CORPORATE & COMMERCIAL

ALERT

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IN THIS ISSUE

Liability of directors for potentially misleading product claims

The scope in which directors may incur personal liability is regulated by the Companies Act 71 of 2008 (Companies Act). To compete in any market directors are required to make strategic and *"risk for reward"* commercial decisions on behalf of a company.

Exploring the principles of share buy-backs

Share buy-back transactions can have a significant negative impact on non-targeted shareholders. A share buy-back involves a company repurchasing its own shares from existing shareholders which then again forms part of the authorised, unissued share capital of the company.

Distributions: More than meets the (i)

Section 46 of the Companies Act 71 of 2008 (Act) is clear on the requirements that must be met before a company may make a distribution – a company must not make any proposed distribution unless the distribution is pursuant to an existing legal obligation of the company, or a court order, or where the board of the company has authorised the distribution.

Liability of directors for potentially misleading product claims

The scope in which directors may incur personal liability is regulated by the Companies Act 71 of 2008 (Companies Act). To compete in any market directors are required to make strategic and "*risk for reward*" commercial decisions on behalf of a company.

However, certain forms of behaviour are prohibited outright and can attract personal liability. What follows is a theoretical discussion on whether this rings true in relation to potentially misleading product claims, taking into account the provisions of the Consumer Protection Act 68 of 2008 (CPA) and the Companies Act.

THE CPA

Section 29(a) of the CPA states that a producer, importer, distributor, retailer or service provider must not market any goods or services "*in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 41*".

Section 41(1)(a) of the CPA states that when marketing goods or services, a supplier must not "*directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer*".

Read together, these provisions not only proscribe the act of sharing information that is blatantly false or misleading, but they also prohibit the marketing of products or services in a manner that would reasonably convey a false or misleading perception of a product or service.

These statutory prohibitions are widely known, as are the reputational and legal consequences flowing from them. However, understanding the extent to which a director may be held personally liable for damages incurred by a company for engaging in this practice requires a closer look at the provisions of the Companies Act.

THE COMPANIES ACT

Section 76(3)(c) of the Companies Act codifies certain fiduciary duties that directors owe to a company which include "*acting with the degree of care, skill and diligence that may reasonably be expected of a person (i) carrying out the same functions in relation to the company as those carried out by that director; and (ii) having the general knowledge, skill and experience of that director*".

In addition, section 77(2)(b) of the Companies Act provides that a director may be held liable in accordance with the principles of the common law relating to delict for any loss, damages or costs incurred by the company resulting from a breach of his or her duties contained in section 76(3)(c). It is important to note that under section 77 the plaintiff is the company, not the company's consumers or creditors.

Without any authority to the contrary, it is not unreasonable to presume that a contravention, by a company, of sections 29(a) and 41(1)(a) of the CPA would prompt an investigation into whether the responsible director acted with the required degree of care, skill and diligence, particularly if the director was instrumental in the release of misinformation.

Section 77(3)(b) of the Companies Act provides that a director is liable for any loss, damages, or costs incurred by the company as a "*consequence of the director having acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1)*".

Liability of directors for potentially misleading product claims

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Section 22(1) of the Companies Act states that *"a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose"*.

The key word here is "*fraudulent*" activities, the meaning of which extends far beyond the ambit given by its predecessor, section 424 of the Companies Act 61 of 1973 (Old Companies Act). Previously this only related to defrauding creditors, whereas under the current Companies Act this prohibition exists in relation to *"any person or for any fraudulent purpose"*.

RECENT CASE LAW

However, when interpreting the meaning of "*fraudulent*" in section 22(1), recent case law shows us that the principles developed around section 424 of the Old Companies Act are still relevant. In this regard, Stegmann J summed up the position as follows:

> *"It is confined to those instances in which it can be proved that the person who made the misrepresentation knew that it may not be correct and therefore had no honest belief in its truth, and yet, by making it, suggested that he did believe it to be true."*

Our judiciary has not had an opportunity to determine whether potentially misleading product claims would equate to fraudulent conduct. However, from a theoretical perspective this would not be a difficult connection to establish.

Liability of directors to third parties such as creditors and consumers remains an evolving area, in light of section 218(2) of the Companies Act, which is a general liability provision in respect of breaches of the Companies Act. Certain *obiter dicta* in *Mirchandani v Unica Iron & Steel* (*Pty*) *Ltd and Unica Iron & Steel* (*Pty*) *Ltd v Mirchandani* (802/2020, 813/2020) [2022] ZASCA 58 keep the possibility alive for third parties to hold directors personally liable (in delict) for a breach of their fiduciary duties. While almost every rule has its exceptions, balanced against the proposition of personal liability is the fundamental notion of the separate juristic personality of a company, the starting point always being that directors are not held personally liable where it is the company which acted. However, questions of delictual wrongfulness and "*duty of care*" also come into play.

CONCLUSION

From the above, it is evident that personal liability of directors for potentially misleading product claims has not received much attention from our judiciary. However, the dynamic nature of sections 76(3)(c), 22(1) and 218(2) of the Companies Act suggest that the imposition of personal liability under these circumstances is not out of the question. This would be so even if a director was not instrumental to, but nevertheless exercised control over, the release of such misinformation. To avoid being the subject of any future precedent on this topic, it is advised that directors scrutinise all commercial decisions against their duty toward a company and whether the risks relating to such decisions would survive the above provisions.

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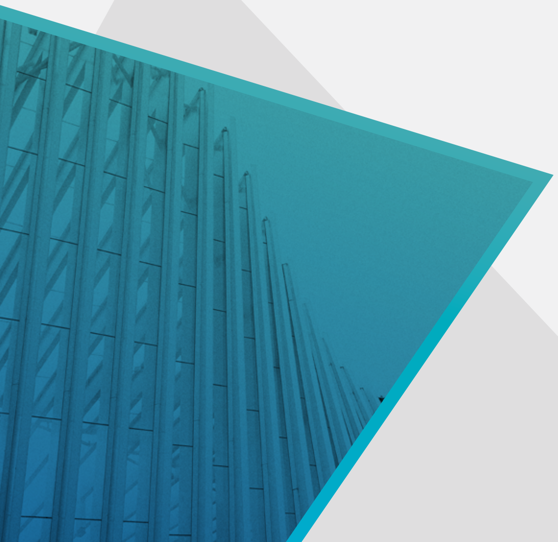

Exploring the principles of share buy-backs

Share buy-back transactions can have a significant negative impact on non-targeted shareholders. A share buy-back involves a company repurchasing its own shares from existing shareholders which then again forms part of the authorised, unissued share capital of the company.

In many cases this results in a fundamental change to the company's capital and control structures. In this regard, the drafters of the Companies Act 71 of 2008 (Companies Act) included sections 48, 114, 115 and 164, which prescribe strict procedural requirements for these transactions.

The intricate interplay between these provisions led the Supreme Court of Appeal (SCA), in the recent case of *Capital Appreciation Ltd v First National Nominees* (*Pty*) *Ltd and Others* [2022] 85 ZASCA 280, to clarify their application. The judgment is significant for minority and dissenting shareholders who feel aggrieved by share buy-backs.

BACKGROUND

The matter came before the SCA on appeal from the Gauteng Local Division of the High Court, Johannesburg. Capital Appreciation Ltd (Capprec) sent out a circular in terms of section 48(2)(a) of the Companies Act, which sought authority from shareholders for Capprec to repurchase a number of its own shares in terms of a specific buy-back transaction. However, because this proposed repurchase exceeded 5% of the total issued share capital in Capprec, section 48(8)(b) subjected this proposal to the requirements of sections 114 and 115 of the Companies Act.

Sections 114 and 115 deal with "*fundamental transactions*". Section 114(1)(e) allows this kind of proposal to also be made at board level. However, section 115(1)(a), read with section 115(2)(a), requires this to be approved by way of a special resolution. Importantly, section 115(8) entitled First National Nominees (Pty) Ltd (the dissenting shareholder) to relief under section 164 (appraisal rights), provided it (i) notified the company of its intention to oppose the special resolution; and (ii) was present at the meeting and voted against that resolution. The special resolution was passed, and it was common cause that the dissenting shareholder complied with these procedural requirements, thereafter invoking its right under section 164(5) to demand that the company purchase its shares at fair value.

Unhappy with the offer made by Capprec, the dissenting shareholder launched an application in terms of section 164(14) to have the fair value determined by the High Court. Section 164 was central to the dispute in both courts. In short, it was argued by Capprec that appraisal rights are intended for fundamental transactions referred to in the operative section, namely section 164, and not transactions under section 48 involving a "voluntary seller". It further contended that section 48(8)(b) only subjected the proposed repurchase to the procedural requirements under sections 114 and 115 and did not grant the dissenting shareholder an avenue for relief in terms of section 164.

Exploring the principles of share buy-backs

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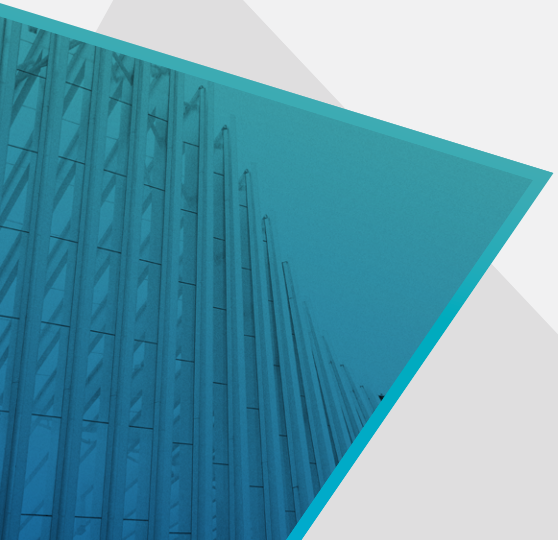

COURT'S INTERPRETATION

The central question before the High Court was whether a "*one-on-one*" contractual repurchase, exceeding the 5% threshold in terms of section 48(8)(b), should be considered a "*scheme of arrangement*" as contemplated in section 114, or whether it ought merely to be subject to the requirements set out in the section.

The High Court considered the historical approach to share buy-backs, noting that, regardless of how it was effected, such transactions have been subject to many forms of abuse. In this regard, by including a 5% threshold in section 48(8)(b), the legislature recognised that not all repurchase transactions should be subject to further conditions, but only those which involved "*a significant and substantial repurchase*". Similarly, the SCA found that section 114 was drafted for those repurchases that amount to "*wholesale fundamental changes to the company's capital structure*".

The High Court found that reference in section 48(8)(b) to "*the requirements*" of sections 114 and 115 was a reference to those provisions as a whole. By implication, the legislature intended for all the procedural conditions and rights set out in these sections to apply, particularly section 115(8) entitling the dissenting shareholder to exercise appraisal rights in terms of section 164. To find otherwise would create an unsatisfactory situation whereby minority shareholders are entitled to appraisal rights when the board effects a substantial reacquisition in terms of section 114, but not if the board decided to do so in terms of section 48. Consequently, the practice of excluding certain protections in sections 114 and 115 when contemplating transactions in terms of section 48(8)(b), would render this threshold superfluous.

Both the High Court and the SCA recognised that this inclusive interpretation aligns with the legislature's intention to protect minority shareholders, allowing those "*who do not approve of certain triggering events, to opt out of the company by withdrawing the fair value of their shares in cash*".

CONCLUSION

The SCA acknowledged that there is a direct connection between section 48(8)(b) – via sections 114 and 115 – to section 164 and the appraisal rights contended for by the dissenting shareholder.

In this regard, section 48(8)(b) deems repurchases above a particular threshold to be "*fundamental transactions*" and subject to the same procedural requirements and remedies. In other words, it does not matter which avenue the board pursues in giving effect to a share buy-backs; if the 5% threshold is crossed, this will invoke the requirements of sections 114 and 115, allowing dissenting shareholders to obtain a judicial determination on the fair value of their shares as provided in section 164.

Exploring the principles of share buy-backs

CONTINUED

The SCA, however, left open the question of whether such a buy-back is in fact a "*scheme of arrangement*"; it did not expressly overrule the High Court's reasoning that this was not a scheme of arrangement. A "*fundamental transaction*" is actually not a defined term in the Companies Act (although it is accepted that it refers to the transactions in sections 112 to 114), and categorisation as a "*fundamental transaction*" is, textually at least, not enough to bring it within the list of "*affected transactions*" in section 117(1)(c). This remains an issue of importance insofar as "*regulated companies*" undertake specific buy-backs, the essential issue being whether the takeover laws apply to such a transaction. It is notable in this regard that the Takeover Regulation Panel's firm view remains that such transactions, when undertaken by regulated companies, do indeed fall under the panel's jurisdiction.

LAYEN PETERSEN AND JUSTINE KRIGE

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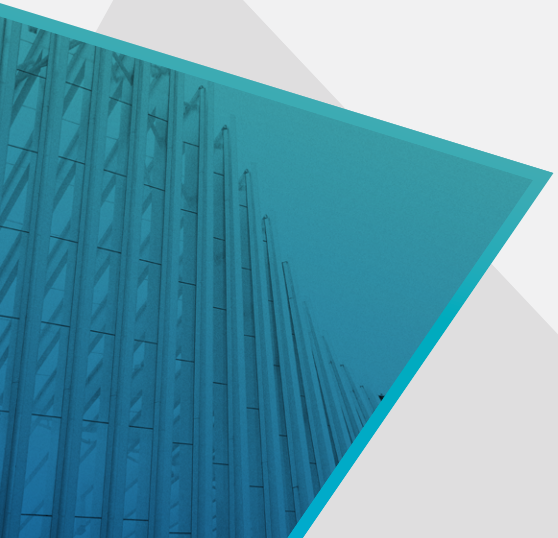

Distributions: More than meets the (i)

Section 46 of the Companies Act 71 of 2008 (Act) is clear on the requirements that must be met before a company may make a distribution – a company must not make any proposed distribution unless the distribution is pursuant to an existing legal obligation of the company, or a court order, or where the board of the company has authorised the distribution.

In all cases the board must have acknowledged that it has applied the solvency and liquidity test and concluded that the company will satisfy the test immediately after completing the distribution.

Ordinarily, when considering whether a distribution might occur, we tend to only consider an upward flow of cash, assets or benefits to the direct shareholders of the company concerned – the classic dividend. However, companies should be aware that a "*distribution*" as defined in section 1 of the Act is far wider than the generally assumed concept of a payment by a company of a cash or in specie dividend to its shareholders (as contemplated in subsection (a)(i) of the definition). Boards need to ensure that other qualifying transactions are not overlooked for purposes of section 46.

What should be clear from the outset is that a distribution is not just a transfer of money or assets and that subsections (b) and (c) of the definition go further to include an incurrence of a debt or other obligation or a forgiveness or waiver of debt or other obligation (respectively) by a company. What should also be kept in mind is that a distribution is not just a transfer, incurrence, forgiveness or waiver by a company for the benefit of a direct shareholder. Furthermore, each of the subsections of the definition include a reference to being for the benefit of holders of shares of the company or "*of another company within the same group of companies*". This effectively means that a distribution can also be made by virtue of a "*lateral*" or even "downward" transfer, incurrence, forgiveness or waiver which is for the benefit of any shareholder of any company within the same group of companies.

The second aspect of the definition to which we draw attention is the inclusion in subsection (a) of the words "*to the holder of a beneficial interest in any such shares*". In this regard, it is important to note the definition of "*beneficial interest*" (also found in section 1 of the Act) includes a person or entity who holds the right or entitlement to (i) receive or participate in any distribution in respect of the company's securities, (ii) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities, or (iii) dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities) other than through ownership of those shares, but also through "*agreement, relationship or otherwise*". This means that a distribution includes a transfer by a company to a non-shareholder, who only holds a beneficial interest in any shares of the company or a person or entity who holds a beneficial interest in any shares in another group company.

Distributions: More than meets the (i)

CONTINUED

As a starting point, it seems that the broad wording is probably best read as an attempt to ensure that the requirements for a distribution cannot be bypassed by a benefit being passed to shareholders which are not direct shareholders or are shareholders elsewhere in a group. As tends to happen in trying to cover all eventualities, the net has been cast very widely and it is worth noting that the scope of the provision has not yet been settled.

It should be noted that although completion of a distribution without complying with the requirements of section 46 does not render the distribution void (unlike sections 44 and 45 of the Act which specifically state that non-compliant transactions are void), the directors themselves can be held liable to the extent set out in section 77(3) of the Act if they fail to vote against the making of a distribution despite knowing such distribution was contrary to section 46 of the Act.

What is highlighted above should trigger directors to consider carefully whether any unusual transfers or arrangements intra-group require compliance with section 46. If in doubt, compliance through passing the necessary resolutions and conducting the appropriate solvency and liquidity test should safeguard the process from future difficulties.

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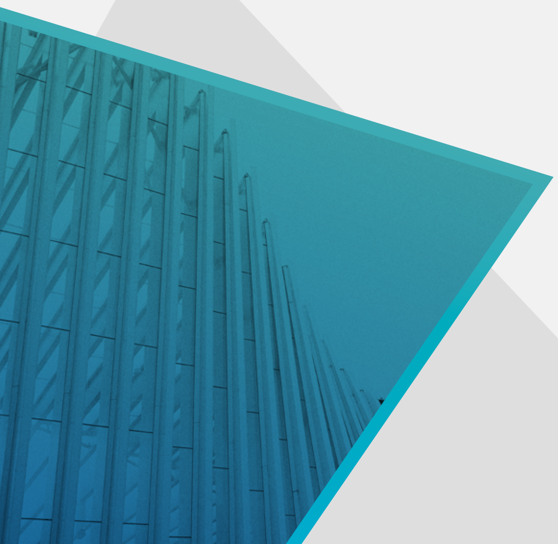

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DealMakers

2021
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2nd by General Corporate Finance Deal Flow.
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3rd by General Corporate Finance Deal Flow.
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2019
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