I now turn to whether or not the alleged conduct of Second Respondent breached any of the standards set out in section 76 of the Act⁴.

5.7 Second Respondent’s defence or ground of justification may include what is contemplated in section 76(4). She satisfies the relevant obligation if she shows that she took “reasonably diligent steps to become informed about the matter”. This appears to be subjective in nature. Otherwise, she has to show that the performance of her functions was not below the requisite standard. Should it be determined that her conduct was below standard, Second Respondent would have acted negligently or in dereliction of her duties.

5.8 Second Respondent states that she delegated authority to Third Respondent to manage the day-to-day business of First Respondent.⁵ She also submitted that she only became aware of a dispute between Second Applicant and Third Respondent

³ See generally Van der Walt JC and Midgley JR Principles of Delict (3rd ed.) (LexisNexis Butterworths Durban 2005 on pp 166 to 167.

⁴ For a crisp enunciation of standards of director’s conduct in terms of the Act, a reading of Manamela’s dictum in *Spineco* is insightful. See note 7 supra at paras 66 – 77.

⁵ Second Respondent’s Answering Affidavit at paragraph 43.

when a lawyer's letter was sent to her during mid-April 2021.⁶

5.9 Section 76(4) introduced the “business judgment rule” into South African law and therefore a director is not liable for mere errors of judgment. She is not required “to have special business acumen or expertise, or singular ability or intelligence, or even experience in the business of the company” but has to meet the test for the “reasonable” director.⁷ However, the business judgment rule has various restrictions that must be complied with in addition to the requirements of the Act. The decision must be informed otherwise the rule will not apply.

5.10 There are two basic “sets” of duties: the fiduciary duties and the duties of care and skill. If one does not comply with the fiduciary duties, it is not an automatic non-compliance with duties of care and skill, and vice versa. The duty of “bona fides” is a separate overarching duty – in addition to “objective duties”.

5.11 The problem *in casu* is that there is no evidence that Second Respondent in failing to address the conflict between Second Applicant and Third Respondent, caused harm or potential harm to the company [s 76(2)(a)(ii)]. Up to and including this set of facts there is no evidence of a dereliction of duty on the part of Second Respondent.

Unclean Hands Principle

5.12 Modern equity law is relevant to fiduciary relationships, such as that of the parties to this dispute.⁸ A lawsuit seeking the removal of a director is an equitable remedy and the party bringing such an action must do so with clean hands. This means that the party seeking the director's removal must not be wrongfully responsible for the circumstances leading to the application.

5.13 It is clear from the papers and from arguments during the hearing that Second

⁶ Second Respondent's Answering Affidavit at paragraph 44.1

⁷ Delpont P and Vorster Q Henochsberg on the Companies Act 71 of 2008 on p 298(7) (LexisNexis online version May 2016)

⁸ See generally, JD Heydon, MJ Leeming, PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrine and Remedies* (LexisNexis, 5th ed., 2015); McGhee (ed.)

Applicant's conduct is not without fault. It was Second Respondent's evidence that Second Applicant took unilateral decisions, which had the effect of increasing the operational costs of First Applicant. Furthermore, according to Second Respondent, his conduct was for his personal enrichment and that of his family and friends, and not in the best interest of First Applicant.

5.14 It is noteworthy for First Applicant that Second Respondent is also a holder of equity and shareholder in the Company. This entitles Second Respondent to continue to have an embedded financial interest in the Company, and she cannot lose these rights and interests by her removal as a director.

5.15 Given the impasse between the parties, it may be in the best interests of the Company that it is dissolved. The parties do not seem to require it as a vehicle to conduct their respective businesses anymore. Two of the broad categories of just and equitable grounds for the winding up of a company are deadlock (between members or directors) and grounds analogous to those that allow the dissolution of partnerships. However, these are only my comments *en passant* and they are not necessarily decisive of this matter.

6. FINDINGS

6.1 This Tribunal had to be placed in a position in which it is able to determine what Second Respondent, as a director, has done or failed to do, which amounts to neglecting, or being derelict in the performance of his or her functions as a director, as contemplated in section 71(3)(b) of the Companies Act. Second Applicant has not shown a causal link between Second Respondent's omission to assist with resolving the disputes and any losses incurred by the First Applicant.

6.2 For Second Respondent's conduct to fall below par of the standards set in section 76, it must also be disqualified in terms of subsections 4(b) and 5(a). It is my finding that Second Respondent's conduct does not fall foul of this in her capacity as a director of the Company. There is no evidence that this was prejudicial to the Company.

6.3 Given the circumstances and turn of events faced by Second Respondent, I can not find that a reasonable person would have acted to the contrary.

6.4 Against the backdrop of all stated above, I find that the Second Respondent has not been derelict or neglected the performance of her functions as a director of the Company.

7. ORDER

7.1 The application is refused.

7.2 Each party to pay its own costs.

ADV. ISHARA BODASING

For Second Applicant: Adv Riaan Venter, instructed by Vermaak Beeslaar Attorneys

For Respondents: Chimwala Attorneys