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CORPORATE & COMMERCIAL **ALERT**

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Tightening up on tacit terms

In determining whether a tacit term exists, the court held that it must consider whether there is any room for importing the alleged tacit term, and, importantly, pointed to the existence of the "whole agreement" and "non-variation" clauses, as well as the comprehensiveness of the written contract (45 pages in this case), which, together, strongly militated against the reading in of any tacit terms.

Better late than never? Potential consequences of the failure to submit a section 60 written resolution to all shareholders simultaneously

In terms of s60 of the Companies Act, No 71 of 2008, shareholders may, instead of holding a formal meeting, consent in writing to decisions which could be voted on at a shareholders' meeting. Although s60 presents a practical way for shareholders to pass resolutions, there are important principles not immediately apparent from the language of s60 that should not be overlooked.

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Tightening up on tacit terms

Broadly, the common law test for the reading in of a tacit term is the so-called "officious bystander test".

The courts have recently reaffirmed the restrictive scope of reading tacit terms into written contracts. A notable example of this is the Supreme Court of Appeal's judgment in *Adhu Investments CC and Others v Padayachee* (1410/2016) [2019] ZASCA 63, where Hugo Heinrich Knoetze (Knoetze), Kumaran Padayachee (Padayachee) and others had agreed to embark on a "lucrative" business transaction (Transaction) but, as business sometimes goes, the agreement fell through and the parties prepared an exit agreement. However, Knoetze had, prior to the signature of the exit agreement, set up a separate structure which resulted in a similar outcome as the Transaction, sans the other parties.

As part of following his deal through, the bank had granted Knoetze's company a loan facility, R2,5 million of which, Padayachee contended, was payable to him based on his part in securing the loan by honouring his disclosure obligations in terms of the exit agreement. Padayachee, who was not a party to the loan agreement, argued that the loan agreement contained an unwritten *stipulatio alteri* (a benefit for a third party), tacitly incorporated into the agreement and, in his papers before the court, accepted the benefit and claimed it from Knoetze's company.

Broadly, the common law test for the reading in of a tacit term is the so-called "officious bystander test" – a tacit term would be read into a contract if, in response to a query from an outsider, the contracting parties would without hesitation and unanimously have answered in the affirmative to the inclusion of the proposed term.

However, whilst judgment had been decided in favour of Padayachee, it was not based on the courts reading a tacit term into the loan agreement. The court reiterated that, generally, it *"would be very slow to import a tacit term in a contract particularly where…the parties have concluded a comprehensive written agreement that deals in great detail with the subject matter of the contract and it is not necessary to give the contract business efficacy"*.

In determining whether a tacit term exists, the court held that it must consider whether there is any room for importing the alleged tacit term, and, importantly, pointed to the existence of the "whole agreement" and "non-variation" clauses, as well as the comprehensiveness of the written contract (45 pages in this case), which, together, strongly militated against the reading in of any tacit terms. However, the court did state that the mere presence of a "whole agreement" or "non-variation" clause will not of itself preclude the reading in of a tacit term.

Tightening up on tacit terms...*continued*

It confirmed that evidence of prior negotiations is inadmissible in interpreting the terms of a written contract, save perhaps in very exceptional circumstances.

In a different context of the law of contractual interpretation, a similar restrictive approach was followed in *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2019] 1 All SA 291 (SCA), where the SCA reined in the recent tendency of the high courts in admitting extrinsic evidence to interpret the terms of a written agreement. It confirmed that evidence of prior negotiations is inadmissible in interpreting the terms of a written contract, save perhaps in very exceptional circumstances. Whilst it remains very much the case that the terms of any legal document must be construed in its overall setting and context, per the continuously restated principles in *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012* (4) SA 593 (SCA), the ambit of the extrinsic evidence that is admissible in this regard has been curtailed by *Blair Atholl*.

The above trends reaffirm the importance of ensuring that the parties fully set out all their respective performances, and cater for all eventualities, in their written agreement, as the courts will be slow to read in omitted terms for them or to give liberal and expansive interpretations to written terms based on prior negotiations.

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Better late than never? Potential consequences of the failure to submit a section 60 written resolution to all shareholders simultaneously

Although not expressly stated therein, s60 may be read as requiring equal and simultaneous, or at least non-delayed, submission of the resolution to all shareholders by the board.

In terms of s60 of the Companies Act, No 71 of 2008, shareholders may, instead of holding a formal meeting, consent in writing to decisions which could be voted on at a shareholders' meeting. Although s60 presents a practical way for shareholders to pass resolutions, there are important principles not immediately apparent from the language of s60 that should not be overlooked.

Section 60 is clear that resolutions submitted for written approval must be submitted to all shareholders entitled to exercise voting rights in relation to the subject matter of the resolution. What is not clear, however, are the requirements relating to the *timing* of such submission.

Although it is not expressly stated therein, s60 may be read as requiring equal and simultaneous, or at least non-delayed, submission of the resolution to all shareholders by the board. Near-simultaneous circulation is important because it prevents the proposers circulating the resolution first to those shareholders who are likely to support it and thus securing their support before any dissenters have had the opportunity to put their case to, or raise their concerns with, the other shareholders. This is significant because a written resolution is deemed to be passed at the point at which it secures the requisite majority of the shareholders, regardless of whether all the shareholders to whom the resolution has been sent have voted, or whether the prescribed period for voting has expired.

Section 60 is in essence a modified statutory version of the doctrine of unanimous assent, a common law principle which allows shareholders to take decisions by unanimous agreement without having to follow the formalities associated with a shareholders' meeting. However, one important difference is that s60 does not require unanimous agreement, but rather only requires that the necessary majority for an ordinary or special resolution, as the case may be, is obtained.

While this departure from the common law has its practical advantages, it requires circumspection if we are to avoid unduly prejudicing shareholders. In this regard we would do well to look to the UK Companies Act 2006, which codified a similarly modified form of

Better late than never? Potential consequences of the failure to submit a section 60 written resolution to all shareholders simultaneously...*continued*

If the board delays in circulating the written resolution simultaneously, this action may be open to challenge if the circulation was delayed for ulterior purposes.

the doctrine of unanimous assent, but specifically mandates that the written resolution be submitted at the same time, or at least without undue delay, to every member entitled to vote. This seems a sensible approach: while a single minority shareholder may often be unable to veto a resolution, they would certainly still be able to air their concerns on the matter to the other shareholders.

If we recognise that the purpose of s60 is to simulate a meeting of the shareholders, the procedure set out in s60 should be utilised in a manner which least derogates from the usual rights or protections afforded to shareholders at a meeting.

If the board of directors delays in circulating the written resolution simultaneously (or at least on a non-delayed basis), this action may be open to challenge if the circulation was delayed for ulterior purposes. Given the line of thinking in the recent case of *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Others (483/2018) [2019] ZASCA 53*, it is clear that the courts are prepared to strike down directors' actions (such as the submission of a resolution) if they acted with an improper purpose in that regard.

It would thus be advisable to follow a fair and equal procedure when submitting s60 written resolutions to shareholders.

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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