THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 187/2016

In the matter between:

RICHARD DU PLESSIS BARRY **APPELLANT**

and

CLEARWATER ESTATES NPC (CLEARWATER ESTATES HOMEOWNERS ASSOCIATION) **FIRST RESPONDENT**

KEVIN OLIVIER (CHAIRPERSON) **SECOND RESPONDENT**

THE COMMISSIONER OF COMPANIES AND INTELLECTUAL PROPERTY COMMISSION **THIRD RESPONDENT**

Neutral citation: *Richard Du Plessis Barry v Clearwater Estates NPC & others (*187/2016) [2017] ZASCA 11 (16 March 2017)

Coram: Leach, Willis, Swain and Mbha JJA and Schippers AJA

Heard: 3 March 2017

Delivered: 16 March 2017

Summary: Companies Act 71 of 2008 : s 58(1) : appointment of proxy 'at any time' : s 58(3)*(c)* : instrument evidencing proxy to be deposited 'before' shareholders meeting : Memorandum of Incorporation of company requiring proxy to be deposited 'not less than 48 hours before' meeting : article inconsistent with unalterable provisions of s 58(1) : article void in terms of s 15(1).

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van der Westhuizen AJ sitting as court of first instance.)

The appeal is dismissed with costs.

JUDGMENT

Swain JA (Leach, Willis, Mbha JJA and Schippers AJA concurring)

[1] The appellant, Mr Richard Du Plessis Barry, in his capacity as a director of the first respondent, Clearwater Estates NPC, a company duly registered in terms of the company laws and known as the Clearwater Estates Homeowners Association, launched an application before the Gauteng Division of the High Court (Pretoria). An order was sought declaring that all the business and resolutions transacted at a special general meeting held by the first respondent on 27 September 2014, were unlawful and void.

[2] The second respondent, Mr Kevin Olivier, was cited in his capacity as the Chairperson of the Board of Directors of the first respondent. The third respondent, the Commissioner of the Companies and Intellectual Property Commission, was cited, insofar as it may be necessary, to rectify its register in respect of the first respondent, in accordance with any order that may be granted.

[3] The special general meeting in question was convened for the purpose of considering and adopting various resolutions relating to the internal governance of the first respondent. A resolution that approved an increase in the levy payments by

the residents was the catalyst that ignited the present dispute.

[4] The challenge to the validity of the resolutions passed at the meeting was that shareholder proxies submitted on the day of the meeting, were in contravention of articles 13.7.10 and 13.7.11 of the first respondent's Memorandum of Incorporation (MOI). These articles provide 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. Absent these late proxies, the attendance at the meeting did not meet the requirements contained in article 13.3.2 of the MOI, which provides for a quorum of not less than 25 per cent of voting rights being present for the purpose of passing any special resolution at any meeting.

[5] In order to attain the requisite quorum, the Board of the first respondent proposed a vote condoning the late filing of these proxies, which was accepted by a majority decision at the meeting. The contested resolutions were then put to the vote and passed. The appellant contends that the meeting was not properly constituted as no special resolutions could be passed in the absence of the requisite quorum. The board's proposal to condone the late filing of the proxies and the adoption of this proposal at the meeting according to the appellant, amounted to the amendment of the first respondent's MOI which could be effected only by way of a special resolution as contemplated in s 65(11) of the Companies Act 71 of 2008 (the Act). This resolution could not be passed because it also lacked the requisite quorum. In other words, the absence of a quorum for the purposes of passing the intended resolutions, was sought to be remedied by the invocation of a special vote that required the same quorum.

[6] The first respondent's answer to these submissions was that articles 13.7.10 and 13.7.11 of the MOI were contrary to the provisions of s 58(1) of the Act, which provides that a shareholder may appoint a proxy 'at any time'. These articles were accordingly null and void as contemplated in s 15(1)*(b)* of the Act. On this basis, so it contended, the requirement in the articles that any proxy be delivered not less than 48 hours before the meeting, was null and void.

[7] The motivation of the parties is readily apparent. On the one hand, the appellant seeks to uphold and enforce the articles in question with the object of defeating the resolutions passed at the special general meeting. On the other hand, the first respondent seeks the annulment of articles 13.7.10 and 13.7.11 with the object of preserving the validity of the resolutions. It has to be questioned whether the present dispute with its attendant legal costs, is in the interest of the residents. The undisputed evidence is that the proposed increase in the levies from R451.50 per month to R724 per month, carries the recommendation of an investigative team whose report was provided to members prior to the meeting. The increase was apparently necessary to ensure that the first respondent has sufficient funds to pay its debts and comply with its obligations in terms of the MOI.

[8] The court a quo (Van der Westhuizen AJ) held that the articles in question were inconsistent with the provisions of s 58(1) of the Act, which was held to be an unalterable provision conferring an unqualified right on a shareholder, to appoint a proxy 'at any time'. It held that the articles impermissibly sought to alter the time stipulated in s 58(1) by adding a limitation to the time within which the proxy had to be delivered to the company, or other person on behalf of the company. The court a quo reasoned that the articles were void to this extent, with the result that the proxies in dispute were properly considered and taken into account and the resolutions validly passed at the meeting. The application was accordingly dismissed with costs, with leave to appeal to this Court being granted at a later stage.

[9] A resolution of the dispute requires a consideration of ss 58(1) and 58(3)*(c)* of the Act, together with the provisions of articles 13.7.10 in 13.7.11 of the MOI of the first respondent. The sections provide as follows:

'58. Shareholder right to be represented by proxy –

(1) At any time, a shareholder of a company may appoint any individual, including an individual who is not a shareholder of that company, as a proxy to –

(a) participate in, and speak and vote at, a shareholders meeting on behalf of the shareholder; or

(b) . . .

(2) . . .

(3) Except to the extent that the Memorandum of Incorporation of a company provides otherwise –

(a) . . .

(b) . . .

(c) a copy of the instrument appointing a proxy must be delivered to the company, or to any other person on behalf of the company, before the proxy exercises any rights of the shareholder at a shareholders meeting.'

[10] Articles 13.7.10 and 13.7.11 of the first respondent's MOI read as follows:

'13.7.10 Any power of attorney and any instrument appointing a proxy and the power of attorney or other authority (if any) under which it is signed, or a notarially certified copy of such power of attorney shall be deposited at the office or at such other place in South Africa as is specified for that purpose in the notice convening the meeting, not less than 48 (FORTY EIGHT) hours (excluding Saturdays, Sundays and public holidays) before the time appointed for holding the meeting or adjourned meeting at which the person named in such instrument proposes to vote, or a poll where a poll is to be held after a meeting or adjourned meeting;

13.7.11 If the power of attorney or other instrument or proxy is not deposited timeously, it shall not be treated as valid.'

[11] These sections must be considered in the context of the definition in s 1 of the Act of 'alterable provisions' and 'unalterable provisions'. An 'alterable provision' is:

'. . . a provision of this Act in which it is expressly contemplated 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.'

An 'unalterable provision' is:

'. . . a provision of this Act that does not expressly contemplate that its effect on any particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by a company's Memorandum of Incorporation or rules.'

[12] The importance of the distinction is apparent from the provisions of s 15(2)*(d)* which provides that, subject to the provisions of s 15(2)*(a)*(iii), the MOI of a company 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

addition, s 15(1) of the Act provides that:

‘(1) Each provision of a company's Memorandum of Incorporation –

(a) must be consistent with this Act; and

(b) is void to the extent that it contravenes, or is inconsistent with, this Act, subject to section 6(15).’

[13] I agree with the conclusion of the court a quo that the provisions of s 58(1) are unalterable. The right of a shareholder to appoint a proxy ‘at any time’ is a provision that does not expressly contemplate its alteration in any way by a company's MOI. The provisions of s 58(3)*(c)* are however alterable, because the section expressly contemplates that its effects may be altered. Consequently if the articles in question contravene or are inconsistent with the provisions of s 58(1), they are void in terms of s 15(1) of the Act.

[14] Central to the appellant's argument is the proposition that on a proper interpretation of these sections, a clear distinction is drawn between the concept of the appointment of a proxy in terms of s 58(1), and the exercise of the proxy in terms of s 58(3)*(c)*. The latter section deals, conceptually, with the administration of proxies. The proviso qualifies an individual's right to exercise a proxy by stipulating that a proxy may be exercised only if the instrument appointing the proxy is delivered to the company (or an authorised agent) before the proxy exercises any rights at a meeting. According to the appellant, the place of delivery, the person to whom the instrument is to be delivered and the time for delivery, are dealt with in this subsection. Any amendment of the time period from ‘before’ (as in the subsection), to ‘not less than 48 (FORTY EIGHT) hours . . . before’ (as in the first respondent's MOI), relates solely to the exercise of the appointment and not to the appointment itself, and is authorised by s 58(3)*(c)*. It was submitted on behalf of the appellant that this interpretation does not give rise to any conflict between ss 58(1) and 58(3)*(c)*, as an individual could hold a valid appointment but be unable to exercise that appointment at a particular meeting. The appellant contended that the legislature therefore intended that there could be a lawful variation through a company MOI of the provisions in the Act relating to the stipulation of a time period, within which proxies must be submitted for the purpose of exercising the rights contained therein, at a particular meeting of the company.

[15] The respondent's answer to these contentions was that the wording of s 58(1)*(a)* is clear and unambiguous and permits no interpretation other than that a shareholder has the right to appoint any individual as a proxy 'at any time.' The respondent argued that this subsection was an unalterable provision in the Act whose purpose was to protect the right of shareholders to participate in, speak and vote at a shareholders meeting and to do so through a proxy of their choice. The respondent submitted that the appointment of a proxy may accordingly take place at any time, including during the meeting. The time clause in the first respondent's MOI accordingly negates, restricts, limits or qualifies this fundamental right of a shareholder contrary to the provisions of s 15(2)*(d)* of the Act. The time clause contained in the first respondent's MOI therefore contravenes and is inconsistent with s 58(1) of the Act and is void to that extent.

[16] In my view, the distinction which the appellant seeks to draw between the appointment of a proxy and the exercise of a proxy in terms of s 58(1) and s 58(3)*(c)* of the Act, is artificial. On the appellant's interpretation the appointment of a proxy by a shareholder to act for and behalf of the shareholder at a particular meeting, less than 48 hours before the meeting is to take place, does not affect the validity of the appointment but simply means that the proxy cannot be exercised at that meeting. However, the appointment contemplated by s 58(1) is not made in vacuo. Although it may take place at 'any time', it has a defined purpose in terms of the Act. That purpose in terms of s 58(1)*(a)*, is to 'participate in, and speak and vote at, a shareholders meeting on behalf of the shareholder'. The appointment of a proxy in respect of a particular meeting seeks to achieve this statutorily defined purpose. 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 appointment of a proxy who is unable to perform any of these statutorily defined functions at a particular meeting has no purpose and is no appointment at all.

[17] The erroneous interpretation placed upon these sections by the appellant results from a failure to pay due regard to the language used, '. . . the context in which the provision appears', and 'the apparent purpose to which it is directed . . .'. (*Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13;

2012 (4) SA 593 (SCA) para 18). That the validity of the appointment of the proxy and not simply the exercise by the proxy of his or her statutory rights in terms of s 58(1)*(a)* is the object of the articles in question, is clear from the wording of Article 13.7.11. This article provides that if the proxy is not deposited timeously '. . . it shall not be treated as valid'. If the object was only to prohibit the exercise by the proxy of the rights conferred upon him or her at the meeting in question, and not affect the validity of the appointment of the proxy, the article need only have provided that the proxy was prohibited from participating in and exercising any rights at the meeting.

[18] The plain wording of ss 58(1)*(a)* and 58(3)*(c)* of the Act read together and in context with due regard to their purpose, is that a shareholder of a company may appoint at any time, anyone who is not a shareholder of the company as a proxy to participate in, and speak and vote at a shareholders meeting on behalf of the shareholder, provided that the proxy delivers a copy of the instrument appointing the proxy, to the company or to any other person on behalf of the company, before the proxy may exercise any of the rights of the shareholder at the meeting.

[19] I am fortified in this conclusion by an examination of the comparable provisions contained in the repealed Companies Act 61 of 1973 (the 1973 Act), with ss 58(1) and 58(3)*(c)* of the Act. Section 189 of the 1973 Act provided as follows:

'(1) Any member of a company entitled to attend and vote at a meeting of the company, or where the articles of a company limited by guarantee so provide, any member of such company, shall be entitled to appoint another person (whether a member or not) as his proxy to attend, speak, and vote in his stead at any meeting of the company . . .'

'(3)*(a)* Any provision contained in a company's articles shall be void insofar as it would have the effect of requiring the instrument appointing a proxy, or any other document necessary to show the validity of or otherwise relating to the appointment of a proxy, to be received by the company at its registered office or by any other person more than forty-eight hours before a meeting in order that the appointment may be effective thereat.'

[20] In terms of the 1973 Act, a provision in a company's articles that the instrument appointing a proxy had to be received by the company more than 48 hours before the meeting, would be void and the proxy would not be 'effective' at the meeting. However, a provision (as provided for in article 13.7.10), requiring the instrument to be presented not less than 48 hours before the meeting would be valid. Although no

time period was stipulated in s 58(1) of the 1973 Act for the appointment of a proxy, a limitation was nevertheless placed upon the ability of a shareholder to appoint a proxy less than 48 hours before a meeting, where the company's articles contained this provision. To do so would be an exercise in futility as the proxy could not be exercised at that meeting. In striking contrast, the Act contains no such limitation and provides that the appointment of a proxy may take place 'at any time' in terms of s 58(1). In addition, no minimum period is specified in s 58(3)*(c)* of the Act for the delivery of the instrument evidencing the proxy. It only has to be delivered 'before' the proxy exercises the rights of the shareholder at the meeting.

[21] It is a principle of statutory interpretation that a 'deliberate change of expression will *prima facie* indicate a change of legislative intention. . . but, as indeed the words *prima facie* serve to emphasise, a change in wording does not always and inevitably denote a change of intention. . .'. (*R v Shole* 1960 (4) SA 781 (A) at 787A). However, as pointed out in *Endumeni* supra paras 20-26, it is 'entirely artificial' to speak of 'an intention of Parliament' and what has to be considered is 'the apparent purpose of the provision'. Viewed in this context a deliberate change of expression will prima facie indicate a change in the legislative purpose of the provision in question. The use of the phrase 'at any time', is a deliberate change of expression. Considered together with the omission of a minimum period for the delivery of the instrument evidencing the proxy and its substitution with the requirement that it is to be delivered 'before' the exercise of any rights at the meeting, a change of legislative purpose with regard to the former minimum period of 48 hours is clearly indicated.

[22] In reaching this conclusion I do not overlook the practical difficulties which the appellant alleges will arise from this interpretation of the provisions of ss 58(1) and 58(3)*(c)* of the Act. It was submitted that should a corporation be unable to regulate the submission of proxies by the imposition of a deadline before a meeting, general meetings of corporations, particularly large corporations, will become unworkable. The situation is postulated of a large company with thousands of shareholders being hamstrung by the submission of thousands of proxies on the day of a scheduled meeting. It was argued that because s 63(1)*(b)* of the Act enjoins the officer presiding over a general meeting to validate and verify proxies prior to allowing a proxy to exercise a vote on the instrument, a general meeting would be unable to

proceed on the scheduled day because of the administrative burden imposed on the presiding officer. If these practical difficulties are real and not simply apparent, their resolution lies not in a strained interpretation of the Act, but by legislative intervention.

[23] The provisions of articles 13.7.10 and 13.7.11 of the first respondent's MOI are accordingly inconsistent with the provisions of s 58(1) and are void in terms of s 15(1) of the Act.

[24] The following order is granted:

The appeal is dismissed with costs.

_____

K G B Swain

Judge of Appeal

Appearances:

For the Appellant:	S G Gouws (with L W De Beer) Instructed by: Jacobs & Moodie (Lit) Inc, c/o Klagsbrun, Edelstein, Bosman & De Vries, Pretoria Symington & De Kok, Bloemfontein
For the Respondent:	B C Stoop SC Instructed by: Lombard Muller & Partners Inc, Pretoria Christo Dippenaar Inc, Bloemfontein