



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT01243ADJ2022

Ex parte application:

GRUPO ANTOLIN SOUTH AFRICA (PTY) LTD

APPLICANT

Presiding Member:

Brian Jennings

Date of handing down of decision:

09 March 2023

DECISION

Introduction

- 1 The applicant is Grupo Antolin South Africa (Pty) Ltd (registration number: 1996/014003/07), represented by Gisela Erasmus (authorised by a resolution

passed by the board of directors at a directors' meeting of the applicant held on 6 December 2022).

- 2 The applicant has requested the Companies Tribunal ("**Tribunal**") to exempt it from the requirement to have a social and ethics committee.
- 3 The basis for the application for exemption is as per paragraph 4 of the affidavit of Gisela Erasmus signed by her on 19 December 2022, and included in the papers, namely –

"4) *It is not reasonably necessary in the public interest to require the company to have a social and ethics committee as:*

- *Grupo Antolin South Africa (Pty) Limited is a family-owned business with the ultimate shareholder being Grupo Antolin Irausa S.A; and*
- *Grupo Antolin South Africa (Pty) Limited employ an average of 385 employees, which is considered to be small enough not to affect public interest; and*
- *Due to the small number of employees and the limited activities performed, the directors are considered capable of performing the functions that would be performed by the SEC, including monitoring the company's activities, having regard to relevant legislation, other legal requirements and prevailing codes of best practice."*

- 4 I point out that the affidavit was stamped "certified a true copy of the original" above the spot where the commissioner of oaths has signed. I am not satisfied

that the founding affidavit complies with the requirements of the Regulations Governing the Administering of an Oath or Affirmation published pursuant to the Justices of the Peace and Commissioners of Oaths Act, 1963, specifically Regulation 3(1) which requires "[t]he deponent shall sign the declaration in the presence of the commissioner of oaths." In this regard, the founding affidavit is dated 19 December 2022. The commissioner of oaths effected her certification on 20 December 2022. No explanation is given as to the lapse of time between signature and certification and I must therefore conclude that, on the face of it, the aforesaid Regulations were not complied with. As a result, no affidavit was submitted by the applicant together with his application and therefore the requirements in Regulation 142(2) were not complied with.

- 5 Included in the papers is a curious document headed "**APPLICATION FOR RELIEF**" which is neither dated, nor signed by an person. After expounding as to what the law is around social and ethics committees, it then concludes with 5 short paragraphs which appear to be a repeat of the founding affidavit included in the papers. This document is not an affidavit, and therefore I place no reliance on it.
- 6 Also included in the papers is an "Appendix A – Reportable Irregularity checklist for audit engagement" which then in the body of the document, has an item ticked for an "unlawful act – contravention of the Companies Act regulations" in relation to the failure to appoint a social and ethics committee. While it has been signed by one G P Van Zyl, no context is provided at all as to the nature of this document and I place no reliance on it.

Applicable law

- 7 Section 72(4) of the Companies Act, No 71 of 2008 (as amended) ("**Companies Act**") empowers the responsible Minister to prescribe regulations setting out, amongst other things, a category of companies required to have a social and ethics committee.
- 8 Regulation 43(1)(c) to the Companies Act ("**Regulations**") requires a company to have a appoint a social and ethics committee if it has, in any two of its previous five years, scored above 500 points in terms of Regulation 26(2).
- 9 Regulation 26(2) sets out the basis for calculating a company's public interest score. I do not find it necessary to repeat this test here.
- 10 Section 72(5) of the Companies Act entitles a company who is obliged to appoint a social and ethics committee, to apply to the Tribunal for an exemption from such requirement. In order for the Tribunal to be satisfied to grant such exemption, either –
 - 10.1 the company is required by some 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; or
 - 10.2 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.

Determination of the applicant's request for exemption

11 For the purposes of this analysis, I have ignored for the time being the material deficiency in the applicant's founding affidavit highlighted above, in an endeavour to assist the applicant by identifying further deficiencies in its case.

12 The applicant's request for exemption falls within the exemption in paragraph 10.2. It listed 3 grounds justifying such exemption. I deal with each in turn:

12.1 The applicant alleges it is a family business.

12.1.1 This may be so, but no evidence is led to this fact. The business in South African certainly is not, as it is a subsidiary of an offshore company. It may be that the offshore company is ultimately a family owned business.

12.1.2 The applicant mentions that there are two directors of the applicant, and they have struggled to find a third to act as a non-executive director. They also suggest that the Companies Act only requires a private company to have a minimum of 1 director.

12.1.3 My inference of this, although it is not as crisply put by the applicant, is that the applicant is compliant with the Companies Act by having more than one director and it would be inappropriate to appoint a third non-executive director (and, in fact, they have struggled to do so) considering the shareholder is ultimately a family business, as there would then be an outsider.

12.1.4 I do not agree. The fact that the Companies Act generally requires in section 66(2)(a) that a private company must have at least one director,

is subject to the requirement in section 72(4)(c) read with Regulation 43(4) which requires a company to have not less than 3 directors, at least one of whom is a director not involved in the day to day business (in common parlance, a non-executive director), should it be required to appoint a social and ethics committee.

12.1.5 The inference that I draw in paragraph 12.1.3 may at best seek to demonstrate why the functions of a social and ethics committee contained in Regulations 43(5)(b) and (c) is perfunctory, but I am not convinced on the papers.

12.1.6 I also point out that the fact that a non-executive director has been found difficult to appoint, is not a valid ground justifying an exemption. I am not aware of the basis for it being difficult, and there could be a myriad of reasons why (some of which may lie within the applicant's control).

12.2 The applicant alleges it employs on average 385 employees which is small enough to not affect public interest

12.2.1 I would have expected the applicant to demonstrate why, *ex facie the papers*, 385 employees is considered "small enough".

12.2.2 No such case is made. In fact, the contrary appears in my mind that this is no "mom and pop corner tearoom", it is an operation of a decent size (however no information as to its nature and extent of operations was placed before me in the founding affidavit).

12.2.3 A social and ethics committee has employment related functions under Regulation 43(5)(a)(v), and assuming satisfactory evidence was led to

justify the allegation made, the applicant must still deal with why, in relation to the other grounds, public interest weighs in favour of its exemption.

12.2.4 I would expect this to address the nature and extent of its operations, its geographic area of operation, its costs of compliance, its interaction with the South African economy and the nature and extent thereof, amongst others.

12.3 Due to the small number of employees and limited activities performed, the directors are capable of performing the functions that would be performed by the SEC

12.3.1 Again, no evidence is led as to these limited activities. I have already commented on the "small number of employees". I do not find this argument compelling as one could assume this is true of every company, as ultimately the board is responsible for the management of all of the company's activities.

12.3.2 The purpose of the establishment of the social and ethics committee would be to shoe-horn these functions to a special sitting, with special consideration being afforded to them.

Order

13 The application by Grupo Antolin South Africa (Pty) Ltd for an exemption from the requirement to appoint a social and ethics committee is hereby dismissed.

14 The applicant is entitled to re-apply for an exemption but is urged to cure the deficiencies in its papers (including those specifically identified above).

BRIAN JENNINGS
MEMBER OF THE COMPANIES TRIBUNAL