Companies Tribunal
a member of the dti group

Companies Tribunal Bulletin

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From the Editor's desk

Inside this edition

The Companies Tribunal (Tribunal) welcomes you back in the New Year. This publication is aimed at engaging stakeholders, building relations and soliciting views from stakeholders, as well as share with you the strides that the Tribunal is making in advancing its mandate.

We would like to express our appreciation for the feedback received from stakeholders. This Third Quarter Bulletin features articles relating to Alternative Dispute Resolution (ADR) in order to encourage readers to consider using ADR as a means of resolving commercial disputes. Due to the significance of public companies convening AGM to promote good corporate culture and accountability this bulletin features an article on the application of an extension to convene Annual General Meeting. The Tribunal's outreach initiative and appointment are highlighted.

I would like to end by a quote from unknown person who said "Don't be discouraged. It's often the last key in the bunch that opens the lock."

We urge stakeholders to make contribution and suggestions in the next Bulletin, such can be sent to the following email addresses: SKhoza@companiestribunal.org.za or DMthalane@companiestribunal.org.za

For any other information kindly contact us on 012 394 3071 or Registry@companiestribunal.org.za

I hope to hear from you!

Editor

S Khoza
Manager: Research

The establishment of Social and Ethics Committees from a business perspective

- By Simukele Khoza

This is an edited version of the presentation by Ms Sindi Zilwa

Ms Sindi Zilwa CEO Nkonki Incorporated

The Companies Tribunal held a seminar in February 2015 on "Promoting Enterprise Development and Accountable Corporate Citizenry". Ms Sindi Zilwa from Nkonki Incorporated, a firm of Chartered Accountants made a presentation that focused on the challenges and opportunities experienced in setting up the Social and Ethics Committees (SEC). She identified that while there are opportunities mainly there are challenges. She highlighted the manner in which the scope of the SEC has been broadened. She indicated that before the introduction of the Companies Act of 2008 (the Act) there were transformation committees that were only focusing on transformation. The Act has since broadened the area of focus regarding social corporate responsibility.

Ms Zilwa urged corporates to comply with the principles as set out in the United Nations Global Principles by understanding that corporate sustainability starts with a company's value system and a principled approach to doing business. She further challenged companies to operate in ways that meet fundamental responsibilities in the areas of human rights, labour, environment and anti-corruption. In the South African context, companies should focus on:

- implementing the Organisation for Economic Co-operation and Development recommendations regarding corruption,
- complying with both the Employment Equity Act and BBBEE requirements, being good corporate citizens,
- caring for the environment and promoting public safety,
- preserving consumer relationships,
- ensuring continuous engagement between labour and employer,
- giving comprehensive report to the shareholders at the company's AGM on all of the areas raised above.

The feedback to the board of directors used to be for instance two to five minutes as directors were only interested in knowing the BBBEE score level. Since the introduction of SEC, board members are paying attention to feedback with the understanding that if they do not give it attention, shareholders will require the Chairperson of the SEC to elaborate for better understanding.

Three opportunities for companies were identified regarding SECs:

- The requirement by the Act for SEC has actually elevated that need for monitoring compliance with legislation,

which was one of the areas that were previously considered unimportant for business.

- best practice has now been converted into written policies and procedures by businesses.

- the need to report to the shareholders on areas relating to SEC at AGMs in terms of the Chairman of the SEC's report which is included in the company's annual report.

Challenges of implementing SEC include the role clarification between the various committees. The name Social and Ethics Committee prompted some companies to bring anything that relates to ethics, code of conduct, everything that could assist in putting in place some preventative measures to ensure that the ethical culture of the organisation is acceptable.

These committees included the Audit, Risk, Human Resources and Procurement Committees. The challenge was how to avoid duplication and ensure synergies between these committees. She suggested synergy can be achieved by:

- The **Audit Committee** and the SEC must work hand-in-hand so that by the time the audit committee sits to approve the financial report, the non-financial data and the sustainability data there can be an indication to the audit committee that one has already dealt with the SEC matters.

- The **Risk Committee** is mandated to check the impact of non-compliance with laws and regulations. In terms of SEC there are particular laws and regulations that must be complied with. In case of risk areas not complied with, such non-compliance has to be elevated by SEC to the Risk Committee for monitoring as one of the risk areas and make sure that mitigation measures are put in place.

- **Human Resource Committee** have the responsibility to improve employment relationships, create decent working conditions, and comply with both Employment Equity Act and Skills Development Act. Employment relationships present an opportunity for both labour and the employer to create decent working conditions. SEC can help monitor and report on non-compliance with these legislations.

- The **Procurement Committee** deals with preferential policy document, the score card; how many black businesses have been procured from and that is the bigger portion of the SEC mandate to make sure that preferential procurement is being adhered to.

Advertising and sponsorship is one of the things that the SEC has to deal with; a member of the SEC should receive a report of non-compliance or a departure from the Advertising Standards of South Africa stating how a particular product is positioned.

In terms of consumer relationships, a member of the SEC has the responsibility to understand how complaints are resolved and whether your customers are satisfied; if those consumer relationships are not coming to your radar screen then you will be failing in your duty as members of the Social and Ethics Committee.

It must be noted that the fundamental difference between SEC and other committees is that the SEC is not an implementing committee but a monitoring committee that reports to the shareholders.

Ms Zilwa advocates that corporates must embrace a principled approach to doing business in order to achieve the objectives of SEC and corporate sustainability.

Application for an extension of a period of convening an Annual General Meeting

- By Siyabonga Ntshangase

In terms of the companies Act, 71 of 2008 (the Act), public companies are required to hold Annual General Meetings (AGMs). The first AGM meeting must take place within 18 months of the incorporation of the company and thereafter the meetings must be held no more than 15 months after the previous AGM or another period as determined upon application by the Companies Tribunal. The company must deliver a notice of the meeting to each shareholder at least 15 business days prior to the AGM. All shareholder's meetings (this includes an AGM) of public companies may be held in South Africa or in another country, but must be accessible for electronic participation by all shareholders, irrespective of the location of the meeting.

A public company is a profit company that is not a state-owned company, a private company or personal liability company; only public companies and state-owned companies are obliged to convene an AGM. The AGM provide an opportunity for the Board of Directors to account to shareholders on the overall status and performance of the Company. Amongst others, matters that may be considered at the AGM at minimum include directors and audit committee reports; audited Annual Financial Statements for the year immediately preceding financial year; Social and Ethics committee reports where applicable. Other business that may be conducted at the AGM is the election of directors, as required by law and the Memorandum of Incorporation (MOI); appointment of the auditors and audit committee; any matters raised by shareholders, regardless of whether advance notice of the topic was given.

The Act set timeframes that needs to be complied with regard to the convening of AGM as stated above. However, companies can apply to the Tribunal for an extension of the time to hold its AGM. The Companies Tribunal does not have jurisdiction to extend the initial first 18 month period from the date of incorporation of the company to convene an AGM.

Section 61 (7) (b) provides that after the first AGM, which is in-line with subsection 61(7) (a), a public company must convene an AGM once in every calendar year, but no more than 15 months after the date of the previous AGM or within an extended time allowed by the Tribunal, on good cause shown. An extension will only be granted if 'good cause is shown'. This requirement is intended to dissuade non-compliance with the Act without substance.

Of significance regarding section 61 (7) (a) is that good cause has to be shown for the Tribunal to grant any application for extension to convene the AGM. The meaning attributed to just cause or good cause is broad and based on the circumstances of each case. Therefore, this means that what is good cause has to be decided on a case-by-case basis. The Court in ***Brits and another v eaton NO and others [1984] 4 All SA 664 (T)*** held that a wide meaning must be given to the words 'Justa causa'. It can be deduced from this decision that there is no hard and fast rule to establish what constitutes good cause. Evidently, in a foreign case of ***Twentyman & Co. v Wolf Carlis (1890-1892) 6 HCG 13***, it was held that 'just cause' in Roman-Dutch Law must be given equivalent meaning to "valuable consideration" founded from English law. In South Africa, just cause was described by Solomon ACJ (as he was then), in the classic case of ***Conradie v Rossouw 1919 AD 279 at 288–289*** to mean a reasonable cause. That is to say, a reason motivating the application must be a good and legitimate one and not one contrary to law, morality or public policy.

Section seven (7) (l) of the Companies Act provides that, amongst others, the purpose of the Act is to provide for predictable and effective environment for the efficient regulation of the companies. As such, the Companies Tribunal adjudicated an ex parte application of ***South African Express Airways SOC Ltd***. In this case, the applicant applied to the Tribunal for an extension of a period to convene an AGM in line with section 61 (7) (b). The applicant stated that, as per section 61 (7) (b), the applicant was required by the Act to hold its AGM on the 31 December 2014. However, the applicant omitted to specify a proposed date (or extension period) for the AGM.

The Companies Tribunal refused the application on basis that it was incomplete. It can be deduced from this provision that the proposed date on which the AGM is to be held is an important consideration but not a decisive factor. Applicants are encouraged to propose a reasonable date since the extension date cannot be arbitrarily determined by the Tribunal since granting unreasonable extensions might defeat the purpose of the Act.

It is clear from the decision of ***South African Express Airways SOC Ltd*** that to extend the AGM, the applicant must indicate the proposed date to convene the AGM. Although the Act and Regulation does not explicitly require the party requesting an extension to provide the date for the extension, it the writer's view that the Tribunal may in its discretion grant an extension where the proposed date of extension is not given provided it is not unfair to any of the party(ies) concerned or unreasonable. Therefore, whether or not the applicant indicates a proposed date to convene an AGM, it does not preclude the Tribunal to extend the period to a date it deem fit taking into account all surrounding circumstances and the degree of the 'good cause shown'.

The Tribunal adjudicated an ex parte application of ***African Bank Limited (ABL)*** in terms of Section 61 (7) (b) of the Act. The application was brought by a duly authorised curator of ABL. The curator (who is also a deponent of the affidavit) avers that the applicant was placed under his curatorship on the 10th of August 2014 by the Minister of Finance. The curator of the applicant stated that the end of financial year of the applicant is 30 September each year. The application was filed with the Tribunal on the 31st of March 2015.

Section 30 of the Act requires the applicant to prepare Annual Financial Statements within six (6) months after the end of each financial year. This means that the Annual Financial Statements were due on the date the application was filed (31 March 2015). Moreover section 61 (8) (ii) of the Act requires an AGM to, at a minimum, provide for audited financial statements for the year immediately preceding the financial year.

The applicant's last AGM was held on the 6 of February 2014 and was required to convene the next AGM on or before the 6 May

2015 unless the Tribunal granted the extension on the application. The applicant reasoned that it was unable to convene the AGM on the grounds that it needed to comply with the minimum requirements of an AGM provided for in paragraph 61(8) (ii), as there was a delay in the preparation of the Annual Financial Statements.

The Tribunal remarked that the processes required whilst the Applicant is under curatorship may have resulted in delays in producing the Annual Financial Statements and thus a delay in the AGM. This can be understood to have been the just cause which informed the Tribunal's decision of granting the application. It must be noted that the company was immediately before the application, put under curatorship, as such, the placing under curatorship had a significant bearing on the preparation of the Annual Financial Statements.

The Tribunal held that the applicant has shown good cause. It was because of the delay in the preparation of Annual Financial Statements (which an AGM cannot proceed without) that caused the applicant not to hold an AGM on the required and prescribed time. The Tribunal granted the extension to hold an AGM to a time no later than 30 September 2015.

A Shift from Adversarial Litigation of Commercial Disputes to Alternative Dispute Resolution

- By Siyabonga Ntshangase

The Companies Act 71 of 2008 brought about important changes in South African models of resolving commercial disputes. Noticeable concerns were that the traditional method of resolving commercial disputes through adversarial litigation had become expensive, sluggish due to the high caseload in courts, and cumbersome as a result of the formalities required in terms of the court processes. These concerns necessitated the establishment of the Companies Tribunal as a forum for commercial disputes resolution through legislative means other than litigation, i.e. alternative dispute resolution (ADR). The Companies Tribunal has jurisdiction nationwide.

In most jurisdictions the term alternative dispute resolution is to some degree a misnomer as it denotes that litigation is a norm and ADR is an alternative to the norm. According to Meek, Susan B. 1996, in the United States of America, the preponderance of lawsuits filed are resolved outside court or before trial and only the least cases are decided through adversarial trial litigation. The shift in the judicial systems in the world makes it more accurate to perceive litigation as an alternative and ADR as a norm. South Africa will soon follow this trend with the establishment of the Companies Tribunal and the recent court annexed mediation introduced by the Department of Justice and Constitutional Development.

Below is an overview of some of the ADR cases which came before the Tribunal.

Overview of ADR Cases before the Companies Tribunal

The Tribunal is mandated to resolve disputes through ADR in terms of the Companies Act. The Tribunal since its inception heard a number of ADR cases. If in the course of alternative dispute resolution either party fails to participate in the process in good faith, or if the Companies finds that there is no reasonable probability of the parties resolving their disputes through that process, then the

Companies Tribunal must issue a certificate in the prescribed form stating that the process has failed in line with section 166 (2) and regulation 132 (3) in a form of CTR 132.3. Secondly, if the dispute resolution is successful, the Presiding Tribunal member will issue a decision and such a decision may be made an order of the court as per section 167 and regulation 133 of the Act.

Any information disclosed by the parties during the mediation process is confidential and cannot be used as evidence in a court of law or any forum. Although the Tribunal seeks to educate the public regarding matters of ADR, because of its public mandate, it undertook not compromise the confidentiality of ADR proceedings. As such, the overview of the cases is provided in such a way as to safeguard the identity of the parties.

Case highlights

Case 1

The dispute before the Tribunal was that there was an agreement entered into by the parties to the effect that there shall be sharing of profits every after 10 years and the applicant alleged complete non-compliance to the agreement. The applicant sought an order claiming his profits in compliance with the initial agreement. The Tribunal acknowledged that the dispute between the parties arose in 2003 (13 years ago).

The Prescription Act 68 of 1969 (Prescription Act) regulate the prescription period in different categories of debts. The Tribunal held that the applicant was required in terms of the Prescription Act to lodge the claim within 3years from the date the dispute arose. This means that the debt in question fell within section 11 (d) of the Prescription Act. Section 11 (d) of the Prescription Act provides that save where an Act of Parliament provides otherwise, the prescription period is three years in respect of any other debt.

In passing, the Tribunal remarked that the applicant should have acted at that time the dispute arose and sought relief in terms of the Close Corporation Act, 69 of 1984 or in terms of other avenues to the disposal of the applicant. The Tribunal held that it did not have the necessary jurisdiction to hear the matter as the debt owed to the applicant (if any) had prescribed. The matter was declared final and closed.

Case 2

The applicant filed an application to the Tribunal for ADR. The applicant submitted that he was denied access to the financials and related records by the respondent. Furthermore, the Applicant submitted that the Respondent changed the banking details of the Close Corporation without the applicant's prior consent. Due to the voluntary nature of the alternative dispute resolution, the respondent did not attend the hearing. A presiding Tribunal Member, in-line with section 166 (2) issued a certificate declaring that the ADR process has failed. The certificate was issued on the date of set down and duly served to both parties.

Case 3

The applicant filed an application to the Tribunal for alternative dispute resolution. The applicant is a natural person whereas the respondent is a juristic person. The applicant deposed in an affidavit that he is a shareholder of the respondent and that he applied unsuccessfully for financial assistance from the respondent. The applicant sought an order from the Tribunal ordering the respondent to afford the applicant financial assistance as a shareholder of the respondent in terms of Section 45 (1) read with Section 2 of the Companies Act.

The applicant specifically indicated that the dispute arose in terms of section 2 and Section 45 (3) (a) (ii) of the Companies Act. In this case, one party appeared in person whereas the other had legal representation. The respondent submitted that the ADR processes as contemplated in section 166 of the Act are voluntary. The respondent submitted further that the applicant had to obtain consent from the respondent for the proceedings before the Tribunal to proceed. In the absence of the respondent's consent to participate in the ADR proceedings, the process was impossible and that the application lacked merits.

The essence of the respondent's case lies on the submission that 'the respondent has not consented to ADR and, as it is a voluntary process, is not and cannot be bound to participate in the process; the Tribunal is not empowered, absent the respondent's consent, to grant relief in terms of the ADR processes. The Respondent’s assertion on the merits of the case was that the applicant is not a company, nor is he related or inter-related to the respondent; there is no duty (on the facts relied on by the applicant and/or generally in law) on the respondent to provide the applicant with the financial assistance sought; and in the absence of such a duty. The mediation process was unsuccessful on the basis that the consent of both parties is required for the mediation to proceed.

Amendment of the Companies Act

It is the writer's view that in order to ensure speedy and easy access to redress, it is necessary to amend the Companies Act to provide for mediation to be made compulsory like it is in other international jurisdictions. It is clear from cases 2 and 3 that the object of providing for speedy, informal and cost effective mechanism of resolving commercial disputes may be defeated by the voluntary nature of the process with parties holding the dominant power or most resources refusing to participate in the process. The refusal to consent to the process may be further exacerbated by the fact that the culture of resolving commercial disputes through ADR in South Africa is not significantly entrenched.

Cape Law Society AGM exhibition

- By Dumisani Mthalane

The Tribunal recognises law societies as one of the key stakeholders. In this regard it has reached out to Law Societies with a view to inform the members about the Tribunal and its services as well as discuss pertinent issues relating to Tribunal cases. Consequently the Tribunal was invited to exhibit at the Cape Law Society Annual General Meeting (AGM) from Friday, 30 October 2015 to Saturday, 31 October 2015 at the Flamingo Casino in Kimberly.

Cape Law Society council members with Justice Minister Michael Masutha (front row, second from left) who was the keynote speaker

The Cape Law Society comprised of lawyers from three provinces, i.e. Northern Cape, Eastern Cape and Western Cape. The AGM was officiated by the Honourable Justice Minister, Advocate Michael Masutha, MP. The aim of the Companies Tribunal exhibition was to raise awareness about the existence of the Tribunal to members of the law society, educate them about the Tribunal's role in mediation, conciliation and arbitration as an alternative to going to court. To also inform the members about the process of filing applications with the Tribunal for adjudication or alternative dispute resolution.

In his keynote address, Minister Masutha acknowledged the presence of the Tribunal and emphasized inter alia; the need to regulate the fee structure in the legal profession in order to bring an element of fairness and improve accessibility to ensure that "the cost of litigation which makes the legal profession inaccessible to the majority of people is corrected," he said.

New appointments

- By Selby Magwasha

Building a competent and credible workforce is one of the key strategic goals of the Tribunal Human Resource strategy.

Mr Sammy Ramaphoko is the new Deputy Manager- Human Resource Management, he took the office from 01 December 2015. Mr Ramaphoko holds a Baccalaureus Technologiae Degree in Public Management from Tshwane University of Technology, National Diploma in Public Management from University of South Africa and various certificates in the field of Human Resource Management. He has vast experience in Human Resource Management and Development from both the public sector and entities. He brings a wealth of experience in talent management, conflict management, communication and change management.

Prior to joining Companies Tribunal, Mr Ramaphoko worked at the South African Local Government Association (SALGA) as a Manager: Talent Acquisition. He spent most of his career at National Treasury as a Human Resources Business Partner. Mr Ramaphoko's new responsibilities include staff recruitment, training, performance management, employee wellness as well as Human Resource policy development.

The Companies Tribunal welcomes Mr Sammy Ramaphoko as a Deputy Manager- Human Resource Management and wish him an enjoyable and productive stay at the Tribunal.

Mr Sammy Ramaphoko the newly appointed Deputy Manager HR

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