

**MERGERS AND AMALGAMATIONS UNDER THE COMPANIES ACT
NO. 71 OF 2008**

by

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Submitted in partial fulfilment of the requirements for the Degree

Masters of Law

at

THE UNIVERSITY OF PRETORIA

Supervisor: Professor PA Delport

November 2014

UNIVERSITY OF PRETORIA
FACULTY OF LAW

STATEMENT OF AUTHENTICITY

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Althea N Soobyah

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CHAPTER ONE: INTRODUCTION

1. INTRODUCTION

The Companies Act No. 71 of 2008¹ became effective on 1 May 2011 and has since had many far reaching consequences in areas such as the regulation of fundamental transactions.

Whilst concepts such as mergers and acquisitions are trite concepts under the common law, mergers and amalgamations were formally introduced into legislation by the Companies Act.

The Companies Act makes provision for the following three categories of fundamental transactions:

- Disposals of all or the greater part of a company's assets or undertaking;
- Mergers and amalgamations; and
- Schemes of arrangements

These fundamental transactions, when entered into, must be approved in the manner specified in the Companies Act.

Disposals of all or the greater part of a company's assets or undertaking are regulated by section 112 of the Companies Act, and schemes of arrangements are regulated by section 114 of the Companies Act.

This document will focus on mergers and amalgamations² as contained under section 113 and the regulation thereof under the Companies Act. It will also compare the requirements contained in the Companies Act to those of the Income Tax Act No. 58 of 1962³ and the effect thereof on the implementation of a merger transaction.

¹ Hereinafter referred to as the Companies Act.

² For ease of reading, unless indicated otherwise, any reference to merger refers to a 'merger and amalgamation'.

³ Hereinafter referred to as the Income Tax Act.

2. BACKGROUND

Amongst others, new concepts such as mergers have been inserted into the Companies Act.

Whilst these transactions were largely governed and regulated by the Securities Regulation Panel established under section 440 of the Companies Act 61 of 1973, the competition commission under the Competition Commission Act No. 89 of 1998⁴ also had a very significant impact on the regulation of mergers. With the introduction of the Companies Act, a new panel, the Take-over Regulation Panel, has been established to regulate affected transactions as defined under the Companies Act. In order for companies to enter into successful merger transactions, compliance with the Companies Act and the Competition Commission Act is required, and for tax relief, the Income Tax Act must also be taken into account.

The problem arises because each of the aforementioned pieces of legislation has their own definition of a merger. They also have different processes that conflict with each other when entering into mergers. The question then arises, which requirements must be met and is it possible if the requirements under the different legislation which seek to regulate the same transaction are in conflict with each other?

3. RESEARCH PROBLEM

Take-overs have been regulated by the Securities Regulation panel as established under section 440 of the Companies Act 61 of 1973. Since the introduction of the Companies Act, there have been many changes to the requirements and processes in respect of these transactions.

The Companies Act sets out certain processes and requirements that must be complied with before any company registered in the Republic of South Africa can enter into a merger transaction.

In addition to the Companies Act, other legislation also governs compliance in respect of mergers. In some instances the processes in respect of compliance differ from that of the Companies Act so much so that it may be seen as conflicting with the provisions of the Companies Act.

⁴ Hereinafter referred to as the Competition Act

Mergers can be costly for companies and in some instances these transactions are entered into for economic reasons and in order to avoid any business rescue or liquidation proceedings. These transactions however may trigger unintended tax consequences under the Income Tax Act. The Income Tax Act has been amended continuously in order to ensure that these consequences are not triggered provided that certain requirements are complied with in terms of the processes relating to mergers.

The process as contained in the Income Tax Act is however not aligned with the process as contained under the Companies Act and in some instances may be in conflict with the provisions of the Companies Act.

4. RESEARCH OBJECTIVE

The objective of this research will be to -

- Explore the scope and application of section 113 read with section 116 of the Companies Act, and
- Determine the effects of the new provisions under the Companies Act on the provisions contained in the Income Tax Act.

5. METHODOLOGY

The methodology to be followed in the mini-dissertation is to firstly provide a brief synopsis of the history of mergers; secondly to explain the statutory changes as effected under the Companies Act; thirdly to assess the requirements and processes associated with merger transactions under the Income Tax Act; fourthly to assess the extent to which the requirements and processes conflict with each other; and lastly to evaluate the impact of any conflict on mergers.

CHAPTER TWO: LEGISLATIVE FRAMEWORK

1. INTRODUCTION

“The cornerstone of the South African M&A legislative framework is the Companies Act 1973 (‘the Companies Act’). A new Companies Act 2008 (‘the New Companies Act’) was, however, promulgated in 2008 and is set to take effect in late 2010 or early 2011. This will significantly overhaul the existing company law regime and the M & A legislative framework”⁵

The South African company law found its origins in English law. Under the previous dispensation and regulatory framework for companies, no provision was made for statutory mergers.

According to Nigel Boardman,⁶ three methods of obtaining control of a company existed under the Companies Act No. 61 of 1973,⁷ namely -

1. A business acquisition;
2. A scheme of arrangement; and
3. A take-over offer

This chapter will focus on the rationale behind the introduction of statutory mergers under the Companies Act No. 71 of 2008 and the legislative framework associated therewith.⁸

2. BACKGROUND

The Companies Act, 1973 was largely based on the British model of company law and made no provision for the combination of business entities by way of a merger.

The only way companies could enter into a restructure under the old regime was through a scheme of arrangement⁹ or the disposal of the assets of one company to that of another company.

⁵ Davids, E & Hale, A, *The Mergers and Acquisitions Review*, (4th ed), 2010 at page 496.

⁶ Boardman, N. A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008. (2010) *Acta Juridica* 306-336

⁷ Hereinafter referred to as the Companies Act, 1973.

⁸ Hereinafter referred to as the Companies Act.

⁹ Section 311 of the Companies Act, 1973.

The Department of Trade and Industry published a policy paper during 2004¹⁰ wherein it was acknowledged that there was a need to align company law with international trends in order to accommodate the changing business environment within the Republic of South Africa and globally.

Having regard to the social and economic context of South Africa and the changes in global business climate, the review of the Companies Act, 1973 was imminent. One of the key objectives of the review of the Companies Act, 1973 was to identify fundamental rules which would govern, amongst others, mergers and acquisitions. In addition to the establishment of the rules which govern mergers and acquisitions there was also a need to simplify the processes relating to these transactions.

Under the previous dispensation, take-overs were regulated by the Securities Regulation Panel established under section 440 of the Companies Act, 1973 because it dealt largely with the transfer of shares. This view has since changed due to the fact that take-overs have evolved to allow for the acquisition of control of companies through the transfer of shares as well as assets. It is the effective management of companies that form the basis for and the existence of company law in South Africa.

It is against this backdrop that a regulatory framework in respect of mergers was introduced into South African company law. This has been the biggest single change in the context of takeovers that has been introduced under the Companies Act¹¹.

Cassim, et al¹² describes the introduction of mergers as –

“Mergers, within limits, are good for the economy, for wealth creation and for corporate efficiency. For this reason, the merger provisions of the Act are welcomed, particularly in a developing economy such as ours⁶². Shareholders who object to the merger are given new appraisal rights in terms of which they may require the company in which they hold shares to pay them out in cash the fair value of their shares. In this way, a proper balance is drawn between the interests of the merging companies, the shareholders concerned and the economy in general.⁶³”

¹⁰ Department of Trade and Industry, *Company law for the 21st century: Guidelines for Corporate Law Reform*, Government Gazette No. 1183 of 2004.

¹¹ Boardman, N. A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008. (2010) *Acta Juridica* 306-336.

¹² Cassim, F. H., Jooste, R., et al. (2012). *Contemporary Company Law (2nd ed.)*. Claremont: Juta & Co. Ltd at page 17

The following statutes may also have application, based on the mechanics of the merger:

1. The Competition Commission Act No. 89 of 1998.¹³

The Competition Act finds application where a merger is notifiable and requires approval before implementation. According to Davids and Yuill¹⁴ a notifiable merger is “one where there is a change of control (either legal or de facto control) over a South African company or business and the thresholds (of assets and turnover) set out in the act for mandatory notification; are met.”

The Competition Act sets out various thresholds which will determine whether a merger should be reported to the Competition Commission for approval of the transaction before implementation. These thresholds are contained under section 12 of the Competition Act. In certain instances however, even small mergers that do not exceed the threshold will be subject to the approval of the Competition Commission. This usually happens when a small merger is considered to substantially lessen or prevent competition. Under these circumstances the Competition Commission can investigate a small merger within 6 months of implementation of a merger.

2. The Banks Act No. 90 of 1994.¹⁵

In certain instances the Banks Act will also apply to a merger transaction. Section 54 of the Banks Act affects the implementation of a merger where one of the parties to the merger transaction involves a bank.

It requires the consent in writing by the Minister of Finance for the to the merger if the transaction constitutes a merger under the Companies Act; one of the parties to the transaction is a bank and the transfer of the assets or liabilities (on its own or together) of the bank to another person exceeds 25 percent of the bank’s assets and liabilities.

The 25 percent is calculated by taking into account the aggregate of all assets and liabilities transferred by a bank to another person during that financial year. The

¹³ Hereinafter referred to as the Competition Act.

¹⁴ Davids, E and Yuill, D, *Negotiated M & A Guide*, (4 November 2011) Accessed online 01 August 2014: www.ibanet.org/document, South Africa.

¹⁵ Hereinafter referred to as the Banks Act.

consent of the Minister of Finance is also required prior to the implementation of the merger.

3. The Income Tax Act No. 58 of 1962.¹⁶

The Income Tax Act provides tax relief in cases where a transaction constitutes an amalgamation as defined. The relief is a deferral of taxes on the transfer of assets and liabilities between two companies which would normally be triggered when there is a disposal of assets by a taxpayer.

More detail on the mechanics of transactions which comply with the definition under the Income Tax Act is discussed in more detail under chapter four of this document.

4. Exchange Control Regulations of 1961.

These controls regulate the flow of funds in and out of the country. It may be important for mergers and amalgamations which include transactions entered into with offshore entities. The control measures have been relaxed over time to cater for and to keep up with current business trends. Although the regulations have been relaxed, it may, in certain instances, require compliance by companies entering into mergers or amalgamations with offshore entities.

As mentioned in chapter two, the scope of this document is limited to the application of the Companies Act and the Income Tax Act in respect of mergers and amalgamations.

3. CONCLUSION

The Companies Act No. 61 of 1973¹⁷, in particular, the regulatory framework in respect of fundamental transactions was in need of substantial reform in order to facilitate the creation of business combinations. Mergers and amalgamations were traditionally not catered for under South African Law and the only way in which two or more companies could restructure its business was through the transfer of shares or assets, or through a scheme of arrangement under section 311 of the Companies Act of 1973.

¹⁶ Hereinafter referred to as the Income Tax Act.

¹⁷ Hereinafter referred to as the Companies Act, 1973.

The legislature deemed it necessary to formally introduce concepts such as mergers and amalgamations under the Companies Act in order to afford companies with flexibility when entering into reorganisations and restructuring. With the introduction of the Companies Act, the statutory merger provisions emerged.

The introduction of mergers and amalgamations into statute was also necessary in order to bridge the gap between competition law and company law as well as to align the Companies Act with international best practices and to keep up to date with current (local and international) business trends.

CHAPTER THREE: MERGERS AND AMALGAMATIONS UNDER THE COMPANIES ACT¹⁸

1. INTRODUCTION

The new merger provision was introduced in order to facilitate business combinations easily and, to achieve flexibility by aligning it with international best practice. The statutory merger provisions is based on the US style mergers and adopted into South African law.

This chapter will focus on the mechanics of a merger as introduced under the Companies Act. It will also analyse the requirements and procedural aspects associated with a successful merger.

2. CONCEPTS UNDER THE COMPANIES ACT

Mergers and amalgamations are governed by section 113 read with section 116 of the Companies Act. With the introduction of mergers and amalgamations under the Companies Act, it is important to pay attention to the definitions relating to mergers and amalgamations.

1. Merger and amalgamation

A merger and amalgamation is defined in section 1 of the Companies Act as a transaction entered into between two or more profit companies pursuant to an agreement which results in –

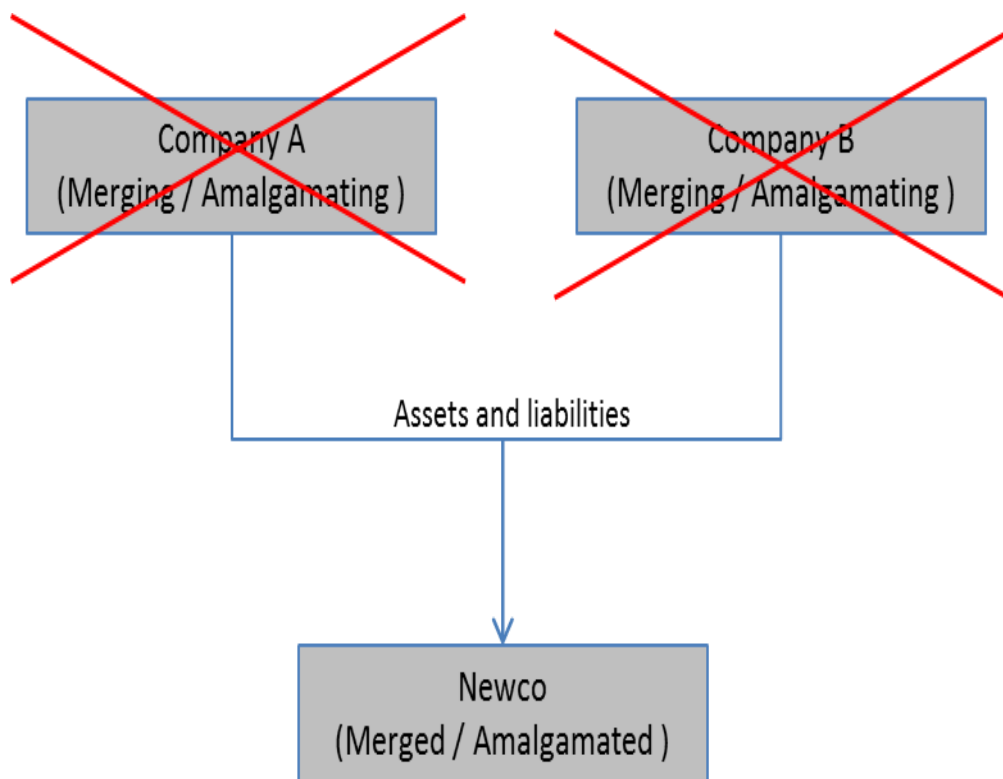
- the formation of one or more new companies which holds all the assets and liabilities that were held by the merging or amalgamating companies immediately prior to the implementation of the agreement and the dissolution of each of the merging or amalgamating companies; or
- the survival of at least one of the merging or amalgamating companies, with or without the formation of a new company and all the assets and liabilities held by the merging or amalgamating companies immediately prior to the implementation of the agreement vest in the surviving merging or amalgamating company together with the new company.

¹⁸ Companies Act No. 71 of 2008.

It is interesting to note that even though there were two separate definitions proposed under the Companies Bill,¹⁹ upon promulgation of the Companies Act, one definition for mergers and amalgamations emerged. The first part of the definition describes a merger and the second, an amalgamation as proposed under the separate definitions contained in the Companies Bill.

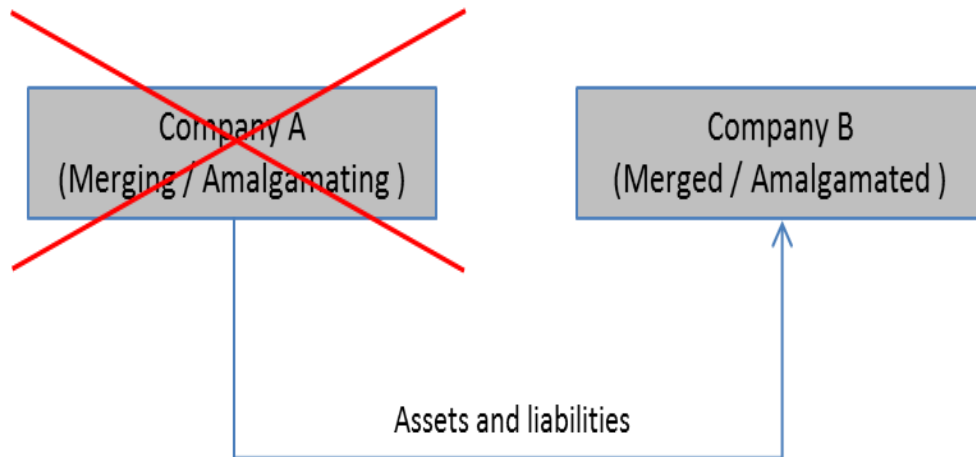
The diagrammatic presentation hereunder illustrates the forms in which a merger can take place as per the definition contained in section 113 of the Companies Act:

1. Formation of one or more new companies that holds all the assets and liabilities of the merging and amalgamating companies

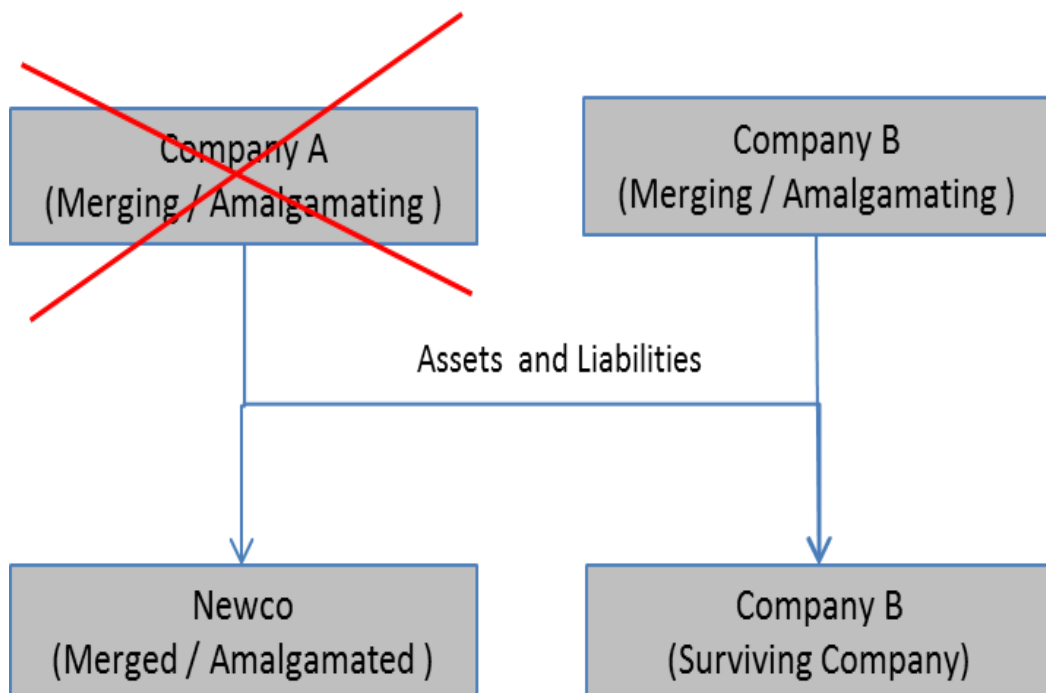


¹⁹ Companies Bill, 2008.

- Survival of one or more companies without the formation of a new company, where the surviving company holds all the assets and liabilities of the merging and amalgamating companies



- The survival of one or more companies with the formation of a new company, where the surviving company and the new company holds all the assets and liabilities of the merging and amalgamating companies



The following observations can be made from the definition of a merger –

1. a merger can only be entered into between two or more profit companies, therefore non-profit companies are not covered by the statutory merger provisions;
2. the definition requires a transfer of all the assets and liabilities of the merging companies to the merged companies; and
3. the existence of the merging companies which do not survive the merger is terminated by operation of law.

Dauids, Norwitz and Yuill²⁰ describe the new procedure as –

“[R]elatively straightforward and flexible which is in line with the intention of the legislature introduction.”

They also identify three key stages of a merger, namely –

- the merger agreement;²¹
- the shareholder approval;²² and
- implementation of the merger²³

These stages and the requirements of each are discussed in detail below (see paragraph dealing with **the requirements for merger**).

Cassim and Yeats, et al²⁴ identifies four types of merger structures, all of which will be subject to the requirements as contained under the Companies Act:

- Pooling-type mergers;
- Triangular and reverse triangular mergers;
- Cash mergers; and
- Short-form mergers.

²⁰ Dauids, E., Norwitz, T., & Yuill, D. (2010). A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008. *Acta Juridica*, 337-371.

²¹ Section 113 of the Companies Act.

²² Section 115 of the Companies Act.

²³ Section 116 of the Companies Act.

²⁴ Cassim, M. F. (2008). Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 1). *Merc LJ*, 20, 1-32.

2. Affected Transaction

An affected transaction is defined in section 117 of the Companies Act as –

- “(i) a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking of a regulated company, as contemplated in section 112, subject to section 118 (3);
- (ii) an amalgamation or merger, as contemplated in section 113, if it involves at least one regulated company, subject to section 118 (3);...”

A merger will be an affected transaction if one of the profit companies, irrespective of whether it is the merging and amalgamating company or the merged and amalgamated company, is a regulated company as defined under section 117.

The definition ensures that all fundamental transactions as contemplated which involve a regulated company and a transfer of voting securities under Part A of Chapter 5 of the Companies Act are subject to sections 117 to 127 of the Companies Act read together with the Takeover Regulations.

According to Luiz,²⁵ the Companies Act adopted a different approach to affected transactions and that it is on the scheme itself and not the effect of the scheme as was the case under the Companies Act, 1973. There is no longer a requirement that there should be a change of control of the voting securities of a company before a transaction is considered to be an affected transaction, the trigger is whether there is an alteration of the fundamental nature of a regulated company.

This effectively means that any merger transaction which constitutes an affected transaction and an offer is made to another company, the person making the offer must comply with all the reporting and approval requirements as set out in sections 121 to 127 and the Takeover Regulations Panel must issue a compliance or exemption certificate (whichever applicable) before a merger or amalgamation can be implemented.

These requirements could have unintended consequences for merger transactions.

²⁵ Luiz, S. M. (2012). Some comments on the scheme of arrangement as an "affected transaction" as defined in the Companies Act 71 of 2008. *PELJ*, 102-131.

3. Regulated Company

A regulated company is defined in section 117 of the Companies Act as –

“...[A] company to which this Part, Part C and the Takeover Regulations apply, as determined in accordance with section 118 (1) and (2)”

Part B of Chapter 5 deals with the authority of the Take-over Regulation Panel in respect of fundamental transactions which are affected transactions. Therefore, if any of the parties to a merger or amalgamation transaction falls privy to the provisions of section 118(1) and (2), it is a regulated company.

Section 118(1) applies to an affected transaction only if the company is a public company, state-owned company or a private company. If it is a private company, section 118(1) will only apply if, within 24 months immediately before the transaction, the company transferred more than 10 percent²⁶ of its issued securities or the company’s memorandum of incorporation expressly provides for the application of Part B, C or the Take-over regulations in respect of the company and its securities.

Section 118(2) requires the Minister to prescribe a percentage as required under section 118(1) in respect of a private company after consultation with the Take-over Regulation Panel. The percentage to be prescribed must however not be less than 10 percent of the issued securities in the private company.

Therefore if the company entering into a merger or amalgamation is a private company which has within 24 months immediately prior to entering into an affected transaction transferred securities in excess of 10 percent to any other party, the company has to in addition to the requirements under section 113, 115 and 116 of the Companies Act, comply all the requirements with Part B, Part C and the Take-over regulations.

According to Stein and Everingham,²⁷ -

“The rationale seems to be that, where a private company’s securities are dealt with in frequently or significant blocks, the general public and its minority shareholders require protections that ss 117 to 127 and the Takeover Regulations give.”

²⁶ Section 118(2) of the Companies Act prescribes the minimum percentage as 10%.

²⁷ Stein, C. & Everingham, G. *The New Companies Act Unlocked*. (2011) Cape Town, South Africa: Siber Ink CC. at page 311

The test regarding whether or not the 10 percent has been exceeded as required under section 118, is dealt with under paragraph 91(2) of the Regulations to the Companies Act. The regulation stipulates that –

1. the 10 percent test must be applied at the time of each qualifying transfer;
2. the number of securities transferred must be compared to the number of securities in issue; and
3. all transfers must be aggregated immediately before the affected transaction is effected.

The transfer of securities within the 24 month period however excludes the transfer of securities to a related or inter-related person of that company.

Paragraph 91(2) contains three exclusions to the 10 percent test, namely –

1. transfers between or among related or inter-related persons;
2. securities of a holding company held by its subsidiaries; and
3. a buyback of securities by a company that are cancelled

Section 2 of the Companies Act identifies the following categories as parties that are related to one another:

1. Any individual who directly or indirectly controls a juristic person;
2. A juristic person who directly or indirectly controls another juristic person is also a related person in relation to the juristic person that it controls; and
3. A holding company and its subsidiary or two subsidiaries, both of which are controlled by the same holding company

Section 1 defines the term 'inter-related' to describe the relationship between three or more persons in a linked series of relationships.

It is important to note that there is a requirement of control contained in each category of related persons identified in the Companies Act. The meaning of control is therefore extremely important in establishing whether the parties to an affected transaction are related or inter-related parties in relation to each other. Control under the Companies Act refers to the voting rights attached to the shares held in a juristic person and if any persons holds more than 50 percent of the voting rights in a juristic person, then that person controls the juristic person concerned.

4. Securities

Securities is defined in section 1 of the Companies Act as –

“... [A]ny shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company.”

Section 117 however limits the definition of securities to only those securities which have voting rights attached to it or is converted to an instrument that has voting rights attached to it. The definition contained in section 117 of the Companies Act is limited to the application of Part B, Part C and the Takeover Regulations.

Mergers and amalgamations are contained in Part A of Chapter 5, although subject to the requirements as contained under Parts B, C and the Takeover Regulations if it constitutes an affected transaction where the merger or amalgamation is entered into with a regulated company as defined under section 117 of the Companies Act.

3. REQUIREMENTS FOR MERGER

Section 113 sets out the requirements which must be complied with in order for any profit company to enter into a merger transaction. It must be borne in mind that the merger process is a consensual one and is subject to various restrictions.²⁸

The following requirements must be met in order to enter into a merger:

1. Written agreement²⁹

There must be a written agreement setting out the terms of the merger. The agreement must contain the following information:

- 1.1 The proposed memorandum of incorporation of any new company to be formed;
- 1.2 The name and identity number of each proposed director of the proposed merged company;
- 1.3 The manner in which the securities are to be converted into securities of any proposed merged company or exchanged for other property;
- 1.4 If any securities are not to be converted into securities of the proposed merged company, the consideration that the holders of those securities will

²⁸ Delpont, P. A. et al *Henochsberg on the Companies Act 71 of 2008*. (2012). LexisNexis. Accessed online www.lexisnexis.co.za

²⁹ Section 113(2) of the Companies Act

receive instead of or in addition to any securities in the proposed merged company;

- 1.5 The manner of payment of any consideration which does not take the form of securities in the merged company or any other juristic person which is to be received in the merger transaction;
- 1.6 Details in respect of the proposed allocation of the assets and liabilities of the merging companies among the companies that will be formed or continue to exist when the merger agreement has been implemented;
- 1.7 Any details necessary to complete the merger and to provide for the subsequent management and operation of the proposed merged companies;
- 1.8 The estimated cost involved with the merger transaction; and
- 1.9 Where any securities of one merging company are held by another merging company, the merger agreement must provide for such securities to be cancelled when the merger becomes effective without the repayment of capital.³⁰

Section 113(2) of the Companies Act specifies that a written agreement must be entered into and that the terms and means of effecting the merger transaction must be contained in the agreement. The content of the agreement merely regulates disclosure of all the material details associated with the merger transaction, it does not place a limitation on the freedom of the parties to negotiate and agree on substantive terms and conditions of the proposed merger agreement. Parties to the merger may in addition to the details as required under the Companies Act, set out terms and conditions in respect of the allocation of assets, the manner of the payments to effected, the management and operation of the surviving or newly formed companies, etc. The terms contained under section 113(2) only sets out the minimum that is required under the agreement, it is not exhaustive and does not limit the parties in respect of what the agreement can or cannot include.

It seems that the information required under section 113(2) is mandatory and must contain be contained in the agreement that will give effect to the implementation of the merger transaction. The first three terms must be complied with and must be contained in the agreement; the fourth and fifth term can only be complied with if there is no conversion of securities or exchange for property or in the event that there is consideration in lieu of or in addition to the conversion of shares or exchange for

³⁰ Section 113(3) of the Companies Act

property. The sixth term is disjunctive with the first term since the first requires the formation of a new company and the sixth term deals with the allocation of assets to the companies which survive the merger transaction.

It is interesting to note that the Companies Act does not make provision for the rectification or amendment of the memorandum of the surviving company in the merger. With regards to the consideration payable to the shareholders of the merging and amalgamating companies, the Companies Act caters for different forms of consideration without limiting it to the exchange or conversion of shares.

The term consideration is defined in the Companies Act and includes money. Therefore payment in the form of cash in exchange for all the assets and liabilities of the merging and amalgamating parties to the transaction is recognised as a permissible form of consideration since it is not specifically excluded under any provisions of the Companies Act regulating mergers and amalgamations. The cash payment as consideration is, according to Davids, Norwitz and Yuill,³¹ not without controversy since it may be used as a mechanism to expropriate shares of the minority shareholders or assist in affecting a freeze-out of minority shareholders.

The consideration to be paid to the merging and amalgamating companies can also be in the form of securities. As indicated above securities for purposes of chapter 5, is limited to voting securities, it is not limited to shares. This means that the securities can be converted into debentures with voting rights. The conversion of securities is also not limited to securities in the merged and amalgamated company, it can be converted into securities of any other company, for example Company A and Company B enter into a merger transaction whereby Company A will be dissolved and all the assets and liabilities will be transferred to Company B (the surviving or merged and amalgamated company). Company B is the holding company of Company C. As consideration for all the assets and liabilities of Company A, the holders of securities in Company A receive as consideration, securities in Company C.

This would also allow for the implementation of a triangular merger or a reverse triangular merger. In a triangular merger a holding company creates a subsidiary in order to facilitate a merger between the subsidiary and the target company where the

³¹ Davids, E., Norwitz, T., & Yuill, D. (2010). A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008. *Acta Juridica*, 337-371.

existence of the target company is terminated upon implementation of the merger agreement. In a reverse triangular merger the target company survives the merger whilst the subsidiary's existence is terminated.

The requirement for the cancellation of securities without repayment is provided for in order to prevent an indirect reduction in the capital of the merged company where the effect of a conversion of the securities would result in the merged company holding shares in itself which is prohibited under the Companies Act.³²

2. Solvency and liquidity test

The test for solvency and liquidity is a two pronged test. The first test that the board of directors must consider is whether each proposed merged entity will satisfy the solvency and liquidity test upon implementation of the merger agreement. It does not require the board to consider the position of the proposed merged entity before the implementation of the merger agreement. It does not matter if one of the merging companies is factually or commercially insolvent prior to the merger transaction, the position of all surviving and new companies after the merger transaction will be the deciding factor on the validity of the merger transaction. The test for solvency and liquidity is a factual test.

Secondly, if the board reasonably believes that each proposed merged entity will satisfy the solvency and liquidity test it may submit the agreement for consideration to the shareholders at a meeting called for this purpose in accordance with section 115 of the Companies Act.

The test for solvency and liquidity is contained in section 4 of the Companies Act and requires the board to consider the foreseeable financial circumstances of the proposed merged company at the time by taking into account the assets at fair value and assessing whether it exceeds or is equal to the liabilities at fair value and make a determination on whether the merged entity will be able to satisfy all debts that become due in the ordinary course of business for a period of 12 months after the test is considered. When conducting a fair value assessment of the assets and liabilities, the board must take into account any contingent asset or liabilities into

³² Section 46 of the Companies Act requires any shares reacquired by a company to be cancelled.

account as well. According to Henochsberg,³³ the reasonable belief by the board adds a subjective element to an objective requirement of “reasonably”.

3. Notice to shareholders and approval process

The Companies Act requires the directors of each merging company to give notice to all shareholders.³⁴ The notice is required in order to inform the shareholders of the reasonable belief of the board that each merged company will satisfy the solvency and liquidity test and to submit the agreement containing the proposed merger transaction to the shareholders.

Regulation 89(1) of the Companies Regulations, 2011³⁵ requires the notice to be published to the shareholders of the company concerned and delivered in accordance with regulation 7 and such notice must be on in Form COR 89 as prescribed by the Companies and Intellectual Properties Commission.³⁶ Section 220 of the Companies Act deems notice to have been served when the document has been either delivered to that person or sent by registered mail to that person’s last known address.

In a recent judgment³⁷ the Constitutional Court had to decide on whether the delivery of notice by registered post was sufficient notice to the affected party concerned.

The court referred to the *Sebola* judgment³⁸ wherein the following statement was made -

“[I]t may reasonably be assumed... that notification of [the] arrival [of the section 129 notice at the Post Office] reached the consumer and that a reasonable consumer would have ensured retrieval of the item.”

The Constitutional Court dismissed the appeal on the basis that there was no general requirement that the notice be brought to the consumer’s subjective attention by the credit provider, or that personal service on the consumer was necessary for valid

³³ Delpont, P. A. et al *Henochsberg on the Companies Act 71 of 2008*. (2012). LexisNexis. Accessed online www.lexisnexis.co.za

³⁴ Section 113(5) of the Companies Act.

³⁵ Hereinafter referred to as the Companies Regulations.

³⁶ Hereinafter referred to as the Commission.

³⁷ *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1.

³⁸ *Sebola v Standard Bank* [2012] ZACC 11.

delivery under the Act, and that delivery by registered post is not valid delivery unless the notice is brought to the attention of the reasonable consumer.

Therefore, if one applies the principles established by the courts in the *Kubyana* judgment³⁹, a notice to be affected under section 113 and 115 of the Companies Act may be affected through via post if the following requirements have been met:

1. The shareholders must have elected to receive notices by way of the postal service,
2. The board's obligation to deliver generally consists of dispatching the notice by registered mail,
3. The board must ensure that the notice reaches the correct branch of the Post Office for collection, and
4. The board must ensure that the Post Office notifies the shareholder concerned (at her designated address) that a registered item is awaiting collection.

Once the merger agreement is concluded, the boards of directors of each of the merging companies are required to submit the transaction for approval at a meeting of shareholders of the respective merging companies in accordance with section 115 of the Companies Act. The meeting of shareholders can take place by way of a formal meeting or in terms of section 60 of the Companies Act which has the same effect as that of a formally constituted meeting.

Unless the merging companies are engaged in business rescue proceedings, and the transaction is in pursuance to or in accordance with a business rescue plan that has been adopted, a notice of the shareholders meeting must be delivered to each shareholder of the merging companies and such notice must include or be accompanied by a copy or summary of the merger agreement and provisions of sections 115 and 164 of the Companies Act.

Section 115 of the Companies Act contains the approval process which must be followed in respect of all fundamental transactions. If any of the requirements under this section have not been met, the merger agreement cannot be implemented.

The required shareholder approval applies despite any requirement contained in section 65 of the Companies Act which deals with the process for shareholder

³⁹ *Kubyana v Standard Bank* [2014] ZACC 1.

resolutions. Section 65 of the Companies Act states that all resolutions taken by shareholders can either be ordinary resolutions or special resolutions. It sets out the requirements to be met in respect of both resolutions. For an ordinary resolution, a 50 percent majority is required whereas a 75 percent majority vote is required in the case of a special resolution. The section also makes provision for the adjustment of the voting rights required in order to pass ordinary and special resolutions. The adjustment to the voting rights must be contained in the company's memorandum of incorporation. This adjustment is subject to the requirement that there must at all times be a margin of at least 10 percentage points between the highest established requirement for the approval of an ordinary resolution and the lowest established requirement for the approval of a special resolution.

Section 115 of the Companies Act requires the proposed transaction to be approved by a special resolution which is adopted by sufficient persons entitled to vote and at least 25 percent of the voting rights must be exercised on that matter or a higher percentage as required by the company's memorandum of incorporation. In the case of a merger transaction the special resolution must be adopted by the shareholders of each of the merging companies.

The voting rights of the acquiring party or any person acting in concert with an acquiring party to the merger transaction will not be taken into account in determining whether requirements in respect of the quorum or approval has been complied with in order to implement the merger transaction. In other words any person acting in concert with the acquiring party will not form part of the 25 percent necessary to constitute a quorum and their votes will not be taken into account to determine whether 75 percent approval to enter into the merger transaction has been met. This position to exclude the voting rights in respect persons acting in concert with the acquiring party and the acquiring party has been adopted in order to avoid or limit the possibility of a resolution being materially tainted by a conflict of interest.⁴⁰

An 'acquiring party' is defined in section 1 of the Companies Act as –

“...[m]eans a person who, as a result of the transaction, would directly or indirectly acquire or establish direct or indirect control or increased control over all or the greater part of a company, or all or the greater part of the assets or undertaking of a company.”

⁴⁰ Luiz, S. M. (2012). Some comments on the scheme of arrangement as an "affected transaction" as defined in the Companies Act 71 of 2008. *PELJ*, 102-131.

The exclusion of an acquiring party's rights in determining a quorum or voting in respect of the resolution to be adopted under section 115 may be problematic in the event that the merger transaction involves two subsidiaries that are wholly owned by the same holding company since there would be no other shareholders that can vote in favour of or against the proposed resolution and the meeting would never be quorate. This would have the effect that the merger transaction could never be entered into under these circumstances.

According to Latsky,⁴¹ the solution lies in the maxim '*lex non cogit ad impossibilia aut inutilia*' which means that the law does not operate for an impossible purpose. He believes that the application of this maxim would have the effect of excluding prohibitions like those contained under section 115 to exclude the rights of the holding company from determining the quorum or voting in favour of or against the proposed merger transaction.

The term acting in concert is defined under section 117 (1)(b) of the Companies Act as any action pursuant to an agreement between two or more persons in terms of which any of them co-operate for the purpose of entering into an affected transaction.

This definition was the subject matter in the *MGX Holdings* judgment⁴² wherein the court held that an agreement could be any agreement between the parties and that it did not have to stipulate or make reference to the affected transaction. In other words, the affected transaction does not have to be the object of the agreement that is entered into to affect the affected transaction; any agreement between the parties will suffice. This judgment has received a lot of criticism on the basis that the court has cast the net too wide and that a stricter interpretation is necessary to apply a more narrower or strict interpretation of the provision. In two subsequent cases,⁴³ the courts took a different approach and indicated that the agreement must include the affected transaction as an object of the agreement in order to make the determination that the parties are acting in concert with each other.

If the resolution is opposed by at least 15 percent of all the voting rights exercised on the resolution, and any of the persons who voted against the resolution has within 5

⁴¹ Latsky, J. (2014). The fundamental transactions under the Companies Act: A report back from practice after a few years. *Stellenbosch Law Review*. (vol.25). 361-384

⁴² *SRP v MGX Holdings Ltd* 16026/2003 (WLD).

⁴³ *Bock and others v Duboro Investments (Pty) Ltd* 2004 (2) SA 242; *Goldfields Limited v Harmony Gold Mining Company Ltd and others* [2006] JOL 17303 (CT).

days after the vote requires the company to seek court approval, the merging company may not implement the merger transaction without the approval of the court.

The court will grant any person leave only if it is satisfied that the applicant is acting in good faith; the applicant appears prepared and able to sustain the proceedings and the applicant has alleged facts which if proved would support an order which sets aside the resolution on the grounds that the resolution is manifestly unfair to any class of holders of the companies securities or the vote to pass the resolution was materially tainted by a conflict of interest, inadequate disclosure, failure to comply with the Companies Act or the memorandum of incorporation or any other material or procedural irregularity.

In the event that the resolution requires approval by a court the company must within 10 business days after the vote apply to court at its own cost for such approval or treat the resolution as a nullity. The merging company will be liable for the costs of the application to court to seek approval of the resolution should it be required by any person objecting to the resolution provided that the resolution is opposed by at least 15 percent of the voting rights exercised at the meeting. An abstention from the voting process is not an opposing vote neither is it an approval, it will just not be counted in the determination of the votes required to pass the resolution. In other words, the 75 percent required to vote to pass the resolution will be calculated on the number of persons voting at the meeting.

4. Independent Expert

Where the merger transaction constitutes an affected transaction as defined in section 117 of the Companies Act, the offeree regulated company must request a ruling from the Takeover Regulation Panel on whether an independent expert must be retained in order to provide a report on the proposed transaction.

The independent expert, if required, must follow the rules as contained in section 114 of the Companies Act verbatim in order to maintain its independence. The independent expert will be required to evaluate the proposed merger and provide a report to the board of directors who must cause it to be distributed together with the proposed merger agreement to all shareholders in accordance with section 115 of the Companies Act.

5. Dissolution of the merging party

After the transfer of assets and liabilities from the merging company to the merged company, the merging company must be dissolved. The dissolution of a company can be achieved in two ways, one is after a company has been wound up and the other is by way of dissolution by a court without the company having to wind-up. The provisions in respect of a merger allows for the transfer of the assets and liabilities *ex lege* (by operation of law), but it uncertain whether the dissolution of the merging company would also take place *ex lege* or whether the dissolution requires sanction by a court.

4. APPLICATION OF TAKE-OVER REGULATIONS

Any merger transaction which constitutes an affected transaction and an offer is made to another company, the person making the offer must comply with all the reporting and approval requirements as set out in sections 121 to 127 and the Takeover Regulations Panel must issue a compliance or exemption certificate (whichever applicable) before a merger or amalgamation can be implemented.

5. IMPLEMENTATION OF MERGERS AND AMALGAMATIONS

Section 116 of the Companies Act regulates the implementation of a merger after the resolutions necessary to implement the merger transaction has been approved in accordance with section 115 of the Companies Act. It requires each part to the merger transaction to give notice in the prescribed manner and form⁴⁴ to every known creditor of that company. Any creditor who will be materially prejudiced by the merger may, within 15 business days after delivery of the notice, seek leave to apply to court to review the merger transaction and the court may grant the leave if it is satisfied that the creditor is acting in good faith, there would be material prejudice to that creditor and there are no other remedies available to the creditor. The 15 business days are calculated from the date of delivery of the notice and not from the date of receipt of the notice. This aspect of notice to creditors is unique to mergers since it is the only fundamental transaction under Chapter 5 of the Companies Act which provides the creditor with an opportunity to intervene in a fundamental transaction.

⁴⁴ Section 220 of the Companies Act prescribes the methods of service in respect of notices to be delivered under the Companies Act. See also regulation 89 of the Companies Regulations, 2011.

Dauids, Norwitz and Yuill⁴⁵ are of the view that the additional creditor notification will add an element of risk in the sense that it may potentially delay the process which will undermine the utility of the procedure and the ease of execution as intended by the legislature. They state the following –

“It is unclear why this extra hurdle should be necessary as the board of directors would already have made the solvency and liquidity assessment, and in any event most significant creditors are in a position to protect themselves by contract. Other creditors, such as employees and the taxman, are likely to have their interests protected under the applicable labour and tax legislation. Although many smaller trade creditors may not necessarily have contractual protections in place, their potential exposure will in most cases be small, and the solvency and liquidity requirements should provide them with sufficient protection.”

The notice does not apply to a company engaged in business rescue proceedings and the merger transaction is pursuant to the business rescue plan.

Once all the requirements for a merger have been met, a notice of amalgamation and merger which includes confirmation that all the requirements of section 113 and 115 have been met, that the merger has been approved by the Competition Commission (where applicable), that the Minister of Finance has consented to the transaction in terms of section 54 of the Banks Act (where applicable), confirmation that it is not subject to the approval of any other regulatory authority or that it has fulfilled all requirements required by any other regulatory authority and a copy of the memorandum of incorporation of the company newly formed must be filed with the Commission.

The Commission must after receiving the notice, issue a registration certificate in respect of each newly formed company and deregister any companies that did not survive the merger transaction.

⁴⁵ Dauids, Norwitz and Yuill raise similar concerns in their article titled “*A microscopic analysis of the new merger and amalgamation provision under the Companies Act 71 of 2008*” Acta Juridica, 337-371 at page 365.

6. NATURE AND EFFECT OF A MERGER TRANSACTION

Any existing liability of a party to a merger transaction is not affected by a merger.⁴⁶ This would also apply in the case of any civil, criminal, administrative proceeding pending by or against a merging company or a conviction, ruling or judgment, or the enforcement thereof by or against a merging company.

Upon implementation of the merger agreement all the assets and the liabilities of the merging entities are transferred to the merged entity by operation of law. This means that all formalities that are usually associated with the transfer of property (fixed, moveable, tangible or intangible) will be transferred without having to comply with all the formal requirements related thereto.

The legislature makes it possible for the automatic transfer of assets and liabilities without adhering to all the formal requirements relating to a specific asset or liability, for example, registration of immovable property may be affected in the Deeds Office without compliance with all the formalities normally associated with the transfer of property, the agreement with a copy of the filed notice will be sufficient evidence to affect the necessary transfers.

This transfer of rights and obligations by operation of law is according to Latsky,⁴⁷ one of the great advantages of a statutory merger and it is what gives this fundamental transaction a distinct advantage over the schemes of arrangements and disposal of all or a greater part of a business or undertaking. It also removes the common law difficulties associated with the transfer of a personal right or claim against a third party.

The disadvantage associated with the transfer of the liabilities under a merger transaction is that the merged company will automatically be liable for all existing as well as contingent liabilities that may arise and which the acquiring party is unaware of at the time of entering into the merger transaction.

⁴⁶ Section 116(6) of the Companies Act.

⁴⁷ Latsky, J. (2014). The fundamental transactions under the Companies Act: A report back from practice after a few years. *Stellenbosch Law Review*. (vol.25). 361-384

The disadvantages associated with the transfer of liabilities of the merging company to the acquiring company is highlighted by Cassim,⁴⁸ as follows-

“[A] attendant disadvantage of the merger procedure is that the acquiring company is, conversely, also automatically liable for all the obligations and liabilities of the disappearing company, including unliquidated and contingent liabilities, and even, it seems, for liabilities which the acquiring company was unaware... Generally, most contracts which are silent on assignability would vest in the surviving company in a merger, even without the consent of the third party. The basis of this view is that in a merger the vesting of the rights and liabilities of the disappearing company in the surviving company occurs automatically by the operation of law, and not by a process of assignment or novation.¹⁸ Even where a contract is expressly non-assignable according to its terms, it would nevertheless generally vest in the surviving company in a merger on the basis that a non-assignability clause is not intended to apply to a transfer by the operation of the law... Courts have laid down²¹ that purely personal contracts cannot be transferred because their very nature dictates that they be performed by a particular person only.”

The merged entity will be liable for all the obligations of each merging company unless expressly excluded under the merger agreement. Section 116 of the Companies Act also makes reference to ‘any other relevant agreement’,⁴⁹ this seems to coincide with the principle that the terms to be included in the merger agreement are merely the minimum required in the agreement and that the agreement can be made subject to the terms of any other agreement to which the merging parties may have entered into with third parties. This could also have the effect that parties are able to limit the scope of transfer of assets and liabilities to the merged entity. The question then arises is whether this defeats the underlying basis of a merger transaction?

Nicol,⁵⁰ addresses the legal effect of a statutory merger on the transfer of third-party contracts. In his article, he considers the position where a third party contract contains an anti-transfer clause and the effect of transferability of these contracts to the merged entity as stipulated in section 116(7) of the Companies Act. Whilst section 116(7) of the Companies Act makes provision for the automatic transfer of property and obligations to the merged entity by operation of law, the transfer is

⁴⁸ Cassim, F. H., Yeats, J. et al. *The Law of Business Structures* (2013). Claremont, South Africa: Juta & Co Ltd.

⁴⁹ Section 116(7)(b) of the Companies Act.

⁵⁰ Nicol B. L., (2013). The legal effect of amalgamations and mergers upon third-party contracts containing anti-transfer provisions. *SA Mercantile Law Journal*, 30-58.

subject to the provisions of the merger agreement or any other relevant agreement. This means that the transfer property and obligations upon implementation of a merger transaction may be subject to the anti-transfer clause which may affect the automatic transfer of property or obligations of the merging entity to the merged entity.

Latsky,⁵¹ also considers the effect of a non-assignment clause and its effect on a statutory merger but he also extends this consideration to pre-emptive clauses contained in any third party agreements entered into by the merging entities. According to him the question is whether a merger transaction implemented in terms of section 113 and 116 of the Companies Act would have the effect that it overrides any non-assignment or pre-emptive clause contained in any other agreement or whether this would hamper the operation of the merger transaction since the provisions of section 116 of the Companies Act is subject to the terms contained in any other relevant agreement. According to him, whilst sections 113 and 116 of the Companies Act is not clear on the question on non-assignment clauses there is a strong argument to be made that an amalgamation transaction would not breach any pre-emptive or non-assignment clause depending on the wording of the clause. Support for this argument is found in the Tecmed⁵² judgment wherein the court drew a distinction between a cession and assignment on one hand and a substitution of parties by operation of law on the other hand.

The Tecmed case dealt with the substitution of the plaintiff in an application pending in the High Court as a result of a merger transaction entered into by the plaintiff and another company on the premise that all assets, liabilities, rights and obligations were automatically and statutorily transferred to the new entity under Japanese Law. The defendant sought an order from the court to set aside the rule 15 notice brought by the plaintiff for the substitution since it did not allow for the substitution which was brought about as a result of the transfer or rights as a result of a merger transaction, it only necessitated a substitution if there was a change in status of the litigating party. The court held that the transfer of rights was not done in terms of a cession but by operation of Japanese Law which is no different from the position created under the Banks Act. The court confirmed the position taken in the Absa⁵³ case that the transfer of all rights and obligations under a merger and amalgamation transaction

⁵¹ Latsky, J. (2014). The fundamental transactions under the Companies Act: A report back from practice after a few years. *Stellenbosch Law Review*. (vol.25). 361-384.

⁵² *Tecmed (Pty) Limited v Nissho Iwai Corporation* 2011 (1) SA 35 (SCA).

⁵³ *Absa Bank Limited v Van Biljon and Another* 2000 (1) SA 1163 (W).

has the effect that the merged entity steps into the shoes of the merging entity by operation of law and dismissed the respondents application to set aside the request for substitution of the plaintiff under the rule 15 notice.

The merger process is not explicit on personal contracts entered into between merging companies and third parties where the very nature of a personal contract requires performance by a specific person. Similarly, issues pertaining to the transfer of intellectual property rights and licences may arise. This is typical where a merger transaction involves legislative prohibitions on the automatic transfer of licences conferred upon a merging entity which affects the automatic transferability of such rights under a merger transaction. An example of this would be a mineral license (which confers the mining company with the right to mine) obtained by a merging entity in accordance with the provisions of the Mineral Petroleum Resources Development Act.⁵⁴ Upon implementation of the merger transaction of mining companies, the mining license is not automatically transferred to the merged entity, an application will have to be made to the Department of Minerals and Energy by the merged entity for such mining right in order to enable it to continue mining operations on the property transferred to it under the merger transaction.

7. CONCLUSION

From the above it is evident that the concept of a merger was intended to provide an easy solution to restructure a business. Any company intending to transfer its assets and liabilities to another company may now do so without a court sanction as previously required. In addition to this the transfer of assets (fixed or movable) can be done without incurring exorbitant court fees to sanction the transfer and registration fees to affect the transfer in accordance with the court order.

From a company perspective, it is an easy and cost effective way of entering into a restructure, provided that all the requirements as contained in section 113 read with section 116 have been met by the parties intending to enter into the merger transaction.

It provides sufficient protection for minority shareholders by allowing shareholders to force a company to obtain court approval for the proposed merger and making other

⁵⁴ Mineral Petroleum Resources Development Act No. 28 of 2002

remedies available to the minority shareholder where the required court sanction is not in favour of such shareholder.

Creditors are afforded protection and ample opportunity to enforce their rights and to oppose the merger transaction.

The merger process is however not without any flaws or uncertainties. Whilst it proposes to be a relatively straight forward and easy way to restructure or combine business entities, the legislation is not so clear in certain respects.

For example, an essential element component in a merger transaction is that the merging entity transfers all its assets and liabilities to the merged entity but the merger agreement can override this principle by limiting the extent to which the liabilities are transferred to the merged entity.⁵⁵ This issue raises concerns for creditors who have rights against the merging entity, it is uncertain how the rights of the creditor will be enforced in situations like these, can the directors of the merging entity be held liable if the transaction is not required to be sanctioned by a court or the creditor is notified after the merging entity ceases to exist.

In addition, section 116(7) states that the merged company will step into the shoes of the merging company in respect of any property held by or obligations of the merging entity. The transferability is subject to the conditions contained in the merger agreement or any other relevant agreement. A potential problem may arise where an agreement entered into with a merging entity and any third party contains an anti-transfer clause or where there are specific restrictions in other legislation which will affect the automatic transfer of rights in the merging entity to the merged entity.

Consideration is not limited to shares in the merged company there are many other options available to the parties to combine business structures. One such method is the payment of cash as consideration for the transfer of the assets and liabilities of the merging company to the merged company. This could have the effect that this method is preferred by the merging parties to squeeze out or eliminate the minority shareholders by compelling them to exchange their shares for cash. This could most definitely be used by a majority shareholder to eliminate the minority shareholder

⁵⁵ Davids, Norwitz and Yuill raise similar concerns in their article titled “*A microscopic analysis of the new merger and amalgamation provision under the Companies Act 71 of 2008*” Acta Juridica, 337-371.

without complying with all the formalities under the Companies Act. This does not mean that the minority shareholder loses the protection afforded under the Companies Act since the process required to implement the merger will require approval of the process at a meeting of shareholders for this purpose.

Another issue to consider is whether a foreign company can be a party to a merger transaction. The Companies Act caters for a merger transaction between two or more profit companies. A company is defined in section 1 of the Companies Act as any juristic person incorporated in terms of the Companies Act or the Companies Act, 1973. This would include an external company which is a foreign company registered under the Companies Act but does not include a foreign company as defined in section 1 of the Companies Act which is incorporated under the laws of another country and not registered as an external company under the Companies Act. It seems that only South African companies will be privy to the merger provisions as contained under the Act and as soon as a foreign company is involved, practitioners would have to consider other alternatives to restructuring business entities.

CHAPTER FOUR: INCOME TAX ACT⁵⁶

1. INTRODUCTION AND BACKGROUND

Ordinarily any disposal of assets by a company would trigger tax consequences for the company disposing of such assets. In order to provide for tax relief for companies within a group entering into restructuring transactions with each other where the shareholding of the entities remained within the group of companies special provisions regulating mergers and amalgamations were introduced under section 44⁵⁷ of the Income Tax Act. This relief defers any income tax or capital gains tax that would have been payable on transfer of any asset between parties in a group until it is disposed of to a third party or a de-grouping occurs.

Since its introduction, the amalgamation provisions have undergone substantial changes. Initially, group relief was allowable only to the extent that an amalgamation transaction occurred between two resident companies, it did not cater for an amalgamation involving an offshore company even if the company was part of the same group of companies as the resident company. Over the past few years cognisance was given to a foreign company which formed part of the same group of companies as the resident company and the legislation was amended to cater for cross-border amalgamation transactions. The latest amendments were affected by the Taxation Laws Amendment Act No. 31 of 2013.⁵⁸

This chapter will analyse the requirements contained under the Income Tax Act in order for a company to qualify for the necessary tax relief when entering into a merger transaction.

⁵⁶ Income Tax Act No. 58 of 1962.

⁵⁷ Section 44 was introduced under the Revenue Laws Amendment Act No. 74 of 2002.

⁵⁸ Hereinafter referred to as the Taxation Laws Amendment Act, 2013.

2. DEFINITION OF AMALGAMATION

The definition is divided into three categories of amalgamations each with its own requirements.

1. Local amalgamations

The first category refers to a transaction wherein a resident amalgamated company transfers all its assets to a resultant company which is a resident by means of an amalgamation, merger or conversion and as a result, the existence of the amalgamated company is terminated.

2. Amalgamations between a local company and a foreign company

The second category makes provision for a transaction wherein a foreign amalgamated company transfers all its assets to a resultant company which is a resident by means of an amalgamation, merger or conversion only to the extent that immediately before the transaction the shares in the foreign company are held as capital assets and as a result of which, the existence of the amalgamated company is terminated.

3. Amalgamations entered into between two foreign companies

The third category makes provision for a transaction wherein a foreign amalgamated company transfers all its assets to a foreign resultant company by means of an amalgamation, merger or conversion only if immediately before the transaction –

- both companies form part of the same group of companies;
- the resultant company is a controlled foreign company in relation to any resident company which is part of the same group of companies as the amalgamated and resultant companies;
- any shares held in the amalgamated company are held as capital assets;
- immediately after the transaction a resident company (alone or together with any other person that is a resident and forms part of the same group of companies of the resident) directly or indirectly holds more than 50 percent of the shares in the resultant company;
- and the existence of the amalgamated company will be terminated.

The definition of amalgamation in all three categories, refer to an amalgamation in the form of a merger, conversion or amalgamation. This means that any amalgamation that is entered into and takes the form of a merger or conversion will still qualify as an amalgamation transaction under section 44 of the Income Tax Act provided that it meets all the requirements of that section.

It is also worth noting that an amalgamation which involves a foreign company which holds shares as assets that such shares must be held as capital assets upon transfer by the amalgamated company.

3. REQUIREMENTS OF AN AMALGAMATION TRANSACTION

Section 44 sets out certain requirements that must be complied in respect of each category of amalgamation with before a transaction will qualify as an amalgamation transaction.

1. Disposal of assets

The term asset⁵⁹ refers to any property whether moveable, immovable, corporeal or incorporeal including gold or platinum coins, and any right or interest in such property. The definition specifically excludes currency as an asset. Property is not defined under the eighth schedule or the Income Tax Act. The ordinary grammatical meaning must therefore be afforded to the term.

The definition is limited to the disposal of assets between two companies which excludes any assets required to settle any debts as they become due in the ordinary course of business of an amalgamated company. The section makes provision for the disposal of three types of assets namely, capital assets; trading stock and allowance assets.

Capital assets are deemed to be disposed of at the cost at which the amalgamated company acquired such asset. It deems the amalgamated and resultant company to be one and the same person for purposes of determining the value of the asset and in the determination of any capital gain or loss arising from the disposal of such assets.

⁵⁹ Section 41 of the Income Tax Act which is the general provision relating to all corporate rules as contained under Part III of Chapter II of the Income Tax Act refers to the definition of an asset under paragraph 1 of the Eighth Schedule definition of an asset.

Similarly, any asset held as trading stock in the hands of the amalgamated company will be acquired as trading stock by the resultant company. For purposes of determining any tax effect on disposal the amalgamated and resultant company are deemed to be one and the same person and any deduction or allowance in the amalgamated company will not be recouped in the hands of the resultant company on the date that the assets are transferred to the resultant company.

2. Consideration in exchange for assets

The resultant company must upon transfer of the assets to it, pay consideration to the amalgamated company for the transfer of the assets. The consideration must be in the form of equity shares or the assumption of debt by the resultant company.

An equity share is defined in section 1 of the Income Tax Act as any share in a company but excludes a share that carries a right to participate beyond a specified amount in a distribution. Section 41(1) of the Income Tax Act expands the definition of an equity share to include a participatory interest in a portfolio of a collective investment scheme in securities for purposes of an amalgamation under section 44 of the Income Tax Act.

In the event that the consideration is in the form of the assumption of debt, the debt must have been incurred more than 18 months prior to the disposal. In the event that the debt was incurred in a period less than 18 months prior to the disposal the debt must constitute a refinancing of debt that occurred in the ordinary course of business and disposed of to the resultant company as part of the amalgamation transaction. Any debt created less than 18 months prior to the amalgamation transaction and it was not incurred as a refinancing of debt which existed, in other words new debt, any assets acquired with that debt will not be subject to tax relief under section 44 of the Income Tax Act. The assets will be subject to tax on disposal to the resultant company.

Any debt incurred in order to facilitate the amalgamation transaction by providing funding to the resultant company to acquire the amalgamated company will also not be regarded as the consideration in exchange for the assets disposed of by the

amalgamated company. Debt cannot be created in the resultant company in order to pay for the assets transferred under an amalgamation transaction.⁶⁰

To the extent that the consideration for the assets constitute cash, the rollover relief will not be applied to such consideration paid or received and such amount received by the amalgamated company will constitute income or capital gains in the hands of the amalgamated company and taxed as such.⁶¹

3. Termination of amalgamated company

Under the definition of an amalgamation transaction, the amalgamated company's existence must be terminated. Section 44(13) of the Income Tax Act requires the amalgamated company to take steps to terminate its existence within 36 months after the transaction has been entered into or a longer period as determined by the Commissioner. Should the amalgamated company not take the necessary steps to liquidate, wind-up or deregister (whichever applicable) within the 36 months or extended period prescribed by the Commissioner, the tax relief falls away and the taxes may be recouped by the Commissioner from the resultant company.

The amalgamated company is deemed to have taken steps to liquidate, wind-up or deregister⁶² if –

1. In the case of liquidation or winding up it has lodged a resolution authorising a voluntary winding-up under:
 - section 80(2) of the Companies Act, or
 - regulation 21 of the Regulations under the Co-operatives Act, 2005;⁶³ or
 - a similar provision under any foreign law applicable to the liquidation of companies if the foreign law so requires; and
 - the company has disposed of all assets and settled all liabilities; and
 - the manager or trustee of a portfolio of the collective investment scheme in property has in terms of the Collective Investments Schemes Act, 2002⁶⁴ applied for the winding up of that portfolio;

⁶⁰ Section 44(b) of the Income Tax Act, See also Silke. (2013) *Silke on South African Income Tax*, Chapter 13.34 Accessed online: www.lexisnexis.co.za.

⁶¹ Section 44(6)(d) of the Income Tax Act.

⁶² Section 41(4) of the Income Tax Act.

⁶³ Regulation R.366 of 30 April 2007 of the Co-operatives Act No.14 of 2005.

⁶⁴ Section 102(1) or (2) of the Collective Investments Schemes Act No. 45 of 2002.

2. In the case of a deregistration of a company, that company has lodged a request for such deregistration with the Companies and Intellectual Property Commission under section 82 of the Companies Act or to a person who exercises similar powers outside the Republic under a similar provision contained in foreign law;
3. A copy of the resolution or request has been lodged with the Commissioner; and
4. All returns or information required to be submitted under any Act administered by the Commissioner for the period within which steps to liquidate, wind-up or deregister must have been taken have been submitted or arrangements to submit have been made with the Commissioner.

4. Shares in amalgamated company

In the event that an amalgamation transaction is entered into between a resident company and a foreign company or between two foreign companies, it is required (in addition to the requirements above) that the surrendered shares in the foreign company are held as capital assets immediately prior to the amalgamation in order to qualify for the tax relief under section 44 of the Income Tax Act.⁶⁵

5. Group of companies

Where an amalgamation transaction is entered into between two foreign companies, the following additional requirements must be met in order to qualify for tax relief under section 44 of the Income Tax Act:

- Immediately before the amalgamation transaction, the amalgamated and resultant companies must form part of the same group of companies and the resultant company must be a controlled foreign company in relation to the same group of companies⁶⁶; and
- Immediately after the amalgamation transaction, more than 50% of the equity shares in the resultant company must be held directly or indirectly by a

⁶⁵ Section 44(1)(b) and (c), See also Income Tax Reporter (volume 52) 6 October 2013, www.lexisnexis.co.za.

⁶⁶ The term 'group of companies' referred to in section 44(1)(c) is defined in section 1 of the Income Tax Act as "[T]wo or more companies in which one company (controlling group company) directly or indirectly holds shares in at least one other company (controlled group company) to the extent that –

- (a) at least 70 percent of the equity shares in each controlled group company are directly held by the controlling group company, one or more controlled group companies or any combination thereof; and
- (b) the controlling group company directly holds at least 70 percent of the equity shares in at least one controlled group company.

resident (alone or together with any other company forming part of the same group of companies)

4. ROLLOVER RELIEF

The following relief will be obtained under the Income Tax Act where the parties have entered into an amalgamation transaction which complies with the requirements as set out in section 44 of the Income Tax Act:

1. Any capital asset held by the amalgamated company will be held as a capital asset in the hands of the resultant company. Such asset will be transferred to the resultant company at the base cost as acquired by the amalgamated company and the resultant company is deemed to have stepped into the shoes of the amalgamated company.
2. Any asset held as trading stock by the amalgamated company and transferred under the amalgamation transaction, will be held as trading stock in the hands of the resultant company. The resultant company is deemed to have acquired the asset at the same cost as the amalgamated company and there will be no recoupment in the hands of the resultant company of any of the allowances or deductions claimed by the amalgamated company in respect of such asset.
3. The resultant company and the amalgamated company are deemed to be one and the same person in respect of any allowance asset which is transferred under an amalgamation transaction. There will be no recoupment of any allowances granted under section 24C in the hands of the resultant company under the amalgamation transaction.
4. Any disposal of the equity shares in the resultant company acquired by the amalgamated company as a result of the amalgamation transaction, to a shareholder of the amalgamated company will be disregarded in calculating the taxable income or assessed loss of the amalgamated company.
5. Any shares acquired by a company as a result of the disposal of the equity shares held by an amalgamated company in the resultant company pursuant to the amalgamation transaction will not be deemed to be a dividend accrued to that company for purposes of section 64B(3)⁶⁷ of the Income Tax Act

⁶⁷ Section 64B(3) of the Income Tax Act deems the disposal of the share to be a dividend for purposes of levying secondary tax on companies.

5. CONCLUSION

An amalgamation under the Income Tax Act recognises an amalgamation as a merger, conversion or amalgamation. It also allows for a cross-border amalgamation transactions subject to certain requirements.

It must be noted that the requirements of section 44 of the Income Tax Act will automatically apply in all cases where an amalgamation transaction is entered into and which complies with the definition of an amalgamation transaction, unless the parties to the amalgamation transaction elect otherwise.⁶⁸

The following are instances in which the parties to an amalgamation transaction may elect that the provisions of section 44 of the Income Tax Act will not apply:

1. the parties enter into a restructure and the transaction which constitutes a liquidation distribution under section 47 of the Income Tax Act;
2. the resultant company is a co-operative or an association formed for a specified purpose for the benefit of the public or section of the public;
3. the resultant company is a portfolio of a collective investment scheme in securities but the amalgamated company is not a portfolio of a collective scheme in securities;
4. the resultant company is a non-profit company as defined under the Companies Act;
5. if the resultant company is a company incorporated under the laws of another country or is a portfolio of a collective investment scheme in bonds or securities carried on outside the Republic and its place of effective management is outside the Republic;
6. any exempt income that would accrue to or be received by the resultant company under any transaction;
7. the resultant company is a public benefit organisation or recreational club approved by the Commissioner under section 30 or 30A of the Income Tax Act;
8. in terms of an amalgamated transaction between two resident companies where the resultant company and a holder of equity shares in an amalgamated company form part of the same group of companies immediately before and after the amalgamation transaction; or
9. an amalgamation between a foreign company and a resident resultant company where the holder of equity shares in an amalgamated company and the resultant

⁶⁸ Section 44(14) of the Income Tax Act.

company form part of the same group of companies immediately before and after that disposal irrespective of whether the amalgamated company is effectively managed within the Republic.

The Income Tax Act only makes provision for the consideration to be in the form of equity shares or the assumption of debt of the amalgamated company. An amalgamation transaction is limited to the transfer of assets it does not require the amalgamated company to transfer any liabilities to the resultant company.

The tax relief afforded under section 44 of the Income Tax Act will depend on the type of agreement entered into between the parties to the transaction. A transaction which complies with the requirements under section 44 of the Income Tax Act will be afforded tax relief in the form of a deferred tax liability otherwise known as rollover relief. The mechanics of section 44 of the Income Tax Act operates as relief in the hands of the company disposing of its assets and will only trigger a tax effect in the hands of the resultant company upon disposal by that company to a third party.

Section 44 of the Income Tax Act also has built-in anti-avoidance⁶⁹ measures, one in particular is where the asset acquired by the resultant company is disposed of within a period of 18 months of acquiring such asset, the disposal will trigger a tax event in the hands of that resultant company which be calculated as a separate tax liability than would normally arise for the year of assessment in question.

⁶⁹ Section 44(5) of the Income Tax Act.

CHAPTER FIVE: MERGER PROVISIONS COMPARED

1. INTRODUCTION

The objective of the Companies Act is to regulate the affairs of all corporate entities with particular focus on the development of the South African economy, balancing the rights and obligations of the shareholders and directors within a company and encouraging responsible and efficient management of companies.⁷⁰

The Income Tax Act on the other hand is enabling legislation which empowers the Commissioner for the South African Revenue Service to efficiently and effectively collect all taxes due to the State.

It is well established that statutes must be interpreted with due regard to their purpose and within their context.⁷¹ The question that arises is which piece of legislation will prevail when a company enters into a merger transaction and some of the requirements of the Companies Act are in direct conflict with the provisions contained under the Income Tax Act?

This chapter will focus on the application of the Companies Act versus the application of the Income Tax Act in order to assess which of the two pieces of legislation will prevail in the event that a direct conflict of interest arises.

2. RULES OF INTERPRETATION

According to Delpont,⁷² three possibilities exist if there are conflicts with other legislation:

1. If there is inconsistency between any provision of the Act and another piece of legislation, both Acts must apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the other;

⁷⁰ *CGT and the Companies Act – Some Issues to Consider*. (November 2012). Accessed online: www.saipa.co.za.

⁷¹ *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1

⁷² Delpont, P. A. *The New Companies Act Manual: including close corporations and partnerships* (2011). Durban: LexisNexis at page 4

2. Section 5 of the Companies Act states that if there is any consistency between the Companies Act and any other legislation, the Companies Act will apply, with the exception of the following Acts:
 - a. Auditing Professions Act;⁷³
 - b. Labour Relations Act;
 - c. Promotion of Administrative Justice Act;
 - d. Promotion of Access to Information Act;
 - e. Public Finance Management Act;
 - f. Securities Services Act;
 - g. Banks Act;
 - h. Local Government: Municipal Finance Management Act; and
 - i. Section 8 of the National Payment System Act

3. In any other case, the Companies Act will apply

The Income Tax Act is not amongst the listed exceptions therefore it seems logical that in the event that a conflict arises between any of the provisions regulating merger transactions under the Companies Act and that of the Income Tax Act and where the sections cannot be applied concurrently, the Companies Act will prevail.

3. SECTION 118(4) OF THE COMPANIES ACT

The interpretation of the Companies Act under section 5 is however subject to section 118(4) of the Companies Act.

Section 118(4) of the Companies Act stipulates specific rules that will apply should any conflict exist between the Companies Act and any other legislation which regulate fundamental transactions which are affected transactions under part B, C and the take-over regulations.

Therefore if a merger transaction constitutes an affected transaction as defined under section 117 of the Companies Act, it will be subject to the provisions relating to the Take-over Regulation Panel under parts B and C of Chapter 5 of the Companies Act. In the event that any conflict arises between any of the provisions contained under part B, part C or the Take-over Regulations and the Income Tax Act then the Income Tax Act will prevail.

⁷³ Auditing Professions Act 26 of 2005

The Income Tax Act would however only prevail to the extent that there is conflict with the Companies Act in respect of the regulatory requirements under section 117 to section 127. The Income Tax Act will not override sections 113 and 116 of the Companies Act relating to the requirements and implementation of a statutory merger transaction.

4. EFFECT OF THE COMPANIES ACT ON THE INCOME TAX ACT

In an article titled *Company mergers and tax*⁷⁴ the authors are not convinced that the changes in the Income Tax Act during 2011 improved the alignment of the tax and corporate regimes and the risk areas still remain. They state that –

“A crucial issue is to determine the underlying cause of the fusion of assets and liabilities of the parties entering into an “amalgamation or merger” transaction... The tax implications will be dictated by the type of agreement used and should be in line with the usual tax implications arising from such agreements, possibly also by the tax rollover rules, if applicable. Alternatively it could be argued that the statutory merger provisions created a new method of transferring assets and liabilities between merging entities, namely by the mere operation of law... There are good legal arguments in favour of this interpretation and, should they be correct, the statutory merger provisions could have far-reaching tax implications.”

The terminology contained within the definition of amalgamations under the Companies Act differs from the terminology under the Income Tax Act. The Companies Act refers to the parties to a merger and amalgamation transaction as the merging or amalgamating company and the merged or amalgamated company. The Income Tax Act refers to the parties as the amalgamated company and the resultant company. This however, does not affect the operation of a merger transaction or create conflict between the requirements contained under the two pieces of legislation.

An important distinction between a merger and amalgamation as contained under the Companies Act and an amalgamation as contained under the Income Tax Act is that the Companies Act requires the disposal of all the assets and the liabilities of the merging company to the merged company whereas the Income Tax Act only

⁷⁴ Gad, R. & Strauss J. *Company mergers and tax*. (30 March 2012) Accessed online: www.ens.co.za.

concerns itself with the disposal of all assets in the amalgamated company to be transferred to the resultant company.

The Companies Act does not allow for the part transfer of assets or a division within a company as a merger or amalgamation. Furthermore it also does not allow the merging or amalgamating company to retain any assets to settle any debts outstanding by the merging or amalgamating company which become due in the ordinary course of business activities as is the case under the Income Tax Act.

A merger under the Companies Act seems to be more flexible in terms of the consideration payable for the transfer of assets and liabilities whilst the Income Tax Act limits the consideration to equity shares and the assumption of debt. The Companies Act requires in certain instances for no consideration to be paid for the transfer of assets and liabilities, this is usually the case where there is a transfer of assets and liabilities between parties connected to one another. The Income Tax Act have anti-avoidance measures in place to prevent the transfer of assets for no consideration between connected persons and taxed in the hands of the entity transferring such assets at a deemed value (usually market value) where the tax relief does not apply to the transaction under section 44 of the Income Tax Act.

Another interesting point to note is the terminology used by the Income Tax Act and the terminology used in the Companies Act to terminate the existence of the merging entities. The Companies Act requires dissolution of the merging entities whilst the Income Tax Act requires the merging entities to terminate within 36 months of the merger transaction. The termination under the Income Tax Act is by way of liquidation, winding-up or deregistration which is different from a dissolution under the Companies Act. Lange and Sutherland⁷⁵ deals with the effect of deregistration on a company without following the liquidation process. They state that the Companies Act provides guidance on the process of deregistration but not the effect thereof on a company and whether deregistration without liquidation results in the termination of legal personality or merely deems it inactive until reinstated by the Companies Intellectual Property Commission.

⁷⁵ De Lange, S. & Sutherland, P. (2014). Deregistrasie sonder likwidasie van maatskappye en beslote korporasies ingevolge die 2008 Maatskappyywet. *Stellenbosch Law Review*. 265-307.

In *Nulandis (Pty) Limited v National Minister of Finance and another*,⁷⁶ the High Court dealt with the distinction between a dissolution and a deregistration. The applicant in this matter applied to court for restoration of a deregistered debtor in order to collect an outstanding debt owed to it. The debtor was deregistered for failure to render annual returns as required under the Companies Act. The applicant applied for the restoration under section 83(4) of the Companies Act, which according to the court not applicable in respect of a restoration, it only applied in cases where a party required dissolution of a company to be declared void. The court stated that the Companies Act, 1973 delinked deregistration from dissolution and that dissolution by winding-up and liquidation terminated the company. A deregistered company before dissolution continued to operate as an association of persons who remained personally liable for its debts and restoration could be achieved through reregistration on application to the Companies Office or by application to court. The consequence was that restoration automatically voided dissolution but voiding dissolution did not automatically result in restoration. Under the Companies Act deregistration is fused with dissolution, the reason for deregistration, whether as a result of a winding-up or deregistration for non-compliance is of no concern, deregistration triggers an automatic dissolution of a company.

5. CONCLUSION

Whilst the purpose of each piece of legislation differs, any company incorporated under the laws of the Republic is bound by the requirements as contained under the Companies Act when entering into merger transactions.

The effect of this is that compliance with the Companies Act may render a company subject to unintended income tax consequences and the rollover relief afforded under the Income Tax Act may not apply to the merger transaction.

It seems as though the definition under section 44 of the Income Tax Act is more relaxed than the definition contained under the Companies Act. The amalgamation provisions are however restricted to companies as defined under section 1 of the Income Tax Act which in turn refers to the definition contained in the Companies Act. This means that every resident company entering into an amalgamation transaction under the Income Tax Act is subject to the regulatory requirements in the Companies Act and non-compliance with any of the provisions of the Companies Act may render

⁷⁶ *Nulandis (Pty) Limited v National Minister of Finance and another* [2013] JOL 30396 (KZP).

the transaction a nullity under the Companies Act and similarly if compliance is achieved under the Companies Act, it may not qualify for rollover relief under the Income Tax Act.

Whilst the Companies Act does recognise the fact that inconsistencies with other legislation may occur and makes provision for such inconsistencies in the application of the Companies Act. The Income Tax Act will not override the provisions of the Companies Act to the extent that a conflict arises in respect of the requirements and implementation of a statutory merger transaction as contained under both pieces of legislation and cannot be interpreted concurrently.

CHAPTER SIX: CONCLUSION

Any company incorporated under the laws of the Republic is required to register with the Companies and Intellectual Property Commission and is bound by the requirements under the Companies Act.

Any transaction entered into by a company is therefore subject to the provisions of the Companies Act and every company is required to comply with the requirements as set out in the Companies Act. A company entering into a statutory merger transaction as defined will be regulated by the Companies Act. Non-compliance with any of the provisions pertaining to the merger will render the transaction a nullity.

The Income Tax Act on the other hand is enabling legislation which empowers the Commissioner for the South African Revenue Service to efficiently and effectively collect all taxes due to the State. It imposes income tax on all income received by or accrued to any person liable to pay taxes. It also imposes tax on the disposal of capital assets as well as the distribution of profits from a company to its shareholders.

Whilst the Income Tax Act is aimed at the collection of taxes, it also makes provision for the deferral of taxes where transactions are entered into between companies within the same group where business restructures often become necessary. Such deferrals are couched under provisions like section 44 of the Income Tax Act which allows companies to combine assets without triggering a disposal in the hands of the entity disposing of the asset. In order to qualify for the tax relief however, the companies entering into the transactions must comply with the requirements as set out in section 44 of the Income Tax Act.

The requirements under the Income Tax Act are in many respects different from those contained under the Companies Act and in some instances stand in direct contrast with each other to the extent that compliance with the Companies Act may have the effect that the transaction will not qualify for tax relief as contained under the Income Tax Act and vice versa.

Furthermore, the Income Tax Act only defines amalgamations and not mergers. If one looks closely at the definition of an amalgamation however, it is evident that an

amalgamation under the Income Tax Act can take the form of a merger, amalgamation or a conversion. This is indicative of the fact that an amalgamation as defined would include a merger.

The Income Tax Act distinguishes between three types of amalgamation transactions. The first involves an amalgamation between two companies resident in South Africa, the second between a resident and non-resident (in other words a foreign company) whereby the foreign company's existence terminates after the transaction and lastly an amalgamation between two foreign companies where the resultant company is a foreign controlled company which exists in a group of companies of which both the amalgamated and resultant companies form part of.

Merger transactions is the only fundamental transaction under the Companies Act which affords the creditor triple protection through application of the solvency and liquidity test; the notice under section 116 of the Companies Act and the right to apply to court to intervene in the transaction where it can prove that its rights have been materially prejudiced.

The terminology used under the Companies Act differs vastly from the terminology used in the Income Tax Act, although colloquial, in some instances it may change the nature or application of a merger process under the two pieces of legislation. For example, the Companies Act makes provision for the transfer of securities, which includes debentures or other instruments as long as they have voting rights attached to it, in the amalgamating and amalgamated companies whilst the Income Tax Act limits the transfer only to shares of the amalgamated and resultant companies.

The Income Tax Act also limits the consideration to shares or the assumption of debt of the amalgamated company any other form of consideration will not be subject to the tax relief afforded under section 44 of the Income Tax Act.

Both pieces of legislation require the existence of the merging entities to end. The means of termination required under each Act differs. It is not clear from the Companies Act whether a court sanction is necessary for the dissolution of the merging entity or whether such termination is merely by notice (filing of the merger agreement) to the Companies and Intellectual Property Commission. The Income Tax Act seems to be very specific on what will constitute a termination of the merging entity's existence.

The effect is that all companies registered within the Republic are subject to the Companies regulatory requirements. Some of the objectives of the Companies Act were to make business restructuring flexible and convenient in order to keep up with current business and international trends. Whilst it may have attempted to align itself with international best practice, it is not aligned to the Income Tax Act and in certain instances the provisions are in direct contrast with those in the Income Tax Act.

Similarly, the merger transactions under the Income Tax Act has gone through some changes over the years to provide tax relief in respect of group structures, it seems that not much attention had been given to the provisions as contained in the Companies Act.

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