

COMPANIES TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case Number CT013July2015

In the Ex Parte Application of;

SMA ENGINEERING SOUTH AFRICA (PTY) LTD
Applicant

(Registration number 1999/016148/07)

In respect of;

AN APPLICATION FOR AN EXEMPTION FROM THE REQUIREMENT TO APPOINT
A SOCIAL AND ETHICS COMMITTEE

Presiding Member of the Companies Tribunal: Lucia Glass

DECISION (Reasons and Order)

PRELIMINARY ISSUES

The deponent to the applicant's affidavit is Stephen Ian van Niekerk, who is the managing director of the applicant.

INTRODUCTION

The applicant avers that it is compelled to appoint a Social and Ethics committee because its public interest Score calculated by the board of the Company as at 28th February 2-13 was 723, and at 28th February 2014 was 717 (the largest contributing factor to the Public Interest Score is the number of employees of the Applicant, being in excess of 430 in both years, the

next largest contributing factor is the turnover, followed by third part liability and finally beneficial ownership, being one only).

FACTS

1. The applicant applies for an exemption from the requirement to appoint a social and ethics committee on the basis that it is *not reasonably necessary in the public interest* (italics added) for the Company to have a Social and Ethics Committee, *having regard to the nature and extent of the activities* (italics added) of the Applicant, as allowed in section 72 (5) (b) of the Companies Act 71 of 2008 (the Act).

2. Having regard to the nature and extent of the activities of the applicant, it is averred that the applicant manufactures automotive components, and does not seek or engage in any procurement or tender activities, or any projects of public nature. It is also alleged that the applicant operates within a narrow niche in the automotive industry and does not engage in any trading activities with the general public.

3. Further it is averred that the Applicant has adopted an internal Employment Equity policy, and adheres to the relevant Employment Equity principles in that the applicant has an existing Employment Equity/Training committee, with members including the Company's financial manager, member of staff as well as representative from NUMSA and an independent consultant. These factors imply that other policies are in place which act as a social and ethics committee and thus a separate social committee need not be appointed.

4. It is averred that having regard to the nature and extent of the activities of the Company, the governance structures are already in place, and it is not reasonably necessary in the public interest to require the applicant to have a Social and Ethics Committee in that the scope and extent of the activities of the Company are limited to a narrow sector of manufacture, restricted to a business that supplies components to larger assembly operations and with little or no exposure to the general public. It is believed that Governance structures already exist within the Company, ensuring communication, compliance and accountability and that a social and ethics committee is not required.

5. It is averred that the interest of the public is not material in the above instances and that the non- appointment of a social and Ethics Committee would not be detrimental to the public interest.

THE APPLICABLE LAW

The following sections of the Act apply:

Section 72 (5) reads as follows: (a) "the company is required in terms of *other legislation* (italics added) 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 (emphasis added)

(b) it is not reasonably necessary for 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* (italics added)."

6. With reference to the applicability of a Social Ethics Committee Regulation 43 (1) and to whom it applies the Regulation reads as follows:

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

7. The calculation of the public interest score is in terms of Regulation 26(2) of the Regulations, which must be calculated 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 R1 million (or portion thereof) in third party liability of the company, 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;"

8. Regulation 43 (2) provides for the situations to which the exemption of the appointment of a Social and Ethics Committee applies and reads as follows:

"A company to which this regulation applies must appoint a social and ethics committee unless-

(a) It is *a subsidiary of another company* (italics added) that has a social and ethics committee, and the social and ethics committee of that other company will perform the

functions required by this regulation on behalf of that subsidiary company; or (emphasis added)

(b) It has been exempted by the Tribunal in accordance with Section 72 (5) and (6)."

9. The functions of the Committee are set out in Regulation 43 (5) which reads:

"(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 as follows:

Human Rights

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

Principle 2: make sure that they are not complicit in human rights abuses.

Labour

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour; and

Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment

Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: undertake initiatives to promote greater environmental responsibility; and

Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery."

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."

APPLICATION OF THE LAW TO THE FACTS

10. The Tribunal is to decide, whether in terms of Section 72 (5) (b), it is **reasonably necessary for the public interest** (emphasis added) to require the company to have a social and ethics committee having regard to the **nature and extent of the activities of the company** (emphasis added).

11. It is my view that once the nature and extent of the activities are established, then it is to be established, whether it is necessary to appoint a social and ethics committee *in relation to the functions it is to perform* (italics added) in terms of Regulation 43 (5).

12. The Tribunal is to weigh up whether by the applicant's very nature and extent, it is to appoint a Social and Ethics Committee and in doing so it is to look at the 'nature and extent'

of the company. In this instance the deponent avers that the nature and extent of the applicant company is as follows;

- It operates within a narrow niche in the automotive industry and does not engage in any trading activities with the general public;
- The Applicant has adopted an internal Employment Equity policy, and adheres to the relevant Employment Equity principles in that the applicant has an existing Employment Equity/Training committee, with members including the Company's financial manager, member of staff as well as representative from NUMSA and an independent consultant;
- The scope and extent of the activities of the Company are limited to a narrow sector of manufacture, restricted to a business that supplies components to larger assembly operations, and with little or no exposure to the general public;
- Governance structures already exist within the Company, ensuring communication, compliance and accountability;

It is my view that none of the above facts carry much weight in exonerating the applicant from establishing a social and ethics committee having regard to its nature and extent and the actual functions of the Social and Ethics committee as described above paragraphs 6, 7, 8 and 9.

It is my view the number of employees of the Applicant, being in excess of 430 in both years and the turnover (in excess of 240 in both years), as well as third part liability and finally beneficial ownership (one only) are factors to consider when establishing the "nature and extent" of the applicant. These weigh heavily in favour of a social and ethics committee to be established.

13. The question to be asked is whether, by this **very nature and extent** of the company, (emphasis added) it is reasonably necessary for the public interest to require the company to appoint a social and ethics committee. It is my view that the very nature of the company as described, makes out a case that it is reasonably necessary to appoint a social and ethics committee.

14. After analysing the functions of a Social and Ethics Committee, and after examining the nature and extent of the applicant, and the reasons for the exemption given, and the possible

reasons for not having to appoint a Social and Ethics Committee, I come to the conclusion that the applicant does require a Social and Ethics committee and the reasons given for not appointing a social and ethics committee are not sufficient to be exempted from appointing a social and ethics committee.

Findings

15. After considering all the facts, I conclude that it is reasonably necessary in the public interest to require the applicant to appoint a social and ethics committee having regard to the nature and extent of the activities of the company.

I accordingly do not grant the relief sought, the applicant is not granted exemption from appointing a Social and Ethics Committee in accordance with the Section 72 (5) (b), of the Act.

LUCIA GLASS

MEMBER OF THE COMPANIES TRIBUNAL OF SOUTH AFRICA

27 August 2015