



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT018Mar2016

In the *ex parte* application of:

CHOPPIES SUPERMARKETS SOUTH AFRICA (PTY) LTD **Applicant**

(Registration Number: 2008/001621/07)

in respect of:

application for an exemption from the requirement to appoint a social and ethics committee

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| Presiding Member | : | Khashane La M. Manamela (Mr.) |
| Date of Decision | : | 14 April 2016 |

DECISION (Reasons and an Order)

Khashane La M. Manamela

[1] The applicant in this matter appears to be related to another entity called Choppies Warehousing Services (Pty) Ltd (Choppies Warehousing). Both Choppies Warehousing and the applicant in this matter are subsidiaries of Choppies Enterprises Limited.

[2] Choppies Enterprises is registered in Botswana and primarily listed on the Botswana Stock Exchange.¹ Its two abovementioned subsidiaries are registered or incorporated as companies in South African. They also have a secondary listing on the Johannesburg Stock Exchange.

[3] I had the privilege of an allocation (as a presiding member of this Tribunal) of both applications by Choppies Warehousing² and the applicant herein, for exemptions from the requirement to appoint a social and ethics committee (an SEC). The two applications are identical, word for word, save in minor respects on peculiar issues, like names and registration numbers. Therefore, I will avoid reinventing the wheel in this matter, so to speak, by duplicating everything I said in the *Choppies Warehousing* matter

[4] In this matter, the applicant also based its application on two grounds. The first ground is that its holding company, namely Choppies Enterprises already has an SEC.³

¹ See par 2.2 of the supporting affidavit on indexed p 3.

² See *Choppies Warehousing Services (Pty) Ltd, Case/File Number: CT019Mar2016* also decided on 14 April 2016. A copy of this decision can be obtained on the website of this Tribunal: www.companiestribunal.org.za.

³ See regulation 43(2)(a) of the Companies Regulations, 2011. The Companies Regulations were determined by the Minister of Trade and Industry in terms of section 223 of the Companies Act 71 of 2008 (the Companies Act) and published under GN R351 in Government Gazette 34239 of 26 April 2011.

And the second ground is that it is not in the public interest for it to be required to have an SEC.⁴

[5] Regulation 43(2)(a)⁵ of the Companies Regulations provides that a company which is a subsidiary of another company with an SEC need not appoint an SEC, if the SEC of the holding company “will perform the functions required by this regulation on behalf of that subsidiary company”. Therefore, regulation 43(2)(a) provides an exclusion rather than an exemption, to qualifying companies who need not apply to this Tribunal for an exemption.⁶

[6] However, the applicant’s holding company, namely Choppies Enterprises is not registered as a company in South Africa. It is for that matter not a company in terms of the Companies Act 71 of 2008.⁷ It is a foreign company.⁸ Therefore, “the exemption or exclusion”⁹ is not available to the applicant. The applicant appears to be aware of this.¹⁰

⁴ See section 72(5)(b) of the Companies Act.

⁵ Regulation 43(2)(a) reads: “A company to which this regulation applies must appoint a social and ethics committee unless...it is a subsidiary of another company that has a social and ethics committee”.

⁶ Regulation 43(2)(a) of the Companies Regulations does not provide for the granting of exemptions, but rather exclude companies falling in the specified category from applying for an exemption from this Tribunal. See De Lange S *The Social and Ethics Committee in terms of the 2008 Companies Act: Some observations regarding the exemptions and the role of the Companies Tribunal* (2015) 27 SA MercLJ 507-539 at pp 510, 512-517.

⁷ Section 1 of the Companies Act defines “company”, among others, as “a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date ...was registered in terms of the ... Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act; or ... Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2; ...was in existence and recognised as an ‘existing company’ in terms of the Companies Act, 1973 (Act No. 61 of 1973); or ...was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act...”

⁸ Section 1 of the Companies Act defines a “foreign company” as “an entity incorporated outside the Republic, irrespective of whether it is...a profit, or non-profit, entity; or ...carrying on business or non-profit activities, as the case may be, within the Republic”.

⁹ See footnote 6 above.

¹⁰ See par 2.4 of the supporting affidavit on indexed pp 3-4.

[7] Now, the second ground for the application. In terms of section 72(5)(b)¹¹ of the Companies Act 71 of 2008 (the Companies Act) an applicant for an exemption premised on this provision has to provide sufficient facts on the nature and extent of its activities for purposes of a determination to be made in terms of this provision. There are no such submissions in this application. The applicant had simply made submissions of a general nature, apart from attaching its memorandum of incorporation to the supporting affidavit. It has not indicated how all these advance its case for an exemption.¹² This is not helpful and our courts of law had found that reliance on a “mass of material contained in the record of an enquiry”¹³ or simply attaching a document as an annexure to an affidavit is improper.¹⁴ Besides, the contents of the documents attached are also silent on the nature and extent of the applicant’s activities.

[8] Although there is no definition in section 72(5)(b) of what constitutes the “nature and extent” of a company’s activities,¹⁵ these words would carry their ordinary meaning¹⁶

¹¹ Section 72(5)(a) reads “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 ... 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.”

¹² See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 324E-F; *Minister of Land Affairs v Wevell Trust* [2008]JOL 21213 (SCA) 19 at par 43; 2008 (2) SA 184 (SCA) at 200. See generally *Herbstein and Van Winsen The Civil Practice of the High Courts of South Africa* 5th ed (Juta Cape Town 2009) (*Herbstein and Van Winsen*) at 443-444.

¹³ See *Lipschitz and Schwartz, NNO v Markowitz* 1976(3) SA 772 (W) at 775H. Refer to the other authorities in cited in footnote 12 above.

¹⁴ See *Port Nolloth Municipality v Xhalisa and Others* 1991 (3) SA 98 (C) 111B-C. Refer to the other authorities in cited in footnote 12 above.

¹⁵ See generally Delport P and Vorster Q (eds) *Henochsberg on the Companies Act 71 of 2008* (Lexisnexis online version November 2015) 278 on section 72(5)(b) and as to what constitutes “public interest”.

¹⁶ *The Oxford Large Print Dictionary* (New Edition) defines “nature” as “*noun* **1**... the world with all its features and living things... **2** a kind, sort, or class; *things of this nature*... **3** the complex of qualities and characteristics innate in a person or animal. **4** a thing’s essential qualities; its characteristics...” , and

in terms of the rules of interpretation applied by our courts.¹⁷ In my view, all these would indicate that this Tribunal has to be furnished with sufficient facts regarding the kind or essential qualities (i.e. nature) and scope (i.e. extent) of the applicant company's activities, in order to facilitate a determination to be made whether or not to grant an exemption based on section 72(5)(b).¹⁸

[9] Further, regulation 43(5) of the Companies Regulations is indicative of the areas or issues to be addressed in an application for an exemption based, among others, on section 72(5)(b).¹⁹ The applicant may refer to the principles stated therein and say how they relate or apply to its activities or environment.

[10] For the abovementioned reasons, this application fails. However, the applicant may, if is so minded or advised, after addressing the concerns or shortcomings stated above, consider bringing another application. I am in no way suggesting that there will be merit for such an application.

“extent” as “*noun* **1** the space over which a thing extends. **2** the range or scope of something; *the full extent of his power.* **3** a large area...”

¹⁷ See the decision of *National Joint Municipal Pension Fund v Endumeni Municipality*: 2012 (4) SA 593 (SCA) at par 18.

¹⁸ See *Links Golf Club (RF) Ltd*, Case/File Number: CT014Mar2015 at pars 7-8, decided on 04 May 2015; *JT Ross (Pty) Ltd*, Case/File Number: CT007Feb2016 at par 8, decided on 16 March 2016; *M Premjee & Sons (Pty) Ltd*, Case/File Number: CT008Feb2016 at pars 4, 5 and 7, decided on 16 March 2016; *Choppies Warehousing Services (Pty) Ltd*, Case/File Number: CT019Mar2016, also decided on 14 April 2016 at pars 9-12.

¹⁹ Regulation 43(5) reads in the material part: “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...; (ii) good corporate citizenship...; (iii) the environment, health and public safety, including the impact of the company's activities and of its products or services; (iv) consumer relationships...; and (v) labour and employment ... (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.” I added underlining for emphasis.

[11] In the result:

- a) the application, as currently formulated, for an exemption from the requirement to appoint a social and ethics committee is refused.

Khashane La M. Manamela (Mr.)
Member, Companies Tribunal
14 April 2016