



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

**(“The Tribunal”)**

**CASE NO: CT006JAN2016**

**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:**

**THE THEKWINI FUND 13 (RF) (PTY) LTD**

**(2014/06933/06)**

**THE APPLICANT**

**Coram K. Tootla**

**Decision delivered on 3 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 private company and its main business entails acquiring the rights, title and interest in and to residential property loan agreements; and the related security with regard to such agreements pursuant to a securitization scheme.
- [4] According to the applicant it states that it is required to appoint a SEC in terms of Section 72 but it does not mention that its public interest score ("PIS") in terms of regulation 26 (2) exceeds 500, nor does it illustrate the manner in which the score is calculated.
- [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 (as cited in the CTR FORM 142) 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 Thekwini Fund 13 (RF) is part of this group). However, this conflicts with the letter by K.L. Penwarden which states that the SEC has been established by SAHL and that the application for exemption has been made as the Applicant has no employees and a narrow social compact. 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).
- [7] For the purpose of this application the affidavit attested to by the Company Secretary together with Form CTR 142 will be considered as the proper basis of the application and that affidavit clearly states that no SEC has been established by the holding company SAHL.
- [8] The nature and extent of the activities have also not been set out, save for the fact that the Memorandum of Incorporation has been attached to the Application.

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) (b).

- [9] 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 it and the SAHL are companies registered in terms of the Act. For these reasons the Applicant seems to imply that it is not reasonably necessary nor in the public interest to require the Applicant to establish a SEC.
- [10] In addition the application for exemption is also requested based on the fact that the Holding company SAHL will establish a SEC and that this would suffice for the Applicant and the Group as set out above.

**APPLICABLE LAW:**

- [11] 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.”

[12] 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.**

[13] 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."

[14] 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)).

[15] A company that falls outside the categories above, or one that falls within those categories but which is a subsidiary of another company (as defined in section 3 of the Companies Act), and the holding company has a SEC that will perform the functions of the SEC for the (subsidiary) company, a SEC need not be appointed (Reg 43 (2) (a)). This follows automatically.

[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.
- [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 and 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.
- [23] 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.

## **FINDING:**

- [24] In applying its mind to this Application, the Tribunal notes firstly that the Applicant does 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.
- [25] The Application also fails on the ground that the holding company SAHL will have a Social and Ethics Company and for that reason it should be exempted from forming an SEC. It is clear that the Applicant has incorrectly made a blanket application on behalf of the group of S.A. Home Loans without stating under oath exactly which companies are part of the group (no diagram illustrating the contents of the group and that of the holding company SAHL).
- [26] Thus it is clear that the Applicant does not currently 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 Section 75 (2)(a) of the Act” currently.
- [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 is necessary.



**ORDER:**

[28] The application for an exemption in respect of the appointment of a SEC is hereby refused as the SAHL does not currently have a Social and Ethics Committee and the automatic exemption does not apply nor does the exemption in terms of Section 72(5)(b) apply.

*k.y. tootla (electronically signed)*

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**KHATIJA TOOTLA**

**Member of the Tribunal**

**3 February 2016**