

Companies Act Developments Seminar

30 January 2024

Seminar Agenda



Yaniv Kleitman
Director
Corporate & Commercial Law

- Share buy-backs
- Regulated companies
- Public access to AFS
- Prescription and fiduciary breaches
- Social and ethics committee aspects
- Beneficial ownership



Thandiwe Nhlapho
Senior Associate
Corporate & Commercial Law

- Validation of Irregular Share Issues
- S40(5) trust arrangement



Akhona Mgwaba
Associate
Corporate & Commercial Law

- CIPC filings
- Employee share schemes
- Financial assistance



Vivien Chaplin
Director
Corporate & Commercial Law

- Remuneration policy
- Remuneration implementation report



Yaniv Kleitman

Director

Corporate & Commercial Law

TOPICS:

- Introduction
- Share buy-backs
- Regulated companies
- Public access to AFS
- Prescription and fiduciary breaches
- Social and ethics committee aspects
- Beneficial ownership

Introduction

- Public commentary phase extended to 29 January 2024
- Has been over 10 years since the Companies Act came into force – time for a review and update
- Broad global trends and discourse that has served as the impetus:
 - Enhanced transparency and disclosure: with the statutory benefit of limited liability, come burdens and responsibilities in terms of transparency
 - Say on executive pay
 - Money-laundering and grey-listing
 - General technical improvements and clarifications

Share buy-backs

- Overhaul of section 48(8)
- Currently position is:
 - Buy-backs from directors and prescribed officers: special resolution
 - Buy-backs of more than 5%: subject "to the requirements of" ss114 and 115
- Is a >5% buy-back a scheme of arrangement, or just subject to the procedural requirements thereof? - *Capital Appreciation* cases
- If done by regulated company, subject to takeover law?
- Amendments will now delink buy-backs from ss114/115: not schemes of arrangements, no takeover law, and no appraisal rights
- Special resolution to be required for all buy-backs – except if on stock exchange or *pro rata* offer

Regulated companies

- Determines which companies are subject to takeover law when an "affected transaction" is done
- Private companies: current test is the 10% transfer / 24-month rule
- To be overhauled: will be similar to the old SRP Code
- 10 or more shareholders with "direct or indirect shareholding"
- What is "indirect" shareholding??
- And must meet certain financial thresholds on assets / turnover as will be prescribed
- The direction of these changes is welcomed, but clarity required on "indirect shareholder"
- Transitional issues?

Public access to AFS

- Amendments to section 26
- Any member of public may request AFS of large private companies (public interest score)
- Problem: these AFS will contain directors' and prescribed officers' remuneration! (section 30(4)-(6)) – which the Bill will clarify, must be individualised disclosure
- Presumably would be unqualified and unconditional access: see *Nova Property Group Holdings* case regarding securities register
- Compare with the position in the EU
- One expects that a bulk of the submissions to be received by DTIC will be on this aspect

Prescription regarding director breaches

- Section 77(7) Companies Act
- Hard time-bar which runs from date of act or omission
- Compare to ordinary prescription laws: reasonable knowledge of material facts underlying cause of action
- See *Nebavest 1 (Pty) Ltd t/a Minster Consulting v Central Plaza Investments 202 (Pty) Ltd and Others* [2023] 2 All SA 795 (WCC) – held that section 77(7) is a special time-bar
- Companies Second Amendment Bill to introduce relaxation by a court on good cause shown
- There is case-law in analogous areas, e.g. arbitration time bars (*Samancor* case) and competition law (*Pickfords* case)

Social & ethics committee

- Material changes are with regard to public companies and SOCs
- Members of SEC of public co will have to be, in majority, non-executive directors
- Members will have to be elected by shareholders at the AGM – like audit committee

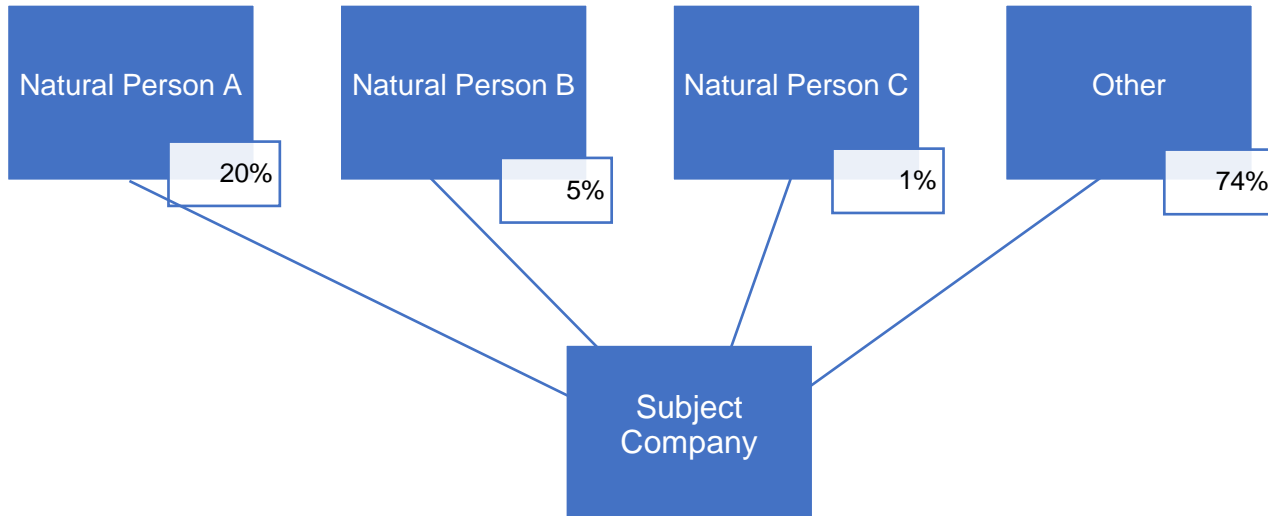
Practical implementation steps on the horizon

- MOI amendments – clauses dealing with share buy-backs, financial assistance etc.
- Share buy-back general resolutions
 - Listed companies: already need special resolution under JSE LR
 - Standing authority to repurchase shares, e.g. under share schemes
- AGM notices: election of S&E committee members

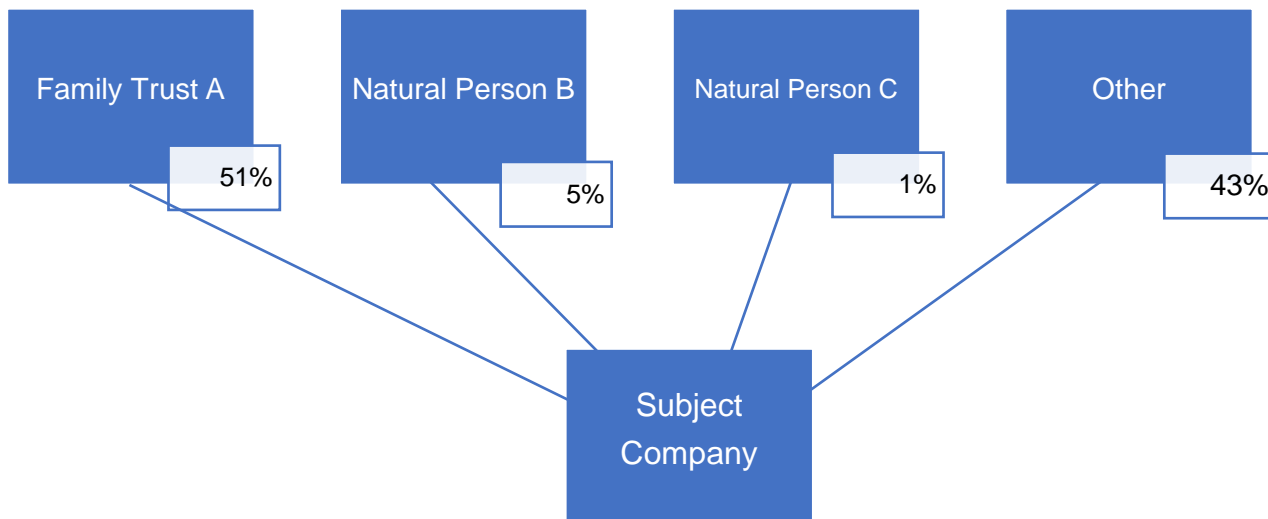
Beneficial ownership

- Non-affected company: beneficial owner | Affected company: holders of beneficial interests in 5%
- Conflation of "beneficial owner" with the 5% beneficial interest rule (e.g. as in CIPC communiques)
- Beneficial owner:
 - Must be individual (natural person)
 - Who exercises "effective control" over or "owns" a company
 - "Effect control" and "own" not defined – S2? Common law?
 - No percentage thresholds prescribed
 - Can there be more than 1 beneficial owner? Aggregation?
 - Management control?
- Also, do not confuse / conflate with definitions in other legislation such as FICA and Trust Property Control Act

Beneficial ownership – example 1



Beneficial ownership – example 2





Thandiwe Nhlapho

Senior Associate

Corporate & Commercial Law

TOPICS:

- Validation of Irregular Share Issues
- S 40 Trust Arrangements

Validation of Irregular Share Issues

- Invalidity of share creation or issue could be brought about by:
 - administrative oversight in not filing MOI amendment re share capital
 - not enough authorized unissued shares in MOI when issuing shares (and 60 bus days under s 38(2) has lapsed)
 - terms not properly authorised
 - s 41 not followed (shareholder approval for certain share issues)
 - pre-emptives in s 39, or MOI or SHA not being strictly adhered to

Validation of Irregular Share Issues

1973 Act position

- S 97
- Could apply to Court to validate invalid share issue
- Court discretion to validate if just and equitable
- Court may make validation order subject to conditions
- Registration of Court order with Registrar
- Any interested person can apply
- Some jurisprudence was developed

Validation of Irregular Share Issues

2008 Act

- No equivalent mechanism
- Shares must be authorised i.t.o. s 36
- Board may issue shares only to extent authorised – s 38

Validation of Irregular Share Issues

- Post-issue ratification mechanism in s 38 usually not a solution and seldom used
- Absence of clear mechanism often gives rise to practical difficulties (two schools of thought)
- Closest section which comes to a possible remedy is s 6(2) exemption by Tribunal, but not clear one really falls within that section.

Validation of Irregular Share Issues

Amendment Bill

- Introduces mechanism similar to s 97 of 1973 Act
- S 38A
- The court may make an order validating the creation, allotment or issue of shares (i) upon application by a company or any party who holds an interest in the company and (ii) satisfying itself that it is just and equitable to do so
- Welcome change however, the timing and costs of a court application will often not be feasible
- Almost verbatim wording - so 1973 Act jurisprudence would be relevant, especially around meaning of “just and equitable”
 - Useful principles outlined in recent African Legend judgement
 - Generally (but not exhaustively) a court will assist if the invalidity was brought about by (i) a historical inadvertence, (ii) technical omission (iii) and/or where there has been no controversy or challenge by shareholders over the years to the share issue
- Validation effective once "prescribed fees" have been paid (to CIPC)
- So still need a regulation dealing with this for clarity

S 40 Trust Arrangements

- Small changes to s 40 dealing with trust arrangements
- Existing mechanism often overlooked and could be useful – however not available for JSE-listed companies as JSE LRs require shares to be fully paid up
- Recap of s 40 principles:
 - Board may issue shares only for adequate consideration
 - Shares are "fully paid" and may be issued only once full consideration has been received
- But s 40(5) exception:

If consideration is –

- in the form of an instrument such that the value cannot immediately be realized by the company or
- in the form of an agreement for future services, benefit or payment
- Consideration then only deemed received when value is actually realised / payment received etc.
- In the interim the shares must be issued and transferred to third party to be held "in accordance with a trust agreement"

S 40 Trust Arrangements

- S 40(6) - certain default terms will not apply unless the trust agreement provides otherwise
 - Voting rights
 - Pre-emptive rights
 - Distributions
- But what kind of "trust" arrangement does s 40(5) envisage. Is it e.g., a trust which is subject to the Trust Property Control Act - our view and counsel's view is that correctly structured it is not
- Amendment Bill clarifies this:
 - "Stakeholder" is an independent third party who has no interest in the company or subscriber, e.g. an attorney, notary public or escrow agent
 - in the company or subscriber, e.g. an attorney, notary public or escrow agent
 - Now a "stakeholder agreement" – a written contract between a stakeholder and the company



Akhona Mgwaba

Associate

Corporate & Commercial Law

TOPICS:

- CIPC filings
- Employee share schemes
- Financial assistance

MOI Amendment Filing Effective Date – section 16

- Current position
 - s16(9)(b): An amendment to a company’s Memorandum of Incorporation takes effect on the later of —
 - the date on, and time at, which the Notice of Amendment is filed; or
 - the date, if any, set out in the Notice of Amendment.
- Definition of “file” in section 1
- Deemed delivery to Commission: Companies Regulations Annexure 3 (Table CR 3)

MOI Amendment Filing Effective Date – section 16

- Issues that Bill intends to address
 - Uncertainty as to the effective date of amendments to a company’s Memorandum of Incorporation.

- Proposed Amendment
 - MOI amendment effective date —
 - 10 business days after receipt of the Notice of Amendment by the Commission, unless endorsed or rejected with reasons by the Commission prior to the expiry of the 10 business days period; or
 - such later date, if any, as set out in the Notice of Amendment.

Financial Assistance – section 45

- Current position
 - s45(3)(a): Despite any provision of a company's MOI to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless –
 - Pursuant to employee share scheme; or
 - In terms of a special resolution.
 - S45(4)
 - Satisfy any restrictions or conditions in MOI.

Financial Assistance

- Issues that Bill intends to address
 - Unnecessary compliance burden.
 - No commercial rationality.
- Proposed Amendment
 - Proposed s45(2A): The provisions of this section do not apply to the giving by a company of financial assistance to, or for the benefit of its subsidiaries.

Financial Assistance – section 45

- Effect of proposed amendment
 - Ease the doing of business by eliminating an unnecessary provision that does not provide any protection but in practice causes compliance burdens.
- NB to note
 - “Subsidiary” = South African subsidiary i.e. downward financial assistance to foreign subsidiaries is still subject to the requirements in s45.

“Purchase” Employee Share Schemes – section 95

- Current position
 - S95(1)(c): a scheme established by a company... either by means of the issue of shares in the company, or by the grant of options for shares in the company
- Issue that the Bill intends to address
 - Unduly restrictive and presents problems in practice.

“Purchase” Employee Share Schemes – section 95

- Proposed amendment
 - Section 95 be amended to provide that the employee share scheme may include the purchase of shares in the company
- Effect of proposed amendment
 - Employee share schemes which involve a purchase of shares will qualify for the financial assistance, section 41 and public offer exemptions
 - Supports the further growth and utilisation of employee share schemes.



Vivien Chaplin

Director
Corporate & Commercial Law

TOPICS:

- Remuneration policy
- Remuneration implementation report

Duty to Prepare and Present Remuneration Policy and Remuneration Report

- Global inequality, social tension and transparency
- Global focus on remuneration
- Two primary elements:
 - Disclosure
 - “Say on Pay”
- King IV
- JSE
- Bill: new Section 30A and 30B:
 - applicable to public companies and SOCs

Duty to Prepare and Present Remuneration Policy and Remuneration Report

- Section 30A: Remuneration Policy
 - Remuneration policy required to be prepared and approval by ordinary resolution at AGM
 - Must be approved every 3 years by ordinary resolution
 - May be amended prior to end of 3 years but
 - only after shareholder approval by ordinary resolution
- What if not approved?

Duty to Prepare and Present Remuneration Policy and Remuneration Report

- Section 30B
- Annual Remuneration Report to be prepared and Presented for AGM
 - in respect of previous financial year
- to be approved by ordinary resolution consisting of -
 - Background Statement
 - Company's Remuneration Policy (30A)
 - Implementation Report

Duty to Prepare and Present Remuneration Policy and Remuneration Report

- Implementation Report:
 - total Remuneration: salary, benefits, fund contributions, incentives
 - total Remuneration of each director/PE
 - total remuneration of the highest paid employee
 - total Remuneration of Lowest Paid Employee
 - average and Median Remuneration of all employees
 - remuneration Gap between top 5% and bottom 5%
- Unintended Consequences

Duty to Prepare and Present Remuneration Policy and Remuneration Report

- Implementation Report and Remuneration Policy - separate documents, each require shareholder approval by ordinary resolution
- If Remuneration Report (including policy and implementation report) is not approved –
 - Remuneration Committee must explain how concerns were dealt with at next AGM
 - Non-executives serving on Remuneration Committee
 - Must stand for re-election at AGM where explanation is sought
 - If again not approved, may not be eligible for 2 years after
- Unintended Consequences

Contact details



Yaniv Kleitman
Director
Corporate & Commercial Law
Yaniv.Kleitman@cdhlegal.com



Thandiwe Nhlapho
Senior Associate
Corporate & Commercial Law
Thandiwe.Nhlapho@cdhlegal.com



Akhona Mgwaba
Associate
Corporate & Commercial Law
Akhona.Mgwaba@cdhlegal.com



Vivien Chaplin
Director
Corporate & Commercial Law
Vivien.Chaplin@cdhlegal.com

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