

**REPUBLIC OF SOUTH AFRICA**



**COMPANIES TRIBUNAL**

**Case/File Number: CT008Mar2015**

In the matter between:

**LGI PROPERTIES EMERALD (SA) LIMITED**

**Applicant**

and

**COMPANIES AND INTELLECTUAL PROPERTY  
COMMISSION<sup>1</sup>**

**Respondent**

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Presiding Member	:	Khashane Manamela (Mr.)
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Date of Decision	:	13 April 2015
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**DECISION (Reasons and an Order)**

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**Khashane Manamela**

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<sup>1</sup> Although the Form CTR 142 filed by the applicant does not reflect the Companies and Intellectual Property Commission (the Commission) as the respondent, the substantive issues and the nature of the relief sought, which is a review of the notice issued by the Commission, warrant the nominal inclusion of the Commission as the respondent. I will deal with the implications of this in the body of the decision.

[1] On 14 January 2015 the Companies and Intellectual Property Commission (the Commission) issued a compliance notice against the applicant in terms of section 171 of the Companies Act 71 of 2008 (the CA 2008). The implications or import of this administrative or regulatory step by the Commission may be better understood and placed in context, by firstly reading section 171 of the CA 2008 where it is sourced. It reads as follows in the material part:

**“171. Issuance of compliance notices**

(1) Subject to subsection (3), the Commission, or the Executive Director of the Panel, may issue a compliance notice in the prescribed form to any person whom the Commission or Executive Director, as the case may be, on reasonable grounds believes -

(a) has contravened this Act; or

(b) assented to, was implicated in, or directly or indirectly benefited from, a contravention of this Act, unless the alleged contravention could otherwise be addressed in terms of this Act by an application to a court or to the Companies Tribunal.

(2) A compliance notice may require the person to whom it is addressed to-

(a) cease, correct or reverse any action in contravention of this Act;

(b) take any action required by this Act;

(c) restore assets or their value to a company or any other person;

(d) provide a community service, in the case of a notice issued by the Commission; or

(e) take any other steps reasonably related to the contravention and designed to rectify its effect.

(3) ...

(4) A compliance notice contemplated in subsection (1) must set out -

(a) the person or association to whom the notice applies;

(b) the provision of this Act that has been contravened;

(c) details of the nature and extent of the non-compliance;

(d) any steps that are required to be taken and the period within which those steps must be taken; and

(e) any penalty that may be imposed in terms of this Act if those steps are not taken.

- (5) A compliance notice issued in terms of this section, or any part of it, remains in force until-
- (a) it is set aside by-
- (i) the Companies Tribunal, or a court upon a review of the notice, in the case of a notice issued by the Commission...
- (6) If the requirements of a compliance notice issued in terms of subsection (1) have been satisfied, the Commission or the Executive Director, as the case may be, must issue a compliance certificate.
- (7) If a person to whom a compliance notice has been issued fails to comply with the notice, the Commission or the Executive Director, as the case may be, may either-
- (a) apply to a court for the imposition of an administrative fine; or
- (b) refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of section 214(3), but may not do both in respect of any particular compliance notice.

[underlining added for emphasis]

[2] The Commission, in essence, required [in terms of the compliance notice] the applicant within 40 days from the date of the notice to prepare annual financial statements as contemplated in section 30 of the CA 2008 for the financial year which ended on 28 February 2013, and submit a copy thereof to the Commission.<sup>2</sup> It is stated that the Commission received a report alluding to a reportable irregularity in terms of the provisions of the Auditing Professions Act 26 of 2005.<sup>3</sup> I will avoid any detention by the intricacies of this alleged reportable irregularity. Suffice to state that the preparation and adoption of annual financial

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<sup>2</sup> See the statement attached to the Form CoR 139.1 dated 14 January 2015 by the Commission.

<sup>3</sup> *Ibid.*

statements by the applicant is central to both the compliance notice and the report in terms of the Auditing Professions Act which precipitated it.

[3] The applicant brings this application as an objection in terms of section 172 of the CA 2008. It applies for a review by this Tribunal of the compliance notice issued by the Commission. Section 172 reads as follows:

**“172. Objection to notices**

(1) Any person issued with a compliance notice in terms of this Act may apply to the Companies Tribunal in the case of a notice issued by the Commission, or to the Takeover Special Committee in the case of a notice issued by the Executive Director, or to a court in either case, to review the notice within -

(a) 15 business days after receiving that notice; or

(b) such longer period as may be allowed on good cause shown.

(2) After considering any representations by the applicant and any other relevant information, the Companies Tribunal, the Takeover Special Committee, or a court may confirm, modify or cancel all or part of a compliance notice.

(3) If the Companies Tribunal, the Takeover Special Committee or a court confirms or modifies all or part of a notice, the applicant must comply with that notice as confirmed or modified, within the time period specified in it, subject to subsection (4).

(4) A decision by the Companies Tribunal or the Takeover Special Committee in terms of this section is binding, subject to any right of review by or appeal to a court.”

[underlining added for emphasis]

[4] The main ground of review is essentially that the previous auditor of the applicant, namely Mazars failed to complete the audit on time, despite an undertaking or commitment to do so. The applicant submits that the failure by its

auditor to audit or complete the audit of its annual financial statements cannot justify the issuance of a compliance notice by the Commission. The following submission captures crisply the nub of the applicant's grounds of review:

*“The Company cannot be expected, or compelled to complete its audited statements when its auditor has failed to duly complete the audit of the Company [sic] financial accounts and the Company has no means to compel the auditor to such [sic] conclusion, save for the intervention of a court of law or appointment of an alternate auditor...”<sup>4</sup>*

[italics and underlining added, the latter for emphasis]

[5] I find the ending of the portion quoted above from the applicant's submissions to be quite catchy. “...save for the intervention of a court of law or appointment of an alternate auditor”. In my view, the submission is not only misplaced in both law and fact, but also self-destructive. It effectively exposes the weakness of the applicant's objection to the Commission's compliance notice. The applicant's attempts to cast itself in the mould of a defenceless company or consumer held at ransom by an intransigent auditor or service provider is not supported by the very facts the applicant relies on for its submissions. I deal with this next.

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<sup>4</sup> See para 12 of the founding affidavit.

[6] Firstly, the applicant appears to be authorised to appoint its auditors in terms of article 96 of its Articles of Association adopted on 08 December 2006.<sup>5</sup> In this article it is stated that the auditor shall be appointed in terms of Chapter X of the Act. The Act is defined in article 1 of the same document as the Companies Act, 1973 (the CA 1973). This chapter is or was very expansive in the manner it deals or dealt with the appointment of auditors. What appears to be of critical significance for current purposes is its sections 269 and 270. Section 269 dealt with the first appointment of auditors, whereas section 270 dealt with the annual appointment of auditors. Further, sections 277 and 278 dealt with removal and appointment of auditors. Therefore, even without delving deeper into those provisions, it is beyond argument that the applicant always had a right or prerogative to appoint and remove its auditor all the times. It is trite fact that the CA 1973 was replaced by the CA 2008 as from 01 May 2011.<sup>6</sup>

[7] Part C of Chapter 3 of the CA 2008 provides for, among many others, the appointment and resignation of auditors. However, even in this new piece of legislation not much has changed regarding the material issues relating to auditors. In terms of section 90 of the CA 2008 the company still has the right each year at its annual general meeting to appoint an auditor.<sup>7</sup> Therefore, the appointment of an auditor lasts from one annual general meeting to another, save where rotation of auditors is required in terms of section 92 of the CA 2008.

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<sup>5</sup> It does not appear as if the applicant has amended its constitutive documents despite the advent of the CA 2008.

<sup>6</sup> The CA 2008, in the main, commenced in application on 01 May 2011, although the commencement date of some provisions was only later.

<sup>7</sup> Section 90(1) of the CA 2008.

This is demonstrative in nature of the powers wielded by companies in this regard regarding appointment and removal of auditors.

[8] However, the material change ushered in by the CA 2008 is that not all companies are obliged to have their annual financial statements audited.<sup>8</sup> Section 30 of the CA 2008 is informative in this regard. It provides for auditing and independent review of annual financial statements.<sup>9</sup> I am not required to determine whether the applicant's annual financial statements have to be audited. Besides, this appears to be beyond the current challenge by the applicant. In fact, the compliance notice by the Commission only required the applicant to file annual financial statements "signed by ... the registered auditor/Independent Reviewer".<sup>10</sup> However, the applicant is a public company and in terms of section 30(2) of the CA 2008 it is required to have its annual financial statements audited.<sup>11</sup> This much the applicant appears to have accepted.

[9] Further, the conduct of auditors as professionals is regulated in terms of the Auditing Professions Act 26 of 2005. This includes an investigation of

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<sup>8</sup> Section 30 of the CA 2008.

<sup>9</sup> Section 30(2) of the CA 2008.

<sup>10</sup> See the statement attached to the Form CoR 139.1 dated 14 January 2015 by the Commission.

<sup>11</sup> Sections 30(1) and (2) read as follows in the relevant part:

"(1) Each year, a company must prepare annual financial statements within six months after the end of its financial year, or such shorter period as may be appropriate to provide the required notice of an annual general meeting in terms of section 61(7).

(2) The annual financial statements must-

(a) be audited, in the case of a public company..."

charges of improper conduct<sup>12</sup> and disciplinary hearing in respect of those charges, against auditors, where deemed warranted.<sup>13</sup> I find it beyond argument that should the allegations made by the applicant against Mazars have been referred to the Independent Regulatory Board for Auditors, same would have been investigated and the necessary pronouncements made regarding the conduct of Mazars or its individual auditors in the matter. It does not appear anywhere in the papers that this was even contemplated by the applicant, but yet it grounds this application.

[10] In addition to what is stated above, the applicant appears to have been always aware that it could appoint another auditor in substitution of Mazars.<sup>14</sup> It also appears that the applicant knew that a court of law could grant it appropriate relief in respect of the alleged conduct of Mazars.<sup>15</sup> But, still the applicant elected neither of these options. Naturally, this cannot be without consequences.

[11] Therefore, against the backdrop of what is state above, I do not accept that the applicant had no control or means to compel its auditors to conclude the audit of the material annual financial statements. It had the right to refer the alleged improper conduct of its auditors to the regulatory body; terminate the relationship and appoint new auditors in substitution of Mazars or approach a

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<sup>12</sup> Section 48 of the Auditing Professions Act 26 of 2005.

<sup>13</sup> Section 50 of the Auditing Professions Act 26 of 2005.

<sup>14</sup> See paras 4 and 5 above.

<sup>15</sup> *Ibid.*



court of law for appropriate relief. I am alive to the fact that both processes take time to conclude. But time was not always against the applicant.

[12] Evident from what is stated at the beginning of this decision<sup>16</sup>, the applicant failed to prepare annual financial statements within six months after the end of its financial year on the 28 February 2013. Therefore, the annual financial statements for that period were due on 31 August 2013. As indicated above, the compliance notice was only issued on 14 January 2015. This was over 16 months after the annual financial statements were due in terms of section 30 of the CA 2008. In my view, this is more than sufficient time for the applicant to have put its house in order, so to speak, by, among others, considering the regulatory and statutory options stated above<sup>17</sup>.

[13] Further, the compliance notice in itself constituted a further opportunity, even if naturally casts in non-palatable terms, for the applicant to file the required annual financial statements. It granted the applicant a period of 40 business days from 15 January 2015 to deliver the required annual financial statements. In my rough calculation this would have expired on 11 March 2015 in the absence of this application.

[14] On the other hand, the allegations by the applicant against Mazars appear to be disputed by the latter. In electronic mail exchanges extracts of which are

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<sup>16</sup> See paras 1 and 2.

<sup>17</sup> See para 10.

included as annexures to the application of 16 January 2015, a certain Mr. Andries Batt, ostensibly a partner at Mazars, states that “*we have completed the audits and have sent the financial statements with amendments to Cornelle on 8 and 13 October 2014...*” The applicant’s notable reaction to this was the appointment of a new auditor. Normally, this would be considered a bold and commendable step, but in my view, it came after an inordinate delay on the part of the applicant.

[15] Therefore, on the basis of representations by the applicant and all other information at my disposal, I find it unnecessary to interfere with the compliance notice issued by the Commission and actually confirm the compliance notice.

[16] However, before I make an order I am beckoned by what I consider to be procedural irregularities. Firstly, I could not find proof that the application was served on the Commission as an interested body whose notice is subjected to review. Secondly, the applicant did not bring the application within 15 business days after receiving the impugned compliance notice as required in terms of section 172(1)(a) of the CA 2008.<sup>18</sup> There is also no explanation or cause shown by the applicant justifying that it be allowed to bring the application on a period longer than prescribed.<sup>19</sup> Some of its filed papers bore the date stamp of the registrar of this Tribunal of 11 February 2015 and some 09 March 2015. The applicant did not show cause to [or request a reprieve by] this Tribunal for these

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<sup>18</sup> See para 3 above.

<sup>19</sup> See section 172(1)(b) and para 3 above.

procedural irregularities, despite being alerted by the registrar to same. In my view, the non-service upon the Commission is in itself fatal in effect to this application.

[17] I make an order in the following terms:

- a) the application is dismissed;
- b) the compliance notice issued by the Companies and Intellectual Property Commission on 14 January 2015 is confirmed.

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**Khashane Manamela**

**Member, Companies Tribunal**