



**COMPANIES TRIBUNAL**

**REPUBLIC OF SOUTH AFRICA**

**CASE NO: CT027NOV2016**

In the matter between:

**JABU JOHANNES SIBANYONI**

**APPLICANT**

**AND**

**VUYISWA RATLADI**

**RESPONDENT**

**IN AN APPLICATION IN TERMS OF SECTIONS 51 AND 71 OF THE COMPANIES  
ACT NO. 71 OF 2008**

**Heard on 01 MARCH 2017**

**Decision handed down on 13 MARCH 2017**

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## DECISION

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### INTRODUCTION

[1] This is an application in terms of sections 51 and 71 of the Companies Act No. 71 of 2008 (“the Act”).

[2] The Applicant is Jabu Johannes Sibanyoni with identity number 870211 5700 08 3, an adult male person, residing at No. 7839, Khutsong Extension 01, Carletonville, Gauteng.

[3] The Respondent is Vuyiswa Ratladi, with identity number 730523 0569 08 5, an adult female person, residing at 246 Utopia Street, Ruimsig Country Estate, Krugersdorp, Gauteng.

[4] Applicant seeks the following relief:

“GRANT BACK OWNERSHIP OF COMPANY”

### BACKGROUND

[5] For better understanding of the issues in this application, a brief background of the relevant facts is necessary. The Applicant brought an application in terms of

sections 51 and 71 of the Companies Act No. 71 of 2008, as amended (“the Act”) for the restoration of his shareholding and the removal of the Respondent as director of Kwezi Investment Proprietary Limited (herein referred to as (“KWEZI”), a private company with registration number 2013/138431/07.

- [6] The Applicant filed on records in support of its application an affidavit dated 30 November 2016 which reads as follows:

*“I WAS REMOVED FROM MY COMPANY BY VUYISWA RATLADI AND LATER APPOINTED HERSELF AS DIRECTOR OF KWEZI INVESTMENT PTY LTD WITH REGISTRATION 2013/138431/07. THE PROCESS WAS DONE WITHOUT MY CONSENT. I WOULD LIKE TO TAKE BACK OWNERSHIP OF THE COMPANY AND HAVE HER REOMOVED”*

- [7] In reply, the Respondent filed a replying affidavit dated 05 January 2017 which reads as follows:

*“Ekhaya Group confirms the receipt of the application to the company tribunal which was applied to by Mr Jabu Sibanyoni.*

***Allegations made by Jabu Sibanyoni are as follows:***

*Removed from the company by Vuyiswa Ratladi and later appointed herself as a Director of Kwezi Investment (Pty) Ltd with registration 2013/138431/07. The process was done without my consent. I would like to take back ownership of the company and have her removed.*

**Response by Ekhaya Group**

***Allegation made by Mr Sibanyoni are not true due to the following:***

*All meetings held regarding Kwezi Investment (Pty) Ltd were conducted legally with involvement of all Directors of Kwezi and Ekhaya;*

*The process to remove Mr Sibanyoni as a Director of Kwezi was legally conducted in a meeting set up of which he was present and agreed to, including all members present in the meeting.*

*The appointment of Vuyiswa Ratladi was conducted legally in the meeting set up which the following members present Mr Jabu Sibanyoni (Director of Kwezi); Mr Muzi Ratladi (Director of Ekhaya), Vuyiswa Ratladi (Director of Ekhaya) and Patrick Diale (Director of Ekhaya). In the meeting of decision to appoint Mrs Vuyiswa Ratladi was decided upon with reasons motivated and agreed by all members present.”*

- [8] The Applicant filed an affidavit in reply dated 11 January 2017 which reads as follows:

*“THE MEETING REGARDING MYSELF AND THE DIRECTORS OF EKHANYA GROUP NEVER TOOK PLACE ACCORDING TO WHAT WAS FILED WITH THE CIPC THE SUPPOSEDLY MEETING TOOK PLACE ON THE 1<sup>ST</sup> OF MAY 2016, THE DAY WAS NOT EVEN A BUSINESS DAY.”*

[9] During arguments the Respondent informed the tribunal that the meeting, to remove the Applicant, between the Applicant and Respondent took place 29 April 2016 as opposed to 01 May 2016 as reflected in the signed minutes of 01 MAY 2016 and the General Power of Attorneys dated 01 May 2016 and signed 01 May 2016. Further, the Applicant and the Respondent agreed to the sale of shares of the 70% (Seventy Percent) of the shares and or securities in KWEZI for the sum of R680, 000.00 (Six Hundred and Eighty Thousand Rands). However no agreement was signed in respect of the 30% (Thirty Percent) of the shares and/or securities in KWEZI.

## **APPLICABLE LAW**

[10] Before I deal with the application filed, I wish to highlight what I believe to be the relevant provisions of the Act.

### **Section 49 of the Act.**

#### **Securities to be evidenced by certificates or uncertificated**

1) *In this Part, “certificated” means evidenced by a certificate, as*

*contemplated in subsection (2) (a).*

2) *Any securities issued by a company must be either*

a) *evidenced by certificates; or*

b) *uncertificated, in which case the company must not issue certificates evidencing or purporting to evidence title to those securities, subject to subsection (6).*

3) *Any securities issued by a company must be either*

a) *the rights and obligations of security holders are not different solely on the basis of their respective securities being certificated or uncertificated; and*

b) *any provision of this Act applies with respect to any uncertificated securities in the same manner as it applies to certificated securities.*

4) *Sections 52 to 55*

a) *apply only to uncertificated securities; and*

b) *prevail in the case of a conflict between any provision of those sections and any other provision of this Act, any other law, the common law, the company's Memorandum of Incorporation or any agreement.*

- 5) *Any certificated securities may cease to be evidenced by certificates, and thereafter be uncertificated, in which case any provision of this Act contemplated in subsection (4) applies to those securities from the date on which they ceased to be evidenced by certificates.*
- 6) *In the manner set out in section 54, any uncertificated securities may be withdrawn from the uncertificated securities register, and certificates issued evidencing those securities, in which case from the date on which they became certificated*
- a) *sections 52 to 55 cease to apply to those securities; and*
- b) *for greater certainty, transfer of ownership in those securities cannot be effected by a participant or central securities depository while they remain in certificated form, unless they are held in certified form in collective custody by the participant or central securities depository.*
- 7) *The Minister may make regulations regarding matters that are supplementary and ancillary to the provisions of this Part*

**[Own emphasis and underlining]**

**Section 51 of the Act.**

**Registration and transfer of certified securities**

1) *A certificate evidencing any certificated securities of a company—*

*a) must state on its face—*

*i) the name of the issuing company;*

*ii) the name of the person to whom the securities were issued;*

*iii) the number and class of shares and the designation of the series, if any, evidenced by that certificate; and*

*iv) any restriction on the transfer of the securities evidenced by that certificate, subject to item 6(4) of Schedule 5;*

*b) must be signed by two persons authorised by the company's board; and*

*c) is proof that the named security holder owns the securities, in the absence of evidence to the contrary.*

2) *A signature contemplated in subsection (1)(b) may be affixed to or placed on the certificate by autographic, mechanical or electronic means.*

- 3) *A certificate remains valid despite the subsequent departure from office of any person who signed it.*
  
- 4) *If, as contemplated in section 50(5), all of a company's shares rank equally for all purposes, and are therefore not distinguished by a numbering system*
  - a) *each certificate issued in respect of those shares must be distinguished by a numbering system; and*
  - b) *if the share has been transferred, the certificate must be endorsed with a reference number or similar device that will enable each preceding holder of the share in succession to be identified.*
  
- 5) *Subject to subsection (6), a company must enter in its securities register every transfer of any certificated securities, including in the entry*
  - a) *the name and address of the transferee;*
  - b) *the description of the securities, or interest transferred;*
  - b) *the date of the transfer; and*
  - d) *the value of any consideration still to be received by the company on each share or interest, in the case of a transfer of securities contemplated in section 40(5) and (6).*
  
- 6) *A company may make an entry contemplated in subsection (5) only if the transfer*

- a) *is evidenced by a proper instrument of transfer that has been delivered to the company; or*
- b) *was effected by operation of law.*

## **Section 71 of the Act.**

### **Removal of directors**

- 1) *Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).*
- 2) *Before the shareholders of a company may consider a resolution contemplated in subsection (1)*
  - a) *the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and*
  - b) *the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.*

- 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.*
- 4) *Before the board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given*
- a) *notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and*

- b) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.*
  
- 5) If, in terms of subsection (3), the board of a company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be, the director concerned, or a person who appointed that director as contemplated in section 66(4)(a)(i), if applicable, may apply within 20 business days to a court to review the determination of the board.*
  
- 6) If, in terms of subsection (3), the board of a company has determined that a director is not ineligible or disqualified, incapacitated, or has not been negligent or derelict, as the case may be*
  - a) any director who voted otherwise on the resolution, or any holder of voting rights entitled to be exercised in the election of that director, may apply to a court to review the determination of the board; and*
  - b) the court, on application in terms of paragraph (a), may*
    - i) confirm the determination of the board; or*
    - ii) remove the director from office, if the court is satisfied that the director is ineligible or disqualified, incapacitated, or has been negligent or derelict.*

- 7) *An applicant in terms of subsection (6) must compensate the company, and any other party, for costs incurred in relation to the application, unless the court reverses the decision of the board.*
- 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.*
- 9) *Nothing in this section deprives a person removed from office as a director in terms of this section of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for*
- a) *loss of office as a director; or*
- b) *loss of any other office as a consequence of being removed as a director.*
- 10) *This section is in addition to the right of a person, in terms of section 162, to apply to a court for an order declaring a director delinquent, or placing a director on probation.*

***[Own emphasis and underlining]***

## **EVALUATION**

[11] After hearing lengthy arguments, the Tribunal examined the relevant sections and addresses the crisp issues before it and the relevant Law and its Powers.

[12] The main issue is whether the Respondent is the holder of shares and/or securities issued by KWEZI.

[13] The second issue is whether the Respondent in duly appointed director of KWEZI.

[14] The third issue is whether the Respondent's name was entered as such in the certificated securities register of KWEZI.

[15] Lastly, whether the Applicant has the right or entitlement through ownership, agreement, relationship or otherwise, to receive and participate in any distribution in respect of KWEZI's shares and/or securities, exercise or cause to be exercised, in the ordinary course, any or all of the rights attached to KWEZI's shares and/or securities or dispose or direct the disposition of KWEZI's shares and/or securities, or any part of a distribution in respect of the shares and/or securities.

[16] Section 49 (2) of the Act provides that any securities issued by a company must be evidenced by certificates.

[17] Having considered the provision of sections 49 and 51 of the Act, including the failure of the Respondent to provide supporting documents, I am of the considered view that the Respondent have no right or entitlement to:

[17.1] Receive or participate in any distribution in respect of 70% of KWEZI's shares and/or securities.

[17.2] Exercise or cause to be exercised, in the ordinary course, any or all the rights attached to 70% of KWEZI's shares and/or securities, or

[17.3] Dispose or direct the disposition of the KWEZI's shares and/or securities, or any part of a distribution in respect of 70% shares/and/or securities.

[17.4] Receive or participate in any distribution in respect of 30% of KWEZI's shares and/or securities.

[17.5] Exercise or cause to be exercised, in the ordinary course, any or all the rights attached to 30% of KWEZI's shares and/or securities, or

[17.6] Dispose or direct the disposition of the KWEZI's shares and/or securities, or any part of a distribution in respect of 30%

shares/and/or securities.

[18] In the interim section 71 of the Act is not applicable.

**ORDER:**

[19] In the result the following order is made:

- a) The relief sought by the Applicant in respect of shareholding in KWEZI is granted. Accordingly the Applicant remains 100% shareholder in KWEZI.

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MMOLEDI MALOKANE  
(MEMBER OF COMPANIES TRIBUNAL OF SOUTH AFRICA)  
Date: 13 MARCH 2017