



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case Number: CT00669ADJ/2021

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 : 31 May 2021

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 – application brought after the previous extension has long expired – held, an AGM for a state-owned company affects the interests of a single shareholder, although other stakeholders may be affected – held, extension granted until 30 September 2021.

DECISION (Reasons and an Order)

Khashane La M. Manamela

Introduction

[1] This is an application in terms of section 61(7)(b)¹ of the Companies Act 71 of 2008 (the Companies Act) for an extension of the time to convene the annual general meeting or the AGM of the applicant, Air Chefs SOC Limited. It ought to be mentioned – with respect - that the applicant has become a regular applicant at this Tribunal for this type of relief. Just over a year ago, on 21 May 2020, I granted (in favour of the applicant) an order for the extension of the time to convene its AGM until 30 September 2020.² The latter extension was actually the third in a period of about ten months.³ Therefore, should this application be successful, the extension granted would be the fourth. The applicant's last or previous AGM was held over three years ago, on 28 March 2018.

[2] In this application the applicant seeks that another extension of the time to convene its AGM be granted until 30 September 2021. The applicant states that it has - again - not been able to convene its AGM within the period of over four months granted in terms of the previous order of extension granted on 21 May 2020. In fact, the applicant has not been able to convene its AGM for a period longer than four months. This is so, because this application was launched with this Tribunal only on 23 April 2021.

[3] Evidently, this was long after the expiry of the extension period in terms of the previous order. The previous order allowed the applicant until 30 September 2020 to

¹ See par [4] below for the reading of section 61(7) of the Companies Act.

² *Ex parte Air Chefs SOC Ltd*, Companies Tribunal, Case Number: CT00356ADJ/2020, 21 May 2020.

³ The first extension was granted until 31 December 2019, the second until 31 March 2020, and the third extension until 30 September 2020.

convene its AGM. I will return to this issue below. Next, I turn my attention to the reasons or grounds advanced by the applicant for the relief sought.

Grounds for an extension and the applicable legal principles (discussed)

[4] The requirement for the applicant, as a public company, to convene its AGM within a prescribed period originates from the provisions of section 61(7) of the Companies Act. Section 61(7) reads in the material part:

“(7) 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.”

[underlining added for emphasis]

[5] The provisions of section 61(7) are actually repeated in the applicant’s Memorandum of Incorporation (MOI).⁴ Both stipulate that the applicant convene its AGM every calendar year and for its next AGM not to be apart from its previous AGM by more than 15 months. The prescribed period may be extended by this Tribunal on good cause shown. The applicant approached this Tribunal in terms of this application

⁴ The applicant’s current MOI was adopted by a special resolution of shareholders passed at a meeting held on 23 November 2016. See par 12.1.1 of the applicant’s MOI.

predicating its request or application on the following statements from its founding affidavit:

“5.

We humbly request the Companies Tribunal to grant Air Chefs an additional extension to hold its Annual General Meeting and condone the filing of this application.

Section 61 (7) (b) of the Companies Act, requires a public entity, the definition extending to a State-owned company, to must convene an Annual General Meeting (AGM) once in every calendar year, but not more than 15 months after the date of the previous AGM, or within an extended time allowed by the Companies Tribunal. As such, the Company is required by the provision of the above section, in particular section (b), read together with section 9 of the Companies Act, to convene an AGM of Shareholders once every calendar year and not more than 15 months from the date of the previous AGM. This requirement has not been met however, the Company has time and again approached the Tribunal for relief to be granted in this respect.”⁵

[6] The requirement in section 61(7)(b) to show “good cause” for an extension goes beyond the merits of the application and also entails the furnishing of reasons for the delay in convening an AGM. I extensively dealt with the issue of showing “good cause” when granting the previous extension in favour of the applicant.⁶ Without rehashing the discussion I deal with the timing of this application.

⁵ Founding Affidavit at par 5.

⁶ *Ex parte Air Chefs SOC Ltd* at pars [9] to [18].

[7] As already stated above this application was launched long after the expiry of the period of extension previously granted. The previous extension was until 30 September 2020. This application was only filed with this Tribunal on 23 April 2021. This was almost seven months after the expiry of the previous extension and therefore gravely out of time. The applicant explains the timing of this application as follows:

“6.

CONDONATION

Air Chefs last held its Annual General Meeting on 28 March 2018 and the next AGM should accordingly have been convened by no later than 28 June 2019 in order to meet the requirements of Section 61(7)(b) of the Companies Act. The Company applied for and was granted an extension to hold its AGM by 30 October 2020.

We are aware that this application should have been brought to the Tribunal before 30 September 2020. The reason for the failure of the Company to bring its application to the Tribunal before 30 October 2020 was due to the extraordinary circumstances that the Company found itself in. The Coronavirus Disease of 2019 (“COVID-19”) pandemic as well as the subsequent national lockdown had a major impact on the aviation industry and the Company in particular. The Company dedicated an enormous amount of time and effort to try and save the Company from the brink of collapse, and this is still ongoing. The impact of the COVID-19 Lockdown, coupled with the SAA prolonged business rescue process, further complicated the process of resolving the outstanding issues around the finalization of the Company’s Annual Financial Statements (“AFS”).

The Company has not been able to convene an AGM due to a number of reasons but chiefly that the going concern assumption cannot be confirmed without a firm confirmation of capital injection from the SAA and ultimate owner of the aviation assets being the Government, non-finalisation of the audit of the AFS and the protracted SAA business rescue process. Necessary approvals to

reengineer the Air Chefs business have not yet been received. Approvals are required from SAA, Department of public Enterprises and National Treasury.

7.

The Companies Tribunal has provided Air Chefs with an extension to hold its AGM on or before 30 September 2020. The Company is still not in a position to hold its AGM on or before this date as a result of the SAA's protracted Business Rescue Process. The business of Air Chefs is heavily reliant on SAA as its major customer for over 80% of the business.

The external auditors are not willing to sign off the company AFS until the SAA going concern issues are resolved. The business Rescue Practitioner has been appointed effective 5 December 2019. The Business Rescue process is expected to be completed by 31 March 2021

8.

The Annual General Meeting was originally planned to be held in 18 November 2020 but was later cancelled. I attach hereto Annexure "B", the Board approved meeting schedule for 2020.

Pursuant to s 61(7) of the Companies Act, Air Chefs humbly requests the Companies Tribunal to grant it a further and/ or alternative relief to hold its AGM by no later than 30 September 2021 and further condone the late filing of this application."⁷

[8] The applicant's statements for condonation appear – with respect – to be muddled, repetitive and even nonchalant. I have previously lamented the lackadaisical

⁷ Founding Affidavit at pars 6-8.

manner with which the applicant appears to approach its applications to this Tribunal.⁸ In fact, I implored the applicant to include specified material in its application in the event the applicant were to apply for a further extension.⁹ But the request was not acceded to and also no explanation was given by the applicant for failing or neglecting to do so.

[9] My lamentation may be better explained or given context by consideration of the following regarding the manner in which the applicant handled the issues in the launch of this application:

[9.1] it was only on 26 November 2020 when the board of directors of the applicant resolved to launch this application. This was over two months after the expiry of the extension previously granted until 30 September 2020.

[9.2] on 07 December 2020 the applicant prepared the Form CTR 142 for this application;

[9.3] on 11 March 2021 the extract of the relevant resolution of the meeting of the board in [9.1] is signed by the applicant's chief executive officer to authorise the bringing of this application. This was notably almost four months after the board resolved to bring this application.

⁸ *Ex parte Air Chefs SOC Ltd* at pars [20] to [22].

⁹ *Ex parte Air Chefs SOC Ltd* at par [23] (b).

[9.4] on 12 March 2021 the founding or supporting affidavit is finalised and dated;

[9.5] on 25 March 2021 the deponent signs the founding or supporting affidavit before a commissioner of oaths. No explanation is given why the deponent took two weeks to attend to just the deposition.

[9.6] on 21 April 2021 a copy of the deponent's identity document is certified, and

[9.7] on 23 April 2021 the application is filed with this Tribunal. This is almost a month after the affidavit was signed and five months after the board resolved to bring this application.

[10] In the previous application for an extension involving the applicant I stated that "good cause" is constituted by "two inclusive ingredients" blended from the *dicta* in the High Court decisions in *The Highly Nutritious Food Company (Pty) Ltd v The Companies Tribunal and Others*¹⁰ and *Minister of Defence and Military Veterans v Motau and Others*.¹¹ I stated the following to be what I labelled a "blended requirement":

¹⁰ *The Highly Nutritious Food Company (Pty) Ltd v The Companies Tribunal and Others* (91718/2016) [2017] ZAGPJHC, Twala J, 22 September 2017) at par [18].

¹¹ *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) at par 54.

“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 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.”¹²

Conclusion

[11] I am – for obvious reasons - concerned about the length of the delay before the applicant brought this application. I am also concerned about the absence of an explanation why the applicant did not accede to my request made in the previous application.¹³ But when these shortcomings are viewed against the merits of the application I am swayed to grant the extension.

[12] Further, it would serve no real or practical purpose to turn down the applicant due to what appears to be the incapacity of its functionaries, no matter how unacceptable such conduct may be. An AGM is primarily for the benefit of the shareholders of a company. The applicant is a state owned company and therefore its AGM implicates the interests of only a single shareholder: the State or the Government. I am not discounting the possible interests of other stakeholders. But the interests of these stakeholders and the interests of

¹² *Ex parte Air Chefs SOC Ltd* at par [18]

¹³ See footnote 9 above.

justice would not be on a collision course with the granting of another extension of the period for convening the applicant's AGM. There is clearly nothing to suggest this. Therefore, I will grant the extension for the period indicated in the application.

Order

[13] The following administrative order is 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 2021.

Khashane La M. Manamela (Mr.)

Member, Companies Tribunal

31 May 2021