



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT006SEP2018

In re *ex parte* application:

PHUTHUMA NATHI INVESTMENTS (RF) LTD

(Registration No. 2006/015187/06)

Presiding Member of the Companies Tribunal: ISHARA BODASING

Date of Decision: 17 September 2018

DECISION

1. INTRODUCTION

1.1 Applicant is PHUTHUMA NATHI INVESTMENTS (RF) Ltd., a company duly incorporated in accordance with the company laws of South Africa, with registration number 2006/015187/06, and having its registered address at Multichoice City, 144 Bram Fischer Drive, Randburg, Gauteng, 2194.

1.2 On 13 September 2018 Applicant applied to the Companies Tribunal for an exemption from appointing a Social and Ethics Committee ("SEC") in terms of section 72(5) and (6) of the Companies Act 71 of 2008 ("the Act") read with Regulation 43 of the Companies Regulations¹ ("the Regulations").

¹ GN R351 in GG 34239 of 26 April 2011.

1.3 The founding affidavit in the CTR142 form is properly deposed to by Mr Peter Orde Goldhawk, a Director of the Applicant, duly authorised to do so on its behalf as per Board Resolution.

2. BACKGROUND

2.1 Applicant is a dormant investment holding company that holds shares in MultiChoice South Africa (Pty) Ltd. ("MCSA"), duly incorporated in terms of the company laws of South Africa, with registration number 2006/015293/07.

2.2 The company does not have employees, does not trade in shares, and does not conduct any trading activity.

2.3 On 16 February 2013 this Tribunal granted Applicant an exemption from appointing an SEC under case number 003-06-2012-8/1/4/2.

2.4 This exemption has now lapsed, hence the present application.

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3. ISSUES

3.1 Applicant's Public Interest Score ("PIS") as at the end of its 2018 financial year was above 500 (five hundred), since more than 500 (five hundred) individuals held and continue to hold beneficial interests in the company's securities.

3.2 Applicant submits that, due to the restrictive nature of its business, it is not reasonably necessary in the public interest for it to establish an SEC.

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4. APPLICABLE LAW

4.1 Section 72 of the Act stipulates:

"(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.

(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—

...

- (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)."

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

...

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

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

- (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."

4.4 The PIS is calculated in terms of Regulation 26(2) as follows—

...

- (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.

4.5 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.

4.6 In terms of Regulation 142(3), an application to this forum 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.

5. EVALUATION

5.1 The Applicant's activities are restricted to those listed in its Memorandum of Incorporation, which are to:

- 5.1.1 Enter into the Transaction Documents;
- 5.1.2 Exercise its rights and obligations under the Transaction Documents;
- 5.1.3 Carry on the main business of holding only HoldCo² Ordinary Shares, cash and such assets as are received or acquired by virtue of or in relation to the holding of HoldCo Ordinary Shares; and
- 5.1.4 Receive and distribute dividends and other distributions in terms of the Transaction Documents.

5.2 Section 72(5)(b) allows this Tribunal to grant an exemption where it is considered not necessarily in the public interest for a company to appoint an SEC, bearing in mind the nature and extent of the activities of the applicant company.

5.3 To determine whether to grant an exemption, this Tribunal has to consider, *inter alia*, applicable legislative provisions, particularly those dealing with the role played or functions performed by an SEC in companies. The areas of function of an SEC are stated in regulation 43(5).³

² The holding company of MCSA

³ See para. 4.3 above

6. FINDINGS

6.1 In my view the functions of an SEC, as stipulated in regulation 43(5), do not appear to be relevant to the Applicant's activities.

6.2 Therefore, on perusal of Applicant's Memorandum of Incorporation, an analysis of the applicable law, and considering Applicant's submissions, I find that it is not in the public interest to require Applicant to establish an SEC in terms of the Act.

7. ORDER

The application for an order for exemption from the requirement to appoint the SEC is granted in terms of S72(5)(b) of the Act.

ADV. ISHARA BODASING