

Protection as a minority shareholder

As a minority shareholder of a company, it is key to ensure that the Shareholders Agreement of the company enshrines the rights of minority shareholders. Minority shareholders find protection in the provisions contained in the Companies Act, as well as through ensuring that the Memorandum of Incorporation and Shareholders Agreement specifically contains additional protection of their rights. So, what protection of rights are available to minority shareholders to protect the proprietary interest in the company?

The Companies Act

Section 163 of the Companies Act is important for minority shareholders, as it provides that a shareholder may make application to the court for relief, should they be of the opinion that they have been oppressed or unfairly prejudiced or disregarded. Over and above this, the Act further provides that a Director may seek the same relief on behalf of a shareholder. Thus, if the court find that the conduct of the company was oppressive or unfairly prejudicial, the court may grant relief to the minority shareholder.

The Shareholders Agreement

A well-drafted Shareholders Agreement will include certain provisions, that protect the rights of minority shareholders and the company. When participating in the conclusion of a Shareholders Agreement, it is important to ask the right questions and to ensure that minority shareholders are afforded the following rights, as is held by the majority shareholders, including but not limited to:

- the right to be involved in all major decisions regarding the company, and to hold a veto where applicable;
- the right to protect their share value and to prevent any dilution in the future of their share capital;
- the right to participate in the management of the company through board representation, often ensuring that they elect at least one director to the board;
- the right to the fair and proper distribution of profits; and
- Tag-along and drag-along rights, as an exit strategy.

Pre-emptive rights should be included in the shareholders agreement as well as the company's memorandum of incorporation. They ensure that prior to any offer of shares to a third-party, that the existing shareholders in the company are offered shares pro-rata to the existing shareholding within the company. Another instance where the pre-emptive right comes into play, is when an exiting shareholder must first offer their shares to the existing shareholders, prior to any other third-party. Thus, pre-emptive rights prevents a possibility of the dilution of shares.

Likewise, ensuring that the minority shareholder has board representation is of the utmost importance. The Shareholders Agreement and or the Memorandum of Incorporation may contain provisions that allow for the minority shareholder to appoint or elect at least one director to the board. Should this be an aspect that is not agreed upon amongst the shareholders, the minority shareholder can request that he/she holds observer rights in respect of the board meetings. He/she will thus be able to observe the meeting but will have no vote in respect of any of the decisions to be made.

Conclusion

Ensuring that your company's constitutional documents are well-drafted is of paramount importance to ensure that your rights have been protected, as well as to protect the company itself. At SchoemanLaw Inc, our commercial law experts can assist you with all your contractual needs, and provide a holistic, tailored approach to your circumstances. Contact an expert at SchoemanLaw today, to ensure your contractual needs are covered.

