

28 AUGUST 2019

CORPORATE & COMMERCIAL ALERT

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The effect of not accepting a board's offer during the appraisal process

One of the most important statements that must be included in a notice to shareholders when a company proposes a fundamental transaction is the statement of the shareholders' appraisal rights in terms of s164 of the Companies Act, No 71 of 2008 (Companies Act). Briefly, s164 states that in the event of the proposal of a fundamental transaction or an amendment of the company's memorandum of incorporation that involves a materially adverse alteration to the rights of a class of shareholders, a dissenting shareholder may demand that the company pay that shareholder the fair value of all of its shares. Our courts are increasingly called upon to adjudicate appraisal rights matters, and this case had to assess the position of a dissenting shareholder when it does not act on an offer for fair value from the company.

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In *Standard Bank Nominees (RF) (Pty) Ltd v Hospitality Property Fund Ltd* [2019] ZAGPJHC 263 (12 June 2019), Standard Bank Nominees (Nominees) and Standard Bank of South Africa Limited (the Trustees) were, respectively, the registered shareholder and beneficial owners of B linked units (indivisibly linked shares and debentures) in the Hospitality Property Fund (HPF) and the Trustees held such units in trust for an investment fund that is managed by third party advisors (Advisors). HPF issued a circular to the holders of its units giving notice of a meeting at which a special resolution would be proposed to approve

a scheme of arrangement (which is one of the "fundamental transactions" in the Companies Act) to substitute all units for no-par value B shares in HPF. Nominees then appointed the Advisors to act as its representatives at the meeting, to vote against the scheme of arrangement (which is a fundamental requirement for activating one's appraisal remedy).

The Advisors to the investment fund, purporting to act on behalf of the investment fund, then went further and followed the s164 appraisal rights process all the way through to instituting the appraisal application in the High Court under s164(14), for the determination of the fair value of the units after the board of HPF had made its offer for fair value (which in terms of s164(12) was open for 30 business days). The Advisors later procured legal advice which confirmed that the Advisors did not have *locus standi* to bring such an appraisal application, and they were not the registered shareholders, and accordingly they withdrew the application.

The interesting position that Nominees found itself in was that it was now potentially a shareholder that may have objected and demanded fair value in terms of s164(5) to (8), that did not accept a fair value offer made by the company's board but that never underwent a valid court process under s164(14) for a determination of fair value. Considering that Nominees did not follow through on its exercise of appraisal rights, it now sought a declaratory order from the court that it is,

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Ultimately the court was to answer the question of whether the withdrawal of the fair value application to the court had the effect of reinstating Nominees' full rights in its shares without interruption.

as a "reinstated shareholder", the holder of the no-par value B shares and claimed its retrospective entitlement to its share of the dividends declared and distributed by HPF from the time that the substitution of units under the scheme of arrangement took effect.

Ultimately the court was to answer the question of whether the withdrawal of the fair value application to the court had the effect of reinstating Nominees' full rights in its shares without interruption. HPF argued that when s164(9) and (10), which deal with the reinstatement of a dissenting shareholder's rights, refer to the shareholder allowing the fair value offer by the company to lapse, they imply that an offer must have actually been expressly rejected (and not simply allowed to lapse) within 30 business days. Absent an express rejection, HPF broadly argued that in terms of the legislative scheme a shareholder's rights are fixed from the moment it makes a demand to be paid fair value. From that point onwards, HPF argued, the shareholder has no further rights in respect of its shares, save for the right to be paid fair value, and that consequently the withdrawal of the appraisal application could have had no effect on Nominees' rights in respect of the shares: it had already relinquished its full set of rights by its election to demand fair value and to exit the company, rather than to remain a shareholder under the scheme of arrangement.

The court held that at the end of the board's 30 business day offer, in the absence of an acceptance by the dissenting shareholder the offer lapses regardless of whether the shareholder

has actually rejected the offer or not. The court further held that s164(10) on its plain terms does not remove any rights held by a dissenting shareholder but simply aims to prescribe what the default position is in the event that a dissenting shareholder does not accept an offer for fair value and fails to institute an application to court within the prescripts of s164(14). The court found that Nominees, as the registered shareholder, failed to institute an appraisal application within 30 business days of the offer being made, and consequently, its rights in respect of its shares were reinstated without interruption – this is in accordance with the clear and plain wording of the relevant provisions.

The above judgment, which acknowledged that s164 is something of a "procedural morass", has at least provided some certainty on the particular aspect of the lapsing of the company's offer and the reinstatement of the dissenting shareholder's rights: mere non-acceptance of the offer, coupled with a failure to bring an application within the 30 business day offer period, results in reinstatement of the shareholder's rights. However, what should be appreciated is that in this case the fair value application was not actually made by the registered shareholder in the first place. It would be interesting to see what the court's conclusion would have been had the registered shareholder (ie the correct party) brought the fair value application but then later withdrew it, and had also not accepted the company's offer. That's a procedural morass for another day.

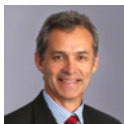
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