



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT012Jan2018

In the matter between:

Hillary Mawarire

Applicant

vs

Tsidzo Services and Investments (Pty) Ltd

Respondent

Presiding Member of the Tribunal : Prof PA Delport

Date of Decision : 6 April 2018

DECISION (Reasons and Order)

1. INTRODUCTION

1.1 The applicant ("applicant") lodged an application with the Companies Tribunal ("Tribunal") on 23 January 2018.

1.2 In terms of the founding affidavit on the CTR 142, the applicant applies “[to] remove Joel Chiwasa from the directorship of the company”.

1.3 The “application” was apparently sent to Joel Chiwasa.

1.4 Joel Chiwasa apparently did not reply and the applicant now applies for a default order. Form CTR 145 is dated 22 February and the supporting affidavit dated 12 March 2018 states that 20 business days have elapsed and there was no reaction from Joel Chiwasa other than “Noted”, hence the application for a default order.

1.5 It should be noted that the respondent is indicated as Tsidzo Services and Investments (Pty) Ltd. The actual respondent should have been said Joel Chiwasa.

2. BACKGROUND

2.1 The information in the CTR 142 is very limited and all that the applicant states is that:

“Joel Chiwasa is doing things without my consent, he removed my contact number from the bank, withholding company documents and information. I am no longer in a position to have a picture of the affairs of the company as well as to control compliances to laws and regulations. Efforts to communicate with him as the other director were not successful as he resorts to threatening, swearing and insulting me.”

2.2 In the supporting affidavit for the application for a default order the applicant states that “Joel Chiwasa was served with the documents from Company’s Tribunal”. The applicant sent the registrar of the Tribunal a copy of an email that was apparently sent to Joel Chiwasa at jchiwasa@gmail.com referring to a “chat” and referring to “attached documents”. Delivery by email is allowed in terms of Table CR 3 of Annexure 3 of the regulation in terms of the Companies Act 71 of 2008 (“Companies Act”).

2.3 The email does not indicate what the “attached documents” were and the affidavit does not refer to this manner of delivery and what was included in the email. Although the reply from jchiwasa@gmail.com is that the message is “noted”, there is no proof or statement, under oath, of what was sent.

2.4 The Tribunal cannot, on the disjointed information, accept that the CTR 142 was sent to and received by Joel Chiwasa, the purported respondent.

3. ISSUES and APPLICABLE LAW

3.1 The applicant applies “[to] remove Joel Chiwasa from the directorship of the company”.

3.2 This is therefore presumably an application in terms of s 71(8) of the Companies Act as Tsidzo Services and Investments (Pty) Ltd (“the company”), has only two directors according to the CoR 14.3, being the applicant and Joel Chiwasa.

3.3 Regulation 142(3)(a) requires that an application must indicate the basis of the application, stating the section of the Companies Act in terms of which the application is made. This was not done, but based on the finding I make in this matter, this omission it is not material.

3.4 Section 71, as far as it is relevant, provides:

“(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.

...

(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.”

4. EVALUATION

4.1 Section 71(8) provides that the Tribunal can make a determination in any of the circumstances contemplated in s 71(3) upon application by a director or shareholder.

4.2 The application in this matter is presumably in terms of s 71(3)(b) in respect of a director that has neglected or been derelict in the performance of the functions of a director.

4.3 Section 71(4), (5) and (6) provide explicitly for the director who is to be removed, to make representations to the Tribunal. The allegations made against that director must set out the circumstances with sufficient specificity to reasonably permit that director to prepare and present a response.

4.4 The allegations in this matter are as set out in para 2.1 above.

4.5 These allegations appear to be vague and unclear in respect of the requirements of s 71(3)(b).

4.6 It also appears, and I make no finding in this respect, that the allegations indicate animosity between the two directors, rather than a *prima facie* neglect in or dereliction of the functions of the director. Removal of the telephone number from bank records, as one example, does not indicate neglect or dereliction in respect of the functions of a director in respect of the company.

5. FINDING and ORDER

5.1 The notice to Joel Chiwasa, who is the actual respondent, is defective in that:

- 5.1.1 it is not clear from the “supporting affidavit”, which is part of the CTR 142, whether the CTR 142 was actually delivered to Joel Chiwasa as a mere “screen shot” of email correspondence and “chats”, not supported by a statement and details thereof in an affidavit is not sufficient;
- 5.1.2 even if the CTR 142 was delivered to and received by Joel Chiwasa, it does not comply with s 71(4)(a) in that it does not set out the circumstances with sufficient specificity to reasonably permit that director to prepare and present a response.

5.2 The application for a default order is refused.

PROF PA DELPORT

COMPANIES TRIBUNAL: MEMBER

DATE: 6 April 2018