

In the matter of :

Q400 LEASING (RF) (Pty) Ltd

Applicant

(Reg. no. 2010/018707/07)

RE: Application for Exemption in terms of section 72 (5) (a) r/w regulations 43; 142-162 and 168

The Parties

1. The Applicant is Q400 LEASING (RF) (Pty) Ltd, a company duly registered in terms of the Company Laws of the Republic of South Africa with Registration no 2007/031006/07 having its registered place of business and office at 4 Merchant Place, Cnr Freeman Drive and Rivonia Road, Sandton, Gauteng . (hereinafter referred to as “ the company”)

Background

2. This is an application by the applicant which was lodged as a result of obligations imposed by the requirements of the Companies Act.
3. The application is lodged by one Paul Antony Kennedy who describes himself as a Director of Q400 LEASING (RF) (Pty) Ltd and alleges that he is authorized to make the affidavit. .
4. The Deponent in the next paragraphs, avers that the facts deposed and stated in the affidavit, are to the best of his knowledge true and correct and that the affidavit is made in support of the application by the company, for an exemption from the requirement to create a social and ethics committee pursuant to section 72(4) (a) of the Companies Act.
5. The next paragraph in the Affidavit then goes to aver that “ in terms of section 72 (5) of the Companies Act 71 of 2008, (and quotes sub sections (a) and (b).”
6. The next paragraph then reads “ in relation to paragraph (a) above, I state that the entity is consolidated within the FirstRand Limited Group. The FirstRand Limited Group have established a group Social and Ethics Committee , which is tasked to ensure the optimal functioning of ethics management processes within the FirstRand Limited Group.”
7. The following paragraph then reads “ in relation to (b) in paragraph 4, this entity is a specialized, ring-fenced investment entity especially established to purchase and lease aircrafts, which consists mainly of lenders and thus not the general public. This ring-fenced entity does not

have any employees and conducts its affairs through RMB (a division of FirstRand Bank Limited) as Facility Agent within strict prescribed contractual terms. Due to the limited purposes for which the entity has been established, and as the entity does not employ anyone, regulation 43(5) (a) (iv) and 43 (5) (a) (v) of the Companies Act, 2008 cannot be applied to the entity.”

APPLICABLE LEGISLATION

8. There is a provision in the Companies Act which refers to the person making and deposing to the application who should be duly authorized to do so and in addition show proof of such authority to act on behalf of a persona which is the entity; this is contained in Regulation 168(3) (e) read with Regulation 168 (4)(a) (ii), (b) and (c) .

9.The relevant Regulation provides as follows:-

Regulation 168.

Filing documents

(1) A regulatory agency-

(a) must assign a distinctive number to each document filed for the first time with the recording officer of that body;

(b) must ensure that every document subsequently filed in respect of a matter is marked with the same distinguishing number;

(c) may refuse to accept a document subsequently filed in respect of the same matter that is not properly marked with the assigned distinguishing number;

(2) Before serving a copy of an initiating document on any person, the initiating party must-

(a) obtain a distinguishing number for that document from the recording officer of the Tribunal; and

(b) note the distinguishing number on every copy of that document.

(3) A person who files any document with a regulatory agency in terms of the Act or these regulations must provide to that regulatory agency the person's-

(a) legal name;

- (b) address for delivery of documents;
- (c) telephone number;
- (d) if available, email address and fax number; and
- (e) *if the person is not an individual, the name of the individual authorised to deal with the regulatory agency on behalf of the person filing the document.* { my own emphasis)

(4) The recording officer of a regulatory agency-

(a) must take reasonable steps to-

(i) confirm the identity of any person filing a document with that regulatory agency;

(ii) *verify that the person filing a document on behalf of, or in relation to a juristic person, has the right to file that document in their own name, or is authorised to file the document on behalf of another person who has the right to file the document*; [my own emphasis]

(iii) verify the authenticity of every document being filed;

(b) *may demand that the person seeking to file a document supply reasonable evidence for the purposes contemplated in paragraph (a); and*

(c) *may reject any document on the grounds that the requirements of paragraph*

(a), or a demand issued in terms of paragraph (b), have not been satisfied. [my own emphasis]

10. The relevant section conferring the obligation referred to in paragraph 2 above provides as follows:-

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.

11. Regulation 43 prescribes for the implementation of s72 (4-10) as follows:-

Regulation 43.-- Social and Ethics Committee

[s. 72 (4) to (10)]

(1) This regulation applies to-

(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 points in terms of regulation 26(2).

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

(b) it has been exempted by the Tribunal in accordance with section 72 (5) and (6).

(3) A board of a company that is required to have a social and ethics committee, and that-

(a) exists on the effective date, must appoint the first members of the committee within 12 months after- (*the 12 months are from 1 May 2011*)

(i) the effective date; (*this is the 1 May 2011*) or

(ii) the determination by the Tribunal of the company's application, if any,

if the Tribunal has not granted the company an exemption;

(b) is incorporated on or after the effective date, (*this means after 1 May 2011*) must constitute a social and ethics committee and appoint its first members within one year after-

(i) its date of incorporation, in the case of a state owned company;

- (ii) the date it first became a listed public company, in such a case; or
- (iii) the date it first met the criteria set out in sub-regulation (1)(c), in any other case.

(4) A company's social and ethics **committee must comprise not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company's business**, and must not have been so involved within the previous three financial years.(my own emphasis)

(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.

Calculation of Public Interest Score

12. Regulation 26(2) prescribes the method of calculating the Public Interest Score (PIS) as follows:-

(2) For the purposes of regulations 27 to 30, 43, 127 and 128, **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; 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.

Procedural History

13. This application is lodged and filed with the Companies Tribunal in terms of section 72 (5) (a) r/w regulations 26(2); 43; 142-162 and 168.

The Act in section 72(5) provides as follows:-

s72(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-*(my own highlighting to emphasize)

(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 (my own emphasis)

(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.

ss(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).

14. Regulation 142 provides as follows:-

(1) A person may apply to the Tribunal for an order in respect of any matter contemplated by this Act, or the Regulations, by completing and filing with the Tribunal's recording officer-

(a) an Application in Form CTR `142; and

- (b) a supporting affidavit **setting out the facts on which the application** is based.
- (2) The applicant must serve a copy of the application and affidavit on each respondent named in the application, within 5 business days after filing it.
- (3) An application in terms of this regulation **must-**
- (a) indicate the basis of the application, stating the section of the Act or these Regulations in terms of which the application is made; and
- (b) depending on the context-
- (i) set out the Commission's decision that is being appealed or reviewed;
- (ii) set out the decision of the Tribunal that the applicant seeks to have varied or rescinded;
- (ii) set out the regulation in respect of which the applicant seeks condonation; or
- (c) indicate the order sought; and
- (d) state the name and address of each person in respect of whom an order is sought.

Rationale for the application

15. The reasons advanced on behalf of the company for the application for exemption are advanced as indicated above.

CONSIDERATION AND DECISION

16. The application is lodged on form CTR 142.

17. It is submitted on behalf of the company that it is an entity that operates as a ring-fenced entity and conducts its affairs through RMB (a division of First brand Bank Limited) as Facility Agent within strict prescribed contractual terms, and that due to the limited purpose for which the entity has been established, regulation 43(5)(a)(i)(cc); 43(5)(a)(i)(dd); 43(5)(a)(ii)(aa); 43(5)(a)(ii)(bb); 43(5)(a)(iii); 43(5)(a)(iv); 43(5)(a)(v); of the Companies Act cannot be applicable to the entity.

18. It is further submitted on behalf of the Applicant that it is consolidated within the FirstRand Limited Group who have established their own social and ethics committee, the entity is a securitized ring-fenced entity specially established to purchase and lease aircrafts. The entity does not have any employees.

19. The deponent submits that based on the submissions made in the papers, the company does not need to comply with Regulation 43 (5).

20. The application was considered taking into account-

- i) the provisions of the Act in section 72(4), regulations 26(2), regulation 43 and section 72(5);
- ii) the submissions made on behalf of the Applicant contained in the accompanying affidavit;
- iii) the reasons given on the CTR 142 under the heading “ for the following reasons” ;

21. The Applicant has various responsibilities to put forward in advancing or making out its case for it to meet the requirements for an exemption by the Tribunal, or, as section 72(5) puts it “***and the Tribunal may grant such an exemption if it is satisfied that***”; the main ones being:-

- i) making a case in its papers that it is a company as envisaged in section 72(4) by the words “a category of companies that **must** each have a social and ethics committee”; It has to show that it has calculated its public interest score “PIS” in accordance with this Act and Regulations; and must clearly indicate why it is a company as envisaged in section 72 (4)
- ii) a supporting affidavit **setting out the facts on which the application** is based. This calls for more than just alleging that “ it is an entity consolidated within the FirstRand Limited Group who have established their own social and ethics committee, the entity is a securitized, ring-fenced entity specially established to purchase and lease aircrafts; the entity does not have employees”. Factual proof that the social and ethics committee established by FirstRand Limited Group will perform the functions of a social and ethics committee on behalf of the Applicant company must be given including how the company Q400 LEASING (FR) (Pty) Ltd, RMB (a division of FirstRand Bank Limited) and FirstRand Limited Group are related. All these must allude to the requirements contained in the Companies Act for the appointing of a Social and Ethics Committee and how they render the Applicant exempt from forming such a Committee;
- iii) It is also not sufficient to make out a case to merely allege “that the company or entity is a Facility Agent and operates within strict prescribed contractual terms.” without stating what other stringent requirements there are, in terms of other legislation it has to comply with as well as how they tie in with the functions, powers and composition of a Social and Ethics Committee , thus rendering it exempt from appointing such a committee;(section 72 (5) (a);
- (iv) The company must demonstrate and prove that it 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 (72 (5) (a) and the regulations (the functions are those of the Social and Ethics committee as listed in regulation 43 (5)); These should be clearly articulated in a manner that does not leave the Tribunal guessing what they are, for it to be “satisfied” so as to grant the exemption.
- v) Further, it is must also be established that the company has scored above 500 points in terms of regulation 26(2) as contemplated in regulation 43(1), as well as the fact that, it existed on the effective date as envisaged in regulation 43 (3) (a); therefore, its Board should have appointed the first members of its social and ethics committee within 12 months after the effective date,

which is, within 12 months after the 1st May 2011 as required by regulation 43(3) (a) (i) unless regulation 43(2)(a) applies to it.

vi) The Applicant company should, if it relies on Regulation 43(2) (a), clearly demonstrate that it is a subsidiary of another company and therefore does not have to appoint a social and ethics committee. Regulation 43 (2) states” 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 company will perform the functions required by this regulation on behalf of that subsidiary company.

22. It is noted that the application for exemption was filed with the Lodgement Unit of the Companies and Intellectual Property Commission on the 11th July 2013, a time that fell outside the period envisaged for appointing the committee being 12 months from the 1st May 2011 or after the determination by the Tribunal of the company’s application, if any, and if the Tribunal has not granted the company an exemption.(regulation 43 (a) (ii). The Applicant pre- existed, having been registered in 2010 and therefore should have appointing its first members of the Social and Ethics Committee within 12 months from Ist May 2011.

23. The Applicant, it is further noted did not apply for, and obtain a condonation for late filing as contemplated by regulations 147 and 166; however, this aspect has not influenced the determination, which has been considered instead of the application being struck off the roll.

Finding and Conclusion

24. The Companies Act in regulation 43(2) (a) provides:-

“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;”

25. The Companies Act in section 72 (5) (a) and (b) provides the considerations that the *Companies Tribunal must be satisfied with, for it to grant an exemption*, and they are:-

“(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 functions 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”

26. The Application is made by a person other than the entity, who is making the application on behalf of the company but does not provide any identity of himself (for example does not even give an identity number in his affidavit nor attach any proof of being a Director of the company he purports to represent).(Regulation 168)

27. The Deponent has also failed to provide proof of the authority he purports to have to file the documents on behalf of the juristic person. (Regulation 168)

28. The Applicant has not proved in its papers any of the considerations that need to be satisfied for the Tribunal to grant the exemption.

29. The Applicant in its CTR 142 form as well as in its accompanying affidavit, alluded to reasons for its application, none of which is accompanied by any proof even though they do fall within the ambit of the considerations contemplated in section 72 (5) (a) or (b); and which would persuade the Tribunal to grant it the exemption.

30. The principal issue in this Application is whether Q400 LEASING (RF) (Pty) Ltd has made out a case on the facts presented by it in the papers lodged with the Companies Tribunal entitling it to relief under s 72 (5) of the Companies Act 71 of 2008.

31. More particularly, the Applicant made multiple averments which it claims entitled it to an exemption from appointing a Social and Ethics Committee without any substantiation of those averments.

32. The Applicant contented itself with presenting in its founding affidavit, allegations pertaining to its being an entity consolidated within the FirstRand Limited Group who have established a social and ethics committee, without the giving of evidence of such, and proof from FirstRand Limited Group that its social and ethics committee will perform the functions envisaged for the committee on behalf of the Applicant; has thus failed to establish a well-grounded justification for an exemption to be granted.

33. The Applicant further, in its application, alludes to a narrow interpretation of the functions of a Social and Ethics Committee, with reference to it not having any employees and it is made up of lenders and not the general public, to the exclusion of the wide array of functions of a Social and Ethics Committee listed in Regulation 43 (5)(a) (i) to (v); (b) and (c); a failure in its part to make out a case for the relief sought.

34. In considering this Application, one should not lose sight of what Q400 LEASING(RF) (Pty) Ltd sought to achieve when it instituted its so-called Application for Relief.

35. The sole purpose of this Application was to obtain an exemption from appointing a Social and Ethics Committee as it is required by the Act to do; and it must do so to the satisfaction of the Tribunal.

36. To my mind, we must determine whether Q400 (RF) (Pty) Ltd has made out a case entitling it to relief under s 72(5) of the Act.

37. It is apposite at this juncture to deal with the contention of the Applicant that its allegations are of such a nature that a court or Tribunal as in this case, would be justified in accepting their evidence on the papers; however, it is our view that the Applicant contented themselves with bare submissions or averments without giving substance of the allegations in its affidavit.

38. It seems to me that the proper approach to a situation such as the one in this case is that a real, genuine and bona fide matter of fact can exist only where the court or Tribunal is satisfied that the party who purports to make out a case has in his affidavit seriously and unambiguously addressed the fact said to be proven.

39. There will of course be instances where a bare allegation meets the requirement because there is no other way open to the party and nothing more can therefore be expected of him; however, this is not such an instance. The party has to “satisfy” the Tribunal.

40. But even more so, if the facts averred lie purely within the knowledge of the averring party, and no basis is laid for the veracity or accuracy of the averment, such, does not auger well for the party.

41. When the facts averred are such that the averring party must necessarily possess knowledge of them and be able to provide detailed evidence, if they be true or accurate but, instead of doing so, rests his case on a bare or ambiguous averment, the court or Tribunal will generally have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a broader matrix of circumstances all of which need to be borne in mind when arriving at a decision.

42. Relief in Application proceedings may only be granted if the facts averred in the Applicant’s affidavit, justify the order or relief sought.

43. A litigant or Applicant may not necessarily recognize or understand the nuances of a bare or general averment as against a real attempt to grapple with all relevant factual allegations to make out a case. But when he signs the founding affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser or deponent as in the matter at hand, who settles a founding affidavit to ascertain and engage with facts which his client avers and to reflect such averments fully and accurately in the founding affidavit. If that does not happen, it should come as no surprise that the court or Tribunal takes a robust view of the matter.’

Conclusion/ Determination

44.

- a) The application is lodged outside the time that it should have been lodged and no application for condonation for late filing is submitted;
- b) The person making the affidavit and application on behalf of the Applicant, a juristic person or entity as they seem to prefer to refer to the Applicant, has neither demonstrated that they have a right to file the documents themselves, nor that they are authorized to deal with the Tribunal and to file documents on behalf of the Applicant.
- c) The Applicant has failed in any event to make out a case for an exemption as envisaged in section 72 (5) of the Act.
- d) The application of the Applicant, must, for the reasons mentioned above fail; it is therefore dismissed.
- e) The company must constitute a social and ethics committee and appoint its first members within 12 months after this dismissal of its application for exemption.
- f) This determination must also be served on the Companies and Intellectual Property Commission for its noting and for monitoring for compliance.

Signed at _____ on this the 27^h day of October 2013.

Ms A.N. Zondi.

Companies Tribunal.