

Corporate & Commercial ALERT

23 AUGUST 2023



CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Minority protections against oppressive and/or prejudicial amendments to an MOI

When considering the age-old question of which provisions should be contained in the memorandum of incorporation (MOI) and which provisions should be contained in the shareholders' agreement (SHA), one important consideration which is often overlooked is the threshold required to amend an MOI as opposed to an SHA.



FOR MORE
INSIGHT INTO
OUR EXPERTISE
AND SERVICES

Minority protections against oppressive and/or prejudicial amendments to an MOI

When considering the age-old question of which provisions should be contained in the memorandum of incorporation (MOI) and which provisions should be contained in the shareholders' agreement (SHA), one important consideration which is often overlooked is the threshold required to amend an MOI as opposed to an SHA.

An MOI is a public document, largely governed by the Companies Act 71 of 2008 (Companies Act), which provides that an MOI may only be amended in compliance with a court order or if the shareholders pass a special resolution authorising the amendment. The Companies Act prescribes that, unless the MOI provides otherwise, a special resolution must be supported by at least 75% of the voting rights in order to approve the amendment. Theoretically, this means that a majority shareholder, or a group of shareholders, who exercises 75% of the voting rights has the power to amend the MOI as they see fit, including the removal of several bespoke minority rights and protections.

On the other hand, an SHA is a private commercial agreement which can only be amended by unanimous written consent of the shareholders. Accordingly, given its confidential nature and increased amendment

threshold, the SHA is often considered the better agreement, from a strategic perspective, to include bespoke minority rights and protections. However, the Companies Act does contain certain restrictions, in respect of alterable and unalterable provisions, which require that deviations from the position set out in the Companies Act be contained in the MOI. This often results in bespoke board appointment rights, for example, being recorded in the MOI, and thus vulnerable to an amendment by special resolution.

Fortunately, there are several protections afforded to minority shareholders in the event of oppressive and/or prejudicial amendments to a company's MOI.

Commercial solutions

The obvious solution would be to ensure that any amendment to the company's MOI requires a voting threshold above 75% (e.g. 100% or both above 75% and all but one shareholder votes in favour),



The graphic features a gold diagonal stripe across a grey background. At the top left, it displays 'The LEGAL 500 EMEA' logo. Below this, the text reads: 'Corporate, Commercial/M&A 2023 Rankings'. Further down, it states: 'Corporate & Commercial practice is ranked in Tier 1.', 'CDH Kenya's Corporate & Commercial practice is ranked in Tier 3.', 'Leading Individuals: Willem Jacobs | David Pinnock', 'Recommended Lawyers: Vivien Chaplin | Peter Hesseling Justine Krige | Sammy Ndolo David Thompson | Roxanna Valayathum Njeri Wagacha', 'Next Generation Lawyers: Justine Krige', and 'Hall of Fame: Ian Hayes'.

Minority protections against oppressive and/ or prejudicial amendments to an MOI

CONTINUED

however, this is often vehemently opposed by majority shareholder/s. Alternatively, the shareholders could agree to a reserved list of clauses which, if amending, require the consent of certain shareholders affected by the amendment or unanimous approval. A third option could be to keep the bespoke minority rights in the MOI but include an undertaking in the SHA not to vote in favour of certain MOI amendments which would adversely affect the rights of certain shareholders.

Statutory protections

Section 161: Application to protect rights

Section 161 of the Companies Act empowers a shareholder to approach a court for a determination or protection order in respect of any of their rights afforded to them in terms of the Companies Act, the company's MOI, the rules of the company or any debt instrument by way of a declaratory order or an interdict.

The provisions of this section also entitle a shareholder to approach the court for an order to remedy any harm which they may have sustained as a result of a breach of any provision of the Companies Act or a violation of any right enshrined in the company's MOI, the rules of the company or any debt instrument, and/or to hold any director personally liable for such harm, where there has been a breach of their fiduciary duties.

This section essentially allows a concerned minority shareholder to take a pre-emptive measure and prevent major shareholders from implementing an oppressive or prejudicial amendment to the MOI. If successful, it would afford a minority shareholder a fair amount of protection and comfort that its bespoke rights are protected by court order.

Section 163: Relief from oppressive or prejudicial conduct

Section 163 of the Companies Act provides, in essence, that a shareholder or a director of a company may apply to court for any form of relief if any act or omission by the company or a person related to the company has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

For an amendment to an MOI to entitle a minority shareholder to relief under section 163, the minority shareholder must prove to the court that the relevant conduct complained of was oppressive, unfairly prejudicial or unfairly disregarded the minority shareholder's interests. Notably, the minority shareholder is not required to show that the conduct complained of was unlawful, instead, section 163 is a question of fairness. That said, the conduct of majority shareholders must be evaluated in light of the majority

Minority protections against oppressive and/ or prejudicial amendments to an MOI

CONTINUED

rule principle that, by becoming a shareholder, a person undertakes to be bound by the decisions of the majority of the shareholders, and, therefore, not all MOI amendments which prejudicially affect a minority shareholder will necessarily entitle a minority shareholder to relief in terms of section 163. In short, the prejudice disregard may be fair.

Examples of possible section 163 relief may include an amendment to the MOI which: (i) materially and adversely alters the preferences, rights, limitations or other terms of the class of shares held by the minority shareholder, such as voting rights or rights to receive dividends; (ii) has the effect that minority shareholders no longer have a right to appoint a representative to the board; or (iii) limits the rights of minority shareholders in terms of section 39(2) of the Companies Act to subscribe for shares before any other person who is not a shareholder (i.e. effectively diluting the shareholding of minority

shareholders) where any of the aforementioned provisions was an integral term upon which they had agreed to become a shareholder of the company.

If an applicant is successful, the court has a wide discretion to make any order it deems appropriate, including, but not limited to, (i) an order interdicting or restraining the company from amending the MOI; (ii) an order directing the company to amend its MOI; or (iii) an order to pay compensation to the minority shareholder. In this regard, a useful recommendation is to plead for alternative forms of relief in order of preference and concluding with a catch-all request that the court grant further or alternative relief that the court may deem appropriate.

Accordingly, this remedy may be a far wider approach than the enforcement of rights or protecting interests in terms of section 161. However, the prospects of success will ultimately depend on the specific facts surrounding the conduct being

challenged. Aggrieved persons are therefore required to identify the nature of the impugned conduct and to establish that the conduct is oppressive or unfairly prejudicial or unfairly disregards the interests of the aggrieved person.

Section 164: Dissenting shareholders appraisal rights

The appraisal remedy, provided for in section 164 of the Companies Act, allows a dissenting shareholder to compel the company to buy back its shares for a fair cash consideration. This provision is primarily triggered by certain fundamental transactions, set out in sections 112 to 115 of the Companies Act, such as major disposals, mergers and schemes of arrangement. Appraisal rights are also triggered if a company gives notice of a meeting to pass a resolution to amend its MOI by altering the preferences, rights, limitations or any other terms of any class of shares in a manner materially adverse to the rights or interests of holders of that class of shares.

Minority protections against oppressive and/ or prejudicial amendments to an MOI

CONTINUED

To exercise its appraisal rights a dissenting shareholder must send a written objection to the company before the resolution to amend the MOI is voted on. The dissenting shareholder must then proceed to vote against the resolution and subsequently, if the company adopts the resolution in question, deliver a written demand for the fair value of their shares to the company.

This provision effectively entitles a minority shareholder the opportunity to exit the company, for fair value, where they are unable to prevent an MOI amendment which they disagree with. Although section 164 of the Companies Act would entitle the minority shareholder to exercise their appraisal rights, this may lead to an undesirable or inequitable outcome in certain instances, and relief in terms of sections 161 or 163 may be more appropriate.

Conclusion

The Companies Act recognises the important role that the MOI plays in the governance of a company. Therefore, the MOI may only be amended if the shareholders pass a special resolution authorising the amendment and several remedies have been included to protect against oppressive or prejudicial amendments to a company's MOI.

However, the reality is that all the statutory remedies contained in the Companies Act involve approaching a competent court, which may not always be feasible from a financial or timing perspective. It is therefore of the utmost importance that shareholders consult with their attorneys before investing, in order to ensure that all potential commercial solutions are explored in the investment documents, including the investee company's MOI.

**Shameegh Allen and
David Thompson**



Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2021 - 2023
ranked our Corporate & Commercial practice in
Band 1: Corporate/M&A and in
**Band 2 Capital Markets: Debt and Capital
Markerts: Equity.**

Ian Hayes ranked by
Chambers Global 2022 - 2023
in **Band 1: Corporate/M&A.**

David Pinnock ranked by
Chambers Global 2022 - 2023 in **Band 1:**
Corporate/M&A: Private Equity.

Peter Hesseling ranked by
Chambers Global 2022 - 2023
in **Band 2: Corporate/M&A** and in
Band 3 Capital Markets: Equity for 2023.

Willem Jacobs ranked by
Chambers Global 2022 - 2023 in **Band 2:**
Corporate/M&A and in **Band 3:**
Corporate/M&A: Private Equity.

Sammy Ndolo ranked by
Chambers Global 2021 - 2023 in
Band 4: Corporate/M&A.

David Thompson ranked by
Chambers Global 2022 - 2023 in
Band 4: Corporate/M&A.

OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:



Ian Hayes

Practice Head & Director:
Corporate & Commercial
T +27 (0)11 562 1593
M +27 (0)83 326 4826
E ian.hayes@cdhlegal.com



David Thompson

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



Sammy Ndolo

Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

Kate Anderson

Director:
Corporate & Commercial
T +27 (0)11 562 1105
M +27 (0)82 418 3784
E kate.anderson@cdhlegal.com

Tessa Brewis

Director:
Corporate & Commercial
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Vivien Chaplin

Sector Head: Mining & Minerals
Director: Corporate & Commercial
T +27 (0)11 562 1556
M +27 (0)82 411 1305
E vivien.chaplin@cdhlegal.com

Clem Daniel

Director:
Corporate & Commercial
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Andrew Giliam

Director:
Corporate & Commercial
T +27 (0)21 481 6363
M +27 (0)83 359 7069
E andrew.giliam@cdhlegal.com

John Gillmer

Joint Sector Head: Private Equity
Director: Corporate & Commercial
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Allan Hannie

Director:
Corporate & Commercial
T +27 (0)21 405 6010
E allan.hannie@cdhlegal.com

Peter Hesselning

Director:
Corporate & Commercial
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesselning@cdhlegal.com

Quintin Honey

Director:
Corporate & Commercial
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Willem Jacobs

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

Brian Jennings

Director:
Corporate & Commercial
T +27 (0)11 562 1866
M +27 (0)82 787 9497
E brian.jennings@cdhlegal.com

Rachel Kelly

Director:
Corporate & Commercial
T +27 (0)11 562 1165
M +27 (0)82 788 0367
E rachel.kelly@cdhlegal.com

Yaniv Kleitman

Director:
Corporate & Commercial
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige

Director:
Corporate & Commercial
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

Dane Kruger

Director:
Corporate & Commercial
T +27 (0)21 481 6362
M +27 (0)74 914 1402
E dane.kruger@cdhlegal.com

André de Lange

Sector Head: Agriculture, Aquaculture
& Fishing Sector
Director: Corporate & Commercial
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Jaco Meyer

Director:
Corporate & Commercial
T +27 (0)11 562 1749
M +27 (0)83 477 8352
E jaco.meyer@cdhlegal.com

OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:

Anita Moolman

Director:
Corporate & Commercial
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

Wayne Murray

Director:
Corporate & Commercial
T +27 (0)21 405 6018
M +27 (0)79 691 0137
E wayne.murray@cdhlegal.com

Francis Newham

Executive Consultant:
Corporate & Commercial
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

David Pinnock

Joint Sector Head: Private Equity
Director: Corporate & Commercial
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid

Director: Corporate & Commercial
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Jess Reid

Director:
Corporate & Commercial
T +27 (0)11 562 1128
M +27 (0)83 571 6987
E jess.reid@cdhlegal.com

Megan Rodgers

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

Ludwig Smith

Director:
Corporate & Commercial
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Tamarin Tosen

Director:
Corporate & Commercial
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum

Director:
Corporate & Commercial
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Roux van der Merwe

Director:
Corporate & Commercial
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Andrew van Niekerk

Head: Projects & Infrastructure
Director: Corporate & Commercial
T +27 (0)21 481 6491
M +27 (0)76 371 3462
E andrew.vanniekerk@cdhlegal.com

Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

Charl Williams

Director:
Corporate & Commercial
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

Christelle Wood

Director:
Corporate & Commercial
T +27 (0)11 562 1372
M +27 (0)83 498 2850
E christelle.wood@cdhlegal.com

Emma Hewitt

Practice Development Director:
Corporate & Commercial
T +27 (0)11 562 1635
E emma.hewitt@cdhlegal.com

Alecia Pienaar

Counsel:
Environmental Law
T +27 (0)82 863 6279
E alecia.pienaar@cdhlegal.com

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.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2023 12581/AUG