

ANNUAL GENERAL MEETINGS IN THE ERA OF COVID-19 PANDEMIC: LAW AND PRACTICE IN TANZANIA

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Abstract

COVID-19 is a pandemic that is currently ravaging the world, with unprecedented disruptions being witnessed. Many governments have imposed restrictions on movement and several measures to contain its spread, including social and physical distancing. This has made it hard to hold conventional physical meetings. Companies are still expected to comply with the provisions of the law and company's constitution, regarding holding company's annual general meetings to transact business therein. This paper reviews the provisions of the Tanzania law regarding holding of such meetings and hence the practicable options amidst the pandemic. It finds that available options include postponing the accounting period and hence the date of AGM, resolutions by circulation, applying to the Registrar to alter mode of conducting AGM. This study establishes that the viable option is to hold virtual meetings and recommends that companies review articles to accommodate this. Tips on holding successful virtual meetings are given.

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1. INTRODUCTION

Annual General Meeting (AGM) is one of the shareholders' meetings that is compulsory for a company to conduct. AGM is a statutory meeting held in accordance with rules and procedures stipulated in the legislation. For Tanzanian companies, their AGMs are subject to provisions of the Companies Act¹ and in addition to that, any company listed in the stock exchange must also observe the related guidelines as stated in the regulator's listing requirements.

The limitations posed by measures taken to combat COVID-19 pandemic caused a new challenge in complying with legal requirements and respective company constitution. This paper examines the legal requirements and hence recommends possible alternatives to holding physical meetings amidst the COVID-19 pandemic. It will explore technological solutions to holding virtual meetings and hence recommends best practice to ensure success. This is a qualitative research methodology with a case study approach, adopting documentary review and content analysis of various websites.

1.1 Covid-19 Background

According to the World Health Organisation (WHO),² CoronaVirus Disease (COVID-19) was first reported in Wuhan, China, on December 31, 2019. WHO declared it a pandemic on March 11, 2020. As of May 30, 2020, at 09h37 CEST, the number of infections globally were 5,796,257 and with 362,483 deaths. It had risen to 31,664,104 cases with 972,221 deaths on

¹ Cap 212 [RE 2008].

² World Health Organisation, "WHO Coronavirus Disease (COVID-19) Dashboard" updated on May 30, 2020 at 09h37 CEST, appearing on <https://covid19.who.int/>, retrieved on May 30, 2020, 14h55 EAT.

September 24, 2020, at 10h52 CEST. COVID-19 is no longer a health crisis, but a socio-economic disruption of epic proportions. WHO advised the public on various measures to protect themselves against the contagion³. Key amongst the advice given is social distancing by maintaining at least three feet from any person, avoiding crowded places, restricting travel and staying home. Various governments have imposed additional measures, including declaring states of emergency, lockdowns, curfews and cessation of movements in certain locations considered the epicentre of the contagion. These measures therefore restrict the possibility of holding physical meetings, with many participants attending.

Coronaviruses are a large family of viruses that are known to cause illness ranging from the common cold to more severe diseases such as Middle East Respiratory Syndrome (MERS) and Severe Acute Respiratory Syndrome (SARS). Coronavirus Disease (COVID-19) is an infectious disease caused by a newly discovered coronavirus. According to WHO, pneumonia of unknown cause was detected in Wuhan, China and reported to WHO Country Office on December 31, 2019. This is a new coronavirus that has not been previously identified in humans. The outbreak was declared as a Public Health Emergency of International Concern ON January 30, 2020. On February 11, 2020, WHO announced the name for the new coronavirus as COVID-19, and declared in a pandemic on March 11, 2020⁴ and that the pandemic is becoming endemic during the press briefing on May 15, 2020. The COVID-19 virus primarily spreads through droplets of saliva or discharge from the nose when an infected person coughs or sneezes.

³ Advice available on <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>, retrieved on May 25, 2020 19h23.

⁴ WHO, COVID-19 Events as they happen, available on <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> retrieved on May 25, 2020, at 20h36.

1.2 COVID-19 Impact

The COVID-19 pandemic has had devastating effects on social and economic life worldwide. The World Bank has warned that globally, the pandemic could push between forty to sixty million people into extreme poverty in 2020, with Sub-Saharan Africa being hit hardest followed by South Asia. The International Labour Organisation (ILO) expects the equivalent of one hundred and ninety-five million jobs lost. The World Food Programme (WFP) projects that one hundred and thirty-five million people are facing crisis levels of hunger or worse, while another one hundred and thirty million people are on the edge of starvation. The World Trade Organisation (WTO) has predicted a decline in consumer spending due to COVID-19 and will decrease international trade by up to thirty percent⁵.

In Kenya, the COVID-19 pandemic has wiped out 80 percent of all formal private sector jobs created since 2015, this is according to a new survey by the Federation of Kenyan Employers (FKE)⁶. The survey, involving 122 private sector firms, puts job losses marked by the modern private sector between March and July 2020 at 173,743 jobs against 218,800 new jobs in the formal private sector between 2015 and 2020.

In Tanzania, a survey based on the responses from members of the Confederation of Tanzania Industries (CTI)⁷ shows that ninety-one percent of manufacturers in the country may be forced to cut down on the number of workers as a result of the slowdown of business caused by the COVID-19 pandemic. Respondents pointed at disruptions in the supply chain: delays in receiving imported raw materials and delivery of sales orders. They pointed

⁵ Editorial Commentary on *The Citizen*, (Dar es Salaam), May 22, 2020, at p. 6.

⁶ Report discussed on https://citizentv.co.ke/business/survey-covid-19-has-wiped-out-80-per-cent-of-private-sector-jobs-created-since-2015-346055/?utm_source=onesignal&utm_medium=notifications&utm_campaign=onesignal_notifications.

⁷ Malanga, A., "Tanzania Manufacturers mull job cuts over COVID-19", *The Citizen Business Week*, (Dar es Salaam), May 22, 2020, at p. 1.

at low sales revenue and loss in production at fifty percent. They called on the government to help mitigate the impact of the pandemic. In another survey on banks⁸, 89% of the respondents expect COVID-19 pandemic to last for over one year and calls for review of policies to adapt the new normal, with suggestions including government facilitation, central bank review of policies, review of BCP, focus on liquidity, improve physical security, change communication channels and capitalisation.

1.3 COVID-19 Response

WHO advised the public on measures to prevent infection and to slow transmission of COVID-19 to wash hands regularly with soap and water, or clean them with alcohol-based hand rub and to maintain at least one metre distance between self and a person coughing or sneezing. Others included to avoid touching face, covering mouth and nose when coughing or sneezing, staying home when feeling unwell and practising physical distancing by avoiding unnecessary travel and staying away from large groups of people⁹.

The response by governments worldwide varied, but the common approach was the issuing of new guidelines. In the United Kingdom, for instance, the Government published compulsory measures, dubbed, the 'Stay at Home Measures', prohibiting, among other things, public gatherings of more than two people¹⁰. It could not therefore be possible to hold physical meetings.

⁸ Swai, T. and Richard, E. "Bankers' Perception on the Impact of COVID-19 in the Banking Sector", Centre for Banking and Financial Services Centre, University of Dar es Salaam Business School, May 20, 2020.

⁹ WHO, COVID-19 Prevention Measures, available on https://www.who.int/health-topics/coronavirus#tab=tab_2, retrieved on May 25, 2020 at 20h58.

¹⁰ The Stay at Home Measures were passed on 26 March 2020 into law in England and Wales, with immediate effect, in statutory instruments (2020/350 in England and 2020/353 in Wales) made pursuant to the Public Health (Control of Disease) Act 1984 of the UK.

The East African countries had taken varied measures in response to the pandemic. Kenya passed¹¹ various restrictions, key amongst these is social distancing. Kenya imposed a national curfew from 19h00 to 05h00. It also imposed cessation of movement in Nairobi Metropolitan Area, and selected counties. The daily working hours end at 16h00 daily. Uganda imposed a total lockdown and closed all its borders, except for trucks ferrying goods across the borders, whose drivers are required to be tested and only allowed into the country when they test negative. Rwanda took a similar approach.

In Tanzania, the government issued guidelines on how to handle cases¹². These guidelines covered standard operating procedures to be applied by all health practitioners as they handle suspected, confirmed, and fatal cases. The Minister responsible for health further issued guides¹³ that prescribed measures including screening at the points of entry, mandatory fourteen-day quarantine for all incoming visitors, testing and contact tracing for confirmed cases, self-isolation for suspected cases, wearing masks, washing hands with soap and running water or alcohol-based sanitizers, public transport regulations, social distancing and avoiding crowded places including banning activities that bring people together. It follows an earlier action that closed all learning institutions in the country. In a move by the government that was seen as easing restrictions¹⁴, the fourteen-day mandatory quarantine for all visitors was removed and required to fill health declaration forms. Additional measures were added for truck drivers entering the country.

¹¹ Refer to “The Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules 2020”.

¹² The United Republic of Tanzania, National Guideline of Clinical Management and Infection Prevention and Control of Novel Coronavirus (COVID-19), January 2020, Ministry of Health, Community Development, Gender, Elderly and Children.

¹³ The United Republic of Tanzania, Travel Advisory No. 2 of April 2, 2020, Ministry of Health, Community Development, Gender, Elderly and Children.

¹⁴ The United Republic of Tanzania, Travel Advisory No. 3 of May 18, 2020, Ministry of Health, Community Development, Gender, Elderly and Children.

1.4 Legal Framework on Pandemics

Infectious diseases' management are regulated by the Public Health Act¹⁵. It covers notification of infectious diseases, duty to report them, isolation of infected persons, diseases to be notified to the Chief Medical Officer. It also covers prevention and control of the spread of infectious diseases. It also covers the control of epidemic and endemic diseases and provides for duties of an authorised officer to publish orders for the control of diseases. It is a duty of a person with infectious disease, a relative, occupier of same premise or health facility to report to the nearest authority or authorised officer of the illness¹⁶. It provides for isolation of a person suffering from an infectious disease. In the list of notifiable diseases appearing the First Schedule¹⁷, is Severe Acute Respiratory Syndrome (SARS). COVID-19 falls under this category of diseases. It is an offence not to comply and the Act provides thus;

Any person who (a) knows or has reasons to think that he is suffering from a notifiable or infectious disease likely to expose other persons to the risk of infection by his presence or conduct in any street, public place, public transport, vehicle, place of entertainment, assembly, club, hotel, restaurant, shop, premises or any other place; commits an offence and upon conviction shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding twelve months or to both¹⁸.

Every person is entitled to right to life, as safeguarded in the Bill of Rights in the Constitution¹⁹. Any move therefore that may compel one to act in contravention of the directives and guidance issued by the Ministry of Health

¹⁵ The Public Health Act, No. 1 of 2009.

¹⁶ Section 10 of the Public Health Act.

¹⁷ First Schedule of the Public Health Act.

¹⁸ Section 16 of the Public Health Act.

¹⁹ Article 14 of the Constitution of the United Republic of Tanzania, 1977.

during pandemics is unconstitutional. Companies have no option but to seek alternatives to holding meetings given that physical meetings are not tenable.

2. LEGAL REQUIREMENTS PERTAINING TO COMPANIES' ANNUAL GENERAL MEETING

2.1 Annual General Meeting (AGM)

Section 133 of the Companies Act²⁰ provides that every company shall hold a general meeting as its annual general meeting in addition to any other meetings in the year. It is a requirement that the notice specifies that it is an AGM. The Act stipulates the business to be transacted to include laying before the members the annual accounts, directors' report and auditor's report. It also includes appointment of auditors for the period up till the next AGM at which accounts are laid. Where the articles²¹ of association requires election or reelection or confirmation of appointment of any directors, such shall be carried out at an AGM.

The first AGM is required to be held within eighteen months of a company's incorporation and when that is done, it may not hold another AGM in its first or the second year²². Not more than fifteen months shall elapse between the dates of one AGM of a company to the next²³. If there is default in holding the AGM, the Act provides that the Minister may, upon application of a member, call or direct calling of AGM and give such ancillary or consequential directions as the Registrar thinks expedient, including directions modifying or supplementing, in relation to the calling, holding and conducting of the meeting, the operation of company's articles. It includes

²⁰ Companies Act ('Cap 212 R.E. 2008')

²¹ "Articles" refers to the Articles of Association of a company, and where they apply, the Model Articles contained in the Schedule (Table A, B, C, D and E) of the Companies (General) Regulations, 2002.

²² Section 133(2) of the Companies Act, 2002.

²³ Section 133 (3) of the Companies Act.

an option to direct that one member of the company present in person or by proxy shall be deemed to constitute a meeting²⁴. Failure to hold an AGM or comply with the directions of the Registrar attracts a fine for the company and every officer of the company who is in default²⁵. This principle was also reiterated in the *Gardner case*²⁶.

One of the grounds a member of the company may petition for winding up, is failure of the company to hold AGM, as was stated in *Nilsson vs Inertia*²⁷ and in *MS. Devota Kimvory & Another vs Celtamico Ltd*²⁸.

As a rite of democracy, AGMs are required to be constituted entities by controlling Acts, and governing charters. AGMs comprise an annual calling to account of directors; a forum for members to elect new directors; and opportunities to verify the information provided; as well as to control directors. The AGM's essence is in highlighting accountability for delegated resources by combining director feedback on past performance to members; along with information relevant for those seeking to make ongoing commitments to the organisation. These actions re-affirm the interdependence that remains the basis of co-operative corporations²⁹. A study conducted by Catusus and Johed³⁰ tried to find out what actually happened during AGMs – is it only a ritual closure, meaning just an annual event for the company to close their account books or an ideal speech

²⁴ Section 133 (4) of the Companies Act.

²⁵ Section 133 (7) of the Companies Act. and Regulation 40.

²⁶ *Gardner v. Iredale* [1912] 1 Ch. 700, 106 L. R. 680.

²⁷ *Nilsson v Inertia* (Miscellaneous Civil Cause 64 Of 2003) [2007] TZHC 12; 13 July 2007.

²⁸ Misc. Comm Cause No.20 of 2019 [2020] TZHCComD 59; 13 May 2020.

²⁹ Carolyn Cordery, (2000), "The Annual General Meeting as an Accountability Mechanism", SSRN Electronic Journal.

³⁰ B. Catusus, G. Johed, (2007), "Annual general meetings- rituals of closure or ideal speech situations? A dual analysis", 23 *Scandinavian Journal of Management*, pp. 168-190.

situation. However, Carrington and Johed³¹ found that the top management had used the AGMs as a platform to discharge their stewardship functions to the shareholders. This was achieved when the top management provided verbal explanations on the complexity of some accounting information, using visual aids. AGM is therefore essential in corporate governance.

2.2 Notice Calling for the Meetings

The Act provides that the notice of a meeting shall be in writing and be for at least twenty-one days. Any provision contrary to this in the articles shall be void³². The notice should specify the time and place of the meeting and the general nature of the business and in the case of AGM, specify the meeting as such. The twenty-one day notice requirement may however be waived and shorter notice agreed upon, if, in case of an AGM, by all members entitled to attend and vote thereat³³.

Unless the articles of the company provide otherwise, notice of the meeting of a company shall be served on every member of the company. Two or more members of the company holding at least ten percent of issued share capital or five percent of members of a company not having share capital, may call for a meeting. Two members present shall form a quorum and any member elected by the members present at a meeting may be the chairman thereof. In case of a company originally with share capital, every member shall have one vote for every share held by him, and in any other case, every member shall have one vote³⁴.

³¹ T. Carrington, G. Johed, (2007) "The construction of top management as a good steward: A study of Swedish Annual General Meetings", 20(5) *Accounting, Auditing and Accountability Journal*, pp.702-728.

³² Section 135 (1) of the Companies Act.

³³ Section 135 (3) (a) and (b) of the Companies Act. and Regulation 41.

³⁴ Section 136 of the Companies Act.

The notice calling for a meeting of a company having share capital should contain a statement that a member entitled to attend and vote, may appoint a proxy and that a proxy need not be a member. The Act provides for a fine to the company and every officer for default in complying with this requirement as respects any meeting³⁵.

Where a special notice is required of a resolution, the Act provides that the resolution shall not be effective unless the notice of the intention to move it has been given to the company not less than twenty-eight days before the meeting at which it is moved, and the company shall give its members notice of any such resolution at the same time and in the same manner as it gives notice of the meeting or, if that is not practicable, shall give them notice thereof, either by advertisement in the newspaper having an appropriate circulation or in any other mode allowed by the articles, not less than twenty-one days before the meeting.³⁶

The Act requires that a copy of the annual accounts, together with a copy of directors' report and auditors' report, shall, not less than twenty-one days before the AGM at which they are to be laid be sent to every member, every debenture holder and any other persons entitled to receive them, unless the company is unaware of their address or joint holders are not entitled to receive. This requirement for twenty-one days may be waived by agreement by all members entitled to attend and vote at the meeting. In default in complying, the company and every officer in default is liable to a fine³⁷.

With the advent of technology, most of the companies have interactive websites and critical information is placed there for members to access anytime. The said reports are therefore availed in soft copy and only a few copies are printed on request. To notify members about the presence of these

³⁵ Section 138 (2) of the Companies Act.

³⁶ Section 144 of the Companies Act.

³⁷ Section 165 of the Companies Act.

reports, an announcement is made on the appropriate media. Some companies have been innovative in creating questions and answers.

2.3 Quorum

The Regulations³⁸ prescribes that no business shall be transacted at any general meeting unless a quorum of members are present at the time when the meeting proceeds to business; two persons entitled to vote on the business to be transacted, each being a member or proxy for a member or a duly authorised representative of a corporation, shall be a quorum³⁹. The meeting is adjourned to the same day next week at the same time and place or to such a time as the directors may decide, if within half an hour from the time appointed for the meeting the quorum is not present or if in the course of the meeting the quorum ceases to be present.

This provision gives room for organisers to use where it is not possible to hold an AGM where notice had already been issued, since it automatically adjourns the AGM.

2.4 Power of Court to Order Meeting

The Act provides that if for any reason it is impracticable to hold the meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in the manner prescribed by the articles or the Act, the court may, either on its own motion or on application of any director of the company or of any member of the company who would be entitled to vote in the meeting, order a meeting of the company to be called, held and conducted in such a manner as the court thinks fit⁴⁰. In that case, the court may give ancillary or consequential directions as it thinks expedient; and these may include a direction that one

³⁸ Regulations for Management of a Public Company Limited by Shares, appearing in Table A of the Act.

³⁹ Article 43 of the Regulations.

⁴⁰ Section 137 of the Companies Act.

member of the company present in person or by proxy shall be deemed to constitute a meeting. Meeting conducted under such an order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted⁴¹.

The provisions in these sections appear to help in providing a viable option to hold an AGM in unique circumstances like the one posed by COVID-19. A director or qualifying member may therefore move the court to that effect.

2.5 Proxies

Any member entitled to attend and vote at a meeting of a company shall be entitled to appoint another person, whether a member or not, as his proxy to attend and vote instead of him, and the proxy appointed to attend and vote shall have the same rights as the member to speak at the meeting⁴². Unless the articles provide otherwise, this requirement shall not apply to a company not having share capital, a member shall not appoint more than one proxy to attend on the same occasion and a proxy shall not be entitled to vote unless on a poll⁴³. Regardless of provisions in the articles of a company, the Act sets the maximum time to receive a document appointing a proxy at forty-eight hours before the meeting or adjourned meeting⁴⁴, duly executed and delivered to the registered office.

This provides an option of holding an AGM with fewer members, holding proxies, to represent the rest, hence complying with both the Act and COVID-19 restrictions.

⁴¹ Section 137 (3) of the Companies Act.

⁴² Section 138 of the Companies Act.

⁴³ Article 61 of the Regulations.

⁴⁴ Section 138 (3) of the Companies Act and Article 62 and 63 of the Regulations.

2.6 Circulation of Members' Resolutions

A company is duty-bound to give members of the company entitled to receive notice of the next AGM or other general meeting of any resolution which may properly be moved and is intended to be moved in that meeting, on requisition in writing by members holding one-twentieth of the total voting rights or not less than one hundred members each holding paid up capital of at least two thousand shillings. A statement of not more than one thousand words with respect to the matter referred to in any proposed resolution or the business to be dealt with at that meeting. If the requisition is received less than six weeks to the meeting, the requisitionists shall bear the cost of sending the resolution and the statement. Notice and circulation of such resolution and statement should be in the manner of serving ordinary notices of meetings; issued with the notice of the meeting or as soon as practicable thereafter. Such a requisition is required to be signed by all requisitionists and deposited at the registered office not less than six weeks before the meeting (for resolution) and not less than one week to the meeting (for any other requisition), accompanied by a sum reasonably sufficient to meet company's expenses in giving effect thereto. Business dealt with at the AGM shall include the said resolution and accidental omission in circulation to one or more members will not invalidate notice⁴⁵.

2.7 Written/ Circular Resolution

The Act permits passing of resolutions without necessarily holding a meeting or without previous notice being required, by resolution in writing signed by or on behalf of all the members of the company who at the date of the resolution would be entitled to attend and vote at such meeting. These include resolution of a company in a general meeting and resolution of a meeting of any class of members of a company. Such a resolution shall have effect as if passed in the respective meeting and any reference in any enactment to a meeting at which a resolution is passed or to members voting

⁴⁵ Section 142 of the Companies Act.

in favour of a resolution shall be construed accordingly. However, circular resolution does not apply to a resolution under section 193 (1) removing a director before expiry of his period of office or a resolution under section 170 (1) removing an auditor before expiry of his term of office⁴⁶.

In case of circular resolution, the date of the resolution means when the resolution is signed by or on behalf of the last member to sign. The signature need not be on a single document which accurately states the terms of the resolution. Members may agree to pass a special resolution in this manner and any reference in any enactment of a special resolution includes such a resolution. The company shall cause a record of the resolution and of the signatures to be entered in a book in the same way as the minutes of a general meeting of the company.⁴⁷

Written/Circular resolution presents a viable alternative to complying with the AGM requirements during COVID-19 restrictions.

3. BUSINESS TO BE TRANSACTED AT AGM

The management of a company is entrusted on directors⁴⁸. When exercising powers and or performing duties, directors must act honestly and in good faith and in what the director believes to be the best interest of the company⁴⁹, or its holding company. It is the duty of the directors to ensure business is transacted at the AGM as provided for in the Act.

3.1 Company Accounts

The Act requires the directors to prepare individual accounts for each accounting period and lay before the company in a general meeting in

⁴⁶ Section 147 of the Companies Act.

⁴⁷ Section 149 of the Companies Act.

⁴⁸ Section 181 of the Companies Act. and Article 71 of the Regulations.

⁴⁹ Section 182 of the Companies Act.

accordance with section 166. Such accounts shall indicate profit or loss account (income and expenditure for non-trading entities), a balance sheet at the last as at the last day of the accounting period and a cash flow statement⁵⁰. These shall include notes or document annexed thereto and, where applicable, consolidated group accounts⁵¹. These books are required to give a true and fair view of profit or loss for the period, state of affairs at the end of the period and sources and uses of funds during the period, respectively. The Minister may prescribe regulations that the accounts must comply with or a body like the National Board of Accountants and Auditors (NBAA). The company accounts are required to be approved by the board of directors and signed by a director, whose signature and name shall appear on the balance sheet. Directors wilfully failing to comply with these provisions are liable to imprisonment and a fine⁵².

The directors shall cause to be prepared and be laid before the company in a general meeting accounts and reports as required in the Act⁵³.

The registrar is empowered⁵⁴ to postpone the accounting period and hence postpone submission of relevant accounts to a general meeting, where it is desirable for a holding company or subsidiary to extend its accounting period for the subsidiary to coincide with that of its holding company. The registrar may on application or with the consent of directors of the company whose accounting period is to be extended directly that the submission of accounts to a general meeting, the holding of an AGM or making of the annual return, shall be so postponed.

⁵⁰ Section 153 of the Companies Act.

⁵¹ Section 156 of the Companies Act.

⁵² Section 154 of the Companies Act.

⁵³ In accordance with sections 153, 155 and 159 of the Companies Act and Article 115 of the Regulations.

⁵⁴ Under section 157 of the Companies Act.

This provision therefore presents a good option during the COVID-19 pandemic and hence directors or members may apply to the registrar to postpone the accounting period, and by extension, the holding of AGM. Whereas this option is restricted in some jurisdictions like Kenya to once in five years, the Act here does not restrict the frequency of changes.

3.2 Directors' Report

Directors are required to prepare directors' reports. This report is required to give a fair review of the development of the business of the company and its subsidiaries during the accounting period and their position at the end of it and the amount, if any, which they recommend to be paid by way of dividend⁵⁵. In wilful default to comply, directors are liable to a fine and imprisonment, on conviction.

The directors' report is required to be approved by the board of directors and signed by a director, whose signature and name shall appear therein. The company and every officer in default shall be liable to a fine if the directors' report presented to the meeting or to the registrar, are not duly signed⁵⁶.

3.3 Auditors' Report

A company's auditors are required to make a report to the members of the company on all annual accounts of the company of which copies are laid before the company in a general meeting during their tenure of office. Such a report will state whether in the auditors' view, the accounts comply with the requirements of the Act and portray a true and fair view of the state of affairs at the end of the period, profit or loss for the period and the cash flow for the period. Auditors' report should also check consistency of the directors' report and the accounts and should be read in the AGM and shall be open for inspection by the members⁵⁷.

⁵⁵ Section 159 of the Companies Act.

⁵⁶ Section 160 of the Companies Act.

⁵⁷ Section 161 of the Companies Act.

The auditors' report laid before the AGM and submitted to the registrar, should be signed by the auditors and their names appear in every copy, failure to which the company and every officer of it in default shall be liable to a fine.

The Act⁵⁸ sets the period for laying the accounts and reports in a general meeting. For public companies, it is seven months from the end of the accounting period and ten months for private companies. In default to comply, every person who immediately before the end of that period was a director of the company, is guilty of an offence and liable to a fine and, for continued contravention, to a daily default fine. It is a defence to demonstrate that they took all reasonable steps to comply before the end of that period, but it is not a defence to prove that the documents were not prepared.

If the Minister doubts compliance of the accounts to the requirements of the Act, he may give notice to the directors of the company indicating the respects in which it appears to him that such a question arises, or may arise, and hence give a notice of not less than one month to give him an explanation or prepare revised accounts. If not explanation or revised accounts are received within the period, he may apply to court to order the company to prepare and have revised audited accounts⁵⁹.

For private companies qualifying for exempt under section 171, member(s) holding at least ten percent paid up capital or ten percent of members for companies with no share capital, may demand for an audit of its accounts for the period by depositing the notice in writing to the registered office not less than one month to the end of the accounting period. The company shall be obliged to appoint an auditor for that accounting period⁶⁰.

⁵⁸ Under section 167 of the Companies Act.

⁵⁹ Section 168 of the Companies Act.

⁶⁰ Section 173 of the Companies Act.

3.4 Appointment and Remuneration of Auditors

Every company is required⁶¹ to appoint auditor(s) in a general meeting to hold office from the conclusion of that general meeting until the conclusion of the next general meeting at which accounts are laid. A retiring auditor is deemed to be reappointed without any resolution being passed unless he is not qualified, somebody else has been appointed or resolution passed that he is not re-appointed or he has given notice in writing to the company of his unwillingness to be re-appointed.

Registrar may appoint an auditor to fill the vacancy where none is appointed or reappointed in a general meeting. Directors are empowered to appoint the first auditor to hold office until the first general meeting of the company. They may also fill a casual vacancy before the next general meeting. An auditor may be removed from office by an ordinary resolution, which is required to be filed with the registrar within fourteen days.

Remuneration of the auditors of a company may be fixed by the directors or registrar, for the auditors they appointed respectively, but shall be fixed at the general meeting and stated in a note in the company's annual accounts.

The Act⁶² exempts qualifying private companies from the requirement to appoint auditor(s) either in the first accounting period or subsequent periods. The threshold is based on the turnover and gross assets, and the level is set in the regulations prescribed by the minister, having regard to generally accepted principles of accounting. This does not apply to a private company who was at any time during the accounting period operating as a bank, insurance, a dealer or investment adviser or any other ineligible group. The exemption is however subject to directors stating in the balance sheet that the company satisfied qualifying conditions during the period, no notice has

⁶¹ Under section 170 of the Companies Act and Article 117 of the Regulations.

⁶² Under section 171 of the Companies Act.

been deposited under section 173, issue directors' report, and affix appropriate certificate, verified by the auditors, to its annual return as required under section 132.

It is a requirement⁶³ that a special notice be issued for a resolution at a general meeting which accounts are laid, to appoint an auditor other than the retiring auditor, provide expressly that the retiring auditor shall not be re-appointed, filling casual vacancy in the office of the auditor or removing an auditor before the expiry of his term in office. The retiring auditor or auditor to be removed, shall be furnished with the notice and is entitled to make representation to be circulated to members, unless received late, in which case, the auditor may read it out at the general meeting.

The auditor is required to be Certified Public Accountant and should not be an officer or employee of the company or their partners or employees. Company's auditors are entitled to attend any general meeting of the company and to receive all notices of and other communications relating to the general meeting which any member is entitled to received, and to be heard in the general meeting on any matter concerning them as auditors⁶⁴.

An auditor may resign by depositing notice in writing, accompanied by a statement of matters he considers fit to be brought to the attention of the members, and this is also required to be filed with the registrar within fourteen days. The resigning auditor may file a notice requiring the directors to convene an extraordinary general meeting of the company for the purpose of receiving such explanation of matters related to his resignation. Directors are required to circulate to members such statement and issue notice of twenty-one days to convene the meeting⁶⁵.

⁶³ Under section 174 of the Companies Act.

⁶⁴ Section 176 of the Companies Act.

⁶⁵ Section 178 of the Companies Act.

Directors are therefore expected to find alternative ways to ensure the provisions of the Act, as above, are fully complied with, despite the COVID-19 pandemic restrictions. All the notices to the members should be served on the auditor as well and information pertaining to their duty availed.

3.5 Declaration of Dividend

A company is permitted to declare dividends in respect of any accounting period or other period, in a general meeting of that company⁶⁶. If the directors' recommendation of dividend is rejected or varied at the general meeting, that fact should be captured in directors' annual report and annual return. Dividend is paid out of company's realised profit less its realised losses or out of its realised revenue profits less its realised revenue losses, provided that directors reasonably believe that the company will continue to discharge its liabilities as they fall due and that realisable value of its assets will not be less than the amount of its liabilities, after paying the dividend. Open-ended Investment Company has to follow regulations by the Minister or by the Capital Markets and Securities Authority (CMSA) or any other authority designated for that purpose. Directors may set aside reserve(s) before declaring a dividend⁶⁷.

4. OPTIONS AVAILABLE TO COMPLY WITH AGM LEGAL REQUIREMENTS

As pointed out above, Section 133 of the Act requires all companies to hold an AGM, the first AGM to be held within 18 months of registration of the company. Then successive periods to be within 12 months. It should be held within 6 months of the year end. The Company, its officers and directors in default, commit an offence for not holding AGM and liable to a fine. Each subsequent day of default is treated as a separate new offence and fine

⁶⁶ Section 180 of the Companies Act and Article 103 of the Regulations.

⁶⁷ Article 105 of the Regulations.

separately. Options on how to comply with this legal requirement therefore need to be explored.

4.1 Physical meetings

The Act envisages physical meetings, especially for the public companies. Despite the variant AGM forms now possible due to technology, the postmodern world appears to continue to favour face-to-face conversations, or at least combined video-voice links between members and governors⁶⁸. Given the restrictions on social distancing and advisory against large gatherings, physical AGM can only happen if the number of members is within the limit set by the government. If the number is more than the limit set, then the only possible way is to have shareholder issue proxies to a small number to hold the AGM. This may not be tenable unless the shareholders are willing to relinquish their rights to a few representatives. Giving proxies to a few of them, however, remains a viable option.

4.2 Circular/Written resolutions

As permitted under Section 147 of the Act, a company may opt for written circular resolutions by all members. This has the same effect as if a physical meeting was held. It may not be possible for many shareholders to all sign the resolution as envisaged in the Act, and hence this suits companies with reasonably small numbers of shareholders. It can transact business listed in section 133 of the Act except removal of directors or auditor whose term of office has not come to an end. Directors are required to prepare resolutions and statements explaining what the resolution is all about, and the explanation should not be more than 1000 words. Members to return resolutions by a specified time. If no date is given, the Act provides for 28 days. The Act allows return of resolution electronically. Directors must all

⁶⁸ Strätling, Rebecca. (2003). General Meetings: A Dispensable Tool for Corporate Governance of Listed Companies?. *Corporate Governance: An International Review*. 11. 74-82. 10.1111/1467-8683.00303.

approve to take effect. For members, resolutions can take effect with the required majority, as specified in the company's articles.

4.3 Virtual Meeting

Virtual Meeting is where members who are not present in the same physical location participate in an online scheduled and structured discussions through use of videoconference, audio conference, web conference or a combination of these or such other electronic methods to make decisions as would ordinarily be required in a physical meeting. Virtual Meetings also include Hybrid Meetings i.e. where a few members are physically present and the rest join online.

The Act is silent on virtual AGM. Reference is therefore to respective company's articles, which must expressly permit virtual AGM, or else this option will not be available. Fiduciary duties of directors include to act within the powers provided for in the company's constitution, failure to which they are liable. The Act provides for a member to bring a derivative claim against a director for breach of duty. Where there is no provision to conduct a general meeting by a means other than what is provided for, any other option is in breach of the law. A company may however amend the articles to provide for virtual AGM. It can be done if it is practical, yes, but given that the same shareholders will need to convene, an amendment of the articles may be set as special business and transacted after opening of the virtual general meeting. This needs to be captured in the notice convening the meeting, which also contains the agenda.

Pemmelaar⁶⁹, in his study based on the companies in Holland, found that only 45% of shareholders casted their votes during the AGM. Due to this, he has recommended virtual general meetings to be conducted as an

⁶⁹ W.M. Pemmelaar, (2008) "Towards a virtual general meeting: 'I accept' or 'I decline'?", 4(3) Utrecht Law Review, pp. 163-187.

alternative way to solve the problem of low attendance of the shareholders. This recommendation was proposed earlier by Krans⁷⁰ that demonstrated benefit of this virtual meeting which would allow shareholders to communicate quickly, efficiently, cost-effectively⁷¹, and enable them to be analytical of the agenda, reports, proposals and other discussion papers.

4.4 Postponement of AGM

There are other possible options provided in the Act that a company may explore, to defer holding AGM. A company may apply to the registrar to postpone the AGM, under section 133(4) of the Act. The registrar may consider the merit of the request and grant deferral to a reasonable date after the timeline specified in the Act and direct any ancillary and consequential matter he deems fit.

It may also seek to amend the accounting reference date. Article 105 of the regulations empowers the registrar to grant change of accounting date and when that happens, the AGM stands postponed. In some jurisdictions, this option is restricted and only available once every five years.

It can also apply to the court to have AGM in any other means, where provisions of articles and the Act become hard to be complied with. Member (s) may apply to postpone the AGM or conduct it in a manner that is possible, given the circumstances. Court may decide that one person can form quorum, to facilitate conducting of the AGM⁷². This option is also available to the Minister⁷³, if a director or member applies for intervention.

⁷⁰ A.V.D. Krans, (2007) "The virtual shareholders meeting: How to make it work?", *Journal of International Commercial Law and Technology*, vol.2, no.1, pp. 32-37.

⁷¹ H. Marc, (2006) "The cyber shareholders", *Finweek*, vol.10, pp. 1-18.

⁷² See Section 137 of the Companies Act.

⁷³ Under Section 133 (4) of the Companies Act.

A company may also consider convening the AGM in the proper manner, then adjourn immediately to a later date. This, however, may be a costly option and not desirable.

5. ADDITIONAL REQUIREMENTS FOR PUBLIC/LISTED COMPANIES

Listed companies may have additional requirements from the regulators. Most regulators do not have any provisions regarding alternatives to physical general meetings and the circumstances created by COVID-19 poses a new grey area.

The High Court of Kenya, while ruling on WPP Scangroup Limited case⁷⁴, granted permission to all listed companies to hold AGMs using alternative means. WPP Scangroup Limited (Scangroup), a company listed in the Nairobi Securities Exchange (NSE)⁷⁵ needed to convene an Extraordinary General Meeting (EGM). Its articles, like those of most companies, anticipated shareholders' general meetings to be physical meetings. It moved to court⁷⁶ on April 20, 2020 to seek leave of the court under section 280⁷⁷ of the Kenyan Companies Act⁷⁸, which allows a member to move to court to compel the company to hold a general meeting of the company in a particular

⁷⁴ WPP Scangroup Limited's Miscellaneous Application No. E680 of 2020 for an order allowing the convening of an Extraordinary General Meeting under section 280 of the Kenyan Companies Act, at High Court of Kenya, Nairobi (Unreported).

⁷⁵ The Nairobi Securities Exchange (NSE) is the principal securities exchange of Kenya. Besides equity securities, the NSE offers a platform for the issuance and trading of debt securities. The NSE is a member of the African Securities Exchanges Association and the East African Securities Exchanges Association. It is a full member of the Association of Futures Markets and the World Federation of Exchanges, and a partner Exchange in the United Nations Sustainable Stock Exchanges Initiative.

⁷⁶ Under Miscellaneous Application No. E680 of 2020.

⁷⁷ Which is *pari materia* with Section 137 of Tanzania's Companies Act, Cap 212.

⁷⁸ Kenya's Companies Act, 2015.

manner, seeking to hold EGM through electronic means. Capital Markets Authority (CMA)⁷⁹ was joined as an Interested Party to the suit, in its capacity as the protector of the investors' interests. The court, on April 29, 2020, granted Scan group its prayers and adopted CMA's consent as the order of the High Court, and went further to allow companies listed in NSE to hold shareholder meetings using alternative means. To rely on that order, a listed company needs to obtain a "no objection" from CMA before issuing notice of the meeting and in so doing, describe the alternative and demonstrate that it will not prejudice shareholders.

In addition to the consent at the court, CMA authorised⁸⁰ all listed companies in a press release, to publish their results online, declare and pay out dividends and appoint auditors without summoning shareholders, but have these decisions ratified in the next shareholders' AGM. Shareholders' prior approval is however still required before selling shares in a subsidiary that results in ceasing to be part of the company. The authorization by the court in the Scangroup case made it possible to conduct full business in an AGM, by alternative means. CMA further gave consent to boards of issuers of securities to proceed to declare and pay dividends, subject to companies' dividend policies, procuring relevant approvals and availing audited financial statements to CMA, NSE and the public. It also allowed boards of listed

⁷⁹ The Capital Markets Authority (CMA), of Kenya, was set up in 1989 as a statutory agency under the Kenya's Capital Markets Act Cap 485A. It is charged with the prime responsibility of both regulating and developing an orderly, fair and efficient capital markets in Kenya with the view to promoting market integrity and investor confidence.

⁸⁰ Capital Markets Authority, Capital markets industry announces measures to mitigate the adverse effects of the coronavirus pandemic, CMA NSE and CDSC Press Release on Response to Coronavirus Effects on 3 April 2020, available on https://www.cma.or.ke/index.php?option=com_content&view=article&id=621:cma-nse-and-cdsc-press-release-on-response-to-coronavirus-effects-03042020&catid=12:press-center&Itemid=207 retrieved on May 27, 2020 at 12h57.

companies to appoint auditors and set their remuneration and have these decisions ratified in the next AGM, once convened.

As for listed companies in Tanzania, Dar es Salaam Stock Exchange (DSE), CMSA listing rules do not contain specific provisions relating to manner or timing of AGM. The guiding principle remains the applicable provisions of the Companies Act and the respective Articles of Associations of the respective company. Some sectors have regulators, who have additional requirements that may touch on the conduct of meetings by the players, and these form additional guiding principles⁸¹. No specific guidance had been issued to address the challenges posed by COVID-19 pandemic.

Taking the cue from the Kenyan situation, guidelines may be issued by regulators but must be within the legal provisions. An application may then be made to the court of law to seek alternative options of complying with the legal requirement by alternative means. Legislation may also be passed to grant companies alternatives. This happened in the United Kingdom, where the Financial Conduct Authority (FCA)⁸² published a policy statement which, in effect, gives listed companies an additional two months to finalise their annual report and accounts. After much uncertainty for organisations which need to hold members' meetings during the lockdown, new legislation has been introduced recently to relax corporate governance requirements – the Corporate Insolvency and Governance Act 2020. This Act includes a more flexible framework for the holding of members' meetings, such as an ability to hold meetings through electronic or virtual means, even if not currently authorised under an organisation's governing document. These measures aim to allow AGMs and other general meetings to be validly held, while the

⁸¹ Marwa, M., "Holding AGMs by listed firms during COVID-19 Pandemic", *The Citizen's Business Week*, (Dar es Salaam), May 21, 2020, at p. 13.

⁸² The full FCA statement can be found at: www.fca.org.uk/news/statements/delaying-annual-company-accounts-coronavirus.

current restrictions on public gatherings remain in place and while there is potential for social distancing measures to continue in some form for the foreseeable future.

In the UK, the publication by ICSA⁸³, on AGMs and the impact of covid-19, set out the alternative options, including: Adaption of the basis to hold the AGM, Delaying convening the AGM, if notice has not yet been issued, Postponing the AGM, if permitted under the rules, Adjourning the AGM and/or Conducting a hybrid AGM, if permitted under the rules. While this is for UK companies, some of the general principles are relevant to Tanzanian organisations and can easily be adopted, given the circumstances brought by COVID-19. CMSA may issue guidelines based on such practices.

6. RECOMMENDATIONS IN HOLDING VIRTUAL MEETINGS

6.1 International Best Practices in AGM

Salin et al⁸⁴ selected five (5) best practices carried out during the AGM that may be adopted by the companies including those in Tanzania, summarised as brief information on person seeking for appointment as director, detailed attendance of the directors, proxy restriction, detailed attendance of director during the previous AGM and shareholders' attendance. The example of some the international practices that have become the source of the research

⁸³ Institute of Chartered Secretaries Association, available on https://lpscdn.linklaters.com/-/media/digital-marketing-image-library/files/01_insights/publications/2020/march/agms_and_impact_of_covid-19--supplement_final.ashx?rev=4c77ae46-96c1-4ca1-837f-f200626022e6&extension=pdf.

⁸⁴ Salin et al, (2010) "Disclosure on Directors and Shareholders of Annual General Meetings – Insights from an International Best Practices", *2010 International Conference on Economics, Business and Management (ICEBM 2010)*.

include the Cadbury Report⁸⁵, the Combined Code⁸⁶, the Myners Report⁸⁷, the Institute of Chartered Secretaries and Administrators Good Governance Guide⁸⁸, the Organisation for Economic Co-operation and Development (OECD) Principles, the Institute of Corporate Governance Network⁸⁹ and many others. The provisions of these international best practices can be the basis of holding successful virtual meetings.

6.2 Complying with Legal Requirements

The first point is to ensure that virtual AGM is accommodated either by the constitutive document⁹⁰ of the respective organisation or permission granted by the court. Secondly, decide on the mode of virtual AGM, either fully virtual or hybrid, technology to use and the service provider. Ensure compliance with the law on notices, communication, protection of minority shareholders and attendance. State in the notice that the AGM is held virtually. Include more information like details of virtual meeting, registration processes, amend the note on proxy forms' delivery, period applicable to delivery of proxies, questions and other business from shareholders.

A notice convening the meeting should be circulated to all members, at least twenty-one days to the meeting for ordinary resolutions and at least twenty-eight days for special resolutions. If this notice falls short, include a resolution to waive the notice period for a shorter one. The notice must specify that the

⁸⁵ Report of the Committee on the Financial Aspects of Corporate Governance. London, 1992.

⁸⁶ Financial Reporting Council, The Combined Code on Corporate Governance. London, 2003.

⁸⁷ Epona Consulting Limited, Review of Impediments to Voting UK Shares, 2004.

⁸⁸ The Institute of Chartered Secretaries and Administrators, ICSA Guidance Note. London.

⁸⁹ The Institute of Corporate Governance Network, ICGN Statement on Global Corporate Governance Principles Revised. London, 2005.

⁹⁰ "Constitutive Document" means the Articles of Association, respective By-laws, Constitution, Charter, Trust Deed or similar document of an Organisation as the case may be.

meeting is an AGM, or else directors and officers in default will be liable to a fine. The notice should be accompanied by clear guidelines on virtual meeting procedures and details of accessing login details, accessing proxy forms, audited financial statements, directors' and auditor's reports and submission of other business or questions. If notice is already issued, retract it by a cancellation. A supplementary notice giving out guidelines on how the virtual AGM will be conducted can be issued. It is advisable to issue the notice in popular newspapers.

Guidelines may be issued by the regulator or specific legislation or regulations passed to support virtual meetings and these need to be considered. Some organisations are governed by other legislation (than the Companies Act) and are therefore bound by the provisions of those respective Acts to comply when conducting their general meetings. Some institutions are set up in specific Acts of Parliament and provisions of those Acts regarding general meetings must be complied with.

It is advisable for a company to develop Policies, Procedures and Guidelines for conducting virtual meetings to promote effective decision making, professionalism, uniformity, and consistency.

6.3 Practical Guideline for Virtual Meetings

Technology differs between organisations and depends on the needs of participants, their sophistication, number of participants, type of meeting, level of access to technology, complexity of the organisation, systems security requirements, and cost of the technology. The chosen technology should consider these. Security may be enhanced by ensuring end to end encryption, selecting the right technology, use of identifiers and passwords, sending security IDs and passwords to users in a secure manner and ensuring only invited persons access the system during the session.

During pre-meeting coordination, the secretary and the chairperson may develop and review AGM virtual meeting checklists, with input from subject matter experts. It should cover AGM compliance requirements regarding the notice, communication, circulation of materials, proxies, questions, other business, and conducting the meeting.

It is advisable to set rules for the participants during the meeting, and these may be available technologically, and participants required to commit that they will comply by accepting the terms and conditions. These may include adherence to the company's Information Security Policy, Confidentiality Policy, Code of Ethical Conduct and applicable laws. Guidelines should cover breaks during the meeting, how voting shall be done, results announcement and participation of company's auditors in confirming validity. Test-run the AGM at least twice before the real AGM to be sure of all the plans in place. Prepare well and simulate all scenarios with the service provider.

Confirm attendance by extracting login details of participants and if need be, have an electronic signature to the attendance sheet. After the meeting, the chairman should sign the resolutions either physically or electronically. Secretary may then delivery the documents to the registrar, either physically or electronically⁹¹.

7. EFFECTIVENESS OF VIRTUAL MEETINGS

When conducted well, virtual meetings have many advantages to an organisation. There is an increased number of shareholders participating as compared to physical meetings as there are no limitations. It is also cost-effective to conduct virtual meetings as compared to physical meetings in terms of cost of the venue, security arrangements, travelling and accommodations, risks associated with that and meals during the AGM.

⁹¹ as permitted under section 454 of the Act.

Physical AGM has a limit to respond to all queries. Virtual AGM has functionality to record all questions and the board may respond even at a later date. Security for online platforms remains an issue to address but mitigation measures can be implemented like sign in details to be specific to the shareholder. Systems specifically designed for AGM allows voting and instant results and with video and audio capacity that gives the participant a feeling of physical meeting.

Studies have found that the use of event technology can create up to twenty percent increase in attendance, while reducing related costs by up to thirty percent⁹². When done right, online meetings can yield results just like physical meetings in addition to cutting down on logistics. Technology has a huge impact on the way events are planned and implemented. Audio visual interaction produces better results. Tools that accommodate multiple people include Google Meeting, Skype, Zoom, Microsoft Teams, WEB Ex, Facebook Live, Webinar to name but a few. There are specific applications tailored for the AGMs. With the rapport that they bring between the speaker and the audience, it creates a truly unified and cohesive image.

Technological solutions however come with cybersecurity challenges. Going by cyberattacks experienced in the recent past, solutions are vulnerable.

8. CONCLUSION

It is a legal and compliance requirement to conduct a company's annual meeting as we have noted. The COVID-19 containment measures, especially restriction of travel and social distancing requirements has made it hard to comply with physical meetings and therefore, alternative measures must be resorted to. These include physical meetings with lesser members with proxies, circular resolution, and virtual meetings. Emergency legislation to

⁹² Wambugu, S. "Using Technology to Create Buzz for Events", *The Citizen*, (Dar es Salaam), May 22, 2020, at p. 14.

allow virtual AGMs and deferral, given that existing laws did not anticipate a scenario like what is being experienced. Various regulatory and professional bodies are developing guidelines and it is important for companies to align constitutive documents to accommodate virtual meetings and develop policies and procedures on how to convene and conduct such meetings. Virtual meetings may turn out to be the norm even after the COVID-19 pandemic is over, given the benefits it has compared to physical meetings.