
FUNDAMENTAL TRANSACTIONS

Some Applications and Implications

Piet Delport

Fundamental transactions and implementation

S 112, S 113 (S 116), S 114 plus S 115

Section 112

(2) A company may not dispose of all or the greater part of its assets or undertaking unless—

(a) the disposal has been approved by a special resolution of the shareholders, in accordance with section 115; and

(b) the company has satisfied all other requirements set out in section 115, to the extent those requirements are applicable to such a disposal by that company.

(5) A resolution contemplated in subsection (2) (a) is effective only to the extent that it authorises a specific transaction.

Turquand – s 228 of the 1973 Companies Act.

Stand 242 Hendrik Potgieter Road Ruimsig applicable?

S 66 and s 20 of the 2008 Act.

Section 114

114. Proposals for scheme of arrangement.—(1) Unless it is in liquidation or in the course of business rescue proceedings in terms of Chapter 6, the board of a company may propose and, subject to subsection (4) and approval in terms of this Part, implement any arrangement between the company and holders of any class of its securities by way of, among other things—

- (a) a consolidation of securities of different classes;
- (b) a division of securities into different classes;
- (c) an expropriation of securities from the holders;
- (d) exchanging any of its securities for other securities;
- (e) a re-acquisition by the company of its securities; or
- (f) a combination of the methods contemplated in this subsection.

What is an arrangement?

“Arrangements” contemplated by this section “are of the widest character and . . . ‘the only limitations are that the scheme cannot authorise something contrary to the general law or wholly *ultra vires* the company *Du Preez v Garber: In re Die Boerebank Bpk*”

The achievement of such object by way of the use of the machinery of the section must be necessary in the sense that it cannot otherwise conveniently be achieved (ie by independent agreement between the company and each of the affected parties) *Ex parte Lomati Landgoed Beherende Eiendoms Bpk; Senwes Ltd v Jan van Heerden & Sons CC*.

S 114 a residual procedure?

S 311 authorities.

Section 48

48. Company or subsidiary acquiring company's shares.—(1) This section does not apply to (s 164 and redemption in redeemable securities) —

...

(2) Subject to subsections (3) and (8), and if the decision to do so satisfies the requirements of section 46—

(a) the board of a company may determine that the company will acquire a number of its own shares; and

...

(8) A decision by the board of a company contemplated in subsection (2) (a)—

(a) must be approved by a special resolution of the shareholders of the company if any shares are to be acquired by the company from a director or prescribed officer of the company, or a person related to a director or prescribed officer of the company; and

(b) is subject to the requirements of sections 114 and 115 if, considered alone, or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares.

Section 48 and section 114

S 48 (8) (a) and (b) disjunctive?

Consensual transactions – s 48 (8) (a)

Application of s 114 and 115

Subject to ss 114 and 115 if more than 5% - s 48 (8) (b)

Board resolution and s 75

Acquisition from all board members – board resolution?

Acquisition of shares

“Acquisition”

S 46 - “Consideration” – solvency and liquidity

S 48 not excluded iro business rescue

S 48 and Business rescue – *Moodley v On Digital Media*

Section 115 and arrangements?

Consensual - more than 75%?

Conclusion
