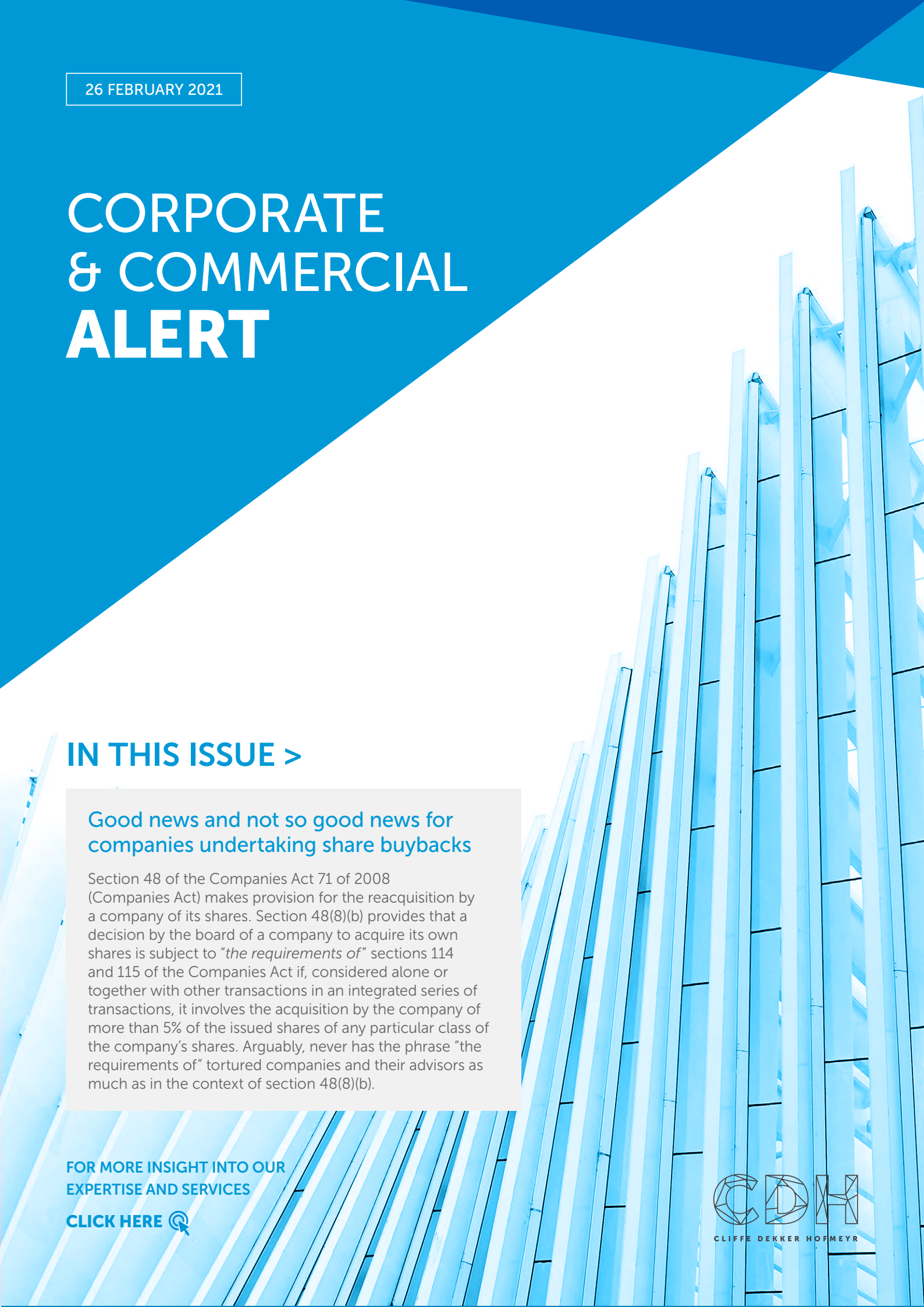
26 FEBRUARY 2021

CORPORATE & COMMERCIAL **ALERT**



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Good news and not so good news for companies undertaking share buybacks

Section 48 of the Companies Act 71 of 2008 (Companies Act) makes provision for the reacquisition by a company of its shares. Section 48(8)(b) provides that a decision by the board of a company to acquire its own shares is subject to "*the requirements of*" sections 114 and 115 of the Companies Act 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. Arguably, never has the phrase "the requirements of" tortured companies and their advisors as much as in the context of section 48(8)(b).

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Good news and not so good news for companies undertaking share buybacks

Two important questions have stood since the commencement of the Companies Act, with regard to substantial share buybacks.

Section 48 of the Companies Act 71 of 2008 (Companies Act) makes provision for the reacquisition by a company of its shares. Section 48(8)(b) provides that a decision by the board of a company to acquire its own shares is subject to "*the requirements of*" sections 114 and 115 of the Companies Act 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. Arguably, never has the phrase "the requirements of" tortured companies and their advisors as much as in the context of section 48(8)(b).

Two important questions have stood since the commencement of the Companies Act, with regard to substantial share buybacks: (1). Is such a buyback in fact a scheme, or is it merely subject to the procedural requirements thereof? (2). Either way, are appraisal rights triggered when the company proposes such a buyback? A recent judgment has given with the one hand but taken with the other.

In the Johannesburg High Court case of *First National Nominees Proprietary Limited and Others v Capital Appreciation Limited* (case no. 19/41679, 5 February 2021), Capital Appreciation Limited (Capprec) issued a circular to its shareholders in terms of which it advised them that it would be repurchasing a certain number of shares held by specific shareholders. The circular stated that the transaction triggered sections 48, 114 and 164 of the Companies Act as it entailed Capprec acquiring in excess of 5% of its own issued shares. Capprec, however, later backpedalled and contended that the transaction did not trigger section 164 (the appraisal remedy). The circular also informed the shareholders that the transaction required approval by way of special resolution in terms of section 115 of the Companies Act. The latter point has always been without controversy.

Section 164 of the Companies Act affords a dissenting shareholder appraisal rights. Should the dissenting shareholder comply with the procedural requirements in objecting to certain categories of special

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Good news and not so good news for companies undertaking share buybacks...*continued*

A key question faced by the court was whether, if a transaction falls within the ambit of section 48(8)(b) it would, with more, be deemed to be a *"scheme of arrangement"* as contemplated in section 114, or whether the repurchase was merely subject *mutatis mutandis* to the requirements of a scheme of arrangement.

resolutions, the company will be required to make a written offer for the dissenter's shares. Should the dissenter reject the company's offer, it may then approach the court requesting a judicial appraisal, or determination, of the fair value of the tendered shares. The appraisal remedy is aimed at maintaining an equilibrium between minority shareholders and controlling shareholders in that it empowers minority shareholders to withdraw from a company while obtaining fair value for their shares, in cases where the company proposes a fundamental transaction or materially and adversely alters share class rights.

Capprec contended that the transaction contemplated in the circular did not trigger the provisions of section 164 and that this section was only applicable in certain circumstances, including transactions contemplated in sections 112, 113 or 114 of the Companies Act (as listed in section 164(2)(b)). Capprec argued that there was no basis upon which the dissenting shareholder, First National Nominees Proprietary Limited (Nominees), could rely on section 164 as the proposed buyback did not constitute a *"scheme of arrangement"* as envisaged in section 114.

A key question faced by the court was whether, if a transaction falls within the ambit of section 48(8)(b) it would, with more, be deemed to be a *"scheme of arrangement"* as contemplated in section 114, or whether the repurchase was merely subject *mutatis mutandis* to the requirements of a scheme of arrangement.

The thrust of Capprec's argument was that section 48 deals with the acquisition by a company of its own shares in a manner different to section 114. Section 48 deals with a consensual, *"one-on-one"* buyback between the company and the seller of shares, and section 114 deals with a scheme of arrangement between the company and generally the holders of any class of its shares in a manner contemplated in sections 114(1)(a) to (f), where in all of these instances there must be the requirement of coercion. The whole premise and point of a scheme of arrangement, after all, is to bind a whole group of shareholders by way of a special resolution, regardless of whether the minority voted against the scheme or did not even participate in the vote. This is fundamentally different to what is contemplated in section 48(8)(b) in that a re-acquisition in terms thereof involves a voluntary seller in a normal contractual setting.

Capprec further submitted that although section 48(8)(b) requires that the transaction be subject to *"the requirements of"* sections 114 and 115, this is only a reference to the procedural requirements of those sections. It does not deem a transaction which is not a scheme, in its common law sense, to be a scheme. Capprec argued that section 48(8)(b) only makes reference to sections 114 and 115, and no reference is made therein to section 164. If the legislature intended that section 164 would be triggered in respect of a purely contractual buyback, express reference would have been made thereto in section 48.

Good news and not so good news for companies undertaking share buybacks...*continued*

But by making reference to sections 114 and 115 as a whole, the legislature intended for all the provisions in those sections to apply. This would include the condition set out in section 115(8) entitling shareholders to exercise appraisal rights in terms of section 164.

The court agreed with the first half of the argument, but not the second half. A purely consensual and contractual share buyback transaction is indeed not a section 114 scheme of arrangement, but rather it is subject to the procedural requirements of sections 114 and 115.

But by making reference to sections 114 and 115 as a whole, the legislature intended for all the provisions in those sections to apply. This would include the condition set out in section 115(8) entitling shareholders to exercise appraisal rights in terms of section 164.

The upshot of the judgment therefore is that where a regulated company undertakes a contractual/voluntary share buyback from specific shareholders under section 48(8)(b) of the Companies Act, it is not undertaking a *"scheme of arrangement"* and therefore one is not concerned with an *"affected transaction"* under section 117(1)(c)(iii) which is regulated by the Takeover Regulation Panel. This removes a substantial layer of regulation as the whole of Parts B and C of Chapter 5 of the Companies Act, together with the takeover regulations, falls away. However appraisal rights do still apply, and this is not linked to whether or not the company is a regulated company but rather has to do with the fact that section 115(8) cross-refers to dissenting shareholders' rights in section 164. The latter is a hotly debatable view, as the operative section regulating appraisal rights, namely section 164, appears to capture only schemes of arrangement as referred to in section 114, but there has already been precedent whereby a court took the view that section 115(8) has the effect of broadening the appraisal remedy beyond the transactions listed in section 164 (*Cilliers v LA Concorde Holdings Limited and Others 2018* (6) SA 97 (WCC)).

Notably, the Panel has over the years adopted a different view regarding the first issue, namely its jurisdiction over such buybacks as *"affected transactions"*, and it will be interesting to see if it issues any official guidance in light of this judgment.

Murendeni Mashige and Yaniv Kleitman

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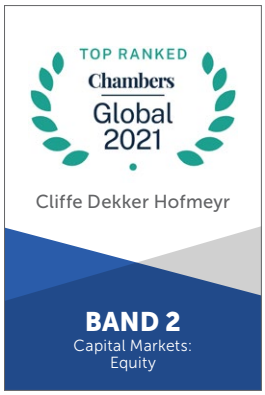

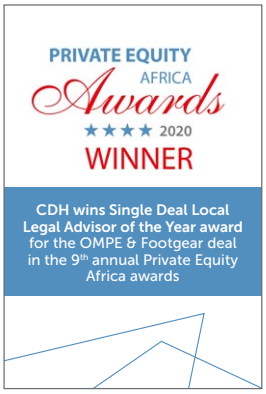

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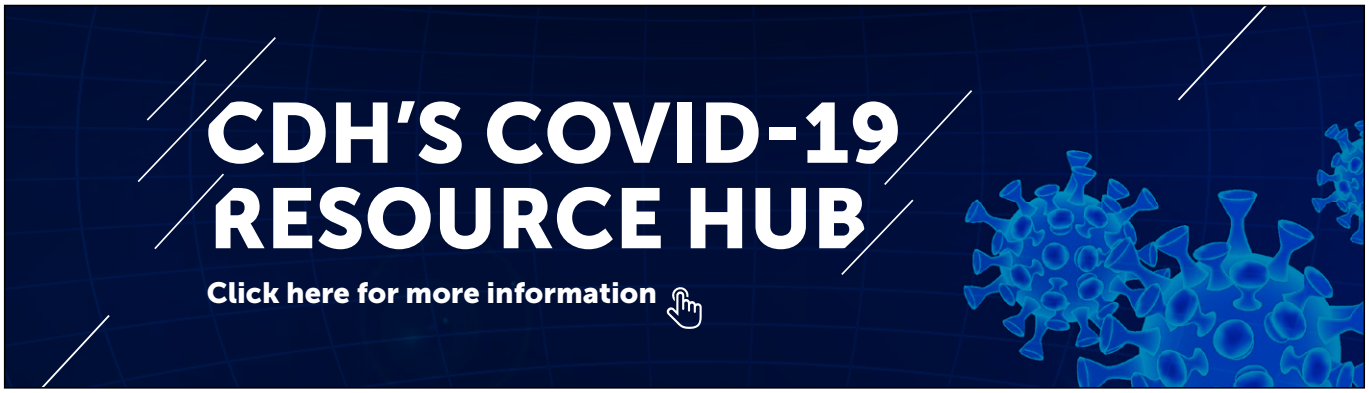

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