

# CORPORATE & COMMERCIAL ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING  
KIETI LAW LLP, KENYA

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### Mischief managed: Directors' duties and section 75 of the Companies Act

A company is a transformative vehicle capable of providing stakeholders with great financial gain and serving as a catalyst for societal impact. Key to this are its distinct features as a business structure, one of them being the separation of ownership and control. Whilst shareholders own the venture, directors are responsible for directing and controlling the business and affairs of a company.



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## Mischief managed: Directors' duties and section 75 of the Companies Act

A company is a transformative vehicle capable of providing stakeholders with great financial gain and serving as a catalyst for societal impact. Key to this are its distinct features as a business structure, one of them being the separation of ownership and control. Whilst shareholders own the venture, directors are responsible for directing and controlling the business and affairs of a company.

Directors are continually held to higher standards, due to their ability to make vital decisions relating to the running of a company, as evidenced by section 75 of the Companies Act 71 of 2008 (Companies Act). A director must not place themselves in a position where their personal interests would conflict with their duties owed to the company, and to whom they stand as a fiduciary. This section regulates those instances. Any mischief in this regard is sought to be managed by disclosure and recusal.

Section 75 requires a director to disclose any personal financial interest that they or a related person has in respect of a matter to be considered at a meeting of the board of directors and recuse themselves from said meeting. Non-disclosure will render an agreement or transaction void

unless it has been subsequently ratified by an ordinary resolution of the shareholders following disclosure or if it has been declared valid by a court.

In terms of section 75(8) of the Companies Act, an interested person may apply to a court to have an agreement or transaction, approved by the board, declared valid. The Commercial Court recently grappled with the interpretation of section 75 in the context of such an application.

In *Atlas Park Holdings (Pty) Ltd v Tailifts South Africa (Pty) Ltd* [2022] 28817-2020 (GJ-Com) (*Atlas Park Holdings v Tailifts*), Mr van Breda on behalf of Atlas Park Holdings (Pty) Ltd (Applicant), brought an application in terms of section 75(8) to declare valid the terms of a lease agreement,

and a subsequent addendum to it, purportedly concluded between the Applicant as lessor and Tailifts South Africa (Pty) Ltd (Respondent), as lessee.

The application was brought due to van Breda's directorships with the Applicant, the Respondent, and certain upstream entities of the Applicant's, when the agreements were allegedly signed. The Applicant's legal contention, made through van Breda, was that it was entitled to relief under section 75(8) because all necessary disclosures were made in relation to the Applicant's direct personal financial interest, due to van Breda's directorship in the Respondent, and that to the extent any necessary disclosures were not made in relation to upstream entities of the Applicant, then this was only in relation to indirect interest which is excluded by section 75.

## Mischief managed: Directors' duties and section 75 of the Companies Act

CONTINUED

The key issue was whether a director must only disclose a direct personal financial interest or if the director knows a related person has in an agreement or transaction pursuant to section 75. In its consideration of the matter, the Commercial Court assessed the definition of "personal financial interest" in section 1 of the Companies Act, being:

*"...a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed but;*

*(b) does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002), unless that person has direct control over the investment decisions of that fund or investment;" (own emphasis).*

The court highlighted that the word "direct" cannot be taken out of this context and its interpretation must include an obligation to disclose if the transaction under consideration involves a related person which itself has a personal financial interest – which, by definition, requires the interest to be a direct and material one.

The court held that this interpretation strongly indicates that any shareholding held in a company, which has an interest in the relevant transaction, other than a unit trust or collect investment scheme, will amount to a direct personal financial interest requiring disclosure in terms of section 75. The court ruled that van Breda's directorship in upstream entities of the Applicant constituted knowledge of such a shareholding and the consequential personal financial interest. This required disclosure in terms of section 75 which was not forthcoming. The application was, as a result, dismissed with costs.

## 2021 WINNERS OF M&A DEAL FLOW 2021

### 2021

1<sup>st</sup> by M&A Deal Flow.  
2<sup>nd</sup> by General Corporate Finance Deal Flow.  
2<sup>nd</sup> by BEE Deal Value.  
3<sup>rd</sup> by General Corporate Finance Deal Flow.  
3<sup>rd</sup> by BEE Deal Flow.  
4<sup>th</sup> by M&A Deal Value.

### 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.

DealMakers



## Mischief managed: Directors' duties and section 75 of the Companies Act

CONTINUED

We have initial difficulties as to the factual basis for the judgment to conclude that control existed throughout the corporate chain. That aside, the judgment is seemingly at odds with the challenges and realities of commercial transactions. The court admits, in quoting Henochsberg, that in determining who the related persons are in a given matter the “*possible applications are almost endless*”.

Then, surely it was not the intention of the legislature to require blanket disclosure of all interests in all companies that a particular director may have, if the matter under consideration at a board meeting does not involve any of those companies. This would not be practical or desirable. If a related person to a director is not subject to the agreement or transaction at hand, the question then arises as to what purpose a blanket disclosure would serve. Trends in practice indicate that the market has interpreted section 75 to have a jurisdictional requirement which requires a related party to be a party to the transaction in order to be subject to its provisions. This case then, might not be the marauders map to managing section 75 that it strives to be.

On this topic of the connection between shareholders and the management of a company, the court interestingly disagreed with Henochsberg’s view that section 75 must be informed by and perhaps limited to the breaches of fiduciary duty enumerated in section 76 with the common law filling in the gaps. It argued that any potential mischief by directors must be managed and regulated to a higher standard than the provisions of section 76, which, in addition to directors, also deals with other members of a company’s management structure.

In the context of section 75 disclosures and other requirements in terms of the Companies Act, *Atlas Park Holdings v Tailifts* is an ardent reminder that the directors of a company are held to more exacting standards than other office bearers in terms of our law. Navigating such waters can often prove tricky and requires careful consideration.

**BRIAN JENNINGS AND  
VAUGHN RAJAH**

## 2022 RESULTS

### CHAMBERS GLOBAL 2021 - 2022

ranked our Corporate & Commercial practice in Band 1: corporate M&A and in Band 2 capital markets: Debt and capital markets: equity.

**Ian Hayes** ranked by **CHAMBERS GLOBAL 2022** in Band 1: corporate M&A.

**David Pinnock** ranked by **CHAMBERS GLOBAL 2022** in Band 1: corporate M&A: private equity.

**Johan Latsky** ranked by **CHAMBERS GLOBAL 2022** as a Senior Statesperson for capital markets: equity.

**Jackie King** ranked by **CHAMBERS GLOBAL 2022** in Band 2: capital markets: debt.

**Peter Hesseling** ranked by **CHAMBERS GLOBAL 2022** in Band 2: corporate M&A.

**Willem Jacobs** ranked by **CHAMBERS GLOBAL 2022** in Band 2: corporate/M&A and in Band 3: corporate/M&A: Private equity.

**Sammy Ndolo** ranked by **CHAMBERS GLOBAL 2022** in Band 4: corporate/M&A, Kenya.

**David Thompson** ranked by **CHAMBERS GLOBAL 2022** in Band 4: corporate/M&A.

**Gasant Orrie** ranked by **CHAMBERS GLOBAL 2022** in Band 5: corporate/M&A.



Cliffe Dekker Hofmeyr

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### BBBEE STATUS: LEVEL ONE 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.

### PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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