COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT009Dec2015

In the *ex parte* application of:

ST FRANCIS LINKS HOMEOWNERS ASSOCIATION NPC **Applicant**
(Registration Number: 2006/017273/08)

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

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Presiding Member	:	Khashane La M. Manamela (Mr.)
Date of Decision	:	11 February 2016

DECISION (Reasons and an Order)

Khashane La M. Manamela

[1] This application is grounded on section 72(5)(b)[1] of the Companies Act 71 of 2008 (the Companies Act). Section 72(5), applied in conjunction with regulation 43[2] of the Companies Regulations, 2011 (Company Regulations),[3] provides for the appointment of a social and ethics committee (an SEC). The same provisions cater for exemptions from this requirement.[4] Among others, a company may be exempted from the requirement to appoint an SEC on public interest considerations based on the nature and extent of its activities.[5]

[2] The applicant submits that due to the limited nature and extent of its activities it ought to be exempted from the requirement to appoint an SEC. More on this below, after expressing some concerns regarding matters of form in this application.

[3] The current application represents a second attempt by the applicant to obtain the relief sought. I am aware of the decision dated 18 May 2015[6] by my colleague Mr. PJ

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[1] Section 72(5) of the Companies Act 71 of 2008 (the Companies Act) reads as follows in the material part: "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) …
(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."

[2] Regulation 43(2) is the most relevant for current purposes. It 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.

[3] 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.

[4] See s 72(5)(b) in footnote 1 above.

[5] *Ibid.*

[6] See *St Francis Links Homeowners Association NPC*, case/file number: CT015Mar2015, decided on 18 May 2015 (the *First Francis Links*). This decision and other decisions of this Tribunal are available on the website www.companiestribunal.org.za.

Veldhuizen in terms of which he refused relief. His refusal was out of procedural concerns or grounds.[7]

[4] I also recently had the privilege of adjudicating on a matter involving an entity which appears to be related to the applicant.[8] Therein the same relief was sought. Other than the fact that, the supporting affidavit in this application reflects a date after the application was made, this application has the same procedural shortcomings as the other matter.[9]

[5] The shortcomings include that the supporting affidavit was signed before a commissioner of oaths with an apparent interest in the matter,[10] namely Mr. Andrew Barton. Mr Barton is the company secretary of the applicant[11] and acted as the signatory to Form CTR 142 in this application.[12] However, as I do not consider the shortcomings to be, inimical to provisions of the Companies Act in particular or perverting the interests of justice in general, I condone the shortcomings as technical irregularities.[13] Therefore, I will proceed to deal with the substantive issues of this application.

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[7] In the *First Francis Links* relief was refused due to the non-commissioning of the statement accompanying the application (see par 3 thereof).
[8] See *Links Golf Club (RF) Limited*, case/file number: CT010Dec2015, decided on 29 January 2016 (the *Links Golf Club*).
[9] See the *Links Golf Club* at pars 3-7.
[10] See regulation 7 of the Regulations Governing the Administering of an Oath or Affirmation. These regulations were published in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 initially published in terms of Government Notice No R1258 of 21 July 1972 and amended in 1977, 1980 and 1982.
[11] See letter dated 2 December 2015 by Mr Andrew Barton to the Registrar of this Tribunal; Form CTR142 date stamped on 17 December 2015
[12] See Form CTR142 date stamped on 17 December 2015.
[13] See regulation 154(3) of the Companies Regulations, which reads thus: "The Tribunal may condone any technical irregularities arising in any of its proceedings."

[6] As stated above, the applicant relied on section 72(5)(b) of the Companies Act[14] for an exemption from appointing an SEC. Accordingly, in order to make a determination whether or not to grant the exemption, regard must be had to the nature and extent of the activities of the applicant. Unfortunately, the legislature has not provided much, if anything, by way of a guide on this, save that there has to be public interest considerations crested on reasonableness and with regard to the nature and extent of the activities of the company.

[7] The nub of the applicant's submissions is that it exists for a very limited purpose of the "MANAGEMENT OF A HOMEOWNERS ASSOCIATION AND RELATED FACILITIES TO THE BENEFIT OF ALL MEMBERS"[15] In expansion of this, the following is submitted:

[7.1] the applicant as a non-profit company fulfills a "public benefit purpose";[16]

[7.2] the applicant has 495 home owners, but will consist of 540 homes when the estate is completed;[17]

[7.3] the applicant has approximately 35 permanent employees,[18] and

[7.4] the applicant's total revenue for the year ended 30 September 2015 was R13.7 million, with its expenditure at R11.5 million and the balance of R2.2 million retained as part of reserves.[19]

[14] See footnote 1 above for a full citation of s 72(5)(b) of the Companies Act.
[15] See the applicant's Memorandum of Incorporation on page 1; fourth paragraph from the bottom on page 1 of the supporting affidavit. The paragraphs in the affidavit are unmarked.
[16] See second paragraph from the bottom on page 1 of the supporting affidavit.
[17] See third paragraph from the bottom on page 1 of the supporting affidavit.
[18] See last paragraph on page 2 of the supporting affidavit.
[19] See page 2 of the supporting affidavit.

[8] It is also submitted that the main cause of the applicant to be required to appoint an SEC was the number of its members or homeowners currently tallying to 495. The number of members significantly contributed to the applicant's public interest score exceeding 500 points. In other words, barring the number of home owners or members, the applicant would be excluded from the requirement to appoint an SEC. I agree with the logic in this submission.

[9] In terms of regulation 43(1)(c) of the Companies Regulations, a company which scored above 500 points in any two of the previous five years, is required to appoint an SEC.[20] The points or public interest score are calculated in terms of regulation 26(2) of the Companies Regulations.[21]

[10] However, the actual public interest score of the applicant is not stated. However, in my view, this is not that difficult to fathom. With the number of members (i.e. 495)[22]; the number of employees (i.e. 35)[23] and the over R13 million turnover,[24] it is easy to see

[20] Regulation 43(1), which reads as follows "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)." I added underlining for emphasis.

[21] Regulation 26(2) reads as follows in the part material for current purposes: "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) …; 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." I added underlining for emphasis.

[22] See regulation 26(2)(d)(ii) quoted in footnote 21 above.

[23] See regulation 26(2)(a) quoted in footnote 21 above.

[24] See regulation 26(2)(c) quoted in footnote 21 above.

how the applicant exceeded the 500 points threshold. Besides, the applicant's say so has to be accepted, lest the applicant would not have been bothered to launch and relaunch this application. Its score must be above the regulated threshold of 500 points. For, the only other bases for a company to be required to appoint an SEC are when it is listed public company[25] and a state owned company.[26] The applicant is a non-profit company.

[11] For purposes of the determination to be made herein, the applicant's activities ought to be also considered against the purpose and functions of an SEC, as stated in regulation 43(5) of the Companies Regulations. Regulation 43(5) 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

[25] See regulation 43(1)(b) of the Companies Regulations
[26] See regulation 43(1)(a) of the Companies Regulations

(c) to report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate."

[12] Evident from the provisions of regulation 43(5) above is the fact that, an SEC monitors the activities of the particular company against the law and prevailing codes of best practice;[27] draw matters thereon to the attention of the board of directors[28] and report through one of its members, to the shareholders at annual general meetings.[29] Therefore, whilst the granting or refusal of an exemption based on section 72(5)(b) is determined from the nature and extent of the company's activities, those activities ought to be assessed from the objectives and purpose of the company to have an SEC. This is always a factual enquiry and therefore each matter would turn on its facts.

[13] Upon assessment of the nature and extent of the activities of the applicant as stated above, in my view, it is not reasonably necessary in the public interest for the applicant to appoint an SEC. The applicant was established as a non-profit company with a mandate limited to the management of the affairs of its homeowners association. It derives its income significantly from levies collected from its members, as the home owners within the estate and expends almost all of its income on estate-related costs, whilst the remainder is retained for future use. It does not appear to have activities beyond its members' estate. Therefore, public interest will be served by granting an

[27] See regulation 43(5)(a) of the Companies Regulations.
[28] See regulation 43(5)(b) of the Companies Regulations.
[29] See regulation 43(5)(c) of the Companies Regulations.

exemption, which to avoid any doubt, will be for a period of 5 (five) years from date of the order made herein.

[14] In the result:

a) the applicant is exempted from the requirement to appoint a social and ethics committee; and

b) the exemption granted in terms of a) hereof is for a period of 5 (five) years from date hereof.

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Khashane La M. Manamela (Mr.)

Member, Companies Tribunal

11 February 2016