

**IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA
PRETORIA**

Case No.: CT005Jun2017

In the Ex Parte application of:

SOUTH AFRICAN EXPRESS AIRWAYS SOC LTD

Applicant

DECISION

INTRODUCTION

1. This is an application in terms of section 61(7) of the Companies Act 71 of 2008 (the “Companies Act”) for an extension of time for the Applicant to convene its annual general meeting (“AGM”).
2. The Applicant is South African Express Airways SOC Ltd, a state owned company as contemplated in terms of Item 2 of Schedule 5 of the Companies Act with registration number 1990/007412/30.
3. The Applicant previously brought an application for an extension of time to convene its AGM under case number CT017NOV 2016, which my fellow Companies Tribunal member Ms. Lucia Glass granted.

3.1. In terms of her order she had allowed the applicant an extension to the first week in June 2017 to convene the AGM for the following reasons:

3.1.1. The finalisation of the Applicant's annual financial statements were delayed due to the implementation of accounting policy changes that related to the maintenance reserves and possible impairment thereof and clarity relating to the perpetual portion (R121m) of the guarantee granted to the Applicant by the South African government;

3.1.2. The clarification regarding the guarantee could only be resolved by the Fiscal Liability Committee (the "Committee") of the National Treasury and that the Committee's next setting was only scheduled for March 2017, while feedback would only be provided thereafter.

3.1.3. The possibility of audit issues requiring the intervention of the Committee.

3.2. This extension was granted on 30 November 2016.

THE APPLICATION

4. The Applicant now requests a further extension of the *'period of convening an annual general meeting of the shareholder of a public*

company in terms of section 61(7)(b), and proposes all requests relief for a period of three months (end of September 2017)'.

5. The Applicant, in its supporting affidavit deposed to by Maryna Rene Gie who has been duly authorised in terms of the resolution dated 17 November 2016, advances the following reasons for the request for a further extension:

- 5.1. The finalisation of the annual financial statements that delayed the process has been completed;

- 5.2. The Auditor General of South Africa, SA Express auditor, experienced difficulty in finalising the audit opinion;

- 5.3. The audit opinion has now been received and SA Express is in a position to finalise the annual report, enabling the Applicant to proceed with the AGM;

- 5.4. Logistically and taking cognisance of the requested notice period set out in section 62(1)(b) of the Companies Act, holding the AGM before the deadline afforded to SA express in the previous application is highly unlikely.

APPLICABLE LAW

6. Section 61 of the Companies Act deals with shareholders meeting and subsection (7)(b) states that:

“A public company must convene an annual general meeting of its shareholders 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.”

7. The Applicant refers me to paragraph 12.1.1 of the Memorandum of Incorporation, which was supposed to have been annexed to the application as annexure B. The relevant clauses are not annexed but from the affidavit it would appear the clause reads:

“The board shall convene an annual general meeting at least once a year but no later than 15 (fifteen) months after the date of the previous annual general meeting or within an extended time allowed by the Companies Tribunal, on good cause shown.”

8. Section 61(8) of the Companies Act states that:

“A meeting convened in terms of subsection (7) must, at a minimum, provide for the following business to be transacted –

(a) *Presentation of –*

(i) *The directors report;*

(ii) *Audited financial statements for the immediately preceding financial year; and*

(iii) *An audit committee report.”*

9. With regard to notice of meetings, the following subsections of section 62 of the Companies Act are relevant and reads:

“(1) *The company must deliver a notice of each shareholders meeting in the prescribed manner and form to all of the shareholders of the company as of the record date for the meeting, at least –*

(a) *15 business days before the meeting is to begin, in the case of a public company or a non-profit company that has voting members; or”*

“(2) *A company's Memorandum of Incorporation may provide for longer or shorter minimum notice period and required by subsection (1).”*

“(3) *A notice of the shareholders meeting must be in writing, and must include –*

(d) *In the case of an annual general meeting of the company –*

- (i) *The financial statements to be presented or a summarised form thereof; and*
- (ii) *Directions for obtaining a copy of the complete annual financial statements for the preceding financial year; and"*

10. What is annexed by the Applicant is clause 12.2.1 which deals with the notice of meetings to shareholders and reads:

"Subject to compliance with section 62 of the Companies Act, an annual general meeting and a general meeting of the shareholders shall be convened by giving notice of at least 15 (fifteen) business days to the shareholder."

EVALUATION

11. Based on the reading of the current and previous application, it would seem that the applicant would have convened its previous AGM on or about September 2015.
12. The Applicant was therefore required to convene its AGM during 2016 (the following calendar year), alternatively no more than 15 months after the date of the previous AGM, which from the previous application would have been 9 December 2016.

13. The Applicant requested and was granted an extension to convene its AGM to June 2017, which is approximately six months after 9 December 2016.
14. The Applicant is now requesting a further extension to convene its AGM to September 2017, which is approximately nine months after 9 December 2016.
15. If the date calculation is correct, then the Applicant would not have convened an AGM within two years from the previous AGM.
16. The Applicant is a public company and I would like to pause at this point to note my concern that the Applicant has taken this long to convene an AGM with its shareholder.
17. However, I grant the extension only because section 61(8) of the Companies Act requires the audited financial statements for the immediately preceding financial year and the audit committee's report to be presented and form part of the business that would be transacted at the AGM.
18. The Applicant indicated in its affidavit that the finalisation of the annual financial statements have been completed and that they are in receipt of the auditor general's audit opinion.

19. With reference to section 62 of the Companies Act and the relevant clause of the Applicant's Memorandum of Incorporation, the Applicant is only required to give notice to each shareholder 15 business days before the meeting is to begin.
20. I am therefore of the view that the AGM can be extended by a further six weeks from date of this order and that an additional four months (end of September) is unnecessarily long under the circumstances. It is important to highlight that the six weeks extension from date of order constitutes a total of 10 weeks from the extended date on which the AGM should have been convened.

ORDER

I proceed to make an order in the following terms:

- a) The Applicant is granted a further extension for the period of convening an AGM of the shareholders.
- b) The applicant is required to convene such an AGM on or before 15 August 2017, which is six weeks from date of this order.

ADV LIZELLE HASKINS

MEMBER OF THE COMPANIES TRIBUNAL

DATED: 3 JULY 2017