



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT01042ADJ2022

In *ex parte* application of:

WIERDAGLEN ESTATE HOMEOWNERS ASSOCIATION

Applicant

(Registration Number: 2000 / 001400 / 08)

for an exemption from the requirement to appoint a social and ethics committee

Summary: *Application for an exemption from the requirement to appoint a social and ethics committee (SEC) – application based on section 72(5)(b) of the Companies Act, 2008 (Act No. 71 of 2008) – 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 – application for condonation – excessive delay occurred – good prospects of success serves as a mitigating factor for the excessive delay – no party has been prejudiced by the delay. Held, that condonation is granted and that exemption is granted for a period of five years.*

Coram: Lindelani Daniel Sikhitha

Decision handed down on 31 July 2022

DECISION (Reasons and Order)

Per **Lindelani Daniel Sikhitha:**

A. INTRODUCTION

[1] The Applicant in this matter is Wierda Glen Homeowners Association NPC, Registration Number: 2000 / 001400 / 08, which is a non-profit company duly

formed, registered and incorporated in terms of the applicable laws of the Republic of South Africa. The Applicant has its registered address at 111 Partridge Road, Rooihuiskraal North, Extension 16, Centurion, Gauteng, Republic of South Africa.

[2] This is an *ex parte* application for an exemption from the requirement to appoint a social and ethics committee (“SEC”) in terms of section 72(5)(b) read with section 72(6) of the Companies Act, 2008 (Act No. 71 of 2008) (“the Act”). The application is supported by a Founding Affidavit deposed to by Johannes Abraham Dempers (“Dempers”) who is the Chairperson of the Board of Directors of the Applicant. Dempers’ authority to lodge the current application and to sign the documents in relation thereto is recorded on the Resolution of the Board of the Applicant dated 10 May 2022.

[3] I am therefore satisfied that Dempers is duly authorised to sign all documents, forms and affidavits on behalf of the Applicant. I am further satisfied that he is also authorised to do all those things that are necessary to give effect to all the resolutions of the Board of Directors of the Applicant regarding the current application.

B. FACTUAL BACKGROUND RELEVANT TO THE CURRENT APPLICATION FOR AN EXEMPTION TO ESTABLISH AN SEC

[4] The Applicant is bringing an application for exemption to form a SEC in terms of section 72(5)(b) of the Act. The relevant provisions of section 72(5) read 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 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.”** [Own emphasis added.]

[5] In terms of section 72(6) of the Act, an exemption granted in terms of subsection (5) is valid for five years, or such shorter period as the Companies Tribunal may determine at the time of granting the exemption, unless set aside by the Companies Tribunal in terms of subsection (7). The Applicant had previously applied and was granted an exemption by the Companies Tribunal on the 15th day of July 2014 and such exemption was valid for a period of two years. According to my calculations, such exemption expired on the 15th day of July 2016.

[6] The Applicant apparently attempted to apply for an exemption from appointing a SEC by lodging an application in relation thereto on the 19th day of August 2020. This application seems to have fallen through the cracks as no case number was allocated and the countless written and telephonic follow up enquiries by the erstwhile attorneys of the Applicant went unanswered by the Companies Tribunal. Be that as it may, the Applicant is basing its application for an exemption to appoint a SEC on the following grounds in terms of section 72(5)(b) of the Act:

6.1 Reasonable necessity;

6.2 Public interest;

6.3 Nature of the activities of the Applicant; and

6.4 Extent of the activities of the Applicant.

[7] The Applicant has achieved a PIS score of more than 500 points and it therefore falls within a category of companies that are required to appoint a SEC in terms of regulation 43(1)(c) of the Companies Regulations, 2011 (“the Regulations”). The Applicant based its application for the requested exemption from the requirement to appoint a SEC on the reasons which can be summarized as follows:

7.1 The Applicant is an association of homeowners and it manages an estate known as Wierda Glen Residential and Security Estate (“Wierda Glen Estate”) that has been developed on the Rooihuiskraal North, Extension 16 Township, Centurion, Registration Division J. R.

7.2 The main purpose for the formation of the Applicant is to promote, advance and protect the interests of its members relative to their ownership of their respective erven in the Wierda Glen Estate.

7.3 The mission of the Applicant is recorded as follows:

“To ensure a secure, cost effective, unique and high-quality lifestyle within an aesthetically pleasing environment that would be positively perceived by owners and residents and inspire people to invest in property in Wierda Glen Estate”

7.4 In terms of Clause 7 of the Memorandum of Incorporation of the Applicant, the objects and purpose of the Applicant is to provide for:

7.4.1 the promotion and enforcement of standards in keeping with the character of the Wierda Glen Estate in such a way that members of the Applicant derive the maximum collective benefits therefrom;

7.4.2 control over and protection and maintenance of the communal property in the Wierda Glen Estate and to apportion the expenses in relation thereto between the members of the Applicant in the form of charging levies to the members;

7.4.3 setting policy guidelines and operational procedures governing the communal issues within the Wierda Glen Estate, including but not limited to the provision of security, access control, perimeter walling and control, maintenance, cleaning, advertising, signage and related issues and generally for the promotion of the communal interest of

owners and occupiers of erven within the Wierda Glen Estate;
and

7.4.4 the enforcement of construction management agreements entered into by the Applicant containing a code of conduct entered into with any contractors to govern their and their subcontractors' construction activities on erven within the Wierda Glen Estate.

7.5 In terms of Clause 8 of the Memorandum of Incorporation of the Applicant, its membership is limited to registered members of erven or Units in the Wierda Glen Estate. Membership thereof commences simultaneously with the registration of any deed of transfer of an erf or unit in the Wierda Glen Estate into the name(s) of the owner(s) concerned. Registration of the erf or unit *ipso facto* constitutes the introduction of the transferee as a member of the Applicant *mutatis mutandis*.

7.6 At the end of its 2022 financial year, the Applicant's PIS was calculated based on the following information:

7.6.1	Employees	:	11
7.6.2	Third party liability	:	R29 000 000.00 (for every R 1 million or portion thereof)
7.6.3	Turnover	:	R15 890 911.00 (for every R1 million or portion thereof)
7.6.4	Members	:	R748

- 7.7 The Applicant's PIS score will therefore consistently exceed 500 points each year. The Applicant's high PIS score is largely attributable to the number of members which the Applicant has. The other elements of the Applicant's high PIS score are either directly related to its membership or in comparison thereto, very small.
- 7.8 The Applicant solely conducts the business of managing a homeowners' association for the benefit of and in the interest of its members in accordance with its stated objects and purpose as outlined in Clause 7 of its Memorandum of Incorporation. The Applicant does not conduct any other kind of business whatsoever.
- 7.9 The Applicant performs many of the functions that an average homeowner would perform on its own, which cannot affect anyone but the homeowner on whose behalf those functions are performed. Therefore, the Applicant's sole aim is to represent and promote the group interests of homeowners who live in the Wierda Glen Estate.
- 7.10 Even if the Applicant was to cease being involved in the management of the Wierda Glen Estate, then each individual homeowner will still continue with the same activities as that of the Applicant, namely, the upkeep of the property, fences, sewage, and gardens, payment of municipal accounts, hiring of security services and many others. The activities performed by the Applicant in relation to the Wierda Glen Estate are therefore domestic in nature. Therefore, the Applicant cannot be seen as a corporate player in the least.

- 7.11 The nature and extent of the Applicant's activities clearly differentiates from those of other large profit and/or non-profit companies that have many employees, earn large profits and have a huge impact on the general public and the environment in which they operate.
- 7.12 The only business that the Applicant undertakes and would continue to undertake is to disburse amounts which entail the upkeep of the estate, payment of municipal accounts and the payment of a few salaried employees in its service. This does not have an impact on its surroundings or affect other people, other than the estate itself.
- 7.13 The Applicant therefore submits that no real purpose would be served in appointing a SEC and it is not reasonably necessary in the public interest to require the Applicant to appoint a SEC, having regard to the nature and extent of its activities.

[8] I will now proceed to consider the law that is applicable to the current application for an exemption for the Applicant to appoint a SEC. This exercise is crucial for me to do because it lays bare the real issues that I am required to deal with in this application. The first issue relates to whether the Companies Tribunal does have jurisdiction to deal with the current application for an exemption for the Applicant to appoint a SEC. The second issue relates to whether the Applicant had managed to adduce the necessary evidence to satisfy the requirements to enable the Companies Tribunal to grant it the exemption that is sought. The last issue will be to assess the application for condonation as presented and to determine if the application has been able to show good cause to explain the delay.

C. APPLICABLE LAW IN RELATION TO EXEMPTIONS

[9] Section 72(4) empowers the Minister of Trade and Industry (“the Minister”) to prescribe, by way of Regulations, those companies which shall be required to appoint a SEC. The Minister did indeed make the Regulations in terms of section 223 of the Act and they are what is referred to as Companies Regulations, 2011.

[10] Regulation 43(1) of the Regulations expressly states that it applies to every state-owned company, every listed public company, and any other company that has, in any two of the previous five years, scored above 500 points in terms of regulation 26(2) of the Regulations, or would have so scored if the Act had been in effect at that time.

[11] There is a total of 748 housing units in the Wierda Glen Estate which have been converted into sectional title complexes. The Applicant’s PIS score has consistently exceeded 500 points in each financial year mainly as a result of the number of housing units which are found in the Wierda Glen Estate.

[12] The Applicant has therefore scored, in more than two of the previous five financial years (being 2017 to 2022), above 500 points and regulation 43(1) of the Regulations will apply to the Applicant. In terms of regulation 43(2) of the Regulations a company to which regulation 43 applies must appoint a SEC unless if the company in question:

12.1 **is a subsidiary of another company that already has a SEC, and a SEC of that other company will perform the functions required by regulation 43 of the Regulations on behalf of that subsidiary company; or**

12.2 **has been exempted by the Companies Tribunal in accordance with section 72 (5) and (6) of the Act.** [Own emphasis added.]

[13] In terms of section 72(5) a company that falls within a category of companies that are required in terms of section 72(4) and regulation 43 to appoint a SEC may apply to the Companies Tribunal in the prescribed manner and form for an exemption from that requirement, and the Companies Tribunal may grant such an exemption if it is satisfied that:

13.1 **the company in question 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 SEC in terms of section 72 and regulation 43 of the Regulations¹; or**

13.2 **it is not reasonably necessary in the public interest to require the company to have the SEC, having regard to the nature and extent of the activities of the company².** [Own emphasis added.]

[14] Based on what is outlined above, section 72(5)(a) of the Act provides that an exemption from the requirement to appoint the SEC may be granted by the Companies Tribunal on the basis that the company (the Applicant) in question 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 SEC in terms of section 72 and the applicable provisions of the Regulations.

¹ Refer to section 72(5)(a) of the Act.

² Refer to section 72(5)(b) of the Act.

- [15] Section 72(5)(b) of the Act provides that an exemption from the requirement to appoint a SEC may be granted by the Companies Tribunal on the basis that it is not reasonably necessary in the public interest to require such a company to appoint a SEC having regard to the nature and extent of the activities of the company in question. The Applicant is applying for an exemption to establish a SEC in terms of section 72(5)(b) of the Act for reasons that are fully outlined in paragraph 7 above.
- [16] In terms of paragraph 3 of Dempers' Founding Affidavit, the current application for exemption from the requirement to appoint the SEC is being made in terms of section 72(5)(b) of the Act. I will deal with the basis of the application at a later stage in my determination.
- [17] In terms of regulation 142(1) of the Regulations, a person may apply to the Companies Tribunal for an order in respect of any matter contemplated by the Act, or the Regulations by completing and filing with the Companies Tribunal's recording officer:
- 17.1 an Application in Form CTR 142; and
 - 17.2 a supporting affidavit setting out the facts on which the application is based.
- [18] In the current application, the Applicant is seeking an exemption from appointing a SEC on the basis that it is not reasonably necessary in the public interest as contemplated in section 72(5)(b) of the Act to require the Applicant to appoint a SEC, having regard to the nature and extent of its activities, particularly in relation to the functions of a SEC as set out in regulation 43(5).

[19] Form CTR 142 was duly signed on behalf of the Applicant by Dempers, who is the Chairperson of the Board of the Applicant. In addition, the application is supported by a Founding Affidavit deposed to by Dempers. It is clear from the documents placed before me that Dempers had been duly authorized to depose the Founding Affidavit, to launch the current application and to do all things that are necessary in relation thereto.

[20] I am therefore satisfied that the current application complies with the requirements set out in regulation 142(1) of the Regulations and it is therefore properly brought before the Companies Tribunal. I will now proceed to evaluate the merits of the application based on the papers placed before me.

D. EVALUATION OF THE CURRENT APPLICATION FOR EXEMPTION

[21] The Applicant is a South African registered company and the day-to-day business activities and affairs of the Applicant are managed by its Board of Directors.

[22] I gathered from the papers placed before the Companies Tribunal that the current application is based on the premise that it is not reasonably necessary in the public interest to require the Applicant to establish a SEC having regard to the nature and extent of the activities of the Applicant. In my evaluation of the current application, I am expected to deal with the issues that are related to the following:

22.1 reasonable necessity;

22.2 public interest;

22.3 nature of the activities of the Applicant; and

22.4 extent of the activities of the Applicant.

[23] In my view, the evaluation of the issues listed above is important for purposes of my determination of the ultimate question of whether the Applicant should be granted an exemption from the requirement of establishing a SEC. In undertaking such kind of evaluation, I will rely on the information provided by the Applicant in its papers and more specifically the allegations contained in Dempers' Founding Affidavit.

[24] I have already outlined the reasons provided by the Applicant in support of the current application for an exemption to appoint a SEC in paragraph 7 above. In order to avoid overburdening this determination, I will therefore not repeat them again here.

[25] In terms of regulation 43(5) of the Regulations, the SEC of a company should be appointed for purposes of serving functions which can be grouped into three categories:

25.1 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:-

25.1.1 Social and economic development, including the company's standing in terms of the goals and purposes of: -

25.1.1.1 The 10 principles set out in the United Nations Global Company Principles;

25.1.1.2 The OECD recommendations regarding corruption (refer to the Organisation for Economic Co-operation and Development (OECD) website for further details (www.oecd.org));

25.1.1.3 The Employment Equity Act, No 55 of 1998; and

25.1.1.4 The Broad-Based Black Economic Empowerment Act, No 53 of 2003;

25.1.2 Good corporate citizenship, including the company's:-

25.1.2.1 Promotion of equality, prevention of unfair discrimination and measures to address corruption;

25.1.2.2 Contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and

25.1.2.3 Record of sponsorship, donations and charitable giving;

25.1.3 The environment, health and public safety, including the impact of the company's activities and of its products or services;

25.1.4 Consumer relationships, including the company's policies and record relating to advertising, public relations and compliance with consumer protection laws; and

25.1.5 Labour and employment, including:-

25.1.5.1 The company's standing in terms of the International Labour Organization Protocol on decent work and working conditions; and

25.1.5.2 The company's employment relationships, and its contribution toward the educational development of its employees;

25.2 To draw matters within its mandate to the attention of the Board as occasion requires; and

25.3 To report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate.

[26] As outlined in regulation 43(5) of the Regulations, the role of the SEC is therefore in the main to look into compliance on social and ethics issues including but not limited to the following:

26.1 triple bottom reporting;

26.2 economic, social and environmental sustainability as provided for in the United Nations Global Reporting Initiatives;

26.3 decent work;

26.4 procurement;

26.5 transformational goals;

26.6 human rights and labour standards;

26.7 anti-corruption; and

26.8 all issues falling within its mandate.

[27] In my view, SECs are important not only to protect the communities and the environment where companies operate but for the protection of shareholders' interests as well. They are also very critical in the protection and development of basic human rights which are contained in the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ("the Constitution").

[28] Any negative news relating to social and ethics issues have a serious economic impact for companies and the country in general. SECs are there for the main purpose of bringing these issues to the attention of the board and to also report them in the shareholders' meetings, as and when required. Such reporting will ensure that the board and shareholders of the company recommend and take appropriate corrective measures.

[29] As we may all know, companies that are required to have SECs are public companies, state owned companies and companies that have in any two or previous five years scored above 500 points in terms of the Regulations. I am therefore enjoined to consider the functions of the SEC as provided for in regulation 43(5) of the Regulations when dealing with this current Application.

E. EXEMPTION BASED ON SECTION 72(5)(B) OF THE ACT (BASED ON PUBLIC INTEREST CONSIDERATIONS)

[30] The current application for exemption from the requirement to appoint a SEC is brought in terms of section 72(5)(b) of the Act. This section provides that an exemption may be granted on the basis that it is not reasonably necessary in the public interest to require the applicant company to appoint the SEC

having regard to the nature and extent of the activities of the applicant company.

[31] I did peruse Dempers' Founding Affidavit and I found the following allegations which are relevant for evaluation of the merits of the merits of the application for exemption of the Applicant to establish a SEC:

31.1 The Applicant is an association of homeowners and it manages an estate known as Wierda Glen Estate.

31.2 The main purpose of the Applicant is to promote, advance and protect the interests of its members relative to their ownership of their respective erven in the estate known as Wierda Glen Estate.

31.3 The mission of the Applicant is to ensure a secure, cost effective, unique and high-quality lifestyle within an aesthetically pleasing environment that would be positively perceived by owners and residents and inspire people to invest in property in Wierda Glen Estate.

31.4 In terms of Clause 7 of the Memorandum of Incorporation of the Applicant, its objects and purpose of the Applicant is to provide for:

31.4.1 the promotion and enforcement of standards in keeping with the character of the Wierda Glen Estate in such a way that members of the Applicant derive the maximum collective benefit;

31.4.2 control over and protection and maintenance of the communal property in the Wierda Glen Estate and to apportion the

expenses in relation thereto between the members of the Applicant in the form of charging levies to the members;

31.4.3 setting policy guidelines and operational procedures governing the communal issues within the Wierda Glen Estate, including but not limited to the provision of security, access control, perimeter walling and control, maintenance, cleaning, advertising, signage and related issues and generally for the promotion of the communal interest of owners and occupiers of erven within the Wierda Glen Estate; and

31.4.4 the enforcement of construction management agreements entered into by the Applicant containing a code of conduct entered into with any contractors to govern their and their subcontractors' construction activities on erven within the Wierda Glen Estate.

31.5 In terms of Clause 8 of the Memorandum of Incorporation of the Applicant, its membership is limited to registered members of erven or Units in the Wierda Glen Estate. Membership thereof commences simultaneously with the registration of any deed of transfer of an erf or unit in the Wierda Glen Estate into the name(s) of the owner(s) concerned. Registration of the erf or unit *ipso facto* constitutes the introduction of the transferee as a member of the Applicant *mutatis mutandis*.

31.6 At the end of its 2022 financial year, the Applicant's PIS score was calculated based on the following information:

31.6.1 Employees : 11

31.6.2 Third party liability : R29 000 000.00 (for every R 1 million or portion thereof)

31.6.3 Turnover : R15 890 911.00 (for every R1 million or portion thereof)

31.6.4 Members : R748

31.7 The Applicant's PIS score will therefore consistently exceed 500 points on each financial year. The Applicant's high PIS score is largely attributable to the number of members which the Applicant has. The other elements of the Applicant's high PIS score are either directly related to its membership or in comparison thereto, very small.

31.8 The Applicant solely conducts the business of managing a homeowners' association for the benefit of and in the interest of its members in accordance with its stated objects and purpose as outlined in Clause 7 of its Memorandum of Incorporation. The Applicant does not conduct any other kind of business whatsoever.

31.9 The Applicant performs many of the functions that an average homeowner would perform on its own. Such functions do not affect anyone else but the homeowner on whose behalf those functions are performed. Therefore, the Applicant's sole aim is to represent and

promote the group interests of the homeowners who live in the Wierda Glen Estate.

- 31.10 Even if the Applicant was to cease being involved in the management of the Wierda Glen Estate, then each individual homeowner will still continue with the same activities as that of the Applicant, namely, the upkeep of the property, fences, sewage, and gardens, payment of municipal accounts, hiring of security services and many others. The activities performed by the Applicant in relation to the Wierda Glen Estate are domestic in nature and therefore the Applicant cannot be seen as a corporate player in the least.
- 31.11 The nature and extent of the Applicant's activities clearly differentiates from those of other large profit and/or non-profit companies that have many employees, earn large profits and have a huge impact on the general public and the environment in which they operate.
- 31.12 The only business that the Applicant would undertake is to disburse amounts which entail the upkeep of the estate, payment of municipal accounts and the payment of a few salaried employees in its service. This does not have an impact on its surroundings or affect other people, other than the estate itself.
- 31.13 The Applicant therefore submits that no real purpose would be served in appointing a SEC for the Applicant. In addition, it is not reasonably necessary in the public interest to require the Applicant to appoint a SEC, having regard to the nature and extent of the Applicant's activities.

[32] I now turn to consider the following requirements for purposes of determining whether an exemption from appointing a SEC should be granted to the Applicant:

32.1 Reasonable necessity:

32.1.1 The Applicant is an association of homeowners and it had been established for purposes of managing and upkeeping of the Wierda Glen Estate.

32.1.2 The main purpose of the Applicant is to promote, advance and protect the interests of its members relative to their ownership of their respective erven in the Wierda Glen Estate.

32.1.3 The mission of the Applicant is to ensure a secure, cost effective, unique and high-quality lifestyle within an aesthetically pleasing environment that would be positively perceived by owners and residents and inspire people to invest in property in Wierda Glen Estate.

32.1.4 In terms of Clause 7 of the Applicant's Memorandum of Incorporation, its objects and purpose of the Applicant is to provide for:

32.1.4.1 the promotion and enforcement of standards in keeping with the character of the Wierda Glen Estate in such a way that members of the Applicant derive the maximum collective benefit;

- 32.1.4.2 control over and protection and maintenance of the communal property in the Wierda Glen Estate and to apportion the expenses in relation thereto between the members of the Applicant in the form of charging levies to the members;
 - 32.1.4.3 setting policy guidelines and operational procedures governing the communal issues within the Wierda Glen Estate, including but not limited to the provision of security, access control, perimeter walling and control, maintenance, cleaning, advertising, signage and related issues and generally for the promotion of the communal interest of owners and occupiers of erven within the Wierda Glen Estate; and
 - 32.1.4.4 the enforcement of construction management agreements entered into by the Applicant containing a code of conduct entered into with any contractors to govern their and their subcontractors' construction activities on erven within the Wierda Glen Estate
- 32.1.5 I have considered the reasons advanced by the Applicant as the basis for bringing the application for an exemption in

this matter and I am satisfied that it is not reasonably necessary to require the Applicant to establish a SEC.

32.2 Public interest:

32.2.1 The Applicant's PIS score has consistently exceed 500 points each year. The Applicant's high PIS score is largely attributable to the number of members which the Applicant has. The other elements of the Applicant's high PIS score are either directly related to its membership or in comparison thereto, very small.

32.2.2 The Applicant solely conducts the business of managing a homeowners' association for the benefit of and in the interest of its members in accordance with its stated objects and purpose as outlined in Clause 7 of its Memorandum of Incorporation. The Applicant does not conduct any other kind of business whatsoever.

32.2.3 The Applicant performs many of the functions that an average homeowner would perform on its own, which do not affect anyone else but the homeowner on whose behalf those functions are performed. Therefore, the Applicant's sole aim is to represent and promote the group interests of homeowners who live in the Wierda Glen Estate.

32.2.4 Even if the Applicant was to cease being involved in the management of the Wierda Glen Estate, then each individual homeowner will still continue with the same

activities as that of the Applicant, namely, the upkeep of the property, fences, sewage, and gardens, payment of municipal accounts, hiring of security services and many others. The activities performed by the Applicant in relation to the Wierda Glen Estate are mainly domestic in nature and therefore the Applicant cannot be seen as a corporate player in the least.

32.2.3 It is my view that there are no internal or external stakeholders who are going to be prejudiced by the absence of a SEC within the Applicant's Board of Directors.

32.2.5 It is my further view that requiring the Applicant to appoint a SEC will impose a cost burden on the Applicant. The Applicant will be required to appoint at least one director who is not involved in the day-to-day management of the business of the Applicant.

32.2.6 It is therefore not in the public interest that the Applicant should be required to appoint a SEC.

32.3 Nature of the activities of the Applicant:

32.3.1 The main purpose of the Applicant is to promote, advance and protect the interests of its members relative to their ownership of their respective erven in the Wierda Glen Estate.

32.3.2 The Applicant was established mainly to ensure that its members have a secure, cost effective, unique and high-

quality lifestyle within an aesthetically pleasing environment that would be positively perceived by owners and residents and inspire people to invest in property in Wierda Glen Estate.

32.3.3 The main object of the Applicant is to provide for:

32.3.3.1 the promotion and enforcement of standards in keeping with the character of the Wierda Glen Estate in such a way that members of the Applicant derive the maximum collective benefit;

32.3.3.2 control over and protection and maintenance of the communal property in the Wierda Glen Estate and to apportion the expenses in relation thereto between the members of the Applicant in the form of charging levies to the members;

32.3.3.3 setting policy guidelines and operational procedures governing the communal issues within the Wierda Glen Estate, including but not limited to the provision of security, access control, perimeter walling and control, maintenance, cleaning, advertising, signage and related issues and generally for the promotion of the communal interest of owners and occupiers of erven within the Wierda Glen Estate; and

- 32.3.3.4 the enforcement of construction management agreements entered into by the Applicant containing a code of conduct entered into with any contractors to govern their and their subcontractors' construction activities on even within the Wierda Glen Estate.
- 32.3.4 Even if the Applicant was to cease being involved in the management of the Wierda Glen Estate, then each individual homeowner will still continue with the same activities as that of the Applicant, namely, the upkeep of the property, fences, sewage, and gardens, payment of municipal accounts, hiring of security services and many others.
- 32.3.5 The activities performed by the Applicant in relation to the Wierda Glen Estate are all domestic in nature.
- 32.3.5 The nature and extent of the Applicant's activities clearly differentiates from those of other large profit and/or non-profit companies that have many employees, earn large profits and have a huge impact on the general public and the environment in which they operate.
- 32.3.6 The only business that the Applicant would undertake is to disburse amounts which entail the upkeep of the estate, payment of municipal accounts and the payment of a few salaried employees in its service. This does not have an

impact on its surroundings or affect other people, other than the estate itself.

32.4 Extent of the activities of the Applicant:

32.4.1 The Applicant's activities can be categorised as domestic related activities.

32.4.2 These activities include but they are not limited to the following:

32.4.2.1 the upkeep of the Wierda Glen Estate including, amongst other things, fences, sewage, gardens and other communal areas;

32.4.2.2 payment of municipal accounts;

32.4.2.3 hiring of security services; and

32.4.2.4 payment of the employees of the Applicant.

32.4.3 The Applicant has eleven (11) employees who perform various functions at Wierda Glen Estate.

32.4.5 I have considered the reasons advanced by the Applicant as the basis for bringing the application for an exemption to appoint a SEC in this matter and I am satisfied that based on the nature of the business activities of the Applicant, it is not reasonably necessary in the public interest to require the Applicant to appoint a SEC having regard to the nature and extent of the Applicant's activities.

F. FINDINGS

[33] I find that the Applicant managed to adduce the necessary evidence that is sufficient for it to be granted an exemption in terms of section 72(5)(b) of the Act read together with regulation 43 of the Regulations.

[34] I am therefore satisfied that the exemption to be granted should be for a period of five (5) years which must be calculated from the date that I make my order which appears herein below.

F. THE CONDONATION APPLICATION

[35] The Applicant is also requesting that the Companies Tribunal must grant it condonation for the late filing of the application for exemption from the requirement to appoint a SEC. The Applicant had previously applied and was granted exemption from the requirement to appoint a SEC which exemption was valid for a period of two years calculated from the 15th day of July 2014. Upon expiration of the exemption on the 15th day of July 2016, the Applicant did not seek a further exemption until 19 August 2020.

[36] According the allegations contained in Dempers' Founding Affidavit, the Applicant only attempted to bring an application for an exemption from the requirement to appoint a SEC on the 19th day of August 2020. This Application was not assigned a case number by the Companies Tribunal despite numerous written and telephonic follows ups that were made by the Applicant's erstwhile attorneys. I should take this opportunity to unreservedly apologise to the Applicant for the manner that its application was treated and the ultimate failures by the Companies Tribunal. The Applicant does not

deserve the kind of treatment that was meted out to it by the Companies Tribunal. Public bodies such as the Companies Tribunal are required, in terms of the Constitution, to display and adhere to the highest standards of service and to observe the principles which enshrines in section 195 of the Constitution.

[37] Be that as it may, due to the lapse of time, the Applicant decided to abandon the afore-mentioned application and instructed its current attorneys to launch a new application all together. In an application for condonation, the test is whether the delay is unreasonable and, if so, whether the delay should be condoned. This is a kind of discretion that should made after one has done some form of a balancing exercise. Factors to be considered in determining whether the delay is unreasonable are mainly the degree of lateness, explanation for the delay, prospects of success and prejudice to the parties.

[38] The Applicant has been aware that its PIS score is above 500 points and further that it is required to apply for an exemption since the 15th day of July 2016 when its previously granted exemption expired. The Applicant only attempted to bring its exemption application from the requirement to appoint a SEC on 19 August 2020. In my view the delay is excessive and the Applicant failed to provide any reasonable explanation for the period of the delay which occurred between 15 July 2016 and 19 August 2020.

[39] However, even though the delay is excessive, the Applicant is having good prospects of success in its main application. The good prospects of success serve as a mitigating factor for the excessive delay in this matter. In addition, there is no other party that will be prejudiced by the late submission of the

Applicant's application for exemption in this matter. The Applicant's application for condonation should therefore be favourably considered based on these two grounds.

[40] Under the circumstances, it is my view that the Applicant has shown sufficient reasons for its application for condonation for the late filing of its application for an exemption from the requirement to appoint a SEC to be granted by the Companies Tribunal. Consequently, I am inclined to grant condonation for the delay in bringing the application for an exemption in this matter. On that basis I will therefore proceed to make an order which follows hereunder.

G. ORDER

[41] I therefore make the following order:

41.1 condonation for the late filing of the application for an exemption is hereby granted;

41.2 the application for an exemption from the requirement to appoint a Social and Ethics Committee is hereby granted in terms of section 72(5)(b) of the Act read together with regulation 43 of the Regulations; and

41.3 the exemption granted in terms of paragraph 41.2 above is valid for a period of five (5) years from the date of this order.

LINDELANI DANIEL SIKHITHA

Member of the Companies Tribunal

Date: 31 July 2022