



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT010Dec2015

In the *ex parte* application of:

LINKS GOLF CLUB (RF) LIMITED

Applicant

(Registration Number: 2006/017924/06)

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	:	29 January 2016

DECISION (Reasons and an Order)

Khashane La M. Manamela

Introduction

[1] The applicant seeks an exemption from the requirement (in terms of section 72(5)(b)¹ of the Companies Act 71 of 2008 (the Companies Act), read with regulation 43(2)² of the Companies Regulations, 2011 (Company Regulations))³ to appoint a social and ethics committee (an SEC).

[2] I previously made a determination and order refusing similar relief to the applicant on 04 May 2015 in another application.⁴ Other than procedural concerns,⁵ I found that application to be parsimonious in terms of submissions or facts relating to the nature and extent of the applicant's activities.⁶ However, despite the fact that the applicant evidently took almost 7 months in reapplying,⁷ most of the problems in that application, persist in this application, in one form or another. I deal with some of the

¹ 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."

² 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)." I added underlining to the aforesaid citation.

³The Companies Regulations were determined by the Minister of Trade and Industry in terms of section 223 of the Act 71 of 2008 and published under GN R351 in Government Gazette 34239 of 26 April 2011.

⁴ My decision was in the matter of *Ex parte Application of Links Golf Club (RF) Ltd*, case/file number: CT014May2015, decided on 04 May 2015. This decision is available on the website of this Tribunal, www.companiestribunal.org.za. I will refer to this decision as the *First Links Golf Club*.

⁵ See the *First Links Golf Club* at par 3. This matter is fully cited in fn 4 above. See par 3 of the *First Links Golf Club Application* fully cited in fn 4 above.

⁶ See the *First Links Golf Club* at pars 7 and 8. This matter is fully cited in fn 4 above.

⁷ The application bears a stamp of this Tribunal of 17 December 2015 and my decision was handed down on 04 May 2015.

problems next and make use of subheadings to highlight the issues under the heading Procedural Concerns.

Procedural Concerns

Deposition or commissioning of the supporting affidavit

[3] In the *First Links Golf Club*, the statement in support of the application was not signed before a commissioner of oaths.⁸ In this application the statement is commissioned.⁹ However, the commissioner of oaths is one Mr. Andrew Barton. Not only is he the company secretary of the applicant, he actually signed the application.¹⁰ Regulation 7 of the Regulations Governing the Administering of an Oath or Affirmation¹¹ reads as follows:

“A commissioner of oaths shall not administer an oath or affirmation relating to matter in which he has interest.”

[4] Mr. Barton clearly has an interest in this application. Therefore, his involvement as a commissioner of oaths casts the authenticity of the deposition in a bad light. However, I will move to other aspects of this application.

⁸ See the *First Links Golf Club* at par 3.

⁹ See page 4 of the supporting affidavit.

¹⁰ See Form CTR 142 dated 30 November 2015 by the applicant and date stamped 17 December 2015 by the registry of this Tribunal. See further a letter dated 02 December 2015 by the applicant to the registrar of this Tribunal, which appears to be the covering letter to the application.

¹¹ The 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.

Authority to bring the application

[5] It is not clear whether the applicant relies on a resolution dated 18 May 2015 as authority to bring this application. This is the same resolution which authorised the launch of the *First Links Golf Club*.¹² However, the document (evincing authority to bring the application) attached to the present application states that “Following a previous board decision to submit an application to exempt the company from having a social and ethics committee it was resolved that...” In my view, the underlining part of the quotation denotes the existence of another resolution. However, there is no further submission in this regard. But, I will again move on.

Limited documentary proof

[6] Further, although the name of the company is followed by the expression “RF” indicating the existence of restriction or prohibition regarding amendment of some provision or provisions of the applicant’s Memorandum of Incorporation or MOI.¹³ Although, there is a copy of the MOI included in the papers, it is not signed and does not appear to have been filed with the relevant authorities as required by the Companies Act.¹⁴ In advancing this aspect, the applicant submits that it was established for a limited purpose.¹⁵ Also, there is no document supporting the submission that the applicant’s public interest score reached exceeded 500 points significantly due to its membership comprising homeowners.¹⁶

¹² See fn 4 above.

¹³ See sections 11(3)(b) and 12 of the Companies Act.

¹⁴ See section 13 of the Companies Act.

¹⁵ See third paragraph from above on page 1 of the supporting affidavit. The paragraphs in the affidavit are unnumbered.

¹⁶ See second paragraph from below on page 3 of the supporting affidavit.

[7] However, although in no way discounting the materiality of the aforesaid concerns, I will condone them as technical irregularities¹⁷ and move on to deal with the substantive aspects of this application.

Merits

[8] The applicant premised its application on section 72(5)(b) of the Companies Act.¹⁸ However, elsewhere in the application, it is submitted that “sufficient mechanisms are in place in the company’s existing structures to substantially deal with matters relating to a social and ethics committee”.¹⁹ This sounds like there is reliance on section 72(5)(a) of the Companies Act²⁰, tentative as the submission appears to be. Be that as it may, there is strong reliance on section 72(5)(b). Accordingly a determination will only be made in terms of the latter provision. To determine the requirements for the exemption sought by the applicant, it is necessary to have a look at the nature and extent of the activities of the applicant. The applicant’s submissions in this regard can be summarised as follows:

[8.1] the applicant’s purpose is management of a golf club and its related facilities for the benefit of the applicant’s members and it is therefore ring-fenced;

¹⁷ Regulation 154(3) reads as follows: “The Tribunal may condone any technical irregularities arising in any of its proceedings.”

¹⁸ See fn 1 above for a full citation of s 72(5)(b) of the Companies Act.

¹⁹ See second paragraph from the bottom on page 2 of the supporting affidavit.

²⁰ Section 72(5)(a) reads as follows: “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...” I added the underlining for emphasis.

- [8.2] the applicant was set up as a public company due to previous legislative requirements regarding the number of its members, but has not been converted to a private company due to financial constraints;
- [8.3] the applicant has 495 owners of properties (the owner members);
- [8.4] the applicant has approximately 50 employees;
- [8.5] the applicant's assets and income are used to advance its objectives for the benefit of its members under guidance of the board of directors, which serves without remuneration;
- [8.6] its total revenue for the year ended 30 September 2015 was R14.7 million, but there is nil operating profit;
- [8.7] the applicant is involved in a number of community activities in the St Francis Bay area.

[9] Although there is a slight improvement, the submissions are still very limited. However, the emphasis is on the fact that the applicant was formed for purposes of managing a golf club for its members. According to the applicant's MOI, albeit against the misgivings expressed above,²¹ confirms the current limited scope of activities of the applicant. For purposes of the determination to be made herein, the applicant's activities ought to be considered against the purpose and functions of an SEC are stated in regulation 43(5) of the Companies Regulations. Regulation 43(5) reads as follows in the material part:

"A social and ethics committee has the following functions:

²¹ See paragraph 6 above.

- (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.”

[10] In terms of regulation 43(5) an SEC monitors the activities of the particular company against the law and prevailing codes of best practice;²² draw matters thereon to the attention of the board of directors²³ and report to the shareholders at annual general meetings.²⁴ Accordingly, in determining the nature and extent of the company's activities, regard ought to be had to what an SEC's purpose is. Although, every matter turns on its facts, full and further discussion on the regulation and section 72(5)(b) of the Companies Act can be accessed in previous decisions of this Tribunal, some of which I have the privilege of being involved in available from the Tribunal's website.²⁵

²² See regulation 43(5)(a).

²³ See regulation 43(5)(b).

²⁴ See regulation 43(5)(c).

²⁵ The website of this Tribunal is at www.companiestribunal.org.za.

Determination or Finding

[11] Against the backdrop of what is stated above, especially the nature and size of the applicant's activities, it is my view that, it is not reasonably necessary in the public interest for the applicant to appoint an SEC. I accept that applicant's activities are limited to the management of the golf club for its members. Therefore, an exemption will be granted for a period of 5 (five) years.

Order

[12] In the result:

- a) the applicant is exempted from the requirement to appoint a social and ethics committee for a period of 5 (five) years from date hereof.

Khashane La M. Manamela (Mr.)

Member, Companies Tribunal

29 January 2016