A new era for mergers and amalgamations

The coming into effect of the new Companies Act 71 of 2008 ("the New Companies Act"), which is likely to be in September of this year, will unveil a new chapter in South African corporate law. Valid criticism may be leveled against many aspects of the new Companies Act, but the introduction of amalgamations and mergers into our corporate practice, is largely a welcomed innovation.

Section 113 of the New Companies Act allows profit companies (state-owned, public, private and personal liability companies) to amalgamate and merge. An amalgamation or merger will entail two or more profit companies combining or sharing their commercial efforts and economic resources, in whole or in part. It will result in either the restructuring of one or more of the existing merging companies (whether relating to their shareholdings and or their asset composition), the creation of a new company or a combination of the two. Although not required, it may simultaneously involve dissolving any number of the old companies.

Amalgamations and mergers are one of the three types of fundamental transactions in the New Companies Act. The other two are schemes of arrangement (which differ materially from the Section 311 scheme in terms of the Companies Act 61 of 1973 ("the Old Act")) and the disposal of a greater part of the business of a company (similar to the old Section 228 transactions).

Previously mergers and acquisitions were typically affected by way of a sale of business or a sale of shares. Sectional 311 schemes of arrangement in terms of the Old Act were also sometimes creatively used when structuring mergers and acquisitions. The legislature has now come to the commercial party and for the very first time introduced amalgamations and mergers as a new kind of transaction to facilitate corporate

restructurings.

The provisions of the New Companies Act governing amalgamations and mergers have been met with a fair amount of skepticism and critics have noted that the new kind of transaction may give rise to much uncertainty. However the innovation is very much needed and the concept should be viewed as a major step forward in aligning our corporate law with modern trends in other jurisdictions.

Parties to an amalgamation or merger can to a large extent decide for themselves the exact terms and procedure for the implementation of the amalgamation and merger. This flexibility is welcomed, but it is important to approach it with caution. As with any innovative concept there are pitfalls to be avoided such as the uncertainty regarding the tax treatment of this new kind of transaction, the possibility of having the transaction challenged by disgruntled shareholders exercising their appraisal rights and the fact that it is uncertain how these locally unprecedented transactions will be viewed by the courts.

Some comfort is to be had in the fact that these transactions are well established in other countries such as Switzerland as an example. Admittedly, the fact that a transaction instrument which has been practiced with a fair degree of success abroad, is no guarantee that the same level of effectiveness would be achieved in South Africa.

It is the task of an attorney to point out to his or her client the options as well as the risks associated with a transaction proposed in terms of the New Companies Act. The monumental achievement of the late emeritus Professor Chris Barnard embarking on a venture never successfully undertaken by any scientist before is largely down to the established wisdom of an expert in his field having the appropriate degree of experience to tackle such a task. If amalgamations and mergers are approached with the same wisdom, then there is no reason why such a company restructuring, amidst the prevailing uncertainty, cannot be effected with the same degree of success.

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