

**IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA  
(‘THE TRIBUNAL’)**

**Case No.: CT007MAR2018**

In the *Ex Parte* Application of:

**KAXU SOLAR ONE (RF) (PTY) LTD**  
(Registration number 2011/109767/07)

Applicant

*In re:*

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

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**DECISION**

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**INTRODUCTION**

[1] This is an application in terms of section 72(5)(b) of the Companies Act 71 of 2008 (the “**Act**”) for an exemption from the requirement to appoint a social and ethics committee.

[2] The Applicant based its application on the following:

[2.1.] It is not reasonably necessary for the public interest to require the Applicant to have a social and ethics committee having regard to:

[2.1.1] The nature of the Applicant;

[2.1.2] The nature of the activities of the Applicant; and

[2.1.3] That the Companies Tribunal exempted a similar entity, Xina Solar (RF) (Pty) Ltd, from the requirement to appoint a social and ethics committee.

[3] The Applicant previously applied to the Companies Tribunal under case number CT020MAY2017 seeking the same relief but relying on the ground that *“ABY South Africa, Newshelf and IDC 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 the Act and the Regulations or alternatively already appointed their own social and ethics committee in terms of the Act and the Regulations”*. The application was refused on 1 June 2017 on the basis that the Applicants allegation *“that its shareholders 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 is not sufficient and complete”* and *“an allegation without supporting documents or statements is insufficient and incomplete”*.

However, the Applicant was granted leave to re-apply to the Companies Tribunal after supplementing its papers.

- [4] In this application, the Applicant refers me to the Xina Solar One (RF) (Pty) Ltd ("**Xina**") application to the Companies Tribunal under case number CT020MAY2017, wherein Xina sought an order in terms of section 72(5)(a) and (b) of the Act for an exemption from the requirement to appoint a social and ethics committee. The application was granted on 30 March 2017 on the basis that "*the nature and extent of the Applicant's activities and the overarching contractual and regulated environment in which these activities are conducted*".

## THE APPLICANT

- [5] The Applicant is Kaxu Solar One (RF) (Pty) Ltd with its registered office situated at Office 103, Ancorley Building, 45 Scott Street, Upington, 8800.
- [6] The Applicant is a limited liability company duly registered in terms of the company laws of South Africa with registration number 2011/109767/07.
- [7] The Applicant is a ring-fenced company whose powers are limited in terms of section 15(2) of the Act and article 2.2(4) of its Memorandum of Incorporation ("**Mol**").

- [8] The Applicant serves as a special project vehicle with the sole purpose of undertaking the construction, completion, ownership and operation of a 100MW concentration solar power electricity generation facility located approximately 30 km north-east of the town of Pofadder in the Northern Cape Province (the “**Project**”).
- [9] The Applicant has been granted and currently holds an electricity generation license permitting it to operate, generate and sell energy from the Project.
- [10] The Applicant has entered into a Power Purchase Agreement (“**PPA**”) with Eskom Holdings SOC Limited (“**ESKOM**”) as the Buyer following the Applicant’s selection by the Department of Energy (“**DoE**”) pursuant to the Renewable Energy Independent Power Producer (“**REIPP**”) procurement Programme (“**IPP Programme**”).
- [11] The Applicant entered into an Implementation Agreement (“**IA**”) with the DoE in terms of which the performance of obligations in the PPA are regulated and monitored.

## **GROUNDINGS FOR THE APPLICATION**

- [12] The Applicant submits the following in support of its application:

- [12.1] The Applicant sole reason for existence and the operation of the Applicant is for the provision resources of ESKOM.
- [12.2] The functioning of the Applicant is strictly regulated in the Applicant's Mol which protects the due and proper performance of the PPA, which in turn is provided for in the IA.
- [12.3] The PPA is reliant on the Applicant's compliance and complete observation of its obligations in the IA.
- [12.4] The IA provides a list of economic and development obligations and further creates specific thresholds to which the Applicant is required to adhere, failing which, penalties may be applied and it may lead to the termination of the PPA.
- [12.5] The Applicant is monitored by the DoE and is required to provide detailed reports as to the compliance with the obligations and thresholds provided for in the IA.

[12.6] The Applicants Mol, the PPA and the IA safeguard these legislative mandates<sup>1</sup> in that the Applicant has to perform its obligations within compliance of the above agreements.

## **APPLICABLE LAW**

[13] This application for the exemption from the requirement to establish a social and ethics committee is made in terms of section 72(5)(b) of the Act.

*“(5) A company that falls within this 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 -*

*(b) it is not reasonably necessary for 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.”*

[14] With regard to this section, it is clear that (1) the Applicant must be required to appoint a Social and Ethics Committee, (2) the application of

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<sup>1</sup> DoE is an organ of State with specific legislative mandates which often resemble those of a social and ethics committee. The objective to fulfil these mandates will be predominant throughout their transactions, relations and functioning. The IA is not a mere contract but one where the DoE as organ of State will ensure the due and proper performance of its terms which are connected to the fulfillment of its legislative mandate.

exemption from appointing such a committee must be made to the Tribunal in the prescribed manner and form, and (3) the Tribunal may only grant an exemption if it is satisfied that it is not reasonably necessary for the public interest to require the Applicant to have a social and ethics committee having regard to the nature and extent of the activities of the company.

***Is the Applicant required to appoint a Social and Ethics Committee?***

[15] Section 72(4) of the Act read together with regulation 43(1) deals with the requirement of appointing a Social and Ethics Committee and reads:

*“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.”*

[16] The categories of companies are listed in regulation 43(1) of the Regulations:

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

[17] The calculation of the public interest score is in terms of regulation 26(2) of the Regulations, which must be calculated at the end of each financial year, 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 financial year end;*
- (c) One point for every R1 million (or portion thereof) in turnover during the financial year; and*
- (d) One point for every individual who, at the end of the financial year, is known by the company"*

[18] The Applicant accepts that it is required to appoint a social and ethics committee.

***Is the Applicant's application to the Tribunal in the prescribed manner and form?***

[19] The prescribed manner and form in making the application to the Companies Tribunal is set out in regulation 142 of the Companies Act (GNR 351 of 265 April 2011) (the "**Regulations**").



[20] The Applicant filed its CTR 142 form together with the supporting affidavit (and several annexures) with the Companies Tribunal on 22 February 2018, in compliance with regulation 142.

***Is it not reasonably necessary for the public interest to require the Applicant to have a social and ethics committee, having regard to the nature and extent of the activities of the company?***

[21] There are no criteria to determine whether or not it is reasonably necessary for the public interest to require the Applicant to have the social and ethics committee.

[22] In the Henochsberg Commentary on the Act, it is submitted that the proposed functions of the social and ethics committee as set out in regulation 43(5) are the factors that must be taken into account to determine whether it is reasonably necessary and in the public interest to have such a committee:

*“(a) To monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, with regard to matters relating to -*

*(i) Social and economic development, including the company's standing in terms of the goals and purposes of—*

- (aa) *the 10 principles set out in the United Nations Global Principles;*
  - (bb) *the OECD recommendations regarding corruption;*
  - (cc) *the Employment Equity Act; and*
  - (dd) *the Broad-Based Black Economic Empowerment Act;<sup>2</sup>*
- (ii) *good corporate citizenship, including the companies—*
  - (aa) *promotion of equality, prevention of unfair discrimination, and reduction of corruption;*
  - (bb) *contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and*
  - (cc) *record of sponsorship, donations and charitable giving;<sup>3</sup>*
- (iii) *the environment, health and public safety, including the impact of the company's activities and of its products or services;<sup>4</sup>*
- (iv) *consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws<sup>5</sup>; and*

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<sup>2</sup> The contribution of the company to social and economic development *of the community in which it operates* (public interest).

<sup>3</sup> The effect of the company as a corporate citizen *in the particular community* (public interest).

<sup>4</sup> The effect that the company's activities and products has on *environment, health and public safety* (public interest).

<sup>5</sup> The actions of the company *in respect of consumers*, including advertising, public relations and consumer protection (public interest).

- (v) *labour and employment, including—*
  - (aa) *the company's standing in terms of the International Labour Organization Protocol on decent work and working conditions; and*
  - (bb) *the company's employment relationships, and its contribution toward the educational development of its employees;<sup>6</sup>*
- (b) *to draw matters within its mandate to the attention of the Board as occasion requires; and*
- (c) *to report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate."*

[23] The Applicants activities and the extent thereof must be of such a nature that it does not require the functions of the social and ethics committee as listed above.

## Findings

[24] The Applicant is a ring-fenced special purpose vehicle with the sole purpose to generate solar power. The Applicant is required to be a licence holder and is as such regulated in terms of its agreements concluded with ESKOM and the DoE performs an oversight role by monitoring the

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<sup>6</sup> 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" (public interest).

Applicant compliance. I, therefore, find that it is not reasonably necessary for the public interest to require the Applicant to appoint a social and ethics committee having regard to the nature and extent of the activities of the company.

[25] I take cognizance of the decision by my fellow member, Mmoledi Malokane. In particular, that he found that Xina (similar to the Applicant) was not required to appoint a Social and Ethics Committee.

## **ORDER**

I make an order in the following terms:

- a) The Applicant is granted an exemption for a period of five (5) years from appointing a Social and Ethics Committee.
- b) This Order must be served on the Registrar of Close Corporations of the Companies and Intellectual Property Commission.
- c) Any other person with an interest that is the subject of this application may, within twenty (20) business days after receiving the Notice of this Order, apply to the Tribunal to set aside the Order as contemplated in section 72(7).

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**ADV LIZELLE HASKINS**

MEMBER OF THE COMPANIES TRIBUNAL

DATED: 4 May 2018