



## IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

**Case No: CT016Nov2018**

### **Ex parte application:**

Eric Ellerine Trust (Pty) Ltd

**APPLICANT**

**Presiding Member of the Tribunal** : Prof PA Delport

**Date of Decision** : 14 December 2018

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### **DECISION (Reasons and Order)**

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#### **1. INTRODUCTION**

The applicant applies to the Companies Tribunal in terms of section 72(5)(b) of the Companies Act 71 of 2008 (“Act” / “Companies Act”) and regulation 43(2)(b) of the regulations in terms of the Companies Act (GNR 351 of 26 April 2011) (“Companies Act regulations” / “regulation/s”) for an exemption from appointing a Social and Ethics Committee (“SEC”).

## 2. BACKGROUND

- 2.1 The applicant also applied for an exemption from the appointment of an SEC under CT014Sept2018 (“initial application”).
- 2.2 In the initial application the applicant was indicated in the ruling as Eric Ellering Trust (Pty)Ltd (1968/014293/07). I accept that the registration number should have been indicated as 1968/015293/07.
- 2.3 The Tribunal, per K Tootla, made the following ruling in the initial application [para 18]:  
“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 (sic) 26 (2) and Reg 43 (5) and it has failed to justify its application for exemption.”
- 2.4 There seems to be two grounds on which the Tribunal made its ruling. In the first instance that it has not set out the nature and extent of its activities, and secondly that it has not “convinced the Tribunal that the PIS points do not exceed 500.”
- 2.5 In respect of the second point it is accepted that the reference is made to the 2017 financial year where the applicant received dividends due to a restructuring and those dividends, as an extraordinary item for that year, are sought to be excluded on that basis from the calculation of the Public Interest Score (“PIS”).
- 2.6 The applicant now brings this application (“new application”/“re-application”) on, apparently, essentially the same bases as the initial application, except for the statement ([para 11] of the supporting affidavit) that:  
“At the date of the original application for exemption the public interest score for the 2018 financial year was not available. However, in this re-application,

the public interest score for the 2018 financial year is available. The public interest score for the 2018 financial year end is 80 points, which indicates that the public interest score is well below 500 points. This would be the case for the foreseeable future.”

2.7 The fact that the PIS for the 2018 financial year is below 500 does not change the substance of the finding in the initial application as reg 43(1) provides that an SEC must be appointed in the case of a company, other than an SOE and a listed company, if the PIS, calculated in accordance with reg 26(2), is above 500 in any two of the previous five years. This was the case in 2016 and 2017. The PIS calculation of 2016 was addressed in the initial ruling as stated above.

2.8 The applicant brings, in its own words, a “re-application”. The Act and/or regulations do not provide for such a process and the initial ruling, subject to what is stated below, still applies.

2.9 The regulations do provide that:

“142. Applications to the Tribunal in respect of matters other than complaints

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

...

(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;" (the emphasis is mine)

2.10 In *Newgold Issuer Limited* CTR00B/04/2013 the Tribunal, per Khashane Manamela, analysed the concepts of “variation” and “rescission” extensively,

with reference also to other tribunals and also the application and interpretation of those concepts in the civil procedure of the Magistrate court and the High Court. He concluded:

“[13] From my analysis of the above, I return holding a view that, what is commonly catered for [by adjudicative tribunals and courts referred to above] in provisions for variation or rescission of judgments or orders is to correct or reverse the effect of the judgments or orders obtained due to fraud or by mistake common to the parties; in default of the applicant party; those deemed void *ab origine* or to correct patent errors. I do not consider the crafters of regulation 142(3)(b)(ii) of the Regulations to have had a different intended outcome...” (footnotes omitted)

2.11 The applicant did not bring its “re-application”, which is apparently an application for variation or rescission, on any of these grounds.

2.12 The regulations do not expressly provide for alternative redress, such as a review by the High Court, but it is submitted that it is a possible avenue in terms of the provisions of rule 53 of the Uniform Rules (see *Newgold Issuer Limited* ruling above [para 23]). However, this statement should not be seen or interpreted as an opinion on the merits or otherwise of such an application.

### **3. FINDING and ORDER**

The “re-application” for an exemption from appointing a Social and Ethics Committee is dismissed.

**SIGNATURE**

**COMPANIES TRIBUNAL: MEMBER**

**DATE: 14 December 2018**