COMPANIES TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case/File Number: **CTR001/11/2012**



In the *Ex Parte* Application of:

GAUTENG CRICKET BOARD NPC **Applicant**

(Registration Number: 1977/002554/08)

Presiding Member : Khashane Manamela

DECISION (Reasons and Order)

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[1] Gauteng Cricket Board NPC (the applicant) lodged an application ostensibly in terms of section 61(7) of the Companies Act 71 of 2008 (the Act) for an extension of time until the 08th January 2013 to hold its annual general meeting.

[2] Although, I still proceeded to prepare and deliver this finding, I am alive to the possibility that, this finding may have been overtaken by other issues due to

its late arrival. Although, I may sound defensive or even condescending, I venture to point out that, this Tribunal, due to reasons beyond its control, was not capacitated to attend to this matter earlier. I nevertheless apologise on behalf of this Tribunal for any inconvenience that may have been caused to the applicant and anyone interested in the outcome of this application.

[3] Naturally, the facts grounding the application or the relief sought in terms thereof, are very brief. The applicant has in terms of its memorandum and articles of association since its incorporation in 1977 held its annual general meeting between July and September of each year. This was also the case in 2011, but not in 2012.

[4] The 2012 annual general meeting couldn't be held in time due to other company activities significantly resulting from a commission of enquiry appointed in 2010. The applicant couldn't, among others, formally amend its memorandum of incorporation and there were some negotiations with other interest groups and stakeholders highlighted through the commission of enquiry. Therefore, the applicant wanted this Tribunal to allow an extension until January 2013 to hold its annual general meeting for 2012, hence this application.

[5] As already mentioned above, the application is made it terms of section 61(7) of the Act (61(7)). Section 61(7) of the Act reads as follows:

"(7) A public company must 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 no 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."

[I added the underlining for emphasis]

[6] Evidently, the aforesaid provision seems to be only applicable to public companies and therefore not available to the applicant as a non-profit company.

[7] This much I can deduce from the definition of a public company in the Act, which explicitly excludes a non-profit company. It defines a public company as a "profit company that is not a state-owned company, a private company or a personal liability company..."[1]

[8] On the other hand, the definition of a non-profit company in the Act cannot also be stretched, this or the other way, to include a public company. The definition is as follows:

"**"non-profit company"** means a company-
(a) incorporated for a public benefit or other object as required by item 1(1) of Schedule 1; and
(b) the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1(3) of Schedule 1..."

[1] I have added the underlining for emphasis to the definition as quoted from section 1 of the Companies Act 71 of 2008 (the Act).

[9] Therefore, on a textual or literal interpretation, section 61(7) doesn't seem to be available for the remedy required by the applicant. And on this ground alone, this application appears to have encountered a setback. However, this Tribunal is inured to be informal[2] and less technical[3] in its approach and therefore I will continue to determine whether the aforesaid provision on a different interpretation, perhaps one based on the object and purpose of the provision, or other provisions in the Act, is capable of attaining the relief sought by the applicant.

[10] A purposive approach has been widely used by our constitutional court and established in several of its judgments.[4] In terms of this approach, the language of the constitutional text must be interpreted purposively and in context[5] and therefore although the court must thus seek to give effect to the object and purpose of the provision, it remains limited by the language used.[6] The court is not permitted to impose a meaning on the text that it is not capable of bearing.[7] In my opinion the aforesaid approach is employable in respect of other legislation than the Constitution of the Republic of South Africa.[8]

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[2] See section 180(1)(b) of the Act.
[3] See regulation 154(3) of the Companies Regulations, 2011.
[4] *General Council of the Bar versus Mansingh (417/12)[2013] ZASCA 9 (15 March 2013)* at paragraph 10 as reported on the website:www.justice.gov.za/sca.
[5] *Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and another* 2011 (1) SA 327 (CC) paragraph 32 footnote 34.
[6] See *General Council of the Bar versus Mansingh* still on page 10.
[7] *South African Airways (Pty) Ltd v Aviation Union of South Africa and others* 2011 (3) SA 148 (SCA) paragraph 29.
[8] Act 108 of 1996.

[11] Therefore, it has to be determined whether on a purposive or contextual interpretation, the legislature still intended to exclude a non-profit company and other forms of profit companies from the provisions of section 61(7). Or put differently, whether the legislature had intended to exclude the aforesaid companies from a requirement to hold an annual general meeting. The aforesaid would include a cursory review of the other provisions of the Act and this should appropriately begin with the definition of an annual general meeting as contained in the Act.

[12] The Act defines an annual general meeting as "...the meeting of a public company required by section 61(7)..." This seems to confirm what is contained in section 61(7) to the effect that, an annual general meeting is provided for in the Act only in respect of a public company. However, as stated above, other provisions of the Act may have some contribution to this review and the following are those provisions of the Act found to be most relevant:

- "**30. Annual financial statements**

  (1) Each year, a company must prepare annual financial statements within six months after the end of its financial year, or such shorter period as may be appropriate to provide the required notice of an annual general meeting in terms of section 61(7)."

- "**60. Shareholders acting other than at meeting**

  ...

  (5) For greater certainty, any business of a company that is
  (2) required by this Act or the company's Memorandum of Incorporation to be conducted at an annual general meeting of the company, may not be conducted in the manner contemplated in this section. "

- "**90. Appointment of auditor**

  (1) Upon its incorporation, and each year at its annual general meeting, a public company or state-owned company must appoint an auditor. "

[I added the underlining for emphasis]

[13] Without really pursuing an academic thesis on the above provisions, I reveal here that I understand the above provisions - at least to mean that - other than a public company, the Act requires a state-owned company to hold an annual general meeting. An annual general meeting is at least required for purposes of appointing an auditor in case of a state-owned company. I also understand the above provisions of the Act to signify that, although not bound to do so by the Act, other forms of companies may include in their memoranda of incorporation, the requirement to hold an annual general meeting. These seem to be the object and purpose of these provisions.

[14] With optimum reverence to the legislature, the provisions referred to above, don't seem to have been crafted clearly. This is even exacerbated by the employment of the words like "annual general meeting" and "a company" in the same sentences or provisions of the Act. In the end, more questions than answers emerge, but I do not deem it necessary to pursue this any further and will move on.

[15] The aforesaid being the purpose, then does it mean that companies, other than public companies or state-owned companies, are precluded from holding

annual general meetings? Not so, and as alluded to above, these companies are entitled to include in their memoranda of incorporation, the requirement to hold an annual general meeting. This is actually the case with the applicant and until the applicant's memorandum of incorporation is amended in this respect, the applicant would be required to hold an annual general meeting, even though no statutory obligation exists in this regard.

[16] The aforesaid seems to suggest the possibility of emergence of a conflict between the provisions of the Act and a memorandum of incorporation of a company that hasn't amended its memorandum of incorporation since the effective date of the Act. I am not in any way suggesting here that, where a company's memorandum of incorporation still contains the requirement for the particular company to hold an annual general meeting, this would signify a conflict. A conflict between the provisions of the Act and a memorandum of incorporation of a company may arise in some areas, but as far as the holding of an annual general meeting is concerned, the provisions of the constitutive documents of a company will prevail over the Act until the 30th April 2013. In fact, this is envisaged by the legislature in item 4 (4) of schedule 5 of the Act, which provides as follows:

"(4) During the period of two years immediately following the general effective date –
(a) if there is a conflict between -
(i) a provision of this Act, and a provision of a pre-existing company's Memorandum of Incorporation, the latter provision prevails, except to the extent that this Schedule provides otherwise;
..."

[I added the underlining for emphasis]

[17] To sum up the above, if a company, like it is the case with the applicant, is required by its memorandum of incorporation to hold an annual general meeting, it will still have to hold such a meeting, despite the Act providing otherwise, until its memorandum is amended accordingly. Then, this being a prerogative of the particular company and its shareholders, is it proper to petition this Tribunal in case of a delay or non-compliance by a company with its internal obligations? I really doubt that, this was ever intended by the crafters of the Act. In fact, they did not make such a provision, as it has already being found above.

[18] For this Tribunal is a creature of statute, being the Act. In fact, this Tribunal exists as provided for within the Act and cannot usurp any more powers than what the legislature had rationed to it in terms of provisions of the Act. In fact, this is well captured in section 195(1) as follows:

"**195. Functions of Companies Tribunal**

(1) The Companies Tribunal, or a member of the Tribunal acting alone in accordance with this Act, may-

(a) adjudicate in relation to any application that may be made to it in terms of this Act, and make any order provided for in this Act in respect of such an application;

(b) assist in the resolution of disputes as contemplated in Part C of Chapter 7;and

(c) perform any other function assigned to it by or in terms of this Act, or **any law mentioned in Schedule 4.**"

[I added the underlining and the bold ink towards the end, for emphasis]

[19] The reference to "any law mentioned in Schedule 4" in section 195(1)(c) of the Act doesn't change the situation. In fact, the legislation listed in that schedule

doesn't seem to confer, as yet, any function to this Tribunal. The aforesaid legislation also appears to bear no relevance to this application, even if it was to be found that, one or more of the listed legislation has some function for this Tribunal.

[20] The aforementioned being the case, it follows then that, this Tribunal cannot assist the applicant with an extension of the period within which to hold its annual general meeting. Naturally I would have had to stop here, but I deem it necessary to briefly illustrate further another way of arriving at the aforesaid conclusion I reached.

[21] The following provision(s) from the Act may assist in that envisaged illustration:

"**61. Shareholders meetings**
(1) The board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, may call a shareholders meeting at any time.
...
(11) If a company is unable to convene a meeting as required in terms of this section because it has no directors, or because all of its directors are incapacitated-
(a) any other person authorised by the company's Memorandum of Incorporation may convene the meeting; or
(b) if no person has been authorised as contemplated in paragraph (a), the Companies Tribunal, on a request by any shareholder, may issue an administrative order for a shareholders meeting to be convened on a date, and subject to any terms, that the Tribunal considers appropriate in the circumstances.
(12) If a company fails to convene a meeting for any reason other than as contemplated in subsection (11)-
(a) at a time required in accordance with its Memorandum of Incorporation;
(b) when required by shareholders in terms of subsection (3); or
(c) 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."

[I added the underlining for emphasis]

[22] On the one hand and in terms of section 61(11), this Tribunal is empowered to issue an administrative order for a shareholders' meeting to be convened in instances where such a meeting wasn't convened due to a company being "unable to convene a meeting as required ... because it has no directors, or because all of its directors are incapacitated..."[9]

[23] On the other hand, section 61(12) of the Act confers powers to a court [10] to order the convention of an annual general meeting " when a company fails to convene a meeting for any reason other than ..." in the area designated for this Tribunal in terms of section 61(11).

[24] The above may sound like the biblical judgment [or lack thereof] of Pontius Pilate, but it is not. The aforesaid is obviously stated with optimum reverence to all religions and it is only my attempt to highlight the predicament of the applicant herein, as it may sound like this Tribunal is washing its hand of the applicant. But this Tribunal is clearly not empowered to assist herein. In fact, applicant's relief

[9] To avoid doubt, I do not understand the meetings envisaged here to be in the form of an annual general meeting for any company, other than a public company or a state-owned company.
[10] The Act contains a definition of court or the High Court only in chapter 6 dealing with business rescue. However, I think the reference court would carry its ordinary meaning as a court of law and such a meaning that would exclude this Tribunal.

may be within its own doorway or elsewhere in the absence of an internal remedy.

[25] Yes, there was relief to companies in similar circumstances as the applicant when there was still statutory obligation on all companies to hold annual general meetings. Such relief was obtainable in hallways comparable to those of this Tribunal. I am referring here to the relief which was attainable through the machinery of section 179 of the Companies Act 61 of 1973 (the 1973 Companies Act) repealed in some instances by the Act.

[26] Section 179 of the 1973 Companies Act provided as follows:

"**179. Annual general meeting.**
(1) (a) Every company, at such times as are in this subsection prescribed, shall hold general meetings to be known and described in the notices calling such meetings as annual general meetings of that company.
...
(3) The Registrar may, on application to him before, or, for the purposes of subsection (6), also after, the expiration of the period within which an annual general meeting of a company must be held and on good cause shown, and on payment of the prescribed fee, extend the period within which an annual general meeting of the company concerned..."

[I added the underlining for emphasis]

[27] May I immediately add that, the definition of company in the 1973 Companies Act included all forms of companies "...incorporated under Chapter IV of this Act [i.e. the 1973 Companies Act] and includes any body which immediately

prior to the commencement of this Act was a company in terms of any law repealed by this Act..."[11] Although a non-profit company was labeled an association, incorporation thereof was in terms of section 21 of the 1973 Companies Act which also falls under chapter IV of the aforesaid legislation.

[28] Section 179 of the 1973 Companies Act was therefore available to a non-profit company which seeks extension of the period within which to hold an annual general meeting. The Registrar of Companies was empowered to deal with such an application.

[29] The Act doesn't provide for the office of Registrar of Companies, although in some instances[12], the office of the Registrar of Companies is stated as having been replaced by either the Companies and Intellectual Property Commission (the Commission) or the Commissioner of the Commission. Item 13 of schedule 5 carry one of those provisions, which are also referred to as "Transitional Arrangements" and provides as follows:

"**13. Continued investigation and enforcement of previous Act**
(1) Despite the repeal of the previous Act-
(a) any investigation by the Minister or the Registrar in terms of the previous Act and pending immediately before the effective date, may be continued by the Commission;
....
(c) for a period of three years after the effective date-
(i) the Commission may exercise any power of the Minister, the Registrar..., in terms of the previous Act to investigate and prosecute any breach of that Act that occurred during the period of three years immediately before the effective date, subject to sub-item..."

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[11] Section 1 of the Companies Act 61 of 1973.
[12] This is very explicit in the amendments appearing in schedule 3 to the Act in respect of the Close Corporations Act 69 of 1984.

[30] However, the aforesaid is clearly with regard to the investigative and prosecutorial powers of the Registrar of Companies and therefore not generally applicable to the other functional areas of the Registrar of Companies. Therefore, the legislature have indeed manifested in many ways its exclusion of the statutory obligation to hold an annual general meeting by companies like the applicant (i.e. all companies except public companies and state-owned companies), including during the transitional period.

[31] This is actually the case. However, the legislature indeed foresaw some transitional hurdles in this regard and catered for this in item 5 of Schedule 5 of the Act, which provides as follows:

"(5) If, as a consequence of the coming into effect of the Act and the repeal of the previous Act, a conflict, dispute or doubt arises within two years after the effective date concerning the particular manner or form in which, or time by which, a pre-existing company is required to -
(a) prepare its annual financial statements, convene an annual general meeting, provide to its shareholders copies of its annual financial statements, any notice or any other document;
(b) file any particular document with the Commission; or
(c) take any other particular action required in terms of this Act or the company's Memorandum of Incorporation, the company may apply to the Tribunal for directions, **and** a member of the Tribunal may make an administrative order that is appropriate and reasonable in the circumstances."

[I added bold ink and the underlining for emphasis]

[32] It should be noted that, the aforesaid provision only caters for an approach to this Tribunal for directions and "an administrative order that is appropriate and reasonable in the circumstances..." in instances where there is "a conflict, dispute or doubt ...within two years after the effective date concerning the particular manner or form in which, or time by which, a pre-existing company is required to ...convene an

annual general meeting..." The Tribunal is not empowered to deal with anything else or to simulate the situation provided in section 61(7) of the Act in respect of public companies.

[33] Therefore, with that whirlwind of a review of the applicable law to the facts, I repeat my conclusion that, this Tribunal cannot - even with an inadvertent reliance by the applicant on section 61(7) of the Act, which has since been found to be inapposite - assist the applicant. In fact, the applicant doesn't require the assistance of this Tribunal regarding its delayed annual general meeting. I have already pointed out that, there is currently no statutory obligation or requirement on the applicant to hold an annual general meeting after the annual general meeting that was held for the final period for which same was statutorily required.[13] Beyond the aforesaid, the applicant has only been bound to hold an annual general meeting by a provision in its memorandum of incorporation.

[34] I have already explained that, this Tribunal is a creature of statute and with no empowerment to deal with matters governed by the material portions of the memorandum of incorporation of the applicant. I therefore have to refuse the petition to this Tribunal by the applicant.

[35] I then proceed to make an order in the following terms:

a) the application is dismissed.

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[13] Being for the financial year in which the 1973 Companies Act was last applicable, before its repeal in some respects by the Act.



Khashane Manamela

Member, Companies Tribunal

25th March 2013