Mergers and Amalgamations

Sections 113 and 116 of the Companies Act 2008

The South African Experience

(or - before and after)

BEFORE

- Common law and common (company) law provisions
- What is a “Merger” or “Amalgamation” – flavour?

A “merger” or “amalgamation” refers to a transaction whereby the ***assets*** of two or more companies ***become vested in***, or ***under the control of*** one company, whose shareholders then consist of the shareholders (or most of the shareholders) of the companies that were merged. The single company may be either:

- one of the existing companies which was merged and whose share capital was reorganised to enable it to be the vehicle of the merger; or
- (a new company formed for the purpose of the merger.

A single company may emerge from the merger as the holding company of the companies that were merged, each retaining its separate legal identity and existence as subsidiary.

"Assets become vested" (sale of assets)

How?

Sale of assets

Generally by directors under general management powers / CC only method - members authority

Unless directors' management powers curtailed s 228 1973 Act/ s 112 2008 Act (50%) – CL *Turquand* n/a – s 20(7)??

Type of assets:

- Immovable corporeal– ownership - transfer/registration
- Movable corporeal – ownership transfer
- Incorporeal – ownership cession/registration
- Pactum de non cedendo

  – direct

  – Smuts v Booyens – pre-emptive right - bona fide third party

Consideration for assets:

Cash – in effect a “voluntary” freeze-out.

- Forward/reverse triangular merger: holding company subscribes for shares

Shares –

- Forward/reverse triangular merger: holding company share swop through subsidiary– limited

Holding company issues shares as consideration

- Prospectus
- Consideration adequate
- Share issue requirement – eg s 38, 39 of the Companies Act

Subsidiary issues shares as consideration

- Prospectus– primary offer?
- Consideration adequate

Consideration for liabilities:

Delegation to acquirer – all – third parties

Consideration as above

Non-transmission clause

Creditors – voidable dispositions

Insolvency

SUMMARY

Process – *consensual* with board initiative and shareholder approval.

Fiduciary and other duties of boards of the target and offeror company…

“Under control of”

Change of control over assets (100% shareholding)

Acquisition of securities from shareholders

Smuts v Booyens – pre-emptive right - bona fide third party

Cancellation of minority – s 37, s 48

Consideration

Cash

Securities

- Prospectus
- Consideration adequate
- Share issue requirements – eg s 38, s 39
- Offeror assets

Minority freeze-out

- Direct – s 124 – 10% - regulated company -acquisitions not cancellations
- Indirect – MoI – 5% - all

“Minority” protection

- Oppression – s 163
- Appraisal – s 164 - MoI

“existence of company/ies terminated”

- Wind-up then deregistration

“consolidation of shareholders”

- Shares in offeror (share swop)
- Except freeze-out

Companies Act specific provisions

S311 of 1973 Companies Act / S 114 (arrangements) and 155 (compromises) 2008 Act.

- Arrangement proposed by the *board*
- "Arrangement"? – s 48 etc – EP NBSA?
- "Compromise" – separate process – but creditors treated collectively – Court order?

Arrangement – s 115

- Court – elective

Minority protection – Court

- Oppression – s 163
- Appraisal – s 164
- Triangular mergers – Ex parte Federale Nywerhede
- Creditors/liabilities – compromises/transfer – 155 – Millman?
- Dissolution without winding-up

SS 113 and 116 – optional procedure (assets & liabilities)

(Fundamental transaction – if regulated company also an affected transaction)

"amalgamation or merger" means a transaction, or series of transactions, pursuant to an agreement between two or more companies, resulting in—

(a) the formation of one or more new companies, which together hold all of the *assets and liabilities* that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies; or

(b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with such new company or companies, of all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement;

- Difference? – transfer.

Two or more profit companies, including holding and subsidiary companies, may amalgamate or merge if, upon *implementation* of the amalgamation or merger, each amalgamated or merged company will satisfy the solvency and liquidity test. Existing companies need not be solvent and liquid.

- Solvency and liquidity – s 4- question of fact based on *reasonable foreseeable* financial circumstances – after amalgamation
- Board of amalgamating or merging company must consider if the amalgamating or merging company will satisfy solvency and liquidity (s 4) and if *reasonably believes* – submit agreement in terms of s 115.

Written agreement –

obviously proposed by the board – s 66

fiduciary and other duties (care and skill) (standards of directors' conduct) – ghosts of *van Gorkum*, *Revlon* and *Uncoal*.

Special resolution by shareholders no exclusion of breach – *Movitex v Bulfield* excluded by s 78

Special resolution not fixed at 75%

Freeze out? Apparently yes – no consideration prescribed - S 113(2) provides for consideration instead of securities. "Consideration" as defined in s 1 includes cash.

Squeeze out of more than 75% shareholding possible by special resolution? As much as 39%

Creditors

- After special resolution adopted each each of the amalgamating or merging companies must cause a notice of the amalgamation or merger to be given in the prescribed manner and form to *every known creditor* of that company
- Must state that the amalgamation or merger is not subject to further court application therefore wait 10 business days – or longer – s 115(3)
- Material effect – any creditor can apply for review – of amalgamation or merger – 15 days after resolution.
- Notice of amalgamation (CoR 89) must be filed after s 115 has been complied with and after creditors' 15 days – by whom?
- Notice of amalgamation is filed (CoR 89) and registration certificates of new companies and deregistration of non-surviving companies (presumably without any assets or liabilities)

- Does not affect liability of company and personal liability of directors/prescribed officers of amalgamating or merging companies remains.
- Proceedings against amalgamating or merging companies continue against amalgamated or merged companies – how or jointly and severally (dissolved company?)

What happens to liabilities?

- Each remaining company is *liable for* all the obligations of amalgamating or merging company *in accordance with the provisions of the amalgamation or merger agreement* subject to solvency and liquidity of those companies (s 113(2)(f) and 116(7))

- Transmission *ex lege*? ? S 259 Delaware GCL
- No transmission clause and non-merger clause

Shareholder protection

- Information (regulated more information)
- Copy of amalgamation or merger agreement
- S 164 – amalgamating cos (“offeror” and “target”) triangular
- S 163
- Share issue – Prospectus