



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT001MAY2017

In ex parte application of:

Macquarie Securities South Africa Limited

APPLICANT

(Registration Number: 2006/023546/06)

Issue for consideration: Ex-parte application for an exemption from the requirement to appoint a social and ethics committee.

Coram: Lindelani Daniel Sikhitha

Decision handed down on 10 July 2017

DECISION (Reasons and Order)

INTRODUCTION

- [1] The Applicant is Macquarie Securities South Africa Ltd, which is a listed public company duly formed and incorporated in terms of the Company Laws of the Republic of South Africa and with its registered office situated at The District Sir Lowry, Level 6, Woodstock Sir Lowry, Western Cape, 7925.
- [2] The Applicant has a public interest score of 3 721 based on its annual financial statements for 2016, which public interest score is in excess of 500 points, and

the Applicant is therefore required to appoint a Social and Ethics Committee (“an SEC”) unless if the Applicant is exempted from doing so in terms of either of the grounds provided for in Regulation 43 of the Companies Regulations, 2011 (“the Regulations”).

- [3] This is an *ex parte* application in terms of section 72(5) and 72(6) of the Companies Act, 2008 (Act No. 71 of 2008) (“the Act”) for an exemption from the requirement to appoint an SEC. The current Application was filed with the Companies Tribunal on the 2nd day of May 2017 at about 14h20.

APPLICABLE LAW

- [4] Section 72(4) empowers the Minister of Trade and Industry (“the Minister”) to prescribe, by way of Regulations, those companies which shall be required to appoint an SEC. The Minister did indeed make Companies Regulations, 2011 (“the Regulations”) in terms of 223 of the Act.
- [5] Regulation 43 of the Regulations states that it applies to every state owned company, every listed public company, and any other company that has, in any two of the previous five years, scored above 500 points in terms of Regulation 26(2) of the Regulations, or would have so scored if the Act had been in effect at that time.
- [6] Regulations 43(2) of the Regulations provides that a company to which Regulation 43 applies must appoint an SEC unless if the company in question:
- 6.1 is a subsidiary of another company that already has an SEC, and an SEC of that other company will perform the functions required by

Regulation 43 of the Regulations on behalf of that subsidiary company;
or

6.2 has been exempted by the Companies Tribunal in accordance with
section 72 (5) and (6) of the Act.

[7] In terms of section 72(5) a company that falls within a category of companies
that are required in terms of section 72(4) and Regulation 43 to appoint an SEC
may apply to the Companies Tribunal in the prescribed manner and form for an
exemption from that requirement, and the Companies Tribunal may grant such
an exemption if it is satisfied that:

7.1 the company in question 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 an SEC in terms of section 72 and Regulation 43 of the Regulations¹;
or

7.2 it is not reasonably necessary in the public interest to require the
company to have an SEC, having regard to the nature and extent of the
activities of the company².

[8] In terms of Paragraph 7 of the Supporting Affidavit deposed to by one Graham
Alexander Crawford (“the Supporting Affidavit”), the current Application for
exemption from the requirement to appoint an SEC is being made in terms of
section 72(5)(b) of the Act.

¹ Refer to section 72(5)(a) of the Act.

² Refer to section 72(5)(b) of the Act.

- [9] As already indicated in 7.2 above, section 72(5)(b) provides that an exemption from the requirement to appoint a SEC may be granted on the basis that it is not reasonably necessary in the public interest for a company to appoint a Social and Ethics Committee having regard to the nature and extent of the activities within the Applicant company.
- [10] In the alternative and in Paragraph 8 of the Supporting Affidavit, the current Application for exemption from the requirement to appoint an SEC is being made in terms of section 72(5)(a) of the Act.
- [11] As already indicated in 7.1 above, section 72(5)(a) provides that an exemption from the requirement to appoint an SEC may be granted on the basis that 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.
- [12] In terms of Regulation 142(1) of the Regulations, a person may apply to the Companies Tribunal for an order in respect of any matter contemplated by the Act, or the Regulations by completing and filing with the Companies Tribunal's recording officer:
- 12.1 an Application in Form CTR 142; and
 - 12.2 a supporting affidavit setting out the facts on which the application is based.
- [13] The current Application was submitted by the Applicant to the Companies Tribunal in Form CTR 142 and the Applicant is seeking an exemption on the following basis:

- 13.1 it is not reasonably necessary in the public interest for it to appoint an SEC, having regard to the nature and extent of its activities, particularly in relation to the functions of an SEC as set out in Regulation 43(5); or
- 13.2 another formal mechanism within its structures substantially performs the functions of a social and ethics committee, as set out in detail in the affidavit attached thereto.

[14] Form CTR 142 was duly signed on behalf of the Applicant by Graham Alexander Crawford ("Crawford"), who is a director of the Applicant. In addition, the Application is supported by an affidavit deposed to by Crawford. It is clear for the documents filed with the Companies Tribunal that Crawford had been duly authorized to depose of the supporting affidavit and to launch the current Application for and on behalf of the Applicant in terms of the resolution of the board of directors which is annexed to the supporting affidavit and marked Annexure "A".

[15] I am therefore satisfied that the current Application complies with the requirements set out in Regulation 142(1) of the Regulations.

EVALUATION AND FINDINGS

[16] The Application lacked certain critical information and the Companies Tribunal, through a letter from Mr. Selby Magwasha ("Mr. Magwasha") dated 16 May 2017 requested the information required. I should point out at this stage that the letter was written by Mr. Magwasha on my instructions and after having pointed out to him the information which lacking and which should be requested from the Applicant.

[17] Be that as it may, the information requested from the Applicant in terms of the aforementioned letter read as follows:

“2. Upon perusal of the aforementioned Application for Relief, we noted that there is certain important information that is missing and you are hereby requested to provide same within five (5) days from date of dispatch of this letter. The information that is required from you is listed hereunder:

- 2.1 In paragraph 14 of the Supporting Affidavit, the deponent suggests that Macquarie Securities South Africa Limited was converted into a limited liability public company on 26 September 2013, exclusively in order to list its R10 000 000 000 (ten billion rand) Programme. Kindly advice us as to when exactly did Macquarie Securities South Africa Limited became listed on the interest rate market of the JSE?***
- 2.2 If the listing on the JSE occurred during 2013, kindly provide us with specific reasons as to why Macquarie Securities South Africa Limited did not either establish a social and ethics committee and/or apply for exemption for failure to establish a social and ethics committee within a period of one year from the date it first became a listed public company in compliance with Regulation 43(3)(b)(ii) of the Companies Act 2008 Regulations.***
- 2.3 In paragraphs 18, 19 and 20 of the Supporting Affidavit, the deponent suggests that RMG identifies, quantifies and assesses all material risks and sets prudential limits for the whole Macquarie Group. You are hereby requested to provide us with all the relevant information and documents which records the manner in which the RMG operates in relation to social and ethics committee related portfolio for the Macquarie Securities South Africa Limited. In other words, you are required to explain and/or demonstrate how***

Macquarie Securities South Africa Limited 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 72(5)(a) and the regulations. The documents submitted do not deal and/or outline this aspect in detail and we are therefore not able to fully assess and/or determine the merits of Macquarie Securities South Africa Limited's application based on this aspect.

2.4 *You are requested to demonstrate and/or explain the nature and extent of the activities of Macquarie Securities South Africa Limited which make it not to be reasonably necessary in the public interest to require the company to have a social and ethics committee. The documents which have been submitted do not outline this aspect in detail and we are therefore not able to fully assess and/or determine the merits of Macquarie Securities South Africa Limited's application based on this aspect.*

2.5 *Kindly provide us with documentary proof to the effect that Macquarie Securities South Africa Limited does have a formal mechanism within its structures that substantially performs the functions of the social and ethics committee as set out in Regulation 43(5) of the Companies Act 2008 Regulations. The information requested here should be packaged in line with the allegations contained in paragraphs 26 to 29 of the Supporting Affidavit.” [Own emphasis added].*

[18] Consequently and in order to provide the information requested from it, the Applicant, through Crawford, submitted a Supplementary Affidavit dated 26th day of May 2017.

- [19] It is stated that the Applicant was incorporated as a limited liability private company in South Africa in 2006. The Applicant was converted to a public company on 26 September 2013.³
- [20] The Applicant currently has an SEC in compliance with its obligations under the Act and a copy of the charter of the SEC has been attached to the Supplementary Affidavit and marked Annexure “C”. The real reasons for the current Application is therefore to seek exemption from having an SEC going forward for the reasons set out in the Application.⁴
- [21] It is stated in the Supplementary Affidavit that the Applicant is directly and wholly-owned by Macquarie EMG Holdings Proprietary Limited (“MEH”), which is a limited liability company in the Commonwealth of Australia having its principal place of business in Sydney, Australia. MEH is in turn indirectly and wholly owned by Macquarie Group Limited (“MGL”), which is listed on the Australian Securities Exchange Limited (“ASX”). MGL and its various subsidiaries across the world are referred to as the “Macquarie Group”.⁵
- [22] It is further stated in the Supplementary Affidavit that the Applicant is a subsidiary of MEH and MEH in turn is a subsidiary of MGL. In terms of section 1 of the Act, the term “subsidiary” is defined to have a meaning determined in accordance with section 3 of the Act. Section 3(1) of the Act is most relevant for current purpose and the relevant parts read as follows:

“(1) A company is-

³ Refer to Supplementary Affidavit deposed to by Crawford on the 26th day of May 2017 (“the Supplementary Affidavit”)

⁴ Refer to Paragraph 5 of the Supplementary Affidavit.

⁵ Refer to Paragraph 7 of the Supplementary Affidavit.

- (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)."

[Own emphasis added].

[23] The term "juristic person" is defined in section 1 of the Act and it means the following:

"juristic person" includes-

- (a) a foreign company; and
- (b) a trust, irrespective of whether or not it was established within or outside the Republic..." [Own emphasis added].

[24] The term “foreign company” is also defined in section 1 of the Act and it means the following:

“foreign company” means an entity incorporated outside the Republic, irrespective of whether it is-

(a) a profit, or non-profit, entity; or

(b) carrying on business or non-profit activities, as the case may be, within the Republic....”

[25] I am therefore satisfied that the Applicant is a subsidiary of MEH which is considered to be a foreign company in terms of the Act. MEH is currently registered in the Commonwealth of Australia and it has its principal place of business in Sydney, Australia. As already indicated, MEH is in turn indirectly and wholly owned by MGL, which is listed on the ASX. MGL and its various subsidiaries across the world are referred to as the “Macquarie Group”

[26] Regulation 43(2)(a) of the Regulations provides that a company which is a subsidiary of another company that has a Social and Ethics Committee and the Social and Ethics Committee of that other company (“the holding company”) will perform the functions required by Regulation 43 on behalf of the subsidiary company.

[27] The Companies Tribunal had already dealt with the interpretation of Regulation 43(2)(a) of the Regulations and found that Regulation 43(2)(a) provides an exclusion rather than an exemption, to qualifying companies who need not apply to the Companies Tribunal for an exemption. It follows therefore that Regulation 43(2)(a) does not *per se* deal with the granting of exemptions, but rather indicate which companies are excluded from the requirement

to apply for an exemption to appoint an SEC. Therefore, where a company relies on the provisions of Regulation 43(2)(a) of the Regulations, it need not make any application for exemption to the Companies Tribunal.⁶

[28] However, the Applicant's holding company, namely MEH is not registered as a company in South Africa. It is for that reason therefore not considered a company in terms of the Act. It is however considered a foreign company in terms of the Act. Therefore, the exclusion is not available to the Applicant. The Applicant is clearly aware of this, hence it had already appointed an SEC.

[29] In terms of Regulation 43(5) of the Regulations, an SEC of a company should be appointed for purposes of serving functions which can be grouped into three categories:

29.1 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:-

29.1.1 Social and economic development, including the company's standing in terms of the goals and purposes of: -

29.1.1.1 The 10 principles set out in the United Nations Global Company Principles;

29.1.1.2 The OECD recommendations regarding corruption (refer to the Organisation for Economic Co-operation and Development (OECD) website

⁶ Refer to Ex parte: Choppies Warehousing Service (Pty) Ltd In re: Application for an exemption from the requirement to appoint a social and ethics committee (CT019Mar2016) [2016] COMPTRI 42 (14 April 2016) at Para (7) and Ex parte: Choppies Supermarkets South Africa (Pty) Ltd; In re: Application for an exemption from the requirement to appoint a social and ethics committee (CT018Mar2016) [2016] COMPTRI 43 (14 April 2016) at Paras (5) to (6).

for further details (www.oecd.org));

29.1.1.3 The Employment Equity Act, No 55 of 1998; and

29.1.1.4 The Broad-Based Black Economic Empowerment Act, No 53 of 2003;

29.1.2 Good corporate citizenship, including the company's:-

29.1.2.1 Promotion of equality, prevention of unfair discrimination and measures to address corruption;

29.1.2.2 Contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and

29.1.2.3 Record of sponsorship, donations and charitable giving;

29.1.3 The environment, health and public safety, including the impact of the company's activities and of its products or services;

29.1.4 Consumer relationships, including the company's policies and record relating to advertising, public relations and compliance with consumer protection laws; and

29.1.5 Labour and employment, including:-

29.1.5.1 The company's standing in terms of the International Labour Organization Protocol on decent work and working conditions; and

29.1.5.2 The company's employment relationships, and its contribution toward the educational development

of its employees;

29.2 To draw matters within its mandate to the attention of the Board as occasion requires; and

29.3 To report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate.

[30] As outlined in Regulation 43(5) of the Regulations, the role of the SEC is therefore in the main to look into compliance on social and ethics issues including triple bottom reporting, economic, social and environmental sustainability as provided for in the United Nations Global Reporting Initiatives, decent work, procurement, transformational goals, human rights, labour standards, anticorruption and all issues falling within its mandate. They bring these issues to the attention of the board and also report in the shareholders meeting if required.

[31] In my view, SECs are important not only to protect the communities and the environment where companies operate but for the protection of shareholders' interests as well. Any negative news relating to social and ethics have a serious economic impact for the company and the country in general.

[32] As we may all know, companies that are required to have SECs are public companies, state owned companies, companies that have in any two or previous five years scored above 500 points in terms of the Regulations. I am therefore enjoined to consider the functions of the SEC as provided for in Regulation 43(5) of the Regulations when dealing with this current Application.

Exemption based on section 72(5)(a) of the Act (based on some form of formal mechanism within its structures that substantially performs the functions that would otherwise be performed by a Social and Ethics Committee)

[33] The Applicant is, as an alternative to its main ground of bringing the current Application, applying for exemption from the requirement to appoint a an SEC in terms of section 72(5)(a) of the Act. Section 72(5)(a) provides that the Companies Tribunal may grant an exemption on the basis that 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 an SEC in terms of section 72 of the Act read with Regulation 43 of the Regulations.

[34] On 26 September 2013 the Applicant was converted to a public company and it immediately established an SEC. Its SEC was established on 28 March 2014 in terms of section 72(4) of the Act read with Regulation 43 of the Regulations.⁷ The main purpose and objectives of the Applicant's SEC are to monitor the Applicant's activities, having regard to the relevant legislation, legal requirements and codes of best practice, with regard to matters relating to:

34.1 Social and economic development, including the company's standing in terms of the goals and purposes of:-

34.1.1 the 10 principles set out in the United Global Compact Principles; and

34.1.2 the OECD recommendations regarding corruption;

⁷ Refer to Paragraphs 4 to 5 of the Supporting Affidavit.

- 34.1.3 the Employment Equity Act; and
- 34.1.4 the Broad-Based Black Economic Empowerment Act;
- 34.2 Good corporate citizenship, including the company's:-
 - 34.2.1 promotion of equality, prevention of unfair discrimination, and reduction of corruption;
 - 34.2.2 contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and
 - 34.2.3 record of sponsorship, donations and charitable giving.
- 34.3 The environment, health and public safety, including the impact of the Applicant's activities and its products or services;
- 34.4 Consumer relationships, including the Applicant's advertising, public relations and compliance with consumer protection laws; and
- 34.5 Labour and employment, including:-
 - 34.5.1 the Applicant's standing in terms of the international Labour Organization Protocol on decent work and working conditions; and
 - 34.5.2 the Applicant's employment relationships, and its contribution toward the educational development of its employees.

[35] One of the critical functions of an SEC of the Applicant is to monitor the company's activities, having regard to the relevant legislation, other legal requirements or prevailing codes of best practice, with regard to a number of

issues. In this regard, it is submitted on behalf of the Applicant that the Applicant and all entities within the Macquarie Group are aware that risk forms an integral part of their respective businesses. The main risks faced by the Applicant and the Macquarie Group include market risk, credit risk, equity risk, liquidity risk, operational risk, compliance risk, foreign exchange risk, and legal and regulatory risk.

[36] As a result of the above, the Macquarie Group has established a Risk Management Group (“the RGM”) to ensure appropriate assessment and management of the aforementioned risks on an on-going basis.⁸

[37] It is stated that RMG is an independent division of the Macquarie Group, reporting directly to the managing director and the board of the ultimate shareholder of the Applicant, namely MGL. The head of RMG is a member of the executive committee of the ultimate shareholder of the Applicant, namely MGL.

[38] It is submitted that RMG’s authority is required for all material risk acceptance decisions with the Macquarie Group. RMG’s further role is to identify, quantify and assess all material risks and sets prudential limits. The risks which the Applicant is exposed to are therefore managed on a globally consolidated basis for MGL and the Macquarie Group as a whole. The Macquarie Group’s internal approach to risk ensures that risks in subsidiaries (including the Applicant) are subjected to the same rigour and risk acceptance decisions.⁹

⁸ Refer to Paragraph 18 of the Supporting Affidavit.

⁹ Refer to Paragraph 19 of the Supporting Affidavit.

[39] It is stated that the Applicant supports its community and engages in good corporate citizenship and has a Community Advisory Committee (“the CAC”). The CAC actively supports Macquarie Group staff in pursuing their own community interests and passions. The CAC comprises 7 (seven) employees who volunteer their services. The CAC is involved in various charitable initiatives, such as the Financial Services Charity Fight Night event which raised funds for Partners for Possibility, a co-action, co-learning partnership between school principals and business leaders.¹⁰

[40] The corporate governance framework in place in Australia and to which the Macquarie Group is subject includes a mix of prescribed and voluntary elements. Broadly, the three key elements include the following:

40.1 legally binding case law and legislative requirements, such as the Corporation Act, 2001 (“Corporation Act”), imposing *inter alia*, law securing personal liability on directors and remuneration reporting requirements;

40.2 the listing rules of the ASX which principally have effect as a contract under law; and

40.3 non-binding guidelines, most notably including the third edition of the ASX Corporate Governance Council’s Principles and Recommendations (“ASX Recommendations”).¹¹

[41] The Macquarie Group’s Corporate Governance Statement (“the Statement”) is attached to the Supplementary Affidavit and marked Annexure “E”. The

¹⁰ Refer to Paragraph 20 of the Supporting Affidavit.

¹¹ Refer to Paragraph 8 of the Supplementary Affidavit.

Statement contains recommendations in the ASX Recommendations which include the following:

- 41.1 laying solid foundations for management and oversight;
- 41.2 structuring the board to add value;
- 41.3 acting ethically and responsibly;
- 41.4 safeguarding integrity in corporate reporting;
- 41.5 making timely and balance disclosures;
- 41.6 respecting the rights of security holders;
- 41.7 recognising and managing risks; and
- 41.8 remunerating fairly and responsibly.¹²

[42] The ASX Recommendations, amongst other things, recommend corporate governance practices for entities listed on the ASX that, in the ASX Corporate Governance Council (“Council”) view, are likely to achieve good governance outcomes and meet the reasonable expectations of most investors in most situations.

[43] It is submitted on behalf of the Applicant that the Applicant as a member of the Macquarie Group, is subject to the ASX Recommendations as an externally managed ASX listed entity. In addition, the RMG should be accepted as the Applicant’s risk committee which fulfils the roles required by the SEC in terms of the Companies Act. The manner in which RMG operates is that RMG

¹² Refer to Paragraph 9 of the Supplementary Affidavit.

identifies, quantifies and assesses all material risks and sets prudential limits for the whole Macquarie Group (including the Applicant).¹³

[44] RMG's functions include credit, prudential, capital and markets, market risk, operational risk, compliance, quantitative applications and internal audit. These functions include compliance with prudential standards, maintaining constructive relationships with regulators and preventing the risk of losses.¹⁴

[45] The Applicant adheres to the United Nations Global Compact and the OECD recommendations through the implementation of an Anti-Bribery and Corruption Policy which incorporates each of the OECD recommendations. Bribery and Corruption are further incompatible with the Applicant's goals and values. The Applicant has adopted and implements a number of policies to manage bribery and corruption specifically, such as-

45.1 Anti-Bribery and Corruption Policy, which contains all of the OECD recommendations;

45.2 Breach, Incident and Escalation Policy;

45.3 Business Donations Support Policy;

45.4 Compliance Training Policy;

45.5 Conflicts of Interest Policy;

45.6 Fraud Policy;

45.7 Gifts and Entertainment Policy;

¹³ Refer to Paragraphs 15 to 19 of the Supplementary Affidavit

¹⁴ Refer to Paragraph 22 of the Supplementary Affidavit.

45.8 Outsourcing and Intra-Group Services Policy;

45.9 Payment Control Policy;

45.10 Political Contributions Policy;

45.11 Initial Macquarie Procurement Policy;

45.12 Record Management Policy;

45.13 Sponsorship Policy;

45.14 Travel and Expenses Policy; and

45.15 Whistleblower Policy.¹⁵

[46] It is submitted on behalf of the Applicant that the policies mentioned above have been adopted by the Applicant in South Africa and also apply business dealings of the entire Macquarie Group. Compliance with the above policies is monitored by the RMG and there are procedures which have been implemented to monitor compliance with applicable business dealings, processes and policies. The aforementioned policies apply to contractors, consultants and non-executive directors of the Macquarie Group. Senior management's support for and commitment to the Applicant's internal controls, ethics and compliance measures to prevent and detect bribery and corruption is evident from its adoption and implementation of the aforementioned policies.¹⁶

[47] It is further submitted on behalf of the Applicant that the Applicant does comply with Employment Equity Act and has a human resources team that is

¹⁵ Refer to Paragraph 26.1.1 of the Supporting Affidavit.

¹⁶ Refer to Paragraph 26.1.1.3 of the Supporting Affidavit and Paragraph 26.1.1 of the Supplementary Affidavit.

responsible for filing of all compulsory legislative reports including but not limited to Employment Equity reports. In addition, the Applicant has engaged an external consulting firm to assist it in keeping up to date and in compliance with the requirements of the Financial Services Charter (“the FSC”) and advises in that regard. The Applicant’s board of directors is responsible for the implementation of various initiatives identified to ensure compliance with the FSC.¹⁷

[48] It is further submitted on behalf of the Applicant that the Applicant is required to comply with the Macquarie Group’s Global Workplace Diversity Policy. This policy defines diversity as a broad range of experiences, skills and views. It recognises that diversity is enhanced through workforce representation across a spectrum of backgrounds. In particular, the Applicant seeks to ensure that differences arising through characteristics such as gender, age, ethnicity, cultural background, physical ability, sexual orientation, gender identity and intersex status will not be a barrier to career success. The business model of the Applicant reflects the high value placed on unique contributions and an understanding of the risks of unchallenged conformity.¹⁸

[49] It is stated that the Applicant supports its community and engages in good corporate citizenship and has the CAC that actively supports Macquarie Group staff pursuing their own community interests and passions. This provides benefits for both staff and community organisations and encourages individual’s involvement at a grass-roots level. The CAC follows the global Macquarie Foundation business donation support policy. The Applicant had previously

¹⁷ Refer to Paragraph 26.1.1.5 of the Supporting Affidavit.

¹⁸ Refer to Paragraph 26.1.2.1 of the Supporting Affidavit.

supported various community initiatives which are fully listed in Paragraph 26.1.2.6 of the Supporting Affidavit.

[50] In terms of the Environment and Health & Safety practices, it is submitted on behalf of the Applicant that in terms of its work health and safety policy the Applicant continues to implement best practice wherever possible. The Applicant's work health and safety policy recognises the value of a safe workplace and the importance of work health and safety as an integral part of its business.

[51] It is stated that the Applicant is committed to the implementation of safe work practices and aims to provide an injury free work place for its entire staff. This commitment, it is further stated, reflects the high standard the Applicant seeks to maintain across the wide range of activities it undertakes in diverse locations across the world.

[52] It is further stated that the Applicant also has an occupational health and safety committee, which monitors and drives occupational health and safety committee standards as set out in the South African legislation.

[53] Regarding environmental issues, it is stated that the Applicant contributes to the environment by ensuring that all confidential waste is shredded and then re-cycled and all kitchen waste is sorted into either garbage or recycling. The Applicant therefore ensures that all suitable material for recycling is collected from the Applicant's designated storage facility.¹⁹

¹⁹ Refer to paragraph 26.1.3 of the Supporting Affidavit.

[54] The Applicant is a member of the JSE and it is also licensed as a “financial services provider” under the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002) (“the FAIS Act”) and is an “authorised user” under the Financial Markets Act, 2012 (Act No. 19 of 2012) (“the FMA”).

[55] It is stated that in accordance with the regulatory requirements imposed by the JSE, the FAIS Act and the FMA the Applicant is compelled to comply with strict rules and standards of conduct prescribed inter alia in respect of customer relations and the fair treatment of customers which also constitutes a central part of the Applicant’s culture and business. To reinforce the principles mentioned above, the Applicant currently has the following policies in place:

55.1 Client Money Policy;

55.2 Complaint Handling Policy;

55.3 Complex Structured Transactions Policy;

55.4 Conflicts of Interest Policy;

55.5 External Communications Policy;

55.6 Fit and Proper Policy;

55.7 Personal Dealing Policy;

55.8 Product Design and Distribution Policy;

55.9 Privacy Policy; and

55.10 Voice Recording Policy.²⁰

²⁰ Refer to Paragraph 26.1.4 of the Supporting Affidavit.

- [56] It is stated in Paragraph 26.1.5 of the Supporting Affidavit that the Applicant is committed to the health and wellbeing of staff as is evidenced by the provision of access to an employee wellbeing programme, and a proactive wellness agenda. As part of promoting health and wellness the Applicant also offers staff short term professional counselling through the employee assistance program. The Human Resources section of the Applicant offers critical incident debriefing after a significant event. The Applicant also offers health club discounts and packaging options, along with a range of localised lifestyle offers to support its employees.²¹
- [57] In terms of Regulation 43(5)(b) of the Regulations, another function of the SEC of a company is to draw matters within its mandate to the attention of the Board as occasion requires it to do so. It is stated that the RMG carries out this function within the Macquarie Group and if occasion requires, the RMG will bring such matters to the attention of the Applicant's board.²²
- [58] In terms of Regulation 43(5)(c) of the Regulations, it is another function of an SEC to report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate. It is stated that the Applicant has only one shareholder, namely MEH. The Applicant is also a member of the JSE and is required to comply with the strict rules and reporting requirements imposed by the JSE as well as in terms of the FAIS Act and the FMA.
- [59] After considering what have been submitted on behalf of the Applicant as fully outlined above, I am therefore satisfied that the Applicant had made out a good

²¹ Refer to Paragraph 26.1.5 of the Supporting Affidavit.

²² Refer to Paragraph 26.2 of the Supporting Affidavit.

case qualifying it for an exemption from appointing an SEC in terms of section 72(5)(a) of the Act.

Exemption based on section 72(5)(b) of the Act (based on public interest considerations)

[60] The current Application for exemption from the requirement to appoint a SEC is also brought in terms of section 72(5)(b) of the Act. This section provides that an exemption may be granted on the basis that it is not reasonably necessary in the public interest for a company to appoint an SEC having regard to the nature and extent of the activities within the Applicant.

[61] The Applicant's primary offering comprises the provision of equity derivative products over South Africa listed equity securities. In the ordinary course of its business the Applicant also makes principal investments into listed and unlisted debt and equity securities. The Applicant further offers a range of trading and risk management solutions and specialised investment strategies to institutional and corporate clients and intermediaries.²³

[62] The Applicant established a R5,000,000,000 (five billion rand) debt instrument programme ("the Programme") during 2012 and during 2013 the Programme amount was increased from R5,000,000,000 (five billion rand) to R10,000,000,000 (ten billion rand). On 26 September 2013, the Applicant was converted to a limited liability public company, exclusively in order to list its R10,000,000,000 (ten billion rand) Programme on the interest rate market of the JSE. The JSE listing requirements defines a company as a "listed

²³ Refer to Paragraph 12 of the Supporting Affidavit.

company” if any class of such company's securities are listed and the Applicant can therefore be categorised as a listed public company.²⁴

[63] The minimum denomination of each of the instruments issued by the Applicant under the Programme, is R1,000,000 (one million rand). The consolidated amended and updated programme memorandum dated 8 September 2016, which was approved by the JSE, specifically stated that the instruments under the Programme may not be a suitable investment for all investors and that investors in the instruments should have sufficient knowledge and experience in financial and business matters to meaningfully evaluate the merits and risks of investing in a particular issue of instruments and the information contained in or incorporated by reference into the Programme memorandum.²⁵

[64] It is clear from the papers filed that the Applicant was originally incorporated as a private company, and was only converted to a public company for purposes of the Programme and for purposes of listing the debt instruments on the interest rate market of the JSE. It is stated that the holders of the debt instruments are all sophisticated institutional and corporates investors.²⁶ There are on average only approximately 11 (eleven) holders of debt instruments under the Programme at any given time and as at 15 March 2017, the Applicant had 29 employees.²⁷

[65] The public interest score of the Applicant is currently 3 721 (three thousand seven hundred and twenty one) with reference to the Applicant's 2016 annual financial statements, as a result of its high turnover and its third party liability.

²⁴ Refer to Paragraphs 13 to 14 of the Supporting Affidavit.

²⁵ Refer to Paragraph 15 of the Supporting Affidavit.

²⁶ Refer to Paragraph 27 of the Supporting Affidavit

²⁷ Refer to Paragraphs 16 to 17 of the Supporting Affidavit.

It is stated that the high public interest score is mainly attributable to the Applicant's high turnover and its high third party liability. The staff complement of the Applicant is only 29 (twenty nine) and therefore this is not a significant contributing factor to the Applicant's high public interest score.

[66] It is further stated that the Applicant has only one ordinary shareholder, namely MEH which is in turn an indirectly and wholly subsidiary of MGL. MEH and the Applicant are part of the Macquarie Group.

[67] Based on the nature and extent of the activities of the Applicant, it is therefore clear that the Macquarie Group does have a number of institutions that perform the functions that would otherwise be performed by an SEC in terms of the Act and the Regulations. In addition, the range of the trading and risk management solutions and specialised investment strategies offered by the Applicant are offered to only approximately 11 (eleven) institutional and corporate clients and intermediaries at any given time and not targeted to the general public.

[68] After considering what have been submitted on behalf of the Applicant as fully outlined above, I am therefore satisfied that the Applicant had made out a good case qualifying it for an exemption from appointing an SEC in terms of section 72(5)(b) of the Act.

[69] Based on the aforesaid, I am therefore convinced that the current Application should be granted in terms of both section 72(5)(a) and section 72(5)(b) of the Act.

ORDER

[70] Therefore, based on the aforesaid, I make the following order:

70.1 the Application for an exemption from the requirement to appoint a Social and Ethics Committee is hereby granted;

70.2 the exemption granted in terms of 70.1 above is valid for a period of five (5) years from the date of this order.

LINDELANI DANIEL SIKHITHA

Member of the Companies Tribunal

10 July 2017