

**COMPANIES TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case Number CT007Jun2014

In the Ex Parte Application of;

TUPPERWARE SOUTHERN AFRICA

Applicant

Proprietary Limited (Registration number 1981/009610/06)

in respect of;

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

Tribunal Coram: Lucia Glass, S Gounden, F Maake Kganyago

DECISION

INTRODUCTION

1. The applicant applies to the Companies Tribunal for an exemption from the requirement to appoint a social and ethics committee.
2. The requirement is imposed by section 72 (4) of the Companies Act 71 of 2008 (the Act) and expanded in regulation 43 of the Companies Regulations.(the Regulations)

PRELIMINARY ISSUES

3. The deponent to the applicant's affidavit is Ahmed Vally Bull, who is the Business Manager, Operations and Legal of the Applicant. A Resolution of the board of directors of the Applicant is attached to the application wherein the Board of

Directors authorise A V Bull, to sign all affidavits, forms, resolutions and or any other documents which may be incidental to or necessary for the implementation of the resolution number one. Resolution number one (1.1) is in respect of seeking indulgence from the tribunal for the late filing of its application for exemption from appointing a social and ethics committee in terms of regulation 147 of the Companies Regulations, 2011 promulgated pursuant to the Act and (1.2) is in respect of the application to the Tribunal in terms of Section 72(5) (b) and (6) of the Act for exemption from appointing a social and ethics committee.

4. PURPOSE OF THE APPLICATION

4.1. Condonation Application; To seek the Companies Tribunal's (Tribunal) indulgence in condoning the Applicant's late filing of its application for exemption from appointing a social and ethics committee (SEC) in terms of regulation 147 of the Companies Regulations 2011 (Regulations) promulgated pursuant to the Companies Act, 2008 (Act)

and

4.2 Exemption Application; In the event of the Condonation Application being successful, to apply to the Tribunal, in terms of section 72 (5) and (6) of the Act for an exemption from appointing a SEC.

CONDONATION APPLICATION

FACTS

5. It is averred that due to and administrative oversight by the Applicant, the Applicant did not lodge the Exemption Application within the period set out in regulation 43(3) (a) of the Regulations (A company that existed on the Effective Date, 1 May 2011, was required to make the Exemption application or to appoint the first members of its SEC within 12 months after the Effective Date). It is further averred that the importance of the Exemption Application being heard far outweighs any prejudice, if any that a third party may suffer due to the late filing of the Exemption Application.

Order; Based on the above facts, I make the following order;

Application for the condonation, is granted.

6. APPLICATION FOR AN EXEMPTION TO APPOINT A SOCIAL AND ETHICS COMMITTEE

FACTS

6.1 It is averred that the Applicant's main business is to manufacture and sell premium, innovative products across multiple brands and categories. That the Applicant's products are distributed worldwide primarily through the 'direct to consumer' method, under which products are sold by independent parties and distributors ('Distributors') to consumers outside traditional retail store locations.

6.2 The PIS of the Applicant for the 2 preceding 5 years exceed 500 pints, and thus the Applicant is required to appoint a SEC.

6.3 The Applicant has employed a significant number of people, its employees do not generally interact with the public.

6.4 It is the Distributors who interact with the public and who are independent contractors and not employees of the Applicant. It is averred that it is there for with the Distributors and not the Applicant that the public interest lies. The Applicant mainly facilitates the distribution of the products through Distributors.

6.5 The Applicant has only one shareholder. No member of the public holds shares in the Applicant nor does the public have any type of economic interest in the Applicant. It is averred that the fact that the Applicant has a relatively high turnover does not necessarily imply a material or significant impact in respect of any other persons or the public but the applicant's sole shareholder.

6.6 It is submitted that in view of the nature and extent of the Applicant's Activities which are neither material nor significant, that the appointment of a SEC will not have the effect of the public being better served nor will it confer any benefit to the public at large or a class of the public that uses the Applicant's products.

6.7 The Applicant calculated **its public interest score** (emphasis added) (PIS) in accordance with regulation 26 (2) as follows;

"A number of points equal to the average number **of employees of the Applicant**
2013 to be 548 points
2012 to be 369 points (*emphasis added*)
and one point for every R1million or portion thereof **turnover to be**
2013 to be 534 points
2012 to be 518 points (*emphasis added*)

THE APPLICABLE LAW

7. The Tribunal may grant an exemption to appoint a SEC if it is satisfied that;
Section 72 (5) (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." (*emphasis added*)*

7. 1 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)".** (*emphasis added*)

7.2 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; (*emphasis added*)
- (b) One point for every R1 million (or portion thereof) in **third party liability** of the company, at the financial year end; (*emphasis added*)
- (c) One point for every R1 million (or portion thereof) **in turnover** during the financial year; and (*emphasis added*)
- (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;"** (*emphasis added*)

7.3 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 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)." (emphasis added)

7.4 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 - (emphasis added)

(i) social and economic development, **including the company's standing in terms of the goals and purposes of—**(emphasis added)

(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

8. The Tribunal is to decide, whether in terms of Section 72 (5) (b), it is **reasonably necessary** (*emphasis added*) in **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*)

9. The Tribunal is to weigh up whether it is reasonably necessary, **in the public interest**, having regard to its **very nature and extent**, (*emphasis added*) there is a need of an appointment of a Social and Ethics Committee and in doing so it is to look at the public interest score, to establish the 'nature' and 'public interest' of the company. In this instance the Applicant avers that the

Applicant calculated its **public interest** score (PIS) in accordance with regulation 26 (2) as follows;

"A number of points equal to the average number **of employees of the Applicant 2013 to be 548 points**
2012 to be 369 points (*emphasis added*)

and

one point for **every R1million or portion thereof turnover** to be
2013 to be 534 points
2012 to be 518 points (*emphasis added*)

10. The question to be asked is whether, by this very **nature 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 very clear from the public interest score that the Applicant has a **vast number of employees and a huge turnover**. (*emphasis added*)

It is averred that the Applicant's main business is to manufacture and sell premium, innovative products across , multiple brands and categories. That the Applicant's products are **distributed worldwide**, (*emphasis added*) primarily through the 'direct to consumer' method, under which products are sold by independent parties and distributors to consumers outside traditional retail store locations.

11. After analysing the functions of a Social and Ethics Committee, as stipulated above and after examining the nature and extent of the applicant, as stated above, and the reasons for the exemption as stated above, and the possible reasons for not having to appoint a Social and Ethics Committee, I come to the conclusion that the applicant has not made out a sound case in terms of the Act and I do not exempt the applicant from appointing a Social and Ethics Committee.

Findings

12. After considering all the facts, I conclude that the applicant has not made out a sound case in terms of Sec 72 (5) (b) and 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.

Order

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

MEMBERS OF THE COMPANIES TRIBUNAL

Dated 21st August 2014

Concurred by S.GOUNDEN

MEMBERS OF THE COMPANIES TRIBUNAL

Concurred by M KGANYAGO

MEMBERS OF THE COMPANIES TRIBUNAL