THE NATURE, DEVELOPMENT AND LEGAL REQUIREMENTS OF STATUTORY MERGERS IN ENHANCING TRANSPARENCY, FLEXIBILITY AND EFFICIENCY OF BUSINESS COMBINATIONS

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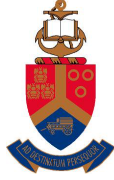

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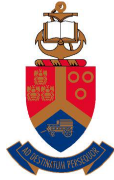

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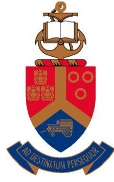

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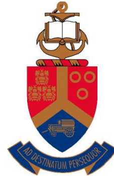

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CHAPTER 1: INTRODUCTION

1.1. Introduction and background to the research topic

In May 2004, the Policy Paper titled 'South African Company Law for the 21st Century'[1] was released by the Minister of Trade and Industry, Mandisi Mpahlwa. This Policy Paper included 'Guidelines for Corporate Law Reform'. The foreword to the Policy Paper stated that the policy sought to set out the basic approach which was intended to be taken in the reform of company law in South Africa, and further set out the framework for detailed technical consultation to ensure that South Africa had company law which was up-to-date, competitive and designed for a modern corporation, which was not merely a domestic institution operating in a new environment, but one which was also an international competitor.[2] The Minister therefore recognised that company law provides the legal basis for business entities which are central to the economy and its prosperity. It was considered necessary by the Minister to take into account the changes in the business environment both in South Africa and globally.[3]

The Corporate Law Reform Policy[4] at point 4.5 titled 'mergers and takeovers' stated that it would be: -

> "necessary to make provision in company law for mergers in the true sense of the word, namely, the absorption of one company into another, with the assets and liabilities of the former becoming the assets and liabilities of the latter and with the former ceasing to exist."[5]

[1] Published in GG 26493 of 23 June 2004.
[2] *Ibid at* 6.
[3] *Ibid*.
[4] Guidelines for Corporate Law Reform *op cit* note 1 at 43.
[5] *Ibid*.

This was by virtue of the fact that the Companies Act 61 of 1973,[6] did not provide mechanisms for business combinations *per se* but required the transfer of assets by scheme of arrangement from one company to another or third company.[7]

It is submitted by Davids *et al*[8] that M&A[9] transactions among major corporations have broad societal impacts and for these reasons, regulation of M&A activity is critical and such regulation should strike a balance between: –

> "encouraging economic activity and prudent risk-taking while appropriately protecting the interests of the many stakeholders of the company involved, the economy and society at large."[10]

The Companies Bill, 2007[11] proposed that: –

> "company law should promote the competitiveness and development of the South African economy" by "encouraging entrepreneurship and enterprise development, and consequently, employment opportunities by (a) simplifying the procedures for forming companies; and (b) reducing costs associated with the formalities of forming a company and maintaining its existence; promoting innovation and investment in South African markets and companies by providing for (a) flexibility in the design and organisation of companies; and (b) a predictable and effective regulatory environment."[12]

Following the legislature's desire to "provide flexibility and enhance efficiency in the economy",[13] the Bill was the catalyst to the introduction of the concept of amalgamation and mergers to South African company law.[14] The preface of the Bill

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[6] Hereinafter referred to as the Companies Act, 1973.
[7] Guidelines for Corporate Law Reform op cit note 1.
[8] Davids, Norwitz & Yuill "A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008" (2010), Modern Company Law for a Competitive South African Economy, Tshepo Mongalo (ed.), *Acta Juridica* 338.
[9] The legal practitioner's vernacular for mergers and acquisitions.
[10] Davids *op cit* note 8 at 338.
[11] GN 166 of 2007 in GG 29630 of 12 Feb 2007 (hereinafter referred to as the Bill").
[12] Explanatory Memorandum to the Companies Bill accessed at www.uct.ac.za/usr/companylaw/downloads/legislation/Companies_Bill_2007.pdf on 26 October 2019 at 3.
[13] Guidelines for Corporate Law Reform *op cit* note 1 at 9.
[14] Companies Bill *op cit* note 11.

stated among its purposes that it sought to provide for equitable and efficient amalgamations, mergers and takeovers of companies.[15]

Insofar as corporate efficiency is concerned, the Explanatory Memorandum to the Bill[16] stated *inter alia*, that: –

> "there should be a remedy to avoid locking in minority shareholders in inefficient companies and the mergers and takeovers regime should be reformed so that the law facilitates the creation of business combinations."[17]

This, it is submitted, refers to the appraisal right,[18] which was introduced in the Companies Act, 71 of 2008.[19] The appraisal right may be described as a right which dissenting shareholders have in the event that they do not approve of decisions taken by the company, to amend its memorandum of incorporation or enter into a Fundamental Transaction, to have their shares bought out by the company in cash, at fair market value, which value may in certain cases be determined by the courts.[20]

The appraisal right is not a 'general right' but is a right which may be invoked by shareholders in the event that the company resolves, by means of a special resolution to amend the rights of a class of shares in terms of its Memorandum of Incorporation or to undertake a Fundamental Transaction as set out in Chapter 5 of the Act.[21] Fundamental Transactions, collectively, refer to the proposal to dispose of all or the greater part of the assets or undertaking of a company, contained in section 112 of the Act, the amalgamation and merger, contained in section 113 of the Act and the

[15] *Ibid*.
[16] Explanatory Memorandum to the Companies Bill *op cit* note 12.
[17] *Ibid* at 5.
[18] S 164 of the Companies Act, 2008.
[19] Hereinafter referred to as the Act.
[20] Cassim *et al*. (2012). *Contemporary Company Law* 796.
[21] *Ibid*.

scheme of arrangement contained in section 114 of the Act. Dissenting shareholders of a company are not compelled to go along with the decision of the (prescribed) majority. They may choose to exit the company, by withdrawing the fair value of their shares in cash, through the exercise of their appraisal rights.[22]

Comparatively, the concept of appraisal rights is said to have originated in the United States of America (the "US") under a law known as the Model Business Corporation Act, 1984 (MBCA), which has now been substantially adopted by a majority of the federal US states.[23] The thinking behind the appraisal right is that it enables shareholders who disagree or dissent from a decision taken by the majority of a company to be provided with a right to exit such company by having the company pay them for the fair value of their shares in order for them to exit.[24] Such dissenting shareholders effectively become the minority of the company insofar as the decision taken by majority vote.

It has also been said that the dissenting shareholder should not pose as a stumbling block to a transaction approved by the majority shareholders of a company, which would be the rationale behind the appraisal right.[25] In order for the dissenting shareholders to exercise their appraisal right and demand that the company pay them the fair value for their shares, one of the triggering events need to occur in order for such a shareholder to follow the appraisal right procedure as set out under section 164 of the Act.[26] In a notice by the company advising of its intention to alter the

[22] *Ibid*.
[23] Mashabane "Appraisal rights and protection of minority shareholders" 2016 *De Rebus* 30 accessed at http://www.derebus.org.za/appraisal-rights-protection-minority-shareholders/ on 01 September 2018. See further, "Model Business Corporation Act (2016 Revision) Launches" American Bar Association accessed at https://www.americanbar.org/groups/business_law/publications/blt/2017/01/08_mbca/ on 24 January 2020.
[24] *Ibid*.
[25] Castañeda "Appraisal Rights: The "Fair" Valuation of Shares in case of Dissent" 1999 September – December *The University of Mexico Law Journal* 814 as referenced by Mashabane *op cit* note 115.
[26] Cassim *op cit* note 20 797.

preferences, rights, limitations or other terms of any class of its shares in a manner which adversely affects the rights of such shareholders or in the event that the company seeks to effect a Fundamental Transaction in accordance with Chapter 5 of the Act, notice must be sent to all shareholders, which notice must advise them of their appraisal right.[27]

It is however noteworthy to mention that the requirement in section 164(1) of the Act, which requires that the proposed transaction be 'materially adverse to rights or interests' is unclear, as the statement presumes two tests, more specifically that the transaction be materially adverse to the shareholders' rights and secondly, to the shareholders' interests.[28] The basis of the rights and interests is not defined.[29] As such, those rights and interests could be other than in terms of the Memorandum of Incorporation.[30] Interests can also mean a dilution of relative voting rights.[31] On the other hand, the appraisal remedy protects minority shareholders against the unfairness of being locked into a company that has gone through drastic changes and a restructure, which such minority may not be in agreement with.[32]

Concepts such as amalgamation and mergers are not entirely new to South African corporate law as it is evident from the Companies Act, 1973 that provided for three methods to effect business combinations. They are:

- proposals to dispose of all or the greater part of the company's assets or undertaking;[33]

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[27] Delport (2011). *The New Companies Act Manual* 164-5.
[28] Delport *op cit* note 27 165.
[29] *Ibid*.
[30] *Ibid*.
[31] *Ibid*. See also *Utopia Vakansie-oorde v Du Plessis* 1974 3 SA 148 (AD).
[32] Cassim "The appraisal remedy and the oppression remedy under the Companies Act of 2008, and the overlap between them" 2017 SA Merc LJ 314.
[33] S 228 of the Companies Act,1973.

- a scheme of arrangement;[34] and
- a take-over offer.[35]

In the event that two or more companies sought to merge, for example, to increase market share, acquire certain skills, goodwill or technology that the other constituent company possessed, it had to rely on the mechanisms provided in the Companies Act, 1973. In addition, the Securities Regulation Panel (established in terms of section 440B of the Companies Act, 1973) regulated mergers insofar as they related to the transfer of shares.

As a result of the innovations by the legislature to company law, section 113 of the Act provides that the board of directors of two or more companies may consider the implementation, by means of an agreement, of an amalgamation or a merger.[36] The amalgamation or merger agreement would be submitted to the shareholders for consideration at a shareholders meeting, in accordance with the requirements set out in section 115 of the Act, prior to the amalgamation or merger being effected.[37]

1.2. Problem Statement and Aim of the Study

The legislature, in codifying the statutory merger[38] procedure in section 113 of the Act, which, as stated, provides that companies may by agreement (and with the requisite approval from their shareholders, among the other requirements set out in section 115 of the Act) merge their assets and liabilities into a combined entity; marks a significant departure from the Companies Act, 1973. It also brings South African company law in line with a number of major jurisdictions worldwide, which have some

[34] S 311 of the Companies Act,1973.
[35] S 440K of the Companies Act,1973.
[36] Delport *op cit* note 27 126-7.
[37] *Ibid.*
[38] For the purposes of this study, 'statutory merger' means the amalgamation and merger.

form of statutory merger procedure.[39] Such jurisdictions include the United States, France, Germany and Canada, all of whom have some form of 'court free' statutory merger procedure.[40]

This study will discuss section 7(b) of the Act insofar as it relates to the intention of the legislature to "enhance flexibility, efficiency and transparency … so that mergers in the true sense could be facilitated."[41] This study will go further in describing the amalgamation or merger as set out in section 113 of the Act by accounting for its requirements, with a focus on the written agreement[42] which is required to be concluded between constituent companies who propose to amalgamate or merge.

The Act provides in section 7(b) that its purpose is *inter alia,* to promote the development of the South African economy by encouraging entrepreneurship and enterprise efficiency;[43] create flexibility and simplicity in the formation and maintenance of companies;[44] and encourage transparency and a high standard of corporate governance.[45]

In discussing the intention of the legislature, as set out in section 7(b) of the Act, the provisions of sections 113 – 116 of the Act will be considered to test whether they are effective or not in giving effect to enterprise efficiency, flexibility and transparency in business combinations. This will be done by considering the provisions and highlighting those that go against the intention of the legislature.

[39] Davids *op cit* note 8 340 – 1.
[40] *Ibid*.
[41] Guidelines for Corporate Law Reform *op cit* note 1 at 43.
[42] S 113(2) of the Companies Act, 2008.
[43] S 7(b)(i) of the Companies Act, 2008.
[44] S 7(b)(ii) of the Companies Act, 2008.
[45] S 7(b)(iii) of the Companies Act, 2008.

1.3. Research Questions[46]

(i) Do the provisions of sections 113 – 116 of the Act enhance transparency, flexibility and the efficiency of business combinations?

(ii) Has South African law evolved to such an extent as to allow all the assets and liabilities of constituent companies to be transferred by the operation of law?

(iii) Can the negative provisions (insofar as they do not give effect to the intention of the legislature) contained in sections 116 of the Act, be mitigated through the inclusion of certain provisions in the amalgamation or merger agreement? Such negative provisions relate to notice to creditors as required by section 116(1) of the Act, the required regulatory approvals in terms of the Competition Act,[47] the Banks Act,[48] the Financial Markets Act,[49] and any other regulatory approvals the statutory merger may be subject to[50] and the transfer of property by the operation of law.[51]

1.4. Limitations

This study will not discuss the other Fundamental Transactions outlined in chapter 5 of the Companies Act, 2008, namely the proposal to dispose of all or the greater part of the assets or undertaking of a company, contained in section 112 of the Companies Act, 2008 and the scheme of arrangement contained in section 114 of the Companies

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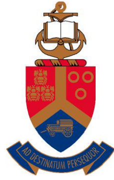
47 Competition Commission Act 89 of 1998, hereinafter referred to as the Competition Act, as cited in S 116(4)(a)(ii) of the Companies Act, 2008.

48 Banks Act 90 of 1994, as cited in S 116(4)(a)(iii) of the Companies Act, 2008.

49 Financial Markets Act 19 of 2012, as cited in S 116(4)(a)(iii) of the Companies Act, 2008.

50 S 116(4)(iv)(aa) of the Companies Act, 2008.

51 S 116(7)(a) of the Companies Act, 2008.



Act, 2008, and will limit its scope to the amalgamation or merger which is described in this study as the statutory merger.

In addition, this study will not enter into a full discussion on the amendments to the Competition Act, as contained in the Competition Amendment Bill which was signed into law on 13 February 2019.

1.5. Methodology

This study will be prepared by means of a literature based approach and a comparative study against the laws of the United States of America, which this study argues is where the concept of statutory mergers was adopted. This will benefit South African law by providing insight on how some concerns which are raised in this study have been addressed. These approaches have been selected, as the aim of the study is to explore the statutory merger and discuss any possible complications associated therewith.

Literature available on this study provides a historical account of where the concept of statutory mergers originates.[52] It describes its origins through a discussion on the adoption of statutory mergers in South African law. It further outlines the requirements of statutory mergers in the Act, and describes the forms in which the statutory merger can take.[53]

This study will briefly discuss the origins of the statutory merger and what the statutory merger is in Chapter 2, with reference to existing literature, and outline what was

[52] Cassim "The statutory merger in South African Law" 2008 Juta's Business Law 40.
[53] Cassim *op cit* note 20 679.

intended by the legislature in adopting this new form of merger into South African company law.

The appraisal right is a new protective measure introduced by the Act.[54] Whilst there are a few sections in the Act to which the appraisal right may apply,[55] this study will outline (in Chapter 2) how the appraisal right may be applied to statutory mergers.[56]

Some scope has been provided by authors of existing literature to delve deeper into the negative provisions (insofar as they go against the intention of the legislature) of section 116 of the Act, and explore whether other areas of the law have developed enough to balance out the negative provisions of section 116 of the Act and facilitate the intention of the legislature to enhance flexibility and efficiency in business combinations.[57]

In addressing some of the shortcomings of the Act in Chapter 4 of this study, a comparison will be drawn with reference to foreign jurisdictions, such as the United States, where the statutory merger was adopted. This study will discuss what was intended by the legislature in contrast to the current state of being.

1.6. Outline of the Chapters

This dissertation consists of 5 Chapters. They are depicted as follows –

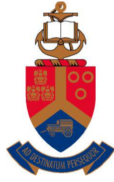
Chapter 1 discusses the background, problem statement, methodology as well as the research questions.

[54] Cassim *op cit* note 20 796.
[55] Cassim *op cit* note 20 799.
[56] Cassim *op cit* note 20 698.
[57] S 7(b)(ii) of the Companies Act, 2008.

Chapter 2 explores the nature, origins and legal requirements of statutory mergers whereas chapter 3 explores the written agreement as required by section 113(2) of the Act.

In chapter 4 of the study, section 116 and its effectiveness in enhancing transparency, flexibility and efficiency of business combinations is discussed.

Chapter 5 unpacks some conclusions and recommendations.



CHAPTER 2: STATUTORY MERGERS – ITS NATURE, ORIGINS AND LEGAL REQUIREMENTS

2.1 Introduction

Prior to the promulgation of the Act, the Companies Act, 1973 provided for three main methods for companies to effect business combinations, these being the proposal to dispose of all or the greater part of the company's assets or undertaking,[58] the scheme of arrangement,[59] and the takeover offer with compulsory acquisition of securities of the minority.[60] It was stated in the Memorandum on the objects of the Companies Bill[61] that the legislature sought to "provide flexibility and enhance efficiency in the economy."[62]

In drafting the Act the legislature leveraged off the experience of academics and legal practitioners in South Africa and foreign jurisdictions.[63] As part of an inclusive approach adopted by the Company Law Reform within the Department of Trade and Industry,[64] simplification was identified as a guideline in the corporate law reform process, and it was stated that the manner in which the Companies Act, 1973 provides for business combinations was cumbersome and inflexible and discouraged incorporation of companies and contributed to a low level of corporate business activity within the economy.[65]

[58] Companies Act, 1973 *op cit* note 11.
[59] Companies Act, 1973 *op cit* note 12.
[60] Companies Act, 1973 *op cit* note 13.
[61] Guidelines for Corporate Law Reform *op cit* note 1.
[62] Guidelines for Corporate Law Reform *op cit* note 1 at 9.
[63] Davids *op cit* note 8 338.
[64] Mongalo "An overview of company law reform in South Africa: From the guidelines to the Companies Act 2008" (2010), Modern Company Law for a Competitive South African Economy, Tshepo Mongalo (ed.), *Acta Juridica* xiii.
[65] Mongalo *op cit* note 38 xvii – xviii.

It was further identified by the Corporate Law Reform, that there was a lack of self-standing merger provisions in the Act that could facilitate amalgamations with less involvement by the courts (this going to the idea of having a 'court-free' statutory merger procedure).[66] Insofar as mergers are concerned, clarity was sought by the Corporate Law Reform, in relation to the role of the Securities Regulation Panel, which has now changed to the Takeover Regulation Panel.[67]

As a result of the corporate law reform process, the Act adheres to the essence of pre-existing South African company law, which is agreed to be largely based on English company law but includes new innovations derived from foreign jurisdictions.[68] One of these innovations being of course, the statutory merger.

This chapter considers the requirements of the statutory merger, as contained in the Act.

2.2 Statutory Mergers: Nature and Origins

South African company law evolved through the promulgation of the Act. The means which were prevalent in the Companies Act, 1973 to effect business combinations in South Africa – namely the scheme of arrangement, the tender offer and the sale of business as a going concern are still found in Chapter 5 of the Act[69] save for the fact that they have been enhanced through the introduction of (among others) two concepts previously unfamiliar to South African company law – the statutory merger and the appraisal rights remedy for dissenting shareholders.[70]

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[66] Mongalo *op cit* note 38 xviii.
[67] *Ibid*.
[68] Davids *op cit* note 8 at 338.
[69] Davids, Norwitz & Yuill "Modern Company Law for a competitive South African Economy" (2010), Modern Company Law for a Competitive South African Economy, Tshepo Mongalo (ed.), *Acta Juridica* 340.
[70] *Ibid*.

The preface of the Bill stated among its purposes that it sought to provide for equitable and efficient amalgamations, mergers and takeovers of companies.[71] This intention was carried through to section 7 of the Act, which sets out the purpose of the Act.

The legislature, in codifying the statutory merger procedure in the Act, which provides that companies may by agreement (and with the requisite approval from their shareholders, among the other requirements set out in section 115 of the Act) merge their assets and liabilities into a combined entity, marks a significant departure from the Companies Act, 1973, as it seemingly, strikes a balance between the efficiency and flexibility sought by the legislature in effecting business combinations, whilst maintaining protection of minority shareholders which the less flexible options of the Companies Act, 1973, presented.[72] The statutory merger thus appears to represent a "liberalisation of policy on the part of the legislature between two conflicting underlying policies."[73] It also, *ex facie*, brings South Africa into line with a number of major jurisdictions worldwide that have some form of statutory merger procedure.[74] Such jurisdictions include the United States, France, Germany and Canada, all of whom have some form of 'court-free' statutory merger procedure.[75]

However, it is noteworthy to mention that although South African company law is rooted in English law, English company law did not adopt a 'court-free' statutory merger procedure, and thus still requires court approval for amalgamation and mergers, which is the approach presented in the Companies Act, 1973. Cassim notes that English law rejected this 'court-free' approach due to problems it may pose to

[71] Davids *op cit* note 4 at 338.
[72] Cassim *op cit* note 9 677.
[73] Cassim *op cit* note 20 677.
[74] Davids *op cit* note 69 341.
[75] Davids *op cit* note 69 341.

creditor protection and the rights of third parties under agreements with a constituent company.[76]

The statutory merger is a modern procedure adopted from the United States.[77] Notwithstanding that individual states in the United States have their own antitrust laws which would be applicable to mergers,[78] on a closer examination of the Act one may argue that the wording adopted in the Act insofar as it relates to amalgamation and mergers, is analogous to the wording of the Delaware General Corporation Law Title 8. Corporations § 257. Merger or consolidation of domestic stock and non-stock corporations. The description of the statutory merger as contained in the Delaware General Corporation Law is very similar to that contained in the Act. The Delaware Code Title 8 section 257(a) states:

> "Any 1 or more nonstock corporations of this State, whether or not organized for profit, may merge or consolidate with 1 or more stock corporations of this State, whether or not organized for profit. The constituent corporations may merge into a single surviving corporation, which may be any 1 of the constituent corporations, or they may consolidate into a new resulting corporation formed by the consolidation, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section. The surviving constituent corporation or the resulting corporation may be organized for profit or not organized for profit and may be a stock corporation or a nonstock corporation."[79]

Section 257(b) of Delaware General Corporation Law goes further to state that –

> "the board of directors of each stock corporation which desires to merge or consolidate and the governing body of each nonstock corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation."[80]

[76] Cassim *op cit* note 20 677.
[77] *Ibid*.
[78] Kangueehi Mergers and Acquisitions as a strategy for Business Growth: A Comparative Overview (LLM dissertation 2015 UCT) 71.
[79] *Title 8 Chapter 1: General Corporation Law subchapter IX. Merger, Consolidation or Conversion* accessed at http://delcode.delaware.gov/title8/c001/sc09/index.shtml on 03 July 2018.
[80] *Ibid*.

In essence, an "amalgamation" occurs where one company fuses with another company and a new company is formed, and a "merger" occurs where one company takes over the other and one of the two companies remain.[81] Technically, the distinction between an amalgamation and a merger is as described by Cassim, more specifically that –

> "in a merger of an acquiring company, Company A, and a target company, Company T; Company A survives and continues in existence while Company T is the disappearing company and is dissolved and deregistered. In an amalgamation between Company A and Company T, both Companies A and T are dissolved and a new company, Company N is created".[82]

Simply put, in a merger there are two companies, and when such companies merge, one survives the merger and remains in existence whilst in an amalgamation where there are two or more companies that effect a combination, all the companies disappear and a new company is formed. However, it is noteworthy to mention that the final version of the Act makes no distinction between an amalgamation or merger.[83]

The Act at defines an "amalgamation or merger" as –

> "a transaction, or series of transactions, pursuant to an agreement between two or more companies, resulting in:
>
> (a) the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies; or

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[81] Latsky "The Fundamental Transactions Under the Companies Act: A Report Back from Practice After the First Few Years" (2014) Stell LR 372. On distinction between amalgamation and merger see also Cassim "The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 1)" (2008) MERC LJ 2 - 3.
[82] Cassim *op cit* note 81 3.
[83] Davids *op cit* note 69 342.

> (b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with any such new company or companies, of all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement."[84]

The terms 'amalgamation' or 'merger', are treated as synonyms and are used interchangeably in the Act that has the effect of drawing no distinction between these concepts.[85] The definition may require amendment for the purposes of clarity so two distinct concepts may be recognised. The legislature ought to have clarified the definition by distinguishing between the two concepts. However, for the purposes of this study it shall be assumed that the definition contained in point (a) refers to an amalgamation, while (b) refers to a merger.

As the definition in the Act is akin to that in the Delaware General Corporation Law, as quoted earlier in this Chapter, it further leads one to conclude that one of the origins of the amalgamation or merger lies in United States antitrust law.

2.2. Statutory Mergers: Legal Requirements

Section 113 of the Act prescribes that two or more profit companies (including holding and subsidiary companies) may amalgamate or merge if, upon implementation of the amalgamation or merger each amalgamated or merged company (in other words 'a company that either: (a) was incorporated pursuant to an amalgamation or merger agreement; or (b) was an amalgamating or merging company and continued in existence after the implementation of the amalgamation or merger agreement, and holds any part of the assets and liabilities that were held by any of the amalgamating

[84] S 1 of the Companies Act, 2008.
[85] Davids *op cit* note 69 342.

or merging companies immediately before the implementation of the agreement'),[86] will satisfy the solvency and liquidity test.[87] Furthermore, two or more companies proposing to amalgamate or merge must enter into a written agreement[88] (which will be discussed in Chapter 3 of this study), setting out the terms and means of effecting the amalgamation or merger, and which is to be submitted to the shareholders for consideration.

By virtue of the fact that the statutory merger is intended to be a court-free procedure (albeit that there are limited instances in which recourse may be sought from the courts), which is intended by the legislature to enhance flexibility, it is submitted that this ensures that the process is cost effective, transparent and efficient.[89]

The statutory merger involves five key stages, namely:

(a) merger agreement;[90]
(b) solvency and liquidity test;[91]
(c) requisite approvals of the merger;[92]

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[86] Definition of amalgamated or merged company derived from S 1 of the Companies Act, 2008.
[87] S 113(1) of the Companies Act, 2008. Note that S 4(1) of the Companies Act, 2008 states as follows in relation to the Solvency and Liquidity test:
4. (1) For any purpose of this Act, a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time—
(a) the assets of the company or, if the company is a member of a group of companies, the aggregate assets of the company, as fairly valued, equal or exceed the liabilities of the company or, if the company is a member of a group of companies, the aggregate liabilities of the company, as fairly valued; and
(b) it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of—
(i) 12 months after the date on which the test is considered; or
(ii) in the case of a distribution contemplated in paragraph *(a)* of the definition of 'distribution' in section 1, 12 months following that distribution.
[88] S 113(2) of the Companies Act, 2008.
[89] Davids *op cit* note 69 343.
[90] S 113(2) of the Companies Act, 2008.
[91] S 113(4) of the Companies Act, 2008.
[92] S 115 of the Companies Act, 2008.

(d) notice to creditors;[93] and

(e) implementation of the merger.[94]

Upon the conclusion of the merger agreement, it is required that the board of directors of the respective amalgamating or merging companies submit the proposed transaction to their respective shareholders for approval.[95] The statutory merger requires approval in accordance with section 115 of the Act. Section 115, which sets out the approval requirements, quorum requirements, the exclusion of various voting rights from the assessment of whether or not these were achieved and circumstances under which court approval is required in respect of a merger[96], also applies to the other Fundamental Transactions in the Act.[97]

A statutory merger must be approved by a special resolution of shareholders, at a meeting called for that purpose, in accordance with section 65 of the Act. In the event that the board of directors of the merging companies 'reasonably believes' that the constituent entities will satisfy the solvency and liquidity test, the directors may call a shareholders meeting for the purpose of considering the proposed statutory merger.[98]

A summary of the merger agreement will be required to be provided by the directors of the merging companies to the shareholders of the merging companies so they may consider the transaction.[99] The summary will further need to set out the rights of the shareholders in terms of section 115 of the Act, more specifically shareholders' approval requirements, the recourse which may be sought from the courts should any

[93] S 116(1) of the Companies Act, 2008.
[94] S 116 of the Companies Act, 2008.
[95] Davids *op cit* note 69 346.
[96] Luiz "Some comments on the scheme of arrangement as an "affected transaction" as defined in the Companies Act 71 Of 2008" 2012 *PELJ* 111 / 638.
[97] S 115(1) of the Companies Act, 2008.
[98] Davids *op cit* note 69 346.
[99] *Ibid*.

shareholders dissent, as well as section 164 of the Act which contains the appraisal right of dissenting shareholders, which as stated earlier in this study, is an innovation to the Act.[100]

It is required that each constituent entity which proposes to either amalgamate or merge, adopt a special resolution.[101] The quorum for the shareholders meeting should be constituted by sufficient persons present who are able to exercise, in aggregate, 25 per cent of all of the voting rights that are entitled to be exercised on that matter, or any higher percentage as may be required by the company's Memorandum of Incorporation.[102] As such, it is possible for shareholders who require an increased level of protection in various instances, which may go outside of the sphere of takeovers, to impose a greater percentage for quorum to be met, by simply providing for this in their Memorandum of Incorporation.[103]

2.3. Court Approval

It is provided in section 115(3) of the Act that in the event that the resolution is opposed by at least 15 per cent or more of the voting rights voting in respect of the amalgamation or merger, any one of the shareholders who dissented to such amalgamation or merger may require the company to seek court approval for the proposed transaction, which will result in a delay in the implementation of the amalgamation or merger, until such court approval has been obtained.[104] In light of the court process in South Africa, it is submitted that court approval may be argued to go against the legislature's intention to create an efficient and cost effective means to

[100] *Ibid*.
[101] Cassim *op cit* note 20 690.
[102] SS 64 and 113(4) of the Companies Act, 2008.
[103] Cassim *op cit* note 20 691.
[104] Davids *op cit* note 69 347.

effect business combinations, albeit being transparent with court documents being open to public scrutiny. The court process in South Africa is costly as it involves soliciting the assistance of experienced attorneys and/or advocates and may be a very lengthy process depending on the court roll which is determined months in advance. This therefore, has the potential to cause a significant delay in the statutory merger transaction. If the resolution in respect of the proposed statutory merger requires approval by a court, the company may either apply to court for such approval and bear the costs of such court application, or they may consider the resolution a nullity.[105]

The court, on an application to review the transaction, may grant leave only if it is satisfied that the applicant is acting in good faith, appears prepared and able to sustain the proceedings, and has alleged facts which, if proved,[106] would support an order to set aside the resolution if the resolution was manifestly unfair to any class of holders of the company's securities, or the vote was materially tainted by conflict of interest, inadequate disclosure, failure to comply with the Act the Memorandum of Incorporation or any applicable rules of the company, or other significant and material procedural irregularity.[107] In addition to the rights which shareholders have under section 115 of the Act to request that the court review the amalgamation or merger, dissenting shareholders may exercise their appraisal rights in terms of section 164 of the Act.[108]

2.4. Appraisal Right

As set out in Chapter 1 of this study, the appraisal right as contained in section 164 of the Act may be relied upon by dissenting shareholders who are not agreeable to the

[105] S 115(5) of the Companies Act, 2008.
[106] S 115(6) of the Companies Act, 2008.
[107] S 115(7) of the Companies Act, 2008.
[108] Davids *op cit* note 43 348.

implementation of the proposed statutory merger.[109] When the board of directors of a company is desirous to effect a statutory merger or a scheme of arrangement, or to dispose of all or a greater part of the company's assets or undertaking, or where the company seeks to amend its Memorandum of Incorporation in a manner which is materially adverse to the rights or interests of a class of shareholders, shareholders who dissent to the same may exercise their appraisal right and demand that the company purchase their shares and compensate them for the fair value of their shares, as determined initially by the company or, failing which, by the court.[110]

2.5. Notice to Creditors

Once shareholder approval and court approval, if required, has been obtained by each of the amalgamating or merging companies, every known creditor of the amalgamating or merging companies will be required to be notified. This is the last step before the implementation of the statutory merger. A creditor who is of the view that it would be materially prejudiced by the amalgamation or merger is entitled to apply to court within 15 business days of being notified of the amalgamation or merger for a review of the proposed amalgamation or merger, provided that the court is satisfied that such creditor is acting in good faith, that the creditor would in fact be materially prejudiced by the merger and that there exists no alternative remedies.[111] In the event that there are no objections by creditors to the proposed merger within the required period, the parties may proceed to implement the merger, in accordance with the provisions of the Act which would be the final steps in the process.[112]

[109] S 164(2)(b) of the Companies Act, 2008.
[110] S 164 of the Companies Act, 2008.
[111] Davids *op cit* note 69 348.
[112] *Ibid*.

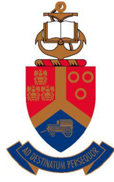
2.6. Implementation of the Statutory Merger

In order to implement the amalgamation or merger, a notice of merger must be filed with the Companies and Intellectual Property Commission, confirming that the transaction has satisfied all the applicable requirements. This includes a notice stating that any required regulatory approvals (such as Competition Commission approval, among the other regulatory approvals which may be required to be obtained)[113] have been obtained and such notice shall further enclose a copy of the Memorandum of Incorporation of the new merged or copies of amalgamated entities.[114]

Once the notice has been received by the Companies and Intellectual Property Commission, it will proceed to issue a registration certificate in respect of each company which will be incorporated and will further deregister each merging or amalgamating company which does not survive the transaction.[115]

It is noteworthy to mention that the amalgamating or merging companies that do not survive the transaction will not be required to be wound-up and such winding up will take effect by the operation of law.[116] The amalgamation or merger would thereafter be implemented in accordance with the provisions of the amalgamation or merger agreement.[117] This is another efficiency contained in the innovations to the Act as liquidation proceedings are avoided. Liquidation proceedings may be lengthy and costly. As such, the legislature was able to enhance flexibility and efficiency in business combinations, through this provision.

[113] Discussed in paragraph 4.3 of this study.
[114] Davids *op cit* note 69 348 – 9.
[115] Davids *op cit* note 69 349.
[116] Cassim *op cit* note 81 7.
[117] Davids *op cit* note 69 349.



2.7. Conclusion

From the wording of the Delaware General Corporation Law Title 8. Corporations § 257. Merger or consolidation of domestic stock and non-stock corporations (as set out earlier in this Chapter), being analogous to the definition of amalgamation or merger in section 1 of the Act, one may conclude that the legislature's intention to bring South African Company law in line with foreign jurisdictions[118] such as the United States, was *ex facie*, successful.

From the requirements of the statutory merger as set out the Act one may further conclude that the statutory merger is a modern, relatively straightforward and simple transaction. Section 116 of the Act provides a comprehensive account on how one may implement the statutory merger. In addition, the Act is not too prescriptive on the content of the amalgamation and merger agreement, and provides parties with some scope to conclude the agreement based on their desired outcome of the transaction.

This study in discussing the implementation of the statutory merger in Chapter 4, will unpack whether these successes are felt on a practical level.

Chapter 3 of this study, however, considers the amalgamation and merger agreement and whether the latitude provided by the legislature enhances efficiency and flexibility in effecting business combinations.

[118] Davids *op cit* note 8 338.

CHAPTER 3: THE WRITTEN AGREEMENT AS REQUIRED BY SECTION 113(2) OF THE ACT

3.1. Introduction

The Act at section 113(2), prescribes that constituent entities seeking to amalgamate or merge, must enter into a written agreement setting out the terms and means of effecting the statutory merger. This chapter discusses the content of the amalgamation or merger agreement, the different types of consideration and how consideration informs the type of merger which is effected. As stated earlier in this study, the legislature has provided some latitude to constituent entities through the wording of section 113(2) of the Act. It is submitted that Section 113(2) of the Act is not a closed list and it allows parties to include further provisions in the agreement based on their desired outcome. The chapter further suggests the amendment of section 113(2) of the Act with the inclusion of additional clauses that could offer protection to parties in an amalgamation or merger and concludes by discussing the appraisal right, which is an innovation of the Act that protects dissenting shareholders.

3.2. Contents of the agreement as set out in Section 113(2) of the Act

Section 113(2) of the Act provides that the amalgamation or merger agreement must set out –

(i) the proposed Memorandum of Incorporation of any new company to be formed by the amalgamation or merger;

(ii) the name and identity number of each proposed director of any proposed amalgamated or merged company;

(iii) the manner in which the securities of each amalgamating or merging company are to be converted into securities of any proposed amalgamated or merged company, or exchanged for other property;

(iv) if any securities of any of the amalgamating or merging companies are not to be converted into securities of any proposed amalgamated or merged company, the consideration that the holders of those securities are to receive in addition to or instead of securities of any proposed amalgamated or merged company;

(v) the manner of payment of any consideration instead of the issue of fractional securities of an amalgamated or merged company or of any other juristic person, the securities of which are to be received in the amalgamation or merger;

(vi) details of the proposed allocation of the assets and liabilities of the amalgamating or merging companies among the companies that will be formed or continue to exist when the amalgamation or merger agreement has been implemented;

(vii) details of any arrangement or strategy necessary to complete the amalgamation or merger, and to provide for the subsequent management and operation of the proposed amalgamated or merged company or companies; and

(viii) the estimated cost of the proposed amalgamation or merger.

It is submitted that section 113(2) of the Act does not specify what level of detail is required to go into the amalgamation and merger agreement insofar as each required provision is concerned. Although the Act sets out which matters should be addressed in the merger or amalgamation agreement, it does not limit what else may be set out

in the agreement. Companies therefore, have considerable latitude to structure the amalgamation or merger, through the agreement, in a manner that best meets their requirements.[119] This enhances flexibility in the formation and maintenance of companies, as sought by the legislature.[120]

However, in light of the fact that the amalgamation and merger agreement is lodged with the Companies and Intellectual Property Commission, companies would be reluctant to provide too much detail in their amalgamation and merger agreements, which may be accessible by the public and more importantly, their competitors. This becomes an even greater concern in the case of listed companies where copies or summaries of the agreement (as required by s 113(5) of the Act) are to be provided to shareholders in anticipation of the shareholders meeting.[121] As such shareholders may be shareholders of competitor companies as well.

3.3. Merger structures and consideration

Consideration is an important aspect that is dealt with in the amalgamation and merger agreement. This is noteworthy as it is closely linked to the different types of statutory merger structures that may arise.[122] Below is a list and description of five types of merger structures that may arise, subject to the provisions of the Act.

(i) Pooling-type mergers[123]

The ‘pooling’ type merger encompass the “traditional” concept of a merger,[124] and

[119] Davids *op cit* note 69 344.
[120] S 7(b)(ii) of the Companies Act, 2008.
[121] Yeats *et al*. 2018. *Commentary on the Companies Act of 2008 Volume 2* 5-11.
[122] Cassim *op cit* note 20 686.
[123] As coined by Cassim *op cit* note 81 25, stated in reference to the Bill.
[124] *Ibid*.

occurs where there are two sets of shareholders, one from Company A and one from Company B. Each set of shareholders will continue to be shareholders in the merged company, Company N, which company will own the joint assets and liabilities of Company A and Company B.[125] In this form of merger, the consideration is usually shares in Company N (being the acquired or surviving company), which will be received by the two sets of shareholders of Company A and Company B, respectively, as consideration.[126] In other words, there are two companies that merge and a new company is created. The shareholders from each company would then acquire shares in the new company. The assets and liabilities of both companies belong to the new company.

Consideration in a pooling type merger may also take the form of other securities, such as debentures of the merged company or the exchange of 'any other property'.[127] It is therefore, possible for the shareholders receiving merger consideration to receive such consideration in the form of shares in another company aside from the surviving company.[128] This facilitates the triangular and reverse triangular mergers where shareholders of constituent entities receive, as consideration, shares in the holding company or the surviving merged company.[129] This further highlights the flexibility of the statutory merger.

[125] *Ibid*.
[126] *Ibid*.
[127] *Ibid*.
[128] *Ibid*.
[129] *Ibid*.

(ii) Triangular mergers

A triangular merger involves a holding company that creates a subsidiary company, which then merges with the target company and the remaining company is the subsidiary. This allows the target entity to be risk remote from the holding company.[130]

The triangular merger therefore involves three companies, a target company which is sought to be acquired by the "true" acquirer, being a holding company but which is ultimately acquired by its newly-formed, wholly-owned subsidiary which is a special purpose vehicle created specifically for the purposes of the merger.[131] This is a manner in which the holding company can circumvent one of the unfortunate consequences of the statutory merger, being the acquisition of the liabilities of the target company.[132] As a result of the triangular merger, the target company would merge with the special purpose vehicle and become the wholly-owned subsidiary of the holding company.[133] The holding company would thus circumvent acquiring the liabilities of the target company, as they are now held by its wholly-owned subsidiary. Shareholders of the target company would then receive either cash or shares in the holding company, as consideration for their shares.[134]

[130] Delport et al. 2012. *Henochsberg on the Companies Act 71 of 2008* Accessed online at www.lexisnexis.co.za.
[131] Cassim *op cit* note 20 702, cited in reference to Bainbridge. 2002. *Corporation Law and Economics* 628 and Clark. 1986. *Corporate Law* 405.
[132] *Ibid*.
[133] Cassim *op cit* note 20 705.
[134] Cassim *op cit* note 20 707.

(iii) Reverse triangular mergers

Conversely, in the reverse triangular merger procedure that is similar in structure to the triangular merger, the target company remains while the subsidiary company disappear.[135]

In other words, the acquirer is the wholly-owned subsidiary company, which acts as the acquisition vehicle for the merger with the target.[136] The essential difference between the triangular merger and the reverse triangular merger structure is that in the triangular merger, the target company mergers with the wholly-owned subsidiary company, and the subsidiary company remains in existence as the surviving company. In the reverse triangular merger, it is the target company that is the surviving company, as the special purpose vehicle merges with the target company and thereafter deregisters by the operation of law.[137] As such, the target company becomes the wholly-owned subsidiary of the true acquirer, being the holding company. The shareholders of the target company usually give up their shares for cash or shares in the holding company, as consideration for the merger.[138]

(iv) Freeze-out mergers[139]

In this form of merger, the acquiring company usually holds securities in the target company as the majority or controlling shareholder. Such controlling shareholder could initiate a freeze-out merger between itself as acquirer and the company as the target, with the purpose of eliminating the interests held in that company by minority

[135] Delport *op cit* note 130.
[136] Cassim "The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 2)" (2008) MERC LJ 147.
[137] *Ibid*.
[138] *Ibid*.
[139] Cassim *op cit* note 136 148.

shareholders. As a result of the freeze-out merger, the controlling shareholder would remain the sole shareholder in the company, while the minority shareholders of the company would be eliminated or 'frozen out', usually in return for a cash consideration or other securities or property or shares which the controlling shareholder would issue in its capacity as the acquiring party in the freeze-out merger.[140] It is evident that this form of statutory merger may result in protection being sought by the minority shareholders who are frozen out.

(v) Cash mergers[141]

Section 113(2)(d) of the Act provides that the amalgamation or merger agreement should state whether any securities of any of the amalgamating or merging companies are not to be converted into securities of any proposed amalgamated or merged company, and set out the consideration that the holders of those securities are to receive in addition to or instead of securities of any proposed amalgamated or merged company. One may conclude that such consideration may take the form of cash.

> "The underpinning policy of paying a cash consideration to the shareholders of the disappearing company is simply that shareholders do not have a vested right to continue to hold their investment as shareholders of the surviving merged entity, but could instead be 'cashed-out'."[142]

The option of a cash consideration, is arguably the simplest means of consideration, which it is submitted could go the furthest in enhancing the intention of the legislature.

[140] *Ibid*.
[141] Cassim *op cit* note 20 686 – 7.
[142] Cassim *op cit* note 9 687.

3.4. Consideration

As set out above, consideration can take various different forms. Consideration will also inform the classification of the transaction into a "type of merger". Consideration is defined in Section 1 of the Act as:

> "anything of value given and accepted in exchange for any property, service, act, omission or forbearance or any other thing of value, including—
> (a) any money, property, negotiable instrument, securities, investment credit facility, token or ticket;
> (b) any labour, barter or similar exchange of one thing for another; or
> (c) any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly;"

The definition is wide in scope, thereby giving the parties to the transaction many options.[143] This goes to the flexibility sought by the legislature. By virtue of the fact that the Act does not prescribe the form that consideration should take for the purpose of effecting a statutory merger, it is submitted that this enhances flexibility, simplicity and efficiency. There are however, numerous factors which influence the choice of the statutory merger consideration, be it in the form of shares, cash, other securities, other property or a mixture of these.[144] The choice will ultimately come down to the requirements of the target company's shareholders, who are to receive the consideration, and even possibly the tax consequences that come with each type of consideration.[145] The form that the amalgamation or merger will take is usually dictated by the consideration payable or in describing which entity will survive the merger and which entity will not survive the merger.

It is important to mention that where securities of a company proposing to merge are held by (or on behalf of) another party to the merger, the amalgamation and merger

[143] *Ibid*.
[144] Cassim *op cit* note 20 688.
[145] *Ibid*.

agreement should set out that such securities will be cancelled when the amalgamation or merger is effective, without a repayment of capital.[146] These shares cannot be converted into the shares of the merged or amalgamated company.[147] This is due to the fact that "the merged company would otherwise effectively hold shares in itself, and the merger would effectively result in an indirect reduction of the capital of the merged company."[148]

3.5. Clauses which may be found in amalgamation or merger agreements

As set forth above, merger and amalgamation agreements are public record and may be viewed by competitors of the constituent companies. Notwithstanding the aforementioned, and as a consequence of the latitude provided by the legislature, it would still be in the interests of constituent entities to ensure that the amalgamation and merger agreements provide sufficient protection to the parties, through the inclusion of provisions which would safeguard their interests. Typical provisions which are normally found in commercial agreements could come to their aid in this regard. These provisions would include condition precedent, indemnities and warranties. The parties would agree to condition precedent fulfilment date(s), which would result in the agreement being a nullity in the event that the condition precedent are not fulfilled or waived by the parties on or prior to that date.

Some examples of condition precedent which may be found in an amalgamation or merger agreement would be that the board of directors of the acquiring company have approved the conclusion of the agreement; that the acquiring company as well as the target company will satisfy the solvency and liquidity test upon the implementation of the amalgamation or merger; the shareholders of the acquiring and target company

[146] Cassim *op cit* note 9 685.
[147] *Ibid*.
[148] *Ibid*.

have approved the amalgamation or merger by way of special resolution in accordance with the provisions of sections 113(5), 115(2)(a) of the Act read with Regulation 89(1).

Some examples of indemnities could include that none of the shareholders of the target or acquiring companies have given a notice objecting to the amalgamation or merger and wherein they wish to enforce their appraisal right in terms of section 164(3) of the Act and none of the shareholders of the acquiring or target companies have voted against the proposed amalgamation or merger.[149]

In addition, examples of warranties could be that the parties have authority to conclude the agreement; the conclusion of the agreement will not result in either party contravening applicable law or regulation to which such a party is subject; and concluding the amalgamation or merger agreement will not contravene the provisions of a party's constitutional documents, to name a few.[150]

It would be prudent for the constituent companies to an amalgamation or merger, to include provisions in the amalgamation or merger agreement which ensure that they are provided with sufficient information so as to allow themselves to apply the solvency and liquidity test.[151]

3.6. Dissenting shareholder protection

The Companies Act, 1973 provided for the derivative action as a means for minority shareholders to be protected from decisions of the majority shareholders or those

[149] Chief Registrar's Circular No 8 of 2015 accessed at https://www.lawsoc.co.za/upload/files/crc_2015_08_amalgamationshell.pdf on 18 November 2018.
[150] *Ibid*.
[151] Yeats *op cit* note 121 5 - 12.

taken by the board of directors. The Act has retained the statutory derivative action together with the application to court in the case of business combinations, as means to protect dissenting shareholders, but has included the innovative appraisal right which may be relied upon by minority shareholders seeking relief from oppressive or prejudicial conduct.[152] This study briefly discusses the appraisal right as it is noteworthy to mention that certain types of statutory mergers, such as the 'freeze-out' merger or one with a cash consideration may be opted for as a means to eliminate minority shareholders.[153]

3.7. Appraisal rights procedure as set out in section 164 of the Act 2008

At any time prior to a resolution to enter into a transaction contemplated in terms of section 113 of the Act (being the focus of this study), or any other Fundamental Transaction, being voted on, a dissenting shareholder may give the company a written notice objecting to the resolution.[154] In the UK case of *Hogg v Cramphorn*[155] the court found that the appraisal right is designed to prevent a dilution of the majority shareholder's interest and strength by the directors exercising their power or issuance in an improper manner, be it for their own personal benefit or to prevent some other occurrence. In the event that the dissenting shareholder does not submit a written notice objecting to the statutory merger, timeously, the shareholder may lose the appraisal right. The notice of objection is therefore an important pre-requisite for the exercise of an appraisal right.[156] The notice of objection should be sent to the company as soon as the statutory merger is proposed by the board of directors of the company, before the resolution is voted on by the shareholders of the constituent

[152] Cassim *op cit* note 20 756.
[153] Cassim *op cit* note 20 709 and 711.
[154] S 164(3) of the Companies Act, 2008.
[155] *Hogg v Cramphorn Ltd* [1967] 1 Ch 254.
[156] Cassim *op cit* note 20 at 800.

companies.[157] The requirement in the Act of the notice of objection being given prior to the shareholders voting on the matter provides the board of directors with the opportunity to revisit its strategy, especially where there is a large number of minority shareholders dissenting to the transaction.[158] This, it is submitted, enhances transparency in the process, as intended by the legislature and is conversely, and arguably a very good tactical advantage.

In terms of section 164(4) of the Act within 10 business days after the company has adopted a resolution, the company must send a notice that the resolution has been adopted to each shareholder who gave the company a written notice of objection as described above, and who has neither withdrawn the notice or voted in support of the resolution.[159] Such dissenting shareholder may demand that the company pay him or her the fair value for all of the shares of the company held by him or her if the shareholder sent the company a notice of objection, the company adopted the resolution to enter into a statutory merger, the shareholder voted against such resolution and complied with all of the procedural requirements of section 164 of the Act.[160]

Following the satisfaction of the aforesaid requirements, the dissenting shareholder may deliver a written notice to the company demanding that the company pay him or her the fair value of all of the shares of the company held by him or her, within twenty business days after receiving a notice as contemplated in section 164(4) of the Act.[161]

[157] *Ibid*.
[158] *Ibid*.
[159] S 164(4) of the Companies Act, 2008.
[160] S 164(5) of the Companies Act, 2008.
[161] "Section 164 Companies Act: A guide for navigating the treacherous terrain of S164 in the era of shareholder activism and opportunism: accessed at https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Corporate/corporate-and-commercial-alert-25-february-section-164-companies-act-a-guide-for-navigating-the-treacherous-terrain-of-s164-in-the-era-of-shareholder-activism-and-opportunism.html on 26 October 2019.

Alternatively, if the dissenting shareholder does not receive a notice contemplated in section 164(4) of the Act, he or she may deliver a written notice within twenty business days after learning that such resolution has been adopted.[162]

The aforementioned demand is further, required to be delivered to the Takeover Regulations Panel (hereinafter referred to as the TRP) and should state the shareholder's name and address, the number and class of shares in respect of which the shareholder seeks payment and same should set out a demand for payment of the fair value of those shares.[163] The shareholder making such demand has no further rights in respect of those shares, other than to be paid fair value, unless the shareholder withdraws that demand before the company makes an offer in respect of such shares, or allows an offer made by the company to lapse.[164] A further instance where the shareholder would retain its rights other than to be paid fair value for its shares, would be in the event that the company failed to make an offer and the shareholder withdraws the demand of the company, by a subsequent special resolution, and the company revokes the adopted resolution that gave rise to the shareholder's appraisal rights.[165] Should any of the aforesaid events occur, all of the shareholder's rights in respect of the shares would be reinstated without interruption.[166]

Within 5 business days after the later of the day on which the action approved by resolution is effective, the last day for the receipt of demands as set out in section 164(7)(a) of the Act or section 164(7)(b) of the Act (if applicable), the company must send to each shareholder who has sent such a demand a written offer to pay an

[162] S 164(7) of the Companies Act, 2008.
[163] S 164(8) of the Companies Act, 2008.
[164] S 164(9)(a) of the Companies Act, 2008.
[165] SS 164(9)(b) and (c) of the Companies Act, 2008.
[166] S 164(10) of the Companies Act, 2008.

amount considered by the company's directors to be the fair value of the relevant shares, accompanied by a statement showing how the value was determined.[167] Every offer made in respect of shares of the same class or series must be on the same terms and such offer shall lapse if it has not been accepted within 30 business days after it was made.[168] If a shareholder accepts an offer, the shareholder must either in the case of shares evidenced by certificates, tender the relevant share certificates to the company or the company's transfer agent; or in the case of uncertificated shares, take the steps required in terms of section 53 of the Act to direct the transfer of those shares to the company or the company's transfer agent and the company must pay that shareholder the agreed amount within 10 business days after the shareholder accepted the offer and tendered the share certificates or directed the transfer to the company of uncertificated shares.[169]

A shareholder who has made a demand may apply to a court to determine a fair value in respect of the shares that were the subject of that demand, and an order requiring the company to pay the shareholder the fair value so determined, if the company has failed to make an offer for the shares or made an offer that the shareholder considers to be inadequate, and that offer has not lapsed.[170] On an application to the court all dissenting shareholders who have not accepted an offer from the company as at the date of the application, must be joined as parties and are bound by the decision of the court.[171] Further, the court must notify the affected dissenting shareholder of the date, place and consequences of the application and of their right to participate in the court proceedings and the court may determine whether any other person is a dissenting shareholder who should be joined as a party. The court must determine a

[167] S 164(11) of the Companies Act, 2008.
[168] S 164(12) of the Companies Act, 2008.
[169] S 164(13) of the Companies Act, 2008.
[170] S 164(14) of the Companies Act, 71 of 2008.
[171] S 164(15)(a) of the Companies Act, 2008.

fair value in respect of the shares of all dissenting shareholders.[172]

The court in its discretion, may appoint one or more appraisers to assist in determining the fair value in respect of the shares or allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the shareholder is effective, until the date of payment.[173] In comparison to the United States, the are Delaware courts propose a method of determining 'fair value' of shares, namely the 'discounted cash flow methodology' which is based on the premise that the value of a company equates to the present value of its projected future cash flows.[174] The court may make an appropriate order of costs, having regard to any offer made by the company, and the final determination of the fair value by the court and the court must make an order requiring the dissenting shareholders to either withdraw their respective demands or to comply with section 164(13)(a) of the Act.[175] The court may order the company to pay the fair value in respect of their shares to each dissenting shareholder who complies with section 13(a) of the Act subject to any conditions the court considers necessary to ensure that the company fulfills its obligations in terms of the Act.[176]

At any time prior to the court making an order, the shareholder may accept the offer made by the company, in which case the shareholder would be required to comply with section 13(a) of the Act, more specifically –

> "the shareholder must tender the relevant share certificates to the company or the company's transfer agent, in the case of shares evidenced by certificates. In the case of uncertificated shares, the shareholder must take the requisite steps (in terms of

[172] SS 164(b), (c)(i) and (ii) of the Companies Act, 2008.
[173] S 164(c)(iii) of the Companies Act, 2008.
[174] Cassim *op cit* note 136 169. See further Olaofe Appraisal Right and Fair Value Determination under the Companies Act No 71 2008: A Critical Analysis (LLM dissertation 2013 UCT).
[175] SS 164(c)(iv) and (v)(aa) of the Companies Act, 2008.
[176] S 164(c)(v)(bb) of the Companies Act, 2008.

section 53) to direct the transfer of the shares to the company or its transfer agent."[177]

It is noteworthy to mention that if the resolution that gave rise to a shareholder's appraisal rights authorised the company to amalgamate or merge (effect a statutory merger) with one or more other companies, such that the company whose shares are the subject of a demand has ceased to exist, the obligations of that company are the obligations of the successor to that company resulting from the amalgamation or merger.[178] In light of the fact that the courts have limited involvement in the actual merger process itself, the appraisal right provides a safeguard for shareholders of the merging companies.[179]

3.8. Conclusion

It is evident from the above that the amalgamation or merger, a seemingly simple and effective means to effect a business combination, may have layers of complexities associated therewith when one dives deeper into the rationale behind the types of merger structures selected by constituent companies. Such effects may result in minority shareholders seeking protection from the actions of the majority. It is submitted that the legislature has unmistakably provided enough latitude for the statutory merger to be structured to suit the desired outcome of the parties. Irrespective of the outcome, this chapter sought to evidence the flexibility of the statutory merger as a means to effect business combinations. The legislative requirement to set out certain provisions in the amalgamation and merger agreement further goes towards displaying the transparency sought by the legislature.

[177] Cassim *op cit* note 20 at 804.
[178] S 164(18) of the Companies Act, 2008.
[179] Davids *op cit* note 8 at 353.

CHAPTER 4: SECTION 116 AND ITS EFFECTIVENESS IN ENHANCING TRANSPARENCY, FLEXIBILITY AND EFFICIENCY OF BUSINESS COMBINATIONS

4.1. Introduction

While Chapters 2 and 3 of this study have discussed the origins of the statutory merger, and have described what the statutory merger is by setting out the requirements prescribed by the Act, Chapter 4 seeks to outline whether through the provisions of the Act which relate to the implementation of the statutory merger (with a focus on regulatory approvals), the legislature has, on a practical level, succeeded in meeting its intention to enhance transparency, flexibility and efficiency of business combinations.

4.2. Implementation of a Statutory Merger

Section 116 of the Act sets out the process to implement a statutory merger. Once the statutory merger has satisfied all of the approval requirements set out in section 115 of the Act (and as described in Chapters 2 and 3 of this study) and to the extent that no objections are raised by creditors within the 15 day period, the parties may proceed to implement the statutory merger in accordance with the said provision.[180]

It is noteworthy to mention that the aforesaid 15 day waiting period has been considered by authors such as Davids *et al* to pose a risk to the statutory merger.[181] Essentially, the waiting period is said to largely undermine the statutory merger and contribute to its underutilization.[182] Davis *et al* go further to state that it is unclear why

[180] S 116(1) of the Companies Act, 2008.
[181] Davids *op cit* note 8 365.
[182] *Ibid*.

creditor notification is required when the directors of the company have applied themselves to the solvency and liquidity test, which as stated earlier in this study,[183] essentially contemplates an assessment of the financial circumstances of a company to ensure that the company's assets equal or exceed its liabilities and that the company will be able to pay its debts as they become due in the ordinary course of business for a period of 12 months after the date on which the test is considered. Notably, the term 'creditor' is defined by the Companies Amendment Bill[184] as a person to whom a company is or may become obligated in terms of any liability or other obligation that would be required to be considered by the company if it were applying the solvency and liquidity test set out in section 4 of the Act.

In terms of the Act, a director will be personally liable for any loss, damage or costs sustained by the company if the director was derelict in his / her duties insofar as the conduct of the business of the company in insolvent circumstances is concerned, or in circumstances where the director otherwise failed to vote against a resolution to which the solvency and liquidity test was applicable, in circumstances where the company did not satisfy that test.[185]

With the importance placed by the Act, 2008 on the duties of directors, which would include applying themselves to the solvency and liquidity test, it is not clear why the legislature included the 15 day notice period for creditors, as this further allows creditors to scrutinise the company's ability to repay its debts (which is the essence of the solvency and liquidity test). This may have been to promote the transparency sought by the legislature albeit that the Memorandum on the objects of the

[183] See paragraph 2.3 of this study.
[184] Companies Amendment Bill B40 of 2010.
[185] SS 44(6)(b), 46(6)(b) and 48(7)(b) of the Companies Act, 2008.

Companies Bill,[186] is silent on the legislature's intention in this regard. The Act, needless to say, offers no guidance in this regard either.

In addition to the above, section 116(1)(b) provides that a creditor who objects to the proposed statutory merger, once notice has been furnished to it, may seek leave to apply to a court for a review of the statutory merger on the grounds that the creditor will be materially prejudiced by the statutory merger. It is submitted that this creates further inefficiencies to the statutory merger procedure, with this being one of the few instances where court involvement is required, it may lead to protracted litigation to which the proposed transaction hinges upon, albeit that the right to apply for review justifies the notice requirement.

It is submitted that section 116(1) plays the role of a 'gate keeper' to a proposed statutory merger transaction, as it creates a barrier to entering the implementation stage of the statutory merger. Only once the provisions of section 116(1) are overcome, may the constituent entities proceed to implement the statutory merger. This, it is submitted, on a practical level, goes against the efficiency and flexibility sought by the legislature. It is further noteworthy to mention that the Delaware General Corporation Law,[187] merely requires the board of directors of constituent entities to adopt a resolution approving the statutory merger and declaring same to be in the best interests of the company. It is interesting that the legislature in South Africa, went a step further to ensure besides approvals being obtained and the solvency and liquidity test being satisfied, that "creditor approval" in a sense, is further obtained.

[186] Guidelines for Corporate Law Reform *op cit* note 1.
[187] S 251(b) of the *Delaware General Corporation Law*, 2001.

4.3. Regulatory Approvals

The Act at section 116 not only requires the satisfaction of the requirements set out in section 113 and section 115 of the Act, but that the parties to the statutory merger obtain approval in terms of the Competition Act,[188] consent of the Minister of Finance in terms of section 54 of the Banks Act or approval of the Registrar of Securities Services in terms of section 64 of the Financial Markets Act, if so required by that act.[189] In addition, the Act provides for "further approval by any regulatory authority."[190]

Katz notes in respect of competition laws that one should distinguish between the substance of such merger control laws and the procedure for evaluating the mergers after same have been notified.[191] Katz submits that the process is too "lawyered" and may result in a lengthy civil litigation.[192] Katz further points out that this is an aspect which may result in uncertainty, cost and delay which he submits chokes off M&A activity.[193]

It is noteworthy to mention that additional considerations have been provided for by the legislature at section 12A of the Competition Act (the assessment of whether a merger will substantially prevent or lessen competition).[194] This includes:

[188] S 116(4)(a)(ii) of the Companies Act, 2008.
[189] S 116(4)(a)(iii) of the Companies Act, 2008.
[190] S 116(4)(a)(iv)(aa) of the Companies Act, 2008.
[191] Katz Deal Makers Q3 2017 Feature accessed online at http://dealmakers.co.za/Common/Doc/DealMakers%2018yrs.pdf on 23 September 2019 6.
[192] *Ibid.*
[193] *Ibid.*
[194] "A New Competition Act" accessed at https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/practice-areas/downloads/A-New-Competition-Act.pdf accessed on 18 October 2019.

(a) a consideration of the extent of common ownership and directorships by the merging entities with firms in related markets;[195]

(b) a consideration of the mergers entered into by the constituent entities within a recent period, as determined by the Competition Commission;[196] and

(c) public interest considerations, which involves the Competition Commission and the Competition Tribunal considering the impact of the merger on small, medium and micro enterprises and historically disadvantaged person ("HDP") firms and the promotion of a greater spread of ownership, including to workers.[197]

The amendments to the Competition Act largely codify merger control policy already in effect, such as the public interest considerations which have always been taken into account. The impact of the amendments is however, said to lead to more complicated merger filings as additional information is required to be furnished to the Competition Commission to assist in a determination of the above considerations.[198]This, it is submitted does not assist in enhancing the efficiencies sought by the legislature.

4.3.1. Takeover Regulations Panel

Section 121 of the Act, provides that any person making an offer which, if accepted, would result in an affected transaction is required to comply with all of the reporting

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[195] *Ibid.*
[196] Competition Alert 13 February 2019 accessed at https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Competition/Competition-alert-13-february-competition-amendment-bill-signed-into-law.html on 18 October 2019.
[197] *Ibid.*
[198] *Ibid.*

or approval requirements of Part C of Chapter 5 of the Act and the Takeover Regulations, except to the extent that the TRP has granted an exemption. In addition, parties are prohibited from giving effect to an affected transaction unless the TRP has either issued a compliance certificate or has granted an exemption in respect of the specific transaction.[199] The TRP has largely been influenced by the United Kingdom's City Code, which was designed to play a supervisory function and regulate takeover and merger activity.[200] The Corporate Law Reform, as highlighted in paragraph 2.1 of this study sought clarity on the role of the TRP.

4.3.2. South African Reserve Bank Approval in Cross-border Statutory Mergers

Exchange control regulations provide that a party cannot transfer any shares to a non-resident without the approval of the exchange control department of the South African Reserve Bank (SARB), which consent must be obtained through an authorised dealer.[201] The rationale behind this is to ensure that residents of South Africa who require funds from outside the Common Monetary Area (hereinafter referred to as CMA) (being Lesotho, Namibia, South Africa and Swaziland (now called Eswatini))[202] do not acquire such funds by purchasing securities in the CMA and selling them abroad without accounting for the proceeds in foreign currency or Rand, from a non-resident Rand account.[203]

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[199] Luiz, "Some comments on the scheme of arrangement as an "affected transaction" as defined in the Companies Act 71 of 2008" (2012) *PELJ* 105.
[200] Slaughter and May "A Guide to Takeovers in the United Kingdom" available at https://www.slaughterandmay.com/media/39320/a-guide-to-takeovers-in-the-united-kingdom.pdf accessed on 21 September 2019 3.
[201] "The International Comparative Legal Guide to: Mergers & Acquisitions 2018" 12th Edition accessed at https://www.ensafrica.com/Uploads/Images/news/ICLGMergersandAcquisitions2018-SouthAfrica.pdf on 22 September 2018.
[202] Swaziland king renames country 'the Kingdom of eSwatini' accessed at https://www.bbc.com/news/world-africa-43821512 on 22 October 2019.
[203] "Currency and Exchanges guidelines for business entities" accessed at https://www.resbank.co.za/RegulationAndSupervision/FinancialSurveillanceAndExchangeControl/Docum

4.3.3. Income Tax

Interestingly, section 44(1) of the Income Tax Act[204] defines an 'amalgamation transaction' as any transaction in terms of which any company (the amalgamated company) disposes of all of its assets (other than assets it elects to use to settle any debts incurred by it in the ordinary course of its trade) to another company (resultant company) which is a resident by means of an amalgamation, conversion or merger and as a result of which that amalgamated company's existence will be terminated (unless such person forms part of the same group of companies immediately before and after the disposal).[205] Section 44 of the Income Tax Act, states further that an amalgamating company must dispose of its assets to the new company to be formed in order for section 44 to apply to the transaction, and therefore result in the parties being afforded with the tax relief contemplated by the section. What is unfortunate from this provision is that the definition of 'amalgamation' in fact defines a merger and an amalgamation, as defined in the Act is not provided for. This leaves open the question of how amalgamations would be dealt with in terms of this section or whether one may assume the same to apply to both amalgamation and mergers.

4.4. The Transfer of Assets and Liabilities by the Operation of Law

Section 116(7) of the Act states that when an amalgamation or merger has been implemented, which should be noted is to be in accordance with the content of the amalgamation or merger agreement, the property of each amalgamating or merging

ents/Currency%20and%20Exchanges%20Guidelines%20for%20Business%20Entities.pdf on 22 September 2018.

[204] Income Tax Act 58 of 1962.

[205] Visagie The Reach and Implication of Section 45(4)(b) of the Income Tax Act 58 of 1962 (LLM dissertation 2015 UP) 8.

company becomes the property of the newly amalgamated, or surviving merged, company or companies and each newly amalgamated or surviving merged company is liable for all of the obligations of every amalgamated or merging company, in accordance with the provisions of the amalgamation or merger agreement, or any other relevant agreement, but in any case, subject to the requirement that each amalgamated or merged company must satisfy the solvency and liquidity test. Henochsberg[206] summarises the position to be that the property of the companies are therefore "allocated" in ownership by operation of law as set out in the amalgamation or merger agreement or any other relevant agreement but subject to the solvency and liquidity test being satisfied.

Delport[207] notes that if as a consequence of a statutory merger there is a transfer of property registered in terms of any public regulation that is to be effected to an amalgamated or merged company, copies of the amalgamation or merger agreement and the notice of amalgamation or merger constitute sufficient evidence to effect the transfer of the registration or that property.[208]Although "property" has been defined in the common law, the Act neither defines "property" nor does it specify what type of property (moveable or immoveable, corporeal or incorporeal) is referred to in the afore said section.[209]

4.5. Property law and the transfer of assets by the operation law

In terms of South African property law, transfer depends on the classification of property.[210] As such, in the case of corporeal movable property, delivery of

[206] Delport *op cit* note 130.
[207] Delport *op cit* note 14 at 129.
[208] Delport *op cit* note 3 at 129.
[209] Delport *op cit* note 130.
[210] Hutchison, et al. 1991. *Willie's principles of South African Law* 296. See also Mostert, et al. 2010. *The principles of the law of property in South Africa* Oxford University Press Southern Africa.

possession is necessary; in the case of a corporeal immovable, registration against the title deeds of the land is essential; in the case of incorporeal property a cession is required and in the case of immovable property, the cession must in addition be registered against the title deeds.[211] Real rights in land are only transferred upon registration, more specifically, "when the deed of transfer, bond, lease, or servitude is signed by the Registrar of Deeds."[212]

In the case of trade marks, transfer of proprietorship takes place in terms of a "transfer agreement". Section 39(1) of the Trade Marks Act,194 of 1993[213] (hereinafter the Trade Marks Act), states that subject to any rights appearing from the register, a registered trade mark is assignable and transmissible, either in connection with or without the goodwill of the business concerned in the goods or services in respect of which it has been registered. Section 39(7) of the Trade Marks Act, provides that no assignment of a registered trade mark or a trade mark which is the subject of an application for registration shall be of any force or effect unless it is in writing and signed by or on behalf of the assignor. Section 40(1) of the Trade Marks Act states further that where a person becomes entitled by assignment or transmission to a registered trade mark, he shall make application on the form prescribed to the registrar to register his title, and the registrar shall on receipt of the application and of proof of title to his satisfaction, register him as the proprietor of the trade mark and shall cause particulars of the assignment or transmission to be entered in the register.

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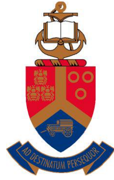
211 *Ibid*.
212 *Ibid*.
213 Hereinafter referred to as the Trade Marks Act.



Henochsberg[214] rightly points out, in addition to the above, that personal servitudes cannot be transferred in the case of a statutory merger and are apparently extinguished.[215] In addition,

> "the provision in section 116(7) of the Companies Act 2008, implies that the property "becomes the property" of the amalgamated or surviving merged company and that the transfer of property, as opposed to the consensual allocation of the property, is *ex lege* and not consensual or otherwise based on contract".[216]

It is submitted that the legislature fails to take into account the fact that areas of property law have not developed to the extent to allow for transfer by the operation of section 116(7) of the Act as same requires more than the implementation of the merger for transfer of such property to be effected. In the case of trade marks, which may form the good will of a company and often be a driver behind effecting the statutory merger, the requirements of the Trade Mark Act would still need to be complied with. This goes against the efficiency and simplicity sought by the legislature.

4.6. Commercial Agreements

It has been interesting to note that the Act does not expressly provide for the transfer of commercial agreements in section 116.[217] Nicol,[218] submits however, that perhaps transfer of contracts may fall under section 116(7)(a) of the Act insofar as they relate to the rights derived by parties in contracts, and section 116(7)(b) of the Act may apply insofar as it relates to the transfer of contractual obligations.[219] It is however,

[214] Delport *op cit* note 130.
[215] See also *Ex parte Marchini* 1964 (1) SA 147 (T) 150F.
[216] *Ibid*.
[217] Nicol "The legal effect of amalgamations and mergers upon third-party contracts containing anti-transfer provisions" (2013) SA Merc LJ 30.
[218] *Ibid*.
[219] Nicol *op cit* note 217 at 31.

noteworthy to point out that section 116(7) of the Act does include a proviso that its operation is to be 'in accordance with the provisions of the amalgamation or merger agreement, or any other relevant agreement'.[220]

> "Essentially, the proviso makes the automatic transfer of a third-party contract subject to the terms thereof; hence, it is submitted that a carefully drafted anti-transfer clause providing explicitly that the contract will not survive the statutory merger (an 'anti-merger-transfer-clause') will be effective to prevent the vesting of the contract in the merged company".[221]

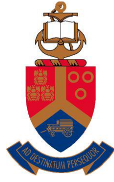
This proviso would therefore, not apply where a contract is silent on transferability. Such contracts, it is submitted, would simply be transferred by the operation of law.[222]

A further noteworthy point is that the provisions of section 116 of the Act are silent in respect of the process to be followed in respect of personal contracts which require performance by a particular person. This is an oversight which may result in the ineffectiveness of the statutory provisions as it inhibits the transfer of performance which may be sought by the acquiring party to a statutory merger.

4.7. Conclusion

It is submitted that the provisions of section 116 of the Act contains several negative provisions, as set out above, which may result in parties to a statutory merger incurring significant costs and time delays in attempting to implement a statutory merger. By providing that creditors may seek leave of the court in section 116(1) of the Act, the legislature created an obstacle which may halt the implementation of the statutory merger all together or contribute greatly to its underutilisation. Further, the regulatory approvals which are required, evidence that the statutory merger may not

[220] *Ibid*.
[221] *Ibid*.
[222] Nicol *op cit* note 217 at 31-2.



be as efficient as sought by the legislature. It is interesting that the legislature did not provide for certain of these approvals to take effect by the operation of law, or on the satisfaction of certain criteria.

Depending on the amalgamation and merger agreement and the desired outcome of the constituent entities, parties could see themselves faced with complying with numerous regulatory requirements which in turn further involve costs and time delays. Finally, the transfer of assets by the operation of section 116(7)(a) of the Act fails to account for the fact that South African property law has not evolved to such an extent as to allow all the assets and liabilities of constituent companies to be transferred *ex lege*. The legislature fails to provide that certain transfer of property is in fact by virtue of agreement between the parties, such as the transfer of trade marks. The proviso in section 116(7)(a) of the Act, which subjects the transfer of property to provisions of 'any other relevant agreement' may result in the prevention of transfer of such property should such agreement contain anti-transfer provisions.[223]

[223] Nicol *op cit* note 217 at 35.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

The statutory merger provisions contained in the Act are seemingly simple, straight forward, and appear to allow constituent entities latitude to decide on certain aspects relative to the merger, such as the content of the amalgamation or merger agreement, other than what has been prescribed by section 113(2) of the Act and the form which the statutory merger will take. The statutory merger provisions of the Act allow for the combining of assets and liabilities, as well as the transfer of property by the operation of law. All of which may be considered to facilitate an efficient and effective means of merging companies. The regulatory approvals required by the Act enhance the transparency of the process and arguably, the notice to creditor requirement in section 116(1) of the Act further serves the same function. However, this study has set out various loopholes and ambiguities in the drafting of the statutory merger provisions which may result in time delays and costs being incurred only for parties to proceed to the stage of implementing the statutory merger.

Albeit that the innovations contained in the Act result in a departure from the traditional and historic adherence to English company law, as was the case in the Companies Act, 1973 (which traditional stance has been retained by certain jurisdictions such as England and Australia, which do not contain a 'court-free' statutory merger procedure), this study identified some inadequacies with the intention to be in line with foreign jurisdictions. Chapter 4 of this study identified some stumbling blocks which go against the intention of the legislature to enhance efficiency and flexibility in the process.

Some recommendations are therefore, respectfully proposed below:

(i) The amendment of the definition of 'amalgamation or merger' in section 1 of the Act is proposed, as it is currently misleading. The two concepts should be distinguished through separate definitions, for the sake of clarity.

(ii) The provision of mechanisms to terminate the amalgamation and merger agreement, where parties for whatever reason make the decision to no longer proceed to implementing same. Delaware General Corporation law[224] provide that the directors of a company in a proposed statutory merger have the right to terminate the merger at any time before same is implemented, despite shareholder approval having been obtained in what is referred to as a Material Adverse Change clause.[225] In the event that regulatory approvals, court approval or the appraisal right threaten the statutory merger, this provision may come to the assistance of the parties.

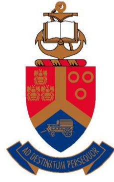
(iii) The need for the waiting period following notice to creditors, as provided in section 116(1) of the Act despite the satisfaction of the solvency and liquidity test by the company's board of directors, should be qualified to state that it facilitates a review application following an incorrect conclusion being arrived at, potentially, following the application of the solvency and liquidity test, as ordinarily, satisfaction of the solvency and liquidity test should prove sufficient to evidence to creditors that they will not be prejudiced by the statutory merger being effected.

[224] *Delaware General Corporation Law 2001*, section 251(d).
[225] Nickig "Triggers for withdrawing from M&A deals" (2010) Without Prejudice 20 accessed through Sabinet Online at https://journals-co-za.uplib.idm.oclc.org/docserver/fulltext/jb_prej/10/11/jb_prej_v10_n11_a11.pdf?expires=1569073300&id=id&accname=57715&checksum=487B52AE0CF75BEC7C965E25BF9AEC8E on 21 September 2019.

(iv) The inclusion of a section in the Act which deals with agreements which may be subject to an anti-transfer clause or a non-assignment clause, or contain personal rights incapable of being transferred. Interestingly enough, neither American Delaware Law nor Canadian law from which the statutory merger was adopted, provide a solution to this, which is stated to be a controversial and uncertain aspect of statutory mergers.[226]

(v) A solution is required with respect to areas of law which have not developed enough to withstand the innovations of the statutory merger provisions.

[226] Kleitman "Giving us an American headache" (2013) Without Prejudice 20 accessed through Sabinet online at https://journals-co-za.uplib.idm.oclc.org/docserver/fulltext/jb_prej/13/6/jb_prej_v13_n6_a8.pdf?expires=1569074095&id=id&accname=57715&checksum=5BD9804DF05CBE2C5549F7B385F5BCE2 on 21 September 2019.



BIBLIOGRAPHY

Primary Sources

<u>Statutes and bills</u>

Banks Act 90 of 1994.

Canada Business Corporations Act, 1985.

Companies Act 61 of 1973.

Companies Act 71 of 2008.

Companies Amendment Act 3 of 2011.

Companies Bill (draft) in GN R166 GG 29630 of 12-02-2007.

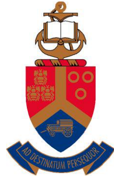
Competition Commission Act 89 of 1998.

Delaware General Corporation Law Title 8, Chapter 1 of the Delaware Code.

Financial Markets Act 19 of 2012.

Income Tax Act 58 of 1962.

Memorandum on the objects of the Companies Bill, 2008 [B 61D-2008].



The Corporate Law Reform Policy (published in GG 26493 of 23 June 2004).

Trade Marks Act 194 of 1993.

Case law

Ex parte Marchini 1964 (1) SA 147 (T) 150F.

Firstrand Bank Ltd v Wayrail Investments (Pty) Ltd [2013] 2 All SA 295 (KZN).

Hogg v Cramphorn Ltd [1967] 1 Ch 254.

Utopia Vakansie-oorde v Du Plessis 1974 (3) SA 148 (AD).

Secondary Sources

Books

Bainbridge, Stephen M "*Corporation Law and Economics"* (2002) Foundation Press.

Cassim, Farouk HI; Cassim, Maleka Femida; Cassim, Rehana; Jooste, Richard; Shev, Joanne and Yeats, Jacqueline "*Contemporary Company Law*' 2ed (2012) Juta & Co Ltd, Claremont.

Clark, Robert Charles "*Corporate Law" 2 ed* (1986) Aspen Publishers.

Delport, Piet "*Henochsberg on the Companies Act 71 of 2008*" (2014) LexisNexis, Durban.

Delport, Piet "*The New Companies Act Manual"* (2011) LexisNexis, Durban.

Hutchison, Dale; van Heerden, Belinda; Visser, D P and van der Merwe, C G "*Willie's principles of South African Law*" 8 ed. (1991) Juta & Co.

Kenyon-Slade, Stephen "*Mergers and Takeovers in the US and UK Law and Practice*" (2004) Oxford.

Mostert, Hanri; Pope, Anne; Badenhorst, P J "*The principles of the law of property in South Africa"* Oxford University Press Southern Africa (2010).

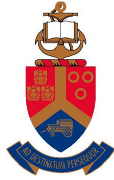
Webster, G C; Page, N S; Webster, C E and Morley, G E "*South African Law of Trademarks"* (1997) LexisNexis, Durban.

Yeats, JL; de la Harpe, RA; Jooste, RD; Stoop, H; Cassim, R; Seligmann, J; Kent, L; Bradstreet, RS; Williams, RC; Cassim, MF; Swanepoel, E; Cassim, FHI & Jarvis, KA "*Commentary on the Companies Act of 2008 Volume 2*" (2018) Juta & Co Ltd, Claremont.

Journal Articles

Boardman, Nigel "A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008" (2010), Modern Company Law for a `competitive South African Economy, Tshepo Mangalo (ed.), Acta Juridica 306.

Cassim, Maleka Femida "The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 1)" (2008) 20 SA Merc LJ 1.



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

Cassim, Maleka Femida "The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 2)" (2008) 20 SA Merc LJ 147.

Cassim, Maleka Femida "The statutory merger in South African law" (2008) 16 Juta's Business Law 40.

Cassim, Maleka Femida "The appraisal remedy and the oppression remedy under the Companies Act of 2008, and the overlap between them" (2017) SA Merc LJ 305.

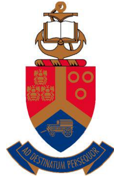
Castañeda, Julián J Garza "Appraisal Rights: The "Fair" Valuation of Shares in case of Dissent" (1999) September – December *The University of Mexico Law Journal* 809.

Davids, Ezra; Norwitz, Trevor and Yuill, David "A microscopic analysis of the new merger and amalgamation provisions in the Companies Act 71 of 2008' in Tshepo Mongalo (ed.) Modern Company Law for a Competitive South African Economy" (2010) Juta & Co Ltd, Claremont.

Latsky, Johan "The Fundamental Transactions Under the Companies Act: A Report Back from Practice After the First Few Years" (2014) 2 Stell LR 361.

Luiz, Stephanie "Some comments on the scheme of arrangement as an "affected transaction" as defined in the Companies Act 71 of 2008" (2012) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 101.

Mostert, et al. 2010. *The principles of the law of property in South Africa* Oxford University Press Southern Africa.



Nicol, Byron Lloyd "The legal effect of amalgamations and mergers upon third-party contracts containing anti-transfer provisions" (2013) 25 SA Merc LJ 30.

Nkoane, Paul "Is there a need for Mandatory Offers in Company Takeover? A critical analysis" (2015) Obiter 363.

Internet Sources

www.lexisnexis.co.za

Explanatory Memorandum to the Companies Bill accessed at www.uct.ac.za/usr/companylaw/downloads/legislation/Companies_Bill_2007.pdf on 26 October 2019.

Basil Mashabane 'Appraisal rights and protection of minority shareholders' *De Rebus* in 2016 (Dec) *DR* 30 accessed at http://www.derebus.org.za/appraisal-rights-protection-minority-shareholders/ on 01 September 2018.

Chief Registrar's Circular No 8 of 2015 accessed at https://www.lawsoc.co.za/upload/files/crc_2015_08_amalgamationshell.pdf on 18 November 2018.

Competition Commission website accessed at http://www.compcom.co.za/mergers-and-acquisitions/ on 22 September 2018.

Currency and Exchanges guidelines for business entities accessed at https://www.resbank.co.za/RegulationAndSupervision/FinancialSurveillanceAndExc

hangeControl/Documents/Currency%20and%20Exchanges%20Guidelines%20for%20Business%20Entities.pdf on 22 September 2018.

Ezra Davids and David Yuill *Negotiated M&A Guide* accessed at https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwj_h8T1i9TdAhXoAMAKHaFNAPoQFjAAegQIChAC&url=https%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3DD626A8E6-EA23-4830-BE48-297D5D81667D&usg=AOvVaw1uao0F0ftPhcnL9WhvFpPD on 24 September 2018.

Title 8 Chapter 1: General Corporation Law subchapter IX. Merger, Consolidation or Conversion' accessed at http://delcode.delaware.gov/title8/c001/sc09/index.shtml on 03 July 2018.

The International Comparative Legal Guide to: Mergers & Acquisitions 2018 12th Edition accessed at https://www.ensafrica.com/Uploads/Images/news/ICLGMergersandAcquisitions2018-SouthAfrica.pdf on 22 September 2018.

Yuill, David 'The New South African Merger Procedure' Expert Guide - Mergers and Acquisitions June 2013, accessed at http://www.bowman.co.za/FileBrowser/ArticleDocuments/Expert-Guide-MergersandAcquisitions-2013.pdf, on 18 August 2014.

Title 8 Chapter 1: General Corporation Law subchapter IX. Merger, Consolidation or Conversion' accessed at http://delcode.delaware.gov/title8/c001/sc09/index.shtml on 03 July 2018.

Section 164 Companies Act: A guide for navigating the treacherous terrain of S164 in the era of shareholder activism and opportunism accessed at https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Corporate/corporate-and-commercial-alert-25-february-section-164-companies-act-a-guide-for-navigating-the-treacherous-terrain-of-s164-in-the-era-of-shareholder-activism-and-opportunism.html on 26 October 2019.

Competition Alert 13 February 2019 accessed at https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Competition/Competition-alert-13-february-competition-amendment-bill-signed-into-law.html on 18 October 2019.

A New Competition Act accessed at https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/practice-areas/downloads/A-New-Competition-Act.pdf on 18 October 2019.

Slaughter and May ‘A Guide to Takeovers in the United Kingdom’ available at https://www.slaughterandmay.com/media/39320/a-guide-to-takeovers-in-the-united-kingdom.pdf on 21 September 2019.

Swaziland king renames country 'the Kingdom of eSwatini' accessed at https://www.bbc.com/news/world-africa-43821512 on 22 October 2019.

Jared Nickig ‘Triggers for withdrawing from M&A deals’ (2010) 10 Without Prejudice 20 accessed through Sabinet Online at https://journals-co-za.uplib.idm.oclc.org/docserver/fulltext/jb_prej/10/11/jb_prej_v10_n11_a11.pdf?expires=1569073300&id=id&accname=57715&checksum=487B52AE0CF75BEC7C965E25BF9AEC8E on 21 September 2019.

Yaniv Kleitman 'Giving us an American headache' (2013) 13 Without Prejudice 20 accessed through Sabinet online at https://journals-co-za.uplib.idm.oclc.org/docserver/fulltext/jb_prej/13/6/jb_prej_v13_n6_a8.pdf?expires=1569074095&id=id&accname=57715&checksum=5BD9804DF05CBE2C5549F7B385F5BCE2 on 21 September 2019.

M Katz Deal Makers Q3 2017 Feature accessed online at http://dealmakers.co.za/Common/Doc/DealMakers%2018yrs.pdf on 23 September 2019.

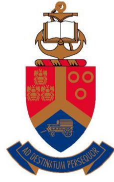
"Model Business Corporation Act (2016 Revision) Launches" American Bar Association accessed at https://www.americanbar.org/groups/business_law/publications/blt/2017/01/08_mbca/ on 24 January 2020.

Dissertation and Thesis

Kangueehi, N.C *Mergers and acquisitions as a strategy for business growth: A comparative overview* (unpublished LLM Mini Thesis, University of Cape Town, 2015).

Masondo, N *The protection of shareholders and creditors in the context of takeovers and reorganisations under the Companies Act 71 of 2008* (unpublished LLM dissertation, University of Pretoria, 2018).

Olaofe, AR Appraisal Right and Fair Value Determination under the Companies Act No 71 2008: A Critical Analysis (unpublished LLM dissertation, University of Cape Town, 2013).



Pessenbacher, S *An analysis of the amalgamation and merger procedure in South African company law* (unpublished LLM dissertation, University of Cape Town, 2017).

Soobyah, A N *Mergers and amalgamations under the Companies Act No. 71 of 2008* (unpublished LLM dissertation, University of Pretoria, 2014).

Visagie, J *The reach and implication of section 45(4)(b) of the Income Tax Act 58 of 1962* (unpublished LLM dissertation, University of Pretoria, 2015).