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# CORPORATE & COMMERCIAL ALERT

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### Frustrating board meetings

Many board meetings are frustrating, for a wide variety of reasons, and especially in the world of virtual meetings. This article, however, deals with the interesting situation where a recalcitrant board member is frustrating the holding of board meetings. It will also touch on challenges created by the obtuseness of provisions like section 73(1) of the Companies Act 71 of 2008 (Companies Act).



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## Frustrating board meetings

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Many board meetings are frustrating, for a wide variety of reasons, and especially in the world of virtual meetings. This article, however, deals with the interesting situation where a recalcitrant board member is frustrating the holding of board meetings. It will also touch on challenges created by the obtuseness of provisions like section 73(1) of the Companies Act 2008 (Companies Act).

Section 73(1) of the act provides that:

- “(1) A director authorised by the board of a company:*
- (a) may call a meeting of the board at any time; and*
  - (b) must call such a meeting if required to do so by at least:*
    - (i) 25% of the directors, in the case of a board that has at least 12 members; or*
    - (ii) two directors, in any other case.”*

Imagine a situation where a private company has two shareholders, one, our client, who can be considered a constructive and noble holder of the majority of the issued shares, and the other, a belligerent minority shareholder. The Memorandum of Incorporation (MOI) of the company provides, as many would in these circumstances, that a valid board meeting requires a quorum to include a director elected as the nominee of each of our client and the minority shareholder, but that if that quorum is not present, the meeting will stand adjourned for a week and the directors present at the adjourned meeting will constitute a quorum. In addition, assume that the same quorum is required for a “round robin resolution” contemplated in section 74 to be passed (that is, a resolution of directors acting other than at a meeting).

Now assume that the two hypothetical shareholders have fallen out, and the antagonistic minority shareholder has decided to make life difficult for their fellow shareholder and directors. Accordingly, they stop responding to attempts to communicate with them and no longer attend meetings of the board.

Should the company now require the passing of a board resolution, it finds itself facing a dilemma.

If a board meeting can be called, then the meeting will stand adjourned for a week and our client’s nominated directors will pass the required resolution a week later. Irritating, but a solution at least.

However, can a meeting be called at all? Section 73(1) allows for a director “authorised by the board of a company” to call a meeting, and obliges them to call a meeting in the circumstances contemplated in (1)(b). But what if no director has been authorised by the board to call meetings? This would be the case if our client did not have the foresight at a previous board meeting to authorise a specific board member to call meetings – not many boards would have foreseen the need created by section 73(1).

Logically, it could also be asked whether any board meeting could ever have been held. The board needs to authorise someone to call a board meeting, which can only be called by someone authorised by the board, which cannot have had a meeting without someone having been authorised to call the meeting. And so on.

### Alternative options

Perhaps this tiresome loop can be avoided if the MOI of the company authorises a certain director to call a board meeting (on the basis that this is the equivalent of being authorised by the board as all of the directors are bound by the MOI). However, the antagonistic shareholder would now

## Frustrating board meetings

*...continued*

Another option is for our client's nominee director to call the meeting and rely on common law principles regarding the authority of directors acting outside of the usual more formal requirements of board proceedings.

be presented with an opportunity to argue that such a provision in the MOI does not constitute the board authorising a director. The Companies Act requires that the board authorises a director, having first carefully considered and debated the matter and having placed that authority in the hands of someone who is deemed worthy. Now, this argument is by no means a sure-fire winner, but it does allow the frustrating shareholder and its nominee director to frustrate the process.

As an aside, it is not a good reflection on the Companies Act if this level of detailed forethought in drafting a MOI is required to enable a company to do something as everyday as call a board meeting.

Despite the relatively clear wording of the provision and the clear lack of the same wording found in section 61(1) allowing for persons specified in the MOI to call a shareholders' meeting, surely this cannot have been the intention of the legislature? A solution would perhaps be to take the view that the section is not restrictive, but is rather intended to cover a situation where no other method was provided in the MOI for the calling of board meetings. This argument would hold that while a director authorised by the board may call a meeting, the section would not prevent someone else specified in the MOI (the company secretary, a director, etc.)

from being able to call a meeting. This of course again leaves the door open for a belligerent party to start another long-winded dispute process.

There are a few further options, all of which provide self-evident opportunities for the reprobate shareholder. One is to approach the Companies Tribunal and ask for an administrative order exempting the company from the relevant provision in terms of section 6(2) of the Companies Act. Another option is for our client's nominee director to call the meeting and rely on common law principles regarding the authority of directors acting outside of the usual more formal requirements of board proceedings. The last option, if the circumstances allow, is for the person (perhaps a director, the chairman or the CEO) who has in the past, as a matter of practice, called for board meetings to call a meeting and to argue that this is accepted past practice.

The better approach would seem to be to take the view that section 73(1) is not restrictive and to have the company's MOI provide that any director can call a board meeting, as an empowering provision in addition to what is set out in section 73(1).

All just to call a board meeting.

*David Pinnock and Kate Anderson*

## 2020 CONSISTENT LEADERS IN M&A LEGAL DEALMAKERS

### 2020

1<sup>st</sup> by M&A Deal Flow.  
1<sup>st</sup> by BEE Deal Flow.  
1<sup>st</sup> by BEE Deal Value.  
2<sup>nd</sup> by General Corporate Finance Deal Flow.  
2<sup>nd</sup> by General Corporate Finance Deal Value.  
3<sup>rd</sup> by M&A Deal Value.  
Catalyst Private Equity Deal of the Year.

### 2019

**M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.**  
1<sup>st</sup> by BEE M&A Deal Flow.  
1<sup>st</sup> by General Corporate Finance Deal Flow.  
2<sup>nd</sup> by M&A Deal Value.  
2<sup>nd</sup> by M&A Deal Flow.

### 2018

1<sup>st</sup> by M&A Deal Flow.  
1<sup>st</sup> by M&A Deal Value.  
2<sup>nd</sup> by General Corporate Finance Deal Flow.  
1<sup>st</sup> by BEE M&A Deal Value.  
2<sup>nd</sup> by BEE M&A Deal Flow.  
Lead legal advisers on the Private Equity Deal of the Year.

### 2017

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

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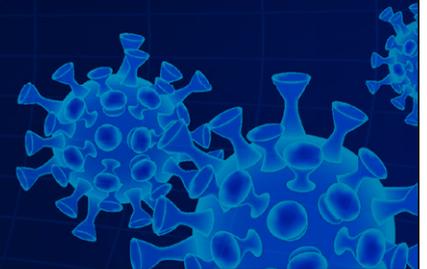
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2020 2<sup>nd</sup> by General Corporate  
Finance Deal Flow.  
2020 2<sup>nd</sup> by General Corporate  
Finance Deal Value.  
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in the 9<sup>th</sup> annual Private Equity  
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Our 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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