# Interpreting Conflicting Statutory Provisions – A Closer Look at Merger Provisions in the Companies Act and Income Tax Act

Carolina Meyer
*BCom(Law) LLB LLM LLD*
*Lecturer, Department of Mercantile Law, University of Pretoria, Pretoria, South Africa*
*https://orcid.org/0000-0002-4971-7470*

**SUMMARY**

It sometimes occurs that provisions of two separate national laws are in conflict with each other, or certain inconsistencies arise with the interpretation of the two provisions. When interpreting legislation where there is an inconsistency or conflict, these provisions must, in terms of the common law, be interpreted so as to be reconciled and to exist coherently. This is, however, not always possible.

In this contribution, the author considers the rules of interpretation of statutes with reference to the merger and amalgamation provisions in the Companies Act 71 of 2008, and the Income Tax Act 58 of 1962. Although the aims of the two Acts differ, both may apply to the same transaction. Therefore, in order to ensure certainty for the merger parties, the two Acts should coincide in terms of their provisions governing the merger or amalgamation transaction.

If a narrow interpretation is used to apply the provisions concurrently and the "mischief" is still not resolved (i.e., the provisions remain in conflict with one another), the question of the next step arises. In terms of the examples used, the Companies Act is the "dominant" Act (the prevailing Act), but what does that mean for the irreconcilable provisions in the Income Tax Act? The author attempts to address how best to approach the identified discrepancies where an outright conflict between the provisions has been identified.

KEYWORDS: Income Tax Act, Companies Act, statutory interpretation, merger, amalgamation

## 1 INTRODUCTION

As a starting point, the South African common-law interpretation rules require that when interpreting legislation that contains an inconsistency or conflict of laws, it must be interpreted in order to be reconciled to co-exist


https://doi.org/10.17159/7vvh3d68

with conflicting laws.[1] In the event that such a reconciliation and co-existence is impossible, different rules of interpretation must be applied to resolve this dilemma.[2]

It is of value to consider both historic and current interpretation rules; South African interpretation rules experienced a culmination of the development of the purposive interpretation of fiscal legislation in the 2012 judgment of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3] (*Endumeni*). As Seligson opined:

> "It seems fair to say that the decision in *Endumeni* has relegated the 'golden rule' of statutory construction to the dustbin of legal history."[4]

Once the differing rules have been identified, the next step is to consider whether the differing rules are inconsistent or in conflict with one another. An inconsistency can, generally speaking, be more easily reconciled by way of interpretation, while an outright conflict of provisions generally proves to be more challenging to reconcile. This is illustrated by way of two examples relating to the Companies Act[5] (Companies Act) and the Income Tax Act[6] (Income Tax Act) regarding mergers and amalgamations. Both Acts govern the same merger transaction, and on this basis one might expect that some form of alignment would have been attempted when a statutory merger was introduced in the Companies Bill, but this was not the case.

After the introduction of the Companies Bill, the Standing Committee on Finance rejected a proposal for an alignment between the Companies Act and the Income Tax Act regarding amalgamation transactions, stating that they are two different Acts serving two different purposes.[7] Although that is correct, and total alignment would, in the author's view, be an impossible feat, it is the author's submission that some form of alignment should have taken place, and could have avoided the existing inconsistencies and conflicts identified in this contribution.

---

1 Devenish *Interpretation of Statutes* (1992) 279.

2 *Ibid*.

3 2012 (4) SA 593 (SCA). The Constitutional Court confirmed the interpretation principles established in *Endumeni* in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (5) SA 1 (CC) 29. Also see *AMCU v Chamber of Mines of South Africa* 2017 (3) SA 242 (CC) fn 28.

4 Seligson "Judicial Forays in Statutory Construction: Endumeni and its Impact on the Interpretation of Fiscal Legislation" 2021 12(2) *Business Tax and Company Law Quarterly* 8 10.

5 71 of 2008.

6 68 of 1962.

7 The Standing Committee on Finance ("Report Back Hearings on the Taxation Laws Amendment Bill 2010" https://www.treasury.gov.za/public%20comments/Full%20Response%20 Doc%20Draft%2025%20August%202010.pdf (accessed 2024-01-11)) recorded the following: "Comment: The amalgamation rules have not been amended in line with section 40 of the new Companies Act. Response: Not accepted. The Income Tax Act currently caters for amalgamations of different types (i.e. 'amalgamations, conversions and mergers'). The purposes of the amalgamation rules as contained in the Income Tax Act versus the Companies Act differ as these Acts seek to achieve diverse aims. For instance, amalgamations referred to in the Companies Act seem to include de-mergers while amalgamations within the Income Tax Act are limited to company combinations (with demergers addressed under the unbundling provisions)."

This contribution attempts to apply the existing interpretation rules to the identified inconsistencies and conflicts in order either to find a way to harmonise the inconsistencies in the provisions, or to best address the outright conflicts that exist.

## 2 GENERAL INTERPRETATION RULES

### 2 1 Interpretation rules prior to *Endumeni*

It is trite that the benchmark judgment of *Endumeni* significantly clarified certain processes to be followed in statutory interpretation. It is therefore necessary to consider what the statutory interpretation rules were prior to this judgment. In the case of *Venter v Rex*,[8] Innes J stated:

> "[W]hen to give the plain words of the statute their ordinary meaning would lead to [an] absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations that the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature."[9]

This has in the past been labelled the "golden rule" of statutory interpretation: in order to establish the intention of the legislature, one must first consider if the statutory text is clear and unambiguous. If it is, effect must be given to the ordinary literal meaning of the text (i.e., the dictionary definitions).[10] If the ordinary grammatical meaning of the words used would give rise to an absurdity that would not have been contemplated by the legislature, one may depart from the ordinary grammatical meaning of the words.[11] Only in the event that there is an absurdity would the context of the text be considered to establish the true intention of the legislature.[12]

The "golden rule" provides an extremely narrow approach to statutory interpretation and has been criticised in the past.[13] For example, Schreiner JA in *Jaga v Dönges*[14] highlights the importance of considering context when interpreting statutory provisions:

---

[8] 1907 TS 910.

[9] *Venter v Rex supra* 914–5.

[10] Botha *Statutory Interpretation: An Introduction for Students* (2022) 100.

[11] *Summit Industrial Corporation v Claimants Against the Fund Comprising the Proceeds of the Sale of the MV Jade Transporter* 1987 (2) SA 583 (A) par 596G–H.

[12] *Ibid*.

[13] Goldswain illustrates the absurdity of the literal interpretation method in light of *Geldenhuys v CIR* 14 SATC 419. In the matter, the court had to consider the meaning of the words "received by" as used in the definition of "gross income" in the Income Tax Act. The court correctly did not attribute the ordinary meaning to the words "received by" as this term bore little relationship to its ordinary grammatical meaning. Goldswain points out that if the court had applied the strict literal meaning to establish the meaning of the words "received by", absurd consequences would have followed. For example, loans would be taxable, or amounts received by an agent on behalf of a principal would be taxable in the hands of the agent. See Goldswain "The Purposive Approach to the Interpretation of Fiscal Legislation – The Winds of Change" 2008 16 *Meditari Accountancy Research* 112.

[14] 1950 (4) SA 653 (A).

> "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context."[15]

In various court judgments, it has been noted to be a dangerous exercise to speculate on the intention of the legislature[16] as this could lead to crediting the legislature with an objective that was absent from its mind and to interpreting words in a way different from what was intended.[17] Innes J further pointed out that one cannot understand words divorced from the circumstances in which they are used, which includes the statute's scope, purpose, and within limits, the statute's background.[18]

The proverbial interpretational water was further "muddied" by the interpretation applied in *Coopers & Lybrand v Bryant*,[19] where the court held that both text and context must be applied in statutory interpretation, but that one must first consider the text and only thereafter the context.

Wallis gives a fitting example to illustrate that this is an artificial way in which to interpret statutes, as humans do not read and understand documents in such a way.[20] In Wallis's example, if a motorist sees a newspaper poster on a lamppost proclaiming "Bulls gore Sharks", their understanding is not that some male bovine has, by chance, encountered an aquatic animal and that the bull impaled the shark with its horns. Wallis suggests that no motorist would first have to conclude that the literal meaning is so absurd that they would need to gather extrinsic evidence surrounding the circumstances (of which the newspaper poster itself would provide very little context) in order to discern the meaning of the poster's words.[21] He ventures that the vast majority of South Africans would read and instantly understand that the poster is referring to the results of the weekend's rugby match because, from the outset, the motorist would have factored into their understanding of the whole context, factors such as the nature of the poster, the day on which the poster appears and their own knowledge of the local rugby teams.[22]

---

15 *Jaga v Dönges supra* 662G–H.

16 See *Summit Industrial Corporation v Claimants Against the Fund Comprising the Proceeds of the Sale of the MV Jade Transporter supra*; *Savage v CIR* 1951 (4) SA 400 409A. In *Endumeni*, it was opined that the intention of the legislator is the incorrect focus (see par 20–21), but should rather be establishing the purpose of the legislation. Also see *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* [2021] 3 All SA 647 (SCA), 2022 (1) SA 100 (SCA) 25–26, 50. In *Endumeni*, it is clear that the correct way to interpret a statute requires a triad of considerations: the inevitable starting point, the text in the provision itself, the context thereof and the purpose of the provision(s) (par 18). In this regard, also see *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA) 55–57.

17 *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 555.

18 *Jaga v Dönges supra* 663.

19 1995 (3) SA 761 (A).

20 Wallis "Interpretation Before and After Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA)" 2019 22 *Potchefstroom Electronic Law Journal* 1 6.

21 *Ibid*.

22 *Ibid*.

This is illustrative of the interpretative difficulties presented by the golden rule of statutory interpretation, and specifically the interpretation method proposed in *Coopers & Lybrand v Bryant.*

## 2 2 Interpretation rules after *Endumeni*

*Endumeni* has provided some more clarity on the correct approach that must be adopted in interpreting statutory provisions and other documents.

In the unanimous judgment delivered by Wallis JA, context and language must be considered together, with neither dominating the other, and this should be the proper approach adopted by the South African courts.[23] The court further indicated that interpretation should not lead to impractical, "unbusinesslike" or oppressive consequences or ones that would stunt the broader operation of the legislation (or contract) under consideration.[24] The court provided the triad of considerations required when interpreting a provision: the text (the inevitable starting point), the context, and the purpose of the provision.[25] The court further pointed out that the focal point of establishing the "intention of the legislature" is misplaced, the focus in modern statutory construction is the purpose of the statute and identifying "the mischief at which it is aimed".[26]

In *CSARS v United Manganese of Kalahari (Pty) Ltd*,[27] the court set out some aspects that can be taken into context when interpreting a statute:

a) section 39(2) of the Constitution;
b) the context of the entire enactment;
c) when the legislation flows from a commission of enquiry or a special drafting committee, reference to their reports;
d) the legislative history; and
e) the general factual background to the statute, such as the nature of its concerns and the social purpose at which it is directed.

The Constitutional Court has also endorsed the approach presented in *Endumeni,* for example in *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal:*[28]

> "The principles applicable to interpreting written documents are now settled. The notice must be read as a whole, having regard to its context and background facts to determine its meaning and purpose. The point of departure is to focus on the words used in the 2008 notice. The words should

23 *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* 19. Also see *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited supra* 56; *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd supra* 50.

24 *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* 26.

25 *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* 18.

26 *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* 21, 26.

27 2020 (4) SA 428 (SCA) par 17.

28 2013 (4) SA 262 (CC); also see endorsement for the interpretation method set out in *Endumeni* in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (2) BCLR 165 (CC), 2019 (5) SA 1 (CC) 29.

> be given their ordinary meaning unless the context in which they are used indicates that a different meaning was contemplated."[29]

Nevertheless, Perumalsamy points out that the guidance provided in *Endumeni* regarding the new rules of interpretation has not had the hoped-for stabilising effect.[30] It appears that old interpretation rules are still being applied by the courts, while simultaneously referring, in principle, to the new authoritative interpretation principles laid down in *Endumeni.*[31] It is submitted that it is understandable that the principles of *Endumeni* are not yet applied by the courts consistently, as it is a mammoth task to overhaul the previous interpretative practice without a universal methodical guide on how to apply the new interpretation principles.

## 3 IDENTIFYING A CONFLICT OR INCONSISTENCY

From time to time, two provisions in an Act, or two provisions in separate Acts, may not be aligned with one another. In the interpretation of such identified discrepancies in legislation, one must first establish whether the discrepancy is a conflict in law or merely an inconsistency.[32] It is important to establish whether one is dealing with an outright conflict of provisions, or merely one that can be attributed to an interpretative phenomenon, such as ambiguity, or inconsistency.[33]

What is the difference between a "conflict" and an "inconsistency"? In *Handel v R*,[34] Heever J pointed out that the word conflict applies to a situation where one version says one thing and the other the opposite. Heever J confirms the common-law principle that where the two are reconcilable (by way of interpretation) they must be reconciled; however, where that is not possible, they are mutually destructive, and a conflict arises.[35]

The common-law principle of interpretation is that, as far as possible, legislation must be interpreted to coincide.[36] One must also consider whether there is a dominant Act in these discrepancies, which would mean that that Act is the prevailing Act if an inconsistency arises between it and another Act. If there is no distinct prevailing Act, or the prevailing provision

---

29 *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal supra* par 128.

30 Perumalsamy "The Life and Times of Textualism in South Africa" 2019 22 *Potchefstroom Electronic Law Journal* 1 3.

31 *Ibid*; for e.g., see *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* 2017 ZACC 32. Also see *CSARS v Daikin Air Conditioning South Africa (Pty) Limited* [2018] ZASCA 66 where the minority judgment rejects the suggestion in *Endumeni* that a unitary interpretation can be applied to all legal documents.

32 Devenish *Interpretation of Statutes* 279.

33 *Ibid*.

34 1933 SWA 37.

35 *Handel v R supra* 40.

36 *Ibid*; *Chotobai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 33.

does not apply, the relevant maxims (or canons) of interpretation[37] must be applied by the courts in the interpretation process to achieve reconciliation between the two provisions. This article considers discrepancies where there is a prevailing Act,[38] so a detailed discussion of the maxims of interpretation falls outside the scope of this article.

Two discrepancies between the provisions of the Companies Act and the Income Tax Act relating to merger and amalgamation transactions are identified below. So as to ascertain whether, and how, these discrepancies can best be addressed, the discussion under heading 4 applies the rules of interpretation, as well as the prevailing Act.

## 3 1 Transfer of all the assets in a merger or amalgamation agreement

A conflict arises between the definition of "amalgamation or merger"[39] in the Companies Act and the definition of "amalgamation transaction"[40] in the Income Tax Act. The Companies Act provides statutory requirements for a merger or amalgamation transaction, while the Income Tax Act provides for tax rollover relief for an amalgamation transaction if relevant requirements are met. In other words, merger parties must meet the relevant merger/amalgamation requirements set out in the Companies Act to have a valid merger or amalgamation in place, while the Income Tax Act provides a tax benefit to merger parties if certain requirements are met.

The Companies Act provides that, with an amalgamation or merger, all the assets and liabilities from the amalgamating company or companies must be transferred to the surviving company or companies. If there are no surviving companies (as with a new company merger), all the assets and liabilities must immediately before the implementation of the merger agreement and the dissolution of the amalgamating or merging company or companies, be transferred to the newly formed company. This applies without exception: in terms of the Companies Act, all liabilities and assets of the amalgamating company or companies must be transferred in an amalgamation or merger transaction.[41]

The Income Tax Act also provides in its definition of "amalgamation transaction" that all assets must be transferred, but it provides for an

[37] These maxims include: legislation does not alter the existing law more than necessary; legislation does not contain a *casus omissus*; legislation doesn't not contain invalid or purposeless provisions; legislation does not operate retrospectively, and legislation is not unjust, inequitable or unreasonable. See Van Staden "A Comparative Analysis of Common-Law Presumptions of Statutory Interpretation" 2015 26(3) *Stellenbosch Law Review* 550–582.

[38] The Companies Act has a prevailing-Act provision in s 5 of the Companies Act.

[39] S 1 of the Companies Act.

[40] S 44(1) of the Income Tax Act.

[41] See s 116(7) of the Companies Act, which provides that once a merger agreement has been implemented, the property of each amalgamating or merging company becomes the property of the newly amalgamated or surviving merged company, or companies, and the same with the obligations of the amalgamating or merging company.

exception. The definition allows an amalgamated company to retain certain assets identified for use to settle a debt:[42]

a) incurred by the company in the ordinary course of its trade,

b) to satisfy any reasonably anticipated liabilities to any sphere of government of any country, and

c) for administration costs for the liquidation or winding-up of the company.

On the face of it, it appears that the two Acts are in conflict with one another as the one is absolute while the other allows for exceptions. However, one must upon interpretation of these two provisions take into account the relevant context. It is submitted that the statutory merger provision in the Companies Act (section 113 read with sections 115 and 116) does not exclusively apply to amalgamation rollover relief provided in section 44 of the Income Tax Act. In other words, parties may achieve the outcome of a merger by using other fundamental transaction mechanisms in the Companies Act, such as a scheme of arrangement (section 114) or the disposal of all or the greater part of[43] the company's assets or undertakings (section 112). Likewise, section 44 of the Income Tax Act (amalgamation transaction) is not the only section that can be used to obtain a tax-neutral transaction for a merger agreement. Other sections of the Income Tax Act, such as section 42 (asset-for-share transaction), section 45 (intragroup transaction), or even section 47 (liquidation distribution), can be used to obtain tax rollover relief for a statutory merger.

In addition, one need not comply with section 44 of the Income Tax Act in order to effect a statutory merger in terms of the Companies Act. If the requirements of section 44 are not met, the transaction will simply not obtain the tax benefit of having the tax triggered with the transaction being rolled forward. It would be a more serious consideration if the statutory merger requirements in the Companies Act were not met, meaning that the transfer would not take place by operation of law (*ex lege*).[44]

It appears that the two governing provisions for mergers and amalgamations cannot apply concurrently in the event the amalgamating company opts to withhold some of the assets to settle its debts prior to the merger. The parties would, in such a case, have to rely on another rollover provision in the Income Tax Act to maintain a tax-neutral statutory merger.

Conversely, if the parties want to withhold certain assets from the merger, the parties will have to rely on another fundamental transaction mechanism provided for in the Companies Act.[45] This would mean the merger would not

---

[42] S 44(1)(*a*) of the Income Tax Act.

[43] S 1 of the Companies Act defines "all or greater part of the assets or undertaking" in respect of a company as: "In the case of the company's assets, more than 50% of its gross assets at fair market value, irrespective of its liabilities or in terms of the company's undertaking, more than 50% of the value of its entire undertaking, at fair market value."

[44] A transfer that is effected by "operation of law" means that it is effected in terms of a statute and not based upon the consensus of transacting parties. As such the transfer occurs automatically. This makes the statutory merger a simple, cost-effective and prompt procedure.

[45] See ss 112 and 114 read with ss 115 and 116 of the Companies Act.

take place by operation of law (in terms of the statutory merger provisions), making the transaction, potentially, more administratively burdensome.

It is submitted that there exists a discrepancy between these two provisions. One would expect that the two provisions governing the same merger or amalgamation transaction would at least be aligned with regard to the general outlines of what may or may not occur in a merger transaction. However, section 44 of the Income Tax Act (in order to accommodate various different types of fundamental transactions) permits the withholding of certain identified assets, which if opted for, it is submitted, means the parties would fall foul of the requirements for a statutory merger in the Companies Act.

Note that the withholding of assets in section 44(1) of the Income Tax Act is an option. It permits the amalgamating party to withhold certain assets to settle debt; as such, it permits the withholding, but does not prescribe it. It is suggested that this option in the Income Tax Act constitutes an inconsistency between the two Acts, as interpretation may prove sufficient to resolve the identified issue. One provision does not outrightly contradict the other; the one Act merely offers an option not recognised in the other Act.

## 3 2 Residency of the parties to the merger or amalgamation transaction

Section 113(1) of the Companies Act provides that two or more profit companies may merge or amalgamate, provided that upon implementation of the merger or amalgamation, each of the amalgamated or merged companies satisfies the solvency and liquidity test. This section affords a limited application of the statutory merger regulations as the section specifically limits the merger to one taking place between two or more "profit companies". The term "profit company" is defined in section 1 of the Companies Act to mean:

> "a company incorporated for the purpose of financial gain for its shareholders".

A "company", in turn, is defined in section 1 of the Companies Act to mean a juristic person incorporated in terms of the Companies Act or a preceding Act, thus limiting it to South African incorporated companies.[46]

This means that the provision only applies to mergers and amalgamations between two or more South African companies. This narrow application of the statutory merger (to mergers between South African companies exclusively) has been criticised by authors in the past; they point out that in the current marketplace, it would be best if South Africa, like many other countries, also allowed for a cross-border merger.[47]

---

[46] S 1 defines an "external company" in the Companies Act as: "a foreign company that is carrying on business, or non-profit activities, as the case may be, within the Republic, subject to section 23(2)."

[47] See Cassim "The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by Appraisal Right (Part 1)" 2008 1 *SA Mercantile Law Journal* 1 8;

Conversely, section 44 of the Income Tax Act was expanded in 2013 not only to provide tax relief for amalgamation transactions where both parties are tax residents in South Africa but also to allow for tax relief for foreign amalgamations. The definition of "amalgamation transaction" was expanded to include paragraphs (*b*) and (*c*) to allow for tax rollover relief where a transaction occurs between a foreign and a resident company[48] or between two foreign companies that form part of the same group of companies, and where, following the merger, the resultant company is a controlled foreign company to any resident that is part of the relevant group of companies.[49]

The definition of a "company" in the Income Tax Act includes, among other things, any association, corporation or company (other than a close corporation) incorporated or deemed to be incorporated in the Republic of South Africa or under the laws of any country other than the Republic.[50] This is notably different from the definition of a company in terms of the Companies Act, which includes only South African companies.

Note that the definition of an "amalgamation transaction" in section 44(1) of the Income Tax Act specifically requires that the disposal between the parties occurs "by means of an amalgamation, conversion or merger". Refer to the discussion below regarding the definitions of these terms.

There is thus a clear discrepancy and even outright conflict between the two Acts, as one provides that a statutory merger may only occur between South African companies, while the other provides tax relief for cross-border mergers. One may initially argue that, as explained in the first example, the scope of section 44 of the Income Tax Act is broader, to accommodate other types of fundamental transaction that may allow for cross-border transactions. A counter-argument to this view is presented below.

## 4 THE PREVAILING ACT

Where there are inconsistencies identified between two Acts, one must first attempt to interpret the provisions so that they coincide and may be applied concurrently, and avoid "unbusinesslike" and ambiguous interpretations.[51] If this cannot be achieved and the two Acts remain irreconcilable, it must be determined whether there is a prevailing Act (which is the Act that must succeed). In the event there is no prevailing Act, the relevant maxims (canons) of interpretation must be applied by the courts in order to achieve reconciliation.

In the identified examples, the Companies Act is the prevailing Act. Section 5(4)(*a*) of the Companies Act provides that if there is an inconsistency between any provision of the Companies Act and another Act (a provision of national legislation), the provisions of both Acts should, to the

Davids, Norwitz and Yuill "A Microscopic Analysis of the New Merger and Amalgamation Provision in the Companies Act 71 of 2008" 2010 *Acta Juridica* 337 355.

48 S 44(1)(*b*) of the Income Tax Act.

49 S 44(1)(*c*) of the Income Tax Act.

50 S 1 of the Income Tax Act.

51 *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* 18.

extent possible, be applied concurrently. This confirms the common-law principle that courts must attempt, as far as possible to "comply with one of the inconsistent provisions without contravening the second".[52]

Where it is not possible to comply with the provision of one Act without contravening the other, as set out in section 5(4)(*b*) of the Companies Act, certain Acts will prevail over the Companies Act. The Income Tax Act does not appear on this list of specific prevailing Acts, and consequently, in terms of section 5(4)(*b*)(ii) if there is an inconsistency in any other case, the Companies Act will prevail.[53] Therefore, if an inconsistency exists between the Companies Act and the Income Tax Act, the Companies Act will be the prevailing Act.

Section 118(4) of the Companies Act provides that if there is a conflict between any provisions of Chapter 5 Part B (Authority of Panel and Takeover Regulations), Chapter 5 Part C (Regulation of affected transactions and offers), the Takeover Regulations, and any provision of another public regulation,[54] the conflicting provisions must be interpreted to apply concurrently to the extent possible. Where it is impossible to apply or comply with one of the inconsistent provisions without contravening the second, the provisions of the other public regulation will prevail. This section specifically does not apply to Part A of Chapter 5 (Approval for certain fundamental transactions), which contains the relevant sections being considered in this article. As such, if one assumes these are not affected transactions as defined, section 118(4) does not find application in the above-mentioned examples.[55] The general prevailing-Act provisions of section 5(4) of the Companies Act remain applicable in the two identified examples.

Having established that the Companies Act is the prevailing Act where there are inconsistencies and conflicts between the two Acts, the impact thereof on the two identified discrepancies discussed above is now considered.

### 4 1 Application to the transfer of all the assets in a merger or amalgamation agreement

The first step is to determine whether these two definitions can coincide and operate concurrently. Considering both the text and context of the definitions for purposes of this example, it is this article's preliminary submission that they can so coincide. This is based on the fact that parties to the merger agreement need not comply with both definitions in order to effect a valid

[52] S 5(4)(*a*) of the Companies Act.

[53] S 5(6) of the Companies Act.

[54] "Public regulation" is defined in section of the Companies Act to mean:

"any national, provincial or local government legislation or subordinate legislation, or any licence, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority".

[55] A transaction qualifies as an "affected transaction" in terms of an amalgamation or merger (s 113) if it involves at least one regulated company, subject to s 118(3) of the Companies Act.

merger agreement. In order to effect a statutory merger (whereby the transfer of all the assets and liabilities occurs by operation of law), the requirements of section 113 (and sections 115 and 116) of the Companies Act must be complied with. The tax relief provided in terms of section 44 of the Income Tax Act is not prescriptive; it is merely a tax benefit for merger parties if the relevant requirements are met.[56] In other words, section 44 permits the amalgamating parties to withhold certain assets, but it does not prescribe it. Therefore, merger parties still have the option under section 44 to transfer all their assets and liabilities (in order not to fall foul of the requirements in the Companies Act).

Nevertheless, De Koker and Williams opine that if parties want a tax-neutral amalgamation transaction, in order to realise such tax benefit, the amalgamation must *first* be effected in terms of the compliance requirements of the Companies Act. Notably, the authors state the following in this regard:

> "Failing such compliance (or if the process is subsequently taken on judicial review and set aside) there will have been no valid amalgamation or merger and consequently no valid transfer of property between the companies and hence no fiscal benefits – or indeed any fiscal consequences – for the arrangement.'
>
> 'If the parties desire that the arrangement will qualify for the tax benefits made available in terms of the Income Tax Act, the provisions of the latter Act [the Income Tax Act] must be fulfilled, *in addition to the requirements of the Companies Act.*"[57] (Emphasis added)

This view indicates that the provisions of the Income Tax Act are subject to the requirements of the Companies Act being met, or else no fiscal benefit (in the form of tax rollover relief) may be obtained for the merger transaction. As indicated above, in the event the relevant Income Tax Act requirements are not met the transaction would simply not qualify for the relevant tax relief, making it a more costly exercise.

In the event that the amalgamating company or companies decide to withhold certain assets as provided for in section 44(1) of the Income Tax Act, the parties must be aware that they will fall foul of the requirements of a statutory merger as set out in the Companies Act. Nevertheless, the parties may still opt to use one of the other forms of fundamental transaction, such as a simple sale-of-business transaction (disposal of a greater part or all of the assets) in terms of section 112. Section 112 of the Companies Act allows parties to choose which assets are to be transferred and which are to be left behind.

It is evident from this example that if one considers only the text (the option to withhold assets) under the golden rule of interpretation, and given there is no ambiguity surrounding the definitions, one could easily conclude that there is an inconsistency between the Income Tax Act provision and the Companies Act. As a result, since the Companies Act is the prevailing Act,

---

[56] If the s 44 requirements are met, the tax relief applies automatically and parties need not "opt in" to the relief.

[57] De Koker and Williams "Companies" in De Koker and Williams *Silke on South African Income Tax* (2024) par 13.34.

the part of the definition in the Income Tax Act that provides for this option would be null and void and would require an amendment. This could be achieved by deleting the relevant option.

However, in following the correct interpretation rules as laid out in *Endumeni*, the context of the two provisions is essential in showing that the two provisions are not mutually exclusive of one another, and therefore, that the option was added to section 44's definition of an "amalgamation transaction" to allow for section 44 rollover relief, even where the statutory merger provision was not applied.

However, there is another part of the "amalgamation transaction" definition that is likely to negate this view that the discrepancies between the definitions may be reconciled by way of interpretation. This is discussed below.

## 4 2 Application to the residency of the parties to the merger or amalgamation transaction

From the first example, one may deduce that section 44(1) of the Income Tax Act provides a much broader scope of application in order to accommodate other fundamental transactions in the Companies Act. Nevertheless, neither section 112 nor section 114 of the Companies Act makes specific reference to an external company; the sections refer only to a "company", meaning that schemes of arrangement apply only to schemes between South African parties and that disposals of all or a greater part of a company's assets must be made by South African companies. As a result, none of the fundamental transactions would provide the basis for the fiscal benefits provided in section 44(1)(*b*) and (*c*) of the Income Tax Act.

In addition, section 44 provides specifically that a disposal between parties must occur "by means of an amalgamation, conversion or merger".[58] Based on this wording, it may be argued that the other fundamental transactions in the Companies Act (e.g., scheme of arrangement or disposal of all or the greater part of a company's assets) would, in fact, not be applicable as it does not constitute a merger,[59] amalgamation[60] or

[58] S 44(1)(*a*)(i) provides: "Amalgamation transaction" means any transaction—in terms of which any company (amalgamated company) which is a resident *disposes of all of its assets* (other than assets it elects to use to settle any debts incurred by it in the ordinary course of its trade and other than assets required to satisfy any reasonably anticipated liabilities to any sphere of government of any country and costs of administration relating to the liquidation or winding-up) to another company (resultant company) which is a resident, *by means of an amalgamation, conversion or merger*" (emphasis added).

[59] "Merger" is defined in the *Collins Dictionary* as: "The combination or amalgamation of a commercial company, institution, etc., with another, or the consolidation of two or more companies, etc., into one" (https://www.com/dictionary/english/merger (accessed 2024-01-11)); Weinberg, Blank and Greystoke define a "merger" as "a marriage between two companies, usually of roughly equal size" (*Weinberg and Blank on Take-overs and Mergers* (1979) 103–104).

[60] In terms of Claassen's *Dictionary of Legal Words and Phrases*, an "amalgamation" involves the blending of two concerns into one (Claassen *Dictionary of Legal Words and Phrases* (2022)).

conversion.[61] As none of these terms is defined in the Income Tax Act, the ordinary meaning must be assigned to them.[62]

If that is the correct interpretation, the application of section 44 of the Income Tax Act becomes extremely limited. If this interpretation is adopted, then one may argue that the option permitted in section 44 to withhold certain assets in the first example is null and void. This is owing to the fact that if that option is exercised, it would mean the merger parties fall foul of the statutory merger requirements, and further that no other fundamental transactions would be applicable, as the relief is limited to disposals between parties by way of amalgamations, conversions or mergers. Section 44 could then only apply if all the assets and liabilities are transferred in terms of the merger or amalgamation agreement.[63]

The court in *Endumeni* provides that a sensible meaning must be preferred over one that leads to insensible or "unbusinesslike" results, or even undermines the apparent purpose of the document.[64] In the light of *Endumeni*, can one argue that the above interpretation could give rise to an insensible or unbusinesslike result? Potentially, yes. However, the courts are advised further in *Endumeni* against the temptation to substitute what they regard to be sensible, reasonable and businesslike for the words actually used. The inevitable starting point for interpretation must be the language used in the provision itself,[65] read in context and having regard to the purpose of the provision and the background to the preparation and production of the statute.[66] As such, the wording in section 44(1)(*a*) is clear: the disposal of assets must occur *by means of* an amalgamation, conversion or merger (emphasis added).

In terms of the second example, if the rollover relief in section 44 only applies where there is a statutory merger (in terms of section 113), then cross-border mergers would be disallowed. This means that only section 113 of the Companies Act can provide a basis upon which the fiscal benefit in section 44 may be obtained.

---

[61] "Conversion" is defined in the *Oxford Learner's Dictionaries* as "the act or process of changing something from one form, use, or system to another" (https://www.oxfordlearnersdictionaries.com/definition/american_english/conversion (accessed 2024-01-11)). Also see Rudnicki "Amalgamations and Mergers: Tax and Legal Comparisons and Nuances" 2017 8(3) *Business Tax and Company Law Quarterly* 1 5, where the authors opine that the term "conversion" appears misplaced in section 44 and perhaps even redundant, as a "change" in economic interest, such as holding shares in a company other than the company that is disposed of by that shareholder, is in any event likely to constitute an amalgamation or merger.

[62] See discussion under heading 2.

[63] It is submitted that retention of assets to settle debt is a futile exercise with a merger, as all the obligations of the amalgamated company become the obligations of the resultant company or companies by operation of law (see s 116(7) of the Companies Act). It is further submitted that the settlement of administrative costs could also be a redundant exercise if the statutory mechanism is used, as all the transfers occur by operation of law, meaning limited, if any, administrative costs regarding the transfer.

[64] *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* par 18.

[65] Lord Neuberger in *MR in Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) par 98.

[66] *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* par 18.

Consider one of the canons (presumptions) of statutory interpretation: legislation does not alter the existing law more than necessary. This is a presumption that legislation should be interpreted in compliance with existing law, or where not possible, should deviate as little as possible.[67] The statutory merger provision in the Companies Act was in existence when the cross-border tax relief was added to section 44(1) of the Income Tax Act in the form of subparagraphs (*b*) and (*c*). If the presumption is applied here, it would reveal that the two sections cannot be interpreted in compliance with one another and that there is a significant deviation from the existing law (mergers may only occur between resident companies).[68]

Strictly speaking, given the above conflict, it would be impossible to apply both Acts (specifically sections 44(1)(*b*) and (*c*) and section 113) concurrently as suggested in section 5(4)(*a*) of the Companies Act. Therefore, in terms of section 5(4)(*b*) of the Companies Act, where it is impossible to apply or comply with one of the inconsistent provisions without contravening the second, the Companies Act will be the prevailing Act. As such, one may deduce that the provisions of section 44(1)(*b*) and (*c*) of the Income Tax Act (the rollover relief for foreign amalgamations) are null and void. An argument may exist that the rollover relief provided in section 44(1)(*b*) and (*c*) may find application if the transaction meets the statutory amalgamation or merger requirements of a foreign jurisdiction that specifically allows for cross-border mergers. Nevertheless, from a South African perspective, these provisions cannot apply concurrently with the Companies Act.

This means that in the first discrepancy example, one may deduce that the option to withhold assets as provided for in section 44(1) of the Income Tax Act is null and void, and, in the second discrepancy example, that paragraphs (*b*) and (*c*) section 44(1) of the Income Tax Act are also null and void.

## 5 CONCLUSION

In 2012, the National Treasury noted the following in its annual Budget review:

> "The comprehensive rewrite of the Companies Act (2008) has given rise to a set of anomalies in relation to tax, especially in the case of reorganisations and other share restructurings. *As many of the tax rules relating to company reorganisations have been in place for 10 years, a review is appropriate*. Government will hold a series of workshops to review the nature of company mergers, acquisitions, and other restructurings to better understand their practical use. These workshops will lay the foundation for tax changes (and possibly changes to company law) over a two-year period.".[69] *(emphasis added)*

---

[67] Van Staden 2015 *Stellenbosch Law Review* 550 558–560.

[68] See *Wendywood Development (Pty) Ltd v Rieger* 1971 (3) SA 28 (A) 38, where it is held that the earlier provisions and later provisions must be read together in order to try and reconcile the seemingly contradictory provisions. Also see Van Staden 2015 *Stellenbosch Law Review* 550 559–560.

[69] The author's research could find no record of these workshops having taken place.

It is clear from the above examples that there remain discrepancies between the relevant Acts in this regard, specifically in the case of merger and amalgamation transactions. This makes it difficult for legal advisors to advise their clients with certainty on merger transactions, and is a reason that the South African Revenue Service (SARS) seems to be inundated with requests for Binding Private Rulings to confirm that their interpretation of the tax rollover relief provisions is aligned to SARS's interpretation of the same regulations (and to ensure the parties qualify for the tax rollover relief).[70]

The importance of the new rules of statutory interpretation, as set out in *Endumeni,* has been illustrated, given that the previous "golden rule" of interpretation provides an artificial way of establishing the meaning of the relevant provisions, where context is pushed aside and is only considered as and when language in a text is ambiguous. In these two examples, the text is not ambiguous and yet there remain conflicting provisions in the two Acts that cannot be reconciled.

It is clear that if a narrow interpretation is applied to the wording in the definition of an "amalgamation transaction" in section 44(1) of the Income Tax Act, certain parts of the definition in paragraph (*a*) would need to be removed on the basis that they are redundant. This is based on the interpretation that the rollover relief in section 44 only applies where there is a disposal by way of a merger, amalgamation or conversion. By implication, this means the requirements of section 113 of the Companies Act must first be met (as confirmed by De Koker and Williams).[71] If that is the case, in order not to fall foul of the requirements in section 113 of the Companies Act, all the assets and liabilities must be transferred. This renders redundant the "option" provided for in section 44(1)(*a*) (that certain assets may be withheld to settle certain identified debts), and the retraction thereof should be considered.

Alternatively, if the intention of the legislature was to allow for assets to be withheld under section 44 of the Income Tax Act in order to align the section with other fundamental transactions in the Companies Act (or another form of disposal of business transaction), it is argued that section 44(1)(*a*) should be amended to refer rather to a disposal in terms of any of the fundamental transactions in the Companies Act or any similar disposal of business transaction. Alternatively, the words "by means of an amalgamation, conversion or merger" must simply be deleted from the section 44(1)(*a*) definition to allow for various other forms of disposal transaction.

This alternative may prove to be a solution to the inconsistency in the first example, but not the second. This is because none of the fundamental transactions in the Companies Act (sections 112–114) provides that the transaction may occur involving an "external company" as the disposing

70 Davis Tax Committee "Report on the Efficiency of South Africa's Corporate Income Tax System" (March 2018) chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.taxcom.org.za/docs/20180411%20Final%20DTC%20CIT%20Report%20-%20to%20Minister.pdf (accessed 2025-03-11).

71 De Koker and Williams in De Koker and Williams *Silke on South African Income Tax* par 13.34.

company.[72] This implies that the fundamental transactions are all limited to disposals by a South African company. As such, the Companies Act requirements cannot be met if the disposing party of the transaction is a foreign company.[73] As highlighted by De Koker and Williams, in order for there to be a fiscal benefit (in the form of tax rollover relief), there must be compliance with the Companies Act; otherwise, there would be no valid amalgamation or merger and consequently no valid transfer of property between the companies, and thus no fiscal tax rollover relief can be triggered.[74]

It is proposed that this inconsistency can be resolved in two ways: either the Companies Act must be reviewed, and a cross-border statutory merger introduced, subject to certain requirements – for example, requiring that the resultant company must, after the merger, be a South African registered company (to remain within the regulations of the Companies Act). Alternatively, paragraphs (*b*) and (*c*) of section 44(1) of the Income Tax Act may have to be reviewed and removed.

In conclusion, as inconsistencies between provisions remain a reality, legal practitioners should approach these inconsistencies in the correct way to ensure proper statutory interpretation by attempting to find an alignment to allow the provisions to coincide with one another where possible. Where this possibility does not exist and there is an outright conflict between the provisions, a prevailing Act will trump other provisions; and if no prevailing Act exists, the maxims of interpretation must be applied to address the mischief that is causing the irreconcilable conflict between the provisions.

---

72 S 115(2)(*b*) of the Companies Act (read with s 112(2)) requires that with a s 112 transaction, a special resolution of a holding company is required, where the company intends to dispose of all or the greater part of its assets and the disposing company is a subsidiary of a South African company or an external company (where the disposal would effectively also mean a disposal of all or a greater part of the assets or undertakings of that holding company). However, s 112 refers to a "company", meaning that the disposing party must be a resident company.

73 In both s 44(1)(*b*) and (*c*), the disposing company (the amalgamated company) is a foreign company.

74 De Koker and Williams in De Koker and Williams *Silke on South African Income Tax* par 13.34.