REPUBLIC OF SOUTH AFRICA

COMPANIES TRIBUNAL

Case/File Number: CT001APR2014

In the matter between:

LA LUCIA SANDS SHARE BLOCK LIMITED	Applicant
and	
FLEXI HOLIDAY CLUB	First Respondent
STUART JOHN LAMONT (owner/trustee)	Second Respondent
ANTHONY NICHOLAS RIDL (owner/trustee)	Third Respondent
MORGAN CHETTY (trustee)	Fourth Respondent
SEAN GILBERT HORNBY (trustee/attorney of record)	Fifth Respondent
RYNIER BARTHOLOMAIS BRANDT (trustee)	Sixth Respondent
VIJAYKUMAR PATEL (trustee)	Seventh Respondent
KEITH MATILA MOKOAPE (trustee)	Eighth Respondent
THEODORE DENNIS REED (trustee)	Ninth Respondent
CLUB LEISURE GROUP (PTY) LTD ("CLG")	Tenth Respondent
CLUB LEISURE GROUP ("the Group")	Eleventh Respondent

Coram	:	Khashane Manamela (Mr.), Khatija Tootla (Ms.) and Sathie Gounden (Mr.)
Date Heard	:	29 August 2014
Date of Decision	:	20 October 2014

DECISION (Reasons and an Order)

Khashane Manamela (Khatija Tootla and Sathie Gounden concurring)

[1] The *Oxford Large Print Dictionary* defines "holiday" as "*…an extended period of recreation…; a break from work…; a day of festivity or recreation, when no work is done.*" and a holidaymaker and other cognate words have corresponding meanings. The protagonists[1] in this matter conduct their business or affairs in holidaymaking.[2] However, since 2006 there appears to have been very few moments of festivity or recreation or any semblance of a cordial or leisurely relationship between the contending parties herein. The parties have spent most of their time in panoply of litigation in the courts and even made an appearance before this Tribunal[3] and the Supreme Court of Appeal.[4]

[2] The applicant is a public company in terms of the Companies Act 71 of 2008 (the CA 2008) and a share block company in terms of the Share Blocks Control Act 59 of 1980. Some considerable attention has been given by the applicant in its papers, including heads of argument, to point out that the applicant is not a typical profit company and should actually be considered a non-profit company.[5] This was reiterated by the counsel, Mr Nicholas John Tee when he made oral submissions before us on behalf of the applicant. I appreciate the

[1] In the main, the applicant, the first and tenth respondents, and to some extent some of the individual respondents have had an acrimonious litigation relationship(s) since 2006.
[2] See paragraphs 50 – 68 [at pages 19 to 24 of the indexed bundle] of the founding affidavit and paragraphs 32 – 42 [at pages 59 to 63 of the indexed bundle] of the answering affidavit.
[3] See *La Lucia Sands Share Block Limited v Flexi Holiday Club*, Case Number: CTR003/10/2012 of 05 August 2013 (Companies Tribunal of SA).
[4] See *La Lucia Sands Share Block v Barkhan* 2010 (6) SA 421 SCA and *La Lucia Sands Share Block Ltd v Flexi Holiday Club* (171/11) [2012] ZASCA 53 (30 March 2012). This case was cited with approval by Potterril J in an unreported case number: 64107/11 of the North Gauteng High Court, Pretoria (as it was known then) of *Basson and Another v On-Point Engineers (Pty) Ltd and Others* dealing with access to a securities register.
[5] See paragraphs 40 – 44 [at pages 17 to 18 of the indexed bundle] of the founding affidavit and paragraphs 11 – 43 of the applicant's heads of argument.

educational value of the material, but I do not think that same is necessarily material for a determination to be made herein. I am alive to the fact that, should the applicant have been a non-profit company, Part E of Chapter 2 of the CA 2008 would not apply to it.[6] Sections 50 and 51 of the CA 2008 are contained in this excluded part, and it is these provisions and their accompanying regulation 32 of the Companies Regulations, 2011[7] (the Regulations) which are material for the determination to be made in this application. There will be other vital statutory provisions to be considered.

[3] Section 50 of the CA 2008 reads as follows in places deemed material for current purposes:

"**50. Securities register and numbering**
(1) Every company must-
(a) establish or cause to be established a register of its issued securities in the prescribed form; and
(b) maintain its securities register in accordance with the prescribed standards.
(2) As soon as practicable after issuing any securities a company must enter or cause to be entered in its securities register, in respect of every class of securities that it has issued-
(a) the total number of those securities that are held in uncertificated form; and
(b) with respect to certificated securities-
(i) the names and addresses of the persons to whom the securities were issued;
(ii) the number of securities issued to each of them;
(iii) the number of, and prescribed circumstances relating to, any securities-
(aa) that have been placed in trust as contemplated in section 40(6)(d);or
(bb) whose transfer has been restricted;
(iv) in the case of securities contemplated in section 43-
(aa) the number of those securities issued and outstanding; and
(bb) the names and addresses of the registered owner of the security and any holders of a beneficial interest in the security; and

[6] Section 10(2)(b) of the Companies Act 71 of 2008 (the CA 2008).
[7] The Companies Regulations were made by the Minister of Trade and Industry[7] in terms of section 223 of the Companies Act 71 of 2008 and published under GN R351 in Government Gazette 34239 of 26 April 2011.

(v) any other prescribed information.
…"

[4] Section 51 reads as follows [also in places deemed material for current purposes]:

"**51. Registration and transfer of certificated 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) …
…
(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;
(c) 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."

[5] And regulation 32 reads as follows at the relevant places:

"**32. Company securities registers**

…

(1) The securities register of a profit company required in terms of section 24 (4)(a), read with section 50 (1)(b), must be kept in one of the official languages of the Republic, and must comprise—

(a) for every class of authorised securities, a record of—

(i) the number of securities authorised, and the date of authorisation;

(ii) the total number of securities of that class that have been issued, re-acquired or surrendered to the company; and

(iii) the number of issued securities of that class that are held in uncertificated form;

(b) in respect of every issuance, re-acquisition or surrender of securities of any particular class, entries showing—

(i) the date on which the securities were issued, re-acquired or surrendered to the company;

(ii) the distinguishing number or numbers of any certificated securities issued, re-acquired or surrendered to the company;

(iii) the consideration for which the securities were issued or re-acquired by, or surrendered to the company; and

(iv) the name of the person to, from or by whom the securities were issued, re-acquired or surrendered, as the case may be; and

(v) …

(c) for every class of authorised securities, at any time—

(i) the number of securities of that class that are available to be issued; and

(ii) the number of securities of that class that are the subject of options or conversion rights which, if exercised, would require securities of that class to be issued.

(2) In addition to the information otherwise required, the company's securities register must also include in respect of each person to whom the company has issued securities, or to whom securities of the company have been transferred—

(a) the person's –

(i) name and business, residential or postal address, as required by section 50 (2) (b) (i); and

(ii) the person's email address if available, unless the person has declined to provide an email address;

(b) an identifying number that is unique to that person;

(c) in respect of each issue of securities to that person, the consideration for which the securities were issued, as determined by the company's board in terms of section 40; and

(d) in respect of each issue or transfer of securities to that person—

(i) the date on which the securities were issued or transferred to the person;

(ii) the number and class of securities issued or transferred to the person;

(iii) the distinguishing number or numbers of the securities issued or transferred to the person, if the securities are held in certificated form;

(e) the date on which any securities that had been issued or transferred to the person were subsequently—

(i) transferred by that person, or by operation of law, to another person; or

(ii) re-acquired by, or surrendered to, the company in terms of any provision of the Act or the Memorandum of Incorporation; and
(f) at any time, the total number of securities of that class held by the person.
(3) …
…
(6) In so far as the identity number and e-mail address of a person may be entered into a register kept under this regulation, such information may, at the instance of the company, Central Securities Depository or relevant Participant as the case may be, be regarded as confidential.
…"

[6] Essentially the above statutory provisions require the applicant to establish and maintain a register of its issued securities in a prescribed form and standard. I will revert to deal with the intricacies thereof later.

[7] The applicant, despite the fact that the CA 2008 and the Regulations came into application already in May 2011, does not have a securities register fully compliant with sections 50 and 51, and regulation 32. The reason for this is not clear from the papers, there appear to have been some level of apprehension regarding the convening of shareholders meeting after 2006 and the earlier decision of this Tribunal was about postponement of the holding of the applicant's annual general meeting.[8] It was initially submitted by the applicant that there is some compliance with section 105 of the Companies Act 61 of 1973 (the CA 1973)[9], but this appears to have been abandoned at the hearing of this application.[10] The abandonment or concession was well made, more so as it was under attack by the respondents.

[8] See footnote 3 above and pages 239 – 258 of the indexed bundle.
[9] In fact the main prayer in the application was that this Tribunal make an administration order permitting the applicant to retain its register in the form and substance of section 105.
[10] See paragraph 10 below.

[8] In terms of the current application, the applicant seeks exemption of a resolution passed by its shareholders in terms of section 6(2) of the CA 2008. The essence of section 6(2) is clearer [in my view] when this provision is flanked by sections 6(1) and (3) of the CA 2008 when considered, as follows:

"**6. Anti-avoidance, exemptions and substantial compliance**
(1) A court, on application by the Commission, Panel or an exchange in respect of a company listed on that exchange, may declare any agreement, transaction, arrangement, resolution or provision of a company's Memorandum of Incorporation or rules-
(a) to be primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act; and
(b) void to the extent that it defeats or reduces the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act.
(2) A person may apply to the Companies Tribunal for an administrative order exempting an agreement, transaction, arrangement, resolution or provision of a company's Memorandum of Incorporation or rules from any prohibition or requirement established by or in terms of an unalterable provision of this Act, other than a provision that falls within the jurisdiction of the Panel.
(3) The Companies Tribunal may make an administrative order contemplated in subsection (2) if it is satisfied that-
(a) the agreement, transaction, arrangement, resolution or provision serves a reasonable purpose other than to defeat or reduce the effect of that prohibition or requirement; and
(b) it is reasonable and justifiable to grant the exemption, having regard to the purposes of this Act and all relevant factors, including-
(i) the purpose and policy served by the relevant prohibition or requirement; and
(ii) the extent to which the agreement, transaction, arrangement, resolution or provision infringes or would infringe the relevant prohibition or requirement."

[9] What is sought to be exempted is a resolution passed at the last[11] annual general meeting of shareholders of the applicant on 27 June 2006. The resolution reads as follows:

"THAT the directors of the company, with immediate effect, be and are hereby instructed to maintain the privacy of all shareholders, in terms of the Constitution of South Africa, and not to release any information other than their names to any party whatsoever, and in the event that any information has to be given out, that the directors first obtain in

[11] Refer to paragraph [7] above.

writing, and be satisfied with the purposes for which the information is required and the identity, background and intentions of the persons seeking such information."

[underlining added for emphasis]

[10] The full spectrum of the prayers in the application were in three alternatives, but at the hearing of this matter Mr Tee submitted that prayer 2 is preferred[12] which for ease of reference reads as follows:

"**THAT**

2. The Applicant, La Lucia Sands Share Block Limited, is hereby granted an exemption from the unalterable provisions of section 50(1)(b) and section 51(5)."

Mr Tee expanded the abovementioned prayer as follows:

"Now I submit that with regard to paragraph 6[3], all the elements there are objectively ascertained and will from the papers, and so I am not going to delay this tribunal any further than to move that an administrative order should issue, I would prefer it in terms of paragraph 2 on page 3 of the application and that paragraph 2 be augmented simply by the statement that

… *the register as it stands is sufficient for the purposes of the Company's Act in Sections 50 and 51*.

CHAIRPERSON: Where do you insert that?

MR TEE: Immediately after that, after paragraph 2, the end of paragraph 2.

CHAIRPERSON: Okay, let me get that wording again.

MR TEE:

[12] See page 3 of the indexed bundle.

And that the applicants [sic] *register as it currently stands is sufficient compliance with Sections 50 and 51 and Regulation 32.*

CHAIRPERSON: Did I hear you correctly that you are saying this is no longer one, alternatively two, it is simply two that you are moving for?

MR TEE: I will prefer two, the reason I prefer two [sic] is I agree with my learned friend that in fact Section 105, the register does not comply with Section 105.

CHAIRPERSON: Okay.

MR TEE: That is the submission, thank you."[13]

[underlining added for emphasis; font and line spacing reduced]

[11] The formulation of the above prayer, be it in its original or amplified version, is [in my view] problematic for a determination to be made by this Tribunal. An exemption in terms of section 6(2) of the CA 2008 is not a general exemption from statutory provisions, but an exemption of "an agreement, transaction, arrangement, resolution or provision of a company's Memorandum " from a prohibition or requirement imposed by an unalterable provision[14] of the CA 2008. In my view, should an exemption be granted of the resolution as it stands, the effect thereof will not necessarily be that the applicant does not have to establish or maintain a securities register or to do so only in a particular format, but something else. I will return to deal with this further.

[13] See lines 1 - 22 on page 31, and lines 1 – 11 on page 32 of the transcript of the hearing.

[14] Unalterable provision is defined in section 1 of the CA 2008 as "a provision of this Act that does not expressly contemplate that its effect on any particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by a company's Memorandum of Incorporation or rules".

[12] The applicant submits that it needs the exemption or administrative order to prevent or stop the abuse by Club Leisure Group or the respondents. This abuse is primarily the continued attempts to takeover [through alleged hostile measures] the applicant by Flexi Holiday Club or the Club Leisure Group, the first and tenth respondents herein. The order sought from this Tribunal should allow the securities register of the applicant to be retained in its current form, *alternatively* with minimal changes which may be required by this Tribunal.[15] Essentially the applicant applies that the addresses and contact telephone numbers of its shareholders be omitted from the register. The applicant's view is that this is what the shareholders resolved in 2006 at their annual general meeting.

[13] With due respect, the application contain elongated submissions, and mostly unnecessarily so. The applicant gives a very detailed narration of the timeshare industry in this country and its unique features and benefits. In the applicant's mind, this is the best thing for not-so-wealthy families desirous of a holiday destination of their own choice.[16] There are also details meant as an explanation for one to avoid the possible confusion on the intricacies of share block ownership. Apparently this is a very complicated area often prone to both academic and legal confusion.[17] We are told that, a share in a share block company gives a holiday maker a personal right against a share block company,

[15] With preference to the amended prayer referred to in paragraph 10 above, it may actually mean that the intention is now to keep a securities register as constituted by annexure "A" to the answering affidavit [pages 83 – 110 of the indexed bundle].
[16] Paragraph 19 of the applicant's heads of argument.
[17] Paragraph 21 of the applicant's heads of argument.

which allows the shareholder the right to use and occupy a particular unit at a particular time or week in the resort owned by the share block company.[18] This is subject to the terms and conditions of the use agreement, and sale and purchase of a share is not possible without the use agreement.[19] The use agreement contains the duties and obligations of the shareholder and is for the benefit of the share block company and the other shareholders in the company.[20] This is said to be a distinguishing feature of the shareholding in a share block company from other companies[21] and also a manifest of the higher degree of fiduciary duty required of directors of share block companies as opposed to ordinary companies.[22] The directors of the former have to ensure compliance with the use agreements and take remedial action in case of breach, more like directors in body corporate of a sectional title development.[23] When disposing of a share in a share block company the appropriate mode of transfer is assignment and not cession like in case of shares in other companies.[24] This means that the directors of a share block company ought to agree to the proposed transfer of shares for the transaction to be effective.[25] The directors have, among others, to assess and ensure that the potential transferee has the means to meet the obligation to pay levies and more importantly the intention to comply with the use agreement.[26] I must interrupt this to point out that I am curious to know how it is

[18] Paragraph 22 of the applicant's heads of argument.
[19] Paragraph 23 of the applicant's heads of argument.
[20] Paragraph 24 of the applicant's heads of argument.
[21] Paragraph 25 of the applicant's heads of argument.
[22] Paragraphs 26 and 40 of the applicant's heads of argument.
[23] Paragraph 26 of the applicant's heads of argument.
[24] Paragraph 29 of the applicant's heads of argument.
[25] Paragraph 30 of the applicant's heads of argument.
[26] Paragraph 30 of the applicant's heads of argument.

humanly possible to determine in advance whether any party to a sale and transfer of shares agreement manifests in advance an intention not to comply with an agreement and the papers unfortunately don't shed any light on this. The directors in a timeshare holiday market have a duty to "preserve the share block's assets for its *bona fide* members",[27] and therefore those deemed to harbour intentions of effecting a hostile takeover of the company will be rejected[28], it is also submitted by the applicant. This is stated as being in the interest of the individual *bona fide* shareholders of the company and failure by the directors to protect the *bona fide* shareholders from a hostile takeover will render the directors liable in law for dereliction of duty.[29] Directors in a share block company have a fiduciary duty not only to the company and but to its shareholders,[30] it is further contended.

[14] It is further submitted that the respondents in this matter have demonstrated in what is referred to as eighteen offensives, a reasonable suspicion of seeking to take over the applicant.[31] The papers go further in explaining that ownership of a share or membership of a share block company is not the same as having points in a holiday club that owns a share in a share block.[32] It is submitted on behalf of the applicant that, defending the applicant against a hostile takeover by the respondents is the central reason for the

[27] Paragraph 31 of the applicant's heads of argument.
[28] Paragraph 32 of the applicant's heads of argument.
[29] Paragraphs 32 and 34 of the applicant's heads of argument.
[30] Paragraphs 40 - 42 of the applicant's heads of argument.
[31] Paragraph 33 of the applicant's heads of argument.
[32] Paragraph 37 of the applicant's heads of argument.

applicant seeking the administrative order from this Tribunal.[33] In this regard, it is argued that the applicant has met the requirements of sections 6(3) of the CA 2008 to obtain the required order. I shall return to deal with this immediately after reviewing the respondents' side of the equation, so to speak.

[15] The respondents oppose the application and have jointly filed an affidavit in this regard and made written and oral submissions through Mr Ian Topping. Firstly, as already indicated above, it is denied by the respondents that the applicant's securities register in its present form complies with section 105 of the CA 1973. This has since become common cause.[34] Further, the respondents argue that, the court prescribed a form for the applicant's securities register in the matter of *La Lucia Sands Share Block Ltd and Others v Barkhan and Others*.[35] The respondents further point out the shortcomings in respect of the applicant's register, including that the register does not: (1) distinguish each share by its number; (2) reflect the amount paid or to be paid as consideration for the share; (3) date of entry of the member's name into the register, and (4) date of cessation of membership by members.[36] This is patently more than the recording of contact details which appears to be the crux of the applicant's contentions.

[33] Paragraph 43 of the applicant's heads of argument.
[34] See paragraph 7 above.
[35] Paragraphs 4 and 5 of the respondents' heads of argument and *La Lucia Sands Share Block v Barkhan* 2010 (6) SA 421 SCA.
[36] Paragraph 6 of the respondents' heads of argument.

[16] It is further submitted by the respondents that, establishment and operation of a company is a matter shrouded with statutory obligations of proper disclosure and accountability to shareholders, and therefore cannot be treated as a private matter.[37] There is also a statutory right by those holding a beneficial interest in the securities of a company and even those who do not inspect the company's securities register.[38] This right derives also from section 32(1) (b) of the Constitution of the Republic of South Africa, 1996 and therefore any limitation should be approached with caution.[39] The purpose of sections 50 and 51 of the CA 2008, together with regulation 32 of the Companies Regulations is to create and maintain accountability and transparency in companies, and therefore the applicant's exemption application flies in the face of the aforesaid principles.[40]

[17] The respondent further submits that the applicant has already been ordered[41] to comply with the provisions of section 105 and 113 of the CA 1973 and the current application is an attempt to re-argue the matter. Further, the provisions of the CA 2008 allow a prospective inspector of the securities register of a company to do so without giving a reason and the only preclusion is when the information is sought for an "*unlawful purpose*".[42] It is submitted in this regard that there is nothing unlawful about the respondents' conduct. If anything the only suspicion about the current turn of events may be some form of collusion

[37] Paragraph 8 of the respondents' heads of argument.
[38] Paragraph 9 of the respondents' heads of argument.
[39] Paragraph 10 of the respondents' heads of argument.
[40] Paragraphs 11 and 12 of the respondents' heads of argument.
[41] *La Lucia Sands Share Block v Barkhan* 2010 (6) SA 421 SCA.
[42] Paragraphs 14 - 15 of the respondents' heads of argument.

between the applicant and an entity called Stardust 137 NPC which is said to be the beneficiary of the applicant's extrajudicial repossession of the shares (called *right of parate executie*) belonging to members who failed to pay their levies.[43] The respondents sum up their defence by stating that there is no cogent reason for the applicant to keep the transfer of its securities secret; and that the exemption sought serves no other purpose, but to defeat the provisions of sections 50 and 51 of the CA 2008, as well as, the statutory principles of transparency and accountability and is therefore neither reasonable nor justifiable to grant same. It is therefore prayed that the application be refused with costs, including those of attorney and senior counsel.[44] I consider the applicable statutory provisions next.

[18] Section 50 of the CA 2008[45] essentially requires a company to establish in the prescribed form and maintain in accordance with the prescribed standards a securities register. There are some requirements regarding what the register must contain per class of issued certificated securities, including the names and addresses of the persons to whom the securities were issued, and the number of securities issued to them.[46]

[43] Paragraph 19 of the respondents' heads of argument.
[44] Paragraphs 21 – 23 of the respondents' heads of argument.
[45] See paragraph 3 above.
[46] Section 50(2)(b).

[19] On the other hand section 51[47] prescribes the contents of a certificate evidencing securities and apart from requiring recording of the name and number of shares, provides that a certificate issued in compliance with its provisions is proof that the named security holder owns the securities, in the absence of evidence to the contrary.[48]

[20] Regulation 32 of the Regulations[49] as expected gives effect to sections 24(4)(a)[50] and 50(1)(b) of the Act. This regulation also requires the securities register of a company to reflect details (including the dates, distinguishing number(s), consideration and name of the person) in respect of the issued, re-acquired or surrendered securities of the company.[51] It further requires a company's securities register to contain (additionally to other required information) the name and business, residential or postal address in terms of section 50(2)(b) of the CA 2008, and if provided the email address[52] of the person to whom securities were issued or transferred, including the date and number of issue or transfer of the securities.[53]

[21] The essence of the above statutory provisions is that the names; contact details (address and e-mail address, if provided); the number of securities or

[47] See paragraph 4 above.
[48] Section 51(1).
[49] See paragraph 5 above.
[50] Section 24(4) of the CA 2008 reads as follows:
"*(4) In addition to the requirements of subsection (3), every company must maintain -*
(a) a securities register or its equivalent, as required by section 50, in the case of a profit company, or a member's register in the case of a non-profit company that has members…"
[51] Regulation 32(1)(b) of the Regulations.
[52] In terms of regulation 32(6) identity number and email address may be treated as confidential.
[53] Regulation 32(2) of the Companies Regulations.

shares acquired; date of acquisition of the shares; consideration paid or to be paid are to be reflected in the securities register. Let me pause to mention that, most of the aforesaid information is omitted from the applicant's securities register as it currently stands.[54]

[22] On the other hand section 105(1) of the CA 1973 provides as follows:

"**105. Register of members**.

(1) Every company shall keep in one of the official languages of the Republic a register of its members, and shall forthwith enter therein-
(a) the names and addresses of the members and, in the case of a company having a share capital, a statement of the shares issued to each member, distinguishing each share by its number, if any, and by its class or kind, and of the amount paid or agreed to be considered as paid on the shares of each member; and
(b) in respect of each member-
(i) the date on which his name was entered in the register as a member; and
(ii) the date on which he ceased to be a member."

[23] We were provided at the hearing of this matter with a document reflecting a comparison of the registers (for members in terms of section 105 of the CA 1973 and holders of securities in terms of section 50 of the CA 2008, and its associated regulation 32 by counsel for the applicant. We are equally grateful for this gesture, as we are for the heads of argument filed on behalf of the parties by counsel. From this document (and also from a direct reference to the impugned legislation), it is confirmed that, the requirements regarding the reflection of contact details of the shareholders or members of the company is not something new. Companies were in the past (i.t.o. the CA 1973) required to reflect in the

[54] Annexure "A" to the answering affidavit [on pages 83 – 110 of the indexed bundle].

registers, names and addresses of their members as they are presently (i.t.o the CA 2008) still required to do so in respect of the holders of their securities. To embrace a technological sign of our times, members may also provide electronic or email addresses, if they so choose.[55] The legislature went slightly further in stating in the CA 2008 provision and specified that the address required may be a business, postal or residential address.[56]

[24] The applicant initially submitted that it keeps a register in terms of section 105 of the CA 1973 and would like this Tribunal to authorise it to continue this form. This as I have mentioned was abandoned at the hearing of this application. The applicant now wants its register as currently kept to be a subject of the exemption to be granted herein.[57] I will return to this a little later.

[25] On the basis of what is stated above in respect of the applicant, this application seeks an exemption in terms of sections 6(2) and (3) of the CA 2008 from the provisions of sections 50 and 51, as read together with regulation 32 of the Regulations. What actually has to be exempted is the applicant's shareholders resolution of 2006 (the 2006 Resolution)[58].

[26] The applicant submits that the 2006 Resolution aptly provides a basis for the exemption sought in terms of this application. I expressed my concerns

[55] Regulation 32(2)(a)(ii).
[56] Regulation 32(2)(a)(i).
[57] See footnote 54 above.
[58] See paragraph 9 above.

regarding this at the hearing of this application, as I also did above.[59] I am of the view that, the 2006 Resolution appears to have been aimed at release of information by the directors and not at the keeping of a statutory register or the information. In my view the members gave the discretion regarding the release of their information [ostensibly regarding their contact details, as names were precluded] to the directors, in case such information has to be provided. In the exercise of their discretion directors have to be satisfied with the purpose for which the information is required; the identity, background and intentions of the person seeking the information. I do not understand this to mean that the information cannot be kept as statutorily required by the CA 2008. In other words, it is my interpretation of the 2006 Resolution that the information can be kept, but its release should be controlled. This has nothing to do with prevention of the alleged corporate bulling by the respondents or the persistent takeover attempts of the applicant by some of the respondents. Therefore, in my view, the current application could have been made for an exemption against uncontrolled disclosure of the register in terms of section 26(2) of the CA 2008. The members would like some measure of control on the release of information and as this would impinge on a statutory provision[60] which grants unconditional access to company records, an exemption is necessary. I am alive to the fact that, it is not my territory to offer legal advice to the contenders and therefore my aforesaid comments should be considered to be *en passant*. Also, the aforesaid shouldn't be construed to suggest that such an application will be meritorious. I will

[59] See paragraph 11 above.
[60] Section 26 of the CA 2008.

proceed to deal with the application despite having expressed the reservations above and the reason for this will become clearer below.

[27] It is common cause that, the 2006 Resolution or what the applicant intends it to achieve, does not satisfy the requirements of sections 50 and 51 of the CA 2008 applied together with regulation 32 of the Regulations, hence this application. It is also common cause that the impugned provisions of the aforesaid sections are unalterable.[61] What has to be determined is firstly, whether the 2006 Resolution serves a reasonable purpose other than to defeat or reduce the effect of the impugned statutory provisions, secondly, whether it is reasonable and justifiable to grant the exemption. The second or latter part of the determination or enquiry has to have regard to the purposes of the CA 2008 and all relevant factors, including the purpose and policy served by the relevant prohibition or requirement, and the extent to which the 2006 Resolution infringes or would infringe the relevant prohibition or requirement.

[28] My lamentation regarding what I understand to be the purpose for the 2006 Resolution and what the applicant seeks to achieve with it, are still relevant here.[62] However, I have decided to move on and deal with the applicant's submissions that the alleged takeover attempts and corporate bullying by the respondents or some of them were the grounds the shareholders passed the

[61] See footnote 14 above for a definition of an "unalterable provision".
[62] See in the immediate, paragraph 26 above.

2006 Resolution. The immediate question to be answered is whether this is a reasonable purpose.

[29] The learned author of the English law-based[63] book *Company Law* (3 edition)[64]states the following regarding takeovers:

"Takeovers are the means by which business expansion occurs. Companies may seek vertical integration (i.e. takeovers of companies at different stages in the production process) or horizontal integration (takeovers of companies at the same stage of the production process) or seek to diversify, as in the case of conglomerates. Takeovers tend to be associated in the public mind with aggressive or predatory management."[65]

The learned author continues and state that:

"As with any major investment decision, there may be a variety of motives for a company making a takeover bid for another company."[66]

[30] The above statements, in my view, provide a good perspective of takeovers anywhere in the world they occur. Takeovers or mergers and acquisitions are provided in this country, among others, in terms of sections 112 – 116 of the CA 2008 and previously in terms of, among others, sections 311 – 321 of the CA 1973. They have always been part of our statutory landscape and

[63] Section 5 of the CA 2008 allows the courts to consider foreign company law when interpreting or applying the CA 2008, and section 193 the Companies Tribunal to have regard to international developments in the field of company law, in carrying out its functions.
[64] Hannigan, B. *Company Law, 2012* Oxford University Press, Oxford, UK (Hannigan's *Company Law*).
[65] At paragraph 26-2 of Hannigan's *Company Law*.
[66] At paragraph 26-3 of Hannigan's *Company Law* and quoted without references.

the process has always involved approval by majority of the shareholders and judicial oversight.[67] I therefore do not see the reason why a takeover of the applicant by any person including the respondents will be something that this Tribunal should assist in preventing. I do not assert myself the wisdom regarding the socio-economic aspects of a takeover, but only that our laws do not appear to prohibit it. Also to the extent that the manner in which a takeover is effected by the particular prospective acquirer does not comply with the law, the affected parties (be it the target company or its shareholders) will always have the right to approach our courts for appropriate relief. Therefore, in as far as the applicant purports that the 2006 Resolution empowers or compels it or its directors to thwart any takeover attempts by the respondents, I am of the view that it serves no reasonable purpose. The learned authors of *Henochsberg on Companies Act*[68] (as at May 2014) at page 40 state the following in this regard:

"It should be noted that the requirements for the exercise of the discretion by the Companies Tribunal are conjunctive, i.e. if it finds that it will be reasonable and justifiable to grant an exemption having regard to (a) the purposes of the Act; (b) all relevant factors; (c) the purpose and policy served by the relevant prohibition or requirement; and (d) the extent to which the agreement, transaction, arrangement, resolution or provision infringes or would infringe the relevant prohibition or requirement, it must in addition also be satisfied that the agreement, transaction, arrangement, resolution or provision serves a reasonable purpose other than to defeat or reduce the *effect of* a prohibition or requirement of the Act."[69]

[31] I have already hinted in the preceding paragraph that in my opinion the 2006 Resolution does not clear the hurdle, so to speak, presented by the first leg

[67] Section 115 of the CA 2008 and section 311 of the CA 1973.
[68] Delport, P.A. and Vorster, Q. *Henochsberg on Companies Act 71 of 2008* (electronic version).
[69] Accessed through the link http://www.mylexisnexis.co.za/Index.aspx on 28 September 2014.

of section 6(3)(a) of the CA 2006 as I have already found that it does not serve a reasonable purpose other than to defeat or reduce the requirement of sections 50 and 51 of the CA 2008 and regulation 32 of the Regulations. As the enquiry is conjunctive, I also state that I do not consider it reasonable and justifiable to grant the exemption especially when considering the purposes of the CA 2008 as reflected in section 7, which include the need to encourage transparency and high standards of corporate governance.[70]

[32] The applicant has taken the effort of listing what is called eighteen offensives by the respondents. I do not consider these to be relevant for the current purposes and I am simply mentioning them here to remark that the CA 2008 provides ample protection for shareholders on the basis of oppressive or unfairly prejudicial conduct, in case of such conduct by majority shareholder in a successful takeover[71] or even for appraisal rights of a shareholder who dissents to a merger or takeover.[72] I am also of the view that directors of the applicant should not consider it their fiduciary duty to prevent any takeover without the involvement of shareholders. The 2006 Resolution is not such involvement and was in fact aimed at a particular objective. Further, the changes ushered in by the CA 2008 may be influential to members' views on the material issues.

[33] Against the above background, I am of the view that the approach taken by the applicant was not the best under the circumstances and therefore the

[70] Section 7(b)(iii) of the CA 2008.
[71] Sections 161 and 163 of the CA 2008.
[72] Section 164 of the CA 2008.

respondents should not be mulcted with costs relating to these proceedings. I also fully associate myself with the words of the court in *La Lucia Sands Share Block v Barkhan* 2010 (6) SA 421 SCA regarding the issue of costs.[73] Therefore, I consider this matter to be appropriate for this Tribunal to make an order for costs[74] and this is in favour of the respondents.

[34] I therefore proceed to make an order in the following terms:

a) the application is refused with costs at a tariff applicable in respect of High Court matters, including the costs of Senior Counsel.

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Khashane Manamela

Member, Companies Tribunal

Sathie Gounden Concurring

Member, Companies Tribunal

Khatija Tootla Concurring

Member, Companies Tribunal

[73] See paragraph [22] of *La Lucia Sands Share Block v Barkhan* 2010 (6) SA 421 SCA.
[74] Regulation 156(1) of the Companies Regulations.