9 FEBRUARY 2021

DISPUTE RESOLUTION **ALERT**

IN THIS ISSUE >

Are shareholder irrevocable undertakings enforceable?

Irrevocable undertakings are commonplace in commercial transactions. These undertakings are typically relied upon when making investments or entering into commercial transactions with counterparty companies. Shareholder undertakings to vote in a certain way are an important type of undertaking in this context. It was therefore a matter of significant commercial importance when the validity of such undertakings was recently considered became a question for consideration in the *High Court and Supreme Court of Appeal in Women in Capital Growth (Pty) Ltd and Another v Scott and Others* (1193/2019) [2020] ZASCA 95.

Day to day or not?

The notion of corporate accountability has been a source of criticism (and praise) for juristic entities across the world. While theories surrounding holding wrongdoing directors accountable continue to develop, a converse debate regarding the rights and entitlements of certain directors continues. Important to this debate is the right that certain directors have in the day to day management of a company's business.

Investment Protection for trade-related infrastructure to realise the AfCFTA's full potential

The African Continental Free Trade Area (AfCFTA) is the continent's most ambitious economic project. Its general objective is to create the world's largest single market (by number of participating countries) for the trade in goods and services.

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

CLICK HERE

CDH
CLIFFE DEKKER HOFMEYR

Are shareholder irrevocable undertakings enforceable?

It later became apparent that the shareholders did not intend to honour their obligations under the irrevocable undertakings and regarded such undertakings as invalid and unenforceable.

Irrevocable undertakings are commonplace in commercial transactions. These undertakings are typically relied upon when making investments or entering into commercial transactions with counterparty companies. Shareholder undertakings to vote in a certain way are an important type of undertaking in this context. It was therefore a matter of significant commercial importance when the validity of such undertakings was recently considered became a question for consideration in the High Court and Supreme Court of Appeal in *Women in Capital Growth (Pty) Ltd and Another v Scott and Others* (1193/2019) [2020] ZASCA 95.

Briefly, the facts of the case were as follows. During February 2019, the respondents, as shareholders of the third applicant (the company), each gave irrevocable undertakings in favour of the first and second applicant (proxies), for the benefit of the company. The shareholders opposed the application and sought, by way of a counter application, to have the irrevocable undertakings declared unlawful, invalid and unenforceable. It later became apparent that the shareholders did not intend to honour their obligations under the irrevocable undertakings and regarded such undertakings as invalid and unenforceable.

The company and the proxies issued urgent proceedings out of the High Court seeking declaratory relief that would oblige the shareholders to vote in accordance with their irrevocable undertakings at the next shareholders meeting. The shareholders opposed the application and sought, by way of a counter application, to have the irrevocable undertakings declared unlawful, invalid and unenforceable.

The basis for the shareholders' contention that the undertakings were unlawful was that they contravened sections 58(8)(c) and 71(2)(b) of the Companies Act 71 of 2008.

The first legal issue: Section 58(8)(c) of the Companies Act provides as follows:

> *"If a company issues an invitation to shareholders to appoint one or more persons named by the company as a proxy, or supplies a form of instrument for appointing a proxy the company must not require that the proxy appointment be made irrevocable."*

The second legal issue: Section 71(2)(b) requires that a director must be afforded a reasonable opportunity to be heard before a vote is taken to remove him. The idea behind this provision is that the director in question may be able to change the minds of those who were to vote for his removal. Accordingly, so the argument goes, the shareholders are required to listen to what the director has to say before making a decision and should not be held to irrevocable undertakings to vote one way or the other.

In regard to the first legal issue, the court held that section 58(8)(c) is only applicable in circumstances where the company issues an invitation to shareholders to appoint persons named by the company as a proxy and, in this case, the company had issued no such invitation. The company was not a party to the undertakings and a reading of the undertakings did not support the interpretation that the undertakings were sought by the company. Accordingly, the court held that the undertakings did not fall foul of section 58(8)(c).

CDH
CLIFFE DEKKER HOFMEYR

Are shareholder irrevocable undertakings enforceable?*...continued*

The appeal was dismissed on the basis that any decision would have no practical effect or result, given that the agreements that were the subject of the undertakings had already been implemented.

In regard to the second legal issue, the court noted that it was not referred to any authority for the proposition that there are statutory constraints on the powers of shareholders to remove directors. On the contrary the court cited precedent that any agreements by shareholders regarding their votes in a general meeting is valid and does not derogate from the company's right to elect or remove a director upon requisite number of votes. Furthermore, the validity of agreements between shareholders that, for example, preclude a mode of removal of directors has long been recognised. Accordingly, the court held that there is no prohibition on agreements between shareholders to determine how their best interests should be served in exercising their voters' interests. Further to this, the shareholders of accompany do not stand any fiduciary relationship and thus are under no duty to exercise their votes *bona fide* in the interests of the company as a whole.

In regard to the director's right to be heard prior to a vote for his removal, the court noted that this was a provision relating to process and procedure, and did not put substantive constraints on the exercise of the power to remove. In other words, the court could intervene in the event that there were procedural irregularities but was not in a position to do so for reasons that impact on the substance of the reasons for a removal.

For the above reasons, the court declared that the respondents were bound by their irrevocable undertakings and dismissed the counter application.

The matter was taken on appeal to the Supreme Court of Appeal by the shareholders. The appeal was dismissed on the basis that any decision would have no practical effect or result, given that the agreements that were the subject of the undertakings had already been implemented.

The judgment, which promotes commercial certainty, will be welcomed by businesses whose transactions are undertaken on the basis that they have security and protection based on these types of shareholder undertakings.

Timothy Baker and Siviwe Mcetywa

CLIFFE DEKKER HOFMEYR

Day to day or not?

The 2017 Western Cape High Court decision in *Kaimowitz V Delahunt And Others 2017* (3) SA 201 (WCC) presents a useful assessment of the limitations of directors' rights.

The notion of corporate accountability has been a source of criticism (and praise) for juristic entities across the world. While theories surrounding holding wrongdoing directors accountable continue to develop, a converse debate regarding the rights and entitlements of certain directors continues. Important to this debate is the right that certain directors have in the day to day management of a company's business.

Section 66 (1) of the Companies Act 71 of 2008 (the Act) provides that "*the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the function of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise*".

The 2017 Western Cape High Court decision in *Kaimowitz V Delahunt And Others* 2017 (3) SA 201 (WCC) presents a useful assessment of the limitations of directors' rights. The applicant was a director and employee of a respondent company. On receiving notice that his employment was to be terminated, the applicant's role within the company altered dramatically. Importantly, his directorship would be sustained, albeit as a capacity as non-executive director. While he was entitled to attend directors' meetings, he was prohibited from being involved in the day-to-day management of the company. The court was therefore called upon to determine whether a director, save for where provided for in the Memorandum of Incorporation (MOI), is entitled to be involved in the day to day running of the company.

The court distinguished between the roles of a director and a manager, aiding the conclusion that on the facts before it a director is not entitled as a right to be involved in the day to day activities of the company. On a proper interpretation of section 66(1) of the Act, the day to day management of a company may be delegated by the board of directors (the board) to a managing director and/or committees of the board. The right to such involvement does not, therefore, reside with each director individually. As the court went on to note, "*the involvement of a director in the affairs of the company must be assessed in terms of enabling a director to perform those duties which are imposed upon him/her as a result of his/her appointment as a director*". The court thus concluded that the management of a company in terms of its overall supervision resides in the board as a collective as opposed to individual directors.

This decision sheds light on the importance of clarified roles for directors, particularly where directors operate in dual capacities of director and employee. The decision further provides some semblance of a framework on which to conceptualise the boundaries of responsibility that directors are tasked with, and indeed entitled to in respect of the day to day management of the company as and when permitted by the board.

Denise Durand and Jonathan Sive

CDH
CLIFFE DEKKER HOFMEYR

Investment Protection for trade-related infrastructure to realise the AfCFTA's full potential

On 1 January 2021 member states of the AfCFTA commenced trading under the terms of the AfCFTA Agreement.

The African Continental Free Trade Area (AfCFTA) is the continent's most ambitious economic project. Its general objective is to create the world's largest single market (by number of participating countries) for the trade in goods and services. This objective will be facilitated by the free movement of businesspeople to deepen economic integration on the African continent. The specific objectives of AfCFTA are to progressively eliminate tariff and non-tariff barriers on goods; progressively liberalise trade in services; and promote co-operation on investment, intellectual property rights and competition policy. On 1 January 2021 member states of the AfCFTA commenced trading under the terms of the AfCFTA Agreement. The AfCFTA currently consists of 36 of the 54 signatory states that have ratified the AfCFTA Agreement, with several states still in the process of ratification.

The realisation of AfCFTA's objectives would significantly contribute to the growth and development of African economies over the next few years. The World Bank estimates that the effective implementation of the AfCFTA will, amongst others, increase the volume of intra-Africa trade by 81% by 2035, and increase total African exports by 29%. That in turn implies an increase of GDP by $450 billion or 7% per annum, lifting at least 30 million people out of extreme poverty by 2035.

There are, however, several hurdles African states must overcome in the short to medium term in order to effectively implement and realise the objectives of AfCFTA. The biggest of these challenges will be dealing with the poor state of roads, railways and port facilities as well as telecommunications infrastructure. There is thus a need for significant investment in trade-related infrastructure through initiatives such as the AU's Programme for Infrastructure Development.

The Protocol on Investment (Protocol) is a critical instrument to foster intra-Africa investments. Its terms are, however, still being negotiated as part of phase II of AfCFTA's instruments. The Protocol is important because it will provide investors with additional legal protection to mitigate against investment risk on the continent. Such protections are expected to include several protection standards typically found in new generation investment treaties on the continent and to reflect the policy position of African states on investment protection as espoused in the Draft Pan African Code on Investment, 2015.

The Draft Pan African Code on Investment, 2015 (Draft Investment Code) sets out the policy position of African states on fundamental investment protection standards required on the continent and is generally viewed as the foundation for any future investment protection instruments on the continent. One would therefore expect that Protocol will reflect, to a large extent, the fundamental aspects of the Draft Investment Code.

CDH
CLIFFE DEKKER HOFMEYR

Investment Protection for trade-related infrastructure to realise the AfCFTA's full potential

...continued

The AfCFTA member states must fast track the negotiation of the Protocol as it will play a critical role in driving private sector investment in trade-related infrastructure.

The standards of protection that can be expected in the Protocol are, amongst others:

a) expropriation and compensation;

b) the Most Favoured Nation Treatment standard;

c) National Treatment standard; and

d) free transfer of funds.

Save for the standard listed above, it is unclear whether the Protocol will contain provisions such as Fair and Equitable Treatment (FET Standard) or, at the very least, the Minimum Standard of Protection standard found under customary international law, including whether intra-African investors will have recourse to investor-state arbitration or a pan-African investment court, or whether investors will be limited to domestic courts.

The Draft Investment Code appears to suggest that the Protocol will omit the FET Standard in totality and that access to investor-state arbitration will be subject to the policy position of a particular host government. It is not clear what role investor-state arbitration will ultimately play under the Protocol as a direct enforcement mechanism for investors of guarantees and/or commitment by host states. The current position expressed by African states in the Draft Investment Code is that investment disputes between investors and African states "*may be resolved through arbitration, subject to the applicable laws of the host State and/or the mutual agreement of the disputing parties, and subject to exhaustion of local remedies*". And so, it would seem that the Protocol will not, by default, introduce prior written consent for investment disputes to be submitted to arbitration by African states. The result being that there will be no automatic right by any intra-African investor to enforce the guarantees under the Protocol, watering down the guarantees and commitment of states to investors.

The AfCFTA member states must fast track the negotiation of the Protocol as it will play a critical role in driving private sector investment in trade-related infrastructure. There is also a need for more transparency by the AU on the status of various critical instruments of the AfCFTA such as the Protocol. Such transparency will ensure that the private sector can actively participate in providing the input and support necessary to ensure the AfCFTA's success.

Jackwell Feris

CDH
CLIFFE DEKKER HOFMEYR

Cliffe Dekker Hofmeyr's Dispute Resolution rankings in THE LEGAL 500 EMEA 2020:

CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.
Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2020.
Eugene Bester is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.
Jonathan Witts-Hewinson is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.
Pieter Conradie is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.
Rishaban Moodley is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.
Kgosi Nkaiseng is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.
Tim Smit is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.
Gareth Howard is ranked as a Rising Star in THE LEGAL 500 EMEA 2020.

CDH's Construction practice is ranked in Tier 2 in THE LEGAL 500 EMEA 2020.
Clive Rumsey is ranked as a Leading Individual in Construction in THE LEGAL 500 EMEA 2020.
Joe Whittle is recommended in Construction in THE LEGAL 500 EMEA 2020.
Timothy Baker is recommended in Construction in THE LEGAL 500 EMEA 2020.
Siviwe Mcetywa is ranked as a Rising Star in Construction in THE LEGAL 500 EMEA 2020.

CHAMBERS GLOBAL 2017 - 2020 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.
CHAMBERS GLOBAL 2018 - 2020 ranked our Dispute Resolution practice in Band 2: Insurance.
CHAMBERS GLOBAL 2020 ranked our Public Procurement sector in Band 2: Public Procurement.
CHAMBERS GLOBAL 2017 - 2020 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.
CHAMBERS GLOBAL 2020 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.
Pieter Conradie ranked by CHAMBERS GLOBAL 2019 - 2020 as Senior Statespeople: Dispute Resolution.
Clive Rumsey ranked by CHAMBERS GLOBAL 2013-2020 in Band 1: Construction and Band 4: Dispute Resolution.
Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 - 2020 in Band 2: Dispute Resolution.
Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2020 in Band 3: Dispute Resolution.
Joe Whittle ranked by CHAMBERS GLOBAL 2020 in Band 3: Construction
Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 as an up and coming Restructuring/Insolvency lawyer.

CDH IS THE EXCLUSIVE MEMBER FIRM IN AFRICA FOR THE:
Insuralex Global Insurance Lawyers Group
(the world's leading insurance and reinsurance law firm network).
CLICK HERE TO READ MORE

OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Thabile Fuhrmann
Chairperson
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Mongezi Mpahlwa
Director
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Clive Rumsey
Director
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba
Director
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit
Director
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse
Executive Consultant
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

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.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CDH
CLIFFE DEKKER HOFMEYR