



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT01650/ADJ/2024

In the matter between:

DRAKENSBERG ENERGY (PROPRIETARY) LIMITED
Applicant

(Registration number 2015/346724/07)

and

SIBUSISO RAYMOND SENGANE

Respondent

Issue for determination: This is an application for an order that Mr Sibusiso Raymond Sengane be removed as Director of the Company, being Drakensberg Energy (Pty) Ltd.

Coram: N Cawe

Decision handed down on 22 March 2024

DECISION (Reasons and Order)

INTRODUCTION

- [1] The Applicant in this matter is DRAKENSBERGENERGY (PROPRIETARY) LTD (the company), a private company duly registered and incorporated under the company laws of the Republic of South Africa with registration number 2015/346724/07 and with its registered address at The West Peak, 13 Lourensford Road, Somerset West, Western Cape, 7130, Republic of South Africa.
- [2] The Respondent is Sibusiso Raymond Sengane (Sengane), an adult male South African businessman, and currently residing at 1217 Funda Road, St Wendolins, Pine Town, KwaZulu-Natal. 3610, Republic of South Africa.
- [3] The dispute between the parties in this matter relates to the conduct of the Respondent which includes dereliction of his duties as a director by not participating in the day to day affairs of the Company.
- [4] This is an application in terms of section 71(8) of the Companies Act, 2008 (Act No. 71 of 2008) ("the Act"). The Respondent in this matter is one of three (3) directors of the Company as is evidenced by a copy of the Register of Directors and Officers of the said company, which is attached to the unpaginated Bundle of Documents, submitted with the application. I therefore accept the document as a valid document which serves as a true and correct record of the current registered directors of the Company.

BACKGROUND FACTS

- [5] Applicant's papers, before the Tribunal, set out that the Respondent was appointed a director in the company in July 2021.
- [6] On 21 November 2023 an email was sent to the Respondent, to the email address appearing on the Register of Companies, notifying him of a meeting that was to be held on 6 December 2023 about his pending removal from his directorship position.

- [7] The Respondent did not respond to the email, nor did he attend the meeting, which was held on the scheduled date.
- [8] On 11 December a Resolution for the removal of the Respondent was passed by his co-directors.
- [9] On 12 January the Applicant lodged a Form CTR 142 with the Tribunal.
- [10] According to Goncalo Pinheiro Amaro (Amaro), in her Founding Affidavit that accompanies the application, dated 12 January 2024, Sengane had to be removed as a director at the Applicant company for reason that he has not participated in the affairs of the company, due to the fact that he no longer associated with the company on a day to day basis.

ISSUE TO BE DECIDED

- [6] Whether Sengane;
 - 6.1 contravened any provisions of the Act
 - 6.2 acted in a manner that warrants his removal as a director of
DRAKENSBERG ENERGY (PTY) LTD

APPLICABLE LAW

- [7] Section 70(1) of the Act makes provisions with regard to vacancies on the board of a company. The relevant provisions of section 70(1) read as follows:
 - “(1) Subject to subsection 2, a person ceases to be a director, and a vacancy arises on the board of a company-

(a) ...; or

- (b) in any case, if the person-
 - (i) resigns or dies;
 - (ii) in the case of an *ex officio* director, ceases to hold the office, title, designation or similar status that entitled the person to be an *ex officio* director;
 - (iii) ...;
 - (iv) ...;
 - (v) becomes ineligible or disqualified in terms of section 69, subject to section 71(3); or
 - (vi) **is removed: -**
 - (aa) **by resolution of the shareholders in terms of section 71(1);**
 - (bb) **by resolution of the board in terms of section 71(3); or**
 - (cc) **by order of the court in terms of section 71(5) or (6).** [emphasis added.]

[8] Section 70(1)(b)(vi) clearly provides for removal of a person as a director of a company under the following circumstances:

- 8.1 By resolution of the shareholders of a company in terms of section 71(1) of the Act;
- 8.2 By resolution of the board of a company in terms of section 71(3) of the Act.

[9] Section 71 of the Act deals with the removal of directors of companies under various circumstances and the relevant provisions thereof read as follows:

“(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.** [emphasis added.]

[10] As per Swart v Heine (192/15) [2016] ZASCA16 (14 March 2016) para 7 and on the facts of the application, it is accepted that the basis of the application is Section 71 (3).

[11] In the event that any of the circumstances contemplated in section 71(3) of the Act occur, any director or shareholder of the company may bring an application to the Companies Tribunal, to make a determination contemplated in the subsection.

[12] Since the Company has 3 directors, the application for removal of any director of the Company must be done in terms of sections 71(1) and 72(2) of the Act. The Companies Tribunal must proceed to make a determination as contemplated in section 71(3) of the Act. Sections 71(4), 71(5) and 71(6), each read with the changes required by the context, apply to the determination of the Application by the Companies Tribunal.

[12] The instant application is brought on a default basis, therefore, Regulation 142(1) of 2011 (“the Regulations”) applies. The Regulation states that a person may apply to the Companies Tribunal for an order in respect of any matter contemplated by the Act or the Regulations by completing and filing with the Companies Tribunal’s recording officer:

- 12.1 an Application in Form CTR 142; and
- 12.2 a supporting affidavit setting out the facts on which the application is based.

[13] The current Application, together with the Supporting Affidavit, deposed to by the Amaro, were filed with the Companies Tribunal on the 12th day of January 2024. A copy of the stamped Form CTR 142 - Application for Relief, is attached to Applicant's papers.

[14] In terms of regulation 142(2), the Applicant is required to serve a copy of the application and supporting affidavit on each respondent cited in the application, within 5 business days after filing it with the Companies Tribunal.

COMPLIANCE WITH PROCEDURAL MATTERS

[15] It appears from the papers placed before the Companies Tribunal that the current Application was emailed to the Respondent on the 21st day of November 2023. The email address used is that which appears on the CIPC register for the Respondent.

[16] In terms of regulation 143(1) of the Regulations, 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 complaint referral, or application, that has been filed with the Companies Tribunal.

[17] The Respondent was properly served and, consequently, should have served a copy of his answer on the Applicant and also file his answer with the Companies Tribunal within twenty (20) business days as required by Regulation 143(1) of the relevant Regulations.

[18] Another relevant Regulation in the instant matter, is Regulation 153(2). It is important that I should make reference to the provisions of regulation 153(1) and (2) which read as follows:

“(1) If a person served with an initiating document has not filed a response within the prescribed period, the initiating party may apply to have the order, as applied for, issued against that person by the Tribunal.

(2) On an application in terms of sub-regulation (1), the Tribunal may make an appropriate order–

(a) after it has heard any required evidence concerning the motion; and

(b) if it is satisfied that the notice or application was adequately served.”

[19] The Applicant did indeed proceed to file its application for a Default Order (Form CTR 145) in terms of regulation 153(1) of the Regulations on the 26th day of February 2024.

[20] On the CTR 145 the Applicant makes the following assertions, which are considered to be relevant to the current Application:

20.1 *“As at the date of filing of the application for the default order, there has been no response (answer) forthcoming from the Respondent in opposition to the Application to the Companies Tribunal;*

20.2 *Sengane was granted a period of 21 days from the date of the aforementioned documents to respond to the application, as stipulated by law.*

20.3 *Sengane has not acknowledged receipt of the documents, nor has he filed a responding affidavit within the statutory framework”.*

[21] Upon careful consideration of the application for the default order that has been placed before me, I am satisfied that the application was adequately served on the Respondent as prescribed by regulation 153. The Tribunal is, therefore, enjoined to consider the default order application in its present form.

FINDINGS

[23] The Tribunal can only consider and/ or grant a default order if it is satisfied that the application was adequately served on the Respondent.

[24] It follows from what is enunciated above that the present application was adequately served on the Respondent and, therefore, the default order should be allowed on that basis.

THE ORDER

[25] I therefore make the following order:

25.1 The application for a default order is granted

25.2 Mr SIBUSISO RAYMOND SENGANE is hereby removed as a director of DRAKENSBERG ENERGY (PTY) LTD with immediate effect.

25.3 A copy of this Order must be served on the Companies and Intellectual Property Commission.

25.4 There is no order as to costs as the matter was unopposed.

Nomagcisa Cawe Member of the Companies Tribunal

22 March 2024