

From the Editor's desk

Inside this edition

01 From the editor's desk

02 The value of implementing social and ethics committees (SECs) - by Simukele Khoza

03 The Tribunal opens Fraud and Ethics Line - by Sindi Khwela

04 The Companies Tribunal on an outreach drive - by Dumisani Mthlane

05 Case highlights - by Simukele Khoza

06 Driving the Tribunal - by Charmaine Wessels

It is a pleasure to introduce the first quarterly bulletin of the Companies Tribunal. The bulletin is an electronic publication which serves as a platform for engagement with various stakeholders on issues pertinent to company law particularly those falling within the mandate of the Companies Tribunal.

This publication features articles on social and ethics, highlights of Tribunal decided cases, and Tribunal's outreach drive.

The Companies Tribunal (Tribunal) is established in terms of section 193 of the Companies Act 71 of 2008 (the Act) and has been in operation since September 2012. It has jurisdiction throughout the country. It is mandated to adjudicate applications made in terms of the Act. As part of its adjudication function it considers amongst others applications for exemptions from establishing social and ethics committee, directorship and name disputes and extension of time to hold an annual general meeting (AGM). The Tribunal also serves an alternative dispute resolution body (i.e. mediation, conciliation and arbitration body) for complaints relating to company law.

I hope you will find this publication interesting and informative. Contributions, suggestions and reviews on the issues you would like to see featured are welcomed. Contributions must be sent to Mr Simukele Khoza or Mr Dumisani Mthlane at the following contact addresses: SKhoza@companiestribunal.org.za or DMthlane@companiestribunal.org.za. I would like to thank all those who contributed to the production of this publication.

Visit us online at www.companiestribunal.org.za for more information about the work of the Tribunal and recent decisions that have been issued.

For any other information please contact us on 012 394 3071 or email to Registry@companiestribunal.org.za. You can also report unethical behavior on the Fraud and Ethics Line 0800 20 20 34 or send email to tribunal@tipoffs.com.

I hope to hear from you!

Editor

S Khoza
Manager: Research



The value of implementing social and ethics committees (SECs)

- By Simukele Khoza

The Companies Tribunal is established in terms of the Companies Act, 2008 (the Act) to adjudicate applications made in terms of the Act. It also serves as an alternative dispute resolution body for complaints relating to company law. Any complaint which a person can refer to court, relating to company law, may be referred to the Tribunal for mediation, conciliation and arbitration. Some of the disputes that the Tribunal has considered in terms of mediation, conciliation or arbitration relates to directorship and mismanagement of finance. The Tribunal is mandated as part of its adjudication function to, amongst others, consider applications for exemptions from establishing Social and Ethics Committees (SECs).

Applications for exemptions from establishing SECs can be made on the basis that the company has some form of formal mechanism within its corporate governance structure in terms of other legislation that performs substantially, the same function that would otherwise be performed by a SEC; or having regard to the nature and extent of the company's activities, it is not reasonably necessary in the public interest for the company to establish a Social and Ethics Committee. The Companies Tribunal has received applications for exemptions from establishing SECs from companies in various sectors; such as agriculture, aviation, construction, finance, health, home owners associations, information technology, manufacturing, mining and retail.

The requirement, in terms of Section 72 of the Act for public listed companies and companies with a public interest score of over 500 points, to establish SECs was to encourage ethical business practices. SECs are intended to ensure that companies act responsibly and are accountable for decisions relating to their business practices.

At a seminar hosted by the Companies Tribunal on promoting enterprise development and accountable corporate citizenry, it was indicated that in the beginning, the implementation of SECs posed a challenge for companies. These challenges related to role clarification between various governance committees and understanding the role of SECs in general. However, the benefits of SECs have since been realised. These benefits include, amongst others, the monitoring of



Delegates at the Companies Tribunal Seminar on promoting enterprise development and accountable corporate citizenry

compliance with legislation previously considered unimportant for business and it presented an opportunity to convert best practices into written policies and procedures.

Although companies have embraced SECs, companies should continuously add value to communities, clients, suppliers and customers without being driven primarily by expectations to be profiled in the media. As a result, corporate accountability should move beyond focusing only on social concerns. The establishment of SECs should never focus on self-gratification and self-promotion, but rather be geared towards fundamentally impacting stakeholders' lives positively.

Companies should move beyond philanthropy and ensure the systemic integration of matters relating to SECs into business planning. Such matters relating to SECs involve addressing sustainability; impact on the environment; relationships with all stakeholders; interaction with, and impact of, company activities on the community within which the business operates; the treatment of, and investment in, its employees and its health and safety practices; black economic empowerment and the ethical corporate culture.

The emphasis of SECs is on companies having a social conscience as well as behaving as responsible corporate citizens.

A properly functioning SEC will contribute to the success of the company financially and also in building long lasting relationships with stakeholders, as well as improve ethical corporate culture.

Corporates are encouraged to champion the appointment of SECs with the understanding that as much as they make profits, they are committed to the developmental goals of South Africa.

Companies are therefore urged to commit greater resources to SECs in their business planning, monitoring and reporting processes. The SECs must report to shareholders at the

Annual General Meeting on the activities of the company relating to its mandate. Stakeholders are also urged to cooperate and engage in conversation with business to ensure that the aims of SECs are fully realised. Corporates should avoid a situation where the implementation of SECs will be driven by mere compliance or negative factors such as civic activism or litigation, but by sound business principles.

The Tribunal opens Fraud and Ethics Line

- By Sindi Khwela



The Tribunal derives its income from public funds and as such has a particular responsibility to ensure that income and resources are used solely for the purposes intended. Fraud and corruption remain a threat to public trust and confidence and as such the Tribunal is committed to ensuring that the prevention and management of fraud becomes an integral part of the organisation's culture and strategy.

The Tribunal's anti-fraud and corruption policy is based on amongst others the following principles:

- Zero-tolerance to fraud and corruption
- Accountability of leadership, Tribunal members and staff
- Duty to implement effective anti-fraud controls
- Duty to protect whistle-blowers

In line with its strategy for prevention and management of fraud and corruption the Companies Tribunal has subscribed to the Tip-off anonymous service. The Companies Tribunal's anonymous Tip-off line is called Fraud and Ethics line.

How does it work?

The Companies Tribunal's Fraud and Ethics Line is independently managed by Deloitte's Tip-offs Anonymous. Trained operators, using sophisticated contact centre equipment, will respond to calls in English 24/7, and Afrikaans, Zulu, Sotho or Xhosa during South African business hours, 365 days per year.

Anyone can contact the Companies Tribunal's Fraud and Ethics Line by dialing the dedicated Free Call telephone number: 0800 202 034 or by sending an e-mail to tribunal@tip-offs.com, or a fax to 0800 00 77 88, or free mail to KZN 138, Umhlanga Rocks, 4320.

For more information on the Companies Tribunal's Fraud and Ethics Line visit the website www.tip-offs.com. Although you may choose to tell Tip-offs Anonymous who you are, the Tip-off report that is to be send to the Management of the Tribunal for consideration and action will never reveal your identity or even your gender (unless you choose your identity to be made known to the company!).

Don't support fraud and corruption, report it!

Please contact the Companies Tribunal Fraud and Ethics Line if you have any information relating to fraud and corruption being committed at the Companies Tribunal.

The Companies Tribunal on an outreach drive

- By Dumisani Mthlane

The Companies Tribunal participated in two outreach events one was at the Vereeniging Civic Theatre in Sedibeng District Municipality and another one in Wattville Community Centre in eKurhuleni Municipality. The Tribunal's participation was part of its drive to reach out to communities particularly the business sector and aspiring entrepreneurs. Amongst the topics that were presented at both events was an outline of the role of the Tribunal and its product and services. Members of the public were afforded an opportunity to engage Tribunal officials and ask questions. The Tribunal distributed promotional material at the exhibition stands.

The Sedibeng event was officiated by the Deputy Minister of Trade and Industry, Mr Mzwandile Masina. This event was attended by more than six hundred people including women and youth. During his keynote address Deputy Minister Masina emphasised economic empowerment for South Africans, further that radical socio-economic interventions are needed across the country so as to benefit all communities. He also added that the government's focus is to “create a robust manufacturing sector that will allow black industrialists to expand and empower other entrepreneurs who will be able to take part in the mainstream economy”.

Amongst the attendees was the Executive Mayor of Sedibeng

District Municipality, Mr Mahole Mofokeng who encouraged the community to take full advantage of the services offered by **the dti** to realize economic development in the area.

The Sedibeng outreach was broadcast live on Sedibeng FM which offered a free radio interview slot to the Tribunal for the Tribunal representative to come and explain the Tribunal mandate in details to its listeners.

The Economic Opportunities Open Day which was held in Wattville was organised by the South African Black Hawkers Micro Business Association, the Department of Social development and Government Communication and Information System. It was aimed at providing information on government SMME's support and business opportunities and to disseminate government information.

The Tribunal will continue to participate in outreach programmes in partnership with other stakeholders as they provide an opportunity to raise awareness about the existence of the Tribunal and the services it offers as well as to ensure that we reach as many communities as possible across the country especially from previously disadvantaged communities.



Companies Tribunal staff answering at the Tribunal exhibition stand during the Wattville Open Day

Case highlights

- By Simukele Khoza

Links Golf Club (RF) Ltd

Links Golf Club (RF) Ltd (the Applicant) applied for an exemption from appointing a social and ethics committee in terms of section 75(5)(b) of the Companies Act, 71 of 2008. In terms of this section the Tribunal will grant exemption if it is satisfied that "... it is not reasonably necessary in the public interest to require a company to have a social and ethics committee, having regard to the nature and extent of the activities of the company."



The Applicant is a public company established for the "management of a golf club and related facilities to the benefit of all members". It submits that it has about 40 permanent employees and total revenue of R5.9 million and an operating profit in the negative for the year ended 30 September 2012. As a result the Applicant has a public interest score exceeding 500 points and is thus required in terms of regulation 43 read with regulation 26(2)(d)(ii) of the Companies Regulations, 2011, to appoint a social and ethics committee.

The Applicant submits that it is involved in a number of community activities in ST Francis Bay and that the social and ethics committee requirements will result in "additional costs" being incurred and due to the Applicant's "current economic environment" this will ultimately "reduce the benefits enjoyed by the local community"

The Tribunal found that the submission by the Applicant is limited and does not reveal the nature and extent of the Applicant's activities. The Tribunal was consequently precluded from determining whether it is reasonably necessary in the public interest to require the Applicant to have a SEC or not. The Tribunal further found that the Applicant failed to consider the functional areas of SEC as stated in regulation 43(5) which serve as a useful guide in drafting the application. The application was silent on a number of the functional areas mentioned in regulation 43 (5) such as the social and economic development (which incorporate employment equity and black economic empowerment issues); the impact of the Applicant's activities on the environment, health and public safety and consumer relationships.

Ruling: The application for exemption to appoint SEC was thus refused.

THE SCOTT FETZER COMPANY (Applicant) vs KIRBY SERVICES And REPAIR CENTRE (PTY) LTD (Respondent)

The applicant is registered in terms of the laws of Delaware State of the United States of America (USA); the company is based in Westlake, Ohio, USA. The application is about the trade mark "KIRBY" registered in South Africa in favour of the applicant in classes 09 and 37 in respect of goods and services. The KIRBY trade mark was first registered in 1951.

The respondent is a private company based in Glenwood, Durban. The respondent's name KIRBY SERVICES AND REPAIR CENTRE includes the word or element "KIRBY" as in the applicant's trade mark. The applicant advances that the respondent's name does not satisfy the requirements of the Companies Act 71 of 2008 (the Act). The applicant is of the view that the inclusion of the word KIRBY in the respondent's name causes the name to be confusingly similar to its trade mark KIRBY and therefore would falsely imply or suggest, or would reasonably mislead a person to believe incorrectly that, the respondent is part of, or associated with the applicant. It is against this background that the applicant submitted that the respondent should be ordered to change its name as envisaged by section 160(3) (b) (ii) of the Act.

The respondent did not oppose the application; as a result the applicant filed an application for default order as required by section 153 of the Company Regulations, 2011. The Tribunal expressed concern regarding the time lapse between the registration of the respondent's name (i.e. 07 August 2013) and the date of initiation of the proceedings (i.e. 10 February 2015). In terms of section 160 (2), an application in respect of the dispute concerning registration of a company name has to be brought, where the applicant received a notice of registration of the impugned company name (as contemplated in section 160 (10)), within three months or

where no such notice was received, on good cause shown at any time after the date of registration of the impugned name. The applicant submits in the application for default order that they became aware of the existence of the “offending name” in about July 2014; this was after almost a year the registration of the respondent's name had taken place. The Tribunal raised concern about the lack of information on how the applicant became aware of the respondent's name, and why only in July 2014 and not earlier.

The Tribunal stated that the failure to show good cause is significant and decisive, as has already been held in similar matters which served before the Tribunal. Finally, the Tribunal's view is that without good cause shown company names cannot be challenged long after they are registered or reserved as there is a need for some level of certainty and credibility required in terms of the register of company names kept by the Companies and Intellectual Property Commission.

Ruling: The application was refused.

Driving the Tribunal

- by Charmaine Wessels

After much anticipation and a rigorous procurement process, the Companies Tribunal received its first company pool vehicle!

On a lighter note, after much anticipation and a rigorous procurement process, the Companies Tribunal received its first company pool vehicle!

Excitement was high after the long wait and there was a buzz in the office once we knew that it was going to be collected. Off we all went down into the basement to welcome the new arrival. Woowww!! Our eyes were wide and sparkly – what a beauty! Slick, slim-lined, gorgeous design, a really classy car.

It's all good looks, complete safety features, spacious and “infotainment” (you learn a new word every day in the age of technology!). For your information, this includes the radio, speakers, CD frontloader, USB port and Bluetooth.

Here's to many smooth kilometres!



Mr Hans Kruger handing over the car keys to Mr Thembinkosi Jongani



Contact details

Tel : 012 3943071 | Fax : 012 394 4071

Physical Address

the dti Campus Block E - 3rd Floor,
77 Meintjies Street,
Sunnyside
Pretoria, 0002

Website

www.companiestribunal.org.za

Email

Tmputle@companiestribunal.org.za

design and layout: Dumisani Mthlane