IN THE COMPANIES TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: CT01752ADJ2024

In the matter between:

ZWELAKHE AFRICA REGINALD MAHLANGU **APPLICANT**

and

SONIA NKAGENG RAMPOLOKENG **RESPONDENT**

Presiding Member: Professor Marumoagae

Date of the decision: 2 September 2024

DECISION (Reasons and order)

A INTRODUCTION

[1] The Applicant is **ZWELAKHE AFRICA REGINALD MAHLANGU,** an adult male director of the Company known as **LIZWELAKHE SOLUTIONS (PTY) LTD (hereafter 'LIZWELAKHE SOLUTIONS'** with registration number 2015/113557/07.

[2] The Respondent is **SONIA NKAGENG RAMPOLOKENG,** an adult female director of **LIZWELAKHE SOLUTIONS.**

[3] The Applicant brought this application for this Tribunal to remove the Respondent as the director of **LIZWELAKHE SOLUTIONS.** This issue before the Tribunal is whether the Applicant made a case for a default judgment for the Respondent's removal as a director of **LIZWELAKHE SOLUTIONS**.

B FACTUAL MATRIX

[4] The Applicant desires to have the Respondent removed from her office as a director of LIZWELAKHE SOLUTIONS. According to the Applicant, the Respondent is inactive in this company. Further, the Respondent is causing financial disruptions in the company thereby directly and negatively affecting the livelihoods of everybody associated with this company. It is alleged further that the Respondent is prohibiting LIZWELAKHE SOLUTIONS from carrying out its duties. According to the Applicant, the Respondent caused LIZWELAKHE SOLUTIONS bank account to be frozen thereby causing this company severe financial prejudice and in the process impacting its productivity and economic stability.

[5] It is alleged that the Respondent was appointed a director of LIZWELAKHE SOLUTIONS when this company partnered with another company, MUDZI RESOURCES (PTY) LTD (hereafter 'MUZI') to work on a mining project. According to the Applicant, some conditions needed to be met after the Respondent was appointed as a director of LIZWELAKHE SOLUTIONS. MUDZI was required to do due diligence and provide upfront funding as part of the project capital which was intended to lead to MUDZI, which was represented by the Respondent, attaining shares in LIZWELAKHE SOLUTIONS.

[6] Nonetheless, the Applicant deposed to an affidavit wherein she clearly stated the reasons why this Tribunal should grant her the relief she sought. The Applicant alleges that the Respondent cannot continue to be part of the LIZWELAKHE SOLUTIONS as a director because she has other commitments that she is currently busy with and binding her. Further, the Respondent failed to comply with the conditions that she agreed to comply with after being made a director of LIZWELAKHE SOLUTIONS.

[7] The Applicant contends that the Respondent and her team compiled a technical report where they indicated that the project that was intended to be undertaken by the LIZWELAKHE SOLUTIONS constituted a financial risk for them. Further, this led to numerous requests being made by the Applicant for the Respondent to vacate her office as the director of LIZWELAKHE SOLUTIONS, which

requests have been ignored. On 6 December 2023, the Applicant wrote a letter to the Respondent informing her that steps will be taken to remove her as a director.

[8] The Applicant instructed its attorneys to transmit a letter dated 23 January 2023 to the Respondent. It is alleged in this letter that by conducting herself as described in paragraph 4 above, the Respondent acted in direct contradiction of her fiduciary duty to act responsibly, practice the duty of care, display good faith and confidentiality, and act in the best interests of LIZWELAKHE SOLUTIONS and the Applicant as its 100% shareholder.

[9] The Applicant lodged his application with the Tribunal on 5 April 2024. On 15 April 2024, the officials of the Tribunal acknowledged receipt of the application. On 16 April 2024, the Applicant served the application 'on the respondent' by email. However, the Respondent did not reply to this email. On 21 June 2024, the Applicant approached the Tribunal for a default decision against the Respondent.

C APPLICABLE PRINCIPLES AND ANALYSIS

[10] To succeed, the Applicant is legislatively required in terms of Regulation 142(1)(b) of the Companies Regulations, 2011 to complete a relevant form that must be accompanied by a supporting affidavit. This affidavit must set out the facts on which the application is based. It is clear from the Applicant's affidavit and the letters that were seemingly written to the Respondent that the Applicant is not happy with the conduct of the Respondent concerning LIZWELAKHE SOLUTIONS, and wants the Respondent to be removed as a director.

[11] Before the Tribunal can entertain the merits of the Applicant's application, it is important to first assess whether the prescribed procedure has been followed. In terms of Regulation 142(3), any applicant who approaches the Tribunal for relief must state the section of the Act or the Regulation in terms of which the Application is made. This Regulation is peremptory, irrespective of whether the Applicant is legally represented. There is evidence that at some stage the Applicant sought legal advice. The letters drafted on the Applicant's instructions seemingly to the Respondent were written by a legal practitioner.

[12] However, in these proceedings, the Applicant was not legally represented. For this reason, it may be somewhat unfair to hold the Applicant strictly to the prescripts of Regulation 142(3). Perhaps, the officials of this Tribunal should highlight the contents of this Regulation to all unrepresented Applicants. Nonetheless, even though the Applicant did not specify which particular section or Regulation this application is based, it is clear from all the facts and evidence before the Tribunal that this is an application for the removal of the Respondent as the director of LIZWELAKHE SOLUTIONS

[13] The Applicant duly transmitted his application by email 'to the respondent' within five business days as prescribed in Regulation 142(2). The Respondent did not provide an answer to this application as mandated by Regulation 143(1). The Respondent was supposed to serve her answer to the application within twenty business days of being served with the application. 'Failure' to do so led the Applicant to ask for a default decision to remove the Respondent from her office as the director of LIZWELAKHE SOLUTIONS.

[14] Table CR 3 of Annexure 3 to the Companies Regulations provides various methods and times for the service of documents in this Tribunal, one of which is an email. An application can be sent through an electronic mail and date and time of deemed delivery thereof would be the date and time *'… recorded by the computer used by the sender, unless there is conclusive evidence that it was delivered on a different date or at a different time'*.[1]

[15] In terms of the proof of service provided by the Applicant, an email was sent to the Respondent on 16 April 2024, wherein the application to remove the Responded was attached. This information is duly recorded by the Applicant's computer as the sender of this email. On the face of it, it appears that the Applicant effectively served the application on the Respondent.

[16] However, there is no evidence placed before the Tribunal that suggests that the email used to serve the Respondent belongs to the Respondent. In other words, it is not immediately clear whether the Respondent received the Applicant's email. The fundamental challenge with this is that it will be improper for this

[1] Table CR 3 of Annexure 3 to the Companies Regulations

Tribunal to consider the merits of this Application and, if it finds that the Applicant made out a case for the relief sought, to make an adverse decision against the Respondent when it is not clear whether the Respondent is aware of these proceedings.

[17] It is constitutionally impermissible for any forum vested with judicial or quasi-judicial powers to decide a case against affected persons when such persons have not been notified of the proceedings. It is a different story if the Respondent was indeed notified and decided not to take part in the proceedings. If there was such notification, the Tribunal should be satisfied that the notice was effective and the Respondent is aware of the proceedings. There is nothing placed before this Tribunal that suggests that the Responded is aware of these proceedings. What has been placed before the Tribunal is a consistent one-way communication by the Applicant to the Respondent without any response from the Respondent.

[18] It is not even clear how some of the letters seemingly written on the Applicant's instructions were transmitted to the Responded. For instance, on the letter dated 23 January 2023, while what appears to be the Respondent's physical address is stated in the letter, it is not entirely clear whether this letter was sent by ordinary or registered post. What is clear, however, is that there was no response from the Respondent to this letter.

[19] It may well be that the Respondent received all the communication from the Applicant and decided to frustrate the process by not responding to the Applicant's communication. But service by way of sheriff has the potential to address this problem. Even though service by email is an effective and recognised method of service, disposing of this matter based on email service where it is not clear whether the Respondent received the notice would fly in the face of the rules of natural justice and seriously infringe upon the Respondent's right to be heard. The Tribunal cannot finalise the matter in circumstances where there is doubt that the Respondent is aware of these proceedings. It is not enough that the Applicant's computer recorded the intended delivery.

[20] It was held in *Commissioner for the South African Revenue Service v Morgan Beef (Pty) Ltd,* that *'… it is not unusual for people to not receive emails sent to them by legitimate sources or senders'*.[2] The court in *Shakoane v Community Schemes Ombud Service and Others*, held that:

'[w]here a sender chooses to rely on e-mail for service … they must track the email for display and or delivery to the intended recipient, or they must use the traditional methods of service.[3]

The court further held that:

'[a]t the very least, emails must be tracked either for a delivery or a read receipt'.[4]

[21] While it is clear that the email was sent, it is unclear if the email address used belongs to the Respondent, and if it does, whether the application was received. The Tribunal can only adjudicate the merits of this matter and make an order against the Respondent when it is satisfied that she has received the application and decided not to participate in these proceedings. To do otherwise would be to act contrary to the rules of natural justice and deny the Respondent of her *audi alteram partem* rights. This will also not be constitutionally justifiable.

D CONCLUSION

[22] Since there is doubt that the Respondent received the application, there is no need to entertain the merits of the application. The Applicant should be granted an opportunity to adequately prosecute this application by effecting proper service on the Respondent.

ORDER

[23] In the premises, the following order is made:

[23.1] The application is removed from the roll.

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Professor Marumoagae

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[2] (66096/2020) [2022] ZAGPPHC 367 (2 May 2022) para 16.
[3] (A23/2023) [2023] ZAGPPHC 1173 (20 October 2023) para 21.
[4] Ibid para 29.