10 FEBRUARY 2021

CORPORATE & COMMERCIAL **ALERT**

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Revisiting the Companies Amendment Bill 2018 - should CIPC make details about private company share structures readily available to the public?

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Pride, prejudice and section 163 of the Companies Act

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Whether a company's affairs are managed across the boardroom table, or across the family dining room table, relations among shareholders and directors can (and do) easily go sour. For this reason, the Companies Act 71 of 2008 provides certain mechanisms through which parties may find relief in instances where things go wrong. One such mechanism is section 163 which allows a shareholder or a director of a company, as the case may be, to approach the courts and ask for relief if any act or omission by the company or a related person has an oppressive or unfairly prejudicial result, or unfairly disregards the interests of such shareholder or director. This section sets out a list of remedies which a court may consider granting in instances where such conduct was sufficiently proven, including a restraint order against the conduct complained of, an order directing an issue or exchange of shares, an order to pay compensation, or an order placing the company in liquidation or business rescue.

Gent and another v Du Plessis

In *Gent and another v Du Plessis* the applicant (Gent) and the respondent (Du Plessis) were the only shareholders in Bonnox Proprietary Limited and had been the only shareholders since 2012, until which time Gent was also the only director of the company. After Gent's resignation in 2012, Du Plessis was appointed as the sole director until he was subsequently removed and dismissed in 2013 due to his gross misconduct and mismanagement of the company.

Du Plessis refused to take his dismissal lying down and brought an application in the Gauteng Division of the High Court seeking, among other things, a liquidation order and alternatively, an order that Gent's conduct towards him, which included allegedly excluding him from decision making in the company and removing him as director of the company, was oppressive and unfairly prejudicial in that it undermined his rights as a minority shareholder of the company.

The High Court found that neither Du Plessis' loss of confidence in the management of the company, which was allegedly due to the fact that Gent excluded him from such management and refused to provide him with certain financial information, nor his resentment at having been removed as a director had established the requirements for section 163 relief to be granted. On appeal before a full bench of the High Court, the *court a quo's* finding that Du Plessis failed to satisfy the requirements of section 163 was upheld. Nevertheless, the full bench went on to grant relief in terms of the section, justifying its approach by holding itself "*duty-bound to design or craft a mechanism which would result in a clean break between the parties*". It thus ordered that Du Plessis buy Gent's shares in the company so Gent could exit as a shareholder.

On appeal, the Supreme Court of Appeal had to assess the validity of the decision by the full bench of the High Court to grant relief in terms of section 163, in spite of the conclusion by the full bench that Du Plessis had failed to show that

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Pride, prejudice and section 163 of the Companies Act...*continued*

It can be very difficult, in particular in closely held companies where the same persons often occupy the dual positions of both directors and shareholders, if these persons are at an impasse with no hope of independently resolving their dispute.

the requirements of section 163(1) of the Companies Act were met. The SCA agreed with the decisions of both the courts that Du Plessis had failed to show how Gent's conduct towards him had been oppressive and unfairly prejudicial, holding that (i) Du Plessis was validly removed as a director and fairly dismissed after having been found guilty of misconduct and his dismissal did not constitute conduct which fell within the ambit of section 163(1); and (ii) the mere exercise of majority shareholding voting rights does not amount to oppression. Further, the SCA held that the full bench of the High Court had misdirected itself in making an order that Gent sell her majority shareholding to Du Plessis and ought to have dismissed the appeal from the outset. The order of the full bench was set aside and replaced with an order that the appeal be dismissed with costs.

Lessons learnt

It can be very difficult, in particular in closely held companies where the same persons often occupy the dual positions of both directors and shareholders, if these persons are at an impasse with no hope of independently resolving their dispute. This case is, however, a testament to the principle that irrespective of however much our courts would like to impose their own sense of justice by crafting remedies to rectify a situation and resolve a deadlock, they are still required to act within the bounds set out in our legislation. The Companies Act limits relief in terms of section 163(2) to situations where the requirements of section 163(1) have been met, and in the absence thereof, our courts are not free to independently grant such relief.

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Revisiting the Companies Amendment Bill 2018 - should CIPC make details about private company share structures readily available to the public?

To paraphrase the Nova judgment, this is ostensibly a prioritisation by the legislature of the public's right to access information over the right to privacy of private company security holders.

It is often assumed that details about private company share structures are intrinsically confidential. This is incorrect. Section 26(2) of the Companies Act 71 of 2008 (Act) provides any person with a right to inspect or copy the securities register of a private company upon the payment of a nominal fee.

Section 26(2) of the Act conveys an unqualified right. It is neither subject to the substantive or procedural requirements of the Promotion of Access to Information Act 2 of 2000, nor dependent on the motive behind the request (see *Nova Property Group Holdings Ltd and others v Cobbett and another* (MandG Centre for Investigative Journalism NPC as amicus curiae) 2016 (3) All SA 32 (SCA) (Nova)).

If a private company fails to provide access to its securities register pursuant to a request under section 26(2) of the Act, the person making the request is entitled to an order of court compelling the access sought. To paraphrase the Nova judgment, this is ostensibly a prioritisation by the legislature of the public's right to access information over the right to privacy of private company security holders.

On 21 September 2018 a draft amendment Bill to the Act (Bill) was published for public comment. As at the date hereof, the Bill has not been passed into law.

The Bill represents the first set of substantive amendments to the Act since it came into effect on 1 May 2011. Relevantly, the Bill:

- expands the categories of company records that can be accessed under section 26(2) of the Act to include, among others, a private company's memorandum of incorporation, annual financial statements, and minutes of shareholder meetings; and
- proposes a new section 33(1)(aA) that requires a company to submit to the Companies and Intellectual Property Commission (CIPC) a copy of its securities register simultaneously when filing its annual return.

It would be speculative to comment on the rationale for the proposed amendments to section 26(2) of the Act and the inclusion of the new section 33(1)(aA). It is however arguable that such amendments will precipitate increased transparency and strengthen corporate governance accountability.

Private company security holders (who comprise not only shareholders but also funders that hold preference shares, debt instruments and options) may raise concerns about potential infringements on their right to privacy. An argument on such grounds is inclined to fail. The Constitutional Court (CC) has held that the establishment of a private company is not a private matter and noted that it is a legal fiction that is recognised

Revisiting the Companies Amendment Bill 2018 - should CIPC make details about private company share structures readily available to the public?*...continued*

On balance, the amendments to section 26(2) of the Act and the inclusion of the new section 33(1)(aA) under the Bill are positive developments.

by society and funded by resources generated in the public sphere. Further, the CC stated that a person who conducts business through a private company enjoys certain rights but is also subject to accompanying responsibilities (including statutory obligations to disclosure of information). Consequently, there cannot exist a reasonable expectation of privacy over such information (see *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC)).

Considering the above, should CIPC publish details about private company share structures on its eServices platform?

Such a move would be consistent with international practice. Consider Australia and New Zealand which, like South Africa, are both Commonwealth jurisdictions. The Australian Securities and Investments Commission (ASIC) and the New Zealand Companies Office (NZCO) publish full details of private company share structures (including details about shareholders and ultimate holding companies) on their respective online platforms. Coupled with this, regulations require companies to notify ASIC and NZCO, within prescribed periods, if any changes to their share structures occur.

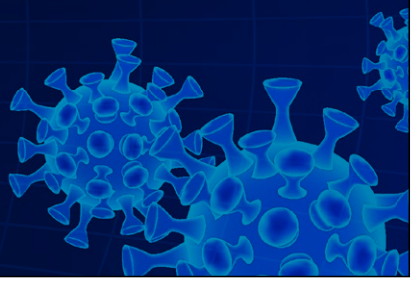
By emulating the approach of ASIC and NZCO, CIPC could reduce the barriers to accessing information under section 26(2) of the Act and simultaneously reduce the opacity of private company share structures.

The data collected by CIPC could be collated in a way that illustrates the interconnected relationships between companies, directors, and holders of securities. Without discounting the practicalities and associated costs of implementing this proposal, the incentives for the governmental agencies and the public are numerous and include, among other things:

- improving tax collection;
- combatting corruption; tender fraud and money laundering;
- verifying broad-based black economic empowerment ownership structures;
- tracing the ultimate beneficial owners of companies; and
- facilitating good corporate governance.

On balance, the amendments to section 26(2) of the Act and the inclusion of the new section 33(1)(aA) under the Bill are positive developments. The question as to whether CIPC should make private company share structures readily available to the public would require more nuanced thought. However, on face value there appears to be a robust argument in favour of adopting this approach grounded on the potential public benefits that would be derived from greater transparency and easier access to information.

Darryl Jago



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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
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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