



**IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA**

**("THE TRIBUNAL")**

**CASE NUMBER: CT00141/ADJ/2019**

**In the ex parte application of:**

**JT ROSS PROPERTIES (PTY) LTD**

**APPLICANT**

**Coram: PJ Veldhuizen**

**Decision delivered 5 September 2019**

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**DECISION AND REASONS**

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**A. INTRODUCTION**

1. The Applicant is **JT ROSS PROPERTIES (PTY) LTD**, a private company, with registration number 2000/005528/07, registered in terms of the company laws of the Republic of South Africa.
2. The Applicant has exceeded the minimum public interest score of 500 more than twice in the past two years and it is required to appoint a Social and Ethics Committee

in terms of section 72(4), read with regulation 43, of the Companies Act No 71 of 2008 (“the Act”).

3. This is an application brought in terms of section 72(5)(b) of the Act where the Applicant applies to the Tribunal for an exemption from the requirement to appoint a Social and Ethics Committee.
4. The Applicant has previously applied to the Tribunal for similar relief but the application was refused with the Presiding Member indicating that the Applicant could re-apply to the Tribunal after duly supplementing its papers. This is that application.

## **B. THE LEGISLATION**

### **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.

### **Section 72(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.

**Section 72(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).

**Regulation 26 (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.

### **Regulation 43**

(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 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—

(i) the effective date; 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, 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.

(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.

**C. THE ISSUES NOW TO BE DECIDED BY THE TRIBUNAL**

5. Has Applicant met the Tribunal's procedural requirements ?

6. Is it reasonably necessary in the public interest to require the Applicant to have a Social and Ethics Committee, having regard to the nature and extent of the activities of the Applicant ?
7. Has the Applicant made out a proper case for exemption ?

**D. EVALUATION OF EVIDENCE**

8. According to the duly authorised deponent of the Founding Affidavit, **MELANIE ANN GILLESPIE**, a director of the Applicant:

8.1. The Applicant's main business is to own commercial and industrial property which it rents out.

8.2. The Applicant has no employees.

8.3. While the Applicant has an extensive property portfolio, the shareholders of Ross Property Holdings (Pty) Ltd (the sole shareholder of the Applicant) is the Jam Trust, the beneficiaries of which are all Ross family members and there are therefore no external shareholders or beneficiaries outside of the Ross family.

8.4. The day to day management of the Applicant's leases and maintenance of the buildings/properties is dealt with by a separate management company and any development of land by a development company within the group.

8.5. All other day to day functions of the Applicant are overseen by the 2 (two) Directors.

- 8.6. In terms of Regulation 43 (4) of the Companies Act, "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." Accordingly, so says the Applicant that should it be required to form a social and ethics committee, it would be required to appoint a director who is not involved in the day-to-day management of the Applicant's business and who has not been so involved in the past three financial years. The Applicant submits that this would result in prejudice to the Applicant in that it would be forced to incur an unnecessary additional expense as well as an infringement or dilution of the existing director's authority. It would also be superfluous as the running (and presumably the functions of a social and ethics committee) of the Applicant is overseen by the two existing Directors;
- 8.7. For the reasons stated the requirement to appoint a social and ethics committee will cause the Applicant an undue burden.
- 8.8. In the light of the above, the appointment of a social and ethics committee is not required in the public interest.
9. As pointed out in previous similar matters that the Tribunal has considered, the authors of **Henochsberg on the Companies Act 71 of 2008**<sup>1</sup> submit that factors to be taken in to account for the Tribunal to determine whether it is reasonably

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<sup>1</sup> **Author:** Formerly edited by: The Late Hon Mr Justice PM Meskin. Authors: Professor Piet Delport LLB LLD (Pret) HDip Tax Law (Wits); Professor Quintus Vorster PhD (Stell) CA (SA). Contributors: Professor David Burdette BIuris LLB (Unisa) LLD (Pret)

necessary and in the public interest to have a Social and Ethics Committee are the proposed functions set out in regulation 43 (5).

10. **Henochsberg** goes further and submits that if however, the quantitative criterium (ie the public interest score) has already determined that a social and ethics committee is required, what additional factors in the light of this determination should be considered when faced with the question of whether it is reasonably necessary in the public interest to have such a committee.
11. The Tribunal assumes then that Legislature intended it to exercise a discretion notwithstanding the quantitative criterium and such discretion shall be exercised accordingly with reference to the content of regulation 43(5).
12. Henochsberg sets out what may be considered in practice for the Tribunal to reach a determination, as follows—
  - (a) the contribution of the company (qualitative criterium) to social and economic development *of the community in which it operates* (public interest) (reg 43 (5) (a) (i));
  - (b) the effect of the company as a corporate citizen (qualitative criterium) *in the particular community* (public interest) (reg 43 (5) (a) (ii));
  - (c) the effect (qualitative criterium) that the company's activities and products has on *environment, health and public safety* (public interest) (reg 43 (5) (a) (iii));

- (d) the actions of the company (qualitative criterium) *in respect of consumers*, including advertising, public relations and consumer protection (public interest) (reg 43 (5) (a) (iv));
  
- (e) the company's actions (qualitative criterium) *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" (public interest) (reg 43 (5) (a) (v)).

**E. DECISION**

Having carefully considered the evidence in the founding affidavit of the Applicant, the ratio of the previous decision made by the Tribunal and having considered the factors above, the Tribunal is satisfied that the Applicant has met with the procedural requirements and is entitled to the relief sought. Accordingly, Applicant is exempted from the requirement to appoint a Social and Ethics Committee for a period of five (5) years from the date of this determination.

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**PJ VELDHUIZEN**  
**MEMBER OF THE COMPANIES TRIBUNAL**  
**CAPE TOWN**