IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT02006/ADJ/2024

In the matter between:

Mzwandile Mtshibe **Applicant**

and

Mandla Albert Sibiya **Respondent**

Coram: Nomagcisa Cawe
Decision handed down on 25 January 2024

DECISION (Reasons and Order)

INTRODUCTION

[1] The Applicant in this matter is Mzwandile Mtshibe, a director of Manzwai Civil Engineering (Pty) Ltd "the Company") (Reg. 2015/040373/07) currently residing at 47 Karley Close, Reservoir Hills, 4091.

[2] The Respondent is Mandla Albert Sibiya, a co-director of the Company, residing

at 139 Sikhakhane Street, Emfihlweni Section, Tembisa, Gauteng Province, 1632.

BACKGROUND INFORMATION

[3] The Applicant wants the Companies Tribunal to remove the Respondent as a director of the Company. Applicant alleges that he has been maintaining and updating company documents alone for the past two years. He has tried contacting Respondent via email and telephonically with no success. He has, therefore, concluded that Respondent is no longer interested in the affairs of the company.

[4] Consequently, the Applicant is aggrieved by the attitude of the Respondent and has brought the current application to have Respondent removed as director.

FORM AND SUBSTANCE OF THE APPLICATION FOR RELIEF IN TERMS OF THE ACT AND THE REGULATIONS

[5] Before I deal with the merits of the application, I consider it important that I should first deal with some preliminary issues which relate to the form and substance that applications of this nature should comply with in terms of the applicable provisions of the Companies Act 71 of 2008 ("the Act ")and the Companies Regulations of 2011 ("the Regulations").

[6] In terms of regulation 142(2), the Applicant is required to serve a copy of the application together with the Founding Affidavit and any attachment thereto on each respondent cited in the application, within five (5) business days, calculated from the date of filing of the application with the Companies Tribunal.

[7] It is evident from the papers before me that the current application was filed with the Companies Tribunal on the 9 October 2024. The application for a default order was filed on the 14 November 2024. Upon receipt and perusal of the papers, I immediately noticed that there is no Founding Affidavit. The Founding Affidavit is crucial to any application before the Tribunal, as it sets out the basis for the application. In the instant case it would set out which section/s of the Act were contravened by the

Respondent.

I further noticed that there was no proof of service attached to the application showing that the application was served on the Respondent.

[8] In terms of section 180 of the Act, the Companies Tribunal must conduct its adjudication proceedings, contemplated in the Act, expeditiously and in accordance with the rules of natural justice. The doctrine of *'audi alteram partem'* dictates that no one should be condemned without having been afforded the opportunity to be heard prior to such condemnation. In administrative decisions, this principle has been applied to ensure fair play in the administration of justice before any administrative decision is taken. This doctrine ensures that every affected person is guaranteed and given the right to a fair hearing prior to any decision that affects their rights and legitimate expectations is taken.

[9] The right to a fair hearing requires that individuals are not penalized by decisions affecting their rights or legitimate expectations unless they have been given prior notice of the cases against them and the opportunity to present their own cases. It is my view, therefore, that the Applicant should, in line with the principles of natural justice, have the application properly served on the Respondent.

[10] It is advisable that the Applicant must serve the application, on the Respondent, in the proper manner and in line with the provisions of the Regulations. This will ensure that Respondent is given notice of these proceedings and is also afforded the opportunity to be heard by the Companies Tribunal before any adverse finding is made against him.

THE FORM AND SUBSTANCE OF THE APPLICATION FOR DEFAULT ORDER

[11] Despite the fact that there was no proper service of the current application on the Respondent, the Applicant proceeded to file the application for a default order with the Companies Tribunal in terms of regulation 153(1). The application for the default order was filed with the Companies Tribunal on the 14 November 2024. The application for default order was clearly filed after the expiry of the twenty (20)

business days that the Respondent is afforded to file its answer in terms of the Regulation 143(1) of the Regulations.

[12] Once an application for default order is filed, the Companies Tribunal is enjoined to consider such an application in line with the applicable provisions of the Act and the Regulations. The Companies Tribunal is, therefore, enjoined to consider the current application in terms of the provisions of regulation 153(1) and (2) of the Regulations. It is important that I should refer to the provisions of regulation 153(1) and (2) which read as follows:

> *"(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.****"* [Own emphasis added.]

[13] In terms of regulation 153(2)(b) , I can only consider the current application for default order and make an appropriate order in relation thereto, if I am satisfied that the application was adequately served on the Respondent. I am, however, not satisfied that there was adequate service of the application on the Respondent. The only reference to service is an email sent by the Applicant to an address that cannot be verified as that of the Respondent, as it does not appear on the Companies and Intellectual Property Commission (CIPC) registration records.

[14] The Applicant is, in terms of regulation 142(2), required to serve a copy of the application and supporting documents on each respondent who is named on the

application within five (5) business days after filing same with the Companies Tribunal. It is evident that the application was not adequately served on the Respondent and that the application for default order should, therefore, be refused on that basis

[15] I have noted, while perusing through the papers, that the Applicant lacks legal knowledge and thorough understanding of the legal processes which must be complied with when bringing applications before the Companies Tribunal. In adhering to the spirit and purport of the Act, I am therefore duty bound to guide and direct the Applicant regarding what he should do to comply with the legal requirements in terms of the Act read together with the Regulations.

[16] In terms of section 183 of the Act, the Companies Tribunal may, subject to the requirements of the applicable sections of the Act, determine any matter of procedure for an adjudication hearing, with due regard to the circumstances of the case. Based on the authority which is vested in the Companies Tribunal, in terms of section 183 of the Act, I am therefore, issuing directives in line with the spirit and purport which appear from the provisions of the Act, which states that when circumstances permit, the Tribunal may conduct its proceedings informally.

THE ORDER AND DIRECTIVES

[17] Based on what I have outlined above, I therefore, make the order and issue the following directive:

17.1 The application for default Order in terms of regulation 153 of the Regulations is hereby refused on the ground that there was no adequate service of the application for relief on the Respondent;

17.2 The application is hereby postponed *sine die*;

17.3 The Applicant is directed to draft and attach a Founding Affidavit setting out the reasons for the application to remove the Respondent as director of the Company. He must cite the provisions of the Act that have been infringed by the Respondent.

17.4 The Applicant is directed to serve the application Form CTR 142 and the

Founding Affidavit; and

17.5 Service of the documents referred to in paragraph 17.3 and 17.4 above must be effected by office of the Sheriff that is appointed to serve legal processes in the area where the Respondent is physically located.

17.6 There is no order as to costs

N CAWE
Member of the Companies Tribunal
25 January 2025