COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT007Feb2016

In the *ex parte* application of:

JT ROSS (PTY) LTD **Applicant**
(Registration Number: 2001/025759/07)

in respect of:
application for an exemption from the requirement to appoint a social and ethics committee

---

Presiding Member	:	Khashane La M. Manamela (Mr.)
Date of Decision	:	16 March 2016

DECISION (Reasons and an Order)

Khashane La M. Manamela

[1] The applicant is a subsidiary of JT Ross and Son (Pty) Ltd. Together, they are part of the JT Ross Group of companies (the JT Ross Group). The JT Ross Group has common directors. It is submitted that there are committees within the JT Ross Group performing the functions of a social and ethics committee (SEC), ostensibly for the JT Ross Group, including the applicant. Therefore, the applicant ought to be granted an exemption from the requirement to appoint an SEC in terms of section 72(5)(a) of the Companies Act 71 of 2008 (the Companies Act), read with regulation 43[1] of the Companies Regulations, 2011 (Company Regulations).[2]

[2] This application is saddled with problems. Firstly, although the Form CTR 142 is dated 17 September 2015, the supporting affidavit attached thereto is dated 10 April 2013.[3] Therefore, a period of about 18 months had elapsed in between the two documents. Secondly, the resolution evincing authority for the application and the deponent (i.e. Melanie Ann Gillespie) is dated 20 May 2015.[4] On the same date Doug Ross, a director ostensibly of the applicant, gave authority to an entity called Henzel Services (Pty) Ltd or its employees to "communicate" (Henzel) with this Tribunal.[5] There is no document authorising Doug Ross to give such authority to Henzel. The resolution mentioned above only authorised the deponent to depose to the affidavit herein. Doug

[1] Regulation 43(2) reads as follows: "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)." I added underlining to the aforesaid citation, for emphasis.
[2] The Companies Regulations were determined by the Minister of Trade and Industry in terms of section 223 of the Act 71 of 2008 and published under GN R351 in Government Gazette 34239 of 26 April 2011.
[3] See indexed p 1.
[4] Se indexed p 26.
[5] See indexed p 27.

Ross does not have the purported powers, but the board of directors of the applicant. Therefore, Henzel did not have authority to file the application on behalf of the applicant. Thirdly, included in the papers is a Form CTR 145 dated 29 April 2013 together with copies of identity documents.[6] It appears that this was the original notice of motion before the Form CTR 142 referred to above was substituted for it. Also, from the attached electronic mail exchanges, the application appears to have been initially filed on 28 September 2015.[7] However, there is no other supporting affidavit to this application apart from the one of 10 April 2013 referred to above. The relevance of all these dates will become clearer below.

[3] The application appears to be based on outdated material. From the available facts, the applicant is not a state owned company or a listed public company. Therefore, it is required to appoint an SEC due to its public interest score being over 500 points as contemplated by regulation 43(1)(c) of the Companies Regulations. This regulation reads as follows:

> "**43. Social and Ethics Committee**
> (1) This regulation applies to—
> (a) every state owned company;
> (b) every listed public company; and
> (c) any other company that has in <u>any two of the previous five years</u>, scored above 500 points in terms of regulation 26(2)."

[I added the underlining for emphasis]

[6] See indexed pp 29-33.
[7] See indexed pp 34-38.

[4] A reading of the above provision, particularly the underlined part, in my view, confirms that time is of the essence in this type of applications. An applicant company required by regulation 43(1)(c) to appoint an SEC would have had a public interest score exceeding 500 points in any two years of the last five years. This would have to be the case even with the applicant. There is a document which appears to reflect the applicant's public interest score for the years 2008 to 2012.[8] Although, there is no score stated in respect of 2012, the scores for the rest of the years are as follows: 715 for 2009; 658 for 2010; 360 for 2011, and 449 for 2012. Therefore, the application was precipitated by the public interest scores of the years 2009 and 2010. For these years the applicant's public interest score exceeded 500 points. But, be that as it may, it is now over five years and there is no submission regarding the applicant's public interest score since 2012. The application appears to be no longer necessary or required. For the moment, I will move on to deal with other issues, but will return to discuss this below.

[5] Apart from what is stated above, the rest of the submissions by the applicant for an exemption are to the effect that the SEC functions set out in regulation 43(5) of the Companies Regulations are performed by the committees and/or persons within the applicant or the JT Ross Group for the applicant, as follows:

> [5.1] the board of directors, the JT Ross Group legal advisor and company secretary "maintain" activities, whilst considering relevant legislation; other legal requirements or prevailing codes of best practice; the 10 principles set out in the United Nations Global Compact Principles and the

[8] See indexed p 28 and par 6 of the supporting affidavit on indexed p 2.

OECD recommendations regarding corruption.[9] The applicant has four directors who are all actively involved in the day to day running of the applicant.

[5.2] the JT Ross Group has an existing committee, comprising the head of human resources; company secretary; departmental head and the director of the applicant (being the deponent herein),[10] which committee monitors and actively implement, to the extent possible, the provisions of the Broad–Based Black Economic Empowerment Act 53 of 2003.

[5.3] the books of account of the applicant are independently audited on an annual basis;

[5.4] the JT Group contributes to charitable trusts called the JT Ross Charitable Trust (which is involved in various projects in the community) and the JD Ross Bursary Trust (which awards bursaries to underprivileged students at the University of KwaZulu-Natal);

[5.5] regarding applicable legislation relating to health and safety, the JT Ross Group employs sector specialists to ensure strict compliance. The applicant is making attempts to engage in green building practices and its directors are members of the Green Building Council of SA; the National

[9] See par 8.1 of the founding affidavit on indexed p 3.
[10] The deponent, Melanie Ann Gillespie, introduces herself as "an adult female business woman and …a Director of the Applicant" in par 1 of the supporting affidavit on indexed p 2.

Home Builders Registration Council and the South African Property Owners Association.

[5.6] the JT Ross Group's marketing department, legal advisor and board of directors, are responsible for the applicant's consumer relationships, advertising and public relations activities;

[5.7] the applicant is not an employer as defined in the Labour Relations Act[11] and therefore is not required to comply with the Employment Equity Act 55 of 1998; and

[5.8] the directors of the applicant report to the shareholders at the applicant's annual general meeting on all relevant matters set out in this paragraph.

[6] From the above submissions, it appears that the application is based on two grounds. Firstly, as contemplated in terms of section 72(5)(a) and secondly in terms of section 72(5)(b) of the Companies Act. These provisions read 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

[11]See par 3 of the supporting affidavit on indexed p 2. I am not certain here that I understand the submission made.

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."

[I added underlining for emphasis]

[7] An exemption based on section 72(5)(a) is possible where the applicant 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 functions of an SEC. From the submissions in paragraph [5] above it appears that the applicant have some committees or persons from within or from the JT Ross Group performing some or all functions of an SEC. However, there is no evidence that the applicant is required by other legislation to have these committees or form of formal mechanism performing its SEC functions. What is clear is that the applicant's board of directors; the JT Ross Group legal advisor; the JT Ross Group company secretary, and other functionaries of the applicant or the JT Ross Group, jointly or severally performs some functions which appear to be SEC functions. But this is not sufficient for purposes of acquiring an exemption or even in compliance with the provisions of section 72(5)(a) of the Companies Act.

[8] In as far as section 72(5)(b) is concerned, an exemption may be granted on public interest considerations informed by the nature and extent of the applicant company's activities. Apart from the general submission that the applicant is active in the

construction and property development sectors, there is no submission regarding the company's activities. Much space in the papers is dedicated to the submissions on the benevolent activities of the JT Ross Group and the applicant. These are not the only determinants for an exemption. There are other relevant factors. The application would have benefitted from consideration of the provisions of regulation 43(5) of the Companies Regulations. This provision is helpful in determining what areas or issues are to be addressed in an application of this nature, and reads as follows in the material part:

> "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) …
> …
> (cc) the Employment Equity Act; and
> (dd) the Broad-Based Black Economic Empowerment Act;
> (ii) good corporate citizenship…
> (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 …
> (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."

[9] Therefore, considering the parsimonious and outdated nature of the submissions herein, the current application ought to fail. The applicant, if is so minded or advised, may bring a fresh application which, among others, has to address the concerns raised above.

[10] In the result:

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

Khashane La M. Manamela (Mr.)
Member, Companies Tribunal
16 March 2016