



Non-profit companies and Proxies

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On 16 March 2017, the Supreme Court of Appeal (SCA) delivered a judgment which should prompt every non-profit company (NPC) with voting membership to review its Memorandum of Incorporation (MOI). Failure to do so may have the effect of unlawfully negating, restricting, or limiting, the rights of voting members.

Summary of Facts

In the matter of *Richard Du Plessis Barry v Clearwater Estates NPC & others (187/2016) [2017] ZASCA 11* the SCA was effectively asked to consider if the business and resolutions transacted at a special general meeting of Clearwater Estates NPC (the Company), held on 27 September 2014, were unlawful and void. One of the resolutions taken at the Company's membership meeting was to increase the levy payments of residents who formed part of the Company's operation as a homeowner association.

The NPC's MOI provided that: "*a proxy shall not be treated as valid unless it is deposited at a designated location not less than 48 hours before the time designated for holding the meeting at which the proxy is to be exercised.*" The MOI further required a quorum of not less than 25 per cent of voting rights being present to pass any special resolution at any meeting. Due to the late filing of some proxies, the required quorum was not present. The Company's Board resolved to condone the late filing of the proxies, which resulted in the special resolutions being passed.

One of the Company's directors contested the validity of the special resolutions and, in essence, argued that the resolutions were passed in contravention of the Company's MOI. The Company argued that the above 48-hour requirement to deposit proxies is inconsistent with section 58(1) of the Companies Act and therefore void.

The Companies Act

Section 58 is entitled: *Shareholder right to be represented by proxy*. It is important to note that while non-profit companies do not have shareholders, section 10(4) of the Companies Act provides that reference to shareholders in the Act means reference to *voting members* for non-profit companies.

The relevant part of section 58 (1) would, in this context, read: "***At any time***, a [voting member] of a [non-profit] company may appoint any individual, including an individual who is not a [voting member] of that company, as a proxy to participate in, and speak and vote at, a [members'] meeting on behalf of the [voting member] ..."

The Court had to decide whether section 58(1) amounts to an *alterable* or *unalterable* provision as defined in the Companies Act. If section 58(1) is an *unalterable provision*, it means that the Company's MOI cannot change its effect. Conversely it means that if section 58(1) is an *alterable provision*, it can be changed in the Company's MOI.

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Section 15(2)(a)(iii) of the Companies Act provides that the Company's MOI may not contain a provision that negates, restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision of the Act. In essence, any clause in the MOI that seeks to change an *unalterable provision* of the Act, is void.

Court's conclusion

The SCA concluded that section 58(1) is an unalterable provision. This means that it cannot be changed by the Company's MOI. This is because it affords voting members the right to appoint a proxy 'at any time'. This does not allow for its amendment in any way in the Company's MOI. By implication, section 58(1) is aimed at protecting the right of voting members to participate in, speak and vote at a members' meeting. The SCA further commented that: "*If that purpose is thwarted by a time bar imposed in terms of s 58(3)(c) for the delivery of the instrument appointing the proxy, then the validity of the appointment of the proxy itself is impugned.*"

The SCA held that the time restriction contained in the Company's MOI was inconsistent with the provisions of s 58(1) and declared void in terms of s 15(1) of the Act. The Company was not entitled to require its voting members to deposit proxy instruments 48 hours before the time scheduled for the members' meeting.

What does the judgment mean for NPCs?

The implication of this judgment is that time restrictions relating to proxies of voting members are void and, if enforced, will impact on the validity of members' meetings and resolutions flowing from such meetings.

It is therefore advisable that NPCs should review their MOIs and, where applicable, Company Rules, to ensure that unalterable provisions are deleted and the rights of voting members are not unlawfully negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by its MOI or Rules. Pending the amendment process, the Company must not endeavor to enforce any unalterable provisions contained in the MOI.

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