



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT00519ADJ2020

In the *ex parte* application of:

Efora Energy Ltd.

Applicant

(Registration number: 1993/00460/06)

Presiding Member of the Companies Tribunal: ISHARA BODASING

Date of Decision: 03 December 2020

DECISION (Reasons and an Order)

1. INTRODUCTION

1.1 Applicant is Efora Energy Limited, a company incorporated in terms of the company laws of South Africa, with its registered address at 2nd Floor, Building 11, Design Quarter District, Leslie Avenue, Gauteng.

1.2 Applicant's Chief Executive Officer, Marius Damain Matroos, duly authorised, deposed to an affidavit in support of this application, which was filed with the Tribunal on 01 December 2020.

1.3 This is an application in terms of Section 61(7)(b) of the Companies Act 71 of 2008 ("the Act"), for an administrative order to extend the date for Applicant to hold its

2019 annual general meeting (AGM) to 28 February 2021 or a date that this Tribunal deems appropriate.

2. ISSUES

2.1 This Tribunal is faced with two main issues:

2.1.1 Has the Applicant shown good cause for the late filing of this application?

2.1.2 Has the Applicant shown good cause to bring this application?

2.2 Paragraph 15.11.1(b) of Applicant's Memorandum of Incorporation (Moi) requires it to hold an AGM once in a calendar year, but no more than fifteen (15) months after the date of the previous AGM. The previous AGM was held on 16 August 2019, which meant that the next AGM would have had to be convened by 16 November 2020.

2.3 Applicant states that the reasons for its request are manifold, including that:

2.3.1 Due to Covid-19 and the resultant nationwide lockdown from 26 March 2020, its external auditors' access to information was impaired. Finalisation of the external audit was further exacerbated by the geographical locations of its various subsidiaries; and

2.3.2 As part of the evidence required by the external auditors to sign off on the external audit, Applicant awaits a response from the Unemployment Insurance Fund (UIF) in respect of either the subordination of a loan or a twelve-month moratorium of the loan repayments.

3. APPLICABLE LAW

3.1 Section 61(7) of the Act provides:

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 with an extended time allowed by the Companies Tribunal, **on good cause shown**. [my emphasis]*

4. EVALUATION

Late filing of the Application

4.1 At the outset, and *mero motu*, I deal with the question of Applicant's late filing of this application for an extension to hold its AGM, with no request for the late filing to be condoned. Applicant has not even hinted at any reason why it did not timely lodge this application.

4.2 As mentioned earlier, Applicant should have held its 2019 AGM by 16 November 2020. The application for an extension was lodged about a fortnight thereafter on 1 December 2020. If an application in terms of Section 61(7) of the Act is to be more than an empty ritual, it must demand that this be done timely so that this Tribunal is afforded the scope to perform its purpose. This Tribunal is not to be used as a rubber stamp.

Good cause

4.3 I now turn to the issue of whether or not the Applicant has shown good cause to bring this application for an extension of time within which to hold its AGM.

4.4 Section 61(7)(b) of the Act grants this Tribunal the necessary jurisdiction to consider and grant the relief sought by the Applicant on "good cause shown". However, "good cause" is neither defined nor explained in the Act. Therefore, I am guided by the decision of the Constitutional Court, in the Military Veterans case, where it was said:

Good cause may be defined as a substantial or 'legally sufficient reason' for a choice made or action taken. Assessing whether there is good cause for a decision

*is a factual determination dependent upon the particular circumstances of the case at hand.*¹

4.5 Based on the above dictum, for the Applicant *in casu* to successfully show or establish “good cause”, it ought to have furnished a substantial or “legally sufficient reason” for the extension sought. In other words, the Applicant ought to have furnished sufficient or substantial reasons in law why it would not be able to convene its AGM by the expiry of the 15 months’ period from its previous AGM (i.e. 16 November 2020).

4.6 Furthermore, in the unreported decision of The Highly Nutritious Food Company case,² Twala, J. evaluated what is “good cause”:

*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.*³

4.7 Therefore, to succeed on the “good cause” leg of an application such as this, Applicant had to advance a sufficient, substantial or reasonable explanation for the delay in convening an AGM, **and** grounds that warrant the Tribunal granting such an extension.

Lack of evidence

4.8 In the case of Absa Bank v Ntsane⁴ the court reiterated the principle that in an affidavit made *ex parte* the deponent is duty bound to disclose all relevant facts which might influence the court’s decision. The failure to comply with this

¹ Minister of Defence and Military Veterans v Motau and Others 2014(5) SA 69 (CC) 89 at par 54.

² Highly Nutritious Food Company (Pty) Ltd. v Companies Tribunal and Others, High Court, Gauteng Local Division, Case nr. 91718/2016 at par. 12.

³ See Highly Nutritious Food at par [18].

⁴ Absa Bank Ltd v Ntsane & another 2007 (3) SA 554 (T) (para 50 at 562I—563A, with reference to Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348F—349B).

fundamental principle, said Bertelsmann J, whether by design or by neglect, would entitle the court to dismiss the application on that ground alone.

4.9 Applicant does not provide any supporting evidence in respect of the reasons for which an extension is applied. The bald statements of the deponent to the supporting affidavit leaves this Tribunal in the dark.

4.10 In respect of its first excuse, the following needs to be addressed:

4.10.1 Our nation moved into alert level 2 during August 2020, which effectively permitted local travel; and alert level 1 during September 2020, which permitted international travel. On the face of it, applicant's external auditors' access to information seems to have not been impaired by the lockdown for approximately two months leading up to the due date for its AGM.

4.10.2 It is unclear why, given the relaxation of the lockdown, and the Applicant's Mol allowing for the holding of virtual meetings⁵, access to information was a challenge.

4.11 In respect of the second excuse, the following needs to be addressed:

4.11.1 On 30 September 2020, this Tribunal granted an extension to Afric Oil (Applicant's subsidiary) to hold its AGM by 30 November 2020, one of the reasons being exactly the same as that cited in this application regarding the Unemployment Insurance Fund (UIF) loan.⁶

4.11.2 In order to avoid being a frequent visitor to this Tribunal, Applicant should indicate the status of its engagements with the UIF, what are the challenges, and when is it expected that the evidence required by the external auditors to sign off on the external audit will be furnished.

⁵ Clause 5.6: Electronic Participation by Shareholders

⁶ *Ex parte* application of Afric Oil (Pty) Ltd., Case No: CT00459ADJ2020, 30 September 2020

4.11.3 Furthermore, if the UIF loan relates to the nationwide lockdown period, then it begs the question as regards its relevance for the 2019/2020 financial year.

4.12 However, all is not lost. The door is still open to Applicant to re-lodge a condonation application, and a more substantively supported application in terms of section 61(7)(b) of the Act. Furthermore, Section 61(12) of the Act provides that a court can order a company to convene an AGM “when a company fails to convene a meeting for any reason other than ... “in the instances described for this Tribunal in terms of section 61(11) of the Act.

5. FINDINGS

5.1 The fatal bullet striking at the heart of this application for an extension, is not just that it was lodged a fortnight after the AGM was due to be held, but rather that Applicant did not seek a condonation for this.

5.2 Even if this could be overlooked, I find that the paucity of information to support Applicant’s excuses, results in a failure to show good cause to bring the application.

6. ORDER

The application is dismissed.



ADV. ISHARA BODASING