

IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

(“The Tribunal”)

CASE NO: CT005NOV2015

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:

BLC PLANT COMPANY (PTY) LTD

(1976/002975/07)

THE APPLICANT

Coram K. Tootla

Decision delivered on 7 December 2015

DECISION

INTRODUCTION:

- [1] The applicant applies to the Companies Tribunal presumably in terms of section 72 (5) and section 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] G. Stravino on behalf of the applicant contends that it is a family owned business with one director and no other information about the business being provided.

- [3] There is no indication of the number employees; third party liabilities; turnover and other factors in respect of the company which brings the public interest score (PIS) to exceed 500 points.
- [4] The applicant simply states under oath that it is a family owned business of which he is a director and it seems that on that basis it applies for an exemption to a Social and Ethics Committee.
- [5] The Applicant has not stated under which section of the Act it makes the application nor has it calculated the PIS in terms of the Regulations 26 and whether it falls under the third category “any other company” mentioned in Reg 43 (2).

APPLICABLE LAW:

- [6] 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.”

[7] 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.**

[8] 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."

[9] 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)).

[10] 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)).

[11] 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:

- [12] 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.
- [13] 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.
- [14] The applicant avers in the founding affidavit that it need not appoint a SEC as it is a family owned business and has only one director.
- [15] 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.
- [16] 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. 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.

[17] 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:

[18] The Tribunal is unable to consider the application of the Applicant as the application has not been justified nor has it mentioned any section or regulation that is applicable for an application of this nature.

Thus without evidence as to the public interest score of the company as calculated in Reg 26 and whether the Applicant falls within a certain category of companies, the Tribunal cannot apply its mind and exercise a proper discretion.

ORDER:

[19] 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

7 December 2015