

IN THE COMPANIES TRIBUNAL: REPUBLIC OF SOUTH AFRICA



Application/ Case no: CTR 003/04/2013

8/1/4/2

In the matter of:

Klein Karoo SAAD Bemarking (Pty) Ltd

Applicant

RE: Application for Exemption in terms of section 72 (5) (a) r/w regulations 43; 142-162 and 168

The Parties

1. The Applicant is Klein Karoo SAAD Bermaking (Pty) Ltd a company incorporated in terms of the Laws of the Republic of South Africa with registration number 2000/002535/07.
2. No address of the registered office or principal place is given by the Applicant.

Background

3. This is an application by the applicant which was lodged as a result of obligations imposed by the requirements of the Companies Act.

4. The relevant section provides as follows:-

s72(4) The Minister, by regulation, may prescribe-

a) a category of companies that must each have a social and ethics committee, if it is desirable in the public interest, having regard to-

(i) annual turnover;

(ii) workforce size; or

(iii) the nature and extent of the activities of such companies;

(b) the functions to be performed by social and ethics committees required by this subsection; and

(c) rules governing the composition and conduct of social and ethics committees.

Regulation 43 prescribes for the implementation of s72 (4-10) as follows:-

Reg. 43. Social and Ethics Committee

[s. 72 (4) to (10)]

(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- (*the 12 months are from 1 May 2011*)

(i) the effective date; (*this is the 1 May 2011*) 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, (*this means after 1 May 2011*) 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.

(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.

Calculation of Public Interest Score

5. Regulation 26(2) prescribes the method of calculating the Public Interest Score (PIS) as follows:-

(2) For the purposes of regulations 27 to 30, 43, 127 and 128, **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

(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.

Procedural History

6. This application is lodged and filed with the Companies Tribunal in terms of section 72 (5) (a) r/w regulations 26(2); 43; 142-162 and 168.

The Act in section 72(5) provides as follows:-

s72(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-*(my own highlighting to emphasize)

(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.

ss(6) An exemption granted in terms of subsection (5) is valid for five years, or such shorter period as the Tribunal may determine at the time of granting the exemption, unless set aside by the Tribunal in terms of subsection (7).

7. Regulation 142 provides as follows:-

(1) A person may apply to the Tribunal for an order in respect of any matter contemplated by this Act, or the Regulations, by completing and filing with the Tribunal's recording officer-

(a) an Application in Form CTR `142; and

(b) a supporting affidavit setting out the facts on which the application is based.

(2) The applicant must serve a copy of the application and affidavit on each respondent named in the application, within 5 business days after filing it.

(3) An application in terms of this regulation **must-**

(a) indicate the basis of the application, stating the section of the Act or these Regulations in terms of which the application is made; and

(b) depending on the context-

(i) set out the Commission's decision that is being appealed or reviewed;

(ii) set out the decision of the Tribunal that the applicant seeks to have varied or rescinded;

(ii) set out the regulation in respect of which the applicant seeks condonation; or

(c) indicate the order sought; and

(d) state the name and address of each person in respect of whom an order is sought.

Factual Background of this matter.

8. The application is lodged on form CTR 142.

9. The applicant submits in its application contained in the CTR form 142 accompanied by the annexed affidavit that it is a company incorporated in terms of the company laws of the Republic of South Africa.

10. It is not submitted on behalf of the company what the main area of its operations is, nor is its principal place of business given.

Rationale for the application

11. The reasons advanced on behalf of the company for the application for exemption are:-

a) the composition of the Board of Directors in conjunction with the Audit committee, remuneration and personnel committee sufficiently and adequately address the key aspects of the requirements of the Social and Ethics committee;

b) that the scope and size of the company does not justify the costs involving the appointing of a separate committee.

Considerations for the Determination

12. The application was considered taking into account-

- i) the provisions of the Act in section 72(4), regulations 26(2), regulation 43 and section 72(5);
- ii) the submissions made on behalf of the Applicant contained in the accompanying affidavit;
- iii) the reasons given on the CTR 142 under the heading “for the following reasons” ;

13. it is not established from the papers whether the Applicant is a company as envisaged in section 72(4) by the words “a category of companies that **must** each have a social and ethics committee”; the functions of the Social and Ethics committee as listed in regulation 43 (5) and the Applicant has failed to illustrate how and by who those functions will be performed;

14. It is also not established whether the company has calculated its public interest score “PIS” in accordance with the formula prescribed in regulation 26(2).

15. It is an established fact, from the registration number of the company that it existed on the effective date as envisaged in regulation 43 (3) (a); therefore, its Board should have appointed the first members of its social and ethics committee within 12 months after the effective date, which is, within 12 months after the 1st May 2011 as required by regulation 43(3) (a) (i) unless regulation 43(2)(a) applies to it.

16. It is noted that the application for exemption was filed with the Lodgement Unit of the Companies and Intellectual Property Commission on the 14th March 2013, a time that fell outside the period envisaged for appointing the committee as indicated in paragraph 4 above or after the determination by the Tribunal of the company’s application, if any, and if the Tribunal has not granted the company an exemption.(regulation 43 (a) (ii).

17. The Applicant, it is further noted did not apply for, and obtain a condonation for late filing as contemplated by regulation 147(1) and (2); however, this aspect has not influenced the determination, which has been considered instead of being struck off the roll.

Finding and Conclusion

18. The Companies Act in regulation 43(2) (a) provides:-

“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;**”

This provision makes no reference to an audit committee nor to a remuneration and personnel committee.

- (b) the Applicant has submitted that it is a company whose Board of Directors has both an audit as well as a remuneration and personnel committee, but has neither averred nor proved how its having those committees exonerates it from the requirements to appoint a social and ethics committee, a requirement that applies to all companies envisaged by the provisions of both section 72 (4) and regulation 43.

It cannot be a correct interpretation of these provisions to conclude that the drafters thereof intended to exclude companies that have the prescribed audit as well as a remuneration and personnel committees from the application of these; instead they apply in addition to the committees mentioned by the Applicant and will only be averted by the existence of a social and ethics committee within the structure of that company performing the functions of a social and ethics committee.

(b) Another avenue for averting the applications of these provisions is that a company has been exempted by the Tribunal in accordance with section 72 (5) and (6).

19. The Companies Act in section 72 (5) (a) and (b) provides the considerations that the Companies Tribunal **must** be satisfied with, for it to grant an exemption, and they are:-

“(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”

The Applicant in its application, has not put forward the nature and extent of its activities, nor has it demonstrated that there is a formal mechanism within its structure that substantially performs the function that would otherwise be performed by the social and ethics committee as the reason for its application but has instead alluded to reasons that are not provided for in section 72(5) as considerations that the Tribunal must take into account in arriving at a decision.

- (c) The Act nowhere makes reference to cost or expense consideration as some of the aspects to be taken as sufficient to justify the granting of an exemption by the Tribunal.

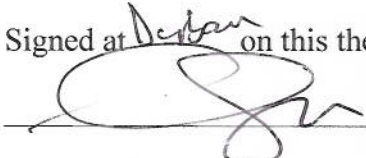
20. The Applicant in its CTR 142 form as well as in its accompanying affidavit, alluded to reasons for its application, none of which fall within the ambit of the considerations contemplated in section 72 (5) (a) or (b); and which would persuade the Tribunal to grant it the exemption.

Conclusion/ Determination

21. a) The application of the Applicant, must, for the reasons mentioned above fail; it is therefore dismissed.

b) The company must constitute a social and ethics committee and appoint its first members within 12 months after this dismissal of its application for exemption.

c) This determination must also be served on the Companies and Intellectual Property Commission for its noting and for monitoring for compliance.

Signed at  on this the 19th day of May 2013.

Ms A.N. Zondi.

Companies Tribunal.