



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA
(“The Tribunal”)

CASE NO: CT020 AUG 2015

**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:

KEEROMSTRAAT 30 BELEGGINGS (RF) BEPERK

(1995/139145/06)

THE APPLICANT

Coram K. Tootla

Decision delivered on 18 October 2015

DECISION

INTRODUCTION:

- [1] The applicant applies to the Companies Tribunal in terms of Sections 72 (5) and 72 (6) of the Companies Act 71 of 2008 (“Act”) and the regulations in terms of the Companies Act (Govt. Gazette No. 351 of 265 April 2011) (“Regulation/s” or Reg/s) for an exemption from appointing a Social and Ethics Committee (“SEC”).

BACKGROUND:

- [2] The applicant states in its founding affidavit that it is a dormant investment –holding company which holds shares in Naspers Ltd; it does not trade in shares or conduct any trading activity; and that it has no employees nor does it occupy any premises.
- [3] However, according to clause 2 of the Memorandum of Incorporation drafted in July 2012 the applicant was incorporated and registered as a public company, whose purpose is to act as a control structure to ensure the continued independent control of Naspers Group and all its stakeholders; to expand its businesses locally and internationally for the benefit of all stakeholders.
- [4] Applicant contends that it is required to appoint a SEC in terms of regulation 43 (1) due to the fact that its public interest score (“PIS”) calculated in terms of Regulation 26 is alleged to be more than 500 points. However, the Applicant has not deemed it fit to calculate the actual PIS. This is a crucial defect in the application. There is no indication of the total number of beneficial interest holders.
- [5] The Act and Regulations require the Applicant firstly to calculate the PIS and thereafter to explain why an exemption to establish an SEC is being requested.
- [6] According to form CoR 15.2 submitted by the applicant, it is a ring-fenced (RF) company and it has 10 directors. Note that based on Section 11 (3) (b) of the Companies Act, the mere restriction of activities does not make a company a “RF” company. However, nothing turns on this for the purposes of this decision.

- [7] Despite this, the Tribunal examines the requirements of the Act and the Regulations with regard to an exemption to establish a SEC to enable the Applicant to obtain a proper understanding of the Law.

APPLICABLE LAW:

- [8] 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.”

[9] 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.

[10] 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.”

[11] 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)).

[12] 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:

[13] The requirements in respect of the appointment of the SEC and the discretion of the Tribunal in this regard are therefore twofold. In the first instance it must be determined if the company is required to appoint a SEC. If this is not the case (viz. because of reg 43 (2) (a)), then the Tribunal has no function or discretion.

If a SEC needs to be appointed, the only discretion (my underlining) that the Tribunal has, is in terms of section 72 (5), i.e.

13.1 does *another Act* require a formal mechanism that substantially performs the function that would otherwise be performed by the SEC ?, or,

13.2 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?

[14] Thus it is clear from section 72(5) read with regulation 43(2)(b) that the Tribunal has discretion to exempt a company from appointing a SEC where it is satisfied that the company already has a formal mechanism within its structures that substantially performs the function of a SEC in terms of a legislative responsibility. This is not applicable in this application.

[15] Hence, the only discretion that the Tribunal then has, is as set out in para 13.2 above. In exercising its discretion in this respect the role and functions of the SEC and the matters that must be monitored as detailed in Reg 43 (2) must be taken into account. The activities that need to be evaluated to decide whether it is in the public interest, given the *nature* and *extent* of the activities, to grant an exemption from appointment of a SEC are those in respect of the calculation of the PIS, as those activities also determine whether a SEC must be appointed as set out above.

[16] The Tribunal must apply its mind, based on the nature and extent of the activities of the applicant. The nature of the applicant's business is not very clear from the supporting affidavit as opposed to the Memorandum of Incorporation of the applicant, nor is there any evidence (my underlining) about the extent of the activities.

- [17] Despite the Applicant stating in the founding affidavit of Ms. Kisbey-Green that the PIS exceeds 500, there is no indication how the PIS was calculated which is what is required in terms of Regulation 26. There are various beneficial shareholders (unknown number), resulting in the PIS being determined by this beneficial interest.
- [18] The question has to be asked that even though the Applicant does not trade in shares or conduct any trading activity does it still have to comply with Section 28 and Reg 28 .?
- [19] The fact that the Applicant indicates that it is an investment-holding company that holds shares in Naspers Limited also raises a number of further questions. Does the Applicant earn any dividends from the investment in Naspers or pay any taxes on those dividends itself or other income? Does it charge administrative fees? Does it have an income and expenditure statement? Do the directors receive remuneration for their services and why would the Board consist of so many directors if there was no business at hand?

No information has been provided with regard thereto and hence the Tribunal cannot arrive at the conclusion that it is 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.

- [20] The fact that the company is a “RF” company is also not decisive in determining whether a SEC must be appointed or not. Even if the company was a proper “RF” company in terms of Section 11(3) of the Act, the MOI reflects that it merely restricts the capacity of the company, and this in itself may or may not be significant in respect of the nature of the activities. However, in this instance, it has no effect in respect of the extent of its activities.

FINDING :

- [21] With due respect the Applicant’s application is defective in that it has firstly not calculated the PIS nor has it applied its mind to the nature and extent of its activities which would have assisted in the consideration of this application.

[22] The Application simply belabors the point of the restrictive nature of its activities but does not go through an exercise to determine the PIS; nor thereafter to explain the nature and extent of its activities.

This and also the fact that the Applicant does not examine its activities within the context of all the items in terms of Reg 43 (5) (a)(i)- (v) (not just one or two items); and whether these factors impacts the public interest and whether for that reason/s a SEC is or is not required for the Applicant.

[23] Thus it would be expected that the Applicant justify why it is not in the public interest to require the Applicant to establish a SEC which it has not been done.

[24] The extent of the activities of the Applicant makes it *prima facie* in the public interest to appoint a SEC, unless the nature of the activities indicate to the contrary.

[25] In addition, without sufficient evidence as to the extent (my underlining) of these activities of the applicant, the Tribunal cannot apply its mind and exercise a proper discretion.

ORDER:

[26] In the circumstances, the application for an order for the exemption from the requirement to appoint the SEC is refused.

KHATIJA TOOTLA

Member of the Companies Tribunal

18 October 2015