IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT002Jun2019

In re *ex parte* application:
MEROPA LEISURE AND ENTERTAINMENT (PTY) LTD
(Registration No. 1997/007830/07)

Presiding Member of the Companies Tribunal: ISHARA BODASING
Date of Decision: 14 June 2019

DECISION

1. INTRODUCTION

1.1 Applicant is MEROPA LEISURE AND ENTERTAINMENT (PTY) LTD., with registration number 1997/007830/07, and whose main business is to operate hotels and casinos.

1.2 On 27 May 2019 an application was made to the Companies Tribunal for Applicant to be exempt from appointing a Social and Ethics Committee ("SEC") in terms of section 72(5) and (6) of the Companies Act 71 of 2008 ("the Act") read with Regulation 43 of the Companies Regulations[1] ("the Regulations").

1.3 The founding affidavit in the CTR142 form is deposed to by Elizabeth Defillo Hernandez, Group Manager: Governance and Secretarial of Sun International Limited.

2. ISSUES

[1] GN R351 in GG 34239 of 26 April 2011.

2.1 There is no evidence that Applicant is a company duly incorporated in accordance with the company laws of South Africa. The attached certificates of incorporation and to commence business do not have the seal of the Companies Registration Office, which is an authentication requirement.

2.2 Applicant's articles of Association require it to have between two to twelve Directors on its Board. There is neither evidence of this, nor of whether they passed a resolution that the deponent is mandated to bring this application on behalf of Applicant.

2.3 Ms Hernandez claims that Sun International Corporate Services (Pty) Ltd is the registered company secretary of the Applicant[2]. There is no evidence to support this contention. Furthermore, the attached Memorandum of Association of Applicant cites its group secretary as Silvia Ann Bailes.

2.4 Ms Hernandez also alleges that Sun International (SA) Limited manages Applicant in terms of an operating management agreement concluded on 11 April 2019.[3] Again, there is no supporting evidence to this effect.

2.5 According to Ms Hernandez, Applicant's Public Interest Score ("PIS") as at the end of its 2017 and 2018 financial years was above 500 (five hundred), being 750 and 776 respectively. There is no detail in respect of the scoring. No further information in respect of its number of employees and its trading activities is furnished in this regard.

2.6 Ms Hernandez refers to annexure B of her affidavit to assert that the SEC of Sun International Limited has agreed to perform the relevant functions on behalf of Applicant. However, there is again no evidence that Applicant is a subsidiary of Sun International Limited or that Applicant's Board has consented to this function being performed by Sun International Limited.

3. APPLICABLE LAW

3.1 Section 72 of the Act stipulates:

"(4) The Minister, by regulation, may prescribe –

[2] Affidavit of Hernandez at para. 2

[3] *Ibid* at para 4.1

(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)."

3.2 The Companies Regulations provide in Regulation 43(1) that a SEC must be appointed by:

...

(c) Any other company with a PIS above 500 in any two of the previous five (financial) years.

3.3 The PIS is calculated in terms of Regulation 26(2) as follows—

…

(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 the profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities; or

(ii) in the case of non profit company, to be a member of the company, or a member of an association that is a member of the company.

3.4 If a company is required to appoint an SEC, it may apply for a ruling by the Tribunal for an exemption, under the provision of section 72(5) of the Companies Act.

3.5 Section 66(1) of the Act provides as follows:

"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 of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise."

3.6 In terms of Regulation 142(3), an application to this forum for a ruling must be made by filing:

(a) an Application form CTR 142; and

(b) a supporting affidavit setting out the facts on which the application is based.

4. **EVALUATION**

4.1 It is incumbent on the Applicant to place sufficient evidence before this Tribunal to support the application.

4.2 Furthermore, it is also a trite law that the deponent to an affidavit founding an application, must be duly authorised by the Applicant to bring such application. The directors' powers under s 66 enable them to cause the company to participate in legal proceedings. For this purpose, they must authorise the institution of the proceedings and the prosecution thereof.[4] They must also authorise one of their number or someone else (e.g. a manager or the secretary) to represent the company in such proceedings.... There must be evidence before the Court that the person purporting to represent the company has been authorised accordingly with regard to the particular

[4] Ganes v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624

proceedings.[5]

5. FINDINGS

5.1 What has been placed before this Tribunal by the applicant is in my view insufficient to address what is required for an exemption in terms of the Act.

5.2 Furthermore, the deponent to the affidavit in support of this application has failed to demonstrate that she is mandated to represent the Applicant to make this application.

5.3 Therefore, on perusal of Applicant's supporting documentation, an analysis of the applicable law, and considering the deponent's submissions, I find that the dearth of evidence is fatal to this application.

6. ORDER

The application for an order for exemption from the requirement to appoint an SEC is dismissed.

ADV. ISHARA BODASING

[5] Henochsberg on the Companies Act 71 of 2008, Vol 1 [Issue 5] 253- 257