



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case Number: CT00423ADJ/2020

In the *ex parte* application of:

SAKHILE INITIATIVE 2 (RF) LIMITED

Applicant

(Registration Number: 2009/009274/06)

Presiding Member : Khashane La M. Manamela (Mr.)

Date of Decision : 30 September 2020

Summary: Application for an extension of time to convene an annual general meeting of shareholders of the applicant 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 reasons or grounds for extension relate to the delay in finalising annual financial statements and interruptions arising from measures imposed to combat the COVID-19 pandemic – held, extension is granted for a period of 4 (four) months from date of order.

DECISION (Reasons and an Order)

Khashane La M. Manamela

Introduction

[1] Sakhile Initiative 2 (RF) Limited is the applicant in this *ex parte* application for extension of the period to convene the 2019 annual general meeting of its shareholders. The applicant last held its annual general meeting (AGM) on 31 January 2019. As a public company, the applicant is required in terms of section 61(7)(b)¹ of the Companies Act 71 of 2008 (the Companies Act) to convene an AGM once every calendar year, but no more than 15 months after the date of its previous AGM. The applicant seeks an extension of 6 (six) months, ostensibly from date when a favourable order is made in the application.

[2] When considering that the applicant's previous AGM was on 31 January 2019, the applicant ought to have held its AGM by not later than 30 April 2020. A gap of more than 15 months from its previous AGM, prescribed by section 61(7)(b), has evidently long elapsed. Exactly 20 months has elapsed since the applicant's previous AGM on 31 January 2019. This application was only filed on 31 August 2020. Therefore, even on the latter consideration, the application was launched long after expiry of the stipulated 15 months' time-period. I will deal with this further, below.

Grounds for an extension

[3] To its credit, the applicant is alive to the fact that there was considerable delay before launching this application. It predominantly cites the COVID-19 lockdown as the reason for the delay. But, in my respectful view, this is rather opportunistic.

¹ See par [7] below for a reading of section 61(7) of the Companies Act 71 of 2008 (the Companies Act).

[4] The lockdown followed announcement of the declaration of a national state of disaster in terms of the Disaster Management Act 57 of 2002 on 15 March 2020 by the President of the Republic of South Africa.² But it was only from 27 March 2020 onwards that the COVID-19 restrictions were applied under the so-called “lockdown”.³ The lockdown was eased gradually from 29 April 2020 onwards. Therefore, considering that the application is supported by an affidavit comprising only a paltry four pages, there was always an opportunity to bring this application in compliance with the provisions of s 61(7)(b) of the Companies Act or sooner than 31 August 2020. I will also revert to this issue, below.

[5] I consider it necessary to reflect the following relevant parts of the applicant’s founding or supporting affidavit in support of the relief sought:

- “9. As alluded to above, the Applicant has since its incorporation held its annual general meeting as required in terms of clause 25(1) of its MOI and/or read with section 61(7) of the Companies Act, until now. The Applicant is willing and is taking all reasonable endeavours to hold its 2019 annual general meeting.
10. The Applicant held its 2018 annual general meeting on 31 January 2019. The Applicant is required in terms of clause 25(1) of its MOI and/or read with section 6(7) of the Companies Act to hold its 2019 annual general meeting by no later than 15 months from 31 January 2019. The 15 months period by which the Applicant is required to hold its 2019 annual general meeting expired on 30 April 2020.

² See Government Gazette No. 43096 of 15 March 2020.

³ See Government Gazette No. 43167 of 26 March 2020.

11. The Applicant has made all attempts and taken all reasonable endeavours to hold its 2019 annual general meeting, but it was not possible for it or not in a position to hold such meeting before the expiry of the 15 months period. The reasons for the Applicant's failure or inability to hold its 2019 annual general meeting before expiry of the 15 months period are the following:
 - 11.1. The Applicant's annual financial statements for the year ended 31 March 2019 not have [sic] been finalised, and which are required to be presented at such annual general meeting for approval.
 - 11.2. After the approval of the annual financial statements as the Applicant was planning to convene the annual general meeting, the country went into a national lockdown and thereafter implemented lockdown restrictions thus making it impossible to convene the annual general meeting. It is however expected that during the 6 months period requested, the Applicant will be in a position to have the annual financial statements for the financial year ended 31 March 2019 present to the shareholders for consideration, noting and, where appropriate, approval. Furthermore, alternative means will be made to ensure that the Applicant adheres to the lockdown restrictions.
12. ...
13. ...
14. Given the nature of the business of the Applicant as a special purpose, ring-fenced investment company, whose business is solely to hold shares in the Omnia Group Companies on behalf of and for the benefit of employees of the Omnia Group Companies, I am of the belief that no person will be prejudiced by extending the holding of the annual general meeting to a later date."

[6] Before I deal with these submissions, I turn to the issue whether or not this Tribunal has jurisdiction to extend a period for holding an AGM after the expiry of the stipulated 15 months' period under section 61(7)(b).

Can this Tribunal extend an elapsed period?

[7] This question was answered affirmatively in a decision of this Tribunal I had the privilege of presiding over, namely *II Incentives Limited*.⁴ In *Incentives*, as in this application, this Tribunal dealt with the “extension” of the 15 months period, contemplated in section 61(7)(b), after it had already expired. But before I get to that decision it may be opportune to reflect the provisions of section 61(7) of the Companies Act in the material part, 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.”

[underlining added for emphasis]

[8] As already indicated, in *Incentives* this Tribunal granted relief despite the expiry of the 15 months’ time-period. The following material from *Incentives* reflects how the issue of extension was dealt with against the provisions of section 61(7):

“[6] My further reading of section 61(7) gives rise to only two issues worthy of discussion for current purposes. One of the issues is the word “extended”, located within the phrase “within an extended time allowed by the Companies Tribunal” and the other is “good cause”, as in the phrase “good cause shown”.

⁴ *II Incentives Limited*, Companies Tribunal case number: CT005Jan2016, 11 February 2016. This decision (and others to be referred to below) is accessible on the website of the Companies Tribunal: www.companiestribunal.org.za.

[7] Firstly, the word “extended” is not defined in the Companies Act. Therefore, I will use the ordinary or dictionary meaning of its present tense verb, extend. It is explained as:

“1 make longer in space or time. 2 stretch out (a hand, foot, etc.). 3 reach, be continuous over an area or from one point to another... 4 enlarge, increase the scope of.”

[8] My understanding of the aforesaid meanings is that the 15 months period can be *made longer* or *stretched out* or *enlarged*. The *elongation* or *stretching* or *enlarging* has to be to the period of 15 months. In other words, before expiry of a period of 15 months from the date of the previous AGM. Therefore, once the period within which an AGM is not held by the company exceed 15 months, even if by days or weeks, as in this matter, it is no longer possible to extend (i.e. to *make longer* or *stretched out* or *enlarged*) such period. As indicated above, the applicant ought to have held its AGM by 03 January 2016, being 15 months after its last AGM held on 03 October 2014. The applicant filed this application on 21 January 2016. In my view this was out of time as the 15 months period had already elapsed on 03 January 2016. My aforesaid view or interpretation would leave the applicant without a remedy, unless a shareholder acts in terms of section 61(12) of the Companies Act. However, the legislature did not make it clear as to when the application for an extension is to be made in terms of section 61(7). Is it before or after expiry of the 15 months or both? This could be a matter of a day or a week.

[9] However, in my view, the legislature clearly intended there to be relief for instances where the company had not been able to convene its AGM within the statutory period. The purpose of the statutory provision was not to create a calendar trap for companies, wherein the extension would be granted or refused on stringent interpretation. The inclusion of “good cause” attached to the concept of “extension” gives me the impression that a purposive interpretation, preceded by a factual enquiry, is required. I deal with the concept of “good cause” next... Every matter would depend upon its own facts in this regard. Therefore, I would consider nothing to be turning on the timing of this application and consider the application to have been made in compliance with the requirements of section 61(7).

[quoted without accompanying footnotes]

[9] I consider the views expressed in *Incentives* relevant and of significant force to the facts in this matter. Therefore, I will proceed to consider other aspects of this application against the background or setting provided by the decision of *Incentives*.

Other aspects of the “good cause” requirement

[10] As stated above⁵ and also from the quotation from *Incentives*, it is clear that section 61(7)(b) requires that an applicant for an extension shows “good cause” in order to access relief. But, the phrase or concept “good cause” is not explained in the Companies Act.

[11] Recently in the decisions of *Ahmed Al-Kadi Private Hospital Limited*⁶ and *Air Chefs SOC Limited*,⁷ I dealt extensively with the requirement of showing “good cause” under section 61(7)(b) against other applicable legal principles. Both decisions cited COVID-19 as ground for an extension and the *Air Chefs* decision additionally cited the absence of annual financial statements. I consider the views expressed in both decisions relevant to the facts of this matter and determination to be made in this matter. I find it unnecessary to take the discussion any further in this matter.

Conclusion

[12] Between the restrictions from the COVID-19 pandemic and the unavailability of annual financial statements, albeit that the financial statements have been outstanding for

⁵ See par [7] above.

⁶ *Ahmed Al-Kadi Private Hospital Limited*, Companies Tribunal case number CT00363ADJ/2020, 21 May 2020 at pars [8]- [16].

⁷ *Air Chefs SOC Limited*, Companies Tribunal case number CT00356ADJ/2020, 21 May 2020 at pars [9]- [18].

a very long time, I find that there is good cause to extend the period for convening the applicant's AGM. An order will be made in this regard.

[13] But considering the facts of this matter, I find the suggested period of 6 (six) months for the extension inappropriate. The applicant has had more than enough time to prepare its annual financial statements. Put in proper perspective, the applicant is a special purpose vehicle and therefore its annual financial statements ought not to take that long time to finalise. As for a sitting of the actual meeting of shareholders or AGM under this era of COVID-19, the applicant - as an alternative to a gathering of persons - should consider convening its AGM by means of electronic communication, as contemplated by section 63(2) of the Companies Act.⁸ Actually, the applicant's own MOU provides for its AGM to be held by means of electronic communication.⁹

[14] Therefore, I consider an extension of a period of 4 (four) months appropriate. This would provide the applicant with ample time for the necessary preparations up to the end of 2020 to convene its AGM.

Order

[15] On the basis of what is stated above, the following administrative order is made:

⁸ Section 63(2) of the Companies Act reads: "Unless prohibited by its Memorandum of Incorporation, a company may provide for - (a) a shareholders meeting to be conducted entirely by electronic communication; or (b) one or more shareholders, or proxies for shareholders, to participate by electronic communication in all or part of a shareholders meeting that is being held in person, as long as the electronic communication employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting."

⁹ See par 25.7 of the applicant's MOI.

- a) the time for, Sakhile Initiative 2 (RF) Limited (registration number: 2009/009274/06), the applicant herein, to hold its annual general meeting of shareholders is extended until 31 December 2020.



Khashane La M. Manamela (Mr.)

Member, Companies Tribunal

30 September 2020