

Inaugural Company Law Developments Conference

The Cutting Edge on M&A and Takeover law –
major developments, big ideas and
unresolved issues.

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TOPIC:

Schemes of arrangement



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Schemes of arrangement – s114

- Biggest highlight: jettisoning of 2 x stage court approval – has cemented it as the go-to method for acquisition of a widely-held company
- Court only brought in if dissenter alleges grounds under s115 (3)/(7)
- This is sole remedy to set a scheme aside – *Africa Wide* 2023 (1) SA 98 (GJ) (and see also *Sand Grove*)

Schemes of arrangement – s114

- 5% share buy-backs (*Capital Appreciation* cases) – debate ended on 27 Dec 2024
- Separate class meetings? – *Sand Grove* 2022 (5) SA 277 (WCC)
 - Yes... but depends!
 - Case by case basis
- But intriguing in-principle questions remain:
 - Do you need a prospectus in share swap schemes?
 - Is a scheme a "dealing" for insider trading purposes? (SSA versus FMA)
 - The unicorn: a "hostile scheme"??

TOPIC:
Concertation



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Acting in concert

- Any action pursuant to an **agreement** between or among two or more persons, in terms of which any of them **co-operate** for the **purpose of entering or proposing** an affected transaction or offer.
- Affected transactions are fundamental transactions (being the disposal of all or the greater part of the assets or undertaking, statutory amalgamation or mergers, and schemes of arrangement), mandatory offers, general offers to shareholders and squeeze-outs.
- All public companies are **regulated companies** as well as certain private companies.

Some implications of concertation

- Concert party relationships must be announced, so that everyone knows – reg 101(7)(a)
- Aggregation of concert parties' holdings for mandatory offers – s123.
- When doing an affected transaction by way of a fundamental transaction, the votes of the concert parties of the acquirer are sterilized in respect of the special resolution – s115(4).
- If a concert party happened to acquire any shares in the target in the 6 months prior to the offer, the highest price paid sets the floor /minimum for the ensuing offer price - reg 111(3).

Practical application – Irrevocable Undertakings

- Target shareholder gives a mere undertaking to support the offer.
- What if that irrevocable goes a step further: In an offer where say the consideration consists of cash and an alternative of Bidco shares, the Bidco may want the target shareholder in question to contract itself to take the share consideration, thereby reinvesting into Bidco.
- An irrevocable to not accept the offer, and to rather remain in the target company.

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