

IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO:

CT018Mar2014

Ex parte application:

SOUTHCHESTER (RF) LTD

Applicant

(2010/021595/06)

Coram: Delpont P.A.

Decision handed down on 30 June 2014

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 regulation 142 of 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”). The applicant did appoint a SEC but now applies for an exemption as stated above.

BACKGROUND

[2] The applicant is a ringfenced entity with its sole business being to issue debentures and to invest the proceeds in a portfolio of financial instruments and products.

- [3] The applicant has a sole shareholder, being Southchester Holdings (Pty) Ltd (“Holdings”), which makes it a wholly owned subsidiary of Holdings. The application is brought by Tamara Ross-Gillespie as “shareholder representative” of Holdings. A sole shareholder has the rights as in terms of section 57 (2) and a sole director, which Tamara Ross-Gillespie is, is entitled in terms of section 57 (3) (a), without specific authority, to bring the application in name of the applicant.
- [4] The applicant is apparently required to appoint a SEC due to the fact that its public interest score (“PIS”) for any two of the preceding five years is more than 500. There is no indication in the supporting affidavit how the PIS is calculated.

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.

(6) 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).

(7) 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 twofold. In the first instance it must be determined if the company is required to appoint a SEC. If this is not the case (eg because of reg 43 (2) (a)), then the Tribunal has no function or discretion.

[13] If a SEC needs to be appointed, the only discretion that the Tribunal has to grant an exemption, is in terms of section 72 (5), ie:

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

13.2 if it is 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.

[14] It is clear that the circumstances as in para 13.1 do not apply in this instance as the applicant is not subject to such a requirement in terms of another Act.

[15] The Tribunal can, however, also give an exemption if it is satisfied that it is 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.

[16] In exercising its discretion in this respect the role and functions of the SEC and the matters that must be monitored as detailed in reg 43 (2) must be taken into account.

[17] The role and functions of the SEC are to:

- 17.1 monitor the company's activities with regard to
 - 17.1.1 matters relating to corruption, employment equity and BBBEE
 - 17.1.2 good corporate citizenship, in respect of
 - 17.1.2.1 promotion of equality, prevention of unfair discrimination, and reduction of corruption;
 - 17.1.2.2 contribution to development of the communities and of sponsorship, donations and charitable giving;
 - 17.1.3 the environment, health and public safety;
 - 17.1.4 consumer relationships,
 - 17.1.5 labour and employment, including decent work and working conditions and its employment relationships and its contribution toward the educational development of its employees;
- 17.2 to draw matters within its mandate to the attention of the board as occasion requires; and
- 17.3 to report to the shareholders at the company's annual general meeting on these matters.

[18] If one takes the fact into account that in terms of s 76 (3) of the Act the board must act *bona fide* and in the interest in the company, taking into account the enlightened shareholder approach, it can be argued that the SEC role and functions actually fall within the powers and capacity of the board in any case.

[19] The SEC provisions would therefore, like codes such as King III, not add to the duties of the directors, but rather indicate *a manner in which* or *how* the duties must be complied with.

[20] The legislature obviously deemed these issues and the role and function of the SEC to be important enough to require an additional mechanism to ensure that the company and the board comply if the nature and extent of the activities of the company warrant it.

- [21] The concept “activities of the company” is not defined, and it is suggested that the categories of activities set out in reg 26 (2) to calculate the PIS determine not only the activities of the company but the *nature* and the *extent* of the activities as well.
- [22] If the PIS is above 500 the nature and extent of the activities are *prima facie* significant or material, and the SEC must be appointed.
- [23] However, even if the PIS is above 500, the appointment of the SEC may not be necessary if the nature and extent of the activities are such that the appointment of the SEC would not serve the public interest.
- [24] Regulation 43 (2) does not prescribe either the *nature* or the *extent* of the activities, but reg 43 (5) should be used to determine the public interest, because if the nature and extent of activities are of a certain type and/or magnitude, the matters as in reg 43 (5) would serve the public interest.
- [25] In *Ex Parte President of the Conference of the Methodist Church of Southern Africa NO: In Re William Marsh Will Trust* 1993 (2) SA 697 (C) at 703 “public interest” was defined as: “The phrase 'the public interest' does not permit of a clear and comprehensive definition. As was observed by Herbstein J in *Argus Printing and Publishing Co Ltd v Darby's Artware (Pty) Ltd and Others* 1952 (2) SA 1 (C) one must adopt, in giving effect to the phrase, a
 'broad commonsense view of the position as a whole . . . (and it must be considered whether) . . . the public would be better served if the applicant were to be allowed to proceed with its scheme than by a continuation of the existing state of affairs.’”
- [26] If one takes cognizance of the matters in reg 43 (5), it may be deduced that “public interest” could be defined as:
- 26.1 The contribution of the company to social and economic development *of the community in which it operates* (reg 43 (5) (a) (i));
- 26.2 The effect of the company as a corporate citizen *in the particular community* (reg 43 (5) (a) (ii));

- 26.3 The effect that the company's activities and products has on *environment, health and public safety* (reg 43 (5) (a) (iii));
- 26.4 The actions of the company *in respect of consumers*, including advertising, public relations and consumer protection ((reg 43 (5) (a) (iv));
- 26.5 The company's actions *in respect of its employees and its employment practices*, which obviously includes compliance with labour relations but which should also encompass general employee "well-being" (reg 43 (5) (a) (v)).

[27] The activities that need to be evaluated to decide whether it is in the public interest, given the nature and extent of those activities, to grant an exemption from appointment of a SEC are obviously only those used in respect of the calculation of the PIS, because the level of those activities determine whether, in the public interest, a SEC must be appointed.

[28] One can, obviously, be tempted to apply the reg 43 (5) principles to determine whether a SEC must be appointed, and not the activities as in reg 26 (2).

[29] This is, however, fallacious for various reasons, some of these being that in the first instance the functions and principles ("matters" as provided for in reg 43 (5) (a)) as in reg 43 (5) must be "monitored" and reported on by the SEC. To use it to determine whether a SEC must be appointed would be a circuitous argument. Secondly, even if this is not the case, the provisions of reg 43 (5) (b) and (c) can never be a factor to determine the necessity of a SEC as those are functions of a SEC if appointed. Thirdly the function of the SEC is "...to monitor the company's *activities*..." with regard to the matters in reg 43 (5) and therefore only if the *activities* are such that it would be material in respect of the *matters* in reg 43 (5) is it required to be monitored by the SEC. The *matters* in reg 43 (5) are therefore not *activities*.

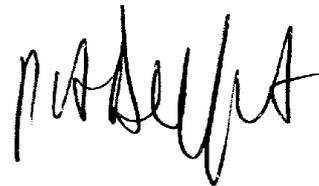
FINDING

- [30] As stated in para 4 above, the applicant must appoint the SEC.
- [31] The applicant avers that it need not (continue to) appoint a SEC due to the fact that:
- “(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...”
- as provided for in s 72 (5) (b) of the Act.
- [32] As support for the application the applicant states in para 4.6 of the supporting affidavit that, inter alia:
- “..due to the restricted nature of the business activities and the specific purpose of the Applicant, it is not reasonably necessary nor in the public interest to require the Applicant to continue with a Social and Ethics Committee.”
- [33] The Tribunal’s discretion to grant an exemption is however restricted to situations if:
- 33.1 another *Act* requires a formal mechanism that substantially performs the function that would otherwise be performed by the SEC, or,
- 33.2 if it is 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.
- [35] The only discretion that the Tribunal then has, is as in para 33.2 above.
- [36] The activities that need to be evaluated to decide whether it is in the public interest, given the *nature* and *extent* of the activities, to grant an exemption from appointment of a SEC are obviously only those in respect of the calculation of the PIS, as those activities also determine whether a SEC must be appointed as discussed in para 29.

- The Tribunal must apply its mind, based on the nature and extent of the activities of the applicant. The nature of the applicant's business is clear from the supporting affidavit and the Memorandum of Incorporation of the applicant, but there is no evidence about the extent of the activities.
- Without evidence as to the extent of the activities of the applicant the Tribunal cannot apply its mind and exercise a proper discretion.

ORDER

- [43] The application for an exemption in respect of the appointment of a SEC is hereby refused.



**P.A. DELPORT
MEMBER OF THE COMPANIES
TRIBUNAL**