



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT021Jul2018

In the *ex parte* application of:

VINPRO NPC

Applicant

(Registration Number: 2008/012968/08)

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

Presiding Member	:	Khashane La M. Manamela (Mr.)
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Date of Decision	:	31 July 2018
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DECISION (Reasons and an Order)

Khashane La M. Manamela

Introduction

[1] The applicant, evidently a non-profit company, comprises members who are wine producers, wine cellars and other stakeholders in the wine industry. It has, ostensibly during the material financial year or at the date of application,¹ approximately 2618 members and, it is submitted, this significantly contributed to the applicant's high public interest score.² The applicant submits, on the bases of the grounds I will discuss below, that it would satisfy this Tribunal to grant the applicant an exemption from the requirement to appoint a social and ethics committee. The application is based on the provisions of sections 72(5)(a) and 72(5)(b) of the Companies Act 71 of 2008 (the Companies Act).³

[2] Section 72(5)(a) grants this Tribunal jurisdiction to exempt a qualifying company from the requirement to appoint a social and ethics committee, if such 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 social and ethics committee function, as envisaged in the provisions of the Companies Act and its Companies Regulations, 2011.

¹ The supporting affidavit was deposed to on 28 June 2018 and the Form CTR142 bears the same date.

² The public interest score is calculated in terms of regulation 26(2) of the Companies Regulations, 2011, quoted in footnote 10 below.

³ Section 72(5) of the Companies Act reads: "(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."

[3] On the other hand, section 72(5)(b) allows this Tribunal to grant an exemption where it is considered not necessarily in the public interest for a company to appoint a social and ethics committee bearing in mind the nature and extent of the activities of the applicant company.

[4] I hasten to respectfully point out that, in my view, the applicant's reliance on section 72(5)(a) is misplaced. Therefore, this part of the application may be disposed of without much ado. The following submissions are, among others, made in support of the application for an exemption on the basis of section 72(5)(a) and I only quote the material part:

“

8.

It is further submitted that Vinpro has numerous other internal structures and maintains involvement in numerous other external structures which perform functions equivalent to that of a social and ethics committee as set out in Regulation 43(5) of the Companies Regulations, 2011.

9.

Vinpro founded the Vinpro Foundation, a non-profit organisation, in 2013 with the aim to develop, support and improve the sustainability of the South African wine industry by promoting and backing excellence. The Vinpro Foundation is involved in combating the effects of Foetal Alcohol Syndrome and encouraging early childhood development through the Industry Association for Responsible Alcohol Use ... and Vinpro Foundation Wine Project which appoints social workers... The Vinpro Foundation is also involved in skills and leadership development through providing bursaries to previously disadvantaged students who study towards qualifications in agricultural sciences ... Subsidies are also provided for vineyard and cellar worker training.

10.

Vinpro has an internal Transformation & Development division which provides tailor-made Broad Based Black Economic Empowerment (BBBEE) guidance to its members and focuses on the promotion of social development through dedicated ethical trade, training and research initiatives. The BBBEE guidance service included project evaluation and assistance with the establishment and long-term sustainability of new land reform projects as well as assistance in obtaining funding for new and existing empowerment projects.

11.

Vinpro is also extensively involved in the training of vineyard workers by offering group training via a comprehensive series of training courses as well as do-it-yourself DVD training package. Vinpro trains approximately 800 vineyard workers annually.

12.

Furthermore, Vinpro supports compliance with ethical trading standards with regard to the working conditions of farm workers and plays a key role in ensuring that the members also comply with these standards through advice with regard to ethical trade practices and upliftment of farm workers as well as monitoring progress with ethical trade in the industry...

13.

Vinpro is also an integral part of the Laborie Dialogue Initiative which, together with the Food & Allied Workers' Union (FAWU), aims to build long-term relationships based on co-operation, openness and trust, as well as the parties' shared objective of ensuring sustained, long-term growth, prosperity and profitability of the fruit and wine industries, while focusing on the improvement of the lives of the workers and the communities involved in the wine industry.”⁴

⁴ See pars 9 -13 of the supporting affidavit.

[5] From the above quotation it is clear that Vinpro is not required by any legislation (other than the Companies Act) to have any of the structures or formal mechanisms referred to above. Further, it is not clear as to whether the complete social and ethics function, if any, as detailed in the Companies Act and the Companies Regulations, is performed by the current Vinpro structures jointly or severally.

[6] I previously dealt with the provisions of section 72(5)(a) in other decisions of this Tribunal, including in the matter of *JT Ross (Pty) Ltd*,⁵ wherein I, among others, stated the following:

“An exemption based on section 72(5)(a) is possible where the applicant 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 functions of an SEC. From the submissions in paragraph [5] above it appears that the applicant has some committees or persons from within or from the JT Ross Group performing some or all functions of an SEC. However, there is no evidence that the applicant is required by other legislation to have these committees or form of formal mechanism performing its SEC functions. What is clear is that the applicant’s board of directors; the JT Ross Group legal advisor; the JT Ross Group company secretary, and other functionaries of the applicant or the JT Ross Group, jointly or severally performs some functions which appear to be SEC functions. But this is not sufficient for purposes of acquiring an exemption or even in compliance with the provisions of section 72(5)(a) of the Companies Act.”⁶

⁵ Decided under case/file number: CT007Feb2016 on 16 March 2016. For other decisions of this Tribunal visit the website: www.companiestribunal.org.za.

⁶ See *JT Ross (Pty) Ltd* at par [7].

[7] Be that as it may, I dispose of this part of the application (based on section 72(5)(a)) on the ground of absence of a legislative requirement on the part of Vinpro to have any of its current structures or formal mechanisms performing a social and ethics function. I will then proceed to deal with submissions based on section 72(5)(b), but this will only be immediately after a brief narration of the nature and extent of the applicant's activities. This ought not to detain me long.

Nature and extent of the applicant's activities

[8] From what is stated above, one can tell that the applicant is a grouping of winemakers or other persons in the wine or wine-related industry. However, there are no direct submissions made to explain the nature and extent of the applicant's activities. One is rather referred to some portions of the memorandum of incorporation of the applicant in this regard.

[9] At the risk of burdening this decision, I quote from the submissions made regarding the business and objects of the applicant the following:

“The main business and objects of Vinpro are contained in clause 3.1 of the MOI reading as follows:

3.1 As contemplated in ... the Income Tax Act and ... the Companies Act, the main object of the Company, with a view to promoting the common interests of the Members, is to create an enabling environment to unlock and maximise sustainable benefits for its Members in a unified Wine Industry value chain in a constantly changing global context, and, in so doing, also to:

- 3.1.1 act as the official mouthpiece and unified voice for its Members in the Wine Industry in all negotiations and interactions with the relevant Provincial and National Government Departments and Agencies, as well as other relevant industries and bodies;
- 3.1.2 investigate and resolve trade barriers in order to increase the Wine Industry's competitiveness in the global trading environment, including the facilitation of imports and exports in the Wine Industry and promotion of market access;
- 3.1.3 establish uniform quality requisites and other relevant regulations in the Wine Industry, inter alia, in accordance with the requirements as set by the Company;
- 3.1.4 protect intellectual property and plant improvement rights;
- 3.1.5 gather, prepare and distribute/disseminate relevant industry information in relation to production, local and international marketing and tourism and the sale of wine products relating to the Wine Industry, aligned with conditions of appropriate legislation if applicable, including the implementation of activities and projects to advance any of the afore-going goals as well as coordinating interaction between Stakeholders as well as the Members - in conjunction therewith the Board will be entitled to establish and maintain a website and newsletters and publications, thus promoting matters of general interest that may affect the well-being and viability of the Wine Industry;

- 3.1.6 identify and capacitate/facilitate a long-term strategy to develop, support and maintain relevant production, post-harvest and market research, including a national industry development plan and national R&D priorities and generic marketing funding and priorities;
- 3.1.7 support human capital and skills development throughout the wine industry value chain;
- 3.1.8 promote and facilitate continued communication as well as social and environmental sustainability amongst Members;
- 3.1.9 seek an encouraging Broad Based Black Economic empowerment initiatives in the Wine Industry;
- 3.1.10 generate public awareness to the health aspects of wine products relating to the Wine Industry;
- 3.1.11 if deemed necessary by the Board, apply for and/or facilitate the imposition of Levies on the basis determined by the Board, or otherwise on the basis required in terms of the provisions of the Marketing of Agricultural Products Act, No 47 of 1996 ...; and
- 3.1.12 undertake in general all such activities which may be required to improve and enhance the interests of the Members, including facilitating further growth of the Wine Industry to maximise its profitability and ensure its sustainability by collectively providing a platform for Members to collectively respond to industry wide issues, invest in research and

marketing, share knowledge and interact with the Stakeholders.”⁷

[10] I proceed, next, to discuss the above submissions against the applicable legal principles.

Applicant’s case and applicable legal principles (a discussion)

[11] The applicant’s case for an exemption is simply that it has, for the financial year which ended 30 June 2017, only had 35 employees; annual turnover of R27 600 000; outstanding creditors of R4 200 000, and, approximately 2618 members.⁸ The applicant provided a copy of its financial statements for the 2017 financial year in support of its case. It is also submitted that the applicant “is not at its core a public entity as all of its members are wine producers, wine cellars and industry stakeholders”.⁹ I honestly doubt the legal accuracy of the latter statement, but nothing will really turn on this for current purposes.

[12] Considering the method of calculation of a public interest score set out in regulation 26(2)¹⁰ of the Companies Regulations, the applicant indeed exceeded the

⁷ See the supporting affidavit at par 4.

⁸ See the supporting affidavit at par 7.

⁹ *Ibid.*

¹⁰ Regulation 26(2) reads as follows in the material part: “For the purposes of regulations 27 to 30, 43... every company must calculate its ‘public interest score’ at the end of each financial year, calculated as the sum of the following: —

(a) a number of points equal to the average number of employees of the company during the financial year;
(b) one point for every R 1 million (or portion thereof) in third party liability of the company, at the financial year end;
(c) one point for every R 1 million (or portion thereof) in turnover during the financial year; and

threshold of 500 points (in terms of public interest score) stipulated by regulation 43(1)(3),¹¹ significantly due to the number of its members at the end of the 2017 financial year. The applicant was obviously alive to this aspect, hence this application.

[13] The determination required in terms of an application for exemption based on the provisions of section 72(5)(b) of the Companies Act enjoins this Tribunal to consider the nature and extent of the applicant's activities. I have already laid out above,¹² what it is submitted, constitutes the nature and extent of the applicant's activities. An analysis of the submissions made against the prescripts of section 72(5)(b) of the Companies Act and regulation 43(5) of the Companies Regulations is warranted in order to consider whether or not to grant an exemption in this matter.

[14] But, perhaps a general discussion of the above-mentioned statutory provisions ought to precede the analysis. And there is no need to reinvent the wheel in this regard, so to speak. For the impugned provisions have had the attention of this Tribunal previously in other matters, including in the matter of *Mpilo Investment Holdings 2 (RF) Pty Ltd*¹³ in which, among others, the following was stated:

“[5] Further, the applicant has a public interest score of 1 498 points for the year ending March 2016. It also has had scores slightly higher or lower to that figure since 2016. The applicant is accordingly required in terms of section 72(4)

(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...”

¹¹ See *Mpilo Investment Holdings 2 (RF) Pty Ltd* at par [7] for a reading of regulation 43.

¹² See pars [8]- [9] above.

¹³ Decided under case/file number: CT010DEC2016 on 30 December 2016.

of the Companies Act and regulation 43(1) of the Companies Regulations, 2011 (the Companies Regulations) to appoint a social and ethics committee. Also, for completeness, a public interest score is calculated in terms of regulation 26(2) of the Companies Regulations.

[6] It is submitted against the backdrop of mainly what is stated above that, it is not reasonably necessary in the public interest to require the applicant to have a social and ethics committee (an SEC) in terms of section 72(5)(b) of the Companies Act. The applicant ought to be exempted from appointing or having an SEC on the basis of the nature and extent of activities within it as aforementioned and borne by the filed papers.

[7] To determine whether to grant an exemption, this Tribunal has to consider, among others, applicable legislative provisions, particularly those dealing with the role played or functions performed by an SEC in companies. The areas of function of an SEC are stated in regulation 43(5) as follows:

“(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.”

[8] In my view, the above provisions confirm the role of an SEC in monitoring the activities within companies against the applicable law and prevailing codes of best practice; drawing matters thereon to the attention of the board of directors and reporting to the shareholders at annual general meetings. These, in my view, provide a framework within which this Tribunal may determine the nature and extent of the activities within an applicant for an exemption. This approach is like a beaten path for applications of this nature before this Tribunal, although the nature of the determination or enquiry is facts-based and consequently differ from matter to matter.”¹⁴

[quoted without the accompanying footnotes, but with added underlining]

¹⁴ See *Mpilo Investment Holdings 2 (RF) Pty Ltd* at pars [5]- [8].

[15] As stated above, the applicant attributes its high public interest score to the number of its members: approximately 2618 as at the end of the 2017 financial year. It is also stated that the applicant has only 35 employees; annual turnover was R27 600 000 and outstanding creditors in an amount of R4 200 000 as at 30 June 2017. I assume the reference to outstanding creditors to be to third-party liability of the company at the end of the 2017 financial year, which is the other area to be considered for calculating the public interest score in terms of regulation 26(2). These submissions appear to be backed up, so to speak, by the applicant's financial statements for the year which ended on 30 June 2017, referred to above.

Conclusion and order

[16] At face value the applicant's activities appear to be vast. But on a closer scrutiny it is clear that the applicant is almost like a mouth-piece for an association of wine makers and related persons. It does not appear from the submissions that the applicant is involved in the production or retail of wine or any manufacturing at all, save for the services of an administrative or marketing nature it renders on behalf of its members. The applicant's memorandum of incorporation appears to support this view.

[17] I am alive to the fact that the services rendered by the applicant, just like its other activities, may have a bearing on the vast number of its members. But, in my view, most of the functions of a social and ethics committee, as stipulated in regulation 43(5), do not appear to be that relevant to the applicant, even if they are not necessarily irrelevant. Where those functions become relevant, for example with regard to the 35 employees of

the company, the members and other as yet unidentified members of the public, I am confident that the other mechanisms or structures put in place by the applicant would be useful. This ought not to be construed to be granting the application indirectly on the basis of section 72(5)(a) already discarded above. It is clear not. The determination, inclusive of the latter statement, is based on consideration of the nature and extent of the applicant's activities. Further, the members themselves, to the extent dictated by the nature and extent of their corporate activities and whether the relevant statutory provision is relevant and triggered in this regard, may have to appoint social and ethics committees of their own.

[18] As appearing in the quotation above,¹⁵ the determination in this type of matters is fact intensive and, therefore, incapable of being cast in hard and fast rules or stated with any semblance of scientific accuracy. The decider of fact, as with me in this matter, has to decide the matter on the basis of the paper and ink placed before him or her, even though the test of the real world may yield a different outcome. And time is always of the essence when it comes to facts. All these ought not to be construed aspersions on the drafters or doubt as to the accuracy of the finding to be made herein.

[19] Based on what is stated above, I am satisfied that 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 its activities. Therefore, the application is successful and the applicant will be granted an exemption from the requirement of appoint a social and ethics committee for a period of five years from date of the order.

¹⁵ See *Mpilo Investment Holdings 2 (RF) Pty Ltd* at par [8] quoted in par [14] above.

[20] In the result:

- a) the applicant is exempted from the requirement to appoint a social and ethics committee for a period of 5 (five) years from date of this order.

Khashane La M. Manamela (Mr.)

Member, Companies Tribunal

31 July 2018