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# DISPUTE RESOLUTION ALERT

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ISSUE

## MINORITY SHAREHOLDERS' APPRAISAL RIGHTS: THE GIFT THAT KEEPS ON GIVING

The introduction of a shareholder's appraisal rights by s164 of the Companies Act, No 71 of 2008 (Act) has been highlighted by the Department of Trade and Industry as an indication of the legislature's commitment to minority shareholder protection.

# MINORITY SHAREHOLDERS' APPRAISAL RIGHTS: THE GIFT THAT KEEPS ON GIVING

*Where a company resolves, in terms of s112 of the Act, to dispose of all or a greater part of its assets or undertaking, subject to compliance with various statutory requirements, an objecting shareholder may demand that the company pay the objecting shareholder fair value for its shares.*

*It was generally accepted that the appraisal rights, established in terms of s164 of the Act, are only granted to shareholders in the disposing company. This generally held view was successfully challenged in a recent matter that came before the Western Cape High Court.*

The introduction of a shareholder's appraisal rights by s164 of the Companies Act, No 71 of 2008 (Act) has been highlighted by the Department of Trade and Industry as an indication of the legislature's commitment to minority shareholder protection.

Section 164 affords a shareholder, in certain circumstances, the right to demand that a company pay to it the fair value for all shares held by such shareholder in the company.

One of the circumstances triggering a shareholder's appraisal rights is when a company gives notice to shareholders of a meeting to consider adopting a resolution to enter into a transaction contemplated in inter alia s112 of the Act.

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This generally held view was successfully challenged in a recent matter that came before the Western Cape High Court in the unreported judgment of *Abraham Albertus Cilliers v La Concorde Holdings Limited and Others* [Case Number 23029/2016], delivered on 14 June 2018.

The court was required to determine whether or not shareholder appraisal rights were established in favour of a dissenting minority shareholders of a holding company, in terms of s164 of the Act, where the holding company's subsidiary disposes of all or the greater part of its assets or undertaking, in circumstances where, having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary constituted a disposal of all or the greater part of the assets or undertaking of the holding company, in terms of s115(2)(b) of the Act.

In the *Cilliers* matter, Mr Abraham Albertus Cilliers (Applicant) was a minority shareholder in the first respondent, La Concorde Holdings Ltd (Holding Company).

The Holding Company owned 100% of the shares in the capital of its wholly owned subsidiary, KVVV SA (Pty) Ltd (Subsidiary), together with a significant interest in KVV Intellectual (Pty) Ltd (Third Respondent).

On 11 May 2016, SENS announced that the Subsidiary would dispose of all its operational assets to a third party.



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# MINORITY SHAREHOLDERS' APPRAISAL RIGHTS: THE GIFT THAT KEEPS ON GIVING

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*The question for the court's determination was thus whether s164 of the Act affords appraisal rights to the dissenting shareholders of the holding company whose subsidiary has implemented a transaction disposing of all or the greater part of its assets or undertaking.*

On 29 June 2016, the Holding Company gave notice to its shareholders of a general meeting, held on 29 July 2016, at which resolutions were put to the holding company's shareholders, on the basis that the Subsidiary's disposal by the subsidiary constituted a disposal of all or the greater part of the assets or undertaking of both the Subsidiary and Holding Company, regard being had to the latter's consolidated financial statements, as required by s115(2)(b) of the Act.

At the meeting, the Applicant, together with the fourth to ninth respondents, in their capacity as shareholders of the Holding Company, objected to and voted against the resolutions.

The question for the court's determination was thus whether s164 of the Act affords appraisal rights to the dissenting shareholders of the holding company whose subsidiary has implemented a transaction disposing of all or the greater part of its assets or undertaking in circumstances envisaged in s115(2)(b) of the Act.

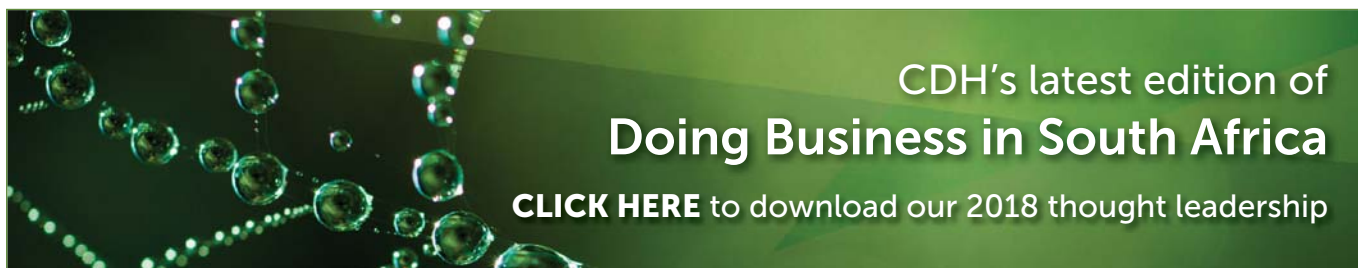
The applicant argued that the point of departure was s115(8) of the Act, which authorises the holder of any voting rights in a company to seek relief in terms of s164 of the Act.

Counsel for certain of the respondents argued that a distinction should be drawn between the words "the company" and "a company" used in the section, and that the two references in the section should be interpreted to mean "the disposing company", not "the holding company" and that a dissenting shareholder of the disposing company has an appraisal right if the company in which it holds shares, adopted a resolution contemplated in s112 of the Act, as resolved by the Subsidiary in this matter.

The court, taking into account the context, purpose and background of the Act, held that the only sensible meaning to be ascribed to the phrase, "the holder of any voting rights in a company", is exactly what it says, and must be what the legislature intended it to mean. The court found that if the legislature intended the meaning of "the holder of any voting rights in a company" to be limited to "the holder of voting rights in the disposing company", it would have said so.

The court noted that the relevant provisions of the Act regulating the disposal of all or the greater part of the assets or undertaking are s112, s113, s114, s115 and s164 of the Act and these sections are interrelated.

In this regard, the court reasoned that s112 of the Act is in fact subject to the provisions of s115 of the Act.



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# MINORITY SHAREHOLDERS' APPRAISAL RIGHTS: THE GIFT THAT KEEPS ON GIVING

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*The court held that the transaction contemplated by the Subsidiary was a transaction in terms of s112 of the Act.*



The court held that the transaction contemplated by the Subsidiary was a transaction in terms of s112 of the Act. Section 112 does not create an appraisal right; it contemplates the adoption of a special resolution by the shareholders, approving the disposal of all or the greater part of the assets or undertaking of a company, in terms of s115 of the Act.

Section 115 in turn sets out the manner in which shareholder approval must be obtained, but so the court found, creates a requirement and establishes an obligation for the shareholders in the disposing company's holding company if, having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary constitutes a disposal of all or the greater part of the assets or undertaking of the holding company.

The disposing company, as a subsidiary, may not proceed with the transaction unless a special resolution of the holding company approves it. If the shareholders of the holding company had no right to vote on the matter, then s112 and s115 would be rendered meaningless. The court reasoned

that if the shareholders of the holding company do have the right to vote on the matter, then the procedure stipulated in s115(2)(a) and (b) must be followed and the moment the shareholders are given notice of a meeting to be held to consider adopting a resolution to enter into a transaction in terms of s112, the rights in terms of s164 are triggered by s164(2).

Taking into account the purpose of appraisal rights, as a mechanism to protect all shareholders with voting rights, the court found that a sensible and meaningful interpretation to be given to s164, read in conjunction with s112; and s115 of the Act, is that the applicant has an appraisal right as a shareholder in the holding company, when its subsidiary disposes of all or the greater part of its assets or undertaking, in circumstances where s115(2)(b) of the Act is applicable. The disposal of the assets of the subsidiary in this context, will have a material effect on the investment of the shareholders in the holding company.

This is indeed good news for minority shareholders.

*Lucinde Rhodie*

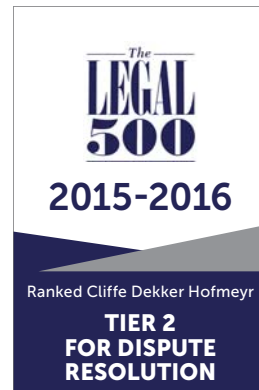
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