



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Case No: CT00810ADJ2021

In the matter between:

JAMES EVANS

APPLICANT

and

THE TWO OCEANS MARATHON NPC

(Reg. Nr: 2008/024732/08)

FIRST RESPONDENT

**COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

SECOND RESPONDENT

Coram: ISHARA BODASING

Date of Hearing: 17 December 2021

Date of Decision: 25 January 2022

DECISION (Reasons and Order)

1. INTRODUCTION

1.1 This is an application for an order to set aside the proceedings at First Respondent's Annual General Meeting (AGM) held in December 2020.

1.2 First Respondent is the Two Oceans Marathon NPC (“TOM”), a non-profit company incorporated in terms of the company laws of South Africa and having its principal place of business at 125 Main Road, Heathfield, Cape Town.

1.3 Second Respondent is the Companies and Intellectual Property Commission (“CIPC”), a juristic person established in terms of section 185(1) of the Companies Act 71 of 2008 (“the Act”). I note that although papers were served on the CIPC, it has elected not to participate in these proceedings.

1.4 In its opposing papers, TOM raised some preliminary issues, which were the subject of a hearing to consider the parties’ submissions. My findings on these issues favoured the Applicant, and it was ordered that the matter proceed to a hearing on the merits of the main application. Costs were reserved.

2. ISSUE

This decision focuses on the main issues raised by Applicant:

2.1 That TOM’s AGM notice published on 23 October 2020 should be set aside as invalid;

2.2 That TOM’s 2020 AGM held on 09 December 2020 should be set aside as invalid;

2.3 TOM should be ordered to hold its 2020 AGM in terms of the notice published on 30 August 2020.

3. APPLICABLE LAW

3.1 **Section 62 of the Act** deals with **Notice of meetings**, and states that:

(4) If there was a material defect in the giving of the notice of a shareholders meeting, the meeting may proceed, subject to subsection (5), only if every person who is entitled to exercise voting rights in respect of any item on the meeting agenda is present at the meeting and votes to approve the ratification of the

defective notice.

(5) If a material defect in the form or manner of giving notice of a meeting relates only to one or more particular matters on the agenda for the meeting-

(a) any such matter may be severed from the agenda, and the notice remains valid with respect to any remaining matters on the agenda; and

(b) the meeting may proceed to consider a severed matter, if the defective notice in respect of that matter has been ratified in terms of subsection (4)(d).

(6) An immaterial defect in the form or manner of giving notice of a shareholders meeting, or an accidental or inadvertent failure in the delivery of the notice to any particular shareholder to whom it was addressed, does not invalidate any action taken at the meeting.

3.2 **Section 63** of the Act deals with **Conduct of meetings** and states:

(2) 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

(3) If a company provides for participation in a meeting by electronic communication, as contemplated in subsection (2)-

(a) the notice of that meeting must inform shareholders of the availability of that form of participation, and provide any necessary information to enable shareholders or their proxies to access the available medium or means of electronic communication; and

(b) access to the medium or means of electronic communication is at the expense of the shareholder or proxy, except to the extent that the company determines otherwise.

4. EVALUATION

4.1 The requirements in TOM's MOI for the holding of an AGM are:

4.1.1 The meeting must be held within four months of the end of the financial year.

(MOI 1.5.4(a)(ii).)

4.1.2 The financial year ends on 30 June (MOI 1.1(3)), implying that the AGM must be held by the end of October each year).

4.1.3 The notice period for an AGM is 45 days. (MOI 1.5.4(a)(e)(i).)

4.1.4 The notice calling for the AGM shall include a call for nominations and items for the agenda to be submitted at least 21 days before the date set for the AGM (MOI 1.5.4(g)).

4.1.5 The final agenda for the AGM, nominations for the board of directors, the board report, proposal for an auditor and the annual financial statements must be sent out to members at least 14 days before the date set for the AGM. (MOI 1.5.4(h).)

4.1.6 A members' meeting can be held entirely or partially by electronic communication (MOI 1.5.4(i).)

4.2 TOM postponed the holding of its 2020 AGM from 14 October 2020 to 09 December 2020, in order to facilitate better and physical participation of its members, when the Covid-19 lockdown restrictions were eased from to Level 1. Notice of the postponement was circulated to members on 11 October 2020, and details of the postponed AGM were sent on 23 October 2020.

4.3 On 25 November TOM sent out the final agenda for the meeting to be held on 9 December 2020. Notification for the December AGM did not provide for electronic participation by members. However, on the morning of the meeting, details of such arrangements were shared with members when TOM realised that the venue may not accommodate all registered attendees.

4.4 Applicant's dissatisfaction with the process lies in his allegation that TOM abandoned the initial notice after nominations for the board had closed and restarted the process. This, according to Applicant, resulting in the meeting being held out of time with a different list of nominations, including two outgoing board

members who had failed to be nominated on the first list.

4.5 Applicant contends that the notice and conduct of the December meeting were invalid as insufficient notice was given of the right to attend via electronic communication, not all members were entitled to attend the meeting and vote and those who attended via electronic communication could not participate concurrently and reasonably efficiently.

4.6 The notice Applicant received on 23 October 2020 indicated that he had been “booked” to attend.¹ Although Applicant disputed his confirmation at the hearing, he never indicated this to the organisers of the TOM AGM at the time. He also never deemed it necessary to question the validity of the notice or the agenda leading up to the meeting.

4.7 On 18 November 2020, Applicant notified TOM of a resolution he wished to table for the December AGM. On 08 December 2020, the day before the meeting, Applicant withdrew his nomination for election to the TOM Board. This conduct indicates that, at the time, Applicant did not have any issues with the validity of the AGM notice.

4.8 There is no evidence that any member of TOM was denied the right to appoint a proxy to attend the 2020 AGM in person or virtually. Furthermore, at the AGM itself, the postponement of the AGM was condoned unanimously, thereby complying with section 62(4) of the Act.²

5. FINDINGS

Against the backdrop of all stated above, I find that:

5.1 TOM’s AGM notice published on 23 October 2020 was valid;

¹ Applicant’s Founding Affidavit: Annexure JTE5

² para 48 and Annexure WS10 of TOM Answering Affidavit

5.2 TOM's 2020 AGM held on 09 December 2020 stands as valid.

6. ORDER

6.1 The Application is dismissed;

6.2 Each party to pay its own costs.

ADV. ISHARA BODASING

For Applicant: Himself

For First Respondent: Mr Glyn Williams of Chennells Albertyn Attorneys, Notaries and Conveyancers.