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REAL ESTATE ALERT

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PULL YOUR WEIGHT, BUT ONLY IN MODERATION - THE EXERCISE OF WEIGHTED VOTING POWER BY DEVELOPERS OF SECTIONAL TITLE SCHEMES

In the recent case of *Wilhelm Schreck Croucamp and Others v Hazeldean Retreat Partnership and Others*, the High Court considered the lawfulness of the exercise by the developer of a sectional title retirement estate of its weighted voting power in the passing of a resolution to reappoint a particular healthcare provider in terms of a service provision agreement for the purposes of providing frail care services to the residents of the development.

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The healthcare provider issued summons against the developer and the home owners' association wherein it claimed payment of damages amounting to approximately R40 million.

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In the recent case of *Wilhelm Schreck Croucamp and Others v Hazeldean Retreat Partnership and Others*, the High Court considered the lawfulness of the exercise by the developer of a sectional title retirement estate of its weighted voting power in the passing of a resolution to reappoint a particular healthcare provider in terms of a service provision agreement for the purposes of providing frail care services to the residents of the development.

The residents of the development were unsatisfied with the services provided by the healthcare provider in question - at a special general meeting of the home owners' association, 91% of the residents voted in favour of removing the healthcare provider. The developer then terminated the healthcare provider's services on the grounds that it had breached its obligations.

The healthcare provider then issued summons against the developer and the home owners' association wherein it claimed payment of damages amounting to approximately R40 million for repudiation of the service provision agreement, which it alleged was unlawful since the healthcare provider had not been placed on terms to rectify its breach. The healthcare provider was willing to settle its claim if it was reinstated in terms of a new service provision agreement for the establishment of a healthcare co-ordinating committee to better protect the residents' rights.

In considering the reappointment of the healthcare provider, the developer determined that the claim against the home owners' association would be gravely prejudicial to its members and the development at large. The developer took various steps to persuade the home owners' association of the benefits of reappointing the healthcare provider, calling various meetings and information sessions on the matter. Ultimately the healthcare provider placed the developer on terms in respect of its claim and the developer was forced to make a decision.

The developer delivered voting packs to all owners of units to obtain voting by round robin resolution in terms of s60 of the Companies Act. The proposed resolution stated that the healthcare provider be reappointed in terms of a new service provision agreement with the developer and the home owners association and provided for other administrative requirements in connection therewith.

The developer utilised its weighted vote, the resolutions were adopted and the damages claim was settled. The owners of units then issued an application to declare that the resolutions were unlawful and invalid, contending that the round robin resolution procedure in terms of s60 of the Companies Act could not be unilaterally invoked by the developer but had to apply to the board of directors to do so. The court disagreed with this interpretation and held that the purpose of the section had to be taken into account, which is to obtain the same result that a formal shareholders' meeting would achieve, but in an informal manner, thus the court held that the developer was acting within its rights in terms of s60 of the Companies Act. The fact that a higher bar is set for the adoption of a resolution in terms of s60 (the support of a majority of persons entitled to vote, rather than the majority of persons that actually voted) provides adequate protection to shareholders.

The owners also contended that the resolutions should be declared to be oppressive or prejudicial conduct that

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Arguably the most important feature of this judgment was the court's emphasis that this was the first occasion in nine years that the developer utilised its weighted vote.

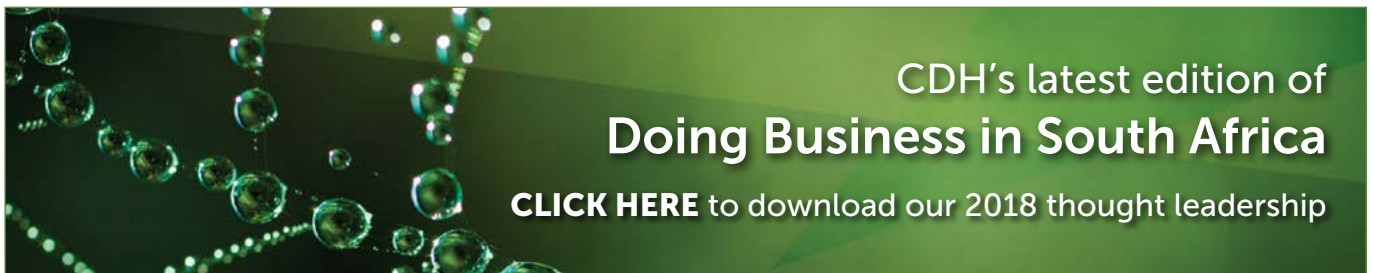


unfairly disregards the rights of the owners in terms of s163 of the Companies Act. The court held that in this regard, the focus should be on whether the result of the resolution was oppressive or unfairly prejudicial to or unfairly disregards the interests of the applicants- the conduct need not be unlawful. The court further held that it is a fundamental corporate law principle that by becoming a shareholder, one undertakes to be bound by the decision of the majority. A minority shareholder cannot obtain relief merely because it is outvoted on a certain issue or dissatisfied with the conduct of the company's affairs. Only conduct which prejudicially affects shareholders or disregards their interests will entitle them to relief and only conduct which is detrimental to the financial interests of a shareholder is relevant.

Arguably the most important feature of this judgment was the court's emphasis that this was the first occasion in nine years that the developer utilised its weighted vote in concluding that there was no basis upon which the court could find that the utilisation of the developer's weighted vote was oppressive or unfairly prejudicial conduct that unfairly disregarded the owners' rights.

This judgment illustrates that our courts regard the exercise of weighted voting power by a developer (even to adopt a resolution that may be at odds with the general sentiment of the home owners in such development) as lawful provided that it is exercised in moderation and not in extreme cases where the exercise of the weighted vote would be blatantly detrimental towards the financial interests of the home owners as minority shareholders.

Melissa Peneda and John Webber



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