



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

**CASE NO: CT009MAY2018**

Ex Parte Application

**GOLDER ASSOCIATES AFRICA (PTY) LTD**

**APPLICANT**

Presiding Member: K Moodaliyar

Date of Decision: 18 June 2018

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### **DECISION**

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#### **INTRODUCTION**

[1] The Applicant is the Golder Associates Africa ("the Applicant"), private company registered in terms of the company laws of the Republic of South Africa.

[2] The Applicant applies to the Companies Tribunal for an exemption to the regulated structure when appointing a Social and Ethics Committee ("SEC").

[3] The affidavit in support of CTR142 is deposed to by Ralph Heath, the Managing Director of the Applicant and duly authorized to depose the affidavit by the Resolution of the Applicant dated 6 September 2017.

## **APPLICANT'S SUBMISSIONS**

- [4] The Deponent submits that the matters regarding the social and ethics functions of the Applicant are overseen by the board of directors of its holding company Golder Associates Africa Incorporated in Mauritius.
- [5] The Deponent asserts that the Applicant does not hold any fiduciary assets in South Africa.
- [6] The Deponent further submits that the Applicant has a Public Interest Score of 488.

## **APPLICABLE LAW**

- [7] Section 72 of the Companies Act 71 of 2008 stipulates:

“(4) The Minister, by regulation, may prescribe –

- (a) a category of companies that must each have a social and ethics committee, 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.

- (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.

(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).

(7) The Commission, on its own initiative or on request by a shareholder, or a person who was granted standing by the Tribunal at the hearing of the exemption application, may apply to the Tribunal to set aside an exemption only on the grounds that the basis on which the exemption was granted no longer applies.”

[8] The regulations in terms of the Companies Act (GNR 351 of 265 April 2011) (“Companies Regulations”) provide in Regulation 43(2) that a SEC must be appointed by:

- State owned companies;
- Listed public companies;

- Any other company with a Public Interest Score (“PIS”) above 500 in any two of the previous five (financial) years.

[9] Regulation 43(4) specifies that the Committee should:

“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.”

[10] Regulation 43(5) defines the functions of the SEC as:

“(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 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."

[11] The PIS is calculated as follows—

- (a) a number of points equal to the average number of employees of the company during the financial year ('employee' has the meaning set out in the Labour Relations Act 66 of 1995 (reg 26(1)(a)));
- (b) one point for every R1 million (or portion thereof) in third party liability of the company held by creditors at the financial year end;
- (c) one point for every R1 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 the profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities; or
  - (ii) in the case of non profit company, to be a member of the company, or a member of an association that is a member of the company (Reg 26(2)).

[12] A company that falls outside the categories above, or one that falls within those categories but which is a subsidiary of another company (as defined in section 3 of the Companies Act) and has a holding company that has a SEC that will perform the functions of the SEC for the (subsidiary) company, a SEC need not be appointed (Reg 43(2)(a)).

[13] If a company is required to appoint an SEC, it may apply for a ruling by the Tribunal for an exemption, under the provision of section 72(5) of the Companies Act.

- [14] Application for a ruling must be made by filing:
- (a) “an Application form CTR 142; and
  - (b) a supporting affidavit setting out the facts on which the application is based.” (Reg 142(3)).

## **EVALUATION**

[15] The Deponent’s submission that in terms of Section 72(5) the matters regarding the social and ethics of the Applicant is overseen by the board of directors in Mauritius cannot be the basis to grant the Applicant an exemption from appointing an SEC. To be eligible for such exemption the holding company must be incorporated in accordance with South African company laws.

[16] The Deponent provided that the Applicant does not hold fiduciary assets in South Africa, without providing further information regarding the nature and extent of its activities and the size of the workforce.

[17] The deponent states that the Applicant’s Public Interest Score is 488 which is below the requisite 500 points according to Regulation 43. If the score is below 500 points, the Applicant is not required to form a SEC.

[18] For this reason, it will not be possible for the Tribunal to grant the Applicant an exemption from appointing an SEC when the Applicant does not meet the public interest score regulatory requirements obligating it to appoint an SEC.

## **ORDER**

[19] The application is dismissed.

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**KASTURI MOODALIYAR**  
**MEMBER OF THE COMPANIES TRIBUNAL**