

20, 23, 24, 27, 39, 40



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NUMBER: CT01951ADJ/2024

In the matter between:

ABEL JACOBUS LUBBE

APPLICANT

and

OTLILE SOLOMON REUBEN TLHAPANE

RESPONDENT

Presiding Member: D R Terblanche

Date of handing down of decision: 1 November 2024

DECISION (Reasons, Findings and Order)

1. The Applicant is **ABEL JACOBUS LUBBE** (“LUBBE” or the “Applicant”), an adult male.
 2. The Respondent is **OTLILE SOLOMON REUBEN TLHAPANE** (“TLHAPANE ” or the “Respondent”), an adult male.
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3. The Applicant and the Respondent are Directors of Bonabale Waste Management (Pty) Ltd. (Registration Number: 2014/228341/07), with its registered address situated at 15 Kwikkie Ave, Cashan, Rustenburg, (hereinafter referred to as "the Company").

THE APPLICATION

4. The Applicant applied to the Companies Tribunal (the "Tribunal") for an order removing the Respondent as a director of the Company, in terms of sections 71(8) of the Companies Act, 2008 (Act No. 71 of 2008 (the "Act", or "CA").

PRELIMINARY MATTERS

5. Regulation 142 deals with "Applications to the Tribunal in respect of matters other than complaints."
6. Regulation 142 provides that –

"(1) A person may apply to the Tribunal for an order in respect of any matter contemplated by the Act, or these regulations, by completing and filing with the Tribunal's recording officer—

- (a) an Application in Form CTR 142; and*
- (b) a supporting affidavit setting out the facts on which the application is based.*
- (2) 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.*
- (3) An application in terms of this regulation must—*
 - (a) indicate the basis of the application, stating the section of the Act or these regulations in terms of which the Application is made; and*
 - (b) depending on the context -*
 - (i) set out the Commission's decision that is being appealed or reviewed;*
 - (ii) set out the decision of the Tribunal that the applicant seeks to have varied or rescinded;*
 - (iii) set out the regulation in respect of which the applicant seeks condonation; or*

- (c) *indicate the order sought; and*
- (d) *state the name and address of each person in respect of whom an order is sought. “*

7. The Applicant made the application to the Tribunal accordingly. The Applicant’s Form CTR 142 reflects the Tribunal date stamp of 29 August 2024.
8. The Applicant had to file the application and the attached affidavit on the Respondent within 5 days of filing the application with the Tribunal, i.e. by no later than 5 September 2024.
9. The record before the Tribunal reflects that on Friday, 30 Aug 2024 at 11:02:28, the Applicant served the Form CTR142 and founding affidavit on the Respondent *via* email at otlhapane@bonabale.com; eneole@gmail.com.
10. According to Regulation 143(1), the Respondent had twenty (20) business days from the date of service to file and serve her answer, i.e. by no later than the 30 September 2024.
11. It appears from the Applicant’s affidavit in support of the default application that the Respondent received the application and the supporting documentation but failed to file an answer in the required format by the due date.
12. On the 28 October 2024, the Applicant submitted an application in Form CTR145 for a default order against the Respondent, attaching the required supporting affidavit and proof of service of the main application and annexures on the Respondent.
13. Regulation 153 of the CA provides that -

“(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.”*

14. Having considered the procedural requirements for the main and default applications, and the facts relating to these applications, I conclude that the Applicant complied with the requirements of Regulation 142, 143 and 153 of the regulations under the CA.
15. I am satisfied that the Applicant adequately served the notice of the application as prescribed in Regulation 7(1) of the CA; that the Respondent had not answered to the application within twenty (20) days of receipt of the application in terms of Regulation 153(1); and that this application can be considered on a default basis against the Respondent.

THE APPLICANT’S CASE

16. The background and the allegations made in support of this application appear from the uncontroverted sworn affidavit deposed to by Lubbe.

Background

17. The company’s main business is providing waste management services for Impala Platinum Mine, Rustenburg ("the Mine").
18. The Applicant and the Respondent are the directors of the Company. They were employees of the Company and were paid a monthly salary.
19. The Company has one bank account through which it performs its operations. The Directors, the Applicant, and the Respondent must approve and release all payments from the Company's bank account.
20. The Respondent consistently resisted releasing payments from the bank, which were necessary for the Company to fulfil its obligations to employees and service providers. Despite previously answered questions, the Respondent continued to make the same irrelevant inquiries about the required payments.

21. The Respondent further failed to timeously sign off on the financial statements of the Company as compiled by the appointed auditors resulting in penalties being incurred as a result of the late submission of same.
22. The consequences of the Respondent's actions resulted in employees being paid late and non-payment or late payment to service providers, resulting in those service providers suspending their services, causing the Company reputational damage and financial loss.
23. Since the Applicant commenced disciplinary action against the Applicant relating to the performance by the Respondent of his job responsibilities, the Respondent's behaviours mentioned above increased and became even more disruptive.
24. Resulting from the disciplinary action against the Respondent the Company dismissed the Respondent. Since the Respondent ceased being an employee of the Company, his actions in failing to release crucial payments required for the operations of the Company have simply continued.
25. Furthermore, notwithstanding the Applicant's constant reminders to the Respondent of the Respondent's role and responsibilities as director, he has become progressively disruptive in board meetings and not acting in the best interest of the Company.
26. Despite all reasonable efforts to secure the Respondent's cooperation and ensure the Respondent's compliance with his responsibilities as a director of the Company, including paying the Respondent his net salary, the Respondent has consistently failed to meet these obligations.
27. Based on the above the Applicant alleges that the Respondent has seriously neglected or has been in dereliction of his duties as director of the Company.
28. The Applicant believes that the Respondent is no longer fit to serve as a director of the Company. The Respondent's disruptive actions are hindering the Company's ability to operate effectively,

which could ultimately lead to its downfall and have devastating consequences for its employees.

THE APPLICABLE LEGAL PROVISIONS AND ANALYSIS OF THE FACTS AND EVIDENCE

29. Section 71 of the CA deals with the removal of directors of companies under various circumstances.

30. The Applicant brings this application under section 71(8) to the Tribunal for an order from the Tribunal to remove the Respondent as a director of the company. Section 71(8) of the CA provides –

“(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 decide 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.”*

31. Section 71(3) of the CA provides –

“(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 the 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.”*

32. The Tribunal has the necessary jurisdiction to consider the application in terms of section 71(8). In terms of section 71(8)(b), read with section 71(3) of the CA, any director or shareholder of the company may bring an application to the Tribunal, to decide an application as contemplated in section 71(3) of the CA due to a director or shareholder's ineligibility, disqualification (in terms of section 69, other than on the grounds contemplated in section 69 (8) (a)), incapacitation, negligence or dereliction in the performance of the functions as a director.
33. The Act sets out under sections 69, 70, 71, 76, 77, and 162 various examples of misconduct and disqualification that would warrant removal as a director from the board of directors and / or declaration of a director as a delinquent director, as well as conduct that which would attract criminal or civil liability.
34. Section 76 of the CA sets the standards of directors' conduct. In this matter, the Applicant alleges negligence and neglectful conduct by the Respondent. The allegation most closely tracks an alleged contravention of 76(3), i.e.,

“(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 concerning the company as those carried out by that director; and
(ii) having the general knowledge, skill, and experience of that director.”

35. Having considered the Applicant's submissions, the Tribunal's main consideration for this application, is whether the Respondent exercises the powers and performs the functions of a director in good faith and for a proper purpose, in the best interests of the company; and with the degree of care, skill, and diligence that may reasonably be expected of a person.
36. Determining whether the actions or behaviours of the Respondent constitute “misconduct”

under the relevant sections of the CA is generally not a straightforward exercise.

37. Such an exercise involves some form of assessment and evaluation of facts and prevailing circumstances under which the alleged misconduct took place being performed by the arbiter of the dispute.
38. The Respondent did not oppose the application. Accordingly, the Applicant's allegations, supporting evidence, and version the Applicant placed before the Tribunal, stand uncontroverted.
39. I accept the uncontroverted facts and evidence in support of the facts the Applicant placed before the Tribunal in this matter.
40. It is clear from the issues raised by the Applicant that the Respondent's conduct falls short of the expected standard. This is particularly evident in how the Respondent has handled the consideration, approval, and release of payments that are essential for the Company to meet its financial commitments and obligations to employees and service providers. This failure could ultimately jeopardize the Company's stability, leading to devastating consequences for its employees.

FINDING

41. I find that the Respondent had been derelict and neglectful of his duties as director of the company as envisaged in section 71(3) of the CA.

ORDERS SOUGHT

42. The Applicants seeks and order from the Tribunal to –
 - 42.1 Remove the Respondent be removed as a director of Bonabale Waste Management (Pty) Ltd (Registration Number: 2014/228341/07), in terms of Section 71(8) of the Act;
 - 42.2 Order the Companies and Intellectual Property Commission to deregister the Respondent as director of Bonabale Waste Management (Pty) Ltd (Registration Number:

2014/228341/07), within a period of 10 (ten) days from date of receipt of the order;

42.3 Direct the Registrar of the Tribunal to deliver a copy of the order to the Commissioner of Companies and Intellectual Property Commission within 5 (five) days from date of handing down of the order; and

42.4 Order the Respondent to pay the costs of the application.

43 The Tribunal cannot order the Companies and Intellectual Property Commission (CIPC) to deregister the Respondent as director of Bonabale Waste Management (Pty) Ltd. The CIPC is not a party to this application.

44 Costs: The Respondent did not oppose this application. The Tribunal will therefore not make a costs order against the Respondent.

ORDER

45 I accordingly issue an order in the following terms-

45.1 I hereby grant the application for the removal of the Respondent as a director of Bonabale Waste Management (Pty) Ltd (Registration Number: 2014/228341/07); and

45.2 I make no costs order.

Dated at Johannesburg on this 1st day of November 2024.

D R Terblanche

Member of the Companies Tribunal