COMPANIES TRIBUNAL OF SOUTH AFRICA

Case Number: CT00277ADJ2020

In the *ex parte* application of:

SAMSUNG ELECTRONICS SOUTH AFRICA (PTY) LTD **Applicant**

(Registration Number: 1994/003872/07)

Presiding Member	:	Khashane La M. Manamela (Mr.)
Date of Decision	:	24 February 2020

Summary: Application for an exemption from the requirement in regulation 43(4) of the Companies Regulations, 2011 to appoint (for purposes of a social and ethics committee (SEC)) a director who is not involved in the day-to-day management of the company's business (non-executive director) – exemption not sought in terms of the provisions of section 72(5) of the Companies Act 71 of 2008, but generally – sections 6(2) and (3) of the Companies Act deemed applicable – non-inclusion of non-executive director in SEC serves no reasonable purpose other than to defeat or reduce the effect of the requirement in regulation 43(4).

DECISION (Reasons and an Order)

Khashane La M. Manamela

Introduction

[1] Samsung Electronics South Africa Proprietary Limited, the applicant in this matter, submits that it has a social and ethics committee (SEC) as contemplated by section 72 of the Companies Act 71 of 2008 (the Companies Act),[1] read with regulation 43 of the Companies Regulations, 2011 (the Companies Regulations).[2] The applicant seeks that this Tribunal grant an administrative order exempting it from the requirement of regulation 43(4) of the Companies Regulations to appoint in the applicant's social and ethics committee (SEC) a director who is not involved in the day-to-day management of the company's business (non-executive director). The applicant submits that it "is not currently feasible" for it to appoint a non-executive director,[3] as stipulated by regulation 43(4),[4] and therefore seeks - in terms of this application – an exemption from this requirement.

[2] The applicant preceded this application by forwarding an enquiry to the legal services section of this Tribunal in November 2019. The applicant enquired or sought an "opinion" of the Tribunal regarding whether it can apply for an exemption and how to go about this. The Tribunal's legal section promptly advised the applicant to launch an application for an exemption setting out "the reasons why the company need to be

[1] See par 12 for a reading of the material part of section 72 of the Companies Act (the Companies Act).
[2] See par 13 for a reading of the material part of regulation 43 of the Companies Regulations, 2011 (Companies Regulations).
[3] The reference "non-executive director" is not used in the Companies Act, but the *King III Report on Corporate Governance for South Africa, 2009* ("*King III*") (at principle 1.17) and King IV Report on Corporate Governance for South Africa 2016 (*King IV*), both issued by The Institute of Directors in Southern Africa in conjunction with the King Committee on Corporate Governance in South Africa, among others, at paragraph 70. See further Michele Havenga *The social and ethics committee in South African Company Law* 2015 *THRHR* 285, regulation 43(4) of the Companies Regulations.
[4] See par 21 of the affidavit in support of the application.

exempted from complying with required criteria of SEC composition" for a decision thereon by a member of this Tribunal.[5] Consequently, this application was launched.

[3] The applicant makes it clear that it does not currently seek an exemption envisaged by section 72(5) of the Companies Act from the requirement to appoint an SEC. This, in fact, is logical since the applicant considers itself to already have an SEC.

Applicant's case

[4] According to the applicant its public interest score was approximately 16 680 points for some undisclosed financial year and, therefore, the applicant is required to have an SEC.[6] Then, since around November 2016, the applicant constituted an "SEC",[7] which has since been meeting regularly and performing the applicable functions in terms of the Companies Act, it is further submitted.

[5] The applicant's "SEC" has a charter. The charter, among others, set out the purpose, roles and responsibilities of the applicant's SEC, apart from stating the mandate, composition and reporting responsibilities. A copy of the applicant's charter forms part of the papers before this Tribunal together with other documents, including the applicant's memorandum of incorporation.

[5] See electronic mail (email) from this Tribunal's Mr Douglas Mokaba to the applicant's Mr Mohamed Patel of 07 November 2019.
[6] Public interest score is calculated in terms of regulation 26(2) of the Companies Regulations.
[7] The words or reference social and ethics committee or its abbreviated form SEC, shall be stated between quotation marks to denote the committee currently constituted by the applicant, which admittedly does not meet the relevant prescripts of the Companies Regulations.

[6] In terms of paragraph 3 of the applicant's charter the composition of the applicant's "SEC" is as follows:

> "3.1 The Committee shall be appointed by the Board and shall comprise of a Chairman and at least 2 other members.
>
> 3.2 The following shall attend by invitation:
>
> 3.2.1 Such persons determined by the Committee."

[7] The applicant has set out the roles and responsibilities of the applicant's SEC in the charter. The material part of the charter reads as follows:

> "2. **Roles and Responsibilities**
>
> 2.1 The Committee will manage and monitor the Company's activities to achieve and maintain world-class standards in the company's social and ethics environment, with due regard to all relevant legislation, policies, legal requirements and codes of best practice.
>
> 2.2 The functions of the Committee are to monitor the Company's activities, specifically with regard to matters relating to human rights, equality, corruption, health, public safety, consumer and labour relations as well as empowerment. In addition, it will assess, measure and review the Company's performance, standing and goals in respect of:
>
> 2.2.1 social and economic development …;
>
> 2.2.2 good corporate citizenship …;
>
> 2.2.3 the environment, health and public safety, as well as the impact of the Company's activities and of its products and services;
>
> 2.2.4 consumer relationships (such as advertising and public relations and compliance with the consumer protection laws) and;
>
> 2.2.5 labour and employment …;
>
> 2.3 The Committee must draw matters within its mandate / remit to the Board's attention as the occasion requires;
>
> 2.4 The Committee must consider all relevant regulatory developments and seek to ensure compliance by the Company with the policies, guidelines

and standards applicable to the management of the social and ethics matters;

2.5 The Committee shall review:

2.5.1 the Annual Sustainability Development Report and recommend it to the Board for approval; and

2.5.2 the Culture Charter Initiatives…"

[8] The quotation above appears to be largely derived from regulation 43(5) of the Companies Regulations.

[9] The authority granted to the applicant's SEC is set out in paragraph 7 of its charter. Further, in terms of paragraph 8 of the charter, the applicant's SEC reports to the Board through its chairperson. I hasten to say that this does not seem to accord with regulation 43 which requires the SEC to report to the shareholders.[8] I will revert to this later, below.

[10] The essence of the applicant's case appears to be located in the following paragraphs of its founding affidavit:

"20 As is noted from paragraph 5 of the Charter, the Applicant's SEC is to be constituted by a chairman, together with at least two further members. Factually, the Applicant's SEC comprises all <u>two board members of the Applicant as well as eight prescribed officers, which include, amongst others, the Applicant's head of legal, head of human resources, head of marketing and head of sales.</u> Accordingly, the Applicant's SEC meets the requirement regarding the number of members, as set out in

[8] Regulation 43(5)(c) provides "(5) A social and ethics committee [is to] ... to report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate.

regulation 43(4). However, as aforesaid, the Applicant's Board currently does not comprise of any non-executive directors, and by natural extension, its SEC does not comprise of "*a director who is not involved in the day to-day management of the company's business*" in accordance with regulation 43(4).

21 It is not currently feasible for the Applicant to appoint a non-executive director, for the following reasons –

21.1 such non-executive director would be appointed solely for the purpose of constituting a member of the Applicant's SEC, as a non-executive director is not required by the Applicant for the proper functioning of its Board; and

21.2 the Applicant operates a business which is information-sensitive and its Board is therefore privy to various trade secrets, not least confidential information pertaining to the Applicant's products which are sold in a highly competitive market. Accordingly, the Applicant is of the justifiable belief that the appointment of a non-executive director, solely for the purposes of the composition of the SEC, would jeopardise the confidentiality of its business operations.

22 Notwithstanding the omission of a non-executive director from the composition of the Applicant's SEC, the Applicant is of the belief that the Charter provides for sufficient means to maintain the objectivity of its SEC. For instance, paragraph 9 requires that any members of the SEC who has or has been deemed to have a conflict of interest regarding a matter before the Applicant's SEC recuse him or herself. Further, the authority provisions of paragraph 7 together with the monitoring provisions of paragraph 10 of the Charter provide for sufficient oversight by the Applicant's SEC over the Applicant's key management and employees. Thus, the Applicant is of the belief that its lack of a non-executive director does not detract from the ability of its SEC to fully

and properly perform the functions imposed on it by the Act and the Regulations.

23 Accordingly and for the reasons set out above, the Applicant requests that it be exempted from the requirement of its SEC comprising at least one non-executive director."

[underlining added for emphasis]

[11] I discuss the submissions made in support of the applicant's case against applicable legal principles, next.

Applicant's case and applicable legal principles (an analysis)

General

[12] As indicated above, the applicant's case is that it has an "SEC" as contemplated by section 72(4) of the Companies Act and regulation 43. The former provision reads in the material part:

"(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"

[13] As already indicated, the applicant concedes that its "SEC", as currently constituted, does not fully comply with the provisions of regulation 43(4) as it does not have "a director who is not involved in the day-to-day management of the company's business". Regulation 43(4) reads in the material part:

> "(4) A company's social and ethics committee must 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."

[underlining added for emphasis]

[14] According to the applicant's submissions it is currently not feasible for the applicant to appoint a director who is not involved in the day-to-day management of the company's business or, colloquially, a non-executive director. The reason for this, in the main, relates to confidentiality considerations in the conduct of the business and affairs of the applicant and the need to protect the applicant's "various trade secrets".[9]

[15] Obviously, maintenance of confidentiality is critical for every business. Thus, the applicant's concern in this regard is natural. However, issues relating to "trade secrets" or confidentiality pertains to every business or company, including those bound - in terms of regulation 43 (read with section 72(4)) - to have an SEC. There is no evidence why the applicant or its business is unique in this regard so much so that its quest to maintain its

[9] See par 10 above.

"trade secrets" should qualify it for an exemption from the provision. But I will nevertheless proceed to other aspects of the discussion.

[16] Further, according to the applicant, its constitution; reporting structure and its "SEC" charter and "SEC" activities render the requirement to have a non-executive director superfluous, as they provide "sufficient means to maintain the objectivity of its SEC".[10] The applicant is confident that its "SEC" plays the same role and practically meets the objectives of an SEC, properly constituted in terms of Companies Regulations.

[17] The applicant submits that the circumstances of its case qualifies it for an exemption from the requirement that its SEC should have at least one non-executive director. Further, it is submitted that the exemption it seeks ought not to be derived from section 72(5) of the Companies Act. Ostensibly, this is significantly influenced by the fact that the applicant considers itself to already have an SEC as it could be gleaned from the following submissions:

> "12 For the avoidance of doubt, the Applicant was not advised to, and does not wish to at this stage, make an application in terms of section 72(5) of the Act, being an exemption from the requirement to appoint an SEC in its entirety. Accordingly, this application is not founded on the grounds for the granting of an exemption in terms of section 72(5). In this regard, the Applicant has constituted an SEC since during or about November 2016, which SEC meets regularly and performs the functions required of it in terms of the Act."

[10] See par 22 of the applicant's affidavit in support of the application.

Exemption in terms of which provision?

[18] But the applicant does not state or disclose where in the provisions of the Companies Act or the Companies Regulations the exemption is to be derived. At face value, this appears not compliant with the provisions of regulation 142(3)(a) of the Companies Regulations. This regulation requires that the application "indicate the basis of the application, stating the section of the [Companies Act] or [the Companies Regulations] in terms of which the Application is made".

[19] But, instead of disposing the application on the basis of this shortcoming, I will venture into determining whether a provision exists in terms of which a determination can be made regarding the relief sought by the applicant. Suffice it to state that I find solace for my approach in provisions of regulation 154(3) of the Companies Regulations, which allow this Tribunal to condone technical irregularities.[11]

[20] It has already been held in various decisions of this Tribunal that the jurisdiction of this Tribunal is primarily located within the four corners of the Companies Act, as given effect by the Companies Regulations.[12] Therefore, the nature and extent of the relief granted have to be in terms of the provisions of these statutory instruments.

[11] Regulation 154(3) of the Companies Regulations reads: "The Tribunal may condone any technical irregularities arising in any of its proceedings".

[12] See, among others, *The New Reclamation Group (Pty) Ltd v Commissioner of the Companies and Intellectual Property Commission*, CT004Oct2015, 10 October 2016; *Yususf Suleiman Kalla v Commissioner of the Companies and Intellectual Property Commission*, CT004Jul2016, 30 December 2016 and *Mpho Leaderman Ramafalo v Commissioner of the Companies and Intellectual Property Commission*, CT005Mar2018, 29 June 2018.

Section 6(2) of the Companies Act

[21] Criss-crossing the provisions of the Companies Act, I can only find section 6 of the Companies Act as another provision, its terms of which this Tribunal may grant exemptions. This provision reads in the material part:

> "(2) A person may apply to the Companies Tribunal for an administrative order exempting an agreement, transaction, arrangement, resolution or provision of a company's Memorandum of Incorporation or rules from any prohibition or requirement established by or in terms of an unalterable provision of this Act, other than a provision that falls within the jurisdiction of the [Takeover Regulation Panel].
> 3) The Companies Tribunal may make an administrative order contemplated in subsection (2) if it is satisfied that-
> (a) the agreement, transaction, arrangement, resolution or provision serves a reasonable purpose other than to defeat or reduce the effect of that prohibition or requirement; and
> (b) it is reasonable and justifiable to grant the exemption, having regard to the purposes of this Act and all relevant factors, including-
> (i) the purpose and policy served by the relevant prohibition or requirement; and
> (ii) the extent to which the agreement, transaction, arrangement, resolution or provision infringes or would infringe the relevant prohibition or requirement."

[22] A preliminary analysis of the statutory provisions, quoted above, makes it clear that this Tribunal - in terms of section 6(2) - may grant an exemption regarding agreements, transactions, arrangements, resolutions or provisions contained in Memorandums of Incorporation or rules of companies from any requirement or prohibition established by or in terms of an unalterable provision of the Companies Act (excluding provisions falling within the jurisdiction of the Takeover Regulation Panel), where this Tribunal is satisfied that the requirements of section 6(3) have been met.

[23] The immediate question that comes to mind is whether on the facts of this matter the provisions of section 6 are applicable? This determination becomes even more necessary since the application does not disclose the provision on which the application is made.[13]

Does the determination to be made involve an agreement, transaction, arrangement, resolution or provision of the applicant's MOI or rules?

[24] One of the jurisdictional facts of sections 6(2) and 6(3) is that the exemption is only available in respect of agreements, transactions, arrangements, resolutions or provisions of a company's Memorandum of Incorporation (MOI) or rules.[14] Therefore, the determination to be made in this regard is whether the exemption currently sought by the applicant involves an agreement, transaction, arrangement, resolution or a provision of the applicant's MOI or rules.

[25] The Companies Act defines "agreement" (in section 1) as including "a contract, or an arrangement or understanding between or among two or more parties that purports to create rights and obligations between or among those parties". There is no direct definition for the other concepts (i.e. "transaction", "arrangement" or resolution). But "resolution" is categorised as either "ordinary resolution"[15] or "special resolution".[16] And "arrangement" is included in the abovementioned definition of "agreement".

---

[13] See pars 18 and 19 above.
[14] Section 6(2).
[15] Section 1 defines "ordinary resolution" as "a resolution adopted with the support of more than 50% of the voting rights exercised on the resolution, or a higher percentage as contemplated in section 65(8)- (a) at a shareholders meeting; or (b) by holders of the company's securities acting other than at a meeting, as contemplated in section 60".
[16] According to section 1 "special resolution" means "(a) in the case of a company, a resolution adopted with the support of at 40 least 75% of the voting rights exercised on the resolution, or a different percentage

[26] I do not deem it necessary to adopt a thesis-like determination of the concepts. Suffice it to state here that their meanings ought to be understood in terms of the interpretation approach suggested by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality.*[17] Therefore, I would accept – without deciding this and only for current purposes - that a determination to be made in this regard involves transaction, arrangement, resolution or provision of the applicant's MOI or rules.

Does the requirement in regulation 43(4) constitutes a "prohibition or requirement established by or in terms of an unalterable provision" of the Companies Act?

[27] Next to determine is whether the requirement in regulation 43(4) to have a director not involved in the day-today management of the company's business within an SEC constitutes a "prohibition or requirement established by or in terms of an unalterable provision of [the Companies Act]".

[28] Section 1 of the Companies Act defines an "unalterable provision" as:

> "a provision of this Act that does not expressly contemplate that its effect on any particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by a company's Memorandum of Incorporation or rules"

---

as contemplated in section 65(10)- (i) at a shareholders meeting; or (ii) by holders of the company's securities acting other than at a meeting, as contemplated in section 60; or (b) in the case of any other juristic person, a decision by the owner or owners of that person, or by another authorised person, that requires the highest level of support in order to be adopted, in terms of the 50 relevant law under which that juristic person was incorporated".

[17] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at par 18.

and "this Act" (i.e. the Companies Act) is defined in section 1 as including "the Schedules and regulations".

[29] Without much ado I find that the requirement in regulation 43(4) constitutes a "requirement established by or in terms of an unalterable provision" of the Companies Act. Regulation 43(4) (forming part of the Companies Act) contains an unalterable provision in its requirement regarding the composition of the SEC. With these findings the determination to be made here would aptly fall within the provisions of section 6(2) and, therefore, within the jurisdiction of this Tribunal.

Section 6(3) of the Companies Act

[30] Next in consideration is section 6(3). This provision affords this Tribunal a wide discretion to grant an exemption,[18] where it is satisfied the application meets the two-legged conjunctive requirements[19] therein in that:

> "(a) the agreement, transaction, arrangement, resolution or provision serves a reasonable purpose other than to defeat or reduce the effect of that prohibition or requirement; and
> (b) it is reasonable and justifiable to grant the exemption, having regard to the purposes of this Act and all relevant factors, including-
> (i) the purpose and policy served by the relevant prohibition or requirement; and
> (ii) the extent to which the agreement, transaction, arrangement, resolution or provision infringes or would infringe the relevant prohibition or requirement."

[18] See Delport P *Henochsberg on the Companies Act 71 of 2008* (LexisNexis online version, last updated in September 2019) at p 41.
[19] *Ibid.*

[31] The learned author of *Henochsberg on the Companies Act 71 of 2008* aptly questions when a provision in the MOI in conflict with the Companies Act will "serve a reasonable purpose" other than to "defeat or reduce" the effect of a prohibition or requirement of the Companies Act, but surmises that the legislative intention may have been that the prohibition in the Companies Act, for example, and the effect of that prohibition, ought to be established.[20] I agree with these views.

[32] The approach to the determination in terms of section 6(3) was set out in the decision of this Tribunal in *La Lucia Sands Share Block Limited v Flexi Holiday Club & Others*.[21] Although, in *La Lucia Sands* this Tribunal dealt with a different form of an unalterable provision from the one in this matter, I consider the following statements from that decision to be relevant for current purposes:

> "It is common cause that, the 2006 Resolution or what the applicant intends it to achieve, does not satisfy the requirements of sections 50 and 51 of the CA 2008 applied together with regulation 32 of the Regulations, hence this application. It is also common cause that the impugned provisions of the aforesaid sections are unalterable.[22] What has to be determined is firstly, whether the 2006 Resolution serves a reasonable purpose other than to defeat or reduce the effect of the impugned statutory provisions, secondly, whether it is reasonable and justifiable to grant the exemption. The second or latter part of the determination or enquiry has to have regard to the purposes of the CA 2008 and all relevant factors, including the purpose and policy served by the relevant prohibition or

[20] See *Henochsberg on the Companies Act 71 of 2008* at p 42. See further the purposes of the Companies Act set out in section 7 thereof.
[21] *La Lucia Sands Share Block Limited v Flexi Holiday Club & Others*, CT001APR2014, 20 October 2014. This decision and others referred to above may be accessed at the Tribunal's website: www.companiestribunal.org.za.
[22] See par 28 above, for the definition of an "unalterable provision".

requirement, and the extent to which the 2006 Resolution infringes or would infringe the relevant prohibition or requirement.[23]

[33] In *La Lucia Sands*[24] there was reliance on the following commentary from *Henochsberg on Companies Act 71 of 2008*:

> "It should be noted that the requirements for the exercise of the discretion by the Companies Tribunal are conjunctive, ie if it finds that it will be reasonable and justifiable to grant an exemption having regard to (a) the purposes of the Act; (b) all relevant factors; (c) the purpose and policy served by the relevant prohibition or requirement; and (d) the extent to which the agreement, transaction, arrangement, resolution or provision infringes or would infringe the relevant prohibition or requirement, it must in addition also be satisfied that the agreement, transaction, arrangement, resolution or provision serves a reasonable purpose other than to defeat or reduce the *effect of* a prohibition or requirement of the Act.."[25]

[23] See *La Lucia Sands* at par 27. In an article dealing exemptions in terms of section 6(2) some learned commentators found fault with the approach adopted in the decision of *La Lucia Sands* regarding the conjunctive nature of the requirements (see Truter P and Jones A *Exemption from unalterable provisions an underutilised procedure*, De Rebus Feb 2015 44/ http://www.derebus.org.za/exemption-from-unalterable-provisions-an-underutilised-procedure/). I agree that once the Tribunal is dissatisfied that the first leg of the enquiry or requirement in section 3(a) is not met, then there is no need to proceed to second leg in section 3(b). But, in *La Lucia Sands* consideration of the second part of the leg was simply for completeness as could be gleaned from the following (at par 31 thereof)*:* "I have already hinted in the preceding paragraph that in my opinion the 2006 Resolution does not clear the hurdle, so to speak, presented by the first leg of section 6(3)(a) of the CA 2006 as I have already found that it does not serve a reasonable purpose other than to defeat or reduce the requirement of sections 50 and 51 of the CA 2008 and regulation 32 of the Regulations. As the enquiry is conjunctive, I also state that I do not consider it reasonable and justifiable to grant the exemption especially when considering the purposes of the CA 2008 as reflected in section 7, which include the need to encourage transparency and high standards of corporate governance." [quoted without accompanying footnote]

[24] See *La Lucia Sands* at par 30.

[25] See *Henochsberg on Companies Act 71 of 2008* on p 42.

[34] Nonetheless, the facts of this matter do not suggest that the determination to be made herein would give rise to the same considerations as in *La Lucia Sands*, but there is immense guidance from that decision.

Does the non-inclusion of a non-executive director serve a reasonable purpose other than to defeat or reduce the effect of the prohibition or requirement?

[35] I am not aware of an explanation by the legislature regarding the purpose of the requirement in regulation 43(4) that an SEC ought to comprise at least one director not involved in the day-to-day management of the company's business, and who has not been so involved within the previous three financial years. But there are some views in this regard from commentators.

[36] It is said that this requirement was rather onerous in the draft Companies Regulations[26] in terms of which a majority of the three members of the SEC was to comprise independent non-executive directors.[27] Further, it is said that regulation 43(4) was considered to be contrary to the *King III* recommendation that the board committee comprises a majority made of non-executive members, and that the majority of the non-

[26] See *Government Gazette* 32832 (Notice 1664 of 2009) of 22 December 2009.

[27] See regulations 50(6) and 50(8) of Companies Regulations, 2010 (published by the Minister of Trade and Industry in Government Gazette No 32832 on 22 December 2009 Notice 1664 of 2009) which read as follows in their material part, respectively: "(6) A company's social and ethics committee comprises not less than three directors of the company, a majority of whom must satisfy the requirements set out in subregulation (8). (7) … (8) Every member of a company's social and ethics advisory panel must be a person who is not- (a) disqualified in terms of the Act from being a director or prescribed officer of that company; (b) involved in the day to day management of the company's business nor has been so involved at any time during the previous three financial years; (c) a prescribed officer, or full-time executive employee, of the company or another related or inter-related company, or have been such an officer or employee at any time during the previous three financial years …" See further Kloppers HJ *Driving corporate social responsibility (CSR) through the Companies Act: An overview of the social and ethics committee* PER 2013 Vol 16 No 1, 166/536-199/536; Havenga M 2015 *THRHR* 285.

executive directors should further be independent.[28] Also, that (although this is not explicit in the wording of Companies Regulations or the Companies Act) the non-executive director ought to serve as the chairperson of the SEC.[29] These views by the commentators are authoritative and useful for the determination to be made herein.

[37] Back to the issues. To recap, the applicant's submissions in support of its case for the non-inclusion of a non-executive director in its "SEC" are premised on the following grounds. The applicant's "SEC" is to be constituted by two members of its board of directors and eight prescribed officers from a variety of its corporate sections or departments. Therefore, the quantitative element of the requirement in regulation 43(4) is met (i.e. the appointment of not less than 3 (three) directors prescribed officers), but the qualitative part or element (i.e. the inclusion of a non-executive director) is unmet.

[38] Further, the applicant's case is that at the moment it is not feasible for the applicant to appoint a non-executive director, due to the following: the non-executive director would only be required to serve in the applicant's "SEC", as her/his involvement would not be required elsewhere in the applicant's board, and the inclusion of the non-executive director may expose the applicant to perils regarding "various trade secrets" or "confidential information" pertaining to its products "sold in a highly competitive market".[30] Also, the applicant says despite the shortcoming in the composition of its

[28] See *King III* at principle 2.18, which states: "**The board should comprise a balance of power, with a majority of non-executive directors. The majority of non-executive directors should be independent**". See further Stoop HH *Towards greener companies – Sustainability and the Social and Ethics Committee* Stell LR 2013 3.
[29] The Companies Act, NO 71 of 2008 Alert at p1, 19 April 2012, DLA Cliffe Dekker Hofmeyer Social and Ethics.
[30] See par 10 above.

"SEC", its charter "provides for sufficient means to maintain the objectivity of its SEC" and the ability of its "SEC" "to fully and properly perform the functions imposed on it by the Companies Act and the Companies Regulations.

[39] Therefore, even though the applicant did not directly make submissions based on section 6 of the Companies Act, in my view, the submissions made in support of the applicant's deviations from regulation 43(4) are, with respect serendipitously, relevant for a case based on the former provision. One can thus – with a measure of self-assurance - say that in the applicant's judgment the non-inclusion of a non-executive director in its "SEC" serves a reasonable purpose other than to defeat or reduce the effect of the prohibition or requirement in regulation 43(4).

[40] Apart from the commentators referred to above, the inclusion of a non-executive directors in the SEC appears to have also occupied the hypothetical mind of the legislature in the draft Companies Regulations. The same appears to be applicable to the King codes of best practices. In the draft Companies Regulations, the requirement was that the majority in an SEC of at least three members ought to be independent non-executive directors. The *King* codes of best practices appear to express similar views. Therefore, the general view from legislation and best corporate practice points of view is that there ought to be an independent or an outsider in an SEC in the form of a non-executive director.

[41] In my view, the inclusion of a non-executive director in the SEC represents, among others, the legislature's attempt at the enhancement of transparency in the functioning of the SEC.[31] By logical extension the transparency in the SEC would provide a window, so to speak, into the material aspects of the business and affairs of a company in as far as they relate to the areas of function of the SEC.[32] This is one of the enshrined purposes of the Companies Act.[33]

[42] The transparency purpose or objective in section 7(b)(iii) of the Companies Act appears starkly at odds with the applicant's general claim for maintenance of confidentiality in the conduct of its business and affairs. The applicant views the inclusion of an outsider like a non-executive director in its "SEC" to threaten its "information-sensitive" business through the exposure of its various trade secrets or confidential information pertaining to its products sold in a highly competitive market.[34]

[43] I have already mentioned above that confidentiality is the quintessence of every business. Therefore, the applicant's concern in this regard is understandable. But the inclusion of a non-executive director in the SEC is aimed at piercing at the very core of the veil of secrecy or confidentiality inherent in companies, at least in the functional areas of an SEC. I consider it natural that all companies, or at least most companies, would prefer the absence of seemingly intrusive eyes of an outside not involved in the

[31] See Kloppers Driving *Corporate Social Responsibility* PER 2013 Vol 16 No 1.
[32] The function areas of the SEC are set out in regulation 43(5) of the Companies Regulations.
[33] According to section 7(b)(iii) the purposes of the Companies Act includes to "promote the development of the South African economy by …encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation…"
[34] See par 10 above.

company's day to day administration of the business of the company. Put differently, "trade secrets" or confidentiality concerns apply to every business or company, including companies bound in terms of regulation 43 (read with section 72(4)) to have an SEC. Therefore, this suggests that the applicant is not alone in this regard. For there is no evidence to suggest that the applicant or its business is unique in this regard, so much so, that its quest to maintain its "trade secrets" – without more - would qualify it for an exemption from the provision. Besides, directors owe fiduciary duties to their companies and a non-executive director employed by the applicant would be subject to the same fiduciary duties as the applicant's executive directors.[35] There is no room for differentiation in this regard. Therefore, I do not find merit in this ground. But, I will proceed to deal with the other grounds.

[44] The second leg of the applicant's case is that its constitution; reporting structure; the charter of its "SEC" and the activities of its "SEC" render the requirement to have a non-executive director superfluous. It is said that these instruments, traits and/or attributes provide sufficient means to ensure that the applicant's "SEC" remains objective; is alive to its role and essentially meets the objectives of a statutorily-compliant SEC.

[45] I have already stated that the requirement to include a non-executive director in the SEC is to ensure transparency and the involvement of an independent person in the SEC. Someone who is not involved in the day-to-day management of the business of the

[35] See section 76 of the Companies Act. The Companies Act does not distinguish between executive and non-executive directors. See generally sections 1 and 66 of the Companies Act.

company. Such person has to have been not involved in the business of the company within the previous three financial years. These denote detachment from the business of the company in the current management of the business of the applicant and of the immediate past. This ensures that there is at least one member, in the form of a director, who, for example, will not be otherwise involved in the issues that may engage the SEC during its tenure. Nothing in the structure of the applicant's constitution; reporting structure; the charter of its "SEC" and the activities of its "SEC" is capable of ensuring the transparency and independence inherent in the involvement of an outsider, in the person of the non-executive director, in the applicant's SEC. Currently, all persons involved in the applicant's "SEC" are involved in the day-to-day management of the business of the applicant. Therefore, the inclusion of a non-executive director is not superfluous, but necessary. Consequently, I also do not find any merit in the issues raised in this leg of the applicant's case.

[46] Another issue raised by the applicant appears to be from an economics or costs point of view. The applicant says a non-executive director would not be required elsewhere within the applicant, but only for purposes of the SEC. With respect, this submission is self-defeating or even illogical. A non-executive director is meant not to be involved in the day-to-day management of the business of the company. This is also the essence of the requirement of the regulation 43(4). Therefore, I do not find merit in this leg too. Then, this disposes of the matter.

Conclusion

[47] With the views or findings already made or expressed above, I find that the applicant's non-inclusion of at least one director not involved in the day-to-day management of the business of the applicant in its "SEC" serves no reasonable purpose other than to defeat or reduce the effect of the requirement in regulation 43(4). Therefore, this application would fail. And there is no need to proceed to the other part of section 6(3), namely section 6(3)(b).[36]

Order

[48] In the result,

a) the application is dismissed.

Khashane La M. Manamela (Mr.)

Member, Companies Tribunal

24 February 2020

[36] See par 21above for a reading of section 6(3)(b).