IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CT03Jan2017

In the matter:

General Reinsurance Africa Ltd Applicant

(1966/003833/06)

Coram: Delport P.A.

Decision handed down on 28 February 2017

DECISION

INTRODUCTION and BACKGROUND

[1] The applicant is General Reinsurance Africa Ltd ("Gen Re"), registration number 1966/003833/06, a public company incorporated in terms of the Companies Act 71 of 2008 ("Companies Act").

[2] The applicant applies in terms of s 2(3) of the Companies Act, for a ruling from the Tribunal that a certain person "… be exempted from the application of Section 2(3) of the Companies Act…" as per para 20 of the supporting affidavit of as stated in of the supporting affidavit of Peter John Temple ("Temple") duly authorized thereto by the board of applicant.

[3] Gen Re is authorised by the Financial Services Board ("FSB") to carry on life and non-life reinsurance business, pursuant to the Long-term Insurance Act 52 of 1998 ("LTIA") and the Short-term Insurance Act 53 of 1998 ("STIA").

[4] Section 9(3)(a)(i) and (ii) of the LTIA and s 9(3)(a)(i) and (ii) of the STIA provide that in an application for the registration as a long-term or short-term insurer, the applicant must *inter alia* be a public company which has the carrying on of long-term insurance

or short-term insurance business as its main object. The provisions of the LTIA and the STIA are, for all intents and purposes identical in respect of this matter and subsequent references will be to the LTIA, and these will apply, *mutatis mutandis*, to the STIA.

[5] The application of the Companies Act in respect of long-term insurers is of significance also in respect of possible conflicting provisions in eg the LTIA and the Companies Act. Section 3 of the Companies Act 61 of 1973 ("1973 Companies Act"), which was repealed, with exceptions not relevant here, with effect from 1 May 2011 by s 224 of the 2008 Companies Act provided as follows:

> " Restricted application of Act in case of banking and insurance companies and certain other associations.—(1) The provisions of this Act shall not apply—
> …
> (b) with reference to any company or external company or society which is subject to the provisions of any law relating to insurance companies or societies in so far as those provisions are inconsistent with the provisions of this Act;"

[6] The effect of this provision was that although the 1973 Companies Act and eg the Insurance Act of 1943 (substituted by, *inter alia*, the LTIA) applied concurrently, that the Insurance Act will apply in the case of any conflict or inconsistency between the LTIA and the 1973 Companies Act. Section 5 of the 2008 Companies Act, however, now provides:

> "5. General interpretation of Act.—(1) This Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7.
> …
> (4) If there is an inconsistency between any provision of this Act and a provision of any other national legislation—
> (a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and
> (b) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second—
> (i) any applicable provisions of the—
> (aa) Auditing Profession Act;
> (bb) Labour Relations Act, 1995 (Act No. 66 of 1995);
> (cc) Promotion of Access to Information Act, 2000 (Act No. 2 of 2000);
> (dd) Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000);
> (ee) Public Finance Management Act, 1999 (Act No. 1 of 1999);
> (ff) Financial Markets Act, 2012;
> (gg) Banks Act;
> (hh) Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of
> (ii) section 8 of the National Payment System Act, 1998 (Act No. 78 of 1998),
> prevail in the case of an inconsistency involving any of them, except to the extent provided otherwise in sections 30 (8) or 49 (4); or

(ii) the provisions of this Act prevail in any other case, except to the extent provided otherwise in subsection (5) or section 118 (4).”

This section therefore reversed the position as it was under the 1973 Companies Act and the provisions of the 2008 Companies Act will have preference under the circumstances as stated in s 5(4)(b)(ii), as the LTIA or STIA is not included under s 5(4)(b).

[7] Part F of Chapter 2 of the Companies Act has extensive provisions in respect of the duties of directors and in respect of corporate governance and these apply in respect of all directors. Another Act can prescribe additional requirements, but these cannot substitute the requirements of the Companies Act, except as provided in s 5(4)(b) of the Companies Act. The regulation by other Acts, not listed in s 5(4)(b) such as the LTIA if different from the Companies, will have the effect that the Companies Act will apply, if there are irreconcilable inconsistencies or conflict.

[8] Section 9(3)(b)(ii) of the LTIA provides that the registrar (as defined in s 2 of the LTIA) shall not grant registration as a long-term insurer if any person who is, or will, from the date of proposed registration, be a director or managing executive of the applicant, is not fit and proper to hold the office concerned.

[9] In terms of s 12(1)(bD) of the LTIA, the registrar may also give notice to the long-term insurer of the registrar's intention, and of the reasons therefor, to prohibit that long-term insurer, with effect from a date specified in the notice, from carrying on the long-term insurance business specified in that notice if long-term insurer is, in the opinion of the registrar not managed in accordance with the governance and risk management framework prescribed by the registrar in the *Gazette*.

[10] The governance and risk management framework was prescribed by the registrar of Long-term Insurance in Board Notice 158 of 2014 in *Government Gazette* 38357 of 19 December 2014 with effect from 1 April 2015 (“2014 Board Notice”). The 2014 Board Notice requires, in respect of governance, that:

“Composition and governance of board of directors
3. (1) For purposes of this section [Footnote: These requirements are based on the requirements for members of audit committees as set out in the Companies Act.], -
(a) a non-executive director means an individual who is not involved in the day-to-day management of the insurer or has not been so involved at any time during the last 12 months; and

(b) an independent director -

(i) means a non-executive director that –

(aa) is not and has not in the past three years been an employee of the insurer or any of its related or inter-related persons (as defined in section 1 of the Companies Act);

(bb) is not a member of the immediate family of an individual mentioned in subparagraph (aa); or

(cc) is not a material supplier or customer of the insurer, such that a reasonable and informed third party would conclude in the circumstances that the integrity, impartiality or objectivity of that director"

[11] Section 1 of the Companies Act defines "related", when used in respect of two persons, to mean persons who are connected to one another in any manner contemplated in section 2 (1) (*a*) to (*c*) and "inter-related", when used in respect of three or more persons, to mean persons who are related to one another in a linked series of relationships, such that two of the persons are related in a manner contemplated in section 2 (1), and one of them is related to the third in any such manner, and so forth in an unbroken series. There are various cases on this definition, but based on my finding in this application it is not necessary to discuss or refer to those cases.

[12] The footnote to s 3(1) of the Board Notice states that the requirement in said s 3 is based on s 94(4) of the Companies Act. This does not mean that s 94(4) of the Companies Act, or any other section of the Companies Act, applies by "incorporation". It is also clear that a provision of the Companies Act, or any Act for that matter, cannot be made applicable in respect of enforcement in respect of that Act by anything else but an Act. Even this *modus operandi* is doubtful in respect of the Companies Act, due to, *inter alia*, also the provisions of s 5 of the Companies Act as discussed above.[1]

[13] The provisions of s 94(4) of the Companies Act is therefore, in my opinion, irrelevant in respect if the interpretation and application of the Board Notice.

[14] Gen Re appointed Ms Laurika Steenkamp ("Steenkamp") on its board as a non-executive (but not independent) director effective 1 February 2016. Steenkamp was

[1] See eg, *Mpofu v South African Broadcasting Corp Limited* (*SABC*) *and Others* (2008/18386) [2008] ZAGPHC 413 (16 September 2008) para 29; *South African Broadcasting Corporation Ltd v Mpofu and Another* [2009] 4 All SA 169 (GSJ) para 20 and *Henochsberg on the Companies Act 71 of 2008* 48(3).

also appointed as a member of the Audit and Risk committee of Gen Re as non-executive (but not independent) director.

[15] Steenkamp had been previously employed by Gen Re in the following positions and during the following periods:

- May 2001 to December 2007: Finance Manager;
- March to May 2010: Temporary Financial Accountant;
- May 2010 to May 2013: Operations Manager (Claims and Underwriting).

[16] Steenkamp left the employment of Gen Re in May 2013. From June 2016 she qualified to be "independent" in terms of s 3(1)(b) of the Board Notice as three years have elapsed since her employment.

[17] However, subsequent to June 2016, Gen Re appointed Janine Laubscher ("Laubscher") as financial manager with effect from 1 January 2017. Laubscher is the sister-in-law of Steenkamp.

[18] The effect of this relationship is that Steenkamp, although clearly non-executive, may not be "independent" vis-à-vis Laubscher in terms of the Board Notice and the inclusion of the definition of "related" in terms of s 2 of the Companies Act.

[19] Section 3 of the Board notice in effect provides that a person who is a member of the immediate family of an employee of the insurer or any of its (the insurer's) related or interrelated persons is not independent. The operative criterium here is "employee". Therefore, if a person is immediate family of an employee of the insurer or of a related or interrelated person of the insurer, that person is not independent.

[20] The applicant now applies in terms of s 2(3) of the Companies Act, for a ruling from the Tribunal that Steenkamp "… be exempted from the application of Section 2(3) of the Companies Act… as stated in para 20 of the supporting affidavit of Temple. This application is based on various facts and circumstances set out in the preceding paragraphs of the affidavit of Temple. Based on my finding in this matter, it is not necessary to traverse the merits of these facts and circumstances. It may be noted that the reference to s 2(3) is erroneous, as that is the subsection that empowers the Tribunal to give an exemption from 2(1). It is not logical, in this instance, to apply for an exemption in respect of an exemption.

[21] Section 2(3) of the Companies Act provides:

"(3) With respect to any particular matter arising in terms of this Act, a court, the Companies Tribunal or the Panel may exempt any person from the application of a provision of this Act that would apply to that person because of a relationship contemplated in subsection (1) if the person can show that, in respect of that particular matter, there is sufficient evidence to conclude that the person acts independently of any related or inter-related person."

[22] The Tribunal therefore, in essence, has the jurisdiction to exempt a person from an *application* of a provision of the *Companies Act*, that would apply to that person because of a *related or inter-related relationship* (my italics).

[23] It is important to note that the Tribunal does not have jurisdiction in respect of any other Act, but the Companies Act. The power of the Tribunal in terms of the Companies Act is that an application of s 2(1) can be excluded, but that s 2(1) itself cannot be "excluded". Therefore, if distribution of income is made to a person who is related to an incorporator of a non-profit company, which is not allowed in terms of s 8 and the provisions of Schedule1 of the Companies Act, application can be made that for purposes of those provisions, a person, who would otherwise be "related" in terms of s 2(1) is exempted. The exemption is not in respect of s 2, but in respect of the application of s 2 under certain circumstances.

[24] Be that as it may, the board notice provides that a person is not independent if she (in this case) is immediate family of an employee of the company or of a person related to the company. Laubscher is an employee of the company and Steenkamp is her sister-in-law. It is not necessary to traverse the issue of employee of a person related to the company as that situation is not shown in the fact.

FINDING AND ORDER

[25] Whether a sister-in-law relationship is "immediate family", for which there is no definition in the Board Notice, is therefore the crux of this matter, and this question does not fall within the ambit of s 2 of the Companies Act. In addition, even if the question of "immediate family" did fall within the ambit of s 2, s 2(3) makes it clear

that the Tribunal has jurisdiction in respect of the *application* of s 2 to a provision of the *Companies Act.* The Board Notice and its application clearly does not fall within the Companies Act and therefore the Tribunal has no jurisdiction.

[26] The application is therefore refused.

P.A. DELPORT

MEMBER OF THE COMPANIES TRIBUNAL