



**IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA**

**("THE TRIBUNAL")**

**CASE NUMBER: CT013FEB2016**

**In the ex parte application of:**

**ASHBURTON SA CREDIT  
CO-INVESTMENT FUND 1 (RF) LIMITED**

**APPLICANT**

**Coram: PJ Veldhuizen**

**Order delivered 22 March 2016**

**ORDER**

**A. INTRODUCTION**

1. The Applicant is **ASHBURTON SA CREDIT CO-INVESTMENT FUND 1 (RF) LIMITED** a public company, with registration number 2014/072618/06, registered in terms of the company laws of the Republic of South Africa, with its registered office at 4 Merchant Place, CNR Fredman and Rivonia, Sandton, Gauteng, Johannesburg.

2. The Applicant has a public interest score exceeding 500 and is required to appoint a Social and Ethics Committee in terms of section 72(4), read with regulation 43, of the Companies Act No 71 of 2008 (“the Act”).
3. This is an application brought in terms of section 72(5)(b) of the Act where the Applicant applies to the Tribunal for an exemption from this requirement. The Applicant also brings an application for condonation for the late filing of the exemption application.

## **B. THE LEGISLATION**

### **Section 72 (4)**

The Minister, by regulation, may prescribe—

- (a) a category of companies that must each have a social and ethics committee, if it is desirable in the public interest, having regard to—
  - (i) annual turnover;
  - (ii) workforce size; or
  - (iii) the nature and extent of the activities of such companies;
- (b) the functions to be performed by social and ethics committees required by this subsection; and
- (c) rules governing the composition and conduct of social and ethics committees.

### **Section 72(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) 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; 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.

#### **Section 72(6)**

An exemption granted in terms of subsection (5) is valid for five years, or such shorter period as the Tribunal may determine at the time of granting the exemption, unless set aside by the Tribunal in terms of subsection (7).

#### **Regulation 26 (2)**

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.

### **Regulation 43**

(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).

(3) A board of a company that is required to have a social and ethics committee, and that—

- (a) exists on the effective date, must appoint the first members of the committee within 12 months after—
  - (i) the effective date; or
  - (ii) the determination by the Tribunal of the company's application, if any, if the Tribunal has not granted the company an exemption;
- (b) is incorporated on or after the effective date, must constitute a social and ethics committee and appoint its first members within one year after—
  - (i) its date of incorporation, in the case of a state owned company;
  - (ii) the date it first became a listed public company, in such a case; or
  - (iii) the date it first met the criteria set out in [sub-regulation \(1\) \(c\)](#), in any other case.

(4) A company's social and ethics committee must comprise not less than three directors or prescribed officers of the 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.

(5) 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) the 10 principles set out in the United Nations Global Compact Principles; 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
- (c) to report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate.

## **C. THE ISSUES NOW TO BE DECIDED BY THE TRIBUNAL**

- 4. Has Applicant met the Tribunal's procedural requirements ?
- 5. Is it reasonably necessary in the public interest to require the Applicant to have a social and ethics committee, having regard to the nature and extent of the activities of the Applicant ?
- 6. Has the Applicant made out a proper case for exemption ?

## D. EVALUATION OF EVIDENCE

7. The Applicant describes the nature and extent of its activities as that of a *"special purpose vehicle that issues debt instruments (including, without limitation, debentures, promissory notes and commercial paper), enter (sic) into other transactions with corporate and institutional investors and/or uses funds borrowed or raised directly or indirectly from the debt instruments to acquire the rights, title and interest in and to any assets. The company's objective is to achieve stable returns by investing in participating assets"*.
8. Furthermore the Applicant has no employees.
9. The authors of **Henochsberg on the Companies Act 71 of 2008**<sup>1</sup> submit that factors to be taken in to account for the Tribunal to determine whether it is reasonably necessary and in the public interest to have a Social and Ethics Committee are the proposed functions set out in regulation 43 (5).
10. **Henochsberg** goes further and submits that if however, the quantitative criterium (ie the public interest score) has already determined that a social and ethics committee is required, what additional factors in the light of this determination should be considered when faced with the question of whether it is reasonably necessary in the public interest to have such a committee.

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<sup>1</sup> **Author:** Formerly edited by: The Late Hon Mr Justice PM Meskin. Authors: Professor Piet Delport LLB LLD (Pret) HDip Tax Law (Wits); Professor Quintus Vorster PhD (Stell) CA (SA). Contributors: Professor David Burdette BLuris LLB (Unisa) LLD (Pret)



11. I assume then that Legislature intended the Tribunal to exercise a discretion notwithstanding the quantitative criterium and I shall exercise this discretion accordingly with reference to the content of regulation 43(5).
12. Henochsberg usefully, in my view, sets out what may be considered in practice for the Tribunal to reach a determination, as follows—
  - (a) the contribution of the company (qualitative criterium) to social and economic development *of the community in which it operates* (public interest) (reg 43 (5) (a) (i));
  - (b) the effect of the company as a corporate citizen (qualitative criterium) *in the particular community* (public interest) (reg 43 (5) (a) (ii));
  - (c) the effect (qualitative criterium) that the company's activities and products has on *environment, health and public safety* (public interest) (reg 43 (5) (a) (iii));
  - (d) the actions of the company (qualitative criterium) *in respect of consumers*, including advertising, public relations and consumer protection (public interest) (reg 43 (5) (a) (iv));
  - (e) the company's actions (qualitative criterium) *in respect of its employees and its employment practices*, which obviously includes

compliance with labour relations but which should also encompass general employee “well-being” (public interest) (reg 43 (5) (a) (v)).

**E. DECISION**

Having carefully considered the evidence in the supporting affidavit of the Applicant and having considered the factors as suggested above, the Tribunal is satisfied that the Applicant is entitled to condonation, has met with the procedural requirements and is entitled to the relief sought. Accordingly, the application for condonation is granted and the Applicant is exempted from the requirement to appoint a Social and Ethics Committee for a period of five (5) years from the date of this determination.



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**PJ VELDHUIZEN**

**MEMBER OF THE COMPANIES TRIBUNAL**

**CAPE TOWN**