



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT018Jan2016

In the *ex parte* application of:

THE THEKWINI FUND 11 (RF) LIMITED

Applicant

(Registration Number: 2013/020930/06)

in respect of:

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

Presiding Member	:	Khashane La M. Manamela (Mr.)
Date of Decision	:	15 February 2016

DECISION (Reasons and an Order)

Khashane La M. Manamela

[1] The applicant herein is a public company belonging to what is called the SA Home Loans group.¹ It is submitted that the applicant in terms of either its public interest score or by virtue of being a listed public company is required to appoint a social and ethics committee (an SEC).² In my view, the aforesaid submissions are vague. There should have been a clear indication of why the applicant is required to appoint an SEC. Yes, it is either by virtue of being a listed public company or with a public interest score in excess of 500 points or both, but these have to be specified.³ With respect, this is actually indicative of the quality of the submissions in the rest of the application.

[2] The application was made on one affidavit comprising hardly a page for seven companies from the SA Home Loans group. But, with respect, there is hardly anything in the supporting affidavit. The applications in respect of two of the seven entities, being this matter and another,⁴ were allocated or assigned to me for a determination. The two applications are exactly the same in substance and form. The submissions made are the same in each and every aspect thereof.

¹ See paragraph 4 of the supporting affidavit by Ursula Schei on indexed page 4 of the application.

² See paragraph 5 of the supporting affidavit on indexed page 4.

³ See regulation 43(1) of the Companies Regulations, 2011. Regulation 43(1) reads as follows: "This Regulation applies to—

(a) every state owned company;

(b) every listed public company;

(c) any other company that has in any two of the previous five years, scored above 500 points in terms of regulation 26(2)." The Companies Regulations were determined by the Minister of Trade and Industry in terms of section 223 of the Companies Act 71 of 2008 and published under GN R351 in Government Gazette 34239 of 26 April 2011.

⁴ See *Alpha Housing Warehouse (RF) (Pty) Ltd*, case/file number: CT017Jan2016, also decided on 15 February 2016 (*Alpha Housing Warehouse*). This decision and other decisions of this Tribunal are available on the website www.companiestribunal.org.za.

[3] I lamented the defects or shortcomings of the papers and submissions in *Alpha Housing Warehouse (RF) (Pty) Ltd*,⁵ the other application. I see no reason for repeating myself in that regard herein. Therefore, I refer to the comments I made and reasons I gave in the decision of *Alpha Housing Warehouse* regarding my refusal of relief in that matter. However, I will only deal with those issues that I consider worthy of highlighting, before making an order along the lines already hinted.

[4] As in *Alpha Housing Warehouse*, the applicant herein seeks an exemption on two bases. Firstly, on the basis that it is a subsidiary of another entity called SAHL Investment Holdings (Pty) Ltd (SAHL IH) also in the SA Home Loans group. I hasten to point out that, there is contradiction regarding whether SAHL IH has an SEC or not. According to a letter by KL Penwarden dated 21 January 2014,⁶ SAHL IH already established an SEC, but in the supporting affidavit by Ursula Schei⁷ and the Form CTR 142 to the application signed by Schei,⁸ an SEC is still to be formed. Contradiction or no contradiction, the simple issue is that the applicant is not a subsidiary⁹ of SAHL IH, but something labeled “managed and consolidated entity”.¹⁰ Therefore, the automatic exemption or exclusion in terms of regulation 43(2)(a)¹¹ of the Companies Regulations is not available for the applicant. It is only available to subsidiaries of companies with SECs

⁵ *Ibid.*

⁶ See a letter by KL Penwarden, CEO of SA Home Loans to the Registrar’s office dated 21 January 2014 on indexed pages 2 and 3 (Penwarden’s letter).

⁷ See paragraph 6 of the supporting affidavit by Schei on indexed page 4 of the application.

⁸ See indexed page 1 of the application.

⁹ Section 3 of the Companies Act explains what constitute subsidiary relationships.

¹⁰ See a paragraph numbered 3 of Penwarden’s letter on indexed page 2.

¹¹ Regulation 43(2) reads as follows: “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).”

whose SECs will perform the requisite functions for the subsidiaries.¹² The fact that the applicant is not a subsidiary of SAHL IH is also reflected on a table reflecting SA Home Loans Group structure included in the papers.¹³

[5] The second basis for the application is said to be due to the fact that, the applicant has no employees and has a narrow social impact.¹⁴ This is the beginning and end of the submissions made herein to support an exemption in terms of section 72(5)(b) of the Companies Act. An exemption on this provision is based on public interest considerations grounded on reasonableness determined from the nature and extent of the applicant company's activities. This is a factual inquiry, but yet in this application, I do not have anything alluding to the nature and extent of the activities of the applicant. Searching through the applicant's Memorandum of Incorporation (the MOI),¹⁵ I get an idea of the nature of the applicant's business, but obviously not all its activities. However, what I get seems not to support the bare statement made by the applicant. From just the MOI, I think there is much to be said before any conclusion is reached that the social impact of the applicant is narrow. The applicant ought to have provided sufficient facts for the type of relief sought in terms of this application, but it failed.

¹² *Ibid.*

¹³ On the table reflecting SA Home Loans Group structure, which is not paginated, the applicant appears as one of the managed entities and unlike entities like SAHL Insurance Company Ltd or Interest Rate Cap Company (Pty) Ltd, both wholly owned by SAHL Investment Holdings (Pty) Ltd, there is no indication of shareholding.

¹⁴ See paragraph numbered 3 in Penwarden letter on indexed page 2.

¹⁵ See clause 8.1 of the applicant's MOI adopted at a special meeting of the applicant held on 16 July 2013, which reads as follows in the material part: "8.1 The main purpose of the Company and main business which the Company is to carry on, is to –

8.1.1 acquire the rights, title and interest in and to residential property loan agreements and the related security with regard to such loan agreements ... pursuant to a securitisation scheme ... with funds raised directly or indirectly through the issue of Notes and to manage Participating Assets so acquired..."

[6] As stated above, besides the defects of substance and form herein, there isn't much by way of submissions. Therefore, the application will fail but, perhaps the applicant could heed my non-binding remarks made herein, in case it is still required to appoint an SEC.

[7] In the result:

- a) the application for an exemption from the requirement to appoint a social and ethics committee is refused.

Khashane La M. Manamela (Mr.)

Member, Companies Tribunal

15 February 2016