



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA

CASE NO: CT009FEB2017

Ex Parte Application

**SERENGETI GOLF AND WILDLIFE ESTATE
PROPERTY OWNERS ASSOCIATION NPC**

APPLICANT

Presiding Member: K Moodaliyar

Date of Decision: 23 March 2017

DECISION

INTRODUCTION

[1] The Applicant, Serengeti Golf and Wildlife Estate Property Owners NPC, is bringing an application in terms of section 61(7)(b) of the Companies Act 71 of 2008 ("the Act") for an extension of time for convening an annual general meeting.

[2] The Applicant is a non-profit company under the company laws of South Africa, with registration number 2007/013033/08.

[3] An affidavit in terms of CTR 142 is deposed to by Mr Johannes Stephanus Hendriks ("deponent"), the estate manager of the Applicant, duly authorised to do so in terms of a delegation of authority of the Board of Directors of the Applicant.

[4] The Deponent submitted that the Applicant is a residential golf estate with currently approximately 450 completed residences privately owned and another 116 in the process of being constructed and that the estate is a gated community with security perimeter around all the residential properties as well as the golf course and conservation area.

[5] The Deponent stated that upon registration and incorporation of the Applicant, the members at the time adopted the Estate Rules and Regulations as they are empowered to do so in terms of Memorandum and Articles of Association and in terms of the Act the Articles of Association were converted to Memorandum of Incorporation.

ISSUES

[6] The Deponent indicated that the Applicant does not trade in the market as a normal company might do nor does it invest money as a business or use public money for purposes of trading or participating in business.

[7] The Deponent further submitted that the Applicant only deals with the residents and their visitors, it does not deal with golfers visiting the estate to play golf or other visitors other than all the residents are members of the Applicant by virtue of their ownership of property within the Estate.

[8] The Deponent stated that the previous Annual General Meeting (AGM) was held on 19 October 2015 and the next AGM was scheduled to be held on 27 February 2017.

[9] More than fifteen months would have lapsed between the meetings, and hence the Applicant applies for condonation and extension of the time to hold the AGM.

[10] A meeting of the Board of Directors took place on 27 February 2017, to note that the AGM fell outside the timeframe of section 61(7)(b) of the Act, and that the Board only had the opportunity to approve its Annual Financial Statements on 2 February 2017.

[11] The Deponent further stated that at the last AGM held on 19 October 2015, the members of the Applicant adopted a resolution to appoint a new auditor for the Applicant and the members also instructed the new auditors to do a full and complete audit, which took much longer than anticipated. The next AGM could only be convened once the audit report became available, and this report was finalized and handed on to the board of the Applicant on 23 December 2016.

[12] Given that it was the December holidays and most members were unavailable, and the fact that enough time had to be given in 2017 to provide for all the notices to members, as required by the Act and the Memorandum of Incorporation, the meeting could not take place any earlier, and a date of 27 February 2017 was the earliest date that the meeting could have been convened.

[13] The Deponent further stated that calling the AGM after the required time was in no way detrimental to the Applicant or its members but in fact would benefit members as they now had the complete audit report at their disposal for the AGM, and there was no prejudice to the members to hold the AGM after the period of fifteen months.

[14] The Deponent stated that the failure to comply with the period of fifteen months which expired at the end of October 2016 was not due to any negligence nor failure to observe the Act, but because the audit of the financial records was not available to members.

[15] The Applicant thus requests that the Companies Tribunal grant relief to extend the time period to provide its annual financial statements and to hold the annual general meeting.

APPLICABLE LAW

[16] Section 61(7) of the Act stipulates:

“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 every calendar year, but not 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.” (underlining is my emphasis)

[17] One should also take note of the following provisions:

Section 10 (3) of the Act provides that, Sections 58 – 65, read with the changes required by the context:

“(3)(a) apply to a non-profit company only if the company has voting members”;

Section 61(1) “The board of a company, or any other person specified in the company’s Memorandum of Incorporation or rules, may call a shareholders meeting at any time”.

61(12) “If a company fails to convene a meeting for any reason other than as contemplated in subsection (11)—

- (a) at a time required in accordance with its Memorandum of Incorporation;
- (b) when required by shareholders in terms of subsection (3);
- or
- (c) within the time required by subsection (7), a shareholder may apply to a court for an order requiring the company to convene a meeting on a date, and subject to any terms, that the court considers appropriate in the circumstances.”

EVALUATION

[18] The Applicant cited Section 61 (7) as the impending provision that requires compliance in terms of the period in which the AGM can take place. It should be noted that this section applies to a *public company* and the Applicant itself is a non-profit company.

[19] The Act defines a “public company” as a “profit company that is not a state-owned company, a private company or a personal liability company”.

[20] A “non-profit company” is defined in the Act as a company’ “(a) incorporated for a public benefit or other object as required by item 1(1) of Schedule 1; and (b) the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1(3) of Schedule 1”.

[21] It does appear that the non-profit company as defined cannot extended to apply to the provisions as required in Section 61(7) which distinctly refers to a “public company”.

[22] Having encountered a similar set of circumstances relating to a non-profit company in the Companies Tribunal decision *Gauteng Cricket Board NPC*,¹ the presiding member K Manamela, considered the purposive approach, where he stated that:

“In terms of this approach, the language of the constitutional text must be interpreted purposively and in context² and therefore although the court must thus seek to give effect to the object and purpose of the provision, it remains limited by the language used. The court is not

¹ CTR001/11/2012, decision dated 25 March 2013.

² *Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and another* 201a1 (1)SA 327 (CC) para 32, note 34.

permitted to impose a meaning on the text that it is not capable of bearing. In my opinion the aforesaid approach is employable in respect of other legislation than the Constitution of the Republic of South Africa.”³

“Therefore, it has to be determined whether on a purposive or contextual interpretation, the legislature still intended to exclude a non-profit company and other forms of profit companies from the provisions of section 61(7).”⁴

[23] In dismissing the above matter, Manamela emphasized that “This Tribunal cannot-even with an inadvertent reliance by the applicant on section 61(7) of the Act, which has since been found to be inapposite-assist the applicant. In fact, the applicant doesn’t require the assistance of this Tribunal regarding the delayed annual general meeting.”⁵ (my emphasis).

[24] I am in agreement with the reasoning outlined above in the interpretation and applicability of section 61(7) in cases such as these. I am also inclined to believe that in this case section 61(7) would not be applicable.⁶ Before dismissing the case purely based on this reasoning, I shall take this evaluation further.

[25] Section 61(1) directs us to the Memorandum of Association which provides the Applicant with capacity to call the AGM. In turning to the Applicant’s Memorandum of Incorporation and Articles of Association, it is stated that an AGM should be held on an annual basis. This means that the meeting should have taken place in October 2016 at the latest.

³ *Gauteng Cricket Board NPC*, pg 4.

⁴ *Ibid* at pg 5.

⁵ *Ibid* at pg 14.

⁶ Cf. *Irene Farm Villages Homeowners Association NPC*, Companies Tribunal, Case no: CT005OCT2016.

[26] Section 61 (12) (c) allows for the shareholders to approach the court where there has been a delay in the meeting. I believe that this would be the most applicable section in this regard and empower the Tribunal to pronounce on the validity of the application.

FINDINGS

[27] The Applicant has shown good cause as to why the AGM could not be held on time, considering that the new auditors were appointed, and that annual financial statements could not be prepared before the due time, and the December holidays were also a delaying factor, if adequate notice had to be given.

ORDER

[28] The Applicant, is hereby granted an extension of time to hold its annual general by no later than 31 May 2017.

KASTURI MOODALIYAR
MEMBER OF THE COMPANIES TRIBUNAL