

IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

“The Tribunal”

Case Number: CT00268ADJ2020

Ex parte application:

Outlook Farms CC

Applicant

**APPLICATION FOR EXEMPTION FROM THE REQUIREMENT TO
APPOINT A SOCIAL AND ETHICS COMMITTEE**

DECISION

INTRODUCTION

- [1]** The Applicant is Outlook Farms CC (the company), with registration number 1991/022820/23, duly represented herein by its member, Eric Peckham, duly authorised by resolution of the members of the company.
- [2]** The Applicant seeks an exemption from the requirement to appoint a Social and Ethics Committee (SEC) in terms of sections 72(5) of the Companies Act 71 of 2008 (“The Companies Act”), read with regulation 43(2)(b) of the Regulations to the Companies Act.

BACKGROUND

[3] Applicant duly filed form CTR142 and an affidavit with the Tribunal on 30 January 2020. Applicant made the following submissions:

- that the company's main objective is the farming of bananas, macadamias, cane and related activities in the agricultural industry, and that the business is family owned and run and only operates in Southbroom, KwaZulu Natal.
- that farming operations are labour intensive due to the topography of land on which farming operations take place. This results in the farm not being able to mechanise in order to reduce its staff complement.
- the members meet twice per week where they discuss all company related matters which generally include items listed in S.53(5) of the Act. In addition, the farming operations have to comply with various labour and environmental requirements including the Department of Labour, Department of Water and Global Gap which regularly attend to inspections at the farm, to ensure compliance. All crop developments are also inspected regularly.
- that the company's public interest score calculated as at 30 June 2019 is 521 points broken down as follows:
 - (i) average number of employees = 422 points

(ii) third party liabilities=18 points

(iii) turnover=78 points

(iv) number of parties that are members of the corporation= 3 points

The members submit that in their opinion, the appointment of a social and ethics committee should not apply due to the nature and extent of the company's operations.

Applicable Law

[4] This is an application in terms of S.72 of the Companies Act, which provides that:

(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 the social and ethics committee required by this subsection; and

(c) The rules governing the composition and conduct of social and ethics committees.

- [5]** Subsection 5 provides the opportunity to apply for an exemption from having a social and ethics committee, for those companies that are required to have a social and ethics committee in terms of subsection (4), as follows:

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 exemption if it is satisfied that-

- (a) the company is required in terms of other legislation to have, and does have, some other 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] Subsection 6 provides for the duration of an exemption granted in terms of the section above, and stipulates that such exemption shall be valid for five years, or such shorter period as the Tribunal may determine at the time of granting the exemption.

[7] Regulation 43(1) gives effect to section 72(4) of the Companies Act and provides as follows:

This regulation applies to:

(a) every state owned company;

(b) every listed company; and

(c) any other company that has in any two of the previous five years, scored above 500 points in terms of regulation 26(2).

[8] Regulation 26(2) provides for the manner in which public interest score must be calculated and provides that it must be calculated as the sum of the following:

(a) a number of points equal to the average number of employees of the company during the financial year;

(b) One point for every R1 million (or portion thereof) in third party liability of the company, at the end of the financial year;

*(c) One point for every R1 million (or portion thereof)
in turnover during the financial year; and*

(d).....

[9] A company to which Regulation 43 applies, must appoint a social and ethics committee, unless it has been exempted by the Tribunal, in accordance with Section 72(5) and (6) of the Act.

[10] Regulation 43 (5) provides for the functions of a social and ethics committee, including; to monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice. These include the monitoring of; social and economic development, good corporate citizenship, the environment, health and public safety including the impact of the company's activities and of its products or services, consumer relationships and labour and employment.

EVALUATION

[11] The applicant is a close corporation as it has furnished a founding statement¹, therefore it is not a company as defined in section 1 of the Companies Act, which provides that a close corporation becomes a company "if it has subsequently been converted in terms of Schedule 2" of

¹ CK2- Amended Founding Statement

the Act. The Applicant has not provided any evidence showing that it has been converted from a close corporation to a company, therefore the requirement of a social and ethics committee does not apply to the applicant. Furthermore, the Tribunal does not have jurisdiction over close corporations.

FINDINGS

[12] The Tribunal does not have jurisdiction over this application.

ORDER:

The application is dismissed.

B. Zulu
Member: Companies Tribunal
01 February 2020