



PRACTICE NOTE 1 OF 2024

**INTERPRETATION OF S 61(1) OF THE COMPANIES ACT, ACT 71 OF 2008
THE COMPANIES TRIBUNAL**

Kindly note that this Practice Note is effective as from 1 March 2024 concerning the interpretation of S 61(1) of the Companies Act, Act 71 Of 2008.



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INTERPRETATION OF SECTION 61(1) OF THE COMPANIES ACT, ACT 71 OF 2008 THE COMPANIES TRIBUNAL

1 BACKGROUND

1.1 The Companies Tribunal's (the CT) mandate is to adjudicate applications, resolve disputes through Alternative Dispute Resolution (ADR) and to perform any other function assigned to it by any law in terms of Schedule 4 of the Act. The CT's members decide cases on behalf of the CT.

1.2 The CT members have jointly decided on the interpretation of section 61 (7) of the Companies Act in order to ensure consistency and certainty. To this end, this Practice Note expresses such interpretation as the CT's interpretation of section 61 (7).

2 SECTION 61(7) AND OTHER RELEVANT PROVISIONS

The relevant sections of the Companies Act:

2.1 Section 61(7) of the Companies Act No.71 of 2008 (as amended) ("**Companies Act**") provides as follows:

"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."

2.2 Sections 10(1) and 10(3) of the Companies Act state as follows:

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



- (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."

3 THE CT'S INTERPRETATION OF SECTION 61 (7) OF THE COMPANIES ACT, ACT 71 OF 2008

- 3.1 The structure of section 10 provides valuable guidance regarding the legislature's intention and to what extent the Act applies or does not apply to non-profit companies (the NPCs).
- 3.2 Section 10(1) specifically states that "*every provision of this Act applies to a non-profit company*, subject to the provisions, limitations, alterations, or extensions set out in this section, and in Schedule 1." Subsection 2 sets out the specific limitations and subsection 3 provides extensions.
- 3.3 Section 10(3) explicitly states that sections 58-65 (inclusive of section 61 (7) as will be addressed below) apply to NPCs. The proviso is that the NPC must have voting members. When the NPC has voting members, s 58-65's application is made subject to item 4 of Schedule 1.
- 3.4 Section 61 makes reference throughout to 'the company'. However, subsections 7-14 predominantly regulate AGMs in public companies. It may be tempting to assume that these provisions do not apply to the NPCs based on the specific reference to *public companies*.
- 3.5 Section 10(3) provides guidance on how to interpret section 61(7). It states that when interpreting sections 58 to 65, it must be "read with the changes required by the context." The below paragraphs unpacks the interpretation of context in this regard.
- 3.6 In *Ex Parte Aqua Vista Home Owners Association (RF) NPC* CT00587ADJ2021 (26 February 2021), at paragraphs 30- 31, Prof PA Delpont said:

If the interpretation of sections 58 to 65, and particularly section 61(7), has the effect that an NPC with members is seen to be a public company, it clearly begs the question as to what type of company, public or private, an NPC without members will be.

Also, sections 58 to 65, and particularly section 61, distinguish between public and private companies. There is no logical reason then why the choice is made that the provisions relating



to public companies, and not those in respect of private companies, will be made applicable to an NPC with members.

- 3.7 The Act has distinguished between various company types. Having done so, it appropriately provides the application of specific provisions of the Act to certain company types. The application of specific provisions to a different company type is based on the legislature's intention and not on the definition or classification of companies and the rationale for such classification. Moreover, the intention of the legislature is clarified in how it addressed the modified application of the Companies Act to NPCs, as is argued hereinafter. Therefore, it is the CT's view that it was not necessary for the legislature to distinguish between NPCs and other company types because its intention was to make specific provisions applicable to other company types to be applicable to the NPCs. The wording of section 10(3) affirms that.
- 3.8 The legislature evidently intended for section 61(7) to apply to NPCs with members. It demonstrated such intention by explicitly including section 61(7) in the list of sections that are applicable to NPCs. Thus, the change that must be read into section 61(7) as outlined in section 10(3) is that where the section makes mention of the public company, such should be read to apply to NPCs with members. It did not need to legislate for NPCs without members for obvious reasons.
- 3.9 The above interpretation aligns with section 10(1) as it limits the general application of the Companies Act. Such modified application is subject to the limitations, alterations and extension that the Act provides. This is achieved through specific provisions. Section 10(2) provides for the restriction of the application of specific provisions, while section 10(3) provides for the extension of the application of specific provisions.
- 3.10 Section 10 (3) makes specific mention of sections that apply to the NPCs, which are sections 58 to 65. The application of these sections is guided by only two factors, namely, (a) the NPC must have voting members, and (b) the application is subject to item 4 of Schedule 1. It is inconceivable that the legislature drafted a provision stating that particular sections apply to the NPC when it is possible they would not apply. For this reason, in respect of the NPCs, it specifically stated the sections of the Act that do not apply to the NPCs.
- 3.11 In *Ex Parte Aqua Vista Home Owners Association (RF) NPC* at para 32 stated:
- If the provisions in respect of a public company are to be applied to an NPC, and only one with members, the legislature could have made it expressly applicable, such as in the case of a state-owned company as provided for in section 9(1) of the Companies Act.




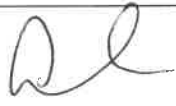


3.12 The distinction in how section 9(1) and 10(3) were drafted further demonstrates the legislature's intention. In section 9(1), the legislature foresaw a circumstance where the Act would not apply and gave authority to the Minister to provide for an exemption of such deemed applicable section. There is no similar provision provided for in section 10(3). Therefore, the legislature did not intend any exemptions to be applicable to section 10 (3) or sections 58 to 65.

3.13 Therefore, it is submitted that section 61(7) does apply to NPCs.

4 THE CT'S APPROACH

4.1 From the effective date of this Practice Note, the CT will apply the above interpretation in matters related to the application of section 61 (7) to NPCs, until determined otherwise judicially.

This document has been approved by:

	Responsibility	Capacity	Signature	Date
Compiled	Ms. Minah Tong-Mongalo	Deputy Chairperson		22 February 2024
Supported	Dr. Mohamed Chitchay	Member		22 February 2024
Supported	Mr. Brian Jennings	Member		22 February 2024
Approved	Judge Dennis Davis	Chairperson		12 March 2024

