IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT009AUG2017

In ex parte application of:

Anheuser-Busch Inbev Africa (Pty) Limited **APPLICANT**

(Registration Number: 1998/019836/07)

Issue for consideration: Ex-parte application for an exemption from the requirement to appoint a social and ethics committee in terms of section 72(5) of the Companies Act, 2008 (Act No. 71 of 2008).

Coram: Lindelani Daniel Sikhitha

Decision handed down on 11 September 2017

DECISION (Reasons and Order)

INTRODUCTION

[1] The Applicant is Anheuser-Busch Inbev Africa (Pty) Ltd, which is a limited liability private company duly formed and incorporated in terms of the Company Laws of the Republic of South Africa and with its registered office situated at Two Jan Smuts Avenu, Braamfotein, Johannesburg, 2001.

[2] The Applicant alleges that it has public interest score, in any two of the previous five years, that is above 500 points in terms of Regulation 26(2) of the Regulations. The Applicant has however failed to provide any further information regarding the exact number of its public interest score.[1]

[3] In terms of the Companies Act, 2008 (Act No. 71 of 2008) ("the Act") read together with the Companies Regulations, 2011 ("the Regulations") the Applicant is therefore required to appoint a Social and Ethics Committee ("an SEC") unless if the Applicant is exempted from doing so in terms of either of the grounds provided for in Regulation 43 of the Regulations.

[4] This is therefore an *ex parte* application in terms of section 72(5) and 72(6) of the Act for an exemption from the requirement to appoint an SEC. The current Application was filed with the Companies Tribunal on the 11th day of August 2017 at about 11h30.

APPLICABLE LAW

[5] Section 72(4) empowers the Minister of Trade and Industry ("the Minister") to prescribe, by way of Regulations, those companies which shall be required to appoint an SEC. In line with the aforementioned section, the Minister did indeed make Regulations in terms of 223 of the Act.

[6] Regulation 43 of the Regulations states that it applies to every state owned company, every listed public company, and any other company that has, in any two of the previous five years, scored above 500 points in terms of

[1] Refer to Paragraph 7 of the Supplementary Affidavit deposed to by Duncan Pask, who is allegedly the Company Secretary for the Applicant.

Regulation 26(2) of the Regulations, or would have so scored if the Act had been in effect at that time.

[7] Regulations 43(2) of the Regulations provides that a company to which Regulation 43 applies must appoint an SEC unless if the company in question:

7.1 is a subsidiary of another company that already has an SEC, and an SEC of that other company will perform the functions required by Regulation 43 of the Regulations on behalf of that subsidiary company; or

7.2 has been exempted by the Companies Tribunal in accordance with section 72 (5) and (6) of the Act.

[8] In terms of section 72(5) of the Act, a company that falls within a category of companies that are required in terms of section 72(4) of the Act and Regulation 43 of the Regulations to appoint an SEC may apply to the Companies Tribunal in the prescribed manner and form for an exemption from that requirement, and the Companies Tribunal may grant such an exemption if it is satisfied that:

8.1 the company in question 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 an SEC in terms of section 72 of the Act and Regulation 43 of the Regulations[2]; or

[2] Refer to section 72(5)(a) of the Act.

8.2 it is not reasonably necessary in the public interest to require the company to have an SEC, having regard to the nature and extent of the activities of the company[3].

[9] In terms of Paragraph 8 of the Affidavit in Support of an Application in terms of Section 72(5)(b) of the Companies Act, 71 of 2008 ("the Supporting Affidavit") deposed to by one Duncan Pask, the current application for exemption from the requirement to appoint an SEC is being made in terms of section 72(5)(b) of the Act.

[10] As already indicated in 8.2 above, section 72(5)(b) provides that an exemption from the requirement to appoint a SEC may be granted on the basis that it is not reasonably necessary in the public interest for a company to appoint an SEC having regard to the nature and extent of the activities within the Applicant's company.

[11] In the alternative and in Paragraph 10 of the Supporting Affidavit, the current application for exemption from the requirement to appoint an SEC is being made in terms of section 72(5)(a) of the Act.

[12] As already indicated in 8.1 above, section 72(5)(a) provides that an exemption from the requirement to appoint an SEC may be granted on the basis that 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 as outlined in section 72 read together with Regulation 43 of the Regulations.

[3] Refer to section 72(5)(b) of the Act.

[13] In terms of Regulation 142(1) of the Regulations, a person may apply to the Companies Tribunal for an order in respect of any matter contemplated by the Act, or the Regulations by completing and filing with the Companies Tribunal's recording officer:

13.1 an application in Form CTR 142; and

13.2 a supporting affidavit setting out the facts on which the application is based.

[14] The current application was submitted by the Applicant to the Companies Tribunal in Form CTR 142 and the Applicant is seeking an exemption on the following basis, that:

14.1 it is not reasonably necessary in the public interest for it to appoint an SEC, having regard to the nature and extent of its activities, particularly in relation to the functions of an SEC as set out in Regulation 43(5); or

14.2 another formal mechanism within its structures substantially performs the functions of a social and ethics committee, as set out in detail in the Supporting Affidavit attached thereto.

[15] Form CTR 142 was duly signed on behalf of the Applicant by Duncan Pask ("Pask"), who is a director of the Applicant. In addition, the application is supported by the Supporting Affidavit deposed to by Pask. It is clear from the documents filed with the Companies Tribunal that Pask had been purportedly authorized to depose of the Supporting Affidavit and to launch the current application on behalf of the Applicant in terms of the resolution of the board of directors of the Applicant passed on 07 July 2017. A copy of the resolution is

annexed to the Supporting Affidavit and but it is not marked as appendix thereto.

[16] I have noted that the names of the signatories to the aforementioned resolution of the board of directors of the Applicant are AS Murray, RT Almeida Cabral De Soares and JA Mabuza. In terms of page 4 of Form CoR 14.3 attached to the Supporting Affidavit deposed to by Pask but not marked as appendix thereto, the active directors and officers of the Applicant are Maria Luiza Moreira (Company Secretary), Mark John Bowman (Director) and Jonathan Andrew Kirby (Director). The active directors and officers of the Applicant did not sign the purported resolution of the board of directors of the Applicant and there is no explanation as to why the aforementioned resolution is signed by persons other than the active directors and officers of the Applicant.

[17] I am therefore not satisfied that the current application complies with the requirements set out in Regulation 142(1) of the Regulations Pask is not authorised by the active directors and officers of the Applicant to bring the current application.

EVALUATION AND FINDINGS

[18] Be that as it may, it is alleged that the Applicant is a wholly-owed subsidiary of SABMiller Africa and Asia B. V. (NL) (“SABMiller Africa and Asia”). SABMiller Africa and Asia is a company incorporated in the Netherlands. SABMiller Africa and Asia is ultimately owned by Anheuser-Busch Inbev

SA/NV ("AB Inbev"). AB Inbev is a company incorporated in Leuven, Belgium and listed on Euronext, Brussels.[4]

[19] It is further alleged without providing any proof thereof that the sole purpose and object of the Applicant is to provide management services to the AB Inbev group of companies on the African continent. [5]

[20] It is further alleged that the Applicant's turnover and liabilities in any two of the previous five years, scored above 500 points in terms of Regulation 26(2) of the Regulations. Consequently, the Applicant does acknowledge that it required in terms of the Act read together with the Regulations to appoint an SEC.

[21] As already stated above, the Applicant is a wholly-owned subsidiary of SABMiller Africa and Asia which is a company incorporated in the Netherlands. SABMiller Africa and Asia is in turn a wholly-owned subsidiary of AB Inbev which is a company incorporated in Leuven, Belgium.

[22] In terms of section 1 of the Act, the term "subsidiary" is defined to have a meaning determined in accordance with section 3 of the Act. Section 3(1) of the Act is most relevant for current purpose and the relevant parts read as follows:

"(1) A company is-

(a) <u>a subsidiary of another juristic person if that juristic person, one or more other subsidiaries of that juristic person, or one</u>

[4] Refer to Paragrpah 4 of the Supporting Affidavit.
[5] Refer to Paragraph 5 of the Supporting Affidavit.

or more nominees of that juristic person or any of its subsidiaries, alone or in any combination-

(i) is or are directly or indirectly able to exercise, or control the exercise of, a majority of the general voting rights associated with issued securities of that company, whether pursuant to a shareholder agreement or otherwise; or

(ii) has or have the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board; or

(b) ***a wholly-owned subsidiary of another juristic person if all of the general voting rights associated with issued securities of the company are held or controlled, alone or in any combination, by persons contemplated in paragraph (a)."*** [Own emphasis added].

[23] The term "juristic person" is defined in section 1 of the Act and it means the following:

"juristic person" includes-

(a) a foreign company; and

(b) a trust, irrespective of whether or not it was established within or outside the Republic..." [Own emphasis added].

[24] The term "foreign company" is also defined in section 1 of the Act and it means the following:

"foreign company" means an entity incorporated outside the Republic, irrespective of whether it is-

(a) a profit, or non-profit, entity; or

(b) carrying on business or non-profit activities, as the case may be, within the Republic…."

[25] Relying on the Supporting Affidavit deposed by Pask, I am therefore satisfied that the Applicant is a subsidiary of SABMiller Africa and Asia which is considered to be a foreign company in terms of the Act as it is incorporated in the Netherlands. As already indicated, SABMiller Africa and Asia is in turn wholly owned by Ab Inbev, which is incorporated in Leuven, Belgium and listed on the Euronext in Brussels. Ab Inbev and its various subsidiaries across the world are referred to as the "AB Inbev Group"

[26] Regulation 43(2)(a) of the Regulations provides that a company to which Regulation 43 applies must appoint an SEC unless if it is a subsidiary of another company that has a Social and Ethics Committee, and the Social and Ethics Committee of that other company ("the holding company") will perform the functions required by Regulation 43 on behalf of the subsidiary company.

[27] The Companies Tribunal had already dealt with the interpretation of Regulation 43(2)(a) of the Regulations and found that Regulation 43(2)(a) provides an exclusion rather than an exemption, to qualifying companies who need not apply to the Companies Tribunal for an exemption. It follows therefore that Regulation 43(2)(a) does not *per se* deal with the granting of exemptions, but rather indicate which companies are excluded from

the requirement to apply for an exemption to appoint an SEC. Therefore, where a company relies on the provisions of Regulation 43(2)(a) of the Regulations, it need not make any application for exemption to the Companies Tribunal.[6]

[28] However, the Applicant's holding company, namely SABMiller Africa and Asia is not registered as a company in South Africa. It is for that reason therefore not considered a company in terms of the Act. It is however considered a foreign company in terms of the Act. Therefore, the exclusion in terms of Regulation 43(2)(a) is not available to the Applicant.

[29] In terms of Regulation 43(5) of the Regulations, an SEC of a company should be appointed for purposes of serving functions which can be grouped into three categories:

29.1 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:-

29.1.1 Social and economic development, including the company's standing in terms of the goals and purposes of: -

29.1.1.1 The 10 principles set out in the United Nations Global Company Principles;

29.1.1.2 The OECD recommendations regarding corruption (refer to the Organisation for Economic Co-operation and Development (OECD) website

[6] Refer to Ex parte: Choppies Warehousing Service (Pty) Ltd In re: Application for an exemption from the requirement to appoint a social and ethics committee (CT019Mar2016) [2016] COMPTRI 42 (14 April 2016) at Para (7) and Ex parte: Choppies Supermarkets South Africa (Pty) Ltd; In re: Application for an exemption from the requirement to appoint a social and ethics committee (CT018Mar2016) [2016] COMPTRI 43 (14 April 2016) at Paras (5) to (6).

for further details (www.oecd. org));

29.1.1.3 The Employment Equity Act, No 55 of 1998; and

29.1.1.4 The Broad-Based Black Economic Empowerment Act, No 53 of 2003;

29.1.2 Good corporate citizenship, including the company's:-

29.1.2.1 Promotion of equality, prevention of unfair discrimination and measures to address corruption;

29.1.2.2 Contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and

29.1.2.3 Record of sponsorship, donations and charitable giving;

29.1.3 The environment, health and public safety, including the impact of the company's activities and of its products or services;

29.1.4 Consumer relationships, including the company's policies and record relating to advertising, public relations and compliance with consumer protection laws; and

29.1.5 Labour and employment, including:-

29.1.5.1 The company's standing in terms of the International Labour Organization Protocol on decent work and working conditions; and

29.1.5.2 The company's employment relationships, and its contribution toward the educational development

of its employees;

29.2 To draw matters within its mandate to the attention of the Board as occasion requires; and

29.3 To report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate.

[30] As outlined in Regulation 43(5) of the Regulations, the role of the SEC is therefore in the main to look into compliance on social and ethics issues including triple bottom reporting, economic, social and environmental sustainability as provided for in the United Nations Global Reporting Initiatives, decent work, procurement, transformational goals, human rights, labour standards, anticorruption and all issues falling within its mandate. They bring these issues to the attention of the board and also report them in the shareholders meeting if required.

[31] In my view, SECs are important not only to protect the communities and the environment where companies operate but for the protection of shareholders' interests as well. Any negative news relating to social and ethics have a serious economic impact for the company and the country in general.

[32] As we may all know, companies that are required to have SECs are public companies, state owned companies, companies that have in any two or previous five years scored above 500 points in terms of the Regulations. I am therefore enjoined to consider the functions of the SEC as provided for in Regulation 43(5) of the Regulations when dealing with this current Application.

Exemption based on section 72(5)(a) of the Act (based on some form of formal mechanism within its structures that substantially performs the functions that would otherwise be performed by a Social and Ethics Committee)

[33] The Applicant is, as an alternative to its main ground of bringing the current Application, applying for exemption from the requirement to appoint a an SEC in terms of section 72(5)(a) of the Act. Section 72(5)(a) provides that the Companies Tribunal may grant an exemption on the basis that 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 an SEC in terms of section 72 of the Act read with Regulation 43 of the Regulations.

[34] In Paragraph 10 of the Supporting Affidavit, the following is alleged on behalf of the Applicant:

> **"[10] In further support of this Application, it is noted that, for reasons of cost and administrative efficiency and given that SABSA is the operating company for AB Inbev's interests within the African continent, it is SABSA's Social and Ethics Committee that conducts all oversight and governance functions in respect of the companies within the AB Inbev group of companies within the African continent (including the Applicant). Furthermore, with effect from the commencement of the coming into force of the Companies Act, the SABSA Social and Ethics Committee has increased its scope to include all functions required to be performed by a social and ethics committee under the**

Companies Act (to the extent that these functions were not already being performed). SABSA's Social and Ethics Committee has been operating for a number of years and is made up of representatives of SABSA and Anheuser-Busch Inbev and in light of the functions that it performs. It is accordingly submitted that SABSA's Social and Ethics Committee substantially performs the functions that would otherwise be performed by a Social and Ethics committee that the Applicant would have established."

[35] The Applicant had however failed to provide essential and supportive information and documents with regard to the following:

35.1 with regard to the main purpose and objectives of the SABSA's SEC;

35.2 SABSA's SEC Charter or Terms of Reference;

35.3 The manner in which SABSA's SEC Charter or Terms of Reference applies and/or binds the Applicant; and

35.4 The manner in which the current SABSA's SEC functions are in line with those outlined in Regulation 43(5) of the Regulations.

[36] After considering what have been submitted on behalf of the Applicant as well as the shortcomings outlined above, I am therefore not satisfied that the Applicant had made out a good case qualifying it for an exemption from appointing an SEC in terms of section 72(5)(a) of the Act. The Applicant is however free to bring a fresh application for exemption from appointing an SEC in terms of section 72(5)(a) and it should ensure that it provides relevant

and necessary information including supporting documents when it brings such an application for consideration by the Companies Tribunal.

Exemption based on section 72(5)(b) of the Act (based on public interest considerations)

[37] The current Application for exemption from the requirement to appoint an SEC is also brought in terms of section 72(5)(b) of the Act. This section provides that an exemption may be granted on the basis that it is not reasonably necessary in the public interest to require the Applicant to establish an SEC, having regard to the nature and extent of the activities of the Applicant.[7]

[38] The main reasons provided in support of the Applicant's exemption application in terms of section 72(5)(b) of the Act are the following:

38.1 the Applicant is a management services company and its sole purpose and objective is to provide management services to the AB Inbev Group of companies on the African continent;

38.2 a large number of the functions that are required to be performed by a social and ethics committee, as set out in Regulation 43(5), relate to, among other things, employment matters, health and safety matters and customer relationship and the Applicant does not have any customers and only 164 employees.[8]

[39] The Applicant did not furnish any documents or evidence to support the allegation that its sole purpose and objective is to provide management

[7] Refer to Paragraph 8 of the Supporting Affidavit.
[8] Refer to Paragraph 12 of the Supporting Affidavit.

services to AB Inbev Group of companies in the African continent. The Memorandum of Incorporation of the Applicant does not specify the purpose and object of the Applicant to be the one identified by Pask in the Supporting Affidavit.

[40] Due to the fact that the Applicant failed to provide essential information and supportive documents in its application, I am therefore not able to make any determination regarding this leg of the application. I am therefore not satisfied that the Applicant had made out a good case qualifying it for an exemption from appointing an SEC in terms of section 72(5)(b) of the Act.

[41] Based on my findings above, the application for exemption of the Applicant from the requirement to appoint an SEC is therefore refused. The Applicant is however free to bring a fresh application for exemption from appointing an SEC in terms of section 72(5)(a) and it should ensure that it provides relevant and necessary information including supporting documents when it brings such an application for consideration by the Companies Tribunal.

ORDER:

[42] Therefore, based on the aforesaid, I make the following order:

42.1 the application for an exemption from the requirement to appoint a Social and Ethics Committee in terms of section 72(5)(a) and (b) read together with Regulation 43 of the Regulations is hereby refused; and

42.2 the Applicant is required in terms of section 72(5) of the Act read together with Regulation 43(3)(a)(ii) of the Regulations to establish a

Social and Ethics Committee and to appoint members of such committee within a period of 12 (TWELVE) months from the date of delivery of this determination.

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LINDELANI DANIEL SIKHITHA

Member of the Companies Tribunal

11 September 2017