COMPANIES TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case Number CT012OCT2015

In the Ex Parte Application of;

ADT SECURITY (PTY) LIMITED **Applicant**

(Registration number 2000/029969/07)

in respect of;

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

Presiding Member of the Tribunal: Lucia Glass

DECISION (Reasons and Order)

INTRODUCTION

1. The Applicant applies for an exemption from the requirement to appoint a social and ethics committee on the basis that the Applicant has an existing committee which performs the functions that would otherwise be performed by a social and ethics committee, in terms of section 72 (5) of the Companies Act 71 of 2008 (the Act) and expanded in regulation 43 of the Companies Regulations (the Regulations).

2. The Applicant further applies for an exemption from applying for this Application outside the period as provided for in regulation 43(3)(a) i.e. two years from the effective date of 1st May 2011. The Applicant requests condonation for the late filing of the application due to the fact that the Applicant has gone through a significant realignment of its business operations. Further that the previous company secretary failed to bring the requirement to appoint a social and ethics committee to the attention of the board of directors. Further that during the recent audit review, the Applicant's auditors highlighted the requirement to the Applicant's board that the

Applicant was required to appoint a social and ethics committee due to the Applicant being over the 500 base points.

3. It is my view that the reasons given for not applying within the two year period in terms of regulation 43(3)(a) are bona fide and I grant the Applicant condonation for the late filing of this application.

PRELIMINARY ISSUES

4. The deponent to the Applicant's affidavit is Kubashnie Pillay who is a director of the applicant and is authorised to depose to the affidavit by virtue of a duly adopted board resolution which is attached to her affidavit.

5. It is averred that, in terms of regulation 43 of the Regulations to the Act, the Applicant has scored, and is expected to score, above 500 points in terms of Regulation 26 (2) and whether it is accordingly required to appoint a social and ethics committee in terms of regulation 43 of the Act.

FACTS

6. The Applicant applies to the Tribunal for exemption from appointing a Social and Ethics Committee, in terms of Section 72(5)(e) of the Act, that the Tribunal grant an exemption if it is satisfied that the applicant 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.

7. The Applicant further applies to the Tribunal for exemption of appointing a Social and Ethics Committee, in terms of Section 7(b) of the Act, (i.e., that the purposes of the Act are to promote the development of the South African economy by creating flexibility and simplicity in the formation and maintenance of companies).

8. The Applicant further applies Tribunal for exemption of appointing a Social and Ethics Committee, in terms of Section 7 (j) of the Act, (i.e., that the purpose of the Act is to encourage the efficient and responsible management of companies).

9. The Deponent avers that the grounds for exemption to appoint a social and ethics committee is based on the fact that the Applicant has an existing committee which substantially performs the functions that would otherwise be performed by the social and ethics committee.

10. It is averred that this Committee convenes on a weekly basis and the members include the current directors of the Applicant, business leads and functional leads.

11. It is alleged that this committee covers topics such as Human resources, Environment, Health and Safety, transformation and diversity, controllership an Investigations and Legal.

12. THE APPLICABLE LAW

Regulation 43 (2) provides for the situations to which the exemption of the appointment of a Social and Ethics Committee applies and 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 (emphasis added)*
*(b) It has been **exempted by the Tribunal** in accordance with Section 72 (5)and (6)." (emphasis added)*

I quote Section 72 (5) which reads as follows:

***(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 (emphasis added)*
***(b)** it is not reasonably necessary for 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."** (emphasis added)*

The functions of the Committee are set out in Regulation 43 (5) reads as folloows:

"(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 as follows:

Human Rights

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

Principle 2: make sure that they are not complicit in human rights abuses.

Labour

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour; and

Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment

Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: undertake initiatives to promote greater environmental responsibility; and

Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery."

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."

APPLICATION OF THE LAW TO THE FACTS

14. The Tribunal is to decide, whether in terms of Section 72 (5) (a), 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 perform the function that would otherwise be performed by the social and ethics committee, in terms of this section and the regulations (emphasis added).

15. It is my view that the emphasis of this section is to be placed on the words **'in terms of other legislation**' is required 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 the Act and Regulations (emphasis added).

16. It is my understanding that the functions of the Social and Ethics committee are specific and substantial. The Applicant does not mention that there is other legislation that requires it to have and that the Applicant does have, some form of formal mechanism (in terms of other legislation) within its structures that substantially performs the function that would otherwise be performed by the social and ethics committee

Findings

17. After considering all the facts and the law, I conclude that it is necessary that the Applicant appoints a social and ethics committee and is not exempted from doing so. It is my view that Section 7 (b) and (j) provide an overall interpretation of the Act and can not override a specific wording of the Act such as 'in terms of other legislation'.

Order

I accordingly do not exempt the applicant from appointing a Social and Ethics Committee for a period of 3 years.

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LUCIA GLASS

MEMBER OF THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Dated 18.12.15