

IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: ct003may2019

Ex parte application:

RFS Homeloans (Pty) Ltd **APPLICANT**

Member of the Tribunal : Prof PA Delport
Date of Decision : 24 July 2019

DECISION (Reasons and Order)

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1. INTRODUCTION

The applicant applies to the Companies Tribunal in terms of section 72 of the Companies Act 71 of 2008 ("Act" / "Companies Act") and regulation 43 of the regulations in terms of the Companies Act (GNR 351 of 26 April 2011) ("Companies Act regulations" / "regulation/s") for an exemption from appointing a Social and Ethics Committee ("SEC").

2. BACKGROUND

2.1 The applicant is RFS Homeloans (Pty) Ltd (2005/006823/07), a private company that is, in effect, a special project vehicle.

2.2 The application is brought by Christiaan Johannes Du Plooy who is duly authorised to do it on behalf of the applicant in terms of a majority round robin resolution of the directors.

2.3 The applicant concluded an agreement with the National Fund for Municipal Workers ("NFMW").

2.4 The business of the applicant in terms of the NFMW agreement is basically as follows (para 5.6 of the founding affidavit):

2.4.1 it provides housing loans to municipal employees in terms of a surety agreement between itself and the NFMW;

2.4.2 the services rendered by the applicant are restricted to members of the NFMW only and no services are rendered to the general public;

2.4.3 all of the housing loans are pension backed housing loans and funding for these housing loans are provided by the NFMW;

2.4.4 should the member default on payment of the housing loan the applicant is entitled to call upon the NFMW to pay the full outstanding amount; and

2.4.5 the NFMW may settle the housing loan from the member's fund credit with the Fund.

2.5 The applicant is required to appoint an SEC due to the fact that its public interest score ("PIS") for the years 2017 and 2018 is more than 500 due solely to the liabilities of the company to employees, as one of the elements of calculating the PIS.

3. APPLICABLE LAW

3.1 The Companies Act 71 of 2008 provides as follows in section 72:

“(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.

(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.

(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) The Commission, on its own initiative or on request by a shareholder, or a person who was granted standing by the Tribunal at the hearing of the exemption application, may apply to the Tribunal to set aside an exemption

only on the grounds that the basis on which the exemption was granted no longer applies."

3.2 The regulations in terms of the Companies Act provide in reg 43(2) that an SEC must be appointed by, *inter alia*, a company with a PIS above 500 as calculated in accordance with reg 26(2) in any two of the previous five (financial) years.

3.3 The applicant is therefore required to appoint an SEC.

3.4 The requirements in respect of the appointment of the SEC and the discretion of the Tribunal in this regard are twofold. In the first instance it must be determined if the company is required to appoint an SEC. If this is not the case (eg because of reg 43(2)(a)), then the Tribunal has no function or discretion. If an SEC needs to be appointed, the only discretion that the Tribunal has, is in terms of section 72(5), ie

3.4.1 does another Act require a formal mechanism that substantially performs the function that would otherwise be performed by the SEC, or,

3.4.2 if is it not reasonably necessary in the public interest to require the company to have an SEC, having regard to the nature and extent of the activities of the company.

4. EVALUATION

4.1 The applicant is of the opinion that it is not reasonably necessary in the public interest to require it to have an SEC, having regard to the nature and extent of the activities.

4.2 The business of the applicant is purely to act as conduit or special vehicle to provide housing loans from advances from the NFMW to a particular category people, i.e. those who are employees of the NFMW.

4.3 The only “public interest” issue here is the employees who receive housing loans through the applicant as intermediary, and the size of the loans has the effect that the PIS more than 500.

5. FINDING

For as single criterium of the nature as in this case in respect of a company acting as agent or conduit to require the appointment of an SEC is not logical and such an interpretation would lead to “. . . insensible or unbusinesslike results . . .”: *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 and *Henochsberg on the Companies Act 71 of 2008* 284.

6. ORDER

The applicant is exempted from the requirement to appoint an SEC for a period of five years from the date of this decision.

SIGNATURE

Prof P.A. Delport
COMPANIES TRIBUNAL: MEMBER
DATE: 24 July 2019