

IN THIS ISSUE

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CORPORATE & COMMERCIAL ALERT

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It is trite that a company's board is the controlling mind behind every action taken by a company. In orchestrating the company's affairs, board members must act in the best interests of the company and may not participate in decisions which further their own personal financial interests. However, when two group companies contract with each other where board members serve on both entities, this potential conflict of interest becomes unavoidable. The increasing frequency of this occurrence has necessitated a closer look at the disclosure and recusal requirement in section 75(5) of the Companies Act 71 of 2008 (Companies Act) and how these procedural aspects are to be dealt with.

SECTION 75(5) OF THE COMPANIES ACT

In summary, section 75(5) of the Companies Act provides that, if a director of a company has a "personal financial interest" in a matter to be considered at a meeting of the board, or knows that a "related person" has a personal financial interest in the matter, that director must recuse him/herself from a meeting where the matter is to be decided.

Section 1 of the Companies Act defines "personal financial interest", when used with respect to any person, as "a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed". This will often be the case for both parties to commercial contracts.

Importantly, section 75(1)(b) of the Companies Act provides that a "'related person', when used in reference to a director, has the meaning set out in section 1, but also includes a second company of which the director or a related person is also a director".

It is an all too common occurrence that certain members of the board of company A also serve as members on the board for its sister company B (common directors). In this situation, section 75(1)(b) prevents these common directors from voting

as regards agreements between company A and company B, as company B would be considered "related" to company A. This section applies notwithstanding that such board members themselves may derive no direct personal financial benefit from the proposed transaction to be approved, and there is no carve-out in section 75 regarding intra-group transactions, even where wholly-owned subsidiaries are concerned. This would be even more problematic where the boards of both company A and company B are constituted entirely by common directors (so-called "mirror boards"). leaving no unconflicted directors to pass a decision once all recusals have been made

Although practically challenging, the underlying rationale of section 75(1)(b) is that a director of two companies owes a fiduciary duty to

CORPORATE & COMMERCIAL ALERT

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both companies and must act in their respective interests. In theory there is a concern around divided loyalties where a director of two companies deliberates on a decision in terms of which both companies have a material financial interest, as the furtherance of one company's interest may be to the detriment of the other. For instance, in the context of one group company deciding whether to stand as guarantor or surety for another group company's bank debts, or deciding whether to purchase property from another group company, the concern of the legislature is that the common director is tempted to push through a decision of the first company (quarantor, purchaser) when actually it is the second company's (borrower, seller) interests he truly has at heart. This goes to the root of the common law position that a director must always avoid a conflict of interest.

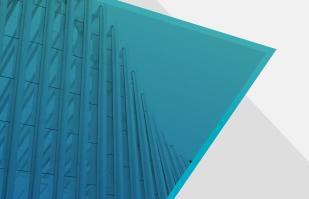
POSSIBLE SOLUTIONS

Section 75(7) of the Companies Act provides that a decision by a board is valid despite any personal financial interest of a director or related person only if:

- (a) "it was approved following disclosure of that interest in the manner contemplated in this section; or
- (b) despite having been approved without disclosure of that interest, it:
 - i. has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest: or
 - ii. has been declared to be valid by a court in terms of subsection (8)."

Section 75(7) provides three scenarios where a decision may be valid notwithstanding a personal financial interest of a director or related person in three instances.

- (a) Firstly, where the conflicted director makes the appropriate disclosure and recuses him/herself in accordance with section 75(5). Practically, this will only be possible where, following the common directors' recusal, there are sufficient directors remaining who may vote on the matter.
- (b) Secondly, where the decision has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest. As regards group entities whose boards consist entirely of common directors, the only option is for all of the directors to disclose their personal financial interests, and thereafter refer the resolution to the company's shareholder for ratification. It does not seem obvious that this falls within section 75(7)(b)(i), as the latter appears to only deal with situations of non-disclosure (whether inadvertent or mala fide) by the conflicted director, but should pass muster under common law principles.



CORPORATE & COMMERCIAL ALERT

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Thirdly, where the decision has been declared to be valid by an order of court.

In the second scenario, there is no authority to suggest that this remedial provision will not apply where the counterparty to a transaction is also the very shareholder of the company seeking to ratify. Shareholders are not bound by conflict-of-interest rules and can vote their shares in their absolute discretion. In other words, where the counterparty is a holding company, it is acceptable for that

holding company to ratify actions "to be taken" or actions "already taken" by the subsidiary seeking approval.

CONCLUSION

Section 75(5) is problematic for group companies wishing to contract with each other where directors serve on both entities. Common directors must adhere to these provisions or face possible liability for a breach of their fiduciary duties. Although section 75(7) provides remedies for these procedural obstacles, obtaining

shareholder approval for each decision taken or to be taken at board level may be slow and administratively cumbersome. Consequently, group companies may consider avoiding this overlap in management by ensuring mirror boards are not pervasive throughout the group, and that there are sufficient "independent" board members on each company board.

JUSTINE KRIGE AND LAYEN PETERSEN



2021 WINNERS OF M&A DEAL FLOW 2021

2021

 1st by M&A Deal Flow.
 2nd by General Corporate Finance Deal Flow.
 2nd by BEE Deal Value.

3rd by General Corporate Finance Deal Flow.

3rd by BEE Deal Flow. 4th by M&A Deal Value.

2020

1st by M&A Deal Flow. 1st by BEE Deal Flow.

1st by BEE Deal Flow. 1st by BEE Deal Value.

2nd by General Corporate Finance Deal Flow. 2nd by General Corporate Finance Deal Value.

3rd by M&A Deal Value.

Catalyst Private Equity Deal of the Year.

2019

M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.

1st by BEE M&A Deal Flow.

1st by General Corporate Finance Deal Flow. 2nd by M&A Deal Value.

2nd by M&A Deal Flow.

Deal Makers

2018

 1^{st} by M&A Deal Flow.

1st by M&A Deal Value.

2nd by General Corporate Finance Deal Flow.

1st by BEE M&A Deal Value.

2nd by BEE M&A Deal Flow. Lead legal advisers on the Private Equity Deal of the Year



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BBBEE STATUS: LEVEL ONE 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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