



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT010DEC2016

In the *ex parte* application of:

MPILO INVESTMENT HOLDINGS 2 (RF) PTY LTD

Applicant

(Registration Number: 2005/015711/07)

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

Presiding Member : Khashane La M. Manamela (Mr.)

Date of Decision : 30 December 2016

DECISION (Reasons and an Order)

Khashane La M. Manamela

[1] The applicant seeks an exemption from the requirement to appoint a ¹social and ethics committee in terms of section 72(5)(b) of the Companies Act 71 of 2008 (the Companies Act). This statutory provision provides that an exemption may be granted on the basis that it is not necessarily in the public interest for a company to appoint a social and ethics committee bearing in mind the nature and extent of the activities within the applicant company.

[2] The applicant submits that it is a private company with restricted functions established and registered in 2005. It is further submitted that the applicant is “a special purpose vehicle” established “as part of the black ownership initiative” by an entity called Mediclinic International plc.² The latter company is said to have a primary listing on the London Stock Exchange and secondary listings on the Johannesburg Stock Exchange and the Namibian Stock Exchange. The entire issued share capital of the applicant is held by an entity called Phodiso Holdings Ltd, a black-owned company.

[3] The purpose of establishing the applicant or the black ownership initiative of Mediclinic was to introduce, among others, Phodiso Holdings Ltd as a strategic black partner and shareholder of Mediclinic by the “transfer of and issue of new ordinary shares

¹ Section 72(5) of the Companies Act reads: “(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.”

² See par 3 of the supporting affidavit.

in Mediclinic” to the applicant as a special purpose vehicle.³ It is submitted in this regard that the applicant currently owns 24 582 960 ordinary shares in Mediclinic which amounts to 3.33% of the total issued share capital of Mediclinic.

[4] The shareholding in Mediclinic is said to be the only asset of the applicant. It is also submitted that the applicant has no employees and from the papers filed the activities of the applicant are restricted in terms of its Memorandum of Incorporation to only activities relating to the applicant’s shareholding in Mediclinic.

[5] Further, the applicant has a public interest score of 1 498 points for the year ending March 2016.⁴ It also has had scores slightly higher or lower to that figure since 2016.⁵ The applicant is accordingly required in terms of section 72(4)⁶ of the Companies Act and regulation 43(1) ⁷ of the Companies Regulations, 2011⁸ (the Companies

³ *Ibid.*

⁴ See annexure B to the application

⁵ *Ibid.*

⁶ **Section 72(4)** reads as follows: “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.”

⁷ **Regulation 43(1)** reads as follows in the material part: “This regulation applies to—

(a) every state owned company;
(b) every listed public company;
(c) any other company that has in any two of the previous five years, scored above 500 points in terms of regulation 26(2).”

⁸ 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.

Regulations) to appoint a social and ethics committee. Also, for completeness, a public interest score is calculated in terms of regulation 26(2)⁹ of the Companies Regulations.

[6] It is submitted against the backdrop of mainly what is stated above that, it is not reasonably necessary in the public interest to require the applicant to have a social and ethics committee (an SEC) in terms of section 72(5)(b)¹⁰ of the Companies Act. The applicant ought to be exempted from appointing or having an SEC on the basis of the nature and extent of activities within it as aforementioned and borne by the filed papers.

[7] To determine whether to grant an exemption, this Tribunal has to consider, among others, applicable legislative provisions, particularly those dealing with the role played or functions performed by an SEC in companies. The areas of function of an SEC are stated in regulation 43(5) as follows:

“(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 -

⁹ **Regulation 26(2)** reads as follows in the material part: “For the purposes of regulations 27 to 30, 43... 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) in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company’s issued securities...”

¹⁰ **Section 72(5)(b)** provides that: “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.”

- (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] In my view, the above provisions confirm the role of an SEC in monitoring the activities within companies against the applicable law and prevailing codes of best

practice;¹¹ drawing matters thereon to the attention of the board of directors¹² and reporting to the shareholders at annual general meetings.¹³ These, in my view, provide a framework within which this Tribunal may determine the nature and extent of the activities within an applicant for an exemption. This approach is like a beaten path for applications of this nature before this Tribunal,¹⁴ although the nature of the determination or enquiry is facts-based and consequently differ from matter to matter.

[9] Considering what is stated above regarding the nature and extent of the applicant's activities; the fact that the applicant exceeded the threshold for public interest score mainly due to third party liability (i.e. 1451 points) relating to preference shares and special preference shares attached to its holding or sister companies, and the restriction in the applicant's Memorandum of Incorporation, I am satisfied that it is not reasonably necessary in the public interest to require the applicant to have an SEC. I deem it necessary to add that, I do not expect that the circumstances of the applicant would change in the next five years and therefore the exemption will be for a period of five years. Obviously, it beckons the applicant to re-apply should its circumstances materially change during the aforementioned period.

[10] In the result:

- a) the applicant is exempted from the requirement to appoint a social and ethics committee for a period of 5 (five) years from date of this order.

¹¹ See regulation 43(5)(a).

¹² See regulation 43(5)(b).

¹³ See regulation 43(5)(c).

¹⁴ See previous decisions of this Tribunal available on the website: www.companiestribunal.org.za.

Khashane La M. Manamela (Mr.)

Member, Companies Tribunal

30 December 2016