



Legal Update
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Business Unusual in Covid 19: Directors and shareholders meetings and decisions

The measures implemented by Governments all over the world to contain the spread of Covid 19 have catapulted many businesses into a new reality where the usual business formalities such as shaking hands, dressing in formal wear, working from the office and holding meetings around boardroom tables have become a thing of the past.

Instead most of the professional environment now work from home offices and dining room tables.

Despite these changes, directors and shareholders still need to communicate and hold meetings and make decisions both large and small.

In South Africa, formal directors and shareholders meetings can still be held using platforms like Zoom and Microsoft Teams or other teleconferencing facilities unless the company's Memorandum of Incorporation specifically prohibits meetings being held through electronic communication.

While all shareholders meetings of a public company are required to be reasonably accessible within the Republic for electronic participation by shareholders, other companies may prohibit electronic participation in meetings in their Memorandum of Incorporation.

In light of Government's restrictions on public gatherings and the future of social-distancing that confronts us, companies would do well to ensure that their governing documents permit meetings being held through electronic communication.

The requirements in the Companies Act, 2008 ("Act") regarding the manner in which these meetings are called, the requirements for minute keeping, quorum requirements, exercising voting rights and the

procedures set out in the Memorandum of Incorporation and Shareholders Agreement for calling these meetings must be adhered to unless the Memorandum of Incorporation and Shareholders Agreement allow for some formalities to be dispensed with.

The Act allows resolutions to be adopted in writing without having to call a formal meeting. This is commonly referred to as a round robin resolution and provides a quick and efficient means for the passing of resolutions without the need to hold meetings.

Section 74 of the Act deals with written directors' resolutions and section 60 deals with written shareholders' resolutions. These sections prescribe the procedures for adopting resolutions absent a meeting.

It is important to keep in mind that some resolutions simply can't be adopted through a round robin process. For example, a director may not be removed by a written resolution of shareholders without the holding of a meeting. Further, the business of a company that is required to be attended to at the company's annual general meeting may not be conducted in written shareholders' resolutions.

Annual General Meetings

Companies that are required by the Act or their Memorandum of Incorporation to hold an annual general meeting are resorting to conducting wholly virtual meetings to ensure compliance with Government's prohibition on public gatherings.

If a company (other than a public company's) Memorandum of Incorporation specifically prohibits meetings being held electronically or, the company does not have the facilities to hold a meeting electronically, and the annual general meeting is due to be called during the National State of Disaster, this may pose a problem.

Are there options available to a company to postpone or delay the annual meeting date?

A public company can apply to the Companies Tribunal in terms of section 61(7)(b) to call the meeting within an extended time on "good cause shown". The Companies Tribunal have granted a number of extensions to public company's in light of the National State of Disaster.

In the matter of *Modern Business Holdings (Pty) Ltd* Case No: CT00337/ADJ/2020 the Companies Tribunal confirmed the application of the decision of the Constitutional Court in *Minister of Defence and Military Veterans v Motau and Others* 2014(5) SA 69 (CC) to the interpretation of what "good cause shown" would be. In the Military Veterans case it was held that good cause is defined as a substantial or legally sufficient reason for a choice made or action taken and that the assessment was a factual one which depended on the circumstances of each case. Modern Business Holdings (Pty) Ltd asked the Companies Tribunal for an administrative order to extend the date for it to hold its annual general meeting. The Presiding Member took judicial notice of the fact that South African is in an unprecedented nation-wide lockdown and granted the extension on the basis that the national state of disaster has made it impossible for the company to hold its annual general meeting.

If a public company does not comply with its obligations to call an annual general meeting and does not apply to the Companies Tribunal for an extended date then the Companies and Intellectual Properties Commission could issue a compliance notice to the directors. Failure to comply with a compliance notice is an offence under the Act.

The provision in section 61(7) of the Act is not available to other companies.

If the Memorandum of Incorporation is silent on what a private company should do if it can't call an annual general meeting then the remedy appears to lie with its shareholders. Section 61(12) of the Act gives a shareholder the right to apply to court for an order requiring the company to convene a meeting on a date that the court considers appropriate in the circumstances. The company would then be required to compensate the shareholder for the costs of the court application.

A possible solution would be to propose an amendment to the private company's Memorandum of Incorporation to allow for the extension of the date for an annual general meeting to be called in certain circumstances and where necessary to remove any restriction on meetings being held electronically.

Failing to comply with a formality could leave a decision taken at a shareholders' or a directors' meeting open to being challenged and rendered invalid. If you have any uncertainty regarding the procedure to be used when passing a resolution or calling a meeting you should consider obtaining legal advice. There has never been a better time to review your company's governing documents to ensure that going forward you have some flexibility when it comes to calling and conducting meetings as we embrace the "new normal" in the working world.

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