



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT018MAY2017

Ex parte application:

KHI SOLAR ONE (RF) (PTY) LTD

APPLICANT

Presiding Member of the Tribunal : Prof PA Delport

Date of Decision : 26 June 2018

DECISION (Reasons and Order)

1. INTRODUCTION

- 1.1 The applicant applies to the Companies Tribunal ("Tribunal") in terms of regulation 142(3)(b)(ii) of the regulations under the Companies Act 71 of 2008 ("Companies Act") (GNR 351 of 26 April 2011) ("Companies Act regulations" / "regulation/s") for an order for the variation or the rescission of a decision by the Companies Tribunal.
- 1.2 The applicant seeks a variation or rescission of ruling CT018MAY2017 of 29 June 2017 by the Tribunal for refusal to grant an exemption from appointing a

Social and Ethics Committee (“SEC”) on the grounds as, *inter alia*, in section 72(5)(b) of the Act.

2. BACKGROUND

- 2.1 The applicant applied for the exemption from the obligation to appoint a SEC and the Tribunal refused the application in CT018MAY2017 of 29 June 2017.
- 2.2 The applicant initially submitted a statement that was not an affidavit with the application.
- 2.3 A duly sworn founding affidavit (“founding affidavit”) was submitted to the Tribunal on 21 May 2018.
- 2.4 The applicant pointed out certain administrative/referencing errors in said ruling, which were unfortunate, but fortunately none of which are material.
- 2.5 The applicant “seeks that the decision of the Tribunal be varied or alternatively rescinded so as to grant the Applicant an opportunity to supplement the main application or alternatively submit a new application instead of a refusal on merit.”
- 2.6 Para 7 of the founding affidavit avers:

“The basis for this application is that the Applicant believes that there could have been several technical errors throughout the consideration of the main application; in that:

 - (i) The Companies Tribunal appears to have misconstrued the basis of the Applicant's main application;
 - (ii) The Companies Tribunal may have overlooked several allegations that the applicant made in the founding affidavit; and
 - (iii) There is inconsistency in the findings of the Companies Tribunal in respect of the Applicant and its inter-related entities for the same subject matter.”

2.7 As to the “misconstrued basis” the applicant states the following in the founding affidavit (emphasis is mine):

“10. It is apparent from paragraph 1 of the above-mentioned decision that the Tribunal appears to have misconstrued the basis of the main application as reference is made to regulation 143(3)(b)(ii) which is clearly an error.

11. When looking at the regulations which are relevant to the appointment of a Social and Ethics Committee, specifically 43(3)(b)(ii), it refers to the period within which a listed public company is required to appoint a Social and Ethics Committee. This is not relevant to the main application or the Applicant. *Furthermore, it is regulation 43(2) that is relevant to the main application; as it refers to exemption of companies that are required to appoint a social and ethics committee.*

12. The Applicant, in paragraph 23 of the founding affidavit, clearly states that the main application was based on section 72(5)(b), *in terms of which it is provided that the Companies Tribunal may grant an exemption if it is satisfied that it is not necessary in the public interest to require a company to have a social and ethics committee, having regard to the nature and extent of the activities of said company.*” (emphasis is mine).

2.8 In respect of the “overlooked allegations” the applicants states in the founding affidavit (as far as it is relevant):

“15. The Power Purchase Agreement entered into between the Applicant and Eskom Holdings SOC Limited ("the Buyer") is not only a result of the abovementioned selection but it is reliant on the Applicant's compliance and complete observation of their obligations in the Implementation Agreement ["IA"]. This entails that a breach of the obligations in the Implementation Agreement can be a ground for cancellation of the Power Purchase Agreement.

16. The Implementation Agreement not only provides a list of Economic and Development Obligations but further creates specific thresholds to which the Applicant is required to adhere, failing which, penalties may be applied and it may lead to termination of the Power Purchase Agreement. A copy of the REIPP Fact Sheet is attached hereto and marked "B".

...

18. The sole reason for the existence of the Applicant is to provide the resources to the Buyer; therefore, since the provision of this service is strictly regulated in the agreement with the Department of Energy and the fact that the Applicant is a ring-fenced entity, the Applicant cannot carry out its functions if not in compliance with the abovementioned agreements, as can be seen on clause 2.2(4) of the Applicant's Memorandum of Incorporation...”

2.9 The IA with the Department of Energy (“DoE”) provides for economic development obligations that are:

- RSA Based Employees who are Citizens.
- RSA Based Employees who are Black People
- Skilled Employees who are Black People.
- RSA Based Employees who are Citizens from Local Communities.
- Value of Local Content Spend.
- Shareholding by Black People in the Seller
- Shareholding by Local Communities in the Seller.
- Shareholding by Black People the EPC Contractor.
- Shareholding by Black People the Operations Contractor.
- Black Top Management.
- BBBEE Procurement.
- QSE and EME Procurement.
- Women Owned Vendor Procurement.
- Enterprise Development Contributions.
- Adjusted Enterprise Development Contributions.
- Socio-Economic Development Contributions.
- Adjusted Socio-Economic Development Contributions

2.10 The shareholders of the applicant have, according to para 17 of the supporting affidavit for purposes of CT018MAY2017 “...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 the Act and the Regulations or alternatively already appointed their own social and ethics committee in terms of the Act and the Regulations.”

2.11 The applicant further contended that “due to the nature and extent of the applicant's activities, taking into account the corporate structure and binding contractual relationship of the applicant with the DoE it is not reasonably necessary in the public interest to require the applicant to have a social and ethics committee.”

- 2.12 It should be added that the application is brought by Tapiwa Dube, and it is stated in the founding affidavit that: “2. I am a Director of the Applicant and duly authorised to depose of this affidavit on behalf of the Applicant.” A single director, as such, does not have the authority to act for and on behalf of the company, also in respect of litigation: see, *inter alia*, *Kaimowitz v Delahunt and Others* 2017 (3) SA 201 (WCC).

3. APPLICABLE LAW

- 3.1 The applicable statutory provisions were set out in detail in CT018MAY2017 and will not repeated here.
- 3.2 The salient issue is that if a SEC needs to be appointed, as is the case with the applicant due to its Public Interest Score (“PIS”), the only discretion that the Tribunal has, is in terms of section 72(5)(a) and (b), ie:
- 3.2.1 does *another Act* require a formal mechanism that substantially performs the function that would otherwise be performed by the SEC, or,
- 3.2.2 if is it not reasonably necessary in the public interest to require the company to have a SEC, having regard to the nature and extent of the activities of the company.

4. EVALUATION

- 4.1 The “...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 the Act and the Regulations or alternatively already appointed their own social and ethics committee in terms of the Act and the Regulations.” (para 17 of the supporting affidavit for CT018MAY2017) does not clarify if this is done as required by *another Act* as prescribed in section 72(5)(a).

- 4.2 If such requirement is not by another Act, ie other than the Companies Act, an exemption cannot be granted on this ground.
- 4.3 The applicant did not state whether the requirement is by another Act and this exemption in terms of s 72(5)(a) was therefore not considered.
- 4.4 The fact that the SEC functions and objects are stated in the Memorandum of Incorporation of the company is of no consequence as far as section 72(5)(a) or (b) is concerned, as it is not a ground to grant an exemption.
- 4.5 I may need to remark, and it is not taken into account for purposes of this ruling, that mere inclusion of the functions and objects of the SEC in the Memorandum of Incorporation will not have the same effect and purpose as the SEC, which by its nature and composition is intended to have a particular independent oversight role with direct access also to the shareholders in general meeting.
- 4.6 The applicant contends that a “misconstrued basis” was that the Tribunal did not consider the facts on the basis of section 72(5)(b) *“in terms of which it is provided that the Companies Tribunal may grant an exemption if it is satisfied that it is not necessary in the public interest to require a company to have a social and ethics committee, having regard to the nature and extent of the activities of said company.”*
- 4.7 In CT018MAY2017 the following was stated”
- “4.4 The alternative ground, as I understand it, is that the applicant is of the opinion that it is not reasonably necessary in the public interest to require it to have a SEC, having regard to the nature and extent of the activities.
- 4.5 However the requirements in the IA clearly requires public interest actions and the applicant has an obligation to comply with those requirements.

- 4.6 As such, it cannot be contended that the applicant does not require a SEC as informed by the “public interest”, it is actually the opposite.”
- 4.8 If the obligations in the IA are considered, it is clear that public interest is paramount. To argue that the applicant does not need a SEC because it is contractually bound to promote the public interest and that the public interest objectives are part of its Memorandum of Incorporation, is not persuasive, the opposite is true, ie it requires a SEC to ensure that the public interest objectives in those documents are complied with.
- 4.9 The Tribunal therefore clearly applied section 72(5)(b) and not as erroneously indicated, regulation 43(3)(b)(ii). Said regulation was never applied, and that much is also clear in para 1 of CT018MAY2017.
- 4.10 The Tribunal has made a finding and it is *functus officio*: See *De Villiers and Another NNO v BOE Bank Ltd* 2004 (3) SA 459 (SCA); *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC); D E van Loggerenberg *Erasmus: Superior Court Practice* (2017) D1-570A. While regulation 142(3)(b)(ii) provides for a variation or rescission of a ruling, it does not define what those actions entail.
- 4.11 The High Court (Uniform Rules) therefore apply as provided for in regulation 154.
- 4.12 Rule 42 of the Uniform Rules provides as follows:
“(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
(c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.”

4.13 Only rule 42(1)(b) can possibly apply *in casu*. As indicated, although the reference was to regulation 142(3)(b)(ii) and not to section 72(5)(b), the provisions of the latter were applied and this patent reference error is rectified. It does not and did not, however result in an ambiguity, or a patent error or omission in the order/finding, as contemplated in said rule see *Erasmus: Superior Court Practice* (2017) D1-570A.

4.14 An order (or Tribunal ruling) can also be varied or rescinded under the common law, on the grounds of fraud, *justus error*, or, in exceptional circumstances, if new documents have been discovered: see *Erasmus: Superior Court Practice* (2017) D1-561 *et seq.* None of these grounds exist here.

5. FINDING and ORDER

The application for the variation or rescission of the finding as in CT018MAY2017 is refused.

SIGNATURE

Prof PA Delport

COMPANIES TRIBUNAL: MEMBER

DATE: 26 June 2018