



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT018May2017

Ex parte application:

KHI SOLAR ONE (RF) (PTY) LTD

APPLICANT

Presiding Member of the Tribunal : Prof PA Delpont

Date of Decision : 29 June 2017

DECISION (Reasons and Order)

1. INTRODUCTION

The applicant applies to the Companies Tribunal in terms of sections 72 (5) and 72 (6) of the Companies Act 71 of 2008 (“Act” / “Companies Act”) and regulation 143 (3) (b) (ii) of the regulations in terms of the Companies Act (GNR 351 of 26 April 2011) (“Companies Act regulations” / “regulation/s”) for an exemption from appointing a Social and Ethics Committee (“SEC”).

2. BACKGROUND

- 2.1 The applicant is a private company that is a special project vehicle for purpose of construction, completion, ownership and operation of a concentrated solar power electricity generation facility in the Northern Cape Province.
- 2.2 The application is brought by Pablo-Lopez Campos Gavini who is duly authorised to do it on behalf of the applicant in terms of a majority round robin resolution of the directors dated 20 March 2017.
- 2.3 The applicant concluded an Implementation Agreement (“IA”) with the Department of Energy (“DoE”).
- 2.4 The IA provides for economic development obligations that are:
- RSA Based Employees who are Citizens.
 - RSA Based Employees who are Black People
 - Skilled Employees who are Black People.
 - RSA Based Employees who are Citizens from Local Communities.
 - Value of Local Content Spend.
 - Shareholding by Black People in the Seller
 - Shareholding by Local Communities in the Seller.
 - Shareholding by Black People the EPC Contractor.
 - Shareholding by Black People the Operations Contractor.
 - Black Top Management.
 - BBBEE Procurement.
 - QSE and EME Procurement.
 - Women Owned Vendor Procurement.
 - Enterprise Development Contributions.
 - Adjusted Enterprise Development Contributions.
 - Socio-Economic Development Contributions.
 - Adjusted Socio-Economic Development Contributions

- 2.5 The shareholders of the applicant are Newshelf, Son Reviere and IDC and these shareholders have, according to para 17 of the supporting affidavit, "...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."
- 2.6 The applicant contends 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."

3. APPLICABLE LAW

- 3.1 The Companies Act 71 of 2008 provides as follows in section 72:

"(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.

(5) A company that falls within a 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—

(a) the company is required in terms of 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 in terms of this section and the regulations; 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.

(6) An exemption granted in terms of subsection (5) is valid for five years, or such shorter period as the Tribunal may determine at the time of granting the exemption, unless set aside by the Tribunal in terms of subsection (7).

(7) The Commission, on its own initiative or on request by a shareholder, or a person who was granted standing by the Tribunal at the hearing of the exemption application, may apply to the Tribunal to set aside an exemption only on the grounds that the basis on which the exemption was granted no longer applies.”

3.2 The regulations in terms of the Companies Act provide in reg 43(2) that a SEC must be appointed by, inter alia, a company with a Public Interest Score above 500 in any two of the previous five (financial) years.

3.3 The applicant states (para 12 of the supporting affidavit), that it is required to appoint a SEC.

3.4 A company that falls outside the categories above, or one that falls within those categories but which is a subsidiary of another company (as defined in section 3 of the Companies Act) and the holding company has a SEC that will perform the functions of the SEC for the (subsidiary) company, a SEC need not be appointed (reg 43 (2) (a)).

3.5 The requirements in respect of the appointment of the SEC and the discretion of the Tribunal in this regard are therefore twofold. In the first instance it must be determined if the company is required to appoint a SEC. If this is not the

case (eg because of reg 43 (2) (a)), then the Tribunal has no function or discretion. If a SEC needs to be appointed, the only discretion that the Tribunal has, is in terms of section 72 (5), ie

3.5.1 does *another Act* require a formal mechanism that substantially performs the function that would otherwise be performed by the SEC, or,

3.5.2 if is it not reasonably necessary in the public interest to require the company to have a SEC, having regard to the nature and extent of the activities of the company.

4. EVALUATION

4.1 The "...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." (para 17 of the supporting affidavit) does not clarify if this is done as required by *another Act*.

4.2 If such requirement is not by another Act, ie other than the Companies Act, an exemption cannot be granted on this ground.

4.3 The applicant does not state whether the requirement is by another Act.

4.4 The alternative ground, as I understand it, is that the applicant is of the opinion that it is not reasonably necessary in the public interest to require it to have a SEC, having regard to the nature and extent of the activities.

4.5 However the requirements in the IA clearly requires public interest actions and the applicant has an obligation to comply with those requirements.

4.6 As such, it cannot be contended that the applicant does not require a SEC as informed by the “public interest”, it is actually the opposite.

5. FINDING

Neither of the grounds advanced by the applicant supports an application for the exemption of the appointment of a SEC.

6. ORDER

The application for the exemption of the appointment of a SEC is refused.

SIGNATURE

COMPANIES TRIBUNAL: MEMBER

DATE: 29 June 2017