



**COMPANIES TRIBUNAL OF SOUTH AFRICA**

**Case/File Number: CT015NOV2018**

In the *ex parte* application of:

**ELLERINE BROS PROPRIETARY LIMITED**

**Applicant**

(Registration Number: 1960/001074/07)

*in respect of an application for an exemption from the requirement to appoint a social and ethics committee*

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Presiding Member : Khashane La M. Manamela (Mr.)

Date of Decision : 30 November 2018

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**DECISION (Reasons and an Order)**

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**Khashane La M. Manamela**

## ***Introduction***

[1] Ellerine Bros Proprietary Limited, evidently the applicant herein, seeks an exemption from the requirement to appoint a social and ethics committee in terms of section 72(5)(b) of the Companies Act 71 of 2008 (the Companies Act).<sup>1</sup> It is submitted, in terms of this application, that it would satisfy this Tribunal to grant an exemption to the applicant on the basis of the reasonable necessities or dictates of the public interest, determined from the nature and extent of the activities of the applicant.<sup>2</sup>

[2] This application represents a sequel to an earlier application by the same applicant which was refused by this Tribunal in terms of a determination made by my colleague and fellow member of this Tribunal, Mr Mmoledi Malokane, on 28 September 2018 (the Previous Application Order).<sup>3</sup> Apart from the refusal to grant an exemption, the following term was contained in the Previous Application Order:

“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.”

[underlining added for emphasis]

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<sup>1</sup> Section 72(5) of the Companies Act reads: “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.”

<sup>2</sup> See footnote 1 above for a reading of section 72(5)(b) of the Companies Act.

<sup>3</sup> The previous application is reflected in the decision of this Tribunal: *Ellerine Bros Proprietary Limited*, Case Number: CT013SEP2018, dated 28 September 2018. Copies of the decisions of this Tribunal may be obtained through access to the website: [www.companiestribunal.org.za](http://www.companiestribunal.org.za).

***Order made in terms of the previous application and its effect (a brief discussion)***

[3] From the underlined part of the quotation from the Previous Application Order above, it is clear that the applicant was ordered to appoint a social and ethics committee within a period of 12 months from 28 September 2018. It is not necessary nor my place to comment on the merits of this part of the Previous Application Order. Suffice to say that untrammelled by any subsequent process, this part of the Previous Application Order remains extant. It constitutes a directive of this Tribunal to the applicant.

[4] Despite the directive of this Tribunal to appoint a social and ethics committee, the applicant launched this application and tagged it a re-application. There is no explanation as to why this approach was adopted by the applicant. It appears, with respect, that the applicant may be oblivious of the aforementioned directive or interpreting the terms of the Previous Application Order, differently. But, nothing really turns on this, as I hold the view that with the directive still in place, the applicant is precluded from making another application for an exemption to appoint a social and ethics committee, unlike if the application was simply dismissed.

[5] For greater certainty, I am of the view that the applicant would require some sort of “variation” of the directive in the Previous Application Order. But I do not consider it warranted to express a view as to what sort of “variation” may be applicable under the circumstances. I have already had the prior opportunity in this regard in terms of a

decision I handed down on 04 June 2014 in the matter of *Newgold Issuer Limited*.<sup>4</sup> In *Newgold Issuer*, I refused an application (in terms of regulation 142(3)(b)(ii)<sup>5</sup> of the Companies Regulations, 2011) for variation of a previous determination. I discussed in that decision, in great detail, whether decisions of this Tribunal are capable of variation in terms of the aforementioned provision or any other provision and, in the process, traversed comparable rules of the Courts, as well as, other forums of similar standing to this Tribunal. I consider the following *dicta* from *Newgold Issuer* to be informative under the current circumstances:

“[21] It is therefore my opinion that, generally a party unhappy with a decision of this Tribunal has the right of review or appeal by the high court with jurisdiction. It is evident that, the legislature appears to have overlooked providing for this. However, there are instances where an appeal or a review is specifically provided for in the Act and the Regulations. For example, section 172(4) of the Act provides for appeals and reviews in respect of a decision of the Companies Tribunal made in terms of that section. Also, regulation 156(2)(j) of the Regulations states that a decision of the taxing master is subject to the review of the High Court on application.

[22] Also the interests of justice would require that, the applicant’s access to court ought not to be impeded by some *lacuna* in the law or regulatory oversight. This is in no way a farfetched solution or an exercise manifesting adjudicative desperation. For, I traversed the various contours of the Act and noted that section 183 of the Act and regulation 154(1)(b) of the Regulations appear to allow this Tribunal to make up its rules and procedures to suit the circumstances of the case in hand or to have regard to the High Court Rules “in cases not provided for by these Regulations”. I do not think these provisions are helpful for current purposes, but the reference to the high court is.

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<sup>4</sup> Under Case Number: CTR008/04/2013. I could not locate a copy of this decision on this Tribunal’s website ([www.companiestribunal.org.za](http://www.companiestribunal.org.za)) and I will therefore, for ease of reference, annex a copy to this decision and have marked it “A”.

<sup>5</sup> Regulation 142(3)(b)(ii) reads: “An application in terms of this regulation must – (a)...; and (b) depending on the context – (i) ...; (ii) set out the decision of the Tribunal that the applicant seeks to have varied or rescinded”. [underlining added for emphasis]

[23] The high court has oversight powers over the decisions of this Tribunal. This is not unique to this Tribunal. The other tribunals discussed above are apposite points of reference. In terms of prevailing legislation these tribunals have their appeals and reviews to the high court. Although the Act appears to have been modeled along the lines of the pre-existing National Credit Act and the Competition Act which created the Consumer Tribunal and the Competition Tribunal, respectively, as already stated, this Tribunal is not so fortunate as to have a provision in the Act or the Regulations generally providing for appeals or reviews. I have already found this to be an oversight in the crafting of the Act and the Regulations. Therefore, I am of the opinion that, decisions of this Tribunal are subject to a review by the high court in terms of rule 53 of the Uniform Rules of Court. Rule 53(1) reads as follows:

**“53 Reviews**

(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected...”

[I added the underlining]

[24] It is therefore my view that, the applicant should have pursued a review of the Original Decision rather than an application for rescission or variation thereof. This was in no way affected by the shortcomings of regulation 142(3)(b)(ii) of the Regulations discussed above. A rescission or variation of the Original Decision was always a wrong choice in challenging the correctness of the Original Decision. Such an application cannot succeed. Also this Tribunal cannot consider the matter afresh even with the now very elaborate submissions, as the Original Decision is final, in as far as this Tribunal is concerned.”

[quoted without accompanying footnotes]

[6] To avoid doubt and with respect, I am not suggesting that an attempt at variation of the Previous Application Order would be judged meritorious by the adjudicating forum. It is not necessary for me to express a firm view in this regard in the absence of an application requiring such determination to be made. But, considering the *dicta* from *Newgold Issuer* reflected above, it may well be that such application for variation would not fall within the confined jurisdiction of this Tribunal. As a matter of fact, a significant part of the issues above was merely meant to enrich the discussion. For the outcome of any process embarked upon by the applicant would be influenced by the factual matrix of such process.

***Conclusion and order***

[7] As already stated, I am, for the reason mentioned above, precluded from considering the merits of this application by the directive contained in the second term of the Previous Application Order. This includes determining whether or not it is not reasonably necessary in the public interest to require the applicant to have a social and ethics committee, having regard to the nature and extent of the applicant's activities. Therefore, this application will be refused.

[8] The applicant, if so minded or advised, has to either comply or somewhat take steps for the removal of the impediment contained in the Previous Application Order directing the applicant to appoint a social and ethics committee within 12 months from 28 September 2018. This represents a jurisdictional hurdle that ought to be cleared by the applicant.

[9] In the result,

- a) the application is refused, only for the reasons stated above.

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**Khashane La M. Manamela (Mr.)**

**Member, Companies Tribunal**

**30 November 2018**