IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

"The Tribunal"

Case Number: CT00790ADJ2021

In the matter between:

Johannes Tshaka **Applicant**

And

Eugene Kevin February **Respondent**

In re: Khanyo Housing Development (Pty) Ltd

Registration Number: 2007/033756/07

DECISION

INTRODUCTION:

[1] The Applicant is **Johannes Tshaka** ("the Applicant"), an adult male director and shareholder of Pharmaheal (Pty) Ltd, whose further personal particulars have been furnished with this application and are retained by the Tribunal for personal information protection purposes.

[2] The Respondent is **Eugene Kevin February**("the Respondent"), an adult male director and shareholder of of Pharmaheal (Pty) Ltd, also whose further personal particulars have been submitted with this application.

THE APPLICATION

[3] This is an application in terms of Section 71(8) of the Companies Act 71 of 2008 ("the Act"), for an administrative order

determining the removal of the Respondent as a director of Khanyo Housing Development(Pty) Ltd ("the company").

[4] In line with the Act, the relief sought from the Tribunal is based on the fact that the company only has two directors[1] the Applicant and the Respondent, and therefore the Tribunal enjoys jurusdiction in this regard. Both the application for relief (in terms of regulation 142), and the notice of motion (in terms of regulation 145) forms have duly been completed by Johannes Tshaka as the Applicant, and no reference therein has been made to the company also being the applicant, although the supporting documents refer to the company as being the second applicant, and therefore in that case I reject that reference as it is not in line with the stautory documents filed with this Tribunal.

[5] The Applicant duly filed its application with the Tribunal on 17 August 2021, in terms of Regulation 142[2], which section requires that the Applicant file an application form CTR 142 and a supporting affidavit setting out the facts in which the application is based.

[6] The Applicant has provided a Sheriff's return of service of the application upon the Respondent, which was served the 20th August 2021, by affixing a copy to the outer or principal main

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[1] CIPC Certificate of Confirmation dated 06 August 2021

[2] (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 CTR142; 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 addres of each person in respect of whom the order is sought.

gate of the Respondent's premises. The Sheriff made a note that he had affixed the application document, as the mother of the Respondent refused to accept service of the document. I am satisfied that on this basis, the application was adequately served.

[7] The Respondent has failed to answer to the application within 20 business days from dateof being served with the application, as contemplated in Regulation 143[3] of the Act.

[8] The Applicant has filed the notice of motion with the Tribunal's recording officer, on form CTR145 dated 07 October 2021, and seeks a default order, as contemplated in Regulation 153[4], for the removal of the Respondent as the director of the company, based on the following submissions and supporting documentary evidence, where relevant, as summarised:

8.1 that the Respondent is guilty of neglect or derelict in the performance of his duties as he has abandoned the company, and that the Respondent is not a fit and proper person to hold the position of a director of the company.

8.2 that the Applicant co-founded the company in November 2007 and its core business entails operating in the space of building RDP houses in the Western Cape, and further that for the past nine years of operation, the Respondent performed duties as an executive director of the Company, but

[3] (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 the Answer on the initiating party; and
(b) file the Answer with proof of service.

[4] (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 the application in terms of subregulation (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.
(3) upon an order being made in terms of subregulation (2), the recording officer must serve the order on the person described in subsection (1) and on every other party.

however failed to fulfil such duties on numerous occassions, which left the company and the Applicant in a precarious position. The Applicant left employment in 2012 to focus on the business of the company, on assessment of the financial affairs of the company he noticed payments totaling R67 000 (sixty seven thousand rand) paid to Francis February who is the mother of the Respondent. When the Applicant queried these payments, the Respondent could not provide a reasonable and satisfactory explanation.

8.3 that in or around October 2015 to May 2016, the Respondent disappeared from the company without leave of absence, he did not notify the company directors and when asked to give reasons he advised that he had been sick. No medical certificate was furnished to this effect.

8.4 that in June 2017 when the Applicant did a reconciliation of claims from the Western Cape Housing Department, he found that the Respondent never claimed 15 housing subsidies, which would have resulted in a loss of R1 664 206(one million six hundred and sixty four thousand two hundred and five rand) to the company.

8.5 that in or around 2018, the company had 3 directors[5], when the Respondent was again not around due to mental incapacity, the Applicant could not utilise the company's bank account due to the Respondent who had reported to the bank that the card had been stolen, that he was the sole owner of the company and that the Applicant had

[5] The the third director, Nomvuyo Eusebia Simetu passed away on 03 October 2018

stolen R90 000 (ninety thousand rand) from the company[6]. When the Applicant issued a notice of meeting of the three directors, the Respondent did not attend. In this meeting, the two directors resolved that the Respondent be removed as a director of the company, however the other director passed away on 03 October 2018. To date, the Applicant is still facing the same challenges with the Respondent not being available as a director to the company and frustrating the effective management of the company.

APPLICABLE LAW

[9] In considering the application and the relief sought by the applicant, one must have consideration to what the Act provides and what powers are conferred by the Act on the Tribunal. Where removal of directors is concerned, s.71 details the procedures that must be complied with. Section 71(8) (b) particularly provides that if a company has fewer than three directors, any director or shareholder of the company may apply to the Companies Tribunal to make a determination regarding such removal. The Act provides that the Tribunal may consider the removal of a director on the following grounds, as contemplated in terms of S.71 (3) of the Act:

(I) That the director is ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69(8)(a); or

(II) That the director is incapacitated to the extent that the director is unable to perform the functions of a director,

[6] the R90 000 had legitimately been paid to the company's legal representatives, the creditor of the company.

and is unlikely to regain that capacity within a reasonable time; or

(III) That the director has neglected or been derelict in the performance of the functions of director.

EVALUATION OF EVIDENCE

[10] I have had regard to the circumstances leading to the Applicant filing this application, and further that although served with the application papers, and having been afforded sufficient time to respond to the Applicant's submissions outlined in his affidavit, the Respondent has not Responded to the application. The Respondent has failed to act in the best interests of the company, with the degree of care, skill and diligence that may be reasonably expected from a director[7] in his position. His wilful misconduct, and breach of trust in the performance of his duties as director of the company amounts to deriliction of duty as a director.

FINDINGS

[11] I am satisfied that the Respondent has neglected and or has been derelict in the performance of the functions of director of Khanyo Housing Development (Pty) Ltd.

[12] In the premises, I am satisfied that the Applicant has shown good cause why he should be entitled to the relief sought.

ORDER

[7] Section 76(3) of the Act

The Respondent is removed as a director of Khanyo Housing Development (Pty) Ltd.

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B. Zulu

MEMBER: COMPANIES TRIBUNAL

28 October 2021