IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT01121ADJ2022

In *ex parte* application of:

OBAVEST (PROPRIETARY) LIMITED **Applicant**

(Registration Number: 2002 / 016404 / 07)

for an exemption from the requirement to appoint a social and ethics committee

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Summary: *Application for an exemption from the requirement to appoint a social and ethics committee (SEC) – application based on section 72(5)(b) of the Companies Act, 2008 (Act No. 71 of 2008) – 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. Held, that exemption is granted for a period of five years.*

Coram: Lindelani Daniel Sikhitha

Decision handed down on 31 August 2022

DECISION (Reasons and Order)

Per **Lindelani Daniel Sikhitha:**

A. INTRODUCTION

[1] The Applicant in this matter is OBAVEST (PROPRIETARY) LIMITED, Registration Number: 2017 / 189451 / 07, which is a private company with

limited liability. The Applicant is duly formed, registered and incorporated in terms of the applicable laws of the Republic of South Africa. The Applicant has its main place of business at corner of Graham & Silverlakes Road, Silverlakes, Pretoria, Gauteng Province, Republic of South Africa, 0081.

[2] This is an *ex parte* application for an exemption from the requirement to appoint a social and ethics committee ("SEC") in terms of section 72(5)(b) read with section 72(6) of the Companies Act, 2008 (Act No. 71 of 2008) ("the Act"). The application is supported by a Founding Affidavit deposed to by Francois Johannes Jacobus Du Rand ("Du Rand") who is the Company Secretary of the Applicant. Du Rand's authority to lodge the current application and to sign the documents in relation thereto is recorded on the Resolution of the Board of Directors of the Applicant dared the 20th day of July 2022.

[3] I am therefore satisfied that Du Rand is duly authorised to sign all documents, forms and affidavits on behalf of the Applicant. I am further satisfied that Du Rand is also authorised to do all those things that are necessary to give effect to all the resolutions of the Board of Directors of the Applicant regarding the current application.

B. FACTUAL BACKGROUND RELEVANT TO THE CURRENT APPLICATION FOR AN EXEMPTION TO APPOINT A SEC

[4] The Applicant is bringing an application for exemption to form a SEC in terms of section 72(5)(b) of the Act. The relevant provisions of section 72(5) read as follows:

"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."** [Own emphasis added.]

[5] In terms of section 72(6) of the Act, an exemption granted in terms of subsection (5) is valid for five years, or such shorter period as the Companies Tribunal may determine at the time of granting the exemption, unless set aside by the Companies Tribunal in terms of subsection (7). Be that as it may, the Applicant is basing its application for an exemption to appoint a SEC on the following grounds in terms of section 72(5)(b) of the Act:

5.1 Reasonable necessity;

5.2 Public interest;

5.3 Nature of the activities of the Applicant; and

5.4 Extent of the activities of the Applicant.

[6] In the past two (2) successive financial years, the Applicant has achieved a public interest score ("PIS") of more than 500 points and it therefore falls within a category of companies that are required to appoint a SEC in terms of regulation 43(1)(c) of the Companies Regulations, 2011 ("the Regulations"). The Applicant is basing its application for the requested exemption from the requirement to appoint a SEC on the reasons which can be summarized as follows:

6.1 The Applicant is a passive investment holding company which had been specifically established to hold shareholding investment in Obaro Business Investments (Proprietary) Limited, with registration number 1998 / 001621 / 07 ("Obaro").

6.2 The Applicant conducts no activities, does not have any business operations and has no employees. In addition, the Applicant does not own any property or assets except for its 32.93% shareholding in Obaro.

6.3 The Applicant has very limited day to day administrative operations and as already stated does not have employees.

6.4 Obaro has its own SEC as envisaged in section 72(4) of the Act and it performs the administrative and secretarial duties of the Applicant, on behalf of the Applicant, in terms of an agreement between the Applicant and Obaro.

6.5 Obaro operates in the agriculture sector by providing agricultural input products, manufacturing and distribution of a variety of agricultural products and it provides financing and insurance services as well.

6.6 The Applicant's public interest score ("PIS") was more than 500 points in the past two (2) successive financial years. The Applicant's PIS is currently scored at 958 points (nine hundred and fifty-eight points) and for the previous successive financial years, the Applicant's PIS were as follows:

6.6.1 in 2020 financial year, the PIS of the Applicant was 904 points, of which 897 points were attributable to the total number of individuals with a direct or indirect beneficial interest in the Applicant; and

6.6.2 in 2021 financial year, the PIS of the Applicant was 958 points, of which 948 points were attributable to the total number of individuals with a direct or indirect beneficial interest in the Applicant.

[7] I will now proceed to consider the law that is applicable to the current application for an exemption for the Applicant to appoint a SEC. This exercise is crucial for me to do because it lays bare the real issues that I am required to deal with in my assessment of this application and eventual decision regarding the relief sought by the Applicant.

[8] Be that as it may, the first issue to be considered relates to whether the Companies Tribunal does have jurisdiction to deal with the current application for an exemption for the Applicant to appoint a SEC. The second issue relates

to whether the Applicant had managed to adduce the necessary evidence to satisfy the requirements to enable the Companies Tribunal to grant it the exemption that is sought. The last issue will be to assess the application for condonation as presented and to determine if the Applicant has been able to show good cause to explain the delay and/or failure to bring the application for exemption from the requirement to appoint a SEC within the prescribed period.

C. APPLICABLE LAW IN RELATION TO EXEMPTIONS

[9] 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 a SEC. The Minister did indeed make the Regulations in terms of section 223 of the Act and they are what is referred to as Companies Regulations, 2011.

[10] Regulation 43(1) of the Regulations expressly 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 a PIS of 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.

[11] The Applicant has therefore scored, in more than two of the previous five financial years (being 2020, 2021 and 2022), above 500 points and regulation 43(1) of the Regulations will apply to the Applicant. In terms of regulation 43(2) of the Regulations a company to which regulation 43 applies must appoint a SEC unless if the company in question:

11.1 **is a subsidiary of another company that already has a SEC, and a SEC of that other company will perform the functions required by regulation 43 of the Regulations on behalf of that subsidiary company; or**

11.2 **has been exempted by the Companies Tribunal in accordance with section 72 (5) and (6) of the Act.** [Own emphasis added.]

[12] 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 a 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:

12.1 **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 the SEC in terms of section 72 and regulation 43 of the Regulations[1]; or**

12.2 **it is not reasonably necessary in the public interest to require the company to have the SEC, having regard to the nature and extent of the activities of the company[2].** [Own emphasis added.]

[13] Based on what is outlined above, section 72(5)(a) of the Act provides that an exemption from the requirement to appoint the SEC may be granted by the Companies Tribunal on the basis that the company in question is required in

[1] Refer to section 72(5)(a) of the Act.
[2] Refer to section 72(5)(b) of the Act.

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 SEC in terms of section 72 and the applicable provisions of the Regulations.

[14] Section 72(5)(b) of the Act provides that an exemption from the requirement to appoint a SEC may be granted by the Companies Tribunal on the basis that it is not reasonably necessary in the public interest to require such a company to appoint a SEC having regard to the nature and extent of the activities of the company in question. The Applicant is applying for an exemption to establish a SEC in terms of section 72(5)(b) of the Act for reasons that are fully outlined in paragraph 6 above.

[15] In terms of paragraphs 5 and 17 of Du Rand's Founding Affidavit, the current application for exemption from the requirement to appoint the SEC is being made in terms of section 72(5)(b) of the Act. I will deal with the basis of the application at a later stage in my determination.

[16] 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:

16.1 an Application in Form CTR 142; and

16.2 a supporting affidavit setting out the facts on which the application is based.

[17] In the current application, the Applicant is seeking an exemption from appointing a SEC on the basis that it is not reasonably necessary in the public

interest as contemplated in section 72(5)(b) of the Act to require the Applicant to appoint a SEC, having regard to the nature and extent of its activities, particularly in relation to the functions of a SEC as set out in regulation 43(5).

[18] Form CTR 142 was duly signed on behalf of the Applicant by Du Rand, who is the company secretary of the Applicant. In addition, the application is supported by a Founding Affidavit deposed to by Du Rand. It is clear from the documents placed before me that Du Rand had been duly authorized to depose the Founding Affidavit, to launch the current application and to do all things that are necessary in relation thereto.

[19] I am therefore satisfied that the current application complies with the requirements set out in regulation 142(1) of the Regulations and it is therefore properly brought before the Companies Tribunal. I will now proceed to evaluate the merits of the application based on the papers placed before me.

D. EVALUATION OF THE CURRENT APPLICATION FOR EXEMPTION

[20] The Applicant is a South African registered company and its limited day-to-day business activities and affairs of the Applicant are managed by its Board of Directors.

[21] I gathered from the papers placed before the Companies Tribunal that the current application is based on the premise that it is not reasonably necessary in the public interest to require the Applicant to establish a SEC having regard to the nature and extent of the activities of the Applicant. In my evaluation of the current application, I am expected to deal with the issues that are related to the following:

21.1 reasonable necessity;

21.2 public interest;

21.3 nature of the activities of the Applicant; and

21.4 extent of the activities of the Applicant.

[22] In my view, the evaluation of the issues listed above is important for purposes of my determination of the ultimate question of whether the Applicant should be granted an exemption from the requirement of establishing a SEC. In undertaking such kind of evaluation, I will rely on the information provided by the Applicant in its papers and more specifically the allegations contained in Du Rand's Founding Affidavit.

[23] I have already outlined the reasons provided by the Applicant in support of the current application for an exemption to appoint a SEC in paragraph 6 above. In order to avoid overburdening this determination, I will therefore not repeat them again here.

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

24.1 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:-

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

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

24.1.1.2 The OECD recommendations regarding corruption (refer to the Organisation for Economic Co-operation and Development (OECD) website for further details (www.oecd. org));

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

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

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

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

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

24.1.2.3 Record of sponsorship, donations and charitable giving;

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

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

24.1.5 Labour and employment, including:-

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

24.1.5.2 The company's employment relationships, and its contribution toward the educational development of its employees;

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

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

[25] 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 but not limited to the following:

25.1 triple-bottom-line reporting ("TBL") (TBL is an accounting framework that includes social, environment, and financial);

25.2 economic, social and environmental sustainability as provided for in the United Nations Global Reporting Initiatives;

25.3 decent work;

25.4 procurement;

25.5 transformational goals;

25.6 human rights and labour standards;

25.7 anti-corruption; and

25.8 all issues falling within its mandate.

[26] SECs are very important not only to protect the communities and the environment where companies operate but for the protection of shareholders' interests as well. They are also very critical in the protection and development of basic human rights which are contained in the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ("the Constitution"). In the *ex parte* exemption application in *Masimong Group Holdings Prorietary Limited* [CT00734ADJ2021] my learned sister Tootla made the following important remarks with regard to the importance of a SEC as envisaged in the Act:

> "[19] The role and functions of the SEC are to monitor the company's activities with regard to matters relating to corruption, employment equity and BBBEE ; good corporate citizenship, in respect of promotion of equality, prevention of unfair discrimination, and reduction of corruption; contribution to development of the communities and of sponsorship, donations and charitable giving; the environment, health and public safety; consumer relationships, labour and employment, including decent work and working conditions and its employment relationships and its contribution toward the educational development of its employees; and to draw matters within its

mandate to the attention of the board as occasion requires; and to report to the shareholders at the company's annual general meeting on these matters. These matters have been extensively set out in Reg. 43 (5) and denotes the importance the legislature considers these in the role and function of the SEC as being part of the public interest.

[20] The purpose and functions of the SEC are indeed significant as it is an additional policing mechanism created to ensure that the company complies with relevant laws, other legal requirements and prevailing codes of best practice; and for the Board to monitor same if the nature and extent of the activities of the company warrant it in the public interest."

[27] I fully agree with the afore-cited remarks made by Tootla in *Masimong's* matter as they are equally relevant in this matter. Any negative news relating to social and ethics issues have a serious economic impact for companies and the country in general. SECs are there for the main purpose of bringing these issues to the attention of the board and to also report them in the shareholders' meetings, as and when required. Such reporting will ensure that the board and shareholders of the company recommend and take appropriate corrective measures.

[28] As we may all know, companies that are required to have SECs are public companies, state owned companies and companies that have in any two or previous five years scored PIS of 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.

E. EXEMPTION BASED ON SECTION 72(5)(B) OF THE ACT

[29] The current application for exemption from the requirement to appoint a SEC is 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 to require the applicant company to appoint the SEC having regard to the nature and extent of the activities of the applicant company.

[30] I did peruse Du Rand's Founding Affidavit and I found the allegations contained in paragraph 21 therein to be relevant for evaluation of the merits of the application for exemption of the Applicant to establish a SEC. These allegations are grouped into four categories which are summarized in paragraph 31 below.

[31] The requirements for purposes of determining whether an exemption from appointing a SEC should be granted to the Applicant are as outlined herein below:

31.1 **Reasonable necessity**:

31.1.1 The nature of the Applicant's current business activities is limited to investment holdings.

31.1.2 The Applicant has no other operations or activities aside from its shareholding in Obaro which has appointed its own SEC.

31.1.3 In the event that the Applicant is required to perform any administrative and secretarial duties, the Applicant has entered into an agreement with Obaro to perform such activities on its behalf. As such, the Applicant's administrative and secretarial duties are regulated and policed by Obaro's SEC to the extent that is applicable.

31.1.4 The Applicant has no employees and it does not have any form of interaction with members of the public. In terms of regulation 43(5) of the Regulations, employees are relevant to a number of functional areas of a SEC and therefore the virtual absence of employees would be significant to the determination to be made in this application.

31.2 **Public interest**:

31.2.1 The Applicant has does not conduct any business operations.

31.2.2 The Applicant does not have any other assets save for its shareholding in Obaro.

31.2.3 The Applicant does not have any employees and it does not have any interaction with members of the public.

31.2.4 Obaro, which is the investee company of the Applicant, has itself appointed a SEC in terms of Regulation 43(1) of the Regulations, and all Obaro's interactions with the Applicant would be regulated and policed in terms of Obaro's own SEC.

31.3 **Nature of the activities of the Applicant:**

31.3.1 The Applicant was established as a special purpose vehicle whose sole aim is to hold shares in Obaro on behalf of its shareholders.

31.3.2 The Applicant is therefore an investment holding company that does not conduct any other operations or activities.

31.3.3 The Applicant's only assets are its investments in the form of shares in Obaro. Obaro has appointed its own SEC.

31.3.4 The nature of the activities of the Applicant in relation to each of the functions of a SEC as set out in regulation 43(5) can be summarized as follows:

31.3.4.1 the activities of the Applicant do not directly impact the environment or public health and safety;

31.3.4.2 the Applicant does not sell any products or services and therefore does not have any customers or third-party in terms of consumer relationships;

31.3.4.3 the Applicant is a private company with no employees and no business operations. As such, there are no labour or employment relationships to monitor and no employees to train educational development opportunities to; and

31.3.4.4 there would be nothing to report to the shareholders.

31.3.5 It is submitted that it is not reasonably necessary in the public interest to require the Applicant to establish a social and ethics committee.

31.4 **Extent of the activities of the Applicant:**

31.4.1 The Applicant is a special purpose vehicle whose sole aim is to hold shares in Obaro on behalf of its shareholders.

31.4.2 The Applicant is an investment holding company that does not conduct any other operations or activities.

31.4.3 The Applicant's only assets are its investments in the form of shares in Obaro. Obaro has appointed its own SEC which indirectly benefit the shareholders of the Applicant.

31.4.4 The extent of the activities of the Applicant in relation to each of the functions of a SEC as set out in regulation 43(5) can be summarized as follows:

31.4.4.1 the activities of the Applicant do not directly impact the environment or public health and safety;

31.4.4.2 the Applicant does not sell any products or services and therefore does not have any customers or third-party in terms of consumer relationships;

31.4.4.3 the Applicant is a private company with no employees and no business operations. As such, there are no labour or employment relationships to monitor and no employees to train educational development opportunities to; and

31.4.4.4 there would be nothing to report to the shareholders.

31.4.5 It is submitted that it is not reasonably necessary in the public interest to require the Applicant to establish a social and ethics committee.

[32] I have on a number occasions reiterated the importance of SEC's. SEC's are important not only for protection of workforce, communities and the environment, but also for the protection of shareholders' interest in a company. In the *ex parte* application for an exemption in *Rallen (Proprietary) Limited* [CT00861ADJ2021] the applicant argued that it was not in the public interest for its company to appoint a SEC based on the nature and extent of its company's activities.

[33] It is evident from the papers placed before Obaro has, in terms of the Act and Regulations established a SEC which performs all the functions required by regulation 43 of the Regulations. The established SEC act in the interest (either directly or indirectly) of the relevant parties, including the Applicant as a shareholder in Obaro. In addition, the same beneficiaries who would benefit

from and be protected by a SEC to be established by the Applicant are already benefiting from the SEC established by Obaro.

[34] It is my further view that requiring the Applicant to appoint a SEC will impose a cost burden on the Applicant. The Applicant will be required to appoint at least one director who is not involved in the day-to-day management of the business of the Applicant. I am therefore satisfied that the nature of the business of the applicant justifies why it is not reasonably necessary in the public interest to require the Applicant to have a SEC.

[35] Based on my evaluation above, it is therefore not reasonably necessary in the public interest to require the Applicant to have a SEC, having regard to the nature and extent of the activities of the Applicant for the Applicant to be required to appoint a SEC.

[36] In terms of regulation 43(3)(b)(iii) of the Regulations, a board of a company that is required to have a social and ethics committee, and that is incorporated on or after the effective date, must constitute a social and ethics committee and appoint its first members within one year after the date that it first met the criteria set out in regulation 43(1)(c), in any other case.

[37] According the papers placed before me, the Applicant first met the criteria set out in Regulation 43(1)(c) of the Regulations in 2020. However, the failure to bring an application for an exemption from the requirement to appoint a SEC to the Companies Tribunal earlier did not result in any prejudice to any person. The Applicant is therefore requesting that its failure to appoint a SEC should be condoned and I am satisfied that such condonation should be granted.

F. FINDINGS

[38] I find that the Applicant managed to adduce the necessary evidence that is sufficient for it to be granted an exemption in terms of section 72(5)(b) of the Act read together with regulation 43 of the Regulations.

[39] I am therefore satisfied that the exemption to be granted should be for a period of five (5) years which must be calculated from the date that I make my order which appears herein below.

G. THE ORDER

[40] I therefore make the following order:

40.1 the application for an exemption from the requirement to appoint a Social and Ethics Committee is hereby granted in terms of section 72(5)(b) of the Act read together with regulation 43 of the Regulations; and

40.2 the exemption granted in terms of paragraph 40.1 above is valid for a period of five (5) years from the date of this order.

LINDELANI DANIEL SIKHITHA

Member of the Companies Tribunal

Date: 31 August 2022