

IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

“The Tribunal”

Case Number: CT00204/ADJ/2019

In the ex parte matter of:

Tongaat Hulett Limited

(REGISTRATION NO. 1892/000610/06)

DECISION

1. INTRODUCTION:

- 1.1 The applicant is Tongaat Hulett Limited.
- 1.2 The applicant has filed an application requesting an extension to hold its AGM on 11 December 2019, which is more than the statutory 15 months after the last AGM, which was held on 8 August 2018.
- 1.3 The application is brought by the applicant's Company Secretary, Maditshaba Mahlari (ID 721 126 0345 083), duly authorised by the Chief Executive and the Chief Financial Officers of the applicant (the Executive).

2. THE APPLICATION

- 2.1 The applicant has submitted, in the CTR142 that the company was in the process of undergoing a forensic investigation led by PWC, and the annual financial audit is being conducted by the company's auditors, Deloitte, and further that the final accounting treatments are being resolved by the company.
- 2.2 The applicant further submitted that there has been a change in senior management at the company over recent months:

- (i) The company's previous Chief executive Officer, (CEO) Mr Peter Staude, retired with effect from 31 October 2018, and Mr Sydney Mtsambiwa was appointed as Acting CEO from that date. Mr John Gavin Hudson was subsequently appointed CEO with effect from 01 February 2019.
 - (ii) The company's Chief Financial Officer (CFO), Mr Murray Munro, resigned with effect from 07 August 2018, and Mr RD Aitken was appointed as Acting CFO from that date. He was subsequently appointed as the CFO with effect from 01 March 2019.
- 2.3 The CFO encountered some inconsistencies in his preliminary reviews of the financial statements, which ultimately led to the board resolving that PWC be appointed to conduct a forensic investigation.
- 2.4 PWC were duly appointed and the investigation has been concluded . The company awaits the final report while the final accounting treatments are being resolved by the company. Amongst the findings that are part of the investigation is the misstatements in the company's 2018 and prior year financial statements, and backdating of about 15 land sale agreements, which likely facilitated the recognition of income in earlier accounting periods.
- 2.5 The applicant has opened a criminal case against its former senior executive, and other relevant authorities have been advised of the suspicious transactions, as required by the law.
- 2.6 The applicant, through its Company Secretariat, therefore requests the Tribunal to grant an extension to hold its AGM on 16 January 2020, as the company will only be able to finalise and release the annual financial statements on 30 November 2019, and will then subsequently only hold its AGM on 16

January 2020, which date would be more than the mandatory 15 months after the date of the previous AGM, which was held on 8 August 2018.

2.7 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 Companies Act (the Act) it relies upon for this application, it has stated that it requests the Tribunal to grant an extension to hold its AGM on 16 January 2020.

3.2 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.**”*

3.3 Section 61(8) provides for the 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.*

3.4 Clause 36 of the applicant's Articles of Association provides for Annual General Meetings and states: *"subject to the provisions of the Act, an annual general meeting shall be held once in every year at such time and place as the directors may determine, provided, however, that the annual general meeting shall be held not later than nine(9) months after the end of each financial year of the company, and provided that no more than fifteen (15) months shall elapse between the date of the one general meeting of the company and that of the next"*.

3.5 The company's Articles of Association, as they refer to the AGM, are consistent with the requirements of the Act.

4. EVALUATION OF EVIDENCE

4.1 There is some confusion on the extension date being sought by the applicant, as the resolution signed by the Executive on 02 October 2019 , states that the Company Secretary has been duly authorised to depose to the affidavit requesting the Companies Tribunal to grant Tongaat Hulett an extension to hold its AGM on 11 December 2019. The affidavit submitted by the Company Secretary states the date on which the AGM will be held as 16 January 2020. The

conclusion that can be drawn by the Tribunal is that the Company Secretary has given a date that is inconsistent with the authorization issued by the Executive and therefore the Tribunal will rely on the date stated in the authorization, being 11 December 2019.

4.2 The Tribunal is satisfied that good cause has been shown why the AGM could not be held within the statutory period required by the Act.

5. FINDINGS

The applicant has shown good cause why it has not been able to hold its AGM within the stipulated 15 months and for the Tribunal to consider and grant the extension as requested.

ORDER

The applicant is granted an extension to hold its AGM on 11 December 2019.

B. Zulu

MEMBER: COMPANIES TRIBUNAL

25 OCTOBER 2019