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CORPORATE & COMMERCIAL ALERT

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Shareholder self-help and the board's refusal to convene a meeting

In the case of *Heatherview Estate Extension 24 Home Owners Association v Mahlatse Trading Enterprise CC and Others* (22616/2019) [2019] ZAGPPHC 180 (20 May 2019), the High Court considered the meaning and effect of s61 of the Companies Act, No 71 of 2008 (Companies Act), and whether a meeting convened by certain members of a non-profit company themselves, in instances where the board failed to do so upon having received written demand by such members in terms of s61(3), was a lawfully constituted meeting.

Shareholder self-help and the board's refusal to convene a meeting

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On 20 February 2019, the respondents in the matter - a group of disgruntled or dissident members of the applicant, the Heatherview Estate Extension 24 Home Owners Association, a non-profit company (NPC) - attached a notice for an annual general meeting of the NPC (AGM) to the main entrance of the township (AGM Notice), following which, the legal representatives of such members sent notice, in terms of s61(3)(a) of the Companies Act, on their behalf, to the board of directors of the NPC asking that they convene a member's meeting. Neither the board nor the managing agent of the NPC responded to such notice. On 22 February 2019, the AGM Notice was also circulated amongst those members who were part of a WhatsApp group

(who were alleged to be the majority of the members of the NPC) and on 17 March 2019, each homeowner was directly approached and handed a copy of the notice.

The members purported to convene the AGM on 25 March 2019, at which meeting, resolutions were purportedly adopted to, *inter alia*, remove and replace the directors and the appointed manager of the NPC and to amend the Articles of Association (AOA) by deleting an article prohibiting members that do not pay levies from voting. The NPC sought relief on an urgent basis to the effect that, *inter alia*, such meeting and the resolutions that were passed at such meeting, be declared unlawful and void, on the basis that such members acted contrary to the provisions of the Companies Act and the AOA, whereby they resorted to self-help in convening the meeting as opposed to having approached a court for an order that the directors convene the meeting. The NPC submitted that where the board fails to convene a meeting in response to a notice in terms of s61(3) of the Companies Act, the members are required to approach a court in terms of s61(12) thereof, however, the members were of the view that, as s61(12) makes use of the word "may", the members were not obliged to approach the court and they thus convened the meeting themselves.

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Shareholder self-help and the board's refusal to convene a meeting ...continued

The court held that, while shareholders may request the board to convene a meeting in terms of s61(3), it is the board that is required to do so, and where the shareholders or members convene the meeting themselves, it is unlawful.

The court considered the provisions of s61, in particular, s61(3) and 61(12) of the Companies Act. Section 61(1) of the Companies Act provides that the board of a company or any other person specified in the company's memorandum of incorporation (MOI) or rules may call a shareholders meeting at any time. Section 61(3) of the Companies Act provides that -

"Subject to subsection (5) and (6), the board of a company, or any other person specified in the company's memorandum of incorporation or rules, must call a shareholders meeting if one or more written and signed demands for such a meeting are delivered to the company, and

- (a) *each such demand describes the specific purpose for which the meeting is proposed; and*
- (b) *in aggregate, demands for substantially the same purpose are made and signed by the holders, as of the earliest time specified in any of those demands, of at least 10% of the voting rights entitled to be exercised in relation to the matter proposed to be considered at the meeting."*

In terms of s61(12) of the Companies Act -

"If a company fails to convene a meeting for any reason other than as contemplated in subsection (11) -

- (a) *at a time required in accordance with its memorandum of incorporation;*
- (b) *when required by shareholders in terms of subsection (3); or*
- (c) *within the time required by subsection (7),*

a shareholder may apply to a court for an order requiring the company to convene a meeting on a date, and subject to any terms, that the court considers appropriate in the circumstances."

The court held that, while shareholders may request the board to convene a meeting in terms of s61(3), it is the board that is required to do so, and where the shareholders or members convene the meeting themselves, it is unlawful. The court disagreed with the members' contention that, as s61(12) is not peremptory, the members were entitled to convene a meeting themselves and

2018 1ST BY M&A DEAL FLOW FOR THE 10TH YEAR IN A ROW.

2018

1st by M&A Deal Flow.
1st by M&A Deal Value.
2nd by General Corporate Finance Deal Flow.
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2nd by BEE M&A Deal Flow.
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2017

2nd by M&A Deal Value.
1st by General Corporate Finance Deal Flow for the 6th time in 7 years.
1st by General Corporate Finance Deal Value.
2nd by M&A Deal Flow and Deal Value (Africa, excluding South Africa).
2nd by BEE Deal Flow and Deal Value.

2016

1st by M&A Deal Flow.
1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
3rd by General Corporate Finance Deal Value.

2015

1st by M&A Deal Flow.
1st by General Corporate Finance Deal Flow.

DealMakers

2014

1st by M&A Deal Flow.
1st by M&A Deal Value.
1st by General Corporate Finance Deal Flow.

2013

1st by M&A Deal Flow.
1st by M&A Deal Value.
1st by Unlisted Deals - Deal Flow.

Shareholder self-help and the board's refusal to convene a meeting ...continued

Where the board fails or refuses to convene a meeting upon having received a written demand from the shareholders, the only remedy available to the shareholders is to approach the court, in which case, it is still not guaranteed that the court would order that a meeting be convened.

held that, if the board fails to convene a meeting when requested to do so in terms of s61(3), the remedy available to the members is to approach the court in terms of s61(12). In addition, if a court is approached by shareholders to compel the directors to convene a meeting, the court reiterated the view that was held in the case of *CDH Invest NV v Petrotank South Africa Proprietary Limited and another* [2018] 1 All SA 450 (GJ), that intervention by the court is not there for the asking. Where the court is approached, the court would have to thus first be satisfied as to whether the calling of a member's meeting was *bona fide*, had a legitimate purpose and was in the best interests of the company, as the court generally declines to interfere in the management of the company's affairs. In *CDH Invest*, it was reasoned that it could not have been intended that the court is to "act as a mere rubberstamp of technical compliance by means of a prior statutory demand".

Where the board fails or refuses to convene a meeting upon having received a written demand from the shareholders, the only remedy available to the shareholders is to approach the court, in which case, it is still not guaranteed that the court would order that a meeting be convened. It may be valuable to have a provision drafted in the MOI of a company extending the right to convene a meeting to shareholders who hold a certain percentage of the voting rights. However, at the same time, such a provision may bring about its own practical concerns in circumstances where a shareholder, for ulterior motives, begins to abuse this power and constantly bypasses the board in convening shareholder meetings. Thus, there are advantages and disadvantages to such a provision, and each case should be assessed on its own merits.

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