

IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

“The Tribunal”

Case Number: CT00791ADJ2021

Ex parte application:

Tanquata Investment Holdings (Pty) Ltd

Applicant

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

DECISION

INTRODUCTION

- [1]** The Applicant is Tanquata Investment Holdings (Pty) Ltd, with registration number 2002/031452/07, with its registered address at 7th Floor, Newlands Terraces, 8 Boundary Road, Newlands, 7735¹, duly represented herein by its director, Justin Kretzschmar, with ID number: 710713 5100 085².
- [2]** The Applicant seeks an exemption from the requirement to appoint a Social and Ethics Committee (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.

¹ In terms of CIPC Disclosure Certificate dated 17 August 2021

² Resolution of Directors dated 12 August 2021

BACKGROUND

[3] The applicant duly filed form CTR142³ and an affidavit with the Tribunal on 18 August 2021. The applicant submitted that it wishes to apply for an extension to the exemption from the requirement to appoint a Social and Ethics committee granted to it in 2016 under case number CT006Aug2016. The exemption was granted for a period of 5 years expiring on 30 August 2021. In terms of the business of the applicant, the company is an investment holding company and the sole limited partner of the Gallium Fund *en commandite* partnership. It has no employees and does not engage in advertising or similar interactions with the public. The principal activities of the wholly owned subsidiaries of the applicant are stockbroking and asset management. The applicant further submitted that it has an Audit and Risk committee which, the applicant submitted, substantially performs the functions of a Social and Ethics committee which may be relevant in light of the nature and extent of the activities of the applicant, and has gone to indicate to what extent it has developed policies to ensure compliance with the relevant functions for which the Social and Ethics committee would be

³ (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-

- (a) an application in Form CTR142; and
- (b) a supporting affidavit setting out the facts on which the application is based.

responsible for oversight, and in this case, its Audit and Risk committee.

- [4] The applicant is required to appoint a Social and Ethics committee due to its PI score being above 500 points in the preceding years.

Applicable Law

- [4] 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.

[5] Subsection 5 provides the opportunity to apply for an exemption from having a social and ethics committee, for those 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.*

[6] 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.

- [7]** 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).

- [8]** 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).....

- [9] 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.
- [10] 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

- [11] The applicant is a private company and is not automatically required to have a Social and Ethics committee, as is the case with a state-owned company or a listed public company [Reg43(1)(a) and (b)]. The applicant is required to have a Social and Ethics committee by virtue of its public interest score being above 500 in the previous two and preceding years, as evidenced by its exemption that was granted in 2016 (CT006Aug2016). The applicant is the limited partner of the Gallium Fund, and by virtue of it

being a limited partner, its exposure is limited to its financial commitment in the *en commandite* partnership, and is only liable for the debts incurred by the partnership to the extent of its capital commitment to the Fund and any distributions received by it. The applicant, further, has no employees or interactions with the public. I am satisfied that the nature of the business of the applicant justifies why it is not in the public interest for it to have a Social and Ethics committee and accept the approval of the extension on that basis. I agree with my colleague, Ms Glass (CT018Jul2015), when she decided on this case in 2015 (and by the same logic, disagree with Mr Veldhuizen [CT006Aug2016] who accepted this rationalisation) that the Audit and Risk committee has been established in terms of the Companies Act to fulfil specific statutory duties and one cannot rely on the existence of this committee to escape the legal requirement of having a Social and Ethics committee, otherwise these two committees would not have been established by the same Act if either one could fulfil the duties of the other.

FINDINGS

- [13]** 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. The application was filed timeously on 18 August 2021, prior to the expiry of the exemption on 30 August 2021.

ORDER:

1. The application for extension of 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 with effect from 01 September 2021.

B. Zulu
Member: Companies Tribunal
19 August 2021