



## COMPANIES TRIBUNAL OF SOUTH AFRICA

**Case/File Number: CT019Mar2016**

In the *ex parte* application of:

**CHOPPIES WAREHOUSING SERVICES (PTY) LTD**

**Applicant**

(Registration Number: 2008/016511/07)

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	:	14 April 2016

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

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**Khashane La M. Manamela**

### ***Introduction and nature of the application***

[1] The applicant is a South African company. It is a subsidiary of Choppies Enterprises Limited.<sup>1</sup> The latter has a secondary listing on the Johannesburg Stock Exchange, but is registered in Botswana and primarily listed on the Botswana Stock Exchange.<sup>2</sup>

[2] It is submitted in terms of this application that, the applicant ought to be exempted from the requirement to appoint a social and ethics committee (an SEC). The grounds for the application are twofold. Firstly, as Choppies Enterprises Limited, the applicant's holding company, already has an SEC. Secondly, that it is not in the public interest to require the applicant to have an SEC. These grounds are based on regulation 43(2)(a) of the Companies Regulations, 2011<sup>3</sup> and section 72(5)(b) of the Companies Act 71 of 2008 (the Companies Act), respectively. I deal with these two legislative provisions next under similarly named headings.

### ***“Exemption”<sup>4</sup> based on regulation 43(2)(a)(i.e. that applicant is a subsidiary of another company)***

[3] Regulation 43, in the material part, reads:

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<sup>1</sup> This matter was allocated to me together with another matter for an entity called *Choppies Supermarkets South Africa (Pty) Ltd* decided under Case/File Number: CT018Mar2016 also on 14 April 2016. The applicant and Choppies Supermarkets South Africa are subsidiaries of another entity called Choppies Enterprises. The applications are identical. A copy of the decision in respect of *Choppies Supermarkets South Africa* is available on this Tribunal's website: [www.companiestribunal.org.za](http://www.companiestribunal.org.za).

<sup>2</sup> See par 2.2 of the supporting affidavit on indexed p 3.

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

<sup>4</sup> Regulation 43(2)(a) of the Companies Regulations does not provide for the granting of exemptions, but rather exclude companies falling in the specified category from applying for an exemption from this Tribunal. See De Lange S *The Social and Ethics Committee in terms of the 2008 Companies Act: Some observations regarding the exemptions and the role of the Companies Tribunal* (2015) 27 SA MercLJ 507-539 at pp 510, 512-517.

- “(1) This regulation applies to—
- (a) every state owned company;
  - (b) every listed public company; and
  - (c) any other company that has in any two of the previous five years, scored above 500 points in terms of regulation 26(2).
- (2) 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 for emphasis]

[4] As stated above, the applicant is a subsidiary of Choppies Enterprises, a company incorporated in Botswana. Choppies Enterprises is not registered as or considered a company in terms of the South African Companies Act. Section 1 of the Companies Act defines “company” as:

- “a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date-
- (a) was registered in terms of the-
    - (i) Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act; or
    - (ii) Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2;
  - (b) was in existence and recognised as an ‘existing company’ in terms of the Companies Act, 1973 (Act No. 61 of 1973); or

(c) was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act...”

[5] Taking further the discussion of the definition above, “a domesticated company” is defined by the same section as “a foreign company whose registration has been transferred to the Republic in terms of section 13(5) to (11)...”, and a “foreign company” as “an entity incorporated outside the Republic, irrespective of whether it is...a profit, or non-profit, entity; or ...carrying on business or non-profit activities, as the case may be, within the Republic”.<sup>5</sup> In terms of information available on file, the applicant’s holding company is not a “domesticated company”, but a “foreign company”. Also evident from the aforesaid definitions is that the former (i.e. “domesticated company”) is a company in terms of the Companies Act, whereas the latter (i.e. “foreign company”) is not.

[6] But, the applicant appears to have been already aware of this fact from a reading of its submissions, including the following:

“The SEC appointed by the Company [i.e. Choppies Enterprises] presently performs the functions specified in regulation 43(5), however the exemption recognised by regulation 43(2)(a) in respect of companies that are subsidiaries of a company that has a social and ethics committee which also performs the specified functions on behalf of its subsidiaries, is not available to the Applicant only in view of the fact that the Company, which was formally incorporated in Botswana on 19 January 2004, is not a “company” for purposes of regulation 43(2)(a) (ie [sic] a company incorporated in South Africa). As

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<sup>5</sup> See section 1 of the Companies Act.

highlighted above, the Company has a secondary listing on the securities exchange operated by the JSE.”<sup>6</sup>

[I added underlining for emphasis]

[7] I agree with the above concession by the Applicant and actually commend it as properly made. With that, then an “exemption” or exclusion,<sup>7</sup> based on regulation 43(2)(a) of the Companies Regulations is not available to the applicant. As indicated above, regulation 43(2)(a) does not *per se* deal with the granting of exemptions, but rather indicate which companies are excluded from the requirement to apply for an exemption to appoint an SEC. Therefore, where a company relies on this provision, it need not make any application to this Tribunal.<sup>8</sup>

[8] I dealt with this aspect or ground of the application for the sake of completeness. There was no need or even ground on my or this Tribunal’s part to entertain this. I move on to the second ground for this application.

***Exemption based on section 72(5)(b) of the Companies Act (based on public interest considerations)***

[9] Section 72(5)(b) of the Companies Act reads:

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<sup>6</sup> See par 2.4 of the supporting affidavit on indexed pp 3-4.

<sup>7</sup> See footnote 4 above.

<sup>8</sup> See *Alpha Housing Warehouse (RF)(Pty) Ltd, Case/File Number: CT017Jan2016* at pars 17-18, decided on 15 February 2016; *Thekwini Fund 11 (RF) Ltd, Case/File Number: CT018Jan2016* at par , decided on 15 February 2016. Copies of these decisions are available on this Tribunal’s website: [www.companiestribunal.org.za](http://www.companiestribunal.org.za).

“(5) 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) ...; or

(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.”

[I added underlining for emphasis]

[10] There are no submissions to advance the applicant’s claim for an exemption based on section 72(5)(b). For other than what is stated above, the applicant made submissions only of a general nature. It also attached its memorandum of incorporation to the affidavit in support of the application, without indicating how this advances its case for an exemption.<sup>9</sup> I will follow the lead of our courts of not allowing reliance on a “mass of material contained in the record of an enquiry”<sup>10</sup> or simply attaching an annexure to an affidavit.<sup>11</sup> The applicant also simply repeated the wording of legislative provisions without indicating how these applied to it or its activities. In short, there is no indication of the nature and extent of the applicant’s activities.

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<sup>9</sup> See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 324E-F; *Minister of Land Affairs v Wevell Trust* [2008]JOL 21213 (SCA) 19 at par 43; 2008 (2) SA 184 (SCA) at 200. See generally *Herbstein and Van Winsen The Civil Practice of the High Courts of South Africa* 5<sup>th</sup> ed (Juta Cape Town 2009) (*Herbstein and Van Winsen*) at 443-444.

<sup>10</sup> See *Lipschitz and Schwartz, NNO v Markowitz* 1976(3) SA 772 (W) at 775H. See further authorities cited in footnote 9 above.

<sup>11</sup> See *Port Nolloth Municipality v Xhalisa and Others* 1991 (3) SA 98 (C) 111B-C. See further authorities cited in footnote 9 above.

[11] An applicant company for an SEC exemption based on section 72(5)(b) has to supply sufficient facts on the nature and extent of its activities. There is no definition of the phrase “nature and extent” in the Companies Act,<sup>12</sup> and therefore these words would carry their ordinary meanings<sup>13</sup> in terms of the rules of interpretation applied by our courts, as set out, in the decision of *National Joint Municipal Pension Fund v Endumeni Municipality*:<sup>14</sup>

“Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. ... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”<sup>15</sup>

[I added the underlining for emphasis]

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<sup>12</sup> See generally Delport P and Vorster Q (eds) *Henochsberg on the Companies Act 71 of 2008* (Lexisnexis online version November 2015) 278 on section 72(5)(b).

<sup>13</sup> *The Oxford Large Print Dictionary* (New Edition) defines “nature” as “*noun* **1**... the world with all its features and living things... **2** a kind, sort, or class; *things of this nature*... **3** the complex of qualities and characteristics innate in a person or animal. **4** a thing’s essential qualities; its characteristics...” and “extent” as “*noun* **1** the space over which a thing extends. **2** the range or scope of something; *the full extent of his power*. **3** a large area...”

<sup>14</sup> 2012 (4) SA 593 (SCA) (*Endumeni*).

<sup>15</sup> *Endumeni* at par 18; quoted without footnotes.

[12] In terms of section 72(5)(b) this Tribunal has to be furnished with sufficient facts as to what the particular company's activities kind or essential qualities (i.e. nature) and scope (i.e. extent) thereof, in order to determine whether or not to grant an exemption based on public interest considerations.<sup>16</sup> There is no definition or description of the phrase "public interest" or what constitutes same. However a reading of the seminal work of *Henochsberg on the Companies Act 71 of 2008*<sup>17</sup> may be valuable. But, I see no reason to be detained by this any longer.

[13] In regulation 43(5) of the Companies Regulations the legislature has indicated the areas or issues to be addressed in an application of this nature. It reads 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;

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<sup>16</sup> See *Links Golf Club (RF) Ltd*, Case/File Number: CT014Mar2015 at pars 7-8, decided on 04 May 2015; *JT Ross (Pty) Ltd*, Case/File Number: CT007Feb2016 at par 8, decided on 16 March 2016; *M Premjee & Sons (Pty) Ltd*, Case/File Number: CT008Feb2016 at pars 4, 5 and 7, decided on 16 March 2016. Copies of these decisions are available on this Tribunal's website: [www.companiestribunal.org.za](http://www.companiestribunal.org.za).

<sup>17</sup> See *Henochsberg on the Companies Act 71 of 2008* at 278. See footnote 12 above for a full citation of this work.



- (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."

[14] Therefore, the application cannot succeed and the applicant, if is so minded or advised, may consider bringing a fresh application which, among others, take heed of what is stated above. Such application will be dealt with on its merits and my comments herein are not necessarily binding on another member of this Tribunal seized with the matter.

[15] In the result:

- a) the application, as currently formulated, 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**

**14 April 2016**