



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

(“The Tribunal”)

CASE NO: CT00410ADJ2020

In Re: In an Application in terms of Section 72 of the Companies Act 71 of 2008 (“the Act”) for an exemption to appoint a Social and Ethics Committee (SEC) for the Applicant, in terms of Regulation 43.

In an Ex parte Application for exemption by:

**Letsatsi Community Trust (Pty) Ltd
(2012/003744/07)**

THE APPLICANT

Coram K. Tootla

Decision delivered on 30 October 2021

DECISION

INTRODUCTION:

[1] The applicant applies to the Companies Tribunal in terms of Sections 72 of the Companies Act 71 of 2008 (“Act”) and Regulation 43 in terms of the Companies Act (Govt. Gazette No. 351 of 265 April 2011) (“Regulation/s” or Reg/s) for an exemption from appointing a Social and Ethics Committee (“SEC”).

BACKGROUND:

[2] The Applicant is Letsatsi Community Trust Proprietary Limited, bearing registration number 2012/003744/07, a private company duly incorporated in terms of the Company laws of the Republic of South Africa.

[3] According to Paul Jessiman, he being duly authorized to make the application, the Applicant is a simple investment holding company and functions as a vehicle to hold shares to ring fence the risk and reward associated with a particular investment activity.

Such investment activity comprises owning shares in an infrastructure investment and receiving dividends and sale proceeds therefrom as well as any interest and capital payments on shareholder loans it may have provided. The Company's sole investment is a 7.50 % indirect shareholding in the Letsatsi Power Plant which is a 60 MW solar PV park in the Free State.

[4] The Applicant is of the view that it is not reasonably necessary in the public interest to require the applicant to appoint a Social and Ethics Committee, having regard to the nature of the Applicant and the limited extent of its activities. The nature and extent of the Company activities are that it has no employees and no workplace. The Company is furthermore 100% owned by the Letsatsi Solar Park Trust, a non-profit trust which funds social development programmes provided by DGMT PBO and REAP PBO to benefit the local communities living within a 50km radius of the plant.

APPLICABLE LAW:

[5] 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—
- (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.
- (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).
- (7) The Commission, on its own initiative or on request by a shareholder, or a person who was granted standing by the Tribunal at the hearing of the exemption application, may apply to the Tribunal to set aside an exemption only on the grounds that the basis on which the exemption was granted no longer applies.”

[6] The regulations in terms of the Companies Act provide in Reg 43(2) that a SEC must be appointed by:

- State owned companies;

- listed public companies;
- any other company with a Public Interest Score above 500 in any two of the previous five (financial) years.

[7] Regulation 43(5) defines the functions of the SEC as:

“(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.”

[8] The PIS is calculated as follows –

- (a) a number of points equal to the average number of employees of the company during the financial year ('employee' has the meaning set out in the Labour Relations Act 66 of 1995 (Reg 26(1)(a));
- (b) one point for every R1 million (or portion thereof) in third party liability of the company held by creditors at the financial year end;
- (c) one point for every R1 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 (Reg. 26(2)).

[9] If a company is required to appoint a SEC, it can apply for a ruling by the Tribunal for an exemption, under the provisions of section 72 (5) of the Companies Act.

- Application for a ruling must be made in form CTR 142
- together with a supporting affidavit setting out the facts on which the application is based (reg 142 (3)).

EVALUATION:

[10] The Applicant has simply indicated that the Applicant falls within the category of companies required in terms of section 72 of the Act and the regulations to appoint a Social and Ethics Committee. The Applicant has not deemed it fit to calculate its public interest score (PIS) for the past two consecutive years and to show it exceeds 500 nor has it deemed it fit to advise the Tribunal how it arrived at the calculation.

[11] There is no indication of the total number of beneficial interest holders, the number of employees, the third party liabilities, the total turnover etc. The Act and Regulations (especially Reg 26(2) require the Applicant firstly to calculate the PIS and thereafter to explain why an exemption to establish an SEC is being requested.

[12] Since there is no calculation done in terms of Reg 26 (2), the Tribunal cannot simply assume that the Applicant's PIS score exceeds 500. Hence the Application is defective as well as the fact that the Applicant has not applied the law as set out above nor in respect of which sub section of Section 72 (5) the application is made and how it can be justified.

ORDER:

[13] In the circumstances, the application for an order for the exemption from the requirement to appoint the SEC is dismissed due to fatal errors in its application.

[14] It is recommended that the Applicant launch a fresh application , properly motivated in terms of the Law as aforementioned with compliance with Section 72 (5); Reg 43 and Reg 26.

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Khatija Tootla

Member of the Companies Tribunal

30 October 2021