COMPANIES TRIBUNAL OF SOUTH AFRICA

Case Number: CT00589ADJ2021

In the *ex parte* application of:

CULLINAN GOLF ESTATE **Applicant**

HOMEOWNERS ASSOCIATION NPC

(Registration Number: 2005/006058/08)

Presiding Member	:	Khashane La M. Manamela (Mr.)
Date of Decision	:	01 March 2021

Summary: Application for an extension of time to convene an annual general meeting of members of the applicant – restrictions or measures introduced to combat the COVID-19 pandemic cited as ground for the application - applicant is a non-profit company – application ostensibly based on s 61(7)(b) of the Companies Act 71 of 2008 – held, despite s 10(3), read with s 10(1), of the Companies Act providing that s 61(7)(b) would apply to non-profit companies "with the changes required by the context", non-profit companies are not required to convene annual general meetings – held, s 61(7)(b) is only applicable to public companies – held, application fails due to lack of jurisdiction of the part of this Tribunal to grant the relief sought

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DECISION (Reasons and an Order)

Khashane La M. Manamela

Introduction

[1] In this *ex parte* application, Cullinan Golf Estate Homeowners Association NPC, evidently a non-profit company, seeks that this Tribunal extend the period within which it was to convene its annual general meeting (AGM). The applicant last held its AGM on 15 March 2019. It is submitted that the applicant was supposed to hold its AGM by not later than 15 June 2020, by which date a period of 15 months had elapsed from the date the applicant last held its AGM. This appears to be a provision from the applicant's memorandum of incorporation,[1] in as much as it is a repetition of section 61(7)(b)[2] of the Companies Act 71 of 2008 (the Companies Act). It is stated that the applicant requires an extension of the period for convening its AGM until 60 days after the termination of the "lockdown". It is now a widely known fact that the "lockdown" is reference to the restrictive measures, among others, as to gatherings, imposed to combat the COVID-19 pandemic.[3]

Grounds for an extension (and the timing of this application)

[2] Predicated upon the understanding, either based on its memorandum of incorporation[4] or the Companies Act[5] or both, the applicant cites as grounds for not convening its AGM, the following:

> "2. … The lockdown came into effect on 28 December 2020 and face to face meetings are prohibited during the lockdown. An online meeting could not be held as in terms of Clause 15.4 of the Memorandum of Incorporation of the

[1] Par 14.1 of the applicant's memorandum of incorporation.
[2] See par [9] below, for a reading of section 61(7) of the Companies Act 71 of 2008.
[3] Par [4] below.
[4] Footnote 1 above.
[5] Section 61(7) of the Companies Act.

Company a General Meeting is not allowed to be held by way of electronic communication as provided for in Section 63(2) of the Companies Act.

3. We therefore request a further extension but due to the on-going lockdown cannot provide an alternative date as to when the meeting can be held.

4. We undertake to convene a face to face General Meeting within sixty days after the lockdown has been terminated."[6]

[3] Before I deal with the merits of this application, I would like to point out a few issues of concern. The application is made on the authority given by the board of directors of the applicant to Mr Henri Buchner du Toit in terms of a power of attorney or resolution dated 07 September 2020. The mandate of the board to Mr Du Toit was to apply to this Tribunal for the extension of the period to convene the applicant's AGM later than 31 May 2020. I cannot fathom the reason for citing this date in the resolution, but I will move on. It is evident from what is aforementioned that the board had acted after the fact as it sought to extend a period which had already passed.[7] This was even a good reason for Mr Du Toit to act with the necessary expediency and haste. But he did not. He deposed to the affidavit in support of the application only five months later on 04 February 2021. In his affidavit he cited or relied exclusively on circumstances which occurred after the board's resolution. He mentioned nothing on why the AGM could not have been held between 31 May 2020 (the date on which according to the board the meeting should have been held) and 07 September 2020 (when the board decided to

[6] Form CTR 142, dated 03 February 2021, reflecting a date of this Tribunal of 12 February 2021. The contents of the Form CTR 142 are substantially repeated in the supporting affidavit.
[7] Par [5] below.

launch the application). He relied on the events of December 2020. It also took him over a week later to lodge this application with this Tribunal on 12 February 2021. All these do not augur well for a party who is eager to cause to be condoned its non-compliance with the provisions of its own constitution. And there is no explanation for the delay in launching this application. But I will move on.

[4] It is also incorrect to say that no face-to-face meetings could be held during the lockdown imposed in December 2020. The so-called "lockdown" was one of many extensions of the declaration of the national state of disaster in terms of the Disaster Management Act 57 of 2002 made by the President of the Republic of South Africa in March 2020.[8] The restrictive measures of the lockdown have been continuously eased on a gradual basis from the end of May or beginning of June 2020. This was around the time when the applicant's AGM was due to be held. The correct position is that in terms of the COVID-19 regulations, issued by the government from time to time, there has been limitations or restrictions regarding attendance of gatherings. It is not unexpected that this would continue as long as the COVID-19 pandemic continues to pose a problem. In fact, new regulations for further easing of the restrictions as to gathering were issued on the eve of this decision on 28 February 2021.[9] Therefore, it is - with respect - disingenuous

[8] Government Gazette No. 43096 of 15 March 2020, read with Government Gazette No. 43167 of 26 March 2020.

[9] Regulation 72(3) *et seq* of Disaster Management Act, 2002: Amendment of Regulations issued in terms of section 27(2) in terms of Government Notice No R 152 of 28 February 2021 (Government Gazette No 44201), which reads in the material part: "(3) All … social, political and cultural gatherings are permitted but limited to 100 persons or less for indoor venues and 250 persons or less for outdoor venues and if the venue is too small to hold the prescribed number of persons observing a distance of at least one and a half metres from each other, then not more than 50 percent of the capacity of the venue may be used, subject to strict adherence to all health protocols and social distancing measures. (4) Gatherings at a workplace for work purposes are allowed. subject to strict adherence to all health protocols and social distancing measures. (5) (a) Hotels, lodges. bed and breakfasts. timeshare facilities. resorts and guest houses are

for the applicant to cite the regulations only imposed in December 2020, when it has had opportunities to take advantage of less restrictive regulations in force before. There is no suggestion that the applicant had convened its AGM for December 2020 or thereafter only for this to be scuppered by the December 2020 issued COVID-19 regulations. In fact, the applicant's case is that this Tribunal must grant it an open-ended extension, long enough to defer its AGM for as long as COVID-19 is extant, plus 60 days thereafter.

[5] But the applicant appears to be requesting this Tribunal to grant an extension of the period to convene its AGM retrospectively or after the period had elapsed. The applicant's AGM was to be held by May/June 2020. This actually broach the question whether this Tribunal has jurisdiction to extend an elapsed period for the holding of an AGM?

[6] In *Ex Parte II Incentives Limited*,[10] this Tribunal dealt with the "extension" of the period to hold an AGM, as envisaged in section 61(7)(b) of the Companies Act after it had already expired. The authority for this Tribunal to extend the period for holding an AGM is located in section 61(7) of the Companies Act.[11]

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allowed full capacity of the available rooms for accommodation, with patrons observing a distance of at least one and a half metres from each other when in common spaces. (b) Conferencing, dining and entertainment facilities are subject to a limitation of a maximum of 100 persons or less for indoor venues and 250 persons or less for outdoor venues and if the venue is too small to hold 100 persons indoors or 250 persons outdoors observing a distance of at least one and a half metres from each other. then not more than 50 percent of the capacity of the venue may be used …"

[10] *Ex Parte II Incentives Limited*, Companies Tribunal, Case Number: CT005Jan2016, 11 February 2016. This decision (including others referred to below) is accessible on the website of the Companies Tribunal: www.companiestribunal.org.za.

[11] See par [9] below, for a reading of section 61(7).

[7] In the decision in *Incentives* this Tribunal made a determination order despite the period of 15 months having already elapsed. This approach was repeated by this Tribunal in other decisions.[12] Therefore, despite my lamentations above regarding the manner in which the applicant or its deponent Mr Du Toit has handled the launch of this application, I will proceed to deal with the substantive issues in this matter.

Applicant's case and applicable legal principles (a discussion)

[8] As indicated above, the applicant's case is that it cannot hold its AGM because of restrictions for combatting the COVID-19 pandemic. The applicant assert that these restrictions have prohibited face-to-face meetings. Therefore, no AGM of the applicant will be held as long as the COVID-19 pandemic endures. I have already pointed out that this submission – with respect – is without merit. The applicant also submits that it cannot hold the AGM electronically as contemplated by section 63(2)[13] of the Companies Act due to a provision in paragraph 15.4 (sc. 15.5) of its memorandum of incorporation, which proscribes participation at an AGM by electronic communication.[14] Obviously this restrictive provision in the applicant's memorandum of incorporation was decided upon by the applicant without the contemplation of a natural disaster or interruption, such as the COVID-19 pandemic. This may have been well intended at the time. However, as

[12] See, for example, *Ex Parte Sakhile Initiative 2 (RF) Limited*, Companies Tribunal, Case Number: CT00423ADJ2020, 30 September 2020; *Ex Parte Zini River Estate Homeowners Association (RF) NPC*, Case Number: CT00477ADJ2020, 29 October 2020. These and further decisions may be found on the website of this Tribunal: www.companiestribunal.org.za.

[13] Section 63(2) reads: "(2) Unless prohibited by its Memorandum of Incorporation, a company may provide for - (a) a shareholders meeting to be conducted entirely by electronic communication; or (b) one or more shareholders, or proxies for shareholders, to participate by electronic communication in all or part of a shareholders meeting that is being held in person, as long as the electronic communication employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting." [underlining added for emphasis]

[14] Par [2] above.

matters stand, the applicant's members may ordinarily be required in terms of its memorandum of incorporation to gather in person in order to remove the restriction so that they can hold an AGM by electronic communication. In turn, such meeting may be restrictively affected by the COVID-19 restrictions, to the extent that they apply. Essentially, the grounds proffered by the applicant for failure to convene its AGM, despite my lamentations above,[15] are a sign of the times we are in: the times of the COVID-19 pandemic.

[9] The applicant have not disclosed or specifically stated the provision in the Companies Act in terms of which this application is made.[16] However, the relief sought clearly confirms that the application is premised upon the provisions of section 61(7) of the Companies Act. This provision reads in the material part:

> "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 within an extended time allowed by the Companies Tribunal, on good cause shown."

[10] From a reading of section 61(7)(b), appearing above, it is clear that the provision applies to public companies. The applicant is a non-profit company. In my view the provisions in section 61(7)(b) do not apply to non-profit companies. I have expressed this

[15] Pars [2]- [4] above.
[16] Regulation 142(3) of the Companies Regulations, 2011.

view previously, including in *Ex Parte Gauteng Cricket Board NPC*[17] in which, among others, I said the following:

> "Therefore … this Tribunal cannot - even with an inadvertent reliance by the applicant on section 61(7) of the Act, which has since been found to be inapposite - assist the applicant. In fact, the applicant doesn't require the assistance of this Tribunal regarding its delayed annual general meeting. I have already pointed out that, there is currently no statutory obligation or requirement on the applicant to hold an annual general meeting after the annual general meeting that was held for the final period for which same was statutorily required. Beyond the aforesaid, the applicant has only been bound to hold an annual general meeting by a provision in its memorandum of incorporation."[18]

[quoted without accompanying footnotes]

[11] The view or reason for the decision in *Gauteng Cricket Board* has been applied in other decisions of this Tribunal.[19] But, I have noted some decisions of this Tribunal which held that section 61(7) applies to non-profit companies.[20] Some of these decisions assert their reliance upon the provisions of section 10(3), read with section 10(1), of the Companies Act. These provision read as follows:

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[17] *Ex Parte Gauteng Cricket Board NPC*, Companies Tribunal, Case Number: CTR001/11/2012, 23 March 2013.
[18] *Gauteng Cricket Board* at par [33].
[19] See, among others, *Cedar Creek Homeowners Association NPC*, Companies Tribunal, Case Number: CT011NOV2017 (22 November 2017) at par 5.1 *per* Prof PA Delport and other decisions on the Tribunal's website. For a contrary view see *Serengeti Golf and Wildlife Estate Property Owners Association NPC*, Companies Tribunal, Case Number: CT009FEB2017 (23 March 2017) at par 22 *et seq per* Prof K Moodaliyar.
[20] *Blyde River Botanical Reserve Homeowners Association NPC*, Companies Tribunal, Case Number: CT007MAR2019, 01 April 2019; *Aqua Vista Home Owners Association*, Companies Tribunal, Case Number: CT00450ADJ2020, 20 November 2020, and *Raslouw Home Owners Association*, Companies Tribunal, Case Number: CT00533ADJ2020, 06 February 2021.

"(1) Every provision of [the Companies Act] applies to a non-profit company, subject to the provisions, limitations, alterations or extensions set out in this section, and in Schedule 1.

(2) …

(3) Sections 58 to 65, read with the changes required by the context-

(a) apply to a non-profit company only if the company has voting members; and

(b) when applied to a non-profit company, are subject to the provisions of item 4 of Schedule 1.

[underlining added for emphasis]

[12] Without much ado, but with respect to the contrary views, I do not believe section 10, quoted immediately above, renders non-profit companies liable to hold annual general meetings of members. Not even private companies, which are profit companies, ordinarily have this requirement.[21] Therefore, the application of section 61(7) "with the changes required by the context", urged upon in section 10(3), is that its provisions to do not apply to non-profit companies. Further, I find solace in this regard in the following material from the stated authorities:

[12.1] In *Henochsberg on the Companies Act 71 of 2008*[22] it is stated as follows with regard to section 10 of the Companies Act:

"Non-profit company. Subsection (3) provides that ss 58 to 65, *read with the changes required in the context*, apply to non-profit companies. Sections 58 to 65, however, refer to various types of companies and in s 61 there is a clear distinction between public companies and other types of companies: see General

[21] Par [13] below.

[22] Delport, P. 2020. *Henochsberg on the Companies Act 71 of 2008*. Last updated: October 2020 - SI 24. LexisNexis.

Note on s 61. In respect of meetings, s 61 (2) (*c*) provides that "a company" must convene a shareholders' meeting when otherwise required in terms of s 61 (3) or s 61 (7), or if required by the company's Memorandum of Incorporation. Section 61 (7) requires that a public company "must convene an annual general meeting", with the effect that companies other than public companies must convene such a meeting when required by the Memorandum of Incorporation. Therefore, when read with the "changes required by the context", there is no justification that s 61 (7) will apply to non-profit companies to the exclusion of the provisions that require other companies to hold annual general meetings as provided for in the Memorandum of Incorporation of the particular company. The non-profit company is, due to the fact that it is not a profit company, not a public company: see s 8 *sv* Public company. This is the sensible meaning and is to be preferred to one that leads to insensible or unbusinesslike results: *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), 2012 (4) SA 593 (SCA) para 18 and s 15 *sv* Subsection (6). If the provisions in respect of a public company are to be applied to a non-profit company, the legislature could have made it expressly applicable, such as in the case of a state-owned company as provided for in s 9 (1) of the Companies Act. Also, the express provisions in s 19 (3) of the Companies Act 61 of 1973 that a section 21 company (company limited by guarantee), the predecessor of the non-profit company, is deemed to be a public company, were not transferred to the Companies Act 71 of 2008: *Ex parte: Cedar Creek Home Owners' Association NPC* CT011Nov2017 (28 Nov 2017). It is accepted that the legislature was aware of this and the fact that the deeming provision was not transferred to the Companies Act 71 of 2008 is an indication that there was a change in the legislative purpose: see eg *R v Shole* [1960] 4 All SA 411 (A), 1960 (4) SA 781 (A) at 787A; *Ngwenda Gold* (*Pty*) *Ltd v Precious Propspec Trading 80* (*Pty*) *Ltd* 2011/3166 14 December 2011 (GSJ) and *Boost Sports Africa* (*Pty*) *Ltd v South African Breweries Ltd* [2015] 3 All SA 255 (SCA); 2015 (5) SA 38 (SCA) para 13; *Barry v Clearwater Estates NPC and Others* [2017] JOL 37552 (SCA), 2017 (3) SA 364 (SCA) para 21 and *Systems Applications Consultants (Pty) Ltd t/a Securinfo v Systems Applications Products AG and Others* [2020] JOL 47558 (SCA) para 32."[23]

[23] *Henochsberg on the Companies Act 71 of 2008* at p 54(21).

[12.2] Further, in *Henochsberg on the Companies Act 71 of 2008* it is stated as follows with regard to section 61(7) of the Companies Act:

> "A public company must convene an annual general meeting of its shareholders initially, no more than 18 months after the company's date of incorporation thereafter, 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 (sub-s (7)). See s 1 *sv* "public company" and s 8 *sv* **Public Company**. Non-compliance with the requirements of sub-s (7) could result in a compliance notice by the Companies and Intellectual Property Commission in terms of s 171 (7) (see **General Note** on s 171). If the compliance notice is not adhered to, it could result in criminal sanctions as a result of s 171 (7) (*b*) with the penalties as prescribed in s 216 (*b*): see **General Note** on s 216 and *S v Quantum Property Group Limited* SH7/67/2016 of 21 July 2016 (Specialised Commercial Crime Court, Bellville, Cape Town). Only a company that is registered as a public company, ie a profit company that is not a state-owned company, a private company or a personal liability company is required in terms of sub-s (7) to have an annual general meeting. A non-profit company is not a profit company (see s 1 *sv* "profit company") and can therefore not be a public company (see s 1 *sv* "public company"). It is therefore not subject to sub-s (7): see also s 8 *sv* **Public company** and **General Note** on s 10."[24]

[12.3] Also, in *Commentary on the Companies Act of 2008*[25] it is stated as follows with regard to section 61(7) of the Companies Act:

> "While it is mandatory for a public company to hold an annual general meeting, it is not mandatory for a private company to do so. A public company must convene an annual general meeting not more than 18 months after the company's date of incorporation and thereafter once in every calendar year, but no more than

[24] *Henochsberg on the Companies Act 71 of 2008* at p 235.
[25] Yeats, JL. ed. *Commentary on the Companies Act of 2008*. Jutastat e-publications, accessed on 26 February 2021.

> 15 months after the date of the previous annual general meeting. The Companies Tribunal may extend this time period, provided good cause is shown."[26]

[underlining added for emphasis, but quoted without accompanying footnote(s)]

[13] What is stated in the latter quoted authority appears to drive home the fact that, private companies, being profit companies, are not required to convene annual general meetings. Therefore, this responsibility or statutory requirement could not have been contemplated by the legislature for non-profit companies.

Conclusion

[14] Based on what is stated above, I reiterate – with respect - my view that the applicant is not required to convene an AGM by the provisions of the Companies Act. Obviously, the applicant appears to have assumed this responsibility in terms of a provision in its memorandum of incorporation.[27] And for a good measure further restrained it by proscribing participation in or convening an AGM by means of electronic communication.[28]

[15] Consequently, this Tribunal lacks jurisdiction to grant an order for the extension of the period to convene the applicant's AGM, as sought by the applicant or at all. This application will be dismissed for the abovementioned reasons.

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[26] *Commentary on the Companies Act of 2008* at RS 1, 2020, p 2-1271.
[27] Par 14.1 of the applicant's memorandum of incorporation.
[28] Par 15.5 of the applicant's memorandum of incorporation.

Order

[16] Therefore, the following order is made:

a) the application is dismissed.

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Khashane La M. Manamela (Mr.)

Member, Companies Tribunal

01 March 2021