COMPANIES ACT, 71 OF 2008
MINORITY PROTECTION

The Companies Act of 2008 (the "Act") introduces various measures designed to protect minority shareholders. Some of these will have a significant impact on the way in which mergers and acquisitions are dealt with (Chapter 5).

The types of transactions that will be specifically affected by the newly introduced minority protections are the fundamental transactions referred to in Chapter 5 of the Act.

Fundamental transactions include the following 3 (three) types of transactions in terms of the Act:

- the disposal of all or the greater part of the assets or the undertaking of a company such as the sale of the company's business or the majority of its assets (as specified in section 112);
- the conclusion by a company of a transaction of amalgamation or merger (as specified in section 113); and
- implementation of a scheme of arrangement, (as specified in section 114).

What you should do:
When a fundamental transaction is considered by a company, ensure that the requirements of Chapter 5 are adhered to.

Section 115 stipulates the required approval for fundamental transactions.

A proposed fundamental transaction must be approved by a special resolution adopted by persons entitled to exercise voting rights, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% (or the higher percentage, if specified in the Memorandum of Incorporation) of the entitled voting rights.

It is worth noting that this special resolution can not be passed by way of round robin as contemplated in section 60 and 65 of the Act, but only at a duly constituted meeting.

A further requirement is that a special resolution must also be adopted in the same manner as mentioned above, by the shareholders of the company's **holding company** if any, if:

- the holding company is a company or an external company;
- the proposed transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary; and

having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary constitutes a disposal of all or the greater part of the assets or undertaking of the holding company.
The proposed transaction **must** be approved by at least 75% of the voting rights exercised in respect of the relevant resolution, or the lesser amount as per the company's Memorandum of Incorporation.

Despite adopting the abovementioned resolution, a company will be **prohibited from proceeding** with the proposed transaction without the approval of a court if:

- the resolution was opposed by at least 15% of the exercised voting rights on that resolution, and within 5 (five) business days after the vote, any person who voted against the resolution requires the company to seek court approval; or
- within 10 (ten) business days after such vote by any person voting against the resolution, the court grants that person leave to apply to a court for a review of the transaction in accordance with section 115 of the Act.

What you should do:

When a special resolution is proposed in respect of a fundamental transaction, support of at least 86% of the persons exercising their voting rights at the meeting should be obtained in order to avoid the possibility of the transaction being blocked by a minority.

If a resolution requires approval by a court, the company must either within 10 (ten) business days after the vote, apply to the court for approval or treat the resolution as a nullity. Should the company apply to court, the company will bear the costs of that application.

In respect of an application by a person voting against the resolution, the court may only grant an application for leave if the court is satisfied that the applicant is acting in good faith, the applicant appears prepared and able to sustain the proceedings and has alleged facts which, if proved by the applicant, would support an order to set aside the special resolution.

What you should know:

For the purpose of adopting a special resolution any voting rights controlled by an acquiring party, a person related to an acquiring party or a person acting in consent with either of them, must not be included in calculating the percentage of voting rights:

- *required to be present or actually present, in determining whether the applicable quorum requirements are satisfied; or*
- *required to be voted in support of a resolution, or actually voted in support of the resolution.*

In addition to the above, section 164 (Chapter 7) of the Act grants a shareholder that has given a company written notice objecting to a special resolution to approve a fundamental transaction and has voted against the resolution, the right to demand that the company pay to such dissenting shareholder the fair value for all the shares of the company held by that dissenting shareholder. The necessary procedural requirements must be met in this regard. Dissenting minority shareholders therefore have been granted a valuable right to force the acquisition of their shares by the company in certain circumstances. It should be noted that similar rights have been granted to minority shareholders in the event of a proposed amendment of the company's Memorandum of Incorporation that may have an adverse effect on the rights of that particular class of shareholder.

What you should do:

If a company has given notice to shareholders of a meeting to consider adopting a resolution to enter into a fundamental transaction, that notice must include a statement informing shareholders of their rights under section 164 of the Act.

If compliance with section 164 would result in a company being unable to pay its debts as they fall due and payable for the ensuing 12 (twelve) months, then the company may apply to court for an order varying its obligations, but the court must ensure that the dissenting shareholders are paid at the earliest possible date compatible with the company satisfying its other financial obligations.

The risk of having to pay minority shareholders an undefined amount of money on the entering into of a fundamental transaction makes the planning of such a transaction extremely difficult. Unless the risk of appraisal rights being exercised can be clearly quantified, a company will be uncertain in many instances whether it will be called upon in terms of section 164 of the Act and, if so, the amount of its financial obligations which may arise as a result thereof. This makes the evaluation of a transaction, and the raising of the requisite amount of finance in order to fund a transaction, much more complex and uncertain. Companies will be well advised to obtain support from legal counsel when contemplating a fundamental transaction.

NEED ASSISTANCE WITH THE IMPLICATIONS OF THIS ACT?

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