IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CT014Jul2016

Ex parte application:

Commercial Meat Wholesalers (Proprietary) Limited

Applicant

(Registration number: 1995/013314/07)

Coram: S Gounden

Decision handed down on: 5 August 2016

DECISION

INTRODUCTION

[1] The applicant applies to the Companies Tribunal in terms of sections 72 (5) and 72 (6) of the Companies Act 71 of 2008 ("Act" / "Companies Act") and the regulations in terms of the Companies Act (GNR 351 of 265 April 2011) ("Companies Act regulations" / "regulation/s") for an exemption from appointing a Social and Ethics Committee ("SEC").

BACKGROUND

[2] The applicant is a private company and operates in Port Elizabeth.

[3] The applicant was incorporated and registered as a proprietary limited company in order to trade in wholesale and retail of meat, poultry and related products.

[4] The applicant is required to appoint a SEC in terms of regulation 43 (1) due to the fact that its public interest score ("PIS") as calculated in terms of regulation 26 (2) for the preceding financial year is more than 500 points. The applicant provided no indication of the PIS.

APPLICABLE LAW

[5] The Companies Act 71 of 2008 provides as follows in section 72:

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

(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.

(c) 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).

(d) The Commission, on its own initiative or on request by a shareholder, or a person who was granted standing by the Tribunal at the hearing of the exemption application, may apply to the Tribunal to set aside an exemption only on the grounds that the basis on which the exemption was granted no longer applies."

[6] The regulations in terms of the Companies Act provide in Reg 43(2) that a SEC must be appointed by:

- State owned companies;
- listed public companies;
- any other company with a Public Interest Score above 500 in any two of the previous five (financial) years.

[7] Regulation 43(5) defines the functions of the SEC as:

"(5) 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) the 10 principles set out in the United Nations Global Compact Principles; 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."

[8] The PIS is calculated as follows –

(a) a number of points equal to the average number of employees of the company during the financial year ('employee' has the meaning set out in the Labour Relations Act 66 of 1995 (Reg 26(1)(a));

(b) one point for every R1 million (or portion thereof) in third party liability of the company held by creditors at the financial year end;

(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 a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities; 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 (Reg 26(2)).

[9] A company that falls outside the categories above, or one that falls within those categories but which is a subsidiary of another company (as defined in section 3 of the Companies Act) and the holding company has a SEC that will perform the functions of the SEC for the (subsidiary) company, a SEC need not be appointed (Reg 43 (2) (a)).

[10] If a company is required to appoint a SEC, it can apply for a ruling by the Tribunal for an exemption, under the provisions of section 72 (5) of the Companies Act.

[11] Application for a ruling must be made

- In form CTR 142
- together with a supporting affidavit setting out the facts on which the application is based (Reg 142 (3)).

EVALUATION

[12] The requirements in respect of the appointment of the SEC and the discretion of the Tribunal in this regard are therefore two fold. In the first instance it must be determined if the company is required to appoint a SEC. If this is not the case (e.g. because of Reg 43 (2) (a)), then the Tribunal has no function or discretion. If a SEC needs to be appointed, the only discretion that the Tribunal has, is in terms of section 72 (5), i.e.

(a) does *another Act* require a formal mechanism that substantially performs the function that would otherwise be performed by the SEC, or,

(b) if is it not reasonably necessary in the public interest to require the company to have a SEC, having regard to the nature and extent of the activities of the company.

[13] The applicant avers in the founding affidavit that it need not appoint a SEC as provided for in s 72 (5) (a) of the Act due to the fact that the applicant:

- "operates in Port Elizabeth only and therefore the extent of its activities are limited and it will not impact the public at large";
- "is involved in the wholesale and retail of meat, poultry and related products. This has little impact on the environment and would therefore not impact the public at large";
- "employed an average of 163 employees which is considered to be small enough not to affect public interest" and
- "has a small number of employees and performs limited activities, the directors are considered capable of performing the functions that would be performed by the SEC, including monitoring the company's activities, having regard to relevant legislation, other legal requirements and prevailing codes of best practice".

[14] The Tribunal's discretion to grant an exemption is restricted to situations if:

- another *Act* requires a formal mechanism that substantially performs the function that would otherwise be performed by the SEC, or,
- if is it not reasonably necessary in the *public interest*, not reasonably necessary *nor* in the public interest as stated in the supporting affidavit, to require the company to have a SEC, having regard to the *nature* and *extent* of the activities of the company.

[15] The Tribunal must apply its mind, based on the application submitted.

FINDING

[16] The Director have not demonstrated that it is not reasonably necessary in the public interest to require the company to have a Social and Ethics Committee, having regards to the nature and extent of activities of the company.

[17] Without sufficient evidence as to the extent of the activities and functions of the directors of the applicant, the Tribunal cannot apply its mind and exercise a proper discretion as to whether the directors would substantially performs the function that would otherwise be performed by the SEC.

ORDER

[18] The application for an order for the exemption from the requirement to appoint the SEC is therefore refused.

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S GOUNDEN

Member of the Companies Tribunal

5 August 2016