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## Exemption from unalterable provisions an underutilised procedure

In principle, every company is required to comply with all of the unalterable provisions of the Companies Act 71 of 2008 (the Act), except to the extent that its Memorandum of Incorporation (MOI) imposes on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than otherwise would apply to the company in terms of an unalterable provision in terms of s 15(2)(a)(iii) of the Act. An 'unalterable provision' is defined in s 1 as a provision of the Act that does not 'expressly contemplate 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' or rules.

However, this principle is not absolute. It is limited by an exemption procedure set out in s 6(2) of the Act, which has re-

ceived little attention to date. In terms of s 6(2), a person may apply to the Companies Tribunal for an administrative order exempting an agreement, transaction, arrangement, resolution or provision of a company's MOI or rules from any prohibition or requirement established by or in terms of an unalterable provision of the Act, other than a provision that falls within the jurisdiction of the panel (which is primarily concerned with affected transactions and offers and has jurisdiction over the matters referred to in section 201 of the Act).

Therefore, s 6(2) of the Act affords the Companies Tribunal extensive powers to make an administrative order for exemption from any prohibition or requirement established by or in terms of an unalterable provision of the Act. These powers may, in terms of s 6(3), be exercised if the Companies Tribunal is satisfied that -

'(a) the agreement, transaction, arrangement, resolution or provision serves a reasonable purpose other than to defeat or reduce the effect of that prohibition or requirement; and

(b) it is reasonable and justifiable to grant the exemption, having regard to the purposes of this Act and all relevant factors, including -

(i) the purpose and policy served by the relevant prohibition or requirement; and

(ii) the extent to which the agreement, transaction, arrangement, resolution or provision infringes or would infringe the relevant prohibition or requirement.'

The use of the word 'and' between the requirements set out in s 6(3) indicates that both requirements must be met for an administrative order to be granted.

In the case of *La Lucia Sands Share Block Limited v Flexi Holiday Club and Ten Others* (CT) (unreported case no

CT001APR014, 20-10-2014) ([www.companiestribunal.org.za/images/decisions/ct001apr2014.pdf](http://www.companiestribunal.org.za/images/decisions/ct001apr2014.pdf), accessed 9-12-2014) the Companies Tribunal handed down the first decision on s 6(2) of the Act. The decision sheds light on how the Companies Tribunal is likely to approach applications for exemption in terms of this provision.

In the *La Lucia Sands* case the applicant was a public and share block company in terms of the Act and Share Blocks Control Act 59 of 1980, respectively. In terms of s 51 of the Act and reg 32 of the Companies Regulations, the applicant was required to establish and maintain a register of its issued securities in the prescribed form and standard. Despite the advent of the Act and the regulations thereto, the applicant had failed to do so.

The applicant sought an exemption from the unalterable provisions of ss 50 (Securities register and numbering) and 51 (Registration and transfer of certificated securities) and reg 32 (Company securities registers) of the Act coupled with an order that the applicant's register as it stood constituted sufficient compliance with these provisions.

In its decision, the Companies Tribunal pointed out that an exemption in terms of s 6(2) of the Act 'is not a general exemption from statutory provisions, but an exemption of "an agreement, transaction, arrangement, resolution or provision of a company's Memorandum" from a prohibition or requirement imposed by an unalterable provision' of the Act. Therefore, what in fact had to be exempted was a resolution of the shareholders of the applicant, and not the unalterable provisions themselves. In terms of a resolution of the shareholders of the applicant passed on 27 June 2006 the directors of the applicant were 'instructed to maintain the privacy of all shareholders' of the applicant, '... and not to release any information other than their names to any party whatsoever, and in the event that any information has to be given out, that the directors first obtain in writing, and be satisfied with the purposes for which information is required and the identity, background and intentions of the persons seeking such information.' The applicant's reason for applying for the exemption was that it wished to prevent or stop abuse by the respondents. The alleged abuse was primarily the first and tenth respondents' attempts to take over the applicant through hostile means.

The Companies Tribunal found that insofar as the 2006 resolution empowered or compelled the applicant or its directors to thwart any takeover attempts by the respondents it did not serve a reasonable purpose in terms of s 6(3)(a) of

the Act. The Companies Tribunal noted that takeovers have always been a part of the statutory landscape of South Africa, and that to the extent that the manner in which a prospective takeover is conducted does not comply with the law, the affected parties will be entitled to approach the courts for relief. In any event, the 2006 resolution was directed towards the release of information by the directors of the applicant and not the maintenance of a statutory register or information.

On the basis that it accepted that the two legs of the inquiry in s 6(3) are conjunctive, the Companies Tribunal also found that it would not be reasonable and justifiable to grant the exemption in terms of s 6(3)(b) of the

Act. The Companies Tribunal did not fully articulate its reasons for this finding save to state that it did 'not consider it reasonable and justifiable to grant the exemption, especially when considering the purposes of the CA 2008 as reflected in section 7, which include the need to encourage transparency and high standards of corporate governance.' Given that both legs of the inquiry in s 6(3) must be met for an application for exemption to be granted, it is submitted that it was not necessary for the Companies Tribunal in the *La Lucia Sands* case to proceed to the second leg of the inquiry. However, s 7 provides useful guidance as to when it will be reasonable and justifiable to grant an exemption as it sets out the purposes of the Act as follows:

'(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;

(b) promote the development of the South African economy by -

(i) encouraging entrepreneurship and enterprise efficiency;

(ii) creating flexibility and simplicity in the formation and maintenance of companies; and

(iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;

(c) promote innovation and investment in the South African markets;

(d) reaffirm the concept of the company as a means of achieving economic and social benefits;

(e) continue to provide for the crea-

tion and use of companies, in a manner that enhances the economic welfare of South Africa as a global partner within the global economy;

(f) promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;

(g) create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;

(h) provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to

perform their functions;

(i) balance the rights and obligations of shareholders and directors within companies;

(j) encourage the efficient and responsible management of companies;

(k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and

(l) provide a predictable and efficient environment for the efficient regulation of companies.'

There are various practical examples in which s 6(2) may be underutilised and its application might serve to mitigate the effect of a prohibition or requirement established by an unalterable provision in the Act.

- Prior to the inception of the Act it was common for shareholders to be granted the direct right of appointment of directors of the company. However, s 66(4)(b) of the Act provides that a profit company's (other than a state-owned company) MOI must provide for the election by shareholders of at least 50% of the directors, and 50% of any alternate directors. It may be open to argument that in specific circumstances shareholders should be allowed to retain this direct right of appointment, particularly if such right safeguards the interests of shareholders and enhances the governance of the company.

- In the *La Lucia Sands* case the Companies Tribunal stated that the application in question could have been made for an exemption against an uncontrolled dis-

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closure of the register contemplated in terms of s 26(2) of the Act on the basis that the members wished to maintain some measure of control on the release of information.

- In terms of sched 2 to the Act, every member of a close corporation which has been converted into a company in terms of the Act is entitled to become a shareholder of the company resulting from that conversion. This provision entails the issue of shares to those former members. Section 40(1)(a) of the Act requires that the board of a company may issue authorised shares only for adequate consideration to the company as determined by the board. It might not be reasonable to require former members of a close corporation that has converted to a company to pay adequate consideration for their shares in the converted company.

In order to go about filing an application for exemption, it is necessary to have regard to the Practice Guidelines (setting out procedures reflecting what constitutes best practice) of the Companies Tribunal of the Republic of South

Africa. The guidelines require the following documents to be included in the application:

- A form CTR 142. This form includes a concise statement setting out the circumstances and the particulars of the request.
- A sworn statement or affidavit setting out the facts on which the application for exemption is based.
- Certified copies of the agreement, transaction, arrangement or resolution.
- A copy of the Memorandum of Incorporation of a company or the company's rules as filed with the Commission.
- Proof of authority where the deponent is acting on behalf of a juristic person or corporate body.

The application may be filed with the Registrar of the Companies Tribunal by hand, registered mail or by fax or e-mail. If transmitted by fax or e-mail, the application must include a cover page or cover message, respectively, on which the name, address and telephone number of the sender, either the name of the person to whom it is addressed, and the name of that person's attorney, if appli-

cable; or, the name or description of the class of intended recipients, are reflected. An application delivered by fax must also include the transmission date, the total number of pages and the name and contact details of the sender (see [www.companiestribunal.org.za](http://www.companiestribunal.org.za) in this regard).

Pending the grant of an application for exemption by the Companies Tribunal, it is uncertain what the status of an agreement, transaction, arrangement, resolution or provision of a company's MOI or rules that is in conflict with the Act will be. Commentators submit that the provision in conflict with an unalterable requirement or prohibition in the Act will be void given that the exemption cannot operate retrospectively (PA Delport *Henocheberg on the Companies Act 71 of 2008* vol 1 1ed (Durban: LexisNexis 2011) at 50).

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