



**COMPANIES TRIBUNAL  
REPUBLIC OF SOUTH AFRICA**

**CASE NO: CT005JUN2019**

In the *ex parte* application

**LEKELA POWER INTERMEDIATE HOLDINGS PROPRIETARY LIMITED**

(Registration number: 2014/088719/07)

**Applicant**

in respect of:

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

Decision handed down on 20 June 2019

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**DECISION**

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**INTRODUCTION**

[1] The Applicant applies to the Companies Tribunal<sup>1</sup> (“the Tribunal”) for an exemption from the requirement to appoint a social and ethics committee in terms of section 72(5)(b) of the Companies Act No. 71 of 2008 (“the Act”), which section

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<sup>1</sup> Juristic person established in terms of section 193 of the Act to provide speedy resolution of company disputes. The Tribunal has jurisdiction throughout the Republic of South Africa.

empowers this Tribunal to grant an exemption to a qualifying company based on the reasonable dictates of the public interest determined from the nature and extent of the activities of the particular company.

## **BACKGROUND**

[2] The Applicant is LEKELA POWER INTERMEDIATE HOLDINGS PROPRIETARY LIMITED a private company with limited liability duly incorporated in terms of the Act, with registration number: 2014/08871/07.

[3] The Applicant seeks the following relief:

***“Order in terms of Section 72(5) of the Companies Act 71 of 2008 for an exception from the requirement to appoint a Social and Ethics Committee”***

[4] In this application, the Applicant applies to the Tribunal for an exemption to appoint a social and ethics committee. The Applicant submits that it is not reasonably necessary in the public interest to have a social and ethics committee, having regard to the nature and extend of the Applicant’s activities. In support of this application the Applicant based its application on the following grounds that:

[4.1] the Applicant is a subsidiary of Lekela Power B.V with registration number 60937173.<sup>2</sup>

[4.2] the Applicant has no employees.<sup>3</sup>

[4.3] the Applicant was registered as a special purpose vehicle solely to hold the investment through Lekela Power Round 3 Holdings

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<sup>2</sup> Paragraph 8 of the supporting affidavit reads as follows: *“I confirm that Lekela Power B.V. (registration number: 60937173) is the sole shareholder of 100% (one hundred percent) of the issued ordinary shares by the Applicant.”*

<sup>3</sup> Paragraph 10 of the supporting affidavit reads as follows: *“I confirm that the Applicant has no employees and that all services are contracted in from other service providers.”*

(RF) (Pty) Ltd (“Lekela Power”), a subsidiary of the Applicant, and to finance Noupoot Wind Farm (RF) (Pty) Ltd, Loeriesfontein 2 Wind farm (RF) (Pty) Ltd and Khobab Wind Farm (RF) (Pty) Ltd (“*subsidiary companies*”), subsidiaries of Lekela Power; and to finance the *subsidiary companies* through its own funds or with recourse to institutional lenders.<sup>4</sup>

[4.4] the Applicant’s business activities are not reasonable in the interest of the greater public.<sup>5</sup>

## APPLICABLE LAW

### Section 72(5)(b) of the Act: Board Committees

[5] Section 72(5)(b) reads as follows:

“ *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) *...; or*

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<sup>4</sup> Paragraph 15 of the supporting affidavit reads as follows: “*I confirm that the Applicant was incorporated and registered as a special purpose vehicle solely to hold the investment in the Projected Companies (via Lekela Power Round 3 Holdings (RF) (Pty) Ltd and to finance the same through its own funds or with recourse to institutional lenders. For this reason, due to the restricted nature of the business activities, the Applicant has limited interaction with institutional lenders.*”

<sup>5</sup> Paragraph 17 of the supporting affidavit reads as follows: “*I confirm that the Applicant’s business activities are therefore not reasonable in the interest of the greater public for the Applicant to appoint a SEC.*”

- (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.”

**[Note my underling and emphasis]**

### **Regulation 43 of the Act: Board Committees**

[6] Regulation 43 reads as follows:

“ (1) *This regulation applies to*

- (a) *every state-owned company;*
- (b) *every listed public company; and*
- (c) *any other company that has in any two of the previous five years, scored above 500 points in terms of regulation 26(2).*

(2) *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) *A board of a company that is required to have a social and ethics committee, and that -*

- (a) *exists on the effective date, must appoint the first members of the committee within 12 months after*
  - (i) *the effective date; or*

- (ii) *the determination by the Tribunal of the company's application, if any, if the Tribunal has not granted the company an exemption;*
- (b) *is incorporated on or after the effective date, must constitute a social and ethics committee and appoint its first members within one year after*
  - (i) *its date of incorporation, in the case of a state-owned company;*
  - (ii) *the date it first became a listed public company, in such a case; or*
  - (iii) *the date it first met the criteria set out in sub-regulation (1)(c), in any other case.*

**[Note my underling and emphasis]**

(4) ....

(5) *A social and ethics committee has the following functions:*

- (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 Compact Principles; and*
    - (bb) *the OECD recommendations regarding corruption;*
    - (cc) *the Employment Equity Act; and*
    - (dd) *the Broad-Based Black Economic Empowerment Act;*

- (ii) good corporate citizenship, including the company's—
  - (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;**
- (iii) the environment, health and public safety, including the impact of the company's activities and of its products or services;*
- (iv) consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws; and*
- (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;**
- (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.”*

## **EVALUATION**

- [7] In its papers the Applicant erred to mention the Public Interest Score (“PIS”) for the year ending 31 December 2017 and 31 December 2018.
- [8] The Deponent to the Applicant's papers Michael Gary Parsons avers that he is authorised to act on behalf of the Applicant in terms of a signed resolution of directors dated 27 May 2019, marked as annexure ‘A’, however the attached resolution marked annexure “A” is dated 06 June 2019. The resolution is signed by the three (3) directors of the Applicant. Messrs Michael Gary Parsons, Christopher John Ford and Christos Antonopoulos appears to be the appointed and/or registered directors of the Applicant according to the records maintained by the Companies and Intellectual Property Commission<sup>6</sup>.
- [9] The application is based on section 72(5) of the Act read together with Regulation 43 of the Companies Regulations, 2001.
- [10] The main question to be asked, in dealing with what the Tribunal is required to decide on, is whether the reasons submitted by the Applicant, justify an order in terms of Section 72(5) of the Act.

## **FINDING**

- [11] The relief sought by the Applicant is for an order for exemption to appoint a social and ethics committee.
- [12] Regulation 43(2)(a) provides that a company to which this regulation applied must appoint a social and ethics committee unless it is a subsidiary of another company that has a social and ethics committee, and the social and ethics committee of that company will perform the functions required by this regulation

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<sup>6</sup> Juristic person established in terms of section 185 of the Act to, among other functions, establish and maintain a companies register and any other register contemplated in the Act, or any other legislation that assigns a registry function to the Commission.

on behalf of that subsidiary company.

[13] Further, Regulation 43(2) (b) provides that a company to which this regulation applies must appoint a social and ethics committee unless it has been exempted by the Tribunal in accordance with section 72(5) and (6) of the Act.

[14] After considering all the facts, I conclude that the Applicant has made a case in terms of Regulation 43(2)(b) of the Companies Regulations, 2011 read together with section 72(5)(b) of the Act that it is not reasonably necessary in 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 Applicant.

[15] Therefore, based on the aforesaid, I grant the exception.

## **ORDER**

In the result the following order is made:

- a) The application for an exemption from the requirement to appoint a Social and Ethics Committee in terms of section 72(5)(b) read together with Regulation 43 of the Regulations is hereby granted;
- b) The Applicant is not required in terms of section 72(5) of the Act read together with Regulation 43(3) of the Regulations to establish a Social and Ethics Committee and to appoint members of such committee;
- c) The Applicant is exempted for a period of three (3) years from appointing a Social and Ethics Committee; and
- d) A copy of this Order must be served on the Applicant and the Commissioner of the Companies and Intellectual Property Commission.

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MMOLEDI MALOKANE

(MEMBER OF COMPANIES TRIBUNAL OF SOUTH AFRICA)

Date: 20 June 2019