



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case Number: CT00356ADJ/2020

In the *ex parte* application of:

AIR CHEFS SOC LIMITED

Applicant

(Registration Number: 1990/006277/30)

Presiding Member : Khashane La M. Manamela (Mr.)

Date of Decision : 21 May 2020

Summary: Application for an extension of time to convene an annual general meeting of shareholders in terms of section 61(7)(b) of the Companies Act 71 of 2008 – section 61(7)(b) requires an applicant to show “good cause” to be granted relief – applicant’s grounds for extension primarily concern the fact that its holding company is under supervision due to on-going business rescue proceedings and there is uncertainty regarding the applicant’s ability to proceed as a going concern – no sufficient details as to how these issues (in the form of grounds for relief) directly affect the convening of the applicant’s annual general meeting – extension granted until 30 September 2020, mainly on considerations of the business interruption from measures imposed to combat the COVID-19 pandemic – applicant required to address specific issues (mainly derived from section 61(8) Companies Act) in future similar applications.

DECISION (Reasons and an Order)

Khashane La M. Manamela

Introduction

[1] Air Chefs SOC Limited, the applicant herein, is a profit company incorporated as a state-owned company. As a state-owned company the provisions of the Companies Act 71 of 2008 (the Companies Act) applicable to a public company find modified application to the applicant.¹ The applicant, therefore, is required in terms of the provisions of section 61(7)(b)² of the Companies Act to convene an annual general meeting of shareholders once every calendar year. Further, its annual general meetings (i.e. the previous and subsequent meetings) are not to be apart from each other by a period of more than 15 months. In other words, the subsequent annual general meeting (AGM) ought not to be convened more than 15 months from the date of its previous AGM. The applicant states in this application that it was not in a position to convene its AGM in time and, therefore, seeks an extension of the time to convene its AGM until 31 December 2020. The applicant's last or previous AGM was held on 28 March 2018. But in a series of applications to this Tribunal the time for convening the applicant's AGM was extended a number of times.³ The last extended period was up to 31 March 2020.

[2] The applicant launched this application on 26 March 2020, a few days before expiry of the last extended time.⁴ Its founding affidavit was only deposed to on 26 March 2020 and other documents in the application reflect dates around that time. This, no

¹ See section 9(1) of the Companies Act, which reads "Subject to section 5(4) and (5), any provision of this Act that applies to a public company applies also to a state-owned company, except to the extent that the Minister has granted an exemption in terms of subsection (3)."

² See par 7 below for a reading of section 61(7)(b) of the Companies Act 71 of 2008.

³ See par 4 below for submissions on the extensions previously sought and granted in favour of the applicant.

⁴ Form CTR 142 (application for relief) reflects a date stamp of 26 March 2020.

doubt, was very late and because the application was not launched on an urgent basis,⁵ it is arguable that the application was out of time as there was no basis or legitimate expectation that it will be adjudicated upon before 31 March 2020. From the reasons given for the extension sought in terms of this application, it is clear that the applicant, particularly its company secretary who deposed to the affidavit, knew or ought to have known that the AGM will not take place. Surely, the applicant would have been required to send out notices for its AGM in time to comply with prescribed minimum notice period stipulated in the Companies Act⁶ or the applicant's memorandum of incorporation. Sheer prudence dictated that the applicant ought to have acted earlier than it did in bringing this application. It does not avail the applicant to invoke, as part of its grounds for application, the announcement by the President of the Republic of South Africa on 15 March 2020 of the declaration of a national state disaster in terms of the Disaster Management Act 57 of 2002 (Disaster Management Act)⁷ in terms of which measures to combat COVID-19⁸ in South Africa were introduced. Besides, even this announcement does not appear to have spurred the applicant's functionaries into action, earlier enough. With respect, this tardiness on the part of the applicant may be because the applicant has grown confident that extensions are there for the asking from this Tribunal. I will say more about this later.

⁵ Regulation 147 of the Companies Regulations, 2011 provides for a procedure for urgent adjudication or hearing of matters by this Tribunal.

⁶ See, among others, section 62 of the Companies Act.

⁷ See Government Gazette No. 43096 of 15 March 2020.

⁸ The name given by the World Health Organization (WHO) to the coronavirus disease, caused by the virus known as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2; previously known as "2019 novel coronavirus"). See [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it).

Applicant's case (i.e. grounds (for showing good cause) for extension of time for convening an AGM)

[3] As stated above, the applicant previously applied and was granted (at least twice) an extension (under section 61(7)(b)) regarding the time to convene its AGM. These and other statements appear in the current application and will be traversed below.

[4] The applicant's submissions for the relief sought essentially appear in the following statements from its supporting or founding affidavit:

“

3.

Air Chefs SOC Limited ...is a company ...contemplated in Item 2 of Schedule 5 of the Companies Act 71 of 2008 (the Companies Act). The business of Air Chefs is engaging in the production and supply of food for in-flight catering and/or any other catering requirements. Air Chefs is a wholly-owned subsidiary of SAA.

4.

We humbly request the Companies Tribunal to grant Air Chefs an extension to hold its Annual General Meeting.

In line with section 61 (7) (b) of the Companies Act, a public entity including a State-owned company must convene an Annual General Meeting once in every calendar year, but not more than 15 months after the date of the previous Annual General Meeting (AGM), or within an extended time allowed by the Companies Tribunal.

5.

Air Chefs last held its Annual General Meeting on 28 March 2018 and the next AGM should have been held by 28 June 2019. The Companies Tribunal granted Air Chefs an extension to hold its AGM on or before 31 December 2019. The

Company was further granted an extension to hold its AGM on or before 31 March 2020. However, it seems unlikely that the company will be in a position to hold its AGM on or before this date as a result of the ongoing Business Rescue process at South African Airways and pending finalisation of the company's Annual Financial Statements ... due to ongoing engagements with the shareholder to eliminate the significant uncertainties regarding Air Chefs going concern status. Air Chefs' survival depends on SAA as its major customer and as a subsidiary company. The Business Rescue Practitioners were expected to finalise the business rescue plan by 31 March 2020, but due to the impact of the Corona Virus (COVID-19) to the aviation industry globally and President Ramaphosa declaring a national lockdown from the 17th March to the 16th April 2020, it is expected that these developments will have a significant impact on the rescue plan that was intended to be published by the Business Rescue Practitioners.”

[underlining added for emphasis]

[5] Further, according to the applicant's Memorandum of Incorporation (MOI),⁹ included in the papers, the applicant is required to hold an AGM every year and not more than 15 months from its last AGM,¹⁰ otherwise an extension ought to be sought from this Tribunal. This provision in the applicant's MOI appear to be a reproduction of section 61(7)(b).¹¹

⁹ The applicant's current MOI was adopted by a special resolution of shareholders passed at a meeting held on 23 November 2016.

¹⁰ See par 12.1.1 of the applicant's MOI.

¹¹ See par 7 below, for a reading of section 61(7)(b).

[6] It is on the basis of significantly what is stated above that the applicant seeks extension of the time to hold its AGM from 31 March 2020 to 31 December 2020. I discuss the submissions against the applicable legal principles, next.

Submissions and applicable legal principles (a discussion)

[7] As already evident, the most applicable legal principle to this application and determination to be made is located in section 61(7)(b) of the Companies Act. This provision reads:

“A public company must convene an annual general meeting of its shareholders-

(a) ...

(b) ... 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.”

[underlining added for emphasis]

[8] I have already stated above that section 61(7)(b), applicable to public companies, apply to the applicant as a state-owned company by virtue of section 9(1).¹² The former provision requires public companies to convene an AGM every calendar year and not more than 15 months apart (from the previous AGM to the subsequent one). The same provision allows a public company, on “good cause” shown, to be granted an extension of time to convene an AGM by this Tribunal. Therefore, for this application to succeed the applicant ought to adduce facts or evidence equating to “good cause”.

¹² See footnote 1 above.

[9] For a start, there is no explanation in the Companies Act as to what constitutes “good cause”.

[10] In *Minister of Defence and Military Veterans v Motau and Others*¹³ (*Motau*) the Constitutional Court had to determine what constituted “good cause” in the facts and law applicable to that decision. It held that:

“Good cause may be defined as a substantial or 'legally sufficient reason' for a choice made or action taken. [Garner (ed) *Black's Law Dictionary* 8 ed (Thomson West, St Paul 2004) at 235] Assessing whether there is good cause for a decision is a factual determination dependent upon the particular circumstances of the case at hand. [See, for example, *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC) (2007 (4) BCLR 339; [2006] ZACC 23) (*Union of Refugee Women*) para 86] ¹⁴

[underlining added for emphasis and accompanying footnotes omitted, but material therefrom reflected in square brackets]

[11] The facts and legal principles in *Motau* were different from those in this matter. In *Motau*,¹⁵ General Motau and Ms Mokoena were terminated or removed as members of the board of directors of a state-owned company called Armscor. The termination was by the Minister of Defence and Military Veterans (the Minister) and she purported to act in terms of section 8(c) of the Armaments Corporation of South Africa Ltd Act 51 of 2003 (the Armscor Act). Section 8(c) of the Armscor Act allows the Minister to make such

¹³ *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC).

¹⁴ See *Motau* at par 54.

¹⁵ See headnote from *Motau* on p 69.

termination upon “good cause shown”. Dissatisfied with their termination General Motau and Ms Mokoena successfully approached the High Court for relief. But, their victory did not fully endure the appeal by the Minister to the Constitutional Court and was partially reversed.¹⁶ They had sought for the Minister’s decision to be reviewed and set aside on grounds emanating from the Promotion of Administrative Justice Act 3 of 2000 and, of particular relevance to this matter, on the basis that Minister failed to show “good cause”, as required by the Armscor Act.

[12] Although the facts and the law in *Motau* differ with those in this matter, there is persuasive value in some of its *dicta* towards the determination to be made in this matter. With respect, this much is appreciated (on the basis of cited authorities) by the Constitutional Court in *Motau* that: assessing the existence of “good cause”, in respect of the Minister’s decision for example, “is a factual determination dependent upon the particular circumstances of the case at hand”.¹⁷

[13] According to the principles in *Motau* an applicant ought to successfully show “good cause” by furnishing a substantial or “legally sufficient reason” for the action taken or choice made. In other words, an applicant (as in this matter) ought to furnish sufficient or substantial reasons in law why it was not able to convene its AGM by 31

¹⁶ In the Constitutional Court the order of the High Court was replaced with the following: “(a) It is declared that the minister acted unlawfully insofar as she terminated the services of General Motau and Ms Mokoena on the Armscor board without following the procedure set out in s 71(1) and (2) of the Companies Act. (b) The minister's decision to terminate the services of General Motau and Ms Mokoena on the Armscor board is not set aside. (c) The minister is ordered to pay the costs incurred by General Motau and Ms Mokoena in the high court.” See *Motau* at 72-73.

¹⁷ See *Motau* at par 54.

March 2020 and why the time for convening its AGM should be extended until 31 December 2020.

[14] In the High Court decision (unreported) of *The Highly Nutritious Food Company (Pty) Ltd v The Companies Tribunal and Others (Highly Nutritious Food)*,¹⁸ the Gauteng Local Division, Johannesburg (the High Court) held, per Twala J, that:

“Section 160(2)(b) allows any person and at any time to bring an application on good cause shown. This does not refer only to the delay in bringing the application but to show good cause as to why the application must be entertained. The section requires the applicant to furnish a reasonable explanation as to why the application should be entertained by the Tribunal. It does not require an explanation only as to the delay in bringing the application but refer to the merit of the application as well.”¹⁹

[15] It is clear that *Highly Nutritious Food* also dealt with different set of facts and even legal principles. It concerned provisions of section 160(2)(b)²⁰ dealing with company names’ disputes and, actually, was a review of a decision of this Tribunal.²¹ Section 160(2)(b) also requires that “good cause” be shown regarding the timing or delay in bringing an application against the reservation or registration of a disputed company name.

¹⁸ *The Highly Nutritious Food Company (Pty) Ltd v The Companies Tribunal and Others* (91718/2016) [2017] ZAGPJHC (22 September 2017).

¹⁹ See *Highly Nutritious Food* at par [18].

²⁰ Section 160(2) reads: “An application in terms of subsection (1) may be made- (a) within three months after the date of a notice contemplated in subsection (1), if the applicant received such a notice; or (b) on good cause shown at any time after the date of the reservation or registration of the name that is the subject of the application, in any other case.” [underlining added for emphasis]

²¹ *The Highly Nutritious Food Company (Pty) Ltd v Eat Right Catering Services (Pty) Ltd and Others*, Companies Tribunal Case Number: CT014Apr2016.

[16] In *Highly Nutritious Food* the High Court relied on the decision of the Supreme Court of Appeal in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*²² (and other decisions) dealing with rescission of judgments.²³ The Constitutional Court decision of *Motau* was not considered at all. I speculate that the High Court may have found decisions dealing with delay or time factor more relevant than *Motau* which was more about the substantive reasons for the action taken or choice made (i.e. decision). But, with respect, not much turns on any difference in these, whether in syntax (i.e. form) or substance.

[17] However, due to the nature and extent of the substance of its *dicta*, *Highly Nutritious Food*, appears to be more persuasive for the determination to be made in this matter. The essence of the explanation for “good cause” expressed in *Highly Nutritious Food* is that the decider of fact ought not only consider the reasonableness of the explanation proffered for the delay, but also the merits of the matter. These signify that there are two inclusive ingredients to the concept of “good cause”: reasonableness of the explanation for the delay and prospects of success or merits of the matter.

[18] The two inclusive ingredients of “good cause” from *Highly Nutritious Food* may be blended (at the risk of diminishing their impact or import) with the views expressed in *Motau*. Once done, the blended requirement will be to the effect that to successfully clear the hurdle posed by the requirement to show “good cause” for purposes of an application for extension of time to convene an AGM under section 61(7)(b), the applicant is

²² *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA).

²³ See *Colyn v Tiger Food Industries* at 9C or par [11].

required to furnish to this Tribunal sufficient or substantial or reasonable explanation for the time-factor (or delay in convening an AGM) and meritorious grounds for the extension sought. In the sum, there ought to be reasonable or substantial grounds for the extension, including its timing.

Conclusion and Order

[19] Evidently, the applicant's reasons or grounds for extension are based on the on-going business rescue proceedings in the applicant's sister company, South African Airways (SAA), and doubts or uncertainty regarding the applicant's going-concern status.

[20] Honestly, I do not fully understand why these ought to be reasons for not convening an AGM of the applicant. This is not to say that I do not find the reasons credible, but their causal link to the applicant appears to be weak.

[21] There is no explanation why the applicant cannot convene its AGM and material issues discussed, instead of perpetually delaying its AGM, due to reasons or circumstances to do with another company, albeit a holding company. Much ado is necessary about why the reasons given for extension have a direct bearing or relevance to matters to be dealt with at an AGM of the applicant.²⁴ Also the extension sought is for a very long time (i.e. nine months) and, even on this, there is no attempt at justification for

²⁴ See section 61(8) of the Companies Act, which reads "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) appointment of- (i) an auditor for the ensuing financial year; and (ii) an audit committee; and (d) any matters raised by shareholders, with or without advance notice to the company".

the length of the period sought. The applicant's last AGM was held in March 2018. This is over two years ago and with the current extension required it will be a period of almost three years before the subsequent AGM is held.

[22] Therefore, I respectfully find the material contained in the supporting affidavit to be very parsimonious for the relief sought. This is not the same as saying there is failure to show good cause on the part of the applicant. But, the application does not go far in assisting a decider of fact, represented by this Tribunal, to fully understand why the uncertainties with the applicant's going concern status, for example, ought to delay its AGM. The only saving element of this application, which to some extent is self-created, is that the date to be extended has already passed (i.e. 31 March 2020) after this application was launched literally a couple of business days before the expiry of the period. Another reason is the restrictions attaching to measures to combat COVID-19 pandemic in terms of the Disaster Management Act. Therefore, I will grant the extension for a shorter period of six months. I will also add material worthy of consideration for purposes of future applications by the applicant, should there be any. It is of great concern to me that the extension under section 61(7)(b) has been somewhat routinely invoked by the applicant.

[23] On the basis of what is stated above, the following administrative order (in a)) and request (in b)) are made:

- a) the time for, Air Chefs SOC Limited (registration number: 1990/006277/30), the applicant herein, to hold its annual general meeting is extended until 30 September 2020;
- b) the applicant, in the event that it requires relief based on section 61(7)(b) of the Companies Act 71 of 2008 in the future, is implored to include the following material in its application for such relief:
- (i) whether audited financial statements have been prepared for the 2018, 2019 and/or 2020 financial years, if not full reasons why they have not been prepared and when they will be prepared;
 - (ii) whether directors have been appointed for the 2018, 2019 and 2020 financial years, if so the basis they have been appointed in the absence of an annual general meeting of shareholders;
 - (iii) whether auditors (if the office of the Auditor General is not utilised) have been appointed for the 2018, 2019 and 2020 financial years, if so why they have been appointed in the absence of an annual general meeting of shareholders;
 - (iv) whether in the opinion of the applicant there are no stakeholders, including shareholder(s), adversely affected or prejudiced by the

continued extension of the time to convene the applicant's annual general meeting of shareholders;

- (v) why the business rescue proceedings or any other process relating to the affairs of the South African Airways SOC Limited is relevant to the preparation of the audited financial statements of the applicant and the convening of the applicant's annual general meeting, and
- (vi) in the event the application for extension is lodged with the Companies Tribunal less than two months before the date of convening the applicant's annual general meeting or less than two months before the expiry of the extended time for convening the applicant's annual general meeting, the applicant to furnish substantive explanation why the application was not made earlier.

Khashane La M. Manamela (Mr.)

Member, Companies Tribunal

21 May 2020