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Corporate & Commercial ALERT

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The COVID-19 pandemic posed various practical difficulties for many companies. Among those difficulties were the complexities of ensuring compliance with companies' statutory obligations in terms of the Companies Act 71 of 2008 (Companies Act). At a time when remote working and virtual meetings became the "new normal", many companies were required to rapidly adapt their standard procedures and structures to ensure their continued functioning as well as their legal and corporate governance compliance.



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INCORPORATING
KIETI LAW LLP, KENYA

Is conducting a wholly virtual shareholder meeting or AGM compliant with the Companies Act?

The COVID-19 pandemic posed various practical difficulties for many companies. Among those difficulties were the complexities of ensuring compliance with companies' statutory obligations in terms of the Companies Act 71 of 2008 (Companies Act). At a time when remote working and virtual meetings became the "new normal", many companies were required to rapidly adapt their standard procedures and structures to ensure their continued functioning as well as their legal and corporate governance compliance.

During the COVID-19 lockdowns, one of the practical difficulties faced by companies, particularly publicly listed companies with large shareholder bases, was the manner in which shareholder meetings and annual general meetings (AGMs) were convened and administered. In addition to convening AGMs, companies are also required to convene shareholder meetings to approve all fundamental transactions (such as schemes of arrangement, statutory mergers and significant disposals of assets). Moreover, companies listed on the Johannesburg Stock Exchange (JSE) are required to have all shareholder resolutions which are required in terms of the JSE Listings Requirements tabled for consideration at a meeting of the shareholders.

With the COVID-19 lockdowns having subsequently ceased, many companies are now grappling with the merits of administering shareholder meetings on a wholly virtual basis.

The Companies Act

Section 63(2) of the Companies Act states that:

"... unless prohibited by its memorandum of incorporation, a company may provide for (a) a shareholders meeting to be conducted entirely by electronic communication; or (b) one or more shareholders, or proxies for shareholders, to participate by electronic communication in all or part of a shareholders meeting that is being held in person, as long as the electronic communication employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting."



The graphic features a gold diagonal stripe across a light blue background. At the top left, it displays 'The LEGAL 500 EMEA' logo. Below this, the text reads: 'Corporate, Commercial/M&A 2023 Rankings'. The main content lists: '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 Hesselting, Justine Krige | Sammy Ndolo, David Thompson | Roxanna Valayathum, Njeri Wagacha', 'Next Generation Lawyers: Justine Krige', and 'Hall of Fame: Ian Hayes'.

The Legal 500
EMEA

**Corporate, Commercial/M&A
2023 Rankings**

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 Hesselting
Justine Krige | Sammy Ndolo
David Thompson | Roxanna Valayathum
Njeri Wagacha

Next Generation Lawyers:
Justine Krige

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Ian Hayes

Is conducting a wholly virtual shareholder meeting or AGM compliant with the Companies Act?

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Section 63(2) needs to be read with section 61(10) of the Companies Act, which states that:

"... every shareholders meeting of a public company must be reasonably accessible within the Republic for electronic participation by shareholders in the manner contemplated in section 63(2), irrespective of whether the meeting is held in the Republic or elsewhere."

In addition to the above provisions, section 63(3) of the Companies Act provides that:

"... if a company provides for participation in a meeting by electronic communication (a) the notice of that meeting must inform shareholders of the availability of that form of participation, and provide any necessary information to enable shareholders or their proxies to access the available medium or means

of electronic communication; and (b) access to the medium or means of electronic communication is at the expense of the shareholder or proxy, except to the extent that the company determines otherwise."

It is therefore clear that a company conducting a wholly virtual shareholder meeting or AGM is legally competent in terms of the Companies Act, provided that the company's memorandum of incorporation (MOI) permits this.

Challenges for wholly virtual shareholder meetings and AGMs

Despite virtual shareholder meetings and AGMs being, in principle, legally competent, from a practical perspective a wholly virtual meeting must be administered in such a way as to ensure that firstly, the meeting is reasonably accessible to all shareholders and proxies and,

secondly, all participants in the meeting are able to (i) participate reasonably effectively and (ii) communicate concurrently with one another.

In practice, the following elements often pose practical difficulties in effectively convening and administering virtual shareholder meetings for publicly listed companies.

1. Eligibility to be admitted to the virtual shareholder meeting

In terms of section 63(1) of the Companies Act, before any person may attend or participate in a shareholder meeting, that person must present reasonably satisfactory identification; and the person presiding at the meeting must be reasonably satisfied that the right of that person to participate and vote, either as a shareholder, or as a proxy for a shareholder, has been reasonably verified.

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If a company hosted a physical meeting, the company secretary, transfer secretaries or scrutineers would typically verify a shareholder's identity in person at the meeting venue. However, this can be difficult to administer in the context of a virtual meeting.

When meetings are held virtually, in order to ensure compliance with section 63(1) of the Companies Act, companies typically request that shareholders submit proof of their identities and shareholding in the company to the company secretary, transfer secretary or scrutineers at least 48 hours before the meeting takes place. However, there always remains the possibility that a shareholder, without having complied with this request, could on the day of the meeting request to join the virtual meeting and participate. Given that the meeting is required to be reasonably accessible to all

shareholders and proxies, to deny this shareholder access to the meeting in these circumstances may constitute an infringement of their rights as a shareholder.

Accordingly, companies (and relevant service providers engaged by companies) should endeavour to put appropriate measures in place to expeditiously verify the identities of late-coming shareholders or proxies.

2. *Appointing a proxy*

In terms of section 62(3)(e) of the Companies Act, a company must deliver a notice of each shareholder meeting in the prescribed manner and form to all of the shareholders of the company. The notice of a shareholder meeting must be in writing, and must include a reasonably prominent statement that (i) a shareholder entitled to attend and vote at the meeting is entitled to appoint a proxy to attend, participate

in and vote at the meeting in the place of the shareholder, or two or more proxies if the MOI of the company so permits; (ii) a proxy need not also be a shareholder of the company; and (iii) section 63(1) requires that meeting participants provide satisfactory identification.

It is common for companies to request that shareholders submit proxy forms or documents to the company not less than 48 hours before a meeting takes place to avoid unnecessary administrative burdens.

In *Barry v Clearwater Estates NPC & Others* 2017 (3) SA 364 (SCA), it was contended that proxy forms submitted on the day of the meeting were invalid and therefore that the necessary quorum had not been met, and any resolutions passed invalid. The Supreme Court of Appeal, however, decided that the appointment of a proxy may take

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place at any time, as per the language of section 58(1) of the Companies Act. This means that despite companies making requests that shareholders submit proxy forms not less than 48 hours before meeting, a shareholder remains entitled to submit a proxy form on the day of the meeting.

Accordingly, companies convening a wholly virtual meeting should ensure that appropriate measures are adopted to procure that proxy forms may be submitted, and counted in the voting, at any time up to the commencement of the meeting.

3. Capability to exercise voting rights and have votes counted by scrutineers

The Companies Act and the JSE Listings Requirements require that certain shareholder resolutions must be adopted at a meeting of the shareholders, and cannot be adopted via written resolution. The rationale for this appears to be, amongst other

things, that shareholders ought to have the opportunity to engage with the board of the company and participate in discussions on the matters in question alongside the remainder of the shareholder base.

Due to the practicable and technological complexities of administering shareholder voting in real time during a fully virtual shareholder meeting, some companies have required that votes of shareholders must be cast by submitting proxy forms prior to the meeting, and cannot be exercised during the meeting.

Having regard to the rationale for requiring that certain matters requiring shareholder approval must be considered and, if appropriate, approved at a meeting of the shareholders, in our view this approach may be subject to challenge as a deprivation of shareholders' ability to effectively exercise their rights.

Accordingly, to mitigate the risk of challenge on this basis, a company wishing to convene a fully virtual shareholder meeting should procure that shareholders are able to exercise their voting rights during the meeting.

4. Ability to communicate concurrently

There remains the obligation on the company to ensure equal access to the electronic meetings for shareholders as well as the obligation to ensure that each shareholder has the ability to communicate concurrently, as contemplated in section 63(2) of the Companies Act.

AGMs ultimately provide a platform for shareholders to share their views, ask questions of the company's board, and generally ensure that the company is functioning in their best interests. AGMs are important to ensure transparency, and provide shareholders with an opportunity to discuss and understand any risks to or opportunities for the company.

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Accordingly, it is advisable that the online virtual platform must allow for access to the meeting for shareholders to participate and/or communicate concurrently. This, of course, can be difficult to administer electronically.

All is not lost

Despite these challenges, there are service providers that successfully facilitate wholly virtual shareholder meetings for large JSE-listed companies and private companies. Amongst other things, these service providers offer proxy voting and

messaging systems which allow for instant accurate polling, expanding the scope of shareholder engagement and providing issuers with the opportunity to change the way they conduct shareholder meetings. The benefit of moving to paperless AGMs has resulted in an efficient, secure and accurate voting solution. Rather than counting votes by hand, votes are collected and counted electronically, with companies displaying the results in real-time, reducing human error and increasing voter confidence.

Ultimately, before conducting wholly virtual shareholder meetings, it is important for companies to ensure that appropriate measures are put in place so that the meeting is administered in a lawful manner and to mitigate the scope of challenges on grounds of procedural irregularity, deprivation of rights or prejudicial conduct.

Dane Kruger and Jesse Prinsloo

CONSISTENTLY SUCCESSFUL

2022

1st by M&A Listed Deal Flow.
3rd by M&A Listed Deal Value,
M&A Unlisted Deal Value,
M&A Unlisted Deal Flow
and General Corporate
Finance Deal Value.

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 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.

DealMakers

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.



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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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