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ACQUISITION OF SHARES IN A HOLDING COMPANY BY ITS SUBSIDIARY

1 General

The relationship between companies in a group has always been troublesome and complicated. The problems and issues were highlighted in the dictum of Coetzee J, as he then was, in *The Unisec Group Ltd v Sage Holdings Ltd* 1986 3 SA 259 (T) 265ff:

> "The rapid development of the group of companies-concept since the first world war produced a mixed bag of results. The group usually consists of one or more pyramids of interrelated companies in which all or the majority of the shares of some are held by others with the parent or holding company at the apex. Economic and administrative advantages flow from this arrangement, on the one hand, but, on the other, it is clearly capable of abuse, particularly in regard to the important principle that a company may not traffic in its own shares. Through this principle, the group concept drives a coach and horses. In addition, the true financial state of the holding company can be effectively masked from the eyes of its shareholders and indeed distorted in the separate accounts of the companies in the group . . . The mischief which, in the absence of statutory control, may flow from the [holding company/subsidiary] arrangement can be succinctly stated as:
> (1) The trafficking by a company in its own shares.
> (2) The reduction of its capital, not by a special resolution of the members, but by executive action of its directors.
> (3) The sterilisation of funds which are available to it for capital investment.
> (4) The entrenchment of the directors' control of H Co.
> (5) The misleading picture presented by the final accounts I of H Co which might very well be a gross distortion of the truth without being, technically, inaccurate."

The main issues are therefore that of control, or actually the abuse of control and the possibility that the capital will be reduced by way of "round tripping" as described in *Unisec* above. Although reference is made to "reduction in capital" within the (then) milieu of capital maintenance, the same principles apply in respect of the use of capital but subject to the solvency and liquidity of the company, as introduced into South African company law by sections 85 to 87 and 39 and 89 of the Companies Act 61 of 1973 ("1973 Companies Act") and carried over to the Companies Act 71 of 2008 ("2008 Companies Act"/"Act"). The principles of abuse of control remain the same from that applied in respect of the 1973 Companies Act, but the application may differ due to a change in the ambit of the duties of directors.

Against this background the aim is to explore some of the requirements in the case of a subsidiary acquiring shares in the holding company and also to address some of the issues in respect of a non-compliance with the statutory requirements.

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2 Acquisition of shares in holding company by subsidiary

Section 48 of the Companies Act provides, as far at it is relevant, as follows:

"**48. Company or subsidiary acquiring company's shares**

(1) . . .

(2) Subject to subsections (3) and (8), and if the decision to do so satisfies the requirements of section 46 –

(a) the board of a company may determine that the company will acquire a number of its own shares; and

(b) the board of a subsidiary company may determine that it will acquire shares of its holding company, but –

(i) not more than 10%, in aggregate, of the number of issued shares of any class of shares of a company may be held by, or for the benefit of, all of the subsidiaries of that company, taken together; and

(ii) no voting rights attached to those shares may be exercised while the shares are held by the subsidiary, and it remains a subsidiary of the company whose shares it holds.

(3) Despite any provision of any law, agreement, order or the Memorandum of Incorporation of a company, the company may not acquire its own shares, and a subsidiary of a company may not acquire shares of that company, if, as a result of that acquisition, there would no longer be any shares of the company in issue other than –

(a) shares held by one or more subsidiaries of the company; or

(b) convertible or redeemable shares.

(4) An agreement with a company providing for the acquisition by the company of shares issued by it is enforceable against the company, subject to subsections (2) and (3).

(5) If a company alleges that, as a result of the operation of subsection (2) or (3), it is unable to fulfil its obligations in terms of an agreement contemplated in subsection (4) –

(a) the company must apply to a court for an order in terms of paragraph (c);

(b) the company has the burden of proving that fulfilment of its obligations would put it in breach of subsection (2) or (3); and

(c) if the court is satisfied that the company is prevented from fulfilling its obligations pursuant to the agreement, the court may make an order that –

(i) is just and equitable, having regard to the financial circumstances of the company; and

(ii) ensures that the person to whom the company is required to make a payment in terms of the agreement is paid at the earliest possible date compatible with the company satisfying its other financial obligations as they fall due and payable.

(6) If a company acquires any shares contrary to section 46, or this section, the company must, not more than two years after the acquisition, apply to a court for an order reversing the acquisition, and the court may order –

(a) the person from whom the shares were acquired to return the amount paid by the company; and

(b) the company to issue to that person an equivalent number of shares of the same class as those acquired.

(7) A director of a company is liable to the extent set out in section 77(3)(e)(vii) if the director –

(a) was present at the meeting when the board approved an acquisition of shares contemplated in this section, or participated in the making of such a decision in terms of section 74; and

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(b) failed to vote against the acquisition of shares, despite knowing that the acquisition was contrary to this section or section 46.

(8) A decision by the board of a company contemplated in subsection (2)(a) –

(a) must be approved by a special resolution of the shareholders of the company if any shares are to be acquired by the company from a director or prescribed officer of the company, or a person related to a director or prescribed officer of the company; and

(b) is subject to the requirements of sections 114 and 115 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."

Section 48 covers two distinct situations. These are the acquisition by a company of its own shares, as well as the acquisition by a subsidiary of the company of the (holding) company's shares. Section 48 further authorises the acquisitions mentioned above by qualification as it states that "Subject to sub-s (3) and (8) and if the *decision to do so satisfies the requirements of s 46*" the board may determine that it will acquire a number of its own shares. The decision of the board must comply with section 46, which is problematic as section 46 on its own (subsection (1)) requires a decision.

Section 48(2)(b) provides in respect of a subsidiary as far it is relevant here, that the board of the subsidiary company must

- take the decision in terms of section 46; and
- may determine that the subsidiary will acquire shares in the holding company; but
- the maximum of shares acquired in the holding company is 10%, in aggregate taken together, of the number of issued shares of any class of shares of a company.

The requirements in section 46 is firstly that there must be a board resolution (s 46(1)(a) ("initiating resolution")), although this requirement is already contained in section 48(2)(a) and (b). The second requirement is that it must "reasonably appear" that the company will satisfy the solvency and liquidity test (in s 4) immediately after the distribution (s 46(1)(b) (the "objective requirement") and the board must thirdly, by resolution (the "effecting resolution"), acknowledge that it has applied the solvency and liquidity test and reasonably concluded that the company will satisfy that test immediately after that distribution (s 46(1)(c)). The effecting resolution therefore consists of two elements, ie application of the solvency and liquidity test and the subsequent resolution. The Act uses the concepts of "decision" and "resolution" interchangeably, and it is submitted that the concepts are therefore synonyms.

If the section 46 decision has been complied with, a subsidiary, or subsidiaries taken together, can hold a maximum of 10% of the number of issued shares of any class of shares of the holding company. Unlike the 1973 Act, it is now clear that the resolution to acquire shares in the holding company must be taken by the board of the subsidiary company. This company is under control of the holding company and the possibility of abuse of control is patent (see the definition of subsidiary relationships in s 3; Delport *et al Henochsberg on the Companies Act 71 of 2008* 30; Botha *Groups in South African company law* (LLD thesis UP 1981) 165). There are various measures, in the common law and in the Act to regulate possible abuse of control. It is beyond the scope of this note to discuss

these in detail, but a novel feature of the Act is to extend the fiduciary duties of the board of directors of the holding company to include certain subsidiaries.

Section 76(2) of the Act provides:

> "(2) A director of a company must –
> (a) not use the position of director, or any information obtained while acting in the capacity of a director –
> (i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or
> (ii) to knowingly cause harm to the company or a subsidiary of the company."

There is therefore a positive duty to act in the best interests of the wholly owned subsidiary but also a negative duty not to cause harm to the interests of subsidiaries (ie wholly owned subsidiaries and otherwise). An "instruction" to the board of the subsidiary which could otherwise be an abuse of power, will, to a certain extent at least, be tempered by the duty in section 76(2) (Delport *et al* 288). The enforcement of duties over the holding/subsidiary boundaries is also possible in terms of section 163 (see s 2 in respect of related parties and *Kudumane Investment Holdings Ltd v Northern Cape Manganese Company (Pty) Ltd* 34403/2011 11 June 2012 (GSJ) paras 49–50; *Peel v Hamon J&C Engineering (Pty) Ltd* 2013 2 SA 331 (GSJ) paras 53 55).

If a company acquires shares in itself, it is by definition a "distribution" in terms of section 46. A "distribution" is defined in section 1 as

> "a direct or indirect –
> (a) transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one or more holders of any of the shares, or to the holder of a beneficial interest in any such shares, of that company or of another company within the same group of companies, whether –
> (i) in the form of a dividend;
> (ii) as a payment in lieu of a capitalisation share, as contemplated in section 47;
> (iii) as consideration for the acquisition –
> (aa) by the company of any of its shares, as contemplated in section 48; or
> (bb) by any company within the same group of companies, of any shares of a company within that group of companies; or
> (iv) otherwise in respect of any of the shares of that company or of another company within the same group of companies, subject to section 164 (19);
> (b) incurrence of a debt or other obligation by a company for the benefit of one or more holders of any of the shares of that company or of another company within the same group of companies; or
> (c) forgiveness or waiver by a company of a debt or other obligation owed to the company by one or more holders of any of the shares of that company or of another company within the same group of companies".

The possibility exists therefore that there is an overlap between sections 48 and 46 (see Jooste "Issues relating to the regulation of 'distributions' by the 2008 Companies Act" 2009 *SALJ* 627; Van der Linde "The regulation of distributions to shareholders in the Companies Act 2008" 2009 *TSAR* 484; Bradstreet "Regulating legal capital reduction: A comparison of creditor protection in South Africa and the state of Delaware" 2012 *SALJ* 736 in respect of distributions in terms of section 46).

It should, however, be noted that section 46 is wider than section 48, in that the former provides for a "distribution" which includes:

- a transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one or more holders of any of the shares of that company or of another company within the same group of companies; or
- the incurrence of a debt or other obligation by a company for the benefit of one or more holders of any of the shares; or
- the forgiveness or waiver by a company of a debt or other obligation owed to the company by one or more holders of any of the shares of that company.

The transfer of money includes a dividend and the acquisition of shares by the company in terms of section 48 or the acquisition of shares by any company within the group of companies.

The overlap between sections 46 and 48, as in respect of the transaction, is in the first instance in respect of the acquisition of shares by the company in terms of section 48, as clearly stated in the definition of a "distribution", that is, its own shares. This also distinguishes the three different forms of transfer of money because only in the case where the company acquires its own shares, does it have an influence on the existence of shares.

3 Consequences of non-compliance

3 1 Status of shares

If a company acquires its own shares, section 35(5)(a) provides:

> "(5) Shares of a company that have been issued and subsequently –
> (a) acquired by that company, as contemplated in section 48; or
> (b) surrendered to that company in the exercise of appraisal rights in terms of section 164, have the same status as shares that have been authorised but not issued."

Whether it is wise to cancel the shares is debatable, but this issue falls outside the ambit of this note (see in this regard Cassim "The repurchase by a company of its own shares: The concept of treasury shares" 2003 *SALJ* 137; "The challenge of treasury shares" 2010 *Acta Juridica* 151). In the second instance there is also an overlap in the case of a transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one or more holders of any of the shares of another company within the same group of companies. The second overlap is in respect of the acquisition of shares by the subsidiary company in the holding company, but it also includes the acquisition of additional shares by the holding company in a subsidiary.

Section 48(6) regulates the consequences of non-compliance of section 48. It provides that if a company acquires any shares (a) contrary to section 46, or (b) contrary to section 48, the company must, not more than two years after the acquisition, apply to a court for an order reversing the acquisition, and the court may order (a) the person from whom the shares were acquired to return the amount paid by the company; and (b) the company to issue to that person an equivalent number of shares of the same class as those acquired.

The question will then be when an acquisition, in terms of section 48, will be contrary to section 46. As stated above, section 48 requires in the first instance that the *decision* (and not the transaction) in terms of section 48, whether it is by

the company to acquire its own shares or by the subsidiary to acquire the shares in a holding company, must satisfy the requirements of section 46.

This decision, whether by the company or a subsidiary, is also subject to section 48(3) and (8). Subsection (3) provides that the company may not acquire its own shares, and a subsidiary of a company may not acquire shares of that company, if, as a result of that acquisition, there would no longer be any shares of the company in issue other than shares held by one or more subsidiaries of the company or only convertible or redeemable shares. Section 48(8) provides that the decision by the board of a company to acquire its own shares must be approved by a special resolution of the shareholders of the company if any shares are to be acquired by the company from a director or prescribed officer of the company, or a person related to a director or prescribed officer of the company and the resolution is also subject to the requirements of sections 114 and 115 if the transaction involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares. These provisions are fraught with uncertainty, but only the fact that subsections (3) and (8) impose conditions or requirements additional to the decision in terms of subsection (2)(a) is presently relevant.

If the *decision* in terms of subsection (2)(a) does not comply with the requirements of section 46, it is also a non-compliance with section 48 and section 48(6) will apply. However, if the *effect* of that decision is that subsection (3) or (8) is contravened, it could be also possible that section 48(6) will be put into operation.

Another possibility is that the whole section 46, and not only the decision, must be complied with as required, by implication, by section 48(6). Section 48 is in any case also made applicable in respect of section 46 due to the express inclusion thereof in para (iii)(aa) of the definition of a "distribution" in the situation where the company acquires "any of its shares". The acquisition other than by the company of its own shares, such as the acquisition of the subsidiary of shares in the holding company, is included as a distribution in para (iii)(bb) of the definition of "distribution" in section 1 which provides that consideration paid by any company within the same group of companies, of any shares of a company within that group of companies. Although this is wider than the situation in section 48(2)(b), the latter situation is included as a distribution, at least by implication.

As far as the acquisition of shares is concerned, however, the only additional requirements in respect of a board decision, are that of section 46(2) and (3). Section 46(2) provides that when the board of a company has adopted the effecting resolution, the relevant distribution must be fully carried out, subject only to section 46(3), which provides that the effecting resolution must be taken again if the distribution is not completed within 120 business days after the effecting resolution. Non-compliance with these requirements is therefore expressly dealt with in section 46 and cannot be addressed by section 48(6). Therefore the compliance with section 46 referred to in section 48(6) can only be in respect of the decision as referred to the introduction to section 48(2). Nothing is therefore added, it is submitted, by interpreting the application of section 46 in respect of section 48(6) as to include the whole section 46. It is therefore submitted that the reference to section 46 in the introductory words in section 48(2) is only to the requirements of the decision in terms of section 46 that must be complied with, and not to the whole of section 46.

If a company acquires shares in itself, those shares are cancelled and returned to authorised but unissued shares in terms of section 35(5). Section 48(6) provides that if the company acquires shares contrary to section 46, or this section (s 48), the company must apply to a court for the order as provided for in section 48(6)(a) and (b). These orders are conjunctive and section 48(6) does not give the Court a discretion to grant any other order.

If an acquisition is made contrary to the requirements of the decision in section 46, the orders in terms of section 48(6)(a) and (b) would be competent and follow logically, that is, the person from whom the shares were acquired must return the amount paid by the company and the company must (re-)issue an equivalent number of shares of the same class as those acquired to that person because those shares have been cancelled in terms of section 35(5). The company does not have a choice to implement section 48(6) as it is clearly peremptory and the company must apply for the orders. It is maybe significant to note that the Act originally provided that the company "may" institute action, but this was changed to "must" by section 32(d) of the Companies Amendment Act 3 of 2011.

An acquisition contrary to section 48(2)(b) in respect of shares in the holding company by a subsidiary is also subject to the provisions of section 48(6). The effect of non-compliance with section 48(2)(b) is, however, uncertain. Section 46 is also applicable as the definition of a "distribution" in section 1 is also

> "a direct or indirect transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one or more holders of any of the shares . . . of that company or of another company within the same group of companies, whether
>
> . . .
>
> (iii) as consideration for the acquisition;
>
> . . .
>
> (bb) by any company within the same group of companies, of any shares of a company within that group of companies".

It should be noted that this definition is wider than merely a subsidiary company acquiring shares in the holding company. It also includes the acquisition of shares by the holding company in its subsidiary. Therefore if a company buys shares in another company, it will not be a "distribution". However, if the first company acquires shares to the extent that the second company becomes a subsidiary of the first company, any additional shares acquired will be a "distribution" and subject to, at least, the requirements of section 46 (see s 1 for the definition of "group of companies" and Delport *et al* 30).

As in the case with a company acquiring its own shares, an application of the whole section 46, as opposed to the decision requirements of section 46, does not add any duties or obligations not already contained in the decision requirements incorporated by section 48(2).

Apart from the conditions imposed by section 48(3) and (8) as discussed above, section 48(2)(b)(i) and (ii) contain additional requirements for the implementation of the decision, and not for the decision itself. These are that the aggregate acquisition is limited to 10% in aggregate taken together, of the number of issued shares of any class of shares of the holding company and the voting rights of the shares so held may not be exercised.

If section 48(2)(b) has not been complied with due to the fact that the decision requirements of section 46 were not adhered to, that the subsidiary or subsidiaries acquire, on aggregate, more than 10% of the particular class in the holding company, or that the requirements of subsections (3) and (8) were not complied

with, the actions are subject to section 48(6). However, in terms of this provision the company must apply to a court for the order as provided for in section 48(6)(a) and (b). As stated above these orders are conjunctive and section 48(6) does not give the court a discretion to grant any other order. The remedies in section 48(6), however, do not follow logically as the shares acquired by the subsidiary, below or above the 10% threshold, are not cancelled in terms of section 35(5) as would be the case if a company acquires its own shares. Section 48(6) application will therefore only be possible in respect of a company acquiring its own shares and not in respect of a subsidiary acquiring the shares in its holding company. In respect of non-compliance with the additional requirements of subsection (3) or (8) the application of subsection 48(6) is equally excluded due to non-applicability of the orders.

It will therefore not be competent, as argued above, for a court to make any of the orders prescribed in section 48(6)(a) and (b) and the court does not have an inherent jurisdiction to make any other order. In addition, the terminology used throughout section 48 is "a company" in respect of acquisition of its own shares by a company and "a subsidiary of a company", in respect of shares acquired by a subsidiary in a holding company. The use of "a company" in section 48(6) and not "a subsidiary of a company" could also indicate that the ambit of section 48(6) is only in respect of a company acquiring its own shares and not if it is the acquisition of shares by a subsidiary of a company.

3 2 Validity of contract

The validity and consequences of an acquisition of shares by a subsidiary of a company contrary to the provisions of section 48(2) if section 48(6) does not apply must be considered.

Section 48(4) provides that the agreement with a company providing for the acquisition by the company of shares issued by it is enforceable against the company, subject to subsections (2) and (3) (see Van der Linde "The regulation of distributions to shareholders in the Companies Act 2008" 2009 *TSAR* 484 494 for interpretational problems with this provision and differences with s 46 enforcement). However, this section does not address the situation under section 48(2)(b) in respect of the acquisition of shares by a subsidiary as it expressly provides only for the acquisition of a company of its own shares. The consequences of the acquisition by a subsidiary of shares in a holding company must therefore be determined in terms of the general principles of the Act.

Section 218(1) of the Act provides as follows:

> "Subject to any provision in this Act specifically declaring void an agreement, resolution or provision of an agreement, Memorandum of Incorporation, or rules of a company, nothing in this Act renders void any other agreement, resolution or provision of an agreement, Memorandum of Incorporation or rules of a company that is prohibited, voidable or that may be declared unlawful in terms of this Act, unless a court has made a declaration to that effect regarding that agreement, resolution or provision."

Section 48 does not provide that the decision contrary to section 48(2)(b) is void. The question would be what the effect would be if the decision does not satisfy the requirements of section 46 as provided for in the introductory words of section 48(2). It is submitted that the particular decision would be subject to section 46 consequences as section 46 also applies, in respect of acquisitions by a subsidiary of shares in a holding company due to the definition of "distributions"

as discussed above. Therefore, if the initiation decision and effecting decision does not comply with section 46, the acquisition would, to the extent that it does not comply, be unenforceable. It should be noted that the objective requirement, as provided for in section 46(1)(b) is not applied, as expressly stated in section 46(2). Section 46(1) provides that a "company *must* not" and section 48(5) refers to the situation that the section "prohibits . . . compliance" because of non-compliance of the solvency and liquidity test. This is stronger than "the board may" in section 48(2)(b) but whether the express prohibition in section 46 allows for a deduction that the transactions that do not comply with section 48 is void, it respectfully doubted (see eg *Dulce Vita v Chris van Coller* (192/12) [2013] ZASCA 22 (22 March 2013) in respect of voidness of contracts that are declared unlawful).

A resolution that complies with the introductory words of section 48 in respect of the decision to acquire shares in the holding company by the subsidiary but does not comply with the requirement in section 48(2)(b)(i) will not render the acquisition or holding of those shares void or even unenforceable, as the effect of such a resolution is not covered under either section 48 or section 46 and the resolution and the effect of such a resolution will be regulated under section 218(1).

3 3 Liability

In addition to the consequences in respect of the transaction, section 48(7), read with section 77(3)(e)(vii), provides that a director, including a prescribed officer of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director or prescribed officer being present at the meeting when the board approved an acquisition of any of its shares by the company or the acquisition of shares in the holding company by the subsidiary (or participated in the making of the decision by round-robin resolution in terms of s 74) and failed to vote against that acquisition of shares, despite knowing that the acquisition was contrary to section 48 or contrary to section 46.

The liability of the directors and prescribed officers are irrespective of whether the acquisition, whether by the company of its own shares or the acquisition by a subsidiary of the shares of the holding company, is unenforceable or, in respect of the former acquisition, is reversed in terms of section 48(6). Under section 46(6) read with section 77(3)(e)(vi) the liability for a distribution not complying with section 46 is that a director, including a prescribed officer of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director or prescribed officer being present at the meeting when the board approved the distribution, but it is limited to the amount that was distributed that exceeded the solvency and liquidity test, but reduced by the amount which the company recovered from persons to which the distribution was made. This reduction in the extent of possible liability does not operate in respect of section 48. Whether there is an election as to which section will be used if an action is a transgression of both sections 46 and 48 is uncertain. Liability in terms of section 46(6) read with section 77(3)(e)(vi) is only in respect of loss, damages or costs sustained *by the company* and not by third parties.

Liability in respect of third parties can be in terms of section 218(2) and (3) of the Act which provides as follows:

> "(2) Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.
>
> (3) The provisions of this section do not affect the right to any remedy that a person may otherwise have."

Any person will be liable under section 218(2), not only directors and prescribed officers. It is also possible that third parties, that is, creditors, the holding company and even the company itself can institute action in terms of section 218(2). This liability is in addition to any other liability and does not exclude possible common law remedies as provided for in section 218(3). The viewpoint that the requirement that there must be a "contravention" is limited only to action that gives rise to criminal liability is too narrow and any non-compliance with the Act will be a contravention and therefore actionable (see Delport *et al* 639).

A company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company may also apply to a court for an order declaring a person (director) delinquent. A person may be declared delinquent under the circumstances prescribed in section 162(5). These grounds are that the person consented to serve as a director, or acted as such while disqualified in terms of section 69 (s 162(5)(a)), or while under a court order of probation, acted as a director in a manner that contravened that order (s 162(5)(b)); or where a person, while being a director, grossly abused the position of director (s 162(5)(c)(i)), took personal advantage of information or an opportunity, contrary to section 76(2)(a) (s 162(5)(c)(ii)), or intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary contrary to section 76(2)(a) (s 162(5)(c)(iii) (*Kukama v Lobelo* 38587/2011 12 April 2012 (GSJ) confirmed on appeal [2013] ZAGPJHC 72 (31 May 2013) para 19.2). For an order in terms of subsection (5)(c), fault in the form of intent or gross negligence is, however, required.

4 Conclusion

Section 48 is a minefield for the company and its directors and prescribed officers. This is because of the provisions of section 48 on its own, because of the incorporation of section 46 which is not successful, and also because of the integration of section 48 with the rest of the Companies Act, like with sections 35 and 115. Add to all this the added complexities of the holding/subsidiary relationship, and the result is a section that is unworkable. Sections 85 to 87 of the 1973 Companies Act, and sections 39 and 89 relating to holding/subsidiary relationships, that in effect abolished the capital maintenance as far back as 1999, should have been used as a basis as these sections presented very little interpretational problems.

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