



IN THE COMPANIES TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA

("The Tribunal")

CASE NO: CT021JUL2015

In an ex parte application of:-

GRAND PARADE INVESTMENTS LTD

THE APPLICANT

(1997/003548/06)

Coram K. Tootla

Decision delivered on 5 October 2015

DECISION

In respect of an Application for an order for substituted service

INTRODUCTION:

- [1] The Applicant is **GRAND PARADE INVESTMENTS LTD**, a company incorporated in terms of the Companies Act of 2008, duly listed on the Johannesburg Stock Exchange, having its principal place of business situated at 12 th floor, convention tower, Heerengracht Street, Foreshore, Cape Town.
- [2] The applicant seeks an order to deliver notice of an annual general meeting of shareholders by way of ordinary mail in substitution of the methods of delivery contemplated in Regulation 7 (Reg) of Regulations 2011 read together with section 6 of the Companies Act 71 of 2008 (the Act) and column 2 of Table CR3 of Annexure 3 to the Regulations.

- [3] Reg.7 (1) read against the background of section 6 of the Act provides for delivery of notices or documents for purposes of the Act and the Regulations. The meeting is to be convened on or around 2 December 2015.

APPLICABLE LAW:

- [4] For the purpose of brevity Section 6(8); Ss 6 (9); 6(10); 6(11) of the Companies Act and Regulation 7 applies where relevant, and will not be set out in detail herein.
- [5] A company (in the case of a public company) must deliver a notice of each shareholders' meeting in the prescribed manner and to all the shareholders of the company as at the record date (section 62(1))(a) for the meeting, at least 15 business days before the meeting is to begin.

EVALUATION:

- [6] Annexure "LP7" indicates that 9149 of the retail shareholders of the total 9189 shareholders are individuals. In terms of the Companies Act 2008, the applicant is obliged to notify all its shareholders of its annual general meeting. However, the latest share register from Computershare reflects a total of 7192 shareholders under cover of the Applicant's letter dated 1 October 2015.
- [7] Having perused the documents, the share register and the additional documents, it is clear that the annual general meetings have been fairly well attended. The question arises whether the notices via ordinary mail will be effective?
- [8] Reg 7(3) permits the Tribunal to entertain an application for substituted service. Reg 7 in general refers to the different methods of delivery acceptable. However, Reg 7(3) talks to the instance where it is impossible to deliver a document in any manner provided for in the Act. Reg. 7(1) (b) stipulates the methods of delivery of how the notices of annual general meetings may be served on the relevant shareholders.

- [9] The Applicant claims that the methods set out in table CR 3 is inappropriate, ineffective and impractical and thus impossible to comply with within the meaning of Reg. 7(3). The Applicant's arguments are indeed unconvincing as can be seen from the contradictory information provided.
- [10] The Applicant is of the view that when Reg 7(3) and Table CR3 are read in the light of Section 6(9), it is clear that the aim and object of these provisions are to ensure that notices and other documentation are delivered to the relevant addressees in an efficacious manner as possible, as well as the parties sending out the notices have sufficient flexibility to ensure that the notices reach the addressees, regard being had to the relevant circumstances. This is indeed the law.
- [11] However, on examination of Section 6(9) what is clear is that when granting substituted service and in approving a mode of delivery, that mode must constitute "substantial compliance" with the Act's delivery requirements to ensure that documents are effectively delivered to their intended recipients rather than to insist on strict adherence to any particular mode of delivery mentioned in Table CR3.
- [12] Hence it is enquired as to how effective will the delivery be via ordinary mail? The Applicant's view is that delivery by registered post will not be effective, is cumbersome and more expensive as there is no guarantee that the shareholders will collect their letters. Similarly, it can be argued that there is no guarantee either that the shareholders will collect their letters when it is posted to them by ordinary mail. It is not the method which is in issue but rather the effectiveness of the method. The Applicant's view that delivery by ordinary post equates to personal delivery is rejected. It still requires access to a postal box of the SA Post Office unless the item is delivered by hand to a physical address. This does not appear to be the submissions made herein.
- [13] The Applicants' situation is not that it is impossible to serve the AGM notice in any manner contemplated in the Act; but it is that the Applicant prefers to serve the notice via ordinary mail instead of via email or other acceptable method such as registered post.

- [14] Rule 4 of the Uniform Rules of the High Court requires the Applicant to show what steps have been taken to ascertain the parties' whereabouts; and whether these have been unsuccessful. The Applicant has not taken the time to ascertain this as the Applicant has the details of the whereabouts, but argues it is cumbersome and not cost effective to do so. That does not amount to an impossibility. It may be impractical for the Applicant but certainly not impossible. Ordinarily for an application for substituted service to be successful, the Applicant has to show that there is some reasonable likelihood that the form of service suggested will come to the knowledge of the shareholders. This has not been shown by the Applicant.
- [15] The Tribunal is of the view that apart from what is provided in Reg 7 and Section 6 (9) - (11) which provides for substituted service, such orders cannot simply be granted simply for the asking. It has to be substantiated for the Tribunal to grant it as a departure from the norm.
- [16] Since Section 6(9)(b) also provides that in addition, any deviation from the prescribed manner does not invalidate the action taken by the person delivering that document, record, statement or notice, unless (my emphasis) the deviation (i) materially reduces the probability that the intended recipient will receive the document, record, statement or notice; or (ii) such as would reasonably mislead a person to whom the document, record, statement or notice is or is to be delivered; the Tribunal examines the circumstances under which it can grant an order which amounts to an efficacious delivery of documents and also not to prejudice the shareholders despite the Applicant's representative having provided some conflicting and confusing arguments and information.
- [17] There is a specific reason why registered post is provided for in the Law in various pieces of legislation, including the National Credit Act, as it is a safeguard which is a better form of service than ordinary mail as the proof of registered service with a slip is some form of proof. On the other hand, that is not so for ordinary mail.

It is the duty of the Tribunal to be satisfied that the substituting method of delivery will ensure that there is some likelihood of the notice coming to the knowledge of the intended recipients.

[18] It is unclear what submissions were made to obtain the court order which was in any event in terms of the Companies Act of 1973 and not the 2008 Act. With regard to previous decisions of the Tribunal, it is unclear which principle of law was stated therein for it to be possibly binding or persuasive for purposes of the current decision. However, my learned colleague, Mr K. Manamela was also disinclined to order that service be by ordinary mail and ordered publication in an English and Afrikaans newspapers.

[19] Since the Tribunal has been provided with more accurate information by the Applicant (after a request was made by the Registrar); and based on the information provided, the Tribunal makes an order which is appropriate to the circumstance and in line with the objectives of the Act to provide a predictable and effective environment for the efficient regulation of companies as well as to encourage the efficient and responsible management of companies.

[20] Furthermore, based on the information provided in the letter dated 1 October 2015 by the Applicant together with an analysis of the shareholders and their addresses; the number of shareholders who have elected to receive notices via electronic mail; and the number of shareholders who have indicated that they elect to receive notices via post, the Tribunal makes the following order to ensure that all shareholders of the applicant are sent AGM notices so that the delivery thereof is efficacious and in line with the Law.

ORDER:

- [a] That the applicant be granted leave or authorised to deliver notices convening the annual general meeting of shareholders to be held on or around 2 December 2015 or whatever date the meeting is to be held (in accordance with Section 61 (7)(b)), by way of attaching the notices to the pay-slips of each employee shareholder; and via ordinary mail for all shareholders as well as electronically via email for those who have email depending on when the AGM is to be held and taking into consideration the time limit of not less than 15 days- notice as per Section 62 of the Act.
- [b] Publication of the notice in national or regional English and Afrikaans newspapers not less than 15 days before the date of the meeting.
- [c] That, the notices delivered as contemplated in [a] above shall be deemed to have been received by the intended recipients on the seventh day following the day on which such notices were handed to the shareholders with the pay-slips, emailed or posted.
- [d] That, the applicant shall deliver proof of compliance with [b] to the recording officer/ registrar of the Tribunal within 45 days from date of the meeting; as well as compliance in respect of [a] under cover of an affidavit.
- [f] Finally, the Applicant is to ensure that the addresses of all shareholders are verified and updated before the 2016 AGM.

k.y. *tootla (electronically signed)*

KHATIJA TOOTLA

Member of the Companies Tribunal

26 October 2015