



## **IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA**

**(“The Tribunal”)**

**CASE NO: CT016JAN2016**

**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:**

**AMBER HOUSE FUND 4 (RF) LTD**

**(2013/14828607)**

**THE APPLICANT**

**Coram K. Tootla**

**Decision delivered on 25 February 2016**

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### **DECISION**

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#### **INTRODUCTION:**

- [1] The applicant applies to the Companies Tribunal in terms of sections 72 (5) 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] The application has been made by the company secretary who has been duly authorized.
- [3] The Applicant is a ring-fenced public company and its main business is to acquire the right, title and interest in and to residential property loan agreements; and the related security with regard to such agreements pursuant to a securitization scheme as more fully set out in clause 9 of the memorandum of incorporation. This has not been set out by the Company Secretary.
- [4] The applicant states that it is required to appoint a SEC in terms of Section 72 (4) and Regulation 43 (1); and by virtue of its listed company status; but it does not mention that its public interest score ("PIS") in terms of regulation 26 (2) exceeds 500 and has done so for the past two financial years, nor does it illustrate the manner in which the score is calculated. It is crucial that the calculation of the score is to be set out in the affidavit in tabular form or by an annexure to the affidavit explaining how the Applicant has arrived at a score exceeding 500 taking into consideration all the factors in Reg 26 (2).
- [5] The Applicant contends that it applies for an exemption based on the fact 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 and also because it is part of the group of S.A. Home Loans which is a wholly owned subsidiary of SAHL Investment Holdings (Pty) Ltd (SAHL) as per the affidavit of Ursula Shei, the company secretary.
- [6] The Company secretary then proceeds to state that as a SEC will be formed by SAHL Investment Holdings which is the holding company for S.A Home loans and (The Amber Fund 3 (RF) is part of this group). However, after a request by the Tribunal via the Registrar the Applicant provided some documents indicating that the holding company SAHL has established a SEC but that the application for exemption has been made as the Applicant has no employees and all its administrative functions are performed by SAHL. The mere fact that the Applicant has no employees is insufficient grounds upon which the exemption can be granted.

There are various other factors that have to be taken into consideration in terms of Reg. 43(5) and also whether the Application has been properly made.

- [7] The nature and extent of the activities of the company have also not been set out, save for the fact that the Memorandum of Incorporation has been attached to the Application. It is indeed a concern that the Applicant's application is not properly set out nor justified in terms of the Act and regulations. It is of further of grave concern that there is a clear misunderstanding of the Law.

The Applicant has not shown or justified that it is not reasonably necessary in the public interest for the Applicant to have a social and ethics committee. The question is whether it is justifiable in terms of Section 72 (5).

- [8] It seems that the Applicant has made mere allegations about why it should not have a SEC, but it has not examined the importance of the SEC; and the fact that the Applicant and SAHL are companies registered in terms of the Act. For the reasons cited above the Applicant seems to imply that it is not reasonably necessary nor in the public interest to require the Applicant to establish a SEC.
- [9] In addition the application for exemption is also requested based on the fact that the Holding company SAHL has established a SEC and that this would suffice for the Applicant and the Group as set out above.

#### **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 Public Interest Score 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] **Section 3- Subsidiary relationships.**—(1) a company is—

- (a) A subsidiary of another juristic person if that juristic person, one or more other subsidiaries of that juristic person, or one or more nominees of that juristic person or any of its subsidiaries, alone or in any combination—

(i) is or are directly or indirectly able to exercise, or control the exercise of, a majority of the general voting rights associated with issued securities of that company, whether pursuant to a shareholder agreement or otherwise; or

(ii) has or have the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board; or

(b) a wholly-owned subsidiary of another juristic person if all of the general voting rights associated with issued securities of the company are held or controlled, alone or in any combination, by persons contemplated in paragraph (a). (2) For the purpose of determining whether a person controls all or a majority of the general voting rights associated with issued securities of a company—

(a) voting rights that are exercisable only in certain circumstances are to be taken into account only—

(i) when those circumstances have arisen, and for so long as they continue; or

(ii) when those circumstances are under the control of the person holding the voting rights;

(b) voting rights that are exercisable only on the instructions or with the consent or concurrence of another person are to be treated as being held by a nominee for that other person; and

(c) voting rights held by—

(i) a person as nominee for another person are to be treated as held by that other person; or

(ii) a person in a fiduciary capacity are to be treated as held by the beneficiary of those voting rights. (3) For the purposes of subsection (2), “hold”, or any derivative of it, refers to the registered or direct or indirect beneficial holder of securities conferring a right to vote.

[15] **Section 2.** Related and inter-related persons, **and control.**—(1) For all purposes of this Act—

(a) an individual is related to another individual if they—

(i) are married, or live together in a relationship similar to a marriage; or

(ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity;

(b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2); and

**(c) a juristic person is related to another juristic person if—**

(i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);

(ii) either is a subsidiary of the other; or

(iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2). (2) For the purpose of subsection (1), a person controls a juristic person, or its business, if—

(a) in the case of a juristic person that is a company—

(i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3 (1) (a); or

(ii) that first person together with any related or inter-related person, is—

(aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or

(bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;



(d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c).

- [16] 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:**

- [17] 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.
- [18] 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.
- [19] The applicant avers in the founding affidavit that it need not appoint a SEC as provided for in section 72 (5) of the Act in that it is part of the group of S.A Home Loans which in turn is a subsidiary of SAHL. A company that falls outside the categories above as set out in Reg 43(2), or one that falls within those categories but which is a wholly owned subsidiary; and provided that the holding company has a SEC which will perform the functions of the SEC for the (subsidiary) company, a SEC need not be appointed (Reg 43 (2) (a)). This follows automatically. However, it is clear that in this instance the Applicant's holding company is S.A Home Loans, and it is the applicant who is the subsidiary of S.A. Home Loans.

- [20] It is patently clear that there is a compelling and specific purpose in Law for a SEC to be appointed as it forms an essential part of good corporate governance and best practice which also fits into the category of enhanced accountability and transparency.
- [21] Although the concept “activities of the company” is undefined, it is opined that the **categories of activities** set out in Reg. 26 (2) to calculate the PIS determine **not only the activities of the company** but also **the nature and the extent of the activities**.
- [22] Although Reg. 43 (2) does not prescribe either the **nature or the extent** of the activities, the Tribunal is of the view that Reg 43 (5) is to be used to determine the public interest; because if the nature and extent of activities are of a certain type, degree and/or magnitude, the matters set out extensively in Reg 43 (5) would then logically serve the public interest. However, if for example a company has no employees but declares dividends then in that event the subsection of Reg 43(5) which deals with corporate governance, fraud etc. must nevertheless be dealt with. Thus having no employees on its own does not justify an exemption.
- [23] Finally, the Applicant has not mentioned that its public interest score (“PIS”) in terms of regulation 26 (2) exceeds 500 and has done so for the past two financial years in 5 years, nor does it illustrate the manner in which the score is calculated by virtue of setting this out in the affidavit. This is a serious flaw in the Application. The Applicant has failed to comply with Reg 26 (2).
- [24] The Applicant has not deemed it fit to make an Application for exemption to establish a SEC after the Companies Act came into operation nor has it complied with the JSE listing requirement to do so. It now does so years after the fact which is a serious contravention of the Act. This failure in itself has not been explained by the Applicant.

#### **FINDING:**

- [25] In applying its mind to this Application, the Tribunal notes firstly that the Applicant has not set out the nature and extent of its activities in terms of Section 72(5) (b). The fact that the Applicant contends it is restricted in its activities, this in itself may or may not be important in respect of the nature and extent of the activities.

Thus without evidence as to the nature and extent of the activities of the applicant set out in the Application and argued, the Tribunal cannot apply its mind and exercise a proper discretion.

- [26] The Application also fails on the ground that the holding company SAHL has a Social and Ethics Company and for that reason the Applicant should be exempted from forming an SEC. It is clear that the Applicant has incorrectly made a blanket application on behalf of the group under S.A. Home Loans Company without taking into consideration whether or not the Applicant is a subsidiary of SAHL. The Tribunal has attempted to assist the Applicant by requesting further information about various issues regarding the companies in the Group; as well as specifically how and why the Applicant believes that the Applicant is a subsidiary of SAHL. This is another gap in the application.
- [27] When the SAHL has a SEC, and **if** the Applicant is a subsidiary of SAHL in terms of section 3 of the Act, and if that SEC acts as the SEC of all companies in the group taking into consideration that it must cater for all the requirements mentioned in Reg.43 (5) (unless they do not apply), then only would an “automatic exemption” apply to the subsidiary not to establish an SEC of its own. In that event no application to the Tribunal is necessary. However, it is clear that only S.A Home Loans is a wholly owned subsidiary of SAHL. Whether or not the Applicant is a subsidiary of the SAHL has not been explained or justified?
- [28] The Applicant clearly failed to explain how it can be regarded as a subsidiary of SAHL with reference to Section 3 (1) and (2), and Section 2(2). In a nutshell the shareholding is not important but the voting rights held by SAHL in the Applicant company is the crucial issue in determining whether the Applicant can be regarded as a subsidiary of SAHL.
- [29] Thus the Applicant has in addition not shown that it is a subsidiary of SAHL by virtue of its voting rights held as set out in Section 3. The application is deficient in various respects and the Tribunal is unable to apply its mind to those issues if they have not been pointed out and justified to the Tribunal. All this information is peculiarly within the knowledge of the Applicant.

[30] In a subsequent letter the compliance officer, Ms. B. Williams claims that SAHL holds all the voting rights in S.A Home Loans. However, there is no evidence as to this fact and no evidence as to where these powers are derived from whether in the form of a shareholders agreement or the Memorandum of Incorporation etc.

In addition, **there is no evidence** as to whether SAHL holds all the voting rights in the Applicant Company and none of this has been explained in the affidavit.

[31] Finally, the Tribunal disputes that the current approach that the SEC of SAHL holding company can practically monitor effectively and properly the numerous number of companies under the structure as submitted in the Group structure (only after it was requested by the Tribunal).

[32] In the sum total, it is clear that the Applicant does not understand its responsibilities under Section 72 (5), Rag 26 (2) and Rag 43 (5) and has thus failed to justify its application for exemption.

**ORDER:**

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

[34] A copy of this decision is to be served on the Compliance Department of CIPC.

*k.y. tootla (electronically signed)*

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**KHATIJA TOOTLA**

**Member of the Tribunal**

**25 February 2016**