CORPORATE & COMMERCIAL
ALERT

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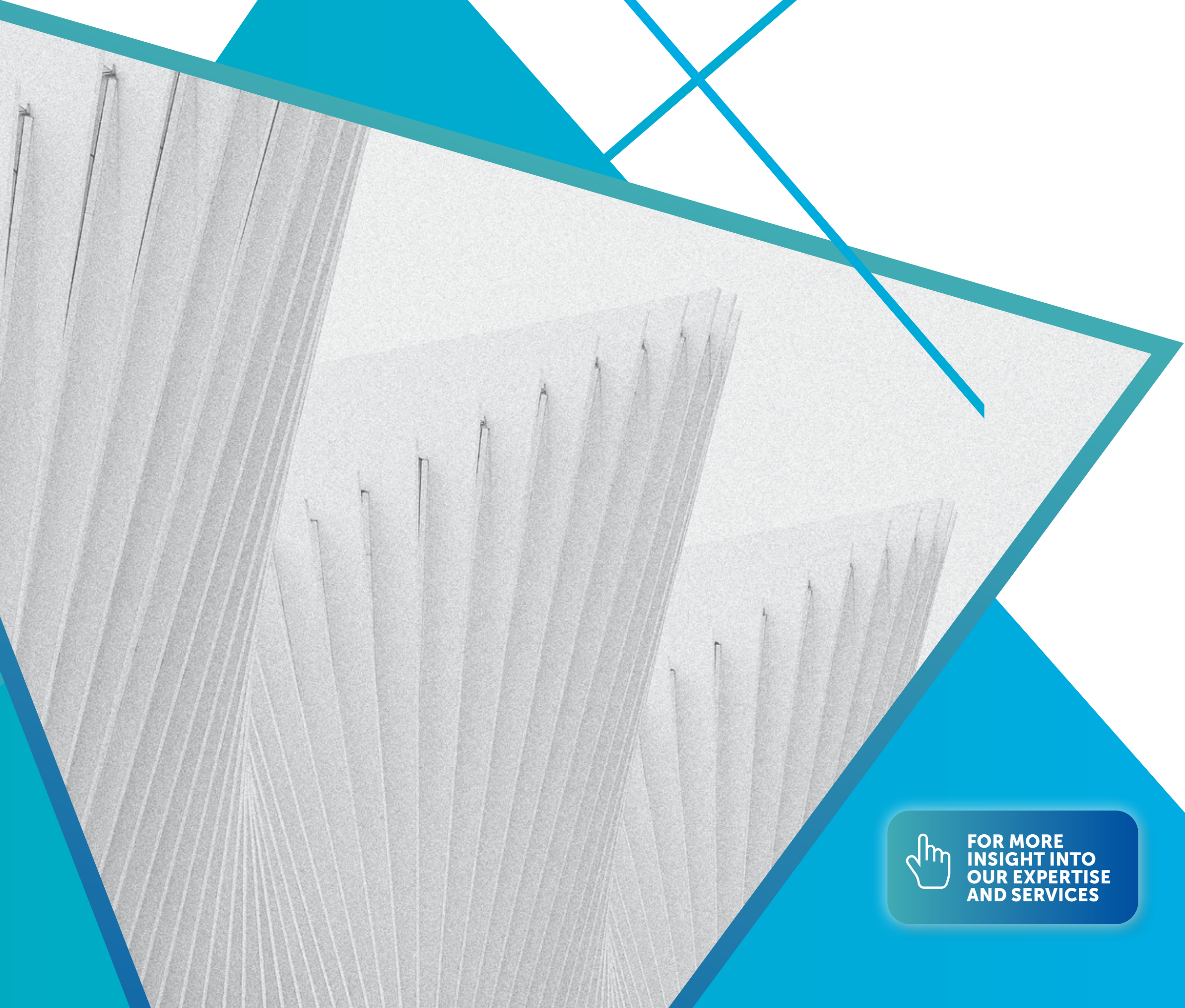
INCORPORATING
KIETI LAW LLP, KENYA



FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

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SOUTH AFRICA

Social and Ethics Committees: A reflection on the treatment of exemption applications in the Companies Tribunal

The Companies Tribunal Annual Report 2020 – 2021 indicates that there has been a gradual increase in applications for exemptions from establishing Social and Ethics Committees (SECs) in accordance with section 72(5) of the Companies Act 71 of 2008 (Act) before the Companies Tribunal (Tribunal). Considering the costs and resources associated with the operation of a SEC and that the functions of a SEC are in certain instances being carried out by other means, this is not surprising.

Regulation 43(1) of the Companies Regulations, 2011 (Regulations) lists companies that are required to appoint a SEC as every state-owned company; listed and unlisted public companies; and any other company that has in any two of the previous five years scored above 500 *"public interest score points"* (PIS). In terms of Regulation 26(2), a company's PIS is calculated as follows:

- 1 point for every employee (equal to the average number of employees during the financial year);
- 1 point for every R1 million of third-party liability at the end of the financial year (third-party liability means debts outstanding, creditors, instalment sales, etc. owing to outside parties);
- 1 point for every R1 million of turnover (or portion thereof) during the financial year; and
- 1 point for every individual with a beneficial interest in the company's securities (if a for-profit company) and in the case of a non-profit company, 1 point for every member of the company (or who is a member of an association that is a member of the company).

The PIS indicates the degree of public interest in a company. Henochsberg on the Companies Act 71 of 2008 stipulates that while the public interest element has no clear definition, Regulation 43(5) gives a practical perspective as to what it means. Public interest can therefore be defined as the contribution of the company:

- to social and economic development of the community in which it operates ((reg 43(5)(a)(i));
- the effect of the company as a corporate citizen in the particular community (reg 43(5)(a)(ii));
- the effect that the company's activities and products have on the environment, health and public safety (reg 43(5)(a)(iii));
- the actions of the company in respect of consumers, including advertising, public relations and consumer protection (reg 43(5)(a)(iv)); and
- the company's actions in respect of its employees and its employment practices, which obviously includes compliance with labour relations, but which should also encompass general employee *"well-being"* (reg 43 (5)(a)(v)).

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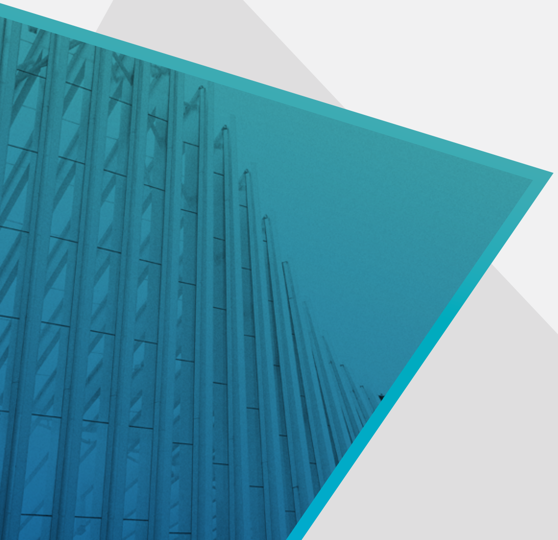

Accordingly, SECs are required to discharge the following functions, which include monitoring and reporting on matters within the committee's mandate which relate to, among other things:

- social and economic development;
- good corporate citizenship;
- the environment, health and public safety;
- consumer relationships; and
- labour and employment.

In terms of Regulation 43(5)(a) of the Regulations, a SEC should also monitor a company's activities having regard to any relevant legislation, other legal requirements or prevailing codes of best practice concerning the SEC. This article discusses the current guidelines followed by the Tribunal when deciding whether to exempt a company falling under the category contemplated in Regulation 43(1) from the establishment of a SEC with reference to the decision in *Ex parte: Purveyors South African Mine Services (Pty) Ltd (CT00949ADJ2022)* as well as section 72(5) of the Act. This article will also indicate how the approach followed by the Tribunal has evolved over the years and we will provide an opinion on this evolution.

CURRENT GUIDELINES

According to section 72(5) of the Act, certain conditions must be met before the Tribunal can grant an exemption. These conditions are:

- the company is required in terms of other legislation to have, and does have, formal mechanisms within its structures which substantially perform the functions of a SEC; or
- the company can prove that it is not necessarily in the public interest to require it to have a SEC considering the nature and extent of the structure and activities of the company.

In addition, in terms of Regulation 43(2)(a), companies are automatically exempt from establishing SECs if their holding companies have established SECs that will perform the functions of a SEC on behalf of the subsidiaries.

We will discuss each of the above circumstances below.

Formal mechanisms that perform the functions of a SEC

According to Ex parte: The Valspar (South Africa) Corporation (Pty) Ltd (CT00833ADJ2021), formal mechanisms are not limited to bodies or committees. Formal mechanisms can include policies such as anti-bribery and anti-corruption policies, code of conduct policies, equal employment opportunity policies, employee privacy policies, non-harassment policies, employment equity plans and workplace violence policies, amongst other policies a company may have in place.

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Most companies would be able to meet this condition.

Public interest

Furthermore, in *Ex parte President of the Conference of the Methodist Church of Southern Africa NO 1993 2 SA 697* (K) the following was said about public interest:

> *"The phrase 'the public interest' does not permit of a clear and comprehensive definition. As was observed by Herbstein J in Argus Printing and Publishing Co Ltd v Darby's Artware (Pty) Ltd and Others [1952] (2) SA 1 (C) one must adopt, in giving effect to the phrase, a 'broad common-sense view of the position as a whole' ... (and it must be considered whether) ... the public would be better served if the applicant were to be allowed to proceed with its scheme than by a continuation of the existing state of affairs."*

From the above, it is clear that the public would have sufficient interest in a company's activities where said activities would have a significant impact on the public. This can be determined by looking at two criteria: the quantitative criteria (the annual turnover and workforce size) and the qualitative criteria (the nature and extent of a company's activities). The quantitative criteria will usually be determined by a company's PIS.

In *Ex parte: Purveyors*, the Tribunal emphasised that it is only after the quantitative criteria have been met that the qualitative criteria can be evaluated. This evaluation will be at the discretion of the Tribunal. According to Henochsberg on the Companies Act 71 of 2008 at 284 *et seq*, the qualitative criteria must be evaluated with reference to Regulation 43(5). In practice, it will be done taking into consideration the public interest element as discussed above.

Once the Tribunal finds that the nature and extent of the company's activities are entrenched into any aspect of the public and/or a community, the Tribunal will likely find that the qualitative criteria has been met and that it would be in the public interest for the company to establish a SEC.

Subsidiaries of other companies that have a SEC

Regulation 43(2)(a) automatically exempts subsidiary companies from establishing SECs if their holding companies have established SECs that will perform the functions of a SEC on behalf of the subsidiaries.

In *Ex parte: Purveyors* case the Tribunal found that in order for the above exemption to be applicable to a subsidiary, the holding company must be a South African company as defined in section 1 of the Act. This is especially important to subsidiaries belonging to international holding companies. These subsidiary companies need to establish their own SEC unless an exemption could be granted on other grounds.

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EVOLUTION OF THE TREATMENT OF EXEMPTION CASES

Considering the gradual increase in exemption applications, there has been a shift in how the Tribunal treats these applications. The Tribunal has in the past indulged applicants who provided obscure documentation and information relating to either the qualitative and/or quantitative criteria which was required. An example of this is found in the case of *Ex parte Atlantis Mining (Sa) (Pty) Ltd (CT013May2014)* where an exemption was granted even though the applicant failed to provide any documentation relating to its PIS, mention the number of employees working for it, or specify the nature of its business.

There has since been a progressive shift from this stance, as is evident in *Ex parte Masimong Group Holdings (Pty) Ltd (CT00734ADJ2021)* where the Tribunal held that it was not enough for the applicant to merely inform the Tribunal of the nature of its business. Instead, it needed to describe the nature and extent of its business activities. The Tribunal also emphasised that even if an applicant has no employees, the public interest element must still be adequately satisfied in an exemption application.

Ex parte Purveyors is a critical case in this notable shift in the treatment of exemption applications. The applicant in this instance contended that it was not in the public interest for it to have its own SEC because of the nature and extent of its activities and in view of the minimal size of its employee body. It was also the applicant's contention that it was a subsidiary of a holding company based in China which already had an established SEC for its group of companies. The Tribunal held that the mere fact that the company had 19 employees was insufficient for determining that it was not in the public interest for the company to have a SEC. It further established that when a company's PIS is more than 500 (which would then require it to establish a SEC), focus should be drawn to what qualitative criteria should be considered to determine whether it is necessarily in the public interest to establish a SEC. The Tribunal held that the applicant complied with the quantitative criteria for the appointment of a SEC but did not give any details of the computation of the PIS in terms of Regulation 26(2), other than the number of employees. Without the information about other quantitative criteria it was impossible to evaluate the qualitative criteria *vis a vis* Regulation 43(5).

The *Ex parte Purveyors* case sheds light on the necessity of applicants applying for exemptions to provide as much information as possible, such as the turnover of the company,

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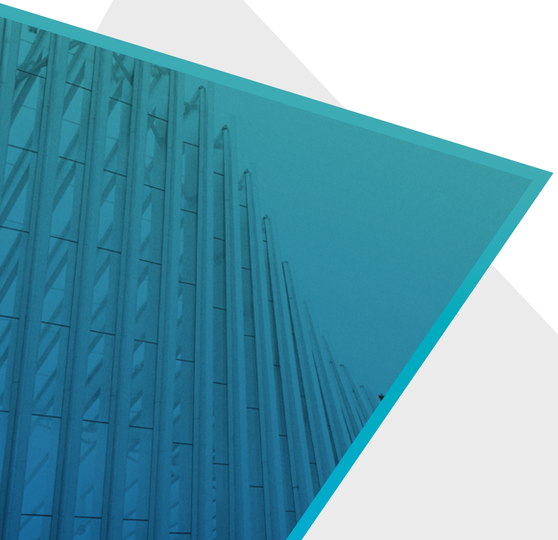

third-party liability of the applicant as well as details of individuals who directly or indirectly have a beneficial interest in issued securities within their application. It is our view that this case will specifically set the tone for exemption applications going forward.

It is our view that the Legislature has recognised the important role to be played by SECs in South Africa. Based on the data captured in the Social and Ethics Committee Trends and Survey Report 2021, published by The Institute of Directors South Africa, it has been found that company boards are increasingly taking the function of the SEC more seriously. Thus, matters like organisational ethics, broad-based Black economic empowerment, employment equity, fraud and corruption prevention, stakeholder relationships and employee relations have been progressively emphasised in fostering an ethical culture in an organisation. Resultantly, corporate scandals have been recorded to have dropped from 7% to 1%, which may indicate that companies are learning from their mistakes and are moving from a reactive stance to a more proactive stance. In line with this shift, the Tribunal will likely take a much firmer stance towards ensuring that exemptions are granted on a strict basis and only in circumstances where due thought has been given to evidencing compliance with the criteria for exemption, thereby creating certainty in the process.

What this means is that in order for companies to be exempt from establishing a SEC, they will have to thoroughly prove to the Tribunal that formal mechanisms within its structures substantially perform the functions of a SEC or that it is not necessarily in the public interest for it to have a SEC, considering the nature and extent of the structure and activities of the company. Providing the bare minimum of information, as was the case before, will no longer suffice and could result in a denied application. Companies should therefore take heed of the judgment arrived at in *Ex parte Purveyors*.

ROXANNA VALAYATHUM,
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Simple agreements for future equity: An African perspective

Historically, investments were typically structured as either equity investments, debt investments, or a mixture of both. The concept of a simple agreement of future equity (SAFE) is a fairly new investment option that is becoming increasingly common in the US and European start-up markets.

So what is a SAFE? In simple terms, a SAFE is a cash investment in exchange for an agreement that provides an investor with the right to acquire future equity in a company. The investor does not become a member of the company, nor does the investor acquire any voting rights or any other rights in the company as a shareholder. Further, the investor does not obtain the right to repayment of their cash investment, nor earn any interest on the cash investment.

The concept of a SAFE was introduced in 2013 by the Y Combinator in the US to help a young start-up company raise capital quickly and easily. The SAFE document has since been used as a 'template' by start-up companies in the US, Europe and Canada when raising seed-funding, with a few developments to the SAFE over the years.

The SAFE has not been a popular investment option in Africa. This is mainly due to the fact that the start-up market in Africa is still considered to be in its infancy stage. We have, however, recently learned of a few transactions where a SAFE has been used or considered as an investment option in Africa. It is therefore important for an entrepreneur or an investor to understand what a SAFE is and to analyse whether it could become a popular option in Africa.

HOW DOES A SAFE WORK?

A SAFE is used by investors who are looking to invest in start-ups in their seed financing rounds. Typically, these start-ups are fast-growing companies with innovative ideas that are quickly taken up in a market. These are usually seen in the e-commerce and fintech industries.

A SAFE provides the investor with the right to obtain equity in the company on the occurrence of a triggering event. This triggering event could either be a liquidity event, a merger, IPO or a future qualified equity investment. The future qualified equity investment is more typically seen in SAFEs and it provides the investor with the right to obtain the same type of equity that a future investor obtains.

The percentage of equity to be obtained by the investor, on the occurrence of a triggering event, is usually determined by a valuation cap. The valuation cap basically sets the maximum company value. For instance, an investor may choose to invest USD 5,000 with a valuation cap of USD 100,000 to obtain 5% equity in the company upon the triggering event taking place.

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Simple agreements for future equity: An African perspective

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Further, the conditions and rights provided in a SAFE may vary as these depend on the number of investors proposing to invest in the company as well as the level of investment each investor is willing to make. An investor may also negotiate to enter into a pro-rata side letter giving the investor the right to make additional investments in future seed investment rounds, thus increasing their capacity to acquire future equity.

BENEFITS AND DRAWBACKS

The main drawback of a SAFE is the question of the value of the company. The cash investment is made on the potential of the company and not on its actual valuation. This, therefore, leaves the investor open to losing their investment or not acquiring their investment worth. Further, if the company fails, the SAFE becomes worthless. In essence, the investor takes on all the risk while the company bears little to none.

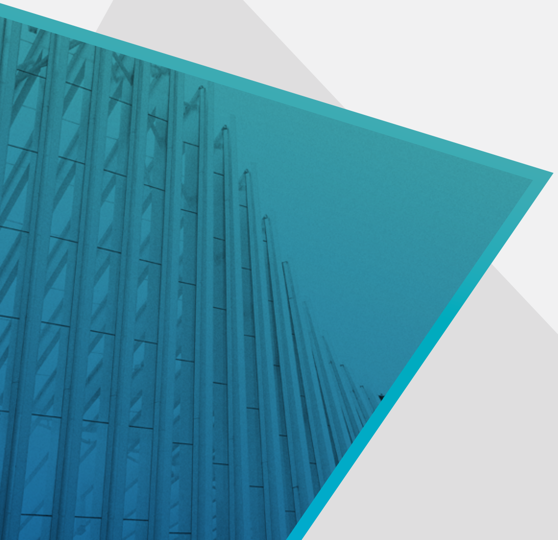
Further, companies carrying out seed fundraising in this manner typically have a plethora of investors pursuing to invest in the company. This may cause each investor to have less bargaining power. This could particularly be an issue for sophisticated investors as the company will generally dictate the terms of a SAFE.

However, the most significant advantage of a SAFE is the ease and speed of execution at a lower transaction fee. The SAFE also provides the investor with a unique opportunity to invest in a start-up in its early stages, potentially providing the investor with substantive returns.

AN AFRICAN PERSPECTIVE

As stated, SAFEs are typically used for fast-growing companies with the potential to grow into unicorn companies, which are start-ups that are valued at over USD 1 billion. The US was reported to have 670 unicorn companies as of April 2021. Unicorn companies are known to grow fast, causing investors to have to make quick decisions on whether or not to invest in them. To put this in perspective, the fastest company to become a unicorn in the US was Aptos in March 2022 – the company was founded in December 2021 by former employees of Meta Platforms, Inc. Taking this into consideration it is understandable why investors would decide to use the SAFE route and not the traditional route of investing, which takes a longer period of time.

Africa, on the other hand, has a very young but robust start-up industry. It is only recently that Africa has produced unicorn companies such as Jumia, Flutterwave, Interswitch Group and Fawry. These companies are in the fintech and e-commerce industries. As a result, both local and international investors are taking a keener interest in start-ups in Africa.



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Simple agreements for future equity: An African perspective

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In this respect, the venture capitalist and angel investor industry in Africa has seen some significant growth over recent years.

We are also increasingly seeing angel investors and venture capitalists look to make quick investments within a span of less than two months so as to not miss out on the opportunity to invest in rapidly growing industries and companies.

With the predicted growth of the start-up market in Africa and the increasing potential of start-ups to become unicorn companies in Africa, we foresee an increased use of SAFEs in Africa, especially in the fintech and e-commerce industries. It is therefore prudent for investors and entrepreneurs to familiarise themselves with the intricacies of a SAFE.

NJERI WAGACHA AND
RIZICHI KASHERO-ONDEGO

The LEGAL 500 EMEA

2022 RESULTS

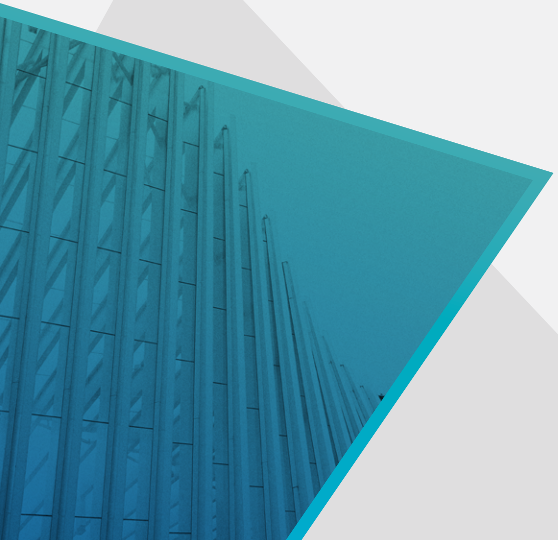
The Legal 500 EMEA 2022 recommended our **Corporate & Commercial practice** in **Tier 1** for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Willem Jacobs** and **David Pinnock** as a leading individuals for commercial, corporate/M&A.

The Legal 500 EMEA 2022 included **Ian Hayes** in the 'Hall of Fame' for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Johan Latsky, Peter Hesseling, Rachel Kelly, Vivien Chaplin, Roux van der Merwe, Roelof Bonnet, Brian Jennings** and **David Thompson** for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Justine Krige** as a next generation lawyer for corporate, commercial/M&A.



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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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