

In the matter of:

Uni-Africa Investment Holdings Ltd

Applicant

Coram: Khatija Tootla

Decision handed down on the 30 April 2014

DECISION

INTRODUCTION:

- [1] The Applicant brings an application in terms of Schedule 5 of the Companies Act 71 of 2008 for the extension of time (of three months from date of application) within which the Company's annual general meetings ("AGM") for the financial year end from 28 February 2005 to 28 February 2013 may be held

BACKGROUND / EVIDENCE:

- [2] The Applicant in this matter is Uni-Africa Investment Holdings Ltd, bearing registration number 1998/009208/06 who applies for the extension of time as set out above, and whose application is supported by an affidavit submitted by Reza Motani, a Director and CEO of the Applicant Company.

- [3] Mr. Motani has not been duly authorized by the Board of Directors (in terms of Section 66 of the Act) to make this application by virtue of a resolution of the Board of Directors. Furthermore the affidavit of Mr. Motani is defective in that it does not comply with the Justices of Peace Act nor does it have the relevant Commissioner of Oaths clause appended to the affidavit in accordance with the Law.
- [4] The Application on behalf of the Applicant has been submitted by Probity Business Services (Pty) Ltd on form CTR 142, represented by N.V. Toerien, but once again it has not been authorised by the Board of Directors to do so.
- [5] The Applicant has deemed it fit to bring an application under the new Companies Act of 2008 ("the Act") for an extension of time to hold all its AGMs from appropriate dates (and no mention is made of the specific dates when these AGMs ought to have been held) for the financial year end 2005 to financial year end 2013. The ground for the application was that due to administrative issues/challenges being experienced over the past nine years, and not having being overcome the Applicant company did not hold annual general meetings at the appropriate times
(which times remain unmentioned) as stipulated in the Companies Act 1973 ("1973 Act") and some AGMs in terms of the 2008 Act (which Act has not been mentioned at all in the Application).
- [6] It is also clear that since AGMs have not been held, the annual financial statements of the Applicant have not been presented to shareholders as required by section 286 of the 1973 Act, for those statements which were to be presented

prior to 1 May 2011; nor have financial statements been presented for the relevant AGMs which were to be held from 1 May 2011 or thereafter.

[7] Note that Section 61(8) (a) (ii) of the Act requires the presentation of audited financial statements for the immediately preceding financial year at the AGM. Thus it is abundantly clear that the lack of information and justification by the Applicant makes it rather difficult for the Tribunal to consider the matter at all. However, in order to assist the Applicant, the Tribunal clarifies the issues for the Applicant's edification as set out below.

[8] In the interim, the Companies Act of 2008 became effective on 1st May 2011 and the holding of annual general meetings is now governed by section 61 of the Act. Section 61(7) of the Act provides that "a public company must (my emphasis) convene an annual general meeting of its shareholders initially, no more than 18 months after the company's date of incorporation; and thereafter, once in every calendar year, but no more than 15 months after the date of the previous annual general meeting, or within an extended time (my emphasis) allowed by the Companies Tribunal, on good cause shown (my emphasis)".

[9] In terms of the Act, the Applicant is a public company and is therefore required to hold (must hold i.e. it is peremptory) an AGM within 15 months after the date of the previous AGM (which has not been held at all in this instance since 2005) or within an extended time allowed by the Companies Tribunal ("the Tribunal").

ISSUES:

[10] The Tribunal has to consider whether the Applicant should be granted an extension of time within which the Applicant's AGMs may be held in terms of the

Act (even though some of the time periods fall within the period when the 1973 Act applied; and under section 61(7)(b) and 61 (11)(b) of the Act for those AGMs which fall under the Act (2008).

The latter subsection is inapplicable in this matter, as it only applies in the instance of a company having no directors or when all the directors have become incapacitated.

- [11] The Tribunal also has to consider whether part of the order can be made retrospectively in terms of the 1973 Act (Refer to item 11 (1) Schedule 5 as elucidated below).

APPLICABLE LAW

- [12] Section 61(7) of the Act reads as follows:-

“A public company must (my emphasis) convene an annual general meeting of its shareholders-

- (a) initially, no more than 18 months after the company’s date of incorporation; and*
- (b) thereafter, once in every calendar year, but not more than 15 months after the date of the previous annual general meeting, or within an extended time allowed by the Companies Tribunal, on good cause shown.”*

- [13] Section 61(8) (a) (ii) of the Act reads as follows:-

“A meeting convened in terms of section (7) must, at a minimum, provide for the following business to be transacted-

- (c) presentation of-*

(i).....

(ii) *audited financial statements for the immediately preceding financial year, and”*

EVALUATION:

- [15] The Applicant lodged its application in terms of Schedule 5 but does not deem it fit to mention in terms of which specific section (of Schedule 5). No mention is made of any section or subsection and no explanation is provided to indicate to the Tribunal that the Application is in fact in terms of a particular section/s and hence the Application remains unjustified.
- [16] The Tribunal is, accordingly, asked to render a decision to grant an extension of time to dates that have already passed. However, it is a requirement in terms of section 61(7) (b) of the Act that the Applicant obtains the consent of the Tribunal where an AGM is held more than 15 months after the previous AGM of the Applicant. Where, presumably, such consent is not obtained from the Tribunal and the AGM is nevertheless held more than 15 months after the previous AGM, it seems that in terms of this section it would not be a validly constituted AGM. Hence the Application of the Applicant is understandable. In effect, it means that consent will be required to validate the AGM prior to holding same and subsequently to validate the actions taken at the AGM.
- [17] The Act became effective on 1st May 2011 and the holding of annual general meetings is governed by section 61 of the Act. In accordance with Section 61(7) of the Act the company is required to hold an AGM within 15 months after the date of the previous AGM (which has not been held for more than 5 years) or within an extended time allowed by the Companies Tribunal (“the Tribunal”).

- [18] Although the Applicant explained that administrative issues are the basis of the application for extension made to the Tribunal, the fact is that no annual general meetings were held from 2005 to date, which presupposes that there are serious problems surrounding the issue of convening an annual general meeting and the passing of the financial statements, which cannot be in the interest of shareholders. No explanation whatsoever has been forthcoming to show good cause in terms of the Act nor is there any explanation advanced about the AGMs which were to be held under the auspices of the 1973 Act either.
- [19] It is unfortunate that the Applicant has not deemed it fit to provide more information surrounding the circumstances of not holding annual general meetings in more than 5 years since 2005. The Applicant has also not considered the action which was required under the 1973 Act and no explanation has been forthcoming as to why it has taken so many years to settle the Applicant's administrative issues and why the application for consent was not made to the Registrar of Cipro under the 1973 Act. A fully motivated and candid explanation of the exact state of affairs would have assisted the Applicant in its Application.
- [20] In its affidavit (which is in any event defective as set out above) and supporting documents the Applicant has provided insufficient evidence to show good cause that it was unable to hold its AGM on appropriate dates (which remain unmentioned in the affidavit or on the CTR form 142).

- [21] It is also rather unfortunate that the Applicant has not made any differentiation between AGMs to be held in terms of the 1973 Act and the 2008 Act.
- [22] In addition, clause 32 of the articles of association of the Applicant company clearly states that the company shall hold its first AGM within 18 months after the date of its incorporation and shall thereafter in each year hold an AGM not more than 15 months elapsing between the date of one AGM; and that of the next AGM and that the AGM shall (my emphasis) be held within nine months after the expiration of the financial year of the Company. This seems to be in line with the 1973 Act which was the Act applicable when the aforesaid articles of association were registered. In passing it is noted that the Company has not seen it fit to convert its articles to a memorandum of incorporation within a time period as required by the 2008 Act nor has any explanation about these issues been forthcoming. There is once again a breach of governance rules set out in the articles of association.
- [23] The transitional arrangements in Schedule 5 alluded to does not assist the Applicant at all nor does the Applicant explain how it can be justified in terms of the Act. It seems that the Applicant did not make an application for extension to hold an AGM or AGMs under 1973 Act and as such there is no matter pending before the Registrar of Cipro under that Act; and any matter not fully addressed at that time, must be concluded by the Registrar in terms of that Act, despite its repeal or amendment (Section 3 (1), Schedule 5). There is no evidence that such an application is pending and the application before the Tribunal implies that no such application is pending.

[24] However, the Applicant can note that the shareholder/s of the company have the option to approach the Court for protection of its rights in terms of Section 61 (12). It is indeed untenable that this state of affairs has continued to the extent it has and shareholders have not objected to the lack of governance in the Applicant Company.

[25] Section 61 (12) states that if a company fails to convene a meeting for any reason other than as contemplated in subsection (11) –

(d) at a time required in accordance with its Memorandum of Incorporation;

(e) when required by shareholders in terms of subsection (3) ; or

(f) within the time required by subsection (7)

a shareholder may apply to a court for an order requiring the company to convene a meeting on a date, and subject to any terms, that the court considers appropriate in the circumstances.

[26] To assist the Applicant, the Tribunal refers to Item 11 (1) of Schedule 5 which states that “ any right or obligation imposed on any person in terms of the 1973 Act that had not been spent or fulfilled immediately before the effective date is a valid or obligation imposed on, that person in terms of any comparable provision of this Act (2008), as from the date that the right, entitlement, obligation first arose, subject to the provisions of this Act (2008)”

[27] Thus the obligation to hold an AGM/AGMs remain, and is an obligation in terms of a comparable provision under the 2008 Act, but subject to the provisions of the 2008 Act. Therefore an obligation to hold an AGM under the 1973 Act has now become an obligation under the 2008 Act. However, the question arises as to whether the words “subject to the provisions of the 2008 Act” implies that the Tribunal has jurisdiction to deal with this particular issue and it seems so within the context of Item 1 (supra).

FINDINGS:

[28] The Tribunal finds that the Applicant’s application is defective in that the affidavit has not been commissioned in terms of the Law and secondly Mr. Motani has not been duly authorized by a resolution of the Board of Directors to lodge an Application.

[29] Moreover, the Tribunal finds that the Applicant did not show good cause on why it could not hold all its AGMs as required in the 1973 Act or the Act (2008); why it has not made any application during the period that the 1973 Act was applicable to the Registrar; and finally the Applicant has not mentioned that the Application has been made in terms of Item 1, Schedule 5 of the application nor has it been motivated and justified in terms thereof.

[30] In the premises, the Applicant has not made out a case at all for the Tribunal to consider as the application is defective in various respects as set out above.

[31] To assist the Applicant in a future application, the Tribunal suggests that the Applicant ensure if it makes any further application to the Tribunal that the factors as aforementioned be taken into account; a detailed application with all the relevant documentation and explanations as to the reason this state of affairs has occurred at a hearing before the Tribunal for the Tribunal to consider the matter.

ORDER:

[32] The Applicant's application is dismissed for the aforesaid reasons.

Khatija Tootla

Member of Companies Tribunal

30 April 2014