IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA
("THE TRIBUNAL")

CASE NUMBER: CT01743ADJ2024

In the matter between:

DONOVAN CAFFA	Applicant
and	
COENRAAD LOURENS GERMISHUIZEN	Respondent
Newclear Holdings (Pty) Ltd Registration number: 023/778610/07.	Second Respondent

Panel: D Terblanche
Date of decision: 28 March 2025

DECISION AND REASONS: MAIN APPLICATION

THE PARTIES

1. The Applicant is Donovan Caffa ("Caffa" or the "Applicant"), an adult male.

2. The Respondent is Coenraad Lourens Germishuizen ("Germishuizen" or the "Respondent"), an adult male.

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3. The Applicant and the Respondent were directors and shareholders of the second Respondent, Newclear Holdings (Pty) Ltd ("the Company"), registered under the company laws of South Africa with registration number 023/778610/07.

THE APPLICATION

4. On January 4, 2024, the Applicant filed an application under section 71(8) of the Companies Act, No. 71 of 2008 ("the Act" or "the CA").

5. The Applicant sought an order from the Companies Tribunal ("the Tribunal"), amongst others, to have the Respondent removed as a director of the Company.

6. The Respondent failed to submit its answer within the prescribed timelines according to the Regulations issued under the Companies Act ("the Companies Regulations, 2011").

7. The Respondent applied to the Tribunal for condonation of the late filing of its answering affidavit, and to extend the period to file its answer. The Applicant opposed the condonation and extension application.

8. After hearing the condonation and extension application, the Tribunal condoned the late filing of the Respondent's answer and allowed the Respondent an extension of the period within which to file its answer.

9. The Tribunal scheduled the main application for a hearing on the opposed roll on March 5, 2025. The Tribunal heard the opposed application on that date.

THE RELIEF THE APPLICANT SEEKS

10. The Applicant outlined the orders it seeks from the Tribunal in, amongst others, Form CTR142 filed on 4 January 2024, namely, to –
    10.1. Remove the Respondent as a director; and
    10.2. Order the transfer of funds from FNB to Capitec.

11. In the Applicant's statement of claim (undated and not commissioned), the Applicant requested the following relief, namely that -

"The First and Second Respondents must provide the records of the company in accordance with Section 26(1)(a) – (e) of the Companies Act:

(a) The company's Memorandum of Incorporation, any amendments to it, and any rules established by the company, as detailed in Section 24(3)(a);

(b) The records related to the company's directors, as mentioned in Section 24(3)(b);

(c) Reports for annual meetings and annual financial statements, as referenced in Section 24(3)(c)(i) and (ii);

(d) Notifications and minutes of annual meetings, along with communications referred to in Section 24(3)(d) and (e). In the case of a non-profit company, the references in Section 24(3)(d) to shareholders' meetings, and in Section 24(3)(e) to communications sent to holders of a company's securities, should be interpreted as referring to a meeting of members or communications to members, respectively;

(e) The securities register of a profit company or the members register of a non-profit company that has members, as specified in Section 24(4). The duties of the First Respondent must be revoked due to misconduct, and the Respondent should be declared delinquent under Section 162 of the Companies Act, along with any further or alternative relief."

BACKGROUND

12. In May 2023, the Applicant and Respondent started a business together. They incorporated the Company to manage the projects procured through their networks.

13. From late October towards early November 2023, the relationships between the parties began to sour.

14. A serious bone of contention for the Applicant was the Respondent's exclusive control over the Company's FNB account, including the disbursements and transfers made from that account. The management and control over the accounts is linked to the management and control over the projects the parties respectively brought into the Company, the source of the funds. The Applicant alleges that they agreed to manage the projects in consultation and agreement with each other, including the financial management. The Respondent contends that the agreement is that each party would manage the projects and finances related to the projects they individually brought to the Company. According to the Respondent, funds for the Applicant's projects would be processed through the CAPITEC account, while funds for the Respondent's projects would go through the FNB account. At the date of the hearing, the FNB account has been frozen, leaving both the Applicant and Respondent without access.

15. The Applicant alleges that the Respondent obtained sole control over the FNB bank account through nefarious means. The Applicant alleged that the Respondent fraudulently applied the Applicant’s signature to the bank application form to obtain sole control over the account. The Respondent denies this and avers that the Applicant sent the Applicant’s signature to the Respondent to apply it to the application form. After the Respondent completed the application form, the Respondent sent the forms to the Applicant to check. The Applicant checked the form and corrected his cellular telephone number. Since the Applicant has removed the Respondent as a director of the Company, the Respondent no longer has access to the FNB account.

16. Another sticking point between the parties is their respective shareholding. According to the Applicant he holds 51% of the shares and the Respondent 49%. According to the Respondent, the parties agreed to equal shareholding, i.e., a 50/50% shareholding split. The Company did not establish a share register and did not issue share certificates. The parties rely on bank application forms and voice notes to support their respective and differing contentions regarding the shareholding.

17. The Applicant removed the Respondent as a director of the Company, allegedly, in accordance with section 71(1) of the Companies Act. The Applicant claimed that all necessary procedures were followed during this process. The Respondent, however, contended that the Applicant did not follow due process. If necessary, I will return to the shareholding issue in relation to the Respondent's removal as a director of the Company by the Applicant under section 71(1) of the CA.

18. It is against this background that the Applicant applied for the removal of the Respondent as a director of the Company. The Applicant alleges that the Respondent failed to fulfil his fiduciary duties towards the Company, engaged in fraudulent conduct to gain sole control over the Company's FNB account, and made payments and transfers from this account without consulting or obtaining consent from the Applicant. Additionally, it is claimed that these actions conflicted with the interests of the Company. There are also concerns about a conflict of interest involving the Respondent's company, CEFCO, with the Company. In May 2023, the Applicant and Respondent started a business together. They incorporated the Company to manage the projects sourced through their networks.

APPLIACABLE LEGAL PROVISIOINS

19. The applicable legal provisions relating to the application are section 71(8) read with section 71(3) of the CA.

19.1. Section 71(3) provides that –

> *"(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."

19.2. Section 71(8) provides that -

"(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

EVALUATION

20. The Application before the Tribunal is to remove the Respondent as a director of the Company, and for certain other orders.

21. The Tribunal has jurisdiction to make an order determining that a director be removed in terms of section 71(8) read with section 71(3) of the CA, providing the Applicant proves his case, i.e., that the circumstances prescribed in section 71(3) are present, and the company has fewer than three directors, including the director to be removed.

22. As per COR14.3 dated 10 June 2023m the Company had fewer than three directors, making section 71(8) applicable to the Company.

23. Before evaluating the merits of the application to remove the Respondent as a director of the Company, I will first assess whether the relief requested by the Applicant is appropriate, as it might be moot.

24. It is common cause that the Respondent was no longer a director of the Company on January 4, 2024, the date when the Applicant filed the application to remove the Respondent as a director.

25. The documentary evidence provided by the parties to the Tribunal confirms that the Respondent was removed as a director of the Company. This is demonstrated by:

21.1. COR39: The Director's Amendments dated 22 December 2023, which list only the Applicant as an "active director/member."

21.2. COR14.3: The Registration Certificate dated 11 January 2024, which indicates that only the Applicant is a director of the Company.

26. The relief the Applicant seeks from the Tribunal to remove the Respondent as a director of the Company is moot.

27. The Supreme Court of Appeal in ***Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs (104/2022) [2023] ZASCA 35 (31 March 2023)[1],*** dealt with the issue of mootness on an appeal from the high court, where impugned regulations had been repealed and were no longer in force before the adjudication of the matter in the high court and in the court of appeal. The court stated in paragraph 20 of the judgment that "*There is no discrete issue before us. In the circumstances, it was not necessary to go into the merits of the matter. To adjudicate on the circumstances that gave rise to the limitation on the right to freedom of religion that no longer exist would be to do so in a vacuum."* The court therefore found that the high court had no discretion to determine a matter which is moot, nor is there any need to deal with the merits.

28. The Applicant also requested the Tribunal for orders against the Respondent to -

28.1. Transfer funds from FNB to Capitec (as indicated in the Applicant's Form CTR142).

[1] See also: ***Minister of Tourism and Others v Afriforum NPC and Another*** **[2023] ZACC 7 (CC)** para 23 where the constitutional court stated that - '*A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by a court's decision or which would be resolved by a court's decision. A case is also moot when a court's decision would be of academic interest only.'*

28.2. Provide *"…the records of the Company as per Section 26(1)(a) – (e) of the Companies Act to the Applicant*…". This is contained in the Applicant's statement of claim (undated and not commissioned).[2]

29. From the Applicant's papers and submissions, it appears the company records the Applicant seeks are actually the Company's FNB bank statements. The Company's FNB account was under the Respondent's control until the account was frozen and the Respondent removed as a director of the Company.

30. The Tribunal engaged extensively with the parties about this relief and the legislative basis for the Tribunal to grant it.

31. The Applicant submitted that the Tribunal has jurisdiction over any matter regulated under the CA, but could not direct the Tribunal to any specific and explicit provision in the Companies Act that grants the Tribunal authority to order a person to transfer funds from one bank account to another, or to order a person (not a director or member) to make company records available under section 26(1) (a)-(e) of the CA.

32. Having considered this issue it is clear that there is no basis for the Tribunal to make the order the Applicant seeks against the Respondent.

32.1. The Tribunal is a statutory body and can only exercise the powers granted to it by the Companies Act. Upon reviewing the sections the Applicant relied on, the Tribunal found no provisions that give it the authority to issue the requested orders in the circumstances of this application.

32.2. Moreover –

[2] The Tribunal deals with this issue for completeness despite the irregularity, as the parties extensively engaged on this prayer at the hearing.

32.2.1. The Respondent cannot access the Company FNB account to access the statements – the Respondent is no longer a director of the Company, and the account has been frozen.

32.2.2. Section 26(1)(c) of the CA does not establish a basis for the Tribunal to order the Respondent to provide the Applicant with bank statements. The section does not relate to bank statements, but to annual financial statements[3], as defined in section 1 of the CA.

32.2.3. If the Applicant refers to other records and not only the bank statements, it appears on the balance of probabilities that those records may simply not exists as the company either did not establish them, or because the Company has been in existence for too short a period to have established those records.

FINDINGS

33. The Tribunal has no discretion to determine the merits of a matter which is moot, i.e., to remove the Respondent as a director of the Company (since the Respondent had already been removed.)

34. Whether the Applicant removed the Respondent without due process and / or incorrectly under section 71(1) of the CA, though mentioned by the Respondent is not before the Tribunal, and the Tribunal will not delve into the merits or demerits of it, nor make any findings in that respect.

ORDER

35. The Tribunal –

[3] Section 26(1)(c) states that – "*(c) Reports for annual meetings and annual financial statements, as referenced in Section 24(3)(c)(i) and (ii); …"* my underlining.

35.1. Dismisses the Applicant's application and the relief the Applicant seeks.

35.2. Makes no costs order.

Dated at Johannesburg on this 28h day of March 2025

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D R Terblanche

Member of the Companies Tribunal