



**IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA
("The Tribunal")**

CASE NO: CT014Sept 2018

**In Re: In an Application in terms of
Section 72 (5) of the Companies Act 71 of
2008 ("the Act") for an exemption to
appoint a Social and Ethics Committee
(SEC) in terms of Regulation 43.**

In an Ex parte Application for exemption by:

**Eric Ellerrine Trust (Pty) Ltd
(1968/014293/07)**

THE APPLICANT

Coram K. Tootla

Decision delivered on 28 September 2018

DECISION

INTRODUCTION:

- [1] The applicant applies to the Companies Tribunal for an exemption to appoint an SEC which ideally ought to have been done in terms of Sections 72 (5) (b) pursuant to 72 (4) (a) of the Companies Act 71 of 2008 ("Act") and the regulations in terms of the Companies Act (Govt. Gazette No. 351 of 265 April 2011) ("Regulation/s" or Reg/s) for an exemption from appointing a SEC. C

BACKGROUND:

- [2] The applicant is a subsidiary of a company and applies on form CTR 142 without indicating under which section and subsection of the Companies Act it applies for an exemption.
- [3] It is clear from the applicant's schedule that it is required to appoint a SEC due to the fact that its public interest score ("PIS") exceeds 500 for the years 2017 and 2016 in a total of 5 years (as set out in a schedule to the affidavit of Eric Ellerines) i.e the company does have a Public Interest Score above 500 in any two of the previous five (financial) years in terms of Reg 43(1) (c). The score is to be calculated in terms of Reg 26 (2).
- [4] The applicant states that since the company has 1 employee, and because its public interest points (PIS) do not exceed 500 points in 2016 (after it recalculated the points based on the dividend declared by its holding company), that it is entitled to apply for an exemption. The applicant indicates that the Public Interest Score (PIS) is high due to extraordinary items which was not in the normal course of business. The Schedule attached to the affidavit does not clarify the number of shareholders, the annual turnover, the nature and extent of the activities of the company as stated in Section 72 (4).
- [5] Eric Ellerine states that included in the calculation of the PIS were dividends received from the Group companies due to a group restructure but no structure of the companies have been provided nor have the details been explained.

APPLICABLE LAW:

- [6] 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.”

[7] 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 (my emphasis)**

[8] Regulation 43(5) defines the role and 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.”

[9] **The PIS is calculated** (my emphasis) 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)).

[10] 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)).

[11] 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.

[12] 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:

[13] 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 (viz. because of reg 43 (2) (a)), then the Tribunal has no function or discretion.

If a SEC needs to be appointed, the only discretion (my underlining) that the Tribunal has, is in terms of section 72 (5), i.e.

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 is it 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] Thus it is clear from section 72(5) read with regulation 43(2)(b) that the Tribunal has discretion to exempt a company from appointing a SEC, where it is satisfied that the company already has a formal mechanism within its structures that substantially performs the function of a SEC in terms of a legislative responsibility or 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.

[15] Since the Application has not been brought in terms of Section 72(5(a), this issue need not be considered by the Tribunal. It seems then the Application has been brought in terms Section 72(5) (b) and has to be dealt with accordingly.

[16] The role and functions of the SEC have been set out clearly in Section Reg 43(5). It is patently clear that there is a compelling and specific purpose in Law for an SEC to be appointed as it forms an essential part of good corporate governance and best practice. It also fits into the category of enhanced accountability and transparency. Significantly, the title to Reg 26 is “interpretation of regulations affecting transparency and accountability” which applies specifically to various regulations, one of them being Reg 43.

[17] The purpose and functions of the SEC are indeed significant as it is **an additional policing mechanism** created to ensure that the company complies with relevant laws, other legal requirements and prevailing codes of best practice; and for the Board to monitor same if the nature and extent of the activities of the company warrant it in the public interest.

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

Since the Applicant has not set out the nature and extent of activities in terms of Section 72 (5) (b), it cannot be granted an exemption nor has it convinced the Tribunal that the PIS points do not exceed 500. In the sum total, it is clear that the Applicant does not understand its responsibilities under Section 72 (5), Reg 26 (2) and Reg 43 (5) and it has failed to justify its application for exemption.

- [19] If the PIS is above 500 for the years 2017 and 2016, the nature and extent of the activities are *prima facie* significant or material, then the SEC must be appointed.
- [20] 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. The Applicant has not addressed this matter at all in its Application.
- [21] Regulation 43 (2) does not prescribe either the *nature* or the *extent* of the activities, but reg 43 (5) is to 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.
- [22] The only discretion that the Tribunal has in terms of section 72 (5) under these circumstances is it 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.
- [23] There is no argument (or facts) in the founding affidavit on which the Tribunal can exercise its discretion based on the *nature* and *extent* of the activities of the applicant.

ORDER:

[24] In the circumstances, the application for an order for the exemption from the requirement to appoint the SEC is refused.

[25] The Applicant is obliged to appoint a Social and Ethics Committee since its public interest score exceeds 500 by not later than 30 November 2018 and CIPC is tasked to ensure that this is done.

[26] Copy of this order is to be served on the compliance department of CIPC.

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KHATIJA TOOTLA

Member of the Companies Tribunal

28 September 2018