COMPANIES TRIBUNAL

REPUBLIC OF SOUTH AFRICA

CASE NO: CT006MAY2016

In the *ex parte* application of:

IMPUMELELO CP NOTE PROGRAMME (RF) LIMITED Applicant

(Registration number: 2013/211998/06)

in respect of:

AN APPLICATION FOR AN EXEMPTION FROM THE REQUIREMENT TO APPOINT SOCIAL AND ETHICS COMMITTEE.

Decision handed down on 11 AUGUST 2016

DECISION

INTRODUCTION

[1] The Applicant applies to the Companies Tribunal (''the Tribunal'') for an exemption from the requirement to appoint a social and ethics committee in

terms of section 72 (5) (b) of the Companies Act No. 71 of 2008 (''the Act'').

BACKGROUND

[2] The Applicant is Impumelelo CP Note Programme 1 (RF) Limited a public company with limited liability duly incorporated in terms of the Act, as amended.

[3] The applicant seeks the following relief as stated in its supporting affidavit:

''PURPOSE FOR THE APPLICATION

The purpose of this application is to seek relief in terms of Regulation 142, of the Companies Regulations, 2001 and Section 72(5) of the Companies Act, for an exemption from the requirement to appoint a Social and ethics Committee."

''Based on the above, I therefore request the Tribunal to grant relief in terms of the Application for relief in the attached form CT142 to which this affidavit is annexed"

APPLICABLE LAW

[4] Before I deal with the relief sought, I wish to highlight what I believe to be the relevant applicable Section and Regulation of the Act.

Section 72 (5) (b) of the Act: Board Committees

[5] Section 72 (5) (b) reads as follows:

‘’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.”

Regulation 43 of the Act: Board Committees

[6] Regulation 43 reads as follows:

‘’ (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—

(i) the effective date; 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, 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.''

EVALUATION

[7] The Deponent to the Applicant's affidavit Rishendrie Thanthony in paragraph 1.1 states that:

> *''1.1. I am duly authorised to bring this application for an exemption from the requirement to appoint a Social and Ethics Committee in terms of Section 72(5) of the Companies Act No. 71 of 2008, as amended (''Companies Act'') on behalf of the Applicant and to do all things necessary in this regard. A certified copy of the relevant shareholder's resolution of the Applicant which authorises me to act as aforesaid is annexed hereto marked ''Annexure B''.*

[8] Annexure B referred to in paragraph 1.1 of the Applicant's supporting affidavit is not attached to this Application.

[9] Rishendrie Thanthony is purportedly duly authorised to bring the application on behalf of the Applicant by way of resolution of shareholder, however in his affidavit he does not make mention his capacity although according to the Ceritificate of Confirmation issued 17 November 2015 by the Companies and Intellectual Property Commission..

[10] In support of its application the Applicant attached copy of the Certificate of

Confirmation issued by the Companies and Intellectual Property Commission on 17 November 2015 and according to the Certificate the Deponent, Willem Hermanus Swanepoel, Brendan Harmse, Pieter Johannes Voster Van Der Merwe and Kuveshan appears to be the directors of the Applicant.

[11] The application is based on section 75 (5) (b) of the Act, that it is not reasonably necessary in the public interest for the Applicant to have a social and ethics committee.

[12] In terms of section 75 (5) (b) of the Act an exemption will be granted by this Tribunal if it is satisfied that ''… *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*.''

[13] The main question to be asked, in dealing with what the Tribunal is required to decide on, is whether the reasons submitted by the Applicant, justify an order in terms of Section 72 (5) (b) of the Act.

FINDING

[14] The relief sought by the Applicant is for an order for exemption to appoint a social and ethics committee.

[15] The Applicant is registered as a public company. In terms of section 66 of the Act a public company is required to have at least three (3) directors.

[16] The affidavit in support of the application for exemption is not supported by a resolution of directors. The authority to bring an application must be given by the board, and not the shareholders in terms of section 66 (1) of the Act, which provides that the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all the powers and perform any of the functions of the company.

[17] In paragraph 3.4 the Deponent states that:

> *''3.4 The Applicant calculated its public interest score as at its last financial year end, and should the Applicant be assessed solely on its public interest score, it may be required to appoint a Social and Ethics Committee, in terms of Section 72(4) of the Companies Act and Regulation 43(1) of the Companies Regulations, 2011;''*

[18] The Deponent does not substantiate as to how its public interest score was calculated.

[19] The Applicant does not give details regarding Public Interest Score in terms of regulation 26 (2) of the Act

[20] In paragraph 5.3 the Deponent states that:

> *''5.3 The securitisation programme is partly facilitated by the Applicant in terms of a suite of Transaction Documents. All activities of the Applicant, such as the scope of its operations*

and its priority of payments allocating cash flows are pre-prescribed by these Transaction Documents. The Applicant is restricted from trading and has no employees. All required services are contracted to external service providers.''

[21] The Applicant did not indicated that a social and ethics committee is not necessary to monitor the Applicant's activities with regard to social and economic development; good corporate citizenship; environment, health and public safety and consumer relationships.

[22] The submissions by the Applicant are very limited and do not reasonably reveal the nature and extent of the Applicant's activities.

[23] In my view the application is defective and incomplete.

[24] Therefore, based on the aforesaid, I refuse to grant an exemption, but do so not necessarily due to matters relating to the nature and extent of the Applicant's activities, but on the limitation of the submissions in the current application. However, the Applicant may re-apply after supplementing its papers.

ORDER

In the result the following order is made:

a) The current application for an exemption from the requirements to appoint a social and ethics committee is refused.

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MMOLEDI MALOKANE

(MEMBER OF COMPANIES TRIBUNAL OF SOUTH AFRICA)

Date: 11 AUGUST 2016