Corporate & Commercial

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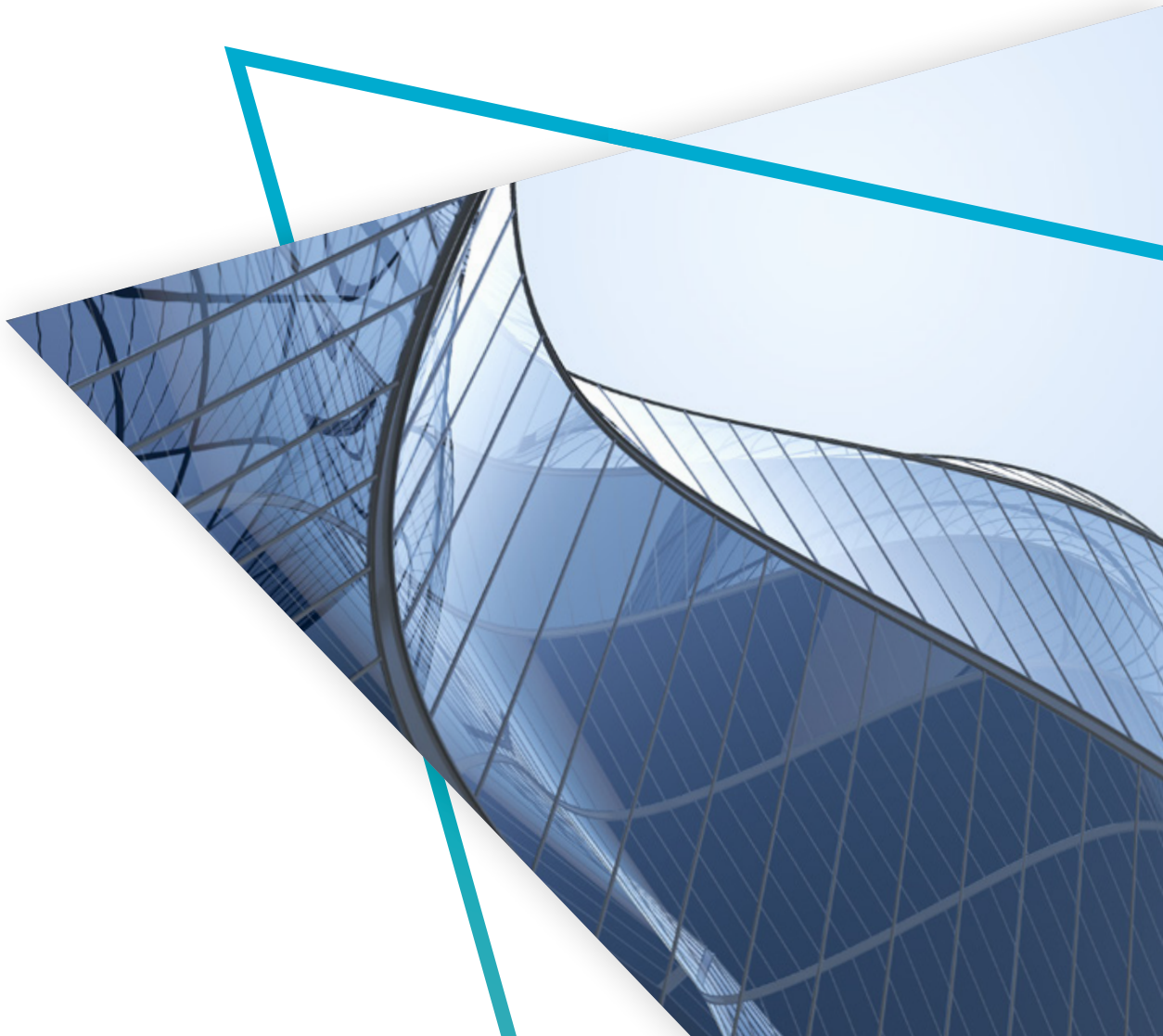

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CORPORATE & COMMERCIAL ALERT

50/50 shareholders and oppressive conduct: When some shareholders are more equal than others

A fundamental principle of South African company law is "*majority rules*" – shareholders and directors are bound by the decisions of the majority even where such decisions are not in their interest. However, recognising the potential for unfair abuse of such a principle, the Companies Act 71 of 2008 (Companies Act) devised section 163, which allows a director or shareholder of a company to apply to court for relief from oppressive conduct of the company or a person related to it that unfairly disregards or prejudices the interests of the applicant. Section 163 therefore paints the picture of a majority shareholder abusing its ability to control the company to unfairly bully or oppress minority shareholders. But what happens if the shareholders are equals – can a 50/50 shareholder be oppressed by their equal? This was the question before the High Court in *Van der Watt v Schoeman and Others* [2024] 91 SA 531 (ECGq).

In the *Van der Watt* case, two medical doctors (Van der Watt and Schoeman) incorporated a private company through which they ran their medical practices. Van der Watt and Schoeman each held 50% of the issued shares and sat on the board of the company as the only two directors. At both board and shareholder level, they were equals from a voting and management perspective. After some time, the relationship between Van der Watt and Schoeman became strained, with Van der Watt opting to step back from the practice, although she retained her shareholding and directorship in the company. Shortly thereafter, Schoeman began excluding Van der Watt from the management and affairs of the company, acting on behalf of the company without seeking the approval of Van der Watt and, consequently, without the authorisation of the board. Despite Van der Watt's repeated requests for a board meeting to deal with this problematic conduct, she was ignored by Schoeman. Unhappy with her treatment by her partner-shareholder and the subsequent deadlock caused by such conduct, Van der Watt sought to exit the company by selling her shares and loan account. After receiving an unsatisfactory offer from Schoeman for her shares, Van der Watt launched court proceedings under, amongst other things, section 163 of the Companies Act.

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The applicability of section 163 to shareholder deadlocks and oppression of a 50/50 shareholder

Central to the dispute between Van der Watt and Schoeman was the applicability of section 163 to a director or shareholder confronted with a deadlock. Schoeman argued that section 163 was not available to Van der Watt in that, as equal shareholder, she was not an oppressed minority.

The court considered that while section 252 of the old Companies Act No 61 of 1973 typically operated as a mechanism for the protection of minority shareholders against oppressive and prejudicial conduct of the majority shareholders, the reference in section 163(1)(a) to oppression by the company "*or a related person*", read with the relation/control provisions in sections 2(1)(b) and 2(2)(d) of the Companies Act, served to extend the remedy in section 163 to deadlock situations like that in the *Van der Watt* case.

As such, the court found that section 163 omits reference to a minority-majority dynamic and readily applies to a 50/50 shareholding. In fact, the language of section 163 could even permit a majority shareholder or director to rely on the remedy, although typically no relief would be granted on the basis that such a shareholder or director must use its control of the voting rights to eliminate any oppression or prejudice (an option which is not available to a 50/50 shareholder who does not control the company). The court further held that section 163 could apply to a shareholder deadlock between 50/50 shareholders, as although a deadlock does not involve the conduct of the company per se, the court's view was that a 50/50 shareholder could be a related person to the company and therefore such shareholder's conduct is captured in the net of section 163. Accordingly, the court came to the rescue of Van der Watt and, using the wide range of remedies under section 163, ordered that Schoeman purchase the shares and loan account of Van der Watt at a price determined by a third-party expert.

Problematic elements of the court's decision

While the court's decision may be a relief to oppressed 50/50 shareholders, there are problematic elements of its decision that require a cautious approach for a shareholder relying on section 163 and the findings in the *Van der Watt* case.

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The court's satisfaction that the shareholder deadlock fell within the ambit of section 163 due to such deadlock arising from the conduct of a related person of the company, namely Schoeman, is questionable. On the face of the facts, nothing suggested that Schoeman was a related person to the company. The Companies Act provides that a person is only related to a company if they control the company (either through shareholder voting rights, being able to elect the majority of the board, or the ability to influence the policies of the company in a way that is consistent with control). In a typical 50/50 shareholding, neither party controls the company and this is the very reason that a board or shareholder deadlock can occur. Therefore, it is not clear that section 163 should apply to a 50/50 shareholder deadlock in all instances. A more appropriate remedy would instead be found in section 81(1)(d) where a deadlock can be resolved by the winding up of the company.

It is also not clear how the conduct of Schoeman, which was unauthorised and not within her powers, could constitute the conduct of the company or the exercise of Schoeman's powers as a director. At no time did the board of the company confer Schoeman with the powers to act on behalf of the company, although a court may argue that such an approach is overly technical and, at the heart of it, that Van der Watt's interests were being unfairly disregarded by the conduct of Schoeman irrespective of whether Schoeman was authorised or not.

While the judgment stands as an option to applicants in a 50/50 shareholding, the problems that are apparent in the judgment may be too difficult to overcome in another court. Despite not expressly restricting itself to majority-minority dynamics, section 163 may still be better suited to coming to the aid of minority shareholders or directors with other remedies being more appropriate in the 50/50 shareholding context.

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