

IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

CASE NO: CT007APR2015

Ex Parte Application

BASIL READ LIMITED

APPLICANT

Presiding Member: K Moodaliyar

Date of Decision: 17 June 2015

DECISION

INTRODUCTION

[1] The Applicant is Basil Read Limited (“the Applicant”), a limited company duly incorporated in terms of the company laws of the Republic of South Africa.

[2] The Applicant is a wholly owned subsidiary of Basil Read Holdings Limited under registration number 1984/007758/06.

[3] The Applicant applies to the Companies Tribunal for an exemption from appointing a Social and Ethics Committee (“SEC”).

BACKGROUND

[4] The applicant is apparently required to appoint a SEC and a member of the board of directors, apparently duly authorised thereto, applies for and on behalf of the applicant for an exemption to appoint such SEC.

[5] An affidavit in support of CTR 142 has been properly deposed by Ms Andiswa Thandeka Ndoni, the Company Secretary of the Applicant, and has been duly authorised to do so by a Resolution of the Board.

ISSUES

[6] The Applicant applies for an exemption to appoint the SEC.

APPLICABLE LAW

[7] This is an application brought in terms of Section 72 of the Companies Act 71 of 2008 which stipulates:

“(4) The Minister, by regulation, may prescribe –

(a) a category of companies that must each have a social and ethics committee, it is desirable in the public interest, having regard to—

- i. annual turnover
- ii. workforce size; or
- iii. the nature and extent of the activities of such companies;

(b) the functions to be performed by social and ethics committees required by this subsection; and

(c) rules governing the composition and conduct of social and ethics committees.

(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—

(a) the company is required in terms of other legislation to have, and does have, some form of formal mechanism within its structures that substantially performs the function that would otherwise be performed by the social and ethics committee in terms of this section and the regulations; or

(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) An exemption granted in terms of subsection (5) is valid for five years, or such shorter period as the Tribunal may determine at the time of granting the exemption, unless set aside by the Tribunal in terms of subsection (7).

(7) The Commission, on its own initiative or on request by a shareholder, or a person who was granted standing by the Tribunal at the hearing of the exemption application, may apply to the Tribunal to set aside an exemption only on the grounds that the basis on which the exemption was granted no longer applies.”

[8] The regulations in terms of the Companies Act (GNR 351 of 265 April 2011) (“Companies Regulations”) provide in Regulation 43(2) that a SEC must be appointed by:

- State owned companies;
- Listed public companies;
- Any other company with a Public Interest Score (“PIS”) above 500 in any two of the previous five (financial) years.

[9] Regulation 43(5) defines the functions of the SEC as:

“(5) 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) the 10 principles set out in the United Nations Global Compact Principles; and

(bb) the OECD recommendations regarding corruption;

(cc) the Employment Equity Act; and

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

(ii) good corporate citizenship, including the company’s –

(aa) promotion of equality, prevention of unfair discrimination, and reduction of corruption;

(bb) contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and

(cc) record of sponsorship, donations and charitable giving;

- (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, including—
 - (aa) the company's standing in terms of the International Labour Organisation Protocol on decent work and working conditions; and
 - (bb) the company's employment relationships, and its contribution toward the educational development of its employees.
- (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."

[10] The PIS is calculated as follows—

- (a) a number of points equal to the average number of employees of the company during the financial year ('employee' has the meaning set out in the Labour Relations Act 66 of 1995 (reg 26(1)(a));
- (b) one point for every R1 million (or portion thereof) in third party liability of the company held by creditors at the financial year end;

- (c) one point for every R1 million (or portion thereof) in turnover during the financial year; and
- (d) one point for every individual who, at the end of the financial year, is known by the company-
 - (i) in the case of the profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities; or
 - (ii) in the case of non profit company, to be a member of the company, or a member of an association that is a member of the company (Reg 26(2)).

[11] A company that falls outside the categories above, or one that falls within those categories but which is a subsidiary of another company (as defined in section 3 of the Companies Act) and has a holding company that has a SEC that will perform the functions of the SEC for the (subsidiary) company, a SEC need not be appointed (Reg 43(2)(a)).

[12] If a company is required to appoint an SEC, it may apply for a ruling by the Tribunal for an exemption, under the provision of section 72(5) of the Companies Act.

[13] Application for a ruling must be made by filing:

- (a) "an Application form CTR 142; and
- (b) a supporting affidavit setting out the facts on which the application is based." (Reg 142(3)).

EVALUATION

[14] The requirements in respect of the appointment of the SEC and the discretion of the Tribunal in this regard are therefore twofold. In the

first instance it must be determined if the company is required to appoint a SEC.

[15] If this is not the case (e.g. because of Reg 43(2(a))), then the Tribunal has no function or discretion.

[16] If the SEC needs to be appointed, the only discretion that the Tribunal has in terms of section 72(5), i.e. does *another* Act require a formal mechanism that substantially performs the function that would otherwise be performed by the SEC, or, is it not reasonably necessary in the public interest to require the company to have a SEC, having regard to the nature and extent of the activities of the company.

[17] Ms Ndoni's deposes in her affidavit that the Applicant is a subsidiary of Basil Read Holdings Limited.

[18] A 'holding company' is defined in Section 1 of the Act as "in relation to subsidiary, means a juristic person that controls that subsidiary as a result of any circumstances contemplated in section 2(2)(a) or 3(1)(a). A "group of companies" is defined in Section 1 as " a holding company and all its subsidiaries".

[19] The deponent further states¹ that Basil Read Holdings Limited has formal appointed a Social Ethics and Transformation Committee (SETC) and that this Committee was appointed in terms in terms of Section 72 of the Act and Regulation 43 of the Companies Regulation.

[20] Ms Ndoni's affidavit states that Basil Read Holdings Limited SETC performs functions of a social and ethics committee for all Basil Read Group of companies including the Applicant.²

¹ Paragraph 6 of Aniswa Ndoni's Affidavit.

² Paragraph 7 *ibid*.

[21] Ms Ndoni's affidavit further states that the Applicant has scored at least 500 Public Interest points for the past 5 consecutive years as it had a least 500 employees and achieved at least R500m in turnover for each of the 5 preceding years.

FINDINGS

[22] The Applicant falls within the category of companies required to form a SEC because its Public Interest Score exceeds 500 points in the previous two years of the last five years.

[23] The Applicant functions within a "Holding" company in respect of which there is a SEC . The Applicant has demonstrated in terms of Section 72(5)(a) of the Act that it has formal mechanisms within its structures that substantially performs the functions that would otherwise be performed by its SEC which is now provided by its holding company.

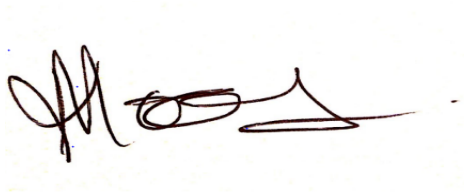
[24] Having considered the application, the applicable legislation and regulations and in the light of the purposes of the Act as to create flexibility and simplicity in the formation and maintenance of companies and to encourage the efficient and responsible management of companies, the Tribunal is satisfied that Section 72(5)(2) can be widely interpreted to allow for an exemption in the circumstances of the Applicant.

[25] The Tribunal therefore finds that it is not reasonably necessary in the public interest to require the Applicant to have a social and ethics committee, having regard to its nature and extent of its activities within the group of companies to which it belongs.

ORDER

[26] The Tribunal hereby grants the Applicant an exemption not to establish a social and ethics committee in respect of itself.

[27] The exemption shall remain valid for a period of five [5] years in from the date of this decision.

A handwritten signature in dark ink, appearing to be 'Kasturi Moodaliyar', written over a light blue grid background.

KASTURI MOODALIYAR
MEMBER OF THE COMPANIES TRIBUNAL