CORPORATE AND COMMERCIAL

IN THIS ISSUE

CAN SPECIAL RESOLUTION MATTERS BE PASSED BY "UNANIMOUS ASSENT"?

As a point of departure under the Companies Act, No 71 of 2008 (Companies Act), the board of directors of a company has full powers to manage and control the company's business and affairs, unless otherwise stated in the Companies Act or the company's memorandum of incorporation (MOI). In this regard, s66(1) of the Companies Act provides:

> "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 functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise."

For a number of matters and transactions a special resolution of shareholders is required. A special resolution entails a 75% majority vote, however this position can be altered in a company's MOI subject to there being at least a 10% margin between ordinary resolutions and special resolutions (s65). (It should be noted that for listed companies the threshold of 75% for special resolutions cannot be lowered as this is not permitted by the JSE Listings Requirements).

The special resolutions that are required under the Companies Act are set out in s65(11), and may be summarised as follows – a special resolution is required to:

- amend the company's MOI;
- ratify a consolidated revision of a company's MOI;
- ratify actions by the company or directors in excess of their authority, as contemplated in s20(2);
- approve an issue of shares or grant of rights in the circumstances contemplated in s41(1);
- approve an issue of shares or securities as contemplated in s41(3);
- authorise the board to grant financial assistance in the circumstances contemplated in s44 or s45;
- approve a decision of the board for re-acquisition of shares in the circumstances contemplated in s48(8);
- authorise the basis for compensation to directors;
- approve the voluntary winding up of the company;
- approve an application to transfer the registration of the company to a foreign jurisdiction;
- approve any proposed fundamental transaction; and
- revoke a special resolution which triggered appraisal rights under s164.

Sometimes a company will implement the above transactions (eg an issue of shares that required a special resolution under s41 or the advance of financial assistance under s44 or s45) and unintentionally omit to *formally* pass the requisite special resolution of its shareholders. However, it may well be that, on the facts, all of the shareholders knew about the transactions and at least informally consented to same. Can the principle of unanimous assent save the day and render such transactions valid and compliant despite the absence of a formal resolution (whether by way of a meeting or a "round robin")? The common law principle of unanimous assent is essentially to the effect that if all of the shareholders consented to the matter, even if informally or tacitly, that suffices as the requisite shareholder approval for purposes of company law, and the absence of a resolution is therefore not fatal to the transaction. This principle has been adopted and applied in a line of cases, most importantly *Gohlke and Schneider and Another v Westies Minerals (Edms) Bpk* 1970 (2) SA 685 (A).

At the outset it must be appreciated that there is Appellate Division authority to the effect that unanimous assent *cannot* suffice where the legislation requires a special resolution: In *Quadrangle Investments (Pty) Ltd v Witind Holdings Ltd* 1975 (1) SA 572 (A), decided some 40 years ago under the previous Companies Act 61 of 1973, the court stated that an

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amendment to the articles of association of a company required a special resolution under that Act and that this could not be done by unanimous assent. However, one aspect to be borne in mind is that under the previous Act all special resolutions had to be lodged and registered with the Registrar of Companies (the previously named "CIPRO") in order to be of any force and effect (the old s200, s202 and s203). There was therefore an important publicity principle behind special resolutions, and this appears to have been an important rationale behind the old case law around unanimous assent and special resolutions. Under the new Companies Act, there is no general requirement for special resolutions to be filed at the Companies and Intellectual Property Commission (CIPC) – it is only required to be filed if the specific provision dealing with that special resolution expressly states that filing is a requirement (eg amendments to the MOI – s16(9)).

It is interesting to note a few High Court judgements of late which arguably mark a silent "revolt" against judgements such as *Quadrangle*. In *Hartbees Brick Works (Pty) Ltd v Szamosvari* (1256/2012) [2014] ZAGPPHC 113 (14 March 2014), a case decided by the Pretoria High Court and still with reference to the previous Companies Act, a company with a sole shareholder sold and transferred its business without having passed or registered a special resolution under the old s228 for the disposal of the whole or greater part of the assets or undertaking of the company (the new provision is s112). However, the shareholder was at all times in control of the process and clearly knew about the transaction. The court held that the principle of "substantial compliance" applied: the section was clearly for the protection of shareholders; the shareholder in question was not prejudiced as he was aware of the transaction and was integrally involved in its negotiation and conclusion; therefore why should the disposal be attacked? Further, it should be noted that the old Act was still being applied, together with its requirement that special resolutions be registered. Although there was a sole shareholder, this did not seem to be the reason for the court's judgement – it simply relied on the concept of substantial compliance.

In the Johannesburg case of *Swissinc AG (Pty) Limited and Others v Jupiter 8 Commercial Trust and Others* (2013/4487) [2013] ZAGPJHC 296 (6 December 2013), financial assistance in connection with the acquisition of securities under s44 of the Companies Act was of concern. Again, a formal special resolution was not passed, but the court held that there was evidence of unanimous assent and that this was sufficient. The court in fact cited *Quadrangle* as support for the applicability of unanimous assent – the very case which held that one cannot use unanimous assent for special resolution matters! However, in *Bavasah v Stirton and Another* [2014] 2 All SA 51 (WCC) (12 February 2014), dealing with an issue of shares, the Cape Town High Court also cited *Quadrangle* and expressed doubt around whether unanimous assent could be applied to special resolution matters, but it did not really unpack or decide the legal question as on the facts there was no unanimous assent in any event.

Certainly for matters which still require a filing at the CIPC under the Companies Act (amendments to the MOI and winding-up resolutions) it must be accepted that the reasoning in *Quadrangle* continues to apply: there is a publicity principle infused into the relevant provision and therefore there cannot be an amendment of an MOI or a voluntary winding up without filing a special resolution. Perhaps for fundamental transactions one would also argue that unanimous assent is not sufficient given the very specific procedures and disclosures that must be made (but even that is debatable). What about all other special resolution matters? The trend of case law is interesting in this regard, and the big question is whether the absence of a requirement to file at the CIPC is potentially decisive. In a given case (and probably as a last resort) one could rely on cases like Swissinc and Hartbees and explore whether unanimous assent can save the transaction in question from invalidity. However, until we have a definitive view from the Supreme Court of Appeal on this matter, with an express "overruling" or qualification of *Quadrangle*, the prudent and conservative view is that passing a special resolution is a mandatory statutory requirement which cannot be fulfilled through informal unanimous assent.

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