

IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

“The Tribunal”

Case Number: CT00478ADJ2020

Ex Parte Application:

NITRO SECURITISATION 6 (RF) Ltd

APPLICANT

Registration Number 2015/325900/06

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

DECISION

INTRODUCTION:

- [1]** The Applicant is Nitro Securitisation 6 (RF) Ltd, with registration number 2015/325900/06¹, a ring-fenced public company, with its address at 4 Merchant Place, Corner Fredman Drive and Rivonia Road, Sandton, 2146. The Applicant is duly represented herein by its director, David Peter Towers, duly authorised².
- [2]** The Applicant seeks an exemption from the requirements to appoint a Social and Ethics (SEC) in terms of sections 72(5) of the Companies Act 71 of 2008 (“The Companies Act”), read with regulation 43(2)(b) of the Regulations to the Companies Act. The reasons furnished by the Applicant for the exemption being that

¹ Form COR14.3 CIPC

² By resolution of directors on 17 April 2020

the company is a Special Purpose Vehicle (SPV), and that 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 its activities, and the fact that the company does not have employees.

BACKGROUND

[3] The Applicant duly filed form CTR142 and an affidavit with the Tribunal, on 15 October 2020. The Applicant submitted that the company is a special purpose vehicle and that its main business is to issue Notes (including, without limitation, debentures, promissory notes and commercial paper) and /or to enter into other transactions with investors and use funds borrowed or raised directly from the Notes and/or Debt Obligations to acquire or invest in, from time to time, the rights, title and interest in and to any assets (together with security related thereto) (including the right to sell, assign, transfer or otherwise dispose of such Participating Assets), and, if applicable, to collateralise its Debt Obligations; and/ or enter into derivatives contracts as may be desirable or necessary to manage risks or to hedge exposures of the Company or as may be contemplated in the Issuer Programme³.

[4] The Applicant further submitted that it does not have employees, but however, has a PI score of above 500 points.

³ See also Memorandum of Incorporation: Clause 1.2.1.1.1-main purpose and main business

The Applicant, in addressing regulation 43(5) which provides for the functions of a Social and Ethics committee, submitted that:

- the contribution of the company to social and economic development of the community in which it operates would be negligible due to the limited effect on exposure to the community;
- the company's activities and products have no effect, directly or indirectly, on the environment, health and public safety;
- the actions of the company in respect of consumers, including advertising, public relations and consumer protection would be irrelevant, as specialised purpose vehicles are created for the consumers who are sophisticated institutional investors who can fend for themselves;
- the requirements to comply to oversee labour relations would be irrelevant as the company does not have employees.
- due to the nature and extent of its activities, and the fact that it does not have any employees, the applicant has applied to the Tribunal for exemption from having a Social and Ethics Committee, as required by S.72(4)(a).

[5] The Applicant has submitted its Memorandum of Incorporation, which confirms the Applicant's submissions on its business activities.

Application of the Law

[6] This is an application in terms of S.72 of the Companies Act, which provides that:

(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 the social and ethics committee required by this subsection; and

(c) The rules governing the composition and conduct of social and ethics committees.

[7] Subsection 5 provides the opportunity to apply for an exemption from having a social and ethics committee, for companies that are required to have a social and ethics committee in terms of subsection (4), as follows:

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 exemption if it is satisfied that-

- (a) the company is required in terms of other legislation to have, and does have , some other 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.*

[8] Subsection 6 provides for the duration of an exemption granted in terms of the section above, and stipulates that such exemption shall be valid for five years, or such shorter period as the Tribunal may determine at the time of granting the exemption.

[9] Regulation 43(1) gives effect to section 72(4) of the Companies Act and provides as follows:

This regulation applies to:

- (a) every state owned company;*

(b) every listed 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).

[10] Regulation 26(2) provides for the manner in which public interest score must be calculated and provides that it must be 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 R1 million (or portion thereof) in third party liability of the company, at the end of the financial year;

(c) One point for every R1 million (or portion thereof) in turnover during the financial year; and

(d).....

[11] A company to which Regulation 43 applies, must appoint a social and ethics committee, unless it has been exempted by the Tribunal, in accordance with Section 72(5) and (6) of the Act.

[12] Regulation 43 (5) provides for the functions of a social and ethics committee, including; to monitor the company's

activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice.

These include the monitoring of; social and economic development, good corporate citizenship, the environment, health and public safety including the impact of the company's activities and of its products or services, consumer relationships and labour and employment.

EVALUATION

[13] The Applicant is a company that is required to appoint a social and ethics committee in terms of Regulation 43(1). The Applicant submitted that it applies for an exemption from having a Social and Ethics committee, due to the reasons outlined above. The Applicant is a ring-fenced public company whose activities are restricted in terms of its Memorandum of Incorporation.

[14] The Applicant submitted that the exemption is based on S.72(5)(b) of the Companies Act in that 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.

[15] The Social and Ethics committee is a statutory company committee established to monitor and ensure that companies act in a responsible manner and contribute to

the economic and social development of communities within which they operate.

[16] The Applicant has clearly shown that its business activities are of a unique nature and that there is no need to have a Social and Ethics committee in the absence of any external and internal stakeholders in the company, save for the directors of the company and those who elect to participate in the investment schemes. The company does not operate within, and is not exposed to any particular community, has no employees and operates a “voluntary participation” trading business where only those who can afford to invest in the company can do so. It appears that no stakeholder will be prejudiced from the absence of a Social and Ethics committee within the company. It would be futile for the Applicant to constitute such a committee as the functions of the committee are not relevant and applicable to the Applicant company.

FINDINGS

[17] The Tribunal is satisfied that the Applicant has shown that 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 its activities.

ORDER:

1. The application for an order for exemption from the requirement to appoint a social and ethics committee is granted.
2. The exemption shall be effective for a period of five (5) years from date hereof.

B. Zulu
Member: Companies Tribunal
29 October 2020