

CORPORATE MERGERS & ACQUISITIONS

When does an acquisition by a company of its own shares constitute a scheme of arrangement?

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Understanding the relationship between Section 48 and Section 114 of the Companies Act in Light of the Companies Amendment Act, No. 16 Of 2024

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1. Introduction

The relationship between section 48 of the Companies Act, No. 71 of 2008 (“**the Companies Act**”) (which regulates share repurchases) and section 114 of the Companies Act (which regulates schemes of arrangement) has historically been a source of interpretational uncertainty.

This article briefly explores the interface between these two provisions of the Companies Act in light of (i) the judicial guidance provided in *Capital Appreciation Ltd v First National Nominees (Pty) Ltd and Others* 2022 (6) SA 67 (SCA) read with the judgment of the court a quo (collectively the “**Capital Appreciation judgments**”) on the previous version of section 48 and (ii) the current version of section 48 following the promulgation of the Companies Amendment Act, No. 16 of 2024 (“**the 2024 Companies Amendment Act**”) which came into effect on 27 December 2024.

2. Legislative Background and Historical Debate

Prior to the promulgation of the 2024 Companies Amendment Act, section 48(8)(b) of the Companies Act stipulated that a decision by the board of a company to repurchase more than 5% of the company's own shares, whether in one transaction or through a series of integrated transactions (a “**Threshold Share Repurchase**”), was subject to the requirements of sections 114 and 115 of the Companies Act.

Given that section 114 regulates schemes of arrangement, a debate emerged as to whether Threshold Share Repurchases were (i) automatically deemed to be schemes of arrangement such that all provisions in the Companies Act which apply to schemes or arrangements would also be applicable to Threshold Share Repurchases or (ii) merely that Threshold Share Repurchases are subject to the same procedural requirements in sections 114 and 115 of the Companies Act.

3. Judicial Guidance in The *Capital Appreciation* Judgement

The two alternative interpretations (as set out above) were considered by the Gauteng Division of the High Court in *First National Nominees (Pty) Limited and Others v Capital Appreciation Limited and Another* 2021 (4) SA 516 (GJ). The High Court examined the nature of a ‘scheme of arrangement’ and pointed out that section 114(1) of the Companies Act characterises a scheme of arrangement as “*any arrangement between the company and holders of any class of its securities*” but that an “arrangement” is not defined in the Companies Act. The court relied on various authorities to characterise a scheme of arrangement as a mechanism which can be used by the company to “*affect the respective rights and obligations inter se of the company and its holders of securities in a manner which cannot otherwise be conveniently achieved by independent agreement between the company and each holder of securities*”.

As such, a repurchase by a negotiated agreement which is concluded between the company and a particular shareholder on a consensus basis is not such a scheme of arrangement as it is only binding on those two parties and does not legally bind any other shareholders to any legal consequences in respect of the shares held by such other shareholders.

It was concluded by the High Court that the effect of section 48(8)(b) was **not** to deem a Threshold Share Repurchase to be a scheme of arrangement if, having regard to the nature of the transaction, it was not such an arrangement (as described above). The intention of the legislature was rather to subject Threshold Share Repurchases to ‘the procedural requirements’ of sections 114 and 115, and to trigger the shareholder rights arising from sections 114 and 115 (for example, the appraisal rights of shareholders in terms of section 164 of the Companies Act).

The judgment of the High Court was taken on appeal, and the Supreme Court of Appeal concurred with the findings of the High Court, thereby providing a clearer understanding of (i) the meaning of a scheme of arrangement, and (ii) the relationship between section 48 and section 114 of the Companies Act prior to the promulgation of the 2024 Companies Amendment Act.

Although the *Capital Appreciation* judgments primarily focused on the appraisal rights of dissenting shareholders in terms of section 164 of the Companies Act, the judgments nonetheless provided a judicial interpretation of section 48(8)(b) and its relationship with sections 114 and 115 of the Companies Act. The High Court and the Supreme Court of Appeal both confirmed that while section 48(8)(b), prior to its amendment, made Threshold Share Repurchases ‘subject to’ the **procedural requirements** of sections 114 and 115, it did not *deem* such transactions to actually be schemes of arrangement i.e. that the consequences of the repurchase transaction would become of wider application than to the parties to the section 48(8)(b) repurchase transaction. However, by importing the procedural framework of sections 114 and 115 of the Companies Act, such transactions could trigger shareholder appraisal rights under section 164, even if the Threshold Share Repurchase was not, in substance, a scheme of arrangement.

4. The Effect of the 2024 Companies Amendment Act

The 2024 Companies Amendment Act came into effect on 27 December 2024 and notably amended section 48(8) of the Companies Act by removing the reference to sections 114 and 115. The amended section 48(8) now stipulates *inter alia* that, in general, a decision by the board of a company to the effect that the company would acquire its own shares must be approved by a special resolution of the shareholders of the company **unless** the shares are acquired as a result of –

(i) a *pro rata* offer made by the company to all shareholders of the company or a particular class of shareholders of the company (notwithstanding that the *pro rata* offer made to all shareholders may include shareholders who are also directors, prescribed officers or persons related to a director or prescribed officers of the company); or

(ii) a transaction effected on a recognised and duly licensed stock exchange on which the shares of the company are traded.

However, despite the removal of the reference to section 114 in section 48(8), section 114(1)(e) of the Companies Act still lists a re-acquisition by a company of its securities as an example of a scheme of arrangement between a company and its shareholders, and section 114(4) still stipulates that section 48 applies to a proposed arrangement contemplated in section 114 to the extent that the arrangement would result in any re-acquisition by a company of any of its previously issued securities.

5. When is a Share Repurchase by a Company a “Scheme of Arrangement”?

The logical inference to be drawn from the recently amended wording of section 48 read with the unamended section 114 of the Companies Act is that a share repurchase which does not, having regard to the factual circumstances, constitute a ‘scheme of arrangement’ between a company and its shareholders (as characterised in the *Capital Appreciation* judgments) will be subject only to the requirements in section 48, whereas a share repurchase which does, having regard to the factual circumstances, constitute a ‘scheme of arrangement’ between a company and its shareholders (as characterised in the *Capital Appreciation* judgments) will be subject the requirements in sections 114 and 115.

Therefore, with the removal of the 5% threshold in section 48(8) in terms of the 2024 Companies Amendment Act, the circumstances and consequences of a particular share repurchase is the relevant consideration to determine whether a particular share repurchase amounts to a “true” scheme of arrangement or whether it is an individual repurchase transaction between willing buyer and willing seller, as opposed to approaching a repurchase transaction with a specific focus on whether or not a 5% threshold would be crossed.

In this regard, we can draw on the following guiding principles established by the High Court and the Supreme Court of Appeal in the *Capital Appreciation* judgments:

(i) if a company repurchases shares from a shareholder (the “**Selling Shareholder**”) by agreement between the company and the Selling Shareholder, the repurchase does not constitute a scheme of arrangement as the agreement is solely between the company and the Selling Shareholder and it does not legally bind any other shareholders whose consent to the transaction was not obtained, and consequently only section 48 of the Companies Act would apply; and

(ii) if a company will be able to repurchase shares from shareholders who do not consent to the repurchase but who are legally bound to such transaction pursuant to a special resolution of the shareholders of the company which approves such transaction, such a transaction would amount to a scheme of arrangement, and consequently sections 114 and 115 of the Companies Act would apply.

6. Conclusion

The effect of the 2024 Companies Amendment Act on section 48 of the Companies Act is that we can lay to rest the debate whether consensual share repurchases are “deemed” to be schemes of arrangement. However, identifying when a share repurchase will constitute a scheme of arrangement as opposed to a “pure” section 48 repurchase remains an important question to determine as it would dictate whether the more stringent provisions of sections 114 and 115 applying to the transaction or whether only the provisions of section 48 are required to be complied with.

It is therefore recommended that shareholders and companies should obtain advice from commercial attorneys who have the necessary expertise to advise on these matters.

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[1] *Capital Appreciation Ltd v First National Nominees (Pty) Ltd and Others* 2022 (6) SA 67 (SCA)



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