



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case no.: **CT01399ADJ2023**

In the matter between:

THE SOUTH AFRICAN MEDICAL ASSOCIATION NPC

Applicant

and

THE CIPC

First Respondent

RICHARD TUFT

Second Respondent

Presiding member: Richard Bradstreet

Dater of hearing: 29 September 2023

Date of decision: 24 November 2023

DECISION (Reasons and Order)

INTRODUCTION

1. The Applicant is The South African Medical Association NPC ("SAMA"), a non-profit company duly incorporated and registered in terms of the laws of the Republic of South Africa, with registration number 1927/000136/08, and having its registered address recorded as Block F, Castle Walk Corporate Park, Nossob Street, Erasmuskloof Ext 3, Pretoria, 0181.

2. The First Respondent is the Companies and Intellectual Property Commission (“the CIPC”), a juristic entity duly established in terms of the Companies Act 71 of 2008 (“Companies Act”), with its registered address at the DTIC Campus Block F, 77 Meintjies Street, Sunnyside, Pretoria, 0001.
3. The Second Respondent is Richard Tuft (“Dr Tuft”), an adult male practicing as a medical doctor, and is a member of the Applicant, ordinarily resident at 11 Lovers Walk, Kenilworth, Cape Town, 7708.
4. The present application concerns a compliance notice issued by the CIPC, in terms of section 171(1) of the Companies Act, to SAMA, which SAMA now seeks to have set aside.
5. The matter was set down for hearing on 29 September and the Tribunal heard argument on behalf of SAMA on that date. The Respondents chose not to make oral submissions, but in adjudicating this matter, regard will be had to the answering papers filed on behalf of the CIPC.

BACKGROUND TO COMPLIANCE NOTICE

6. On 12 December 2022, Dr Tuft submitted a complaint to the CIPC, relating to SAMA, and specifically concerning the allegations of (i) SAMA’s board having acted inconsistently with the Companies Act, and (ii) infringement of his rights under that Act as well as SAMA’s memorandum of incorporation (“MOI”).
7. Pursuant to this complaint, the CIPC conducted an investigation and a report was prepared (case G364 (2022), dated 2 March 2023) (“the Inspector’s Report”). The report found, *inter alia*, that SAMA’s failure to call and constitute National Council meetings in accordance with the provision of its unregistered rules meant that it had violated its own MOI, and caused prejudice to Dr Tuft. Accordingly, it was recommended that the Commissioner of the CIPC approve and issue a compliance notice.

8. The compliance notice was issued on 15 March 2023, and required that SAMA, within 20 business days from the date of the notice, (i) comply with Schedule 4 Parts A(1) to A(3) of its MOI, (ii) submit to the CIPC a statement that the directors have so complied, and (iii) provide reasons to the CIPC as to why SAMA did not timeously comply with these provisions.
9. It is relevant that subsequent to the complaint being received, and prior to the preparation of the Inspector's Report, the appointed inspector sent a letter to SAMA consisting of, *inter alia*, details of the complaint, to which SAMA responded. In SAMA's response (dated 23 February 2023), it indicated that it was aware of what it understood to be non-compliance with the Companies Act, and explained that it had been in the process of obtaining the approval of a new MOI that it considered necessary to bring the organisation into compliance with the Act, and which it would assumedly then act in accordance with. The matter being addressed internally was described as "a cause of heated debate between a small number of members and the directors", and SAMA welcomed the CIPC's intervention. It was further explained that the proposed new MOI had failed to obtain sufficient support to be adopted at SAMA's previous AGM, but that SAMA hoped to have it passed the upcoming one scheduled for 23 March 2023, the directors having in the interim engaged on an "educational drive to educate members" in relation to the "need" for the MOI to be replaced.
10. The Inspector's Report considered certain requests made to the CIPC by SAMA in their response, including "an indulgency from CIPC, while directors again attempt to have the proposed MOI adopted by the members at the upcoming AGM". In relation to the requests directed at the CIPC, the report found the following (at para 8.3):

"It is evident from the provisions of section 66(1), that the Respondent should manage the SAMA in consideration of its adopted and registered MOI. Considering the continued internal company battles relating to the dissenting views on [a] new MOI and Rules for SAMA, CGSE is of the view that the Respondent, instead of ignoring the provisions of its

current MOI, should have consideration of the provisions of section 156 reading with section 166 of [the Companies Act], which provide for appropriate adjudication by the Companies Tribunal and/or a division of the High Court.”

11. The AGM scheduled for just over a week after receipt of the compliance notice was postponed for lack of quorum until 30 March 2023, and the new MOI was approved at the meeting held on the postponed date. This application was formally brought on 2 June 2023 (which is the date that the CTR142 form was stamped, although the form itself bears the date 31 May).
12. The main relief sought by SAMA in the present matter is the setting aside of the compliance notice dated 15 March in its entirety. Before making a determination on this issue, the question of condonation for the late filing of the application must be considered.

CONDONATION FOR LATE FILING

13. The CIPC has opposed the application for late filing of the application on the basis that SAMA had been made aware of the complaint as early as 3 February 2023, knowing that it was required to comply with Schedule 4 Part A of its MOI. SAMA had been reminded of its right to apply to the Companies Tribunal for an order confirming, modifying or setting aside all or part of the compliance notice, and specifically been made aware of the possibility of raising an objection to the notice in terms of section 172 of the Companies Act.
14. When issued with a compliance notice by the CIPC, section 172(1) provides for any person issued with such a notice to apply to the Companies Tribunal to review the notice, either within 15 business days after receiving the notice, or within such longer period as may be allowed on good cause shown. In the present case, the period between issue and filing is 30 business days.

15. In determining whether good cause has been shown, much will inevitably depend on the circumstances of the case. Innes CJ has remarked (in *Cohen Bros v Samuels* 1906 TS 224) that:

“[i]n the nature of things it is hardly possible, and certainly undesirable, for the court to attempt to [define good cause]. No general rule which the wit of man could devise would be likely to cover the varying circumstances which may arise in applications of this nature. We can only deal with each application on its merits, and decide in each case whether good cause has been shown.”

16. During April 2023, SAMA – through its attorneys – endeavoured to engage with the CIPC to either withdraw or amend the compliance notice, in view of explanations and context being provided in relation to the perceived difficulties presented by SAMA’s MOI at that time. The chain of correspondence appears to have ended on 20 April, with a letter from the CIPC which *inter alia* explained that it could not issue a compliance certificate in view of SAMA’s non-compliance, and that an application would need to be made to the Companies Tribunal for relief in terms of section 172.
17. SAMA has explained that after receipt of the CIPC’s letter of 20 April 2023, it was decided that a meeting would be arranged with its attorneys to discuss what steps were required to be taken. The attorney dealing with the matter until then advised SAMA that he thought it would be prudent to involve another director from the firm with more experience in the area, but this “ideal” director was ill at the time, and subsequently underwent an emergency procedure. As a result, the first day that both directors could meet with representatives of SAMA was on Friday 5 May 2023. At this meeting, the decision to approach this Tribunal was made, but then there was a further delay as a result of the first attorney’s prior engagements until the following Friday (12 May).
18. Without repeating the details of further events set out in the founding affidavit, it suffices to say that its drafting and settling took until the evening of 30 May 2023, when the firm received input and comments from counsel. It was only

two days thereafter that the application was filed, and in the circumstances, I accept the submission made on behalf of SAMA that it was not tardy in giving instructions to its attorneys, and it appears that the firm did prepare the application as soon as it was reasonably able. Accordingly, I find that good cause has been shown to condone the late filing of the application, the substance of which now needs to be considered.

THE COMPLIANCE NOTICE

19. As already mentioned, the compliance notice required SAMA to comply with Schedule 4 Parts A(1) to A(3) of its (previous) MOI, which relate to the process for the appointment of directors, and read as follows:

“(1) The voting members shall elect, according to their various geographical and group constituencies, representatives to serve as National Councillors. Every third year, the National Council comprising these duly elected representatives shall hold elections to appoint a Chairperson and Vice-Chairperson of SAMA both of whom will serve on the Board of Directors of SAMA.

(2) The National Councillors shall, at the elections held by the National Council, elect Chairpersons of certain of the Committees of SAMA as set out in the Company Rules, who will serve as directors of SAMA. The Board of Directors will consist of the Chair and Vice-Chair (elected at National Council), the President and two Deputy Presidents of the Trade Union, the Chairpersons of the Professional Affairs Standing Committees, the Chairpersons of the Specialists and General Practitioners Membership Committees respectively, and, if necessary, when lacking in such representation after the above-mentioned members have been elected/introduced in their ex officio capacities, additional Board Members in a number to be approved from time to time by the National Council to proportionally ensure representation by Historically Disadvantaged Individuals, female medical doctors and young medical doctors. The Board will have the authority to invite members with the necessary skill sets and expertise to make representations or to give input for such periods of time and in those circumstances that might be required.

(3) The annual term of directors will be renewable for three consecutive years.”

20. Moreover, SAMA was required to submit a statement confirming compliance by the directors, and to provide reasons as to why compliance by SAMA was not

timeous. Mr Cook, representing the applicant, presented argument before the Tribunal on the interpretation of what was required of SAMA in relation to the specific directions in terms of the notice. In particular, the issue was raised as to whether certain of these applied in the alternative. I do not consider it necessary to deal with that issue at this stage, because the first question that needs to be considered is whether, in view of the alleged illegalities in SAMA's previous MOI, the directions given by the CIPC in its compliance notice were valid, or whether SAMA was required to act contrary to the law. Whether or not SAMA complied is not relevant to the question of whether the notice should be set aside in its entirety on the basis that it fundamentally required SAMA to act contrary to provisions of the Companies Act, or to do something that was impossible pursuant to the adoption of the new MOI. This is what I understand to be the crux of the case put forward by Mr Cook.

21. Section 15(1) of the Companies Act requires that each provision of a company's MOI must be consistent with the Act, and that any provision that contravenes, or is inconsistent with the Act, is void. The only qualification to such invalidity relates to where the specific content or effect of the relevant provision is required of the company by or in terms of any applicable public regulation, or by the listing requirements of an exchange, which is not applicable in this case.
22. If it is so that formal compliance with SAMA's previous MOI, and particularly the provisions in respect of which compliance was mandated in terms of the notice, would result in a substantive breach of the Companies Act, then it would not be appropriate to enforce such formal compliance. This, in my view, would be a basis on which to set the notice aside, because the CIPC cannot have the power to act, or require a company to act, in contravention of the statute in terms of which it is – and indeed any South African company – is established.

Did the compliance notice require SAMA to act unlawfully?

23. SAMA has pointed to a number of provisions in its previous MOI that are in conflict with the Companies Act. These relate to directors' tenure and rotations, the powers of the board, and election of directors. It goes without saying that the replacement of the MOI would have been likely to resolve any issues that SAMA had identified and specifically sought to resolve in the new MOI, and that the repeal of the previous MOI would have had the effect of repealing Schedule 4 Part A (with which compliance was required by the CIPC in its notice). However, the question to be determined is whether compliance with Schedule 4 Part A specifically would have been in contravention of the Companies Act.
24. It is evident from paragraphs (1) and (2) of the relevant part of SAMA's previous MOI, quoted above, that it conferred power on the National Council to decide on the membership of SAMA's board of directors, generally by virtue of being able to control who was to occupy *ex officio* positions on the board. Most, if not all, of SAMA's board would be appointments of such a nature, the chair and vice chair of various committees automatically being afforded a seat on the board by virtue of such roles within the broader governance structure.
25. The Applicants in this case submit that the Companies Act envisages that in the context of a non-profit company with members, directors must be chosen by the members, and that this structure is therefore inconsistent with the Act. Item 5(1) of Schedule 1 to the Act provides as follows:
- "If a non-profit company has members, the Memorandum of Incorporation must – (a) set out the basis on which the members choose the directors of the company..."*
26. In the opinion provided to SAMA by a firm of attorneys on 7 October 2019, which apparently formed the basis for the overhaul of SAMA's MOI, it was noted that "on a strict interpretation of the Companies Act, the MOI is not compliant" for the reason that the National Council (and not the members) determine the membership of the board. I am not convinced that such a "strict" interpretation

of Item 5(1)(a) aligns with other provisions dealing with the board of non-profit companies.

27. Although Item 5(1)(a) does refer to the “choice” of directors being attributable to members, it does not necessarily imply direct control by the members over board membership, as would be implied if reference were made to the “election” of directors. It seems as though members of SAMA’s board would properly be said to be “appointed” by the National Council, the membership of which is directly determined by members of the company. By the addition of another tier to the governance structure of the company, the members choose the directors indirectly, by electing persons who shall constitute the body responsible for the appointment of directors to the board.
28. The above-mentioned opinion also stated that “[t]he Companies Act requires that at least one third of directors on the Board must be elected by the members each year”. Item 5(1)(b) of the same schedule, however, provides that:

“if any directors are to be elected by the voting members [the MOI must] provide for election each year of at least one-third of those elected directors.” (emphasis added)
29. Sub-Item (1)(a) must obviously be read together with sub-Item (1)(b), and it is therefore impossible that the former can properly be construed as *requiring* that members elect directors to the board. It follows that what is required of the MOI is that it must provide for the way in which members are involved in the process of determining the directors of the company – hence the use of the word “choose” rather than “elect”. In my view, a reading of either sub-item that renders the previous MOI non-compliant on the above reasoning would not only need to be strict, but also taken out of context.
30. In terms of section 66(4)(a)(i) of the Companies Act, a company’s MOI may provide for “the *direct* appointment and removal of one or more directors by any person who is named in, or determined in terms of the Memorandum of Incorporation” (emphasis added). In terms of SAMA’s previous MOI, it is the

National Council that performs this function, the directors not being elected by voting members. The rotation requirement in relation to one third of directors would appear to only apply where directors *are* to be elected by voting members, in which case, it is only one third of those *elected* directors (that is, elected by the members, rather than appointed by the National Council) that must be subject to re-election each year.

31. On a literal reading of the Companies Act, I cannot agree with the interpretation expressed in the opinion provided to SAMA on 7 October 2019. Unlike in the case of a (non-state-owned) profit company, there is no provision similar to section 66(4)(b) that requires a non-profit company to have any specific percentage of directors elected by members. This is reaffirmed by the use of the word “if” in Item 5(1)(b) of Schedule 1 to the Act, quoted above.
32. Another question arises in relation to the reference to “person” in section 66(4)(a)(i). Although this word is defined in the Act to include a juristic person, this provision does not expressly envisage that an entity such as the National Council of SAMA, being an elected body of persons, would fulfil such a role. This is clearly an alterable provision of the Act, and the use of “may” would not necessarily exclude the possibility of an MOI providing for a group of persons to exercise direct control over the membership of the board. If it is permissible for one person to be the decision-maker, there does not appear to me to be any reason why such a decision could not be made by a group of persons – as would practically be the case where a resolution is passed by a juristic person so empowered in terms of another company’s MOI, in respect of appointment of directors to the board of the latter company. In my view, a decision made by a group of elected persons would, if anything, enhance rather than detract from standards of corporate governance.

Was SAMA unable to comply with the compliance notice?

33. Since Part A of Schedule 4 to SAMA's previous MOI does not seem to me to be in conflict with the Companies Act, I must agree with the submission made in answer by the CIPC that at the time of the issuance of the Compliance Notice, Schedule 4 Part A of SAMA's MOI was valid and enforceable. The answering affidavit goes on to state the following (at para 6.2.2):

"[C]onsidering Applicant's letter to CIPC on 23 February 2023, it is submitted that the Applicant at the time of the AGM was unsure and/or not convinced about the correct legal nature of the AGM versus the provisions of Schedule 4 Part A of its MOI at the time, hence its request for a legal directive from CIPC. Despite the advice emanating from the Inspector's Report proposing a legal directive thought the Companies Tribunal and/or a Court of law, the Respondent continued in its ignorance of the provisions of its MOI at the time." (references to annexures removed)

34. The letter referred to was in reply to the initial letter sent to SAMA by the CIPC inviting a response to the complaint under investigation, and was signed by the both the chairperson and vice-chairperson of SAMA. In this letter, it was acknowledged that certain members, including Dr Tuft had expressed the view, *inter alia*, that (i) the CIPC has confirmed there to be *prima facie* evidence that the board of SAMA is illegal and has not complied with the MOI, (ii) the MOI is valid and legal as it stands and does not require amendment, and (iii) the CIPC has not found the MOI to be non-compliant with the Companies Act.
35. It seems clear from the letter that the board was uncertain about the lawfulness of certain provisions of its MOI, admitting that "[s]ince 2019 the Board [had] defaulted to the position as set out in the Companies Act, whenever there [had] been doubt as to what the position is, given the conflicts between the Companies Act, MOI and unregistered Rules (which were the common practice)", and acknowledging that this had "unfortunately caused much unhappiness within a small group of members". Moreover, and pertinently, the board expressly requested the following from the CIPC:

“1. A directive from CIPC on whether their interpretation (as advised by the Company Secretary) of Schedule 3 and clause 7.2.5 of the MOI read with section 61(8) of the Companies Act and thereby holding director elections at the AGM is correct?

2. A directive from CIPC on whether the MOI can elect to hold an AGM but then direct that directors be voted on at another meeting of the members, at the exclusion of section 61(8) of the Companies Act?

3. An indulgency from CIPC while the directors again attempt to have the proposed MOI adopted by the members at the upcoming AGM, as the Company is in a transitional phase, following the statutory audit and legal opinion obtained in 2019, which has seen a change in process at the Company which is not sitting well with certain members and is therefore meeting resistance, despite the Board being adamant to have a legally compliant MOI, free of any ambiguities and/or inconsistencies.

4. Guidance on the way forward should the proposed MOI again be rejected by the members, i.e., can the Company continue to operate under the current MOI (annexure A) despite all the concerns raised and risk to the Company? The view being that if the proposed MOI is again rejected the directors will then need to bring this matter to the Companies Tribunal for mediation while the directors continue to follow the prescripts of the Companies Act.”

36. In relation to the planned replacement of the MOI, the directors sought permission (“an indulgency”) from the CIPC to go ahead with adopting the new one, but at the same time seem to acknowledge the possibility that SAMA could continue to operate under the previous MOI in force at that time. The letter concluded with the request that the CIPC provide “any feedback and/or proposed steps forward” by 20 March in order for this to be shared with the members at the AGM (scheduled for 23 March). On 15 March, the compliance notice was issued.

37. At this stage, it appears that the relevant provisions of the previous MOI were indeed legally enforceable, but Mr Cook, for the Applicant, made the argument that these provisions are unenforceable for having ceased to exist. Before engaging with this point, a summary of the series of events pursuant to the issue of the compliance notice will provide context to this argument:

- On 23 March, the AGM was not able to take place as planned because it was not quorate, and was postponed by a week.
- On 30 March an AGM was held at which the new MOI was adopted.
- On 3 April, attorneys acting for SAMA addressed a letter to the CIPC informing it of the adoption of the new MOI and requesting either the withdrawal of the compliance notice, or the issue of a compliance notice. It was alleged that the compliance notice had become “moot” on the basis that the portions of the previous MOI that it required compliance with no longer formed part of SAMA’s MOI.
- On 11 April, the CIPC replied, disputing the mootness of the notice, and noting that SAMA had failed to comply.
- On 19 April, SAMA’s attorneys responded reiterating the impossibility of complying with the previous MOI, and the reasons for the adoption of the new one (as already dealt with in detail above).
- On 20 April, the CIPC responded again, drawing SAMA’s attention to the appropriate manner to have the notice reviewed.

38. Mr Cook argued that the wording of the compliance notice allowed for an interpretation whereby it would be acceptable for SAMA not to enforce the relevant provisions of its MOI, if it provides an explanation as to why it did not. As already set out, the notice required that SAMA, within 20 business days: (i) comply with Schedule 4 Parts A(1) to A(3) of its MOI (para 2.1 to 2.3 of the notice), (ii) submit to the CIPC a statement that the directors have so complied (para 2.4), and (iii) provide reasons to the CIPC as to why SAMA did not timeously comply with Schedule 4 Parts A(1) to A(3) of its MOI (para 2.5). The submission was made that the second and third directions set out above (paras 2.4 and 2.5) should be read disjunctively – i.e. if the directors cannot confirm that they have complied with Schedule 4 Parts A(1) to A(3), then they should

give reasons for this. Thus, it was argued, since compliance was impossible, it would suffice for reasons to be given.

39. Although authority was given in support of this contention, I cannot find therein support for an interpretation that negates the need to comply with the first direction listed above. The use of the word “timeous” in the third direction used in relation to the compliance can, in my view, only envisage the circumstances where the company had, pursuant to the issue of the notice, been brought into compliance, as would be confirmed in terms of the second direction.
40. Even if this interpretation were to be accepted, if the reason given for not complying with Schedule 4 Parts A(1) to A(3) is that it was impossible to do so, the impossibility must have existed at the time of the notice being issued. The impossibility cannot arise later, particularly when the impossibility was created by the conduct of the company subsequent to receipt of the notice, as summarised above. I would be inclined to accept this argument if it were the case that the CIPC was seeking to force SAMA to comply with an obligation that doesn’t exist (as was submitted in argument).
41. The further submission was made that this Tribunal cannot make an order where it doesn’t have the power to do so, with reference to the case of *Morar NO v Akoo* 2011 (6) SA 311. In this case, Wallis JA found – in the context of a partnership – that when a court goes beyond merely enforcing the contractual obligations of partners, it must identify a source of its power to do so (paras 18-19). I am, however, not persuaded that this principle is relevant to what the Tribunal is required to decide in the present application for the purposes of determining whether to set aside the compliance notice. This would require consideration of the circumstances prevailing at the time that compliance notice was issued. The CIPC does not seek to now enforce compliance in terms of the notice; SAMA seeks to have the compliance notice set aside, and relies on legal impossibility as a ground on which to do so.

42. When asked to address the Tribunal on the question of timing, Mr Cook responded in two parts. He reiterated that the previous MOI cannot now be enforced, which I accept for the purposes of argument, but do not see as being relevant to the relief sought (as discussed above). He then traced the timeline of events leading up to the adoption of the new MOI, noting that its adoption was anticipated to be imminent, after a process that had taken years. The submission was also made that the directors acted in accordance with their duties rather than any ill-intent, but this is not relevant to the question of whether it was possible for them to comply with Schedule 4 Parts A(1) to A(3) of its previous MOI, which was valid and enforceable at the time.
43. Mr Cook suggested that for self-created impossibility to be an impediment to the CIPC's opposition, allegations of *mala fide* conduct ought to have been raised in its answering papers, but I cannot take the same view. For the impossibility argument to succeed, it must have been impossible for SAMA to have complied at the time that compliance was required. If this was not clear to the directors at that time, it should have become clear in the exchange of correspondence with the CIPC thereafter. As already set out above, the relevant provisions were valid and enforceable, and only became unenforceable when the MOI was amended. The board of SAMA may have had doubts about their enforceability, but chose not to take the advice of the CIPC, after seeking its advice.
44. Not only is it clear that SAMA failed to comply with the compliance notice; their reasons given to justify non-compliance do not pass muster. Even if the notice envisaged that an explanation for not complying (at all, rather than timeously) could be given in lieu of a confirmation that the relevant provisions had been complied with, the explanation given does not justify the failure to comply with provisions of the MOI existing at the time that were valid and enforceable, where compliance was practically and legally possible. Moreover, I do not see any reason that would justify the Tribunal setting aside the compliance notice.

45. To set the notice aside would be condoning what seems to be a disregard by the board of clear instructions from the regulator without good reason. Compliance with the notice and the overhaul of the company's governance structure (which had been in progress for years) were not mutually exclusive. Compliance with the previous MOI as required by the CIPC would not have prevented the company from being able to go ahead with the passing of the new MOI in due course.

ORDER

46. It is accordingly ordered that:
- (a) the late filing of this application is condoned; and
 - (b) the main application is dismissed.

Richard Bradstreet

Member of the Companies Tribunal

24 November 2023