

IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

("THE TRIBUNAL")

CASE NUMBER: CT019MAY2015

In the *ex parte* matter of:

DIAGEO SOUTH AFRICA (PTY) LTD

APPLICANT

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

Coram: PJ Veldhuizen

Order delivered 30 SEPTEMBER 2015

ORDER

1. THE APPLICANT

The Applicant is **DIAGEO SOUTH AFRICA (PTY) LTD** ("the Applicant"), duly formed and incorporated in terms of the Company Laws of the Republic of South Africa as a profit company and is in terms of Section 8(2)(b) of the Companies Act No 71 of 2008 ("the Act") categorized as a private company.

2. THE APPLICATION

This is an *ex parte* application brought in terms of Section 72(5)(a) of the Act for an exemption from the requirement to appoint a Social and Ethics Committee.

3. THE REQUIREMENTS OF THE ACT

3.1. Section 72 (4) provides for the Minister to prescribe, by way of Regulation, those companies which shall be required to appoint a Social and Ethics Committee.

3.2. Section 72 (5) provides that, notwithstanding a requirement to appoint a Social and Ethics Committee, a company 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 *inter alia* that (a) "...the company is required in terms of some 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;".

3.3. Regulation 43 (1) (c) of the Act requires "... any other company that has in any two of the previous five years, scored above 500 points in terms of Regulation 26 (2)".

3.4. Regulation 43 (2) (a) of the Act requires that a "company to which this regulation applies must appoint a social and ethics committee unless – (a) it is a subsidiary of another company that has a social and ethics committee, and the social and ethics committee of that other company will perform the functions required by this regulation on behalf of that subsidiary company; or (b) it has been exempted by the Tribunal in accordance with section 72 (5) and (6)."

3.5. Regulation 26 (2) sets out the methodology of a company calculating its "public interest score".

4. THE FACTS

4.1. The Applicant confirms in the supporting affidavit filed by Ingrid Ntombizodwa Velleman ("the Deponent") that the Applicant is a subsidiary of companies registered outside of South Africa.

4.2. The Deponent confirms further that the Applicant has now reached the point where its Public Interest Score exceeds 500 points and has done so in more than two of the preceding five financial years. Accordingly, the Applicant is required in terms of Regulation 43 (1) (c) of the Act to appoint a Social and Ethics Committee.

4.3. The Deponent alleges that it owns 50% of Brandhouse Beverages (Pty) Ltd ("Brandhouse") and that Brandhouse has an existing Social and Ethics Committee and that if this application were successful the role and membership of the Brandhouse Social and Ethics Committee would be expanded in order to perform the functions required by a Social and Ethics Committee of the Applicant and Brandhouse.

5. ANALYSIS OF THE FACTS

5.1. The Applicant is a company, which on its own version is required to appoint a Social and Ethics Committee.

5.2. The two conditions for exemption¹ stated in the Act are:

5.2.1. if the company is already required by another law to have an existing structure in place that actually performs the functions prescribed by the Act to the Social and Ethics Committee; or

5.2.2. If the nature and extent of the company's activities are such that it does not have any significant impact on the public interest.

¹ The Social and Ethics Committee Handbook – Guidebook for South African Companies P9, compiled by Prof Deon Rossouw, The Ethics Institute of South Africa (2012)

5.3. The Applicant fails to allege that it is required in terms of any other legislation to have some form of formal mechanism within its structure that substantially performs the function that would be performed by the required Social and Ethics Committee.

5.4. The Applicant fails to allege that, save a fifty percent interest in Brandhouse, that it has a formal mechanism within its structure that substantially performs the function that would be performed by the required Social and Ethics Committee.² The Applicant simply avers that if this *ex parte* exemption application is granted the role of the Brandhouse Social and Ethics Committee will be extended to fulfill the role of a Social and Ethics Committee of the Applicant.

5.5. The Deponent refers to Brandhouse as a subsidiary of the Applicant but this is not so. Applicant owns fifty percent of Brandhouse and therefore Brandhouse is not in a subsidiary relationship to the Applicant as provided for in Section 3 of the Act.

5.6. The Applicant is not a subsidiary of Brandhouse.³

5.7. The Applicant fails to meet the conditions for exemption.

² Section 72(5)

³ Regulation 43(2)(a)

6. ORDER

The application is refused.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

PJ VELDHUIZEN
MEMBER OF THE COMPANIES TRIBUNAL
CAPE TOWN