

REPUBLIC OF SOUTH AFRICA



COMPANIES TRIBUNAL

Case/File Number: CT010Feb2014

In the *ex parte* application of:

GRAND PARADE INVESTMENTS LIMITED

Applicant

(Registration Number: 1997/003548/06)

in respect of:

**AN APPLICATION FOR AN ORDER [OR LEAVE] TO DELIVER NOTICES BY
WAY OF SUBSTITUTED SERVICE**

Presiding Member of the Tribunal

: Khashane Manamela

DECISION (Reasons and Order)

[1] In terms of the documents filed with this Tribunal, GRAND PARADE INVESTMENTS LIMITED (Registration Number: 1997/003548/06) is the applicant. Ms. Lazelle Parton is the deponent to the affidavit filed in support of the application. She introduced herself as the company secretary of the applicant and asserted to herself authority to bring the application on behalf of the applicant, but did not furnish proof of or details of the source of her alleged authority. The issue of authority to bring the application is very important¹ and therefore, the absence of proof will definitely be influential in respect of the order made herein. I will return to deal with this later.

[2] The applicant seeks an order in terms of which it would be authorised to deliver notice of a general meeting of shareholders² by way of ordinary mail in substitution of the methods of delivery contemplated in regulation 7 of the Companies Regulations, 2011 (the Regulations) [read together with section 6 of the Companies Act 71 of 2008 (the Act)] and listed in the second column of Table CR3 of Annexure 3 to the Regulations.

[3] Regulation 7(1) of the Regulations, read against the background of section 6 of the Act, provides for delivery of notices or documents for purposes of the Act and the Regulations. The selected portions of the regulation read as follows:

¹ *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 351E-G and generally Cilliers, A.C.; Loots, C. and Nel, H.C. *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa*, 9 edition, 2007 Juta Cape Town pages 436-438.

² Paragraph 7 of the supporting affidavit.

“7. Delivery of documents

...

(1) A notice or document to be delivered for any purpose contemplated in the Act or these Regulations may be delivered in any manner—

- (a) contemplated in section 6 (10) or (11); or
- (b) set out in Table CR 3.

(2) A document delivered by a method listed in the second column of Table CR 3 must be regarded as having been delivered to the intended recipient—

- (a) on the date and at the time shown opposite that method, in the third column of that table; or
- (b) if the date and time for the delivery of a document referred to in Table CR 3 to a regulatory agency is outside of the office hours of that regulatory agency, as set out in regulation 165(2), that document will be deemed to have been delivered on the next business day, subject to regulation 165(3).

(3) If, in a particular matter, it proves impossible to deliver a document in any manner provided for in the Act or these Regulations—

- (a) if any person other than the Tribunal is required to deliver the document, the person may apply to either the Tribunal or the High Court for an order of substituted service; or

(b) if the Tribunal is required to deliver the document, the recording officer of the Tribunal concerned may apply to the High Court for an order of substituted service.

(4) A document that is delivered by fax must include a cover page, and a document that is transmitted by electronic mail must be accompanied by a cover message...”

[I selectively added the underlining for emphasis]

[4] On the other hand, Table CR3 lists methods of delivery of notices or documents in respect of various persons, but the following for “any persons” and “natural persons”:

4.1 in respect of “any persons”:

- By faxing the notice or a certified copy of the document to the person, if the person has a fax number; or
- By sending the notice or a copy of the document by electronic mail, if the person has an address for receiving electronic mail; or
- By sending the notice or a certified copy of the document by registered post to the person's last-known address; or
- By any other means authorised by the High Court; or
- By any other method allowed for that person in terms of the following rows of this Table.

4.2 in respect of “natural persons”:

1. By handing the notice or a certified copy of the document to the person, or to any representative authorised in writing to accept service on behalf of the person; or
2. By leaving the notice or a certified copy of the document at the person's place of residence or business with any other person who is apparently at least 16 years old and in charge of the premises at the time; or
3. By leaving the notice or a certified copy of the document at the person's place of employment with any person who is apparently at least 16 years old and apparently in authority.

[5] It is submitted by the applicant that, as the Companies Act 61 of 1973 (the 1973 Act) did not specify or prescribe methods of delivery of notices to shareholders when general meetings were convened, it developed a custom of delivering such notices through ordinary mail.³ And further that, its general meetings “have been very well attended by shareholders, clearly indicating that the delivery of the notices by means of ordinary mail was effective”.⁴ It ought to be immediately stated that, this statement is very unhelpful to this Tribunal, without any specific figures or percentages of the shareholders on average who attended the particular general meetings [convened through a notice delivered by ordinary

³ *Ibid* at paragraph 8.

⁴ *Ibid* at paragraph 9.

mail] compared with the total number of shareholders. Further, I also think the submission [with maximum respect] misses the point, as a substantial compliance with the notice requirements in the Act [and the Regulations] cannot only be gauged by the number of those attending. In my view, the sufficiency of the notice has to be determined from the substance and form of the method employed for the delivery of the notice of the meeting.⁵ The primary concern to a dispatcher of the notice should always be to reach all affected members and the number of those attending is only secondary to the equation, so to speak. Besides, it ill behoves the applicant to submit that ordinary mail is effective, when no other methods of delivery appear to have ever been tested.

[6] Back to the other aspects of the application. The crux of the applicant's submissions is that, each of the prescribed methods of delivery listed in 4.1 and 4.2 above, "is inappropriate, ineffective and impractical in the present circumstances..." of the applicant.⁶ The reasons proffered in support of this conclusion are essentially the following. The applicant has approximately 8700 shareholders, a significant portion of which are natural persons from "disadvantaged communities".⁷ The applicant doesn't have facsimile numbers or electronic mail (e-mail) addresses of all its shareholders and this makes delivery through those methods impossible. Further, given the huge number of shareholders, physical delivery of the notice would prove onerous and

⁵ This is borne by section 6(9)(a) and (b) of the Act.

⁶ *Ibid* at paragraph 13.

⁷ *Ibid* at paragraph 19. The nature of the disadvantage is not explained, including the relevance thereof to the method of delivery of the notice to shareholders and even where an attempt to do so is made, there is a striking paucity of information or paucity of relevant information.

impractical. Therefore, the only method remaining from those listed in Table CR3 referred to above, is delivery by registered post.

[7] The applicant further submits that, delivery of the notice by registered post would not be more effective than by ordinary post, for among others, the following reasons:

7.1 “Delivering the notice ...by means of registered post would require them [the shareholders, particularly those who live in “disadvantaged communities”], after being informed that the notice was being held on their behalf, to attend on the local post office and uplift the relevant documents.”⁸

7.2 “Failure to uplift the notice within a relatively short period would result in it being returned to the applicant uncollected.”⁹

7.3 “As the local post office is not readily accessible to many of the applicant’s shareholders, it is possible that many notices ...would be returned ...uncollected.”¹⁰

⁸ As stated under footnote 7 above, the applicant does not explain why there is reference to a “disadvantage”, like whether all these shareholders live in places with no access to a post office, which would in any case apply to both methods of delivery, be it by registered post or by ordinary post.

⁹ Again no details are provided to support these submissions, like the average number of days it takes for an item to be returned and whether this is prevalent with the applicant’s shareholders or generally regarding postal services in their geographic areas.

¹⁰ There is no explanation as to the nature of the alleged lack of access to a post office. I repeat that, to my mind, whether an item is by registered post or ordinary post, it would require access to a SA Post Office facility.

7.4 “Delivery of the notices by means of ordinary mail would...ensure that each of the notices is personally¹¹ delivered to each of the shareholders – there would be no concerns with regard to accessibility...”

7.5 “It is important to note that the difference in the costs of posting by ordinary post (approximately R22.00) as opposed to registered post (approximately R24.00) is not material at all thus the real issue is ensuring that the shareholders actually receive the notice...”¹²

[8] To state that, I find the applicant’s submissions as stated above contradictory and confusing, will be stating the absolute least. With respect, I think the submissions may be [to some point] misleading, especially when one considers what is stated in 7.1 to 7.5 above and the submission that “...the notices will be more likely to reach the applicant’s shareholders if they are sent by ordinary mail rather than by registered post.”¹³ No difference is made by the elucidation that, this is so due to “...a significant proportion of the applicant’s shareholders [being] ... natural persons from disadvantaged communities. If the notices are sent via registered post there is a strong possibility that they will not reach such shareholders: the individuals will be required to uplift the documents

¹¹ I do not agree that delivery by ordinary post equates to personal delivery. It still requires access to a postal box of the SA Post Office or its agencies, unless the item is delivered by hand using a physical address, which does not appear to be the submission made.

¹² This in my opinion is the safeguard offered by delivery through registered post. I am not certain of the prices mentioned for the dispatch of the mail, but would accept this at face value.

¹³ Paragraph 34 of the supporting affidavit.

from a branch of the Post Office and, given the difficulties for such individuals in accessing the Post Office's premises, many notices may return to the applicant undelivered."¹⁴ For, I had always thought the safest and effective delivery of mail was through registered, rather than ordinary mail, even if with the attendant efforts of uplifting registered slips etc. I had thought the higher financial cost attaching to the registered mail delivery, was the primary reason why this method will be less appealing than ordinary post, but the applicant's view is that, "there is a strong possibility that they [the notices] will not reach such shareholders [being, the applicant's shareholders from disadvantaged communities]: ...given the difficulties for such individuals in accessing the Post Office's premises..."¹⁵

[9] Further from my misgivings expressed above, I find the applicant's submissions to be raising the following practical problems or questions. Are all individual shareholders of the applicant from the same disadvantaged community, for them to be batched as such? What are the geographical locations of these members with no access to registered post facilities? How would they overcome such hurdles in respect of access to items posted by ordinary mail? Are the items posted by ordinary mail not supposed to be collected from the local branch of the South African Post Office, albeit from a postal box? The applicant's submissions are selectively silent on these. I think this silence is deliberate and employed to further the generalisation of the circumstances of the applicant's members. I get a sense of an attempt to implore the sympathetic emotions of this

¹⁴ *Ibid* at paragraph 34.1.

¹⁵ See paragraph 7.3 above and the footnote thereto.

Tribunal, especially due to the prevalence of the word “disadvantaged”¹⁶. Should this be the case, it would be highly unfortunate and such attempt is rejected, subtle as it may be.

[10] It is my interpretation of the methods of delivery stated above that, the legislature [in case of the Act] or the Minister¹⁷ [in case of the Regulations] deliberately chose the methods which will ensure receipt of the notice or document and the retention of proof of delivery. Without discounting the statutory availability of an order for a substituted service, I think such orders should be generally considered to equate to a departure from the norm. They should not simply be availed for the asking.

[11] When entertaining an application for a substituted service order, this Tribunal has to be always satisfied that, the substituting method of delivery will ensure that the notice will come to the knowledge of the intended recipients. This is not unique to this Tribunal as our courts, including our highest courts (being the Supreme Court of Appeal and the Constitutional Court) albeit in respect of section 129 and 130 of the National Credit Act 34 of 2005, have been devoting a considerable amount of effort towards ensuring notice or knowledge

¹⁶ This word appears everywhere and there are no details provided as to the nature of the “disadvantage” referred to, like the absence of postal facilities where these members or shareholders reside.

¹⁷ Being, the Minister of Trade and Industry empowered in terms of section 223 of the Act.

of processes come to the attention of those intended¹⁸ when delivery by way of registered post is involved.

[12] However, in this matter I have very specific precedents or authorities to follow or deviate from. It is submitted on behalf of the applicant that, since the advent of the Act, the applicant has been convening the general meetings of shareholders through delivery of the notices by ordinary mail after obtaining orders for substituted service from the court and this Tribunal in 2011¹⁹, and 2012²⁰ and 2013²¹, respectively. I am not certain as to the nature of the submissions made to obtain the court order. And as to the previous decisions of the Tribunal, I could not find any principle therein I regard as possibly binding²² or persuasive for purposes of the current decision.

[13] The following questions immediately come to mind regarding the method of delivery sought by the applicant: being delivery by ordinary mail. How will we ever know if the notices reached their intended recipients? Will we ever know what percentage of the intended recipients did receive the notice or of those who

¹⁸ *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC); *ABSA Bank Ltd v Mkhize and Another*; *ABSA Bank Ltd v Chetty*; *ABSA Bank Ltd v Mlipha* [2013] ZASCA 139; *Balkind v ABSA Bank* [2012] ZAECGHC 102; 2013 (2) SA 486 (ECG); *ABSA Bank Ltd v Petersen* [2012] ZAWCHC 168; 2013 (1) SA 481 (WCC); *ABSA Bank Ltd v Mkhize and Another and Two Similar Cases* [2012] ZAKZDHC 38; 2012 (5) SA 574 (KZD); and *Nedbank Ltd v Binneman and Thirteen Similar Cases* [2012] ZAWCHC 141; 2012 (5) SA 569 (WCC).

¹⁹ An order dated 27th September 2011 by the Honourable Ms Justice Allie of the Western Cape High Court is included as annexure “LP1” to the papers.

²⁰ My colleague Mr. Randall Williams granted delivered a decision of this Tribunal [incorporating an order] dated 27th September 2012 included as annexure “LP2” to the papers.

²¹ A copy of a decision of this Tribunal delivered by my colleague Ms Lucia Glass on the 16th August 2013 is included under cover of a letter of this Tribunal marked annexure “LP3”.

²² *R v Welcome* 1957 (3) SA 22 (N). See generally Du Bois, F *Wille's Principles of South African Law*, 9 edition, 2007 Juta Cape Town pages 76-92.

didn't? Will the applicant ever attempt to determine who of its members did not receive the notice and the reasons therefor? Will the applicant take reasonable steps to correct the situation [assuming there is a problem] before launching another application for substituted service, when there is again a need? Will those attending be responding to the notice received through the ordinary mail or does a word of mouth also play a role? Should a word of mouth play a role, will those attending after receiving oral notice, be regarded as sufficiently notified of the business of the meeting? The latter question is against the presumption that, a notice for a general meeting should always advise the prospective attendees of the business to be transacted at the prospective meeting²³. I do not have answers to all those questions and I expected some of them to be addressed by the submissions made in the application.

[14] In my mind, the applicant should have furnished this Tribunal with [at least] the following information:

- the exact number of shareholders to receive the notice;
- an average of those whom it is submitted may have a problem with accessing registered post notice;
- the average number or percentage of shareholders who have attended general or annual general meetings for the previous three financial years;
- whether there has been complaint or problems with delivery of notice to shareholders by ordinary post;

²³ Section 62(3) of the Act.

- how often or regularly are members required to update their records, including postal address records;
- whether members attending are exclusively dependent on written notice or also do so even when they have received notice by, for example, word of mouth from other members.

[15] Be that as it may, I would grant the relief sought for a different reason, which has not even been regarded as vital by the applicant. I regard the posting of the notices by registered mail as onerous due to the activities attended thereto²⁴ and expensive than ordinary mail²⁵. However, unlike in a typical case of an order by substituted service²⁶, which often afford the adjudicating forum the benefit of determining sufficiency of the ordered method when the matter ultimately return for further adjudication, this Tribunal would have no way of knowing whether there has been sufficient notice or not. Therefore, in order to ensure that, all shareholders of the applicant receive notice of the general meeting, I would require publication of the notice in national or regional English and Afrikaans newspapers not less than 15 days before the date of the meeting.

[16] I promised to return to the omission of a resolution confirming authority by the company for these proceedings. I was swayed by the fact that, similar

²⁴ The applicant to its credit has listed some of these activities in paragraph 24 of its supporting affidavit, like “*affixing registered post barcodes to ...envelopes*” or “*having the relevant service provider [presumably the SA Post Office] scan the barcodes into the system*”.

²⁵ Although according to the applicant, the difference in price between ordinary and registered post is negligible, cumulatively when considering the number [reportedly 8503 shareholders] of shareholders to be notified, I think the cost could be very high.

²⁶ *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* on pages 387-388.

proceedings have been launched previously in this Tribunal and a court of law.²⁷ However, I would require that proof of authority to bring the current application be filed with the registrar of this Tribunal.

[17] I therefore make an order in the following terms:

- a) that, the applicant is granted leave or authorised to deliver notices convening the general meeting of shareholders to be held on a date before 30th June 2014 or whatever date the meeting is held, by way of ordinary mail;
- b) that, the notices delivered as contemplated in a) above shall be deemed to have been received by the intended recipients on the seventh day following the day on which such notices were posted;
- c) that, the applicant shall cause the notice to be published in national or regional English and Afrikaans newspapers not less than 15 days before the date of the general meeting;
- d) that, the applicant shall deliver proof of compliance with c) to the registrar within 30 days from date of the meeting or within 90 days from date of this order, whichever occurs first, or in both cases notice that the meeting was never held;

²⁷ See paragraph 12 above.

- e) that, the applicant shall deliver proof of authority of Ms. Lazelle Parton to initiate these proceedings within 30 days from date of this order.

Khashane Manamela

Member, Companies Tribunal

08th May 2014