

IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

(“The Tribunal”)

CASE NO: CT003OCT2014

In Re: In an Application in terms of Section 72 (5) of the Companies Act 71 of 2008 (“the Act”) for an exemption to appoint a Social and Ethics Committee (SEC) for the Applicant, in terms of Regulation 43.

In an Ex parte Application for exemption by:

AMOIL (PTY) LTD

(1989/005469/07)

THE APPLICANT

Coram K. Tootla

Decision delivered on 18 June 2015

DECISION

INTRODUCTION:

- [1] The applicant applies to the Companies Tribunal in terms of sections 72 (5) and presumably 72 (6) of the Companies Act 71 of 2008 (“Act”) and the regulations in terms of the Companies Act (GNR 351 of 265 April 2011) (“regulation/s”) for an exemption from appointing a Social and Ethics Committee (“SEC”).

BACKGROUND:

- [2] The applicant contends that it is in the business of buying and trading in high value marine fuels and acts as a middle man for the fuel which it purchases from the major oil companies and on-sells it to international customers, making a small margin of profit.

- [3] It is alleged that the number of employees are 10 ; third party liabilities are R 67 million and so forth which then brings the public interest score (PIS) to a total of 1024; and that it does not take physical delivery of the fuel. Explanations about the turnover have been provided.
- [4] According to the applicant it states that it is required to appoint a SEC in terms of Section 72 and regulation 43 and that its public interest score (“PIS”) in terms of regulation 26 (2) exceeds 500.
- [5] The Applicant contends that it applies for an exemption based on the fact that 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 nature of the activities have been set out in para 5 of the founding affidavit and the Applicant has attempted to show (see para 6) that it is not reasonably necessary in the public interest for the Applicant to have a social and ethics committee. The question is whether it is justifiable in terms of Section 72 (5) (b).
- [7] It seems that the Applicant has made mere allegations about why it should not have a SEC but it has not examined the importance of the SEC and the fact that it is a company registered in terms of the Act. For these reasons in para 5 the Applicant seems to imply that it is not reasonably necessary nor in the public interest to require the Applicant to establish a SEC.

APPLICABLE LAW:

- [8] The Companies Act 71 of 2008 provides as follows in section 72:

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

- (a) a category of companies that must each have a social and ethics committee, if 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.”

[9] The regulations in terms of the Companies Act provide in Reg 43(2) that a SEC must be appointed by:

- State owned companies;

- listed public companies;
- **any other company with a Public Interest Score above 500 in any two of the previous five (financial) years.**

[10] 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 Organization 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.”

[11] 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 a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities; or
 - (ii) in the case of a 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)).

- [12] 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 the holding company 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)).
- [13] If a company is required to appoint a SEC, it can apply for a ruling by the Tribunal for an exemption, under the provisions of section 72 (5) of the Companies Act. Application for a ruling must be made in form CTR 142 ; together with 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 twofold. In the first instance it must be determined if the company is required to appoint a SEC. If this is not the case, then the Tribunal has no function or discretion.
- [15] If a SEC needs to be appointed (as set out in the Application), the only discretion that the Tribunal has is in terms of section 72 (5) i.e. does another Act require a formal mechanism which 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.
- [16] The applicant avers in the founding affidavit that it need not appoint a SEC as provided for in section 72 (5) (b) of the Act (by implication) due to the fact that it attempts to explain that by virtue of the nature and extent of its activities it is not reasonably necessary to appoint an SEC.
- [17] It is patently clear that there is a compelling and specific purpose in Law for an SEC to be appointed as it forms an essential part of good corporate governance and best practice and also fits into the category of enhanced accountability and transparency.

Significantly, the title to Reg 26 is “interpretation of regulations affecting transparency and accountability” which applies specifically to various regulations, one of them being Reg 43.

- [18] This is the reason that a SEC has been specifically legislated to enable the management of companies which fall within the ambit of Reg 26 (2) by ensuring mainly compliance with laws in South Africa, good corporate citizenship and anti-corruption mechanisms etc. Ensuring compliance is not performing the functions per se but to monitor the compliance of the company, which in effect serves the public interest at large as contemplated in Reg 43 (5).
- [19] The question arises as to how one exercises its discretion in respect of para 7; and it is clear that the role and functions of the SEC and the matters that must be monitored are those as extensively set out in Reg 43 (5); but more importantly it is the activities in Section 72 (5) which are the factors to be taken into account when deciding whether it is reasonably necessary for a company to have an SEC or not.
- [20] The role and functions of the SEC are to monitor the company’s activities with regard to matters relating to corruption, employment equity and BBBEE ; good corporate citizenship, in respect of promotion of equality, prevention of unfair discrimination, and reduction of corruption; contribution to development of the communities and of sponsorship, donations and charitable giving; the environment, health and public safety; consumer relationships, labour and employment, including decent work and working conditions and its employment relationships and its contribution toward the educational development of its employees; and to draw matters within its mandate to the attention of the board as occasion requires; and to report to the shareholders at the company’s annual general meeting on these matters.

The extensive setting out of these matters in Reg. 43 (5) denotes the importance the legislature considers these in the role and function of the SEC as being part of the public interest.

- [21] The purpose and functions of the SEC are indeed significant as it is **an additional policing mechanism** created to ensure that the company complies with relevant laws, other legal requirements and prevailing codes of best practice; and for the Board to monitor same if the nature and extent of the activities of the company warrant it in the public interest.
- [22] Although the concept “activities of the company” is undefined, it is opined that the **categories of activities** set out in Reg. 26 (2) to calculate the PIS determine **not only the activities of the company** but also **the nature and the extent of the activities**.
- [23] Although Reg. 43 (2) does not prescribe either the **nature or the extent** of the activities, the Tribunal is of the view that Reg 43 (5) is to be used to determine the public interest, because if the nature and extent of activities are of a certain type, degree and/or magnitude, the matters set out extensively in Reg 43 (5) would then logically serve the public interest.
- [24] Although the concept of “public interest” is not defined in Section 1 of the Act, one can refer to authorities and other definitions to assist in interpretation. *Black's Law Dictionary* (6th Edition) defines public interest as: “Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national Government ”.
- [25] Furthermore, in **Ex Parte President of the Conference of the Methodist Church of Southern Africa NO: In Re William Marsh Will Trust 1993 (2) SA 697 (C) at 703** “public interest” was defined as: “The phrase which does not permit of a clear and comprehensive definition.

Herbstein J in **Argus Printing and Publishing Co Ltd v Darby's Artware (Pty) Ltd and Others** 1952 (2) SA 1 (C) one must adopt, in giving effect to the phrase, a 'broad commonsense view of the position as a whole . . . (and it must be considered whether) . . . the public would be **better served** if the applicant were to be allowed to proceed with its scheme than by a continuation of the existing state of affairs.'"

[26] However, when referring to Reg 43 (5) (a) (i) – (v), it can be gleaned that “public interest” could be defined as the contribution of the company to social and economic development of the community in which it operates ; the effect of the company as a corporate citizen in the particular community ; the effect that the company’s activities and products have on the environment, health and public safety ; the actions of the company in respect of consumers, including advertising, public relations and consumer protection; the company’s actions in respect of its employees and its employment practices, including compliance with labour relations, employees working conditions and educational development.

[27] The activities that need to be evaluated to decide whether it is in the public interest, given the nature and extent of those activities, to grant an exemption from appointment of a SEC are obviously those used in respect of the calculation of the PIS, because the level of those activities determine whether, in the public interest, a SEC must be appointed.

It is to be noted that the function of the SEC is “...to monitor the company’s activities and only to the extent that it would be material with respect to the matters as set out in Reg 43 (5). Hence the matters set out in Reg 43 (5) are not **activities**.

FINDING:

[28] The Tribunal must apply its mind, based on the nature and extent of the activities of the applicant. The nature of the applicant’s business is clear from the supporting affidavit but there is no evidence about the said nature nor the extent of the activities. The fact that the Applicant contends it is restricted in its activities, this in itself may or may not be important in respect of the nature and extent of the activities.

Thus without evidence as to the extent of the activities of the applicant the Tribunal cannot apply its mind and exercise a proper discretion.

ORDER:

[29] The application for an exemption in respect of the appointment of a SEC is hereby refused.

k.y. tootla (electronically signed)

KHATIJA TOOTLA

Member of the Companies Tribunal

18 June 2015