



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT008Feb2016

In the *ex parte* application of:

M PREMJEE & SONS (PTY) LTD

Applicant

(Registration Number: 1950/036657/07)

in respect of:

application for an exemption from the requirement to appoint a social and ethics committee

Presiding Member	:	Khashane La M. Manamela (Mr.)
Date of Decision	:	16 March 2016

DECISION (Reasons and an Order)

Khashane La M. Manamela

[1] This applicant company's public interest score exceeded 500 points for the past financial years since 2012.¹ The applicant's public interest score ranged between 761 for 2012 to 1097 for 2015.² Therefore, the applicant is required in terms of section 72(5) of the Companies Act 71 of 2008 (the Companies Act), read with regulation 43³ of the Companies Regulations, 2011 (Company Regulations),⁴ to appoint a social and ethics committee (an SEC). It now submits that it ought to be exempted in terms of section 72(5)(b)⁵ of the Companies Act for reasons that I will revert to below.

[2] I have concerns regarding some procedural aspects of this application. Firstly, the commissioner of oaths to the supporting affidavit by Vrajlal Premjee, appears to be from the applicant's firm of auditors.⁶ Therefore, the supporting affidavit may have been signed before a commissioner of oaths with an interest in the matter.⁷ It also appears that

¹ See pars 4) and 5) of the affidavit attached to the Form CTR 142.

² The public interest scores are recorded as 761 for 2012; 983 for 2013; 1125 for 2014 and 1097 for 2015.

³ Regulation 43 reads as follows in the material part: "(1) This regulation applies to—

(a) every state owned company;

(b) every listed public company; and

(c) any other company that has in any two of the previous five years, scored above 500 points in terms of regulation 26(2).

(2) A company to which this regulation applies must appoint a social and ethics committee unless—

(a) ...; or

(b) it has been exempted by the Tribunal in accordance with section 72 (5) and (6)".

⁴The Companies Regulations were determined by the Minister of Trade and Industry in terms of section 223 of the Companies Act 71 of 2008 (the Companies Act) and published under GN R351 in Government Gazette 34239 of 26 April 2011.

⁵ Section 72(5) of the Companies Act reads as follows in the material part: "A company that falls within a category of companies that are required in terms of this section and the regulations to appoint a social and ethics committee may apply to the Tribunal ...for an exemption from that requirement, and the Tribunal may grant such an exemption if it is satisfied that -

(a) ...

(b) it is not reasonably necessary in the public interest to require the company to have a social and ethics committee, having regard to the nature and extent of the activities of the company."

⁶ The applicant's registered office address (as reflected on indexed p 30) is the same as the address of the commissioner of oaths, Rodney Cecil Moore (in the declaration on indexed p 3).

⁷ See regulation 7 of the Regulations Governing the Administering of an Oath or Affirmation. These regulations were published in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 initially published in terms of Government Notice No R1258 of 21 July 1972 and amended in 1977, 1980 and 1982.

the same firm of auditors was involved in lodging this application.⁸ Secondly, the resolution purporting to grant authority for initiating the application and for the deponent, Vrajlal Premjee, to sign the affidavit is undated.⁹ Therefore, it is not clear as to when it was passed. Thirdly, although Vrajlal Premjee submits that he is a director,¹⁰ he does not disclose the role he plays in the applicant and thereby confirming that the facts in his affidavit are within his personal knowledge. Fourthly, most of the submissions made for an exemption are not made in the affidavit, but some document¹¹ without probative value, tucked away somewhere in the papers. Regulation 142 of the Companies Regulations requires that the facts on which the application is based be in the supporting affidavit.¹² These defects are very significant, but due to the nature of the order I will be making below, I will condone them as technical irregularities.¹³ There are also problems regarding the substantive issues in this matter.

[3] As stated above, this application is based on section 72(5)(b) of the Companies Act. This provision reads as follows in the material part:

“(5) A company that falls within a category of companies that are required in terms of this section and the regulations to appoint a social and ethics committee may apply to the Tribunal in the prescribed manner and form for an exemption from that requirement, and the Tribunal may grant such an exemption if it is satisfied that -

⁸ See electronic mail exchanges between the office of the registrar of this Tribunal and D’Arcy-Herman and Co. Inc dated 04 and 05 February 2016 on indexed pp 41-44.

⁹ See indexed p 27.

¹⁰ In terms of the certificate issued by the Commissioner of the Companies and Intellectual Property Commission on 04 February 2016 (included as indexed pp 30 to 36), the deponent is one of three directors and therefore part of a board of directors as envisaged in section 66 of the Companies Act.

¹¹ See indexed pp 37-40.

¹² See regulation 142(1)(b) of the Companies Regulations.

¹³ See regulation 154(3) of the Companies Regulations, which reads as follows: “The Tribunal may condone any technical irregularities arising in any of its proceedings.”

(a) ...

(b) it is not reasonably necessary in the public interest to require the company to have a social and ethics committee, having regard to the nature and extent of the activities of the company.”

[I added underlining for emphasis]

[4] Apart from what is stated above,¹⁴ the following are submitted as grounds for an exemption required by the applicant:

[4.1] the applicant is a family-owned business, owned by family trust, with its current directors occupying the office of trustees in the family trust.

[4.2] the applicant is a wholesale company which purchases goods from large corporations and sell to various small vendors;

[4.3] it buys approximately 70% of its goods from large corporations;

[4.4] the applicant doesn't have a large workforce as it has had an average of between 116 (in 2012) to 170 (in 2015) employees;

¹⁴ See par [1] above.

[4.5] the applicant is situated in Louis Trichardt, Limpopo Province with a population of around 520 000 people and a population growth rate of 0.43%;¹⁵

[4.6] the applicant public interest score is significantly influenced by its high turnover and that wholesale companies always have high turnovers.¹⁶

[5] A further ground or submission is made as follows:

“...the Applicant is a wholesale company which is not governed by any specific laws, acts or mechanisms that substantially performs the functions that would otherwise be performed by the SEC. Therefore Section 72(5)(a) does not apply.”¹⁷

[6] Although, in my view, the submission is not very clear, I understand it to mean that applicant does not have the option to choose an exemption based on section 72(5)(a) in making this application as this provision is inapplicable. In other words this provision is eliminated. This is no surprise, as the applicant clearly based its application on section 72(5)(b).¹⁸

¹⁵ It is submitted that the population of Louis Trichardt has been 518 250 in 2012; 520 478 in 2013; 522 716 in 2014 and 524 964 in 2015. See par 9) on indexed p 40.

¹⁶ *Ibid* and in particular footnote 2 above.

¹⁷ See par 4) under the heading “**EVALUATION**” on indexed p 39.

¹⁸ See the Form CTR 142 on indexed p 1 and par [3] above.

[7] The submissions made herein are not sufficient to make a determination of the nature and extent of the applicant's activities. All that is being repeatedly submitted is that the applicant is a wholesale business and would not have been required to apply for an exemption if it wasn't for its high turnover. This is not helpful at all. It does not follow that wholesale businesses have to be granted exemptions. This Tribunal has to be furnished with facts as to what the particular company's activities are, in reasonably more details, in order to make the requisite determination. A presiding member of this Tribunal dealing with a matter has to have a clear picture of the nature and size or reach of the applicant's company's activities. This means that such facts as are sufficient as to satisfy this Tribunal to consider granting an exemption or not, ought to be furnished. Regulation 43(5) of the Companies Regulations may be helpful in determining what areas or issues are to be addressed in the application. Regulation 43(5) reads as follows in the material part:

“A social and ethics committee has the following functions:

(a) To monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, with regard to matters relating to -
(i) social and economic development, including the company's standing in terms of the goals and purposes of—

(aa) ...

...

(cc) the Employment Equity Act; and

(dd) the Broad-Based Black Economic Empowerment Act;

(ii) good corporate citizenship...

(iii) the environment, health and public safety, including the impact of the company's activities and of its products or services;

(iv) consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws; and

- (v) labour and employment ...
- (b) to draw matters within its mandate to the attention of the Board as occasion requires; and
- (c) to report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate."

[8] Therefore, the application as it is currently crafted cannot succeed. It will be refused and the applicant would have to consider the concerns raised above and if is so minded or advised, bring a fresh application.

[9] In the result:

- a) the application for an exemption from the requirement to appoint a social and ethics committee is refused for reasons stated above.

Khashane La M. Manamela (Mr.)
Member, Companies Tribunal
16 March 2016