COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT013SEP2015

In the matter between:

THEMBINKOSI BRISCO ZWANE Applicant

and

SIMPHIWE ZWANE Respondent

Presiding Member	:	Khashane La M. Manamela (Mr.)
Date of Decision	:	01 December 2015

DECISION (Reasons and an Order)

Khashane La M. Manamela

[1] The contending parties herein, notably sharing the surname or last name Zwane, are the only directors of a private company called DECORATORS AT ANT (the company).[1]The company appears to have commenced business on 02 December 2011[2] and is therefore a fairly new company.

[2] The applicant's case against the respondent is that the respondent should be removed as a director of the company due to some disqualification and/or failure in the performance of his duties or responsibilities.[3] There is no word from the respondent and what is stated below may explain the respondent's absence from these proceedings.

[3] The applicant is very frugal in the submissions made herein, but nothing will turn on this. The bases for the removal of the respondent as a directory of the company are the following. It is submitted that the respondent "lack commitment to the company".[4] Further, that the respondent "has not contributed anything for [sic] the company not even his time".[5] It is added that the respondent "has not performed his responsibilities as director" and as such is said to have "failed to add value in the company".[6] The applicant concludes with the submissions that his efforts to discuss his complaints with the respondent over a meeting have

[1] See Certificate issued by the Commissioner of Companies & Intellectual Property Commission dated 20 July 2015 included as part of the papers.
[2] *Ibid.*
[3] See Form CTR 142 dated 10 September 2015; Form CTR145 dated 26 October 2015.
[4] See affidavit dated 10 September 2015 by the applicant.
[5] See affidavit dated 10 September 2015 by the applicant.
[6] See affidavit dated 10 September 2015 by the applicant.

been unsuccessful as the respondent "has no time to meet"[7] and refuses to perform his duties. The applicant repeats these submissions in his affidavit in support of an application for a default order.[8]

[4] As hinted above, the respondent is not participating in these proceedings, hence the application for a default order. However, I am not satisfied that the respondent was adequately served with the papers in this matter. A brief exposition of the relevant facts will explain this finding.

[5] The following appears from the papers in this matter. On 17 August 2015, a certain Mr. Neo Morailane, ostensibly acting on behalf of the applicant, made enquiries through electronic mail (e-mail) regarding the procedures of this Tribunal. The following day the Registrar forwarded a link for access documents on practice and procedures.[9] The interaction with the office of the Registrar continued and the applicant was, among others, told he can file documents electronically; furnished with a stamped copy of the papers bearing a case number and advised to serve the papers on the respondent as contemplated in regulation 142(2) of the Companies Regulations, 2011.[10] The applicant was also advised to furnish the office of the Registrar with proof of confirmation of receipt of the papers by the respondent. On 18 September 2015 Mr. Morailane advised

[7] See affidavit dated 10 September 2015 by the applicant.
[8] See affidavit dated 26 October 2015 by the applicant. Application for a default order is in terms of regulation 153 of the Companies Regulations, 2011. The Companies Regulations, 2011 were determined by the Minister of Trade and Industry in terms of section 223 of the Companies Act 71 of 2008 and published under GN R351 in Government Gazette 34239 of 26 April 2011 (the Companies Regulations).
[9] His e-mail dated 17 August 2015 was responded to by Ms Tebogo Mputle on 18 August 2015.
[10] Regulation 142(2) reads as follows: "The applicant must serve a copy of the application and affidavit on each respondent named in the application, within 5 business days after filing it."

the Registrar that the documents were sent to the respondent, but did not furnish proof of dispatch. In later e-mails he explained that he spoke to the respondent, albeit not clear whether it was telephonic or in person; the respondent acknowledged receipt of the documents and promised to "send an acknowledgement of receipt".[11] However, there is nothing in the papers in my file indicating that the documents were sent to the respondent and what e-mail address was used and proof that the e-mail belongs to the respondent. The say-so made by Mr. Morailane on behalf of the applicant, in my view, is not adequate for purposes of granting a default order as contemplated by the Companies Regulations.[12] More so, as the allegations regarding service are made in electronic mails by someone who appears to be an agent whose authority has not even been established or confirmed by the applicant. This aspect alone is disposive of the application and an order will be made in this regard.

[6] However, against the aforesaid finding, I proceed to make some few passing remarks in a quest to assist the applicant, who appears to be a lay person. This should not be understood to be legal advice on the matter or confirmation of the merit of the application or even to purport to bind other members of this Tribunal who may be seized with any future application by the applicant.

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[11] See e-mail dated 22 September 2015 from Neo Morailane to Manda Zibi of the Tribunal.

[12] See regulation 153(2) which reads as follows: "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."

[7] The application appears to be as contemplated by the provisions of section 71 of the Companies Act 71 of 2008 (the Act). The aforesaid section reads as follows in the relevant part:

"**71. Removal of directors**

(1) …

(2) …

(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) …

(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) …

(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."

[underlining added for emphasis]

[8] Therefore, there appears to be a statutory capacity or legal standing for the applicant to apply for the remedy he is currently applying. The basis appears to be in subsection 71(8) of the Act. Through this section, this Tribunal can make a determination which would otherwise have been made by the board of directors of a company should there have been not "*fewer than three directors*".[13] The company has only two directors and therefore the current application appears to be well within the contemplation of the relevant legislative provision.

[9] The ground for making the application contemplated in section 71(8) of the Act is the existence of the circumstance(s) contemplated in section 71(3) for the removal of the director. The circumstances generally relate to ineligibility or disqualification in terms of section 69[14] and incapacitation (in terms of section 71(3)(a)(i) and (ii)) and where a director is alleged to have "neglected, or been derelict in the performance of, the functions of director" (in terms of section 71(3)(b)). The test in section 71 of the Act is reasonableness and sufficiency of the allegations made against the director. The provision allows the impugned director the right to be heard before a determination is made by this Tribunal.[15] Section 76 of the Act, in particular sections 76(3) and (4), are also relevant in this regard. They read as follows in the material part:

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[13] Caroline Ncube "*You're fired! The removal of directors under the Companies Act 71 of 2008*" 2011 *SALJ* pp 33–51 on p 34 refers to these as "two new modes of removal"; and on p 44 as "alternative modes".
[14] Section 69(8)(a) is specifically excluded and reads as follows: "A person is disqualified to be a director of a company if- (a) a court has prohibited that person to be a director, or declared the person to be delinquent in terms of section 162, or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984)".
[15] See sections 71(4)(a) and (b) of the Act. See also sections 71(2)(a) and (b) of the Act.

"(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…"

[10] However, even with the above exposition of the law, each application will depend on its own facts. Therefore, the applicant will need to set out facts which

he deems necessary for a determination to be made herein. A general reading of the matter of ***Spineco Medical International (Pty) Ltd and another v Webb*** Case/File Number: CT021NOV2014[16] in which I had the benefit of participating may be a helpful guide. Be that as it may, the current application fails.

[11] Therefore, I make the following order:

a) the application is refused.

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Khashane La M. Manamela

Member, Companies Tribunal

01 December 2015

[16] Decided on 11 August 2015. The aforesaid decision can be accessed on the website of the Companies Tribunal: www.companiestribunal.org.za.