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# ARTICLE

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**FRUSTRATING THE TRANSACTION**

The new Companies Act 2008, has been looming over the heads of South African businesses for a number of years, and whilst this has caused much frustration and criticism regarding its delayed implementation; one thing is certain - the Act will bring about lots of change and even further criticism once it is implemented.

Of course, many business folk who are not close to the changes might *only* have heard that the Act is more in line with international trends, more modern in its terminology and simpler to deal with than its predecessor Act of 1973. And so, those directors and company secretariat who may have -- at their peril -- kept an arms length of the new Act due to this generalist, perhaps over simplified talk, may be in for a nasty surprise. It may be true that the new Act is more modern, and that the formation and running of a company may seem easier to deal with than previously, however one must not be unguarded by what may at first appear simpler to adopt, neither be fooled by the continuous delays of the new Act and the effort that will be required by companies to implement its provisions. If the truth be told, there are a number of areas within the new Act which will catch many unsuspecting people by surprise, not least the many new provisions of personal liability for non compliance.

One such area of considerable change found in the new Act is -- for example -- the manner in which company takeovers and mergers will be conducted, including the manner in which the regulator (currently the Securities Regulation Panel [SRP]) will be replaced by the Takeover Regulation Panel (TRP). As expected, the administrative functions of the TRP will increase considerably and beyond those of the SRP at present. The new regulatory body will be responsible for -- among other -- keeping South Africa in line with international regulatory bodies vis-à-vis what is known in the new Act to be 'fundamental and affected transactions'. The TRP will function as the new regulatory body that will protect the minority shareholders who are affected by such transactions and ensure that they receive fair and equal treatment during the course of their proceedings.

Another significant change is the introduction of "fundamental transactions" within the wider definition of "affected transactions". Fundamental transactions (Sections 112, 113 and 114) deal with; the disposal of all or the greater part of the company's assets or undertaking; an amalgamation or merger; and, a scheme of arrangement. These transactions seem straight forward enough, and depending on the company's MOI, a lower threshold to pass a special resolution can be agreed. However, Sections 115 and 164 can massively disrupt the afore-mentioned process if they are invoked by minority shareholders.

A scheme of arrangement currently requires a court to convene a scheme meeting and following a favourable vote thereon, a court sanction of the scheme. However, the 2008 Act does not require court intervention in any fundamental transaction unless 15% of shareholders (or in certain circumstances a single shareholder) voted against the fundamental transaction and require the company to obtain court approval.

Whether the courts will hear such matters on an urgent basis is yet to be seen. If not, it could leave transactions in limbo for a prolonged period of time to the detriment of the offeror and the company. The company can abandon the resolution if it does not wish to contest the matter in court. Suddenly, instead of an easier process, a 15% belligerent body of shareholders, or even a single shareholder, can upset the applecart.

Section 164 further exacerbates the woes of the company attempting a fundamental transaction; here a single dissenting shareholder can demand that the company pay the shareholder fair value for all of his shares. If the shareholder does not accept the offer made to him by the company as being fair value, this too would ultimately be settled by the court. Of course the company can abandon the special resolution rather than incurring the expense of a court battle. It does seem that this creates fertile ground for shareholders to "green mail" the company.

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A beleaguered company could always implement a restricted array of measures to frustrate an offer provided that such measure was approved by a majority of non-conflicted shareholders in general meeting. The 2008 Act requires that the same restricted measures must receive the prior written approval of the Panel, and the approval of the shareholders of the relevant securities. The Act is silent on whether this approval is by a majority vote in general meeting by non-conflicted shareholders, or whether it requires the written approval of every non-conflicted shareholder. If the latter is the case, as it appears the Act reads, then it will be nearly impossible for a company to take such frustrating action.

Considering the fact that many skeptics -- or those who have adopted a "wait and see" approach -- may still be uncertain as to whether or not the new Companies Act 2008 is ready for its anticipated release come 01 April 2011, the jury may still be out regarding the implications and impacts upon South African business, not to mention of course the many more frustrations which may be attached to other vague or uncertain areas of the Act.

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