



# CORPORATE & COMMERCIAL AND ENVIRONMENTAL LAW ALERT

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CLIFFE DEKKER HOFMEYR

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### Unlocking solar photovoltaic investment potential

On 25 July 2022, President Cyril Ramaphosa released a press statement regarding the electricity crisis in the country which focused, amongst other things, on the improvement of the performance of Eskom's existing fleet stations, acceleration of the procurement of new generation capacity, increase of private investment in generation capacity, the enablement of businesses and households to invest in rooftop solar, as well as the fundamental transformation of the electricity sector and positioning it for future sustainability.



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## Unlocking solar photovoltaic investment potential

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On 25 July 2022, President Cyril Ramaphosa released a press statement regarding the electricity crisis in the country which focused, amongst other things, on:

- the improvement of the performance of Eskom's existing fleet stations;
- acceleration of the procurement of new generation capacity;
- increase of private investment in generation capacity;
- enabling businesses and households to invest in rooftop solar; and
- the fundamental transformation of the electricity sector and positioning it for future sustainability.

The mission of the statement cannot be achieved unless certain permitting requirements are revised for clean energy generating projects. One such requirement is the need to obtain an environmental authorisation (EA) in terms of the National Environmental Management Act 107 of 1998 (NEMA) for the development or expansion of solar photovoltaic installations (solar facility or solar facilities). In terms of NEMA, a solar facility requires an EA if its development or expansion meets specific thresholds that trigger a listed activity in terms of the NEMA EIA Listing Notices. Depending on the threshold of the solar facility, the net effect of this is that any person who seeks to develop a solar facility is required to follow an environmental impact assessment (EIA) or a basic assessment process in order to obtain an EA for the development and operation of a solar facility. These impact assessment processes can be very cumbersome and subject to long timeframes, limiting the urgent addressing of the electricity crisis in the country.

### **PROPOSED EXEMPTION FROM THE NEED TO OBTAIN AN EA IN TERMS OF NEMA FOR SOLAR FACILITIES**

In response to the statement, the Department of Forestry, Fisheries, and Environment (DFFE) published a notice for comment in *Government Gazette Number 46871 of Government Notice 2466* dated 8 September 2022 (the notice) which seeks to remove the requirement to obtain an EA under certain conditions for the development or expansion of a solar facility. According to the notice, the requirement to obtain an EA will fall away, and only registration will be required by a person who seeks to develop or expand a solar facility that will be located in low or medium environmentally sensitive areas. The commenting period on the notice will come to an end on 8 October 2022 and therefore we eagerly await the final notice which will take effect.

## Unlocking solar photovoltaic investment potential

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### **POSITIVES PROPOSED BY THE NOTICE FOR SOLAR FACILITY INVESTMENTS**

Notably, not only does the notice exempt certain solar facilities from the need to obtain an EA, it seeks to shorten the timeframe process to obtain registration approval for the development and expansion of solar facilities. As per the notice, a solar facility could potentially be registered within 10 days of submission to the DFFE, which will be very positive for project development and planning. The registration approval for a solar facility will be valid for three years, and any registration approval that lapses will be subject to a fresh registration process. Change of ownership will not amount to re-registration, but notification of the change of ownership will be required as opposed to approval of an application for transfer of an EA from the holder thereof to a third party or entity such as a special purpose vehicle which is often utilised for solar facility projects.

In embarking on the registration process set out in the notice, the developer of the solar facility will be obliged to appoint a specialist who must undertake a site sensitivity verification and such a specialist will have to meet the requirements set out in regulation 13 of the NEMA Environmental Impact Assessment Regulations which inter alia requires the specialist to be independent, suitably qualified and objective when performing any tasks. In conducting the site verification, the specialist will be obliged to use specific environmental themes, which include terrestrial biodiversity, aquatic biodiversity, agriculture, cultural heritage, palaeontology, and civil aviation.

Importantly, the notice has no limitation on the generation capacity of the solar facilities. This is significant and allows for alignment with the Department of Mineral Resources and Energy's proposal to do away with the megawatt capacity threshold

of embedded generation electricity facilities which will only require registration, compared with having to apply for and obtain a generation licence. Further, all activities ancillary to the development of a solar facility will be exempted from the need to obtain an EA in terms of NEMA. By way of example, the construction of roads for solar facilities will be automatically immune from the need to obtain an EA in terms of NEMA if undertaken to develop such solar facilities.

### **POTENTIAL CHALLENGES OF THE NOTICE FOR SOLAR FACILITY**

While the notice brings some positives for solar investments and development, it is important to note that the development of a solar facility triggers permitting requirements not only in terms of NEMA but also in terms of other environmental legislation such as a water use licence or general authorisation in terms of the National Water Act 36

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of 1998, which is often required. Other regulatory permitting approvals synonymous with solar facilities include the need to potentially obtain approvals in terms of other relevant legislation such as the Mineral and Petroleum Resources Act 28 of 2002 (MPRDA) and municipal by-laws. Therefore, streamlining the permitting requirements set out in other environmental legislation will become a necessity in order for the notice to fully unlock solar investments. To achieve this, timelines for approvals in terms of the MPRDA and the municipal by-laws need to be tightened to give effect to the timelines set out in the notice.

As it stands in the notice, it is unclear as to whether a registration approval obtained in terms of the notice will potentially be appealable and the failure to carry out a robust public participation process is a common ground to legally challenge solar facilities. However, we caution that

any registration approval by the DFFE could potentially be appealable in terms of section 43 of NEMA. Save for landowner consent, the verification of the site sensitivity does not appear to follow any consultative process set out in the NEMA EIA Regulations and therefore parties might seek to challenge the registration approvals obtained in terms of the notice if the process is not contemplated to form part of the expedited process.

Without a doubt the removal of the need to obtain an EA for solar facilities that will be located in low and medium environmentally sensitive areas opens up the opportunity for further investment in solar facilities, increased transactions in this space and hopefully the expeditious development thereof. However, there are other regulatory hurdles and barriers that still need to be unlocked in order to optimally achieve solar facility development. Apart from the misaligned regulatory hurdles,

it will be very useful if the final notice can close any potential lacuna in order to avoid legal challenges that might delay solar investment projects.

In conclusion, the notice presents an opportunity to contribute to South Africa's just transition and will hopefully be a contributing factor to the development, production and distribution of green hydrogen in the not too distant future. It is also anticipated that the notice will present private companies with even more opportunity to participate in the decarbonisation of the economy, by facilitating sustainable and innovative solutions to produce greener products such as green steel, sustainably mined commodities, and green ammonia.

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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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