

From the Editor's desk

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The Companies Tribunal (Tribunal) is excited to present this first quarterly Bulletin. This Bulletin highlights activities and events undertaken as committed in the Tribunal's Annual Performance Plan for the financial year 2023/24. The Bulletin will also shed light on the seminar held in partnership with the North-West University on the 09 March at Mafikeng Campus.

We are pleased to share with our stakeholders the government collaborative events undertaken, exhibition during the first quarter and a number of stakeholder engagements conducted by the Communications and Marketing Division.

This first quarter Bulletin feature the following articles:

- Case highlights
- Seminar on expanding the role of the Companies Tribunal
- Stakeholder engagement

We encourage stakeholders 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

We wish you well.

Mr S. Khoza
Manager: Communications and Marketing



Case Highlights

- By Simukele Khoza

Annual General Meeting

South African Airways SOC Ltd

The Applicant applied to the Companies Tribunal (the Tribunal) in terms of section 61 (7) of the Companies Act 71 of 2008 and Regulation 142 of the Companies Act for an extension to hold its 2023 annual general meeting ("AGM"). Zwelifikile Mhlontlo, the Interim Chief Financial Officer & Director filed an application on behalf of Applicant. The reason for the application was that the company was awaiting the finalisation of the external audit process.



SAA is a company contemplated in terms of Schedule 5 of the Act. The company is required to convene an annual general meeting (AGM) of its shareholders. The Applicant held its last AGM on 25 February 2022, and had to convene its next AGM by no later than 24 May 2023. The Applicant's Board held a meeting on 23 February 2023, they approved a decision to file an application to the Tribunal for extension to hold its AGM; they realized that it was unlikely that the 24 May 2023 deadline to convene AGM was going to be met due to ongoing audit process.

The Applicant expected the audit process to be concluded during May 2023; followed by governance processes including consideration and approval of the audited financial statements, submission to the Executive Authority and Parliament, which the Applicant estimated would take about three months to 30 August 2023. The Applicant attached confirmation by external auditors that the audit process was underway. Therefore, the Applicant, requested the Tribunal to grant it relief to hold its AGM by 30 September 2023.

The Tribunal was satisfied that the Applicant had shown good cause for the extension to convene AGM by 30 September 2023.

Order: Granted.

Social & Ethics Committee (SEC)

K2011141315 South Africa (RF) (Pty) Ltd

The Applicant filed an application for exemption from establishing SEC in terms of Section 72 (5) and the regulations in terms of the Companies Act. The application was filed by Zintle Mjali duly authorized on behalf of the Applicant. In support of the application, the Applicant stated that:

- The Applicant is a simple investment holding company and only functions as a vehicle to hold shares to ring fence the risks and rewards associated with a particular investment activity;
- Such investment activity comprises owning shares in an infrastructure investment and receiving dividends and proceeds, as well as any interest and capital payments on shareholder loans it may have provided. The Applicant's sole investment is a 25% direct shareholding in Oakleaf Investments 79 (RF) Proprietary Limited, the Lesedi Power Plant, which is approximately 75MW solar PV park in the Northern Cape;
- The Applicant is 70% owned by Kuaji Energy Capital Investments Propriety Limited which is an investment holding vehicle;
- The Applicant is furthermore 30% owned by the Lesedi Solar Park Trust Company (Pty) Limited, which in turn, is 100% owned by the Lesedi Solar Park Trust, a non-profit trust which funds social development programmes provided by DGMT PBO to benefit the local communities living within a 50km radius of the plant; and
- The Applicant has no employees and no workplace.

Furthermore, the Applicant stated that:

- The Applicant falls within the category of companies required in terms of Section 72 of the Companies Act of 2008 and the regulations to appoint a Social and Ethics Committee.
- The Applicant's directors are, however, of the view that it is not reasonably necessary in the public interest to require the Company to have a Social and Ethics Committee, having regard to the nature and extent of its activities and, accordingly, an exemption application in terms of Section 72(5) of the Companies Act of 2008 is being directed to the Companies Tribunal

on this basis.

- Considering the responsibilities of a SEC, the nature and extent of the activities of company, the Applicant advanced that it is not in the public interest to require the Company to have a SEC.

In order to grant an exemption from the appointment of a SEC one has to use the calculation of the PIS as it has the effect of “policing” compliance with the law. The Applicant failed to indicate their Public Interest Score (PIS) in the instant application, it's the Tribunal's view that non-reference to the PIS was fatal to the Applicant's case. The application was hurried and does not address essential requirements of the Act. There was no indication as to whether the holding companies of the Applicant have SECs as required by the Act in Regulation 43(5), in which case the provisions of Regulation 43 (2)(a) would apply.

Therefore, it was the Tribunal's view that it is reasonably in the public interest to require the company to have a SEC having regard to the nature and extent of the activities of the Applicant.

Order: The Applicant's was denied exemption from appointing SEC.

Review

Nonkululeko Nombuso Nkabinde (Applicant) vs Companies and Intellectual Property Commission (Respondent)

The Applicant applied for relief to the Companies Tribunal in terms of section 11(2) of the Act by completing Form CTR142 on 5 December 2022. On the 27th September 2022, the Applicant applied to the CIPC to reserve the following names: "TROLI and TROLLI". On the same day, the CIPC issued a Notice Refusing Name Reservation (Form CoR9.5) indicating that:

- the proposed name is deceptively and confusingly similar to names already on the register as contemplated in section 11(2) of the Act.
- A distinguishing element must be inserted that will sufficiently be capable of differentiating their name from the names already registered; or
- If the Applicant files a letter of consent from the similarly named entities, then it can be registered.

The CIPC's Form CoR9.5 does not comply with the requirements of section 12(3)(a)(i) of the Act as it fails to require the Applicant to serve a copy of the application and name reservation on any person. It was necessary for the Tribunal to deal with the Applicant's submissions as to CIPC's linear treatment of the names "TROLI" and "TROLLI".

- firstly, it may be that the name "TROLI" is confusingly similar to the name "TROLLI" and vice versa;
- the fact that the companies with the name "TROLI" may be in deregistration process does not take anything further. The fact remains that they are currently registered (noting that one is finally deregistered)

Section 158(b)(ii) compels both the Tribunal and the CIPC, when determining a matter brought before it, where if any provision of the Companies Act or a document in terms of the Companies Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of the Companies Act and will best improve the realisation and enjoyment of rights.

Tribunal has the exclusive jurisdiction to settle disputes as to whether a name contravenes sections 11(2)(b) or (c), and not the CIPC. By issuing the Form CoR9.5, the CIPC is unlawfully appropriating to it, powers vested exclusively in the Tribunal as per section 12(3)(a)(ii). Insofar as the application for TROLLI is concerned, section 11(2)(a) would be applicable and therefore the CIPC was entitled to reject the reservation of this name.

Order:

- the decision of the CIPC in terms of CoR9.5 dated 27 September 2022 under reference 9373994038, insofar as it relates to the reservation of the name "TROLI" only, is hereby reviewed, and set aside; and
- the CIPC is directed, insofar as it relates to the reservation of the name "TROLI" only, to reconsider the application taking into account section 12(3)(a) read with Regulation 9(4).

Seminar on Expanding the role of the Companies Tribunal

- By Dumisani Mthlane

On Thursday 9 March 2023, the Companies Tribunal (the Tribunal) in partnership with the North-West University (NWU) hosted a seminar under the theme, 'expanding the role of the Companies Tribunal – a case for comprehensive amendments'. The seminar took place at the NWU in Mafikeng campus in a hybrid format.

The purpose of the seminar was to engage stakeholders and raise awareness about Tribunal's services as contemplated in the Companies Act of 2008 (the Act) and explore areas that the Tribunal can expand its functions so that it is more effective. The seminar contributed towards broadening the understanding of Tribunal's services from stakeholders based in North-West Province. The seminar discussed the following topics:

SESSION 1

Overview of the mandate of the Companies Tribunal in adjudication and resolution of company's disputes involving the promotion and protection of shareholder activism under the Companies Act 71 of 2008

–by Ms. Keamogetse Motlogeloa

Ms Motlogeloa gave background about the term shareholder. She stated that the Companies Act regulates shareholder activities for retail and institutional shareholders. The retail shareholder is basically the individual investor investing in a company in their own personal capacity, while an institutional shareholder refers to legal entities investing on behalf of their

members.

She outlined several rights that shareholders are provided for by the Companies Act, these rights include amongst others; the rights to propose shareholders, resolutions during the annual general meeting, voting rights during the annual general meeting and the basic right of participating within the annual general meeting. Shareholders are also empowered through the Act to further discipline management or bring legal action against directors of their company in their own capacity or acting for the company via the shareholder regulations that are presented through Section 161 to Section 165 of the Companies Act.

She stated that currently the mandate of this Tribunal does not encourage shareholder activism. The mandate and the jurisdiction of the Tribunal is not adequate to resolve certain matters in relation to shareholders, only the High Court can deal with substantial issues, such as the oppression of a shareholder, which means when the shareholder is oppressed in that company, they cannot approach the Tribunal and only the High Court can resolve these issues. She added that the Tribunal does not have an enforcement mechanism. More should be done in this respect, to ensure that should shareholders be able to have their day in the Tribunal, that their orders that are presented can be enforced without going to the High Court and that may have financial implications.

She recommended that the Companies Act should be amended such that mandate of the Tribunal to employ



mandatory ADR. Another recommendation was that parties that refuse to participate in ADR, be penalised. The Tribunal should further adopt a variety of methods to create awareness. The overall mandate of the Tribunal must be extended to address this group that are unique to shareholders, in order to promote shareholder activism in South Africa.

Alternative Dispute Resolution (ADR)

—by Judge Dennis Davis

Judge Davis indicated that ADR is a mechanism set out in Section 166 of the Act as an alternative to a court and as a means of resolving company law disputes, easily, capably and professionally. It involves mediation and arbitration. He stated that the amount of cases that go before the courts in the area of company law, to a large degree relate mainly to business rescue. And a number of commercial disputes are sent for arbitration, costs are high, and this has become an industry for retired judges.

He mentioned that lawyers, acting on behalf of both sides, would in the adversarial context of our legal system exacerbate the disputes, poured more fuel onto the fire and therefore involve their clients in extraordinary costs. He also mentioned that courts have warned that litigation only succeeds in increasing the hostility between the parties, whereas the mediation might well preserve relationships after the dispute has taken place. And the reason for that is because when you deal with mediation it allows for dialogue, it allows for a process by which the parties can reach each other without in the sense moving into an automatically adversarial process. He believes that we should move from litigation to mediation and certainly the Tribunal should play an increasing role in this.

He advised that the Tribunal has to develop their legitimacy and their confidence within legal community that it can perform the task of complex arbitration of legal disputes in same way as private arbitrators.

How to ensure a company name reservation does not infringe a registered trademark and unpack the Mbongwe decision

—by Mr Tevin Jones

Mr Jones started by differentiating the company's register and the trademarks register and indicated that these are two separate registers. If one wants to register a company, this is governed by the Companies Act, and the company name would appear once reserved and being registered on the company's register. Similarly, if one registers a trademark, this is governed by the Trademarks Act and the trademark will then appear on the trademarks register. He explained the name reservation process with the CIPC.

He cautioned that before one reserves the company name, one should conduct a pre-trademark search and a browser search to confirm that the name one wants to reserve is available to use. He advised that it is the responsibility of the applicant seeking registration of the company to ensure that the name chosen does not infringe on someone else's registered or unregistered trademark rights or a company name rights in South Africa.

He explained Section 11 of the Companies Act which sets out the criteria for names of companies which states that, the name of a company must not be the same as or confusion is similar to another name. He also advised on the correct procedure to follow when reserving a company name, i.e. conduct a free trademark search on the trademarks register and it's free on CIPC website. He stated that one should tick the applicable class before proceeding with the search, this is important as it determines the parameters of your search results, and you can only search for one class at the time.

He mentioned the second step and as advised on the CIPC website, is to conduct an online browser search using preferred search engines like Google, Microsoft, Edge etc. He advised that, one needs to ensure that name reservation is not potentially infringed on other parties' registered rights or potentially a common law use right. If unsure, it is preferable to speak to an intellectual property specialist. If due diligence is not conducted when reserving a company, this may lead to third party claims which are costly. Therefore, third parties are technically entitled to demand that you change your company name and seize all use of your company name in any form whatsoever at your own cost. This could be very devastating and costly to new companies that have invested time and money into their business.

Mr Jones unpacked the Mbongwe decision. This decision is about company name objection that Comair which is the Applicant filed against a company name called Kulula South Africa (Pty) Ltd. The Respondent did not file the response with the Tribunal and so the applicant filed an application for a default order, and it was granted. In the decision the Tribunal stated that it does not have power to order CIPC to change respondent's company name if the respondent does not comply with the order within 30 days. The Applicant went to the High Court to enforce the order of the Tribunal and it was granted. The High Court went further by declaring that the Tribunal is in fact empowered to make an administrative order to direct the CIPC to change the name of the company to its registration number if that company fails to comply with an order made by the Tribunal.

What is important about the Mbongwe decision is that that there is now a High Court precedent that confirms that the Tribunal does have the power to direct the CIPC to change the company's name to its registration number if the company does not comply with the Companies Tribunal order within the

requested time frame.

SESSION 2

Re-consideration of the Close Corporations Act 69 of 1984 in terms of opportunities presented for the extension of the mandate of the Companies Tribunal in the areas of Reservation of Names, Changing of Names, Extension of AGM/ meetings, Removal/Cessation of Directors/ Members, and Investigation

–by Dr Elfas Torerai

In his presentation, Dr Torerai highlighted the following challenges:

- Public perception - people seem to equate free services to poor quality. Considerably fewer people opt to approach the Companies Tribunal than those who go to court.
- Consequently, the goal of the Companies Tribunal is somehow defeated as disputes that could be speedily dealt with continue to drag in the courts, adversely affecting business growth in South Africa. It is also possible that fewer corporations/companies are registering now compared to the period when close corporations were allowed.
- Based on the above, he thought necessary to expand the mandate of the Companies Tribunal

The following **recommendations** were made:

- There is a case made for the re-consideration of the Close Corporations Act in terms of opportunities it presents for the Companies Tribunal to expand its mandate.
- The Close Corporations Act provides a less cumbersome, less formalities and has a user-friendly approach. The Companies Tribunal can leverage on this to expand its reach and usefulness to businesses in South Africa.
- The Close Corporation Act has limited personal liability for shareholders and it could explain why more business operations were opened under the Close Corporations Act as opposed to the Companies Act.
- It can be concluded that efforts to review the Close Corporations Act with a view to expand the mandate of the Companies Tribunal are a move

in the right direction. If anything, this could assist in changing the negative perceptions businesses have towards the Companies Tribunal.

Re-thinking the Co-operatives Act 14 of 2005 and the Companies Act 71 of 2008 (Non- Profit Companies) in terms of opportunities presented for the extension of the mandate of the Companies Tribunal in the areas of Reservation of Names, Changing of Names, Extension of AGM/ meetings, Removal/Cessation of Directors/ Members, and Investigation

–by Dr. PT Magau

Dr Magau made the following recommendations:

- The role and mandate of the Companies Tribunal is vital in adjudicating company disputes and contributing to the creation of fair and ethical corporate practices.
- Nonetheless, various legislative restrictions hamper the Companies Tribunal from exercising its role and mandate optimally.
- The regulation of the mandate of the Companies Tribunal regarding the reservation and changing of names, extension of AGMs and disputes regarding directorship needs to be amended.
- South African policy makers should strongly consider revamping the role and mandate of the Companies Tribunal.

Exploring possible opportunities presented by Business Rescue under the Companies Act 71 of 2008 for expansion of the mandate of the Companies Tribunal

–by Adv. Lucinda Steenkamp

Adv Steenkamp started by giving background about business rescue concept, i.e., it is provided by Chapter 6 of the Companies Act and the Companies Act Regulations. These provide business rescue process and requirements associated therewith. The CIPC is not responsible for the appointment and only endorses such appointment if the Legislative requirements are met such as, valid business rescue practitioner licence. CIPC has to maintain and enforce compliance with the Act which includes the administrative side of the process of business rescue, but with limited powers in terms of the business rescue practitioners.

She further stated that, Companies Act provides for two ways in which the business rescue can be initiated. This is through special resolution, to commence business rescue as described in Section 29 of the Act or through a court order to begin business rescue proceedings Section 131 of the Companies

Act and any effective person may approach the court for a business rescue. This includes shareholders, creditors, trade unions etc.

The functions of the CIPC relating to business rescue primarily is overseeing and management of the filing of relevant business rescue notices. Further functions include the accreditation of professional bodies as described in Section 138.

Adv Steenkamp stated that one of the problematic areas within business rescue include the misalignment in the process of appointing a business rescue practitioner between the Board and the court options. The Tribunal have the authority to review CIPC's decision in this instance and not the power to adjudicate in terms of dispute between the parties on authority to appoint.

She highlighted a matter where there was a dispute between the parties about the authority to appoint additional business rescue practitioners which went to the Constitutional Court. It was held by the Constitutional Court that the authority to appoint additional business rescue practitioners vested in the company and not the existing business rescue practitioner. This matter led to problems because it was decided four years after the company commenced business rescue. This did not assist in the rescue of this company.

Another challenge identified by Adv Steenkamp is that Companies Act provides for the removal as replacement of a business rescue practitioner only via an application to a court, i.e. Section 130 and 139. This results in an extensive and time-consuming process. And also, that nothing in the current Act which prohibit an appointed business rescue practitioner to make use of entity funds the very company that it is trying to rescue to oppose any litigation brought by an affective person to remove him/her as the business rescue practitioner. This places additional financial strain on companies already in distress.

She concluded by stating that the Tribunal could play a vital role in business rescue. The expansion of the Tribunal's mandate in this area could assist greatly, in terms of the legislative burden, the cost and time as well as contributing to the affective enforcement of the Act.

The seminar was a success, all Speakers made input and agreed that the jurisdiction of the Companies Tribunal be extended. The seminar attracted academics, company law practitioners, the business fraternity, North-West provincial government representatives and company law students. The Tribunal will continue to partner with institutions of higher learning.



Delegates that attended the seminar physically

Stakeholder engagement

- By Dumisani Mthlane

The Tribunal started the financial year on high note by hosting many engagements with various stakeholders based in Gauteng, Limpopo, and KwaZulu-Natal provinces. Stakeholder engagement is our priority to ensure that Tribunal's services are known by the public.

Rand Easter Show 2023

The Rand Easter Show 2023 was preceded by the SMME Summit which took place on the 5th April, the Summit is known for launching, supporting and growing business and



Photos taken at the Rand Easter Show

small enterprises. The purpose of the summit was to link SMME's with corporates and the public sector representatives for them to share information regarding their services ranging from resolution of company disputes, funding, training for SMME's and market access. During the Summit, the Tribunal got an opportunity to make a presentation and exhibit its services.

From the 06 to 10 April 2023, the Tribunal together with other government departments and entities exhibited their services for the Rand Easter Show 2023. Participation at the Rand Show assisted the Tribunal to forge relations with other key stakeholders like the Departments of Economic Development in both Gauteng and North-West Provinces. Delegates were informed about the Tribunal's services; they were afforded an opportunity to ask questions; and receive information brochures.

The Rand Easter Show is one of the biggest exhibitions in the country, participating at the Rand Show elevated the brand of the Tribunal and presented a great opportunity for the Tribunal to reach out to new stakeholders.

African Continental Free Trade Area Agreement (AfCFTA) Awareness Workshop

The Tribunal exhibited at an awareness workshop on the Implementation and Operationalization of the African Continental Free Trade Area Agreement (AfCFTA), which took place on 9th June 2023 at Polokwane in Limpopo province.

The workshop was organized by the Department of Trade, Industry and Competition (the dtic) and the Limpopo Economic Development Agency (LEDA). The workshop aimed at apprising South African companies and export ready SMME's on the benefits of trading under the AfCFTA, which intends to create a single continental market with a population of about 1.3 billion people and a combined Gross Domestic Product (GDP) of approximately USD 3.4 trillion.

This workshop was the third after successful workshops held in Kwazulu-Natal and Gauteng provinces and was part of a series that the dtic is rolling out nationally. Addressing the delegates, Mr Calvin Phume, the Director for Africa Bilateral Economic Relations, stated that the AfCFTA represents a remarkable achievement, symbolizing our collective commitment to harnessing the potential of trade to drive growth, create jobs, and uplift the lives of millions of people across the continent. He also told delegates that the workshop serves as a crucial platform for fostering awareness and understanding of the AfCFTA among provincial stakeholders i.e., private sector, SMME's, women and youth owned enterprises. He added that, it is a testament to our dedication as Government to ensuring that all regions and communities are well-informed and actively participate in this landmark initiative.

Amongst the benefits of AfCFTA include expanded market access to a single market of 1.3 billion people across Africa, trade facilitation through reduced trade barriers and simplification of customs procedures, diversification of supply chains, investment opportunities, sectoral growth, job creation and enhanced competitiveness.

The Tribunal showcased its products and services through an exhibition where brochures were shared with delegates, and they were also afforded an opportunity to engage the Tribunal about its mandate.

Deputy Minister's Business Seminar

The Deputy Minister's Business Seminar took place on 29th June 2023 at the Indoor Sports Complex in Alfred Duma Local Municipality (Ladysmith) in KwaZulu-Natal province.

The Business Seminar was hosted by **the dtic's** Deputy Minister, Ms. Nomalungelo Gina and it was part of the Presidential Imbizo build-up session. The Business Seminar was well attended and comprised of businesspeople from



Delegates that attended the AfCFTA Awareness Workshop

uThukela District Municipality. Explaining the purpose of the Seminar was Ms. Ncumisa Mcata-Mhlaule, **the dtic's** Chief Director for Agro-processing. She stated that the event is part of **the dtic's** campaign to promote entrepreneurship and enterprise development. She urged delegates to use this seminar to gain as much information as possible. The seminar was supported by the Speaker of Alfred Duma Local Municipality, Mr. BP Sithole and Mr. Chris Mtshali, the Chief Director for Enterprise Development: Co-ops and SMMEs (KZN EDTEA). Mr. Mtshali stated that their aim as the Department is to deal with all hindrances of business development. He explained objectives of Operation Vula which is amongst others; to find markets for entrepreneurs in terms of the sectors identified. Mr. Sithole stated that the Municipality has set aside R4,5 million to create a building where businesses will be able to trade.

Delivering the Keynote Address was the Deputy Minister of **the dtic**, Ms. Nomalungelo Gina. She spoke about the important role that SMMEs can play in reducing unemployment and the importance of formalizing their businesses. Formalizing a business is important especially when requesting government support. She also mentioned that Alfred Duma region is big in agriculture, those that are interested in trading marijuana should contact government to get licenses.

Presidential Imbizo

The Presidential Imbizo took place on 30th June 2023 at Oqungweni Sports Field under uThukela District Municipality in KwaZulu-Natal province.

The Imbizo was led by President Cyril Ramaphosa, and it was aimed at unlocking barriers to effective service delivery and improving on programmes and projects that address development in the district. Members of the community used the Imbizo to raise service delivery issues with the President, his Executive and local Councillors. It was attended by thousands of community members, Government Ministers

and Deputy Ministers, Chiefs, Church leaders and Government officials. Community members also got an opportunity to receive information and help from government departments and agencies.

It was important for the Tribunal to participate at the Imbizo because it's part of the APP commitments that it participates in events that are organized by the Government and Ministry. The Tribunal was able to distribute brochures and explain its mandate to community members through an exhibition. Other institutions that exhibited were government departments, government entities, academic institutions, and municipalities.

Other engagements the Tribunal participated in was the Access to market opportunities for your business, organised by the Proudly SA and TKZN which took place in Durban, and the meeting with the Black Lawyers Association. We would like to remind our stakeholders that our doors are open if they wish to invite us for a presentation.

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