



COMPANIES TRIBUNAL

REPUBLIC OF SOUTH AFRICA

CASE NO: CT15APR2016

In the matter between:

INDIAN TECHNOMAC COMPANY SOUTH AFRICA PROPRIETARY LIMITED

(Registration number: 2011/007616/07)

APPLICANT

AND

MICHAU EXPLORATION AND DRILLING PROPRIETARY LIMITED

(Registration number: 2009/020997/07)

FIRST RESPONDENT

**MARIA SUSANNA ELIZABETH MICHAU
RESPONDENT**

SECOND

CORNELIUS CHRISTIAAN MICHAU

THIRD RESPONDENT

MICHAU EXPLORATION AND DRILLING PROPRIETARY LIMITED

(Registration number: 2010/020661/07)

FOURTH RESPONDENT

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION

FIFTH RESPONDENT

IN AN APPLICATION IN TERMS OF SECTION 71 (8) OF THE COMPANIES ACT 2008

Heard on 05 OCTOBER 2017

Decision handed down on 04 JANUARY 2017

DECISION

INTRODUCTION

- [1] This is an application in terms of section 71 (8) of the Companies Act No. 71 of 2008 ("the Act").
- [2] The Applicant is Indian Technomac Company South Africa Proprietary Limited, a private company duly incorporated in terms of the Companies Act No. 71 of 2008, as amended with its registered address at 677 Umgeni Road, Durban, Kwazulu-Natal.
- [3] The First Respondent is Michau Exploration and Drilling Proprietary Limited, a private company duly incorporated in terms of the Companies Act No. 71 of 2008, as amended with its registered address at 10A-3rd Avenue, Parys, Free-State.
- [4] The Second Respondent is Maria Susanna Elizabeth Michau, an adult female, director of the First Respondent and residing at 10A-3RD Avenue, Parys, Free-

State.

- [5] The Third Respondent is Cornelius Christiaan Michau, an adult male, director of the First Respondent and residing at 10A-3rd Avenue, Parys, Free-State.
- [6] The Fourth Respondent is Haloglo Proprietary Limited, a private company duly incorporated in terms of the Companies Act No. 71 of 2008, as amended with its registered address at 10 Bokmakierie, Cashan, Rustenburg, North-West.
- [7] The Fifth Respondent is the Companies and Intellectual Property Commission, a juristic person established in terms of section 185 of the Companies Act No. 71 of 2008, as amended with its address at the DTI Building, Block R, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.
- [8] Applicant seeks the following relief:
 - a) That the Second and Third Respondents be removed as directors of the First Respondent.
 - b) That Igoikisshore Rangunandan be appointed director of the First Respondent.
 - c) That in the event of the Second, Third or Fourth Respondents opposing the aforesaid relief, then the Second, Third or the Fourth Respondents be directed to pay the costs occasioned by the application jointly and

severely.

- d) The Fifth Respondent to update their records accordingly.

BACKGROUND

[9] For better understanding of the issues in this application, a brief background of the relevant facts is necessary. The Applicant brought an application in terms of section 71 (8) of the Companies Act No. 71 of 2008, as amended ("The Act") for the removal of the Second and Third Respondents as directors of the First Respondent.

[10] In terms of the Memorandum of Sale of shares dated 23 January 2012 the First Respondent sold to the Applicant 70% (seventy percent) of the issued shares and/or securities in the First Respondent for the sum of R20, 000, 000.00 (Twenty Million Rands) inclusive of Valued Added Tax.

[11] Clauses 3, 4 and 5 of the Memorandum of Sale of shares reads as follows:

3. RECORDAL

3.1 *The Seller hereby sells to the purchaser seventy percent (70%) of the issued shares in the Company;*

3.2 *The Purchaser has agreed to purchase the total of seventy percent (70%) of the issued shares in the Company;*

4. SUBJECT MATTER OF THE SALE

The Seller hereby sells to the Purchaser who hereby purchases 70% of the issued and authorised Share capital of the Company.

5. PURCHASE CONSIDERATION AND PAYMENT

5.1 *The purchase consideration of the Sale Shares shall be R20 000 000.00 (Twenty Million Rand), inclusive of VAT;*

5.2 ...

5.3 ...

[12] The crux of the Respondent's arguments was that despite the effective date of the Memorandum of Sale of shares the Applicant is only entitled to derive the benefits from the shareholding which includes the appointment of directors once upon payment of the purchase price in full, the Applicant having paid the sum of R7, 000, 000.00 (Seven Million Rands).

[13] Clause 9 of the Memorandum of Sale of shares reads as follows:

9. TRANSFER OF BENEFITS TO THE PURCHASER

9.1 *Nothwithstanding the date of signature or transfer of the Sale Shares, benefit in and to the shareholding to be acquired by the Purchaser in terms hereof, shall pass to it as on the date of payment of the purchase consideration;*

9.2 ...

[14] The Applicant's attorney Mr. Ragunandan submitted that in terms of the resolutions the First Respondent had already disposed of 70% (seventy percent) of the issues shares on 12 January to the Applicant and to the Fourth Respondent.

APPLICABLE LAW

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

Section 49 of the Act.

Securities to be evidenced by certificates or uncertificated

1) *In this Part, "certificated" means evidenced by a certificate, as contemplated in subsection (2) (a).*

- 2) Any securities issued by a company must be either
- a) evidenced by certificates; or
 - b) *uncertificated, in which case the company must not issue certificates evidencing or purporting to evidence title to those securities, subject to subsection (6).*
- 3) *Any securities issued by a company must be either*
- a) *the rights and obligations of security holders are not different solely on the basis of their respective securities being certificated or uncertificated; and*
 - b) *any provision of this Act applies with respect to any uncertificated securities in the same manner as it applies to certificated securities.*
- 4) *Sections 52 to 55*
- a) *apply only to uncertificated securities; and*
 - b) *prevail in the case of a conflict between any provision of those sections and any other provision of this Act, any other law, the common law, the company's Memorandum of Incorporation or any agreement.*
- 5) *Any certificated securities may cease to be evidenced by certificates, and*

thereafter be uncertificated, in which case any provision of this Act contemplated in subsection (4) applies to those securities from the date on which they ceased to be evidenced by certificates.

6) *In the manner set out in section 54, any uncertificated securities may be withdrawn from the uncertificated securities register, and certificates issued evidencing those securities, in which case from the date on which they became certificated*

a) *sections 52 to 55 cease to apply to those securities; and*

b) *for greater certainty, transfer of ownership in those securities cannot be effected by a participant or central securities depository while they remain in certificated form, unless they are held in certified form in collective custody by the participant or central securities depository.*

7) *The Minister may make regulations regarding matters that are supplementary and ancillary to the provisions of this Part*

[Own emphasis and underlining]

Section 71 of the Act.

Removal of directors

- 1) *Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).*
- 2) *Before the shareholders of a company may consider a resolution contemplated in subsection (1)*
 - a) *the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and*
 - b) *the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.*
- 3) *If a company has more than two directors, and a shareholder or director has alleged that a director of the company*
 - a) *has become*
 - i) *ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69(8)(a); or*

- ii) *incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or*
 - b) *has neglected, or been derelict in the performance of, the functions of director, the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.*
 - 4) *Before the board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given*
 - a) *notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and*
 - b) *a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.*
 - 5) *If, in terms of subsection (3), the board of a company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be, the director concerned, or a person who appointed that director as contemplated in section 66(4)(a)(i), if applicable,*

may apply within 20 business days to a court to review the determination of the board.

6) *If, in terms of subsection (3), the board of a company has determined that a director is not ineligible or disqualified, incapacitated, or has not been negligent or derelict, as the case may be*

a) *any director who voted otherwise on the resolution, or any holder of voting rights entitled to be exercised in the election of that director, may apply to a court to review the determination of the board; and*

b) *the court, on application in terms of paragraph (a), may*

i) confirm the determination of the board; or

ii) remove the director from office, if the court is satisfied that the director is ineligible or disqualified, incapacitated, or has been negligent or derelict.

7) *An applicant in terms of subsection (6) must compensate the company, and any other party, for costs incurred in relation to the application, unless the court reverses the decision of the board.*

8) *If a company has fewer than three directors*

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

b) *in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies*

Tribunal, to make a determination contemplated in that subsection;
and

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

9) *Nothing in this section deprives a person removed from office as a director in terms of this section of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for*

a) *loss of office as a director; or*

b) *loss of any other office as a consequence of being removed as a director.*

10) *This section is in addition to the right of a person, in terms of section 162, to apply to a court for an order declaring a director delinquent, or placing a director on probation.*

[Own emphasis and underlining]

EVALUATION

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

- [17] The main issue is whether the Applicant is the holder of shares and/or securities issued by the First Respondent
- [18] Further, whether the Applicant's name was entered as such in the certificated securities register of the First Respondent.
- [19] Lastly, whether the Applicant has the right or entitlement through ownership, agreement, relationship or otherwise, to receive and participate in any distribution in respect of the First Respondent's shares and/or securities, exercise or cause to be exercised, in the ordinary course, any or all of the rights attached to the First Respondent's shares and/or securities or dispose or direct the disposition of the First Respondent's shares and/or securities, or any part of a distribution in respect of the shares and/or securities.
- [20] Section 49 (2) of the Act provides that any securities issued by a company must be evidenced by certificates.
- [21] Having considered the provision of section 49 of the Act together with clause 9 of the memorandum of Sale of shares, I am of the considered view the Applicant does not have the right or entitlement to:
- [21.1] Receive or participate in any distribution in respect of the Firsts Respondent's shares and/or securities.
- [21.2] Exercise or cause to be exercised, in the ordinary course, any or all

the rights attached to the First Respondent's shares and/or securities, or

[21.3] Dispose or direct the disposition of the first Respondent's shares and/or securities, or any part of a distribution in respect of the shares/and/or securities.

[22] Therefore section 71 (8) may not be invoked by the Applicant pending the fulfilment of the suspensive condition as contained in clause 9 of the Memorandum of Sale of shares.

ORDER:

[23] The following order is therefore made: In the result the following order is made:

a) The Application is dismissed.

MMOLEDI MALOKANE
(MEMBER OF COMPANIES TRIBUNAL OF SOUTH AFRICA)
Date: 04 JANUARY 2017