

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2024-084861

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
16/3/26	
DATE	SIGNATURE

In the matter between:

MODIAKGOTLA OLEBOGENG MILDRED

Applicant

and

MODIAKGOTLA CONSTANCE

First Respondent

THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Second Respondent

CHICTAY MOHAMED ALLI N.O.

Third Respondent

Company Law — Removal of Director — Companies Tribunal — Section 71(8) of the Companies Act 71 of 2008 — Tribunal constituted by a single member — Whether Tribunal properly constituted — ultra vires decision.

Administrative Law — Review — Tribunal's refusal to rescind default decision — Default decision given without notice ---- Failure to consider applicant's defence — Procedural fairness.

Rescission — Tribunal regulations — Requirement to consider evidence and ensure proper service — Tribunal's failure to exercise discretion judicially — Removal of director without notice and without considering merits — Manifest procedural irregularities.

Interim Relief — Rule nisi issued — Suspension of default order removing director — Preservation of applicant's rights pending determination of constitutionality of Tribunal's composition under s 71(8).

Summary:

The applicant, a 50% shareholder and co-director in a private company, sought to review a Tribunal decision refusing to rescind a default order that had removed her as director. The underlying default order had been granted without notice by a single Tribunal member and notwithstanding that the applicant had delivered an answering affidavit (albeit three days late).

Held - The Tribunal had failed to comply with the procedural requirements in the Companies Regulations, particularly the obligation to consider evidence and ensure notice and service before granting a default order. The rescission decision was thus procedurally flawed.

Held - The Tribunal was required to consider prospects of success and substantive defences, particularly in a matter involving allegations of serious misconduct and it failed to do so.

Held -On the papers, it appeared, prima facie, that the Tribunal, sitting as a single member, lacked the statutory authority to adjudicate a removal application under s 71(8); section 195 of the Act permits a single member only where the Act expressly provides for it, and section 71(8) contains no such authorisation.

Held - Matters concerning removal of directors, involve significant legal questions and potential High Court review under s 71(5)–(6); are intended to be heard by a three-member panel including at least one legally trained member.

Held – A rule nisi issued calling upon the parties to show cause why the Tribunal’s decision to remove the applicant as director should not be declared ultra vires and set aside.

Held - the Tribunal’s order removing the applicant as director suspended and her rights preserved pending final determination of the scope of the Tribunal’s powers.

JUDGMENT

FISHER J

Introduction

- [1] This application is framed as the review of a decision of the Companies Tribunal of South Africa (the Tribunal) sitting as a single member in the guise of the third respondent (the member).
- [2] The impugned decision is the refusal by the Tribunal to rescind an order given in an application (the main application) purportedly brought under section 71(8) of the Companies Act of 2008 (the Act). In terms of the latter decision the applicant

was summarily removed as a director in her absence. I shall refer to this latter order as the main decision and to the order which is impugned in this application as the rescission decision.

- [3] The pleaded basis for the review is that the member made a series of errors in the refusal to rescind, chief among these being the failure to consider the good cause.
- [4] The remedy sought in this application on the setting aside of the rescission order is the referral back to the Tribunal for adjudication of the main application on the application of proper principles.
- [5] The allegations made by the first respondent as a basis for the removal of the applicant are serious and involve charges against the applicant of embezzlement and other serious accusations of misconduct.
- [6] The result of the main decision has been to render the applicant unable to conduct the business of a company in which she holds a 50% interest and from which she previously derived an income.
- [7] This has had profound consequences for the applicant. She has been deprived of a livelihood and suffered reputational harm resulting from the serious allegations of misconduct and criminality which have been allowed by the Tribunal to stand unchallenged.

The proceedings in this court

- [8] The Tribunal and the member presiding (I shall refer to them collectively as the Tribunal respondents) do not oppose this application.
- [9] The only opposing party is the first respondent, to whom I will refer as the respondent.
- [10] At the commencement of the hearing, counsel for the respondent sought a postponement of the matter on the basis that the legal practitioner who had represented her at the Tribunal hearings was not available because she was on maternity leave.

- [11] The applicant had known for more than two months that any postponement on the basis of unavailability of the legal practitioner would be opposed. This notwithstanding, no substantive application was made for a postponement. Instead, counsel was briefed on the Friday before the Tuesday hearing to appear for the purposes of seeking a postponement only. He was not briefed on the merits. The submissions made from the Bar were hearsay in nature and there was no explanation tendered for why another practitioner could not have been briefed to take the place of the long unavailable legal practitioner.
- [12] What is more, the prejudice faced by the applicant if the matter were postponed is extreme.
- [13] Furthermore, the case of the applicant is, on the merits of the rescission as pleaded, unanswerable.
- [14] Aside from these pleaded merits there is, to my mind, a further and more fundamental problem which requires ventilation: the procedure adopted by the Tribunal and the respondent from the outset has, *prima facie*, been unsustainable and untenable in that the Tribunal, as constituted by the single member, acted *ultra vires*. This point is central to the determination of this matter and to the broader approach taken by this court
- [15] Unfortunately, the approach taken in the matter by all parties misses this issue central.
- [16] The procedure adopted by the Tribunal from inception, on the face of it, represents, such a deviation from that prescribed by the Act and regulations that it is impossible for this court to accede to the remedy sought by the applicant which a referral back to the Tribunal for the re-adjudication of the main application.
- [17] A finding on the rescission application in the absence of the consideration of the *ultra vires* point, even if this were competent, would leave the applicant in limbo as far as the main application is concerned. This is not in the interests of justice. The applicant has already been substantially prejudiced by the general approach taken in this matter

- [18] From a public interest perspective, I am advised on behalf of the applicant that for the Tribunal to sit as a single member for the purposes of adjudicating applications under section 71(8) is routine. Reference to the Tribunal website confirms this to be the case.
- [19] Applications under 71(8) are an important function of the Tribunal, perhaps one of its most important. Whilst not squarely raised, the ultra vires point is implicated in the decision necessary to be taken by this court in relation to remedy and the further conduct of this matter and matters such as these in the Tribunal.
- [20] I intend, thus, to deal finally with the impugned rescission decision, but, in relation to remedy, I will deal, prima facie, with the applicable legal principles relating to section 71(8) applications to the Tribunal. I will then issue a rule nisi calling upon the parties to appear and show cause as to why it should not be declared that the decision in the main application was taken ultra vires in that the Tribunal was not properly constituted. This would, ultimately, have the effect that the applicant's directorship remains intact.
- [21] The position pending the final determination of this point is, to my mind, properly dealt with by way of interim order which preserves the applicant's rights. This serves the interests of justice.
- [22] The Tribunal respondents may make submissions on the issue of the correct procedural approach to the composition of the Tribunal in section 71(8) applications should they join issue with this court's prima facie approach. The respondent, also, is thus provided with an opportunity to be heard in relation to this aspect should she so wish. The respondent will also have an opportunity, in due course, to bring the application before the Tribunal in a manner that is procedurally sound in the event that she wishes to persist with the removal of her sister as co-director.
- [23] I now set out the relevant background before dealing with the applicable legal framework.

Relevant facts including procedural background in the Tribunal

[24] The applicant and the respondent are sisters. They formed Amogelang Mpho Cleaning Services (Pty) Ltd (the company) during 2014.

[25] The applicant and the respondent were and remain the only shareholders (each holding 50%). Both were directors before the applicant's removal.

The main application

[26] On 08 August 2023 the respondent applied to the Tribunal in terms of section 71(8)(b) of the Act read with regulations 142 to 145 of the Companies Regulations 2011 for the removal of the applicant as director.

[27] The respondent alleged that the applicant had misappropriated company funds, unfairly dismissed employees, confiscated company assets and generally misconducted herself in carrying out her role as a director.

[28] The application was delivered to the applicant on 14 August 2023, and the member was appointed by the chairman of the Tribunal to deal therewith.

[29] The Tribunal, thus constituted, dealt with the matter under the procedural rules of the Tribunal. The procedure entails the delivery of answering and replying to affidavits.

[30] In her answering affidavit, the applicant denied the misconduct and criminality complained of by the respondent and made accusations of misconduct of her own against the respondent.

[31] The respondent made application for default judgment on 13 September 2023 notwithstanding the filing of this answering affidavit because the affidavit was three days late.

[32] Because of this lateness, the member took the decision to treat the answering affidavit as *pro non scripto* and he duly granted his default decision which he signed on 30 October 2023.

- [33] The decision entailed the granting of the relief sought by default including the removal of the applicant as a director of the company purportedly in terms of Section 71(8) of the Act, followed up with an order that the Companies and Intellectual Property Commission (CIPC) deregister the applicant as director of the company within ten days.
- [34] The respondent was surprised to receive the decision from the Tribunal. She had been given no notice that there would be an application for a default decision despite of the filing of her answering affidavit.
- [35] Reference to the legislative scheme under section 71 shows that it does not provide for a determination of an application under section 71(8) in the absence of a consideration of the merits. The Tribunal's determination of the matter by default led to confusion.
- [36] The determination of the matter should properly have been directly to a review by this court. The scheme provides for an automatic review to the High Court but a review under PAJA would have been competent as well. I deal later with the automatic review procedure.
- [37] The circuitous and confused process adopted has, ultimately, ended up as a review before this court. To my mind, the fact that the matter has made its way to the court via a route that is procedurally unsound should not render the opportunity to consider the real issue a wasted one. As I have said, it is important, in the public interest, that there be some clarification of the Tribunal's process in relation to these matters.

The application for rescission

- [38] As it was, and faced with a default order, the applicant's attorneys took what they thought to be the next procedural step. They sought rescission of the default decision on 29 February 2024 together with condonation for the late filing of the answering affidavit.
- [39] The respondent opposed the applications for rescission and condonation. She, however, omitted to plead over to deal with the substantive joinder of issue in the

answering affidavit. Instead, she merely attacked the attorney's explanation for the three-day lateness.

[40] The respondent also complained that the application for default judgment was brought too late.

[41] The applicant explained and, her attorney confirmed, that this alleged lateness was due to the applicant being out of funds. This is unsurprising as her source of income had been cut off.

[42] The hearing of the rescission application which had been set down for 05 June 2024 was postponed because of the absence of an application for condonation for the late filing of the application. The applicant had, by this stage, been subject to the default order removing her as director for more than six months. This position still maintains.

[43] The Tribunal, ultimately, heard the application for rescission on 01 July 2024 and on 03 July 2024 the member handed down his decision on the rescission application. In terms thereof, he upheld the application for the late filing of the application for rescission on the basis that the alleged three-month delay in bringing the rescission application was not unreasonable, but he refused the rescission application on the basis that the three-day delay had not been properly explained. This, to my mind, is a curious stance under circumstances where the applicant's attorney set out in some details that the lapse was his and due to a miscounting of the dies.

[44] The Tribunal was, in any event, at this stage already embarked on a process which was neither procedurally competent nor fair.

[45] The basis for the decision of the rescission application is, essentially, contained in paragraph 5.6 of the rescission decision which reads as follows:

"In this case before the Tribunal Applicants reply to the Application were three days late. Hence, they were not considered by the Tribunal. The Applicant was aware that they were late as the Application was made by an attorney. The Applicants attorneys admitted that he was at fault for misdiarising the dates. The Applicant failed to make a condonation application but instead blamed the Tribunal. There is no obligation on the

Tribunal to inform the Applicant who is legally represented that they should make a condonation application. The Applicants' reasons for the lateness are unacceptable. The Tribunals decision was thus made without the Applicants submissions since the Applicants submissions were not put before the Tribunal timeously and the Applicant also failed to make a condonation application.” (Emphasis added)

[46] On a consideration of the merits alone the refusal of the rescission is manifestly assailable on a number of fronts, including that the application for default order could be brought without notice; that the answering affidavit could be ignored because it was out of time; that it was not necessary to consider the applicant's version and the prospects of success when determining the rescission; that the applicant's attorney's explanation on oath for the three days lateness due to him miscounting the *dies* was “unacceptable.”

[47] The decision ignores the fact that the regulations relating to the bringing of applications require notice to be given and that the Tribunal was not entitled to grant the order without considering evidence and without being satisfied that there has been service.¹

The applicable legal framework

[48] The Tribunal is established as a juristic person and agency of the Department of Trade and Industry in terms of section 193(1) of the Act. It is independent, and subject only to the Constitution and the law. It must exercise its functions in accordance with the Act. Each organ of state has the duty to assist it to maintain its independence and impartiality and to perform its functions effectively. It comprises a chairperson and not less than 10 other women or men appointed by the Minister on a full or part-time basis.²

¹ Tribunal regulation 142; regulation 153.

² Section 193(4)

[49] The Tribunal deals primarily with Company-law disputes relating to governance, compliance and enforcement matters, alternative dispute resolution processes, exemptions, statutory approvals and reviews of certain administrative decisions under the Act. Several of its functions do not engage company law or other legal principles directly.

[50] The Tribunal sits either as a member acting alone or as a panel of three³.

[51] In terms of 194(3) it is required that the Tribunal comprise (a) persons with suitable qualifications and experience in economics, law, commerce, industry or public affairs; and (b) sufficient persons with legal training and experience to satisfy the requirements of section 195 (3)(a) - which provides that when a panel is appointed there must be a legally trained person on it.

[52] The chairperson is responsible to manage the caseload of the Companies Tribunal, and in terms of section 195(2) must assign each matter referred to the Tribunal to-

“(a) a member of the Tribunal, to the extent that this Act provides for a matter to be considered by a single member of the Tribunal; or

(b) a panel composed of any three members of the Tribunal, in any other case.”
(Emphasis added)

[53] Section 195(3) provides that “[w]hen assigning a matter to a panel in terms of subsection (2)(b) (i.e. a panel of three), the chairperson must- (a) ensure that at least one member of the panel is a person who has suitable legal qualifications and experience; and (b) designate a member of the panel to preside over the panel's proceedings. (Emphasis added.)

[54] It seems to me, prima facie, that properly construed, section 195 means that the chairman can appoint a single member to determine a Tribunal matter only if the Act provides for it to be so dealt with; where it does not make such a provision

³ Section 195(1)

the default position is a panel of three members, at least one of which is required to have suitable legal qualifications and experience.

[55] In sum, to be a candidate for appointment to the Tribunal one need not have legal qualifications and experience. Accordingly, a single member need not be legally trained; but if the matter requires a panel of three there must be, at least, one lawyer serving on the panel.

[56] It seems that it is the intention of the legislature that matters requiring the determination of legal issues or when the Tribunal sits in a quasi-judicial capacity should be dealt with by a panel, which includes lawyers.

[57] With respect, the member appointed in this case appears not to be legally trained.

[58] Partnership style companies such as the company in issue are based on co-operation and equal participation. The participants in such companies are at risk of deadlock bringing down their substratum. This position has been dealt with extensively in our law in relation to the winding up of solvent companies.

[59] In terms of section 71(3), If a company has more than two directors, and a shareholder or director has alleged that a director of the company has become ineligible or disqualified or 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 has neglected, or been derelict in the performance of, the functions of director (the removal grounds) “the board, other than the director concerned, must determine the matter by resolution, and may remove a director” whom it has determined are guilty of or subject to one or more of the removal grounds.” This is majority rule.

[60] Where there are fewer than three directors, Section 71(8) of the Act provides a mechanism for the determination of an allegation that the other director is guilty of or subject to one or more of the removal grounds. In this case resort is had to the Tribunal acting in what seems to be a quasi-judicial role.

[61] In terms of section 71(8), if a company has fewer than three directors, subsections 71 (4) to (6) which apply where there are more than two directors apply with the necessary changes in this application to the Tribunal.

[62] These subsections provide for automatic review of the determination of the existence of the grounds or the finding that such grounds are not established to the High Court.

[63] This automatic review process was never reached in this case. This was because of the unlawful and procedurally unfair default procedure imposed by the Tribunal in the main application.

[64] The process is obviously corporate law laden, and the result of such an application has serious implications for the directors the company as well a third parties such as creditors or associated entities.

[65] The scope of such an order is wide. Section 195(8) provides that an order of Tribunal may be filed in the High Court as an order of the court, in accordance with its rules. This has the potential to have consequences for future business relationships and other directorships of the director who has been removed.

[66] It is thus hardly surprising that section 71(8) does not provide that an application under that section may be dealt with by a single member of the Tribunal.

[67] But, even accepting that there is no final determination of the ultra vires point at this stage, and putting this point aside for the moment, on the merits of the rescission decision applying general principles, it falls to be set aside, and this can be and should be done now.

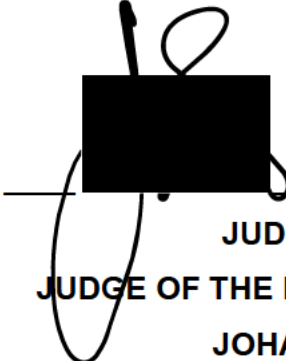
[68] In the interim, it seems to me that fairness dictates that the default order in the main application should be suspended.

Order

[69] I grant an order which reads as follows:

1. The Tribunal's decision dated 1 July 2024 and issued under case number CT01711ADJ2023 [ie the refusal to rescind] is reviewed and set aside.

2. A rule nisi is issued calling upon the parties to appear and show cause on 20 July 2026 before Fisher J, by arrangement with her office, as to why an order as follows should not be granted:
 - a. The decision to remove the applicant as director dated 30 October 2023 (the main decision) is reviewed and set aside on the basis that it is ultra vires in that the Tribunal was not properly constituted, and the applicant's directorship is thus reinstated for all purposes.
 - b. The costs are to be paid by any opposing party and are to be joint and several and calculated on scale C.
3. Pending the final determination in the rule nisi, the main decision removing the applicant from office is suspended.
4. The costs of the application, thus far, are to be paid by the first respondent on scale C.



JUDGE FISHER J
JUDGE OF THE HIGH COURT
JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Caselines. The date for hand-down is deemed to be 16 March 2026.

Date of Hearing: **20 January 2026**

Date of Judgment: **16 March 2026**

Appearances:

Attorneys for the applicant: **Ebersohns Attorneys**

Attorneys for the first respondent: **T.A. Dipudi Attorneys**

