



## COMPANIES TRIBUNAL OF SOUTH AFRICA

**Case/File Number: CT017Jan2016**

In the *ex parte* application of:

**ALPHA HOUSING WAREHOUSE (RF) PROPRIETARY LIMITED      Applicant**

(Registration Number: 2012/215104/07)

in respect of:

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

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Presiding Member : Khashane La M. Manamela (Mr.)

Date of Decision : 15 February 2016

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### **DECISION (Reasons and an Order)**

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**Khashane La M. Manamela**

## ***Introduction***

[1] In terms of this application, ostensibly based on section 72(5)<sup>1</sup> of the Companies Act 71 of 2008 (the Companies Act), this Tribunal is requested by the applicant to grant an exemption from the requirement to appoint a social and ethics committee (an SEC).

[2] However, there is no way I can begin to look at the material issues in this matter without bemoaning the state and condition of the papers and the quality of the submissions herein. The documents appear to have been prepared at different points in time and by different functionaries of the applicant. Consequently, they present a very disjointed and inconsistent case for an exemption. Because all these go to the root of the relief sought herein, I will deal with these shortcomings below.

## ***Procedural and Substantive shortcomings***

[3] I will make use of subheadings to improve the layout of the discussions, but the issues may be interlinking beyond the allocated compartments.

## ***Dates and Timing of the Application***

[4] The Form CTR 142, which is the prescribed form for the application equivalent of the notice of motion in courts of law,<sup>2</sup> is dated 01 November 2013 by the applicant.<sup>3</sup> This

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<sup>1</sup> Section 72(5) of the Companies Act 71 of 2008 (the Companies Act) reads as follows in the material part: “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) ...

(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.”

document reflects this Tribunal's date stamp of 29 January 2016. This is the date on which this application was initiated<sup>4</sup> (or in this Tribunal's parlance, date of filing<sup>5</sup>).

[5] The abovementioned form (i.e. Form CTR 142) is accompanied by a letter dated 21 January 2014, also bearing this Tribunal's date stamp of 29 January 2016.<sup>6</sup> The letter is on the letterhead of SA Home Loans and is by KL Penwarden, CEO of SA Home Loans (Penwarden's letter). Normally, a letter which is not incorporated into the submissions in the affidavit, lacks probative value regarding the issues in hand, but I will revert to this a little later.

[6] Next, is a document labeled affidavit by Ursula Schei. Schei is the Group Legal and Compliance Manager of SA Home Loans. She also completed and signed the Form CTR 142 referred to above.<sup>7</sup> The affidavit by Schei is undated<sup>8</sup> and its declaration is incomplete in respect of the place where it was made.<sup>9</sup> Therefore, it is not possible to place it in chronological order *vis-à-vis* other documents in the application, particularly the Form CTR 142, which it supports.<sup>10</sup> I will also revert to this.

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<sup>2</sup> See regulation 142(1) of the Companies Regulations, 2011 (Companies Regulations) and Table CR 1 – Prescribed Forms of Annexure 1 of the Companies Regulations. 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.

<sup>3</sup> See Form CTR 142 on indexed page 1 of the application.

<sup>4</sup> See electronic mail exchanges of 21 and 29 January 2016 between the Registrar's office and a compliance officer of SA Home Loans, who submitted the application on behalf of the applicant, on indexed page 61 of the application.

<sup>5</sup> See regulation 142(1).

<sup>6</sup> See letter by KL Penwarden, CEO of SA Home Loans (Pty) Ltd to the Registrar's office dated 21 January 2014, on indexed pages 2 and 3 of the application (Penwarden's letter).

<sup>7</sup> See paragraphs 4 and 5 above.

<sup>8</sup> The deposition includes reference to "2014" but the month and day is not inserted, including the place.

<sup>9</sup> See paragraph 9 below.

<sup>10</sup> See regulation 142(1) of the Companies Regulations.

[7] There is a resolution passed on 14 July 2014, giving authority and ratification to Schei to apply for an exemption.<sup>11</sup> This resolution was signed on 07 and 08 August 2014, and 18 December 2014. Notably, it was preceded by the Form CTR 142 (dated 05 November 2013) and, as indicated, its relation in time to Schei's undated affidavit, is impossible to determine. This issue will also be taken further below.

[8] Finally, one of the shortcomings relate to the date of this application. I have already briefly touched on this issue above, but as applications for exemptions are time-based,<sup>12</sup> I will continue on this issue. Extracts from electronic mail discussions between the applicant and the Registrar's office confirms that the application was filed on 21 January 2016, together with six others by SA Home Loans. The application for exemption for all these entities were made in the same affidavit, hardly covering a single page, in extent.<sup>13</sup> The applicant and the six other applicants for exemptions are said to form part of the SA Home Loans group.<sup>14</sup> This means the application was lodged more than two years after it was first contemplated by the applicant when the Form CTR 142 was completed on 05 November 2013.<sup>15</sup> This is very significant regarding the relief sought herein and I deal with this below.

*Incomplete declaration of the supporting affidavit.*

[9] As stated above, the declaration to the affidavit by Schei is incomplete. It does not have date and place of declaration. The immediate question to mind is whether or not the

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<sup>11</sup> See indexed page 6.

<sup>12</sup> See paragraphs 11, 12 and 13 below.

<sup>13</sup> See undated affidavit by Ursula Schei on indexed pages 4 and 5. See generally paragraphs 6 and 7 above.

<sup>14</sup> See paragraph 5 of the affidavit on indexed page 4.

<sup>15</sup> See paragraph 4 above.

affidavit is valid. In my view, it is not valid for lack of compliance with the Regulations Governing the Administering of an Oath or Affirmation.<sup>16</sup> Regulation 4(1) of the aforesaid regulations reads as follows:

“Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.”

[underlining added for emphasis]

[10] Evidently, the declaration to the supporting affidavit in this matter does not meet the requirements of regulation 4 quoted above, particularly the underlined portion thereof. I will revert to this later herein.

*Discrepancy in dates and effect thereof*

[11] As stated above, some of the documents in the application date back to over two years ago, in November 2013.<sup>17</sup> Time is of the essence in an application for the required exemption. For example, in terms of regulation 43(1)(c) of the Companies Regulations, a company which scored above 500 points in any two of the previous five years, is required to appoint an SEC.<sup>18</sup> This determination is made at the time of making the application. *In*

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<sup>16</sup> These regulations were published in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 initially published in terms of Government Notice No R1258 of 21 July 1972 and amended in 1977, 1980 and 1982.

<sup>17</sup> See paragraphs 4 and 8 above.

<sup>18</sup> Regulation 43(1), which reads as follows “This regulation applies to—

(a) every state owned company;  
(b) every listed public company; and

*casu*, in all likelihood, the aforesaid determination was made around November 2013, due to the applicant's public interest score having exceeded the threshold of 500 points in any two of the previous five years. The reason why the applicant is required to appoint an SEC is not disclosed. However, in my view, it ought to be on the basis of its public interest score being in excess of the 500 points threshold. Only state owned companies<sup>19</sup> or listed public companies<sup>20</sup> are required to appoint an SEC without consideration or tally of the public interest score. Therefore, it is critical to know which of "any two of the previous five years" caused this application to be filed.

[12] The information regarding dates and timing is not only vital when determination to grant or refuse an exemption is made, but also thereafter. Interested persons desirous of acting in terms of section 72(2) to challenge the existence of basis on which the exemption was granted, may need to know in respect of which financial years the application was made. As matters stand in this application, "any two of the previous five years" could have been determined in November 2013;<sup>21</sup> January 2014;<sup>22</sup> July 2014;<sup>23</sup> December 2014<sup>24</sup> or January 2016.<sup>25</sup> The guesswork is unnecessary for a committee of importance like an SEC and could have been avoided.

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(c) any other company that has in any two of the previous five years, scored above 500 points in terms of regulation 26(2)." I added underlining for emphasis.

<sup>19</sup> See regulation 43(1)(a) of the Companies Regulations.

<sup>20</sup> See regulation 43(1)(b) of the Companies Regulations.

<sup>21</sup> See paragraph 4 above.

<sup>22</sup> See paragraph 5 above.

<sup>23</sup> See paragraph 7 above.

<sup>24</sup> *Ibid.*

<sup>25</sup> See paragraphs 4 and 8 above.

[13] The essence of the above becomes clearer when one considers the bases of calculating the public interest score in terms of regulation 26(2) of the Companies Regulations. This is apparent from a reading of this provision, which is as follows:

“For the purposes of regulations 27 to 30, 43, 127 and 128, every company must calculate its ‘public interest score’ at the end of each financial year, calculated as the sum of the following:—

(a) a number of points equal to the average number of employees of the company during the financial year;

(b) one point for every R 1 million (or portion thereof) in third party liability of the company, at the financial year end;

(c) one point for every R 1 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 a profit company, to directly or indirectly have a beneficial interest in any of the company’s issued securities; or

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

[I added underlining for emphasis]

The underlined portions of regulation 26(2) quoted above, refers to matters of time or dates, like “during the financial year” or “at the financial year end”, for calculating public interest scores. The question which financial year or financial years are applicable to the applicant’s application for exemption would remain unanswered.

[14] These concerns or shortcomings are very decisive for this matter, but I will deal briefly with the merits of the application, for completeness. The wisdom of this approach or absence thereof can be judged at the end hereof.

### *Submissions on the merits*

[15] The applicant's submissions for an exemption originate from two sources. One of the sources is Penwarden's letter and the other, is the affidavit by Schei. Both were dealt with above.<sup>26</sup> As I have already mentioned above, under normal circumstances, I am to ignore Penwarden's letter for lack of probative value as it is nowhere referred to in the application, but these are not normal circumstances. I deal with Penwarden's letter next.

[16] The following is from Penwarden's letter:

- "1. I am duly authorised hereto in my capacity as the Chief Executive of the Company and Investment Holdings (Pty) Ltd;
2. SAHL IH [i.e. SAHL Investment Holdings (Pty) Ltd] has established a Social and Ethics Committee in accordance with the Companies Act which has assumed responsibility for its business and that of its [sic] wholly owned subsidiaries and managed entities.
3. Alpha Housing Warehouse (RF) Proprietary Limited ("AHW") is a managed and consolidated entity of SAHL IH. It is hereby submitted that AHF 4 is not required to appoint a Social and Ethics Committee, by virtue of Sectins [sic] 72 (5) and (6) as it has no employees and a narrow social impact. In addition SAHL IH, has established a Social and Ethics committee and has assumed responsibility for its business and that of AHW which is a managed and consolidated entity of the SAHL IH group."<sup>27</sup>

[I added the underlining for emphasis]

[17] Penwarden's letter appears to suggest that, the applicant may be granted an exemption on two bases. Firstly, on the basis that the SAHL Investment Holdings (Pty)

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<sup>26</sup> See paragraphs 5 and 6 above, respectively.

<sup>27</sup> See paragraphs numbered 1, 2 and 3 of the Penwarden's letter.



Ltd has an SEC of its own and this SEC has “assumed responsibility” to also act as an SEC for its subsidiaries and the so-called managed entities. This appears to be reference to an automatic exemption or exclusion in terms of regulation 43(2)(a).<sup>28</sup> This regulation excludes from the requirement to apply for an exemption, subsidiaries of companies with SECs and which SECs perform the requisite functions for the subsidiary.<sup>29</sup> However, the applicant is not a subsidiary of SAHL Investment Holdings, but what is referred to as “a managed and consolidated entity”. The applicant did not provide explain this reference. However, the quotation from Penwarden’s letter above and a table reflecting SA Home Loans Group structure provided with the papers,<sup>30</sup> leave no doubt in this regard.

[18] Regulation 43(2)(a) does not apply to managed or consolidated entities, but only for subsidiaries.<sup>31</sup> Besides, there appears to be a contradiction between Penwarden’s letter and the affidavit by Schei. According to Penwarden’s letter there is already in existence an SEC in SAHL Investment Holdings, but according to both Schei’s affidavit<sup>32</sup> and the Form CTR 142<sup>33</sup> signed by Schei, this is still in the offing. There could have been a better approach.

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<sup>28</sup> 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).”

<sup>29</sup> See footnote 25 above.

<sup>30</sup> 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.

<sup>31</sup> Section 3 of the Companies Act explains what constitute subsidiary relationships.

<sup>32</sup> See paragraph 6 of the supporting affidavit by Schei on indexed page 4 of the application.

<sup>33</sup> See paragraph 4 above and indexed page 1 of the application.

[19] The second basis for an exemption in terms of Penwarden's letter appears to be based on section 72(5)(b).<sup>34</sup> It is stated that the applicant has no employees and has a narrow social impact. There is no further information in this regard and therefore it is difficult to appreciate the full effect of the statement.

[20] An exemption in terms of section 72(5)(b) is based on public interest considerations grounded on reasonableness determined from the nature and extent of the applicant company's activities. In my view, this is a factual inquiry. Therefore, relevant and sufficient facts have to be brought to the attention of this Tribunal for a determination to be made, whether to grant or refuse an exemption. With the glaring frugality of facts in Penwarden's letter, it is impossible to even begin to understand the nature of the activities of the applicant, let alone, the extent thereof. This is a critical and fatal shortcoming.

[21] Before, reaching the conclusion in the previous paragraph, I tried looking at other documents to see if there was something to save the day for the applicant, but did not find anything. In the Memorandum of Incorporation (MOI) of the applicant it is stated that:

“9.1 The main purpose of the Company and main business which the Company is to carry on, is to –

9.1.1 borrow money and furnish security in connection therewith for purposes of advancing monies under residential property loans, acquiring the right, title and interest in and to residential property loan agreements and the related security with regard to such loan agreements and generally funding its business as a credit provider;

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<sup>34</sup> See footnote 1 above.

9.1.2            advance residential property loans, to members of the public in general for purposes of acquiring immovable residential property, secured against, *inter alia*, the immovable property and acquire the rights, title and interest in and to residential property loan agreements and the related security with regard to such loan agreements ... with funds lent and advanced by the Lenders under the Facility Agreements or pursuant to any third party funding acquired by the Company as a credit provider...”<sup>35</sup>

[underlining added for emphasis]

[22]    The above material from the applicant’s MOI, particularly the underlined portions, in my view, does not appear to support the contention that the applicant has a narrow social impact. Even if the applicant does have a narrow social impact, there is nothing in the papers to support this bald statement. Not even from the supporting affidavit by Schei, which also contains general statements with no indication of the activities of the applicant. An application for the type of exemption sought here has to provide sufficient facts, particularly on the nature or type and extent or size of the activities of the applicant company. A Tribunal member determining whether or not to grant an exemption need not be left in doubt as to the company’s activities, lest it is impossible to discharge his or her task in hand. The required facts extend beyond employees and the social impact of the company.

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<sup>35</sup> See clause 9.1 of the applicant’s Memorandum of Incorporation adopted at the applicant’s general meeting of 04 October 2013 on indexed pages 19-20.

[23] In provided the facts required for the application, guidance could be derived from the areas which constitute the functions of an SEC as set out in regulation 43(5). For ease of reference, this regulation reads as follows in the material part:

“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) ...

...

(cc) the Employment Equity Act; and

(dd) the Broad-Based Black Economic Empowerment Act;

(ii) good corporate citizenship...

(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 ...

(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.”

[24] Clear from the above quotation, the areas of functions of an SEC are very specific and quite far reaching in extent. Quite often applicants to this Tribunal tend to limit the discussions to presence or absence of employees, but that is only one aspect to be considered.

### ***Conclusion and Order***

[25] All these said, there is no escaping that this application is riddled with defects of a procedural and substantive nature. In my view, obviously said with optimum respect to the applicant and its functionaries, the application was approached routinely and with no regard to the import of and role played by an SEC in a company. One may be excused from thinking that the applicant may have thought an exemption by this Tribunal is granted for the asking. Such will be dereliction of duty. The application ought to fail, although one hopes that, the applicant will perhaps consider what is stated herein for another and better attempt at acquiring an exemption. However, I should caution that my views are not binding on other members of this Tribunal in future applications, but the provisions of the Companies Act and its Companies Regulations are binding to all.

[26] In the result:

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

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**Khashane La M. Manamela (Mr.)**

**Member, Companies Tribunal**

**15 February 2016**