COMPANIES TRIBUNAL.

(DTI CAMPUS, SUNNYSIDE, PRETORIA)

CASE NUMBER: CT001AUG2017

In the matter between:

NANCY MAKALIMA	**Applicant**
And	
SANSKI INVESTMENTS 45 (PTY) LTD **Registration No: 2005/004053/07**	**First Respondent**
XOLANI NJOKWENI	**Second Respondent**
THAMIE LEFAKANE	**Third Respondent**
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**Fourth Respondent**

DECISION

Introduction

1. This matter is concerned with the main application, being an application for the reinstatement of the applicant as the sole director of Sanski Investments 45(Pty) Ltd, the first respondent, on grounds that the second and third respondents removed the applicant irregularly from her position as the director, as well as the interlocutory opposed condonation application for the late delivery of applicant's replying affidavit.

Condonation Interlocutory application

2. The applicant failed to file the replying affidavit by 28 September 2017 as required by the regulations. Respondents made several enquiries from applicant's attorneys regarding the non-delivery of the replying affidavit without the courtesy of a reply from applicant's attorneys. Ultimately, respondents set the application down for hearing on 1 December 2017. Applicant only delivered her replying affidavit and application for condonation for the late delivery of the replying affidavit on 21 November 2017.

3. Applicant's main ground of the condonation application is that allegations contained in the respondents' answering affidavit required intensive investigations before a replying affidavit could be prepared. The said allegations relate to the changes effected over time allegedly without her knowledge as the director of Sanski Investments 45 (Pty)Ltd. She suspected that the changes were effected fraudulently. Applicant submits that the period allowed by the regulations for delivery of the reply was not sufficient for the investigation, hence the delay and subsequent late delivery. Further, applicant submitted that notwithstanding requests for documentation relied on for the changes, the fourth respondent had failed to furnish the information.

4. Respondents oppose the application mainly on the grounds that the application lacks sufficient detail required of a party seeking for indulgence from the Companies Tribunal. The condonation application was granted.

5. Factors taken into consideration for the granting of the condonation are, the seriousness of the allegations contained in the application, the need to bring certainty in the administration of the company, evidence

of the need to access information in the records of the CIPC for an objective assessment of the merits and the best interest of justice.

Application on merits

6. Applicant claims that the second and third respondents lacked the authority to remove her from the directorship of the first respondent in terms of Section 71(3) of the Companies Act 71 of 2008 because their appointment as directors was irregular.

7. The Applicant challenges the validity of the appointment of second and third respondents as directors of the first respondent on grounds that:

   7.1. First respondent did not have shareholders at the time when the general meeting was requisitioned allegedly by shareholders, for the adoption of resolutions by the general meeting to dismiss the applicant as a director and to appoint second and third respondents as directors. Applicant submits that therefore whoever requisitioned the meeting, lacked the *locus standi* to do so.

   7.2. The general meeting was not convened in compliance with the process stipulated in first respondent's Articles of Association read with the Companies Act 71 of 2008.

   7.3. The appointments of second and third respondents were therefore based on invalid resolutions.

   7.4. When the second and third respondents were purportedly appointed as directors, applicant was the sole director of first

respondent, as a result, their appointment as directors ought to have been made pursuant to a resolution passed by her on behalf of first respondent. Applicant did not pass such a resolution.

7.5. There was suspicion that the appointment of second and third respondents as directors was fraudulent.

8. First, second and third respondents are opposing this application and submit that the removal of the applicant was in accordance with the Companies Act 71 of 2008 on the following grounds:

8.1. Second and third respondents were duly appointed directors of first respondent at an annual general meeting which had been duly requisitioned by shareholders.

8.2. Second and third respondents accepted their appointments on 19 April 2016 and accordingly lodged the written acceptances with the Companies and Intellectual Property Commission. They were henceforth entitled to serve as directors of first respondent.

8.3. Having followed due process, second and third respondents in their capacity as directors removed the applicant from the directorship by ordinary resolution on 8 September 2016, in terms of section 71(3) of the Companies Act 71 of 2008. All necessary documents were filed with the fourth respondent in terms of circulars issued by the fourth respondent for the removal of a director in terms of section 71 of the Companies Act.

8.4. Respondents submit that the appointment of applicant as the sole director was proposed by second respondent solely for the purpose of incorporating Sanski Investments 45(Pty) Ltd, the first respondent. Further, they submit that applicant's appointment had always been an interim measure. Second respondent claims that he acquired the company and appointed applicant as a director simply because he needed someone to act as a director for Sanski.

8.5. Respondents deny the suggestion or insinuation that their appointments were done through a misrepresentation to the fourth respondent.

9. The nature of disputes raised in this matter require me to first enquire on the validity of the shareholders meeting of 11 February 2015 and consequently, the resolutions passed by that meeting.

10. Based on the nature of disputes, alleged lack of meaningful response by the fourth respondent to applicant's request for information as well as the fact that applicant is the official custodian of information relating to companies, I found it necessary to issue a directive:

10.1. Requiring the fourth respondent to release relevant information of the first respondent under oath;

10.2. Authorising the parties to deliver supplementary affidavits after receipt of documentation from the fourth respondent; and

10.3. Requiring the parties to hold a pre-hearing conference and furnish minute thereof.

11. All parties complied with the directive, accordingly, the adjudication of this application is based on evidence from all parties in this case, including documents from the fourth respondent.

12. For ease of reference in this affidavit I shall refer to:
    a. Nancy Makalima as applicant;
    b. Sanski Investments 45(Pty)Ltd as Sanski/the company;
    c. Xolani Njokweni as second respondent;
    d. Thamie Lefakane as third respondent;
    e. Xolani Njokweni and Thamie Lefakane collectively as “the two respondents”;
    f. The first, second and third respondents collectively as “the respondents”;
    g. Commission and intellectual property commission as “the CIPC”
    h. The Articles of association as “the MOI”;
    i. Companies Act 61 of 1973 as “the previous Act”; and
    j. Companies Act 71 of 2008 as “the Act / the current Act”.

Factual Background

13. Sanski Investment Pty(Ltd) is a private company with share capital. The company was incorporated with a single member namely one Hermien Wessels who was also appointed as the sole director. On 7 March 2005, Hermien Wessels resigned as a subscribed member and director of Sanski, the applicant succeeded him in title as both, the sole director and sole member of Sanski.

14. Applicant remained the sole director of Sanski until 21 April 2016, when the two respondents were added to the records of the CIPC as directors of Sanski. Applicant is challenging the validity of the appointment of the two respondents and conesquently, the validity of their resolution to remove her as a director.

15. From its incorporation until 15 April 2014, the registered address of Sanski was Corporate Law Services, Hatfield Gardens.

16. From 21 April 2016 until 26 January 2017 the registered directors of Sanski were three (3), namely the applicant and the two respondents.

17. From 2014 applicant received calls and email from the two respondents with the second respondent suggesting that she resigns as a director of Sanski. On 21 May 2014 second respondent sent an email stating amongst others that Sanski membership number was reduced to 9 with applicant's group being among the eliminated. And it is solely on this basis that her resignation as a director was being sought. This reason for seeking a resignation in May 2014 contradicts the grounds advanced for the removal of applicant as a director especially in respect of the misconduct attributed to the applicant regarding management of the affairs of the company from March 2005 when applicant was appointed the director until May 2014 when the second respondent sent the aforesaid 21 May 2014 email. Ironically, the same person who advance the reduction of Sanski's membership to 9 as the sole reason for seeking her resignation as the director, is the same person who later accuses applicant of dereliction of duties for duration of her appointment as director including 2005 to 2014.

18. Applicant solicited the assistance of one Mphumela Sondiyazi(Mphumela) to intervene in respect of the resignation sought from her. Upon applicant following on progress made about the requested intervention, Mphumela suggested that applicant resigns and accept payment of one million rand (R1 000 000.00). Applicant refused to heed this call. Mphumela denies ever suggesting acceptance of payment of the said amount to the applicant. He confirms that the company was incorporated by the second respondent.

19. In July 2016 applicant received notices from third respondent inviting her to attend an enquiry on charges of misconduct involving dereliction of duty in relation to the affairs of the company, instituted against her by second respondent. The enquiry meeting was held on 8 September 2016.

20. Cause of Complaint for misconduct was that applicant was expected to:
    20.1. Work to ensure that each of the constituted shareholders of the company remained intact for a minimum period of 10 years; and
    20.2. Maintain company business annually, she neglected to do so.

21. Applicant attended the meeting. Applicant avers that a preliminary point requiring respondents to provide documents used for the appointment of the two respondents as directors before the meeting could proceed was raised. Because the documents were not available, the meeting was adjourned pending receipt of the information from

respondents. Respondents deny this and assert that the meeting went ahead and concluded its business which included a resolution to remove applicant as a director of Sanski.

22. For purposes of this adjudication it is not necessary to make a finding on whose version is probably correct in this respect. To me it would seem, nothing turns on what happened at the directors' meeting of 8 September 2016. The two respondents' authority to remove applicant is hinged on the validity of the annual general meeting of 11 February 2015 and the outcome of that meeting regard being had to the standing of the persons who requisitioned the meeting in relation to the company and the process of convening the meeting.

23. Sometime after the meeting of 8 September 2016, Second respondent approached applicant directly requesting for her I.D. so that they could remove her as a director of Sanski. Applicant's present attorneys of record intervened by a letter dated 13 January 2017 and emailed to second respondent on the same date giving reasons for applicant's refusal to furnish the ID copy and requesting second respondent to henceforth communicate directly with them regarding this subject. Further, the attorneys demanded that the respondent desist from communicating with the applicant directly regarding Sanski and that communication be made through them as appointed attorneys. Second respondent did not respond to this letter.

24. Applicant learnt in 2017 that the two respondents had removed her as a director of Sanski and that the said respondents were now the only directors of Sanski. It is this discovery that has given birth to the present application.

25. Documents from the CIPC show that on 18 January 2017, about five days after receipt of the 13 January 2017 letter from applicant's attorneys, second respondent deposed to an affidavit to motivating that the CIPC condone and approve of the removal of applicant as a director without the need to lodge copy of the applicant's identity document on grounds that the applicant failed to furnish the ID copy notwithstanding repeated requests. The affidavit does not disclose contents of a letter dated 13 January 2017 from applicant's attorneys. It is apparent from the CIPC records that second respondent lodged the application for removal of the applicant on 26 February 2017. Apparently, second respondent did not furnish applicant's attorneys with copy of this application as applicant was the interested party in the envisaged removal.

Issue

26. Evidence in this application is basically uncontroverted and there is generally no dispute regarding application and interpretation of legal principles pertaining to the appointment and removal of directors. Any dispute if at all on these issues will be discerned from the body of this decision.

27. As already stated, applicant challenges the authority of the two respondents to remove her as a director on grounds that their appointment is not duly authorised.

28. In order to establish whether the removal was not authorised, it is necessary to wind back to the process undertaken to initiate the election and appointment of second and third respondents as additional directors at the meeting held on 11 February 2015.

29. Purported shareholders of the meeting issued identical proxies, each appointing second respondent and/or third respondent as proxies at the meeting. The validity of the meeting is challenged on grounds of lack of authority to call for the meeting, failure to comply with processes stipulated by the Act read with the MOI for convening the meeting and failure to comply with the requirements relating to exercise of voting rights by proxy at the meeting.

30. In the result I will deal with the elements of the dispute in the following order and make findings relating thereto;

    30.1. Failure to comply with the requirements relating to exercise of voting rights by proxy at the meeting;

    30.2. Failure to comply with processes stipulated by the Act read with the MOI for convening the meeting;

    30.3. Lack of authority to call for a meeting by those who requisitioned the meeting.

Relevant Legal Framework

31. The appointment of directors is regulated by the Companies legislation read with the MOI. Sanski was incorporated under the previous Act and was regulated by that Act until 1 May 2011 when the current Act took effect. This decision is based on the Act and the MOI and to the extent necessary, reference may be made to the previous Act.

32. The appointment of directors is regulated by Sections 67 and 68 of the Act, this matter's enquiry is about the appointment of the two respondents in terms of section 68.

33. Fundamental requirements for convening a valid general meeting is provided for in section 61 of the Act.

34. Representation of the shareholder by proxy at a general meeting is regulated by section 58 of the Act.

35. Acquisition of shares in a company is regulated by Sections 38, 39 and 40 of the Act.

Relevant Sanski amendments from incorporation to August 2017

Before dealing with the issues in this case, I deem it necessary to record following changes effected on the company since its incorporation:

36. Non-compliance with Annual Returns

    36.1. In 2010 the company was deregistered due to non-compliance with the requirement to lodge annual returns, the deregistration was cancelled in 2012; During this period, the applicant's contact details had not been amended on the CIPC records;

    36.2. On 2015.02.04, the CIPC sent Sms notification that Annual Returns were due on 4 February 2015. During this period, applicant's contact details had been removed and substituted with the third respondent's email address and cell number;

    36.3. Due to non-compliance, the CIPC once again initiated the process of deregistering Sanski on 2015.08.15; and

36.4. On 2016.01.14 – Annual return was filed.

37. The relevance of this information is to show that default to comply with the requirement for lodgement of annual returns happened during the period when applicant's cell and email details were registered with the CIPC and even long after the details were replaced with the third respondent's details.

38. Change of applicant's contact details

38.1. It appears from the free disclosure certificate issued by the CIPC on 12 December 2016 attached to the applicant's founding affidavit that on 15 April 2014, the applicant's cell phone number was changed to [0...]and email address to [t...]. According to the aforesaid certificate, the authorising director for this change of details was the applicant and the details of the customer who lodged this notice of change was one Andiswa Petunia Lefakane ID [0...]. Applicant denies that she authorised the changes, she states that the changes were done without her knowledge and involvement.

38.2. The aforesaid amended cell phone number and email address are details of the third respondent. This is borne out by among others, emails attached to the respondents' further supplementary affidavit dated 18 January 2018 as annexures TL11 dated 1 April 2014 and TL12 dated 5 April 2016. Applicant argues that she could not receive any notices from the CIPC, it is therefore reasonable to conclude that the notice requiring annual returns to be filed by 4 February 2015 was sent to third respondent and not the

applicant because by then her contact details had long been substituted by the third respondent's.

39. COR39 Change of directors and members

39.1. The two respondents convened a shareholders meeting of 11 February 2015 on authority of the power of attorney documents incorporating proxies to appoint the two respondents by purported shareholders of Sanski. Respondents submit that the meeting resolved that the two be appointed directors and a supporting resolution signed by the third respondent is attached. Minutes of this meeting, and the attendance register attendance of this meeting have not been made available to the Tribunal by the respondents. From the papers before me, it seems this meeting was attended by the two respondents only.

39.2. Acting on the strength of the resolution of 11 February 2015, the two respondents convened a directors meeting on 19 April 2016 to accept their appointment. Applicant states that though she was the director of Sanski she was neither invited to the meeting nor was she aware of it.

39.3. Acceptance was done by completing and signing the director amendments form 39. It is significant to point out that there are four documents lodged with the CIPC in support of the addition of the two respondents as directors, all the four documents are purportedly signed by or on behalf of the applicant. Those are a notice of 19 April 2016 meeting dated 5 April 2016, a director**'**s resolution to accept appointment of

the two respondents, a 20 April 2016 letter confirming the authority of Thabo Thulo to lodge the director amendments form (CoR 39 form) and the Cor 21.1. The said four documents are on the letterhead of first respondent.

39.4. Further, and there is also a CoR 39 form signed by the two respondents and purportedly the applicant too. Applicant denies signing the documents or knowledge of these documents while the two respondents deny involvement in any impropriety that might be visited upon the process of lodging this director amendments documentation. The two respondents admit having appointed and mandated Thulo to register the changes. They however fail to explain the documents uttered to the CIPC in support of the application as having been signed by the applicant in the capacity of the Sanski CEO.

39.5. Respondents only distance themselves from any impropriety involved in the lodgement of the documents supporting registration of their appointment.

39.6. In terms of the Windeed search attached to the respondents' answering affidavit, the two directors of the company became registered members of Sanski without any contribution on 10 May 2016. However, the disclosure certificate issued by the CIPC on 9 January 2018 shows the number of members of Sanski as one (1). The certificate does not disclose the identity of such a member.

40. <u>CoR21.1 Address Change</u>

40.1. In January 2016, the CIPC acknowledged receipt of COR21.1 (address change notice) from Corporate Law Services registering 29 Shrublands Drive, Parkmore, Sandton, Gauteng, 2196 as the company's new address. The CIPC confirmed that the change was effective from 29 January 2016. During this period, applicant was still registered as the sole director and member of Sanski. She however states that she did not authorise the changes. It is thus unclear as to on whose mandate Corporate Law Services effected this address change.

40.2. In February 2017 the CIPC acknowledged receipt of notice of change of the company postal and physical address(COR21.1) from the second respondent and confirmed that the CIPC records have been amended to reflect 27 Shrublands Drive, Dalecross, Sandton, Gauteng, 2195 as Sanski address. The change was effective from 2 February 2017. This address is also the postal and residential address of Lefakane Thamie Harry, the third respondent.

Turning to the elements of the issue

Failure to comply with the requirements relating to exercise of voting rights by proxy at the meeting;

41. In order to prove that the appointment of the two respondents was duly authorised and therefore valid, respondents presented special power of attorney documents incorporating a proxy, allegedly issued on behalf of the shareholders of Sanski.

42. Section 58 of the Act prescribes the process to be followed in order for the proxy instrument to be valid. In particular, Section 58(3) provides that:

> *"Except to the extent that the Memorandum of Incorporation of a company provides otherwise-*
>
> *…….*
>
> *(c) a copy of the instrument appointing a proxy must be delivered to the company, or to any other person on behalf of the company, before the proxy exercises any rights of the shareholder at a shareholders meeting".*

43. Clause 51 of the MOI provides that the instrument appointing a proxy shall be deposited at the registered office of the company not less than 48 (forty-eight) hours before the time of holding the meeting at which the person named in the instrument of proxy proposes to vote and in default of complying herewith the instrument of proxy shall not be treated as valid. (My emphasis). Applicant relies on this clause for challenging the validity of the proxy.

44. It is clear from Section 58(3)(C) that the MOI takes precedence in this respect. It is peremptory for the proxy to be deposited at the registered office of the company not less than 48 (forty-eight) hours before the commencement of the meeting for the proxy to be valid. It is common cause that the proxy was not deposited as required by the MOI.

45. Respondents argue that the interpretation of the clause cannot be interpreted in a manner that leads to an absurd conclusion in that the

registered address was a shelf company address and it would be impossible to deposit the proxy instruments at that address. I find this argument curious, especially regard being had to the fact that in terms of the records, Corporate Law Services is appointed as the Companies Secretary. Further, as recently as January 2016, Corporate Law Services are on record as rendering a service to Sanski by changing its registered postal and physical address as stated in paragraph 40.1 supra. Further, the two respondents submit that they have at all material times been in charge of Sanski and they were in possession of the proxies. Respondents knew that the applicant was the sole member and director of Sanski, they knew her contact details but they do not explain as to why the applicant was not required to convene the meeting and even why the proxy instruments were not brought to her attention.

46. Applicant submitted that failure to deposit proxy instruments in terms of the MOI is fatal and renders the instrument invalid. On the other hand, respondents, without conceding that failure to deposit the proxy instrument accordingly constitutes procedural non-compliance, submit that if the impropriety is of a minor procedural nature it cannot have a bearing on the ultimate substance of the meeting. Second respondent claims that he acquired the company and appointed applicant as a director simply because he needed someone to act as a director for Sanski. This seems to be suggesting that the second respondent's aim was never to give the applicant the reins to direct the company if indeed he is the one who acquired the company. The question is then what purpose was the appointment of applicant meant to serve, was she there as token, a front or what? There is insufficient evidence for me to draw a conclusion in this regard. Second respondent ought to

have known the requirements of the MOI regarding proxies and further that the registered address of Sanski remains as Corporate Law Services (Pty)(Ltd).

47. Registration of both the postal address and the physical address of the company is required for purposes of communication and service of formal documents, including court process. This requirement is not only for the benefit of the company but also for the benefit of anyone wanting to engage with the company. The real absurdity is with failure to register change of the registered address of the company if respondents considered the registered address on incorporation to be inadequate or improper. It is my finding that failure to comply renders the proxy not valid.

Failure to comply with processes stipulated by the Act read with the MOI for convening the meeting

48. Section 61 of the Act regulates the convening and holding of a shareholder's meeting in instances where the company has directors, is unable to hold the meeting because it does not have directors or is unable to hold the meeting because the directors are incapacitated. Section 61(3) of the current Companies Act reads:

"*Subject to subsection (5) and (6), the board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, must call a shareholders meeting if one or more written and signed demands for such a meeting are delivered to the company, and-*

(a) each such demand describes the specific purpose for which the meeting is proposed; and

(b) in aggregate, demands for substantially the same purpose and made and signed by the holders as of the earliest times specified in any of those demands, of at least 10% of the voting rights entitled to be exercised in relation to the matter proposed to be considered at the meeting."

49. Section 61(11) makes provision for the convening of a shareholder's meeting in cases where the company has no directors or person appointed in the MOI or the directors are incapacitated and it provides as follows:

"If a company is unable to convene a meeting as required in terms of this section because it has no directors, or because all of its directors are incapacitated-

(a) any other person authorised by the company's Memorandum of Incorporation may convene the meeting; or

(c) if no person has been authorised as contemplated in paragraph (a), the Companies Tribunal, on a request by any shareholder, may issue an administrative order for a shareholders meeting to be convened on a date, and subject to any terms, that the Tribunal considers appropriate in the circumstances."

50. Article 33 of the Articles of Association provides that the AGM and other general meetings shall be held at such time and place as the directors shall appoint or at such time and place as stipulated when the meetings are convened in terms of sections 179(4), 181, 182 and 183 of the act (the Companies Act 66 of 1973). Sections 181 to183 of the Companies Act 61 of 1973 deals with the calling for of general

meetings on requisition by members, convening of general meetings by Registrar of Companies and general meetings on order of court respectively.

51. Respondents submit that the meeting was held at the instance of the shareholders, in the circumstance, the relevant provision in the instant case is Section 181 of Act 61 of 1973 in that it deals with general meetings held on requisition by members. This provision corresponds with Section 61(3) which provides for the calling of a general meeting on requisition by members. It prescribes the minimum threshold of members eligible to call for a general meeting.

52. It is clear from the provisions of Section 61(3) of the current Act that the director of the company or a person authorized by the Articles is obliged to convene a general meeting upon demand by shareholders whose power to vote meets the required threshold.

53. As at September 2014, Sanski had only one director, the applicant. The MOI does not appointed a person that must convene the meetings, thus it is the applicant and only her who was empowered to call the general meeting at the demand of shareholders in terms of this section. It is unclear as to at whose advice the request for a meeting was directed at the two respondents, who in the circumstances of this company, lacked the power to call the meeting. The two respondents knew where to find the director but they chose not to approach her for the convening of a valid meeting.

54. Accordingly, it is my finding that the annual general meeting was not convened in accordance with the prescripts of the Act read with the MOI.

Lack of authority to call for a meeting by those who requisitioned the meeting.

55. The answer to the question whether the persons that requisitioned the meeting and appointed the two respondents as proxies for the meeting held on 11 February 2015 were shareholders is also found in the current Companies Act read with the Articles.

56. Sections 38 and 40 of the Act regulate the issuing of shares, the determination of consideration for shares and the acquisition of shares in a company.

57. Section 38(1) of the Act authorizes a board of a company to resolve to issue shares of the company at any time, but only within the classes, and to the extent, that the shares have been authorised by or in terms of the company's Memorandum of Incorporation, in accordance with section 36".

58. Section 40 deal with consideration for the issuing of shares. This provision obliges directors to determine consideration for the shares before the shares are issued.

59. Section 40 of the Act provides that

"(1) The board of a company may issue authorised shares only-

(a) for adequate consideration to the company, as determined by the board;

(b) … or

(c) as a capitalisation share as contemplated in section 47.(2)

Before a company issues any particular shares, the board must determine the consideration for which, and the terms on which, those shares will be issued.(my emphasis)

(3) ……

(4) Subject to subsections (5) to (7), when a company has received the consideration approved by its board for the issuance of any shares-(my emphasis)".

60. Clause 9 of the MOI provides that the share certificate shall be issued under the authority of the directors in such a manner and form as they shall from time to time prescribe.

61. It is abundantly clear from above that in the context of the governance of Sanski, the director(s) of the Company are obliged to participate in the issuance of shares and share certificates.

62. If the argument that the people who demanded the meeting were indeed shareholders, the question is who issued the shares and under what authority. Directors are the mind, the eyes, the feet and the hands of the company. It is for this reason that the directors are vested with the power to run the affairs of the company. The affairs of each company are run by its own directors. To be honest, to date I still cannot figure out as to how shareholding in a company can be validly determined and allocated by another company, even so without the participation of directors of a company whose shares are meant to be

allocated. One first has to be recognized as a shareholder of the concerned company before she, he or it can exercise the right to demand a general meeting.

63. I am fully in agreement with the respondents that the real test of the validity of the appointment of the two respondents lies in the status of the 11th February 2015 meeting. According to the provided records of the company, there are authorized shares of the company but they are not issued. When the general meeting was demanded and subsequently held on 11 February 2015, applicant, the sole director of the company had neither authorized issuance of any shares nor determined consideration for the issuing of shares. While the proxy obtained by the two respondents included the power to remove the applicant from directorship at the meeting of 11 February 2015, she was not given notice of the meeting. The fact that there is no resolution produced regarding the removal is irrelevant for purposes of giving members notice of a meeting.

64. My understanding is that Sasol determines shareholding in the Batho Trust because of the special relationship that it has with that trust. In terms of the respondent's papers, Sanski was not accepted as a beneficiary of Batho Trust. Notwithstanding, there is talk of verification of Sanski particulars by Sasol and payments with Sasol. This comes through to me as quite questionable.

65. In terms of the pre-hearing minute, the applicant has requested respondents for copies of the share register respondents have refused to furnish this information on grounds that the requested information is not germane to the issues at the tribunal. This response is unfortunate

regard being had to the fact that the existence of shareholders in Sanski at the time when the meeting was demanded is in dispute.

66. The register of members is prima facie evidence of shareholding and to the extent reflected in the register. This is so because only shareholders with whose sum of voting power meets a certain threshold are entitled to compel the convening of the meeting. Share certificates do not suffice for the purpose of illustrating rights to exercise rights by virtue of shareholding.

67. I fail to understand why the respondents deny at the pre-hearing conference as well as at the hearing that the issue whether the second and third respondent were validly appointed as directors on 11 February 2015, and maintain that the issues before the Tribunal is the removal of the Applicant as director and request for her reinstatement. In paragraph 3 of the applicant's affidavit, the applicant states as follows "I depose to this affidavit in support of an application for the removal of 2nd and 3rd respondents as directors of the first respondent and that I be reinstated as the sole director of the first respondent." In paragraph 48 of the respondents' answering affidavit, the respondents admit this statement. The essence of this statement is repeated in paragraph 12 of the applicant's founding affidavit.

68. From the evidence presented, I am not satisfied that the meeting was demanded by persons who qualified to call for the meeting. There is no evidence of issuance of shares in terms of the Act, there is also no evidence of the voting strength of those who allegedly demanded the meeting. In the circumstance, my finding is that the meeting was called by persons who lacked the authority to do so.

69. From the paper trail, it would seem that the issue of having applicant as the sole director of Sanski turned into a hot potato in or around 2014 when Sasol was to embark on a verification process to match the list of beneficiaries that it has against full particulars of the directors of Sanski. This is evinced by the second and third respondents' attempt to secure the resignation of the applicant on an urgent basis with a promise of possible gratuitous payment of money in return. Applicant refused the offer.

70. Third respondent even threatened to "*apply measures that would compel applicant to resign"*. Notwithstanding, the applicant remained steadfast. When it became clear that applicant would not buy into their demand, in September 2014 the second and third respondents obtained power of attorneys entitling them to convene a general meeting whose business would be to dismiss the applicant as a director of Sanski and appoint the second and third respondents as the directors. This power of attorney also empowered the two respondents as proxies of each of the purported shareholders. According to the respondents, such meeting was held on 11 February 2015. It appears that the shareholder's general meeting was attended by no other person but the second and third respondents only.

71. Respondents argue that the effect of a resolution passed at an improperly constituted meeting depend on the nature of the impropriety that is found. If the impropriety is of a minor procedural nature, it cannot have a bearing on the ultimate substance of the meeting. If the impropriety is of a substantive nature, it would have a bearing on the legality of the outcome of the meeting.

72. By way of example, The respondents submit that if the meeting was called by persons purporting to be entitled to demand the meeting when they were actually not entitled and therefore the instruments of authority were not in existence, that constitutes substantive non-compliance.

73. Applicant argues that the process leading to the convening of the meeting was irregular, the persons who called for the meeting had no *locus standi* to call the meeting, the resolution to appoint the two respondents as directors is invalid and therefor, the removal of applicant by the two respondents in their capacity as directors is invalid. On the other hand respondents submit that arising from the chain of events of 11 February 2015 which are the election, followed by written consent to be appointed, the appointment of second and third respondents cannot be assailed.

74. I do not agree with the respondent's submission, I tend to agree with the applicant's submission that the meeting was convened irregularly and this irregularity filters down to every activity undertaken on authority derived from that meeting.

75. It is not necessary to deal with the balance of the submissions, which include the alleged inconsistencies between the Act and the MOI.

76. However, I deem it necessary to highlight that applicant was appointed in terms of the previous Act, her rights of directorship are protected by Item 7 of transitional arrangements pertaining to the governance of companies established in terms of the previous Act and the adaptation of governance of such companies to the application of the Companies

Act 71 of 2008 provides that a person holding office as a director, immediately before the effective date, subject to the memorandum of incorporation and the Companies Act 71 of 2008 continues to hold that office as from the effective date.

Jurisdiction

77. The Companies tribunal is a creature of the Act and is required to discharge in terms of Section 195 of the Act. The tribunal's permitted scope of adjudication is found in Section195(1)(a) of the Act which reads:

"(1) The Companies Tribunal, or a member of the Tribunal acting alone in accordance with this Act, may-

(a) adjudicate in relation to any application that may be made to it in terms of this Act, and make any order provided for in this Act in respect of such an application;"

78. I am required to order the reinstatement of applicant as the sole director of the first respondent. By implication, I am required to set aside the appointment of the two respondents as directors and remove them and reinstate the applicant. Applicant amongst others seems to suspect fraud constituted by misrepresentations around the appointment of the two respondents and her removal as a director. I steered away from enquiring on suspicions of fraud and matters related thereto because that falls outside my jurisdiction.

79. The Companies tribunal is only empowered by Section 71(8) of the Act, to remove the director of a company with fewer than three directors. Sanski has two directors registered with the CIPC. The power to invoke

Section 71(8) of the act will be valid only if the following requirements are met:

79.1. The applicant is either a shareholder or a director of the company or both. Applicant is neither of the two, she is fighting for reinstatement as a director;

79.2. The grounds of removal are one or more of the following:

79.2.1. a director of the company has neglected, or been derelict in the performance of the functions of the director;

79.2.2. a director of the company has become disqualified to serve as such;

79.2.3. a director of the company has become incapacitated to perform its functions as such.

79.3. The applicant's application does not meet the above requirements as a result the relief sought falls outside the jurisdiction of the tribunal.

80. Appointment of directors is regulated by sections 66, 67 & 68 of the Act. None of the provisions empower the tribunal to participate in the appointment or reinstatement of a removed director in whatever circumstances.

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82. **Conclusion**

82.1. The application should be dismissed due to lack of jurisdiction by the Companies tribunal.

82.2. The parties request costs against each other. I take cognisance of the fact that in exercise of their discretion, Courts are inclined to grant a costs order against a loosing party. Applicant is the loosing party in the present case. The adjudication forum is required to exercise its discretion to grant or refuse a costs order judicially.

82.3. Having considered facts of this application, I am not satisfied that a costs order would be appropriate in the circumstances of this case. Accordingly there will be no order for costs.

Order

The application is dismissed.

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M.J. RAMAGAGA

MEMBER OF THE COMPANIES TRIBUNAL

05 April 2018