

Interpreting the new South African Companies Act: some challenges

by Johan Henning

INTRODUCTION

The South African Companies Act of 2008 and the Companies Amendment Act of 2011 both came into operation on May 1, 2011. The new Companies Act elicited a veritable tsunami of legal writing and analyses, both in law journals and in law reports. This is not surprising, especially in view of the fact that by far the greater part of its provisions had to be amended on the day it became operative.

In most of these analyses, commentaries and decisions little attention was focused on, and small effort made to implement, the comprehensive prescriptive provisions on the interpretation of the Companies Act. Had these been effected, it is probable, for instance, that recent judicial pronouncements on the application of common law rules such as *eiusdem generis* in interpreting the “just and equitable” ground for winding-up of solvent companies, may have been enunciated with somewhat less alacrity.

In this contribution attention will be focused primarily on some of the interpretation imperatives of section 5 of the Companies Act, as well as a few of the challenges posed by their implementation.

BACKGROUND; OWN INNER LOGIC AND COMMON LAW

In *Ex parte NBSA Centre Ltd* 1987 (2) SA 783 (T), a decision handed down under the previous Companies Act 61 of 1973, the approach to company law and the construction of company legislation was described as follows by Deputy Judge President Coetzee:

*“Company law is much more than the current statute which applies at any particular point in time. (It) has its own inner logic which requires to be identified and mastered. In addition it has developed in a number of areas what might be termed, for want of a more suitable expression, its own inner common law which is not to be found in any specifically identifiable provision. There are a number of such areas. The director-company-member relationship and resultant fiduciary duties of a director and the rule in *Foss v Harbottle* come to mind. Other examples ... are the rule against the acquisition or*

*purchase of its own shares by a company and ... compromises and arrangements. Particularly to these areas, would Gower’s observation about company law (in the preface to the first edition of his well-known work) apply - that one should view its underlying principles in their historic and economic context rather than as a collection of statutory provisions. I should think that it follows that where one deals with problems of construction in these areas, one should be careful not to treat the Act ... by simply rushing for dictionaries, or applying simple rules such as *noscitur a sociis* with undue alacrity.”*

STATUTORY IMPERATIVES

Primary provision

It seems the legislature considered that the *dictum* in *Ex parte NBSA Centre Ltd* should receive detailed statutory support. Section 5 of the Companies Act deals with its “general interpretation.” As far as is relevant for this cursory overview, it prescribes that:

- The Companies Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7 of the Companies Act.
- A court may consider foreign company law, to the extent appropriate for interpreting or applying the Companies Act.
- If there is an inconsistency between a provision of the Companies Act and a provision of any other national legislation, to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second (subject to a few detailed exceptions, not relevant to this discussion):
 - (i) the applicable provisions prevail of the:
 - Auditing Profession Act of 2005,
 - Labour Relations Act of 1995,
 - Promotion of Access to Information Act of 2000,
 - Promotion of Administrative Justice Act of 2000,
 - Public Finance Management Act of 1999,
 - Securities Services Act of 2004,
 - Banks Act of 1990,

- Local Government: Municipal Finance Management Act of 2003,
 - section 8 of the National Payment System Act of 1998, and
 - Public Service Act of 1994 only as far as Chapter 8 of the Companies Act is concerned, and
- (ii) in any other case the provisions of the Companies Act prevail.

Other provisions

Section 158 of the Companies Act provides that, when determining a matter brought before it in terms of or making an order contemplated in the Companies Act, a court:

- must develop the common law as necessary to improve the realisation and enjoyment of rights established by the Companies Act; and
- must promote the spirit, purpose and objects of the Companies Act; and
- if any provision of the Companies Act, read in its context, can be reasonably construed to have more than one meaning, it must prefer the meaning that best promotes the spirit and purpose of the Companies Act, and will best improve the realisation and enjoyment of rights.

Give effect to purposes

The very first imperative in section 5 is that the Companies Act must be interpreted and applied in a manner that gives effect to the purposes of the Companies Act set out in its section 7. This imperative is strengthened by section 158.

Section 7 of the Companies Act provides that these purposes are to:

- promote compliance in the application of company law with the Bill of Rights as provided for in the Constitution;
- promote the development of the South African economy by encouraging entrepreneurship and enterprise efficiency; creating flexibility and simplicity in the formation and maintenance of companies; and 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;
- promote innovation and investment in the South African markets;
- reaffirm the concept of the company as a means of achieving economic and social benefits;
- continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;

- promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;
- 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;
- 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;
- balance the rights and obligations of shareholders and directors within companies;
- encourage the efficient and responsible management of companies;
- 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
- provide a predictable and effective environment for the efficient regulation of companies.

The Bill of Rights contained in Chapter 2 of the South African Constitution applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. A provision of the Bill of Rights binds a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person. When applying a provision of the Bill of Rights to a juristic person, a court in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right in accordance with the Bill.

Indications are that a dedicated endeavour to give full effect to the provisions of sections 5 and 158 and the long list of detailed purposes enumerated in section 7, may prove to be a somewhat daunting task. It may even create opportunities for every heretic to know his text. For instance, when considering whether a certain provision should perforce be construed as introducing a specific iteration of a fashionable foreign doctrine, but without clarity as to the consequences of its application in South African company law, support may be sought in section 5(2) which provides that the court may consider foreign company law, to the extent appropriate. If the proposed construction would saddle the courts with the onerous duty to construct, adapt and develop this doctrine against the background of South Africa's common law also as received from Roman-Dutch law, reliance may be placed on section 158 requiring the courts to develop the common law as necessary to improve the realisation and enjoyment of rights established by the Companies Act.

Then again, it may also be argued that the particular construction merits support no more than to the extent that it would provide a predictable and effective environment for the efficient regulation of companies.

Legislation prevailing

Section 5 subrogates the Companies Act to the provisions of a comprehensive list of at least 10 other national Acts. The practical consequence is that whenever an interpretation of a particular provision of the Companies Act is attempted, it must of necessity be ascertained first whether a conflicting provision is contained in the prioritised legislation.

For instance, when construing section 71 of the Companies Act relating to the removal of directors by shareholders by an ordinary resolution, it is imperative to interpret this section subject to the overriding provisions of, amongst others:

- section 23 of the Constitution providing that everyone has the right to fair labour practices;
- section 213 of the Labour Relations Act which defines an “employee” in part as a person who in any manner assists in carrying on or conducting the business of an employer, as well as its other provisions relating to unfair labour practices and remedies of such an “employee” in the event of dismissal.

Companies Act prevailing

Section 5(4) provides that the Companies Act prevails if there is an inconsistency between a provision of the Companies Act and a provision of any other national legislation, to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second, except as far as the comprehensive list of overriding legislation, discussed above, is concerned.

The long list of prevailing legislation by its very detailed nature creates an impression that it is intended as a *numerus clausus*. This may raise the question how legislation not on the closed list and in existence before the effective date of the Companies Act, is effected.

The Income Tax Act of 1962 is not on the closed list of prevailing legislation. Some amendments have been effected to align the Income Tax Act with the Companies Act. Examples are the new concept of “contributed capital” moving away from the distinction between share capital and share premium accounts. It seems highly likely that further amendments will be necessary to further align the Income Tax Act with the provisions of the Companies Act.

The Share Blocks Control Act of 1980 also is not on the list of prevailing legislation. On the face of it, it would seem

that the provisions of the Companies Act therefore apply to share block companies without modification or exception, even though section 3(2) of the Share Blocks Control Act provides that the provisions of the Companies Act apply to a share block company *only* if those provisions are *not* in conflict with the provisions of the Share Blocks Control Act.

A conclusion that the Companies Act overrides section 3(2) of the Share Blocks Control Act would put an end to share block companies, as their unique characteristics and requirements provided for by the Share Blocks Control Act would be in conflict with and thus overridden by the general prescriptive provisions of the Companies Act. Such a result could very well be contrary to almost all the section 7 purposes to which an interpretation of the Companies Act, inclusive of its section 5, must give effect. Thus there is every indication that the non-inclusion of the Share Blocks Control Act in the list of prevailing legislation in section 5 of the Companies Act should be seen as a rather unfortunate lapsus.

Section 6 of the Companies Act may provide a measure of relief. It provides that a person may apply to the Companies Tribunal for an administrative order exempting an agreement, transaction, arrangement, resolution or provision of a company’s Memorandum of Incorporation or rules from any prohibition or requirement established by or in terms of an unalterable provision of the Companies Act. The Companies Tribunal may make such an administrative order if it is satisfied that:

- 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
- it is reasonable and justifiable to grant the exemption, having regard to the purposes of the Companies Act and all relevant factors, including the purpose and policy served by the relevant prohibition or requirement, and the extent to which the agreement, transaction, arrangement, resolution or provision infringes or would infringe the relevant prohibition or requirement.

Nevertheless, it is rather unfortunate and awkward that this lapsus appears in the very provision defining the interpretation imperatives. It illustrates some of the considerations behind the numerous rectifications introduced by the Companies Amendment Act of 2011. Clearly the efficacy of these rectifications also leave something to be desired. 🚩

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