

REPUBLIC OF SOUTH AFRICA



COMPANIES TRIBUNAL

Case/File Number: CT008MAR2014

In the matter between:

IDADA TRADING 345 (PTY) LTD

First Applicant

Registration Number: 2011/004363/07

XOLANI HUMPHREY MKHWANAZI

Second Applicant

Identity Number: 550325 5804 08 8

and

ADELINA HADIFELE NTHOBA

Respondent

Identity Number: 740212 0340 08 9

Presiding Member of the Tribunal : Khashane Manamela

DECISION (Reasons and Order)

[1] The second applicant and the respondent are the only directors and shareholders of the first applicant. Their respective shareholdings in the first applicant are in equal proportions¹. The first applicant's main purpose of existence is the running of a Nando's franchise in Queenswood, Pretoria. I shall assume for the purposes of this application that the first applicant and the Nando's franchise are essentially the same thing.

[2] However, the relationship between the second applicant and the respondent extends or extended beyond pure business limits into an intimate or love relationship which started in 2008. They cohabited, but I could glean from the papers filed herein that the love relationship has become rocky and the parties seems to have separated or heading in that direction.

[3] The respondent acted as the managing director of the first applicant and/or the manager of the franchise from 2011 until around the 09th day of January 2014². She appears to have been unceremoniously terminated as a manager and employee of the first applicant. There are several allegations of impropriety, malfeasance and moral turpitude. In sum the respondent is accused of stealing monies of the first applicant. I shall detail some of these when I deem fit herein below.

¹ Paragraph 8 of the shareholders agreement attached as annexure "X2" to the supporting affidavit attached to Form CTR 142 (supporting affidavit).

² Paragraph 14.2 of the supporting affidavit.

[4] As a result, the second applicant seeks an order in terms of section 71(8) of the Companies Act 71 of 2008 (the Act) removing the respondent as a director of the first applicant. It is submitted in this regard that, the respondent has become ineligible and disqualified to be a director of the first applicant as contemplated in section 69 of the Act. Candidly, the applicants stated the other purpose for the application as aimed at restricting the respondent from withdrawing any funds from the first applicant's bank account held with Standard Bank.³

[5] There is no word from the respondent and the application is unopposed. Therefore, the application is brought as a request for a default order in terms of regulation 153 of the Companies Regulations, 2011 (the Regulations)⁴. It is submitted on behalf of the applicant that the application was served on the respondent by electronic mail.⁵ Electronic mail is listed as one of the methods of delivery of notices or copies of documents contemplated in regulation 7 of the Regulations [read together with section 6 of the Act] and listed in the second column of Table CR3 of Annexure 3 to the Regulations. I have only noted what appears to be an electronic mail sent by the respondent from a Samsung Mobile on the 19th March 2014 at 9:25 AM stating: "Response [sic] email will be send to you by my attorneys not later than tomorrow. SAPS referred this matter to

³ Paragraph 9.2 of the supporting affidavit. I must add that, when I spoke telephonically to the legal representative of the applicants, I was informed that, the bank account is frozen and this seems to be contradictory to the submissions made in the papers, unless it is the result of the lapse in time.

⁴ A Form CTR 145 accompanied by another affidavit by the second applicant deposed to on the 22nd April 2014 (the default order affidavit) is included as part of my papers.

⁵ Annexure "IX2" to the supporting affidavit.

magistrate court. The court will overrule judgement.”⁶ I am therefore satisfied that the application was adequately served on the respondent.

[6] The matter came before me under urgent circumstances and the papers were electronically sent to be in three batches [the first reaching me at 12h51 and the third and last at 14h42] yesterday, Friday 16th May 2014. I had taken for granted that, the matter was urgent when the Tribunal’s registry contacted me. In my mind I had imagined an application brought in terms of regulation 147 of the Regulations, but this is no way near such an application in resemblance. There are no substantial submissions in respect of urgency, except for references to damages being suffered and imminent legal steps apparently by numerous unnamed companies. Even these are contained in a letter from the legal representatives of the applicants dated 15th May 2014, which seems to place this Tribunal on terms to make a determination in this matter by not later than the 16th May 2014. However, I have decided to deal with the matter nevertheless and overlooked the possible lack of urgency and other possible misgivings the administrative events surrounding this application may have hatched.

[7] Section 71(8) of the Act is the statutory provision affording this Tribunal jurisdiction over this matter. For ease of reference it reads as follows:

“(8) If a company has fewer than three directors-
(a) subsection (3) does not apply to the company;

⁶ Annexure “IX5” to the supporting affidavit.

(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.”

[I added the underlining]

[8] For greater certainty, I am satisfied that, this application falls squarely within the jurisdiction of this Tribunal as the company [first applicant] has only two directors. In turn, the application is brought by the second applicant in his capacity as a director of the first applicant. Therefore, there was no need to acquire a resolution of the directors of the first applicant to authorise the initiation of this application⁷. This is contemplated by the Act and correctly so, since it is improbable that the respondent would have authorised a process aimed at purging her from her directorship.

[9] Section 71(8) enables this Tribunal to make a determination in circumstances contemplated in subsections 71(3); 71(4); 71(5) and 71(6) read within the applicable context. These are circumstances under which a director of a company may be removed by this Tribunal.

⁷ Paragraph 2 of the supporting affidavit.

[10] Section 71(3) reads as follows:

“(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.”

[I have added the underlining]

[11] As stated above, the second applicant submits that, the respondent has become ineligible and disqualified to continue as a director of the first applicant.⁸ The respondent is alleged to have misappropriated or stolen funds of the first applicant in an amount in excess of R335 000.00.

[12] The alleged theft by the respondent reportedly involves money stolen from the drop box safe at the first applicant’s business premises presumably

⁸ Paragraph 10 of the affidavit attached to Form CTR 145.

representing daily sales which were to be collected by a cash collection security service provider. The respondent is alleged to have somewhat had keys to the drop box safe and over a period of a year have helped herself with monies from there. A reconciliation of the misappropriations compiled by the bookkeeper of the first applicant is included. Further, the respondent is alleged to have transferred monies from the first applicant's bank account into her account and cashed a cheque as she is said to be in possession of the company cheque book. A criminal case is reportedly pending against the respondent, although not much has been provided by the way of details in this regard. However, no documentary proof evidencing the abovementioned transgressions by the respondent is furnished. This would have been, for example, bank statements and documents from the security cash collection security service provider or confirmatory affidavits from the relevant employees of the first applicant. A reconciliation of the company's books by its bookkeeper doesn't necessarily imply misappropriation by the respondent. The first applicant has other functionaries and I think the criminal justice system must be vigorously be put to work.

[13] I have already stated above that, the respondent has been removed as a manager of the first applicant and she seems to have observed the second applicant's orders to stay away from the business of the first applicant. Although, not really relevant to the merits of this matter, I have noted from the papers that

she seems to have been ejected from the house she cohabited in with the second applicant.⁹

[14] The allegations against the respondent are of a highly serious nature. For the moment they remain unproven and the criminal justice system would surely take its course in that regard. For this Tribunal, the four corners of the Act and the Regulations are the limits. A director of a company may be removed on the basis of being “ineligible or disqualified in terms of section 69” or where she or her “has neglected, or been derelict in the performance of, the functions of director”. I will firstly deal with ineligibility and disqualification.

[15] Ineligibility and disqualification of directors are set out in sections 69(7) and (8) of the Act whose relevant portions read as follows:

“(7) A person is ineligible to be a director of a company if the person-

(a) is a juristic person;

(b) is an unemancipated minor, or is under a similar legal disability; or

(c) does not satisfy any qualification set out in the company’s Memorandum of Incorporation.

(8) A person is disqualified to be a director of a company if-

⁹ Annexures “X5” to the supporting affidavit and letters by the applicants’ legal representatives dated 10; 21; 24 and 30th January 2014 directed at the respondent.

(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); or

(b) subject to subsections (9) to (12), the person-

(i) is an unrehabilitated insolvent;

(ii) is prohibited in terms of any public regulation to be a director of the company;

(iii) has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or

(iv) has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence-

(aa) involving fraud, misrepresentation or dishonesty;

(bb) in connection with the promotion, formation or management of a company, or in connection with any act contemplated in subsection (2) or (5); or

...”

[I added the underlining]

[16] From the above, I do not think that the alleged breaches or conduct of the respondent renders her ineligible. She does not fall within the categories stated in section 69(7)(a) [applicable to a juristic person] or section 69(7)(b) [applicable in instances of “an unemancipated minor, or is under a similar legal disability”].

As for section 69(7)(c), I am not aware of the additional grounds of ineligibility, if any, set by the first applicant in its memorandum of incorporation (MOI).

[17] From section 69(8) of the Act, I paraphrase that a person is disqualified to serve as a director under the following circumstances, where:

- “a court has prohibited that person to be a director, or declared the person to be delinquent ...”;
- the person “is an unrehabilitated insolvent”;
- the person “is prohibited in terms of any public regulation to be a director of the company”;
- the person “has been removed from an office of trust, on the grounds of misconduct involving dishonesty...”; or
- the person “has been convicted, ...and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence...”

[18] I find the first four circumstances above to be inapplicable to the respondent. The fifth or the last circumstance appears to have some level of relevance.

[19] However, although the respondent is accused of theft and misappropriation of monies of the first applicant, she is not yet convicted and imprisoned as a result. There are no allegations that she already has another

conviction and imprisonment of relevance. Therefore, I find that section 69(8) disqualifications are not inapplicable to the respondent.

[20] Back to section 71(3)(b) of the Act. This provision provides for the removal of a director found to have “neglected, or been derelict in the performance of, the functions of director”. Unfortunately the Act does not define what is considered to be “neglecting” or “been derelict” in the performance of a director’s functions. Therefore, I will opt for the ordinary meaning of the words. *The Oxford Large Print Dictionary (New Edition)* explains the neglect 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. . *noun* neglecting; being neglected...” Neglect and negligence do not necessarily mean the same thing, but a director may be removed on occasion of either.¹⁰ Although the respondent is accused of committing criminal activities, I do not find that she was neglectful of her duties as a director. I am not suggesting that, a person who steals from her company necessarily cares about her company. But these are only unproven allegations at this stage or what has been submitted to me with no probative backing. Further, the conduct she is accused of relates to her managerial duties and it must be remembered that, the respondent does not need to perform any duties to be the director of the first applicant in the same vein that the second applicant does not seem to be fulfilling any managerial duties in the first

¹⁰ Delpont et al *Henochnsberg on the Companies* at page 271 (accessed online through LexisNexis) (*Henochnsberg*) and Caroline B Ncube 2011 SALJ 33.

applicant's operations. She has a three-tier relationship with the first applicant: being, a managerial employee; director and shareholder. The subject of contentions here seems to be her managerial position, although I admit those may have a bearing on her role as a director of the company. However, since she has been removed from this [managerial] position [although, *en passant* it appears that this was done without necessarily following due process of the law], there is no prejudice in my opinion in her serving as a director of the company. Yes, due to the skirmishes resulting from the personal relationship and her alleged misdemeanours, the operations of the first applicant may be adversely affected. But, it must be borne in mind that, this is a family business and invariably the absence or rattle of family ties would affect this kind of business.

[21] Let me look at "been derelict" in the sense of performance of the functions of a director. Again referring to the *The Oxford Large Print Dictionary (New Edition)* this word is explained as "*adjective* deserted and left to fall into ruin. *noun* **1** an abandoned property, especially a ship. **2** a vagrant; a tramp." In my opinion the legislature seems to have used the words neglecting or been derelict as synonyms or as composite behaviour. In my judgment, the respondent's conduct do not fall foul of this in her capacity as a director of the first applicant.

[22] From a further analysis of the papers, it may seem that, the second applicant may have initially allocated all the operational duties of the first applicant to the respondent, including the operation of the business cheque book.

After the fallout with the respondent, the second applicant seems to be determined to get all these powers back to the exclusion of the respondent. In my opinion, removal of the respondent as a director is not the appropriate remedy. The legislature did not cater for instances where one director would allege misappropriations by another and move an application for removal on the unproven allegations. The remedy is available where the capacity or performance of a director viewed objectively is compromised and therefore having no prospect of abating in the future, and thereby causing prejudice to the company.

[23] In my opinion the applicants should have approached a court of law for an interdict, which would be directed to specific conduct of the respondent either in a mandatory or prohibitory form. A good example is the alleged misuse of company funds through the operation of the cheque book. This behaviour should have been interdicted and I guess because it was handled with threats to Standard Bank it boomeranged on the second applicant through the freezing of the bank account. The respondent's conduct complained of has ceased with the removal of the respondent from the business as a manager and with the bank account frozen, I do not see the respondent prejudicing the applicants in any way. I am not certain as to how the second applicant intended conducting the business of the first applicant alone when he chased the respondent from the premises. This was done on the 09th January 2014 after the second applicant alleges to have been tipped off by a certain Jacob on the 29th December 2013 regarding the

respondent's theft of monies captured on video. There is no explanation as to why there seems to have been inaction for a period of about ten days after discovery of the serious crimes. Conspicuous by its absence is a confirmatory affidavit from this surname-less Jacob, the manager who has replaced the respondent. A rhetoric question in this regard: was the respondent, a manager, director and shareholder of the business unaware of the security camera installed at the business to capture her alleged behaviour, whilst Jacob [then not yet a manager] was aware of this? In my opinion, the first applicant wants to remove the respondent as a director not that she is compromised in remaining a director, but for other personal reasons. My suspicions are warranted by the second applicant's apparent lacklustre and nonchalance regarding the pursuit of the criminal matter. There may well be something in the only words attributable to the respondent in this matter reportedly from her mobile phone: "...SAPS referred this matter to magistrate court..."¹¹ This Tribunal should not be used to settle private scores.

[24] What is also striking about this application is that, the second applicant seems to be oblivious of the fact that, the respondent is an equal holder of equity or shareholder in the business. I would imagine, this would entitle the respondent to continue to have an embedded financial interest in the first applicant and cannot lose these rights and interests by a restraining letter or even interdict or removal as a director. Further, although the first applicant's MOI seems to be

¹¹ See paragraph 5 above.

silent on this, I presume that even with the removal of the respondent she would still have the right to appoint a replacement director as an equal shareholder.¹² However, these are only my comments *en passant* and they are not necessarily decisive of this matter. I have already found that, determined from the provisions of the Act, I do not find that a case has been made out for the removal of the respondent as a director of the first applicant.

[25] In the result:

- a) the application is dismissed.

Khashane Manamela

Member, Companies Tribunal

17th May 2014

¹² See generally section 66 of the Companies Act 71 of 2008 and *Henochsberg* on page 258 onwards.