CASES / VONNISSE

The Appraisal Remedy and Share Buy-Backs

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

1 Introduction

The appraisal rights in the Companies Act 71 of 2008 (2008 Act) empower minority shareholders to withdraw from a company, while obtaining a fair value for their shares. The main aim of the appraisal remedy is to achieve some sort of balance between minority and majority shareholders in the company (Cassim "The Appraisal Remedy and the Oppression Remedy Under the Companies Act of 2008, and the Overlap Between Them" 2017 *SA Merc LJ* 305).

Section 48(8)(*b*) of the 2008 Act provides that if a repurchase of shares is considered alone, or together with other transactions in an integrated series of transactions, and involves the acquisition of more than five per cent of the issued shares of any particular class of shares, then the company must comply with the requirements of sections 114 and 115 of the 2008 Act. Section 114(1)(*e*) regulates schemes of arrangement. This includes the acquisition by a company of its own shares pursuant to a shareholder-approved arrangement and requires the preparation and issue of an independent expert report (s 114(2) of the 2008 Act). The procedural requirements applicable to schemes of arrangement are set out in section 115 of the 2008 Act. Section 115 also includes provisions that relate to the approval of the transaction by special resolution and, in addition, provides various other mechanisms aimed at protecting minority shareholders. It is well recognised and trite that if a company were to repurchase its own shares by way of a scheme of arrangement, all the requirements of sections 114 and 115 would apply, including the minority protection provisions mentioned above. However, the law is not as certain in instances where a company wishes to repurchase its own shares other than by way of a scheme of arrangement, in terms of section 48(8)(*b*). There has been a lack of clarity when interpreting section 48 of the 2008 Act (which regulates the acquisition by a company of its own shares) and section 114 (which regulates schemes of arrangement), as both sections apply to situations in which a company seeks to repurchase its own shares.

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The judgment by the Supreme Court of Appeal (SCA) in *Capital Appreciation Ltd v First National Nominees (Pty) Ltd* ([2022] ZASCA 85) is important because it provides much-needed clarity with regard to the interpretation and interaction between sections 48, 114, 115 and 164 of the 2008 Act. The judgment also reinforces the position of our courts and legislation, which is concerned with the protection and preservation of the rights of minority shareholders, as well as with rooting out corruption, abuse and exploitation by majority shareholders. This case note also touches on the impact of the new draft Companies Amendment Bill, 2021 (2021 Bill) on sections 48 and 164 of the 2008 Act and on the requirements to comply with sections 114 and 115.

2 Facts

First National Nominees Ltd (First National), along with Nedbank Ltd (Nedbank) and Rozendal Partners (Pty) Ltd (Rozendal) (the first, second and third respondents respectively in the appeal) brought an application in the Gauteng Local Division of the High Court, Johannesburg (the High Court), in which Rozendal, on behalf of First National, sought an order that an appraiser be appointed in terms of section 164 of the 2008 Act to assist the court in determining the fair value of its shares in Capital Appreciation Ltd (Capital Appreciation) (the appellant), and also, for detailed ancillary relief (par 1).

First National was the registered holder of 18 039 829 ordinary shares in the issued share capital of Capital Appreciation. Although the shares were registered in the name of First National as nominee, they were held on behalf of and for the benefit of Nedbank, the beneficial owner of the shares, as envisaged by section 56 of the 2008 Act. Rozendal is a fund manager that manages a portfolio of assets within a fund scheme in terms of a portfolio management agreement. The shares form a part of the scheme's assets (par 2).

In July 2019, a circular was issued by Capital Appreciation to its shareholders in which it notified them of its intention to repurchase 245 million of its shares from specific shareholders for a total purchase price of R196 million (par 3). The shareholders were advised that because the proposed repurchase would result in the acquisition of more than five per cent of its issued share capital, it was subject to sections 48, 114 and 164 of the 2008 Act (par 3). The shareholders were also informed that, in terms of section 115 of the 2008 Act, the repurchase required their approval by means of a special resolution passed at a general meeting (par 3).

A notice issued by First National objected to the proposed repurchase. First National also indicated that it would vote against the resolution and, at the subsequent general meeting, this transpired. Nonetheless, the special resolution was passed by a large majority of shareholders. First National then made a demand that Capital Appreciation purchase its shares for fair value. An offer of R0.80 per share was made by Capital Appreciation, which was rejected by First National (par 4). An application was then launched in

the High Court for the court to determine the fair value of the shares in terms of section 164(14) of the 2008 Act (par 4).

2 1 Prior proceedings

In the High Court, Capital Appreciation indicated for the first time that, in its view, section 164 of the 2008 Act did not apply, and therefore First National had no right to an appraisal by the court of the fair value of its shares and no right to have its shares bought by Capital Appreciation at the price so determined. Capital Appreciation argued that there was no basis upon which the dissenting shareholder, First National, could rely on section 164, since the proposed buy-back did not constitute a "scheme of arrangement" as envisaged in section 114 of the 2008 Act (*First National Nominees (Pty) Limited v Capital Appreciation Limited* [2021] ZAGPJHC 17; 2021 (4) SA 516 (GJ) (High Court judgment) par 8–9).

Capital Appreciation argued further that the relevant transactions were not a scheme of arrangement as understood by the authorities related to the old Companies Act. It argued that although section 48(8)(*b*) makes the relevant transactions subject to the requirements of sections 114 and 115, this referred only to the procedural requirements of sections 114 and 115. It did not deem a transaction that is not a scheme to be one. Capital Appreciation contended that section 48(8)(*b*) only made reference to sections 114 and 115 and not to section 164. If the legislature had intended to trigger section 164 in the circumstances referred to in section 48(8)(*b*), reference would have been made to it in section 48 (High Court judgment par 19).

Windell J held that "given the legislative history behind the section and given the potential abuses (particularly of minority shareholders) that share repurchases can facilitate, the express wording of section 48(8)(*b*) was clear" (High Court judgment par 27). According to Windell J, the section does not have the effect of deeming a re-acquisition of securities in excess of five per cent to be an arrangement if, by nature, the transaction is not an arrangement, as interpreted in terms of our common law (High Court judgment par 27). The legislature saw fit to impose particular and further conditions on the type of transaction identified in section 48(8)(*b*). It recognised that not all transactions involving a repurchase by the company of its own shares should be subjected to further conditions, but only those involving a significant and substantial repurchase (more than five per cent) (High Court judgment par 27). In transactions of this nature and magnitude, the legislature also recognised that it was minority shareholders who required protection, and this was best achieved by imposing the ready-made protections afforded and provided to minority shareholders in sections 114 and 115 of the Act (High Court judgment par 27).

Windell J held further that by making reference to sections 114 and 115 as a whole, the legislature intended for all the procedural conditions and rights set out in sections 114 and 115 to apply. From a practical procedural perspective, this would, among other things, involve a) the appointment of an independent expert as contemplated in section 114(2), b) the proposing and passing of a special resolution as contemplated in section 115(2)(*a*) and,

c) the entitlement of dissenting shareholders to exercise appraisal rights as contemplated in section 115(8) (High Court judgment par 27).

Accordingly, Windell J held that section 164 applied and that First National had established its entitlement to the appraisal remedy provided by that section. Windell J made a detailed order in which she set out the details relating to the appointment and authority of an appraiser to assist the court in determining the fair value of the shares, and concerning the obligations of the parties in the appraisal process (High Court judgment par 32–33).

3 Issue

The appeal in the SCA concerned whether First National (the first respondent) had a right to an appraisal by the court of the fair value of its shares and a right to have its shares purchased by the appellant, Capital Appreciation, at the price so determined. The court had to provide a proper interpretation of the statutory regime created for the repurchase of shares in terms of sections 48, 114, 115 and 164 of the 2008 Act (par 5).

4 Judgment

Plasket JA (Ponnan and Nicholls JJA, and Tsoka and Phatshoane AJJA concurring) held that the proper starting point was the interpretation of section 48, along with sections 114, 115 and 164 of the 2008 Act. The SCA held that a repurchase of shares by a company above the five per cent threshold mentioned in section 48(8)(*b*) of the 2008 Act was regarded as a fundamental transaction (par 27). According to the court, the status of fundamental transactions is conferred by making those transactions that meet the threshold prescribed in that section subject to sections 114 and 115 (par 27). The SCA held that section 115 prescribes how fundamental transactions such as the share repurchase in issue are to be approved. This, according to the court, permits dissenting shareholders to enjoy the benefit of an appraisal right in terms of section 165 of the 2008 Act (par 28). The SCA accordingly dismissed the appeal with costs (par 30).

5 Discussion

5 1 A company's ability to purchase its own shares

Historically, the principle that a company was not able to purchase its own shares (even if its memorandum or articles of association permitted it to do so) was well recognised and established in company law. The English court in *Trevor v Whitworth* ((1887) 12 AC 409 (HL) 416–417) clearly stated this principle when it held that the purpose of a company was the preservation of its capital and required the prevention of trafficking in its own shares. A company should, said the court, preserve and devote its resources to pursuing its core business, and not extraneous purposes (par 7).

In *Unisec Group Ltd v Sage Holdings Ltd* (1986 (3) SA 259 (T)), Coetzee J described this principle as a common-law rule so fundamental to

company law that, for many years, it was not regarded as necessary to include it in the legislation (264H–265A of the judgment). The rule was aimed at protecting two sets of interests. In S*age Holdings Ltd v Unisec Group Ltd* (1982 (1) SA 337 (W)), Goldstone J explained that a company's capital had to be preserved in the interests of its creditors and to protect shareholders against directors who may have wanted to strengthen their hold on the company (349A of the judgment; par 7).

The Companies Act (61 of 1973) (1973 Act), the predecessor to the 2008 Act, was amended by the Companies Amendment Act (37 of 1999) (Amendment Act). The amendment permitted a company to purchase its own shares by substituting section 85 of the 1973 Act. The amendment provided that, subject to a solvency and liquidity test, a company could "by special resolution ... if authorized thereto by its articles, approve the acquisition of shares issued by the company" (par 7). The amendment to the long-standing principle was in keeping with the position in other jurisdictions such as Britain, other Commonwealth jurisdictions and the United States of America (see Yeats, De la Harpe, Jooste, Stoop, R Cassim, Seligmann, Kent, Bradstreet, Williams, M Cassim, Swanepoel, FHI Cassim and Jarvis *Commentary on the Companies Act of 2008* vol 1 (2018) 2–460; par 7).

Malan J, in *Capitex Bank Ltd v Qorus Holdings Ltd* (2003 (3) SA 302 (W)), commented on the amendment and stated that, while a residue of the capital maintenance principle may have been retained, one aspect of the rule that a company could not purchase its own shares was abolished; the 19th-century concept of capital maintenance was replaced with the contemporary safeguard of a solvency-and-liquidity test (par 10 of the judgment; see also FHI Cassim "The New Statutory Provisions on Company Share Repurchases: Critical Analysis" 1999 *SALJ* 764–767; par 9).

5 2 Section 48 of the 2008 Act

Section 48 of the 2008 Act now enables and regulates the acquisition by a company or its subsidiary of the company's shares. When the Act was first promulgated in 2008, the power to approve a company's acquisition of its own shares was granted to the board of directors, but such power was subjected to the caveats and conditions set out in section 48(1) to 48(7) of the Act. In 2011, subsection 48(8) was introduced into the Act, and it specifically adverted to and circumscribed the board's power in relation to particular types of shares acquisition. It provides as follows:

> "(8) A decision by the board of a company contemplated in subsection (2)(*a*)–
>
> *(a)* must be approved by a special resolution of the shareholders of the company if any shares are to be acquired by the company from a director or prescribed officer of the company, or a person related to a director or prescribed officer of the company; and
>
> *(b)* is subject to the requirements of sections 114 and 115 if, considered alone, or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares".

In its original form, section 48 consisted of seven subsections. The underlying rationale for the safeguards contained in section 48 flows from the risks inherent in the repurchase of a company's shares. Yeats *et al* summarised the risks:

> "Because a repurchase is (i) a distribution of the company's assets and (ii) a re-organisation of issued share capital (and hence of ownership), achieved by (iii) a transfer to the company of its shares, it invites all the abuses associated with each of these three functions. Indeed, a given repurchase may involve abuses of all three of these functions. Repurchase thus has significance for corporate governance, takeover regulation, creditor protection, discrimination between shareholders, oppression of minorities, and the proper functioning of the securities market." (Yeats *et al Commentary on the Companies Act of 2008* 2–463; par 10)

Section 48(1)(*a*) 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" (par 12). According to Plasket JA, this means no more than that the exercise by a shareholder of their appraisal right and the payment of the fair value of the shares by the company "is not treated as an acquisition by a company of its own shares requiring compliance with the requirements of section 48" (see FHI Cassim, M Cassim, R Cassim, Jooste, Shev and Yeats *Contemporary Company Law* 3ed (2021) 393; (par 12)). Section 48 also does not apply to the "redemption by the company of any redeemable securities in accordance with the terms and conditions of those securities" (s 48(1)(*b*) of the 2008 Act; par 12).

In terms of section 48(2)(*a*), "the board of a company may determine that the company will acquire a number of its own shares". The power is restricted in three ways. First, it is made subject to compliance with section 46, which requires *inter alia* that the board apply the solvency-and-liquidity test in section 4, and conclude on reasonable grounds that the company will satisfy that test after the proposed transaction (par 13). Secondly, section 48(3) prohibits the acquisition by a company of its shares, despite "any provision of any law, agreement, order or the Memorandum of Incorporation of a company", if, as a result, "there would no longer be any shares of the company in issue other than" shares held by one or more of its subsidiaries or "convertible or redeemable shares" (par 13). Thirdly, in terms of section 48(8)(*b*), a decision by a company's board to acquire its own shares

> "is subject to the requirements of sections 114 and 115 if, considered alone, or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares." (par 13)

A "series of integrated transactions" is defined in section 1 with reference to section 41(4)(*b*), which provides:

> "a series of transactions is integrated if–
> (i) consummation of one transaction is made contingent on consummation of one or more of the other transactions: or
> (ii) the transactions are entered into within a 12-month period, and involve the same parties, or related persons; and–

> *(aa)* they involve the acquisition or disposal of an interest in one particular company or asset; or
> *(bb)* taken together, they lead to substantial involvement in a business activity that did not previously form part of the company's principal activity."

In this particular case, it was common cause that the repurchase of shares by Capital Appreciation exceeded the threshold provided for in section 48(8)(*b*) of the 2008 Act. In instances where the threshold has been exceeded, sections 114 and 115 apply (par 14).

5 3 Sections 114 and 115 of the 2008 Act

Sections 114 and 115 are found in Chapter 5 of the 2008 Act. This chapter is concerned, *inter alia*, with the approval of what it terms "fundamental transactions". These transactions are disposals by a company of the greater part of its assets or undertaking (s 112); amalgamations or mergers (s 113) and schemes of arrangement (s 114).

Section 114(1) provides:

> "Unless it is in liquidation or in the course of business rescue proceedings in terms of Chapter 6, the board of a company may propose and, subject to subsection (4) and approval in terms of this Part, implement any arrangement between the company and holders of any class of its securities by way of, among other things–
> *(a)* a consolidation of securities of different classes;
> *(b)* a division of securities into different classes;
> *(c)* an expropriation of securities from the holders;
> *(d)* exchanging any of its securities for other securities;
> *(e)* a re-acquisition by the company of its securities; or
> *(f)* a combination of the methods contemplated in this subsection."

Section 114(1) of the Act characterises a scheme of arrangement as "any arrangement between the company and holders of any class of its securities". An "arrangement" is not defined in the 2008 Act. Latsky opines that if one compares an arrangement in terms of the Act with one in terms of a section 311 scheme under the 1973 Act, it is apparent that the objective of an arrangement in terms of section 114 is to affect the respective rights and obligations *inter se* of the company and its holders of securities in a manner that cannot otherwise be conveniently achieved by independent agreement between the company and each holder of securities (see Latsky "The Fundamental Transactions Under the Companies Act: A Report Back From Practice After the First Few Years" 2014 *Stell LR* 361; High Court judgment par 25). Although one cannot use a section 311 scheme to do something that could not have been done by agreement, its function is to take the place of an agreement. The repurchase by agreement from a shareholder is not such an arrangement. It does not legally bind any holder of securities whose agreement has not been obtained (Latsky 2014 *Stell LR* 361; High Court judgment par 25).

According to Cassim *et al*, section 114 is designed to cater for share repurchases of a particular magnitude – that is, those that amount to

"wholesale fundamental changes to the company's capital structure". According to the authors, section 114 "allows the board to propose and if approved to implement a scheme of arrangement which, among other things, might involve a share buy-back" (Cassim *et al Contemporary Company Law* 398; par 16).

Cassim opines that, in terms of section 114(1)(*e*), if a re-acquisition of the securities of a company is effected in terms of a scheme of arrangement, shareholders are entitled to the relief afforded by appraisal rights (Cassim 2017 *SA Merc LJ* 305; High Court judgment par 30).

When any of the transactions listed in section 114(1) are contemplated, the company must, in terms of section 114(2), retain the services of an independent expert to compile a report on the possible consequences of the proposed course of conduct. That report must, in terms of section 114(3), be furnished to the board by the independent expert, who must also "cause it to be distributed to all holders of the company's securities, concerning the proposed arrangement" (par 17). It is required, for instance, to "state all prescribed information relevant to the value of the securities affected by the proposed arrangement". Section 114(3)(*a*) details the "material effects that the proposed arrangement will have on the rights and interests" of those holders of securities likely to be affected by it; section 114(3)(*c*) and (*d*) evaluates the "material adverse effects of the proposed arrangement" and any compensation that may be paid to those adversely affected and if there are any other beneficial effects that accrue. In terms of section 114(3)(*g*), the independent experts must include copies of sections 115 and 164 in their report (par 17).

Section 114(4) provides that section 48 "applies to a proposed arrangement contemplated in this section to the extent that the arrangement would result in any re-acquisition by a company of any of its previously issued securities" (par 18).

Section 115 deals with the required approval for transactions contemplated in Part A of Chapter 5. In terms of section 115(2)(*a*), any of the transactions referred to in section 115(1) 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 and at which sufficient persons are present to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised on that matter, or any higher percentage as may be required by the company's Memorandum of Incorporation, as contemplated in section 64(2)." (par 20)

In terms of section 115(2)(*b*), a similar procedure must be followed by a holding company of a company that contemplates a share repurchase. Section 115(2)(*c*) provides that a transaction contemplated by section 115(1) requires the approval of a court in certain circumstances (see s 115(3)–(7) of the 2008 Act; par 20).

Section 115(8) refers expressly to section 164. It provides:

> "The holder of any voting rights in a company is entitled to seek relief in terms of section 164 if that person–

(a) notified the company in advance of the intention to oppose a special resolution contemplated in this section; and
(b) was present at the meeting and voted against that special resolution."

5 4 Section 164 of the 2008 Act

The appraisal rights for dissenting shareholders are found in section 164 of the 2008 Act. An appraisal right is defined as "the right of dissenting shareholders, on the occurrence of certain events, to have their shares bought out by the company in cash, at a price reflecting the fair value of the shares" (Yeats *et al Commentary on the Companies Act of 2008 Vol 2* 7–24; par 22). According to Van der Linde, the appraisal right is designed to put off not only opportunism but also business decisions taken by the board of directors that may be considered to be ill-advised. In this regard, it may be easier to convince the board of directors to amend or abandon an unwise decision if the number of dissenting shareholders who indicate an intention to use their appraisal rights is considerable. This is in view of the potential loss of capital that the company would endure if it were to purchase the shares of dissenting shareholders at a fair value (Van der Linde "Share Repurchases and the Protection of Shareholders" 2010 *TSAR* 288; High Court judgment par 31). Cassim opines that the appraisal right enables a dissenting shareholder, in certain statutorily prescribed circumstances, to force the company to purchase their shares in cash at a price reflecting the fair value of the shares and to exit the company (Cassim "The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part I)" 2008 *SA Merc LJ* 1 19; High Court judgment par 31).

Section 164(2)*(b)* provides that if a company has given notice to shareholders of a meeting to consider a resolution to approve a transaction contemplated, *inter alia*, by section 114, it must include in that notice "a statement informing shareholders of their rights under this section". Section 164(3) provides that, at any time before the resolution is voted on, "a dissenting shareholder may give the company a written notice objecting to the resolution". In terms of section 164(4) of the 2008 Act, the company must notify dissenting shareholders of the passing of the resolution within 10 business days of its adoption. Dissenting shareholders are those who gave the company notice of their dissent, did not withdraw their notice of objection, and did not vote for the resolution (par 23).

Section 164(5) provides that a

> "shareholder may demand that the company pay the shareholder the fair value for all of the shares of the company held by that person if they had sent a notice of objection to the company; the company had adopted the resolution objected to; and the shareholder had voted against it and had complied with the procedural requirements of the section." (par 24)

Such a shareholder must, in terms of section 164(7), make their demand by delivering a written notice to the company within 20 business days of receiving the notice that the resolution had been passed or, if no such notice was received, within 20 business days of learning of the adoption of the resolution (par 24).

The company is required by section 164(11), within five business days of receiving a demand, to

> "send to each shareholder who has sent such a demand a written offer to pay an amount considered by the company's directors to be the fair value of the relevant shares, subject to subsection (16), accompanied by a statement showing how that value was determined." (par 25)

Section 164(12)(*b*) provides for the lapsing of an offer if it has not been accepted within 30 business days of being made. If, however, the offer is accepted, the company must, in terms of section 164(13)(*b*), pay the shareholder the agreed amount within 10 business days (par 25).

According to Plasket JA, the rights that are in issue in this case arise out of section 164(14) of the 2008 Act (par 25). Section 164(14) provides:

> "A shareholder who has made a demand in terms of subsections (5) to (8) may apply to a court to determine a fair value in respect of the shares that were the subject of that demand, and an order requiring the company to pay the shareholder the fair value so determined, if the company has–
> *(a)* failed to make an offer under subsection (11); or
> *(b)* made an offer that the shareholder considers to be inadequate, and that offer has not lapsed."

Plasket JA stated that, in terms of section 48(8)(*b*), a share repurchase above a particular threshold is regarded as a fundamental transaction. According to Yeats *et al,* this simply means "section 114 and 115 must be complied with" (Yeats *et al Commentary on the Companies Act of 2008 Vol 1* 2–482). Cassim *et al* explain that the "thinking behind section 48(8) appears to be to reconcile the requirements of sections 48 and 114 … why can the board alone make a share buy-back decision in terms of section 48, but a special resolution is required to approve a share buy-back in terms of s 114?" (Cassim *et al Contemporary Company Law* 398; see too Yeats *et al Commentary on the Companies Act of 2008 Vol 1* 2–482; par 27).

The reference in section 48(8)(*b*) to section 114, according to Plasket JA, establishes a direct link between share repurchases envisaged by section 48 and schemes of arrangement as envisaged by section 114(1)(*e*). Section 115 prescribes how the fundamental transactions set out in section 114 are to be approved. As a result, section 115(8) makes provision for dissenting shareholders to enjoy the benefit of an appraisal right in terms of section 164 – that is, the "right of dissenting shareholders, who do not approve of certain triggering events, to withdraw from the company by taking out the fair value of their shares in cash" (Cassim *et al Contemporary Company Law* 945–946; Yeats *et al Commentary on the Companies Act of 2008 Vol 2* 5–33; par 28).

According to Plasket JA, it is apparent that there is a direct connection between section 48(8)(*b*), via sections 114 and 115, and section 164, and the appraisal right contended for by First National. It was common cause that First National complied with the procedural requirements of sections 115 and 164 and was thus entitled to be paid the fair value of its shares by Capital Appreciation (par 29). This approach is in keeping with the recognition that in transactions of this nature, it is the minority shareholders who require some measure of protection. The protections for minority

shareholders are provided for in the 2008 Act in sections 114 and 115; as a result, the appeal in this case was dismissed (par 29).

5 5 The Companies Amendment Bill, 2021

In October 2021, the Department of Trade and Industry published a new draft of the Companies Amendment Bill, 2021 (2021 Bill) for public comment. The new draft of the 2021 Bill proposes to replace section 48(8) with a new subsection (8). The wording in the new subsection does not make reference to sections 114 and 115 of the Act. The result of the proposed amendment, were it to become law, is that there would be no requirement to comply with sections 114 and 115 as it would essentially fall away in respect of such transactions.

6 Conclusion

The SCA in this judgment has provided guidance and much-needed certainty on the repurchase of more than five per cent of the issued shares in a particular class. The court found that a share repurchase of this nature is a scheme of arrangement and is a fundamental transaction. The judgment also provided greater insight into the interpretation of section 48, along with sections 114, 115 and 164 of the 2008 Act with regard to share repurchases. In light of the proposed amendments in the Companies Amendment Bill, 2021, the appraisal rights in section 164 of the 2008 Act will not apply in respect of these transactions. However, until such time as the Amendment Bill becomes law, the judgment in Capital *Appreciation Ltd v First National Nominees (Pty) Ltd* (*supra*) will apply in that a repurchase of more than five per cent of the issued shares of any particular class of a company's shares must be regarded as a fundamental transaction to which the provisions of sections 114, 115 and 164 of the Act will apply.

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