



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT008Nov2015

In the *ex parte* application of:

AFRICA ETF ISSUER (RF) LIMITED

Applicant

(Registration Number: 2013/022008/06)

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 : 21 December 2015

DECISION (Reasons and an Order)

Khashane La M. Manamela

[1] The applicant is an unlisted ring-fenced public company.¹ It was registered on 11 February 2013.² It is said to be a “special purpose vehicle to act as a listed ETF issuer that only issues debentures, fully backed by physical commodities”.³ The applicant is a wholly owned subsidiary of a trust entity called Africa Funds Issuer Owner Trust.⁴ The applicant submits that due to its public interest score of 8115 points in the “last financial year end”⁵ it is required by the provisions of section 72(4)⁶ of the Companies Act 71 of 2008 (the Act) and regulation 43(1)⁷ of the Companies Regulations, 2011⁸ (the Regulations) to appoint a social and ethics committee. The public interest score is calculated in terms of regulation 26(2).⁹

¹ See para 4.1 on p 4 of the supporting affidavit attached to the Form CTR 142.

² See certificate issued by the Companies and Intellectual Property Commission dated 11 February 2013.

³ See para 4.1 on p 4 of the supporting affidavit.

⁴ See para 4.4 on p 5 of the supporting affidavit.

⁵ No year is specifically mentioned, but I assume it to be the financial year ending in 2015.

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.

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...”

The applicant seeks an exemption from appointing a social and ethics committee (SEC).

[2] The grounds upon which the application is based are captured, succinctly so in my view, in the following passage from the applicant's supporting affidavit:

"The Applicant is an unlisted, ring-fenced, bankruptcy remote, special purpose vehicle which was created for the sole purpose of issuing exchange traded funds (ETFs), with the ETFs being listed on the JSE. The Applicant issues non-interest bearing secured debentures ("the Debentures"), fully backed by physical commodities, the Debentures also classified as ETF units. The Applicant holds a specified amount of the commodity(s) [sic] sufficient to fully hedge its liabilities under the ETF units from time to time, through a custodian. The ETF units listed on the JSE price tracks the rand price of the physical commodities stored in the vaults of the custodian. The Applicants obligations under the ETF units are guaranteed by a security trust in terms of the relevant security trust guarantee. The Applicant has no employees nor does it occupy any premises. The Applicant outsources all its functions to a manager being The Standard Bank of South Africa Limited.

Investors in the ETF(s) are natural persons or legal entities which purchase the listed ETF units for the purpose of investing in commodities with the target market being institutional investors."¹⁰

[3] It is further submitted that the activities of the applicant are restricted in terms of conditions specified in its Memorandum of Incorporation (the MOI) and

¹⁰ See para 2.2 on p 2 of the supporting affidavit.

in accordance with section 15(2)(b)¹¹ of the Act. Clause 5.3 of the MOI, among others, is relevant in this regard. It states the following in the material part:

“5.3 The Company shall not, and no Director, other officer, body or organ of the Company shall have the power, authority or ability (or be authorised on behalf of the Company), without the approval of a Special Resolution of the Shareholders and, subject to Clause 5.4, a Special Resolution of Debenture Holders, to:

5.3.1 engage or participate in any business or activity other than its main business as set out in Clause 5.1 and those activities of the Company (and any activities directly related thereto) which it is required to undertake under, or which are otherwise contemplated by, the Transaction Documents;

5.3.2 enter into any transaction or engage in any activity otherwise than in the ordinary course of its business;

5.3.3 amend, vary or alter or purport to amend, vary or alter its Share capital or register any transfer, or issue any Shares, in the capital of the Company;

...

5.3.6 enter into any compromise with its creditors in terms of Section 155;

...

5.3.9 employ any Person as an employee;

5.3.10 occupy any premises;

5.3.11 raise, incur or permit to be outstanding any liability or indebtedness including but not limited to any indebtedness for borrowed money or cede, pledge, mortgage, hypothecate, assign, charge, encumber or provide any other security or priority of interest, whether real or personal, registered or unregistered, of any

¹¹ Section 15(2) provides that “The Memorandum of Incorporation of any company may-

(a) ...

(b) contain any restrictive conditions applicable to the company, and any requirement for the amendment of any such condition in addition to the requirements set out in section 16...”

nature whatsoever or any option, right of refusal or similar interest over any of its assets to any third party whatsoever...”

[I added the underlining]

[4] It is submitted that on the basis of all of the above, it is not reasonably necessary in the public interest to require the applicant to have an SEC. The applicant ought to be exempted from appointing or having an SEC. The submissions are premised on section 72(5)(b)¹² of the Act. To determine the requirements for the exemption sought by the applicant, I consider it necessary to have a look at other related legislative provisions, particularly those dealing with the role played or function performed by SECs in companies.

[5] The functional areas of an SEC are stated in regulation 43(5). This regulation reads 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 -

¹² **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.”

[6] From the above it is clear that an SEC monitors the activities of the particular company against the law and prevailing codes of best practice;¹³ draw matters thereon to the attention of the board of directors¹⁴ and report to the shareholders at annual general meetings.¹⁵ Therefore, in determining the nature and extent of an applicant company's activities, regard is to be had to what SECs are meant to achieve. I have had the privilege of discussing this provision (i.e. section 72(5)(b) of the Act) in previous decisions of this Tribunal.¹⁶ However, I consider every matter to turn on its facts.

[7] In this matter the applicant submits that the nature and extent of its activities are not only limited, but restricted by its MOI.¹⁷ It submits that its public interest score exceeded the 500 points threshold (to 8115 points), due to its "current liabilities of secured Debenture holders listed as ETF's [sic] on the JSE main board".¹⁸ It submits that these liabilities are in an amount of 8 090 points.¹⁹ However, the applicant does not explain what makes up the other 25 points. In terms of regulation 26(2) of the Regulations, a public interest score is calculated at the end of each financial year as the sum of the number of members; number of employees; third party liability; turnover and the number of individuals with beneficial interest in the issued securities of the company.²⁰ As already stated

¹³ See regulation 43(5)(a).

¹⁴ See regulation 43(5)(b).

¹⁵ See regulation 43(5)(c).

¹⁶ Those decisions and others by members of this Tribunal are available on the website: www.companiestribunal.org.za.

¹⁷ See para 3 above.

¹⁸ See para 3.4 on p 3 of the supporting affidavit.

¹⁹ *Ibid.*

²⁰ See footnote 9 above.

above, the applicant is said not to have any employees;²¹ but has third party liability (totaling 8090 points). Therefore, the 25 points discussed above will, in all probabilities, be made up of points garnered from its turnover during the relevant financial year or the number of individuals with direct or indirect beneficial interest in the applicant's issued securities or both. However, in my view, it does not really matter which of the two has the higher tally, as 25 is miniscule on a scale of 500 points, which is the threshold for the requirement to appoint an SEC. Be that as it may, there is clear indication that what precipitated this application is the applicant's third party liability. This may be indicative of the nature and extent of the applicant's activities.

[8] It has already been discussed above that the business of the applicant is in the issuing of exchange traded funds or ETFs, which are listed on the JSE. The applicant does not even occupy any premises and all its functions are managed by Standard Bank.²²

[9] I have already expressed a view that the purpose or functions to be performed by an SEC are mostly helpful in determining whether or not to grant an exemption under section 72(5)(b) of the Act. The functional areas are stated in regulation 43(5).²³ An SEC's function is to monitor the company's activities (having regard to relevant legislation, codes or other legal requirements) regarding matters relating to social and economic development (which

²¹ See paras 2 and 3 above.

²² See para 2 above.

²³ See para 5 above.

incorporate employment equity and black economic empowerment issues); good corporate citizenship; impact of the applicant's activities on the environment, health and public safety; labour and employment issues and consumer relationships. From the aforesaid list, I consider only good corporate citizenship to be relevant for a determination to be made in this matter. Under this function, the SEC is required to monitor company's activities regarding its promotion of equality, prevention of unfair discrimination and reduction of corruption; community development and philanthropy (i.e. donations; sponsorship etc.).

[10] The applicant's submissions suggest that it is unlikely to have these activities, unless its business model or some aspects of its MOI changes. Therefore, in my view, considering the aforesaid activities of the applicant, it is not reasonably necessary in the public interest to require the company to have an SEC. I do not expect that the circumstances of the applicant would change in the next five years. However, even if the circumstances change, the provisions of section 72(7)²⁴ of the Act would always find application. Therefore, the exemption granted will be for a period of 5 (five) years.

[11] 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.

²⁴ **Section 72(7)** reads as follows: "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."

Khashane La M. Manamela (Mr.)

Member, Companies Tribunal

21 December 2015