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CORPORATE & COMMERCIAL ALERT

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Approval of special resolution by court - Condonation for non-compliance with 10 day cut-off period

In the recent case of *Marble Head Investments (Pty) Ltd and Others v Niveus Investments and Another* [2020] ZAWCHC 36 (28 April 2020), the High Court considered whether failure to comply with the 10 day cut-off period in section 115(3)(b) of the Act, may be condoned. In this matter, Marble Head Investments (Pty) Ltd, Nport Investment Holdings (Pty) Ltd and Estelle Wasserfall made application in terms of section 115(3)(b) and section 115(6) for leave to apply to court for a review of resolutions passed by the shareholders of Niveus Investments Ltd, including a special resolution approving a scheme of arrangement.

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Approval of special resolution by court - Condonation for non-compliance with 10 day cut-off period

In particular, section 115(3)(b) of the Act provides that despite the adoption of the requisite special resolution for a fundamental transaction, a company may not proceed to implement the transaction without the approval of a court if the court, on an application within *10 business days* after the vote by any person who voted against the resolution, grants that person leave, in terms of section 115(6), to apply to a court for a review of the transaction.

Under section 115(2) of the Companies Act 71 of 2008 (Act), a fundamental transaction (namely, transactions that involve a disposal of all or the greater part of the assets or undertaking of a company, an amalgamation or merger or a scheme of arrangement) must be approved by a special resolution, at a meeting called for that purpose. Such resolution may in certain circumstances be required to be reviewed and confirmed by a court if there are objections to the resolution by minority shareholders.

In particular, section 115(3)(b) of the Act provides that despite the adoption of the requisite special resolution for a fundamental transaction, a company may not proceed to implement the transaction without the approval of a court if the court, on an application within *10 business days* after the vote by any person who voted against the resolution, grants that person leave, in terms of section 115(6), to apply to a court for a review of the transaction. The court may grant leave in terms of section 115(6) only if it is satisfied that the applicant is acting in good faith, appears prepared and able to sustain the proceedings and has alleged facts which, if proved, would support an order to set aside the resolution.

In the recent case of *Marble Head Investments (Pty) Ltd and Others v Niveus Investments and Another* [2020] ZAWCHC 36 (28 April 2020), the High Court considered whether failure to comply with the 10 day cut-off period

in section 115(3)(b) of the Act, may be condoned. In this matter, Marble Head Investments (Pty) Ltd, Nport Investment Holdings (Pty) Ltd and Estelle Wasserfall (Beneficial Shareholders) made application in terms of section 115(3)(b) and section 115(6) for leave to apply to court for a review of resolutions passed by the shareholders of Niveus Investments Ltd (Niveus), including a special resolution approving a scheme of arrangement.

It was common cause that the Beneficial Shareholders were all beneficial owners of their shares in Niveus and that the registered shareholders were their nominees, namely Ferbros Nominees (Pty) Ltd and Standard Bank Nominees (RF) (Pty) Ltd (Nominee Shareholders). When the applicable resolutions were put to the shareholders of Niveus, it was accordingly the Nominee Shareholders who voted against the resolutions. Given that the Beneficial Shareholders were not the persons who "voted against" the resolutions, it became apparent that the Beneficial Shareholders did not qualify to bring the application. Subsequently, the Nominee Shareholders brought applications to intervene and, to the extent necessary, sought condonation for their non-compliance with the time period provided for in section 115(3)(b) of the Act.

The respondents argued that the court did not have the power to condone non-compliance with the time period in section 115(3)(b) of the Act, and that no proper case had been made out for condonation. Sievers AJ disagreed

Approval of special resolution by court - Condonation for non-compliance with 10 day cut-off period...continued

Even if a cautious company were to postpone the implementation of a fundamental transaction until the expiry of the prescribed 10 business day period, it is now conceivable that minority shareholders may approach the court for relief after the fundamental transaction has already been implemented.

and, citing *Toyota South Africa Motors (Pty) Ltd v Commissioner, SARS* 2002 (4) SA 281 (SCA) and *Samancor Group Pension Fund v Samancor Chrome* 2010 (4) SA 540 (SCA), found that the High Court, because of its inherent jurisdiction, has powers to govern its own procedures and that the said jurisdiction pertains not only to non-compliance with the Rules of the Court but also to statutory time limits.

The court further found that:

'[i]n the present matter a condonation power would not require any engineering to be effected to other parts of section 115 and thus the exclusion of a power to condone need not be implied into the subsection by way of necessary construction. To do so would preclude a person from pursuing a remedy before a court. To imply such an inclusion would be to adopt an approach contrary to that prescribed in section 5(1) of the Act, which requires the Act to be interpreted and applied in a manner which gives effect to the purposes set out in section 7'.

In considering whether a basis for condonation had been established, the court stated that an applicant is required to sufficiently explain the reason for the delay, satisfy the court that its action is not ill-founded and that the granting of the indulgence sought does not prejudice

the other parties in a way that cannot be compensated for by a suitable order as to postponement and costs. The court was satisfied that such grounds existed and that the requirements of section 115(6) of the Act had been met. As such, the court granted the Nominee Shareholders leave in terms of section 115(3)(b) and section 115(6) to apply to court for a review of the special resolution approving the scheme of arrangement in respect of Niveus.

The finding that non-compliance with the time period in section 115(3)(b) of the Act may be condoned, presents a risk in the implementation of fundamental transactions. There is now less certainty that minority shareholders will not approach the court for a review of a transaction after the permitted time period. Even if a cautious company were to postpone the implementation of a fundamental transaction until the expiry of the prescribed 10 business day period, it is now conceivable that minority shareholders may approach the court for relief after the fundamental transaction has already been implemented. Nevertheless, transacting parties can take comfort from the fact that the courts will only grant condonation in exceptional circumstances (such as those that were present in *Marble Head Investments*).

**Christelle Wood and
Ashlyn Quenet-Meintjes**

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BBBEE STATUS: LEVEL TWO 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.

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