

IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CT016APRIL2015

In the ex-parte application of

Norilsk Nickel Africa Propriety Limited

Applicant

Coram: Kganyago M.F

Decision handed down on the 21st August 2015

DECISION

- [1] The applicant has duly authorized Michael Patrick Marriot its Chief Executive Officer and director, to bring an application in terms of section 72(5) of the Companies Act 71 of 2008 ("the Act"). The applicant is seeking an order that it be exempted from appointing a social and ethics committee ("SEC"). The applicant is also applying for condonation for the late filing of its application for exemption to appoint a social and ethics committee.
- [2] The applicant is a wholly owned subsidiary of Norilsk Nickel Mauritius. The applicant has four directors and twelve employees. The applicant's only asset in the Republic of South Africa is a 50% undivided share in an unincorporated joint venture known as Nkomati Joint Venture. The joint venture operates the Nkomati Nickel Mine. African Rainbow Minerals Limited ("ARM"), a public company listed on the JSE, holds the remaining 50% shares in Nkomati Joint Venture.
- [3] The applicant has calculated its Public Interest Score ("PIS") and found that it falls within categories of companies that are required in terms of section 72 of the Act to appoint an SEC. According to the applicant, ARM is having an SEC which already performs the necessary functions required in terms of Regulation 43(5) of the Companies Regulations, 2011 ("the Regulation"), in respect of the Nkomati Mine.

- [4] The applicant is therefore of the view that as Nkomati Mine is being operated by both of them and ARM in terms of the Nkomati Joint Venture, it is not reasonably necessary, nor would it be in the public interest to require them to have an SEC in respect of Nkomati Mine, having regard to the nature and extent of their activities.
- [5] The applicant submit that ARM SEC comprises of three non-executive directors who meet four times in a year. The applicant further submit that the responsibilities of ARM SEC are:-
- 5.1. Monitoring activities having regard to relevant legislation and other legal requirements and codes of best practice;
 - 5.2. Drawing relevant matters to the attention of the Board of Directors of ARM;
 - 5.3. Reporting to the ARM shareholders at each annual general meeting;
 - 5.4. Social and economic development;
 - 5.5. Good corporate citizenship;
 - 5.6. The environment, health and public safety;
 - 5.7. Consumer relationship; and
 - 5.8. Labour and employment.
- [6] The applicant contend that they contribute directly to the SEC of ARM at Nkomati Mine by virtue of their sharing arrangements in terms of the Partnership Agreement. The applicant contend further that the establishment of a separate SEC in respect of Nkomati Mine by them would not only be superfluous, but might result in the duplication and conflict of the duties required to be performed by the SEC giving rise to disputes and the like.

- [7] With regard to their condonation application, the applicant is stating that their shareholders resolved during 2013 to dispose its entire equity interest, and as a result of that they did not deem it necessary to approach the Tribunal and apply for an exemption. The applicant further submit that in process there were some complications and delays which resulted them in eventually losing sight and inadvertently overlooking compliance with the provisions of section 72(5) of the Act. At that stage their primary focus was on the disposal of its entire equity interest.
- [8] In terms of Regulation 147, any party to any matter may apply to the Tribunal to condone late filing of a document. In an application for condonation, the test is whether the delay is unreasonable and, if so, whether the delay should be condoned. Factors to be considered in determining whether the delay is unreasonable are degree of lateness, explanation for the delay, prospects of success and prejudice to the parties.
- [9] The applicant has been aware that they are required to apply for an exemption since 2013. In my view the delay is excessive. However, even though the delay is excessive, the explanation for the delay is adequate. The applicant is having good prospects of success in their main application. There is no other party that will be prejudiced by the late submission of the applicant's application.
- [10] Under the circumstances, in my view, the applicant has shown good grounds why condonation for late filing of their application should be granted.
- [11] In terms of section 72(5)(b) of the Act, the Tribunal may grant an exemption once it is satisfied that it is not reasonably necessary in the public interest to require the Company to have an SEC, having regard to the nature and extend of the activities of the company.
- [12] The applicant has made statements supported by documentary evidence of the nature of their business, how their relationship with ARM is been regulated, the existence of ARM SEC and its responsibilities. I agree with the applicant that it

will be superfluous to expect them to establish a separate SEC taking into consideration their relation with ARM. I am therefore satisfied that the applicant has satisfied the provision of section 72(5)(b) of the Act, and it is therefore not reasonably necessary in the public interest to require them to establish its own SEC separate from that of ARM.

[13] In the result I make the following order:-

13.1. The applicant's application for condonation for late filing of their application is granted.

13.2. The applicant is granted exemption in terms of section 72(5)(b) of the Act for a period of five years from the date of this order from the requirement to appoint a social and ethics committee.

Dated at POLOKWANE on this 21st day of AUGUST 2015.

M.F KGANYAGO

MEMBER OF THE COMPANIES TRIBUNAL