



**IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA**

**Case No: CT018JUL2017**

**In the ex parte matter of:**

**TERNIERGIA PROJECTS (PTY) LTD  
REGISTRATION NUMBER 2013/134621/07**

**APPLICANT**

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

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**DECISION**

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**Presiding Member of the Tribunal: Mohamed Alli Chicktay**

**Date of Decision: 21<sup>st</sup> August 2017**

## **INTRODUCTION**

- [1] This is an application for an exemption from the requirements to appoint a Social and Ethics Committee (SEC) in terms of sections 72(5)(a) and 72(6) of the Companies Act 71 of 2008 (“the Act”) read with Regulation 43(2)(b) of the Companies Regulations.

## **BACKGROUND**

- [2] The Applicant is the subsidiary of an Italian holding Company known as TerniEnergia SpA. The Applicant's primary business is the installation and maintenance of Sola power renewable energy technology in South Africa.
- [3] The Applicant only has two corporate clients, namely Electra Capital (RF) Proprietary Limited (Registration number 2011/101903/07) and Tobivox (RF) Proprietary Limited (Registration number: 2011/117111/07). It has a confidential operations and maintenance agreement with Electra Capital (Electra Capital O and M agreement) and an operations and maintenance agreement with Tobivox (Tobivox O and M agreement)

## **ISSUE IN DISPUTE**

### **Applicant's Arguments**

- [4] The Applicant argue that the two O and M agreements require the applicant to comply with provisions of “other legislation” that has some form of formal mechanism that substantially performs the function that would otherwise be performed by the SEC in terms of section 72(5) (a) of the Companies Act read together with regulation 43(5) of the Companies Regulations.

## **APPLICABLE LEGISLATION**

- [5] Section 72 (4) of the Companies Act provides for the Minister to prescribe, by way of Regulation, those companies, which shall be required to appoint a Social and Ethics Committee.
- [6] Section 72 (5) provides however that, notwithstanding a requirement to appoint a Social and Ethics Committee, a company 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 some 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;"

## **EVALUATION**

- [7] The Applicant is a company, which on its own version is required to appoint a Social and Ethics Committee. The applicant argued however that it should be exempted from doing so since its two O and M agreements put structures in place that would perform the functions prescribed by the Social and Ethics Committee.
- [8] Even though the applicant referred to provisions of the two O and M agreements in some detail the two agreements do not entail "legislation" as required by section 72(5) (a) of the Companies Act. One cannot bypass the establishment of a Social and Ethics Committee through confidential O and M agreements. While these agreements may have provisions that indirectly require some compliance with SEC agreements Social and Ethics Committees are essential in ensuring compliance with significant Social and Ethical issues and the two O and M agreement do not provide significant safeguards in this regard. The agreements are also confidential restricting oversight, which is the primary function of a Social and Ethics Committee

## **FINDINGS**

[9] I find that the applicant has to establish a Social and Ethics Committee as admitted and it is not exempted from doing so in terms of section 72(5)(a) of the Companies Act.

## **ORDER**

[10] The application for an order for the exemption from the requirement to appoint the SEC is therefore refused.

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**Dr. MOHAMED ALLI CHICKTAY**  
**COMPANIES TRIBUNAL: MEMBER**