



## **REPUBLIC OF SOUTH AFRICA**

**CASE NO: CT005May2018**

**In Ex parte Application**

**ATLANTIS MINING (SA) (PTY) LTD**

**(Registration number: 2007/008507/07)**

Presiding Member of the Companies Tribunal: Agnes Tsele-Maseloanyane

Order handed down on 11 May 2018

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### **ORDER AND DECISION**

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#### **1. INTRODUCTION**

- 1.1 This is an application for exemption from the requirements to establish a Social and Ethics Committee (SEC) in terms of section 72 (5) (a) or (b) of the Companies Act, 71 of 2008 read with regulation 43 of the Companies Regulation.

#### **2. BACKGROUND**

- 2.1 The Applicant is Atlantis Mining (SA) (Pty) Ltd having two shareholders. In terms of regulation 43(1) the Applicant falls under Category C in that it has a public interest score above 500 points. The Applicant indicates that it has previously been granted an exemption from appointing a SEC for a period of 3years and that its company structure and operations have remained unchanged.

- 2.2 The Applicant stated that it has two directors and that as per the requirement of section 72(5) the two directors are hands-on in the running of the operations of the company thereby fully involved in all matters, regulatory, legal-cost related and otherwise
- 2.3 The applicant submits that it is not reasonably necessary to have a social and ethics committee having regard to the fact that specific measures are in place in order to compliance (sic) with regards to all sectors of our industry. The applicant further submits that Debmar (Pty) Ltd is the majority shareholder (70%) of Atlantis Mining. Due to the fact that they are mining contractors, Atlantis Mining (SA) (Pty) Ltd is contracted at various coal mines (two at present). Under the strict guidance of the Department of Mineral Resources, all mines that the Applicant is contracted with rightfully insist on upholding all laws and regulations pertaining to mining and as contractors and that the Applicant's directors are always kept up to date with and enforce all legal requirements pertaining to mining.
- 2.4 Furthermore one of the directors is affiliated with various professional bodies such as SAICA, SAIT and SAIPA which assist greatly in being up to date with an ensuring legal compliance with regards to all sectors of the industry. Directors also attend various seminars applicable to the industry and fulfil continued professional development requirements set out in applicable professional bodies they are associated with. The two directors are totally and completely involved in all the running and operations of the company.
- 2.5 The Applicant further submits that its current structure, ensures that measures are put in place in order to ensure legal compliance with regards to all sectors of their industry as per Regulation 43(5) including social and economic development, employment equity, broad-based black economic empowerment, good corporate citizenship, health and safety, consumer relations, labour and employment, including the safeguarding of the company's assets.

### **3. APPLICABLE LAW**

- 3.1 Section 72 (4) provides that the Minister by regulation may prescribe the 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) nature and extent of the activities of such companies

3.2 Section 72(5) provides that 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 that the Tribunal may grant such 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.

3.3 The Companies Regulations provide in Regulation 43(1) that a SEC must be appointed by

(a) state owned companies

(b) Listed public entities

(c) Any other company with a PIS above 500 in any two of the previous five (financial) years.

3.4 Regulation 43 (2) states that: 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 of that other company will perform the function required by this regulation on behalf of that subsidiary company or

(b) it is exempted by the Tribunal in accordance with section 72 (5) and (6)

3.5 Regulation 43 (5) defines the functions of SEC as follows:

(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 the development of the communities in which its activities are predominately conducted or within which its products or services are predominately 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 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 International Labour Organisation 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.

#### **4. EVALUATION**

- 4.1 The Applicant falls within the category of companies that are required to establish a SEC as it has a Public Interest Score of above 500 in terms of regulation 26 (2).
- 4.2 The Applicant does not specify which subsection of Section 72(5), i.e. (a) or (b) it is relying upon. The Applicant's submission is not compatible with the provision of section 72 (5) (a) or (b) which clearly shows that the Applicant either applies for exemption in terms of (a) or (b). These provisions cannot be used at the same time as the grounds and circumstances under which each can be used are different. In its argument the Applicant has conflated or merged the two subsections into one by arguing that it is not reasonably necessary to have a SEC having regard to the fact that specific measures are in place in order to compliance (sic) with regards to all sectors of our industry.
- 4.3. In terms of subsection (a) the Applicant must show that it has a formal mechanism within its structures established in terms of other legislation that perform substantially the same function that would otherwise be performed by SEC. The fact that the Applicant complies with law and regulations of the mining industry, is under strict guidance of the Department of Mineral Resources, the other director is affiliated to various bodies such as SAICA, SAIT and SAIPA, Directors attend various seminars applicable to the industry and fulfil continued Professional development cannot be regarded as having a formal mechanism within the Applicant's structure.
- 4.4 Furthermore, there is no evidence that Applicant is a subsidiary of Debmar (Pty) Ltd and/or that Debmar (Pty) Ltd has a SEC that will perform the SEC functions for the Applicant and should therefore be exempted on that basis. Apart from the 2 directors that are said to be completely and totally involved in all the running and the operation of the company, there is no indication of any formal mechanism within the Applicant's structure established in terms of other legislation that would substantially perform the functions of SEC. The two directors running the operations of the company cannot be regarded as a formal mechanism for purposes of section 72(5) as argued by the Applicant in tis submission.

- 4.5 In its argument the Applicant contends that its current structure, ensures that measures are put in place in order to ensure legal compliance with regards to all sectors of their industry as per Regulation 43(5) including social and economic development, employment equity, broad-based black economic empowerment, good corporate citizenship, health and safety, consumer relations, labour and employment, including the safeguarding of the company's assets.
- 4.6 The Applicant does not indicate which structure in particular will ensure compliance with regulation 43 (5) as required by section 72 (5)(a).
- 4.7 In terms of subsection (b) Applicant must show that it is not reasonably necessary to have a SEC not because the Applicant has some specific measures in place as the Applicant submits in its application but that it is not 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. The Applicant argued that it is not reasonably necessary to appoint SEC and does not advance the grounds required, i.e. having regard to the nature and extent of the activities of the company instead the Applicant advance the grounds that relate to subsection (a) exemption. For the Applicant to rely on subsection (b) it must indicate why given the nature and extend of its activities it is not reasonably necessary in the public interest to have a SEC. The Applicant in its application merely state that they are a Mining Contractors, and it is contracted at various coal mines (at present two). Further that they are compliant with all the mining laws and regulations. The fact that the company complies with all the mining laws and regulation is in my view not sufficient to grant an exemption from appointing a SEC, as the requirements of SEC are broader than those of mining laws and regulations. For instance, the mining laws and regulations do not expect of companies to monitor and report to shareholders on the OECD recommendations regarding corruption as is expected of SEC to do.

## **5. FINDINGS**

- 5.1 The Applicant has failed to make a proper case to be exempted from appointing a social and ethics committee in terms of section 72 (5) (a) or (b).
- 5.2 The Applicant is therefore not exempt from establishing a SEC

6. **ORDER**

6.1 The following order is hereby made:

The Application for an order for exemption from appointing a SEC is hereby refused

The Applicant must establish a SEC within 12 months from date of this order.

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M A Tsele-Maseloanyane

Member of the Companies Tribunal