18 JUNE 2020

CORPORATE & COMMERCIAL AND DISPUTE RESOLUTION **ALERT**

IN THIS **ISSUE**

CDH
CLIFFE DEKKER HOFMEYR

CLICK HERE

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

Decisions by companies during COVID-19 Lockdown: Oppressive or prejudicial?

In the circumstances, there will be situations where questions arise as to whether the decisions made were oppressive or unfairly prejudicial to shareholders or the company itself, possibly triggering the potential for seeking the court's protection under section 163 of the Companies Act 71 of 2008 (Act).

In Alert Level 3 lockdown there remains stringent parameters on how companies, even though now permitted to trade, may conduct their business operations.

During lockdown, companies have been required to make difficult, long-term decisions to ensure their continued survival during, and post lockdown. Given the decisive action by the government to place the country in lockdown, companies had very limited time in which to set contingency plans into place. In the circumstances, there will be situations where questions arise as to whether the decisions made were oppressive or unfairly prejudicial to shareholders or the company itself, possibly triggering the potential for seeking the court's protection under section 163 of the Companies Act 71 of 2008 (Act).

Courts generally do not wish to interfere with the affairs of a company unless absolutely necessary. The courts are also likely to be sympathetic to the circumstances companies find themselves in during these unusual and unforeseen times. That being said, they will also protect shareholders and the company as required by section 163. Fortunately for both the decision makers and those feeling unfairly repressed by those decisions, section 163 provides the court with wide and flexible remedial powers, allowing for the accommodation of the facts of each case. This alert serves to set out when the oppression remedy is available to shareholders and directors and what type of relief the court may grant.

What is the oppression remedy?

Section 163(1) provides that a shareholder or a director of a company may apply to a court for relief if:

> *"(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;*
>
> *(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant; or*
>
> *(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant."*

It is clear that whomever wishes to make use of the remedy set out in section 163 (as partially quoted above) is required to prove that the relevant conduct (complained of) was *"oppressive"* or *"unfairly prejudicial"*. The requirement is not that the conduct need necessarily be unlawful but is focused on the equitable nature of the conduct.

CDH
CLIFFE DEKKER HOFMEYR

Decisions by companies during COVID-19 Lockdown: Oppressive or prejudicial?*...continued*

The provisions of section 163 are not only limited to those conducts in respect of the company itself but extend to persons related to such company, which means that an applicant may obtain relief in respect of the 'conduct' of a holding company or a subsidiary company towards such company, provided that such 'conduct' is oppressive, prejudicial and/or unfairly disregards the interests of the company.

In order to be able to make use of this remedy, an applicant is required to show:

(i) the occurrence of a relevant 'conduct' (being either an act or omission, conduct of business, or exercise of powers by a director or prescribed officer of the company or a related persons); and

(ii) that such 'related person' was oppressive, unfairly prejudicial or unfairly disregarded the interests of the applicant.

Was there a relevant 'conduct'?

Section 163 envisages three different types of relevant 'conduct'.

Firstly, conduct which is the result of an act or omission on the part of the company. This conduct includes resolutions passed by the board of directors of a company or acts of an individual authorised by the board or to whom powers have been delegated.

The second category is the conduct of the business, which relates to the way in which the business of the company, or a related person, is being or has been carried on or conducted. The reference to 'business of the company' relates to such company's external activities but is not necessarily limited to its financial affairs. In some instances, the oppressive conduct of the business of the company may be done by way of the omission of certain acts. This would be where directors are inactive or do nothing to defend a company where they ought to do so.

It must be noted that this conduct alone will not result in an applicant being entitled to relief under the oppression remedy. The applicant will in addition, be required to prove that such conduct (or lack thereof) was in fact oppressive, unfairly prejudicial and/or unfairly disregards the interests of the company.

Thirdly, the exercise of powers of a director or prescribed officer, which includes those instances where a director or prescribed officer exercise their powers for purposes other than those contemplated in the first and second categories detailed above. This will include all other acts or omissions taken by directors or prescribed officers of the company which cannot be said to be in respect of the business of the company or an act or omission of the company or a related person.

The provisions of section 163 are not only limited to those conducts in respect of the company itself but extend to persons related to such company, which means that an applicant may obtain relief in respect of the 'conduct' of a holding company or a subsidiary company (or other related person to such company) towards such company, provided that such 'conduct' is oppressive, prejudicial and/or unfairly disregards the interests of the company.

Decisions by companies during COVID-19 Lockdown: Oppressive or prejudicial?*...continued*

Once the applicant has proved that the act or omission undertaken by the company falls within one of the categories indicated in section 163, the applicant will be required to prove that such conduct is oppressive, unfairly prejudicial or unfairly disregards the interests of the company.

Is the conduct oppressive, unfairly prejudicial, and unfairly disregards interests?

Once the applicant has proved that the act or omission undertaken by the company falls within one of the categories indicated in section 163, the applicant will be required to prove that such conduct is oppressive, unfairly prejudicial or unfairly disregards the interests of the company.

The concepts of oppression, unfair prejudice or the unfair disregard of interest have not been defined in the Act. The Supreme Court of Appeal (SCA) has confirmed that "*interest*" is more broadly defined than "*rights*", allowing section 163 to be construed in a manner that advances the remedy it provides rather than limit it (*Grancy Property Ltd v Manala and Others* 2015 (3) SA 313 (SCA) [26] pages 323 and 324). It must be reiterated that the concepts in question are not necessarily concerned with the unlawfulness of the conduct complained of but with the fairness of such conduct. Where the conduct of the company departs from what is considered fair in the circumstances or amounts to unfair discrimination, the applicant shall be entitled to relief under section 163.

The SCA has also stated that "*it is not the motive for the conduct complained of that the court must look at but the conduct itself and the effect which it has on the other members of the company*" (Grancy [27] at page 324). COVID-19 will therefore not excuse bad decision making.

Notwithstanding that section 163 is widely formulated, it must be kept in mind that the acts or omissions of the majority shareholders will be evaluated in accordance with the principle that when one undertakes to become a shareholder of a company you invariably undertake to accept the decisions taken by the majority shareholders and/or the companies duly elected board of directors.

Relief sought

The general approach of courts when it comes to disputes between shareholders (in particular) is that the courts try not to interfere in the innerworkings of the company and will only do so if absolutely required.

Section 163, however, when successfully invoked provides the court with a discretion to determine an interim or final relief which it deems fit in the circumstances. Such interim or final relief may include measures which would be considered an interference in the innerworkings of a company. The SCA confirmed that "*the provisions of section 163 of the Act are of wide import and constitute a flexible mechanism*" (Grancy [31] page 325).

Section 163(2) sets out a list of remedies which the court may grant. These include, amongst others, an order appointing a liquidator, an order appointing directors in place of or in addition to all or any of the current directors of the company (in the Grancy case, the court itself appointed

CDH
CLIFFE DEKKER HOFMEYR

Decisions by companies during COVID-19 Lockdown: Oppressive or prejudicial?*...continued*

COVID-19 will not excuse oppressive or unfairly prejudicial behaviour, no matter the circumstances. Decisions therefore need to be made carefully, *albeit* efficiently.

two independent directors of the company, and limited the circumstances in which they could be removed), an order varying or setting aside an agreement or transaction. In addition, the court may even order the amendment of a shareholder's agreement.

Section 163(2) makes it clear that this list is not exhaustive, *"the court may make any interim or final order it considers fit, including...[the above listed remedies]"*. Even with the court's potential sympathy in mind in these trying times, directors' decisions will not be immune from scrutiny, more especially so because of their long-term consequences. It is therefore more important in these times to consider what the impact of decisions made as a result of COVID-19 will be, not only on the company, but also on the shareholders and other affected parties, including subsidiary companies.

COVID-19 will not excuse oppressive or unfairly prejudicial behaviour, no matter the circumstances. Decisions therefore need to be made carefully, *albeit* efficiently.

Kendall Keanly and Belinda Scriba

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

Willem Jacobs
National Practice Head
Director
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com

David Thompson
Regional Practice Head
Director
Corporate & Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@cdhlegal.com

Mmatiki Aphiri
Director
T +27 (0)11 562 1087
M +27 (0)83 497 3718
E mmatiki.aphiri@cdhlegal.com

Roelof Bonnet
Director
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@cdhlegal.com

Tessa Brewis
Director
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Etta Chang
Director
T +27 (0)11 562 1432
M +27 (0)72 879 1281
E etta.chang@cdhlegal.com

Vivien Chaplin
Director
T +27 (0)11 562 1556
M +27 (0)82 411 1305
E vivien.chaplin@cdhlegal.com

Clem Daniel
Director
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Jenni Darling
Director
T +27 (0)11 562 1878
M +27 (0)82 826 9055
E jenni.darling@cdhlegal.com

André de Lange
Director
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Werner de Waal
Director
T +27 (0)21 481 6435
M +27 (0)82 466 4443
E werner.dewaal@cdhlegal.com

Emma Dempster
Projects & Energy
Director
T +27 (0)11 562 1194
M +27 (0)79 491 7683
E emma.dempster@cdhlegal.com

Lilia Franca
Director
T +27 (0)11 562 1148
M +27 (0)82 564 1407
E lilia.franca@cdhlegal.com

John Gillmer
Director
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Jay Govender
Projects & Energy Sector Head
Director
T +27 (0)11 562 1387
M +27 (0)82 467 7981
E jay.govender@cdhlegal.com

Johan Green
Director
T +27 (0)21 405 6200
M +27 (0)73 304 6663
E johan.green@cdhlegal.com

Allan Hannie
Director
T +27 (0)21 405 6010
M +27 (0)82 373 2895
E allan.hannie@cdhlegal.com

Peter Hesseling
Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesseling@cdhlegal.com

Quintin Honey
Director
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Kendall Keanly
Director
T +27 (0)21 481 6411
M +27 (0)83 645 5044
E kendall.keanly@cdhlegal.com

Rachel Kelly
Director
T +27 (0)11 562 1165
M +27 (0)82 788 0367
E rachel.kelly@cdhlegal.com

Yaniv Kleitman
Director
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige
Director
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

Johan Latsky
Executive Consultant
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@cdhlegal.com

Giada Masina
Director
T +27 (0)11 562 1221
M +27 (0)72 573 1909
E giada.masina@cdhlegal.com

Nkcubeko Mbambisa
Director
T +27 (0)21 481 6352
M +27 (0)82 058 4268
E nkcubeko.mbambisa@cdhlegal.com

Nonhla Mchunu
Director
T +27 (0)11 562 1228
M +27 (0)82 314 4297
E nonhla.mchunu@cdhlegal.com

Ayanda Mhlongo
Director
T +27 (0)21 481 6436
M +27 (0)82 787 9543
E ayanda.mhlongo@cdhlegal.com

William Midgley
Director
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@cdhlegal.com

Tessmerica Moodley
Director
T +27 (0)21 481 6397
M +27 (0)73 401 2488
E tessmerica.moodley@cdhlegal.com

Anita Moolman
Director
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

Jerain Naidoo
Director
T +27 (0)11 562 1214
M +27 (0)82 788 5533
E jerain.naidoo@cdhlegal.com

Francis Newham
Executive Consultant
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

Gasant Orrie
Cape Managing Partner
Director
T +27 (0)21 405 6044
M +27 (0)83 282 4550
E gasant.orrie@cdhlegal.com

Verushca Pillay
Director
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@cdhlegal.com

David Pinnock
Director
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid
Director
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Megan Rodgers
Oil & Gas Sector Head
Director
T +27 (0)21 481 6429
M +27 (0) 79 877 8870
E megan.rodgers@cdhlegal.com

Ludwig Smith
Director
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Ben Strauss
Director
T +27 (0)21 405 6063
M +27 (0)72 190 9071
E ben.strauss@cdhlegal.com

Tamarin Tosen
Director
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum
Director
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Roux van der Merwe
Director
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Charl Williams
Director
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Thabile Fuhrmann
Chairperson
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Mongezi Mpahlwa
Director
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Belinda Scriba
Director
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit
Director
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse
Executive Consultant
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

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.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com