IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT01179/ADJ/2022

In the matter between:

AMABHUBESI MOTORCYCLE CLUB NPC **APPLICANT**

and

AMABHUBESI MC NPC **RESPONDENT**

Presiding Member of the Companies Tribunal: Joshua Kadish
Date of Decision: 05 March 2023

DECISION (Reasons and an Order)

INTRODUCTION

1. The Applicant is **AMABHUBESI MOTORCYCLE CLUB NPC,** a non-profit company duly incorporated in terms of the company laws of South Africa, with registration number 2022/448709, and with its registered address at J 588, Umlazi, Kwa-Zulu Natal Province.

2. The Respondent is **AMABHUBESI MC NPC,** a non-profit company duly incorporated in terms of the company laws of South Africa, with registration number

2022/481197, and with its registered address at 4 Chesham Place, Westville, Kwa-Zulu Natal Province.

BACKGROUND

3. On 12 October 2022, an application to this Tribunal, in the form of Form CTR 142 was filed. An Affidavit filed in support of the application was deposed to by Mr Zizanele Cedrick Dlamini ("Dlamini") purportedly as a member of the Applicant and in which Dlamini requests, *inter alia*, for an investigation into the Respondent's use of the Applicant's company name.

4. On 12 October 2022 at 09h50, Dlamini emailed a recipient believed to be a member of the Respondent at an email address marked as amabhubesimc@gmail.com ("Delivery Email").[1] A screenshot of the Delivery Email was included in the documentation provided to this Tribunal however no delivery receipt, read recipient or reply (if any) were included. The Applicant did not also not indicate why the aforementioned email address was selected as the registered email address of the Respondent and the attachment to the Delivery Email was not included in the Applicant's papers and therefore I cannot confirm what was in fact attached to such email.

5. On 12 October 2022, Dlamini sent an email to a representative of this Tribunal attaching what appears to be a self-styled "Resolution Letter" dated 11 October 2022 in which the Applicant's other directors agree to nominate Dlamini to "… lodge a complain to Companies Tribunal and Court Matters".

6. On 21 November 2022, a Notice of Motion in the form of Form CTR 145 was filed by a Mr Daniel Njhapha ("Njhapha"). In the CTR 145 Njhapha states that Dlamini "… is not a founder or owner of the club … he has acted fraudulently without members mandate…". Njhapha also filed an Affidavit in support of his CTR 145 Form further detailing the allegation of Dlamini's fraudulent conduct by

[1] Included in the documents lodged with the Tribunal is a screenshot of an email from zdlamini@ikhayafh.co.za dated 12 October 2022 at 09h50. However no delivery report or read receipt confirmation is included.

incorporating the Applicant to defraud members of the Club. No proof of service on Dlamini was included in the papers provided to this Tribunal.

7. A document dated 22 November 2022 has been included in the papers before the Tribunal which consists of an unstamped CTR 147 Form in which Njhapha requests condonation from this Tribunal citing a delay in submission due to incorrect Affidavits being filed.

8. The papers provided to this Tribunal do not include any other relevant documentation.

APPLICABLE LAW

9. **Section 160** of the Act deals with **disputes concerning reservation or registration of company names** and enunciates the jurisdiction of the Companies Tribunal as follows:

(1) A person to whom a notice is delivered in terms of this Act with respect to an application for reservation of a name, registration of a defensive name, application to transfer the reservation of a name or the registration of a defensive name, or the registration of a company's name, or any other person with an interest in the name of a company, may apply to the Companies Tribunal in the prescribed manner and form for a determination whether ***the name, or the reservation, registration or use of the name, or the transfer of any such reservation or registration of a name, satisfies the requirements of this Act****.*

(2) An application in terms of subsection (1) may be made— (a) within three months after the date of a notice contemplated in subsection (1), if the applicant received such a notice; or (b) on good cause shown at any time after the date of the reservation or registration of the name that is the subject of the application, in any other case.

(3) After considering an application made in terms of subsection (1), and any submissions by the applicant and any other person with an interest in the

name or proposed name that is the subject of the application, the Companies Tribunal –:

(a) ***must make a determination*** *whether that name, or the reservation, registration or use of the name, or the transfer of the reservation or registration of the name, satisfies the requirements of this Act; and*

(b) may make an administrative order directing-

(i) the Commission to

(aa) reserve a contested name, or register a particular defensive name that had been contested, for the applicant;

(bb) register a name or amended name that had been contested as the name of a company;

(cc) cancel the reservation of a name, or the registration of a defensive name; or

(dd) transfer, or cancel the transfer of, the reservation of a name, or the registration of a defensive name; or

(ii) a company to choose a new name, and to file a notice of an amendment to its Memorandum of Incorporation, within a period and on any conditions that the Tribunal considers just, equitable and expedient in the circumstances, including a condition exempting the company from the requirement to pay the prescribed fee for filing the notice of amendment contemplated in this paragraph."

10. **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:

"(1) A person may apply to the Tribunal for an order in respect of any matter contemplated by the Act, or those Page 14 of 23 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."

11. **Companies Regulation 153** of 2011 provides for default orders:
"(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 subregulation (1), the Tribunal may make an appropriate order – (a) … (b) if it is satisfied that the notice or application was adequately served."

COMPLIANCE WITH PRESCRIBED FORMALITIES IS A NECESSITY

12. Having set out the chronology of the matter as I understand it, I now address the main procedural discrepancies arising in the Applicant's case

13. A fundamental requirement of this Tribunal is that the administrative procedure must be complied with in order to bring 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. 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 the Tribunal.[2]

14. I am not satisfied that the applicant has complied with the formalities prescribed in Regulation 142(2), for the following reasons:

[2] 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.

a. The Applicant is required to serve a copy of the application and Affidavit (being the Founding Affidavit) on the Respondent. All that I have been provided with is the Delivery Email. While I note that a PDF attachment was indicated to have been attached to the Delivery Email, this attachment has not been included in the Applicant's papers and therefore I cannot confirm if this requirement has been fulfilled;

b. 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 if the person has an address for receiving electronic mail. I have no evidence at my disposal that the recipient email address on the Delivery Email is an email address either owned or used by the Respondent.

15. 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

16. In the circumstances, the application is dismissed.

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

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JOSHUA KADISH