

Shareholders stuck between a rock and a hard place

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Companies Act 71 of 2008

[Brief overview of Section 163](#)

Introduction

There are instances where the Companies Act 71 of 2008 ("the **Act**") and/or the Memorandum of Incorporation ("**MOI**") will require the board of the company to propose resolutions to the shareholders of the company to approve certain commercial transactions.

An example is where a company proposes the repurchase of its shares (the "**Proposed Transaction**"). The Proposed Transaction may be made subject to certain conditions precedent premised on statutory and/or commercial considerations. The conditions precedent may stipulate that:

1. the Proposed Transaction must be approved by special resolution of the company's shareholders (the "**Repurchase Resolution**"), and
2. not more than 5% of the company's shareholders exercise shall have exercised their appraisal rights by making valid demands in terms of Section 164 of the Companies Act 71 of 2008 (the "**Act**") ("**Appraisal Rights Condition**").

Dissenting minority shareholders who are not in favour of the Transaction may seek to vote against the Proposed Transaction, which could result that the Repurchase Resolution is not passed.

If the dissenting minority shareholders who are opposed to the Proposed Transaction constitute less than 5% of the company's shareholders and exercise their appraisal rights, the board of the company will be obliged to comply with the appraisal rights of the dissenting minority shareholders, prior to the conclusion of the Transaction.

Cause of complaint by dissenting minority shareholders

It may be that the financial cost of the company having to comply with the dissenting minority shareholders having exercised their appraisal rights is larger than initially anticipated. Whilst the board of the company is still intent on proceeding with the Proposed Transaction, the cost implications may represent a significant hurdle for the company to do so. In such circumstances, the board of the company may elect to adopt an alternative strategy to give effect to the substance of the Proposed Transaction, whilst impeding dissenting minority shareholders from exercising their appraisal rights.

The alternative strategy to give effect to the substance of the Proposed Transaction may entail issuing a notice to the remaining shareholders, proposing that the remaining shareholders of the company revoke the Repurchase Resolution and approve new resolutions for a revised transaction, absent of a similar Appraisal Rights Condition contained in the Proposed Transaction.

In the circumstances, the dissenting minority shareholders who voted against the Proposed Transaction and invoked their appraisal rights will be placed in the precarious position of not being able to vote on the proposed revised transaction.

The restriction on the rights of the dissenting minority shareholder to vote on the proposed revised transaction is due to operation of Section 164(9) of the Act, which provides that shareholders who invoke their appraisal rights relinquish their rights to vote on further decisions connected to their shares, save for the right to obtain fair value for their shares from the company.^[1]

The intended effect of the above set of circumstances (assuming the remaining shareholders of the company is intent on proceeding with the revised proposed transaction), is that whilst the dissenting minority shareholders will be unable to receive fair value for their shares in the company, the dissenting minority shareholders will also be restricted from participating at the shareholders meeting where the revised proposed transaction will be considered and voted on.

Section 163 of the Act – Potential remedy

The dissenting minority shareholders are afforded relief in terms of Section 163 of the Act to challenge the substantive fairness of the conduct of board of the company and request that the court restrain the board of the company from implementing the revised proposed transaction, alternatively that the court order the board of the company to comply with the appraisal rights invoked by the dissenting minority shareholders, prior to concluding the revised proposed transaction.

In order to obtain the above relief, it is incumbent for the dissenting minority shareholders to satisfy the court that that the effect of the conduct of the board of the company that is being challenged is oppressive, unfairly prejudicial or unfairly disregards the interests of the dissenting minority shareholders.

The above set of facts demonstrate conduct by the board of a company falling within the ambit of Section 163 of the Act as the board of the company did not make an offer to the dissenting minority shareholders for the fair value of their shares, despite the dissenting minority shareholders having exercised their rights to obtain a fair value.

In the circumstances, the court is likely to exercise its wide powers afforded in Section 163 of the Act, to restrict the board of the company from implementing the revised transaction,^[2] alternatively, order the revised prior transaction is conditional on the board of the company having to comply with the appraisal rights invoked by the dissenting minority shareholders.

Conclusion

The prospects of success in relying on Section 163 of the Act will ultimately be premised on the specific facts surrounding the conduct being challenged. Aggrieved persons are therefore required to identify the nature of the impugned conduct and to establish that the conduct is oppressive or unfairly prejudicial or unfairly disregards the interests of the aggrieved person.

A further important consideration for aggrieved persons is setting out the relief which the aggrieved persons request the court to grant. In this regard, a useful recommendation is to plead for alternative forms of relief in order of preference and concluding with a catch-all request that the court grant further and/or alternative relief that the court may deem appropriate.

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[1] Section 164 (9) of the Act.

[2] Section 163 (2)(a) of the Act.



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