

COMPANIES TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case Number CT005MAR2016

In the Ex Parte Application of;

GRAND PARADE INVESTMENTS LIMITED

Applicant

(Registration number 1997/003548/06)

An ex parte

**APPLICATION IN TERMS OF REGULATION 7(3) OF THE COMPANIES
REGULATIONS PUBLISHED UNDER THE COMPANIES ACT, NO 71 OF 2008
FOR AN ORDER TO DELIVER NOTICES BY WAY OF SUBSTITUTED SERVICE.**

Presiding Member of the Tribunal: Lucia Glass

DECISION (Reasons and Order)

INTRODUCTION

1. The Applicant applies in terms of regulation 7 (3) of the Companies Regulations published under the Companies Act, No 71 of 2008 for substituted service and seeks leave to deliver notices of its annual general meeting set to be convened on 26th April 2016, (or alternative date to be confirmed) to its shareholders by ordinary mail.

PRELIMINARY ISSUES

2. The Applicant's Secretary Lazelle Parton acts on behalf of the Applicant and avers that she is duly authorised to bring this application on behalf of the Applicant and attaches a resolution by the Applicant's Board of Directors, marked LP1.

FACTS

3. The Applicant is a public Company listed on the Johannesburg Stock Exchange.
4. The Applicant avers that the manner of service as set out in Sections 6 (10-11) of the Companies Act 71 of 2008 (the Act) and Table CR3, are impossible ineffective and impractical in the circumstances, and impossible within the meaning of regulation 7(3).
5. The Applicant alleges that it does not possess many of its shareholders' facsimile numbers as none of the shareholders elected to receive communications from the Applicant by means of facsimile transmission. This is evident from the information dated 1st March 2016 that has been provided by Computershare, the transfer secretaries appointed by the Applicant to manage its share register, (which is appended as LP9). It is averred that the delivery of the notice by facsimile would be impossible in these circumstances.
6. It is averred that all the shareholders have not elected to receive notices by way of email transmission, and delivery of the notice of the general meeting by this means would not reach all shareholders.
7. The Applicant alleges that delivery of the notice of the general meeting to shareholders by means of registered post would require the shareholder, after being informed that the notice was being held on their behalf, to attend on the local Post Office and uplift the relevant documents. Further that failure to uplift the notice within a relatively short period would result in it being returned to the Applicant, uncollected. There is also the risk that certain shareholders may elect not to uplift the notice or may not have ready access to a local Post Office, or transport thereto, with the result that many notices of the general meeting would be returned to the applicant uncollected.
8. The Applicant avers that the Applicant's shareholders are accustomed to receiving notices of the Applicant's general meetings and its general meetings by way of ordinary mail due to this having been the standard mode of delivery prior to introduction of the Act and following its introduction.
9. It is averred that delivery of the notices by means of ordinary mail would, on the other hand, be consistent with this historic practice and thereby be at least as effective, if not more effective, than by means of registered post, there would be no concerns with regard to

accessibility and there would be a greater likelihood of ensuring that the notices actually reach the shareholders.

10. In the circumstances it is submitted that the delivery of the notice of the general meeting by ordinary mail rather than by registered post would be more effective and more practical.

THE APPLICABLE LAW

11. In order to grant an order for substituted service I believe it necessary to quote the relevant Sections in the Act and Regulations in full as follows;

Section 62 Companies Act 71 of 2008 (the Act) provides for notices of each shareholders meeting as follows: "*The company **must deliver a notice of each shareholders** (emphasis added) meeting **in the prescribed manner and form to all of the shareholders** (emphasis added) of the company as of the record date for the meeting"*

Section 158 of the Act reads as follows; "*When determining a matter brought before it in terms of this Act, or making an order contemplated in this Act, (a) a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act; and (b) the Commission, the Panel, **the Companies Tribunal** (emphasis added) or a court (i) must promote the spirit, purpose and objects of this Act; and (ii) if any provision of this Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realization and enjoyment of rights."*

Regulation 7 reads as follows (1) *A **notice** or document to be delivered for any purpose contemplated in the Act or these regulations may be delivered in any manner (a) contemplated in section 6 (10) or (11); or (b) set out in Table CR 3."*

Section 6 (10) or (11) of the Act reads as follows; "(10) *If, in terms of this Act, a **notice** is required or permitted to be given or published to any person, it is sufficient if the **notice** is transmitted electronically directly to that person in a manner and form such that the **notice** can conveniently be printed by the recipient within a reasonable time and at a reasonable cost.*(11) *If, in terms of this Act, a document, record or statement, **other than a notice** (emphasis added) contemplated in subsection (10), is required- (a) to be retained, it is*

sufficient if an electronic original or reproduction of that document is retained as provided for in section 15 of the Electronic Communications and Transactions Act...

Table CR 3 states the following;

In terms of Table CR 3, the methods of delivery of a notice on a person include the following;
by facsimile
by electronic email
by registered post
by physically delivering the notice to the relevant address of the shareholder and handing same to the notice's addressee
or an appropriate representative by any other means authorised by the High Court.

Regulation 7 (3) states the following;

" If, in a particular matter, it proves impossible to deliver a document in any manner provided for in the Act or these regulations—
*(a) if any person other than the Tribunal is required to deliver the document, the person may apply to **either the Tribunal or the High Court for an order of substituted service**; (emphasis added)"*

APPLICATION OF THE LAW TO THE FACTS

12. The Tribunal has jurisdiction over this matter of substituted service in terms of regulation 7 (3) and may decide whether it is reasonably necessary to depart from the various methods of service provided in the Act and the Regulations if it proves impossible to deliver a document in a manner provided for in the Act or the Regulations.

13. Substituted service, though provided for in the Regulations, is however not defined.

14. It is established that there is no provision for service by '**ordinary mail**' (emphasis added) in either the Act or the Regulations.

15. The Tribunal is a creature of Statute and can therefore only act or function within the parameters of its founding and applicable laws. It has no authority to create laws. This means that the Tribunal cannot create a method of service that does not exist in terms of its founding and applicable laws.

16. The Tribunal is to weigh up, whether, the Applicant has proved in its papers that it is impossible to deliver a document in any manner provided for in the Act or the Regulations.

17. **Guidance** (emphasis added) for a definition of “substituted service” should therefore be sought in the **High Court Act, Rules and Procedures** (emphasis added). I quote Rule 4 (2) of the High Court Rules; "**Not possible to effect service in any manner aforesaid**". This sub rule is aimed at substituted service. Substituted service is ordered when the defendant is believed to be in the Republic but one of the normal forms of service set out in the rules cannot be effected. The court then gives directions authorizing some form of 'substituted service'.

The Applicant's case for substituted service is as follows;

18. The applicant contends that each of the methods of delivery specifically mentioned in Regulation 7 (1) (b) as set out in the Table CR 3 is inappropriate, ineffective and impractical in the present circumstance. The Applicant submits that delivery by facsimile or email is impossible because none of the shareholders wish to receive the notices via facsimile or email.

19. The Applicant further submits that the main problem occasioned by serving the notice by registered post, is that the local post office is not readily accessible to many of the Applicant's shareholders who are individuals and who live in disadvantaged communities and that many notices of the annual general meeting would be returned to the applicant uncollected if delivered via registered mail.

20. It is averred that delivery of the notices by means of ordinary mail would, on the other hand, ensure that each of the notices is personally delivered to each of the shareholders, there would be no concerns with regard to accessibility and there would be a greater likelihood of ensuring that the notices actually reach the shareholders.

21. The applicant intends to take additional care to ensure that its shareholders are apprised of the date, time and venue of the annual general meeting and intends to publish details of the annual general meeting in an English and Afrikaans national daily newspaper 15 days prior to the annual general meeting being convened.

22. The applicant prays for an order granting leave for the applicant to deliver notice of its annual general meeting set to be convened on the 26 April 2016 to its shareholders by way of ordinary mail.

Findings

23. The Tribunal has considered the submissions made by the Applicant and the applicable legislation, in its quest to weigh up whether substituted service is justified instead of the prescribed methods of service of notices. In weighing up the issues the Tribunal has zoomed into whether the Applicant's notices would reach the shareholders by ordinary post more effectively and also whether it is impossible to serve the notices by the means mentioned in the Act and Regulations.

24. I understand that the shareholders have not chosen to receive their notices by email or fax because most of the shareholders do not have email or facsimile facilities, ie., email addresses nor fax numbers. Hence, it is my view that it is impossible to serve the notices on the shareholders via the modern facilities, if the shareholders do not possess these facilities to receive the notices.

25. In respect of service by registered mail, I agree with the applicant in that the registered post (via the Post Office) is a cumbersome method where the registered slips may never reach their destinations, (be returned undelivered) as the disadvantaged communities may not have addresses which are reached via Post Offices, and thus serving by ordinary mail would be an alternative effective method of getting the notice to the shareholders. It is my view that registered post has an added disadvantage in that the registered slips may indicate that the post has been sent, however it does not guarantee that the post has been received. The notices may very well be returned as the shareholders could not or would not attend the Post Office to collect their notices.

26. It is my understanding that the Act not only allows various modern means of delivery of documents but also allows a party to apply to the Tribunal for substituted service, who can then approve any mode of delivery that constitutes 'substantial compliance' with the Act's delivery requirements.

27. It is my view that the Tribunal's decision ought to focus on ensuring that documents are effectively delivered to their intended recipients, rather than to insist on strict adherence to any particular mode of delivery.

28. After considering Rule 4 (2) of the High Court Rules; it is my view that the applicable guideline which is applicable is; *"Substituted service is ordered when the defendant is believed to be in the Republic but one of the normal forms of service set out in the rules cannot be effected. The court then gives directions authorizing some form of 'substituted service'".* It is my view that the normal forms of service cannot be effected and that the Tribunal is to give directions authorizing some form of substituted service.

23. The applicant has complied with the requirements of filing of a Notice of Motion and I can therefore conclude, after considering all the facts, and the law, that the Applicant has made a sound case for substituted service of the notices to shareholders.

Order

I therefore make an order in the following terms;

that the Applicant is granted leave to deliver the notice of its annual general meeting convened for a date on 26 April 2016 or an alternative date to be confirmed, to its shareholders by ordinary mail.

In addition, the Applicant will inform shareholders of the date, time and venue of the general meeting by means of notices to be published in an English and Afrikaans national daily newspaper, 15 business days prior to the general meeting being convened.

LUCIA GLASS

MEMBER OF THE COMPANIES TRIBUNAL OF SOUTH AFRICA

Dated 31 March 2016