

Capital Appreciation Ltd v First National Nominees (Pty) Ltd 2022 ZASCA 85

The connection between share re-acquisitions, schemes of arrangement, and appraisal rights under the Companies Act 71 of 2008

SUMMARY

This note analyses the judgment of the Supreme Court of Appeal in *Capital Appreciation Ltd v First National Nominees (Pty) Ltd 2022 ZASCA 85* pertaining to the issue of whether the appraisal rights in section 164 of the Companies Act 71 of 2008 (the Companies Act) apply to a share re-acquisition of more than 5% of a company's issued shares in terms of section 48(8) of the Companies Act. This judgement is significant in that it highlights the connection between, and the proper interpretation of the statutory regime created by, sections 48, 114, 115, and 164 of the Companies Act as well as the rationale underpinning this statutory regime. The note examines the main issues raised by the judgement as well as the impact that the amendments proposed by the Companies Amendment Bill [B27-2023] will have on this area of company law if this Bill is passed into law.

1 Introduction

The acquisition of a company's issued shares by the company or by a subsidiary of the company (share re-acquisitions, buy-backs, or repurchases) has become a common corporate practice in South Africa.¹ Section 48 of the Companies Act 71 of 2008 (the Companies Act), which regulates share re-acquisitions, permits a company or any subsidiary of the company to acquire the company's issued shares subject to compliance with certain statutory formalities and requirements. Share re-acquisitions are generally advantageous to companies and shareholders. For example, companies may utilise share re-acquisitions to restructure the share capital, manage the capital structure, boost the share price, facilitate share incentive schemes, or directly purchase shares from shareholders who want to sell some of their shares or shareholders who want to exit the company through selling their shares.² Companies may also use share re-acquisitions as a tax-effective way of distributing excess cash to shareholders.³ However, despite their legitimate purposes and potential benefits, share re-acquisition

1 Skae et al *Managerial Finance* (2017) 584.

2 See generally Cassim et al *Contemporary Company Law* (2021) 388-390; Correia et al *Financial Management* (2015) 16-22; Delpont *Henochsberg on the Companies Act 71 of 2008* (2022) 205-206.

3 Correia et al (2015) 16-22; Cassim et al *Contemporary Company Law* (2021) 388; Delpont (2022) 205-206.

transactions may facilitate abuse of powers by the directors and the abuse of minority shareholders.⁴

In *Capital Appreciation Ltd v First National Nominees (Pty) Ltd*,⁵ the Supreme Court of Appeal (the SCA) dealt with the question of whether the appraisal rights in section 164 of the Companies Act apply to a re-acquisition of shares by a company of more than 5% of its issued shares in terms of section 48(8)(b) of the Companies Act. In terms of section 48(8)(b), the board's decision that the company will acquire its own shares is subject to the requirements of sections 114 and 115 of the Companies Act if (when considered as a single transaction or together with other transaction in an integrated series of transactions) it involves the re-acquisition of more than 5% of the company's issued shares of any particular class (the 5% threshold). This note analyses the SCA's judgment in *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* pertaining to what the SCA has referred to as the proper interpretation of the statutory regime created by sections 48, 114, 115, and 164 of the Companies Act⁶ and the rationale underpinning this statutory regime. The note also highlights the potential impact of the Companies Amendment Bill [B27-2023] on this area of company law.

2 Factual background

2.1 Facts

The appellant was Capital Appreciation Ltd (Capital Appreciation) and the three respondents were First National Nominees (Pty) Ltd (First National), Nedbank Ltd, and Rozendal Partners (Pty) Ltd. Briefly, the facts were that Capital Appreciation notified its shareholders, through a circular, of its intention to re-acquire more than 5% of its issued shares from specific shareholders.⁷ Capital Appreciation advised the shareholders that the proposed share re-acquisition was subject to sections 48, 114, and 164 of the Companies Act.⁸ Capital Appreciation further advised its shareholders that the re-acquisition was subject to approval by a special resolution of the shareholders, in terms of section 115 of the Companies Act.⁹ First National, a registered shareholder of Capital Appreciation, gave notice of its objection to the proposed re-acquisition and subsequently voted against the special resolution to approve the re-acquisition at the general meeting.¹⁰ After the special resolution was passed, First National demanded that Capital Appreciation buy its shares in Capital Appreciation at fair value.¹¹ Capital

4 Yeats et al *Commentary on the Companies Act of 2008* (2018) 2-463; Cassim et al *Contemporary Company Law* (2021) 385-388; Delpont (2022) 205.

5 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* 2022 ZASCA 85.

6 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 5.

7 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 3.

8 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 3.

9 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 3.

10 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 4.

11 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 4.

Appreciation offered to pay R0.80 per share but First National rejected the offer.

The respondents then applied to the Gauteng Local Division of the High Court, Johannesburg (the High Court) to determine a fair value of the shares held by First National in Capital Appreciation in terms of section 164(14) of the Companies Act and to appoint an appraiser to assist the High Court in this regard. Capital Appreciation argued that section 164 of the Companies Act did not apply and that, as such, First National was not entitled to the right of appraisal.¹² The sole issue before the High Court, and the sole issue on appeal, was whether section 164 of the Companies Act applied to the re-acquisition of shares by Capital Appreciation.¹³ According to the SCA, this issue entailed the proper interpretation of the statutory regime in terms of sections 48, 114, and 115 of the Companies Act.¹⁴

2 2 The High Court judgment

The High Court made some notable points in relation to the provisions of section 48(8)(b) of the Companies Act as well as their effect and rationale. It is, therefore, apposite here to briefly refer to the High Court's judgment (*First National Nominees (Pty) Limited v Capital Appreciation Limited*).¹⁵

The High Court considered the question of whether a share re-acquisition falling within the ambit of section 48(8)(b) of the Companies Act (a share re-acquisition above the 5% threshold) is also considered to be a scheme of arrangement in terms of section 114, or whether such share repurchase is merely made subject to the requirements of a scheme of arrangement in sections 114 and 115.¹⁶ The High Court held that section 48(8)(b) of the Companies Act does not have the effect of deeming a share re-acquisition transaction that exceeds the 5% threshold to be a scheme of arrangement if, by nature, the transaction is not a scheme of arrangement as contemplated in the common law.¹⁷ Instead, the High Court stressed that '[a] section 48(8)(b) transaction ... remains a section 48 transaction' but is merely made subject to the requirements of sections 114 and 115 of the Companies Act to protect minority shareholders.¹⁸ According to the High Court, the legislature recognised that minority shareholders required protection in the context of share re-acquisition transactions involving a substantial (more than 5%) amount of a company's issued shares.¹⁹ These transactions may entail a restructuring of the company's shares, thereby having a

12 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 5.

13 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 5.

14 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 5.

15 *First National Nominees (Pty) Limited v Capital Appreciation Limited* 2021 4 SA 516 (GJ).

16 *First National Nominees (Pty) Limited v Capital Appreciation Limited* para 24.

17 *First National Nominees (Pty) Limited v Capital Appreciation Limited* para 27.

18 *First National Nominees (Pty) Limited v Capital Appreciation Limited* para 27.

19 *First National Nominees (Pty) Limited v Capital Appreciation Limited* para 28.

significant impact on the minority shareholders.²⁰ This protection, according to the High Court, was best achieved by making such transactions subject to the ‘ready-made’ protective procedures and requirements of sections 114 and 115 of the Companies Act.²¹ The High Court emphasised that the requirements of sections 114 and 115 of the Companies Act were applicable to a share re-acquisition by reason of the fact that the transaction crossed the 5% threshold and regardless of whether the transaction was, as a matter of fact, a scheme of arrangement in nature or not.²²

Concerning the key question of whether section 164 was applicable to share re-acquisitions above the 5% threshold in terms of section 48(8), the High Court held that section 164 was applicable and that First National was entitled to the appraisal remedy in terms of that section.²³ The High Court took the view that the reference (in section 48(8)) to sections 114 and 115 as a whole indicated the legislature’s intention that all the procedural requirements and substantive rights provided in sections 114 and 115 of the Companies Act must apply to a share re-acquisition that exceeds the 5% threshold.²⁴ These included not only the requirements regarding the appointment of an independent expert²⁵ and approval of the transaction by a special resolution²⁶ but also included the shareholders’ right to the appraisal remedy in section 164 of the Companies Act.²⁷ The High Court, therefore, granted the order sought and later granted Capital Appreciation leave to appeal to the SCA.

3 The SCA Judgment

The SCA held that there is a direct connection between share re-acquisitions in terms of section 48(8)(b) (through sections 114 and 115) and the appraisal right in terms of section 164 of the Companies Act.²⁸ Section 164 of the Companies Act was, therefore, applicable to the re-acquisition of shares by Capital Appreciation. The SCA further found that First National had complied with the procedural requirements of sections 115 and 164 of the Companies Act and was, as such, entitled to be paid the fair value for its shares by Capital Appreciation.²⁹ In view of the above findings, the SCA dismissed the appeal with costs.³⁰

20 *First National Nominees (Pty) Limited v Capital Appreciation Limited* paras 30-31.

21 *First National Nominees (Pty) Limited v Capital Appreciation Limited* para 28.

22 *First National Nominees (Pty) Limited v Capital Appreciation Limited* para 32.

23 *First National Nominees (Pty) Limited v Capital Appreciation Limited* para 32.

24 *First National Nominees (Pty) Limited v Capital Appreciation Limited* para 30.

25 S 114(2) of the Companies Act.

26 S 115(2)(a) of the Companies Act.

27 S 115(8) of the Companies Act; *First National Nominees (Pty) Limited v Capital Appreciation Limited* para 30.

28 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 29.

29 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* paras 28-29.

30 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 30.

4 Analysis of the SCA's judgment

The SCA's judgement in *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* considered some important aspects relating to the proper interpretation of the legal regime in terms of sections 48, 114, 115, and 164 of the Companies Act that merit further analysis. They include the following: the application of section 48 of the Companies Act, the statutory formalities regarding share re-acquisitions in terms of section 48 of the Companies Act, the connection between share re-acquisitions (s 48) and schemes of arrangement (s 114), the connection between share re-acquisitions (s 48) and the approval of fundamental transactions (s 115) as well as the connection between share re-acquisitions (s 48) and the appraisal remedy (s 164).

4 1 Application of section 48 of the Companies Act

The SCA correctly indicated the two categories of transactions to which section 48 of the Companies Act does not apply. First, the SCA pointed out that section 48(1)(a) expressly provides that section 48 does not apply to “the making of a demand, tendering of shares and payment by a company to a shareholder in terms of a shareholder’s appraisal rights set out in section 164”.³¹ Citing Cassim et al,³² the SCA held that this simply means that where a shareholder exercises its appraisal rights and the company pays the fair value of the shares (s 164), such exercise of rights and such payment are not considered as an acquisition by a company of its own shares in terms of section 48 of the Companies Act.³³ Secondly, the SCA correctly noted that section 48(1)(b) provides that section 48 does not apply to the “redemption by the company of any redeemable securities in accordance with the terms and conditions of those securities”.³⁴ It, therefore, follows that in all other instances an acquisition by a company of its own shares, or an acquisition by a subsidiary company of shares in its holding company, is treated as a share re-acquisition in terms of section 48 of the Companies Act. The formalities set out in section 48, as discussed below, must be complied with in all such other instances.

4 2 The formalities regarding share re-acquisitions in terms of section 48 of the Companies Act

Notably, section 48(2)(a) of the Companies Act empowers a company’s board to determine that the company will acquire its own shares. The SCA pointed out that the board’s power, in this regard, is not absolute but

31 S 48(1)(a) of the Companies Act; *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 12.

32 Cassim et al *Contemporary Company Law* (2012) 300.

33 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 12. See also Cassim et al *Contemporary Company Law* (2021) 393.

34 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 12. See also Cassim et al *Contemporary Company Law* (2021) 393.

is restricted in three respects. The first restriction is that the board's "decision" that the company re-acquire its shares must satisfy the requirements of section 46 of the Companies Act – the section that regulates distributions. A share re-acquisition in terms of section 48 is considered to be a distribution³⁵ and, as such, it is subject to compliance with all the requirements of a distribution set out in section 46 of the Companies Act. These requirements include that the acquisition of shares must be authorised by a resolution of the board of directors.³⁶ It must reasonably appear that the company will satisfy the solvency and liquidity test in section 4 of the Companies Act after completing the proposed re-acquisition, and the board must have applied the solvency and liquidity test and reasonably concluded that the company will satisfy that test immediately after completion of the proposed acquisition.³⁷

The second restriction indicated by the SCA is that a company may not acquire its shares if after the acquisition of the shares there would not be any shares in issue save for shares held by the company's subsidiaries or convertible or redeemable shares.³⁸

The third restriction highlighted by the SCA is that the board's decision that the company will acquire its own shares "is subject to the requirements of sections 114 and 115" if it involves the acquisition of more than 5% of the company's issued shares of any particular class, whether in a single transaction or in an integrated series of transactions.³⁹ As discussed below, section 114 of the Companies Act provides for the formalities for schemes of arrangement and section 115 provides for the statutory requirements and approvals that must be complied with when implementing fundamental transactions (i.e. schemes of arrangement, disposals of all or the greater part of assets, or amalgamations or mergers).

Apart from the above three restrictions highlighted by the SCA, it is noteworthy that section 48 of the Companies Act imposes further restrictions where a company's shares are to be acquired by any subsidiary of the company and where any of the shares are to be acquired from a director or prescribed officer of the company, or from a person related to such director or prescribed officer. A subsidiary may acquire shares in its holding company subject to the maximum limit of 10% of all the issued shares of any class of the holding company's shares that is permitted to be held by, or for the benefit of, all its subsidiaries taken together.⁴⁰ No voting rights attached to such shares may be

35 See the definition of "distribution" in section 1 of the Companies Act; Davis et al *Companies and other Business Structures* (2019) 105.

36 S 46(1)(a)(ii) of the Companies Act.

37 S 46(1)(b) and (c) of the Companies Act.

38 S 48(3) of the Companies Act; *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 13.

39 S 48(8)(b) of the Companies Act; *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 13.

40 S 48(2)(b)(i) of the Companies Act.

exercised while the shares are held by the company's subsidiary.⁴¹ In the case of share re-acquisitions involving an acquisition of shares held by the company's directors or prescribed officers, or persons related to such directors or prescribed officers, the board's decision that the company will acquire its shares must be approved by a special resolution of the company's shareholders.⁴² This requirement of shareholder approval by a special resolution seeks to protect the shareholders from potential abuse of powers by the directors for personal gain when a company acquires shares from the directors or from persons related to the directors.⁴³

4 3 The connection between share re-acquisitions (s 48(8)(b)) and schemes of arrangement (s 114).

In terms of section 48(8)(b) of the Companies Act, the board's decision that the company will acquire its own shares is subject to the requirements of *inter alia* section 114 if it involves the re-acquisition of more than 5% of the company's issued shares of any particular class. The SCA held that section 48(8)(b) creates a direct link between share re-acquisitions in terms of section 48 and schemes of arrangement in terms of section 114 of the Companies Act.⁴⁴ This accords with the High Court's view that the reference to *inter alia* section 114 entails that all the requirements of section 114 are applicable to a share re-acquisition that exceeds the 5% threshold.⁴⁵

Notably, section 114 of the Companies Act is concerned with the formalities for schemes of arrangement. The SCA reiterated one of the key procedural requirements of section 114 that a company seeking to acquire more than 5% of its issued shares will have to comply with, namely the appointment of an independent expert to prepare a report providing all the prescribed information on the effects of the proposed arrangement to the board of directors and to all the company's security holders.⁴⁶ The independent expert's report must, at a minimum, provide the information that is required in terms of section 114(3)(a)-(g), including prescribed information relevant to the value of the securities affected by the proposed arrangement, a description of the material effects the proposed arrangement will have on the rights and interests of the security holders affected by the proposed arrangement, an evaluation of material adverse effects of the proposed arrangement, and a copy of sections 115 and 164 of the Companies Act.

41 S 48(2)(b)(ii) of the Companies Act.

42 S 48(8)(a) of the Companies Act.

43 Cassim et al *Contemporary Company Law* (2021) 396.

44 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 28.

45 S 114(2) of the Companies Act; *First National Nominees (Pty) Limited v Capital Appreciation Limited* para 30.

46 S 114(2) and (3) of the Companies Act; *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 17.

The SCA referred to the two views expressed by Cassim et al regarding the connection between section 114 of the Companies Act and share re-acquisitions.⁴⁷ The first view is that section 114 seeks to deal with significant share re-acquisitions amounting to “wholesale fundamental changes to the company’s capital structure”.⁴⁸ The second view is that section 114 enables the board of directors to propose and, subject to the requisite approvals, implement a scheme of arrangement involving an acquisition of the company’s own shares.⁴⁹ The SCA further noted that section 114(4) provides that section 48 of the Companies Act is applicable to a proposed scheme of arrangement to the extent that the scheme of arrangement will involve a re-acquisition of the company’s previously issued securities.⁵⁰ According to the High Court, this simply means that, in addition to complying with section 114, share re-acquisition transactions that are pursuant to schemes of arrangement must comply with section 48.⁵¹

It is notable, however, that the SCA did not directly address the question of whether a share re-acquisition above the 5% threshold⁵² is also considered to be a scheme of arrangement in terms of section 114 of the Companies Act. As indicated above, the High Court emphatically held that “[a] section 48(8)(b) transaction ... remains a section 48 transaction” but is merely made subject to the requirements of sections 114 and 115 to protect minority shareholders.⁵³ Concerning the legal nature and characterisation of such a transaction, the SCA simply held that a share re-acquisition in terms of section 48(8)(b) is regarded as a fundamental transaction and the transaction is made subject to the requirements of sections 114 and 115 of the Companies Act.⁵⁴ The SCA further indicated that the re-acquisition will qualify as an affected transaction if a regulated company is involved and, as such, the re-acquisition will have to comply with the Takeover Regulations.⁵⁵ Notably, the High Court’s judgment did not address the question of whether the Takeover Regulations are applicable to a share re-acquisition in terms of section 48(8)(b) of the Companies Act.

With both the High Court and the SCA stressing that the requirements of sections 114 and 115 must be complied with in the context of share re-acquisition transactions that exceed the 5% threshold, and the SCA further clearly stating that the transaction is deemed to be a fundamental

47 Cassim et al *Contemporary Company Law* (2012) 304.

48 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 16, referring to Cassim et al *Contemporary Company Law* (2012) 304. This view has been repeated in Cassim et al *Contemporary Company Law* (2021) 398.

49 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 16, referring to Cassim et al *Contemporary Company Law* (2012) 304. Again, this view has been repeated in Cassim et al *Contemporary Company Law* (2021) 398.

50 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 18.

51 *First National Nominees (Pty) Limited v Capital Appreciation Limited* para 23.

52 S 48(8)(b) of the Companies Act.

53 *First National Nominees (Pty) Limited v Capital Appreciation Limited* para 27.

54 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 27.

55 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* paras 19 and 28.

transaction, it would appear that any emphasis on the nature of such transaction (i.e. whether it is in fact a scheme of arrangement or not) has no significant practical effect. This is because as long as the transaction exceeds the 5% threshold, a company will have to adhere to all the formalities and requirements applicable to schemes of arrangement. These (as discussed below) include all the approval requirements applicable to fundamental transactions and the additional requirements applicable to affected transactions, in the case of a regulated company. It would appear that share re-acquisitions of such magnitude end up being treated as schemes of arrangement even where, by legal classification, they may not be schemes of arrangement.

4 4 The connection between share re-acquisitions (s 48) and the approval of fundamental transactions (s 115)

In addition to creating a direct link between share re-acquisitions in terms of section 48 and schemes of arrangement in terms of section 114, the SCA highlighted that section 48(8)(b) creates a connection between such share re-acquisitions and the approval of fundamental transactions in terms of section 115 of the Companies Act.⁵⁶ Section 48(8)(b) makes it clear that the board's decision that the company will acquire more than 5% of its issued shares of any particular share class is also subject to the requirements of section 115. Section 115 provides for the procedures and approval requirements that a company wishing to implement a fundamental transaction must comply with for the transaction to be valid. These procedures and approval requirements are designed to protect the minority shareholders.⁵⁷ In this regard, the SCA correctly indicated that, in terms of section 115, a company may not implement a fundamental transaction unless the transaction has been approved by the shareholders or by the court (only in certain limited circumstances) and, in the case of a transaction involving a regulated company, the Takeover Regulation Panel has issued a compliance certificate in respect of the transaction or exempted the transaction.⁵⁸

Concerning shareholder approval, the SCA indicated that a fundamental transaction must be approved by "a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose" in accordance with section 115(1)(a)(i) read with paragraph (2)(a) of the Companies Act.⁵⁹ Therefore, a re-acquisition of more than 5% of the company's shares must be approved by a special resolution of the company's shareholders. Furthermore, such a transaction must be approved at a meeting⁶⁰ convened for that purpose and all the prescribed formalities pertaining to shareholder

56 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 28.

57 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 29; *First National Nominees (Pty) Limited v Capital Appreciation Limited* paras 27-31.

58 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* paras 19-20.

59 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 20.

60 Delpport (2022) 422(5).

approval in terms of section 115(2)(a) will have to be complied with. This would mean that a re-acquisition of more than 5% of the company's issued shares may not be approved through the written resolution procedure in terms of section 60 of the Companies Act.

Interestingly, the SCA further stated that section 115(2)(b) of the Companies Act requires that "a similar procedure must be followed by a holding company of a company that contemplates a share repurchase".⁶¹ In this regard, section 115(2)(b) provides that, in the case of a subsidiary company, a proposed fundamental transaction must also be approved by a special resolution of the shareholders of its holding company if:

- (i) the holding company is a company or an external company;
- (ii) the proposed transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary; and
- (iii) having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary constitutes a disposal of all or the greater part of the assets or undertaking of the holding company.

It is clear from the wording of section 115(2)(b) that this section applies only in relation to a transaction that concerns a disposal of all or the greater part of a subsidiary's assets or undertaking.⁶² It is, therefore, submitted that the SCA's assertion that the provisions of section 115(2)(b) would apply to share re-acquisitions does not appear to be the correct legal position. Unfortunately, the SCA did not elaborate on its interpretation to the effect that a contemplated re-acquisition of shares by a subsidiary must also be approved by a special resolution of the shareholders of its holding company, in accordance with section 115(2)(b) of the Companies Act.

Concerning court approval, the SCA correctly indicated that section 115(2)(c) of the Companies Act requires that a fundamental transaction must be approved by a court in certain circumstances.⁶³ In this regard, court approval will be required if at least 15% of the voting rights exercised on the special resolution voted against that resolution and any person who voted against the special resolution requires the company to seek court approval to implement the transaction.⁶⁴ Court approval to implement the transaction will also be required if the court grants any person who voted against the special resolution leave to apply to court for a review of the transaction.⁶⁵ The court may review and set aside the special resolution, and therefore thwart the implementation of a fundamental transaction, in the limited circumstances specified in section 115(7) of the Companies Act. These limited circumstances include where the court finds the resolution to be manifestly unfair to any

61 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 20.

62 Cassim et al *The Law of Business Structures* (2021) 478-479; *Cilliers v LA Concorde Holdings Limited* 2018 6 SA 97 (WCC) para 28.

63 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 20.

64 S 115(3)(a) of the Companies Act.

65 S 115(3)(b) read with (6) and (7) of the Companies Act.

class of holders of the company's securities,⁶⁶ or where the court finds the vote to be materially tainted by conflict of interests, inadequate disclosure, failure to comply with the Companies Act, or Memorandum of Incorporation, or rules of the company, or other procedural irregularities.⁶⁷ The requirement of court approval would therefore, in these circumstances, serve as a protective mechanism for minority shareholders in the context of share re-acquisitions exceeding the 5% threshold. It is worth mentioning that, in some recent cases, some minority shareholders have actively sought to utilise the remedy of judicial review of fundamental transactions.⁶⁸

The SCA's finding that a share re-acquisition that exceeds 5% of the company's issued shares is considered a "fundamental transaction"⁶⁹ is particularly significant as far as the applicability of the Takeover Regulations to such transactions is concerned. When a "regulated company" proposes an "affected transaction" that is not pursuant to, or contemplated in an approved business rescue plan, the Takeover Regulations will apply.⁷⁰ A "regulated company" refers to a public company; a state-owned company (subject to certain exemptions); or a private company, but only if 10% of its issued securities have been transferred (except through transfer between or among related or inter-related persons) within 24 months immediately before the date of the affected transaction, or the company's Memorandum of Incorporation expressly provides that the company and its securities are subject to the Takeover Regulations.⁷¹ An "affected transaction" includes a "fundamental transaction" (i.e. a disposal of all or the greater part of a company's assets or undertaking, an amalgamation or merger, or a scheme of arrangement) proposed by a regulated company.⁷² A regulated company may not implement an affected transaction unless the Takeover Regulation Panel has issued a compliance certificate in respect of the transaction or exempted the transaction.⁷³ Therefore, a share re-acquisition that is above the 5% threshold as contemplated in section 48(8) of the Companies Act is regarded as a fundamental transaction and, if it involves a regulated company, an affected transaction. As an affected transaction, such share re-acquisition must comply with the Takeover Regulations.

66 S 115(7)(a) of the Companies Act.

67 S 115(7)(b) of the Companies Act.

68 See, for example, *Sand Grove Opportunities Master Fund Ltd v Distell Group Holdings Ltd* 2022 5 SA 277 (WCC); *Marble Head Investments (Pty) Ltd v Niveus Investments* 2020 ZAWCHC 36.

69 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 27.

70 S 117(1)(c) and (i) read with s 118(1) and (2) of the Companies Act.

71 S 117(1)(i) of the Companies Act.

72 S 117(1)(c) (i)-(iii) of the Companies Act.

73 S 115(1)(b) of the Companies Act.

4 5 The connection between share re-acquisitions (s 48) and the appraisal remedy (s 164)

The connection between the acquisition of the company's own shares⁷⁴ and the appraisal remedy⁷⁵ is created through section 115 of the Companies Act. As indicated above, the board's decision that the company will acquire its own shares is subject to the requirements of sections 114 and 115 of the Companies Act if it involves the acquisition of more than 5% of the issued shares of any particular share class. The SCA pointed out that section 115(8) expressly refers to section 164⁷⁶ and, therefore, entitles a dissenting shareholder to seek the appraisal remedy in section 164 of the Companies Act. The appraisal remedy or the appraisal right in terms of section 164 essentially refers to the dissenting shareholder's right, upon the occurrence of certain triggering transactions, to have the company pay the fair value of the shares held by such shareholder, instead of thwarting the transaction.⁷⁷ The board's decision for the company to re-acquire more than 5% of its issued shares, therefore, becomes one of the transactions triggering the appraisal remedy, in addition to the four transactions that are specifically listed in section 164(2) of the Companies Act as triggering transactions (i.e. a proposed disposal of all or the greater part of the company's assets or undertaking, amalgamation or merger, scheme of arrangement, and an amendment of the company's Memorandum of Incorporation that is materially adverse to the rights or interests of holders of the relevant class of shares).

Accordingly, a shareholder who is opposed to a share re-acquisition in excess of the 5% threshold will be entitled to demand payment by the company of the fair value for all the shares held by that shareholder in the company.⁷⁸ The shareholder will need to have notified the company in advance of the intention to oppose the special resolution seeking approval of the transaction, and to have been present at the meeting and voted against that resolution.⁷⁹ The dissenting shareholder will also need to meticulously follow the procedural requirements set out in section 164 of the Companies Act.

The SCA pointed out that section 164(14) of the Companies Act gives a dissenting shareholder, who has made a demand that the company pay the fair value for the shares held by that shareholder, the right to apply to a court to determine a fair value of such shares and for an order compelling the company to pay the dissenting shareholder the fair value

74 S 48 of the Companies Act.

75 S 164 of the Companies Act.

76 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 21.

77 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 22, referring to Yeats et al (2018) 7-24; Cassim et al *Contemporary Company Law* (2021) 945-946; Delpont (2022) 577-578.

78 S 164(5)-(8) of the Companies Act.

79 S 164(5) of the Companies Act; *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 20.

as determined by the court in two instances. The first instance is where the company has failed to make an offer to pay the shareholder an amount considered by the directors as the fair value of the shares and the second instance is where the company has made an offer that is considered by the dissenting shareholder to be inadequate.⁸⁰ The SCA has, in this regard, affirmed the approach taken by the High Court that all the procedural requirements and substantive rights provided in sections 114 and 115 of the Companies Act, which include the appraisal remedy in section 164, are applicable to a share repurchase transaction that exceeds the 5% threshold.⁸¹

5 Changes proposed in the Companies Amendment Bill [B27-2023]

One of the significant amendments proposed by the Companies Amendment Bill [B27-2023] is the replacement of section 48(8) of the Companies Act by a new subsection (8).⁸² As discussed above, the current section 48(8)(b) of the Companies Act is the provision that creates a direct link between share re-acquisitions in terms of section 48 and the schemes of arrangement,⁸³ the approval of fundamental transactions,⁸⁴ and the appraisal remedy.⁸⁵

Notably, the new section 48(8) that is proposed in the Companies Amendment Bill [B27-2023]⁸⁶ does not make any reference to sections 114 and 115 of the Companies Act. The proposed amendment also does not make any reference to an acquisition of more than 5% of the issued shares of any particular class of a company's shares. Therefore, if the Companies Amendment Bill [B27-2023] is passed, a share re-acquisition in terms of section 48 of the Companies Act will no longer be subject to the statutory formalities, approvals, and other protective mechanisms in terms of sections 114 and 115, even if the share re-acquisition involves more than 5% (i.e. a substantial quantity) of the company's shares of any particular class. Furthermore, the appraisal remedy under section 164 of the Companies Act, and the protective role that this remedy offers to dissatisfied minority shareholders, will no longer be applicable to substantial share re-acquisitions in terms of section 48. In other words, if passed, the Companies Amendment Bill [B27-2023] will effectively jettison the connection that currently exists between substantial share re-acquisitions (s 48(8)), fundamental transactions (ss 114 and 115), and the appraisal remedy (s 164), including the rationale of protecting the minority shareholders

80 S 164(4) of the Companies Act; *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* paras 26-29.

81 *First National Nominees (Pty) Limited v Capital Appreciation Limited* para 30.

82 See cl 11 of the Companies Amendment Bill [B27-2023].

83 S 114 of the Companies Act.

84 S 115 of the Companies Act.

85 S 164 of the Companies Act.

86 See cl 11 of the Companies Amendment Bill [B27-2023].

underpinning that connection, as articulated by the SCA in *Capital Appreciation Ltd v First National Nominees (Pty) Ltd*.

The approach proposed in the Companies Amendment Bill [B27-2023] may, therefore, be viewed as significantly reducing minority shareholder protection in the context of re-acquisitions of significant quantities of a company's issued shares. On the other hand, this approach may be viewed as seeking to promote flexibility and efficiency in share re-acquisition transactions by removing some of the current statutory procedures and formalities that are applicable to significant share re-acquisitions. Some of the key policy objectives underpinning the Companies Amendment Bill [B27-2023] are the promotion of efficiency and the ease of doing business in South Africa by reducing burdensome compliance requirements.⁸⁷ According to the Memorandum on the Objects of the Companies Amendment Bill [B27-2023], it is essential that company law should *inter alia* 'be clear, user friendly, consistent with well-established principles and not be over burdensome on the conduct of business.' The Companies Amendment Bill [B27-2023], therefore, signifies a significant shift in policy from an emphasis on minority shareholder protection to an emphasis on efficiency in share re-acquisitions. One of the protective mechanisms for minority shareholders that will remain in the context of significant share re-acquisitions will be the duties of directors (in that the directors must comply with their duties when making the determination that the company will acquire its issued shares).⁸⁸ A further protective mechanism will be the proposed requirement of shareholder approval by a special resolution if the shares are not acquired as a result of pro rata offers or transactions effected on a recognised stock exchange on which the company's shares are traded.⁸⁹ The risk of abuse of minority shareholders and the abuse of directorial powers is limited in pro rata re-acquisitions or in re-acquisitions that are done on recognised stock exchanges.⁹⁰

6 Conclusion

This note has analysed the judgement of the SCA in *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* regarding the issue of whether the appraisal rights⁹¹ apply to a share re-acquisition of more than 5% of a company's issued shares.⁹² As the SCA correctly indicated, this issue entailed the proper interpretation of the statutory regime created by sections 48, 114, 115, and 164 of the Companies Act.⁹³ The note has

87 See Memorandum on the Objects of the Companies Amendment Bill [B27-2023].

88 Delpont (2022) 207.

89 See the new s 48(8)(b)(i) and (ii) of the Companies Act that is proposed in cl 11 of the Companies Amendment Bill [B27-2023].

90 Delpont (2022) 208(2B)-208(3).

91 S 164 of the Companies Act.

92 S 48(8) of the Companies Act.

93 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 5.

highlighted the main issues raised by the SCA's judgement, which include: the ambit of the application of section 48 of the Companies Act, the statutory formalities regarding share re-acquisitions in terms of section 48 of the Companies Act, the connection between substantial share re-acquisitions (s 48(8)(b)) and schemes of arrangement (s 114), the connection between substantial share re-acquisitions (s 48) and the approval of fundamental transactions (s 115), and the connection between substantial share re-acquisitions (s 48) and the appraisal remedy (s 164). The note has also highlighted the potential implications of the Companies Amendment Bill [B27-2023] on the statutory formalities and approvals regarding share re-acquisition transactions involving significant quantities of a company's issued shares and their underpinning rationale, as articulated in the SCA's judgment.

The judgement of the SCA in *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* is significant in that it provides clarity regarding the connection between, and the proper interpretation of the statutory regime created by, sections 48, 114, 115, and 164 of the Companies Act as well as the rationale underpinning this statutory regime. It clarifies the formalities and approvals in terms of the Companies Act that must be complied with when the board of directors proposes a share re-acquisition that is above the 5% threshold (whether in a single transaction or in a series of interconnected transactions).

The SCA held that a share re-acquisition transaction that exceeds the 5% threshold (s 48(8)(b)) is deemed to be a fundamental transaction and is subject to the requirements of sections 114 and 115 of the Companies Act. According to the SCA, section 48(8)(b) creates a direct link between share re-acquisitions in terms of section 48 and schemes of arrangement in terms of section 114 as well as the approval of fundamental transactions in terms of section 115.⁹⁴ The consequence of the above connection is that a share re-acquisition above the 5% threshold must comply with all the procedural requirements and formalities for schemes of arrangement in section 114 as well as the strict procedures and approval requirements applicable to fundamental transactions in section 115 of the Companies Act.

Moreover, the SCA held that section 115(8), which expressly refers to section 164, creates the connection between share re-acquisitions (s 48) above the 5% threshold and the appraisal remedy in section 164 of the Companies Act.⁹⁵ Consequently, a dissenting shareholder has the right to demand that the company pay the fair value for the shares held by that shareholder in the company.⁹⁶ If the company has failed to make an offer to pay the fair value of the shares or has made an offer that the dissenting shareholder considers inadequate, the dissenting shareholder is entitled to apply to a court to determine a fair value of such shares and

94 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 28.

95 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 21.

96 S 164(5)-(8) of the Companies Act.

to compel the company to pay such shareholder the fair value determined by the court.⁹⁷

The SCA's judgment in *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* affirms the approach adopted by the High Court that all the procedural requirements and substantive rights provided in sections 114 and 115 of the Companies Act, which include the appraisal remedy in terms of section 164, are applicable to a share re-acquisition that exceeds the 5% threshold.⁹⁸ The SCA, however, did not directly deal with the issue of whether a share re-acquisition above the 5% threshold is also considered to be a scheme of arrangement in terms of section 114 of the Companies Act. The High Court emphatically held that "[a] section 48(8)(b) transaction ... remains a section 48 transaction".⁹⁹ The SCA held that such a transaction is regarded as a "fundamental transaction" and is made subject to the requirements of sections 114 and 115 of the Companies Act.¹⁰⁰ If the transaction involves a regulated company it will qualify as an affected transaction and the Takeover Regulations will have to be complied with. In view of the SCA's judgment, share re-acquisition transactions that exceed the 5% threshold are essentially treated as schemes of arrangement even where, by legal classification, they may not qualify to be schemes of arrangement.

The directors of a company wishing to embark on a share re-acquisition above the 5% threshold should ensure that the company complies with the elaborate procedures and formalities in sections 48, 114, and 115 of the Companies Act for the re-acquisition to be valid. In addition to the formalities and procedural requirements, the board of directors must be cognisant of the fact that the substantive rights afforded by these sections, including the appraisal rights in section 164 of the Companies Act, will apply. Whilst this legislative regime is designed to protect the minority shareholders when companies embark on substantial share re-acquisitions, it also imposes burdensome compliance requirements in share re-acquisition transactions.

It is submitted that the SCA's finding that the provisions of section 115(2)(b) of the Companies Act would apply to share re-acquisitions does not appear to be the correct legal position. As indicated above, these provisions apply only in relation to a disposal of all or the greater part of a subsidiary's assets or undertaking. It does not appear that section 115(2)(b) has the effect that a re-acquisition of shares by a subsidiary must be approved by a special resolution of the shareholders of its holding company (presumably, in addition to approval by a special resolution of the shareholders of the subsidiary).

As a final remark, this note has highlighted that if the Companies Amendment Bill [B27-2023] is passed, a share re-acquisition in terms of

97 S 164(14) of the Companies Act.

98 *First National Nominees (Pty) Limited v Capital Appreciation Limited* para 30.

99 *First National Nominees (Pty) Limited v Capital Appreciation Limited* para 27.

100 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* para 27.

section 48 that exceeds the 5% threshold will no longer be subject to the statutory formalities, approvals, and other protective mechanisms in sections 114, 115 and 164 of the Companies Act. The Companies Amendment Bill [B27-2023], if passed, will effectively jettison the connection that currently exists between substantial share re-acquisitions in terms of section 48, fundamental transactions, and the appraisal remedy, as elucidated by the SCA in *Capital Appreciation Ltd v First National Nominees (Pty) Ltd*. It will have the effect of significantly reducing minority shareholder protection in the context of re-acquisitions of significant quantities of a company's issued shares whilst promoting efficiency by removing some burdensome statutory formalities and approvals relating to such share re-acquisitions. The Bill, therefore, represents a notable shift in policy from an emphasis on shareholder protection to an emphasis on efficiency in share re-acquisitions. However, this will not leave the minority shareholders without protection. If the Companies Amendment Bill [B27-2023] is passed, the protective mechanisms for shareholders in the context of significant share re-acquisitions will be the ordinary duties and liabilities of directors¹⁰¹ as well as the proposed requirement of shareholder approval by a special resolution where the shares are not acquired as a result of pro rata offers or transactions effected on a recognised stock exchange on which the company's shares are traded.¹⁰²

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101 Delpont (2022) 207.

102 See the new s 48(8)(b)(i) and (ii) of the Companies Act that is proposed in cl 11 of the Companies Amendment Bill [B27-2023].