



## COMPANIES TRIBUNAL OF SOUTH AFRICA

**Case/File Number: CT006APR2017**

In the *ex parte* application of:

**NATIONAL HOUSING FINANCE  
CORPORATION SOC LIMITED**

First Applicant

**NATIONAL URBAN RECONSTRUCTION  
AND HOUSING AGENCY NPC**

Second Applicant

and

**RURAL HOUSING LOAN FUND NPC**

Third Applicant

[application in terms of section 6 of the Companies Act 71 of 2008 for an exemption of a transaction *et al* from prohibition established by an unalterable provision of the Companies Act]

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Presiding Member : Khashane La M. Manamela (Mr.),

Dates of Decision : 28 April 2017

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### **DECISION (Reasons and an Order)**

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**K. La M. Manamela**

## ***Introduction***

[1] The first, second and third applicants (the applicants) jointly apply for an exemption of agreement, transaction or arrangement (in terms whereof the assets and liabilities or businesses of second and third applicants will be transferred to the first applicant, at no charge) from a prohibition or requirement imposed by items 1(4)<sup>1</sup> and 2(1)<sup>2</sup> of schedule 1 to the Companies Act 71 of 2008 (the Companies Act). The application is in terms of section 6(2), read with section 6(3), of the Companies Act.<sup>3</sup>

[2] The first applicant (NHFC) is a profit company<sup>4</sup> and also a state-owned company.<sup>5</sup> The second applicant (NURCHA) and third applicant (RHLF) are non-profit companies,<sup>6</sup> established by or on behalf of the Government of the Republic of South Africa (the Government).

[3] All three applicants are institutions established by the Government's Department of Human Settlements or its predecessors (the Department) for the provision of credit, particularly in the form of home loans, through intermediary credit providers, to low and middle-income earning sectors of the economy. These commercial activities by the Department, jointly with the applicants, are aimed at promoting the right to have access

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<sup>1</sup> See par 12 below, for a reading of the provisions of item 1(4) of schedule 1 to the Companies Act.

<sup>2</sup> See par 12 below, for a reading of the provisions of item 2(1) of schedule 1 to the Companies Act.

<sup>3</sup> See par 8 below, for a reading of the provisions of sections 6(1), 6(2) and 6(3) of the Companies Act.

<sup>4</sup> A profit company is defined in section 1 of the Companies Act as "a company incorporated for the purpose of financial gain for its shareholders".

<sup>5</sup> See sections 8(1) and 8(2)(a) of the Companies Act.

<sup>6</sup> A non-profit company is defined in section 1 of the Companies Act as "a company- (a) incorporated for a public benefit or other object as required by item 1(1) of Schedule 1; and (b) the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1(3) of Schedule 1". See further section 8(1) of the Companies Act.

to adequate housing enshrined in section 26<sup>7</sup> of the Constitution of the Republic of South Africa, 1996.

[4] It is submitted that a review of the applicants' roles and operational landscapes by those concerned, revealed that the applicants, when operating severally, as opposed to jointly, are unsuitable to fulfil the mandate of the Department. A decision was consequently taken to consolidate all three entities into a single entity, in the form of NHFC. This, it is hoped, would resolve the difficulties encountered by the multiple structures or entities. The Department or Minister of Human Settlements (the Minister) is in favour of the consolidation and has furnished a letter supporting this application<sup>8</sup>

***Agreement, transaction, arrangement and/or provisions of applicants' memoranda of incorporation***

[5] The consolidation of the applicants into a single entity would, primarily entail the transfer of the assets and liabilities of both NURCHA and RHLF to NHFC. There will be no consideration for the transfers as the underlying transactions or agreements are in the form of donation agreements. The donation agreements are subject to fulfilment of certain suspensive conditions, including the granting of exemptions sought in terms of this application. Thereafter, NURCHA and RHLF will have no assets or liabilities and will be dissolved or deregistered.

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<sup>7</sup> Section 26 of the Constitution of the Republic of South Africa, 1996 reads in the material part: "(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

<sup>8</sup> See annexure "SSM4" on indexed pp 39-40.

[6] The following are some of the reasons given for the consolidation:

- “4.3 .1 to redress the misalignment of activities presently conducted by the Applicants and improve Human Settlement policy and functional alignment;
- 4.3.2 to improve service delivery, including the removal of overlaps and existing institutional functions amongst the Applicants;
- 4.3.3 to implement the recommendations and findings of –
  - 4.3.3.1 the National Treasury following a government-wide review in 2008, which recommended the Consolidation in order to, *inter alia*, rationalise duplications; and
  - 4.3.3.2 the Presidential State Owned Enterprises Review Committee in 2012, which advised the NDoHS [i.e. the Department] that, *inter alia*, there was a need for greater coordination and minimisation of duplication (which the Consolidation aims to achieve);
- 4.3.4 ....
- 4.3.5 to enable the achievement of operational economies of scale, optimal financial resource allocation and an environment conducive to innovative and expanded Human Settlements finance provision;
- 4.3.6 ...
- 4.3.7 to promote long-term financial sustainability, promote savings of government resources and create profitability, including, *inter alia*, by way of an enhanced capital structure by raising debt and equity funding over the medium to long-term and in partnership

with the broadest range of institutions. Such improved capital raising capability a long-term financial sustainability will result in the NDoHS, through the NHFC, being better placed ...

4.3.8 ...

4.3.9 to provide for a Consolidated Human Settlements Development Finance Institution, in the form of the NHFC (as a profit company), which will serve as a Consolidated platform for the establishment of a Human Settlements Development Bank (“**HSDB**”) which is intended in the medium-term to be proposed and established in order to subsume the then Consolidated NHFC and which will fulfil a role fundamentally analogous to that of the Development Bank of Southern Africa SOC Limited (“**DBSA**”), with a focus specifically on Human Settlements sector... In this regard, the policy framework for the establishment of the HSDB is currently in the process of being drafted and, if and once established, the HSDB would, due to the legislative process involved, only be so established significantly after the proposed Consolidation can be implemented. Accordingly, it is submitted that during the interim period the Consolidation is required in order to begin giving effect to the provisions of this paragraph 4.3.”<sup>9</sup>

[7] The applicants submit that the statutory provisions governing NURCHA and RHLF, as non-profit companies, restrict the conclusion and implementation of the donation agreements, referred to above, hence this joint application for an exemption. Next, I consider the statutory provisions and other legal principles considered applicable to this application.

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<sup>9</sup> See pp 9 – 11 of the supporting affidavit.

***Applicable legal principles***

[8] As stated above, this application is predicated on the provisions of sections 6(2) and (3) of the Companies Act. Section 6 reads in the material part:

“(1) A court, on application by the Commission, Panel or an exchange in respect of a company listed on that exchange, may declare any agreement, transaction, arrangement, resolution or provision of a company’s Memorandum of Incorporation or rules-

(a) to be primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act; and

(b) void to the extent that it defeats or reduces the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act.

(2) A person may apply to the Companies Tribunal for an administrative order exempting an agreement, transaction, arrangement, resolution or provision of a company’s Memorandum of Incorporation or rules from any prohibition or requirement established by or in terms of an unalterable provision of this Act, other than a provision that falls within the jurisdiction of the Panel.

(3) The Companies Tribunal may make an administrative order contemplated in subsection (2) if it is satisfied that-

(a) the agreement, transaction, arrangement, resolution or provision serves a reasonable purpose other than to defeat or reduce the effect of that prohibition or requirement; and

(b) it is reasonable and justifiable to grant the exemption, having regard to the purposes of this Act and all relevant factors, including-

(i) the purpose and policy served by the relevant prohibition or requirement; and

(ii) the extent to which the agreement, transaction, arrangement, resolution or provision infringes or would infringe the relevant prohibition or requirement.”

[9] From the list of what may be exempted in terms of this provision, only “agreement” is defined in section 1 of the Companies Act as, including “a contract, or an arrangement or understanding between or among two or more parties that purports to create rights and obligations between or among those parties”.

[10] The other words or concepts (i.e. “transaction”, “arrangement” or resolution) are not defined, although “resolution” is defined as “ordinary resolution”<sup>10</sup> and “special resolution”.<sup>11</sup> Also, “arrangement” is included in the definition of “agreement”.<sup>12</sup> However, in my view, the words will bear their ordinary meanings or in the context they are employed in the respective provisions of the Companies Act. I must add though that, nothing really turns on this for current purposes, as I accept that the consolidation is either an “agreement”, “transaction” or “arrangement”, as contemplated by section 6 of the Companies Act.

[11] Another legal principle to be considered in this application is what constitutes an “unalterable provision”. This is defined in section 1 of the Companies Act as:

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<sup>10</sup> Section 1 defines “ordinary resolution” as “a resolution adopted with the support of more than 50% of the voting rights exercised on the resolution, or a higher percentage as contemplated in section 65(8)- (a) at a shareholders meeting; or (b) by holders of the company’s securities acting other than at a meeting, as contemplated in section 60”.

<sup>11</sup> According to section 1 “special resolution” means “(a) in the case of a company, a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution, or a different percentage as contemplated in section 65(10)- (i) at a shareholders meeting; or (ii) by holders of the company’s securities acting other than at a meeting, as contemplated in section 60; or (b) in the case of any other juristic person, a decision by the owner or owners of that person, or by another authorised person, that requires the highest level of support in order to be adopted, in terms of the law under which that juristic person was incorporated”.

<sup>12</sup> See par 9 above.

“a provision of this Act that does not expressly contemplate that its effect on any particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by a company’s Memorandum of Incorporation or rules”

[12] It is submitted that the material unalterable provisions are contained in items 1(4) and 2(1) of schedule 1 to the Companies Act. Item 1(4) reads:

“(4) Despite any provision in any law or agreement to the contrary, upon the winding up or dissolution of a non-profit company-

(a) no past or present member or director of that company, or person appointing a director of that company, is entitled to any part of the net value of the company after its obligations and liabilities have been satisfied; and

(b) the entire net value of the company must be distributed to one or more nonprofit companies, registered external non-profit companies carrying on activities within the Republic, voluntary associations or non-profit trusts-

(i) having objects similar to its main object; and

(ii) as determined-

(aa) in terms of the company’s Memorandum of Incorporation;

(bb) by its members, if any, or its directors, at or immediately before the time of its dissolution; or

(cc) by the court, if the Memorandum of Incorporation, or the members or directors fail to make such a determination.”

and item 2(1) reads:

“(1) A non-profit company may not-

(a) amalgamate or merge with, or convert to, a profit company; or

(b) dispose of any part of its assets, undertaking or business to a profit company, other than for fair value, except to the extent that such a disposition of an asset occurs in the ordinary course of the activities of the non-profit company.”



[13] This Tribunal is enjoined to, among others, have regard to the purposes of the Companies Act contained in section 7 thereof, when determining or making an administrative order. Section 7 reads:

“The purposes of this Act are to-

(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;

(b) promote the development of the South African economy by-

(i) encouraging entrepreneurship and enterprise efficiency;

(ii) creating flexibility and simplicity in the formation and maintenance of companies; and

(iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;

(c) promote innovation and investment in the South African markets;

(d) reaffirm the concept of the company as a means of achieving economic and social benefits;

(e) continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;

(f) promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;

(g) create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;

(h) provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions;

(i) balance the rights and obligations of shareholders and directors within companies;

(j) encourage the efficient and responsible management of companies;

(k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and

(l) provide a predictable and effective environment for the efficient regulation of companies.”

[14] This Tribunal is imbued with a wide discretion to grant an exemption, if it is satisfied that the application meets the two-legged enquiry or requirements contained in section 3 of the Companies Act.<sup>13</sup> I have had the benefit of forming part of a panel which previously considered this provision in the decision of *La Lucia Sands Share Block Limited v Flexi Holiday Club & Others*.<sup>14</sup> The decision of *La Lucia Sands* dealt with a different form of an unalterable provision to those involved in this application, but in my view, the following is relevant for current purposes:

[27] It is common cause that, the 2006 Resolution or what the applicant intends it to achieve, does not satisfy the requirements of sections 50 and 51 of the CA 2008 applied together with regulation 32 of the Regulations, hence this application. It is also common cause that the impugned provisions of the aforesaid sections are unalterable.<sup>15</sup> What has to be determined is firstly, whether the 2006 Resolution serves a reasonable purpose other than to defeat or reduce the effect of the impugned statutory provisions, secondly, whether it is reasonable and justifiable to grant the exemption. The second or latter part of the determination or enquiry has to have regard to the purposes of the CA 2008 and all relevant factors, including the purpose and policy served by the relevant prohibition or requirement, and the extent to which the 2006 Resolution infringes or would infringe the relevant prohibition or requirement.<sup>16</sup>

[15] Further on the decision of *La Lucia Sands*<sup>17</sup> made reference to the commentary in *Henocheberg on Companies Act*<sup>18</sup> as follows:

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<sup>13</sup> See par 8 above.

<sup>14</sup> CT001APR2014 decided on 20 October 2014. This decision may be accessed through the Tribunal's website: [www.companiestribunal.org.za](http://www.companiestribunal.org.za).

<sup>15</sup> See par 11 above, for the definition of an "unalterable provision".

<sup>16</sup> See *La Lucia Sands* at par 27.

<sup>17</sup> See *La Lucia Sands* at par 30.

<sup>18</sup> Delport, P.A. and Vorster, Q. *Henocheberg on Companies Act 71 of 2008* (electronic version).

“It should be noted that the requirements for the exercise of the discretion by the Companies Tribunal are conjunctive, i.e. if it finds that it will be reasonable and justifiable to grant an exemption having regard to (a) the purposes of the Act; (b) all relevant factors; (c) the purpose and policy served by the relevant prohibition or requirement; and (d) the extent to which the agreement, transaction, arrangement, resolution or provision infringes or would infringe the relevant prohibition or requirement, it must in addition also be satisfied that the agreement, transaction, arrangement, resolution or provision serves a reasonable purpose other than to defeat or reduce the *effect of* a prohibition or requirement of the Act.”<sup>19</sup>

[16] In an article dealing exemptions in terms of section 6(2) some learned commentators found fault with the approach adopted in the decision of *La Lucia Sands* regarding the conjunctive nature of the requirements.<sup>20</sup> I agree that once the Tribunal is dissatisfied that the first leg of the enquiry or requirement in section 3(a) is not met, then there is no need to proceed to second leg in section 3(b), although in *La Lucia Sands* consideration of the second part of the leg was simply for completeness.<sup>21</sup> However, it does not appear that the determination of this matter would give rise to the same considerations as in *La Lucia Sands*.

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<sup>19</sup> See *Henochsberg on Companies Act* (as at May 2014) on p 40 accessed through the link <http://www.mylexisnexis.co.za/Index.aspx> on 28 September 2014; *Henochsberg on Companies Act* 71 of 2008, vol 1 (service issue 11) (LexisNexis 2015) on p 41.

<sup>20</sup> See Truter P and Jones A *Exemption from unalterable provisions an underutilised procedure*, De Rebus Feb 2015 44, accessed on 28 April 2017 through the link <http://www.derebus.org.za/exemption-from-unalterable-provisions-an-underutilised-procedure/>.

<sup>21</sup> See *La Lucia Sands* at par [31] which reads without footnote: “I have already hinted in the preceding paragraph that in my opinion the 2006 Resolution does not clear the hurdle, so to speak, presented by the first leg of section 6(3)(a) of the CA 2006 as I have already found that it does not serve a reasonable purpose other than to defeat or reduce the requirement of sections 50 and 51 of the CA 2008 and regulation 32 of the Regulations. As the enquiry is conjunctive, I also state that I do not consider it reasonable and justifiable to grant the exemption especially when considering the purposes of the CA 2008 as reflected in section 7, which include the need to encourage transparency and high standards of corporate governance.”

***Legal principles and submissions (a discussion)***

[17] The provisions in sections 3(a) and (b) are utilised as subheadings for purposes of the discussion and determination.

***Does the consolidation serve a reasonable purpose other than to defeat or reduce the effect of the prohibition or requirement?***

[18] As indicated above, NURCHA and RHLF, were established as non-profit companies by the Government in order to address housing needs for the needy members of the society. Although, formed with significantly the same objective, NHFC was established as a profit company. From the registration numbers, the three entities appear to have existed since 1995 and 1996, respectively. In my view, they have endured and survived the test of time in their respective markets to justify the conclusion from the review that they would be better placed as a consolidated entity. In other words, there is a considerable amount of historical material from which the conclusion is drawn for the proposed change in strategy.

[19] Further, it is submitted that when fully consummated the Department's or Government's strategy is to convert the consolidated entity into a development bank in the mould of the Development Bank of Southern Africa or the DBSA, albeit, in the human settlement or housing market.

[20] As a state-owned company, NHFC's sole or controlling shareholder, is the Government. It appears that the Government or its nominees are the members or the controllers of NURCHA and RHLF. Therefore, effectively, the assets to be transferred

from the non-profit companies (i.e. NURCHA and RHLF) to the state-owned company (i.e. NHFC), are effectively Government's assets or State property. This, in my view, is significant for the determination to be made in this matter.

[21] The restrictions in terms of items 1(4) and 2(1) of schedule 1 to the Companies Act, in my view, were aimed at protecting assets which may have been obtained under the banner of promotion of a non-profit motive by a company. This protection is mostly relevant upon dissolution of the non-profit motivated company and ensures the continued utilisation of the assets for the same purpose, other than for profit making. It is a known fact that non-profit companies are often formed for noble causes and significantly depend on donations from third party benefactors, philanthropists or governments. Therefore, it would ordinarily be self-defeating or taking unfair advantage of such benevolence for a non-profit company to be converted into a profit company, merged with a profit company or, upon dissolution, to have its assets distributed otherwise, than to another non-profit company or companies. This, in my view, is the purpose and policy served by the impugned provisions or, put otherwise, the mischief, which the legislature sought to guard against by means of the impugned unalterable provisions.

[22] However, it is my view that, the donation of the assets of NURCHA and RHLF to NHFC, for purposes of the consolidation, will not circumvent or impinge the objectives of the impugned unalterable provisions. The consolidation, in my view, is clearly aimed at advancing and fulfilling the Government's mandate to address housing needs and give

reality to section 26<sup>22</sup> of the Constitution regarding the right to have access to adequate housing. Therefore, I find that the consolidation of the applicants serves a reasonable purpose, other than to defeat or reduce the effect of the prohibition or requirement contained in the impugned items of schedule 1 to the Companies Act or the respective Memorandum of Incorporation of each of the applicants.

*Is it reasonable and justifiable to grant the exemption?*

[23] The second part of the two-legged enquiry in terms of section 3 of the Companies Act, concerns a determination by this Tribunal whether or not it is reasonable and justifiable to grant an exemption. I rely on what is stated above in finding that, it is indeed reasonable and justifiable to grant an exemption sought in terms of this application. I am also fortified by my association with the contentions by the applicants that the consolidation may give effect to and promote some of the purposes contained in section 7 of the Companies Act.<sup>23</sup>

***Conclusion and order***

[24] Against the backdrop of what appears above, an exemption will be granted with regard to the consolidation of the first, second and third applicants into a single entity, in the form of the first applicant. To avoid doubt, the exemption will be granted in two parts or duplicated, in order to cater for both donation agreements entered into by the first and second applicants, on the one hand, and the first and third applicants on the other.

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<sup>22</sup> See footnote 7 above.

<sup>23</sup> See par 5.3.5 of the supporting affidavit. See generally par 13 above.

***Order***

[25] The following administrative order is made:

(a) the application in terms of section 6(2), read with section 6(3), of the Companies Act 71 of 2008, for exemption (of the agreement, transaction or arrangement between the first and second applicants in terms whereof the assets and liabilities of the second applicant are transferred to the first applicant, free of charge) from prohibition or requirement established by or in terms of an unalterable provision of the Companies Act 71 of 2008 and/or the provision of the Memorandum of Incorporation of either or both of the applicants, is granted.

(b) the application in terms of section 6(2), read with section 6(3), of the Companies Act 71 of 2008, for exemption (of the agreement, transaction or arrangement between the first and third applicants in terms whereof the assets and liabilities of the third applicant are transferred to the first applicant, free of charge) from prohibition or requirement established by or in terms of an unalterable provision of the Companies Act 71 of 2008 and/or the provision of the Memorandum of Incorporation of either or both of the applicants, is granted.

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**Khashane La M. Manamela**

**Member, Companies Tribunal**

**28 April 2017**