



**IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA**

**CASE NO: CT01081ADJ2022**

**In re *ex parte* Application:**

**IZUSA CARRIERS (PTY) LTD  
(REGISTRATION NO. 2013/185290/07)**

**APPLICANT**

---

**PRESIDING MEMBER OF THE COMPANIES TRIBUNAL: ISHARA BODASING  
DATE OF DECISION: 04 JULY 2022**

---

**DECISION (Reasons and Order)**

---

**1. INTRODUCTION**

1.1 Applicant is Izusa Carriers (PTY) LTD., a company duly incorporated in terms of the company laws of South Africa, with registration number 2013/185290/07, and whose registered address is at Plaas Inyoni, Komatipoort, 1340.

1.2 Applicant has applied to be exempt from appointing a Social and Ethics Committee (“SEC”) in terms of section 72(5)(b) of the Companies Act 71 of 2008 (“the Act”) read with Regulation 43 of the Companies Regulations<sup>1</sup> (“the Regulations”).

---

<sup>1</sup> GN R351 in GG 34239 of 26 April 2011.

1.3 The founding affidavit in the CTR142 form is deposed to by Ebenhaezer Basson, Applicant's sole Director.

## **2. ISSUES**

2.1 According to Mr Basson, Applicant's Public Interest Score ("PIS") as at the end of its 2020 and 2021 financial years was above 500 (five hundred) points, being 617 and 1 220 points respectively.<sup>2</sup>

2.2 Applicant applies for an exemption on the basis that its sole economic interest derives from compensation for the transport of mining goods, it only has three hundred and forty-five (345) employees, and that its two shareholders are owned and controlled by the same individual.

2.3 Applicant contends that it is a family-owned entity, with few complex transactions, and that it would be prejudiced by the requirement to appoint an additional director who is not involved in the day-to-day management of business.

2.4 Therefore, the main issue at hand is whether this arrangement satisfies the requirements of the Act and its Regulations.

## **3. APPLICABLE LAW**

3.1 Section 72 of the Act stipulates:

"(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

---

<sup>2</sup> Letter from Applicant's auditors, PBS Chartered Accountants, in support of the application.

(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).”

3.2 The Companies Regulations provide in Regulation 43(1) that a SEC must be appointed by:

...

(c) Any other company with a PIS above 500 in any two of the previous five (financial) years.

3.3 Regulation 43(2) states that:

“A company to which this regulation applies must appoint a social and ethics committee unless—

(a) it is a subsidiary of another company that has a social and ethics committee, and the social and ethics committee of that other company will perform the functions required by this regulation on behalf of that subsidiary company; or

(b) it has been exempted by the Tribunal in accordance with section 72 (5) and (6).”

3.4 Regulation 43(4) states that:

“A company’s social and ethics committee must comprise not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company’s business and must not have been so involved within the previous three financial years.”

3.5 The areas of function of an SEC are stated in Regulation 43(5) as follows:

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.

3.6 The PIS is calculated in terms of Regulation 26(2) as follows—

...

(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 the profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities; or

(ii) in the case of non profit company, to be a member of the company, or a member of an association that is a member of the company.

#### 4. EVALUATION

4.1 There is a compelling and specific purpose in law for an SEC, which is mandatory<sup>3</sup> since it forms an essential part of good corporate governance, and fits into the category of enhanced accountability and transparency. Significantly, the title to Regulation 26 is "interpretation of regulations affecting transparency and accountability" which applies specifically to various regulations, one of them being Regulation 43.

4.2 It is deemed to be in the public interest that the role and functions of the SEC are to monitor the company's activities in relation to corruption, employment equity and BBBEE; good corporate citizenship, in respect of promotion of equality, prevention of unfair discrimination, and reduction of corruption; contribution to development of the communities and of sponsorship, donations and charitable giving; the environment, health and public safety; consumer relationships, labour and

---

<sup>3</sup> NB the use of the word 'must' in Companies Regulation 43(2)

employment, including decent working conditions, its employment relationships and its contribution toward the educational development of its employees; and to draw matters within its mandate to the Board's attention; and to report to the shareholders at the company's annual general meeting.

4.3 Although the concept of "public interest" is not defined in Section 1 of the Act, one can refer to authorities and other definitions to assist in interpretation. *Black's Law Dictionary* (6th Edition) defines public interest as: "Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national Government."

4.4 In considering the concept of public interest, Herbststein J stated in **Argus Printing v Darby's Artware**<sup>4</sup> that one must adopt, in giving effect to the phrase, 'a broad common-sense view of the position as a whole' . . . (and it must be considered whether) . . . the public would be better served if the applicant were to be allowed to proceed with its scheme than by a continuation of the existing state of affairs.

4.5 This is the backdrop against which I must determine this application for an exemption.<sup>5</sup> In terms of section 72(4)(c) of the Act, the Minister of Trade and Industry, by regulation, may prescribe rules governing the composition and conduct of SEC's. This has been promulgated in Regulation 43(4), which also includes "prescribed officers".<sup>6</sup> The Act defines a prescribed officer as a person who either –

- a. "Exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company"; or

---

<sup>4</sup> *Argus Printing and Publishing Co Ltd v Darby's Artware (Pty) Ltd and Others* 1952 (2) SA 1 (C)

<sup>5</sup> See *Mpilo Investment Holdings 2 (RF) Pty Ltd*. (CT010/DEC2016) at par [7] as regards Regulation 43

<sup>6</sup> "Prescribed Officer" is defined in the Act as "a person who, within a company, performs any function that has been designated by the Minister in terms of section 66 (10)

b. “Regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.”

This definition applies no matter what title is given to the employee or to his/her functions.

4.6 The requirement to include a non-executive director in the SEC is to ensure transparency and accountability through an independent person, who is not involved in the day-to-day management of the company’s business. Currently, only Applicant’s Director is involved in its day-to-day management. This begs the question: *Quis custodiet ipsos custodes?*<sup>7</sup> Therefore, the inclusion of a non-executive director, becomes necessary.

4.7 Applicant submits that it is not reasonably necessary in the public interest, given the nature and extent of its activities, to appoint an SEC. On the papers before me, especially in light of its annual turnover, nature of the business activities and number of employees, I can not accord this any credence.

4.8 Applicant also submits that it is impossible to comply by appointing an independent non-executive director. This argument does not hold much water: the independent non-executive director would attend no more than four meetings per annum. There is no evidence, or even a submission by Applicant, that the costs of this are unaffordable to the Applicant. Furthermore, the other members of the SEC could be prescribed officers from within the Applicant’s shareholding entities.

## 5. FINDINGS

On perusal of Applicant’s supporting documentation, an analysis of the applicable law, and considering the deponent’s submissions, I find that this is not sufficient for purposes of acquiring an exemption or even in compliance with the provisions of the Act and its Regulations.

---

<sup>7</sup> Who will guard the guards themselves?

## 6. ORDER

The application for an order for exemption from the requirement to appoint an SEC is refused.

---

**ADV. ISHARA BODASING**