IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICH IS NOT APPLICABLE
[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES:
~~YES~~ / NO
[3] REVISED ✓
DATE 16/4/18 SIGNATURE

16/4/18

CASE NO: 75463/16 A

In the matter between:

PHAKWE MINING SERVICES (PTY) LTD	First Applicant
TOMMY MABOE	Second Applicant
JAN JOHANNES JAKOBUS GREYVENSTEIN	Third Applicant

and

MEMBER OF THE COMPANIES TRIBUNAL	First Respondent
COMPANIES TRIBUNAL OF SOUTH AFRICA	Second Respondent
MABOE TRANSPORT CC	Third Respondent

JUDGMENT

LOUW, J

[1] This is a review application arising from an application brought by the third respondent before the second respondent in terms of s 71(8) of the Companies Act 71 of 2008 (the Act) for an order to compel the first applicant to hold an annual general meeting for the financial year ending 28 February 2015, an order removing the second and third applicants as directors of the first applicant and an order to compel the first applicant to provide the applicant with certain information. The application is opposed by the third respondent.

[2] In terms of s 71(8) of the Act, if a company has fewer than three directors, in circumstances contemplated in subsection (3) of s 71, any director or shareholder of the company may apply to the Companies Tribunal (second respondent) to make a determination contemplated in that subsection. The determination contemplated in subsection (3) is the removal of a director who has been determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be, at the instance of a shareholder or director of the company. It was common cause that the third respondent, a close corporation, is not, and cannot be, a director of the first applicant.

[3] At the commencement of the hearing before the first respondent on 24 May 2016, it was agreed between the parties that a point *in limine,* namely

the applicants' contention that the third respondent was not a shareholder of the first applicant, and therefore did not have *locus standi* to bring the application, be decided before the hearing of the substantive issues by the second respondent.

[3] The definition of "*shareholder*" in s 1 of the Act is, "*subject to section 57(1), ... the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be*".

[4] The first respondent, in a judgment handed down on 13 June 2016, said that "*(t)he question therefore is merely whether the applicant is a shareholder, i.e. entered as such in the securities register as provided for in s 50 of the Companies Act*". The first respondent held that "*(t)he status of the applicant* (the respondent) *as a shareholder of the first respondent* (the first applicant) *is therefore to be decided only on the affidavits before the Tribunal.*" It is common cause that no evidence relating to the securities register was placed before the first respondent.

[5] With regard to the securities register, the first respondent concluded that "*(W)hatever the 'true' position may be in respect of the securities register, i.e. whether the applicant should or should not be entered therein, the Tribunal cannot make a ruling in that respect.*" No finding was accordingly made in respect of the question whether or not the third

respondent was entered into the securities register as a shareholder, which is the question which the first respondent said was the question to be decided. The ruling thereafter made by the first respondent, was the following:

"On the information before the Tribunal the ruling is made that the applicant appears to be a shareholder as defined in s 1 of the Companies Act in the first respondent (the first applicant) *and the point in limine is therefore dismissed."*

[6] It was submitted on behalf of the third respondent that this decision was provisional and that it may be revisited during the course of the tribunal's consideration of the section 71(8) application. I agree with the submission. My understanding of the finding that the third respondent *"appears to be a shareholder"* is that it was a *prima facie* finding in the absence of evidence of the contents of the securities register and that, depending on information which may be provided about the contents of the securities register, it may or may not finally be found that the third respondent is a shareholder. The first respondent was, however, not required to make only a *prima facie* finding, but that is what he did. It is noteworthy that the first respondent referred to his order as a *"ruling"*. The ruling is not final and can be revisited. It is therefore not reviewable on any of the grounds contended for by the applicants.

[7] But even if the finding of the second respondent must be regarded as final, as was submitted by the applicants, that was not the end of the road for the applicants. In terms of Regulation 142(3)(b)(ii) of the Companies Regulations, 2011 published in terms of s 223 of the Act, any decision of a Companies Tribunal may be varied or rescinded by application to the Tribunal. Regulation 142(1) provides that a person may apply to the Tribunal for an order in respect of any matter contemplated by the Act, or the Regulations, by completing and filing with the Tribunal's recording officer the prescribed form and a supporting affidavit. Regulation 142(3) then provides the following:

An application in terms of this regulation must –

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

(b) depending on the context –

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

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

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

(c) indicate the order sought; and

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

[8] It appears, therefore, that the applicants had an internal remedy which they could, and should, have followed. The applicants would then have been entitled to place the securities register before the appointed tribunal in order to show that the third respondent is not a shareholder of the first applicant and that the finding of the first tribunal should, therefore, be varied or rescinded. Such tribunal may also, in terms of s 182(c)(i) of the Act, summon or order any person to produce any book, document or item necessary for the purposes of the hearing. Thus, as was pointed out by the third respondent, the tribunal, once it commences its hearing, could order the applicants to produce the securities register, which could determine the issue of the third respondent's *locus standi* definitively. In terms of s 182(b) the tribunal may also question any person under oath or affirmation. Oral evidence may therefore be led.

[9] In the result, the application is dismissed with costs.

Counsel for applicants: Adv. B Neukrircher SC; Adv. H Fourie.

Instructed by: Robert Coetzee Attorneys.

Counsel for third respondent: Adv. J L Griffiths.

Instructed by: Eiser & Kantor Attorneys