The role of the independent expert in schemes of arrangement and share repurchase transactions under the Companies Act 71 of 2008

by

Roxanne Cheryl Bain

Submitted in fulfilment of the requirements for the degree

LLM

In the Faculty of Law,
University of Pretoria

October 2019

Supervisor : Professor MF Cassim

Abstract

This mini-dissertation constitutes a critical analysis of the requirements relating to independent experts in the context of schemes of arrangement and share repurchase transactions under the Companies Act 71 of 2008. In particular, the historical development of the expert requirement, its purpose and its intended beneficiaries, is explored. Furthermore, a selection of material issues and considerations relating to the expert requirement are critically analysed, including: (i) the meaning of s 114(3) of the Act and the overlap between the expert report required by ss 114(2) and (3) of the Act and the expert opinion required by the Companies Regulations, 2011; (ii) the meaning of 'fairness and reasonableness' under reg 90(6) of the Companies Regulations; (iii) the timing of the distribution of the expert report; (iv) the role of the expert report in facilitating other remedies under the Act; (v) the extent to which the expert may make recommendations in the report and the opinion; and (vi) the role of the board of directors in relation to the expert report and opinion. Finally, the extent to which compliance with the expert requirement may be validly avoided is considered. In this regard, the particular question of whether the expert requirement is capable of being validly waived is critically analysed.

University of Pretoria

Declaration of originality

Full names of student: Roxanne Cheryl Bain

Student number: 28213107

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.

2. I declare that this mini-dissertation (e.g. essay, report, project, assignment, mini-dissertation, dissertation, thesis, etc) is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.

3. I have not used work previously produced by another student or any other person to hand in as my own.

4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Signature of student:.....

Signature of supervisor:.....

Acknowledgements

I would like to thank:

- My supervisor, Professor Cassim, for her guidance and for being a role model to me in my career.
- Professor Rian Cloete and Dr Willem Gravett, for giving me the opportunity to work in academia and for their mentorship and encouragement.
- My parents and my partner, Jerain Naidoo, for their endless support, love and patience.

Table of contents

I INTRODUCTION

(a) Background

In terms of s 114(1) of the Companies Act 71 of 2008,[1] the board of a company may propose a scheme of arrangement between the company and the holders of any class of the company's securities. In terms of ss 114(2) and (3) of the Act, an independent expert must be retained by the company to provide a report in respect of a scheme of arrangement. Broadly speaking, the requirement is that a suitably qualified, experienced, competent and impartial person must provide a report to security holders which explains the material effects of the transaction in question.[2]

In terms of s 48(8)*(b)* of the Act, any transaction (or 'integrated series of transactions') in terms of which a company repurchases more than 5 per cent of a particular class of its issued shares is 'subject to the requirements of sections 114 and 115'. Therefore, an independent expert must also be retained by the company in accordance with ss 114(2) and (3) to provide a report in respect of a share repurchase transaction contemplated in s 48(8)*(b)* of the Act.

Where an 'affected transaction'[3] involving a 'regulated company'[4] is entered into, Part B and C of the Act and the 'Takeover Regulations'[5] apply in respect of that transaction.[6] As a result, such transaction may not be given effect to unless a compliance certificate has been issued by the Takeover Regulation Panel[7] in terms of s 119(4) of the Act or the TRP has exempted that transaction from the application of Part B and C of the Act and the Takeover Regulations in terms of s 119(6) of the Act.[8] In terms of the Takeover Regulations, amongst other things, the 'independent board'[9] of the 'offeree regulated company'[10] must 'obtain appropriate external

---

[1] Hereafter, the 'Act'.
[2] Sections 114(2) and (3) of the Act.
[3] As defined in s 117(1)*(c)* of the Act.
[4] As defined in s 118(1) read with reg 91(1) of the Companies Regulations, 2011 in GN 351 in *GG* 34239 of 26 April 2011 as amended by GN 619 in *GG* 36759 of 20 August 2013 and GN 82 in *GG* 37299 of 5 February 2014 (hereafter, the 'Companies Regulations').
[5] Being regs 81–122 of the Companies Regulations (see s 121 of the Act).
[6] Sections 118(1), 120 and 121 of the Act.
[7] Hereafter, the 'TRP'.
[8] Section 121 of the Act.
[9] Defined in reg 81*(j)*).
[10] As defined in reg 81(o)(ii)*(bb)*.

advice from an independent expert in the form of a fair and reasonable opinion'.[11] A fair and reasonable opinion is the expert's opinion as to the 'fairness and reasonableness of the consideration for an offer taking account of value and price'.[12] This opinion must be taken into account by the independent board 'in forming its own opinion on an offer consideration'.[13] In terms of s 117(1)*(c)*(iii) of the Act, 'a scheme of arrangement between a regulated company and its shareholders' constitutes an affected transaction. Therefore, if a scheme of arrangement is proposed between a regulated company and the holders of any class of that company's securities, both an independent expert report in terms of ss 114(2) and (3) of the Act and a fair and reasonable opinion by an independent expert in terms of reg 110 of the Takeover Regulations is required.[14]

There are overlaps between the requirements relating to the report and the opinion.[15] As Luiz points out, 'much of the information required to be included in the report by the independent expert would obviously cover similar ground to that which would be covered by the fair and reasonable opinion'.[16]

A question that arises is whether a share repurchase by a regulated company in terms of s 48(8)*(b)* of the Act would also technically trigger *both* the requirement for a report in terms of the Act and an opinion in terms of the Takeover Regulations. The answer depends on whether a share repurchase in terms of s 48(8)*(b)* of the Act constitutes a 'scheme of arrangement',[17] which is unclear.[18] A detailed analysis of this issue is beyond the scope of this dissertation.

---

[11] Regulation 110(1).
[12] Regulation 81*(h)*.
[13] Regulation 110(2).
[14] As confirmed by SM Luiz 'Some comments on the scheme of arrangement as an "affected transaction" as defined in the Companies Act 71 of 2008' (2012) 15 *PER* 102 at 112–113 and 127 and Johan Latsky 'The fundamental transactions under the Companies Act: A report back from practice after the first few years' (2014) 2 *Stell LR* 361 at 369–370.
[15] Luiz (2012) op cit note 14 at 112–113 and 127 and Latsky op cit note 14 at 369–370.
[16] Luiz (2012) op cit note 14 at 113.
[17] Luiz (2012) op cit note 14 at 110–12.
[18] See generally Latsky op cit note 14 at 380–2, Luiz (2012) op cit note 14 at 107–10 and Piet Delport (ed) (formerly edited by Hon Mr Justice PM Meskin) *Henochsberg on the Companies Act 71 of 2008* vol 3 (2018) at 208.

(b) Rationale for research

A critical analysis of the expert requirement is important in light of the fact that retaining an independent expert in terms of the Act is both expensive and time consuming and has been described as 'inappropriate and unnecessary' in certain circumstances.[19] Understanding the reasons for the requirement and the extent to which its purpose is served by the particular provisions of the Act and the Takeover Regulations is therefore essential. This will also lead to a better understanding of the extent to which the requirement for an independent expert can and should be capable of valid avoidance by, for example, obtaining a waiver by all security holders.[20] Share repurchase transactions have several advantages[21] and schemes of arrangement are a popular takeover method.[22] It is therefore important to understand and critically analyse the requirements of such transactions, including those relating to independent experts.[23]

(c) Research problem

In light of the above, a critical analysis of the requirements relating to independent experts in the context of schemes of arrangement and share repurchase transactions is needed.

(d) Research questions

In the context of schemes of arrangement and share repurchase transactions:

i. What is the purpose of the requirement for an independent expert?

---

[19] Latsky op cit note 14 at 370.
[20] Ibid at 370–1; Gary Felthun and Shannon Neill 'Share repurchases and waiving the independent expert's report', Legal Times 6 September 2013 at 1, available at *https://www.ensafrica.com/Uploads/Images/news/6_September_2013_-_The_Legal_Times_-_Share_repurchases_and_waiving_the_independent_experts_report.pdf*, accessed on 2 April 2019 and Yaniv Kleitman 'Life under the Companies Act' (2013) 13 *Without Prejudice* 23 at 23–4.
[21] F.H.I Cassim 'The new statutory provisions on company share repurchases: A critical analysis' (1999) 116 *SALJ* 760 at 773 and Henning, Delport & Katz et al *Reform of South African Corporate Law: Purchase by a Company of its Own Shares* (1998) at 88–9.
[22] Luiz (2012) op cit note 14 at 105 and 111; Latsky op cit note 14 at 368 and SM Luiz 'Protection of holders of securities in the offeree regulated company during affected transactions: General offers and schemes of arrangements' (2014) 26 *SA Merc LJ* 560 at 561.
[23] Luiz (2012) op cit note 14 at 105, 111 and 113.

ii. Who are the beneficiaries of the requirement?
iii. Is the purpose of the expert requirement properly served by the provisions of the Act and the Takeover Regulations? What are some of the material issues and considerations in this regard?
iv. Is it legally possible to avoid having to comply with the requirement to retain an independent expert to report on a transaction? In particular, is it legally competent for security holders to unanimously waive the requirement?

(e) Methodology

The research conducted for purposes of this dissertation will take the form of a desktop study. The relevant provisions of the Act and the Takeover Regulations will be reviewed and critically analysed. This analysis will be done with reference to relevant case law and academic commentary (in the form of books and journal articles). Where appropriate, applicable provisions of the 1973 Act and the Securities Regulation Code on Takeovers and Mergers[24] will be considered, together with relevant case law decided in respect thereof and academic commentary thereon.

This research will focus predominantly on relevant South African law. A detailed comparative approach will therefore not be adopted. However, where appropriate and useful, the legal position in certain foreign jurisdictions where an independent expert plays a role in the context of share repurchases, schemes of arrangement and/or other analogous or comparable takeover procedures, will be considered. In this regard, reference will be made to Australian law,[25] Canadian law[26] and the law of New Zealand.[27]

[24] Securities regulation code on takeovers and mergers and the rules under section 440C (4) (a), (b), (c) and (f) of the Companies Act, 1973 in GN 29 *GG* 12962 of 18 January 1991 (as amended) (hereafter, the 'Code').
[25] Tony Damian & Andrew Rich *Schemes, Takeovers and the Himalayan Peaks: The use of Schemes of Arrangement to Effect Change of Control Transactions* 3 ed (2013) at 261–7. The position under Australian law with regard to independent expert perhaps most closely resembles the position under South African law (Ibid at 261–7 and 683–686). Therefore, greater reliance will be placed on the position in Australia.
[26] Ibid at 659.
[27] Ibid at 667.

(f) Limitations

The possibility of having to retain an independent expert to report and/or opine on transactions other than schemes of arrangement and share repurchase transactions will not be addressed in this dissertation. In dealing with the potential for a company to validly avoid the requirement for an independent expert, the focus will primarily be on the legal competency of a waiver of the requirement by security holders, while other options will only be briefly pointed out. The potential consequences of failing to comply with the expert requirements is beyond the scope of this dissertation.

(g) Referencing

The referencing style of the South African Law Journal will be used in this dissertation.

II THE HISTORICAL DEVELOPMENT OF THE INDEPENDENT EXPERT REQUIREMENT, ITS PURPOSE AND ITS BENEFICIARIES

(a) Introduction

In this chapter:

i. The purpose of the expert requirement will be critically analysed. This will be done with reference to, amongst other things, the historical development thereof. In this regard, the position under the 1973 Act and the Code will be compared to the position under the current Act and the Takeover Regulations.
ii. The question of whether security holders are the sole beneficiaries of the expert requirement will be critically analysed.

(b) The position under the 1973 Act and the Code

i. Schemes of arrangement

Prior to the Act, ss 311 to 313 of the 1973 Act regulated schemes of arrangement and compromises. In terms of s 311 of the 1973 Act, a court had to sanction a meeting of securities holders or creditors[28] for purposes of considering the scheme or compromise[29] and, if at such meeting the scheme or compromise was approved by a 75 per cent majority,[30] the scheme or compromise would only be binding on all members or creditors[31] if sanctioned by a court.[32] Sections 311 to 313 of the 1973 Act did not provide for an independent expert report in the context of a scheme of arrangement. However, in terms of s 312 of the 1973 Act, a 'statement' (also called an 'explanatory statement')[33] had to be sent together with the notice of meeting to consider the scheme, which statement had to include certain prescribed information.[34] The information prescribed by s 312(1)*(a)* of the 1973 Act has been

[28] Or any class of them.
[29] Section 311(1) of the 1973 Act.
[30] 'In value of the creditors or class of creditors' or 'of the votes exercisable by the members or class of members, (as the case may be) present and voting' at the meeting (s 311(2)*(a)–(b)* of the 1973 Act).
[31] Or any class of them.
[32] Section 311(2) of the 1973 Act.
[33] Carl Stein & Geoff Everingham *The New Companies Act Unlocked* (2011) at 293.
[34] Section 312(1)*(a)* of the 1973 Act.

described as 'the equivalent' of s 114(3) of the current Act.[35] However, the explanatory statement in terms of s 312 of the 1973 Act was not required to be prepared by an independent expert, but rather by the company.[36] Similar to the independent expert report,[37] the purpose of the explanatory statement was to 'enable the recipient to decide how to vote'.[38]

Under the 1973 Act, if the scheme of arrangement gave rise to an 'affected transaction' and the Code applied to the company in question,[39] the scheme of arrangement was also subject to the provisions of the Code.[40] The Code did not require an independent expert report or a fair and reasonable opinion.[41] However, a comparable provision was contained in rule 3 of the Code,[42] which stated that the board of the offeree company was required to 'obtain appropriate external advice on any offer as to how it affects all holders of securities, including specifically, where applicable, minority holders of securities', which advice was required to be made available to the relevant security holders 'in a form and manner approved by the Panel'.[43]

The purpose of the Code generally was to 'ensure fair and equal treatment of all holders of relevant securities in relation to affected transactions'.[44] The 'spirit of the Code' required the taking into account of principles such as equal treatment of security holders and provision of information to security holders as well as time to digest such information in order to make informed decisions.[45] Clearly, the requirements in rule 3 of the Code relating to the 'external advisor' would have facilitated this purpose.[46] However, the Code did not regulate the role and function of the external advisor in any real detail (at least not to the extent that the

---

[35] Stein & Everingham op cit note 33 at 293.
[36] Ibid at 293.
[37] Luiz (2012) op cit note 14 at 111.
[38] Cilliers, Benade & Henning et al *Cilliers and Benade Corporate Law* 3 ed (2000) at 457.
[39] See s A(3) of the Code.
[40] See s 440A(1) of the 1973 Act.
[41] Stein & Everingham op cit note 33 at 356.
[42] Maleka Femida Cassim '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 at 17. See also Stein & Everingham op cit note 33 at 356.
[43] Rule 3.1 of the Code.
[44] Explanatory Notes (1) of the Code.
[45] Section C(2) of the Code.
[46] Given that this provision is comparable to the independent expert requirement under the current Act (as pointed out above) and given that, broadly speaking, the purpose of the expert requirement under the current Act is to assist security holders in deciding how to vote (which will be discussed in detail below) (Luiz (2012) op cit note 14 at 111).

independent expert's role and functions are currently regulated by the Act and the Takeover Regulations).[47]

ii. Share repurchases

Share repurchases were regulated by ss 85 to 87 of the 1973 Act. In terms of s 85(1), a company could only repurchase its issued shares if its articles of association authorised share repurchases and such transaction was approved by special resolution of the shareholders of the company. The approval in terms of the special resolution could either be general or specific.[48] A share repurchase under the 1973 Act did not require an independent expert to be appointed to report on the transaction, nor did it require an explanatory statement akin to that provided for in s 312 of the 1973 Act. In terms of ss 87(1) to (4) of the 1973 Act, certain prescribed information had to be included in an offering circular to be distributed to shareholders, but this could easily be circumvented because such a circular was not required if the approval was specific rather than general.[49] In this way, a company could 'easily avoid proper disclosure and the equal treatment of shareholders'.[50]

(c) The purpose of the independent expert requirement under the current Act

i. Schemes of arrangement

A scheme of arrangement is a 'fundamental transaction' which 'fundamentally [alters] a company'.[51] Importantly, unanimous consent to a scheme of arrangement is not required for it to be binding on all security holders (subject to s 115 of the Act).[52] In these circumstances, it is necessary to equitably balance 'majority rule and minority shareholder protection', as is the case with respect to all fundamental

[47] Stein & Everingham op cit note 33 at 356.
[48] Section 85(2) of the 1973 Act.
[49] Section 87(2) of the 1973 Act. See FHI Cassim (1999) op cit note 21 at 774–777 and Kathleen van der Linde 'Share repurchases and the protection of shareholders' 2010 *TSAR* 288 at 299.
[50] van der Linde op cit note 49 at 300. See also FHI Cassim (1999) op cit note 21 at 774.
[51] Maleka Femida Cassim 'Fundamental transactions, takeovers and offers' in Farouk HI Cassim (managing ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) at 672.
[52] Delport op cit note 18 at 410(4).

transactions.[53] There are various minority shareholder protection mechanisms in place under the Act to achieve this,[54] including (amongst others) the requirement for an independent expert to report on the scheme of arrangement in terms of ss 114(2) and (3) of the Act, which is a 'transparency and accountability requirement designed to protect minority shareholders'.[55] In general, 'reporting, disclosure and transparency' are crucial aspects of the Act.[56] These are important for 'a proper corporate law regime' as well as 'managerial and directorial accountability'.[57] Disclosure and transparency is considered to be 'the best guarantee of fair dealing and the best deterrent against fraud, mistrust and suspicion'.[58] Thus the independent expert requirement, as a disclosure mechanism, plays a vital role in our corporate law regime.[59] This is because the report is intended to 'aid the holders of securities in the company in coming to a decision on whether or not to vote in support of the special resolution proposing the scheme of arrangement'.[60] Similarly, in the context of Australian law, the purpose of the expert report has been described as 'an expression' of the principle that disclosure of information assists in protecting 'the legitimate interests of investors, shareholders or offerees of a takeover offer and, in a wider sense, [facilitates] the development of a more efficient market'.[61]

Not only must the expert report explain, broadly speaking, the material effects of the arrangement on the rights and interests of security holders as well as the

---

[53] Latsky op cit note 14 at 362. See also MF Cassim (2008) op cit note 42 at 11 and MF Cassim 'Fundamental transactions' (2012) op cit note 51 at 691.

[54] Unlike under s 311 of the 1973 Act, the sanction of the court is not required to hold a meeting to consider a scheme, nor is court sanction required for the scheme to be binding. Court involvement in schemes of arrangement arises only in limited circumstances (see ss 115(3), (5), (6) and (7) of the Act). However, a scheme of arrangement must be approved by special resolution of the persons entitled to vote on such matter, at a meeting at which persons entitled to exercise at least 25 per cent of the voting rights in respect of that matter are present (s 115(2)*(a)* of the Act). Unlike under s 311 of the 1973 Act, for purposes of calculating the quorum and special resolution thresholds in terms of s 115(2)*(a)* of the current Act, the 'voting rights controlled by an acquiring party, a person related to an acquiring party, or a person acting in concert with either of them' are excluded (s 115(4) of the Act). Dissenting shareholders are also entitled to exercise appraisal rights (ss 115(8) read with 164 of the Act).

[55] Stein & Everingham op cit note 33 at 292.

[56] Farouk HI Cassim 'Introduction to the new Companies Act: General overview of the Act' in Farouk HI Cassim (managing ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) at 14.

[57] Ibid.

[58] Ibid.

[59] Laurie McDonald, Grant Moodie & Ian Ramsay et al *Experts' Reports in Corporate Transactions* (2003) at 1, where a similar point is made in an Australian law context.

[60] Luiz (2012) op cit note 14 at 111. See also MF Cassim (2008) op cit note 42 at 16–17, where the author similarly submits that adequate disclosure is crucial for shareholders in a merger context so that they are able to 'make a properly informed decision on the merits of the merger'.

[61] McDonald, Moodie & Ramsay et al op cit note 69 at 1.

business and prospects of the company[62], but any effect on the material interests of directors and trustees for security holders must also be explained.[63] Similarly, s 312(1)*(a)(iii)* of the 1973 Act provided that the explanatory statement must explain the material interests of directors and the effect on such interests of the arrangement (or compromise). Case law developed in terms of s 312(1)*(a)* of the 1973 Act emphasised the need for full and proper disclosure of directors' interests in the explanatory statement, including, for example, directors deposing to affidavits setting out their interests in both the pre-transaction and post-transaction company structure,[64] setting out alternatives to the proposed transaction in the statement[65] and fully explaining any benefits which directors might receive as a result of the transaction to the detriment of scheme participants.[66] These principles continue to apply under the current Act.[67] Managerial accountability as a consequence of disclosure (mentioned above as an important aspect of the Act), thus clearly forms part of the purpose of the expert report as a protection mechanism for security holders. This is because directors will be deterred from abusing their power by proposing a transaction which is solely in *their* (the directors') interests, and not the interests of the company and the security holders.[68]

Ultimately, when comparing the provisions relating to schemes of arrangement under the current Act to those under the 1973 Act, it appears that the requirement for an independent expert report (together with the extended protections under ss 115 and 164 of the Act) has in effect replaced the minority shareholder protection mechanism of mandatory court approval for all schemes of arrangement under the 1973 Act.[69]

In terms of s 119(1) of the current Act, the TRP must regulate affected transactions involving regulated companies in terms of the relevant takeover

---

[62] Section 114(3)*(a)–(d)*.
[63] Section 114(3)*(e)–(f)* of the Act.
[64] *Ex parte Seafare Investments Ltd* 1970 (1) All SA 31 (C) at 32–3. Henochsberg submits that such affidavits may need to be annexed to the expert report (Delport op cit note 18 at 414(1)).
[65] *Singer NO v MJ Greeff Electrical Contractors (Pty) Ltd* 1990 (3) All SA 513 (W) at 518.
[66] Ibid at 518–519.
[67] Delport op cit note 18 at 414(1)–(2).
[68] A similar argument is made by Delport op cit note 18 at 208 and by van der Linde op cit note 49 at 305 in relation to share repurchases, discussed further below. See also McDonald, Moodie & Ramsay et al op cit note 69 at 3, where a similar argument is made in an Australian law context.
[69] Nigel Boardman 'A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008' 2010 *Acta Juridica* 306 at 315, Stein & Everingham op cit note 33 at 294 and MF Cassim 'Fundamental transactions' (2012) op cit note 51 at 675.

provisions in order to, first, preserve marketplace integrity and fairness to security holders, secondly, ensure that holders of securities are afforded the necessary information to 'facilitate the making of fair and informed decisions' and thirdly, to ensure that holders of securities and regulated companies have adequate time 'to obtain and provide advice with respect to offers'. Once again it is clear from s 119(1) that, as mentioned above, disclosure and transparency in the interests of fairness is of fundamental importance under the Act. As will be borne out further from the analysis below, the requirement for a fair and reasonable opinion under the Takeover Regulations, which, like the report, is clearly also a form of disclosure, can be said to be designed to further the aims set out in s 119(1) of the Act.[70] Luiz points out that the consideration of the independent expert report and the fair and reasonable opinion in respect of an offer clearly serves the purpose of assisting security holders to decide 'whether or not to accept any offer that would result in an affected transaction'.[71] The Takeover Regulations (including the requirement for a fair and reasonable opinion) further these aims to a greater extent than rule 3 of the Code did[72] given the more extensive and detailed requirements that apply to the opinion under the Takeover Regulations.[73]

ii. Share repurchases

Like a scheme of arrangement, a share repurchase can '[alter] the nature of the company'.[74] The need for shareholder protection in share repurchase transactions is borne out by the various risks which such transactions pose to shareholders, particularly in relation to the price paid for the shares by the company.[75] A share repurchase transaction may allow one shareholder[76] to 'obtain an unfair advantage over another shareholder'.[77] For example, if the repurchase price is too low, the shareholders who do not sell their shares will receive a benefit at the selling

[70] Luiz (2014) op cit note 22 at 564.
[71] Luiz (2014) op cit note 22 at 564–5.
[72] Stein & Everingham op cit note 33 at 356. See also Boardman op cit note 69 at 336.
[73] Stein & Everingham op cit note 33 at 356.
[74] FHI Cassim (1999) op cit note 21 at 764.
[75] Henning, Delport & Katz et al op cit note 21 at 89–90, FHI Cassim (1999) op cit note 21 at 774–75 and van der Linde op cit note 49 at 288–89.
[76] Or a group of shareholders.
[77] Or a group of shareholders. Henning, Delport & Katz et al op cit note 21 at 81. See also FHI Cassim (1999) op cit note 21 at 774.

shareholder's expense.[78] This can be an issue even in 'consensual sales' in the event that 'price sensitive information' is being withheld from the selling shareholder by the company.[79] Importantly, share repurchases in terms of s 48 of the current Act will be based on 'contract and therefore consensus' between the particular shareholder or shareholders (seller/s) and the company (purchaser).[80] Even so, 'the preferential treatment of some shareholders *vis-a-vie* others is patent'.[81] Thus, the mere fact that the terms of a share repurchase were contractually agreed between a selling shareholder/s and the purchasing company does not necessarily mean that there is no potential for abuse at the expense of the selling shareholder/s. A further potential risk regarding price is that, in the event that the repurchase price is too high, 'the value of the shareholding of non-selling shareholders will be diluted'.[82] Furthermore, in the context of takeovers, share repurchases could allow a 'reluctant target company' to fend off a takeover by way of 'greenmail' (i.e. 'by purchasing the shares of the perceived raider at a premium over market price or making a payment to a shareholder, in return for a promise not to make a take-over bid').[83] In the context of share repurchase transactions, there is thus a need to address the potential problem of 'unfair or discriminatory treatment of minority shareholders'.[84]

There are many ways to achieve shareholder protection in share repurchases, including (amongst others) requiring shareholder approval by special resolution, as was the case under the 1973 Act.[85] Another 'useful measure against abuse' is disclosure.[86] Disclosure 'facilitates other remedies available to shareholders',[87] 'serves as a deterrent to "greenmail" payments made by the directors'[88] and creates a stumbling block to share repurchases which are unfair, due to fear of criticism on the part of the company 'following disclosure of the nature and effect of the

[78] van der Linde op cit note 49 at 288 and Henning, Delport & Katz et al op cit note 21 at 89.
[79] van der Linde op cit note 49 at 288.
[80] Delport op cit note 18 at 208.
[81] Ibid at 208.
[82] van der Linde op cit note 49 at 288, Henning, Delport & Katz et al op cit note 21 at 89 and FHI Cassim (1999) op cit note 21 at 774.
[83] FHI Cassim (1999) op cit note 21 at 774.
[84] Henning, Delport & Katz et al op cit note 21 at 90. See also FHI Cassim (1999) op cit note 21 at 774–777.
[85] Section 85(1) of the 1873 Act. See also van der Linde op cit note 49 at 289 and 305 and FHI Cassim (1999) op it note 21 at 762–764.
[86] van der linde op cit note 49 at 305. See also FHI Cassim (1999) op cit note 21 at 776.
[87] van der Linde op cit note 49 at 305. See also MF Cassim (2008) op cit note 42 at 16–17.
[88] FHI Cassim (1999) op cit note 21 at 776.

transaction'.[89] Henochsberg submits that s 48(8)*(b)*, by requiring compliance with, amongst others, the requirement for an independent expert report, 'may go some way to protect shareholders in a company from abuse of power by the directors'.[90] Moreover, according to Latsky, 'the independent expert's report is clearly intended for the benefit of the shareholders, who may be prejudiced if the repurchase price of the shares paid to them is either too high or too low'.[91]

A further indication of the purpose of the expert report in the context of share repurchase transactions is the fact that the Act links s 114 with s 115 in s 48(8)*(b).* It is submitted that a link between these two sections is logical for various reasons, including the fact that the report in terms of ss 114(2) and (3) of the Act is intended to assist shareholders in deciding whether to vote in favour of the transaction in question in accordance with s 115 of the Act (as discussed above). In order for the shareholder approval requirement to be effective, such shareholder approval must be given on an informed basis.[92]

In sum, therefore, the requirements relating to the independent expert and the report, which would have to include price sensitive information (amongst other things),[93] constitutes a shareholder protection mechanism in the context of certain share repurchase transactions by facilitating full and proper disclosure to shareholders. The expert requirement is clearly a more effective disclosure mechanism than the easily circumvented requirement to include certain information in the relevant circular under the 1973 Act (mentioned above).

(d) The beneficiaries of the independent expert requirement

Section 114(2)*(a)*(i)*(cc)* of the Act states that the expert must be able to 'assess the effect of the arrangement on … a *creditor* of the company' (amongst others).[94] This casts doubt as to whether the security holders are the *sole* beneficiaries of the report.[95] However, there are a number of considerations which suggest that creditors are not beneficiaries of the report.

---

[89] van der Linde op cit note 49 at 305.
[90] Delport op cit note 18 at 208. See also Stein & Everingham op cit note 33 at 190.
[91] Latsky op cit note 14 at 371.
[92] Henning, Delport & Katz et al op cit note 21 at 93.
[93] See for example s 114(1)*(a)*.
[94] Emphasis my own.
[95] Latsky op cit note 14 at 371.

First, s 114(3) provides that the expert must 'cause [the report] to be distributed to all holders of the company's securities'. The requirement that the report be distributed to all the holders of the company's securities 'would include at least some (but certainly not all) creditors, in the form of holders of debentures and other debt securities'.[96] Creditors as a body are therefore not entitled to receive the report and do not have the right (or even the ability) to benefit from the report *per say*, except in their capacity as security holders (if they *also* hold such capacity).

Secondly, in discussing the requirement for an independent expert report where a share repurchase is proposed in terms of s 48(8)*(b)* of the Act, Latsky stresses that the 'creditors as a body are not the beneficiaries of the report' because their interests are served in a different way.[97] The solvency and liquidity test under s 4 of the Act, which the board must apply where a share repurchase transaction is proposed, will only be satisfied if, first, it reasonably appears that the company will have 'a positive net asset value' and, secondly, it appears that the company will be 'able to satisfy its debts as they become due and payable' for a period of 12 months after the distribution (i.e. the payment of the consideration for the share repurchase by the company to the selling shareholder).[98] The solvency and liquidity test is a mechanism which protects creditors by ensuring that creditors are not 'prejudiced by the company denuding itself of material assets or incurring excessive liabilities' and 'that creditors will be paid timeously'.[99] Therefore, at least in the context of a share repurchase, the 'specific interests' of the creditors 'are not served by the report, but rather by the application of the solvency and liquidity test in terms of section 48 read with section 46 of the Act'.[100] Prejudice to creditors in the context of share repurchase transactions is 'excluded' by the application of this test.[101] Of course, schemes of arrangement will not necessarily attract the mandatory application of the solvency and liquidity test.[102] Nevertheless, as mentioned above, it is clear that in *all* cases the requirement is to distribute the report to the *security holders*, not the creditors as a body.

---

[96] Ibid at 371.
[97] Ibid at 371.
[98] Section 4 of the Act, s 48(2) read with s 46 of the Act and the definition of a 'distribution' in s 1 of the Act.
[99] Stein & Everingham op cit note 33 at 174.
[100] Latsky op cit note 14 at 371.
[101] Cilliers, Benade & Henning et al op cit note 38 at 324.
[102] See s 114(1) of the Act.

Thirdly, much of the prescribed content of the report (explained above) appears to be geared towards providing information which would be helpful to *security holders*. Aside from what has been mentioned above as to the content of the report, provisions of the Act which contain remedies available to *security holders* must also be included in the report.[103] The prescribed content thus does not appear to be catering for the specific interests of creditors (at least not directly) and thus an expert report would arguably be of little value to a creditor. It is also significant that, while 'the solvency and liquidity of the company may become apparent to the board' when taking into account the independent expert's report, it is not specifically a requirement under s 114 or the Takeover Regulations that reference be made to solvency and liquidity in the report or the opinion.[104] Nor is it specifically required that the independent expert 'consider or express an opinion on whether or not the company will be solvent and liquid immediately after implementing the scheme'.[105] The fact that s 114(3) of the Act does not specifically require an opinion as to solvency and liquidity is perhaps further indicative of an intention on the part of the legislature not to specifically protect creditors by way of the expert report. This is because, as mentioned above, the solvency and liquidity test is primarily a creditor protection mechanism.

(e) Conclusion

The independent expert requirement is a minority shareholder protection mechanism intended to assist security holders in deciding whether to vote in favour of a scheme of arrangement or share repurchase transaction in terms of s 48(8)*(b)* of the Act.[106] The requirement also serves as a check on managerial power.[107] In the context of schemes of arrangement, the expert requirement, together with s 115 of the Act, has effectively replaced the requirement under the 1973 Act that a court

[103] Section 114(1)*(g)* of the Act.
[104] Section 114(3) of the Act. Luiz (2012) op cit note 14 at 114.
[105] Ibid.
[106] Stein & Everingham op cit note 33 at 292, Luiz (2012) op cit note 14 at 111, Latsky op cit note 14 at 371, MF Cassim (2008) op cit note 42 at 11 and 16–17, MF Cassim 'Fundamental transactions' (2012) op cit note 51 at 691, McDonald, Moodie & Ramsay et al op cit note 59 at 1, Henning, Delport & Katz op cit note 21 at 90 and van der Linde op cit note 49 at 305.
[107] Section 114(3)*(e)–(f)* of the Act, Delport op cit note 18 at 208 and 414(1)–(2), van der Linde op cit note 49 at 305, FHI Cassim (2012) op cit note 56 at 14, *Seafare Investments* supra note 64 at 32–3, *Singer* supra note 65 at 518–519 and McDonald, Moodie & Ramsay et al op cit note 59 at 3.

approve all schemes of arrangement.[108] In the context of share repurchases, when compared to the 1973 Act, the expert requirement serves to increase the effectiveness of disclosure to shareholders.[109] The requirement for an expert opinion facilitates disclosure and minority shareholder protection and does so to a greater degree than the Code did.[110]

There is some uncertainty as to whether creditors are, together with security holders, intended to be beneficiaries of the independent expert requirement.[111] However, there are several considerations which suggest that security holders are the sole beneficiaries thereof.[112]

[108] Boardman op cit note 69 at 315, Stein & Everingham op cit note 33 at 294 and MF Cassim 'Fundamental transactions' (2012) op cit note 51 at 675.
[109] van der Linde op cit note 49 at 299–300 and 305, FHI Cassim (1999) op cit note 21 at 774–776 and Henning, Delport & Katz op cit note 21 at 93.
[110] Section 119(1) of the Act, Stein & Everingham op cit note 33 at 356, Luiz (2014) op cit note 22 at 654–5 and Boardman op cit note 69 at 336.
[111] Section 114(2)*(a)*(i)*(cc)* of the Act and Latsky op cit note 14 at 371.
[112] Latsky op cit note 14 at 371, s 114(3) and s 4 read with ss 46 and 48 of the Act, Stein & Everingham op cit note 33 at 174, Cilliers, Benade & Henning et al op cit note 38 at 324 and Luiz (2012) op cit note 14 at 114.

III A CRITICAL ANALYSIS OF A SELECTION OF MATERIAL ISSUES AND CONSIDERATIONS RELATING TO THE INDEPENDENT EXPERT REQUIREMENT

(a) Introduction

This chapter will consider whether the Act and the Takeover Regulations properly serve the intended purpose of the independent expert requirement, discussed in chapter II above. In this regard, a selection of material issues and considerations in relation to the expert requirement will be critically analysed. Where appropriate, suggestions will be made for law reform which would align the more granular provisions of the Act with the broader purpose of the expert requirement.

(b) The meaning of s 114(3) of the Act and the overlap between the report and the opinion

Importantly, s 114 of the Act does not provide that the disclosures set out in reg 90(6) of the Takeover Regulations must be included in the expert report. In other words, the expert report does not technically have to include a fairness and reasonableness opinion if the Takeover Regulations do not apply.[113] However, there are a number of indications (to be listed and discussed below) from academics and practitioners which suggest that the provisions relating to the opinion under the Takeover Regulations could be used (and are used in practice) to interpret and fulfil certain of the requirements set out in s 114 of the Act. As will be shown below, this approach is particularly used where the provisions contained in s 114(3) of the Act, which sets out the minimum information which the independent expert report must contain, are unclear. It should be noted that s 114(3) states that the information listed therein must, 'at a minimum', be included in the report. This language suggests that information beyond that which is specifically listed in s 114(3) may be

[113] As confirmed by Luiz (2012) op cit note 14 at 113.

included in the report. Thus, including the disclosures set out in the Takeover Regulations in the report would not be problematic.[114]

First, Rayner & Connellan submit that s 114(3)*(a)* 'provides supportive authority for the Regulations to prescribe the detailed valuation (and price) disclosures required'.[115] Section 114(3)*(a)* is a key example of a provision which is unclear. It provides that the report must 'state all prescribed information relevant to the value of the securities affected by the proposed arrangement', but does not explain what the 'prescribed information relevant to the value of the securities' is. Although Rayner and Connellan's point is made in the context of a discussion relating to regulated companies, where both a report and an opinion would be required (as explained above), the authors' view appears to be that the 'prescribed information' referred to in s 114(3)*(a)* of the Act should be interpreted to mean that which is set out in reg 90(6) of the Takeover Regulations, which contains several more detailed provisions relating to the value of the securities of the company in question.[116] The core provision in this regard is reg 90(6)*(c)* provides that the opinion must include (amongst other things) 'a clear expression of opinion dealing with the fairness and reasonableness of the offer consideration(s) in regard to holders of relevant securities, excluding the offeror'. An independent expert would 'clearly be required to conduct a valuation of the offeree regulated company and its securities' to be able to give this opinion.[117]

Secondly, Latsky states that s 114 of the Act 'requires that there be an independent expert's *report* relating to the *fairness and reasonableness* of the transaction'.[118] This is peculiar given that, as mentioned above, a 'fairness and reasonableness' opinion is only required for an opinion in terms of the Takeover Regulations and not for a report in terms of s 114 of the Act. Thus, Latsky's statement is indicative of a tendency to combine the requirements under reg 90(6) with those in s 114(3) of the Act.[119] Moreover, Latsky makes this point in the context

---

[114] Note also that a similar position applies in respect of reg 90(6), which prescribes information to be included in the opinion. That provision states that the information listed therein must 'amongst other things' be included in the opinion.
[115] KA Rayner & RJ Connellan *Commentary on South African Takeover Law* (2015) at 61.
[116] See regs 90(6)*(c)*, *(e)*, *(f)* and *(g)*.
[117] Luiz (2012) op cit note 14 at 112. See also regs 90(4)–(5).
[118] Latsky op cit note 14 at 370 (emphasis my own).
[119] See also practical evidence of this in 'Independent expert's report on the terms of the repurchase' prepared by Grant Thornton Advisory Services Proprietary Limited in Circular to MiX Telematics Limited shareholders, dated 14 June 2016 available at https://www.mixtelematics.com/category/22-

of share repurchase transactions in terms of s 48(8)*(b)* of the Act, which he goes on to argue are not 'schemes of arrangement' for purposes of s 117(1)*(c)*(iii) of the Act.[120] The implication of this is that the author appears to view an opinion as to the fairness and reasonableness of the consideration as forming part of the report, even if the Takeover Regulations do not apply to the company in question (i.e. even if the information set out in reg 90(6) does not technically have to be included in the report).

Thirdly, s 114(2)*(a)*(ii) provides that the independent expert must be 'able to express *opinions* [and] exercise *judgement'* (amongst other things).[121] This seems to suggest that an expression of an opinion (perhaps within the meaning of reg 90(6)) is indeed contemplated under s 114(3) of the Act.

Fourthly, in discussing the requirement that the expert compare 'the compensation receivable for loss of ownership of existing securities' against 'the material adverse consequences of the transaction',[122] Rayner & Connellan submit that 'the fair and reasonable opinion given by the [independent expert] discharges this duty of disclosure by disclosing whether the consideration receivable is fair and reasonable or not fair but reasonable or not fair and not reasonable'.[123] While the authors discuss these requirements in the context of companies which are subject to the Takeover Regulations (i.e. where both a report and an opinion would be required, explained above), it is still telling that they do not appear to consider the report and the opinion to be entirely separate insofar as their content is concerned.

Finally, there is evidence in practice of independent experts treating disclosures which are technically prescribed by the Takeover Regulations as part of the disclosures prescribed by s 114(3) of the Act.[124] Once again, although practical examples are only publicly available in respect of public (and therefore regulated) companies,[125] it is still significant that the two sets of requirements are not treated as entirely separate.

2016?Itemid=334&download=177, accessed on 15 July 2019 (hereafter, the 'MiX Telematics Independent Expert Report) at 20–2.

[120] Latsky op cit note 14 at 380–2.

[121] Emphasis my own.

[122] Section 114(3)*(d)*.

[123] Rayner & Connellan op cit note 115 at 62.

[124] MiX Telematics Independent Expert Report op cit note 119 at 20–2.

[125] Section 118(1) of the Act.

In sum, therefore, it appears that the valuation provisions in reg 90(6) of the Takeover Regulations could be included in the report for purposes of satisfying certain requirements under s 114(3) of the Act. However, this is not specifically provided for in the Act and it is submitted that, if the intention is for the information prescribed by reg 90(6) to be included in the report even if the Takeover Regulations do not technically apply, it would be logical for s 114(3) of the Act to be amended to specifically provide for this. This would not only provide clarity, but also ensure that the Act is properly aligned with the approach in practice and that security holders in companies to which the Takeover Regulations do not apply are always protected by full and proper disclosure.

(c) The meaning of 'fairness and reasonableness'

The phrase 'fairness and reasonableness' is not defined in the Takeover Regulations or the Act. Under Australian law, where a 'fair and reasonable' opinion by an independent expert is required for a takeover bid, the term 'fair and reasonable' is not considered to be a 'compound phrase'.[126] Rather, the phrase denotes two distinct criteria, namely fairness and, separately, reasonableness.[127] In the context of an Australian takeover bid, the offer in question would be 'fair' in circumstances where 'the value of the consideration is equal to or greater than the value of the securities [which are] the subject of the offer' and is 'reasonable' if it is fair.[128] If it is not fair, however, it could still be reasonable 'if the expert believes there are other reasons for security holders to accept the offer'.[129] For example, the favourable position of the shareholders in the restructured company could lead the expert to find that the price is reasonable even if it is not in line with the value of the securities.[130]

Rayner and Connellan, with reference to the South African Takeover Regulations, submit that fairness is 'linked to value', while reasonableness is 'linked

[126] ASIC Regulatory Guideline 111 'Content of expert reports' dated March 2011 at 15 available at https://download.asic.gov.au/media/1240152/rg111-30032011.pdf, accessed on 9 July 2019. See also Damian & Rich op cit note 25 at 264–7.
[127] ASIC Regulatory Guideline 111 op cit note 126 at 15 and Damian & Rich op cit note 25 at 264.
[128] Damian & Rich op cit note 25 at 265. See also ASIC Regulatory Guideline 111 op cit note 126 at 16.
[129] Ibid.
[130] Damian & Rich op cit note 25 at 267. See also ASIC Regulatory Guideline 111 op cit note 126 at 15–16.

to price'.[131] It appears that the authors may be adopting a similar approach as under Australian law, although it is not entirely clear as, with respect, no further explanation is provided for this statement. South African expert reports prepared for listed companies oftentimes explain the meaning of the phrase along the following lines:

> 'For illustrative purposes, in the case of a repurchase of shares, such repurchase may be said to be fair if the consideration paid is equal to or less than the fair value of the shares which is the subject of the transaction. In other instances, even though the consideration paid may be more than the fair value, the transaction may be said to be reasonable after considering other significant qualitative factors.' [132]

There is thus evidence of an approach similar to the Australian approach being adopted in practice by independent experts in South Africa. It is submitted that, ideally, the legislature should clearly define the meaning of the phrase or, as has been done by the Australian Securities and Investments Commission,[133] the TRP should publish comprehensive guidelines in this regard.[134]

(d) The timing of the distribution of the report

No provision is made in s 114 for the fact that the report must or can be distributed as part of the notice of meeting required to be given in terms of s 115(2) of the Act. However, it has been submitted that it is preferable that the report 'be distributed at least with or prior to the notice'.[135] In *Ensor NO: v South Pine Properties (Pty) Ltd*[136] (which concerned a compromise under s 311 of the 1973 Act) it was held that the explanatory statement in terms of the 1973 Act had to 'be sent to the creditors

---

[131] Rayner & Connellan op cit note 115 at 149.
[132] MiX Telematics Independent Expert Report op cit note 119 at 19. See also 'Report of independent expert' prepared by PricewaterhouseCoopers Corporate Finance Proprietary Limited in Circular to Clover Shareholders dated 28 February 2019 available at https://www.clover.co.za/wp-content/uploads/2019/03/CIL_circular_2019.pdf, accessed on 15 July 2019 (hereafter the 'Clover Independent Expert Report') at 36.
[133] Hereafter, 'ASIC'.
[134] ASIC Regulatory Guideline 111 op cit note 126.
[135] Delport op cit note 18 at 415.
[136] 1978 (2) SA 755 (N).

before they meet to consider the proposal so that each of them knows enough about it to prepare himself for the meeting …'.[137] The court held further that while 'supplementary details' can be (and often are) provided at the actual meeting, 'the basic information which the creditors need in order to understand the effect of the compromise cannot be left until that late stage'.[138] Therefore, 'essential data' has to be 'included in the statement and disseminated in advance'.[139] Luiz, commenting on the current Act, also operates on the assumption that the independent expert must be retained to report on the transaction '*before* a proposed scheme of arrangement can be put to the vote'.[140]

It is submitted that including the report in the notice of meeting is logical in light of the fact that, as discussed in chapter II above, the report is intended to assist securities holders in deciding whether to vote in favour of the transaction or not. To serve as a meaningful aid, the securities holders would need to have adequate time to consider the report before casting their vote. It is noteworthy that the Takeover Regulations provide that the opinion must be included in the relevant circular,[141] and offers must remain open for 30 business days after the date on which an offer circular is posted.[142] Ideally, the Act should be amended to make it clear that the report must be attached to the notice of meeting, to ensure that the fundamental purpose of the expert report requirement is not circumvented.

(e) The facilitation of other shareholder remedies under the Act

Copies of ss 115 and 164 of the Act must be included in the report.[143] The inclusion of a copy of s 164 of the Act effectively highlights 'the right of a holder of securities who voted against the proposal to use his appraisal rights'.[144] As mentioned above, one of the purposes of 'disclosure' requirements in general is to facilitate other remedies which are available to shareholders in the context of a particular transaction. By requiring the copies of ss 115 and 164 of the Act be included in the

---

[137] Ibid at 760.
[138] *Ensor* op cit note 136 at 760.
[139] Ibid at 760.
[140] Luiz (2012) op cit note 14 at 110 (emphasis my own).
[141] Regulations 106(4)*(g)* and 106(7)*(h)*.
[142] Regulations 102(3) and (4).
[143] Section 114(3)*(g)*.
[144] Luiz (2012) op cit note 14 at 111. See also MF Cassim (2008) op cit note 42 at 16.

report, s 114(3) fulfils this facilitative purpose by alerting shareholders to the fact that they are entitled to object to the transaction and that, if they do so object, that relief is potentially available in the form of, for instance, appraisal rights in terms of s 164 of the Act (amongst other things).[145] As Rayner and Connellan submit, the requirement for the inclusion of ss 115 and 164 of the Act in the report is 'for the benefit of shareholders to determine their rights of recourse'.[146]

Furthermore, if there was no requirement for an independent expert report, it is arguable that the appraisal remedy could potentially become redundant as a minority shareholder protection mechanism[147] because shareholders voting in favour of a transaction, and who may have otherwise voted against that transaction if they were properly informed of its effects, would be prejudiced given that the appraisal remedy is only available to shareholders who voted against the resolution in terms of s 115(8) of the Act.[148] In this way, the requirement for an independent expert report goes hand in hand with the appraisal remedy. The same argument could apply to ss 115(3), (5), (6) and (7) of the Act.[149]

(f) The extent to which the expert may make recommendations to the security holders

Henochsberg submits that the duty of the independent expert is simply to 'report on the matters as prescribed' and that it appears that the expert cannot 'make recommendations as to the acceptance of the offer or not'.[150] Presumably, the same principle applies to the opinion.[151] Giving an opinion that the consideration in question is not 'fair and reasonable' is not necessarily equivalent to recommending

[145] MF Cassim (2008) op cit note 42 at 16. See ss 115(3), (5), (6) and (7) of the Act.
[146] Rayner & Connellan op cit note 115 at 63. See also MF Cassim (2008) op cit note 42 at 16.
[147] Maleka Femida Cassim 'Shareholder remedies and minority protection' in Farouk HI Cassim (managing ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) at 797.
[148] Ibid at 801. See s 164(5)*(c)*. See also MF Cassim 'Fundamental Transactions' (2012) op cit note 51 at 697.
[149] MF Cassim 'Fundamental transactions' (2012) op cit note 51 at 697.
[150] Delport op cit note 18 at 414(1).
[151] There is evidence that, in practice, independent expert reports and opinions specifically state that they do not constitute 'recommendations' to shareholders to accept or reject a scheme of arrangement (see Clover Independent Expert Report op cit note 132 at 40).

that the transaction in question not be entered into (although it could conceivably lead to the shareholders voting against it).[152]

This position is in line with the purpose of the requirements relating to independent experts discussed above, namely that the report and opinion are there simply to *aid* shareholders in making a decision (as opposed to effectively dictating to them how the expert thinks they *should* vote). This is confirmed by Rayner and Connellan, who submit that, once an expert has made the necessary disclosures to shareholders, 'shareholders are then left to decide the merits of the transaction and give effect to their actions thereafter'.[153]

(g) The role of the board and the independence of the expert

i. Limitations on the board's involvement

In the context of the expert requirement, the board's role is limited to appointing a suitably independent, competent and experienced expert to prepare a report, and, upon receipt of that report, must ensure that it is distributed to security holders.[154] The position is slightly different with regard to the opinion, which, as mentioned above, is taken into account by the board in forming its own opinion on the offer in question.[155] However, the expert opinion must still be included in the relevant offer circulars on a stand-alone basis[156] and therefore security holders will still be given the benefit of a completely independent opinion as to the fairness and reasonableness of the proposed transaction.

The board therefore has little to no involvement insofar as the content of the report or opinion is concerned (aside from providing the expert with the necessary information to enable it to comply with the relevant provisions of the Act).[157] As Henochsberg submits, the 'acceptance or rejection' of the report does not appear to be within the board's powers.[158] Presumably, the same applies to the opinion –

[152] McDonald, Moodie & Ramsay et al op cit note 59 at 49.
[153] Rayner & Connellan op cit note 115 at 62.
[154] Sections 114(2) and (3) of the Act. Latsky op cit note 14 at 371 and Delport op cit note 18 at 414(1).
[155] Regulation 110(2).
[156] Regulations 106(4)*(g)* and 106(7)*(h)*.
[157] *Seafare Investments* supra note 64 at 33. See also Delport op cit note 18 at 414(1) and McDonald, Moodie & Ramsay et al op cit note 59 at 212.
[158] Delport op cit note 18 at 414(1).

although the independent board uses the opinion to form its own opinion, the expert opinion itself is not capable of being rejected outright in the sense that the independent board cannot simply fail to distribute it to security holders.[159]

It is submitted that this limit on the board's power is the correct position in light of the purpose of the report as a shareholder protection mechanism (discussed above) – any interference by the board would risk such purpose being undermined, primarily because the independence of the expert would potentially be compromised.[160] Indeed, in terms of comprehensive guidelines published by ASIC relating to the independence of experts under Australian law, it is expressly provided that the independence of the expert could be undermined where the party which commissioned the expert report plays an 'active role in shaping an expert report'.[161] Such involvement would be problematic, given the fundamental importance of the expert being genuinely independent – the ASIC Independence Guidelines stress that the independence of the expert is 'critical for the protection of security holders'.[162]

Broadly speaking, the independence requirement under the South African Act is that the expert must not have any relationship with either the company or with 'a proponent of the arrangement' (which, it is submitted, could be taken to mean, amongst others, the board) which 'would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of [the expert] is compromised by that relationship'.[163] Under the Takeover Regulations, the independence requirement is that the independent expert must 'be able to show that it is independent, and will reasonably be perceived to be independent, taking into account any other existing relationships and appointments'.[164] The term 'independent' is defined, with reference to 'a particular person and a particular offer' as meaning a person who, first, 'has no conflict of interest in relation to that offer' and, secondly, 'is able to make impartial decisions in relation to that offer without

---

[159] Regulations 106(4)*(g)* and 106(7)*(h)*.
[160] McDonald, Moodie & Ramsay et al op cit note 59 at 212.
[161] ASIC Regulatory Guide 112 'Independence of experts' dated March 2011 available at https://download.asic.gov.au/media/3336169/rg112-published-25-august-2015.pdf, accessed on 9 July 2019 at 7.
[162] Ibid at 6. See also McDonald, Moodie & Ramsay et al op cit note 59 at 17.
[163] Section 114(2)*(b)*(i). Such a relationship may also not have existed 'within the immediately preceding two years' and the expert must also not 'be related to a person who has or has had' such a relationship (s 114(2)*(b)*(ii)–(iii)).
[164] Regulation 90(3)*(a)*(i).

fear or favour'.[165] Clearly, where the board is allowed to interfere with the content of the report or opinion, these provisions would be breached and the report or opinion would fail to serve its purpose.

The board is also not permitted to negotiate any kind of 'contingency fee' with the expert – the Takeover regulations provide that the opinion must include the expert's fee for the opinion and a 'confirmation that the fee is not contingent on or related to the outcome of the offer'.[166] This prohibition once again links with the independence of the expert as contingency fees undermine the perception of the expert's independence 'due to the perceived bias flowing therefrom'.[167] Given the flexibility afforded by s 114(3) of the Act as to the content of the report (discussed above), such a statement relating to contingency fees could also be included in the report to provide shareholders with a degree of comfort as to the independence of the expert and the fact that the board did not exert any undue influence on the expert.

ii. Appointing a further expert pursuant to improper interference by the board

Regulation 90(3)*(b)* provides that the TRP may at any time (despite having given any approval), *mero motu* or pursuant to written representations by relevant security holders, require that an further expert (approved by the TRP) be appointed. This appears to be catering for a scenario where, for instance, the TRP does not consider the expert initially appointed by the company to comply with the independence requirements.[168] It is submitted that the language of reg 90(2) technically indicates that a second independent expert must be appointed to provide a second *report* in accordance with ss 114(2) and (3) of the Act (as opposed to providing a second fair and reasonable opinion).[169] However, since the same expert would likely be appointed to both report and opine on the transaction in question in the event that the Takeover Regulations apply, and given that there is a strong degree of overlap between the report and the opinion (discussed above),

[165] Regulation 81*(i)*.
[166] Regulation 90(6)*(h)*.
[167] Rayner & Connellan op cit note 115 at 151.
[168] Ibid at 148. Although the provision is potentially broad enough to require the appointment of a second expert for another reason.
[169] See reg 90(2) which provides that whenever an expert is required to be appointed in terms of reg 90, ss 114(2) and (3) of the Act apply.

it is likely that, practically, the further expert would have to give both a second report *and* a second opinion in order for reg 90(3)*(b)* to meaningfully serve its purpose. [170]

The possibility of a further independent expert being appointed in terms of reg 90(3)*(b)* will only arise if a scheme of arrangement is entered into by a regulated company.[171] Thus, where the Takeover Regulations do not apply to the company in question and the security holders have concerns as to the independence of the expert (due to improper interference by the board, for instance), the security holders would not be able to insist on the appointment of a further expert (at least not directly in terms of the Act). Certainly, the security holders could 'punish' such behaviour by voting against the transaction, but this is perhaps not ideal in instances where the transaction could be favourable for the company and the security holders. It is submitted that inserting a mechanism into s 114 of the Act in terms of which the independence of the expert can be challenged by the security holders resulting in a further expert being appointed could enhance minority shareholder protection in instances where non-regulated companies enter into schemes or share repurchase transactions which necessitate expert involvement.

(h) Conclusion

It appears that the disclosures specifically provided for in reg 90(6) could potentially be used to satisfy certain of the requirements of s 114(3) of the Act, even in instances where the Takeover Regulations do not apply to the company in question.[172] Ideally, the Act should be clarified in this regard.

The meaning of the phrase 'fairness and reasonableness' is not defined in the Act and legislative intervention or guidelines by the TRP are needed to provide clarity. It appears that a similar approach to that followed under Australian law is followed in practice in South Africa.[173]

---

[170] This appears to be the view adopted by Rayner & Connellan op cit note 115 at 152.
[171] Section 118(1), as confirmed by Luiz (2012) op cit note 14 at 110.
[172] Rayner & Connellan op cit note 115 at 61–2, Luiz (2012) op cit note 14 at 112, Latsky op cit note 14 at 370 and 380–2, MiX Telematics Independent Expert Report op cit note 119 at 20–2 and s 114(2)*(a)*(ii) of the Act.
[173] ASIC Regulatory Guide 111 op cit note 126, Damian & Rich op cit note 25 at 264–7, Rayner & Connellan op cit note 115 at 149, MiX Telematics Independent Expert Report op cit note 119 at 19 and Clover Independent Expert Report op cit note 132 at 36.

The Act is unclear as to when the expert report must be distributed to security holders. In light of the purpose of the requirement, the Act should be amended to state that the report must be attached to the notice of meeting required in terms of s 115.[174]

The expert report is of crucial importance in facilitating other shareholder rights and remedies under the Act, including appraisal rights in terms of s 164 and other rights in terms of 115.[175] Without an expert report, the appraisal remedy (and other rights and remedies under s 115) could become redundant.[176]

In light of the purpose of the expert requirement, the expert is not entitled to make recommendations in the report or the opinion.[177]

The board's role in the content of the expert report and the opinion should be limited in order to ensure that the report or opinion is given on a genuinely independent and impartial basis.[178] While relief is available to security holders under the Takeover Regulations in the event that the independence of the expert is called into question,[179] the same position does not apply under the Act in the event that the Takeover Regulations do not apply. Thus legislative intervention may be required in this regard.

---

[174] Delport op cit note 18 at 415, *Ensor* supra note 136 at 760 and Luiz (2012) op cit note 14 at 110.
[175] MF Cassim (2008) op cit note 42 at 16 and Rayner & Connellan op cit note 115 at 63.
[176] MF Cassim 'Shareholder remedies' (2012) op cit note 147 at 797 and 801 and MF Cassim 'Fundamental transactions' (2012) op cit note 51 at 697.
[177] Delport op cit note 18 at 414(1), Clover Independent Expert Report op cit note 132 at 40, McDonald, Moodie & Ramsay et al op cit note 59 at 49 and Rayner & Connellan op cit note 115 at 62.
[178] Delport op cit note 18 at 414(1), McDonald, Moodie & Ramsay et al op cit note 59 at 17 and 212 and ASIC Regulatory Guide 112 op cit note 161 at 7.
[179] Regulation 90(3)*(b)*.

IV VALIDLY AVOIDING COMPLIANCE WITH THE INDEPENDENT EXPERT REQUIREMENT

(a) Introduction

In this chapter:

i. The manner in which the fair and reasonable opinion requirement may be avoided will be briefly pointed out.
ii. The extent to which the requirement for an independent expert report can be successfully avoided, other than by way of a waiver, will be briefly pointed out.
iii. The need and potential justifications for companies being entitled to validly avoid the requirements relating to independent experts in certain circumstances will be considered. In this regard, reference will be made to, amongst other things, the position under Australian, Canadian and New Zealand law.
iv. The particular question of whether a unanimous waiver of the requirements in terms of ss 114(2) and (3) of the Act by the security holders would be competent in law will be considered. In this regard, case law relating to the waiver of statutory rights and relevant academic commentary will be considered.

(b) Avoiding compliance with the fair and reasonable opinion requirement

As mentioned in chapter I, complying with the requirements relating to independent experts is time consuming and expensive, particularly for a small private company which does not have the resources of a larger and/or public company.[180] As far as the application of the Takeover Regulations (and thus the requirement for a fair and reasonable opinion) is concerned, s 119(6) of the Act allows the TRP to exempt a transaction from the application of Parts B and C of the Act and the Takeover Regulations provided that certain requirements are met. This provision gives the TRP 'a very wide power' to grant an exemption, which is indicative of the

[180] Latsky op cit note 14 at 370.

legislature's 'desire to increase flexibility and reduce burdensome compliance'.[181] Boardman suggests that exemptions are 'most likely be relevant to offers for private companies' (albeit that s 119(6) technically applies to all offers) and that the Takeover Regulations will mostly apply to large public companies 'for whom the burden of compliance is more proportionate to the size and benefits of the takeover transactions they undertake'.[182] On the other hand, if, for example, a small private company which is not a regulated company or which is likely to get exemption from the application of the Takeover Regulations (in light of the above) enters into a scheme of arrangement or a share repurchase transaction in terms of s 48(8)*(b)*, that company would nevertheless have to comply with the requirement for an independent expert report in terms of ss 114(2) and (3) of the Act, unless it is able to successfully apply to the Companies Tribunal for an exemption from the requirement in terms of ss 6(2) and (3) of the Act.

(c) Exemption in terms of ss 6(2) and (3) of the Act

An order in terms of s 6(2) of the Act may be made if the Companies Tribunal is satisfied that, first, the transaction 'serves a reasonable purpose other than to defeat or reduce the effect of' the requirement for an independent expert report, and secondly, granting the exemption would be 'reasonable and justifiable' in light of the purposes of [the] Act and having regard to all relevant factors, including 'the purpose and policy served by' the requirement for a report and the extent to which the transaction 'infringes or would infringe' the requirement for a report.[183] In light of the crucial purpose served by the report (discussed in chapter II) and, as Latsky submits, the fact that it is not necessarily *impossible* for a company to comply with the requirement, it is arguably unlikely that such an exemption application would be successful.[184] Moreover, applying for an exemption would potentially not be optimal if the company is intent on saving time and costs.

[181] Boardman op cit note 69 at 319.
[182] Ibid.
[183] Section 6(3) of the Act.
[184] Latsky op cit note 14 at 370.

(d) The need for valid avoidance of the expert report requirement

i. The approach to independent expert requirements under Australian, Canadian and New Zealand law

It is noteworthy that in a number of other jurisdictions where an independent expert plays a role in the context of schemes of arrangement and/or share repurchases, the requirement is either: (i) not mandatory; or (ii) mandatory, but only in certain limited circumstances.

For example, under Australian law, an independent expert must only be retained to report on a scheme of arrangement when 'the bidder has a 30 per cent (or greater) "entitlement" in the shares in the target' or 'there is a common director between the bidder and the target'.[185] However, it is 'market practice' in Australia to commission an independent expert report in most circumstances in which a scheme of arrangement is proposed.[186] Even so, it has been suggested that the retention of independent expert 'should be strongly encouraged in connection with schemes of arrangement but not necessarily mandated in all cases'.[187] Factors which, it has been suggested, may prompt Australian companies to view the retention of an expert to be 'inappropriate' where it is not mandatory to do so include, amongst other things, 'if the nature of the target company's business is unique such that its directors believe they are better placed than any expert to form a view on the proposal' or 'if the target board has exhaustively made relevant and appropriate enquiries of potential acquirers of the target company with the result that it is well placed to tell members whether the proposed scheme is one which they should approve'.[188]

With respect to share repurchase transactions, independent expert reports are not a mandatory requirement in terms of Australian law,[189] but the company must, by way of a 'statement' together with the notice of meeting, disclose information to shareholders which is material to their decision of whether to vote in favour of the

[185] Corporations Regulations 2001, schedule 8, part 3, rule 8303.
[186] McDonald, Moodie & Ramsay et al op cit note 59 at 9 and Damian & Rich op cit note 25 at 262.
[187] Ibid at 266.
[188] Ibid at 262.
[189] See ss 257A–J of the Corporations Act 50 of 2001.

resolution pertaining to the repurchase.[190] A method which *may* be used to assist the company in fulfilling its disclosure obligations is to include an independent expert's report in the disclosure document which deals with 'the fairness of the proposal'.[191]

Under Canadian law, it is not a mandatory requirement in terms of the Canada Business Corporations Act R.S.C. 1985, C-44 that an independent expert play a role in respect of a 'plan of arrangement',[192] but it has become practice for the 'plan of arrangement documentation' to include 'a fairness opinion' stating 'whether the arrangement is "fair and reasonable" to security holders'.[193] Importantly, it is acknowledged that an opinion is not always necessary (for example, where the transaction is 'inherently fair to security holders'), but failure to obtain an opinion will likely have to be justified to the director appointed in terms of the Canada Business Corporations Act.[194] If the opinion is obtained, it has been suggested that this opinion 'will typically be a shorter and less comprehensive report than the one that would appear in an Australian scheme'.[195] The independent expert report under an Australian scheme of arrangement is in turn similar in detail and scope as that which is required under South African law.[196] Share repurchases are regulated by ss 34 and 35 of the Canada Business Corporations Act, which do not provide for the involvement of an independent expert.[197]

In terms of New Zealand law, there is no 'express requirement' in the Companies Act that an independent expert be retained in the context of a scheme of arrangement, unless a court orders that such report be prepared.[198] However, it is very rare for a court to make such an order and they generally do not do so.[199] Nevertheless, 'the usual practice is for the scheme documents to be accompanied

---

[190] Section 257G of the Corporations Act 50 of 2001.
[191] R P Austin & I M Ramsay *Ford's principles of corporations law* 15 ed (2013) at 1612.
[192] See s 192 of the Canada Business Corporations Act.
[193] Damian & Rich op cit note 25 at 659 and Corporations Canada 'Policy of the Director concerning arrangements under s192 of the Canada Business Corporations Act' dated 4 January 2010 at 4.03 available at https://corporationscanada.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs01073.html, accessed 18 July 2019.
[194] Corporations Canada 'Policy of the Director' op cit note 193 at 4.03.
[195] Damian & Rich op cit note 25 at 659.
[196] See generally Damian & Rich op cit note 25 at 263–5.
[197] See also Harry Sutherland, Q.C. *Fraser & Stewart company law of Canada* 6 ed (1993) at 163–4.
[198] Damian & Rich op cit note 25 at 667. See s 236(2) of the New Zealand Companies Act 105 of 1993.
[199] Damian & Rich op cit note 25 at 667.

by a “fair and reasonable” opinion from an independent expert.[200] Regarding a share repurchase transaction, the New Zealand Companies Act does not require an independent expert to be retained to report thereon.[201] However, similar to the position under Australian law, a ‘disclosure document’ prepared by the board must be sent to shareholders setting out information necessary for a shareholder to understand the effect of the transaction.[202]

From a brief overview of the position under New Zealand, Canadian and Australian law, it is clear that there appears to be recognition on the part of the legislatures in those jurisdictions that an independent expert report is perhaps not always necessary or appropriate. Moreover, even where the expert report is commissioned, it is significant that the requirements relating to the opinion produced in respect of Canadian plan of arrangement are not as onerous as under Australian or South African law. Certainly, in the context of South Africa’s particular socio-economic and business environment, considerations which may justify foreign legislatures’ more relaxed approach to the requirements relating to independent experts would not necessarily apply equally.[203] Thus, it may be justified that the point of departure in our law is that the requirement is mandatory. However, it is not inconceivable that there will be situations in the South African business environment where an independent expert report is indeed ‘inappropriate and unnecessary’[204] and potentially a waste of company resources. For example, a closely-held private company may have sophisticated and experienced shareholders who understand ‘what a fair price would be in the circumstances, without obtaining an independent expert’s report’.[205]

Importantly, a key difference with respect to New Zealand, Canadian and Australian schemes of arrangement is that such transactions require court approval,[206] similar to the 1973 Act, adding an extra layer of protection for

---

[200] Ibid.
[201] See ss 58 to 67 of the New Zealand Companies Act.
[202] Sections 62 and 64 of the New Zealand Companies Act. Note that a repurchase of less than 5 per cent of shares on the stock exchange is not subject to a prior disclosure requirement (see s 65 of the New Zealand Companies Act).
[203] See FHI Cassim (1999) op cit note 21 at 764 where the author highlights, albeit in the particular context of share repurchases, that laws in foreign jurisdictions must be ‘suitably tailored to meet South African conditions and commercial corporate practice’.
[204] Latsky op cit note 14 at 370.
[205] Felthun & Neill op cit note 20 at 1.
[206] MF Cassim (2008) op cit note 42 at 22–4 and Damian & Rich op cit note 25 at 262, 657 and 667.

shareholders (at least in the context of schemes) which the South African Act no longer provides (opting instead to protect shareholders by means of the expert report and the extended protections in ss 115 and 164 of the Act).[207] Thus, it could be that the expert requirements in those jurisdictions are only less onerous in the context of schemes of arrangement because a court will ultimately decide the matter. Moreover, as mentioned above, in all of the above-mentioned jurisdictions it is the practice to obtain an independent expert report even if it is not mandatory, perhaps signifying its value and importance.[208] However, as is clear from the above, independent experts generally are not required in the context of share repurchase transactions, unlike under the South African Act.

ii. The potential inappropriateness of the expert requirement in the particular context of share repurchase transactions entered into by private companies

The potential inappropriateness of the requirement for an independent expert report is perhaps especially pertinent in the context of a share repurchase transaction contemplated in s 48(8)*(b)* of the Act involving a non-regulated company (or a small private company which is likely to be exempted from the application of the Takeover Regulations).[209] It is telling that one of the submissions made by the Law Society of South Africa regarding amendments to the Act was that, in view of the onerous nature of the requirement for an independent expert report in terms of ss 114(2) and (3), '[there] should be a provision allowing shareholders to elect (by unanimous or 95% consent) to waive the requirements for an independent expert report in regard to a *share repurchase*'.[210]

In considering the potential inappropriateness of the expert requirement in share repurchase transactions, the nature of a share repurchase transaction when compared to a scheme of arrangement is important. A share repurchase transaction

---

[207] MF Cassim (2008) op cit note 42 at 24, Boardman op cit note 69 at 315 and Stein & Everingham op cit note 33 at 294.
[208] McDonald, Moodie & Ramsay et al op cit note 59 at 8–12.
[209] The focus of this waiver discussion will be on such transactions, for reasons which will become clear below.
[210] 'Submissions by the Law Society of South Africa regarding amendments to and review of the Companies Act 71 of 2008', dated August 2014 at 8 available at https://www.lssa.org.za/upload/documents/LSSA%20COMMENTS%20COMPANIES%20ACT%2029%20AUG%202014%20FINAL%20DRAFT%20(2).pdf, accessed on 19 March 2019 (emphasis my own).

in terms of s 48(8)*(b)* of the Act, unlike a scheme of arrangement, is not a 'situation where the wishes of the majority are forced onto a minority'.[211] Rather, the company and the selling shareholder/s enter into a mutual agreement' and no shareholder which is not party to such agreement is forced to sell their shares – an offer is not 'made to shareholders generally' and 'there is no majority that binds a minority'.[212] The need and justification for an independent expert report where this type of transaction is entered into by, for example, a small private company, is arguably not as strong.[213]

The provision of adequate information to shareholders in order to ensure that shareholder approval is effective 'subjects [repurchases] to delays and transaction costs'.[214] It must be borne in mind that, despite being open to abuse, share repurchases also have various advantages, especially for shareholders in private companies.[215] For example, such transactions enable a 'company to buy out a dissident shareholder'[216] or could '[provide] a means whereby a shareholder, or the estate of a deceased shareholder, in a company whose shares are not listed, can find a buyer'.[217] It is arguable that the 'delays and transaction costs' associated with retaining an independent expert would detract from the utility of share repurchases and thus undermine the advantages of such transactions[218] for small private companies which do not have the resources of public companies or large private companies that have many shareholders and are accustomed to corporate activity. The advantages of share repurchase transactions and the related need to preserve their utility and desirability may well outweigh the need for shareholder protection in these circumstances.

---

[211] Latsky op cit not 14 at 381.
[212] Ibid. As mentioned above, there is uncertainty surrounding the nature of a share repurchase transaction in terms of s 48(8)*(b)* and whether it constitutes a scheme of arrangement, with the effect that such a transaction must in fact comply not only with the procedural requirements of a scheme, but also the substantive requirements (including, amongst other things, that the scheme be between the company and *all* members of a class of securities and that it bind *all* members of that class) (Delport op cit note 18 at 208). A detailed analysis of this issue beyond the scope of this dissertation and it will be assumed that (as Henochsberg and Latsky argue) a share repurchase in terms of s 48(8)*(b)* repurchase is not *substantively* a scheme of arrangement (Delport op cit note 18 at 208 and Latsky op cit note 14 at 380–2).
[213] Delport op cit note 18 at 208.
[214] Henning, Delport & Katz et al op cit note 21 at 93.
[215] See generally Henning, Delport & Katz et al op cit note 21 at 88–9 and FHI Cassim (1999) op cit note 21 at 773.
[216] Henning, Delport & Katz et al op cit note 21 at 88 and FHI Cassim (1999) op cit note 21 at 773.
[217] Henning, Delport & Katz et al op cit note 21 at 88.
[218] Ibid at 93.

On the other hand, albeit that a non-selling shareholder in a share repurchase transaction will not be bound by the transaction in the same way that a shareholder is bound by a scheme of arrangement (in the sense that the shareholder will not be forced to sell their shares against their will, as discussed above), this is not to say that the non-selling shareholders are not impacted (sometimes significantly so) by the share repurchase. The potential far-reaching effects of a share repurchase on both selling and non-selling shareholders and the resultant need for shareholder protection have been discussed in chapter II above and should also be borne in mind when considering the appropriateness of the independent expert requirement in these circumstances.

(e) Is waiver of the requirement for an independent expert report competent in law?

i. The practical likelihood of obtaining a waiver

A scheme of arrangement is 'intended to provide machinery for … overcoming the impossibility or impracticality of obtaining the individual consent of every member of the class intended to be bound thereby'.[219] This is because approval of the transaction in terms of s 115(2) of the Act will bind all security holders of the particular class to the scheme, regardless of whether security holders unanimously voted in favour thereof.[220] For this reason, it is submitted that obtaining a valid unanimous waiver from security holders[221] in respect of the requirement for an independent expert report in terms of s 114(2) and (3) of the Act would likely not be feasible in the context of a scheme of arrangement. If the reason for the scheme is that shareholders, for example, cannot be located or are non-responsive,[222] or it is known that certain of them are not in favour of the transaction and do not wish to be bound by it but the company still wishes to go ahead with it, it is unlikely that a unanimous waiver would be obtained. This is likely why the waiver of the

[219] *Ex Parte NBSA Centre Ltd* 1987 (2) SA 783 (T) at 786–9, referred to in Delport op cit note 18 at 411.
[220] Boardman op cit note 69 at 314–315. This is subject to ss 115(3), (5), (6), (7) and (8) read with s 164 of the Act.
[221] Assuming that security holders are the sole beneficiaries of the requirements and are therefore entitled to waive same (discussed further below).
[222] See MF Cassim (2008) op cit note 42 at 9 where the author points out that shareholder apathy in companies with many minority shareholders who hold small numbers of shares 'do not generally attend meetings, let alone cast their votes'.

requirements relating to independent experts is usually discussed only with reference to a share repurchase transaction in terms of s 48(8)*(b)* of the Act.[223] Similarly, this chapter will focus primarily on such transactions.

Of course, it seems theoretically possible (from a purely practical perspective) that a situation may arise in the context of a scheme of arrangement where, for example, security holders agree to waive the requirements relating to independent experts (assuming that such security holders are easy to locate and not apathetic), despite some of them being opposed to the transaction in question. Security holders who nevertheless consider themselves to be adequately informed of the transaction and its effects may wish not to waste company resources in retaining an expert. They could then still choose to vote against the scheme in terms of s 115(2) and potentially exercise their appraisal rights in terms of s 164 or avail themselves of any of the other rights and procedures in ss 115(3), (5), (6) and (7) of the Act. However, it is arguably more likely that security holders who are opposed to the transaction will refuse to waive the requirement. On the other hand, where a closely-held private company proposes to enter into a share repurchase transaction in terms of s 48(8)*(b)* of the Act, the consensual nature of which has been explained above, a waiver could (from a purely practical perspective) conceivably be obtained from all shareholders.

ii. The law relating to waiver of statutory rights

Even if it is practicable to obtain a waiver from each shareholder, the question remains whether it would be competent in law for shareholders to waive the requirements relating to independent experts in terms of ss 114(2) and (3) of the Act. In this regard it is necessary to consider the law relating to the waiver of statutory rights.

The rule relating to the waiver of statutory rights was formulated as follows in *Ritch and Bhyat v Union Government (Minister of Justice)*,[224] which has since been

[223] Latsky op cit note 14 at 370–1 and 380–2, Kleitman op cit note 20 at 23–4 and Felthun & Neill op cit note 20 at 1.
[224] 1912 AD 719.

referred to with approval by the appellate division in several cases[225] and, more recently, by the supreme court of appeal in *Bafana Finance Mabopane v Makwakwa*:[226]

> 'The maxim of the Civil Law … that every man is able to renounce a right conferred by law for his own benefit was fully recognised by the law of Holland. But it was subject to certain exceptions, of which one was that no one could renounce a right contrary to law, or a right introduced not only for his own benefit, but in the interests of the public as well … And the English law on this point is precisely to the same effect.'[227]

The appellate division in the *SA Eagle* case held that 'a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved'.[228] Furthermore, the court held that the fact that a statutory provision is formulated using peremptory language is irrelevant for purposes of determining whether such provision may be waived.[229] Importantly, where the beneficiary of the statutory provision waives the performance of that provision, a third party for whose benefit the provision was not enacted is not entitled 'to insist that the statutory provision be observed'.[230]

The supreme court of appeal in *Bafana* affirmed that a person 'may waive the benefits conferred upon him by an Act of parliament unless the statute expressly or by necessary implication prohibits the waiver'.[231] It has been held that a statute prohibits the waiver of a right 'by necessary implication' where the freedom to waive such a right would be irreconcilable with the purpose of the provision, because waiver would give rise to the very mischief which the provision seeks to curb.[232]

---

[225] *Suider-Afrikaanse Kooperatiewe Sitrusbeurs Beperk v Die Direkteur-Generaal: Handel en Nywerheid* 1997 (2) All SA 321 (A) at 327; *SA Eagle Insurance Co Ltd v Bavuma* 1985 (3) SA 42 (A) at 256 and *Bezuidenhout v AA Mutual Insurance Association Ltd* 1978 (1) SA 703 (A) at 710.
[226] 2006 (4) All SA 1 (SCA) at 5.
[227] *Ritch and Bhyat* supra note 224 at 734–5.
[228] *SA Eagle* supra note 225 at 49, referred to with approval by the supreme court of appeal in *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) para 15 and in *SA Kooperatiewe Sitrusbeurs Bpk* supra note 225 at 327. See also reference by Latsky op cit note 14 at 371.
[229] *SA Eagle* supra note 225 at 49. See also *SA Kooperatiewe Sitrusbeurs Bpk* supra note 225 at 327 and *Bezuidenhout* supra note 244 at 710.
[230] *SA Eagle* supra note 225 at 50.
[231] *Bafana* supra note 226 para 9.
[232] *Portwig v Deputation Street Investments (Pty) Ltd* 1985 (1) SA 83 (D) at 90. See also reference to the 'necessary implication' aspect of the test in *SA Eagle* supra note 225 at 50.

Similarly, the court in *Bafana* held that waiver of a statutory right will be contrary to public policy (and thus unenforceable) if, having regard to the *purpose* of the provision, 'it can be shown that such [waiver] would deprive the party of protection which the Legislature considered it should, as a matter of policy, be afforded by law'.[233] It therefore appears that the questions of whether the statute prohibits waiver by 'necessary implication' and whether waiver of the statute would be contrary to public policy are linked and often require consideration of the same issues.[234]

In sum therefore, there are three (interlinking) elements of a valid waiver of a statutory right: first, the legislation in question must not prohibit the waiver (either expressly or by necessary implication), secondly, the waiver must be given by the person for whose sole benefit the statutory right was enacted, and thirdly, the public cannot have an interest in that statutory right. Put differently, the third element is that the waiver of the right must not be contrary to public policy.

iii. Application of the first and second elements of statutory waiver

The Act does not expressly prohibit waiver of the independent expert report. Whether it does so by necessary implication will be considered together with the third element of public policy below. If it is accepted that the right to an independent expert report is solely for the benefit of the security holders, the second element of a valid waiver will be fulfilled if a unanimous waiver is obtained from security holders. However, there is some uncertainty as to whether creditors are also beneficiaries of the report, as discussed in chapter II above.

iv. The third element of statutory waiver – examples from case law

In general, the courts are unwillingly to uphold the validity of waivers of statutory rights which have a 'tendency … to restrict or prevent a person from vindicating his or her rights in the courts' on the basis that this would be misaligned with public policy.[235] In *Bafana*, the court found that the waiver by a debtor in terms of a loan

[233] *Bafana* supra note 226 para 10.
[234] The court in *Portwig* supra note 232 at 90 commented as much.
[235] *Bafana* supra note 226 para 20.

agreement of its (the debtor's) right to apply to the magistrates court for an administration order under s 74 of the Magistrates Court Act 32 of 1944 would have a tendency 'to deprive the respondent of his right to approach the court for redress', which the court held to be 'offensive to one's sense of justice and … inimical to the public interest'.[236] However, while the courts have held that statutory provisions which grant jurisdiction to the courts (such as the right to appeal in certain cases), require 'strict compliance' and therefore cannot be waived, provisions concerning procedural requirements of civil courts (such as a rule prescribing a time limit within which a person must give notice of appeal and give security to the other party)[237] may indeed be waived.[238] This is because a provision which is 'in the nature of procedure or practice … is not a matter with which the public is concerned'.[239]

The general approach with respect to 'revenue legislation' is that waiver is not competent, on the basis that 'the public has an interest in the due compliance with every requirement of a revenue statute', particularly compliance by the commissioner with provisions relating to income tax, in respect of which 'it is of the highest public importance that … every taxpayer shall be treated exactly alike, no concession being made to one to which another is not equally entitled'.[240]

In *Portwig*, the court had to decide whether a debtor was capable of waiving a benefit under the Conventional Penalties Act 15 of 1962 in terms of a settlement agreement which was entered into pursuant to a contractual dispute.[241] The court found that although the purpose of the provision was to promote fairness, if parties waive their rights with knowledge of those rights and without any undue influence, duress, fraud or mistake, it cannot be said that the purpose of the provision would be undermined and therefore, the provision did not prohibit waiver by necessary implication.[242] Other policy considerations mitigating in favour of permitting the waiver in this case included, first, the right to freedom of contract and secondly, that parties should be bound by contracts which they enter into.[243] A further policy consideration which the court took into account was the fact that the power of the

[236] Ibid para 21.
[237] See also *Steenkamp v Peri-Urban Areas Health Committee* 1946 TPD 424, referred to with approval by the appellate division in *SA Eagle* supra note 225 at 49.
[238] *Bezuidenhout* supra note 225 at 710.
[239] Ibid.
[240] *SA Kooperatiewe Sitrusbeurs Bpk* supra note 225 at 329.
[241] *Portwig* supra note 232 at 83.
[242] Ibid at 91.
[243] Ibid at 92.

courts cannot be infringed upon to such an extent that a party is unable to avail themselves of relevant remedies in respect of a future breach of their rights.[244] Furthermore, the court weighed the public's interest that disputes be settled against the potential unjustified enrichment which would ensue if the provision in question were waived and found that there was no indication in the statute that the latter weighed more than the former.[245] Ultimately therefore, it was found that the benefit in question could be waived.[246]

It has also been held that certain provisions of the Medical Schemes Act 131 of 1998, which 'have as their goal the obligation of a medical scheme to provide prescribed level treatment for all its members' who are suffering from certain conditions, cannot be waived by a member of a medical scheme to which that statute applies on the basis that such a matter is clearly one 'involving public interest and in respect of which public policy requires compliance by medical schemes'.[247]

The courts have considered the bargaining power of persons purporting to waive their rights to be an important factor under the public policy element. In the *Portwig* case, a factor which contributed to a finding that the statutory right in question could indeed be waived was that the purpose of the provision was not specifically to protect a class of persons with weak bargaining power from their own weaknesses.[248] In the *Genesis Medical Scheme* case, the court emphasised the intention of the Medical Schemes Act to protect 'classes of persons who bargain from an inferior position, as members do in regard to their medical schemes'. The court referred to the house of lords decision in *Johnson v Moreton*,[249] where it was held that waiver of a statutory right is not permissible where the provision:

> '[Is] manifestly passed for the protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest … It is precisely [a contracting party's] weakness as a negotiating party from which Parliament wishes to protect him'.[250]

---

[244] Ibid.
[245] Ibid.
[246] Ibid.
[247] *The Council for Medical Schemes v Genesis Medical Scheme* (20518) [2015] ZASCA 161 (16 November 2015) para 42.
[248] *Portwig* supra note 232 at 52.
[249] 1980 AC 37 (HL).
[250] *Genesis Medical Scheme* supra note 247 para 42.

Similarly, in the *Bafana* case, the court held that a clause in a credit agreement which insulates 'the debt from an administration order' results in 'undue preference' for the creditor, which is 'highly prejudicial to the [debtor]'.[251] The court held that if every credit agreement had a clause in terms of which the debtor (oftentimes a vulnerable debtor who has 'little choice but to agree') purports to waive her right in terms of s 74 of the Magistrates Court Act, the provision would become 'a "dead letter" and the clear intentions of the Legislature would be thwarted'.[252]

v. Application of the third element of statutory waiver – arguments against the competency of waiver

Applying these principles from case law to the requirement for an independent expert report under the Act, it could be argued that the 'public interest' element would prove problematic on the basis that:

> 'it is in the public interest that the report be prepared to ensure that a company and its directors (and shareholders who waive their rights) do not make a mistake in determining the value of the shares and the repurchase price, and that the public interest requires that the capital of the company should not be depleted, to the detriment of present or future creditors who deal with the company, by a return of capital to shareholders'.[253].

Thus the protective purpose of the independent expert report (discussed in chapter II above) is of utmost importance in considering the element of public policy. As is clear from the quote above, this protective purpose could be said to not only operate in favour of shareholders (and particularly minority shareholders) but also the public in general. The public has an interest in the optimal functioning of companies within the economy, given the 'vital role' which companies play 'in wealth creation and social renewal'.[254] On some level, therefore, the independent expert report plays a role in ensuring that this public interest is upheld.

---

[251] *Bafana* supra note 226 para 22.
[252] *Bafana* supra note 226 para 23.
[253] Latsky op cit note 14 at 371.
[254] FHI Cassim (2012) op cit note 56 at 3.

Moreover, it has been said that 'the effective protection of minority shareholders is a cornerstone of any sophisticated corporate law system'.[255] Protection of minority shareholders, through requirements such as those relating to independent experts, can therefore be said to be in the public interest. In discussing whether appraisal rights in terms of s 164 of the Act can be waived in advance, Cassim asserts that the enforceability of a purported waiver must be considered in light of the 'policy issue underlying the appraisal right', namely that (broadly speaking), such rights are 'designed for the fundamentally important policy purpose of protecting minority shareholders'.[256] It is submitted that a similar argument could apply with regard to waiver of the requirements relating to independent experts. Of course, as discussed above, minority protection is particularly important in the context of fundamental transactions (such as schemes of arrangement). Indeed, one of the purposes of the Act is that the rights of shareholders and directors within a company should be balanced.[257] A court is likely to take such purpose into account given that ss 158*(b)* and 5(1) require the Act to be interpreted in such a manner as to give effect to its purposes. The independent expert report can certainly be said to contribute towards achieving that balance.

Furthermore, the position of minority shareholders is perhaps comparable to the position of 'inferior' persons with very little bargaining power *vis-a-vie* their contractual counter-parties, in respect of whose statutory rights the supreme court of appeal in both *Bafana* and *Genesis Medical Scheme* refused to uphold a purported waiver (discussed above). Indeed, in an Australian context, it has been observed that 'superior bargaining power exercised, by certain parties to the transaction' is part of the underlying rationale for an expert report.[258] It is not difficult to conceive of a scenario where a minority shareholder finds itself with little choice but to agree to waive the requirement for an independent expert report, due to its relatively weak position in the company, with the result that such shareholder potentially votes in favour of a transaction which it otherwise would not have if it had had the benefit of an expert report.[259] In this way, as in *Bafana* (discussed above),

---

[255] Maleka Femida Cassim *The new derivative action under the Companies Act: Guidelines for judicial discretion* (2016) at 1.
[256] MF Cassim 'Shareholder remedies' (2012) op cit note 147 at 810.
[257] Section 7*(i)* of the Act.
[258] McDonald, Moodie & Ramsay et al op cit note 59 at 14–15.
[259] See chapter III above where this issue was discussed.

the requirement for an expert report becomes a ‘dead letter’ and, as the court pointed out in *Portwig* (discussed above), the mischief which the requirement is intended to prevent could materialise.

Linked to this is the fact that the expert report plays a facilitative role with respect to other shareholder remedies, such as the appraisal remedy (discussed above). This purpose could be undermined if the requirement is capable of waiver. As seen above, the court in *Portwig* emphasised that waiver should not lead to a party being unable to approach a court in future. Although making shareholders aware of their rights and remedies in this regard would not necessarily be problematic (as will be explained below), it is still possible that vulnerable minority shareholders could waive the requirement and vote in favour of the transaction with the result that they are unable to avail themselves of their appraisal (and other) rights. Once again, this prejudice would arise where, had shareholders had the benefit of an expert report, they likely would have voted differently.

It may be particularly unlikely that a court would uphold a waiver of the requirement in the context of a scheme of arrangement, given its ability to drastically alter the control of a company on a potentially non-consensual basis (as discussed above). In any event, for the reasons set out above, it would likely be impossible from a practical perspective to obtain a unanimous waiver in the context of a scheme of arrangement. Moreover, a court may attach weight to the fact that, although expert requirements are not as onerous in the context of schemes of arrangement in terms of Australian, Canadian and New Zealand law (explained above), this is likely only because the shareholder protection mechanism of mandatory court approval is in place. Importantly, s 5(2) of the Act allows a court to consider foreign company law when interpreting the Act.

vi. Application of the third element of statutory waiver – arguments in favour of waiver being in line with public policy

There are policy considerations which arguably support the competency of a waiver of the requirements for an independent expert. First, although ‘corporate reporting, disclosure and transparency’ is an important part of the Act which is ‘crucial to a proper corporate law regime’, this is not to say that there cannot be any limits to this

principle.[260] As Cassim submits, 'too much disclosure clogs up the system and is costly' and 'a proper balance must be found between adequate disclosure and overregulation'.[261] Arguably, in the context of the requirement for an independent expert report, this balance could be found in allowing shareholders to unanimously waive the requirement.

Secondly, while minority protection and the optimal functioning of companies generally might be in the public interest, it can be said that, by the same token, unnecessarily wasting company resources is decidedly not in the public interest. As mentioned above, there are circumstances in which an independent expert report could indeed be seen as inappropriate and unnecessary and in which there is a need to validly avoid the requirement.

Thirdly, it is arguable that the requirement for an independent expert report is not akin to, for example, rights under revenue legislation or rights of access to courts or substantive statutory protections under medical scheme legislation, all of which the public certainly has an interest in upholding at all costs (as seen from the case law above). It is possible to argue that, compared to these types of statutory rights, the right of a shareholder to receive an expert report leans more towards being private in nature. Moreover, Henochsberg refers to the requirement for an independent expert report to be a 'procedural' one as opposed to a 'substantive' one.[262] Arguably, the expert requirement more closely resembles procedural legislative requirements, such as the procedural requirements of the civil courts, the waiver of which our courts have had no difficulty upholding (as discussed above).

Fourthly, as was held in *Portwig* (discussed above), there should be no reason, provided the requirement is for the sole benefit of the security holders, to refuse to uphold a unanimous waiver by the security holders in circumstances where they knew of their right to receive an independent expert report and nevertheless waived same without any kind of undue influence, mistake or duress. Certainly, minority shareholders could be said to be in an 'inferior' position and might therefore be more vulnerable to agreeing to waive the requirement in circumstances where they effectively do not know any better (as explained above), but this is arguably not enough of a reason to prohibit a waiver of the requirement in *general*. Where there

[260] FHI Cassim (2012) op cit note 56 at 14.
[261] Ibid.
[262] Delport op cit note 18 at 208.

has genuinely been duress, undue influence or mistake, the waiver would clearly not be competent in law in terms of general principles of contract (as was made clear by the court in *Portwig*, discussed above), but the finding in *Portwig* is not, it is submitted, suggesting that there should be a blanket prohibition on a waiver of a statutory right simply because a *possibility* of undue influence exists. Such an argument would be akin to arguing that parties may never enter into contracts simply because those with weak bargaining power could *potentially* be unduly influenced and prejudiced. Furthermore, linked with this are the policy considerations of freedom of contract and that persons should be bound by contracts to which they agree (in this case, the signed waiver), as was taken into account in *Portwig* (as discussed above). As will be seen below, a court would ultimately have to weigh up conflicting considerations: on the one hand, minority shareholders are potentially at a greater risk of being prejudiced by a waiver, but on the other hand, there is a valid need and justification for permitting waiver and if parties choose to do so (on the basis of being informed of the rights they are waiving), they should be bound by that decision.

Fifthly, while it may be said that a waiver could undermine the role of the report as facilitating other remedies contained in ss 115 and 164 of the Act (discussed in chapter III above), it should be remembered that the Act in any event requires that a statement informing shareholders of their rights in terms of s 164 of the Act must be included in the notice of meeting to shareholders.[263] Therefore, as far as appraisal rights are concerned, it may be said that the facilitative purpose of the report insofar as it makes security holders aware of other remedies under the Act will not be undermined if a waiver is obtained. As regards s 115 of the Act, it may be advisable for a summary of that provision to also be included in the notice in the event that a waiver is obtained, in order to reduce the risk of security holders being prejudiced by the waiver and a court thus finding that the waiver is against public policy.[264] If the waiver is procured before the meeting in question,[265] both ss 164 and 115 should be attached to the waiver document.

---

[263] Section 164(2). See also MF Cassim 'Shareholder remedies' (2012) op cit note 147 at 800.
[264] This is suggested by Felthun and Neill op cit note 20 at 1.
[265] Which is perhaps the safer option since, if all shareholders do not waive the requirement, the report will likely have to be attached to the notice of meeting (as discussed in chapter II above). Planning to wait for the meeting to obtain a waiver, only to fail to achieve unanimity, would be risky if the company is intent on saving time.

Sixthly, a court may take into account that the requirement for an independent expert report or opinion is less onerous in other jurisdictions, as explained above, particularly in the context of share repurchase transactions.[266]

Seventhly, the value of an independent expert report should perhaps not be overstated. In an Australian context, it has been observed that 'conclusions reached by experts in reports do not purport to be an exact science', especially in light of the fact that valuations are based on benchmarks which are 'continuously, and sometimes rapidly, shifting…'.[267] Expert reports, while they certainly can be valuable, are ultimately '[opinions] based on historical experience' and 'the view that [they] are absolute truth is nonsense'.[268]

Finally, in the particular context of share repurchase transactions in terms of s 48(8)*(b)* of the Act, the arguments in favour of allowing a waiver where it can be practically obtained are most strong. Compared to a scheme of arrangement, the (arguably) less "drastic" and consensual nature of a share repurchase, as discussed above, may well justify, as a matter of policy, allowing for a waiver of the requirement for an independent expert report. Moreover, it is in this particular context where creditors will be protected by the application of the solvency and liquidity test, as discussed in chapter III above. Once again, as explained above, it is significant that it is also in this context that the Law Society of South Africa suggested the Act be amended to allow for a waiver of the requirement.

Importantly, the fact that the Act does not currently provide for a waiver in these circumstances does not necessarily mean that the legislature intends for it to be prohibited (as is clear from the case law above). Nevertheless, amending the Act to expressly provide for waiver would certainly be the best approach, as it would remove any uncertainty in this regard.

Ultimately, the court will have to adopt a balancing approach, as in *Portwig* above, where the various conflicting policy considerations are weighed up in order to determine whether a waiver of the requirement for an independent expert report would be competent in law. While it appears that the arguments in favour of a waiver

---

[266] Once again, s 5(2) of the Act allows a court to consider foreign company law when interpreting the Act.
[267] McDonald, Moodie & Ramsay et al op cit note 59 at 3.
[268] Ibid.

weigh more heavily,[269] until our courts are faced with this issue,[270] it cannot be said with absolute certainty that a waiver is competent in law.

(f) Conclusion

In the event that the Takeover Regulations apply, the requirement for an expert opinion can be avoided by applying for exemption in terms of s 119(6) of the Act.

The expert report requirement can potentially be avoided by way of an exemption application in terms of ss 6(2) (3) of the Act, although this is potentially unlikely to succeed[271] and could be costly and time consuming.

The ability to validly avoid the expert report requirement is necessary and justified, particularly in the context of share repurchase transactions and particularly in light of the fact that the expert requirements in other jurisdictions are generally less onerous.[272]

In order for the expert report requirement to be competently waived, two elements are potentially problematic: first, security holders are not necessarily the sole beneficiaries of the report[273] and secondly, permitting waiver of the requirement could potentially be against public policy.[274] However, there are valid counter-arguments which indicate that waiver is competent.[275]

---

[269] Latsky op cit note 14 at 370.
[270] Kleitman op cit note 20 at 23, where the author confirms that our courts have not yet been faced with this question.
[271] Latsky op cit note 14 at 371.
[272] Corporations Regulations 2001, schedule 8, part 3, rule 8303, McDonald, Moodie & Ramsay et al op cit note 59 at 9, Damian & Rich op cit note 25 at 8–12, 262–5, 266, 657 and 667, ss 257A–J of the Corporations Act 50 of 2001, Austin & Ramsay op cit note 191 at 1612, s 192 of the Canada Business Corporations Act, Corporations Canada 'Policy of the Director' op cit note 193 at 4.03, Sutherland op cit note 197 at 163–4, ss 58 to 67 and s 236(2) of the New Zealand Companies Act 105 of 1993, FHI Cassim (1999) op cit note 21 at 764 and 77, Latsky op cit note 14 at 370–1 and 380–2, Felthun & Neill op cit note 20 at 1, MF Cassim (2008) op cit note 42 at 9 and 22–4, Boardman op cit note 69 at 314–315, Stein & Everingham op cit note 33 at 294, Submissions by the Law Society op cit note 210 at 8, Delport op cit note 18 at 208 and 411, Henning, Delport & Katz et al op cit note 21 at 93 88–9, *NBSA Centre* supra note 219 at 786–9 and Kleitman op cit note 20 at 23–4.
[273] Section 114(2)*(a)*(i)*(cc)* of the Act and Latsky op cit note 14 at 371.
[274] Latsky op cit note 14 at 371 and 381, FHI Cassim (2012) op cit note 56 at 3, MF Cassim (2016) op cit note 255 at 1, MF Cassim 'Shareholder remedies' (2012) op cit note 147 at 797, 801 and 810, ss 5(2) and 7*(i)* of the Act, McDonald, Moodie & Ramsay et al op cit note 59 at 14–15, MF Cassim 'Fundamental transactions' (2012) op cit note 51 at 697, *Bafana* supra note 226 paras 10, 22 and 23, *Portwig* supra note 232 at 52, 90 and 92, *Genesis Medical Scheme* supra note 247 para 42 and Delport op cit note 18 at 208.
[275] FHI Cassim (2012) op cit note 56 at 14, Felthun & Neill op cit note 20 at 1, Delport op cit note 18 at 208, *Portwig* supra note 232 at 83 and 91–92, MF Cassim 'Shareholder remedies' (2012) op cit note 147 at 800, s 5(2) of the Act, McDonald, Moodie & Ramsay et al op cit note 59 at 3, Delport op cit

V CONCLUSION

The independent expert requirement is a minority shareholder protection mechanism intended to assist security holders in deciding whether to vote in favour of a scheme of arrangement or share repurchase transaction in terms of s 48(8)*(b)* of the Act.[276] The requirement also serves as a check on managerial power.[277] In the context of schemes of arrangement, the expert requirement, together with s 115 of the Act, has effectively replaced the requirement under the 1973 Act that a court approve all schemes of arrangement.[278] In the context of share repurchases, when compared to the 1973 Act, the expert requirement serves to increase the effectiveness of disclosure to shareholders.[279] The requirement for an expert opinion facilitates disclosure and minority shareholder protection and does so to a greater degree than the Code did.[280]

There is some uncertainty as to whether creditors are, together with security holders, intended to be beneficiaries of the independent expert requirement.[281] However, there are several considerations which suggest that security holders are the sole beneficiaries thereof.[282]

It appears that the disclosures specifically provided for in reg 90(6) could potentially be used to satisfy certain of the requirements of s 114(3) of the Act, even

note 18 at 208, MF Cassim 'Fundamental transactions' (2012) op cit note 51 at 697, Latsky op cit note 14 at 370 and Submissions by the Law Society op cit note 210 at 8.

[276] Stein & Everingham op cit note 33 at 292, Luiz (2012) op cit note 14 at 111, Latsky op cit note 14 at 371, MF Cassim (2008) op cit note 42 at 11 and 16–17, MF Cassim 'Fundamental transactions' (2012) op cit note 51 at 691, McDonald, Moodie & Ramsay et al op cit note 59 at 1, Henning, Delport & Katz op cit note 21 at 90 and van der Linde op cit note 49 at 305.

[277] Section 114(3)(e)–(f) of the Act, Delport op cit note 18 at 208 and 414(1)–(2), van der Linde op cit note 49 at 305, FHI Cassim (2012) op cit note 56 at 14, *Seafare Investments* supra note 64 at 32–3, *Singer* supra note 65 at 518–519 and McDonald, Moodie & Ramsay et al op cit note 59 at 3.

[278] Boardman op cit note 69 at 315, Stein & Everingham op cit note 33 at 294 and MF Cassim 'Fundamental transactions' (2012) op cit note 51 at 675.

[279] van der Linde op cit note 49 at 299–300 and 305, FHI Cassim (1999) op cit note 21 at 774–776 and Henning, Delport & Katz op cit note 21 at 93.

[280] Section 119(1) of the Act, Stein & Everingham op cit note 33 at 356, Luiz (2014) op cit note 22 at 654–5 and Boardman op cit note 69 at 336.

[281] Section 114(2)*(a)*(i)*(cc)* of the Act and Latsky op cit note 14 at 371.

[282] Latsky op cit note 14 at 371, s 114(3) and s 4 read with ss 46 and 48 of the Act, Stein & Everingham op cit note 33 at 174, Cilliers, Benade & Henning et al op cit note 38 at 324 and Luiz (2012) op cit note 14 at 114.

in instances where the Takeover Regulations do not apply to the company in question.[283] Ideally, the Act should be clarified in this regard.

The meaning of the phrase 'fairness and reasonableness' is not defined in the Act and legislative intervention or guidelines by the TRP are needed to provide clarity. It appears that a similar approach to that followed under Australian law is followed in practice in South Africa.[284]

The Act is unclear as to when the expert report must be distributed to security holders. In light of the purpose of the requirement, the Act should be amended to state that the report must be attached to the notice of meeting required in terms of s 115.[285]

The expert report is of crucial importance in facilitating other shareholder rights and remedies under the Act, including appraisal rights in terms of s 164 and other rights in terms of 115.[286] Without an expert report, the appraisal remedy (and other rights and remedies under s 115) could become redundant.[287]

In light of the purpose of the expert requirement, the expert is not entitled to make recommendations in the report or the opinion.[288]

The board's role in the content of the expert report and the opinion should be limited in order to ensure that the report or opinion is given on a genuinely independent and impartial basis.[289] While relief is available to security holders under the Takeover Regulations in the event that the independence of the expert is called into question,[290] the same position does not apply under the Act in the event that the Takeover Regulations do not apply. Thus legislative intervention may be required in this regard.

---

[283] Rayner & Connellan op cit note 115 at 61–2, Luiz (2012) op cit note 14 at 112, Latsky op cit note 14 at 370 and 380–2, MiX Telematics Independent Expert Report op cit note 119 at 20–2 and s 114(2)*(a)*(ii) of the Act.
[284] ASIC Regulatory Guide 111 op cit note 126, Damian & Rich op cit note 25 at 264–7, Rayner & Connellan op cit note 115 at 149, MiX Telematics Independent Expert Report op cit note 119 at 19 and Clover Independent Expert Report op cit note 132 at 36.
[285] Delport op cit note 18 at 415, *Ensor* supra note 136 at 760 and Luiz (2012) op cit note 14 at 110.
[286] MF Cassim (2008) op cit note 42 at 16 and Rayner & Connellan op cit note 115 at 63.
[287] MF Cassim 'Shareholder remedies' (2012) op cit note 147 at 797 and 801 and MF Cassim 'Fundamental transactions' (2012) op cit note 51 at 697.
[288] Delport op cit note 18 at 414(1), Clover Independent Expert Report op cit note 132 at 40, McDonald, Moodie & Ramsay et al op cit note 59 at 49 and Rayner & Connellan op cit note 115 at 62.
[289] Delport op cit note 18 at 414(1), McDonald, Moodie & Ramsay et al op cit note 59 at 17 and 212 and ASIC Regulatory Guide 112 op cit note 161 at 7.
[290] Regulation 90(3)*(b)*.

In the event that the Takeover Regulations apply, the requirement for an expert opinion can be avoided by applying for exemption in terms of s 119(6) of the Act.

The expert report requirement can potentially be avoided by way of an exemption application in terms of ss 6(2) (3) of the Act, although this is potentially unlikely to succeed[291] and could be costly and time consuming.

The ability to validly avoid the expert report requirement is necessary and justified, particularly in the context of share repurchase transactions and particularly in light of the fact that the expert requirements in other jurisdictions are generally less onerous.[292]

In order for the expert report requirement to be competently waived, two elements are potentially problematic: first, security holders are not necessarily the sole beneficiaries of the report[293] and secondly, permitting waiver of the requirement could potentially be against public policy.[294] However, there are valid counter-arguments which indicate that waiver is competent.[295]

---

[291] Latsky op cit note 14 at 371.

[292] Corporations Regulations 2001, schedule 8, part 3, rule 8303, McDonald, Moodie & Ramsay et al op cit note 59 at 9, Damian & Rich op cit note 25 at 8–12, 262–5, 266, 657 and 667, ss 257A–J of the Corporations Act 50 of 2001, Austin & Ramsay op cit note 191 at 1612, s 192 of the Canada Business Corporations Act, Corporations Canada 'Policy of the Director' op cit note 193 at 4.03, Sutherland op cit note 197 at 163–4, ss 58 to 67 and s 236(2) of the New Zealand Companies Act 105 of 1993, FHI Cassim (1999) op cit note 21 at 764 and 77, Latsky op cit note 14 at 370–1 and 380–2, Felthun & Neill op cit note 20 at 1, MF Cassim (2008) op cit note 42 at 9 and 22–4, Boardman op cit note 69 at 314–315, Stein & Everingham op cit note 33 at 294, Submissions by the Law Society op cit note 210 at 8, Delport op cit note 18 at 208 and 411, Henning, Delport & Katz et al op cit note 21 at 93 88–9, *NBSA Centre* supra note 219 at 786–9 and Kleitman op cit note 20 at 23–4.

[293] Section 114(2)*(a)*(i)*(cc)* of the Act and Latsky op cit note 14 at 371.

[294] Latsky op cit note 14 at 371 and 381, FHI Cassim (2012) op cit note 56 at 3, MF Cassim (2016) op cit note 255 at 1, MF Cassim 'Shareholder remedies' (2012) op cit note 147 at 797, 801 and 810, ss 5(2) and 7*(i)* of the Act, McDonald, Moodie & Ramsay et al op cit note 59 at 14–15, MF Cassim 'Fundamental transactions' (2012) op cit note 51 at 697, *Bafana* supra note 226 paras 10, 22 and 23, *Portwig* supra note 232 at 52, 90 and 92, *Genesis Medical Scheme* supra note 247 para 42 and Delport op cit note 18 at 208.

[295] FHI Cassim (2012) op cit note 56 at 14, Felthun & Neill op cit note 20 at 1, Delport op cit note 18 at 208, *Portwig* supra note 232 at 83 and 91–92, MF Cassim 'Shareholder remedies' (2012) op cit note 147 at 800, s 5(2) of the Act, McDonald, Moodie & Ramsay et al op cit note 59 at 3, Delport op cit note 18 at 208, MF Cassim 'Fundamental transactions' (2012) op cit note 51 at 697, Latsky op cit note 14 at 370 and Submissions by the Law Society op cit note 210 at 8.

VI VI BIBLIOGRAPHY

Books:

RP Austin & IM Ramsay *Ford's Principles of Corporations Law* 15 ed (2013).

Maleka Femida Cassim *The New Derivative Action under the Companies Act: Guidelines for Judicial Discretion* (2016).

Cilliers, Benade & Henning et al *Cilliers and Benade Corporate Law* 3 ed (2000).

Tony Damian & Andrew Rich *Schemes, Takeovers and the Himalayan Peaks: The use of Schemes of Arrangement to Effect Change of Control Transactions* 3 ed (2013).

Henning, Delport & Katz et al *Reform of South African Corporate Law: Purchase by a Company of its Own Shares* (1998).

Laurie McDonald, Grant Moodie & Ian Ramsay et al *Experts' Reports in Corporate Transactions* (2003).

KA Rayner & RJ Connellan *Commentary on South African Takeover Law* (2015).

Carl Stein & Geoff Everingham *The New Companies Act Unlocked* (2011).

Harry Sutherland, Q.C. *Fraser & Stewart Company Law of Canada* 6 ed (1993).

Chapters in books:

Farouk HI Cassim 'Introduction to the new Companies Act: General overview of the Act' in Farouk HI Cassim (managing ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012).

Maleka Femida Cassim 'Shareholder remedies and minority protection' in Farouk HI Cassim (managing ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012).

Maleka Femida Cassim 'Fundamental transactions, takeovers and offers' in Farouk HI Cassim (managing ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012).

Loose-leaf publications:

Piet Delport (ed) (formerly edited by Hon Mr Justice PM Meskin) *Henochsberg on the Companies Act 71 of 2008* vol 3 (2018).

Scholarly journal articles:

Nigel Boardman ‘A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008’ 2010 *Acta Juridica* 306.

F.H.I Cassim ‘The new statutory provisions on company share repurchases: A critical analysis’ (1999) 116 *SALJ* 760.

Maleka Femida Cassim ‘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.

Johan Latsky ‘The fundamental transactions under the Companies Act: A report back from practice after the first few years’ (2014) 2 *Stell LR* 361.

SM Luiz ‘Some comments on the scheme of arrangement as an “affected transaction” as defined in the Companies Act 71 of 2008’ (2012) 15 *PER* 102.

SM Luiz ‘Protection of holders of securities in the offeree regulated company during affected transactions: General offers and schemes of arrangements’ (2014) 26 *SA Merc LJ* 560.

Kathleen van der Linde ‘Share repurchases and the protection of shareholders’ 2010 *TSAR* 288.

Other articles:

Yaniv Kleitman ‘Life under the Companies Act’ (2013) 13 *Without Prejudice* 23.

Cases:

Bafana Finance Mabopane v Makwakwa 2006 (4) All SA 1 (SCA).

Bezuidenhout v AA Mutual Insurance Association Ltd 1978 (1) SA 703 (A).

Ensor NO: v South Pine Properties (Pty) Ltd 1978 (2) SA 755 (N).

Ex Parte NBSA Centre Ltd 1987 (2) SA 783 (T).

Ex Parte Seafare Investments Ltd 1970 (1) All SA 31 (C).

Johnson v Moreton 1980 AC 37 (HL).

Portwig v Deputation Street Investments (Pty) Ltd 1985 (1) SA 83 (D).

Ritch and Bhyat v Union Government (Minister of Justice) 1912 AD 719.

Road Accident Fund v Mothupi 2000 (4) SA 38 (SCA).

SA Eagle Insurance Co Ltd v Bavuma 1985 (3) SA 42 (AD).

Singer NO v MJ Greeff Electrical Contractors (Pty) Ltd 1990 (3) All SA 513 (W).

Steenkamp v Peri-Urban Areas Health Committee 1946 TPD 424.

Suider-Afrikaanse Kooperatiewe Sitrusbeurs Beperk v Die Direkteur-Generaal: Handel en Nywerheid 1997 (2) All SA 321 (A).

The Council for Medical Schemes v Genesis Medical Scheme (20518) [2015] ZASCA 161 (16 November 2015).

Statute (South Africa):

Securities regulation code on takeovers and mergers and the rules under section 440C (4) (a), (b), (c) and (f) of the Companies Act, 1973 in GN 29 *GG* 12962 of 18 January 1991 (as amended).

The Companies Act 61 of 1973.

The Companies Act 71 of 2008.

The Companies Regulations, 2011 in GN R351 in *GG* 34239 of 26 April 2011 as amended by GN 619 *GG* 36759 of 20 August 2013 and GN 82 *GG* 37299 of 5 February 2014.

The Conventional Penalties Act 15 of 1962.

The Magistrates Court Act 32 of 1944.

The Medical Schemes Act 131 of 1998.

Statute (foreign jurisdictions):

The Corporations Act 50 of 2001.

Canada Business Corporations Act R.S.C. 1985, C-44.

Corporations Regulations, Statutory Rules 193 2001.

The New Zealand Companies Act 105 of 1993.

Guidelines (foreign jurisdictions):

ASIC Regulatory Guideline 111 ‘Content of expert reports’ dated March 2011 available at https://download.asic.gov.au/media/1240152/rg111-30032011.pdf, accessed on 9 July 2019.

ASIC Regulatory Guide 112 ‘Independence of experts’ dated March 2011 available at https://download.asic.gov.au/media/3336169/rg112-published-25-august-2015.pdf, accessed on 9 July 2019.

Corporations Canada ‘Policy of the Director concerning arrangements under s192 of the Canada Business Corporations Act’, 4 January 2010 available at https://corporationscanada.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs01073.html, accessed 18 July 2019.

Submissions:

‘Submissions by the Law Society of South Africa regarding amendments to and review of the Companies Act 71 of 2008’, dated August 2014 available at https://www.lssa.org.za/upload/documents/LSSA%20COMMENTS%20COMPANIES%20ACT%2029%20AUG%202014%20FINAL%20DRAFT%20(2).pdf, accessed on 19 March 2019.

Independent expert reports:

‘Independent expert’s report on the terms of the repurchase’ prepared by Grant Thornton Advisory Services Proprietary Limited in Circular to MiX Telematics Limited shareholders, dated 14 June 2016 available at https://www.mixtelematics.com/category/22-2016?Itemid=334&download=177, accessed on 15 July 2019.

‘Report of independent expert’ prepared by PricewaterhouseCoopers Corporate Finance Proprietary Limited in Circular to Clover Shareholders dated 28 February 2019 available at https://www.clover.co.za/wp-content/uploads/2019/03/CIL_circular_2019.pdf, accessed on 15 July 2019.

Internet sources:

Gary Felthun and Shannon Neill ‘Share repurchases and waiving the independent expert’s report’ Times, Legal Times 6 September 2013 at 1, available at *https://www.ensafrica.com/Uploads/Images/news/6_September_2013_-_The_Legal_Times_-_Share_repurchases_and_waiving_the_independent_experts_report.pdf*, accessed on 2 April 2019.