IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA
('Tribunal') **Case No: CT00400ADJ2020**

In the ex parte matter of:

Irene Farm Home Owners' Association HOA NPC

Registration no: 2000/030502/08 **APPLICANT**

Coram K. Tootla

Decision delivered on 27 August 2020

DECISION

INTRODUCTION:

[1] The applicant is Irene Farm Home Owners' Association HOA NPC bearing registration no 2000/030502/08 and whose registered place of business is I40 Irene Village, Irene. Gauteng.

[2] The applicant applies, in terms of Section 61(7) of the Companies Act 71 of 2008 ("Act") for an extension of the period for convening an Annual General Meeting ("AGM").

[3] The application is brought by Adrian Van Niekerk, Chairman of the aforementioned Home Owners' Association, being duly authorised to do so by a resolution of the board of directors of the Applicant.

BACKGROUND:

[4] The applicant held the last AGM on 29 August 2019 for the financial year end February 2018/19.

[5] The applicant states that it has been unable to hold its AGM for the financial year due to the challenges arising out of Covid and the national lockdown.

[6] In terms of its Memorandum of Incorporation (MOI), Applicant must hold an AGM within 6 (six) months after the end of its financial year, which was on 29 February 2020.

[7] The applicant must hold its AGM for by 31 August 2020.

ISSUES:

[8] The question arises whether the Tribunal has jurisdiction in this application. If the answer is in the affirmative, the reasons provided for the extension should be evaluated and it must then be decided if there is "good cause" to grant the application.

[9] However, if the Tribunal does not have jurisdiction, the application must fail and there is no need to determine whether the application is based on "good cause".

APPLICABLE LAW:

[10] Section 61 (7) of the 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."

[11] Section 10 of the Companies Act provides in respect of non-profit companies as follows: 'Modified application with respect to non-profit companies-

(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."

EVALUATION:

[12] With regard to the application in terms of Section 61(7) of the Act, I shall not traverse the extensive arguments and rational reasoning of my fellow tribunal member, Khashane Manamela in *Ex parte Gauteng Cricket* Delport in *Board NPC* CTR001/11 /2012 (25 March 2012). I am in agreement with his decision for the following reasons that Section 61(7) of the Act applies only to public companies and that an NPC does not fall within the definition of a public company.

[13] Section 1 of the Act defines a public company and a profit company as follows:-

'public company' means a profit company that is not a state-owned company, a private company or a personal liability company."

'profit company' means a company incorporated for the purpose of financial gain for its shareholders.

[14] A "non-profit company", according to Section 1 of the A ct, means a company—

(a) incorporated for a public benefit or other object as required by item 1 (1) of Schedule 1; and

(b) the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1 (3) of Schedule 1;

[15] From the aforementioned, it is clear that an NPC cannot be included in the definition of a "public company". The provisions referred to in Schedule 1 are in respect of the nature of the NPC in the sense that it must be operated, directly or indirectly, to advance the "public benefit object", and that it cannot pay, whether in winding-up or otherwise, any income or transfer any assets to its members (Refer also *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC, Minister of Environmental Affairs v Recycling and Kusaga Taka Consulting (Proprietary) Limited* (9675/2017, 10123/17) [2017] ZAWCHC 101 (15 September 2017).

[16] Section 10(3), however, also provides that Sections 58 to 65, read with the changes required in the context, to apply to non-profit companies. Sections 58 to 65, however, refer to various types of companies and in Section 61 there is a clear distinction between public companies and other types of companies as evidenced from Section 61(7) which refers specifically to a public company , whereas in other sub-sections ' a company' is referred to.

[17] 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 only when required by the Memorandum of Incorporation. Therefore, when read with the "changes required by the context", there is no justification that Section 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.

[18] If the provisions in respect of a public company in Section 61 (7) are to be applied to a non- profit company, the legislature would have made it expressly applicable, as in the case of a state-owned company as provided for in Section 9(1) of the Act. In addition, the express provisions in Section 19(3) of the Companies Act 61 of 1973 that a Section 21 company (company limited by guarantee), the predecessor of the N P C , is deemed to be a public company, were not transferred to the Companies Act 71 of 2008.

[19] Since the deeming provision was not transferred from the 1973 Act to the 2008 Act, it indicates that the legislature was aware of this and that the position from the 1973 Act was to deliberately change it as is evident from the 2008 Act (See *Ngwenda Gold* (*Pty*) *Ltd v Precious Propspec Trading 80* (*Pty*) *Ltd* 2011/3166 14 December 2011 (GSJ) in respect of a similar treatment of Section 13 of the Companies Act 61 of 1973)).

[20] Section 61(7) is therefore not applicable to a non-profit company, neither as in respect of a compulsory annual general meeting, nor in respect of the jurisdiction of the Tribunal to grant an extension. It does appear that the non-profit company as defined cannot be extended to apply to the provisions as required in Section 61(7) which distinctly refers to a "public company".

[21] Having encountered a similar set of circumstances relating to a non- profit company in the Companies Tribunal decision *Gauteng Cricket Board NPC*, the presiding member K Manamela, considered the purposive approach, where he stated that:

"In terms of this approach, the language of the constitutional text must be interpreted purposively, and in context, and therefore although the court must thus seek to give effect to the object and purpose of the provision, it remains limited by the language used. (Pony Africa Pumps (Pty) Ltd t/a Tricom Africa vs Hidro-Tech Systems (Pty) Ltd and another 201 a1 (1)SA 327 (CC) para 32, note 34) . The court is <u>not permitted to impose a meaning</u> (my underlining) on the text that it is not capable of bearing. In my opinion the aforesaid approach is employable in respect of other legislation than the Constitution of the Republic of South Africa." (Gauteng Cricket Board NPC, page 4).

Therefore, it has to be determined whether on a purposive or contextual interpretation, the legislature still intended to exclude a non- profit company and other forms of profit companies from the provisions of Section 61(7).' (Gauteng Cricket Board NPC, page 5).'

[22] And based on a contextual interpretation, this clearly supports the interpretation adopted as opined by myself. It is therefore my considered view the legislature would have specifically said so if Section 61(7) were to apply to an NPC.

[23] Can the jurisdiction of the Tribunal be "extended" beyond that provided for in the Companies Act? The Tribunal is a creature of statute and its mandate is strictly to be exercised and understood within the parameters as provided for by section 193 of the Act to perform the functions as set out in section 195 of the Act.

It is clear then the Tribunal does not possess inherent powers as that of the High Court (See *Senwes Ltd v Competition Commission of South Africa* (118/2010) [2011] ZASCA 99 (1 June 2011) and the ruling of this Tribunal in *Duduzile Cynthia Myeni vs CIPC* CT006Mar2017 (29 Jun 2017) paras 9-11)

[24] In addition, the functions of the Tribunal as a statutory body are clearly stated in Section 195(1) of the Act which provides as follows:-

"(1) The Companies Tribunal, or a member of the Tribunal acting alone in accordance with this Act, may—

(a) adjudicate in relation to any application that may be made to it in terms of this Act, and make any order provided for in this Act in respect of such an application;

(b) assist in the resolution of disputes as contemplated in Part C of Chapter 7; and

(c) perform any other function assigned to it by or in terms of this Act, or any law mentioned in Schedule 4."

[25] In the circumstances, the Tribunal can therefore only adjudicate upon matters that "may be made to it in terms of this Act, and make any order provided for in this Act in respect of such an application." In addition or any legislation mentioned in Schedule 4 of the Act, it can also assist in the adjudication of disputes and perform a function assigned to it by the Act

[26] Thus it seems that is the long and short of the jurisdiction of the Tribunal and whether it can be extended to matters that the parties by an agreement as encapsulated in the Memorandum of Incorporation have done, is impossible.

[27] Logically speaking, if an extension of the Tribunal's powers were possible, the legislature would have specifically and clearly made mention of it, which it has not done... In addition, if the provisions in respect of a public company were to apply *mutatis mutandis* to a non-profit company, the legislature would have made it expressly applicable, such as in the case of a "state-owned company" as provided for in Section 9(1) of the Act.

ORDER:

[28] Thus Section 61(7) of the Companies Act does not apply to a non-profit company, neither as regards a mandatory AGM, nor as regards the jurisdiction of this Tribunal to grant an extension.

[29] In the circumstances, the application is dismissed.

k.tootla

Khatija Tootla

(Member of the Companies Tribunal)

27 August 2020