



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT00396ADJ2020

Ex parte application:

Corfou Investments (Pty) Ltd

APPLICANT

Member of the Tribunal : Prof PA Delport

Date of Decision : 5 August 2020

DECISION

1. INTRODUCTION

The applicant applies to the Companies Tribunal in terms of section 72 of the Companies Act 71 of 2008 ("Act" / "Companies Act") and regulation 43 of the regulations in terms of the Companies Act (GNR 351 of 26 April 2011) ("Companies Act regulations" / "regulation/s") for an exemption from appointing a Social and Ethics Committee ("SEC").

2. BACKGROUND

- 2.1 The applicant is Corfou Investments (Pty) Ltd (1983/001621/07), a private company that is a family property investment company.
- 2.2 The application is brought by Norman Desmond Milton Kahn who is duly authorised to do it on behalf of the applicant in terms of a resolution of the directors dated 17 April 2020.
- 2.3 The applicant is, according to the supporting affidavit, a family run property investment business with no employees and the sole shareholder is also a director of the company.
- 2.4 The public interest score ("PIS") of the applicant for the years 2018 and 2019 is more than 500 due to the turnover (R69 454 327 (2019) and R67 616 080 (2018)) and third party liability (R580 493 576 (2019) and R463 627 566 (2018)) with the shareholder adding one point.

3. APPLICABLE LAW

- 3.1 The Companies Act provides as follows in 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.

(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.”

3.2 The regulations in terms of the Companies Act provide in reg 43(2) that an SEC must be appointed by, *inter alia*, a company as defined in reg 43(1)(c) with a PIS above 500 as calculated in accordance with reg 26(2) in any two of the previous five (financial) years.

3.3 The applicant is therefore required to appoint an SEC.

3.4 The requirements in respect of the appointment of the SEC and the discretion of the Tribunal in this regard are twofold. In the first instance it must be determined if the company is required to appoint an SEC. If this is not the

case (eg because of reg 43(2)(a)), then the Tribunal has no function or discretion. If an SEC needs to be appointed, the only discretion that the Tribunal has in respect of the facts in this particular matter is in terms of section 72(5)(b), i.e. if the Tribunal is satisfied that it is not reasonably necessary in the public interest to require the company to have an SEC, having regard to the *nature* and *extent* of the activities of the company.

4. EVALUATION

- 4.1 The business of the applicant is a family run property investment business with no employees or clients and the sole shareholder is also a director of the company.
- 4.2 There is clearly no “public interest” here due to the nature of the business of the applicant, in effect a closely held company with no public participation or interest and with no employees.

5. FINDING

To require the appointment of an SEC in respect of the applicant under these circumstances is not logical and such an interpretation would lead to “. . . insensible or unbusinesslike results . . .”: *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

6. ORDER

The applicant is exempted from the requirement to appoint an SEC for a period of five years from the date of this decision in terms of section 72(6) of the Act.

SIGNATURE

P.A. Delport

COMPANIES TRIBUNAL: MEMBER

DATE: 5 August 2020