

Virtual AGMs in the wake of COVID-19

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by Saarah Coenraad, Candidate Attorney

reviewed by Taryn Potter, Director and Michaela Tyfield, Senior Associate

The "COVID 19" pandemic and the declaration of a national state of disaster in terms of the Disaster Management Act No. 57 of 2002 has had an unprecedented impact on people and businesses alike. Companies incorporated in terms of the Companies Act No. 71 of 2008 (the "**Act**") face additional challenges to meet statutory obligations and to comply with their constitutional documents. Many companies are obliged either by the Act or their constitutional documents to convene an annual general meeting ("**AGM**"); alternatively, a company may need to convene a general meeting of shareholders for matters for which a round robin resolution would not be appropriate. Accordingly, it is necessary to consider the requirements for a valid virtual general meeting of shareholders; and the practical considerations for companies contemplating a virtual AGM.

South African public companies must convene an AGM once in every calendar year but no more than 15 months after the date of the previous AGM.^[1] Furthermore, every shareholders' meeting of a public company must be reasonably accessible within the Republic for electronic participation by shareholders.^[2] Consequently, companies host hybrid AGMs – AGMs with both a physical meeting place and which can be accessed through electronic means. Virtual AGMs or meetings with no physical meeting place are uncommon.

Unlike many other jurisdictions^[3], South Africa's statutory framework anticipates and caters for virtual AGMs and meetings. The Act provides that as long as a company's memorandum of incorporation ("**MOI**") does not preclude it, a company may provide for a shareholders' meeting to be conducted entirely by electronic communication.^[4] The requirements for such meetings are that:

- the electronic communication used must enable all persons participating in the meeting to communicate concurrently with each other without an intermediary and to participate reasonably effectively in the meeting;^[5]
- the notice of the meeting must inform shareholders of the availability of that form of participation, and provide any necessary information to enable shareholders or their proxies to access the available electronic communication.^[6]

A notice of a shareholders' meeting must be in writing, and must include the date, time and place for the meeting, and the record date for the meeting.^[7] Such a notice will usually denote the physical location as the 'place of the meeting'. A close reading of section 63(2) indicates that the Act envisions situations where a shareholders' meeting will have no physical location. Accordingly, the procedural requirement of section 62(3)(a) of the Act would be satisfied by stipulating in the notice that the meeting will take place virtually and providing all of the information regarding the platform on which the meeting will be held and the manner in which shareholders or their proxies may access the meeting.

The Johannesburg Stock Exchange ("**JSE**") has partnered with The Meeting Specialist ("**TMS**") to launch the first completely virtual AGMs in South Africa.^[8] Alexander Forbes hosted South Africa's first fully virtual general meeting by a listed company using the services provided by the JSE and TMS. Alexander Forbes issued a press release stating that a total of 90.93% of voteable shares were represented either in person or by proxy at the virtual meeting.

Certain digital service providers have developed apps that allow users access to the meeting, notices and documents, and which allows them to vote in real time. It is important to offer a technical support line or another mechanism to assist

shareholders to access the electronic tool selected by the company. In instances where shareholders do not have access to reliable internet connection, after taking account of the number of shareholders that will make use of the proxy option, and if Lockdown regulations allow, it may be prudent to make a physical location available where shareholders, who are unable to access the virtual platform, can use the facilities provided to participate and vote. This location would not become the place of the meeting, but would allow shareholders to access the virtual meeting if they do not have access to the necessary technology to participate in the meeting electronically. There is, however, no obligation on the company to assist shareholders in this way: access to the medium or means of electronic communication is at the expense of the shareholder or proxy, except to the extent that the company determines otherwise.^[9]

Virtual meetings and AGMs are an ideal way for companies to stay connected with their shareholders and to allow their scheduled meetings to go ahead despite the Lockdown regulations. A company should engage with its MOI to make sure that it does not prohibit an entirely electronic meeting and must ensure that all of the statutory requirements have been met. Virtual AGMs may become an integral part of the new normal as they allow shareholders a convenient mechanism to exercise their rights, with a likely increase in shareholder participation.

^[1] Section 61(7)(b) of the Act.

^[2] Section 61(10) of the Act.

^[3] For a brief summary of the position in various countries see Cohen, L 'Virtual Annual General Meetings – A global update' available at <https://www.eqsg.com/ir-blog/virtual-annual-general-meetings-update/#legalsituation>, accessed on 13 May 2020.

^[4] Section 63(2)(a) of the Act.

^[5] Section 63(2) of the Act.

^[6] Section 63(3)(a) of the Act.

^[7] Section 62(3)(a) of the Act.

^[8] JSE website (30 March 2020) Available: <https://www.jse.co.za/articles/jse-and-tms-launch-first-virtual-agms-enabling-clients-to-engage-with-shareholders>.

^[9] Section 63(3)(b) of the Act.



Taryn Potter

Director

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