



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT00528ADJ2020

1Invest ETF Issuer (RF) Ltd
(2013/022008/06)

Applicant

Coram: Delpont P.A.

Date of decision: 26 January 2021

Decision

INTRODUCTION

- [1] The applicant applies to the Companies Tribunal in terms of section 72 of the Companies Act 71 of 2008 (“Act” / “Companies Act”) and regulation 43 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”).

BACKGROUND

- [2] The applicant is 1invest ETF Issuer (RF) Ltd (2013/022008/06), a public company.
- [3] The applicant is an insolvency remote special vehicle company that issues debentures against physical commodities and the debentures are also ETFs listed on the JSE Ltd.
- [4] The application is brought by Brendan Harmse, a director of the applicant, who is duly authorised to do it on behalf of the applicant in terms of a resolution of the directors (not the shareholders as stated in para 1.2 of the supporting affidavit) dated 21 November 2020.
- [5] The applicant has no employees and the functions of the applicant are outsourced to Standard Bank Limited.
- [6] The applicant states that it is required to appoint an SEC due to the fact that its "...public interest score as at the last financial year was calculated at 9,111 points. It is noted that 90 points are attributable to current liabilities of secured Debenture holders." (para 3.4 of the supporting affidavit).
- [7] The applicant does not set out how the score of 90,111 points is calculated and the reference to a score of 90 points is presumably incorrect.

APPLICABLE LAW

- [8] 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—

...

- (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.

...”

[9] The regulations in terms of the Companies Act provide in reg 43(2) that an SEC must be appointed by, *inter alia*, a company with a public interest score (“PIS”) above 500 as calculated in accordance with reg 26(2) in any two of the previous five (financial) years.

[10] The applicant submits that its PIS is above 500, but apparently only for the (one) previous financial year (para 3.4 of the supporting affidavit).

[11] If the above is the case than the applicant does not have to appoint an SEC, as the PIS is only above 500 for one financial year.

[12] However, it is unlikely that a company such as this will only have the extent of the activities in a single financial year.

[13] I will accept that the PIS score is above 500 for two consecutive financial years to exclude a waste of time and money in respect of submission of additional documents/affidavits. If my assumption is not correct, the application is not necessary and the Tribunal has no jurisdiction.

- [14] Subject to the above assumption, the requirements in respect of the appointment of the SEC and the discretion of the Tribunal in this regard are twofold. In the first instance it must be determined if the company is required to appoint an SEC. If this is not the case (eg because of reg 43(2)(a)), then the Tribunal has no function or discretion. It is assumed, as stated above, that the requirement is met.
- [15] If an SEC needs to be appointed, the only discretion that the Tribunal has, is in terms of section 72(5), ie
- 15.1 does another Act require a formal mechanism that substantially performs the function that would otherwise be performed by the SEC, or,
 - 15.2 if it is not reasonably necessary in the public interest to require the company to have an SEC, having regard to the nature and extent of the activities of the company.

EVALUATION

- [16] The applicant is of the opinion that it is not reasonably necessary in the public interest to require it to have an SEC, having regard to the nature and extent of the activities.
- [17] The business of the applicant is purely to act as special vehicle to facilitate the issue of debentures, also listed as ETF's on the JSE Ltd, with those debentures backed by physical commodities.
- [18] The applicant clearly complies with the quantitative criteria for the appointment of an SEC, however, the qualitative criteria, as measured in respect of "public interest" are clearly not met: see *Henochsberg on the Companies Act 71 of 2008* at 284 *et seq.*

FINDING and ORDER

[19] The applicant is exempted, subject to the qualification in para [13] above, from the requirement to appoint an SEC for a period of five years from the date of this decision.

PA DELPORT

COMPANIES TRIBUNAL: MEMBER