



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

Case number: CT02008ADJ2024

In the matter between:

Patrick Beya Kalunga

Applicant

and

Sbongile Mangai

Respondent

Presiding Member:

Diane R Terblanche

Date of handing down of decision:

2 December 2024

DECISION (Reasons, Findings and Order)

THE PARTIES

1. The Applicant is Patrick Beya Kalunga (Kalunga or the Applicant).
2. The Respondent is Sbongile Mangai (Mangai or the Respondent).

THE APPLICATION

3. The Applicant applied to the Companies Tribunal (the Tribunal) for an order removing the Respondent as a director of Beya Holdings (PTY) LTD., with registration number 2012/165369/07 (the Company), in terms of sections 71(8) read with section 71(3) of the Companies Act, 2008 (Act No. 71 of 2008 (the Act)).

PRELIMINARY MATTERS

4. Regulation 142 deals with “Applications to the Tribunal in respect of matters other than complaints.” It 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.”
5. The Tribunal stamped the Applicant’s Form CTR 142 on the 15th of October 2024, the filing date of the application.
6. In terms of Regulation 142(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”, by 22 October 2024. The Applicant filed the application on the Respondent on 15 October 2024, via email.
7. Calculated from the date of service of the application on the Respondent, the Respondent had twenty (20) business days i.e., by 5 November 2024, within which to file and serve his answer in terms of Regulation 143(1), which provides that -
 - “(1) Within 20 business days after being served with a Complaint Referral, or an application, that has been filed with the Tribunal, a respondent who wishes to oppose the complaint or application must— (a) serve a copy of an Answer on the initiating party; and (b) file the Answer with proof of service.”
9. Regulation 153 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.
9. According to the Applicant, as per his affidavit supporting his default application, the Respondent had not filed or served an answer, nor proof of service thereof. This enables the Tribunal to “153(2) ...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.”
10. I am satisfied that the Applicant adequately served the notice of the application on the Respondent as prescribed.
11. I now turn to the applicable legal provisions and analysis of the evidence.

THE APPLICABLE LEGAL PROVISIONS AND ANALYSIS OF THE EVIDENCE

12. This is an application by the Applicant in terms of section 71(8) to the Tribunal for an order to remove the Respondent as a director of the company.
13. If a company has fewer than three directors, section 71(8) of the CA applies. It expressly stipulates that section 71(3) of the CA does not apply to such a company.
14. The Tribunal has the necessary jurisdiction to consider the application in terms of section 71(8).
15. 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.
16. The provisions of section 71(8), and section 71(3) of the CA provide -
 - "71(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 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."*
 - (My underlining)*
 - "71(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."
17. The basis upon which the Applicant seeks the Respondent's removal, in his words, is because the Respondent verbally agreed to leave, but refuses to sign the documents required to officially resign as a director.

18. The Respondent's alleged agreement to leave the company does not assist the Tribunal in making the required assessment under section 71(3) that the Respondent has become ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69 (8) (a); or 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 has neglected, or been derelict in the performance of, the functions of director.
19. The Applicant placed no further allegations or evidence before the Tribunal for the Tribunal to make the required assessment under section 71(3) of the Act.
20. Even if it is indeed correct that the Respondent agreed to leave the company as a director, that purported agreement to leave the company does not equate to grounds based on which the Tribunal may make the determination under section 71(3) of the CA.
21. The Applicant is a layperson. However, the Applicant is nevertheless required to allege and prove facts on a balance of probabilities that the Respondent's conduct falls short of the standards set in the Act.
22. I could not find any other allegations and supporting evidence assisting me in assessing whether the Respondent's conduct amounts to performance-related misconduct, a gross breach of his fiduciary duties, or the standard of conduct expected from a director under the CA.

FINDING

23. The application brought by the Applicant for the removal of the Respondent as a director of the Company lacks merits, due to the singular lack of allegations and supporting evidence on a balance of probabilities that the Respondent's conduct falls short of the standards set of directors in the CA.

ORDER

24. Based on what I have outlined above, -

27.1 I hereby dismiss the application for the removal of the Respondent as a director of Beya Holdings (PTY) LTD., with registration number 2012 / 165369/07 (the Company; and

27.2 I make no costs order.

Dated at Johannesburg on this 2nd day of December 2024.

Diane R Terblanche
Member of the Companies Tribunal