

Annual General Meetings (AGMs) in light of COVID-19 Pandemic and Beyond. Is the future Virtual AGMs?

1. Introduction

- 1.1. Companies are required by law to have annual shareholders general meetings but the Corona Virus (COVID-19) Pandemic has scuttled the usually well laid out plans to have in-person meetings.
- 1.2. Companies have now been forced to go back to the drawing board to look for alternative ways to meet with the health and safety of all stakeholders attending being of paramount consideration considering the nature of Covid-19.
- 1.3. Here is what we know so far about COVID-19. It is viral in nature spreading mainly through human contact and has no known cure but its spread can be contained if human contact or interactions can be restricted. The Government has taken measures to curb its spread by advocating for social distancing, closure of schools, businesses, courts, public places, national wide curfew and restriction of movement. These measures have been reduced into various regulations premised on the Public Health Act and the Public Order Act.
- 1.4. This article discusses how companies, particularly public companies, can best manage the upcoming Annual General Meeting (AGM) season in light of the COVID-19 pandemic and the restrictive measures introduced by the Government to control its spread.

2. Legal Requirement

- 2.1. Public companies in Kenya have a legal obligation to hold an AGM within six (6) months of the end of their financial year as stipulated under section 310 (1) of the Companies Act, 2015 ("the Act"). Section 310 (2) of the Act stipulates that if a public company fails to hold its AGM, the company and each officer of the company who is in default, commits an offence and on conviction are each liable to a fine not exceeding Kenya Shillings One Million (Kes. 1,000,000/-).
- 2.2. For an AGM to be valid, the company must issue a twenty-one (21) days' notice to all its members and directors. The notice can either be in hard copy form; in electronic form; by way of a website or partly by one such means and partly by one or more of the other such means. In line with section 285 of the Act, the notice of an AGM must specify:
 - (a) the time and date of the meeting;
 - (b) the place of the meeting; and
 - (c) the general nature of the business to be dealt with at the meeting.

Failure to comply with the above provisions attracts a fine not exceeding Kenya Shillings Five Hundred Thousand (Kes. 500,000/=).

- 2.3. With the current Covid-19 pandemic, it may be impossible for a company to issue the notice to all the shareholders and directors. It may also be impossible for the Company to settle on a venue while issuing AGM notices since the Government has put strict measures to regulate gatherings and movements.
- 2.4. Public Companies also have obligations to file their audited financial reports and a report on corporate governance with the Capital Markets Authority (CMA) and while CMA has provided some flexibility with these filing and disclosure requirements the same are yet to be anchored in law.

3. The Practice

- 3.1 Based on the legal requirement it has become usual, almost a ritual, for public companies to invite their shareholders for physical meetings in their headquarters or conference venues in the major cities once a year.
- 3.2 It is also not unusual to see companies splash millions of shillings for these events including printing and sending out invitation letters, hiring venues, printing company merchandise to be distributed to the hundreds if not thousands of these shareholders.
- 3.3 The physical meetings involve the presentation of the financial and related performance of the company for the previous year by the directors of the company with shareholders raising questions on any issues that they want answered by the board.
- 3.4 In some instances some critics take advantage of the publicity to dress down the directors particularly where the performance is wanting or where the proposed dividends to be distributed to the shareholders fail to meet the expectations of such shareholders.

4. Implications and Way Forward

- 4.1. Owing to the Covid-19 pandemic and the restrictive measures that the Government has put in place to curb the pandemic, companies should consider the following as alternative ways of holding their AGMS;

4.1.1. Location

- (a) Assuming that the Annual General Meeting is to be held in areas where movement is restricted by virtue of an existing lock-down or restriction of movement, the shareholders who dwell outside those areas cannot attend the AGMs in person and companies should therefore encourage the shareholders to vote by proxy.

Section 298 (1) of the Act stipulates that a member of a company is entitled to appoint another person as the member's proxy to exercise all or any of the member's rights to attend and to speak and vote at a meeting of the company.

- (b) If an AGM notice had already been sent, directors facing the decision to change a venue of the AGM should consider urgently issuing a supplemental notice detailing a change of venue. Any such notice should

encourage the use of proxies or technology to attend the AGM virtually (where permissible under the Articles of Association of the company).

4.1.2. Use of technology- Virtual Meetings

- (a) In some cases it may be close to impossible to have physical AGM meetings under the current restrictions. Companies should, in such cases, encourage all shareholders to use the technology available to attend the meeting. This can be through internet platforms such as Zoom, Google Meeting, Microsoft Teams or Skype. These are more flexible modes that encourage the participation of all shareholders regardless of their location.
- (b) For those members who have no access to the technology, companies should encourage them to appoint proxies who can then represent them in the said virtual meetings and vote on their behalf. In embracing technology, the company should ensure that the same is aligned to the Company's Articles of Association so that questions of validity of the AGM do not arise.

4.1.3. Adjourning or postponing

AGMs cannot always be automatically postponed or adjourned – not least where such postponement would exceed the statutory time limit for convening such a meeting. If an AGM can be adjourned or postponed and remain within statutory limits, the company board should consider whether this would merely delay to a time when we will still have the Covid-19 epidemic. In that case and since we do not know for how long the epidemic will last, we propose that company boards should encourage their shareholders to either appoint proxies or adopt use of technology instead of adjourning the inevitable.

4.1.4. Proceeding with the AGM

In the event that the AGM must proceed due to the statutory requirements, these are some of the things that a company can incorporate so as to keep its shareholders safe;

- ❖ The AGM should take the shortest time possible and only core business should be discussed. During the meeting, all members present should be in protective gear like masks, gloves and like items to reduce the risk of contracting the Covid-19 virus;
- ❖ Shareholders should be encouraged to attend and vote through proxies to reduce the numbers of members in attendance;
- ❖ Companies should embrace technology and encourage shareholders to adopt it for ease of participation at the AGM;
- ❖ The AGM agenda should be streamlined to deal only with statutory business;
- ❖ No refreshments should be served to avoid the chance of contamination which may turn out to be a liability to the Company.

4.1.5. Getting a Court Order

- (a) For companies that cannot meet the timelines stipulated under the Act and are unable to hold virtual meetings as described above, the Act under Section 280 provides that a court of competent jurisdiction may order a meeting to be called, held and conducted in a manner that the court directs

in instances where it is impracticable for a company to convene or conduct a meeting as required.

The application to court under the said Section may be by a director of the company or a member entitled to vote at the meeting and upon granting the order the court may also give such ancillary or consequential directions as it considers appropriate including a direction that one member of the company present at the meeting be regarded as constituting a-quorum.

- (b) A meeting convened, held and conducted in accordance with a court order - under the said section is taken for all purposes to be a meeting of the company properly convened, held and conducted.
- (c) Noting that Courts have scaled down their operations to curb the spread of Covid-19 and are only hearing matters via video-conference, the company should file an application under a certificate urgency which will be placed before the duty magistrate or judge for directions on hearing.
- (d) In a recent ruling, the High Court of Kenya in Misc. Application No. E680 of 2020 has allowed WPP-Scangroup Plc to go ahead and hold a virtual general meeting on condition that it complies with the provisions of the Capital Markets Act and Regulations. In line with the said ruling, the Company has called for a meeting to be held on 27th May, 2020. KCB Bank Group has also proceeded and issued a notice to its members calling them for a virtual AGM on 4th June, 2020. However, some companies i.e. BAT Kenya, Total Kenya Plc and Cooperative Bank had already postponed their AGMs in compliance with the Governments restrictions on public gatherings.

5. The Future of Annual General Meetings

With hard choices to make, it is expected that most companies will experiment with virtual meetings so as to safeguard their members and avoid liability. If this is the case companies need to review their articles of association to ensure that they have powers to conduct meetings in a virtual format.

Will this be the new normal for annual general meetings even after the Covid-19 pandemic has passed? Will the virtual meetings turn out to be a convenient and efficient way for companies to hold shareholder meetings even after this necessity of the pandemic has passed? It is not possible to have a video conference for a whole day and this means that the meetings will automatically become shorter. It is also easier to plan a virtual meeting as shareholders can send their questions in advance.

Finally, it is a poorly kept secret that some directors would rather do away with the draining physical meetings and the critics who come to the meetings for show biz. The virtual meetings may be just their answer to this conundrum. Only time will tell.

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