



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT01131ADJ2022

In the matter between:

TLHOAELA, MALESELA SOLLY

Applicant

and

KEKANA, RATANANG KLAAS

Respondent

Presiding Member:

Diane R Terblanche

Date of handing down of decision:

16 March 2023

DECISION (Reasons, Findings and Order)

THE PARTIES

1. The Applicant is **MALESELA SOLLY TLHOAELA (Tlhoaela or the Applicant)**.
2. The Respondent is **RATANANG KLAAS KEKANA (Kekana 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 **MOKOPANE REA KGOLE (PTY) LTD.**, with registration number 2021 / 901422 / 07 (the Company), in terms of sections 71(8) of the Companies Act, 2008 (Act No. 71 of 2008 (the CA)).

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.*
- (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 - (ii) set out the decision of the Tribunal that the applicant seeks to have varied or rescinded;*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. “*

5. The Tribunal stamped the Applicant’s Form CTR 142 dated 15 August 2023, on 18 August 2022.
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”,* according to my calculation, by 25 August 2022.
7. Deputy Sheriff, Mr Thomas Wirry Kekana, served the application on the Respondent and issued a return to the effect -

“That on the 31 August 2022 at 16h20 at HOUSE NO: 1048, HOSPITAL VIEW, MAHWELERENG being the place of residence of RATANANG KEKANA, and during defendant temporary absence a copy of the COMPANIES TRIBUNAL was served upon his younger sister Ms Glory Kekana, a person apparently not less than sixteen years of age and apparently residing there, after the original document was displayed and the nature and contents thereof explained to her. Rule 9(3)(b).”

8. Calculated from the date of service of the application on the Respondent, the Respondent had twenty (20) business days 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. The Respondent had to file his answer, according to my calculation, by 28 September 2022.
10. According to the Applicant, as per his affidavit in support of this default application, the Respondent had not filed or served an answer, nor proof of service thereof.
11. This scenario takes me to Regulation 153 which deals with default orders. Regulation 153 provides in the relevant parts that t-

“(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.”

12. Having considered the procedural requirements for the main and default applications, and the facts relating to these applications, I conclude that –

12.1. The Applicant is non-complaint with the requirements of Regulation 142(2). The Applicant did not serve the application on the Respondent within 5 business days of filing it with the Tribunal on 18 August 2022, according to my calculation, by 25 August 2022 (See Deputy Sheriff Kekana’s return I referred to above).

12.2. The Respondent had not answered to the application within the twenty days of receipt of the application, according to my calculation, by 28 September 2022, and in default in terms of Regulation 153(1).

13. The question I have to consider is whether this Applicant's non-compliance with Regulation 142(2) is fatal to his application, considering -
- 13.1. There is no condonation application before me;
 - 13.2. The Applicant is a lay person and not necessarily *au fait* with all the procedural requirements of such applications, and appears to have prosecuted this application without the assistance of a legally trained professional;
 - 13.3. The delay in the service of the application amounts to a short period of time, namely 4 days; and
 - 13.4. The delay in the service of the application did not prejudice the one other party to the matter, namely the Respondent. The Respondent had a full benefit of time to file a re answer to the application, if he wished to do so.
14. I condone the Applicants non-compliance with the timeframe (five days) within which he had to serve the Application on the Respondent after filing it with the Tribunal, having considered it *mero motu* in terms of Regulation 154 (3)¹, as per the above.
15. I am satisfied that the Applicant adequately served the notice of the application as prescribed in Regulation 7(1) of the CA.
16. Having satisfied myself that the notice of the application had been adequately served, I now turn to evidence concerning the substantive application.

ALLEGATIONS IN SUPPORT OF THE APPLICATION

17. The Applicant alleged that the Respondent has unjustifiably enriched himself by misusing the Company's funds.

¹ Regulation 154 (3) provides that - "*The Tribunal may condone any technical irregularities arising in any of its proceedings.*"

18. The Applicant sued the Respondent, and obtained judgment against the Respondent at a hearing where both parties appeared on 28 June 2022, in the sum of R 760,00 (R 520,00 towards the capital sum, and the balance towards the Deputy Sheriff's fees), in the Magistrates' Court for the District of Mokerong held at Mahwelereng under case number 60/2022.
19. From a return of service by the Deputy Sheriff executed on 1/08/2022 on the Tribunal file, it appears the Applicant unsuccessfully attempted to execute a warrant against the Respondent's property, as "*... the defendant does not have anything at the given address as at the given address is at his parental home as informed by Ms Glory Kekana.*"

THE APPLICABLE LEGAL PROVISIONS AND ANALYSIS OF THE EVIDENCE

20. It is common cause that the Company, **MOKOPANE REA KGOLE (PTY) LTD.**, with registration number 2021 / 901422 / 07, currently has two directors, being the Applicant and the Respondent, as is apparent from the Certificate issued by the Commissioner of Companies & Intellectual Property Commission on Tuesday, September 28, 2021. See COR 14.3: Registration Certificate.
21. Section 71 of the CA deals with the removal of directors of companies under various circumstances.
22. If a company has fewer than three directors, section 71(8) of the CA applies. It expressly stipulates that section 71(3) of the Act does not apply to such a company.
23. 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.

24. The Tribunal has the necessary jurisdiction to consider the application in terms of section 71(8).
25. 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.
26. The provisions of section 71(8), and section 71(3) of the CA provide -
- “(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.”*

“(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*
 - (a) 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.”

27. 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.
28. Section 76 of the CA sets the standards of directors conduct. In this matter the Applicant alleges misuse of company funds. The allegation most closely tracks an alleged contravention of section 76(2)(a) (i) and section 76(3), i.e.,

“(2) A director of a company must— (a) not use the position of director, or any information obtained while acting in the capacity of a director— (i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or ...”

(My underlining)

and

“(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 in relation to the company as those carried out by that director; and*

(ii) *having the general knowledge, skill and experience of that director.”*

(My underlining)

29. Determining whether an actions or behaviours of the Respondent constitute a “misconduct” is not always a straightforward exercise.
30. 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.
31. The allegation placed before me is that the Respondent misused the company’s funds presumably for personal gain.
32. The Applicant provided no details or information about what constituted the “misuse of the funds” - no information about the date, time, place, nature, or the surrounding circumstances of the alleged misuse of Company funds.
33. Beyond the bare allegation the Applicant made that the Respondent misused company funds, the Applicant does not take the Tribunal in his confidence and place facts before the Tribunal to show exactly how and when the Respondent failed to act in accordance with section 76(2) and / or section 76(3) of the CA to justify an order by this Tribunal to remove the Respondent as a director under section 71(8) of the CA.
34. The Applicant is a lay person. I do not expect of the Applicant to quote the specific and detailed provisions of the CA on which he based his application.
35. However, the Applicant is nevertheless required to allege and prove facts on a balance of

probabilities that the Respondent contravened the relevant provisions of the CA referenced above.

36. I noted and considered the information that appears from the record of this matter that indicates that the Applicant obtained a judgment against the Respondent. From the papers it appears that the Applicant in his personal capacity - not the company, nor the Applicant authorized by the company - sued the Respondent for the amount the Applicant obtained judgment. Both parties are cited and appears to have appeared before the court in their personal capacities.
37. I cannot infer from the judgment, which appears to be the reason for it being included in the record of these proceedings before the Tribunal, that the Respondent misused the company's funds and therefore in contravened the CA.
38. I could not find any other allegations and supporting evidence assisting me to assess whether the Respondent's conduct amounts to performance related misconduct, or a gross breach of his fiduciary duties, or the standard of conduct expected from a director.

FINDING

39. It follows that 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 misused the Company's funds, and that such misuse of Company funds led to the Respondent being in contravention of section 72(6) and 71(3) of the CA,

ORDER

40. Based on what I have outlined above, -

40.1. I hereby dismiss the application for the removal of the Respondent as a director of
MOKOPANE REA KGOLE (PTY) LTD., with registration number 2021 / 901422 / 07.

40.2. I make no costs order.

Dated at Johannesburg on this 16th day of March 2023.

Diane R Terblanche

Member of the Companies Tribunal