

From the Editor's desk

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The Companies Tribunal (the Tribunal) is excited to present to you its second quarter Bulletin aimed at creating awareness about its services. Stakeholder engagements were held with law firms in various district municipalities namely: Tshwane, Mopani, Ngaka Modiri Molema and Amajuba. These engagements are beneficial to law firms and businesses specifically in the Local Economic Development sphere of government as companies are encouraged to utilise Tribunal's services which are free of charge.



This Bulletin will feature the following articles:

- Increasing the frontiers of Companies Tribunal's Role - An evolving case for the implementation of good corporate governance as voluntary regulatory compliance regime for Companies Tribunal: A point for consideration
- Case highlights
- Outreach and public awareness
- New appointments

Stakeholders are encouraged to make suggestions and contributions, such inputs must be sent to Messrs. Simukele Khoza and Dumisani Mthlane at the following email addresses: SKhoza@companiestribunal.org.za and DMthlane@companiestribunal.org.za. Kindly visit us online at www.companiestribunal.org.za, contact us on 012 394 1000 and send email to Registry@companiestribunal.org.za.

I hope the articles featured will take your knowledge of the Tribunal to the next level.

Editor: S Khoza

Manager: Communications and Marketing



Increasing the frontiers of Companies Tribunal's Role

An evolving case for the implementation of good corporate governance as voluntary regulatory compliance regime for Companies Tribunal: A point for consideration

- By Leeto Matshidiso

The corporate world in terms of regulations and functionality is changing very fast and even here in South Africa we have seen within fifteen years, the enactment of the new Companies legislation and three codes of good governance, the Companies Act and King Codes.

New Companies Act was promulgated in 2008 while King Commission enacted various codes on good corporate governance, as progressive voluntary regulatory regimes in the form of King Code II, III and IV.

The Companies Act, in terms of section 193 (1) established the Companies Tribunal (the Tribunal), to perform the functions that are stipulated in section 195 (1). According to the provisions of Section 195 (1) of the Companies Act (the Act), the Tribunal perform the following functions:

- Adjudicate in relations to any application that may be made to it in terms of this Act, and make any order provided for in this Act in respect of such an application;
- Assist in the resolution of disputes as contemplated in Part C of Chapter 7; and
- Perform any other function assigned to it by or in terms of the Act or any law mentioned in schedule 4.

The nature and character of the functions of the Tribunal, create an opportunity for it to take lead in the establishment of rich and progressive jurisprudence on company and corporate law in South Africa. So far, the Tribunal comprised mostly by the leading Law Academics, practicing Advocate and Attorneys, who preside over the adjudication process both within the formal process of case management and informal process which emanates from the Alternative Dispute Resolution (ADR).

Since the establishment of the Tribunal, more than 1500 cases were adjudicated upon by the members and this provided a combination of company law and good corporate governance jurisprudence on case laws, that help to change the corporate landscape for the better.

The Tribunal is also playing a vital role of enhancing the functions of the sister institution like Companies and Intellectual Properties Commission (CIPC) that deals with cases of disputes affecting company names, registration and the implementation of the Act in general. The CIPC in most cases, except where the Act provides otherwise, will normally act as the Institution of First Instance, where applications of disputes are lodged and adjudicated. The Tribunal would, save where the Act provides otherwise, then act as an institution

that hear the reviews and appeals of the CIPC decision.

Over the past years, the Tribunal has received a number of Review Applications from the Members of the public, seeking to challenge and setting aside the decisions which were taken by the CIPC as well as application for ADR by Public Members on the referral or advice of the CIPC. There is no doubt that the Tribunal has performed very impressively in the hearing and adjudication of these reviews and appeals as well as issuing the administrative orders in line with the provisions of the Act in resolving some of the corporate disputes.

But there is evolving case and progressive view that, over and above the role of case adjudications and reviews hearings which the Tribunal plays, it is considered to be better placed to play a fundamental regulatory role within the boarder scope of good corporate governance in South Africa. At this current juncture, the role and functions of the Tribunal are complimentary, either by default or indirectly, in as far as the implementation and upholding of good corporate governance is concerned. As a creature of statute, in this case the empowering statute being the Act and the Tribunal possesses the power, to inter alia, review the decisions of the CIPC and therefore it is strategically located at the centre of application and enhancement of this Act.

The role and functions of the Tribunal are again resonating with the implementation of the good corporate governance process which is embraced by most of the registered and listed companies. The subject matters of most of the disputes which are referred for adjudication by the Tribunal borders around the requirements and compliance for corporate governance, such as:

- I. *Registrations of Companies,*
- II. *Companies Names Disputes,*
- III. *Resolution of Disputes by Directors of Companies (ADRs)*
- IV. *Appointments and removal of Directors,*
- V. *Management of Directors and Shareholders meetings,*
- VI. *Violations of Memorandum of Incorporations,*

VII. *Extension of Annual General meetings*

VIII. *Exemptions of the establishment of Board committees, etc*

These subject matters which form the core of good corporate governance creates indirect extension of what could be the third functions of Tribunal within the context of compliance and accreditation authority, that will contribute towards good corporate governance for effective and efficient management of companies.

Should the Tribunal consider this role and function of accrediting all companies in South Africa with good corporate governance and not only adjudicating corporate disputes and providing ADR, the impact on number of cases it is handling may rise. Again, as institution, the Tribunal will be at the centre of driving the economy and attracting investments, from the corporate governance point of view, by contributing towards making South African companies compliant and sustainable.

Currently, there is no institute that was established and dedicated to the accreditation of good corporate governance in South Africa. There are however, key stakeholder Institutions, which play an advisory and regulatory oversight function on the registered and listed companies such as Institute of Directors of Southern Africa (IoDSA), Johannesburg Stock Exchange, Auditor General of South Africa, Chartered Institute of Secretaries, South African Revenue Services etc., on matters of good corporate governance.

Considering the statutory functions and role of the Tribunal and the key stakeholders which are mentioned above, there may be a need in the near future, to consider extending the frontiers and jurisdictional competencies of the Tribunal, in order to explore and further use this area of convergence between legislative and voluntary compliance regimes.

So far, this convergence between legislative and voluntary compliance regimes, with its broader modalities, has found excellent expression on the current work of the Tribunal involving adjudication of disputes about Companies Act as well as the ADR mechanism, which is largely voluntary.

Case Highlights

- By *Simukele Khoza*

EXTENSION TO CONVENE AGM

IRENE FARM HOME OWNERS' ASSOCIATION HOA NPC (Applicant)

The Applicant applied in terms of Section 61(7) of the Companies Act 71 of 2008 ("the Act") for an extension of the period for convening an Annual General Meeting ("AGM"). The application was brought by Adrian Van Niekerk, Chairman of the aforementioned Home Owners' Association (HOA), being duly authorised to do so by a resolution of the board of directors of the Applicant.



The Applicant held the last AGM on 29 August 2019 for the financial year end February 2018/19. The HOA stated that it has been unable to hold its AGM for the financial year due to the challenges arising out of COVID-19 and the national lockdown. In terms of its Memorandum of Incorporation (MOI), the Applicant must hold an AGM within 6 (six) months after the end of its financial year, which was on 29 February 2020. The Applicant was supposed to have held its AGM by 31 August 2020.

In order to adjudicate the application, the Tribunal had to consider the following:

- Whether the Tribunal has jurisdiction in this application. If the answer is in the affirmative, the reasons provided for the extension should be evaluated and it must then be decided if there is "good cause" to grant the application.
- If the Tribunal does not have jurisdiction, the application must fail and there is no need to determine whether the application is based on "good cause".

Section 61(7) requires that a public company "must convene an annual general meeting", with the effect that companies other than public companies must convene such a meeting only when required by the Memorandum of Incorporation. It is the Tribunal's view that Section 61(7) of the Act applies only to public companies and that an NPC does not fall within the definition of a public company. If the provisions in respect of a public company in Section 61 (7) were to be applied to a non-profit company, the legislature would have made it expressly applicable, as in the case of a state-owned company as provided for in Section 9(1) of the Act.

As a matter of emphasis, Section 61(7) of the Act does not apply to a non-profit company, neither as regards a mandatory AGM, nor as regards the jurisdiction of this Tribunal to grant an extension.

Order: Dismissed

SOCIAL AND ETHICS COMMITTEE (SEC)

Joseph Baynes Estate (Pty) Limited (Applicant)

The Applicant applied for an exemption from the requirement to appoint a SEC in terms of section 72(5)(b) read with section 72(6) of the Act. The Applicant in this matter is Joseph Baynes Estate (Pty) Ltd, which is a private company with limited liability, duly formed and incorporated in terms of the company laws of the Republic of South Africa. The Applicant has its business address

situated at Baynesfield Estate, Baynesfield, 3770 which is just outside Pietermaritzburg in Kwa-Zulu Natal. Myles Conrad van Deventer, who is the director of the Applicant deposed the founding affidavit in support of the application. A copy of the Resolution of the Board of Directors of the Applicant confirming van Deventer's authority was attached to van Deventer's founding affidavit. The Tribunal is satisfied that van Deventer is duly authorised to sign all documents, forms and affidavits on behalf of the Applicant. It was stated in the founding affidavit that the Applicant's Public Interest Score (PIS) is currently 547 points for its financial year ending 30 September 2019.

Based on PIS, the Applicant was therefore required to appoint the SEC in terms of section 72(4) of the Act unless if the Applicant is automatically exempted from doing so in terms of either of the grounds provided for in regulation 43 of the Companies Regulations, 2011 ("the Regulations"). Regulation 43 applies to every state-owned company, every listed public company, and any other company that has, in any two of the previous five years, scored above 500 points in terms of regulation 26(2) of the Regulations.

In terms of section 72(5) a company that falls within a category of companies that are required in terms of section 72(4) and regulation 43 to appoint the SEC may apply to the Tribunal in the prescribed manner and form for an exemption from that requirement, and the Tribunal may grant such an exemption if it is satisfied that:

- the company in question is required in terms of other legislation to have, and does have, some form of formal mechanism within its structures that substantially performs the function that would otherwise be performed by the SEC in terms of section 72 and regulation 43 of the Regulations; or
- it is not reasonably necessary in the public interest to require the company to have the SEC, having regard to the nature and extent of the activities of the company.

The Applicant submitted that it is a wholly-owned subsidiary of a non-profit testamentary trust called the Joseph Baynes Estate Board of Administration Will Trust MT 10399/1925/PMB ("the Will Trust"). In terms of regulation 43(2)(a), a company which is a subsidiary of another company that has the SEC and the SEC of that other company ("the Holding Company") will perform the functions required to be performed by the SEC in terms regulation 43 on behalf of the subsidiary company does not require to establish the SEC.

In perusing the founding affidavit, the Tribunal found that the Applicant failed to provide information in support of the following:

- Full details of the circumstances or factors which render it not reasonably necessary in the public interest for the Applicant to be required to appoint the SEC;
- The nature of the activities of the Applicant (full details required); and
- The extent of the activities of the Applicant (full details required).

Order: Refused

NAME DISPUTE

COMAIR LIMITED (Applicant) vs KULULA TOURS (PTY) LIMITED (First Respondent) and COMPANIES AND INTELLECTUAL PROPERTY COMMISSION (Second Respondent)

The Applicant in this matter, is a public company and proprietor of the trade mark "Kulula" in respect of various classes covering a

wide range of goods and services, including “vehicles apparatus for locomotion by land, air or water”, and “travel arrangement, including operation of tours, tourist agencies and travel agents services”. The Applicant advanced that the inclusion of the word 'KULULA' in the First Respondent's company name infringes its trade mark KULULA in that it does not satisfy the provisions of sections 11(2)(b) and (c) of the Act. The Applicant stated that the First Respondent's name is confusingly similar to its KULULA trade mark (see section 11(2)(b)) or the First Respondent's name falsely implies or suggests or is such as would reasonably mislead a person to believe incorrectly that the First respondent is part of or associated with the Applicant (see section 11(2)(c)(i)).

The Applicant sought an order directing the First Respondent to choose a new name, as its current name is contrary to the provisions of section 11 of Act, according to the Applicant. The First Respondent, is a private company registered on 26 June 2019. The First Respondent did not take part in this proceeding, it was an application for default order as envisaged by regulation 153 of the Companies Regulations, 2011 (Companies Regulations).

The application was served on the First Respondent by the sheriff by affixing a copy thereof to the front gate of the premises at 11A Mount Batten Drive Winston Park Gillits. Except for the word “Drive”, which supposed to be “Drive”, the address at which the application was served correspond with the address of registered office for First Respondent. The Tribunal is satisfied that the application was adequately served.

Apart from the First Respondent, the Applicant also joined the CIPC, as the Second Respondent. The Tribunal found no evidence of service of the main application on the CIPC, but only that of the request for default order on 22 October 2019. This would not suffice without service of the initial or main application on the Second Respondent. The main application ought to have been served on all respondents within 5 (five) business days after same was filed on 09 September 2019 and with the Respondents granted 20 (twenty days) to serve and file an answer.

The First Respondent's name comprises two parts or words, namely “KULULA” and “TOURS”. The word KULULA is a trade mark of the Applicant. The inclusion of the word “TOURS” doesn't really distinguish the First Respondent's name from the Applicant's trade mark. The tribunal's view is that whether both words are considered jointly or not, it does not make any difference. The First Respondent's name is confusingly similar to the Applicant's trade mark. Therefore, the Tribunal found that the inclusion of the word KULULA in the First Respondent's name does not satisfy the requirements of the Act.

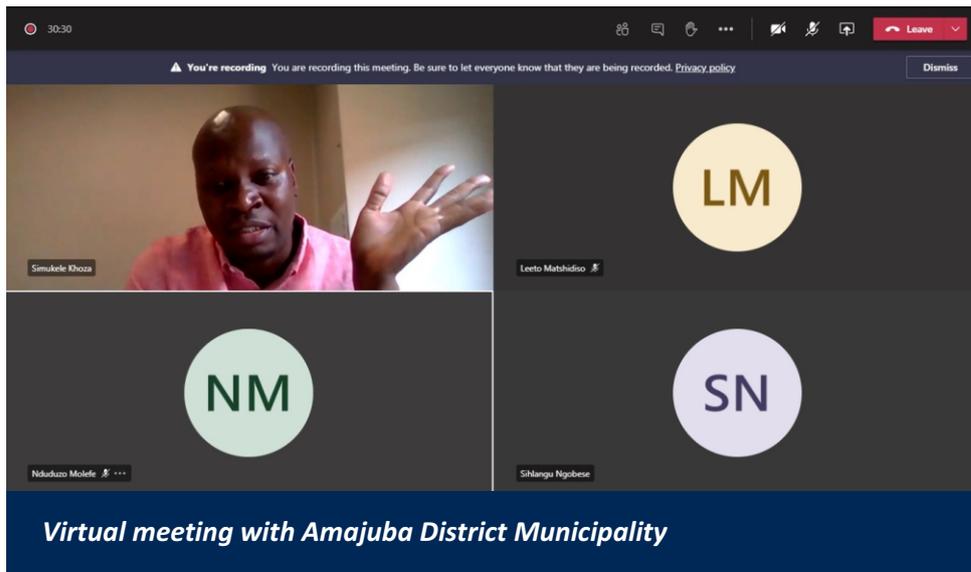
The Applicant requested that a costs order be made against the First Respondent, in the event of an outcome favourable to the Applicant. Regulation 156(1) stipulates that “upon making an order, the Tribunal may make an order for costs”. Secondly, the Applicant also requested that the Tribunal direct the CIPC to replace the First Respondent's company name with the First Respondent's registration number in the event that, the First Respondent fails to comply with an order made herein within the stipulated period of time.

Order:

- the First Respondent's registered company name “KULULA TOURS” does not satisfy the requirements of the Act;
- the First Respondent is directed to choose a new name and file a notice of amendment to its Memorandum of Incorporation;
- the First Respondent is directed to complete the activities ordered in b) hereof within two (02) months of service of this order upon the First Respondent in terms of regulation 153(3) of the Companies Regulations, 2011.

Stakeholder engagement

- By Dumisani Mthlane



Ngobese, the Head of Local Economic Development and another meeting was held with the Economic Cluster of ADM. ADM is situated in the north-western corner of KZN and comprised local municipalities like Dannhauser, Newcastle, and eMadlangeni local municipalities. It is among one of the major coal mining regions in South Africa. Newcastle town is its main urban centre and economic hub. The Tribunal's presentation discussed the following amongst others; types of application that can be adjudicated by the

As part of the commitment to introduce its services to various stakeholders, the Tribunal held meetings with MI Senyolo Attorneys on 7 September 2020 and Amajuba District Municipality on 25 September 2020. These meetings took place virtually in response to government's call to limit physical interaction in order to prevent the spread of COVID-19. Annually, the Tribunal identifies various districts where it plans to engage stakeholders. Mopani and Amajuba districts were identified this financial year.

MI Senyolo Attorneys is a law firm based in Tzaneen under the Mopani District Municipality that specialises in amongst others commercial law. It was important for the Tribunal to engage with this stakeholder because it's situated in the Limpopo province where the Tribunal receives few applications. About a handful of applications received by the Tribunal come from law firms, especially big firms. So, smaller law firms should be educated about Tribunal's services so that they can also provide speedy resolutions of company disputes and save costs for their clients.

The engagement with Amajuba District Municipality (ADM) was two-fold, it started with a meeting with Mr Sihlangu

Tribunal, filing procedure for adjudication, alternative dispute resolution (ADR), benefits of Tribunal's services and the case management system (CMS). The filing of applications through the CMS which is accessed from the website was encouraged. This system is secure, easy to use and has added benefits like tracking and review of the case status and it's compatible with mobile devices.

The use of ADR to resolve company disputes was also encouraged especially during these tough economic times which have been worsened by the scourge of Covid-19. ADR involves resolution of company disputes through mediation, conciliation or arbitration. It is a more flexible, simple mechanism that preserves and builds mutual beneficial relationships amongst parties.

Both stakeholders expressed appreciation about the engagements and indicated that they will inform other stakeholders. ADM proposed regular engagements with the possibility of having a workshop in future. The Tribunal would like to call upon stakeholders to invite it for a presentation about its services, virtual presentations are encouraged as they are cost effective and easy to organise.

New appointments

- By Simukele Khoza



Leeto Matshidiso: Legal Advisor



**Nduduzo Molefe
Records Management Practitioner**

The Tribunal is pleased to announce appointment of Legal Advisor, Mr Leeto Matshidiso and Records Management Practitioner, Mr Nduduzo Melefe.

Mr Matshidiso joined the Tribunal on the 01st September 2020. He studied BProc degree at University of Pretoria and served his Articles at UP Law Clinic until his admission as Attorney of High Court in 2004. He practiced and was the Managing Director of Matshidiso Attorneys in Kimberley until 2009. He relocated to Pretoria and joined North West Transport Investment (SOE) Limited and two of its subsidiaries i.e., the Northwest Star (SOE) Ltd and Atteridgeville Bus Services (SOE) Ltd as the Group Legal Advisor and Company Secretary from 2010.

He later moved to water sector where he joined Magalies Water Board in 2013 as Company Secretary until 2016. Soon thereafter, he was involved in corporate governance consultancy as Executive Director at MGIH (Pty) Ltd and TPW Inc until 2019. He brings with him a wealth of experience to Companies Tribunal having served as a Legal Advisor and as Company Secretary of both National and Provincial Business Entities and practising as an Attorney. He won few accolades like Sir Abbey Bailey Travel Scholarship to UK and represented Water Board at the International Water Conference in Stockholm, Sweden in 1999 and 2015 respectively.

Nduduzo Molefe did his training at the Mpumalanga Provincial Archives in 2014 before being appointed permanently to Limpopo

Provincial Archives as a Senior Archivist in 2016. He joined The National Archives and Records Service in 2017 in the same position, servicing researchers in the Archival Repository Division.

In 2018, he was promoted to Head of Filing Systems under the Records Management Division where he was responsible for guiding and approving records classification systems for National Government Departments, State-owned Entities and Organs of State. Furthermore, he was also responsible for the training of Records Managers and Heads of Registries in the public sector.

He is a published author, having published a research paper in professional and academic journals.

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