

IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

“The Tribunal”

Case Number: CT017Nov2018

In the ex parte matter of:

Hoeksteen Projects (Pty) Ltd

(REGISTRATION NO. 2003/025098/07)

DECISION

1. INTRODUCTION:

- 1.1 The applicant is Hoeksteen Projects (Pty) Ltd.
- 1.2 The applicant has filed an application requesting a ‘further extension of six (6) months to prepare financial statements.
- 1.3 The application is brought by Charles Kenneth Robertson (ID 470914 5018 081), duly authorised by a resolution of the board of the applicant.

2. THE APPLICATION

- 2.1 The applicant received a letter dated 10 October from its auditors, BDO Auditors, informing its directors of a reportable irregularity. The irregularity pertained to the applicant's failure to prepare financial statements within six months after the end of its financial year ending 28 February 2018.
- 2.2 The applicant further received a letter from the Corporate Compliance and Disclosure Regulation Unit of the Companies and Intellectual Property Commission, wherein the investigator notified the applicant that the Independent Regulatory Board, through a registered auditor (which I'm assuming is the BDO auditor), had reported an irregularity

taking place while performing an audit. The letter further stated that the particulars of the irregularities are “the contravention/omission of S.30(1) of the Companies Act of 2008, in that the entity failed to prepare financial statements within the six months after the end of its financial year ending February 2018”.

- 2.3 The applicant advised that its financial statements were in fact prepared well within the required six-month period after year-end, but that the applicant was unable to prove going concern status to the auditors, with the result that the auditors were unwilling to sign-off the applicant's financial statements.
- 2.4 The applicant submits in its affidavit that the company is well advanced with negotiations about an investment that will turn the situation around.
- 2.5 The applicant therefore requests the Tribunal to grant an extension of a further six months up to 28 February 2019 within which to have its financial statements signed-off by its auditors and published.
- 2.6 The applicant has not indicated the section of the Companies Act or the regulations in terms of which the application is made.

3. APPLICABLE LAW

- 3.1 While the applicant has not indicated which section of the Act it relies upon for this application, it has stated that it requests the Tribunal to grant an extension of a further six months up to 28 February 2019, within which to have its financial statements signed-off by its auditors and published.

3.2 The Tribunal member has received an allocation of this application on the basis of an extension of period to convene AGM.

3.3 Section 61 of the Act provides for shareholder meetings.

Section 61(7) specifically, provides as follows:

"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 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."

3.4 Section 61(8) provides for key business issues to be considered at the AGM, it provides:

(8) A meeting convened in terms of subsection (7) must, at a minimum, provide for the following business to be transacted;

(a) Presentation of –

(i) the directors' report;

(ii) audited financial statements for the immediately preceding financial year; and

(iii) an audit committee report;

(b) election of directors, to the extent required by this Act or the company's Memorandum of Incorporation;

(c) An appointment of-

(i) An auditor for the ensuing financial year; and

(ii) An audit committee; and

(iii) Any matters raised by shareholders, with or without advance notice to the company.

4. EVALUATION OF EVIDENCE

- 4.1 The Tribunal does not have jurisdiction to grant an extension for the finalisation of annual financial statements as this is not provided for in the Act.
- 4.2 It is clearly evident from S.61 (7) that only public companies are required to have a mandatory AGM. I agree with the decision in *Ex Parte Gauteng Cricket Board NPC* CTR001/11/2012 (25 March 2012) that S.61 (7) of the Companies Act only applies to public companies. Section 1 of the Act defines a public company as “a profit company that is not a state-owned company, private or personal liability company”. It is also evident from the applicant's CIPC certification of confirmation (COR15.2) and by the insertion of the expression (Pty) Ltd on the applicant's name, as required by S.11 (3)(c) (ii) of the Act, that the applicant is a private company.
- 4.3 It is thus not necessary for this Tribunal to make any reference to the applicant's Memorandum of Incorporation on the convening of its AGM.
- 4.4 The functions of the Companies Tribunal are stated in S.195 of the Companies Act as follows:
- (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.*

4.5 The Act has not empowered the Tribunal to adjudicate on applications for extensions to prepare financial statements, nor has it empowered the Tribunal to deal with applications by private companies to extend period to convene AGMs.

5. FINDINGS

Section 61 (7) of the Companies Act does not apply to a private company.

ORDER

The application is refused.

B. Zulu

COMPANIES TRIBUNAL MEMBER

03 DECEMBER 2018