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CORPORATE & COMMERCIAL **ALERT**

Proxies: The power is in the mandate

In the Supreme Court of Appeal (SCA) case of *Malatji v Ledwaba No and Others* (1136/2019) [2021] ZASCA 29 (30 March 2021), the court considered whether a general meeting of the Mamphoku Makgoba Community Trust (Trust) was convened in compliance with an order handed down by the SCA in 2018 and the trust deed of the Trust.

IN THIS ISSUE >

Not every faulty Bluetooth should have its day in court – a discussion of consumer protection in *Motus Corporation (Pty) Ltd and another v Wentzel*

Robin Hood proponents will be disappointed to learn that the purpose of the protections contained in the Consumer Protection Act 68 of 2008 (CPA) is not simply to "*take from the rich and give to the poor*". The Supreme Court of Appeal (SCA) recently made clear as much, when it overturned a ruling by the Gauteng High Court ordering Renault to refund a consumer the full purchase price of a Renault Kwid plus finance charges payable by the consumer to a third party.

When the tribe has not spoken: How to handle dissenting minority shareholders

In the television show *Survivor*, the jury consists of a group of eliminated castaways that return to witness the remaining castaways at the Tribal Councils. The information they take in from these visits is supposed to help them decide who to vote for to win the ultimate cash prize and title of *Sole Survivor* at the end of the game at the Final Tribal Council. The Final Tribal Council can be likened to an annual general meeting (AGM) of a company because some of the most critical corporate actions are approved at such a meeting and much like some jury members, disgruntled shareholders tend to use their leverage to vote down certain resolutions.

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Not every faulty Bluetooth should have its day in court – a discussion of consumer protection in *Motus Corporation (Pty) Ltd and another v Wentzel*

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The purpose of the CPA is to "*promote and advance the economic welfare of consumers*" to the extent provided for in its provisions. This means that any consumer who invokes the protections provided for in the CPA must be able to show that the supplier in question has breached the relevant provisions of the CPA, properly interpreted. In *Motus Corporation (Pty) Ltd and another v Wentzel*, the SCA found that the High Court misdirected itself both in the interpretation of the CPA and in the remedy ultimately granted.

Factual background

In the High Court, Ms Abigail Wentzel sought (and was granted) a refund in the amount of R256,956.84 in respect of a Renault Kwid motor vehicle purchased from Renault. The actual price of the vehicle was R176,400. However, the court ordered Renault to refund Ms Wentzel the amount of R256,956.98 which included the costs associated with financing the motor vehicle through a third party.

Ms Wentzel relied on sections 55(2) and 56(2)-(3) of the CPA for her relief. We explain these provisions below, which deal with breaches of warranty and refunds for defective goods. In summary, the relevant facts of Ms Wentzel's claims were as follows:

- On 7 December 2017, Ms Wentzel purchased the motor vehicle from Renault.
- On 11 December 2017, Ms Wentzel reported a strange ticking noise in the motor vehicle and mentioned that her air conditioning was on occasion faulty.
- On 27 December 2017, Ms Wentzel took her motor vehicle to Renault for an inspection and repairs were carried out at no charge.
- On 23 January 2018, Ms Wentzel again took her motor vehicle for inspection, reporting issues with her brakes, the windows rattling and sound issues with her Bluetooth system. Repairs were again carried out at no charge.
- On 23 February 2018, due to the motor vehicle reportedly making an unbearable noise, Ms Wentzel took the motor vehicle back to Renault for a service. A motor vehicle "*health check*" was carried out by one of Renault's employees, who stated on affidavit that every problem Ms Wentzel had raised, had been properly attended to.

Not every faulty Bluetooth should have its day in court – a discussion of consumer protection in *Motus Corporation (Pty) Ltd and another v Wentzel*...*continued*

The High Court made short shrift of Renault's defences. It held that "*the courts must take a robust approach towards the economic giants such as [Renault], who can flex their financial muscle to bully unsuspecting consumers to accept flawed goods...*".

- On 14 March 2018, Ms Wentzel escalated the matter to Renault's principal dealer (Petzer), due to the alleged persistent problems. In response, Petzer offered to take her motor vehicle back and trade it in for a Renault Clio. Ms Wentzel declined the offer.
- In the interim, Ms Wentzel had lodged a complaint with the Motor Industry Ombudsman of South Africa (MIOSA) and was subsequently (and incorrectly) advised that MIOSA did not have jurisdiction regarding the matter, given that legal action had already been instituted by one of the parties. At that stage, no legal action had been instituted.
- On 16 May 2018, Ms Wentzel launched an application in the High Court alleging a breach of, among others, sections 56(2)-(3) of the CPA.
- Renault opposed the application. It contended that all of Ms Wentzel's complaints had been attended to, and that the remaining complaint regarding the Bluetooth system was due to the noise from the motor vehicle being driven at high speeds. Additionally, Renault raised four special pleas, including that Ms Wentzel had failed to exhaust her internal remedies provided by section 69 of the CPA, and that she should not have proceeded by way of motion proceedings given the material disputes of fact in the matter.

Judgment

The High Court made short shrift of Renault's defences. It held that "*the courts must take a robust approach towards the economic giants such as [Renault], who can flex their financial muscle to bully unsuspecting consumers to accept flawed goods...*". To drive its point home, the court *a quo* ordered Renault and Renault South Africa (being the group company), to jointly and severally refund the full purchase price of R256,965.84.

On appeal, the SCA briefly considered the special pleas raised by Renault before proceeding to deal with the facts of the matter. In spite of the fact that the SCA did not hear the full argument in relation to the issue of internal remedies, it made a number of remarks about restricting a consumer's right to approach the court, given that this right is specifically entrenched in the Constitution, suggesting that it would likely have found that a failure to exhaust internal remedies does not oust the High Court's jurisdiction. The SCA declined to deal with the remaining special pleas.

The SCA concluded that there were two mutually destructive factual versions before it: on the one hand Ms Wentzel claimed that the motor vehicle and particularly the Bluetooth system remained faulty and had not been properly repaired, whilst on the other hand Renault insisted that it had attended to all of the alleged defects and denied that the Bluetooth system was faulty at all. In this regard it held that the High Court erred in not applying the *Plascon-Evans* test (i.e. where a dispute of facts arises on affidavit, a final order can only be granted if the facts presented by both parties (although contradictory), justify such an order).

Not every faulty Bluetooth should have its day in court – a discussion of consumer protection in Motus Corporation (Pty) Ltd and another v Wentzel...*continued*

The SCA found that a Bluetooth system was merely an accessory to the motor vehicle, and a deficiency in relation thereto did not render the motor vehicle less acceptable.

The SCA also conducted an analysis of the consumer rights contained in section 55(2) of the CPA and which are protected by section 56. Section 55(2) provides that every consumer has a right to receive goods that are free from any defects and which are useable for a reasonable period of time, having regard to the normal use of the goods. Section 56(3) allows a consumer to return goods after a supplier has repaired any part thereof, and within three months from the date of such repair, if the defect is not remedied or a further defect is discovered. At the heart of both of these sections lies the definition of the word "*defect*" as set out in section 53(1)(a) of the CPA, which relates to either (i) a material imperfection rendering the goods less acceptable than a person could reasonably expect; or (ii) any characteristics of the goods that renders it less useful than one would reasonably expect. The SCA held that clearly not every small fault constitutes a defect as defined.

Although no evidence had been led in court regarding the reasonable expectations of motor vehicle purchasers, the SCA found that a Bluetooth system was merely an accessory to the motor vehicle, and a deficiency in relation thereto did not render the motor vehicle less acceptable. The SCA expressed a similar sentiment regarding the other deficiencies complained of, but nevertheless proceeded to the second part of the enquiry, namely whether Ms Wentzel was entitled to a refund in terms of section 56. Here the SCA found that from 28 February 2018 Ms Wentzel had not reported any further defects or made complaints alleging that repairs had not been performed properly. Although the wording of the CPA refers to the term "*discovered*" in relation to further defects, the SCA held that the reporting of these defects is necessary in order to enforce the protection contained in that section. As such, the three-month period contained in the CPA had come and gone by the time Ms Wentzel brought the matter before the High Court.

The SCA ultimately held that Ms Wentzel had failed to make out a case under section 56(3) of the CPA, especially having regard to the serious factual disputes which arose on the papers. Insofar as the dispute could be determined on the papers regarding the nature of the defects and the repairs made by Renault, the SCA held that such dispute ought to have been resolved in favour of Renault on the ordinary approach to disputes of fact on motion.

Conclusion

This case is a testament to the fact that the CPA should not simply be brandished as a blunt weapon with which to pursue every consumer grievance. Whilst the CPA serves to protect consumers and promote their economic welfare, it is important that consumers make sure their grievance falls within the scope of the protections contained in the CPA, and that they pursue the available remedies expediently and in the legally correct manner. This judgment should also be a caution to lower courts to stay within the bounds of the CPA and not be overzealous in seeking to vindicate the rights of consumers.

Justine Krige and Kara Meiring

Proxies: The power is in the mandate

On appeal, the SCA declared that the general meeting of the Trust was unlawful and interdicted the trustees elected at the meeting from acting as trustees of the Trust.

In the Supreme Court of Appeal (SCA) case of *Malatji v Ledwaba No and Others* (1136/2019) [2021] ZASCA 29 (30 March 2021), the court considered whether a general meeting of the Mamphoku Makgoba Community Trust (Trust) was convened in compliance with an order handed down by the SCA in 2018 (2018 Order) and the trust deed of the Trust (Trust Deed).

In terms of the 2018 Order, the SCA ordered the independent trustees of the Trust to convene and hold a general meeting for purposes of nominating and appointing a new board of trustees. A meeting was subsequently held, and a new board of trustees was appointed. Thetele Joseph Malatji (Malatji), who was both a beneficiary and a trustee of the Trust, applied to the High Court to have the election set aside. Malatji argued that the election process was flawed in that, *inter alia*, the independent trustees (i) made provision in the notice convening the meeting for voting by way of 'proxy' where the particular beneficiary was deceased; and (ii) permitted absent beneficiaries to vote by proxy; in circumstances where no provision therefor was made in the Trust Deed or in the 2018 Order. The application was dismissed by the court *a quo*.

On appeal, the SCA declared that the general meeting of the Trust was unlawful and interdicted the trustees elected at the meeting from acting as trustees of the Trust. In arriving at its decision, the court noted that the nomination and appointment of the new board of trustees was to take place '*in accordance with the relevant provisions of the Trust Deed*', which enjoined the trustees to hold a general meeting for the purpose of such election by beneficiaries present and entitled to vote in terms of the Trust Deed. The provisions of the Trust Deed require of a beneficiary to be both present at the meeting and not younger than 21 years old in order to qualify to vote.

The respondents argued that 'present at such meeting' should be interpreted to include 'present by proxy'. It was contended that on a proper interpretation of the Trust Deed, the beneficiaries named in the register are not the sole repositories of benefits under the Trust, but rather they are representatives of a household and where a beneficiary had died, an individual, properly authorised, was entitled to continue to represent the household. The respondents further submitted that the approach taken by the independent trustees to allow voting by proxy through mandated representatives was entirely consistent with the scheme of the Trust Deed.

The SCA rejected this argument and held that a proxy is simply a form of mandate. It requires a mandate to be extended by the principal to his or her agent to exercise the vote to which the principal was entitled at the meeting. Clearly, a deceased beneficiary is unable to extend a mandate and as such, the procedure adopted by the independent trustees in regard to the deceased beneficiaries is unrelated to proxies.

Proxies: The power is in the mandate...*continued*

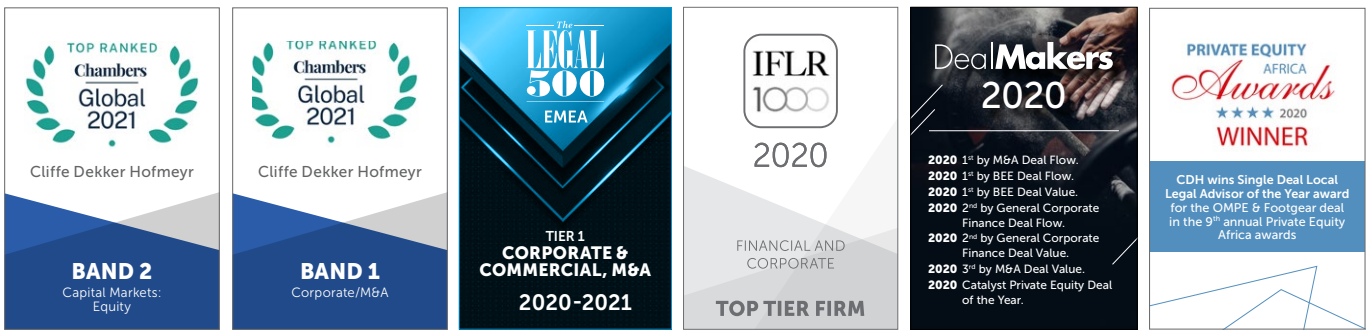
The court held that being 'present at the meeting' meant being physically present and thus the acceptance of votes by 'proxy' on behalf of absent beneficiaries was in breach of the Trust Deed.

In respect of the beneficiaries who were absent and represented by 'proxy' at the meeting, the SCA found that *'...where a person is required by statute to perform an act involving the exercise of his discretion in a matter in which another has an interest he may not, by common law, delegate his power. Thus, a citizen is not entitled to vote by proxy in a public election. No reason in logic commends itself to hold otherwise where a trust deed entitles beneficiaries under the trust to vote for the appointment of trustees. Voting by proxy could therefore only have been permitted if the trust deed provided for it. It did not do so expressly and Mr McNally was unable to refer to any other provisions in the trust deed which might be indicative of an intention to permit voting by proxy'*.

The court held that being 'present at the meeting' meant being physically present and thus the acceptance of votes by 'proxy' on behalf of absent beneficiaries was in breach of the Trust Deed.

This case highlights the importance of ensuring that a trust deed (or a Memorandum of Incorporation, as applicable) contains a proxy construct which expressly allows for the appointment of proxies. There is no common law right to vote by proxy and unless the applicable document provides for voting by proxy, or a statute permits you to appoint a proxy (e.g. in terms of section 58 of the Companies Act 71 of 2008 in respect of shareholders), you cannot appoint a proxy.

Christelle Wood and Devon Clarke



When the tribe has not spoken: How to handle dissenting minority shareholders

Given that the resolutions approving the directors' remuneration and the provision of financial assistance are often passed at the AGM, companies face the risk of minority shareholders taking an activist approach by pooling their votes in order to vote against these resolutions, and their motives for doing so, whilst varied and at times controversial, are legally irrelevant.

In the television show *Survivor*, the jury consists of a group of eliminated castaways that return to witness the remaining castaways at the Tribal Councils. The information they take in from these visits is supposed to help them decide who to vote for to win the ultimate cash prize and title of *Sole Survivor* at the end of the game at the Final Tribal Council. The Final Tribal Council can be likened to an annual general meeting (AGM) of a company because some of the most critical corporate actions are approved at such a meeting and much like some jury members, disgruntled shareholders tend to use their leverage to vote down certain resolutions. This article discusses the growing tendency of minority shareholders voting against, and in some instances having enough power to vote down, important special resolutions such as those for directors' remuneration (in terms of section 66(9) of the Companies Act 71 of 2008 (Companies Act)) and intra-group financial assistance resolutions (in terms of section 45(3)(a)(ii) of the Companies Act) at AGMs, and how companies can address or mitigate this going forward.

Shareholders hold shares as their private property and, unlike board members, they do not participate in the day-to-day management of the company and do not owe a fiduciary duty to the company. Shareholders may exercise the voting rights attached to the shares as they please and in accordance with their personal interests. Resolutions approving directors' remuneration and the provision of financial assistance to related companies are particularly important corporate actions that require shareholder approval prior to implementation. Naturally, shareholders are more scrupulous in their consideration of these resolutions because they are deciding on how the company's resources should be applied. In addition, in terms of the Companies Act, resolutions approving directors' remuneration and financial assistance remain valid for up to two years from the date on which they were passed. To be clear, the conventional thinking is that executive pay falls outside of section 66(8) and (9) of the Companies Act, as such remuneration is *qua* employee and not *qua* director, and thus one is more concerned in this context with fees paid to the non-executive directors. The executive pay policy is however submitted by JSE listed companies to their shareholders for a non-binding advisory vote.

The difficulty that the Companies Act introduced is that directors' remuneration and the provision of financial assistance must be approved by way of a special resolution (supported by at least 75% of the voting rights exercised on the resolution). The threshold for a special resolution may be adjusted upwards or downwards in the memorandum of incorporation of the company, provided that there is always at least a 10% margin between the lowest threshold for passing a special resolution and the highest threshold for passing an ordinary resolution. But not for JSE listed companies: for these companies, the adjustment cannot go downwards from 75%. Given that the resolutions approving the directors' remuneration and the provision of financial assistance are often passed at the AGM, companies face the risk of minority shareholders taking an activist approach by pooling their votes in order to vote against these resolutions, and their motives in doing so, whilst varied and at times controversial, are legally irrelevant. The risk of minority shareholders defeating these resolutions is particularly acute for listed companies because of the often poor attendance at AGMs, which increases the voting weight of the activist minorities who do happen to be present (in person or by proxy).

When the tribe has not spoken: How to handle dissenting minority shareholders...*continued*

One may probably accept that only exceptional circumstances would justify an order under this section, and it would be required that the company has exhausted all other avenues.

As a means to prepare for minority shareholder dissent on key special resolutions, the natural starting point is that companies need to embrace the stakeholder inclusive approach in the King Report on Corporate Governance. In practice, such a stakeholder inclusive approach can entail companies engaging with discontent shareholders on issues of director remuneration and financial assistance in advance of passing the resolutions so that they are able to anticipate the type of concerns or demands shareholders are likely to raise. Another mitigating strategy that companies should consider taking to address this issue is to ensure that special resolutions approving directors' remuneration and financial assistance remain valid for the maximum period of two years (as prescribed by the Companies Act) and not a shorter self-imposed period, such as from one AGM to the next. This buys the company vital time to regroup and assess its position after such resolutions fail at the AGM, and enables the company to at least pay its directors and provide much-needed intra-group financial assistance for another year. Alternatively, and perhaps as a last resort, companies may consider invoking the provisions of section 6(2) of the Companies Act which states that:

> *"A person may apply to the Companies Tribunal for an administrative order exempting an agreement, transaction, arrangement, resolution, or provision of the company's Memorandum of Incorporation or rules from any prohibition or requirement established by or in terms of an unalterable provision of this Act, other than a provision that falls within the jurisdiction of the Panel."*

The Companies Tribunal may issue an exemption order if it is satisfied that: (i) the arrangement serves a reasonable purpose and does not defeat a requirement established by an unalterable provision of the Companies Act, and (ii) it is reasonable and justifiable for the Companies Tribunal to grant the exemption in light of the purposes of the Companies Act and all relevant factors. To date, the use of this provision in the context of a company being hamstrung by its dissenting minority shareholders is unprecedent, and it is unclear what the likely outcome would be of an application in this regard. One may probably accept that only exceptional circumstances would justify an order under this section, and it would be required that the company has exhausted all other avenues.

Whilst the votes of shareholders can never be absolutely predicted, companies need to take steps to ensure that they are practising good corporate governance and are proactively participating in the appropriate level of shareholder engagement. Failure to do so may leave the company exposed to shareholder disapproval in respect of some the most critical matters that require a high level of shareholder assent.

Melissa Mtolo and Yaniv Kleitman

2020 CONSISTENT LEADERS IN M&A LEGAL DEALMAKERS

DealMakers

2020
1st by M&A Deal Flow.
1st by BEE Deal Flow.
1st by BEE Deal Value.
2nd by General Corporate Finance Deal Flow.
2nd by General Corporate Finance Deal Value.
3rd 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.
1st by BEE M&A Deal Flow.
1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
2nd by M&A Deal Flow.

2018
1st by M&A Deal Flow.
1st by M&A Deal Value.
2nd by General Corporate Finance Deal Flow.
1st by BEE M&A Deal Value.
2nd by BEE M&A Deal Flow.
Lead legal advisers on the Private Equity Deal of the Year.

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.

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Mark Linington is recommended in Investment Funds in THE LEGAL 500 EMEA 2021.
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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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