

IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO:

CT006Feb2016

Ex parte application:.

Rothschild (South Africa) (Pty) Ltd
(1999/021764/07)

Applicant

Coram: Delport P.A.

Decision handed down on 18 February 2016

DECISION

INTRODUCTION

- [1] The applicant applies to the Companies Tribunal in terms of sections 72 (5) and 72 (6) of the Companies Act 71 of 2008 (“Act” / “Companies Act”) and regulation 142 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”).

BACKGROUND

- [2] The applicant is a private company, Rothschild (South Africa) (Pty) Ltd with registration number 1999/021764/07.

- [3] The Applicant is a company within the Rothschild Group of companies and has an issued share capital of 1,000 shares.
- [4] The applicant provides corporate finance services.
- [5] Southern Arrows Proprietary Limited ("Sarrows") owns 74.9% of the shares in the applicant and Rothschild's Continuation Holdings AG of Switzerland AG ("RCH") owns 100% of the shares of Sarrows. The majority of the shares in RCH shares are held by Rothschild & Co.
- [6] The remaining 25.1% of the shares in Sarrows are owned by Rothschild South Africa Foundation ("the Foundation").
- [7] The applicant states, in the supporting affidavit of Philippa Mary Stratten (para 8) that "Due to the spread of the above holdings, and if the ultimate beneficial holders of Rothschild & Co's securities are considered to have an indirect beneficial interest in the Applicant, the Applicant would have a public interest score above 500 points..."
- [8] The PIS will exceed 500 due to this "ultimate beneficial holders of Rothschild & Co's securities."
- [9] If the "ultimate beneficial holders of Rothschild & Co's securities" are not taken into account, the applicant has two shareholders as set out in paras 5 and 6 above and the PIS of the applicant for 2014 and 2015 would then be 72 and 63 respectively (supporting affidavit page 3).

APPLICABLE LAW

- [10] The Companies Act 71 of 2008 provides as follows in s 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.”

[11] The regulations in terms of the Companies Act provide in reg 43(2) that a SEC must be appointed by:

- State owned companies;
- listed public companies;
- any other company with a PIS above 500 in any two of the previous five (financial) years.

[12] The PIS is calculated as follows –

- (a) a number of points equal to the average number of employees of the company during the financial year ('employee' has the meaning set out in the Labour Relations Act 66 of 1995 (reg 26(1)(a));
- (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 (reg 26(2)).

[13] A beneficial interest is defined in s 1 of the Companies Act as:

"when used in relation to a company's securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to—

- (a) receive or participate in any distribution in respect of the company's securities;
- (b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or

(c) dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities,"

[14] If a company is required to appoint an SEC, it can apply for a ruling by the Tribunal for an exemption, under the provisions of s 72 (5) of the Companies Act.

[15] It is trite law that absent an agreement or other relationship, shareholding in a holding company (A) does not mean that that person through its shareholding in A, has an "indirect" or beneficial shareholding in the subsidiary company (B). The same principles also apply if there is no holding/subsidiary relationship. The shares in B are held by A, and the shareholder of A merely has a proprietary interest in the share capital of A. This is based on the most basic principle as in *Aron Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL) (see also *Henochsberg on the Companies Act 71 of 2008* at 83 and the definition of "share" in s 1 of the Companies Act).

[16] The "conduit" principle, for want of a better expression, can under certain circumstances be made applicable, such as in tax law, but absent a specific statutory provision in the Companies Act, it does not apply in company law.

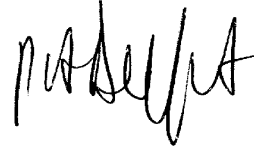
[17] It appears that the oath was administered by a commissioner who has an interest in the affidavit as the stamp indicates that one Paul Ascer Bondi is, apparently, connected to Rothschild (SA) (Pty) Ltd. This would affect the validity of the affidavit and the facts contained therein.

[18] However, I am prepared to condone this irregularity in terms of reg 154(3) due to the facts and circumstances as set out above in respect of the application (or non-application) of the Companies Act.

FINDING

[19] The applicant has a PIS under 500 and does not have to appoint a SEC.

[20] The Tribunal has no function or jurisdiction in this matter and no order is made.

A handwritten signature in black ink, appearing to read 'P.A. Delport', with a stylized, cursive script.

P.A. DELPORT
MEMBER OF THE COMPANIES
TRIBUNAL