IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

("THE TRIBUNAL")

CASE NUMBER: CT004OCT2015

In the matter between:

THE NEW RECLAMATION GROUP (PTY) LTD **APPLICANT**

and

COMPANIES AND INTELLECTUAL

PROPERTY COMMISSION **RESPONDENT**

Coram: PJ Veldhuizen

Order delivered 10 November 2015

ORDER

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1. Introduction

1.1 The Applicant is a private company, with registration number 2005/041029/07, registered in terms of the company laws of the Republic of South Africa, with its principal place of business at 263 Oxford Road, Illovo, Johannesburg.

1.2 The Applicant has a public interest score exceeding 350 and is required in terms of section 33 (1) (a) of the Companies Act No. 71 of 2008 ("the Act"), read with regulation 30 (2) of the Companies Regulations 2011, to file together with its annual return, the companies audited financial statements.

1.3 On 31 August 2015, the Applicant requested the Respondent to declare that the audited financial statements were to be treated as confidential in terms of section 212 of the Act. The Respondent rejected this request and provided written reasons for its decision on 16 September 2015.

1.4 This is an application brought in terms of section 172, read with section 212 of the Act, where the Applicant applies to the Tribunal for the review of a decision taken by the Respondent on 16 September 2015.

1.5 The issues to be decided by the Tribunal are whether:

1.5.1 the Tribunal has jurisdiction in terms of section 172 to review the decision taken by the Respondent; and

1.5.2 whether the decision taken by the Respondent amounts to a Compliance Notice.

2. Background

2.1 The Applicant is a private company specialising in the collection and recycling of waste material.

2.2 The Respondent requested the Applicant on 10 July 2015 to file audited financial statements for the financial years ending 30 June 2012, 2013 and 2014.

2.3 The Applicant alleged that it had consistently filed its returns and complied with the Act and regulations thereto in all respects, save that it had not filed its audited financial statements, as required.

2.4 The Applicant claims confidentiality of its audited financial statements in terms of section 212 (1) of the Act.

2.5 In an email dated 31 August 2015, the Applicant's attorneys set out a motivation to the Respondent in support of the Applicant's claim for confidentiality as follows:

2.5.1 the content of the audited financial statements are private and confidential and not publicly available;

2.5.2 the Applicant is a profit company;

2.5.3 the information contained in the audited financial statements contains price sensitive information which may be used by competitors to easily determine the Applicant's pricing structure;

2.5.4 due to the extremely competitive environment in which the Applicant operates, any disclosure of the audited financial statements would be detrimental to the Applicant;

2.5.5 The audited financial statements contain taxpayer information and the Tax Administration Act, 2011 and in particular section 67 (3) restricts the Respondent from disclosing, publishing or making such information known to any other person;

2.5.6 the audited financial statements contain financial and commercial information, the disclosure of which would be likely to cause harm to the commercial financial interests of the Applicant;

2.5.7 the disclosure of the audited financial statements would put the Applicant at a disadvantage in their contractual or other negotiations with its customers and suppliers *vis a vis* third-party competitors; and

2.5.8 a catch-all motivation related to the disclosure of its audited financial statements amounting to an unfair competitive advantage to third parties which could cause material and irreparable harm to the Applicant, its staff and its service providers.

2.6 The Respondent advised the Applicant's attorneys on 16 September 2015 that the Applicant *"as a company with a public interest score above 350, it has a social and economic significance and owes accountability to the public, public includes creditors; employees; customers; potential investors; shareholders; directors; prescribed officers and regulators, etc. Information presented in the annual financial statements by companies is prescribed in terms of the Companies Act for all companies required to file annual financial statements and with the International Financial Reporting Standards informing the disclosures to be made by all such companies. In order to ensure that there is attainment of the policy objectives of the Companies Act, No. 71 of 2008 as amended, being corporate transparency and high standards of corporate governance, your claim for confidentiality in terms of Section 212 of the Companies Act is therefore not granted."*

3. Relief sought

3.1 The Applicant requests the Tribunal:

3.1.1 to set aside the decision of the Respondent in terms of section 172 to reject the Applicant's request for the audited financial statements to be treated as confidential information; and

3.1.2 to determine, in terms of section 212 (3) of the Act, that the audited financial statements are to be treated as confidential information.

4. Procedural requirements

4.1 The Applicant has filed the prescribed form CTR 142, the sworn supporting affidavit, the resolution authorising the Applicant, Notice of Representative in terms of regulation 157 and the Memorandum of Incorporation of the Applicant on the Respondent via email on 8 October 2015.

4.2 The Respondent has not filed any opposing papers.

4.3 Accordingly, the Tribunal's procedural requirements have been met and the matter will be decided in the absence of any papers from the Respondent.

5. Applicable Law

171. Issuance of compliance notices.—

(1) Subject to subsection (3), the Commission, or the Executive Director of the Panel, 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) A compliance notice may require the person to whom it is addressed to—

(a) cease, correct or reverse any action in contravention of this Act;

(b) take any action required by this Act;

(c) restore assets or their value to a company or any other person;

(d) provide a community service, in the case of a notice issued by the Commission; or

(e) take any other steps reasonably related to the contravention and designed to rectify its effect.

(3) When issuing a notice in terms of subsection (1) to a regulated person or entity, the Commission or Executive Director, as the case may be, must send a copy of the notice to the regulatory authority that granted a licence or similar authority to that regulated person or entity, and in terms of which that person is authorised to conduct business.

(4) A compliance notice contemplated in subsection (1) must set out—

(a) the person or association to whom the notice applies;

(b) the provision of this Act that has been contravened;

(c) details of the nature and extent of the non-compliance;

(d) any steps that are required to be taken and the period within which those steps must be taken; and

(e) any penalty that may be imposed in terms of this Act if those steps are not taken.

(5) A compliance notice issued in terms of this section, or any part of it, remains in force until—

(a)

it is set aside by—

(i) the Companies Tribunal, or a court upon a review of the notice, in the case of a notice issued by the Commission; or

(ii) the Takeover Special Committee, or a court upon a review of the notice, in the case of a notice issued by the Executive Director; or

(b) the Commission, or Executive Director, as the case may be, issues a compliance certificate contemplated in subsection (6).

(6) If the requirements of a compliance notice issued in terms of subsection (1) have been satisfied, the Commission or the Executive Director, as the case may be, must issue a compliance certificate.

(7) If a person to whom a compliance notice has been issued fails to comply with the notice, the Commission or the Executive Director, as the case may be, may either—

(a) apply to a court for the imposition of an administrative fine; or

(b) refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of section 214 (3),

but may not do both in respect of any particular compliance notice.

172. Objection to notices.—

(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, or to the Takeover Special Committee in the case of a notice issued by the Executive Director, or to a court in either case, 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.

(2) After considering any representations by the applicant and any other relevant information, the Companies Tribunal, the Takeover Special Committee, or a court may confirm, modify or cancel all or part of a compliance notice.

(3) If the Companies Tribunal, the Takeover Special Committee or a court confirms or modifies all or part of a notice, the applicant must comply with that notice as confirmed or modified, within the time period specified in it, subject to subsection (4).

(4) A decision by the Companies Tribunal or the Takeover Special Committee in terms of this section is binding, subject to any right of review by, or appeal to, a court.

212. Confidential information.—

(1) When submitting information to the Commission, the Panel, the Companies Tribunal, the Council, or an inspector or investigator appointed in terms of this Act, a person may claim that all or part of that information is confidential.

(2) Any claim contemplated in subsection (1) must be supported by a written statement explaining why the information is confidential.

(3) The Commission, Panel, Companies Tribunal, Council, inspector or investigator, as the case may be, must—

(a) consider a claim made in terms of subsection (1); and

(b) as soon as practicable, make a decision on the confidentiality of the information and access to that information, and provide written reasons for that decision.

(4) Section 172, read with the changes required by the context, applies to a decision in terms of subsection (3).

(5) When making any ruling, decision or order in terms of this Act, the Commission, the Panel, the Companies Tribunal or the Council may take confidential information into account.

(6) If any reasons for a decision in terms of this Act would reveal any confidential information, the Commission, the Panel, the Companies Tribunal or the Council, as the case may be, must provide a copy of the proposed

reasons to the party claiming confidentiality at least 10 business days before publishing those reasons.

(7) Within five business days after receiving a copy of proposed reasons in terms of subsection (6), a party may apply to a court for an appropriate order to protect the confidentiality of the relevant information.

6. Evaluation of the Evidence

6.1 The Applicant was notified via email on 16 September 2015 by the Respondent that its claim for confidentiality in terms of section 212 of the Act has been rejected.

6.2 This does not amount to a Compliance Notice, as contemplated in Section 171 of the Act.

6.3 Such a Compliance Notice should be issued in the Prescribed Form COR 139.1.

6.4 The Applicant has not included such a Compliance Notice in its application to the Tribunal. Accordingly, the Tribunal is unable to deal with the matter, as requested, in terms of Section 172.

7. Findings

7.1 No Compliance Notice in terms of Section 171 has been provided to the Tribunal.

7.2 In the absence of a Compliance Notice as per 7.1, section 172 cannot avail the Applicant of the relief sought.

8. Order

For the reasons above, the application is dismissed.

PJ VELDHUIZEN

MEMBER OF THE COMPANIES TRIBUNAL

CAPE TOWN