

4 DECEMBER 2019

CORPORATE & COMMERCIAL ALERT

IN THIS ISSUE >

Something is missing: Pricing and mandatory offers triggered through share repurchases

Section 123 of the Companies Act No 71 of 2008 (Companies Act) triggers the requirement to make a mandatory offer to purchase the remaining securities in a regulated company in specific circumstances. In terms of section 118(1) of the Companies Act read with regulation 91 of the Companies Regulations, 2011 (Regulations), a "regulated company" is any public company or state-owned company, as well as private companies where more than 10% of the securities in that company were transferred in the past 24 months amongst unrelated persons.

For more insight into our
expertise and services

[CLICK HERE](#) 

Something is missing: Pricing and mandatory offers triggered through share repurchases

In terms of section 123(2) of the Companies Act, a circumstance under which the obligation to make a mandatory offer will be triggered is where a regulated company repurchases any of its voting securities as contemplated in section 48 of the Companies Act.

Section 123 of the Companies Act No 71 of 2008 (Companies Act) triggers the requirement to make a mandatory offer to purchase the remaining securities in a regulated company in specific circumstances. In terms of section 118(1) of the Companies Act read with regulation 91 of the Companies Regulations, 2011 (Regulations), a "regulated company" is any public company or state-owned company, as well as private companies where more than 10% of the securities in that company were transferred in the past 24 months amongst unrelated persons.

In terms of section 123(2) of the Companies Act, a circumstance under which the obligation to make a mandatory offer will be triggered is where a regulated company repurchases any of its voting securities as contemplated in section 48 of the Companies Act, and as a result of the repurchase, a shareholder who held less than 35% of the issued shares in the company prior to the repurchase ends up holding 35% or more of the issued shares in that company (for present purpose the "35% Party"). In these circumstances, the 35% Party will be required to offer to acquire any remaining shares of the same class from the shareholders of the company on terms determined in accordance with the Companies Act and

the Regulations. This note addresses the price to be paid pursuant to a mandatory offer that is triggered through a repurchase.

The Regulations set out the price to be paid under a mandatory offer where the 35% Party, or any party acting in concert with the 35% Party, acquired shares in the regulated company within six months prior to the commencement of the offer period. In these circumstances, in terms of regulation 111(2) of the Regulations, the price to be offered per share must be identical to, or where appropriate, similar to, the highest price paid by the 35% Party (excluding commission, tax and duty) for the acquisition of such shares.

However, neither the Companies Act nor the Regulations prescribe the price to be paid under a mandatory offer in circumstances where the 35% Party has not acquired shares in the regulated company within six months prior to the commencement of the offer period. This scenario seems to be a lacuna and has created a level of uncertainty. It seems illogical and unfair, for instance, that the 35% Party ought to be bound by the price that the company paid to the selling shareholder under the repurchase, as that transaction does not concern the 35% Party and it was not a party thereto. In practice, although one could take the

CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.

Can a shareholder recover loss caused by a wrong done to the company in which it holds shares?...continued

The draft Companies Amendment Bill was last published for comment over a year ago, and a new version of the bill is presumably in the pipeline. Whilst that draft did not address the mandatory offer pricing issue discussed herein, it is hoped that clarity will be provided in future versions.

view that the 35% Party should make the mandatory offer at "fair value" as determined by an independent expert, we recommend that parties first look to the Takeover Regulation Panel for guidance on how a mandatory offer should be priced in these circumstances.

There is an argument to be made that where the repurchase of shares by a regulated company requires shareholder approval by way of a special resolution pursuant to section 48(8) of the Companies Act (for example where it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares), and the 35% Party (in its capacity as a shareholder) votes in favour of the special resolution, by approving the repurchase of shares the 35% Party is to be regarded as having acted "in concert" with the repurchasing company. As such, the provisions of regulation 111(2) of the Regulations could be applicable in determining the price of the resultant mandatory offer, regardless of whether the 35% Party itself acquired shares in

the regulated company within six months prior to the commencement of the offer period or not. As pointed out above, regulation 111(2) of the Regulations takes into account not only acquisitions of shares in the past six months by the 35% Party but also by its concert parties. As the regulated company could, in this scenario, plausibly be considered a concert party, the consideration paid by the company per share pursuant to the repurchase transaction may well be applied in determining the price of the 35% Party's subsequent mandatory offer – this could of course come as a very unpleasant surprise to the 35% Party if the price under the repurchase was high.

The draft Companies Amendment Bill was last published for comment over a year ago, and a new version of the bill is presumably in the pipeline. Whilst that draft did not address the mandatory offer pricing issue discussed herein, it is hoped that clarity will be provided in future versions.

Ben Cripps and Yaniv Kleitman



OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:



Willem Jacobs
National Practice Head
Director
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com



David Thompson
Regional Practice Head
Director
Corporate & Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@cdhlegal.com

Mmatiki Aphiri
Director
T +27 (0)11 562 1087
M +27 (0)83 497 3718
E mmatiki.aphiri@cdhlegal.com

Roelof Bonnet
Director
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@cdhlegal.com

Tessa Brewis
Director
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Etta Chang
Director
T +27 (0)11 562 1432
M +27 (0)72 879 1281
E etta.chang@cdhlegal.com

Clem Daniel
Director
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Jenni Darling
Director
T +27 (0)11 562 1878
M +27 (0)82 826 9055
E jenni.darling@cdhlegal.com

André de Lange
Director
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Werner de Waal
Director
T +27 (0)21 481 6435
M +27 (0)82 466 4443
E werner.dewaal@cdhlegal.com

Emma Dempster
Projects & Energy
Director
T +27 (0)11 562 1194
M +27 (0)79 491 7683
E emma.dempster@cdhlegal.com

Lilia Franca
Director
T +27 (0)11 562 1148
M +27 (0)82 564 1407
E lilia.franca@cdhlegal.com

John Gillmer
Director
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Sandra Gore
Director
T +27 (0)11 562 1433
M +27 (0)71 678 9990
E sandra.gore@cdhlegal.com

Jay Govender
Projects & Energy Sector Head
Director
T +27 (0)11 562 1387
M +27 (0)82 467 7981
E jay.govender@cdhlegal.com

Johan Green
Director
T +27 (0)21 405 6200
M +27 (0)73 304 6663
E johan.green@cdhlegal.com

Allan Hannie
Director
T +27 (0)21 405 6010
M +27 (0)82 373 2895
E allan.hannie@cdhlegal.com

Peter Hesseling
Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesseling@cdhlegal.com

Quintin Honey
Director
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Roelf Horn
Director
T +27 (0)21 405 6036
M +27 (0)82 458 3293
E roelf.horn@cdhlegal.com

Kendall Keanly
Director
T +27 (0)21 481 6411
M +27 (0)83 645 5044
E kendall.keanly@cdhlegal.com

Yaniv Kleitman
Director
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige
Director
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

Johan Latsky
Executive Consultant
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@cdhlegal.com

Giada Masina
Director
T +27 (0)11 562 1221
M +27 (0)72 573 1909
E giada.masina@cdhlegal.com

OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

Nkcubeko Mbambisa

Director
T +27 (0)21 481 6352
M +27 (0)82 058 4268
E nkcubeko.mbambisa@cdhlegal.com

Anita Moolman

Director
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

David Pinnock

Director
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Tamarin Tosen

Director
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Nonhla Mchunu

Director
T +27 (0)11 562 1228
M +27 (0)82 314 4297
E nonhla.mchunu@cdhlegal.com

Jo Neser

Director
T +27 (0)21 481 6329
M +27 (0)82 577 3199
E jo.neser@cdhlegal.com

Allan Reid

Director
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Roxanna Valayathum

Director
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Ayanda Mhlongo

Director
T +27 (0)21 481 6436
M +27 (0)82 787 9543
E ayanda.mhlongo@cdhlegal.com

Francis Newham

Director
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

Megan Rodgers

Oil & Gas Sector Head
Director
T +27 (0)21 481 6429
M +27 (0)79 877 8870
E megan.rodgers@cdhlegal.com

Roux van der Merwe

Director
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

William Midgley

Director
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@cdhlegal.com

Gasant Orrie

Cape Managing Partner
Director
T +27 (0)21 405 6044
M +27 (0)83 282 4550
E gasant.orrie@cdhlegal.com

Ludwig Smith

Director
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Charl Williams

Director
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

Tessmerica Moodley

Director
T +27 (0)21 481 6397
M +27 (0)73 401 2488
E tessmerica.moodley@cdhlegal.com

Verushca Pillay

Director
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@cdhlegal.com

Ben Strauss

Director
T +27 (0)21 405 6063
M +27 (0)72 190 9071
E ben.strauss@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2019 8496/NOV

