17 APRIL 2019

CORPORATE & COMMERCIAL **ALERT**

IN THIS ISSUE >

4 Tips to keep "control" under control

The concepts of "control" and "related persons" are among the most important and pervasive in the Companies Act, No 71 of 2008 (Companies Act), and their ambit may not be as clear-cut as it often seems. Briefly, entities are related to one another if one controls the other, or they have a common controller. Being related brings about the applicability of a number of important provisions of the Companies Act dealing with, for instance, financial assistance, the issuance of shares and the regulation of group companies. Here are a few factors to bear in mind when dealing with control and related parties.

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

CLICK HERE

CDH
CLIFFE DEKKER HOFMEYR

4 Tips to keep "control" under control

One needs to "go behind" the immediate shareholding structure and further assess the position of the shareholders as amongst themselves.

The concepts of "control" and "related persons" are among the most important and pervasive in the Companies Act, No 71 of 2008 (Companies Act), and their ambit may not be as clear-cut as it often seems. Briefly, entities are related to one another if one controls the other, or they have a common controller. Being related brings about the applicability of a number of important provisions of the Companies Act dealing with, for instance, financial assistance, the issuance of shares and the regulation of group companies. Here are a few factors to bear in mind when dealing with control and related parties.

1. **The enquiry does not end at majoritarian control**

   Section 2 of the Companies Act contains the definition of "control". The definition set out in s2(2)(a)(ii), relates to companies and is based on the basic principle of a majority vote at either shareholder or board level.

   However, the enquiry goes further and introduces a catch-all "material influence" aspect in s2(2)(d) which states that a juristic person has the ability to control another juristic person or its business if that person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in s2(2)(a) to s2(2)(c). Section 2(2)(d) thus takes "control" beyond the parameters of ordinary corporate law principles of voting control and indicates that is possible for a person to control a juristic person despite not having *de jure* control or the majority of voting rights in the company.

   Whether a person has control under s2(2)(d) is factual and may well be decisively influenced by the specific terms of a company's memorandum of incorporation or shareholders' agreement.

2. **You have to aggregate shareholdings to determine it**

   In a scenario where, for instance, shareholders A, B and C each hold a third of the issued shares of company X, *prima facie* neither of those shareholders has majoritarian control in respect of company X. However, one needs to "go behind" the immediate shareholding structure and further assess the position of the shareholders as amongst themselves: are perhaps any of A, B or C related to each other – do they have a common controller or does one control the other? And if they are natural persons, bear in mind that relatedness turns on whether they are family members within certain degrees of consanguinity or affinity. If for instance A and B happen to be related to each other, then each of A and B is related to X, because A and B in aggerate control a majority of the shares in X. Thus if A or B is a company and it provides financial assistance to X, s45 of the Companies Act applies. Section 2(2)(a)(ii) of the Companies

CDH
CLIFFE DEKKER HOFMEYR

4 Tips to keep "control" under control...*continued*

Do not blur the concepts of "related companies" and "group companies". Whilst these concepts overlap most of the time, the latter is essentially a subset of the former.

Act provides for the aggregation of shareholdings of related or interrelated juristic persons in order to determine control. Notably, this aggregation applies only to juristic persons that are companies, not for instance trusts or close corporations.

3. **A group of companies**

Do not blur the concepts of "related companies" and "group companies". Whilst these concepts overlap most of the time, the latter is essentially a subset of the former. Certain provisions of the Companies Act apply only to the narrower concept of company groups, whilst others apply to the wider concept of related companies. The definition of "group of companies" in terms of s1 of the Companies Act refers to a holding company and all of its subsidiaries.

A subsidiary can by definition only be a company for Companies Act purposes, more specifically a South African incorporated company – thus a foreign subsidiary, or a controlled trust, are technically not "subsidiaries" but would still qualify as "related" juristic persons. Further, only majoritarian control suffices to establish a holding - subsidiary company relationship; the catch-all in s2(2)(d) does not apply. Examples of provisions that apply exclusively in respect of a "group of companies" are the definition of "distribution" (in essence a transfer of wealth to the shareholders of a company or of a group company) and the rules around the disclosure of directors' and prescribed officers' remuneration in the annual financial statements of certain companies in terms of s30(5) of the Companies Act.

CDH
CLIFFE DEKKER HOFMEYR

4 Tips to keep "control" under control...*continued*

The definition of "control" and "related party" have different meanings based on the context in which each is used in different regulatory regimes.

4. **Different context = different meaning**

   The definition of "control" and "related party" have different meanings based on the context in which each is used in different regulatory regimes:

   - For the purposes of merger control, s12 of the Competition Act sets out the definition of "control" which is similar to that in the Companies Act. The Competition Appeal Court has, however, given the term a particularly wide meaning in order to give competition authorities the ability to examine a wide range of transactions that could affect market structures, thus there are arguably different policy considerations to be borne in mind when interpreting the term under the respective statutory regimes.
   - In the listed environment it will sometimes be important to determine whether an issuer is entering into a "related party transaction" as contemplated in the listings requirements of the relevant stock exchange. For example, whilst there is a degree of overlap, the JSE Listings Requirements' ambit of related parties is substantially different to the Companies Act's. The JSE Listings Requirements mainly look only "upwards" from the issuer's perspective to assess which parties are in a position of control or significant influence in respect of the issuer, such as its material shareholders, directors and their respective associates. Thus, for example, subsidiaries of an issuer are not related parties for JSE purposes whereas they certainly would be for Companies Act purposes. On the other hand, an issuer's co-subsidiary would be a related party of the issuer for both JSE purposes (as it is an associate of a material shareholder of the issuer) and Companies Act purposes (as the issuer and its co-subsidiary have a common controller).

Murendeni Mashige and Yaniv Kleitman

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

Willem Jacobs
National Practice Head
Director
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com

David Thompson
Regional Practice Head
Director
Corporate & Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@cdhlegal.com

Mmatiki Aphiri
Director
T +27 (0)11 562 1087
M +27 (0)83 497 3718
E mmatiki.aphiri@cdhlegal.com

Roelof Bonnet
Director
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@cdhlegal.com

Tessa Brewis
Director
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Etta Chang
Director
T +27 (0)11 562 1432
M +27 (0)72 879 1281
E etta.chang@cdhlegal.com

Clem Daniel
Director
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Jenni Darling
Director
T +27 (0)11 562 1878
M +27 (0)82 826 9055
E jenni.darling@cdhlegal.com

André de Lange
Director
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Werner de Waal
Director
T +27 (0)21 481 6435
M +27 (0)82 466 4443
E werner.dewaal@cdhlegal.com

Emma Dempster
Projects & Energy
Director
T +27 (0)11 562 1194
M +27 (0)79 491 7683
E emma.dempster@cdhlegal.com

Lilia Franca
Director
T +27 (0)11 562 1148
M +27 (0)82 564 1407
E lilia.franca@cdhlegal.com

John Gillmer
Director
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Sandra Gore
Director
T +27 (0)11 562 1433
M +27 (0)71 678 9990
E sandra.gore@cdhlegal.com

Jay Govender
Projects & Energy Sector Head
Director
T +27 (0)11 562 1387
M +27 (0)82 467 7981
E jay.govender@cdhlegal.com

Johan Green
Director
T +27 (0)21 405 6200
M +27 (0)73 304 6663
E johan.green@cdhlegal.com

Allan Hannie
Director
T +27 (0)21 405 6010
M +27 (0)82 373 2895
E allan.hannie@cdhlegal.com

Peter Hesseling
Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesseling@cdhlegal.com

Quintin Honey
Director
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Roelf Horn
Director
T +27 (0)21 405 6036
M +27 (0)82 458 3293
E roelf.horn@cdhlegal.com

Kendall Keanly
Director
T +27 (0)21 481 6411
E kendall.keanly@cdhlegal.com

Yaniv Kleitman
Director
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige
Director
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

Johan Latsky
Executive Consultant
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@cdhlegal.com

Giada Masina
Director
T +27 (0)11 562 1221
M +27 (0)72 573 1909
E giada.masina@cdhlegal.com

Nkcubeko Mbambisa
Director
T +27 (0)21 481 6352
M +27 (0)82 058 4268
E nkcubeko.mbambisa@cdhlegal.com

Nonhla Mchunu
Director
T +27 (0)11 562 1228
M +27 (0)82 314 4297
E nonhla.mchunu@cdhlegal.com

Ayanda Mhlongo
Director
T +27 (0)21 481 6436
M +27 (0)82 787 9543
E ayanda.mhlongo@cdhlegal.com

William Midgley
Director
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@cdhlegal.com

Tessmerica Moodley
Director
T +27 (0)21 481 6397
M +27 (0)73 401 2488
E tessmerica.moodley@cdhlegal.com

Anita Moolman
Director
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

Jo Neser
Director
T +27 (0)21 481 6329
M +27 (0)82 577 3199
E jo.neser@cdhlegal.com

Francis Newham
Director
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

Gasant Orrie
Cape Managing Partner
Director
T +27 (0)21 405 6044
M +27 (0)83 282 4550
E gasant.orrie@cdhlegal.com

Verushca Pillay
Director
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@cdhlegal.com

David Pinnock
Director
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid
Director
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Megan Rodgers
Oil & Gas Sector Head
Director
T +27 (0)21 481 6429
M +27 (0) 79 877 8870
E megan.rodgers@cdhlegal.com

Ludwig Smith
Director
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Ben Strauss
Director
T +27 (0)21 405 6063
M +27 (0)72 190 9071
E ben.strauss@cdhlegal.com

Tamarin Tosen
Director
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum
Director
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Deepa Vallabh
Head: Cross-border M&A,
Africa and Asia
Director
T +27 (0)11 562 1188
M +27 (0)82 571 0707
E deepa.vallabh@cdhlegal.com

Jurg van Dyk
Construction & Engineering Sector Head
Director
T +27 (0)11 562 1216
M +27 (0)82 826 2808
E jurg.vandyk@cdhlegal.com

Roux van der Merwe
Director
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Charl Williams
Director
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com