

From the Editor's desk

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It is a year since the break out of the COVID-19 pandemic, this phenomenon has changed our lives, the world was never prepared for it. The Companies Tribunal (the Tribunal) continues to urge South African companies and businesses to file applications through the online Case Management System which is easily accessible through our website.

The Tribunal is excited to present to you its fourth quarter Bulletin aimed at creating awareness about its services. The Tribunal held a successful seminar in partnership with the University of Pretoria's Department of Mercantile Law. Stakeholder engagements were held

with the Namaqualand Chamber of Commerce and Chris Hani District Municipality. These stakeholder engagements are beneficial to businesses specifically in the Local Economic Development sphere of government as companies are encouraged to utilise Tribunal services which are free of charge.

This fourth quarter Bulletin features the following articles:

- Seminar on legislative shortcomings in implementing Tribunal's mandate by: D Mthlane
- Case highlights by: S Khoza
- Stakeholder engagement by: D Mthlane

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.

I hope the articles featured will encourage stakeholders to utilise Tribunal services.

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Seminar on legislative shortcomings in implementing the Tribunal's mandate

- By Dumisani Mthlane

The Companies Tribunal (Tribunal) in partnership with the University of Pretoria's (UP) Department of Mercantile Law hosted a seminar on legislative shortcomings in implementing the Tribunal's mandate on 5 March 2021 at Gordon's Institute of Business Science (GIBBS). This was the first seminar where majority of the delegates attended virtually to comply with COVID-19 regulations imposed by the Government. It was aimed at engaging stakeholders on the following:

- Practical problems relating to adjudication and the alternative dispute resolution functions of the Companies Tribunal
- Administrative powers of the Companies and Intellectual Property Commission regarding reservations of company names
- Power to order the Companies and Intellectual Property Commission to change names (section 160)
- Jurisdiction over non-profit companies in terms of section 61(7)
- Local and international corporate law developments
- Proposal to introduce a mandatory requirement into

the Companies Act to have worker representation on the board of certain companies

The seminar included expert panel discussions and facilitated questioning and robust engagement. The expert panel comprised of company law heavy weights like Dr Mohamed Alli Chicktay, the Tribunal's Chairperson, Prof Munyai, UP's HOD for Mercantile Law, Prof Michael Katz from ENS Africa, Prof Piet Delport, Prof Boraine, Dr Labuschagne, Dr van Wyk, Dr Scott, all from UP and Matshego Ramagaga the veteran Attorney and also the Tribunal member.

In opening, Dr Chicktay stated that the majority of South Africans are excluded from access to justice, the Tribunal was established to provide access to justice for those who cannot use or cannot afford the Court processes and the purpose of the seminar is to see where we are as a Tribunal. He further stated that whatever comes out of the seminar will hopefully be used to amend the Legislation for the Tribunal to make effective change that will touch the lives of all South Africans. Prof Munyai concurred with Dr Chicktay and added that for UP, the seminar presents a great opportunity to share their

research with members of the Tribunal and all participants from different institutions and sectors. This also provides an opportunity for UP to learn from the Tribunal's knowledge and experiences gained from day-to-day application of the Act and those lessons will serve to enrich UP's teaching and research.

Session 1: Practical problems relating to adjudication and the alternative dispute resolution functions of the Companies Tribunal. Chaired by Dr Scott, this session comprised of Dr Labuschagne and Dr Chicktay. Dr Labuschagne highlighted that for the Tribunal's ADR to be utilised effectively there must be buy-in from the public, majority of commercial disputes are referred to private arbitration. He advised that dispute resolution should be cost effective, fast and ensure that arbitrators are sufficiently independent, trained and knowledgeable. He proposed some of the practical steps that can be taken to improve this process.

Dr Chicktay proposed the introduction of mandatory mediation for the Tribunal to be more effective. He argued that having mandatory mediation will ensure that there are fewer cases in Court and this allows the Court to deal with more complex matters. He dispelled all arguments against mandatory mediation. There was recognition that Section 166 of the Act was poorly drafted e.g. it says that failed certificate should be given where parties are not participating in mediation, conciliation and arbitration, which is not correct because that is not done when it comes to arbitration. The emphasis on the word 'voluntary' by the Act was found to be problematic, it was proposed that voluntary should be applicable to the party who wants to refer a matter to the Tribunal.

Delegates were informed that despite some challenges with the Act and limited jurisdiction of the Tribunal, Section 166 empowers the Tribunal to handle any company dispute through ADR. It was also proposed that the mandate of the Tribunal should be extended such that BBBEE Commission matters can be handled through both adjudication and mediation as opposed to adjudication only. This will decrease the workload of the Courts.

Session 2: Chaired by Dr van Wyk, this session comprised of Prof Delport and Matshego Ramagaga. It discussed administrative powers of the Companies and Intellectual Property Commission (CIPC) regarding reservations of company names, power to order the Companies and Intellectual Property Commission to change names (section 160) and jurisdiction over non-profit companies in terms of section 61(7). Prof Delport started by giving background about the name registration process of the CIPC and the Tribunal's role in adjudication of name disputes. There were shortcomings identified in relation to Section 11 of the Act. For instance, if there was a registration of a defensive name or a reservation, the Tribunal can order the Commission to either reserve it or not reserve it, or to cancel it. It does not say anything about the particular registered name of the company. Section 160 does not give the Tribunal the express power to change a name or to order the CIPC to change a name. Another shortcoming was the fact that the Tribunal does not have enforcement powers in Sub-section 3 (b). If the Tribunal orders a person to change the name and that person does not comply, the Tribunal does not have the power to force him or her or the company to change that name.

On name reservations, there's confusion around how the CIPC should deal with the applications for reservation of names that appear to be confusingly similar to existing names. For instance, if the name is the same, the CIPC does not register. If the name is similar, the Act says the CIPC may issue a directive to the owner of that reserved name directing that owner to then notify specified persons who appear to be people that have a potential interest in the name that has since been reserved. Furthermore, the CIPC is not empowered by the Act to reject a reservation of a name that is in its opinion appears to be confusingly similar to an existing name.

There was no clarity whether the Tribunal does have jurisdiction over non-profit companies in terms of section 61(7) and it was established that some NPCs subject themselves to the Act and others do not. This will be clarified in the new Companies Act amendments.

Session 3: Chaired by Dr van Wyk, this was a panel discussion



shareholders, but to a much larger group of stakeholders. And these include employees, customers, suppliers, the local community and the environment.

Worker representation will ensure that worker's voice is heard in the highest decision-making body of a company i.e. the corporate Board. However, he stated that this should not apply to small family companies but to all companies

comprised of Prof Boraine, Prof Delport, Dr Scott and Dr Labuschagne. This was a discussion on local and international corporate law developments in relation to Section 164 and class rights, Directors' duties and Business rescue. It was observed that the Courts are enforcing the remedies that are available to directors, prescribed officers, shareholders and all the people who have standing in terms of Section 162 to pursue a remedy for delinquency. The Myeni case was used as an example. It was stated that delinquency applications are brought in to make sure that where there is any gross misconduct or recklessness or abuse of the position of power by a director, then certain people have the opportunity to declare that director as a delinquent.

The role that the Tribunal can play during business rescue was also discussed, there are suggestions that have been brought to the Specialist Committee on Company Law in this regard. It was agreed the Tribunal can handle certain aspects/matters in relation to business rescue, like changing of business rescue practitioner etc.

Session 4: Proposal to introduce a mandatory requirement into the Companies Act to have worker representation on the board of certain companies. Save the best for last! This was the last session which was presented by Prof Michael Katz. Prof Katz gave background about this topic which is informed by the fact that there is wide recognition by experts in academia, business leadership that the duties of directors are no longer confined simply to advancing the interests of

who are obliged in terms of the Act and regulations to have a social and ethics committee. He also proposed that the mandatory requirement should be two worker representatives not one. Prof Katz believes that having a worker representative will be the first step in enhancing industrial relations in the country and is a movement towards greater social cohesion.

He made an example of how it has been applied in other jurisdictions and how he proposes it being incorporated into the Companies Act. In England for example, there has now been a corporate governance directive issued by the Department of Trade and Industry that in order to give effect to that, that company must either appoint a non-executive director whose mandate is to look after worker interest or to have a worker director or to have a worker's working group. It has been found that having worker director in the Board has economic benefits and promotes trust in the company.

In closing the seminar, Dr Chicktay thanked all delegates and the presenters for attending. He stated that their input has been extremely beneficial to the Tribunal and the direction it wants to take with regards to amendments of the law to increase the Tribunal's mandate so that it is more efficient.

Case Highlights

- By Simukele Khoza

Name dispute

Business Leadership South Africa (Applicant) vs Business Leadership South Africa NPC (First Respondent) and Companies and Intellectual Property Commission (CIPC) (Second Respondent)

The Applicant is a foundation registered as a non-profit organisation (“NPO”), apparently in terms of the Non-profit Organisations Act 71 of 1997. The application was brought by Busisiwe Mavuso, the Chief Executive Officer of the Applicant, who had the authority to act for and on behalf of the Applicant in terms of a board decision of 26 March 2020.

The Applicant applied for default order on the basis that the name of the First Respondent does not comply with Section 11(2) of the Companies Act 71 of 2008. Regulations 142 and 153 of the Companies Regulations of 2011 regulates an application to the Tribunal as well as the application for a default order under certain circumstances. The First Respondent is a company incorporated in terms of the Act while the Second Respondent is the Commissioner of the CIPC in the capacity as the person responsible for the administration of the Act. The jurisdiction of the Tribunal in this matter is as determined in section 160(1) of the Act.

The Applicant is the proprietor in South Africa of a number of trade marks in terms of the Trade Marks Act 194 of 1993 incorporating, or comprising, “Business Leadership South Africa” over a range of classes and services. The Applicant became aware of the registration of a company with the name “Business Leadership South Africa NPC” during 2019.

The Applicant filed an application for relief to the Tribunal on form CTR 142 dated 9 June 2020 with a supporting affidavit. The Applicant sent a copy of the CTR 142 form and supporting affidavit as lodged with the Tribunal on 12 June 2020 by email to the address of a director of the First Respondent. The First Respondent failed to answer the Applicant within the stipulated twenty (20) business days. The Tribunal was satisfied that the notice to the First Respondent was adequately served as per Regulation 153(2)(b). The Tribunal found that the Applicant had complied with the “good cause” test in respect of merits as well as the period within which the application was brought. The Tribunal found that:

- The name of the First Respondent does not comply with sections 11(2)(a) of the Act as it is the same as a trade mark/s owned by the Applicant.

Order: Granted, the First Respondent was ordered to file a notice of an amendment of its Memorandum of Incorporation, within 60 days of receipt of this order to change its name to a name that does not incorporate the word/s “Business Leadership South Africa”. There was no order as to the costs.

Exemption from appointing Social and Ethics Committee (SEC)

Magnolia Cellular Investment 2(RF) (Pty) Ltd (Applicant)

In February 2021, the Applicant applied to the Tribunal for an exemption from appointing a SEC in terms of section 72 (5) and (6) of the Act read with Regulation 43 of the Companies Regulations. The Applicant is a company duly incorporated in accordance with



the company laws of South Africa, having its registered address at Waterfall Campus Cnr Maxwell Drive and Pretoria Main, Buccleuch Ext 10, Gauteng, 2090.

Along with this application, the Applicant lodged an application for condonation for the late filing of this main application for exemption. The founding affidavit in the CTR142 form was properly deposed by Mr Irshaad Esakjee a Director of the Applicant, duly authorised to do so as per the Board Resolution.

The Applicant is a ring-fenced holding company, whose sole business is holding an equity interest in Cell C. This includes issuing debt securities to repay existing credit facilities, refinancing indebtedness and related acquisition purposes. The Applicant has neither operating activities nor employees. In terms of its Memorandum of Incorporation (MOI), the Applicant is prohibited from conducting business other than is reasonably linked to its funding obligations under its ordinary debt facilities. The Applicant submitted that, due to the limited nature and extent of its business, it is not reasonably necessary in the public interest for it to establish SEC.

Furthermore, it was submitted that in the previous five years, thrice, the Applicant had a Public Interest Score (PIS) exceeding 500 (five hundred) points. In terms of the Regulations 43(3)(b)(iii), the filing of such an application should therefore have taken place during 2019. The Applicant submitted that the delay/omission was due to the challenges faced by Cell C in respect of its trading and operational conditions. Applicant's attorney supplemented its papers in this regard by referring to various websites where these challenges were highlighted. The Tribunal was satisfied that Applicant was not in wilful default of the Act and its Regulations.

The Applicant argued that in terms of section 72(5)(b), it is not necessary in the public interest to require the company to have an SEC and does not have scope to grow its activities and increase public exposure. The Applicant has shown that its high PIS is due to its third-party liability. Furthermore, the Applicant submitted that its existence has no direct bearing on the environment, health and public safety.

Order: The application was granted for two years from the date of this order.

Substituted services

Pick 'n Pay Holdings Limited RF (Applicant)

The Applicant applied to the Tribunal for substituted service in terms of Regulation 7 (3) (a) of the Act. The Applicant is a public company with limited liability duly incorporated in terms of the Act with its registered address at 101 Rosmead Avenue, Kenilworth, Cape Town. The relief sought by the Applicant is for an order of substituted service to deliver notices to shareholders by ordinary post.

The Deponent to the Applicant's affidavit Aboubakar Jakoet stated the following in paragraphs 2, 4, 5 and 6 states that:

2. *'Pick n Pay Holdings Limited RF has an authorised share capital of 800 million shares, of which 527,249,082 shares are issued.*
4. *As a result of this long-standing policy, the majority of shareholders, in volume, are made up of past and present employees of Pick n Pay.*
5. *Many of the company's past and present employees live in disadvantaged communities. Delivery of notices by registered mail is often impossible.*
6. *Delivery of notices by ordinary mail will ensure that the notices are personally delivered and received by shareholders."*

The Tribunal had to determine whether in terms of Regulation 7 (3) (a) the Applicant had reasonably proved impossibility to deliver notices to the Applicant's shareholders by way of registered mail. In support of its application, the Applicant submitted that delivery of notices by ordinary mail would ensure that notices are personally delivered and received by its shareholder however, failed to prove impossibility of delivery by registered post. It is the Tribunal's view that the Applicant failed to provide sufficient prove of impossibility to deliver 'a document in a manner provided for in the Act'.

Order: Dismissed

Extension of time to hold Annual General Meeting (AGM)

Cricket South Africa NPC (CSA) (Applicant)

The application was made in terms of Section 61(7) read together with Section 9 of the Act. The Applicant registered in terms of the company laws of the Republic of South Africa under registration number 2002/002641/08. The Applicant filed an application requesting an extension to hold its AGM more than the statutory 15 months after the last AGM which was held on 7th September 2019. The application was brought by the Applicant's Chief Financial Officer and Acting Chief Executive Officer of the company, they were duly authorized to do so.

The Applicant submitted that the last AGM was held on 26th June 2019 and that the next AGM was scheduled for 5th September 2020. Due to governance challenges the AGM was to be postponed in terms of the minutes of the Members Council Meeting held on 31st August 2020. On 28 October 2020, the Minister of Sports, Arts and Culture announced that the entire CSA Board of Directors had resigned on 26th October 2020. The Minister then announced an interim board on 30th October 2020, thus the request for extension to hold AGM.

Section 61(7) specifically provides as follows: "A public company must convene an annual general meeting of its shareholders-

- (a) Initially, no more than 18 months after the company's date of incorporation; and
- (b) Thereafter, once every calendar year, but no more than 15 months after the date of the previous annual general meeting, or within an extended time allowed by the Companies Tribunal, on good cause shown,"

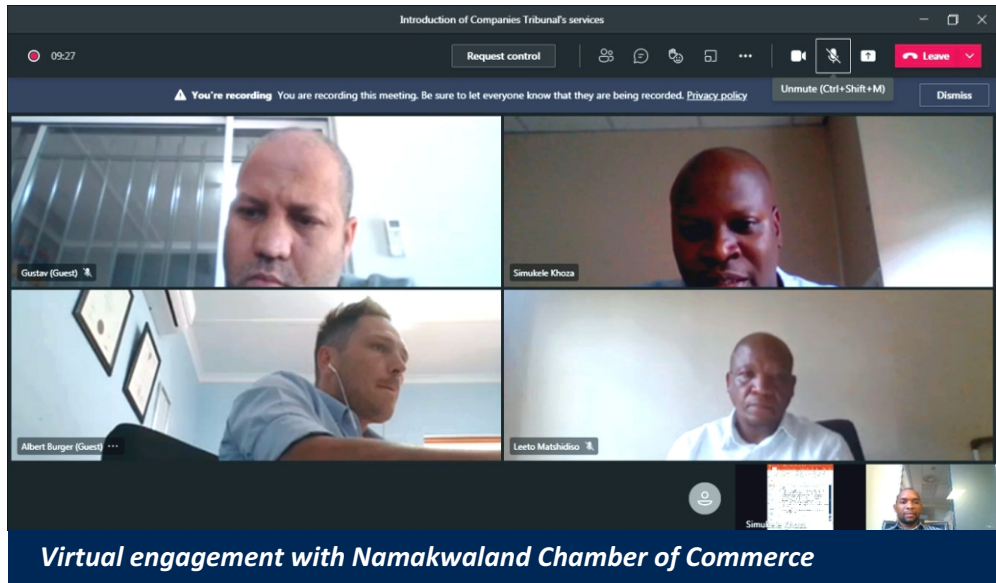
The Tribunal is satisfied that good cause has been shown as to why the AGM could not be held within the statutory period required by the Act. CSA was given an extension to hold its AGM by no later than 31st May 2021.

Order: Granted

Stakeholder engagement

- By Dumisani Mthlane

As part of the deliverables for the quarter, the Tribunal held two virtual engagements with Namakwaland Chamber of Commerce (the Chamber) on 16 March 2021 and the Chris Hani District Municipality on 23 March 2021. Annually, the Tribunal commits to engage stakeholders in various districts across the country in order to raise awareness about its services. The regions that were targeted for the quarter was the Namakwa in Northern Cape and Chris Hani in the Eastern Cape.



Namakwa is one of the 5 districts of the Northern Cape province situated in the West Coast of the country. It covers areas like Springbok, Sutherland, Calvinia and others. It was important to have this engagement with the Chamber because the Tribunal is relatively unknown in the Northern Cape province, this is evident through the fact that very few applications come from there. The Chamber is a strategic stakeholder because it represents companies that are involved in various sectors of the economy, big and small. It is hoped that this engagement is a stepping stone in terms of assisting companies in the Northern Cape province, companies who have disputes but can't afford court processes.

The same applies to Chris Hani District Municipality (CHDM). CHDM comprised of 8 local municipalities in the Eastern Cape province and covers area like Ngcobo, Queenstown, Cradock and others. CHDM indicated that they were not aware about the existence of the Tribunal and appreciated that it provides free services.

In both engagements the Tribunal's presentation discussed name disputes under sections 11 and 160; social and ethics committee exemptions (SEC) in terms of section 72;

alternative dispute resolution (ADR) under section 166; directorship disputes under section 71, benefits of Tribunal's services and the case management system (CMS). Information brochures of the Tribunal were shared.

Both stakeholders expressed appreciation about the engagements and promised to inform companies in their districts. We would like to call upon stakeholders to invite us for a virtual presentation, virtual presentations are encouraged as they are convenient and cost effective.

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