IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CT001Jan2016

In the matter between:

Maboe Transport CC	Applicant
and	
Phakwe Mining Services (Pty) Ltd	First respondent
Tommy Maboe	Second respondent
Jan Johannes Jakobus Greyvenstein	Third respondent

Coram: Delport P.A.

Decision handed down on 13 June 2016

Decision

INTRODUCTION

[1] The applicant is Maboe Transport CC (reg no 2007/125990/23), represented by a Stephen Kwapeng, apparently properly authorised to bring the application.

[2] The first respondent is Phakwe Mining Services (Pty) Ltd (reg no 2009/023656/07).

[3] The second respondent is Tommy Maboe, the only director of the first respondent according to the records of the Companies and Intellectual Property Commission ("CIPC").

[4] The third respondent is Jan Johannes Jakobus Greyvenstein, apparently also a director of the first respondent, although not indicated as such in the records of the CIPC.

[5] The applicant is, apparently, a shareholder in the first respondent.

[6] The applicant applies, based on its founding affidavit by said Stephen Kwapeng, for the following substantive orders:

6.1 to compel the first respondent to hold an annual general meeting for the financial year ending 28 February 2015;

6.2 to remove the second respondent as director of the first respondent terms of s 71 (8) of the Companies Act 71 of 2008 ("Companies Act"/ the "Act" / "2008 Companies Act");

6.3 to remove the third respondent as director of the first respondent terms of s 71 (8) of the Companies Act;

6.3 to compel the first respondent to comply with a demand in terms of s 26 of the Companies Act to provide the applicant with information as requested in a letter dated 30 November 2015.

The basis the application will be discussed hereunder.

[7] The respondents deny the basis of the application, but also raised a number of points *in limine*, such as that the deponent did not have the authority act for the applicant and that the applicant was in the process of deregistration, that the dispute should be determined by arbitration in terms of a shareholders' agreement ("SHA"), most of which were abandoned at the time of the hearing on 24 May 2016 as per para 1 of their heads of argument.

[8] The respondents, however, persisted in a remaining point *in limine*, being that the applicant is not a shareholder of the first respondent (paras 2 *et seq* of the respondents' heads of argument).

[9] It was agreed that the point *in limine* needs to be decided before the substantive issues can be heard by the Tribunal.

POINT *IN LIMINE*

[10] The relevant provisions of s 71 for purposes of the point *in limine* provide as follows:

"71.

…

(3) If a company has more than two directors, and a shareholder or director has alleged that a director of the company—

(a) has become—

(i) ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69 (8) (a); or

(ii) incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or

(b) has neglected, or been derelict in the performance of, the functions of director,

the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.

…

(8) If a company has fewer than three directors—

(a) subsection (3) does not apply to the company;

(b) in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection; and

(c) subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Companies Tribunal."

[11] The remedies in s 71 are patently only available to a shareholder or director as provided for in *inter alia* ss 71(3) and (8).

[12] It is common cause that the applicant, as close corporation, cannot be a director of the respondent and can therefore only avail itself of the remedies in s 71 if it is a shareholder.

[13] The respondent contended that the Tribunal does not have the jurisdiction to declare a person a shareholder or, actually, to decide disputes of fact

pertaining to the *locus standi* of an applicant. That is correct. An order of the Companies Tribunal may be filed in the High Court as an order of the court, in accordance with its rules as provided for in s 195(8) of the Act, but this does not extend the jurisdiction of the Tribunal beyond that as determined in the Companies Act. The High Court remains the primary forum for the resolution of disputes, and for the interpretation and enforcement of the Act (para 3 of the Memorandum on the Objects of the Companies Bill 2008) and see *Henochsberg on the Companies Act 71 of 2008* (Service issue 11 of November 2015) 37 and *Global Vitality Incorporated v Enzyme Process Africa (Pty) Limited and Others* (20884/2013) [2015] ZAWCHC 111 (21 August 2015) para 76.

[14] The status of the applicant as a shareholder of the first respondent is therefore to be decided purely on the affidavits before the Tribunal.

[15] Prior to the 2008 Companies Act the Companies Act 61 of 1973 ("1973 Companies Act") and the common law then applicable determined when a person is a member of a company.

[16] In terms of the 1973 Companies Act there was a distinction between the concepts 'shareholder" and member, with the former a person holding shares but without his/her name entered into the register of members. As soon as that person. Name is entered into the register of member he/she became a member. This is the technically correct distinction, although the terms "shareholder" and "member" were, colloquially at least, used interchangeably.

[17] The 2008 Companies Act changed this and now provides in s 1 as follows:

"'member', when used in reference to—

(*a*) a close corporation, has the meaning set out in section 1 of the Close Corporations Act, 1984 (Act No. 69 of 1984); or

(*b*) a non-profit company, means a person who holds membership in, and specified rights in respect of, that non-profit company, as contemplated Schedule 1; or

(*c*) any other entity, means a person who is a constituent part of that entity;"

and, more to the point:

"'shareholder', subject to section 57 (1), means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be;"

[18] The distinction between "member" and "shareholder" in terms of the 1973 Companies Act alluded to above does therefore, wef 1 May 2011, not exist anymore

[19] Section 57(1) referred to in the definition of "shareholder" includes in the definition of "shareholder" any person who can exercise voting rights in respect of securities, which would include shares, but who is not entered as a shareholder in the securities register, and this extended definition only applies for the purposes of Part F of Chapter 2, in which s 71 is incorporated.

[20] There was no averment or statement as to the fact that the voting rights in the first respondent can or should be exercised by anybody else but the

shareholder/s, so we need not concern ourselves with this very uncertain and problematic provision.

[21] I need not discuss the differences between “shares” and “securities”, and it is sufficient to state the obvious as can be gleaned from the definitions of “share[s]” and “securities” in s 1 of the Companies Act, ie all shares are securities but the converse is not true. So for purposes of this ruling when the word “securities” is used, it will, by definition, include and refer to share/s.

[22] The question therefore is merely whether the applicant is a shareholder, ie entered as such in the securities register as provided for in s 50 of the Companies Act.

[23] I need to add, in parenthesis, that the discussion in respect of “shareholder”, applies only in respect of s 71 and that, eg for purposes of s 26, other rules apply. However, for purposes of this (narrow) point *in limine* I will not address that situation, and also because any remedy in terms of s 26 falls outside the jurisdiction of the Tribunal.

[24] The company must enter the name of the person to whom shares are *issued*, in the securities register, together with the other information as provided for in s 50(2)(b). The significance of this act is also emphasised in s 37(9): see also *Bavasah v Stirton and Another* [2014] 2 All SA 51 (WCC).

[25] The securities register *must* be held by the company and the existence thereof is not optional, due to the use of the word “must” in s 50(1), and the contents and veracity thereof should, obviously, also be subject to the annual audit.

[26] A company must also enter in its securities register every *transfer* of shares, including in the register the information as prescribed by s 51(5), and must do so only if the transfer is evidenced by a proper instrument of transfer that has been delivered to the company, unless it is by operation of law (s 51(6)).

[27] It needs to be noted that a company is not obliged, as was the case in the 1973 Companies Act, to issue a share certificate. However, if it does, the share certificate is proof that the person "owns" the securities, in the absence of evidence to the contrary (s 51(1)(c)). The significance of the underlined word will presently become apparent.

[28] I need to digress here from the line of thought above, to address the significance of the copious presentations by both the applicant and the respondents as to various "contracts" and an, apparently unilateral, "undertaking" in respect of the shares held by the applicant in the first respondent.

[29] Section 35 of the Companies Act provides that a share is "movable property" transferable in a manner provided for and recognized by the Companies Act or other legislation.

[30] The significance of the words "movable property" is that ownership of a share passes without registration, ie by mere delivery. I deem it unnecessary to refer to authorities on the general principles of transfer of ownership as these are surely trite, at least for purposes of this ruling.

[31] In addition, a share is incorporeal and "delivery" is therefore merely by (the consensual act of) cession. What is therefore needed is the obligatory agreement (sale etc) and the transfer agreement: see *Botha v Fick* 1995 (2) SA 750 (AD) at 778. Transfer in the name of the transferee in the securities register or the delivery of a share certificate is not a requirement for valid cession.

[32] If the shares are sold and the "ownership" of the shares are transferred by cession to the transferee without effecting this in the securities register the *registered shareholder holder* will be a nominee for the *owner*, ownership of shares not being dependent on registration (*Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (AD) at 666; *Oakland* case *supra* at 453; *Botha v Fick* 1995 (2) SA 750 (AD) at 764–765; *Watt v Sea Plant Products Ltd* 1999 (4) SA 443 (C) at 453; confirmed on appeal: 2000 (4) SA 711 (SCA); *Smyth v Investec Bank Ltd* 2015 JDR 2278 (GP) para 64). Therefore, the share certificate is only *prima facie* proof of <u>*ownership*</u>. Registration of transfer in the securities register as provided for in s 51(5) of the Companies Act may (or may not) follow, but such registration is not a prerequisite for transfer of ownership and, more importantly, the fact that the shares were (validly) transferred in ownership to somebody else, does not necessitate removal of a person's name from the securities register because that person in not the owner of the shares anymore. This is not very complicated and happens millions of times per day in respect of shareholding of companies listed on the JSE Ltd (albeit in respect of uncertificated securities, but the principles remain exactly the same).

[33] The importance of all this is that the question to be answered in respect of the point *in limine* is not who is the "owner" of the shares, but who is the shareholder, ie as entered in the securities register, because that is what s 71 provides.

[34] It is not necessary to further elaborate on the issue of transfer, but the following quote out of *Smuts v Booyens; Markplaas (Edms) Bpk v Booyens* 2001 (4) SA 15 (SCA) should make it abundantly clear:

"[10] Derdens behels 'n oordrag in die volle en tegniese sin van die woord 'n reeks stappe wat die aangaan van 'n oordragsooreenkoms insluit. Soos Rumpff AR verduidelik het in *Inland Property Development Corporation (Pty) Ltd v Cilliers* [1973 (3) SA 245 (A) op 215C, met beroep op die uitspraak van Lord Reid in *Lyle & Scott v Scott's Trustees and British Investment Trust Ltd* [1959] AC 763 (HL) op 778; [1959] 2 All ER 661 (HL) op 668] ('n saak aangaande art 24*bis* van die Maatskappywet 46 van 1926):

'In regard to shares, the word ''transfer'', in its full and technical sense, is not a single act but consists of a series of steps, namely an agreement to transfer, the execution of a deed of transfer and, finally, the registration of the transfer.'"

[35] Much has been said in the affidavits, and perhaps rightly so, in respect of the question who is *owner*, in common law, of the shares.

[36] In this respect there are the application of the provisions of SHA. Whether clause 11 of the SHA was properly complied with is doubted, but I make not finding in this respect.

[37] There is also the blank transfer form dated 12 June 2015. I hasten to add that the term "blank" transfer form is a colloquial term in company law to indicate that the form was signed by the transferor, to be signed by the transferee if "registration" of the transfer in name of the latter is to be effected as required, *inter alia*, by s 51(6) of the Act as discussed above.

[38] This transfer form is an instrument to effect formal transfer and on its own is not of great significance, what is, will be the result of its use.

[39] Also, there is the issue of the "abandonment" of the shares in the "draft" letter to the first respondent dated 15 July 2015. Again, this may be an (unilateral) action to divest itself of the *ownership* of the shares, but whether this was reflected in the securities register is not clear.

[40] Also, an abandonment cannot leave the shares in limbo – there should either be a new owner or a cancellation, in common law, of the shares. Whether the blank transfer form was intended to effect this abandonment is doubted, as the transfer form predates the abandonment by more than a month – one would assume that the transfer form would follow the abandonment.

[41] It may be that the securities register, as audited, is not correct or that it does not reflect the "true" position, such as was contemplated in eg *Barnard v Carl Greaves Brokers (Pty) Ltd* 2008 (3) SA 663 (C).

[42] Be that as it may, the Tribunal can only make a ruling on the information as provided in the affidavits and additional information I may add, in the heads of argument as it is enjoined to do under the circumstances as in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C, succinctly summarised in *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC).

[43] This information is that the applicant is, by virtue of the share certificate, a "registered" shareholder in the first respondent. The applicant cannot, for

obvious reasons produce the securities register and the share certificate should be sufficient proof under these circumstances.

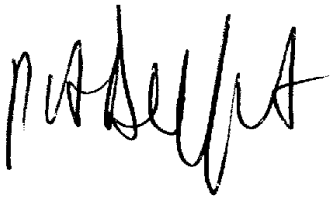
[44] The first respondent is obliged to keep the securities register and also enjoined to keep it up to date as set out above. Surely it would have been easy to produce the securities register and/or an extract therefrom to rebut the validity of the share certificate. That was not done.

[45] Whatever the "true" position may be in respect of the securities register, ie whether the applicant should or should not be entered therein, the Tribunal cannot make a ruling in that respect. In fact, the 2008 Companies Act does not even have a provision that would entitle a Court to do so in terms of the Companies Act. Any rectification should, under restricted circumstances, fall within the inherent jurisdiction of the High Court. See also *Henochsberg on the Companies Act 71 of 2008* (Service issue 11 of November 2015) 208(9) and *Du Plooy NO and Others v De Hollandsche Molen Share Block Ltd and Another* [2016] 1 All SA 748 (WCC).

[46] I deliberately make the ruling only on the point *in limine* and thereby give the parties the opportunity to exercise whatever remedies they may may choose, before proceeding, if it is necessary, to a hearing of the substantive issues on the papers.

Order

[47] On the information before the Tribunal the ruling is made that the applicant appears to be a shareholder as defined in s 1 of the Companies Act in the first respondent and the point *in limine* is therefore dismissed.



Prof P.A. Delport

MEMBER OF THE COMPANIES TRIBUNAL