

THE COMPANIES TRIBUNAL

A REPORT ON THE CHANGES TO THE
COMPANIES ACT: HOW TO PREPARE THE
TRIBUNAL FOR THE NEW ENVIRONMENT



Companies Tribunal

a member of **the dtic**

Submitted by

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TERMS AND ACRONYMS

AA	Accounting Authority
ADR	Alternative Dispute Resolution
AO	Accounting Officer
BBBEE	Broad Based Black Economic Empowerment
CMS	Case Management System
COO	Chief Operating Officer
CIPC	Companies and Intellectual Property Commission
SEC	Social and Ethics Committee
the dtic	Department of Trade, Industry and Competition
Tribunal	Companies Tribunal

¹ <https://www.companiestribunal.org.za/about-us/about-the-companies-tribunal/>

Executive Summary

This research was commissioned by the Companies Tribunal (Tribunal) specifically seeking to understand the impact of the new amendments envisaged in the Companies Amendment Bill 2021 (the Bill), on the planning and operations of the Tribunal and also to understand the preparations that the Tribunal should undertake in view of the anticipated new environment.

From the reading of the Memorandum to the Bill², it appears that the Bill was not intended to introduce substantive changes. The Memorandum expressly states that the amendment proposals relate to “changes to keep up with the current trends and also to close some loopholes in the Act as discovered during the implementation period”. The Memorandum further states that the changes in the Bill do not represent changes to the original policy. During the discussions with **the dtic** officials³ this sentiment was also clear. The officials stated that extensive amendments are planned in the next phase of amendments.

The above notwithstanding, according to the research findings, the Amendment Bill 2021 is a welcome development that brings about some clarity and more certainty in the application of the Companies Act, 71 of 2008. The Bill contains some important provisions that have a potential to impact positively on the Tribunal. The following is a summary of such possible positive impacts.

The Important (big five) Amendments relevant to the Tribunal

- (a) Amendment to Section 72 deals with the Social and Ethics Committee (SEC):** the amendment adds more compliance requirements on the part of the companies. These include publishing the intention to lodge an application for exemption in establishing a social and ethics committee; composition of the Social and Ethics Committee; minimum qualification of SEC members and the period within which to appoint members. The research has found that this is regarded as a positive amendment that will ensure amongst other things that only qualified persons may be part of the SEC. However, the impact of the amendment is minimal at the Tribunal’s level compared to the Companies level. The requirement for the applicants to publish the intention to lodge an application for exemption, will add to the list of requirements that the Tribunal Members will need to consider in assessing the applications by companies for exemption from establishing the SEC.
- (b) Amendment to Section 160 deals with Administrative Orders:** The amendment requires compliance date to be stated in the order and empowers the winning applicant to approach the CIPC in case of non-compliance. The research established that this is a welcome and positive amendment. Section 160 has been a significant area of concern for years. According to the research findings, this amendment will address the current inconsistencies in decisions handed down by various members of the Tribunal. The amendments offer much needed clarity and certainty on the enforcement aspect.

² Memorandum on the objects of the Companies Amendment Bill, 2019, end of the Companies (Act) Amendment Bill, June 2021

³ Consultation Meeting (virtual) held on 25 October 2021

(c) Amendment to Section 166 deals with Alternative Dispute Resolution (ADR): The Amendment now adds the provision for a certificate of non-resolution in mediation and conciliation to be issued and for a further referral to the Tribunal for arbitration with a binding order. The amendment further removes the provisions relating to the accreditation process for ADR.

Some respondents felt that the removal of the accreditation would make no difference as in practice it was not used. CIPC indicated that in the eleven (11) years of implementation of the Act, the CIPC did not receive applications for accreditation and did not accredit any entity⁴. It appears that entities that practise in ADR continued to perform probably, oblivious to the accreditation provisions. Clearly the section was not made use of by these entities.

The research anticipates minimal impact in the Tribunal's environment. This will relate to the need to rename the current certificate of failure into certificate of non-resolution and other minor amendments.

(d) Amendment of Section 194 deals with the responsibilities of the Chairperson. In the Tribunal the Chairperson is perceived as the Accounting Authority (AA) not Accounting Officer (AO) The research findings indicate that the responsibilities allocated to the AA may require him or her to be more active and involved at the Tribunal than has been the case hitherto. The role and the scope of authority of the Accounting Authority will be increased. Some respondents felt that, this Amendment needs to be changed by replacing reference to the Accounting Authority to the Accounting Officer. Should it remain unchanged, the delegation framework must be amended accordingly. In this regard, the Public Finance Management Act (PFMA) of 1999 read together with National Treasury Regulations of 1999 clearly specify the roles of these officers. In the PFMA the Accounting Officer is "responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution."⁵ There is a myriad of other responsibilities for the Accounting Officer including ensuring that he or she establishes an 'effective, efficient and transparent systems of financial and risk management and internal control, system for properly evaluating all major capital projects prior to a final decision on the project'⁶, etc.

(e) Amendment of Section 195(d) deals with the referral of disputes from the BBBEE Commission. This Amendment makes provisions for the Tribunal to conciliate, mediate and arbitrate matters referred to it by the BBBEE Commission. Research has found that the role of the Tribunal will be increased in terms of new responsibilities and focus areas. The number of new applications received in the Tribunal is likely to increase. Accordingly, this may require full capacity of the members of the Tribunal (subject to availability of

⁴ Enquiries made to a senior Manager of the CIPC, Legal Division on 23/03/2022.

⁵ Treasury Regulations for departments, constitutional institutions and public entities issues in terms Public Finance Management Act 1999

⁶ Public Finance Management Act 1999

resources) and full staffing as per the Tribunals organogram (**attached as Annexure 3**). With the Tribunal being involved in the BBBEE dispute matters, some respondents felt that new knowledge will also be required and therefore training will be important, as BBBEE may be a new area for most staff and some members of the Tribunal.

Capacity and resources considerations

In its various reports, (quarterly and annually) the Tribunal continuously highlighted various challenges. The research has also pointed to some of these. They include the following:

- (a) **Facilities:** Regarding facilities, respondents stated that the Tribunal lacks professional, equipped hearing rooms and has inadequate parking space for the visitors. For hearings, the Tribunal utilises two meeting rooms at the entrance of Block E. These rooms are both small and unventilated. One of the rooms has a window which does not open at all. The second room, adjacent to the main meeting room has no window. In the light of the Covid-19 pandemic and its protocols, these rooms' capacities are greatly reduced. All meeting rooms on the floor are also shared facilities with the other occupants of Block E and consequently become unavailable when being used by the other occupants.
- (b) **Funding or budgetary constraints:** The various Annual Reports show that the Tribunal continues to operate under financial difficulties of "Limited Budget" and "Unfunded Priorities". Respondents reported that the Tribunal is often forced to augment its funding from surpluses, unspent funds and occasional additional funding. The unpredictability of the funding makes it difficult for the Tribunal to plan its operations appropriately.

Generic Issues

At a general level and perhaps unrelated to the amendments, in so far as increasing its clientele is concerned, the research found that the Tribunal could be seen as an entity of "first resort" and attract many applicants who value its expertise in various ways such as intellectual leadership in terms of the quality of its orders. This means that the respondents would like to see the Tribunal post amendments taking the lead in terms of the dynamism and appropriateness of its decisions. They believe Tribunal could be more attractive in ADR matters than other institutions due to its simplicity and informality in handling matters of this nature.

The Respondents also indicated that the Tribunal could be of even more importance to smaller firms that do not have the financial muscle to fight matters in the formal courts, which are expensive and time consuming.

Conclusions

The Tribunal is impacted by the amendments in some cases minimally but in other cases substantially. There are a few Amendments where the Tribunal posits that the best way is to amend the Amendment Bill itself. In most of the Amendments, the Tribunal would take less than six months to get ready for implementation. This research has therefore concluded that Section 72 amendments will impact minimally on the Tribunal processes and that Section 160 amendments may increase eagerness to use the services the Tribunal by those applicants that

expressed frustrations with this section of the Act. In addition, Section 166 amendment would have no further implications on the Tribunal subject to one's interpretation and Section 194 amendments could lead to Accounting Authority being more active and involved at the Tribunal in administrative functions. Lastly, Sections 195 amendments are likely to increase the volume of work for the Tribunal which should be managed through referral protocols agreed upon by both entities.

Research Recommendations

Lastly, having analysed the data and information from various key stakeholders, the research recommends some interventions that are required in preparation for the new environment. The recommendations include the following:

(a) Relating to the big five amendments:

The recommendations here include amongst others, timeous communication of the order to the parties in question as well as the effective date of the administrative order thereof. The renaming of the current certificate of failure to certificate of non-resolution as proposed in the Amendment; review of the amendment of the delegation framework to accommodate the new functions given to the accounting authority; and the reconfiguration of the case management system to track the referrals from the Commission

(b) Relating to planning and operations:

Recommendations include strategic planning session focused on the new environment, training of Members of Tribunal and personnel on BBBEE related matters, and further engagement with BBBEE Commission in view of the anticipated flow of referrals from the Commission. Furthermore, there will be a need to refine processes envisaged in the current MOU and to get a better feel of the numbers of referrals to be expected. Therefore, it is recommended that a resource-based review strategy to assess the totality of the Tribunal's resources needs be developed, strategic partnerships with independent legal practitioners, and partnership arrangement with the courts be considered with a view to improving cooperation on adjudication and ADR matters.

1. Introduction and background

1.1 Introduction

The Companies Tribunal (Tribunal) is an agency of the Department of Trade, Industry and Competition (**the dtic**) established in terms of the Companies Act No. 71 of 2008 to provide speedy resolution of company disputes. The Tribunal has jurisdiction throughout the Republic of South Africa. It is independent, and subject to the Constitution and the law. It exercises its functions in accordance with the Act and performs its functions fairly, without fear, favour or prejudice and in a transparent manner⁷.

1.2 Background to the research

In 2011, the Companies Act, 2008 (Act No. 71 of 2008) or (“the Act”), that was a result of the 2004 policy review, came into effect and repealed the Companies Act, 1973. Amongst other things, the Act, introduced significant changes by providing for business rescue, SEC for public companies, corporate governance including financial accountability and provisions relating to shareholder activism. The Act provides for the establishment of institutions, such as the Companies and Intellectual Property Commission (“the Commission”), Companies Tribunal, etc.⁸

According to the Memorandum on the objects of the Companies Amendment Bill, 2019, the Act was destined for a review after five years of implementation⁹, being 2016. Following several processes, finally, in 2021 an Amendment Bill was tabled in Cabinet and thereafter published. Some of the amendments that the Bill proposes have a direct impact on the Tribunal and may possibly test the Tribunal’s capacity. Thus, the need for the Tribunal to commence preparations in anticipation. The Tribunal sought the services of a service provider to conduct research on how to prepare itself to address the new environment brought about by the Amendment Bill.

This research study that has been commissioned by the Companies Tribunal is therefore in keeping with these legislative developments in **the dtic** and its associated agencies.

1.3 Research objectives

The Tribunal sought evidence-based information and data on how to prepare the institution for the new environment which is being proposed by the Companies Amendment Bill. Specifically, the objectives of the research are to understand the impact of the new environment on planning and operations of the Companies Tribunal and to understand the type of preparations that the Tribunal should undertake in view of the pending new environment.

⁷ <https://www.companiestribunal.org.za/about-us/about-the-companies-tribunal/>

⁸ Memorandum on the Objects of the Companies Amendment Bill, 2019, Page 29.

⁹ Ibid, Page 29.

1.4 Research methodology

For this study, the researcher used both qualitative and quantitative research instruments or approaches with a view to providing a balanced outcome of the research process. The researcher has used the questionnaire and interview instruments to collect data and information from various respondents. An open-ended questionnaire for this study was used as it allowed respondents to articulate their thoughts, opinions, and experiences in the interaction with the Tribunal. This instrument allows for long-form and short-form answers to be provided in detail as the case has been in this research process. In addition, mini workshops were also successfully used, in particular with critical stakeholders such as the Management of the Tribunal, the Chairperson of Tribunal and **the dtic** Management.

1.5 Research scope

The study was conducted essentially within selected Council of Trade Industry Institutions (COTII), the Applicants (Legal Firms that lodge applications on behalf of clients), Members of the Tribunal (past and current), Audit and Risk Committee (ARC), Remuneration Committee (REMCO) and Management Committee (Manco) of the Tribunal. The scope was limited to assessing the impact of the current Amendment Bill on the Tribunal and how the institution should prepare for the new environment.

1.6 Limitations of research

It is important to note that the Amendment Bill is still at its infancy and is yet to be enacted. The Bill might change when everything else has been concluded. Other limitations include the reluctance of key respondents to participate in the study, citing confidentiality considerations even though anonymity was assured.

1.7 Research questions

As mentioned earlier, the study seeks to assess the impact of the Amendment Bill on the planning and operations of the Tribunal and how to position the entity for the new environment. In seeking to answer these questions, the study has taken into account the broader socio-economic and legal environments within which the Tribunal operates at the present moment. Consequently, the study crafted research questions and these were sent to the identified respondents. The sample questionnaires are attached hereto as Annexures **A**, **B** and **C** respectively. The questionnaires stated the various sections of the Amendments Bill relevant to the Tribunal and asked the following questions:

- What would be the impact of the amendments and how should the Tribunal better prepare for their implementation;
- What precisely can the Tribunal do better under the Amendment Bill (new environment) regarding its planning and operations; and any other generic steps that the Tribunal can take to improve its dispute resolution mechanisms.

1.8 Legislative and governance framework

In terms of Section 195 of the Companies Act, the Tribunal's mandate is to:

- Adjudicate in relation to any application that may be made to it in terms of the Act, and make any order provided for in the Act in respect of any such application;
- Assist in the resolution of disputes as contemplated in Part C of Chapter 7 of the Act,
- Perform any other function assigned to it in terms of the Act or any law in Schedule 4.

In delivering on this mandate, the Tribunal is enjoined to perform its functions in line with the spirit, purpose and objects of the Constitution, international law and the Companies Act and, in a manner, that is transparent, impartial and without fear, favour or prejudice¹⁰. In executing its legislative mandate, the Tribunal has set out clear strategic objectives which are translated into lucid Annual Performance Plans. Some of these strategic objectives include but not limited to: adjudication of applications timeously, fairly and in a transparent manner, facilitating in resolving disputes in a cost effective, informal and timeous manner and building of body of knowledge around company law¹¹.

1.9 Amendments to the Companies Act

According to the Government Gazette¹² that detailed the Companies Amendment Bill 2021, some of the key objectives with specific reference to the Tribunal is to differentiate the duties between the Chairperson of the Tribunal and the Chief Operating Officer and to provide for matters connected therewith.

(a) Amendment to Section 72 deals with SEC and calls for amongst others: publication of the intention to lodge an application for exemption, requirement for qualification for members, who may appoint the first members of the SEC and the time within which SEC's must be appointed.

(b) Amendment to Section 160 deals with Administrative Orders and has two aspects:

- i. The requirement for members of the Tribunal to stipulate a date in the orders they make. This Amendment will provide certainty for both parties in the dispute. The Tribunal is urged to ensure that there is uniformity in stipulating the date in the order, unless exceptional circumstances exist that would warrant a deviation. There will be a need to standardize the format of orders issued by Members.
- ii. The empowerment for the Applicant who wins the case to approach the CIPC in the event of a recalcitrant Respondent (Failure to change the name within the stipulated date). The Amendment clarifies the power of CIPC to change a contested name at the instance of the Applicant.

¹⁰ Companies Tribunal Annual Report, 2020/21

¹¹ Companies Tribunal: Three (3) Year Annual Performance Plan: 2017/18 -2019/2020

¹² No. 45250 Government Gazette, 1 October 2021

- (c) **Amendments to Section 166 deals with ADR** and has two important aspects to it:
- i. The requirement for the issuing of a Certificate of Non-Resolution where resolution fails: The requirement for a certificate to be issued in case on non-resolution is not new. What is new is that the certificate is now given a name. The Tribunal already had a name for it. It was called certificate of failure. A template for this already exists. The Tribunal will need to do the necessary amendments to the certificates.
 - ii. The Amendment further removes the subsections relating to the accreditation of entities and any reference to any other person. The research found that there are various possible permutations and interpretations regarding this part of the amendment. Some respondents felt it is not clear what the impact of this part will be in the process of implementation. Some respondents thought it may be an attempt to make ADR, in particular the arbitration aspect, mandatory. They felt however that this would not work as the Tribunal's ADR powers are based on consent.
- (d) **Amendments to Section 194 that deals with the Responsibilities of Accounting Authority** states amongst others that the Chairperson of the Tribunal is responsible for the control and management of the Companies Tribunal, the effectiveness and efficiency of the Tribunal, all the income and expenditure of the Companies Tribunal, etc.
- (e) **Lastly, Amendments to section 195 of the Act** gives the Tribunal the power to conciliate, arbitrate or adjudicate administrative matters affecting the company in terms of the Act as may be referred to it by the B-BBEE Commission.

2. Literature and document review

2.1 Introduction

The review of literature in this research found that reviewers, analysts, and other policy commentators, etc, have taken a broader view of the Amendment Bill and not only confined themselves to the sections of the Bill impacting on the Companies Tribunal. Recent commentary and write ups have focused on the Amendment Bill in its totality and its possible impact on industry and commerce. However, literature prior to the Amendment Bill touched on the operations of the Tribunals in South Africa in general and the Companies Tribunal in particular as reflected in this section of the report.

Since the advent of the Amendment Bill, there has been a flurry of commentary from various stakeholders ranging from scepticisms to positive support. This is indicative of the impact the final product is likely to have in the business sector as a whole including other interested parties in the realm of commerce and industry.

2.2 Reviews relating to the proposed amendments relevant to the Tribunal

There has been a wide-ranging interest and commentary from practitioners on Section 72 of the Amendment Bill compared to other sections that are relevant to the Tribunal.

Kennedy-Good (2018) remarked that there is ‘a notable shift in that the Bill prescribes that SEC must prepare and present a report to the shareholders at the annual general meeting or other meetings of shareholders where a company does not hold an annual general meeting. The report must outline how the SEC performed its functions. The report must be approved by way of an ordinary shareholders resolution.’¹³. All of these arguments and perspectives together indicate the importance and relevance of Section 72 to companies in general and how this Amendment would impact on corporate governance.

Section 195 of the Amendment Bill also attracted some interest from various policy and legal analysts such as Kennedy-Good (2018). He mentioned that ‘the Bill seeks to give the Tribunal the power to adjudicate cases referred to it by the B-BBEE Commission. This is an effort by the B-BBEE Commission to forge strategic partnerships with various regulators to ensure compliance with SA’s empowerment laws’¹⁴. A similar observation has been made by Louw (2018) mentioning that “in terms of the Bill, the Tribunal will have powers to adjudicate matters referred to it by the B-BBEE Commission.

2.3 General critique of Tribunals in South Africa

A more general critique of the Tribunals in South Africa is proffered by Baboolal-Frank (2015) arguing that the issue with South African Tribunals is that they do not all function efficiently, effectively and economically. Tribunals are funded by government in order to operate and that the lack of competence of commissioners (Members) appointed at Tribunal stagnates finalisation of matters. A lack of execution mechanisms also contributes to a further frustrated legal system, which amounts to wastage of monies that could have been spent for better delivery of justice to individuals¹⁵. The author further argues that Tribunals in South Africa can be described as ‘haphazard’ in the manner in which they function.

The enhanced model will ensure that the ‘haphazard’ function of certain Tribunals in South Africa is rectified to a unified system that operates in a manner that is ‘effective, efficiently, coherently and is cost effective’ and in the process, addressing access to justice in a sufficient manner¹⁶. The author propagates for entrenched Alternative Dispute Resolution (ADR) mechanisms which has become a global phenomenon and trend in first world countries who are utilising this forum to solve disputes timeously resulting a less costly and effective

¹³ <https://www.financialinstitutionslegalsnapshot.com/2021/10/companies-amendment-bill-2021-comments-appointing-a-social-and-ethics->

¹⁴ Ibid

¹⁵ Rashri Baboolal-Frank (2015) Specialised Tribunals in South Africa and Access to Justice: International Journal of Business, Economics and Law, Vol. 8, Issue 4 (Dec.)
ISSN 2289-1552

¹⁶ Ibid

platform.¹⁷. Fortunately, this kind of an approach to dispute resolution is already embedded in the Tribunal's modus operandi.

2.4 Critical insights into the operations of the Companies Tribunal

Again, Baboolal-Frank (2019) provides critical insights into the operations of the Companies Tribunal in particular and other Tribunals in general in South Africa. First the author restates what is in the law with regard to the functioning of the Tribunal mentioning that 'the Tribunal is vested with powers to determine its own procedures. The Tribunal takes into consideration the circumstances of each case when determining its own procedures.'¹⁸

A more specific critique of the Tribunal is proffered by Baboolal-Frank (2019) arguing that the influence of the High Court rules causes the Tribunal to be formal and, as a result, loses its informality in regard to making the proceedings as expeditious and informal as possible. The Tribunal attempts to cure this shortcoming by being allowed to formulate its own procedures, depending on the circumstances of the case; however, the rigidity of the rules confines the Tribunal to certain parameters and procedures. Another shortcoming is that the Tribunal lacks enforcement mechanisms and is dependent on the High Court through application proceedings to make the decision an order of court. This is the same procedure followed in making an arbitral award an order of court¹⁹. However, on the more complimentary side, the author argues that the strength of the Tribunal is that ADR mechanisms are utilised, which means that ADR mechanisms can be enhanced through a unified system, within a singular pool of resources, in cases where ADR is encouraged as an early form of resolution²⁰. This means that South Africa's ADR mechanisms should gravitate towards realignment in such a manner that eliminates duplication and create a transversal system of cooperation and coordination. This is however, a moot point in the context of historical development of Tribunals in South Africa.

2.5 Statistical review

According to the 3rd Quarter Report: October to December 2021, the number of adjudication applications brought forward increased from 112 in the first quarter to 121 in the second quarter. This is an increase of 8% quarter on quarter. From the second quarter the number increased from 121 to 145 in the third quarter, an increase of 19.8% for this period. These numbers strengthen the argument for increased human and financial resources at Registry Division of the Tribunal to handle these cases.

¹⁷ Ibid

¹⁸ Rashri Baboolal-Frank (2019): A critical analysis of Companies Tribunals in South Africa to create a harmonised Tribunal system: University of Pretoria

¹⁹ Ibid

²⁰ Ibid

Extract: According to the 3rd Quarter Report: October to December 2021

a) Adjudication

NEW Vs OLD	Q 1	Q 2	Q3	Q4	Total YTD
Applications brought forward	112	121	145	-	N/A ²¹
New applications received	65	65	61	-	191
Total applications: Quarter end	177	186	206	-	N/A

Similarly, the number of Alternative Dispute Resolution (ADR) applications brought forward reflect an increasing pattern from quarter to quarter albeit with small numbers. The Research is of the view that the Tribunal would do well to reduce the number of applications that it drags from quarter to quarter. This number has been growing quarterly. It could potentially affect the readiness to implement the Bill.

The additional Employee/s will hopefully assist the Tribunal to deal with the unfinalized applications. To add value, the employee must however have the relevant skills in the legal field, especially around court processes.

3. Summary of research data and thematization

3.1 Synopsis

From a total of fifty (50) potential respondents, systematic sampling was applied precisely because the potential respondents are clearly known and exist in organised or structured form. For this research, this was the optimum sampling approach compared to others such as stratified sampling, simple random sampling, etc. A sample of thirty (30) potential respondents was chosen for this study which is 60% of the total and therefore regarded as a representative sample of respondents.

Data was collected through the questionnaire and interview methods such as one to one interview. There were three research questions as detailed above in the 'research questions' subsection and data is organised under three themes for analytical purposes. A total of seventeen (17) respondents from the sample answered the questionnaire and five (5) comprehensive interviews were conducted. A detailed analysis and interpretation are provided under subsection 'analysis and interpretation of research findings' below in this report.

²¹ Total number does not apply as some applications may repeat in more than one category such as category of applications brought forward and total number of applications at the end of the quarter

The table below provides some general information about the research survey, including details on the sample, collection period and number of respondents

Criteria	Purpose
Objectives	To understand the impact of new environment on planning and operations of the Companies Tribunal; To understand the type of preparations that the Tribunal should undertake in view of the pending new environment
Potential respondents	A total fifty (50) potential respondents in the Tribunal database
Sample of respondents	Representative sample of 30 potential respondents
Selection criteria	Organisations or institutions that work very closely with the Companies Tribunal on ADR and related matters
Reference (data collection) period	September 2021 - March 2022

3.2 Thematization

A theme is defined by Vaismoradi et al (2016) as the “the main product of data analysis that yields practical results in the field of study. Theme is used as attribute, descriptor, element, and concept. As an implicit topic that organizes a group of repeating ideas, it enables researchers to answer the study question. It contains codes that have a common point of reference and has a high degree of generality that unifies ideas regarding the subject of inquiry.²² Mardani (2016) puts it thus “Thematization is one of the subcategories of textual analysis. Textual analysis is the analysis of the text in terms of its textual features or its texture. Thematization strategies are what the writer chooses as the theme of the clause.²³ Accordingly, the themes that will be used in the analysis of this research are largely those adopted in the questionnaires namely:

- **Theme 1:** Impending impact on the CT’s governance, planning and operations due to the Amendments
- **Theme 2:** Perspectives on new environment, added responsibilities and improved dispute resolution mechanisms
- **Theme 3:** State of readiness of the Tribunal

²² Mojtaba Vaismoradi, Jacqueline Jones, Hannele Turunen, Sherrill Snelgrove: Theme development in qualitative content analysis and thematic analysis: Journal of Nursing Education and Practice 2016, Vol. 6, No.5

²³ Tooba Mardani (2016) Thematic Structure: A Study on English and Persian: Islamic Azad University, Iran: Linguistics Archives 2016

4. Analysis and interpretation of research findings

4.1 Introduction

This section presents an analysis of the research findings that have been received from various key respondents relating to this research topic. This section further seeks to distil the wide-ranging views and opinions of the respondents with a view to setting a solid foundation for the conclusions and recommendations in the final analysis.

4.2 Impending impact of the Amendments on the Tribunal's governance, planning and operations

It is evident from the foregoing previous section that the Amendment Bill brings some certainty and clarity on a number of issues regarding the planning and operations of the Tribunal. The changes come in the form of amendments to five important sections of the Act (referred to in this research report colloquially as the “**big five**”). The amendments on the big five are listed below.

(a) Section 72 of the Amendment Bill relating to SEC:

The Section states that a company that falls within the category of companies that are required in terms of the section to appoint a social and ethics committee may apply to the Tribunal for exemption from that requirement in a prescribed manner.

An analysis of data and information relating to Section 72 of the Amendment Bill reveals that the amendment adds compliance requirements more on the part of the companies than on the Tribunal itself. For example, while the amendments states that the Board of a company must appoint the first members of committee within 12 months after effective date or failure to obtain exemption from the Tribunal, it does not state what should happen in the case of failure to comply with this requirement. The Bill could have stated that in the case of failure to appoint timely, the companies should apply to the Tribunal for condonement. Companies already apply to the Tribunal when they fail on certain compliance requirements such as holding Annual General Meetings. This would have added clarity and expanded the mandate of the Tribunal.

(b) Section 160 Amendment relating to administrative orders:

Amendment of section 160 of Act 71 of 2008 mentions amongst other than where the company fails to change its name within the determined period in terms of the administrative order of the Companies Tribunal, the applicant may approach the Commission, after the expiration of the determined period, to substitute the name of the respondent with its' company's registration number followed by 'Inc', '(Pty) Ltd', 'Limited' or 'SOC Ltd'.”.

- i.** The respondents' inputs on this proposed amendment are as follows: Some respondents felt that Section 160 of the Amendment, is a positive development as it solves the long-

standing problem of enforceability of the Tribunal's orders for name change. Some respondents stated that stakeholder engagements by the Tribunal management revealed that this challenge discouraged the use of Tribunal services for name change disputes.

- ii. The Research further found that the two aspects of the amendments are likely to appeal to the Attorney firms that were growing weary and tired of the challenges around the enforceability of section 160 orders. Currently the enforcement is done through the High Court, and it increases the litigation costs. This seems to defeat the purpose of having the Tribunal adjudicate name dispute matters in the first place. Applicants, in particular the Law firms are upbeat about the Amendments.
- iii. It is noteworthy that the Tribunal had already in 2020, entered into a MOU (**attached as Annexure 2**) with the CIPC that allowed enforcement to take place by the Tribunal sending the orders to the CIPC which would then be enforced in the case of failure to implement by the recalcitrant Respondent. It is however good that the enforcement will now be dealt with legislatively. There will be a need for the Tribunal to standardize the format of orders issued by Members and make room for the insertion of a date for compliance.
- iv. Some respondents anticipated that there could be challenges regarding implementation of the administrative order. These challenges may include the timeous communication of the order to the parties in question as well as the effective date of the administrative order thereof. Therefore, communication systems become key to the implementation of the order with a view to avoiding the risk of late implementation. The CIPC is empowered to change the name upon being approached by the applicant, thus minimising review costs currently prevalent on name disputes cases. As mentioned in this report, the Tribunal should ensure that administrative orders are standardized for the purpose of uniformity and efficiency.
- v. Based on these amendments, some respondents estimated a possible rise in applications numbers of 5% (**12 twelve new applications**) on the previous year's total numbers of applications (5% of 244=12). Human resource capacity consideration and related resources in Registry Division of the Tribunal need to be made especially in filling the vacant positions of staff.

(c) Section 166 Amendment relating to ADR

The Amendment provides for a certificate of non-resolution in mediation and conciliation to be issued and for a further referral to the Tribunal for arbitration with a binding order. In terms of this Section the CIPC currently has the power to accredit an 'entity' to handle ADR in terms of the Act. The amendment removes the provisions on accreditation for ADR.

- i. Regarding the requirement for the issuing of a Certificate of Non-Resolution where resolution fails, this research anticipates a minimal impact in the Tribunal's environment. This is due to the fact that the requirement for a certificate to be issued in case on non-resolution is not new. What is new is that the certificate is now given a name. The Tribunal already had a name for it. It was called certificate of failed mediation. A template for this already exists. Therefore, the minimal change anticipated relates to the need to

rename the current certificate of failure into certificate of non-resolution and other minor amendments.

- ii Regarding the removal of the subsections relating to the accreditation of entities and any reference to any other person, the research found that there are various possible permutations and interpretations regarding this part of the amendment. Some respondents felt it is not clear what the impact of this part is. Some respondents thought it may be an attempt to make ADR, in particular the arbitration aspect, mandatory. They felt that this would not work as the Tribunal's ADR powers are based on consent.

Other respondents believe that the removal of the accreditation makes no difference. Indications from the CIPC are that in the eleven (11) years of implementation of the Act, the CIPC did not receive applications for accreditation and did not accredit any entity²⁴. Clearly the section was not made use of. It is therefore doubtful that this amendment will have any impact at all on the environment of the Tribunal. It appears that entities that practise in ADR continued to perform, oblivious to the accreditation requirements.

- iii. Another possible interpretation is that, considering the discussions within the Tribunal for ADR to be made compulsory, perhaps the intention was to force parties to go through to arbitration. This is unlikely. At the Tribunal parties use ADR mainly for cases where the Tribunal does not have jurisdiction. In this case the Tribunal's jurisdiction is based on parties' consent. Where the Tribunal has powers, the parties normally prefer adjudication. Compulsion would mean parties are forced into ADR in cases where the Tribunal does not even have powers to begin with, which would be problematic. It would also lead to challenges of enforcement.
- iv. Another possible interpretation of this Amendment is that once mediation or conciliation takes place, then arbitration process is compulsory.
- v. A furthermore, interpretation of this Amendment is that once mediation or conciliation takes place, and parties opt to follow through with arbitration, then the arbitration order is compulsory. This is a more plausible interpretation. However, this is the very nature of arbitration, which is not unique to Companies Tribunal. Arbitration awards are binding irrespective of the forum they take place in. The Tribunal would be only one of the many forums that do arbitration. The question therefore is why the drafters of the Bill would bother to state the obvious in this regard.

²⁴ Enquiries made to a senior Manager of the CIPC, Legal Division on 23/03/2022.

In the circumstances, the Research recommends as follows:

- That the amendment makes it clear that where the Tribunal does not have jurisdiction, and the parties have consented to ADR, up to arbitration, the arbitrator's award shall be final and binding on them.
- Should the clarification not be made, then in the alternative, then the research anticipates more litigation and reviews of decisions of the Tribunal. It would therefore be necessary for the Tribunal to ensure that adequate resources in the form of personnel in the legal division (currently un-resourced) and the necessary budget.

(d) Section 194 Amendment relating to powers of the Chairperson and the COO

Amendment of section 194 is very extensive. It inter alia proposes:

- conferring certain powers on the chairperson of the Tribunal for the appointment of the Chief Operating Officer. Devolving powers to this level is a positive step indeed.
- The Amendment part relating to the powers of the Chief Operating Officer (COO) needs clarity. Currently it simply states that the Chief Operating Officer is responsible to perform as the Chief Operating Officer of the Tribunal, subject to the Act, the PFMA, and the Tribunal's policies.
- The Amendment also gives the COO the powers to appoint all other such other employees as may be required for the proper functioning of the Tribunal. It appears that the COO appoints all other employees, including the Chief Financial Officer (CFO). Currently, according to the Delegation Framework²⁵, the CFO is appointed by the Chairperson. If this interpretation is correct, then devolvement of the powers lower down, is a welcome development. The research concludes that this amendment needs no further preparation from the Tribunal. According to some Tribunal Respondents, the process remains the same and only the signatory changes.
- The Amendment further gives the Chairperson who is that Accounting Authority the responsibility for (ii) control and management of the Tribunal, (ii)the effectiveness and efficiency of the Tribunal; (iii) all the income and expenditure of the Tribunal; (iv)all assets and the discharge of liabilities of the Tribunal; and (v) the proper diligent implementation of the Public Finance Management Act, 1999 (Act No. 1 of 1999), with respect to the Tribunal. Respondents felt that this part of the amendment make an essentially non-executive position of the Accounting Authority, an executive one. They further stated that in practice these functions are performed by the Chief Operating Officer (and staff) and that reliance on delegation for most of the COO's roles has various disadvantages. Research suggests that the Bill clarifies that the Chairperson is the **Accounting Officer** in terms of section 36 and 37 of the PFMA to avoid confusion.

²⁵ Companies Tribunal: Delegation of Framework applicable to all Members of the Tribunal and staff: May 2019

(e) Section 195 Amendment

The Amendment on section 195 proposes giving the Tribunal the power to conciliate, mediate, arbitrate or adjudicate administrative matters affecting the company in terms of the Act as may be referred to by the B-BBEE Commission.

The research found that on the question of Black Economic Empowerment disputes which may be referred to the Tribunal, this may increase the case load of the Tribunal. Respondents from the Commission were unwilling to give an estimate of the number of cases that may be referred to the Tribunal. Respondents from the Tribunal felt that any number of referral applications from the Commission, even two (2) a year will be a positive development given the few and declining cases received by the Tribunal. They felt that considering that Registry has a rising number of un-finalised applications from quarter to quarter, the possible increase in the number of cases may necessitate staff increase. The Research has noted that there are some critical positions that are vacant and recommends that as a minimum, for readiness, the Tribunal should fill in the vacant positions in Registry and in the Legal Division. Refer to the attached organogram as **(Annexure 3)**

The research has also found that BBBEE being a new field for the Tribunal will require new knowledge. This may necessitate members of the Tribunal to acquaint themselves with this new field of BBBEE as it relates to the company disputes anticipated in the Act.

It is important to note that there already exists, between the Tribunal and the Commission, a Memorandum of Understanding (MOU) **(attached as Annexure 1)** entered into in anticipation of this Amendment and enables the implementation of it. In particular in terms of clause 3.5 of the MOU, states that the MOU embodies the understanding of the Parties with regard to a relationship of consultation, mutual support and co-operation between them, and serves to strengthen and formalise a relationship between the Parties with reference to referral of matters under investigation within the parameters of the BBBEE Act and legislation and policies regulating the BBBEE Commission²⁶. Clause 6 on the Areas of Collaboration provides that the areas of collaboration shall include referral by the BBBEE Commission of BBBEE matters for purposes of alternative dispute resolution and other related disputes falling within the jurisdiction of Tribunal for consideration and appropriate relief or order; information sharing on the best practices aimed at facilitating economic transformation; and any other matters of common interest as may be identified from time to time²⁷. This arrangement between the two entities put the Tribunal in a good position to implement the proposed amendment on BBBEE referrals. A clear modus operandi between the two entities should be developed to eliminate possible delays with regard to referrals. While it is not yet certain what type of matters the BBBEE Commission will in practice refer to the Tribunal, the Amendment does point at the broader governmental aim for different regulators to better cooperate"²⁸.

²⁶ MOU Between Broad -Based Black Economic Empowerment Commission ("B -BBEE Commission") and The Companies Tribunal (the Tribunal) signed 21 May 2020, page 7

²⁷ Ibid, page 9

²⁸ <https://www.linkedin.com/pulse/proposed-changes-south-african-companies-act-adriaan-louw>

4.3 Perspectives on the new environment, added responsibilities and improved dispute resolution mechanisms

The research has found that in the corporate and legal fraternity, given its mandate, the Tribunal could become the first port of call and be a highly respected institution. This may catapult the Tribunal 's profile to a higher level.

One of the key issues that have emerged strongly from the research is that the Tribunal should make use of the latest developments in the Information and Communication Technology (ICT). For instance, there is a strong case being made that a proper (electronic working) Case Management System is absolutely critical for the Tribunal in the age of the Fourth Industrial Revolution (4IR). However, the research has found out that the Tribunal has its own Case Management System (CMS) implemented in 2019. The research found that the system currently has its own glitches and is yet to be fully implemented.

Some respondents also felt that the Tribunal should also explore the usage of social platforms amongst others in positioning the Tribunal as the best entity in dispute resolution compared to costly courts. The target audiences may include the legal fraternity, the judiciary as a whole and other related entity. The research found that Tribunal does make use of the social media to some extent. This includes twitter, LinkedIn and You-Tube.

In terms of the stature of conciliation, mediation and arbitration, research has found that as long as mediation or arbitration is not compulsory for certain disputes, the Tribunal will only hear "lesser " disputes according to some stakeholders.

A further examination of the data and information emerging from this study is the notion, that there are instances where Tribunal members are at times not in sync with the High Court decisions and, in some cases, at cross roads with the High Court in their decisions. This is illustrated by the growing number of the decisions of the Tribunal that are being taken on review and being overturned. In the 2020/21 Annual Report, it is reported that 'the Tribunal had seven cases on review. Respondents reported that some of the cases were lost on appeal and the Tribunal was slapped with costs orders.

Of the total respondents that answered the questionnaire including those there were interviewed, eight (8) of them voiced concerns regarding the quality of the decisions. The fact that some decisions of the Tribunal are overturned on review, is according to the respondent's indicative of the unsatisfactory decisions. The respondents would prefer a situation where only a few of the decisions of the Tribunal are not overturned at review. The Tribunal's cases taken on review are reported in annual reports. However, the further analysis of this aspect is beyond the scope of this research. It is recommended this matter be a subject of further research.

4.4 Tribunal's state of readiness

The following is a summary of the Tribunal's readiness.

Key Issue	Impact	Required Activity	Tribunal Readiness
1. Section 72 SEC Committee (SEC)	<ul style="list-style-type: none"> ▪ Addition to the number of requirements to consider when processing SEC applications. 	Amendment of the list of application requirements for SEC to additionally require proof of publication of the intention to apply	<ul style="list-style-type: none"> ▪ Amendment can be affected in minutes ▪ Communication doable in one day Therefore, Tribunal will be ready in time for implementation.
2. Section 160 Administrative Order	<ul style="list-style-type: none"> ▪ Requirement for a date to be specified on the order ▪ Empowerment for the applicant to approach CIPC in the event of failure to implement. 	<ul style="list-style-type: none"> ▪ Amendment or standardisation of decision templates ▪ Communication or training of members to apply uniformly ▪ Capacity increase in personnel ▪ Budget considerations 	<ul style="list-style-type: none"> ▪ Template can be done within 1 day, ▪ Communication doable in 1 month ▪ Tribunal in process of recruiting ▪ In progress. Therefore, Tribunal will be ready in time for implementation.
3. Section 166 Certificate of non-resolution	Requirement to amend the certificate of failure, now called certificate of non-resolution;	<ul style="list-style-type: none"> ▪ Amend the Certificate of Failure into Certificate of non-resolution, ▪ Communication of the new template to Tribunal members needed 	<ul style="list-style-type: none"> ▪ Amendment can be effected in minutes ▪ Communication doable in one day Therefore, Tribunal will be ready in time for implementation.

<p>4. Section 194</p> <p>Scope of authority of the Accounting Authority</p>	<p>Confusion of the Accounting Officer role with the executive Officer' functions</p>	<ul style="list-style-type: none"> ▪ The review of the current proposed amendment, alternatively ▪ The amendment of the current delegation framework ▪ Communication of the same to the staff 	<ul style="list-style-type: none"> ▪ The review of current proposed amendment is up to the dtic ▪ Delegation amendment can be effected within a day ▪ Communication can be done within 1 day <p>Therefore, Tribunal will be ready in time for implementation.</p>
<p>5. Section 195</p> <p>BBBEE Commission relating BBBEE disputes</p>	<ul style="list-style-type: none"> ▪ Possible increase in the number of the applications ▪ Strengthening of relationship between entities 	<ul style="list-style-type: none"> ▪ Engagements of two entities to refine the referral processes and obtain estimated number of referrals ▪ Communication to the public and to companies on the Tribunal's new BEE functions 	<ul style="list-style-type: none"> ▪ There is already MOU between the entities. Refinements doable within a week. ▪ Communication can be done within a day. <p>Therefore, Tribunal will be ready in time for implementation.</p>
<p>Facilities</p>			
<p>6. Court Rooms</p>	<p>Facilities needed for the anticipated increase of applications and for attractiveness</p>	<ul style="list-style-type: none"> ▪ Two or three well ventilated court rooms. ▪ Court style furniture and equipment 	<ul style="list-style-type: none"> ▪ Rooms and Furniture not yet in place ▪ Virtual platforms can be used in the interim <p>Therefore, Tribunal will be ready in time for implementation.</p>
<p>7. Equipment</p>	<p>Facilities needed for the anticipated increase of applications and for attractiveness</p>	<p>Modern virtual hearing equipment that will also assist with other meetings</p>	<p>Existing, but not the latest equipment</p> <p>Tribunal can use these in the interim</p>

8. Parking bays		Clients coming to hearings	Not adequate. But when virtual platforms are used Tribunal will cope.
Divisional duties			
9. Human Resources	Need for human capacity	<ul style="list-style-type: none"> ▪ Funding and recruitment of ▪ The Legal Advisor ▪ Registry Officer (case Management Officer) ▪ Training on BEE issues 	<ul style="list-style-type: none"> ▪ The filling of both positions in progress. ▪ However, the Tribunal needs to reduce the number of applications that it drags from quarter to quarter.
10. IT	Need for personnel related costs budgeting	Budget for personnel related equipment for one or two more staff Members i.e., computer licensing costs and related software equipment;	This is in progress. Tribunal will be ready
11. Systems (CMS)	Need for the system to be operational beginning to end	Involvement and co-operation of experts	In progress Expected to be ready in six months' time
12. Finance	Need for personnel related costs budgeting	Budgeting as result of one or two personnel in Registry and communication of the changes	This is in progress. Tribunal will be ready

4.5 Generic matters

The research study has further found out that there is a strong need to have sufficient footprint in all provinces in order for the Tribunal to have adequate credence and be easily accessible countrywide. All of these considerations will certainly impact on the planning and operations of the Companies Tribunal

Furthermore, research has found that the Tribunal could benefit immensely by partnering with other similar entities and government departments on matters related to ADR, conciliation and mediation. This is particularly true of those public-sector entities that are tasked with small business support and development. Small businesses often find themselves at loggerheads with bigger corporations on a range of issues ranging from procurement practices, the abuse of minority shareholders interpretation of empowerment prescripts, etc. This partnership could therefore assist the small enterprises in terms dispute resolution and avoid the costly route of going to the courts which would have been preferred by the bigger private sector corporations.

Some respondents including the applicants would like to see full time members (subject to availability of resources) at the Tribunal. This stems from the fact that there is a growing number of cases that have been rolled over from the previous quarters and financial years.

As alluded to earlier, some of the amendments above could increase the workload of cases within the Tribunal. Respondents from the Commission were reluctant to estimate the possible increase in new applications that may be received from the BBBEE Commission's referrals. From the positive improvements on enforcement anticipated through the amendment of Section 160, some respondents estimated twelve (12) new applications per year in total. Therefore 12 is the only figure that the research is willing to use as an estimate of the total annual increase in the number of new applications. This is only a guess estimate figure. The figure could be conservative. However, in the light of the overall declining cases in the Tribunal this possible increase would mark big improvement on the number of new applications. Annual Reports of the Tribunal reveal that between the years 2016 and 2020 the Tribunal continuously experienced decline in new applications received. In 2016/17 the decline was 105, in 2017/18 it was 18, and in 2018/19 it was 10, 2019/20 it was 21.

The research process and interaction with the stakeholders revealed that there is a strong yearning for improved quality of the service or product (decisions of the Tribunal). Respondents also want the Tribunal to consider employing some full time Members of Tribunal to improve the performance of the Tribunal in adjudication and ADR. Some respondents within the Tribunal felt that though this may be desirable, as full-time members will require more resources as opposed to part time members. It is for this reason that the Research recommends the development of the resource-based review strategy by the Tribunal. Venter (2015) broadly defines resource-based view as 'the capacity of an organisation for a unique end result. They are organisation specific clusters of activities developed through

complex interactions between tangible and intangible resources over time and reflect what an organisation needs compared to other organisations'²⁹

At the recently held annual seminar³⁰ of the Tribunal, from the way the seminar was organised to the quality of the presentations, and responses to the various questions, it was clear that the Tribunal has the necessary knowledge expertise, and communication capacity. It is therefore within the Tribunal ability to win the confidence of the public. The researcher has however noted that the term of most of the Members of the Tribunal is coming to an end in March, 2022. Some may or may not be re-appointed. This means that the current skills may not be relied on to judge the capability of the Tribunal. Intensive training will be necessary for the new or additional members.

5. Conclusions

In the final analysis, it is evident from this body of this report that the Amendment Bill and certain sections in particular, (the big five) would have a varying impact on the strategic planning and operations of the Tribunal. It is therefore incumbent upon the Tribunal to position itself appropriately prior to the enactment of these amendments. In this regard, the Researcher broadly concludes that:

5.1 Section 72 deals with SEC. The amendment on it, impacts more to the companies than to the Tribunal. The requirement to publish the intention to apply will minimally impact on the Tribunal processes and require an amended list of application documents.

5.2 Section 160 deals with Administrative Orders this is arguably one of the clearest sections of the Amendment Bill that deals with the old age challenge inconsistencies in decisions of the Tribunal. It is likely that legal firms that had expressed frustrations with this section of the Act, may now be eager to use the services the Tribunal. It is anticipated that this will bring a rise in the number of new applications.

5.3 Section 166 deals with ADR in particular the issuing of a Certificate of Non-Resolution and the removal of accreditation. The impact of the amendment are as follows: with regard to issuing the certificate of non-resolution there will be a need to amend the current certificate of failure. The removal of accreditation, depending one's interpretation has no further implications on the Tribunal.

5.4 Section 194 deals with the responsibilities of the Accounting Authority. The likely impact of this Amendment is that the Accounting Authority to be more active and involved at the Tribunal in administrative functions. Alternatively, the institution will have to rely heavily on delegation, which may have negative implications.

²⁹ Peet Venter et al (2015) Practising Strategy: A Southern African Context: Juta Publishers: Cape Town

³⁰ Seminar held in partnership with the University of Free State, on 18 March, 2022, Sheraton Hotel, Pretoria

5.5 Section 195 makes provisions for BBEE Commission to refer matters to the Tribunal for conciliation, mediation and arbitration arising out of BBEE disputes. The conclusion in this regard is that this is likely to increase the volume of work for the Tribunal which should be managed through referral protocols agreed upon by both entities. This can be done through the current MOU between the two entities.

6. Recommendations on the State of readiness of the Tribunal

6.1 The following recommendations are based mainly on the analysis of data and information that has been collected during the research process. They address the question on how the Tribunal should prepare itself for the new environment occasioned by the Amendment Bill with specific reference to the sections that are applicable to the Tribunal. The recommendations include the following:

6.1.1 Recommendations relating to the “big five” Amendments:

i. Section 72 of the Amendment Bill relating to SEC:

It is recommended that the Tribunal amends its list of application requirements for SEC to additionally require proof of publication of the intention to apply.

ii. Section 160 of the Amendment Bill relating to administrative orders:

The amendment adds the requirement for a date to be specified on the order and empowers the applicant to approach CIPC in the event of failure to implement. The recommendations here include:

- a) The need for the Tribunal to standardize the format of orders issued by Members of the Tribunal and make room for the insertion of a date for compliance.
- b) Timeous communication by the Registry Unit of the order to the parties in question as well as the effective date of the administrative order thereof.
- c) Communication of the amendment by the Communications Unit of the Tribunal needs to be enhanced,
- d) In the light of the forecast increase in the number of new applications, consideration by management be given to fund an additional position in the Registry Unit (possibly the position of the case management officer),
- e) Budget considerations (salary and personnel and IT costs) related to the filling of an extra position, and
- f) It is anticipated that with the clarity that will come with Section 160, there will be fewer review applications. Management is therefore may want to give consideration to the reduction of litigation budget, in view of the anticipated reduction in the number of decisions taken on review.

iii. Section 166 relating to Certificate of Non-Resolution and removal of accreditation:

The Amendment calls for a certificate of non-resolution in ADR and for a further referral to the Tribunal for arbitration with a binding order. It also removes the subsections on accreditation for ADR. The recommendations on this include:

- a) The amendment of the certificate of failure, now called certificate of non-resolution;
- b) Communication of the new template to the members of the Tribunal.

v. Section 194 relating to the Responsibilities of Accounting Authority:

The Amendment states amongst others that the Chairperson of the Tribunal is responsible for the control and management of the Tribunal, the effectiveness and efficiency of the Companies Tribunal, all the income and expenditure of the Companies Tribunal, etc. The relevant recommendations include:

- a) The review of the current proposed amendment to remove executive powers from the Accounting Authority to the Accounting Officer, alternatively
- b) The amendment of the current delegation framework
- c) Communication of the same to the staff about these developments

vi. Section 195 relating to the referrals for ADR by the BBBEE Commission:

The Amendment empowers the Commission to refer BBBEE matters to the Tribunal. The recommendations here include

- a) Engagements of the two entities with a view to:
 - refine the processes for the referral in the context of the current MOU, and
 - obtain estimations of the estimated number of applications to be expected for planning purposes.
- b) Communication to the public companies on the new expanded jurisdiction of the Tribunal to handle referrals. from the BBBEE Commission

6.1.2 Recommendations relating to the planning and operation

6.1.2.1 Strategic planning session

It would be imperative that the Tribunal 's management develop a comprehensive strategic plan on how to respond and prepare for the new environment as outlined in the body of this report. In the realm of strategic management, the envisaged strategic planning session should as matter of necessity focus on some of the key issues such as considering both external and internal environment brought about by the Amendment Bill.

6.1.2.2 Training of Members of Tribunal and personnel on BBBEE related matters

The new environment proposes referrals on BBBEE disputes, which can be complex and sensitive as mentioned in this report. It is therefore recommended that all Members of the Tribunal and key personnel be trained on the necessary aspects of BBBEE transactions.

6.1.2.3 Resource-based review strategy

As alluded to previously, the research has identified a need on resource improvement around hearings rooms, improvements on case management systems, personnel human and knowledge capacities. It is recommended that the Tribunal carries its own resource-based review to confirm the findings.

6.1.2.4 Strategic partnerships with legal fraternity

It is the considered recommendation of the researcher that the Tribunal should establish strategic partnerships with the legal fraternity, the courts and other legal practitioners for mutual benefit.

APPROVALS

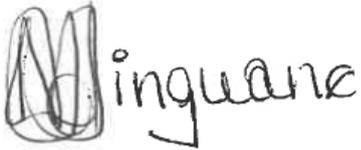
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Date: 30 March, 2022

Approved by:



Maletlatsa Monica Ledingwane
Chief Operating Officer

Date: 30 March, 2022

List of Annexures

Annexure No	Document Name	Attachments
Annexure 1:	MOU between the Tribunal and Broad Based Black Economic Empowerment Commission (BBBEE)	 MoU CT and CIPC Section 160 Novemb
Annexure 2:	MOU between the Tribunal and Companies Intellectual Property Commission (CIPC)	 MOU between CT and BBBEE Commisi
Annexure 3	Structure of the Tribunal as at 31 March 2021	

Annexure No	Document Name	Attachments
Annexure A	Sample Questionnaire: COTTI	 Questionnaire -B-BBEE Commission
Annexure B	Sample Questionnaire: Applicants	 Questionnaire -Adams & Adams.do
Annexure C	Sample Questionnaire: Other Public Sector Institutions	 Questionnaire -DSBD.docx

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