



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT018FEB2016

In the matter between:

PORTFOLIO PHARMACEUTICALS (PTY) LTD

Applicant

and

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

First Respondent

SAURABH DESAI EXPORTS PVT LIMITED

Second Respondent

Presiding Member	:	Khashane La M. Manamela (Mr.),
Dates of Hearing	:	08 July and 29 August 2016
Date of Order	:	29 August 2016
Date of Reasons for Order	:	31 August 2016

DECISION (Reasons and an Order)

K.La M. Manamela

Introduction

[1] On 17 December 2015 the Companies and Intellectual Property Commission (the Commission), acting in terms of section 171 of the Companies Act 71 of 2008 (the Act)¹ issued a compliance notice to a director of the applicant. The director or applicant or both were directed as follows:

“The following is required from you **within 40 business days from the date of this Notice:**

- **Send copies of requested documents as per COR 24 that was sent to the Director requesting access to information.”²**

[2] In terms of Form COR 24 referred to above, the second respondent (or someone on its behalf) required access to various documents in terms of section 26 of the Companies Act. The documents comprised copies of memorandum of incorporation and its amendments; records of directors; copies of reports presented at annual general meetings; notices and minutes of shareholders meetings and shareholders resolutions, and

¹ Section 171(1) reads in the material part:

(1) Subject to subsection (3), the Commission ...may issue a compliance notice in the prescribed form to any person whom the Commission or Executive Director, as the case may be, on reasonable grounds believes -

(a) has contravened this Act; or

(b) assented to, was implicated in, or directly or indirectly benefited from, a contravention of this Act, unless the alleged contravention could otherwise be addressed in terms of this Act by an application to a court or to the Companies Tribunal.”

² See indexed pp 37-38.

copies of written communications by the applicant to holders of its securities, and minutes and resolutions of meetings of directors and directors' committees.³

[3] The applicant was dissatisfied with the compliance notice and eventually launched this application, which became opposed by the second respondent. Papers were exchanged and the matter came before on 08 July 2016. The hearing was very eventful and below, I briefly reflect the material issues on which I was required to make rulings, before the proceedings started and were ultimately adjourned as part-heard to 29 August 2016.

Postponement

[4] The following extract from the transcript of the hearing on 08 July 2016, captures the rub of the postponement application:

“MR STRYDOM: Thank you, Mr Chair. Mr Chair, there has been, there is before you an application for a postponement, a short postponement I might add, by the applicant. The reason for this is that there are currently court proceedings in the High Court of Bombay that we say will have a material impact on the proceedings before you, depending on what orders are being made. The court proceedings in Bombay, you would know from the papers that the executors of the estate of the late Doctor Desai applies for certain interim interdictory relief and some of that relief is aimed at restraining Mr Dhiren Shah and Mr Vidyut Shah, the registered directors of the second respondent, from acting in that capacity whatsoever”⁴

[underlining added for emphasis]

³ See indexed p 39.

⁴ See lines 4-13 on p 2 of the transcript of 08 July 2016.

[5] The application for postponement was opposed by the second respondent, significantly on the ground that, the proceedings in the High Court of Bombay have no bearing to those before this Tribunal. Again, I depend on the transcribed submissions to capture the essence of the contentions in this regard as follows:

“In relation to the relief that they are asking for and whether it has an impact on this, it is not your problem, with respect. If you, your order will not be that they comply with the compliance notice, your order will either be you refuse to set aside the compliance notice, or you will set aside the compliance notice, one or the other. It is a very telling thing that this applicant who came to court asking that you set the compliance notice aside does not want the application to be heard now...”⁵

[6] In the end, I refused postponement and ordered that the applicant pay costs relating to the application on a party and party scale of the High Court.⁶⁷

Condonation

[7] The applicant required condonation for the late launch of the main review application. In terms of section 172 of the Companies Act a person objecting to a compliance notice issued by the first respondent has to approach this Tribunal on review within 15 business days after receipt of the notice.⁸ As indicated above, the notice was

⁵ See from line 23 on p 25 to ln 4 on p 26 of the transcript of 08 July 2016.

⁶ See regulation 156(1) of the Companies Regulation, which reads in the material part: (1) Upon making an order, the Tribunal may make an order for costs. The Companies Regulations, 2011 were determined by the Minister of Trade and Industry in terms of section 223 of the Companies Act and published under GN R351 in Government Gazette 34239 of 26 April 2011 (the Companies Regulations).

⁷ See lines 21 -24 on p 67 of the transcript of 08 July 2016.

⁸ See section 172(1) which reads in the material part: “(1) Any person issued with a compliance notice in terms of this Act may apply to the Companies Tribunal in the case of a notice issued by the Commission ...

issued on 17 December 2015. The application was issued on 16 February 2016 and therefore much later than the prescribed time-period.

[8] Essentially the applicant attributed the cause of the delay to be at the door of its attorney of record. It was submitted that the attorney went away after receiving the notice from his client; prepared a draft letter meant for the investigator of the first respondent in which legal arguments were raised regarding the validity of the request for access to information predicated on the compliance notice; consulted with counsel, and only upon receipt of some documents (referred to as complaint documents) did the applicant become aware of further procedural deficiencies in the process. I granted condonation generally in the interests of justice and undertook to provide reasons for my finding.

[9] In my view, it was in the interests of justice that the matter be fully disposed of on the merits rather than on procedural grounds.⁹ To determine merits of the application, both sides' versions were necessary. This is not to underrate the importance of an application for condonation and disregard of the governing statutory provision in this regard. Also, the explanation for the delay although not fully coherent, did not lead me to draw an inference of laxity and willful disregard of the processes of this Tribunal on the part of the applicant. It also couldn't be inferred that the applicant was not serious about the pursuit of its intended relief.

to review the notice within - (a) 15 business days after receiving that notice; or (b) such longer period as may be allowed on good cause shown.”

⁹See generally Cilliers AC, Loots C and Nel HC *Herbstein and van Winsen The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa* 5th edition (Juta Cape Town 2009) at pp 723-724.

Merits

[10] The hearing was postponed after only Mr F Strydom, appearing for the applicant, has made submissions. Due to other prior arranged engagements from counsel and myself as the presiding member, the proceedings could only be recommenced on 29 August 2016.

[11] On resumption of the proceedings, the applicant submitted that it was no longer persisting with the grounds of review in respect of all documents, but only two categories of documents. The remaining categories were concerning those documents ordered by the first applicant in terms of sections 24(3)(c)(iii) and 24(3)(f) of the Companies Act. The submission was that access to company records in terms of section 26 does not include company records to be kept in terms of those provisions. This appears to be a lacuna in the Companies Act, but there isn't much anyone can do under the circumstances. Mr PN Levenberg SC, appearing for the second respondent, had actually already conceded this aspect in his filed heads of argument. He also submitted to this Tribunal to modify the compliance notice in this regard.¹⁰

Conclusion and Order

[12] Against the above turn of events, I found no reasons to deviate from an order proposed by the parties. I undertook to still furnish the reasons for the order for compliance with regulatory procedures.¹¹

¹⁰ See paras 119-120 of the second respondent's heads of argument.

¹¹ See section 195(5) which provides: "The decision of a panel on a matter referred to it must be in writing and include reasons for that decision."

[13] In the proceeded to make an order along the following lines:

1. the compliance notice issued on or dated 17 December 2015 by the first respondent be and is modified in the following respects:
 - 1.1 Annexure “A” to the compliance notice is modified to require the applicant to furnish the second respondent, within 10 business days from the date hereof, being 29 August 2016, copies of requested documents as indicated per modified COR 24, marked annexure “B”;
 - 1.2 Annexure “B” (i.e. modified COR 24) shall include all the documents as originally ordered in terms of paragraphs (a); (b) and (d), but documents in terms of paragraphs (c) and (e) to exclude those contemplated in sections 24(3)(c)(iii) and 24(3)(f) of the Companies Act 71 of 2008, and
 - 1.3 the above is subject to the contents of the modified Annexure “A” to the compliance notice and modified COR 24, whose modifications were effected by hand and terms thereof read into the record.
2. by agreement between the parties, each party is to pay its own costs, and
3. the applicant pays the second respondent’s taxed or agreed costs in respect of the application for postponement as ordered on 08 July 2016.

Khashane La M. Manamela

Member, Companies Tribunal

31 August 2016

Appearances:

For the Applicant	:	Adv F Strydom
Instructed by	:	Moss Marsh & Georgiev Attorneys Johannesburg
For the First Respondent	:	No appearance (and no papers filed)
For the Second Respondent	:	Mr PN Levenberg SC
Instructed by	:	Bowman Gilfillan Attorneys Johannesburg