

Short notes on:

## **REMOVING A MINORITY SHAREHOLDER**

### ***Introduction***

The Companies Act 71 of 2008, as amended (“Companies Act”), provides for the protection of minority shareholders’ rights. Section 163 of the Companies Act allows for a minority shareholder to apply to a court for relief should they feel oppressed, unfairly prejudiced, or their interests are unfairly disregarded by the board of directors, the majority shareholders, or a separate juristic entity.

Considering the above, any action taken to remove a minority shareholder needs to be taken with due consideration to the above provisions.

So what actions can we take?

### ***Overview***

There is no rule of law that caters explicitly to the removal of a shareholder, and a shareholder may not be forced to sell or forego its shares. Unlike that of a director who deals with the running of the business, the nature of a shareholder is inherently linked to ownership and control.

Considering same, the removal of a minority shareholder is markedly different to that of a director and may only occur by way of agreement.

The Companies Act also includes minority shareholder protections in terms of s 163 (mentioned above). It is important to note that you cannot contract out of these mechanisms.

## **Shareholder's Agreement**

A forfeiture of shares may be included as a penalty mechanism in a Shareholders Agreement. Typically although a very aggressive mechanism, it is linked to non-performance in contributing to the funding requirements of the company or not reaching an agreed milestone. It is not a typical inclusion.

A share sale or share buyback agreement could also result, either between the shareholders or with the company being the buyer of the shares. The valuation mechanism and process to buy or sell are usually included in a shareholder's agreement. In many instances, issues of non-performance or failure to contribute are then rather dealt with as a penalty by way of a discounted valuation model. However, it remains a willing buyer and seller to engage on this level. In addition, negotiation clauses may also be included, which dictate a process for buy-out discussions. The eventual result will be that the minority shareholder is bought out in the manner agreed to per the shareholder's agreement.

A shareholder's agreement may also include 'come-along' and 'tag-along' rights, allowing majority shareholders to "force" a minority shareholder to accept an offer to purchase its shares from a third party. The third-party would usually make an offer to purchase the whole company. The offer must be made to the minority shareholder on the same terms as that made to the majority shareholder.

## **Conclusion**

Navigating the abovementioned agreements can be tricky and its important that the agreement provides for the accountability of all shareholders; especially minority shareholders. In addition, it's important to ensure that these agreements are properly drawn up in with the Companies Act. Therefore, it is best to seek legal assistance when considering same.

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