

**IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA**  
**“The Tribunal”**

**Case Number: CT001MAR2017**

**In the matter between:**

**Ntombi Eunice Nkwinika**

**The Applicant**

**(former member CC 2001/034163/23)**

**AND**

**Magida Mawethu**

**The Respondent**

**(current member CC 2001/034163/23)**

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**DECISION**

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**INTRODUCTION:**

**[1]** The applicant is Ntombi Eunice Nkwinika, a former member of the Eunice Civil Construction CC, a close corporation duly incorporated and registered in terms of the laws of the Republic of South Africa with registration number 2001/034163/23. The applicant brought an application for the removal of the respondent, as per details below, being the current member of Eunice Construction CC, and the reinstatement of the applicant as a member of the CC.

**[2]** The respondent is Magida Mawethu, the current member of Eunice Civil Construction CC, a close corporation duly incorporated and registered in terms of the laws of the Republic of South Africa, with registration number 2001/034163/23.

**[3]** The applicant alleged that the respondent had been served with this application and failed to respond within the stipulated twenty (20) business days, and thus applicant applies for a Default Order.

### **Submissions by Applicant**

Applicant deposed to an affidavit and submitted that she is the lawful owner of Eunice Civil Construction CC ('the CC'), and that she has no knowledge of the respondent who is currently listed in the CIPC's Companies register as a sole member of the CC. Applicant therefore requests that she be reinstated as a member of the CC and that respondent be removed as such, as she alleges that she was unlawfully removed as a member of the CC without her knowledge.

### **Application of the Law to the Case**

It is evident from the certificate of Incorporation issued by the Registrar of Companies Corporations that as at 03 April 2013, Nkwininka Ntombi Eunice (the applicant) was the sole member of the CC. However, CIPC's Disclosure Certificate issued on 29 November 2016 reveals that as at 11 December 2014, a member change was effected; with the respondent being added as a member of the CC. it would seem that in the process of adding the respondent, applicant was removed as a member.

In considering the application and the relief sought by the applicant, one must have consideration of the Companies Act (Act 71 of 2008) and what powers are conferred by the Act on the Companies Tribunal. Where removal of directors is concerned, s.71 adequately details the procedures that must be complied with. S.71(8) (b) provides that if a company has fewer than three directors, any director or shareholder of the company may apply to the Companies tribunal to make a determination regarding such removal. The Act provides that the Tribunal may consider the removal of a director on the following grounds:

- (I) That the director is ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69(8)(a); or
- (II) That the director is 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
- (III) That the director has neglected or been derelict in the performance of the functions of director.

The above are the legislated grounds on which the Tribunal can consider an application for the removal of a director. The Tribunal has also not been afforded the powers to reinstate directors in terms of the Act.

Another issue to be taken into account is the fact that the entity under consideration is a Close Corporation, and whether the Tribunal has powers of determination of removal or reinstatement of members of a Close Corporation. In terms of the Companies Act, 2008 ("the Act"), a company is defined as a juristic person incorporated in terms of the Act, a domesticated company or a juristic person that, immediately before the effective date was registered in terms of either the Companies Act of 1973, other than as an external company as defined in the Act; or the Close Corporations Act of 1984, if it has subsequently been converted in terms of Schedule 2. There is no evidence to show that the CC has been converted in terms of the Schedule to qualify as a company in terms of the Act.

While the applicant may have applied for a default order, as the respondent has not responded to the application, the Companies tribunal is not empowered by the Act to consider such application and a decision by the Companies Tribunal to this application would be *ultra vires* the powers conferred on it.

The tribunal can therefore not grant the relief sought by the applicant. The application is dismissed.

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B. Zulu

09 May 2017