



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT00640ADJ2021

Ex parte application:

Midfield Home Owners Association NPC

Applicant

Presiding Member of the Tribunal : PA Delport

Date of Decision : 5 May 2021

DECISION

INTRODUCTION

[1] The applicant (“applicant”/ “company”) applies to the Companies Tribunal (“Companies Tribunal” / “Tribunal”) in terms of section 72(5)(b) of the Companies Act 71 of 2008 (“Act” / “Companies Act”) read with regulations 43(1)(c) and 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”).

BACKGROUND

- [2] The applicant is Midfield Home Owners Association NPC registered in accordance with the Companies Act with registration number 2005/024376/08.
- [3] The application is brought by Andre Frederich Oberholzer, who is the chair of the applicant and who is duly authorised to do it on behalf of the applicant by a resolution of the board dated 23 February 2021.
- [4] The applicant is a home owners association that manages an estate and the members of the applicant (have to) become members of the association due to ownership of property in the estate as provided for in article 5 of the Memorandum of Incorporation of the applicant
- [5] The applicant had a Public Interest Scores (“PIS”) above 500 for the “past two years”, presumably for 2020 and 2019
- [6] The major component of the PIS is the number of members in the applicant, that increased from 409 to 1000.
- [7] The effect is that the PIS for 2020 (and presumably substantially also for 2019, is 1139, calculated as follows:
- | | |
|------------------------|------------------------------------------------|
| Employees: | 115 |
| Third party liability: | 1,6 (for every R1 million or portion thereof) |
| Turnover: | 22,4 (for every R1 million or portion thereof) |
| Members: | 1000. |
- [8] The applicant applies for an exemption from the appointment of an SEC on the basis that it is not reasonably necessary in the public interest to require it to have a social and ethics committee, having regard to the nature and extent of its activities.

[9] The essence of the application is that the company solely does business as a home owners association, for the benefit of and in the interests of its members and that any other business is merely incidental thereto. The membership and turnover are “ring fenced” in the sense that it is, for want of a better word, domestic.

APPLICABLE LAW

[10] 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—

... 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.

...”

[11] Regulation 43(2) provides that an SEC must be appointed *inter alia* by any company other than a state owned company or listed company, if that company has a PIS above 500 as calculated in terms of regulation 26(2) in *any two of the previous five (financial) years*.

EVALUATION

- [12] If an SEC needs to be appointed, the Tribunal has a discretion to exempt a company if, in this particular context, 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 (section 72(5)(b)).
- [13] The functions of the SEC are as set out in regulation 43(5) and entail certain duties and responsibilities in respect of the activities of the company. It is not necessary to list these duties and responsibilities here, and in summary it may be stated that it determines the social and ethics functions in respect of social and economic development, good corporate citizenship, environmental, health and public safety, consumer relationship and labour and employment.
- [14] The applicant contends that it has a high PIS due, mainly, attributable to its membership and that the other elements of the PIS score are either directly related to its membership or, in comparison, very small.
- [15] The mere fact that only/manly one element of the PIS criteria takes a company over the PIS of 500 does not mean that the public interest dictates that it is not necessary to appoint an SEC and therefore it is not, on its own, sufficient as basis for an application for an exemption.
- [16] However, the PIS is based on purely objective quantitative criteria (ie the PIS) that determines that the SEC is required.
- [17] The question is then logically what should be taken into account to determine whether it is not “reasonably necessary in the public interest” to have an SEC as neither the Act nor the regulations provides for different levels of such a score for purposes of determining the public interest.

[18] There is therefore no qualitative criteria in the factors that are used to calculate the PIS which can be used to determine that although the quantitative criteria have been met, it is not reasonably necessary in the public interest to have the SEC.

[19] In my opinion the extent of the public interest element can therefore only be determined with reference to the qualitative criteria in regulation 43(5): see *Henochsberg on the Companies Act 71 of 2008* at 284 *et seq.*

[20] The applicant complies with the quantitative criteria for the exemption to appoint an SEC as the effects of the quantitative criteria that caused it to have a PIS above 500 on the elements as in regulation 43(5) as summarised above (quantitative criteria) are insignificant.

ORDER

[21] The applicant is therefore exempted in terms of section 72(6) from appointing an SEC for a period of five years from the date of this decision based on the criteria as in section 72(5)(b). The exemption is clearly only applicable if the circumstances and facts in the application and on which decision is based do not change materially.

SIGNATURE

P.A. Delport

COMPANIES TRIBUNAL: MEMBER