

SOUTH AFRICA / JUDGMENT

Du Plessis v Clearwater Estates NPC and Others (82306/2014) [2015] ZAGPPHC 1063 (13 November 2015) [2015] ZAGPPHC 1063

COURT

North Gauteng High Court, Pretoria

BEFORE

Van der Westhuizen

CASE / FILE NUMBER

82306/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO.: 82306/2014

DATE:

13 NOVEMBER 2015

In the matter

between:

RICHARD DU

PLESSIS

BARRY.....Applicant

And

CLEARWATER

ESTATES

NPC.....First

Respondent

(CLEARWATER

ESTATES HOMEOWNERS

ASSOCIATION)

KEVIN

OLIVIER.....Second

Respondent

COMPANIES AND

INTELLECTUAL PROPERTY

COMMISSION.....Third

Respondent

JUDGMENT

VAN DER WESTHUIZEN, A J

1. The applicant applies in terms of the provisions of section 218(1) of the Companies Act, No. 71 of 2008 (the Act) for an order that all the business and resolutions transacted in terms of a purported special general meeting held by the first respondent on 27 September 2014 be declared void and unlawful in particular in respect of five stipulated purported resolutions.
2. The applicant further seeks further orders that would follow in the wake of the aforesaid prayer being granted.
3. It may be prudent to set out the circumstances that eventually led to this application being launched.
4. On 8 September 2014, the first respondent issued a notice of a special general meeting to its members.
5. Articles 13.7.10 and 13.7.11 of the applicant's Memorandum of Incorporation provides that, in the event that a member will be represented by proxy at the meeting, the proxy must be deposited at the office of the applicant not less than 48 hours before the time appointed for the special general meeting, failing which it would be invalid.
6. In respect of the special general meeting of 27 September 2014, a number of proxies were submitted after the 48 hours stipulated in the aforementioned articles, but prior to the resolutions being taken.
7. In the absence of the said proxies being accepted, the required quorum would not have been reached and the meeting could then not have taken place.
8. It is the acceptance of the said proxies that forms the premise upon which this application is brought.
9. The chair at the meeting, the second respondent, called for a vote in respect of the condoning of the late submitting of the said proxies, and the vote was carried in favour thereof. The second respondent, prior to the vote on the acceptance of the said proxies, had taken advice thereon from the first respondent's legal committee present at the meeting.
10. Following on the acceptance of the said proxies, the resolutions in issue were passed.
11. The nub of the dispute relates to the legality or otherwise of the aforesaid articles of the Memorandum of Incorporation of the first respondent.
12. Articles 13.7.10 and 13.7.11 of the first respondent's Memorandum of Incorporation read as follows:

“13.7.10 Any power of attorney and any instrument appointing a proxy and the power of attorney or other authority (if any) under which it is signed, or a notarially certified copy of such power of attorney shall be deposited at the office or at such other place in South Africa as is specified for that purpose in the notice convening the meeting, not less than 48 (FORTY EIGHT) hours (excluding Saturdays, Sundays and public holidays) before the time appointed for holding the meeting or adjourned meeting at which the person named in such instrument proposes to vote, or a poll where a poll is to be held after a meeting or adjourned meeting;

13.7.11 If the power of attorney or other instrument or proxy is not deposited timeously, it shall not be treated as valid. ”

13. In this regard the provisions of section 58 of the Act are of importance. The section reads as follows:

“58(1) At any time, a shareholder of a company may appoint any individual, including an individual who is not a shareholder of that company, as a proxy to-

- (a) participate in, and speak and vote at, a shareholders meeting on behalf of the shareholder; or
 - (b) give or withhold written consent on behalf of the shareholder to a decision contemplated in section 60.
- (2) A proxy appointment-
- (a) must be in writing, dated and signed by the shareholder; and
 - (b) remains valid for-
 - (i) one year after the date on which it was signed; or
 - (ii) any longer or shorter period expressly set out in the appointment, unless it is revoked in a manner contemplated in subsection (4) (c), or expires earlier as contemplated in subsection
- (8) (d).
- (3) Except to the extent that the Memorandum of Incorporation of a company provides otherwise-
- (a) a shareholder of that company may appoint two or more persons concurrently as proxies, and may appoint more than one proxy to exercise voting rights attached to different securities held by the shareholder;
 - (b) a proxy may delegate the proxy's authority to act on behalf of the shareholder to another person, subject to any restriction set out in the instrument appointing the proxy; and
 - (c) a copy of the instrument appointing a proxy must be delivered to the company, or to any other person on behalf of the company, before the proxy exercises any rights of the shareholder at a shareholders meeting.

- (4) Irrespective of the form of instrument used to appoint a proxy-
 - (a) the appointment is suspended at any time and to the extent that the shareholder chooses to act directly and in person in the exercise of any rights as a shareholder;
 - (b) the appointment is revocable unless the proxy appointment expressly states otherwise; and
 - (c) if the appointment is revocable, a shareholder may revoke the proxy appointment by-
 - (i) cancelling it in writing, or making a later inconsistent appointment of a proxy; and (ii) delivering a copy of the revocation instrument to the proxy, and to the company.
- (5) The revocation of a proxy appointment constitutes a complete and final cancellation of the proxy's authority to act on behalf of the shareholder as of the later of-
 - (a) the date stated in the revocation instrument, if any; or
 - (b) the date on which the revocation instrument was delivered as required in subsection (4) (c) (ii).
- (6) If the instrument appointing a proxy or proxies has been delivered to a company, as long as that appointment remains in effect, any notice that is required by this Act or the company's Memorandum of Incorporation to be delivered by the company to the shareholder must be delivered by the company to-
 - (a) the shareholder; or
 - (b) the proxy or proxies, if the shareholder has-
 - (i) directed the company to do so, in writing; and
 - (ii) paid any reasonable fee charged by the company for doing so.
- (7) A proxy is entitled to exercise, or abstain from exercising, any voting right of the shareholder without direction, except to the extent that the Memorandum of Incorporation, or the instrument appointing the proxy, provides otherwise.
- (8) If a company issues an invitation to shareholders to appoint one or more persons named by the company as a proxy, or supplies a form of instrument for appointing a proxy-
 - (a) the invitation must be sent to every shareholder who is entitled to notice of the meeting at which the proxy is intended to be exercised;
 - (b) the invitation, or form of instrument supplied by the company for the purpose of appointing a proxy, must-
 - (i) bear a reasonably prominent summary of the rights established by this section;
 - (ii) contain adequate blank space, immediately preceding the name or names of any person or persons named in it, to enable

a shareholder to write in the name and, if so desired, an alternative name of a proxy chosen by the shareholder; and (Hi) provide adequate space for the shareholder to indicate whether the appointed proxy is to vote in favour of or against any resolution or

resolutions to be put at the meeting, or is to abstain from voting;

- (c) the company must not require that the proxy appointment be made irrevocable; and
- (d) the proxy appointment remains valid only until the end of the meeting at which it was intended to be used, subject to subsection (5).
- (9) Subsection (8) (b) and (d) do not apply if the company merely supplies a generally available standard form of proxy appointment on request by a shareholder. ”
- 14. For present purposes, the provisions of section 58(3) of the Act require consideration. A consideration of the provisions of the said subsection entails an interpretation thereof. In this regard the principles applicable in respect of the interpretation of a statute are conveniently summarised in *Natal Joint Municipal Pension Fund v Endumeni Municipality*. [I]
- 15. Section 1 of the Act provides definitions of important terms relevant to the Act read as a whole and in this regard the following two definitions find application:

“‘alterable provision’ means a provision of this Act in which it is expressly contemplated that its effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company’s Memorandum of Incorporation;

and

“‘unalterable provision’ means a provision of this Act that does not expressly contemplate that its effect on any particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by a company’s Memorandum of Incorporation or rules;”

- 16. It is clear from a purposive and contextual reading of section 58(1) of the Act that a shareholder is entitled to appoint at any time a proxy to participate in, speak at and vote at a shareholders meeting on behalf of a shareholder.
- 17. The first and second respondents submit that section 58(1) of the Act constitutes an unalterable provision. The submission is that section 58(1) conveys a right upon the shareholder to appoint a proxy in his or her stead at any time. Thus, the Memorandum of Incorporation may not negate, restrict, limit, qualify, extend or otherwise alter in substance or effect that right.
- 18. In the present matter, the first and second respondents submit that the provisions of article 13.7.10 of the first respondent’s

Memorandum of Incorporation indeed so negate, restrict, limit, qualify, extend or otherwise alter in substance or effect that right

to appoint a proxy at any time.

19. In furtherance of this submission, the first and second respondents rely on the provisions of section 15(1) of the Act which provides:

“(1) Each provision of a company's Memorandum of Incorporation-

- (a) must be consistent with this Act; and
- (b) is void to the extent that it contravenes, or is inconsistent with, this Act, subject to section 6 (15).”

20. In this regard it is submitted on behalf of the first and second respondents that article 13.7.10 of the first respondent's

Memorandum of Incorporation is inconsistent with the Act and as a consequence void to that effect.

21. The applicant contends on the other hand that section 58(3) of the Act, read conjunctively with the provisions of section 58(1) of the Act, constitutes an alterable provision. The submission being that whereas section 58(1) of the Act deals with the general entitlement of a shareholder to appoint a proxy, section 58(3)(c) provides for the manner within which a proxy is to be provided as opposed to the right to so provide a proxy.
22. Section 58(3)(c) of the Act read purposively and contextually merely provides that the proxy is to be delivered to the company, or to any other person on behalf to the company, before the proxy exercises any rights of the shareholder at the shareholder's meeting, unless the Memorandum of Incorporation provides otherwise in respect of to whom or where the proxy is to be delivered to prior to the proxy exercising any rights. That section does not refer to or relate in any way as to the time when the proxy is to be so delivered. That is provided in section 58(1) of the Act.
23. The crux of the divergent contentions raised by the parties in respect of the alterability or otherwise of the provisions of section 58 of the Act lies in whether the Memorandum of Incorporation of the first respondent could in articles 13.7.10 and 13.7.11 thereof stipulate a limitation of the period within which a proxy has to be delivered to the company, or such person on behalf of the company.
24. In the Memorandum on the Objects of the Companies Bill, 2008 the following is instructive.
25. In paragraph 5 thereof under the rubric “Company formation, naming and dissolution”, it is stated that Part B of Chapter 2 of the Bill provides for a company to be incorporated by the adoption of a

Memorandum of Incorporation, which is the sole governing document of the company. It continues that the Bill imposes certain specific

requirements on the content of a Memorandum of Incorporation, as necessary to protect the interests of shareholders in the company,

and provides a number of default rules, which companies may accept or alter as they wish to meet their needs and serve their interests. In addition, the Bill allows for companies to add to the required or default provision to address matters not addressed in the Bill itself, but stipulates that every provision of every Memorandum of Incorporation must be consistent with the Bill, except to the extent that it expressly contemplates otherwise.

26. Further in the said Memorandum on the Objects of the Companies Bill, the following is said under the rubric “Company governance”:

“Part F of Chapter 2 addresses all matters relating to company governance, introducing changes to enhance flexibility, while

retaining much of the existing regime designed to promote transparency and accountability.

In particular, the Bill

- (a) introduces flexibility in the manner and form of shareholder meetings, the exercise of proxy rights, and the standards for adoption of ordinary and special resolutions;
 - (b) ...”
27. That being the stated purpose of the Companies Bill, and subsequently the Companies Act of 2008, the purposive and contextual interpretation of section 58(1) read with section 58(3)(c) of the Act renders the provision of section 58(1) of the Act an unalterable provision.
28. It follows that the Memorandum of Incorporation of the first respondent, in articles 13.7.10 and 13.7.11 thereof, cannot alter the time stipulated in section 58(1) of the Act by adding a limitation to the time within which the proxy is to be delivered to the company or other person on behalf of the company.
29. I have earlier in this judgment dealt with the submission that section 58(3)(c) of the Act is an alterable provision and hence that the first respondent’s Memorandum of Incorporation can prescribe a more limited time period within which the proxy is to be so delivered. Section 58(3)(c) simply does not refer to a time period within which the proxy is to be delivered.
30. The applicant’s contention in respect of the interpretation of section 58(3)(c) of the Act is untenable. If upheld, it would result in an internal conflict within section 58 of the Act. There would be two provisions within the same section of the Act that determines the time period within which a proxy is to be appointed and hence potentially provide two different time periods.
31. It follows that the provisions of articles 13.7.10 and 13.7.11 are inconsistent with the provisions of the Act and in particular with the provisions of section 58(1) of the Act. Consequently, the provisions of articles 13.7.10 and 13.7.11 of the first respondent’s

Memorandum of Incorporation are void to that extent.

32. In view of the foregoing, the condoning of and acceptance of the alleged late proxies were consistent with the provisions of section 58(1) of the Act.

33. It follows that the application cannot succeed.

34. I grant the following order:

(a) The application is dismissed.

(b) The applicant is ordered to pay the costs.

C J VAN DER WESTHUIZEN

ACTING JUDGE OF APPEAL HIGH COURT

GAUTENG DIVISION

On behalf of Applicant: De Beer

Instructed by: Jacobs & Moodi Inc.

On behalf of Respondents: B C Stoop SC

Instructed by: Lombard Muller en Vennote Inc

[I] 2012(4) SA 593 (SCA) par [18] at 603F-604D

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