



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT01517ADJ2023

In ex parte application of:

**SOUTH AFRICAN AIRWAYS TECHNICAL SOC LIMITED
(1999 / 024058 / 30)**

APPLICANT

Presiding Member of the Companies Tribunal: MINAH TONG-MONGALO

Date of Decision: 7 NOVEMBER 2023

DECISION (Reasons and an Order)

INTRODUCTION

1. The Applicant is South African Airways Technical SOC Ltd, which is a State-Owned Company (“SOC”), registration number 1999 / 024058 / 30, duly formed and incorporated in terms of the company laws of the Republic of South Africa and with its registered office situated at SAA Technical Head Office, Airways Park, 1 Jones Road, OR Tambo International Airport, Kempton Park, Gauteng Province, Republic of South Africa, 1627.
2. The Applicant is a Schedule 2 Public Entity in terms of the Public Finance Management Act No 1 of 1999 (“PFA”). It provides maintenance, repair and overhaul services to aircraft and is wholly owned by South African Airways SOC Ltd 1997/022444/30 (“SAA”).
3. This is an ex parte application for an extension of time to hold the Applicant’s Annual General Meeting (“AGM”) to a date not later than 31 December 2023.

Section 61(7)(b) of the Companies Act, 2008 (Act No. 71 of 2008) (“the Act”) provides that a public company must convene an annual general meeting of its shareholders 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 Act, on good cause shown.

BACKGROUND

4. The Tribunal previously granted the Applicant an extension to hold its AGM in the following cases:
 - 4.1. In CT01245ADJ2023, the Applicant applied to the Tribunal for an extension and the extension of the time by which to hold its AGM.
 - 4.2. Similar to the current case, the Applicant stated that there is an ongoing external audit process, and the expected completion date was 31 January 2023. The scope of the said audit is the 2019, 2020, 2021, and 2022 financial years. A letter from the office of the Auditor General was attached as proof of the ongoing audit. The Tribunal ordered the Applicant to hold its AGM by no later than 31 May 2023.
 - 4.3. Under case number CT01397ADJ2023, the Applicant requested the Tribunal to grant a further extension. Under the said application, the Applicant stated that the audit is in its final stages. It further highlighted the change in board membership. However, the Applicant failed to articulate how this impeded the audit process, which was in progress. It is unclear whether the new board did not include old board members who ought to have had institutional knowledge to enable the board to continue with its mandate. The new board noted that the Audited Financial Statements were incomplete and excluded the External Audit Report. The audit was expected to be completed by 31 July 2023. The Tribunal granted the second extension to hold its AGM by 30 September 2023.
 - 4.4. In the current application, the Applicant is again requesting an extension of the AGM to 31 December 2023. The application only mentions one case wherein the Applicant requested the extension but omits to mention the one granted early in 2023 under case number CT01245ADJ2023. In the current application, the Applicant still makes mention of the “newly constituted Board and Governance structures” in its motivation for the application.
5. The justification for the extension is that:

- 5.1.1. The external audit was expected to be completed on 31 July 2023, and the Annual Financial Statements (“AFS”) were expected to be approved by the Board and the AGM by 28 September 2023. However, as at 27 September 2023, the AFS and audit process are still outstanding.
- 5.1.2. AFS for the 2019, 2020, 2021, and 2022 financial years are delayed due to the volume of work.
- 5.1.3. The Applicant’s ARGCO (I assume that is Audit, Risk and Governance Committee) has found “significant disclosure and prior year adjustment items before” that must be addressed before the board can recommend the AFS. I assume this is the same board that was in power when the previous application was made.
- 5.1.4. The Applicant requires more time to address the board’s request. The board states that the circumstances are beyond its control.

APPLICABLE LAW

6. **Section 9(1)** provides that:

“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).”

7. **Section 61 (7) – (8)** provides that:

“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.

.....

(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) 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.'

8. **Section 29** provides that:

"Financial statements (1) If a company provides any financial statements, including any annual financial statements, to any person for any reason, those statements must-

(a) satisfy the financial reporting standards as to form and content, if any such standards are prescribed;

(b) present fairly the state of affairs and business of the company, and explain the transactions and financial position of the business of the company;"

13. **Section 30** provides that:

"Each year, a company must prepare annual financial statements within six months after the end of its financial year, or such shorter period as may be appropriate to provide the required notice of an annual general meeting in terms of section 61(7)."

IMPORTANCE AND PURPOSE OF THE AGM

9. The AGM provides a platform for the shareholder to hold the board of directors accountable for the overall status and performance of the company. Unreasonable

extension of the AGM makes this accountability mechanism impossible. It also provides an opportunity to elect or re-elect the directors, appoint auditors to approve their remuneration, and discuss any matter that may arise.

EVALUATION

10. There is a pattern of non-compliance regarding the issuance of the AFS. The current audit covers the financial years from 2019 to 2022.
11. The reasons advanced by the Applicant are not factors beyond its control. On the contrary, they signal governance failures.
12. Per section 66 (1) of the 2008 Companies Act, the board has the power to manage the company's affairs and "has authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the Company's Memorandum of Incorporation provides otherwise." The board has failed to demonstrate how it has exercised this legislative power to ensure compliance with the Tribunal's previous two orders.
13. The Tribunal has previously extended the AGM to allow the Applicant to ensure the AGM is held as required by the 2008 Companies Act. The extended period was sufficient for the Applicant to comply.
14. The Constitutional Court in *Minister of Defence and Military Veterans v Motau and Others*¹ attributed the company's failures to the board. It said the board is remunerated to ensure the corporation's affairs are in order. Consequently, it must ensure compliance with the Companies Act, particularly that the processes are in place to ensure timeous completion of AFS within reasonable time and that the AGM takes place. To this end, the board was responsible for ensuring compliance, which it failed to do despite the Tribunal's two extension orders.
15. The S 61 (7) anticipates the scenario where the board has done everything possible to ensure compliance, but despite such efforts, compliance was

¹ 2014(5) SA 69 (CC) para 61.

unachievable. It is not a remedy that should be taken lightly, hence the requirement for just cause. I do not think the S 61 (7) remedy is automatic. It is reserved for deserving circumstances; consequently, the Tribunal has the discretion to consider the circumstance and grant an order accordingly. The Applicant's circumstances are not deserving, considering that it had opportunities to ensure that its affairs are in order and legislative compliance is achieved. The issues raised in this application are not exceptional circumstances the Applicant could not foresee or timeously address should it put the necessary effort to do so. Granting further extension will not serve to deter the Applicant's non-compliance tendency.

16. The Act does not describe what good cause means in this context. The Constitutional Court defined good cause as "a substantial or "legally sufficient reason" for a choice made or action taken."² It further said that "[a]ssessing whether there is good cause for a decision is a factual determination dependent upon the particular circumstances of the case at hand."³ In *The Highly Nutritious Food Company (Pty) Ltd v The Companies Tribunal and Others* (91718/2016) [2017] ZAGPJHC para 18, which relates an application brought in terms of 160 (2) (b) concerning name dispute, the court said this concerning good cause in that context:

"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."

17. In *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470, the court said when dealing with the application for rescission of judgment: "An applicant must give a reasonable explanation of his default. **If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance,...**" In *The Government Employees Pension Fund v Kuper and another*,⁴ the court said "[i]n considering whether the applicant has shown "good cause" for its default, or

² *Minister of Defence and Military Veterans v Motau and Others* 2014(5) SA 69 (CC)

³ *Ibid* at para 54.

⁴ Transvaal Provincial Division Case number 26669/05

its failure to deliver its answering affidavit or whether the applicant has a **reasonable, satisfactory and acceptable explanation**, I am enjoined to determine whether **the reasons proffered by the applicant justify the rescission of the default judgment.**”

18. Thus, in the context under consideration, the Applicant must not only show that it has failed to hold the AGM or it will fail to hold the AGM in the required period but must show the merit. In other words, it must advance a “reasonable, satisfactory and acceptable explanation” of why further extension is warranted.

19. The new board and the internal processes are not sufficient grounds to not meet deadlines and ensure that the AGM takes place. The operational processes should ensure that the issues raised by governance structures are addressed timeously.

20. No exceptional reasons have been advanced in this application to show why the AFS for four years are incomplete and what measures the Applicant took to expedite the process.

21. I am not satisfied that the Applicant has shown good cause to grant a third extension.

FINDINGS

22. The Tribunal has granted the Applicant two extensions previously. The motivation in this application does not constitute a new circumstance that the Applicant could not have foreseen and timeously addressed. Consequently the Applicant has not provided a reasonable, satisfactory and acceptable explanation for the delay.

23. The Applicant has not shown good cause warranting the extension of the AGM as required by S 61 (7).

ORDER

24. The application is refused.

MINAH TONG-MONGALO