

**IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA
HELD AT PRETORIA**

Case number: CT02397/ADJ/2025

In the matter between:

LEONORA SWART

Applicant

(Identity number: 7[...]) And

AND

ANDREW SKEAD BURDEN

First Respondent

(Identity number: 5[...])

WILLIAM STRAAT 480 (PTY) LTD

Second Respondent

(Registration number: 2000/023774/07)

WIZE BUY PROPERTIES (PTY) LTD

Third Respondent

(Registration number: 2022/615515/07)

APPLEBOND (PTY) LTD

Fourth Respondent

(Registration number: 2022/615575/07)

Presiding Tribunal member: D R Terblanche

Date of decision and reasons: 12 January 2026

DECISION AND REASONS

THE PARTIES

1. This matter concerns an application brought by Leonora Swart (the "Applicant") against Andrew Skead Burden (the "First Respondent"), and the companies William Straat 480 (Pty) Ltd, Wize Buy Properties (Pty) Ltd, and Applebond (Pty) Ltd, cited as the Second, Third, and Fourth Respondents, respectively.
2. The Applicant and the First Respondent are the sole directors of the Second, Third, and Fourth Respondents, giving rise to the present dispute concerning the First Respondent to continue as a director of these companies.

THE NATURE OF THE APPLICATION

3. The Applicant has initiated these proceedings under section 71(8) of the Companies Act 71 of 2008 ("the Act").
4. She seeks an order from the Companies Tribunal for the removal of the First Respondent as a director of the three respondent companies.
5. While the initial application referenced section 71(3)(b) of the Act, which pertains to neglect and dereliction of duty, the substance of the claim is that the First Respondent has become incapacitated due to a severe cognitive impairment following a cycling accident in March 2019.

6. This alleged incapacity is said to be the root cause of his subsequent neglect of directorial functions.

SUMMARY OF SUBMISSIONS

7. The Applicant and the First Respondent has a long-standing professional relationship, dating to 1993, which culminated in a legal partnership and shared directorships.
8. The Applicant contends that the 2019 accident caused the First Respondent to suffer a serious brain injury, evidenced by his receipt of long-term disability benefits, his cessation of legal practice, and observable cognitive deficits.
9. The Applicant argued that all the requirements under the section 71(3)(a)(ii) is relevant for purposes of showing why the Respondent has become negligent as provided for in section 71(3)(b) of the Act.
10. The Applicant relies on a letter from his insurer, Liberty Life, his own WhatsApp messages, and his wife assisting him with drafting correspondence and taking note for future reference as proof of his incapacity to perform as a director, which has allegedly caused the First Respondent from attending operational meetings, and reviewing and approving company governance documents and other matters, to the companies' detriment.
11. The First Respondent opposes the application.

12. While he acknowledges the accident and its impact on his ability to practise as a litigation attorney, he strenuously denies that it has rendered him incapacitated as a company director.
13. He argues that the Applicant has excluded him from company operations, that he is unable to attend company meetings, and that his wife support to him with drafting correspondence and notetaking for future reference means that he is incapacitated to serve as a director.
14. The First Respondent also denies that he did not attend to certain matters the Applicant alleges and avers that for certain other matters his approval was not requested.
15. The First Respondent admits that the accident resulted in a level of cognitive impairment. That caused him to stop working as a litigation attorney but does not render him incapacitated to operate a director and business man.
16. He describes the application, filed approximately four years after the accident, as an improper attempt to remove him from the companies for the Applicant's personal gain. He questions the timing of the application.
17. The First Respondent raised two preliminary points: firstly, that the Applicant has incorrectly invoked the provision for neglect and dereliction (section 71(3)(b)) for a claim based on incapacity; and secondly, that she has presented no evidence to prove the First Respondent is incapacitated.

APPLICABLE LEGAL PROVISIONS

18. To address the Respondent's points *in limine*, it is necessary to consider section 71(8) of the Act, which governs director removal in companies with fewer than three directors.

19. Section 71(8) provides that –

"(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.

(Underlining added)

20. The circumstances under which a director may be removed are set out in section of 71(3) of the Act. Section 71(3) provides that –

"(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.

(Underlining added)

THE FIRST PRELIMINARY POINT: INCORRECT CITATION OF THE LAW

21. In support of his first point *in limine* the First Respondent submitted that –

21.1. The only appropriate section, in terms of the Act, that allows for a disqualification in the form of an incapacity of a director is specifically regulated by the provisions of section 71(3)(a)(ii) of the Act.

21.2. The Applicant relies on section 71(3)(b) of the Act. This section specifically provides for an instance where a director of a company has neglected or been derelict in the performance of the functions of a director.

21.3. The only appropriate section, in terms of the Act, that allows for a disqualification in the form of an incapacity of a director is specifically regulated by the provisions of section 71(3)(a)(ii) of the Act. This section has not, in any form, been referenced in the application.

21.4. The First Respondent submitted that the Tribunal cannot in terms of the provisions of section 71(3)(b) of the Act, as relied upon by the Applicant, find or make a determination in respect of the incapacity of a director. This is solely reserved for the provisions of section 71(3)(a)(ii) of the Act.

21.5. At the hearing the First Respondent argued that the first *in limine* is really a jurisdictional challenge on the side of what the Applicant has said in her application versus what she is seeking to achieve.

22. The Applicant argued that the Tribunal should dismiss the First Respondent's first point *in limine* because –

22.1. In general, a party who wishes to rely on a statutory provision as a cause of action or as a defence must formulate the relevant pleading in clear terms with reference to that provision. However, it has been held that it is not necessary to specifically refer to the statute or section relied upon, provided that the case is formulated clearly. Put differently, it is sufficient that the facts pleaded justify the conclusion that the provisions of the statute apply.

22.2. There was clear reference to both sections and the fact of this matter leads to a conclusion that both of these sections can be applicable. that the basis of the application is founded on section 71(8)(b) read with section 71(3), the latter encompassing both section 71(3)(a)(ii) and section 71(3)(b) of the Act.

22.3. It's also evident that all the requirements under the first incapacitated section is relevant for purposes of showing why the Respondent has become negligent as provided for in the second provision.

22.4. You don't have to refer to a specific section as long as it's formulated, that the facts lead to that conclusion that the provision applies.

23. The Applicant contends that the pleaded facts justify the removal of the first respondent as a director on grounds of both incapacity and dereliction of duty, flowing from the same factual event, the cycling accident.

Analysis and Findings

24. The Tribunal's jurisdiction to remove a director in a company with fewer than three directors is conferred by section 71(8) of the Act, which empowers it to make a determination on the grounds set out in section 71(3).
25. These grounds are distinct: amongst others, section 71(3)(a)(ii) concerns removal for incapacity, while section 71(3)(b) concerns removal for neglect or dereliction of duty.
26. The First Respondent correctly noted the discrepancy that appears from the Applicant's founding papers. The Applicant sought relief under section 71(3)(b), yet the factual foundation pleaded was unequivocally one of medical incapacity under section 71(3)(a)(ii) of the Act.
27. However, following established precedent, the Tribunal's focus must be on the substance of the complaint rather than the statutory provision a party cites as a basis.
28. The pleaded facts – a severe head injury causing cognitive impairment – clearly invoke the grounds contemplated in section 71(3)(a)(ii).
29. As the Tribunal possesses jurisdiction to adjudicate claims of incapacity under section 71(3)(a)(ii), the Tribunal dismisses the First Respondent's first point *in limine*.

THE SECOND PRELIMINARY POINT: LACK OF EVIDENCE

30. The First Respondent's contended as a second point *in limine* that –

30.1. The Applicant has presented no evidence to establish the incapacity required under the Act. The core allegation—that the director suffers from a severe cognitive impairment—rests solely on an unverified third-party letter from Liberty Life Group. This document is inadmissible hearsay, as its author was not placed under oath, and the critical medical reports it references were never annexed. Furthermore, the Applicant, a legal practitioner, is not medically qualified to offer an expert opinion on cognitive impairment. Consequently, there is a total absence of probative evidence on the material issue of incapacity.

30.2. The Applicant's suggestion that the condition is "common cause" is incorrect and unsupported.

30.3. The legal and evidential burden remains firmly on the Applicant to objectively prove incapacity, a duty underscored by the principles of natural justice, which require that an affected director be presented with clear evidence to which they can respond. The Applicant cannot shift this onus by suggesting the First Respondent must disprove the allegation.

31. The matters the Applicant put forward as objective evidence of the First Respondent's incapacity does not, in itself, denote legal incapacity, dereliction or neglect.

32. Without the requisite medical evidence, the application discloses no case for incapacity and must be dismissed at the threshold.
33. The Applicant contends that the First Respondent's point *in limine* should be dismissed.
34. Central to the Applicant's argument is that medical evidence is not a mandatory requirement under the Act, and that a finding of incapacity can be based on objective conduct, documentary records, and consistent patterns of behaviour.
35. The Applicant submits that sufficient evidence was presented, including the Liberty Life letter, which concluded the First Respondent suffered a cognitive fallout affecting his memory and daily independence.
36. The Applicant argues that the Respondent has provided no contrary evidence to rebut this, nor did he file a medical report declaring himself fit.
37. She maintains the Liberty letter is not hearsay, as she had first-hand involvement in the claim process and the Respondent does not dispute its contents. In the alternative, she argues that if the letter is hearsay, it should be admitted in the interests of justice.
38. The Applicant asserts that the Respondent's own admission of memory problems—which she equates to a cognitive impairment—and his resulting failure to attend meetings or act independently, objectively demonstrates an incapacity to perform the core duties of a director as mandated by the Act.

Analysis and Findings

39. The Tribunal have carefully considered the parties' submissions – their respective pleadings, heads of argument and their arguments at the hearing of the matter.
40. The Tribunal must assess if the Applicant has provided enough *prima facie* evidence that the First Respondent is incapacitated under section 71(3)(b) of the Act, as this alleged incapacity relates directly to claims of negligence and dereliction.
41. The Tribunal emphasises that a finding of incapacity, which carries grave professional and personal consequences, requires a high degree of evidential certainty.
42. "Incapacity" in this context denotes a debilitating and likely permanent medical or mental condition that functionally prevents a director from performing their core duties, a standard distinct from mere poor performance or neglect.
43. The legal burden to prove this rests entirely on the Applicant.
44. The cornerstone of such a serious allegation must be objective, credible, and substantive evidence.
45. In cases of alleged cognitive impairment, this invariably requires an expert medical report from a relevant specialist. Such a report would need to provide a precise diagnosis, confirm the permanence or indefinite duration of the condition, and explicitly link the diagnosis to specific functional impairments that preclude the fulfilment of directorial responsibilities.
46. The Applicant's evidentiary foundation is fatally flawed.

- 46.1. She relies primarily on a letter from Liberty Life, which references unspecified medical reports to conclude the First Respondent suffers from a "cognitive fallout."
 - 46.2. This letter is inadmissible hearsay; its author was not placed under oath, and the underlying medical reports were never annexed.
 - 46.3. The Applicant's personal observations of memory lapses and records of meeting non-attendance are lay opinions and legally untenable.
47. Consequently, there is a total absence of admissible, probative evidence on the core issue of a permanent medical condition causing incapacity.
48. This constitutes a classic "no evidence" scenario, which is legally fatal to the claim.
49. Since the Applicant's ground for removal under section 71(3)(b) (dereliction) is expressly predicated on this unproven incapacity, the entire application lacks a proper evidential foundation.
50. The First Respondent's second point *in limine* must therefore be upheld.

Order

51. For the reasons set out above, the application for the removal of the First Respondent as a director of the Second, Third, and Fourth Respondents is dismissed.

Dated at Johannesburg this 12th day of January 2026.

D Terblanche

Member of the Companies Tribunal