

# **IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA**

CASE NO:

CT002Nov2015

Ex parte application:

Adventure Industrial Cleaning (Pty) Ltd  
(2006/036209/07)

Applicant

**Coram: Delport P.A.**

**Decision handed down on** 15 February 2016

---

## **DECISION**

---

### **INTRODUCTION**

- [1] The applicant applies to the Companies Tribunal in terms of sections 72 (5) and 72 (6) of the Companies Act 71 of 2008 (“Act” / “Companies Act”) and regulation 142 of the regulations in terms of the Companies Act (GNR 351 of 26 April 2011) (“Companies Act regulations” / “regulation/s”) for an exemption from appointing a Social and Ethics Committee (“SEC”).

### **BACKGROUND**

- [2] The applicant is a private company, Adventure Industrial Cleaning (Pty) Ltd ((2006/036209/07)).
- [3] The applicant does business as a provider of industrial cleaning services.

- [4] The applicant, according to the affidavit of Garth Andrew Crisswel, the managing director of the applicant, employs 500 staff. They are geographically dispersed over 4 provinces, being Gauteng, the North West Province, Kwazulu Natal and the Eastern Cape.
- [5] The applicant is required to appoint a SEC in terms of reg 26(2) due to the fact that its public interest score ("PIS") for any two of the preceding five years *is more than 500*.
- [6] Although the formula refers to one point for each of the employees, which will bring the PIS to 500, it is accepted that the other criteria in the formula will have the effect that the PIS will *exceed 500*.
- [7] The employees are located on the properties of the sites of the clients, and there are 68 separate sites with the largest number of employees on one site being 67.
- [8] The applicant, according to the affidavit of said Garth Andrew Crisswel is "part of the Venture Otto South Africa group of companies which has a comprehensive set [of] Policies and Procedures which governs the employees and gives them access to various problem solving forums."
- [9] The "policies and procedures" referred to are apparently the reason for the application for the exemption from appointing a SEC.

## **APPLICABLE LAW**

- [10] 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.”

[11] 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 PIS above 500 in any two of the previous five (financial) years.

[12] 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."

[13] 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)).

[14] 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)).

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

[16] 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

[17] 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. If this is not the case (eg because of reg 43 (2) (a) in respect of holding/subsidiary companies), then the Tribunal has no function or discretion.

[18] Whether reg 43 (2) (a) applies is not clear from the founding affidavit that states that the applicant: “is part of the Venture Otto South Africa *group of companies*” [my emphasis], but it is presumed that the application indicates that it is not as it is not stated whether the applicant is a subsidiary as defined in s 3 of the Act, and that fact cannot be assumed.

[19] If a SEC needs to be appointed, the only discretion that the Tribunal has is in terms of section 72 (5), ie

19.1 does *another Act* require a formal mechanism that substantially performs the function that would otherwise be performed by the SEC, or,

19.2 if it is 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.

[20] The circumstances as in para 19.1 do not apply in this instance as there is no averment in the affidavit in this respect.

[21] The fact that the applicant is "...part of the Venture Otto South Africa group of companies which has a comprehensive set [of] Policies and Procedures which governs the employees and gives them access to various problem solving forums." does not qualify for an exemption in terms of s 72 (5) (a), ie *another Act* requires a formal mechanism that substantially performs the function that would otherwise be performed by the SEC.

[22] The Tribunal can, however, also give an exemption if it is satisfied that it is 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.

[23] The nature and extent of the activities are used to determine if a SEC must be appointed (see s 72 (4) (a) (iii)), but the nature and extent of the activities must also be used to determine if it is *not reasonably necessary in the public interest* to require the company to have a SEC (s 75 (5) (b)).

[24] In my opinion the test of the nature and activities for appointment of the SEC is more quantitative than qualitative, but the test of the same nature and activities to grant and exemption in the public interest will be more qualitative than quantitative (see *Henochsberg on the Companies Act 71 of 2008* at 278).

[25] The quantitative evaluation should take into account the role and functions of the SEC as provided for in reg 43 (5). These are to:

25.1 monitor the company's activities with regard to

25.1.1 matters relating to corruption, employment equity and BBBEE

25.1.2 good corporate citizenship, in respect of

- 25.1.2.1 promotion of equality, prevention of unfair discrimination, and reduction of corruption;
- 25.1.2.2 contribution to development of the communities and of sponsorship, donations and charitable giving;
- 25.1.3 the environment, health and public safety;
- 25.1.4 consumer relationships,
- 25.1.5 labour and employment, including decent work and working conditions and its employment relationships and its contribution toward the educational development of its employees;
- 25.2 to draw matters within its mandate to the attention of the Board as occasion requires; and
- 25.3 to report to the shareholders at the company's annual general meeting these matters.

[26] 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 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.’”

[27] If one takes cognizance of the matters in reg 43 (5), it may be deducted that “public interest” could be defined as:

- 27.1 The contribution of the company to social and economic development *of the community in which it operates* (reg 43 (5) (a) (i));



- 27.2 The effect of the company as a corporate citizen *in the particular community* (reg 43 (5) (a) (ii));
- 27.3 The effect that the company's activities and products has on *environment, health and public safety* (reg 43 (5) (a) (iii));
- 27.4 The actions of the company *in respect of consumers*, including advertising, public relations and consumer protection ((reg 43 (5) (a) (iv));
- 27.5 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" (reg 43 (5) (a) (v)).

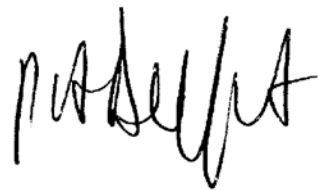
## FINDING

- [28] In my opinion the number of employees and the nature of the activities would at least be relevant in respect of reg 43 (5) (a) (i), reg 43 (5) (a) (iii) and reg 43 (5) (a) (v).
- [29] Therefore, I venture to state that the based on these qualitative criteria, the applicant would not qualify for an exemption in respect of the appointment of the SEC.
- [30] Even if I am wrong in applying the qualitative test, the application would not succeed due to the fact that the authority of Garth Andrew Crisswel to bring the application on behalf of the applicant is defective.
- [31] The authority to act for and on behalf of the company, as annexed to the founding affidavit, and dated 20 April 2011, gives the authority to "sign all contracts, tenders and agreements", which is an authority to contract for and on behalf of the applicant. This, *prima facie*, does not include the authority to bring this application (see also *Mall (Cape) (Pty) Ltd v Merino Ko-operasie*

*Bpk 1957 (2) SA 347 (C) at 351 D et seq and Henochsberg on the Companies Act 71 of 2008 at 249).*

**ORDER**

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

A handwritten signature in black ink, appearing to read 'P.A. Delport', with a stylized, cursive script.

**P.A. DELPORT  
MEMBER OF THE COMPANIES  
TRIBUNAL**