



**COMPANIES TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

CASE NO: CT013SEP2018

In the *ex parte* application

ELLERINE BROS PROPRIETARY LIMITED

(Registration number: 1960/001074/07)

Applicant

in respect of:

**AN APPLICATION FOR AN EXEMPTION FROM THE REQUIREMENT TO
APPOINT SOCIAL AND ETHICS COMMITTEE.**

Decision handed down on 28 SEPTEMBER 2018

DECISION

INTRODUCTION

[1] The Applicant applies to the Companies Tribunal (“the Tribunal”) for an exemption from the requirement to appoint a social and ethics committee in terms of section 72 (5) (a) of the Companies Act No. 71 of 2008 (“the Act”).

BACKGROUND

[2] The Applicant is ELLERINE BROS PROPRIETARY LIMITED a private company with limited liability duly incorporated in terms of the Act, as amended.

[3] The Applicant seeks the following relief:

“Exemption from the formation of a Social and Ethics Committee”

APPLICABLE LAW

[4] Before I deal with the relief sought, I wish to highlight what I believe to be the relevant applicable Section and Regulation of the Act.

Section 72 (5) (a) of the Act: Board Committees

[5] Section 72 (5) (a) reads as follows:

“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.”*

[Note my underling and emphasis]

Regulation 43 of the Act: Board Committees

[6] Regulation 43 reads as follows:

“ (1) *This regulation applies to*

(a) *every state-owned company;*

(b) *every listed public company; and*

(c) *any other company that has in any two of the previous five years, scored above 500 points in terms of regulation 26(2).*

(2) *A company to which this regulation applies must appoint a social and ethics committee unless -*

(a) *it is a subsidiary of another company that has a social and ethics committee, and the social and ethics committee of that other company will perform the functions required by this regulation on behalf of that subsidiary company; or*

- (b) *it has been exempted by the Tribunal in accordance with section 72 (5) and (6).*
- (3) *A board of a company that is required to have a social and ethics committee, and that -*

 - (a) *exists on the effective date, must appoint the first members of the committee within 12 months after*

 - (i) *the effective date; or*
 - (ii) *the determination by the Tribunal of the company's application, if any, if the Tribunal has not granted the company an exemption;*
 - (b) *is incorporated on or after the effective date, must constitute a social and ethics committee and appoint its first members within one year after*

 - (i) *its date of incorporation, in the case of a state-owned company;*
 - (ii) *the date it first became a listed public company, in such a case;*

or
 - (iii) *the date it first met the criteria set out in sub-regulation (1) (c), in any other case.*

[Note my underling and emphasis]

- (4) *A company's social and ethics committee must comprise not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day*

management of the company's business, and must not have been so involved within the previous three financial years.

- (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.”*

EVALUATION

- [7] The Applicant is a private company with its registered address at No. 51 West Street, Houghton, Gauteng Province.
- [8] The Deponent to the Applicant's papers is Eric Ellerine, who avers that he is a director of the Applicant, however does not confirm in his affidavit

whether he has been authorised by the Applicant to depose to his affidavit and to represent it in these proceedings. However, a copy of a resolution of the board of directors of the Applicant is attached. The Deponent to the Applicant's affidavit in paragraphs 1, 2 and 3 states that:

- "1. The company must apply for exemption from the formation of a Social and Ethics Committee*
- 2. The company has a total of 6 employees, one of which is a director.*
- 3. The Public Interest Score for the financial years ended 30 June 2017 and 30 June 2016 were above 500 points. Included is the calculation for the Public Interest Score were dividends received from group companies due to a group restructure. These dividends are considered to be extra-ordinary items and not in the normal course of business. Removal of these dividends from the Public Interest Score calculation would cause the Public Interest Score to be below 500 points. The Public Interest Score in general is not above 500 points.*

[9] The application is based on section 72 (5) of the Act read together with Regulation 43 of the Companies Regulations, 2001.

[10] The main question to be asked, in dealing with what the Tribunal is required to decide on, is whether the reasons submitted by the Applicant, justify an order in terms of Section 72 (5) of the Act.

FINDING

- [11] The relief sought by the Applicant is for an order for exemption to appoint a social and ethics committee.
- [12] Regulation 43 (2) (a) provides that a company to which this regulation applied must appoint a social and ethics committee unless it is a subsidiary of another company that has a social and ethics committee, and the social and ethics committee of that company will perform the functions required by this regulation on behalf of that subsidiary company.
- [13] Further, Regulation 43 (2) (b) provides that a company to which this regulation applies must appoint a social and ethics committee unless it has been exempted by the Tribunal in accordance with section 72 (5) and (6) of the Act.
- [14] It is not clear as to whether the Applicant is required in terms of other legislation to 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.
- [15] After considering all the facts, I conclude that the Applicant has not made a case in terms of Regulation 43 (2) (a) of the Companies Regulations, 2011 read together with section 72 (5) (a) of the Act that it is required in terms of other legislation to have, and does have, some form of formal mechanism within its structures that substantially performs the functions that would be performed by the social and ethics committee. Further, in terms of section 72 (5) (b) that it not reasonably necessary in the public interest to require the applicant to appoint a

social and ethics committee having regard to the nature and extent of the activities of the company.

[16] In terms of section 72 (5) (a) of the Act an exemption will be granted by this Tribunal if it is satisfied 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 perform the function that would otherwise be performed by the social and ethics committee...”*

[17] Further, in terms of section 72 (5) (b) of the Act an exemption will be granted by this Tribunal if it is satisfied 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.”*

[18] Therefore, based on the aforesaid, I refuse to grant the exception.

ORDER

In the result the following order is made:

- a) The application for an exemption from the requirement to appoint a Social and Ethics Committee in terms of sections 72 (5) (a) and 72 (5) (b) read together with Regulation 43 of the Regulations is hereby refused; and

- b) The Applicant is required in terms of section 72 (5) of the Act read together with Regulation 43 (3) (a) of the Regulations to establish a Social and Ethics Committee and to appoint members of such committee within a period of 12 (Twelve) months from the date of delivery of this determination.

MMOLEDI MALOKANE

(MEMBER OF COMPANIES TRIBUNAL OF SOUTH AFRICA)

Date: 28 SEPTEMBER 2018