

**IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA
(‘THE TRIBUNAL’)**

Case No.: CT009Aug2016

In the Ex Parte Application of:

FUTURE INDEFINITE INVESTMENTS 180 (PTY) LTD

Applicant

(Registration number 2002/021851/07)

In re:

AN APPLICATION FOR AN EXEMPTION FROM THE REQUIREMENT TO
APPOINT A SOCIAL AND ETHICS COMMITTEE

DECISION

[1] This is an application in terms of section 72(5)(b) of the Companies Act 71 of 2008 (the “Act”) for an exemption from the requirement to appoint a social and ethics committee on the basis that it is not reasonably necessary in the public interest to require the Applicant to have a social and ethics committee having regard to the nature and extent of the activities of the Applicant.

[2] The Applicant is Future Indefinite Investments 180 (Pty) Limited with registration number 2002/021851/07 and with its registered office situated at 49 Brewery Road, Isando, Gauteng, 1609.

[3] The Applicant is represented by Steven David Gottschalk, the sole director of the Applicant and who has deposed to the affidavit on behalf of the Applicant.

[4] The Applicant submits the following in support of its application:

[4.1] The Applicant is a private property investment company and owns eleven investment properties. Four of the properties are vacant land, one property is under construction and six properties are let. Five of the six properties are let to Value Logistics Limited, a subsidiary of the Value Group Limited, a public company. The let properties comprises of approximately 85% by value of the properties owned by the Applicant and the leases in respect of these properties are Triple A net leases in terms of which the tenants pay all costs associated with the property and takes responsibility for the property.

[4.2] Mr. Gottschalk, the Applicant's sole director is also the CEO of Value Group Limited. As CEO, he attends all Social and Ethics Committee meetings of Value Group Limited and therefore states that he is fully aware of the duties and functions of a Social and Ethics Committee.

[4.3] The Applicant therefore submits that the levels of compliance for a property investment company with these requirements are high.

[4.4] Mr. Gottschalk state that as the person who is actively involved in the day to day activities of the company, he has adequate resources in respect of administration of the company to perform and monitor (1) the social and economic development of the company, (2) its corporate citizenship, and (3) the governance and consumer relations. He also states that he has access to legal and other resources necessary to ensure that the company complies with environment, health and public safety legislation. With regard to labour and employment legislation, Mr. Gottschalk states that the company has no employees and therefore this requirement is not applicable.

[4.5] The Applicant calculated its preliminary Public Interest score for year ended 29 February 2016 at 635, 537, which is attributable to third party liabilities. The company's debt component is significant as a result of the substantial cost of the commercial properties in which the Applicant has invested.

[4.6] The Applicant states that it's activities are not complicated and as such the Applicant is of the view that the size and activities does not warrant the appointment of a minimum of two additional directors as is required by regulation 43(4).

[4.7] The sole shareholder of the Applicant is Mr. Gottschalk's family Trust and Mr. Gottschalk and his family is the beneficiaries of the Trust.

[5] This application for the exemption from the requirement to establish a social and ethics committee is made in terms of section 72(5)(b) of the Act.

"(5) A company that falls within this 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 -

(b) it is not reasonably necessary for 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] With regard to this section, it is clear that (1) the Applicant must be required to appoint a Social and Ethics Committee, (2) the application of exemption from appointing such a committee must be made to the Tribunal in the prescribed manner and form, and (3) the Tribunal may only grant an exemption if it is satisfied that it is not reasonably necessary in the public interest to require the Applicant to have a social and ethics committee having regard to the nature and extent of the activities of the company.

Is the Applicant required to appoint a Social and Ethics Committee?

- [7] Section 72(4) of the Act read together with regulation 43(1) deals with the requirement of appointing a Social and Ethics Committee and reads:

“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.”

[8] The categories of companies are listed in regulation 43(1) of the Regulations:

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

[9] The calculation of the public interest score is in terms of regulation 26(2) of the Regulations, which must be calculated at the end of each financial year, calculated as the sum of the following:

"(a) A number of points equal to the average number of employees of the company during the financial year;
(b) One point for every R1 million (or portion thereof) in third party liability of the company, 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"

[10] The Applicant only provided the Public Interest score for one year, i.e. year ended 2016. The Applicant does not provide the Public Interest scores for any other year in the previous five years that exceeds 500 points. Should the year ended 2016 be the only year wherein the

Applicant's Public Interest score exceeds 500 points during the previous five years, then it is the end of the matter. The Applicant would not be required to appoint a Social and Ethics Committee and the consequent application for exemption thereof is unnecessary.

[11] However, should the Applicant in any of the two years in the previous five years have a Public Interest score above 500 points, then the Applicant is required to appoint a Social and Ethics Committee.

[12] I would like to also highlight that the Applicant merely states that it has calculated the Public Interest score in terms of regulation 26(2) and has scored above 500 points based on third party liabilities with related companies but does not give the detailed breakdown of the value of the third party liabilities, what the actual points are and how it has arrived at the points.

Is the Applicant's application to the Tribunal in the prescribed manner and form?

[13] The prescribed manner and form in making the application to the Company Tribunal is set out in regulation 142 of the Companies Act (GNR 351 of 265 April 2011) (the "Regulations").

[14] The Applicant filed its CTR 142 form together with the supporting affidavit with the Companies Tribunal on 24 August 2016, in compliance with regulation 142.

Is it not reasonably necessary in the public interest to require the Applicant to have a social and ethics committee, having regard to the nature and extent of the activities of the company?

[15] There are no criteria to determine whether or not it is reasonably necessary in the **public interest** to require the Applicant to have the social and ethics committee. 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 ‘the public interest’ does not permit of a clear and comprehensive definition. As was observed by 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 common-sense 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.’”*

[16] In the Henochsberg commentary on the Companies Act 71 of 2008, it is submitted that the proposed functions of the social and ethics committee as set out in regulation 43(5) are the factors that must be taken into account to determine whether it is reasonably necessary and in the public interest to have such a committee:

“(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 [SEP]”

(i) Social and economic development, including the company's standing in terms of the goals and purposes of—[SEP]

(aa) the 10 principles set out in the United Nations Global Principles;

(bb) the OECD recommendations regarding corruption;

(cc) the Employment Equity Act; and

(dd) the Broad-Based Black Economic Empowerment Act;¹

(ii) good corporate citizenship, including the companies—

¹ The contribution of the company to social and economic development of the community in which it operates (public interest).

- (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* ^[L SEP]
 - (cc) *record of sponsorship, donations and charitable giving;*²
- (iii) *the environment, health and public safety, including the impact of the company's activities and of its products or services;*³
- (iv) *consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws*⁴; and
- (v) *labour and employment, including—* ^[L SEP]
- (aa) *the company's standing in terms of the International Labour Organization Protocol on decent work and working conditions;* ^[L SEP] and ^[L SEP]

² The effect of the company as a corporate citizen *in the particular community* (public interest).

³ The effect that the company's activities and products has on *environment, health and public safety* (public interest).

⁴ The actions of the company *in respect of consumers*, including advertising, public relations and consumer protection (public interest).

(bb) the company's employment relationships, and its contribution toward the educational development of its employees;⁵ SEP

(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."

[17] With regard to the Applicant's social and economic development and good corporate citizenship, it is not clear from the application what activities or what contributions the Applicant is making in the community in which it operates. This is a key component of a social and ethics committee. With regard to the effect the Applicants properties have on the environment, health and public safety, I am satisfied that the let properties through its lessees are responsible for its compliance and that the Applicant has sufficient legal and other resources necessary to ensure that the company complies with environment, health, public safety and consumer protection legislation. With regard to the Applicant employees and employment

⁵ The company's actions *in respect of its employees and its employment practices*, which obviously includes compliance with labour relations but which should also encompass general employee "well-being" (public interest).

practices, this is currently not applicable because the Applicant does not have employees.

Findings

[18] After considering all the facts and that the size and activities of the Applicant is not of a complicated nature, I find that the Applicant has made out a proper case in terms of section 72(5)(b) that it is not reasonably necessary in the public interest to require the applicant to appoint a social and ethics committee having regard to the nature and extent of the activities of the company. However, I am concerned that the Applicant has not provided the Tribunal with activities relating to its social and economic development and good corporate citizenship. In order to address this concern, I intend on limiting the exemption to two years in order for the Applicant to re-approach the Tribunal for an exemption and clearly setting out its social and economic development and good corporate citizenship activities.

ORDER

I make an order in the following terms:

- a) The Applicant is granted an exemption from appointing a Social and Ethics Committee. This exemption is valid for two years.

- b) This Order must be served on the Registrar of Close Corporations of the Companies and Intellectual Property Commission.
- c) Any other person with an interest that is the subject of this application may, within twenty (20) business days after receiving the Notice of this Order, apply to the Tribunal to set aside the Order as contemplated in section 72(7).

ADV LIZELLE HASKINS

MEMBER OF THE COMPANIES TRIBUNAL

DATED: 10 OCTOBER 2016