IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA, PRETORIA

("The Tribunal" **CASE NO: CTR 005/08/2013**

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 (SEC) Committee for the Applicant, in terms of Regulation 43.

In an Ex parte Application for exemption by:

ZONWABISE RESORT HOLDINGS LTD **APPLICANT**

Coram K. Tootla

Decision delivered on 24 January 2014

ADMINISTRATIVE ORDER IN TERMS OF SECTION 6 (3) FOR AN EXEMPTION - IN RESPECT OF AN APPLICATION IN TERMS OF SECTION 72 (5) OF THE ACT AND REGULATION 43 OF THE COMPANIES REGULATIONS 2011 ("THE REGS").

1.

INTRODUCTION:

The Applicant, Zonwabise Resort Holdings Limited ("ZR), registration number 1996/010774/06, a company duly incorporated and registered in terms of the laws of the Republic of South Africa, carrying on business within the jurisdiction of South Africa, makes application for an exemption from appointing a social and ethics committee ("SEC"), in terms of section 72(5) (b) of the Companies Act No. 71 of 2008 ("the Act").

2.

ISSUE TO BE DETERMINED:

The Tribunal has to consider whether the Applicant should be granted an exemption to appoint a SEC in terms of Section 72 (5) (b) for a period of five years or a shorter period as may be determined under Section 72(6) and provided that Regulation (Reg) 43 and Reg 26 (2) is complied with.

3.

PROCEDURE:

3.1 Although the Applicant has minimally complied with the procedure to apply for an exemption for a Social and Ethics committee (SEC) by the filing of an affidavit by the Company Secretary, Charlton Kerridge together with form CTR 142, it has not seen it fit to attach a resolution of the Board of Directors to the application which is indeed a crucial omission.

3.2 The form CTR 142 states that the Applicant seeks exemption on the basis that there are no employees who will benefit from such a committee thus defeating the purpose of having such a committee. In addition, in the founding affidavit, Mr Kerridge mentions and presents the annual financial statements for the last financial year ended 30 June 2012 and provides a report of factual findings relating to the PI score of the Applicant.

3.3 However, in para 11 of the founding affidavit it is stated that if one has regard to the functions of the committee, the lack of employees and the nature of the Applicant's business, it is submitted that it would not serve any real purpose to have a SEC; and a request is made on this basis to the Tribunal to apply its discretion in exempting the Applicant from appointing a SEC or for such shorter period as the Tribunal may determine.

3.4 Although the factual findings report is based on the previous two of a five year period where the Applicant scored above 500 points in terms of Regulation 26 (2), what remains unaddressed is what is required of the Applicant in terms of Regulation 43 (2) to appoint a Social and Ethics Committee as contemplated in section 72 (4) (a) of the Act and Reg 43 (2) (a).

4.

APPLICABLE LAW:

4.1 **Regulation 26(2)** provides that for purpose of regulations …., 43…, every company **must** (my emphasis) 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 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.

4.2 **Regulations 43(1)** of the Companies Regulations of 2011 ("the Regulations") provides that 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) (my emphasis).

4.3 It is clear from the above that no matter what other type or category the company falls into, even if it is not a state owned company or a publicly listed company, it can clearly be seen that the words "any other company" can nevertheless due to its public score exceeding 500 points during the stated relevant period, be by law required to appoint a social and ethics committee due to the responsibilities and functions it has to monitor in terms of Reg 43 (5) to serve the 'public interest". Nowhere in these regulations does it state that differentiation can be made with regard to how and what contributes to the PI score. The Regulations are clear either a company exceeds the 500 points for the relevant time periods or not.

4.4 Regulation 43(2) of the Regulations provides that a company to which this regulation applies must (my emphasis) 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).

4.5 Thus Reg 43 (2) above sets out clearly only one of two circumstances under which there would be an exception and hence an exemption to appoint a SEC. Note that Reg 43(2) (a) is clear that only if the company is a subsidiary of another company that has a social and ethics committee and that SEC of the other company will perform the monitoring function, then an automatic exemption applies. In the instant case this situation is not present and the application is any event not based on these circumstances.

5.

MERITS:

5.1 Despite, the absence of a resolution of the Board of directors, the Tribunal hereby examines the exemption application on its merits to ascertain whether it is in compliance with the requirements of the Act and the Regulations in other respects.

5.2 The Application is thus largely based on the grounds that the Applicant does not have any employees when in fact the Company Secretary is an employee albeit a senior employee. **Regulation 43(5) (a)** clearly defines the functions of the SEC which ought to have been taken into consideration by the Applicant. Unfortunately this has not been addressed save to state that if one has regard to the functions of the committee, the lack of employees and the nature of the Applicant's business, it is submitted that it would not serve any real purpose to have a SEC. Why is it that the Applicant has not pointed out why the functions of the committee in terms of Reg 43(5) do not apply to the Applicant's situation?

5.3 Is there an assumption that due to the nature and extent of the activities (which have not been adequately addressed by the Applicant), the SEC is not required? The information provided about this issue is very scanty nor has this been justified for the Tribunal to consider this more seriously. The Applicant has not set out which issues the Applicant is required to address or not address in terms Rag 43 (5). It is expected of the Applicant to explain why it attempts to fit its peculiar circumstances within the ambit of this Act and to justify same. There seems to be a lack of understanding about the requirements of the Act and the Regulations in the Application.

5.4 From these two subsections, it is clear that Reg 43 (1) applies to all companies whose public interest score is above 500 points in any two of the previous five years and Reg 26 (2) explains how the calculation is made to arrive at a public interest score. Reg 43 (1) takes into consideration the total number of employees, shareholders, third party liabilities and turnover to calculate the public score. To clarify further, it can be seen from this sub-regulation that the relevance of whether the Applicant is an empowerment company with no employees is not the deciding issue. Thus whatever type or category the company falls into, even if it is not a state owned company or a publicly listed company, it can be clearly seen that <u>any other company</u> can nevertheless due to its public score exceeding 500 points during the stated relevant period, be by law required to appoint a social and ethics committee due to the responsibilities and functions it has to monitor in terms of Reg 43 (5).

6.

ANALYSIS OF THE EVIDENCE AND EVALUATION:

6.1 Since the Act requires an SEC to be appointed, the only discretion that the Tribunal has is in terms of section 72 (5), ie does another Act require a formal mechanism that 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.

6.2 From a reading of section 72(5) together with Reg. 43(2) (b) it is clear that the Tribunal has a discretion (not that it is obliged to) to exempt a company from appointing a SEC where it is satisfied that the company already has a formal mechanism within its structures that substantially performs the function of a SEC in terms of a legislative responsibility in terms of Section 72 (5) (a) or where it is 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 in terms of Section 72 (5)(b).

6.3 Even though the basis for the Applicant's application is section 72(5) (b) of the Act, the Applicant does not address the requirements of this section adequately in its affidavit. It has not set out the nature and the extent of the activities of the company to justify its application in terms of Section 72 (5) (b), apart from stating that the Applicant's main business is as an empowerment partner in Sun International's operation at the Port Elizabeth beachfront. It is mentioned in para 6 of the affidavit that the Applicant has shareholdings in various companies and that as at 31 March 2013 it has 852 shareholders comprising of natural and juristic personalities. This unfortunately does not take the application any further.

6.4 It is also clear that the company has a company secretary and eight non- executive directors but has no other employees from the date of inception. The Applicant is under the misapprehension that if it has no employees, it is not required or that it serves no purpose in appointing a Social and Ethics Committee. It is clear from the Act that the formation of a SEC is a <u>mandatory</u> (my emphasis) one for certain reasons. The duties and responsibilities have to be complied with whether in a SEC or via another mechanism (in terms of other legislation) which exists in that company. There exists only a provision to apply for an exemption for a <u>limited period</u> based on proper reasons, not that a total exemption for an indefinite period can be granted for a company.

6.5 It is to be re-iterated that this exemption can only be granted if another mechanism exists as set out in the Act which can fulfil these tasks and responsibilities and for a specific period not exceeding five years (Refer Reg 43), or when the nature and extent of the activities of the company are such that it would not be reasonably necessary to appoint an SEC. The latter is in terms of Section 72 (5(b) which is the basis of the Applicant's application. It is evident from this decision and the reasons provided that the Applicant has failed to justify its Application. However, the Applicant seems to state that it satisfies Section 72(5) (b) by claiming that it has no employees and that it is not reasonably required in the public interest to appoint a SEC, having regard to the nature and extent of its activities. From the above it can be seen that the Applicant has not satisfied the test in Section 72 (5) (b).

6.6 Apart from stating that the Applicant is an empowerment company, no other information has been provided as to the nature and extent of the activities of the Applicant for the purpose of applying Section 72 (5) (b). It is insufficient for the Applicant to aver that it has no employees and that due to it being an empowerment company and taking into account its activities, it is not reasonably necessary in the public interest for the Applicant to have an SEC.

6.7 Does the Applicant have any activity which may require it to comply with the OECD recommendations regarding corruption as required in Reg 43 (5) or any other responsibility listed in that subsection? The question arises as to whether and because the Applicant has a specific purpose as an empowerment company and simply because it holds shares in Emfuleni Resorts; Main Street, National Casino Records Manco and Sasol Inzalo it is not required to appoint an SEC. Surely it is obliged to fulfil at the least the latter function in line with the OECD recommendations regarding corruption, and also those in respect of good corporate governance as these functions do affect the larger public interest which has to be protected.

6.8 It also raises other questions. Does the Applicant charge administrative fees, pay taxes, does it have an income and expenditure statement? What is the composition of the management and administrative structures of the Applicant? When perusing the financial statements and the income statement it is very clear that the revenue of the company consists of dividends declared; operation and administrative costs are also paid and in addition tax is payable. Thus it is clear that the Applicant's has to justify why it does not have to show compliance with most of the responsibilities mentioned in Reg. 43 (5). Can it be said that, for example, compliance with the corporate governance responsibility in terms of Reg 43(5) (i) (bb) is not required to be monitored by the SEC and to be reported on to the Board?

6.9 What does "not reasonably necessary in the public interest" within this context mean? From the reading of the section and to establish this, it is paramount that the Applicant is expected to explain the nature and extent of the Applicant's activities in more detail to enable the Tribunal to decide whether it is in the public interest to have an SEC or not. Section 72(5) (b) specifically requires the Tribunal to consider the nature and extent of the activities of the Applicant. However, it is clear that the Applicant does pay administrative costs and taxes.

6.10 This does not mean that the company's activities are to relate to all the matters relating to those mentioned in Reg 43(5) – (v). It can logically speaking easily be one or more of these responsibilities which would reflect a need for the appointment of an SEC, unless these responsibilities are being monitored by another mechanism in the company or at holding company level. In this matter, the Applicant is alleging that it does not participate in any activity, other than to do what is enumerated in the founding affidavit. Without any further justification, the Tribunal is bound by what is before it and has to decide accordingly, more especially as its financial statements indicate otherwise.

6.11 Regulation 43(5)(a) provides that "*a social and ethics committee has the following functions: (a) to monitor the* ***company's activities*** (my emphasis*)*, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, **with regard to matters relating to** (my emphasis) – (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 …" etc.

6.12 The Tribunal interprets regulation 43(5) (a) as referring to the activities that the company has specifically undertaken to address the issues listed therein, which means that the SEC has to monitor the actions that the company has undertaken to implement its tasks and responsibilities (obligations) in terms of this regulation, not that this sub-section refers to the business activities of the company.

6.13 Although the Tribunal has taken cognizance of the fact that the extent of the activities of the Applicant is limited to being an empowerment company, the Applicant has not convinced the Tribunal that all the functions in Reg 43(5) do not require monitoring. The SEC is an important legislated structure in the management of affected companies and it forms a crucial part of good corporate governance.

6.14 Due to the lack of information and a detailed justification, there can be no basis on which it can be said that the Applicant can satisfy the test in terms of Section 72(5) (b), that it is not in the public interest to have an SEC. The crucial issue is also whether the Applicant has a turnover and why the public interest does not need to be addressed by the Applicant.

6.15 There is also no evidence, that one C. Kerridge is duly authorized in terms of a Resolution of the Board of Directors to make the application. Under section 66, the directors' powers enable them to cause the company to participate in legal proceedings.

Simply based on this a director or directors must authorize the institution of the proceedings and the prosecution thereof (Ganes Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624). A manager or company secretary can also be authorized to represent the company in such proceedings either for a special purpose or generally. Thus it can be concluded that there must be evidence before a Court that the person purporting to represent the company has been authorized accordingly with regard to the particular proceedings (Mall (Cape) Pty Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 at 351-352); Refer Section 66 (1) of the Act in respect of the entity with the authority to manage the business and affairs of the company).

7.

SIGNIFICANCE AND PURPOSE OF THE SEC IN TERMS OF REGULATION 43 (5):

7.1 Before the Tribunal makes a decision, it will explain the purpose of the SEC to assist the Applicant in understanding the importance of having a SEC, which cannot be taken lightly within the context of how companies are administered.

Since companies must comply with many laws in terms of Section 72 (4) (b) and Reg 43(5), the social and ethics committee could be seen as a codification of aspects of the duty to ensure compliance with all relevant laws, not some laws. Note the emphasis is on **relevant.**

7.2 The purpose of an SEC in terms of Reg 43 (5) (a) is 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 all the functions as set out in Reg 43(5)(a)(i)-(v). These responsibilities have been specifically legislated to ensure that the public interest is served and protected by the Company, which is required to be a responsible corporate citizen (See Also King III and Section 72 (4)(a) of the Act).

7.3 **Reg. 43(5) provides** more clarity on what the areas of social responsibility are, and what standards are applicable. It is clear that there is a strong emphasis on the responsibility of business towards the communities in which they operate, on social transformation in the workplace, and on the protection of the safety, health and environment. Although this list of duties seems long, it needs to be noted many of the duties are probably already covered within the organisation for example, compliance with health and safety, Broad Based Black Economic Act, corporate governance, and anti-corruption laws but the monitoring of these functions have to be placed and organised under one committee (in terms of the Act and the Regulations), not just any committee which can be set up and have no legislative obligation as explained above.

7.4 These responsibilities have to be placed and organised under one committee for the purpose of monitoring those functions even if they are performed in various other committees. The SEC's role is to "monitor" and not "perform" all of these duties and by virtue of the summary of the list of functions in Reg 43 (5), it is incumbent on the members of SEC and their advisors to understand the laws relevant to those and other issues.

7.5 All the Applicant states is that due to it being an empowerment company which holds shares in other companies and it having no employees, none of the functions of Reg 43(5) functions apply to it and hence there is no need to have an SEC. However, the Applicant has lost sight of the fact 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.

Significantly, the title to Reg 26 is "interpretation of regulations affecting transparency and accountability" which applies specifically to various regulations, one of them being Reg 43. This is the reason that a SEC has been specifically legislated to enable the management of companies which fall within the ambit of Reg 26 (2) by ensuring compliance with laws and corporate governance.

7.6 Section 72 (5) states that the Tribunal may (my emphasis) grant an exemption which means it has a discretion not that it is obliged to and this discretion has to be exercised in favour of an application for SEC exemption if it has been justified by the Applicant, which it has in fact not done so. The Applicant has also not convinced the Tribunal that all the functions in Reg 43(5) do not require monitoring. Merely making the allegation that the company is an empowerment company and holds shares in other companies does not amount to an explanation of the substantial fulfillment of that requirement nor does it suffice in terms of Law as it does not satisfy the requirement in Section 72 (5)(b) and Reg 43(5).

In terms of Regulation 43(5) (b) the SEC is also designed to ensure that it draw matters within the mandate of the committee to the attention of the board as occasion requires; and report (in terms of Reg 43(5) (c)), through the SEC committee member, to the shareholders at the annual general meeting on the matters within its mandate.

7.7 The Applicant has not listed the areas of social responsibility which it is not expected to adhere to, due to the fact that it does not have any employees , viz. Reg 43(5)(a)(i)(cc), Reg 43(5)(a)(i)(cc), Reg 43(5)(a)(ii)(aa), Reg 43(5)(a)(ii)(bb), Reg 43(5)(a)(iii), Reg 43(5)(a)(iv), and Reg 43(5)(a)(v) do not apply to the Applicant if it had no employees at all (the company secretary is an employee) Even if the Applicant has no employees as it alleges, this would means that other sections of this Regulation do apply, for instance, one such being the OECD recommendations as regards corruption as contained in Reg 43(5)(a)(i)(bb). The question then arises as to how other sub- regulations which do apply (my emphasis) will be monitored by the group SEC on behalf of the Applicant and that has not been addressed at all, as the Applicant is under the mistaken belief that in fact none of the responsibilities in terms of Reg 43(5) have to be complied simply because it has no employees.

8.

FINDINGS:

8.1 The Tribunal is not satisfied that the test laid down in Section 72 (5)(b) has been met for the reasons set out above and also because the Applicant has been unable to show compliance with Reg. 43 (5) in that it has been unable to explain why all or none of the responsibilities, one such being the compliance with corporate governance in terms of Reg 43(5) (i) (bb), does not need to be monitored by the applicant and reported on to the Board.

8.2 The Applicant has also not persuaded the Tribunal on a balance of probabilities that it is not reasonably necessary in the public interest to require it to have a SEC having regard to the nature and extent of its activities.

8.3 In the final analysis the Applicant has not made out a case why the exemption application ought to be granted in its favour and has also not satisfied the test laid down in Section 72(5) (b) which is fundamental to this Application nor has a compelling explanation been forthcoming about the nature and extent of the activities of the Applicant for the Tribunal to consider this application more seriously.

ORDER:

Accordingly, the application for exemption is refused and the Applicant is ordered to form a Social and Ethics Committee by no later than 31 March 2014.

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KHATIJA TOOTLA

Member of the Companies Tribunal

24 January 2014