



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

CASE NO: CT01553ADJ2023

In the *ex parte* application of:

SBA TOWERS SOUTH AFRICA (PTY) LTD

APPLICANT

Registration number: 2014 / 077051 / 07

APPLICATION FOR AN EXEMPTION FROM THE REQUIREMENT TO APPOINT A SOCIAL AND ETHICS COMMITTEE (SEC)

Presiding Member: D Terblanche

Date of handing down of decision: 4 December 2023

DECISION AND REASONS

INTRODUCTION

1. The Applicant is SBA Towers South Africa Proprietary Limited (the Applicant), a private company duly incorporated in accordance with the laws of the Republic of South Africa under registration number 2014/077051/07 with its registered office situated at 100 Cecilia Street, Cecilia Square, Paarl, Western Cape. The Applicant was registered to commence business on 15 April 2014. The financial year end of the Applicant is December.

THE APPLICATION

2. The Company applied to the Companies Tribunal (the Tribunal) in terms of sections 72 (5) (a) & (b) of the Companies Act, 71 of 2008 (as amended) (the CA) for an exemption from the requirement to appoint a Social and Ethics Committee (SEC).
3. The Applicant had a public interest (PIS) score of 576 in the 2021 financial year and 845 in the 2022 financial year, based on its annual financial statements for 2021 and 2022. As the public interest score is in excess of 500 points the Applicant is required to appoint a Social and Ethics Committee (an SEC), unless the Applicant is exempted from doing so in terms of either of the grounds stipulated in section 72(5) of the Companies Act, 2008 (Act No. 71 of 2008) (the Companies Act).
4. The Applicant wishes to apply for an exemption in terms of section 72(5)(a) of the Companies Act, for the maximum period of 5 (five) years specified in section 72(6) of the Companies Act, on the grounds that the Applicant is required in terms of other legislation to have, and does have, formal mechanisms within its local and international group structures that substantially performs the oversight, monitoring and reporting functions that would otherwise be performed by an SEC in terms of section 72(5)(a) and the regulations thereto.

PRELIMINARY MATTERS

5. The Applicant duly filed form CTR 142 and the accompanying sworn supporting affidavit (the affidavit) Regulation 142 prescribes, with the Tribunal.
 - 5.1. The date stamp on the CTR 142 is 25 October 2023.
 - 5.2. Sean Alborough (Alborough), General Manager of the Company, deposed to the affidavit.

- 5.3. The Company's Board of Directors resolved and authorised Alborough to depose to and sign the affidavit on behalf of the Company (on file) by virtue of a board resolution dated 23 August 2023.

THE APPLICANT'S SUBMISSIONS

6. The business of the Applicant is to provide wireless communications infrastructure sites throughout South Africa, including towers, buildings and rooftops, to wireless communications providers (such as MTN, Vodacom and Telkom) who lease space from the Applicant on such sites. The Applicant also constructs towers in strategically chosen locations or at the request of wireless communications providers under build to suit arrangements. The Applicant currently employs 64 (sixty-four) people who are located at its registered office in Paarl, Western Cape.
7. The Applicant's detailed submissions regarding the "*formal mechanisms within its local and international group structures that substantially performs the oversight, monitoring and reporting functions that would otherwise be performed by an SEC in terms of section 72(5)(a) and the regulations*" (see paragraph 4 above) appear below.

Group structure

8. The Applicant is directly and wholly owned by BA South Africa Equityholder, LLC which is a company incorporated in accordance with the laws of the United States of America (USA) with its principal place of business in Delaware, USA (the Parent Company).
9. The Parent Company is in turn directly and wholly owned by SBA RSA Holdings, LLC which is a company incorporated in accordance with the laws of the USA, with its principal place of business in Delaware, USA.
10. SBA RSA Holdings, LLC is in turn directly and wholly owned by SBA Telecommunications, LLC a company incorporated in accordance with the laws of the USA, with its principal place of business in Boca Raton, Florida, USA.
11. SBA Telecommunications, LLC is in turn directly and wholly owned by SBA Communications Corporation, a company incorporated in accordance with the laws of

the USA, with its principal place of business in Boca Raton, Florida, USA (SBA Communications).

12. SBA Communications is a publicly traded company that is listed on the NASDAQ Global Select Market under the symbol SBAC.
13. The Applicant has one shareholder and it has no subsidiaries.
14. SBA Communications and its various subsidiaries across the world are referred to as the "SBA Group" (the SBA Group) and regional offices located in Gqeberha, Durban, Pretoria, Mthatha and Bloemfontein.
15. The board of directors of the Applicant is constituted by representatives of SBA Communications, currently Mr. Brendan Cavanagh, Mr. Joshua Koenig and Mr. Richard Cane.
16. Each of the directors of the Applicant is not resident in South Africa and are part of the senior leadership team employed by SBA Communications.
 - 16.1. Mr. Joshua Koenig is the Executive Vice President, Chief Administrative Officer, General Counsel and Secretary/Assistant Treasurer of SBA Communications, as well as a manager of the Parent Company;
 - 16.2. Mr Richard Cane is the President International, Executive Vice President and Assistant Secretary/Assistant Treasurer of SBA Communications, as well as a manager of the Parent Company; and
 - 16.3. Mr. Brendan Cavanagh is the Executive Vice President, Chief Financial Officer of SBA Communications and will be assuming his new role as CEO of SBA Communications from 1 January 2024.
17. The senior executives of the Applicant responsible for managing the business of the Applicant on a day-to-day basis and implementing the SBA Communications strategy in South Africa ("the leadership team") include -

- 17.1. Sean Alborough, the Country Manager who is responsible for the acquisition, build out and operation of SBA wireless telecom tower assets in South Africa and providing overall guidance and leadership to the business to maximize long term value. This position reports to the Vice President - Africa &Asia;
 - 17.2. Comelis Wessels, the Senior Director, Finance who is responsible for managing the finance and OPEX divisions and for ensuring that the company's financial reports are accurate and completed in a timely manner. This position reports to the Vice President-Africa &Asia;
 - 17.3. Henco Pretorius, the Director, Legal who oversees the operational, corporate and regulatory related legal matters, contractual obligations and litigation matters of SBA Communication Corporation's subsidiaries in South Africa and/or other jurisdictions as assigned. This position reports to SBA' s Vice President and Associate General Counsel, Legal - International;
 - 17.4. Shelley Gray, the Director. Site Development who oversees the company's operational departments in all regions and reports to the General Manager;
 - 17.5. Lieuwe Boonstra, the Director, Business Development whose primary objective is to identify new business opportunities, to identify new markets, new partnerships, new ways to reach existing markets, and/or new product or service offerings to better meet the needs of existing markets and to use these opportunities to create more revenue. This position manages the Business Development Department and reports to the General Manager;
 - 17.6. Jolindie Van Schalkwyk, Senior Manager, Regional HR Business Partner who is responsible for leading the efficient and consistent management of the organization's people practices, culture, programs and processes in the Regional markets. This position reports to the Director, Informational Human Resources.
18. From an operational and business perspective, the Applicant's Leadership Team works closely with senior executives of SBA Communications, including -

- 18.1. Joshua Koenig, Executive Vice President, Chief Administrative Officer, General Counsel and Secretary/Assistant Treasurer;
 - 18.2. Theresa Thompson, Head of Global Internal Audit;
 - 18.3. Vitor Lobao, Vice President Mergers & Acquisitions;
 - 18.4. Nicholas Van Slyck, Vice President, Africa & Asia;
 - 18.5. Lynne Hopkins, Senior Director, Communications & Brand;
 - 18.6. Christy Pacini, Executive Director Global HR;
 - 18.7. David Sams, Vice-President, Risk Management;
 - 18.8. Neil Seidman, Senior Vice President, Associate General Counsel - Mergers and Acquisitions; and
 - 18.9. Fernando Cinci, Vice President & Associate General Counsel, Legal International.
19. Further, no decision of the board of directors of the Applicant (the Applicant Board) is taken without input or direction from the board of directors of BA Communications or persons/committees to whom the BA Communications board has delegated authority (the SBA Board].
 20. The oversight which the SBA Board exercises over the Applicant Board, and which the Applicant Board exercises over the Applicant Leadership Team ensures compliance by the Applicant with all the corporate policies and legislation to which SBA Group (including the Applicant) is subject.

Legislation and BA communications policies applicable to the applicant corporate governance

21. The corporate governance legislative framework to which SBA Communications and indirectly the Applicant) is subject includes the following main elements:
 - 21.1. Legislative requirements such as –
 - 21.1.1. the Florida Business Corporations Act,
 - 21.1.2. The Securities Act of 1933,
 - 21.1.3. The Securities Exchange Act of 1934,

- 21.1.4. Sarbanes-Oxley Act of 2002.
- 21.1.5. Dodd- Frank Wall Street Reform;
- 21.1.6. Consumer Protection Act of 2010; and
- 21.1.7. The listings rules of the NASDAQ stock exchange.

- 22. The Applicant is subject to the same corporate governance legislative and policy framework

Corporate governance legislative and policy framework

- 23. The Applicant is subject to the same corporate governance legislative and policy framework to which SBA Communications is subject because it is a wholly owned member of the SBA Group, and the Applicant's directors are also directors and senior executives of SBA Communications and ultimately responsible for oversight of the Applicant. SBA Communications has established a corporate governance policy framework which the SBA Group (including the Applicant) is required to comply with. This comprises the following main elements:

- 23.1. the SBA Communications Corporation Corporate Governance Guidelines reflect the principles by which the company operates and establishes a governance framework that complies with applicable laws and regulations. These guidelines are intended as a component of the flexible governance framework within which the Board, assisted by its committees, directs the affairs of the company.

- 23.2. the SBA Communications Corporation Code of Ethics for Senior Financial Officers sets forth standards of conduct applicable to the Chief Executive Officer, Chief Financial Officer and Chief Accounting Officer to promote honest and ethical conduct, proper disclosure in SBA's periodic filings, and compliance with applicable laws, rules and regulations: and

- 23.3. the SBA Communications Corporation Code of Conduct for Directors, Officers and Employees is designed to -

- 23.3.1. promote honest and ethical conduct, including fair dealing and the ethical handling of conflicts of interest;

- 23.3.2. promote full, fair, accurate, timely and understandable disclosure:
- 23.3.3. promote compliance with applicable laws and governmental rules and regulations:
- 23.3.4. ensure the protection of the company's legitimate business interests, including corporate opportunities, assets and confidential information; and
- 23.3.5. deter wrongdoing.

Risk Management

- 24. One of the functions of an SEC is to monitor the company's activities, having regard to relevant legislation, other legal requirements or prevailing codes of best practice. with regard to a number of issues.
- 25. In this regard, it is submitted that the Applicant is aware that risk forms an integral part of doing business in South Africa.
- 26. The main risks faced by the Applicant and the SBA Group include i.e.: operational risk, compliance risk, foreign currency exchange rates risk, and legal and regulatory risk.
- 27. The SBA Board is actively involved in the oversight and management of risks that could affect the SBA Group. This oversight and management are conducted primarily through committees, as disclosed in the descriptions of each of the committees below and in the charters of each of the committees, but the full SBA Board has retained responsibility for general oversight of risks. SBA Communications has established the following sub-committees relating to risk management:
 - 27.1. the Nominating and Corporate Governance Committee (the NCG Committee);
 - 27.2. the Audit Committee; and
 - 27.3. the Compensation Committee, (collectively, the Sub-Committees).
- 28. The role and functions of the NCG Committee are to –

- 28.1. solicit, consider, recommend and nominate candidates to serve on the Board of SBA Communications under criteria adopted by it from time to time;
 - 28.2. advise the Board with respect to SBA Board composition (including diversity), procedures and committees;
 - 28.3. oversee periodic evaluations of the SBA Board and SBA Board committees, including establishing criteria to be used in connection with such evaluations;
 - 28.4. review and report to the SBA Board on a periodic basis with regards to matters of corporate governance (which is defined for this purpose as the relationships of the SBA Board, the shareholders and management in determining the direction and performance of the SBA Group); and
 - 28.5. develop and review succession planning for SBA Board members and executive officers.
29. The role and functions of the Audit Committee are to –
- 29.1. provide assistance to the corporate directors in fulfilling their responsibility to the shareholders, potential shareholders, and investment community relating to corporate accounting, reporting practices of the SBA Group, the quality and integrity of the financial reports of the SBA Group, the SBA Group's compliance with legal and regulatory requirements and risk management oversight.
 - 29.2. The primary purpose of the Committee shall be overseeing the accounting and financial reporting processes of SBA Communications and the audits of the financial statements of the SBA Communications.
 - 29.3. The Committee also oversees the performance of the company's internal audit function.

30. The role and functions of the Compensation Committee are to –
- 30.1. establish salaries, incentives and other forms of compensation for executive officers and directors of the SBA Group and to administer incentive compensation and benefit plans provided for employees of the SBA Group.
 - 30.2. The Committee's policy is to ensure that compensation programs contribute directly to the success of the SBA Group, including enhanced share value.
 - 30.3. The Committee shall also review and discuss with management the Compensation Discussion and Analysis required to be included in SBA Communication's proxy statement or annual report on Form 10-K (annual report required by the U.S. Securities and Exchange Commission that gives a comprehensive summary of a company's financial performance) (the "CD&A" and, based on such review and discussion, determine whether to recommend to the SBA Board that the CD&A be included in the proxy statement or annual report on Form 10-K.
 - 30.4. The Committee also produces the Compensation Committee Report as required by applicable law, rule or regulation to be included in SBA Communication's proxy statement or annual report on Form 10-K.
31. The Applicant is subject to the authority of each of the Sub-Committees in relation to all risk-related matters.
32. The Applicant, as a wholly owned indirect subsidiary of SBA Communications and as part of the SBA Group, is subject to all of SBA Communications' policies and mandates, including those initiated and implemented by the relevant committees.
33. Any and all policies and mandates implemented by SBA Communications and its various committees, filters through to the whole of the SBA Group, including the Applicant, primarily through the directors who sit on the Applicant's Board, which directors are also senior executives, and some of them directors of SBA Communications.

34. In addition to the legislation, governance framework and policies of SBA Communications to which the Applicant is subject and implements in its day-to-day operations (as described above), the Applicant submitted that it has adopted and implements the practices and policies described below that might otherwise fall within the remit of an SEC:
- 34.1. The Applicant complies with the Employment Equity Act, 55 of 1998 and has a human resources team that is responsible for filing all compulsory legislative reports, including but not limited to, employment equity reports with the Department of Labour. The Applicant is currently in the process of formulating a broad-based black economic empowerment (B-BBEE) strategic plan and has engaged an external consulting firm to address and try and improve its B-BBEE Status.
- 34.2. The Applicant implements the SBA Communications Corporation International Anti-Corruption Compliance Policy in South Africa by conducting compulsory annual FCPA training sessions and questionnaires for all employees, vendors and service providers: contractual undertakings sought from all employees, vendors and service providers; formal due diligence and on-boarding process conducted for all new vendors and service providers.
- 34.3. The Applicant supports its community and engages in good corporate citizenship by conducting annual sponsorship programs where various charitable organisations receive support and relief in the form of donations. Corporate philanthropy is a key focus at SBA Communications. In accordance with the company's values and the brand awareness of SBA Communications, the Applicant is committed to contributing to select non-profit organizations and enhancing their outreach initiatives and activities.
- 34.4. The Applicant implements best practice in respect of work health and safety and its policy in this regard recognises the value of a safe workplace and the importance of work health and safety as an integral part of its business. SBA Communications introduced its employees (including those of the Applicant) to Virgin Pulse, a complimentary and confidential employee assistance programme

which offers its employees and their family support with any work or personal issue, including short-term professional counselling and connectivity to local resources to help manage emotional, practical or physical needs. This program also places a lot of focus on employees' health and offers various programs related to improving employees' physical and mental well-being.

- 34.5. In relation to environmental matters, the Applicant contributes to the local environment by implementing practises such as infrastructure sharing and collocation to help reduce the number of towers in a given geographical area, protecting the "city skyline" and reducing visual contamination. The Applicant owns and constructs multi-tenant infrastructure sites which lessen the need for building duplicate tower sites and the environmental footprint of the telecommunication infrastructure industry. SBA Communications, including the Applicant itself, implements various practises in an effort to promote sustainable living. The premises leased by the Applicant for its head office is a 'green' building, ensuring confidential waste is shredded and recycled and all kitchen waste is sorted and recycled where possible.
35. As noted above, the Applicant Leadership Team works closely on a day-to-day basis with at least one of the three directors of the Applicant and with other senior executives of SBA Communications. In these interactions, the Applicant Leadership Team would bring to the attention of and report into the Applicant Board and other senior executives of SBA Communications matters usually falling within the remit of an SEÇ. The SBA Board plays an oversight role in implementation of the legislative framework applicable to it and its policies in the business of the Applicant, as a wholly owned subsidiary in the SBA Group.

APPLICABLE LAW AND THE DETERMINATION OF THE APPLICANT'S REQUEST FOR EXEMPTION

36. Section 72(4) of the CA) empowers the responsible Minister to prescribe regulations setting out, amongst other things, the categories of companies required to have a SEC.

37. Regulation 43(1) read with Regulation 43(2) require every state-owned company; every listed public company; and any other company that has in any two of its previous five years scored above 500 public interest scores (PIS) points, in terms of Regulation 26(2), to appoint a SEC.
38. Regulation 26(2)¹ sets out the basis for calculating a company's PIS.
39. Regulation 43(4) prescribed the composition of the SEC, and provides that “...a company’s SEC must comprise not less than three directors or prescribed officers of that 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.”
40. Regulation 43(5) prescribes the functions of the SEC. It reads -
- "(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 –

¹ Regulation 26(2) 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 [Regulation 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 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.”

- (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 Principles²; 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*

² Human Rights

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
Principle 2: make sure that they are not complicit in human rights abuses.

Labour

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
Principle 4: the elimination of all forms of forced and compulsory labour; Principle 5: the effective abolition of child labour; and
Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment

Principle 7: Businesses should support a precautionary approach to environmental challenges;
Principle 8: undertake initiatives to promote greater environmental responsibility; and
Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery."

(c) to report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate."

41. Regulation 43(2) allows for exceptions from the requirement of a company to appoint a SEC, namely, where the company is a subsidiary of another company that has a social and ethics committee, or has been exempted by the Tribunal in accordance with section 72(5) and (6) of the CA.
42. Section 72(5) of the Companies Act entitles a company who is obliged to appoint a SEC, to apply to the Tribunal for an exemption from such requirement. In order for the Tribunal to be satisfied to grant such exemption, either –
 - 42.1. 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 SEC; or
 - 42.2. it is not reasonably necessary in the public interest to require the company to have a SEC, having regard to the nature and extent of the activities of the company.
43. A company with a PIS above 500 points in any two of its previous five years (calculated in terms of Regulation 26(2)), has to appoint a SEC in terms of Regulation 43(1)(c) of the Act.
44. If a company is required to appoint an SEC, it may apply for an order by the Tribunal for an exemption, under the provision of section 72(5) of the Companies Act.
45. The Company may be exempted from appointing a SEC if it has some form of formal mechanism within its structures that substantially performs the function that would otherwise be performed by the social and ethics committee³, or 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 company⁴.

³ See section 72(5)(a) of the CA

⁴ See section 72(5)(b) of the CA.

46. I have to consider whether in terms of Section 72 (5) of the CA it is reasonably necessary in the public interest to require this company to have a SEC having regard its submissions that it already have mechanisms in place that fulfil the requirements of section 72 (5) (a) of the CA.
47. The Applicant submitted that the Applicant is required in terms of other legislation to have, and does have, formal mechanisms within its local and international group structures that substantially performs the oversight monitoring and reporting functions that would otherwise be performed by an SEC in terms of section 72(5)(a) and the regulations thereto. See paragraphs 6 to 35 above.
48. In exercising this discretion I must take into account the role and functions of the SEC and the matters that must monitor as detailed in Regulation 43(5). The purpose of a SEC in terms of Regulation 43(5) (a) is 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 all the functions as set out in Reg 43(5) (a)(i)-(v).
49. In terms of Regulation 43(5)(b) the social and ethics committee is also designed to ensure that it draw matters within the mandate of the committee to the attention of the board as occasion requires; and report (in terms of Reg 43(5)(c)), through a committee member, to the shareholders at the annual general meeting on the matters within its mandate.
50. The activities that need to be evaluated to decide whether it is in the public interest, given the *nature* and *extent* of the activities, to grant an exemption from appointing a SEC, are those activities and / factors that contribute to the calculation of the PIS, as those activities and / or factors also determine whether a SEC must be appointed as set out above.

FINDING

51. Upon due consideration of the Applicant's submissions above, I am of the view that the Applicant may be exempted from appointing a SEC as allowed under section 75 of the CA.

52. The Applicant has shown on a balance of probabilities that it has formal mechanisms in place within its structures that substantially performs the functions that would otherwise be performed by the social and ethics committee in terms of section 72 of the CA and the regulations.

ORDER

53. The application for an exemption from the requirement to appoint a SEC is hereby granted in terms of section 72(5)(a) read with section 72(6) of the Companies Act, for a period of five (5) years from the date of this order.

Dated at Johannesburg on this 4th day of December 2023.

Diane Terblanche

MEMBER OF THE COMPANIES TRIBUNAL