IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT02031ADJ2024

In the matter between:

DITHEBE SYDNEY THABANG **APPLICANT**

and

MOKOENA THABANG EDWARD **RESPONDENT**

Presiding Member of the Companies Tribunal: Joshua Kadish
Date of Decision: 24 February 2025

DECISION (Reasons and an Order)

INTRODUCTION

1. Thembe M Holdings (Pty) Ltd (registration number 2022/618598/07) ("the Company") was incorporated on 25 July 2022. Based on the CIPC registration documents, the Applicant and the Respondent are the only two directors of the Company as at the date of this application.

2. The Applicant has applied to this Tribunal seeking the removal of the Respondent as a director of the Company, alleging that he has a lack of interest in being a part of the Company.

BACKGROUND

3. On 30 October 2024, an application to this Tribunal for the abovementioned relief was filed. An affidavit deposed to by the Applicant was filed in support thereof.

4. In the Applicant's affidavit supporting his application to remove the Respondent as a director, he states that the Respondent addressed a WhatsApp message text to the Applicant advising that he would no longer be going to the Company shop. The Applicant further stated that the application to remove the Respondent as a director is based on his incapability and lack of interest to be part of the Company. The Applicant submits that following the above events, he requested that the Respondent formally resign and that to date, the Respondent has failed to do so.

5. An application to have the matter adjudicated on a default basis was filed on 2 December 2024 (more than 20 days after the Applicant served the Respondent with the application on 30 October 2024). I have not been furnished with proof that the email address used is indeed the Respondent's address for receiving electronic mail. Furthermore, no proof of email delivery has been included in my papers and as such, it is unclear whether the application was duly served.

COMPLIANCE WITH REGULATION 142 AND 153

6. A fundamental requirement of this Tribunal is that the administrative procedure must be complied with in order to being an application to this Tribunal. This is even more so where the application involves a request for a default order in terms of Regulation 153 and one in which involves the removal of a director from a company. This Tribunal's position is much the same as a court in this instance (i.e., it is not merely a rubberstamp). This Tribunal has a duty to investigate the matter

so as to be satisfied itself that the appropriate case has been made warranting an order of this Tribunal.[1]

7. **Companies Regulation 142** of 2011 deals with applications to this Tribunal in respect of matters other than complaints and the relevant parts thereof read as follows: (my emphasis underlined)

"(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."

8. Having regard to the applicable law above, I am not satisfied that the Applicant has complied with Regulation 142(1)(b), 142(2) and 142(3)(a) on the papers submitted before me, for the following reasons:

8.1. Regulation 142(1)(b)

The Applicant is required to file both the application in Form CTR 142, as well as a supporting affidavit setting out facts supporting his allegations. The Applicant only alleges that the Respondent has advised that he will no

[1]Refer to *Mzwakhe v Road Accident Fund* (24460/2015) [2017] ZAGPJHC 342 in which Judge Weiner refused to grant a settlement agreement an order of court due to the uncertainty as to the basis of the underlying liability (there being contradictory and flimsy evidence), and without the RAF having made any investigation into its validity.

longer be going to the Company shop and provides no further details to support or provide examples of the Respondent's incapability or lack of interest in the Company. Considering same, I find the papers deficient in that I am unable to make an informed decision regarding the allegation and the applicable law relating thereto.

8.2. Regulation 142(2)

The Applicant is required to serve a copy of the application together with a supporting affidavit on the Respondent within 5 business days after filing it with this Tribunal. All that I have been provided with is a copy of the email wherein the application was served but no proof of successful delivery or proof that the email address used is the Respondent's address for receiving electronic mail. Read receipts confirming transmission to the aforementioned recipient email address were also not provided.

Additionally Table CR3 in the Companies Regulations provides that insofar as delivery of documents by electronic mail is concerned, sending the notice or copy of the document by electronic mail is a valid method of delivery provided the person has an address for receiving electronic mail. I have no evidence at my disposal that the delivery email was dispatched to an email address either owned or used by the Respondent and that the Respondent did in fact receive the aforementioned email.

Therefore, I cannot confirm whether or not the Applicant did indeed serve the application on the Respondent.

8.3. Regulation 142(3)(a)

In indicating the basis of the application, the Applicant is required to state the section of the Act or Regulations in terms of which the application is made. The Applicant has not made any such reference in his application nor his affidavit.

9. Regulation 153 (2)(b) if clear in that it is peremptory that this Tribunal may only make an order "*… if it is satisfied that the notice or application was adequately served.*".

10. Finally, as this application involves a request by the Applicant to remove the Respondent as a director of the Company under Section 71(8) of the Act, the necessity for due and proper notice of such application is elevated. It is imperative that in an application of this nature, the Respondent is afforded a reasonable opportunity to consider the allegation and elect as to whether she would like to make a presentation in respect thereof.

11. Owing to the fatal defects mentioned above, I do not find it necessary to deal with the additional documentation provided in the papers nor the merits of this case.

ORDER

9. In the circumstances, the application is dismissed.

10. As no order is made on the merits, the Applicant is directed, if he so wishes, to refile his application with the procedural deficiencies identified above having been rectified.

Joshua Kadish

JOSHUA KADISH
COMPANIES TRIBUNAL: MEMBER