



COMPANIES TRIBUNAL

DIRECTIVE ON INTERPRETATION OF SECTION 61(7) OF THE COMPANIES ACT REGARDING NON PROFIT COMPANIES

EFFECTIVE FROM: 01 APRIL 2024

1 INTRODUCTION

- 1.1 We were requested to prepare a memorandum setting out the alternative interpretative methods in relation to section 61(7) of the Companies Act. The two proponents are Dr Mohamed Alli Chicktay and Brian Jennings, with Minah Tong-Mongalo as independent (having not yet rendered a decision in this regard).
- 1.2 This document is our attempt at such a memorandum. We annex hereto a few supporting orders where our reasoning has been applied in the relevant instances.

2 SECTION 61(7) AND OTHER RELEVANT PROVISIONS

The following are the relevant sections (insofar as we have been able to identify) of the Companies Act that would come into play:

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

3 NARROW INTERPRETATION

3.1 Brian Jennings handed down an order on 10 February 2023 under case no: CT01258ADJ2023 involving an *ex parte* application by Sable Hills Homeowners Association NPC.

3.2 The applicant requested an order in terms of section 61(7) of the Companies Act extending its annual general meeting ("**AGM**") for 4 months. This request was on the basis that the applicant's memorandum of incorporation ("**MOI**") entitled its AGM to be extended within a time period allowed by the Companies Tribunal, on good cause shown.

3.3 The commercial reason for the extension was that the applicant concluded a transaction which had a material effect on its financial status, at the end of November 2022. Whether this was good cause, was not dealt with as it was moot.

3.4 Brian's narrow interpretation is based on the following principles / reasoning:

3.4.1 The wide ambit in section 10(1) is tempered by the words "subject to the limitations ... set out in this section." The scope of section 10(1) is informed by, amongst other sections, section 10(3). If section 10(3) did not exist, then clearly the broad interpretation must be followed.

3.4.2 Section 10(3) requires the reader to substitute non-profit company where relevant in sections 58 to 65, to ensure that these sections apply to a non-profit company. This is not a wholesale substitution, and the enquiry does not end there. One is required to first determine "the context" because only once the context has been determined, can one read in the changes one is required to read in.

3.4.3 Within an analysis of sections 58 to 65, only sections 61(7) and 61(10) are **specifically** stipulated in favour of public companies. In other words, the legislature deliberately chose to apply these sections to public companies by using specific, and different, language in these sections, as in the rest.

3.4.4 The reason for this deliberate choice is because public companies are viewed by the legislature as important centers of wealth creation, shared among a broad shareholder base. It is vital then that the board be obliged to account to shareholders.



- 3.4.4.1 In this regard, attention is drawn to paragraphs 35 and 36 of Tribunal member Delport's order in Aqua Vista Home Owners Association (RF) NPC. Much reliance was placed on this by Brian, in arriving at his viewpoint. The brief summary is that public companies can have unlimited shareholders and acquire capital from the public. An NPC has restricted business as per Schedule 1 to advance a public benefit object, amongst other restrictions. The levels of disclosure in accounts and accountability are not the same. If the legislature intended for section 61(7) to specifically apply to NPCs, it could have expressly done so such as the case with section 9(1).
- 3.4.4.2 To ameliorate this hard-stop for AGMs potentially operating harshly for public companies in circumstances where it may be inappropriate, discretion was given to public companies to apply for an extension to the Tribunal, on good cause shown. The same harshness does not arise for NPCs who, like private companies, are free to regulate their AGMs (if they wish to hold them) as they see fit – subject to the confines of the Companies Act.
- 3.4.5 The context, therefore of sections 61(7) and 61(10) is not the same as the rest of the provisions in sections 58 to 65. As a result, one ought not to "read in" non-profit company" in these sections.
- 3.4.6 Lastly, as the Tribunal's jurisdiction is fixed by statute, an applicant's MOI cannot create jurisdiction nor oust it.

4 BROAD INTERPRETATION

- 4.1.1 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 the NPCs.
- 4.1.2 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.
- 4.1.3 S 10 (3) explicitly states that sections 58-65 (inclusive of s 61 (7)) apply to the NPCs. The proviso is that the NPC must have voting members. When the NPC has voting members, s 58-65 application is subject to schedule 1 item 4.
- 4.1.4 S 61 makes reference to 'the company'. However, ss 7-14 predominantly regulates AGMs in public companies. It may be tempting to assume that these provisions do not apply to the NPCs.



- 4.1.5 S 10 (3) provides guidance on how to interpret S 67 (1). It states that when interpreting S 58 to 65, it must be “read with the changes required by the context.” How does one determine the context?
- 4.1.6 In *Ex Parte Aqua Vista Home Owners Association (RF) NPC* CT00587ADJ2021 (26 February 2021), at para 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.
- 4.1.7 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 Act to the NPCs, as will be argued hereinafter. Therefore, I respectfully submit that it was not necessary for the legislature to distinguish between the 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 s 10 (3) affirms that.
- 4.1.8 The legislature evidently intended for S 61 (7) to apply to the NPCs. It demonstrated such intention by explicitly including S 61 (7) in the list of sections that are applicable to the NPCs. Thus, the change that must be read into S 61 (7) as outlined in s 10 (3) is that where the section makes mention of the public company, such should be read to apply to the NPCs.
- 4.1.9 The above interpretation aligns with S 10 (1) as it limits the general application of the Act. Such modified application is subject to the limitations, alterations and extension that the Act provides. Such is achieved through specific provisions. Subsection (2) provides for the restriction of the application of specific provisions, while subsection (3) provides for the extension of the application of specific provisions.
- 4.1.10 S 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.

4.1.11 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.

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

4.1.13 Therefore, it is submitted that s 61 (7) does apply to the NPCs.

Approved by Chairperson