REPUBLIC OF SOUTH AFRICA

COMPANIES TRIBUNAL

Case/File Number: CT017Jun2014

In the *ex parte* application of:

SIYAKHA FUND (RF) LIMITED **Applicant**
(Registration Number: 2007/023159/06)

in respect of:

AN APPLICATION FOR SETTING ASIDE A PREVIOUS DECISION OR ORDER AND RE-APPLICATION FOR A NEW ORDER FOR AN EXEMPTION FROM THE REQUIREMENT TO APPOINT A SOCIAL AND ETHICS COMMITTEE

Coram	:	Khashane Manamela (Mr.), Lucia Glass (Ms.) and Piet Delport (Prof.)
Date of Decision	:	30 September 2014

DECISION (Reasons and an Order)

Khashane Manamela (Lucia Glass and Piet Delport concurring)

[1] The applicant states that it is wholly-owned by an entity called Blue Granite Investments Owner Trust. The applicant also submits that it is "*consolidated and recognised in the consolidated financial report of the Standard Bank Group Limited in accordance with the International Financial Reporting Standard…*"[1]

[2] The applicant previously made an application for an exemption from the requirement to appoint a social and ethics committee, which was adjudicated upon by my colleague Mr MF Kganyago. The application was on the bases that it is not reasonably necessary in the public interest to require the company to have a social and ethics committee when considering the nature and extent of its activities[2], and the applicant is part of Standard Bank Group Limited, which has established a Group Social and Ethics Committee.[3] Mr Kganyago on the basis of the information before him refused the application on both grounds or bases (the Original Decision).[4]

[3] The applicant submits in terms of this application[5] that the Original Decision should be set aside. No further submissions are made as to the reasons why the Original Decision should be asset aside. Actually, the applicant chose to

[1] In a covering letter to the application dated 11 June 2014 by one Brendan Harmse addressed to this Tribunal.
[2] Based on section 72(5)(b) of the Companies Act 71 of 2008 (the Act).
[3] See Form CTR 142 under case or file numberCT008FEB2014 of this Tribunal, and regulation 43(2)(a) of the Companies Regulations, 2011.
[4] The decision was handed down on 15 April 2014.
[5] The submission or the request (as labelled by the applicant) is contained in a covering letter referred to in footnote 1. The application as constituted by Form CTR 142 and supporting affidavit deposed to by Brendan Harmse does not refer to the previous application which led to the Original Decision or even the abovementioned covering letter.

request the setting aside of the Original Decision in a letter[6] rather than the supporting affidavit. There is no reference to the letter in the supporting affidavit and in fact the latter does not even refer to the Original Decision or its setting aside. The rules of this Tribunal are very clear in this regard. Regulation 142(1) (a) and (b) of the Companies Regulations, 2011 (the Regulations) prescribe Form CTR 142 and a supporting affidavit for applications before this Tribunal.[7] The letter or its contents should have been incorporated in the supporting affidavit in compliance with this regulation. I will nevertheless overlook this irregularity by invoking the discretion I think I enjoy in this regard in terms of regulation 154(3) of the Regulations.[8] Although is no consolation, the letter appears to be authored by the same person[9] as and the supporting affidavit.

[4] The other request [than the setting aside of the Original Decision], also contained in the covering letter, is that this Tribunal should consider "*the re-lodged application*".[10] The re-lodged application is crafted in expansive terms than the application to the Original Decision, which was a paltry one paragraph.[11] I think the correct label should actually be a *new* application rather than *re-lodged*

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[6] See footnotes 1 and 5 above.
[7] It reads as follows:
"**142. Applications to the Tribunal in respect of matters other than complaints**
(1) A person may apply to the Tribunal for an order in respect of any matter contemplated by the Act, or these regulations, by completing and filing with the Tribunal's recording officer—
(a) an Application in Form CTR 142; and
(b) a supporting affidavit setting out the facts on which the application is based."
[8] It provides that this Tribunal can in the conduct of its hearings condone any technical irregularities arising in any of its proceedings.
[9] A certain Brendan Harmse, a director of the applicant.
[10] Paragraph 4 of the letter by Harmse.
[11] Affidavit dated 23 January 2014 by a certain Stuart Waetzel, stated to be the company secretary of the applicant.

application. This aspect cannot be overlooked in determining the current application.

[5] In my judgment, the critical factors to be looked into here are whether this Tribunal can set aside the Original Decision and then determine the re-lodged application, in that order. This enquiry is a determination of the relevant principles of our law as deemed applicable in the circumstances. I do so following the beaten track of the other four decisions in similar matters I contemporaneously handed down.[12]

[6] The Act and the Regulations are silent regarding instances in which the Tribunal can set aside its own decisions. I don't think this is an oversight as it appears to be a logical aspect of our laws. In fact this is the case with our courts of law and the learned authors of *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* (5 edition) express this view as follows although dealing with a slightly different aspect:

"Once a court has made an order disposing of the matters in issue, the court becomes *functus officio*…" [13]

[references omitted from the above quotation]

[12] CT008Jun2014; CT009Jun2014; CT010Jun2014; CT011Jun2014 and CT016Jun2014.
[13] Cilliers, A.C; Loots, C. and Nel, H.C. *Herbstein & Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal in South Africa* (Volume 1), 5 edition, (Cape Town 2009) at page 917 (*Herbstein & Van Winsen*).

The same authors continue at page 926:

"The general principle now well established in our law, is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that the court thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter ceases." [14]

[again, quotation is without references]

[7] From the above it is clear than there is no provision for setting aside of a decision or order on the basis sought by the applicant, as this Tribunal is clearly *functus officio*. However, I am aware that setting a decision aside is possible in a tribunal or court with review powers or jurisdiction over the deciding tribunal or court *a quo.* In my opinion in the case of this Tribunal, the high court will have such powers.

[8] However, the legislature appears to have overlooked generally providing for this, although there are instances in which the review powers of the high court are specifically provided for. For example, section 172(4) of the Act provides for appeals and reviews to a court in respect of a decision of this Tribunal. Regulation 156(2)(j) of the Regulations caters for a review of a decision of the taxing master by the High Court on application. This appears to be the case with

[14] The principle above has some exceptions, but they do not avail the applicant.

other similar tribunals like the Competition Tribunal of South Africa and the Consumer Tribunal of South Africa as in terms of prevailing legislation these tribunals[15] have their appeals and reviews to the high court. I am of the opinion that, decisions of this Tribunal are subject to a review by the high court in terms of rule 53 of the Uniform Rules of Court. Rule 53(1) reads as follows:

"**53 Reviews**

(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected…"

[underlining added]

[9] Therefore, in my non-binding view, the applicant should have pursued a review of the Original Decision by the high court with jurisdiction in order to set it aside as this Tribunal is now *functus officio* as it is a final and binding decision albeit subject to a review process, should this be deemed advisable. I should not

[15] Section 148 of the National Credit Act 34 of 2005 [for the Consumer Tribunal, although there is a provision for a full panel to hear an appeal in respect of a decision by a single member] and section 37 of the Competition Act 89 of 1998 in which instance the appeal or review is to the Competition Appeal Court.

be construed by the aforesaid to be making a finding that, the high court has jurisdiction to set aside a decision of this Tribunal or that there are valid grounds for a review of the Original Decision. It will always be risky to express a view against the frugality or lack of the submissions in this regard. It may well be that the applicant by setting aside meant a rescission or variation of the Original Decision rather than a review?

[10] Regulation 142(3)(b)(ii) of the Regulations provides a glimpse of what appears to be a rescission or variation of a decision of this Tribunal. Regulation 142(3) reads as follows in selected parts:

"**142. Applications to the Tribunal in respect of matters other than complaints**

(1) A person may apply to the Tribunal for an order in respect of any matter contemplated by the Act, or these regulations, by completing and filing with the Tribunal's recording officer—

…

(3) An application in terms of this regulation must—

(a) indicate the basis of the application, stating the section of the Act or these regulations in terms of which the Application is made; and

(b) depending on the context -

(i) set out the Commission's decision that is being appealed or reviewed;

(ii) set out the decision of the Tribunal that the applicant seeks to have varied or rescinded;

(iii) set out the regulation in respect of which the applicant seeks condonation; or

(c) indicate the order sought; and

(d) state the name and address of each person in respect of whom an order is sought."

[underlining added for emphasis]

[11] The aforesaid is all there is in as far as rescission or variation goes before this Tribunal. Neither the Regulations nor the Act state the circumstances under which this Tribunal may rescind or vary its own decisions. This is ought to be an anomaly as an analysis of provisions relating to other regulatory bodies similar to this Tribunal or rules of courts reveal instances when rescission or variation is possible. For example, in terms of section 165 of the National Credit Act 34 of 2005 variation of orders is possible in the National Consumer Tribunal as follows:

"**Variation of order**

165. The Tribunal, acting of its own accord or on application by a person affected by

(a) erroneously sought or granted in the absence of a party affected by it;

(b) in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or

(c) made or granted as a result of a mistake common to all the parties to the proceedings."

[underlining added for emphasis]

Section 66 of the Competition Act 89 of 1998 applicable to the Competition Tribunal reads as follows:

"**66. Variation of order**

(1) The Competition Tribunal, or the Competition Appeal Court, acting of its own accord or on application of a person affected by a decision or order, may vary or rescind its decision or order -

(a) erroneously sought or granted in the absence of a party affected by it;

(b) in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or

(c) made or granted as a result of a mistake common to all of the parties to the proceeding."

[underlining added for emphasis]

[12] Both the National Credit Act and the Competition Act appear to derive their provisions from rule 42 of the Uniform Rules of Court[16]. This rule reads as follows in selected portions:

"**42 Variation and Rescission of Orders**

(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties."

[I added the underlining]

[13] Further, rule 31 of the Uniform Rules of Court caters for rescission and variation of judgments and orders of the high court granted due to the default of a party.

[16] Rules regulating the conduct of the proceedings of the several provincial and local divisions of the high court of South Africa. These rules are made in terms of section 43 of the Supreme Court Act 59 of 1959 and amended through government notices from time to time and were first published under government notice R48 in *Government Gazette* 999 of 12 January 1965.

[14] Rule 49 of the Rules Regulating the Conduct of Magistrates' Courts of South Africa[17] (the Magistrates' Courts Rules) provides for rescission and variation as follows:

"**Rescission and variation of judgments**

49. (1) A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may … serve and file an application to court, … for a rescission or variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit…

…

(7) All applications for rescission or variation of judgment other than a default judgment must be brought on notice to all parties, supported by an affidavit setting out the grounds on which the applicant seeks the rescission or variation, and the court may rescind or vary such judgment if it is satisfied that there is good reason to do so.

(8) Where the rescission or variation of a judgment is sought on the ground that it is void *ab origine* or was obtained by fraud or mistake, the application must be served and filed within one year after the applicant first had knowledge of such voidness, fraud or mistake.

[17] Made by the Rules Board for Courts of Law under section 6 of the Rules Board for Courts of Law Act 107 of 1985, read with section 9(6)(a) of the Jurisdiction of Regional Courts Amendment Act 31 of 2008, with the approval of the Minister for Justice and Constitutional Development.

(9) A magistrate who of his or her own accord corrects errors in a judgment in terms of section 36(1)(c) of the Act shall, in writing, advise the parties of the correction."

[underlining added]

[15] Rule 49 appears to be based on section 36 of the Magistrates' Courts Act 32 of 1944, which reads as follows in selected places:

"**36 What judgments may be rescinded**

(1) The court may, upon application by any person affected thereby, or, in cases falling under paragraph *(c), suo motu*-

(a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;

(b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties;

(c) correct patent errors in any judgment in respect of which no appeal is pending;

(d) rescind or vary any judgment in respect of which no appeal lies.

(2) If a plaintiff in whose favour a default judgment has been granted has agreed in writing that the judgment be rescinded or varied, a court must rescind or vary such judgment on application by any person affected by it."

[underlining added for emphasis]

[16] In *Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa*[18] it is pointed out that, although section 36(1)(d) of the Magistrates' Courts Act seems to be blurring the lines and straying out of the theme of the other legal provisions quoted above, this is not the case as the section deals with interlocutory orders not having the effect of a final and definitive judgment.[19] The other subsections to section 36 appear to complement rule 49 and the other rules and statutory provisions dealt with above.

[17] In my view, in both the tribunals and courts of law, the provisions for variation or rescission of judgments or orders is to correct or reverse the effect of judgments or orders obtained due to fraud or by mistake common to the parties; in default; those deemed void *ab origine* or to correct patent errors.[20] It is further my view that regulation 142(3)(b)(ii) of the Regulations, although frugal in details, is intended to meet the same purpose. The question is whether it is currently available to the applicant.

[18] I have already lamented the fact that the applicant only deals with the setting aside of the application in a covering letter. The impression created is that the Original Decision ought to be set aside as a matter of routine and the so-called re-lodged the application albeit now in an amplified form, should be

[18] Pages 245-6 of *Jones & Buckle*.
[19] See further section 83(b) of the Magistrates; Courts Act 32 of 1944 and commentary thereon at page 587 of *Jones & Buckle*.
[20] Further grounds for setting aside a judgment exist. For example, where new documents have come to light which should they have been available at the trial would have affected the outcome in favour of the applicant, or in some circumstances where there is a consent to judgment. See also *Herbstein & Van Winsen* at page 941-942.

considered. This approach is clearly misguided and in fact, incorrect. The Original Decision exists and will continue to so exist until either set aside through a proper review application or varied or rescinded after a substantive application is made. Again this should not be construed to be a confirmation of the prospects of either of the aforesaid processes. The applicant should obtain relevant advice in this regard.

[19] Against the backdrop of all the above, this application cannot succeed, both in respect of setting aside the decision of this Tribunal made under case number CT008/FEB/2014 handed down on 15 April 2014 and in terms of the re-lodged application for an exemption from the requirement to appoint a social and ethics committee. Refusal of the application on the latter basis, is not based on a consideration of the merits of the re-lodged application, but as this Tribunal is *functus officio* whilst its decision of 15 April exists.

[20] In the result:

a) the application is refused.

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Khashane Manamela

Member, Companies Tribunal

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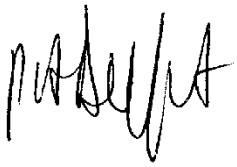
Lucia Glass Concurring

Member, Companies Tribunal



Piet Delport Concurring

Member, Companies Tribunal