

8 NOVEMBER 2017



CORPORATE & COMMERCIAL ALERT

IN THIS ISSUE

CONTESTING THE VALIDITY OF PROXY VOTES – THE SCA'S JUDGMENT IN CLEARWATER ESTATES

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Section 58(1) of the Companies Act, No 71 of 2008 (Companies Act) deals with the appointment of a “proxy”, who is essentially an individual to act in the stead of a shareholder for purposes of, among other things, voting on resolutions of the company.

In terms of s58(1) of the Companies Act, “At any time, a shareholder of a company may appoint any individual, including an individual who is not a shareholder of that company, as a proxy to:

- (a) participate in, and speak and vote at, a shareholders meeting on behalf of the shareholder; or
- (b) give or withhold written consent on behalf of the shareholder to a decision contemplated in section 60.”

These provisions appear relatively straightforward and uncontroversial. However, the Supreme Court of Appeal has recently handed down judgment in a matter about the validity of proxy votes.

Clearwater Estates

Barry v Clearwater Estates NPC & Others 2017 (3) SA 364 (SCA) involved a dispute as to the validity of the appointment of a proxy, and the resulting validity of a resolution passed at a home owners association meeting.

In short, it was contended that proxy forms submitted on the day of the meeting were invalid and therefore that the necessary quorum had not been met, and any resolutions passed invalid.

A central question that arose was whether a company’s memorandum of incorporation, in this case that of Clearwater Estates NPC, can validly alter s58(1) by stipulating a cut-off time before the meeting by which the proxy forms must have been received. In the present case, proxies were to be delivered not less than 48 hours before the meeting. In short, s58(1) refers to the fact a shareholder of a company may “at any time” appoint a proxy, whereas Clearwater Estates NPC had imposed a limit of 48 hours’ notice prior to the meeting.

Section 1 of the Companies Act distinguishes between alterable and unalterable provisions (i.e. those provisions that can and cannot be amended in a company’s memorandum of incorporation). S1 of the Companies Act defines “unalterable provisions” as a provision that “does not expressly contemplate that its effect on any particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by a company’s memorandum of incorporation.”

Section 15(2)(d) of the Companies Act provides that the memorandum of a company “may not include any provision that negates, restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision” of the Act. Section 58(1) is one such unalterable provision.

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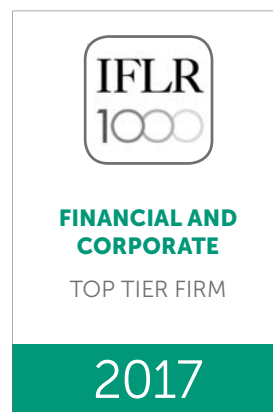
In sum, therefore, the SCA held that s58(1) cannot be altered and, accordingly, that the appointment of a proxy may take place at any time, as per the language of the section. In doing so, the SCA acknowledged that this interpretation may impose a significant practical administrative burden on organisations, in particular those with large numbers of shareholders or members, as with no cut-off for proxy appointments, appointments (and the resulting necessary validations prior to quorum and voting) may be made shortly before or at meetings. It noted, however, that any remedy would need to be made through legislative intervention, rather than by any judicial interpretation.

Conclusion

Proxy appointments are a critical tool to ensuring that meetings proceed and decisions are made, where shareholders/members cannot personally attend. Chairpersons will, however, need to be prepared for the appointment of proxies on the day of meetings, and not receiving advance warning of proxy appointments. Ensuring that sufficient administrative assistance to receive and verify proxies at a meeting will need to be provided for.

Companies also need to be aware of the unalterable provisions of the Companies Act in order to ensure that these are complied with.

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