



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT013MAY2017

In the matter between:

TSEBO HOLDINGS SA (PTY) LTD

FIRST APPLICANT

TSEBO INTRAGROUP (PTY) LTD

SECOND APPLICANT

TSEBO SOLUTIONS GROUP (PTY) LTD

THIRD APPLICANT

and

COMPANIES AND INTELLECTUAL

PROPERTY COMMISSION (CIPC)

RESPONDENT

Presiding Member of the Companies Tribunal: ISHARA BODASING

Date of Decision: 03 AUGUST 2017

DECISION

1. INTRODUCTION

1.1 The First Applicant is Tsebo Holdings SA (Pty) Ltd., a company with registration number 2016/155309/07. The Second Applicant is Tsebo Intragroup (Pty) Ltd., a company with registration number 2016/154961/07. The Third Applicant is Tsebo Solutions Group (Pty) Ltd., a company with registration number 2016/224394/07. All applicants are duly incorporated in accordance with the company laws of South Africa, having their registered address at Tsebo House, 7 Arnold Road, Rosebank, Gauteng.

1.2 Tsebo Holdings SA holds all of the issued shares in Tsebo Intragroup, which in turn holds all of the issued shares in Tsebo Solutions Group. The latter is the operating entity of the Applicants.

1.3 On 17 May 2017, the Applicants sought relief from the Companies Tribunal for an exemption in terms of section 6(2) of the Companies Act 71 of 2008 ("the Act), of the Applicant's resolutions from the temporal restriction contained in section 27(4)(b) of the Act.

1.4 The purpose of their Application is to extend the financial year-end of the Applicants from February 2017 to March 2017 on the basis that, in the particular circumstances of the Applicants, it is reasonable and justifiable to do so.

1.5 On 28 June 2017 Applicants applied for a default order in terms of Regulation 153 of the Companies Regulations¹, in respect of the relief sought in the initial application (as described in the preceding paragraphs).

¹ GN R351 in GG 34239 of 26 April 2011.

² Delport, P. A. & Vorster, Q: Henochsberg on the Companies Act 71 of 2008 (electronic version)

1.6 The founding affidavits in the CTR142 and CTR 145 forms are deposed to by Mr Timothy Garret Walters (“Deponent”), Financial Director of the Applicants, and duly authorised to do so on their behalf.

2. BACKGROUND

2.1 During the year leading up to this application, the Applicants underwent a number of changes in their shareholding and names. Briefly, these were as follows:

2.1.1 A French investment company, Wendel, acquired the shares in South African entities with similar names to the First and Third Applicants.

2.1.2 Wendel instructed Webber Wentzel attorneys as its corporate legal advisors to deal with the acquisition of the Tsebo Group, which included the procurement of shelf companies.

2.1.3 Between April and May 2016, the Applicants were incorporated under the names of the procured shelf companies, with their financial year-end registered as February.

2.2 According to the Deponent, it is Webber Wentzel’s standard practice, when registering companies to be used as shelf companies, to register the financial year-end of the latter as the end of February. The financial year-end of the previous entities and the rest of the Tsebo Group is March. The accounting system and the reporting and consolidation tool (Hyperion) of the Tsebo Group is set up on the basis of a March financial year end.

2.3 Wendel did not include the management of the acquired entities in the set up of the Applicants. According to the Deponent, the attorneys were therefore not instructed to align the financial year-end of the Applicants to that of the Tsebo Group, which is March.

2.4 During March 2017, Applicants first became aware of the February year-end when the South African Revenue Services informed Third Applicant that it would be imposing penalties and interest on the late payment of provisional tax. Deponent alleges that the company secretarial records were still with the

attorneys then, which was why they were not aware of the February financial year-end.

2.5 The Applicants' Directors then resolved to change the financial year-end from February to March 2017. During April 2017, Third Applicant submitted to Respondent its resolution and notice of change of financial year-end to March 2017. Respondent rejected the notice. Deponent avers that it is for this reason that the completed resolutions of First and Second Applicants were not submitted to the Respondent.

2.6 On 22 May 2017, the Applicants' initial application for relief from the Companies Tribunal was served on the Respondent in terms of Company Regulation 142(2). On 28 June 2017, the Applicants lodged an application for a default order in terms of Company Regulation 153.

3. ISSUES

3.1 Respondent, in e-mail to the Applicants, relies on the provisions of section 27 of the Act, and Companies Regulation 25 of 2011 as the basis for rejecting Applicants' notice.

3.2 In arguing for default judgement, Applicants state that the twenty-day period for filing a response from Respondents has expired, and the inference to be drawn is that Respondent does not intend to oppose the application.

3.3 The applicants claim that they will suffer prejudice if the financial year end is not changed, which includes:

3.3.1 The possibility of a breach of debt covenants of a R2 billion loan occurring, as the covenants are measured off March audited financial statements;

3.3.2 Applicants' financial accounting system is configured to March year-end. Should the year-end not change to March, additional system development will have to be undertaken to perform a February audit, and to conduct on-going

reporting for the following financial year, which would then include thirteen (13) months.

- 3.3.3 Applicants estimate that it will cost approximately three hundred thousand rands (R300 000) to update the accounting system, and a further one and a half million rands (R1 500 000) for additional audit work.
- 3.3.4 A negative effect on their level 1 BEE rating, and SARS penalties and interest in excess of one million rands (R1 000 000).
- 3.3.5 No financial year-end procedures were carried out at the end of February 2017, as Applicants' management were unaware that February is the recorded financial year-end. Therefore, no auditors were in attendance for stock count.

3.4 In highlighting the prejudice they could suffer, Applicants contend that the reasonable purpose of their resolution is to avert the detrimental consequences of their failure to comply with the time requirements as contemplated in section 27(4)(b) of the Act.

3.5 Applicants also argue that it is reasonable and justifiable to grant the exemption, having regard to the purpose and policy served by section 27 of the Act, which is to provide legal certainty for stakeholders, and encourage the efficient and responsible management of companies.

4. APPLICABLE LAW

4.1 The import of section 6(2) is best understood when its flanking sections 6(1) and (3) of the Act are also considered:

S6: Anti-avoidance, exemptions and substantial compliance

(1) A court, on application by the Commission, Panel or an exchange in respect of a company listed on that exchange, may declare any agreement, transaction, arrangement, resolution or provision of a company's Memorandum of Incorporation or rules -

(a) to be primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement established by or in terms of an unalterable provision

of this Act; and

(b) void to the extent that it defeats or reduces the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act.

(2) A person may apply to the Companies Tribunal for an administrative order exempting an agreement, transaction, arrangement, resolution or provision of a company's Memorandum of Incorporation or rules from any prohibition or requirement established by or in terms of an unalterable provision of this Act, other than a provision that falls within the jurisdiction of the Panel.

(3) The Companies Tribunal may make an administrative order contemplated in subsection (2) if it is satisfied that -

(a) the agreement, transaction, arrangement, resolution or provision serves a reasonable purpose other than to defeat or reduce the effect of that prohibition or requirement; and

(b) it is reasonable and justifiable to grant the exemption, having regard to the purposes of this Act and all relevant factors, including -

(i) the purpose and policy served by the relevant prohibition or requirement; and

(ii) the extent to which the agreement, transaction, arrangement, resolution or provision infringes or would infringe the relevant prohibition or requirement.

4.2 Companies Regulation 25 of 2011 deals with the company financial year and accounting records, and states that a company must notify the Commission of a change in its financial year-end by filing Form CoR 25.

4.3 Companies Regulation 142 of 2011 provides for applications to the Tribunal in respect of matters other than complaints.

4.4 Companies Regulation 143 of 2011 deals with an answer to the above, and states:

(1) Within 20 business days after being served with a Complaint Referral, or an application, that has been filed with the Tribunal, a respondent who wishes to oppose the complaint or application must—

- (a) serve a copy of an Answer on the initiating party; and*
- (b) file the Answer with proof of service.*

4.5 Companies Regulation 153 of 2011 provides for default orders:

(1) If a person served with an initiating document has not filed a response within the prescribed period, the initiating party may apply to have the order, as applied for, issued against that person by the Tribunal.

4.6 The purposes of the Act are set out in **section 7** and include, for purposes of this matter:

... (b) promote the development of the South African economy by-

- (i) encouraging entrepreneurship and enterprise efficiency;
- (ii) creating flexibility and simplicity in the formation and maintenance of companies; and
- (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;

(c) promote innovation and investment in the South African markets;

(d) reaffirm the concept of the company as a means of achieving economic and social benefits;

(e) continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;

... (g) create optimum conditions for the aggregation of capital for productive

purposes, and for the investment of that capital in enterprises and the spreading of economic risk;

... (j) encourage the efficient and responsible management of companies;

... and (l) provide a predictable and effective environment for the efficient regulation of companies.

4.7 Section 27 of the Act requires the following:

(1) A company must have a financial year, ending on a date set out in the company's Notice of Incorporation, subject to any change made in terms of subsection (4).

(2) The first financial year of a company-

(a) begins on the date that the incorporation of the company is registered, as stated in its registration certificate; and

(b) ends on the date set out in the Notice of Incorporation, which may not be more than 15 months after the date contemplated in paragraph (a).

... (4) The board of a company may change its financial year-end at any time, by filing a notice of that change, but-

(a) it may not do so more than once during any financial year;

(b) the newly established financial year end must be later than the date on which the notice is filed; and

(c) the date as changed may not result in a financial year ending more than 15 months after the end of the preceding financial year.

5. EVALUATION

5.1 At the outset, I will deal with the question of whether the default application in

terms of Regulation 153 is justified. The applicant launched the present application on 17 May 2017 and served it on Respondent on 22 May 2017. The *dies* for opposing the application lapsed on 20 June 2017. Applicants applied for a default order on 28 June 2017. Respondent has not delivered opposing papers. On the face of it, Applicants have made out a case for the main application to be considered on a default basis.

5.2 However, in the interests of justice, I am mindful of the notification provided for in Rule 26 of the Uniform Rules of the High Court, which provides:

If any party fails to deliver any other pleading within the time laid down in these Rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within five days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties, shall be in default of filing such pleading, and ipso facto barred.

5.3 Failure to file the necessary documents should not be used by parties to seize on the slip of the opposite party. It would have been a courteous gesture on the Applicants' part, to notify the Respondent of the imminently expiring *dies*. In particular, in deciding whether the Respondent is truly in default in the sense of not opposing the application, I should have regard to all the documents in the Tribunal's file, noting that Respondent has rejected in writing, the notice filed by Third Applicant.

5.4 I turn now to deal with the initial application. This Tribunal has a fairly wide discretion to grant an exemption if it is satisfied that the application meets the two-legged enquiry as contained in section 6(3) of the Act. The learned authors of Henochsberg on Companies Act (as at May 2017)² state the following in this regard:

"It should be noted that the requirements for the exercise of the discretion by the Companies Tribunal are conjunctive, ie (sic) if it finds that it will be reasonable and justifiable to grant an exemption having regard to (a) the purposes of the Act;

² Delport, P. A. & Vorster, Q: Henochsberg on the Companies Act 71 of 2008 (electronic version)

(b) all relevant factors; (c) the purpose and policy served by the relevant prohibition or requirement; and (d) the extent to which the agreement, transaction, arrangement, resolution or provision infringes or would infringe the relevant prohibition or requirement, it must in addition also be satisfied that the agreement, transaction, arrangement, resolution or provision serves a reasonable purpose other than to defeat or reduce the effect of a prohibition or requirement of the Act.”

5.5 Logistically, company acquisitions are not without challenges. It appears there was an oversight on the part of the Applicants that their financial year-end was not registered as March: an oversight with costly consequences. In making this observation, I am aware that the purpose of the Applicant’s resolutions is to avert the detrimental consequences of their non-compliance with the timing requirements of section 27(4)(b). I accept that the resolution is not intended to defeat or reduce the effect of Section 27(4)(b).

5.6 I have already highlighted the relevant factors that populate section 7 as it expounds the purposes of the Act. These factors serve to guide this Tribunal in deciding whether it is reasonable and justifiable to grant the exemption sought by the Applicants. I am particularly mindful of the need to create flexibility and simplicity in the formation and maintenance of companies, and to encourage the efficient and responsible management of companies.

5.7 I now deal with the last part of the enquiry: the extent to which the resolution infringes the requirements of Section 27. Given that Applicants only became aware of the mistake after the registered financial year-end had passed, and that they acted swiftly to address this, they have infringed the timing requirements by a matter of a few weeks. The infringement is further diminished in light of the fact that it serves the purpose of aligning Applicants’ annual accounting periods with that of their group, which will in turn promote efficient and responsible management of the Applicants.

6. FINDINGS

6.1 Even though the failure of Respondent to file a response to the application can not be condoned, I am not satisfied that it is in the interests of justice to consider this application on a default basis.

6.2 As regards the initial application, in my opinion the Applicants' Resolution clears the hurdles presented by both legs of the enquiry in terms of section 6(3) of the Act. I find that it serves a reasonable purpose other than to defeat or reduce the requirement of section 27(4)(b) of the Act. As the enquiry is conjunctive, I consider it reasonable and justifiable to grant the exemption especially when considering the purposes of the Act as reflected in section 7.

6.3 The Tribunal is satisfied that Applicants have shown good cause for the exemption to be granted.

7. ORDER

7.1 The application for a default order in terms of Company Regulation 153 is dismissed.

7.2 An administrative order is granted in terms of section 6(2) of the Act, exempting Applicants' resolution from the timing restrictions as contained in section 27(4)(b) of the Act, so as to extend the financial year-end of the Applicants from February 2017 to March 2017.

ADV. ISHARA BODASING