



**IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA**

**("THE TRIBUNAL")**

**CASE NUMBER: CT019MAY2017**

**In the *ex parte* matter of:**

**XINA SOLAR ONE (RF) (PTY) LTD**

**APPLICANT**

**Registration Number 2012/165171/07**

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

**Coram: PJ Veldhuizen**

**Order delivered 30 MARCH 2017**

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**ORDER**

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**1. THE APPLICANT**

The Applicant is **XINA SOLAR ONE (RF) (PTY) LTD** ("the Applicant"), duly formed and incorporated in terms of the Company Laws of the

Republic of South Africa as a ring-fenced profit company and is in terms of Section 8(2)(b) and 11(3)(b) of the Companies Act No 71 of 2008 ("the Act") categorized as a ring-fenced private company.

## **2. THE APPLICATION**

This is an *ex parte* application brought 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.

## **3. THE REQUIREMENTS OF THE ACT**

3.1. Section 72 (4) provides for the Minister to prescribe, by way of Regulation, those companies, which shall be required to appoint a Social and Ethics Committee.

3.2. Section 72 (5) provides 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;" 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."

3.3. Regulation 43 (1) (c) of the Act requires "... any other company that has in any two of the previous five years, scored above 500 points in terms of Regulation 26 (2)".

3.4. Regulation 43 (2) (a) of the Act requires that a "company to which this regulation applies must appoint a social and ethics committee unless –

(a) it is a subsidiary of another company that has a social and ethics committee, and the social and ethics committee of that other company will perform the functions required by this regulation on behalf of that subsidiary company; or (b) it has been exempted by the Tribunal in accordance with section 72 (5) and (6)."

3.5. Regulation 26 (2) sets out the methodology of a company calculating its "public interest score".

#### **4. THE FACTS**

4.1. The Applicant confirms in the supporting affidavit filed by **PABLO LOPEZ-CAMPOS GAVINI** ("the Deponent") that the Applicant is a special purpose vehicle with the sole purpose of undertaking the construction, completion, ownership and operation of a 100MW concentrated solar power electricity generation facility ("the Project") located approximately 30km north-east of the town of Pofadder in the Northern Cape Province.

4.2. The Applicant has been granted and currently holds an electricity generation licence permitting it to operate, generate and sell energy from the Project.

4.3. The Applicant has entered into a Power Purchase Agreement ("the PPA") with Eskom Holdings SOC Limited as the Buyer ("the Buyer") following the Applicant's selection by the Department of Energy ("the DoE") pursuant to the Renewable Energy Independent Power Producer ("IPP") procurement programme ("IPP Programme").

4.4. The Applicant has further entered into an Implementation Agreement ("the IA") with the DoE. The DoE and the Applicant have agreed that the Applicant shall undertake the Project upon and subject to the terms and conditions of the IA and the PPA.

4.5. The Deponent confirms further that the Applicant is required in terms of Regulation 43 (1) (c) read with Regulation 26(2) of the Act to appoint a Social and Ethics Committee.

4.6. The Deponent confirms further that the IA binds the Applicant and that the Applicant's selection by the DoE pursuant to the IPP Programme was based, *inter alia*, on the basis of the Applicant's proposal in relation to Economic Development. The Deponent contends that the terms of the Applicant's commitments with regard to Economic Development constitute a contractually binding obligation between the Applicant and the DoE enforcing stringent reporting obligations to ensure compliance with the Applicant's Economic Development Obligations. The Deponent furthermore argues that the nature and extent of the Applicant's activities, being the sale of electricity to the Buyer is solely connected to and cannot be carried out if not in compliance with the IA, PPA and Economic Development Obligations.

4.7. In the light of the above the Applicant submits that due to the nature and extent of the Applicant's activities, taking into account the corporate structure and binding contractual relationship of the Applicant with the DoE it is not reasonably necessary in the public interest to require the Applicant to have a Social and Ethics Committee.

## **5. ANALYSIS OF THE FACTS**

5.1. The Applicant is a company, which on its own version is required to appoint a Social and Ethics Committee.

5.2. The two conditions for exemption<sup>1</sup> stated in the Act are:

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<sup>1</sup> The Social and Ethics Committee Handbook – Guidebook for South African Companies P9, compiled by Prof Deon Rossouw, The Ethics Institute of South Africa (2012)

5.2.1. if the company is already required by another law to have an existing structure in place that actually performs the functions prescribed by the Act to the Social and Ethics Committee; or

5.2.2. If the nature and extent of the company's activities are such that it does not have any significant impact on the public interest.

5.3. Having read the supporting affidavit of the Deponent, I am satisfied that the Applicant has made out a proper case that it is not reasonably necessary in the public interest to require the Applicant to appoint a Social and Ethics Committee. This Decision is arrived at after having regard to *inter alia* the nature and extent of the Applicant's activities and the overarching contractual and regulated environment in which these activities are conducted.

## **6. ORDER**

In the circumstances I make the following Order:

6.1 The Applicant is exempted for a period of three (3) years from appointing a Social and Ethics Committee; and

6.2 A copy of this Order must be served on the Applicant and the Commissioner of the Companies and Intellectual Property Commission (CIPC).



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**PJ VELDHUIZEN**  
**MEMBER OF THE COMPANIES TRIBUNAL**  
**CAPE TOWN**