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Examining the interpretation of section 115(2)(a) of the Companies Act of 2008

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ABSTRACT

For the purposes of protecting the rights and interests of shareholders, section 115(2)(a) of the Companies Act 71 of 2008 is imperative and essential. The section and its concomitant provisions are beginning to find their footing before South African courts. One of the occasions when the imperative nature of the section is seen is when directors take part in decision-making where companies intend to enter into share buy-back schemes of arrangement. In that respect, the clarity and precision of the section has so far received limited scrutiny. To compound matters, even before the role shareholders are expected to play has been thoroughly scrutinised, the sections relating to shareholders' exercise of power are currently the subject of a proposed repeal. Fortunately, recent judgments have begun to provide insight into the interpretation of section 115(2)(a), and the same can be said with respect to similar sections from other jurisdictions. This contribution examines these latter sections. It chiefly shows that the judgments consulted regard

shareholder protection, not as a straight-jacket; the protection has its pitfalls. Meritoriously, it shows how courts interpret section 115(2)(a) to protect shareholders from the pitfalls by promoting/advancing shareholder protection. The judgments also speak with one voice in their interpretation of provisions aimed at maintaining the necessary balance between the rights and interests of company stakeholders. Essentially, the judgments admirably show that the process of finding that balance is a delicate exercise.

Keywords: Majority and minority shareholders; shareholder protection; re-acquisition of shares; share buy-back; duties of directors; company law; distribution.

1 INTRODUCTION

The protection of a company's capital is historical and fundamental. Company capital occupies a key position within the operations of a company, so scrutiny of the role that shareholders play vis-à-vis company directors in the protection of that capital is essential.¹ The importance of a company's capital has always been seen through the lens that it is meant for the satisfaction of creditors' claims. In *Re Exchange Banking Co*, the court said:

“The creditor has no debtor but that impalpable thing, the corporation, which has no property except the assets of the business. The creditor gives credit to that capital and he has therefore a right to say the corporation shall keep its capital and not return it to the shareholders.”²

Since 2011, the Companies Act 71 of 2008 (2008 Act),³ has prohibited certain transactions from being carried out by directors except with the approval of shareholders. The transactions were mostly those which had an effect on shareholder's rights, or whose aims were to change a company's capital structure. From the recent judgments, four factors need highlighting. These provide insight into the important role of shareholders within companies, and they confirm several propositions about the role that section 115(2)(a) of the 2008 Act plays, namely: (i) the section's centrality in maintaining share capital where a company engages in distribution of its money or property; (ii) that the mechanism is used by the legislature as a policy to maintain the existence of companies as a mode of doing business;⁴ (iii) that, as a rule, section

¹ In *Re Exchange Banking Co (Flitcroft)* (1882) 21 Ch D 519. This contribution does not intend to investigate the consequences of the role of shareholders.

² See *Flitcroft* (1882) at para 533.

³ Assented to 8 April 2009. Amended by the Companies Amendment Act 3 of 2011. GG 34243 GN 370 of 26 April 2011 (2011 Amendment Act). Also see Companies Act Regulations, 2011 in GG 34239, GN 351 Reg 9526 of 26 April 2011 (Regulations, 2011); as well as Takeover and Regulation Panel “An introductory guide to dealing with the Takeover Regulation Panel” available at <http://www.trpanel.co.za/wp-content/uploads/PDFs/2016%20electronicBrochure.pdf> (accessed 1 July 2021).

⁴ *Cilliers v Concorde Holdings Limited* 2018 (6) SA 97 (WCC) at para 22; *Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) at para 37. Section 115(2)(a) confirms one other thing: that the 2008 Act still subscribes to the theory of shareholder primacy however refined its current drafting might be.

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

115(2)(a) must be satisfied by companies; and (iv) that shareholders of a disposing company have an obligation, just as much as its subsidiary company/s have where it is the subsidiary that makes a disposal.⁵

The rule creating the obligation has recently been affirmed in *Cooper NO v Myburg*.⁶ It is curious that initially for buy-backs, the Companies Bill, 2008, the Explanatory Guidelines to the 2008 Companies Act, and eventually the 2008 Act, did not require shareholder approval in their respective provisions, despite this mechanism's having been part of the Companies Act 61 of 1973 (1973 Act). For the 2008 Act to be repealed, it took several commentators to heavily criticise the initial lacklustre approach the Act adopted to shareholder protection. For example, some authors considered the Act's approach to be a diminution of shareholder rights.⁷ Wainer opined that, by failing to mention shareholder approval, the 2008 Act omitted one of the most important protections afforded to shareholders against unscrupulous actions by directors, as was the case under the 1973 Act.⁸ Cassim decried the approach of not recognising the fact that the initial protection of shareholders lay in the requirement that the acquisition of shares had to be authorised by special resolution. He reasoned that such an approach not only ensured prevention of abuse of the share repurchase power, but also prevented discrimination against shareholders holding the same class of shares.⁹

After the criticisms, the Act swiftly improved its protection prowess in favour of shareholders.¹⁰ Under Part A of chapter 5 of the 2008 Act, section 115(1) provides that a proposed scheme of arrangement (scheme) shall be approved in terms of section

⁵ Where a company contemplates disposing of a greater part of its assets or undertaking, the provisions of s 115 must be read with those in s 112(1)(a), (b), (c)(i) and (ii) of the 2008 Act. Section 112(2) requires a disposal of a greater part of the assets of a company to be approved in terms of s 115 of the 2008 Act. *Cilliers* (2018) at paras 26 and 28. The last is that the cases highlight how shareholder's role can at times be deliberately compromised/jeopardised by adversely structuring a proposed transaction. *Juspoint Nominees (Pty) Ltd v Sovereign Food Investments Limited (BNS Nominees (Pty) Ltd Intervening)* [2016] ZAECPEHC 15; *Marble Head Investments (Pty) Ltd v Niveus Investments (Ferberos Nominees) (Pty) Ltd* [2020] ZAWCHC 36.

⁶ *Cooper NO v Myburg* [2020] ZAWCHC 174; [2021] 2 All SA 114 (WCC) at para 54 (*Myburg*).

⁷ Blackman MS, Jooste JD & Everingham K *Commentary on the Companies Act 2008* (2002) at 12. See also Cilliers HS & Benade ML *Corporate Law* (2000) at 450; Wainer "The New Companies Act: Peculiarities and anomalies" (2009) *South African Law Journal* 806 at 820. Cassim FHI "The reform of Company Law and the capital maintenance concept" 2005 *South African Law Journal* 287-293; Jooste R "Issues relating to the regulation of 'distributions' by the 2008 Companies Act" 2009 *South African Law Journal* 627-650. However, the requirement to obtain shareholder approval still stood for companies listed on the JSE. See JSE Listing Requirements at 76 para 569(b).

⁸ See Wainer (2009) at 820. However, at the time the requirement to obtain shareholder approval was still operative for companies listed on the JSE. See JSE Listing Requirements at 76 para 569(b).

⁹ See Cassim (2005) at 287-293.

¹⁰ Wainer (2009) at 820; Cassim (2005) at 290. One must say, however, that even though the legislature did not incorporate shareholder protection in the form of s 115(2)(a) in reacquisition of shares, the 2008 Act could not be entirely criticised because it did provide other shareholder protection mechanisms, for example ss 163 and 164 of the same Act.

115.¹¹ As a result, this contribution is intended to interpret and unpack section 115(2)(a) of the Act. It intends to adopt a comparative approach with like provisions from Australia in order to gain insight into the strengths and weaknesses of section 115(2)(a). The analysis is undertaken in the context of formation of schemes of arrangement that, in the main, involve share buy-backs. To that extent, the first task is to highlight the regulatory framework and the rationale underlying section 115(2)(a) in Part 2. The second step, in Part 3, is a pertinent examination of the adoption of a buy-back special resolution under a scheme together with its ancillary provisions. Next, in Part 4, is a critical examination of the adoption of a buy-back special resolution in Australia. Finally, Part 5 provides comments, observations and the conclusion.

2 THE REGULATORY FRAMEWORK AND THE RATIONALE UNDERLYING SECTION 115(2)(A) OF THE 2008 ACT

Section 115(2)(a) of the Act gives effect to section 115(1), and, as far as is relevant, provides that a proposed transaction contemplated in section 115(1) must be approved “by a special resolution adopted by persons entitled to exercise voting rights on such a matter...”.¹² Generally, the provisions of section 115(2) of the 2008 Act provide the substantive part to approve all schemes listed under section 114(1) of the 2008 Act, and those which are not listed but that parties may agree to. In the author’s view, a buy-back scheme of arrangement involves give and take.¹³ The element “give and take” in the context of a buy-back could be a misnomer, as the shares which the company receives for the capital it distributes to its members are not necessarily valuable upon reacquisition. Instead, a company depletes its capital.¹⁴ Because capital is an essential

¹¹ Section 115(1)(a)(i) of the 2008 Act. The section goes further to provide for the approval by the issue of a certificate by the Panel, or an exemption of that transaction in terms s 119(4)(b) and (6), respectively where Parts B, C and the Takeover regulations apply. See s 115(1)(b). See also Regulation 102(13)(a) and (b).

¹² The section continues to state that in the meeting there must be sufficient persons 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).

¹³ Schemes of arrangement are a valuable mechanism much utilised by companies since the inception of these schemes in 1862. Originally, such arrangements were employed between a company and its creditors and then when a company was in winding up. With time, they were extended to apply to companies and their members or any class thereof in the 1900s, though still utilised in winding-up planning situations. The utilisation of schemes only in winding-up situations was discarded with section 38 of the UK Companies 1907. From that point onwards, members and their companies could formulate schemes, but these had to be approved by a majority of those voting. *In the Matter of Dee Valley Group plc* [2017] EWHC 184 (Ch) at para 5 (*Dee Valley*); *In re Savoy Hotel Ltd* [1981] 1 Ch 351 358–359; *Village Roadshow Limited v Boswell Film BmbH* [2004] VSCA 16 para 25. *Re Guardian Assurance Co Ltd* [1917] 1 Ch 431. *Re NFU Development Trust Ltd* [1972] 1 WLR 1548; *Re Uniq plc* [2011] EWHC 749 (Ch); *Sneath v Valley Gold Ltd* [1896] 1 Ch 477.

¹⁴ Section 35(5) of the 2008 Act renders shares acquired as contemplated in s 48 as having the same status as shares that have been authorised but not issued. See also section 257H and 258E(1) of the Corporations Act 2001; *Village Roadshow* (2004) at para 21. Section 258E(1) makes a buy-back of shares under s 257A to 257J of the Corporations Act 2001 to be lawful.

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

component of a company, it is this depletion that the law guards against¹⁵ through the shareholder-approval mechanism under section 115(2)(a) of the 2008 Act. The section is therefore in place as the last element to protect shareholder interests where a reduction of a company's capital is proposed through a buy-back scheme under section 114(1) and section 48 of the 2008 Act, by setting out how a proposed buy-back and its approval ought to be carried out.

The 2008 Act follows in the footsteps of several contemporary statutes regulating company affairs which empower company directors, when discharging their duties, to determine what change a company should make to its capital structure.¹⁶ Thus, section 115(2)(a), and other like sections in statutes from other jurisdictions, empower the shareholders to take part in decision-making alongside directors. The power embodied in a shareholder's vote to approve carries more weight where proposed changes are to a company's capital structure.¹⁷ Broadly, section 115(2)(a) is the *sine qua non* which provides the glue between the powers of the shareholder and the director with respect to how the management of the affairs of their companies ought to evolve.¹⁸ The relationship is abetted by policy imperatives. Hence, and as has been confirmed in *Myburg*, the obligation imposed by section 115(2)(a) on companies cannot be seen outside the parameters that approval of a buy-back is approval of the reduction of a company's share capital.¹⁹

Having observed the judgments that arose from challenges made against the conduct of companies and/or directors over the period of the operation of the 2008 Act, what is manifest is that the inclusion of section 115(2)(a), regulating the approval of proposed buy-backs, was not simply a window-dressing exercise.²⁰ In *Cilliers*,²¹ the court held that the purpose of the approval underpinning section 115(2)(a) is to ensure that the interests and views of all shareholders are considered before a company

¹⁵ *BCE v 1976 Debentureholders* [2008] 3 S.C.R. para 34; *Bradbury v English Sewing Cotton Co* [1923] A.C. 744 (HL) at 767; *Zwicker v. Stanbury*, [1953] 1 S.C.R. 438.

¹⁶ Section 66(1) of the 2008 Act. See also Regulation 84 in relation to "acting in concert". Regulation, 2011. See arguments in Latsky as to whether an arrangement would be a scheme of arrangement if the re-acquisition was between the company and a single shareholder. Latsky J "The fundamental transactions under the Companies Act: A report back from practice after the first few years" (2014) *Stell LR* 361 at 363.

¹⁷ See *Cilliers* (2018) at paras 42–43; *De Sousa v Technology Corporate Management (Proprietary) Limited* 2017 (5) SA 577 (GJ).

¹⁸ *Reezen Limited v Excellerate Holdings Limited* 2018 (6) SA 571 (GJ) (*Reezen*).

¹⁹ See the definition of distribution in s 1 of the 2008 Act. Also see s 46 of same Act.

²⁰ See the provisions of sections 114(2) and (3) of the 2008 Act. Previously, see section 312(1) of the 1973 Act. See as well comment with respect to legislative instruments dealing with the analogous situation of take-over offers in section 314 of the 1973 Act meant to protect shareholders in the offeree company in *Spinnaker Investments (Pty) Ltd v Tongaat Group Ltd* 1982 (1) SA 65 (A) at 72H–73A. See also in *Sefalana Employee Benefits Organisation v Haslam* 2000 (2) SA 415 (SCA) 418J (*Sefalana*), where Marais J approved of the reasoning underlying the rationale of legislation dealing with rights of shareholders in affected transactions.

²¹ See *Cilliers* (2018) at para 22 and *Moraitis* (2017) at para 37.

disposes of its assets, or *where a company contemplates re-acquiring its own shares*. In *Reezen*, the court acknowledged that, in requiring shareholder approval for various transactions, the objective of the legislation appears to be two-fold. On the one hand, it is to protect shareholders. On the other, it is to restrict directors' powers either to issue shares or to make a decision for a company to re-acquire its own shares without shareholder approval.²² The same sentiments were expressed in *Moraitis*.²³ In that case, the court held that the purpose of sections 112 and 115 of the 2008 Act was to ensure that the interests and views of all shareholders are taken into account before the company disposes of the whole or greater part of its assets or the undertaking itself.

3 EXAMINATION OF THE ADOPTION OF SPECIAL RESOLUTION

It is submitted that, in the main, section 115(2)(a) of the Companies Act 2008 presents two criteria that companies must satisfy before a proposed buy-back scheme can be lawfully adopted.²⁴ In this part, the discussion is limited to part of the first criteria, namely, "a special resolution be adopted by persons entitled to exercise voting rights on that matter". Concentration on this isolated part is deliberate and is informed by the fact that, in the opinion of the author, if a company's approved proposal falls short of satisfying the latter requirement, a court may possibly declare that proposed scheme unlawful even before proceeding to the next stage and consider other requirements.²⁵ For ease of discussion the criterion is divided into two: (i) voting by persons who are entitled to exercise voting rights on the matter; and (ii) adoption of a special resolution, first, under sections 48(8)(a), and, secondly, under 115(2)(a).²⁶

At this stage, it makes sense, to begin with a reference to various judgments which have set out principles interpreting documents or statutes, and explain the trite position with which provisions or documents have to be engaged. Paramount in this regard is the Constitutional Court judgment in *PFE International v Industrial Department Corporation of South Africa Ltd*.²⁷ In the case, the Constitutional Court recently affirmed the principle that rules of procedure are no longer to follow the orthodox approach to interpretation, to first read the text, and thereafter consider the context. The Court reasoned that from the onset courts must apply rules of procedure contextually and

²² See the principle underlying section 41(3) of the 2008 Act in *Reezen* (2018) at para 25.

²³ *Moraitis* (2017) at para 37.

²⁴ These are: (i) a special resolution be adopted by persons entitled to exercise voting rights on that matter at a meeting called for that purpose; and (ii) sufficient persons be present to exercise, in aggregate, 25% of voting rights entitled to be exercised on that matter; or any higher percentage as may be required by the company's MOI as contemplated in section 64(2).

²⁵ However, much as this would be the case, anything adopted by a company which is contrary to the s 115 provisions will not be void immediately. A court application will have to be made to have the transaction declared null and void if such will be used by a company to by-pass the procedure the section sets out. See section 218(1) of the 2008 Act; *Reezen* (2018) at paras 21 and 23; *Malasela Taihan Electric Cable (Pty) Ltd v Fidelity Security Services (Pty) Ltd* [2017] ZAGPJHC 341; *Schierhout v Minister of Justice* 1926 AD 99 at 109.

²⁶ See *Marble* (2016) at para 13.

²⁷ *PFE International v Industrial Department Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) at para 30.

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

flexibly. In *National African Federated Chamber of Commerce and Industry v Mkhize*,²⁸ Majiedt JA held that it was trite that a constitution or document must be interpreted in accordance with ordinary rules of construction applied to contracts generally. Effect must be given to the plain language of that document, objectively ascertained within its context. Preference should be given to a sensible meaning over one that leads to nonsensical or unbusinesslike results, or undermines the apparent purpose of that document.²⁹ In *Butler v Van Zyl*,³⁰ Van Zyl AJA followed this approach to the letter. The acting judge held that a court order should not be interpreted such that it literally has undesirable consequences. Particularly, the court said court orders should not be read to put a hold on shareholder voting in a general meeting, otherwise that would render a company moribund. Thus, it was not proper to adopt an interpretation of the court order in that case as interdicting a vote.³¹ With the above underlying principles in mind, it suffices to examine the two criteria identified above.

3.1 Dissecting persons entitled to exercise voting rights on a buy-back

Adoption of special resolutions and the exercise of voting rights³² are inseparable from each other when a company decides on a matter. Therefore, in the author's view, before engaging in the interpretation of the adoption of special resolutions by shareholders it makes sense first to dissect the persons on whom sections 48(8) and 115(2)(a) of the 2008 Act bestow the right to exercise voting rights. For an understanding of who is empowered to exercise voting rights as holders of a company's issued securities, the definition of "shareholders meeting" under section 1 of the 2008 Act is determinative. The section provides that, with respect to any particular matter concerning a company, a shareholders' meeting means: "a meeting of those holders of that company's issued securities who are entitled to exercise voting rights in relation to that matter".³³ So the requirement that only those securities holders entitled to exercise voting rights are permitted to attend is consistent with this definition. The question which then arises is: What test does the 2008 Act envisage?

²⁸ *National African Federated Chamber of Commerce and Industry v Mkhize & Others* (805/13) [2014] ZASCA 177 (*Mkhize*).

²⁹ See *Mkhize* (2014) at para 21; *Turner V Jockey Club of SA* 1974 (3) SA 633 (A) 644G–645C; *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) at 440F–G; *Wilken v Brebner & Others* 1935 AD 175, 187; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; and *Butler v Van Zyl* [2014] ZASCA 81 at para 18.

³⁰ See *Van Zyl* (2014) at paras 19–23.

³¹ See *Van Zyl* (2014) at para 20.

³² Section 1 of the 2008 Act defines voting rights as the right of any holder of the company's securities to vote in connection with that matter, in the case of a profit company. See also *Marble* (2016) at para 15.1.

³³ This definition must be read with the definition of a share, which means one of the units into which the proprietary interest in a profit company is divided. It must also be read with who a shareholder is. See s 1 of the 2008 Act.

3.1.1 *The test to attend shareholder meetings*

In the writer's view, the manner in which a meeting of security holders must be organised and who must attend appears to be in line with the decision in *Verimark*, which previously set out the guiding principles on who may attend meetings to approve a proposed scheme.³⁴ From the judgment, the first principle with which the court underpinned its decision referred to the foundational test for class members, which remains that of:

“whether the impact of the scheme on the legal rights of each particular group (as opposed to their commercial interests arising out of the scheme) is sufficiently similar to make it not impossible for them to consult together “with a view to their common interests.”³⁵

From the passage, what was determinative for courts was how they viewed shareholder class formations. For courts, class formations were informed by the impact of a scheme on the legal rights of each group. Thus, courts were influenced to ascertain how sufficient the similarity of each particular group and/or person's interests were to the other. Two stages on how the test operated are identified. The first stage had two phases: first, it looked at the proximity of the impact of the scheme on the rights or interests of the class which gave a sense of to which class a person belonged; secondly, it looked at the sufficiency in similarity or otherwise that would then direct whether or not it was impossible for two groups and/or persons within that group to consult together “with a view to their common interests”. The latter phrase is significant because, obviously, where either group or those person's interests were impacted on by a scheme dissimilarly “no common interests” would arise.³⁶ *Verimark* and other similar judgments seem to agree that the test used to determine class members applied once there was certainty as to their identity. In other words, the test functioned to ascertain whether the persons within a class should in fact be part of that class.

3.1.2 *The nature of the test regarding the future: Does it promote certainty?*

The second stage is that the test is formulated to give direction as to who may form part of a particular class or group of persons at the time a matter is proposed. The words “with a view to their common interests” speak to the formulation of a class at the present, while anticipating future implications. One of the implications is that a person is part of a class or group with common interests on which persons in that class or

³⁴ *Verimark Holdings Limited v Brait Specialised Trustees (Pty) Limited NO* [2009] ZAGPJHC 45 (*Verimark*). In the Australian context see in *Re Village Roadshow Limited* [2003] VSC 440, Supreme Court of Victoria; and an appeal in *Village Roadshow Limited v Boswell Film BmbH* [2004] VSCA 16.

³⁵ *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573, 583; *In the Matter of Ovato Print Pty Ltd* [2020] NSWSC 1882; *First Pacific Advisors LLC v Boart Longyear Ltd* [2017] NSWCA 116; (2017) 121 ACSR 136 at para 80.

³⁶ *The Commissioner of South African Revenue Services v Logikal Consulting (Pty) Ltd* (Case No. 96768/2016) (*CSARS v Logikal*); *Commissioner of SARS v Cross Atlantic Properties (Pty) Ltd* [2017] ZA GP 554.

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

group may consult or negotiate. Otherwise, if the persons in that class or group have no common interests, the question would be: On what basis could they possibly consult?³⁷

Read in context, the words “with a view” reveal the element of the future. This element has an effect on, and is connected to, the first stage, as it requires that it is certain that, from the outset, persons who are part of a class be only those who would at a later stage be entitled to consult on the buy-back and eventually exercise voting rights. By implication, the manner in which the phrase “with a view” appears in the test recognises the next stage in the ladder of events that shall ensue: (i) that shareholder interests had already converged before the directors of that company determined the proposed buy-back of shares from that class; and (ii) that groups or class members are expected to still negotiate or consult between themselves before exercising their voting rights. The phrase “with a view” is not contrary to and/or distant from an interpretation suggesting “*in the hope of or aiming towards*”. The phrase recognises that at times it might be unclear whether or not holders of that company’s securities agree on the proposed buy-back. So, at the time of the meeting, some negotiation or consultation might still be necessary to determine whether or not to approve a proposal. The test recognises the different steps that are foundational to the ultimate approval of a buy-back by that company’s security holders, by having regard to the different stages which occur before the exercise of voting rights. Therefore, the test does promote certainty.

3.1.3 *The test contemplated under the 2008 Act*

The question which arises is: Does the 2008 Act contemplate the use of the same test? This question should be answered in the affirmative because, from the definition of “shareholder meeting” put forward earlier, the Act appears to do so. To this day, the principles *Verimark* set out remain the example and, analogously, provide a practical demonstration of what sections 48(8) and 115(2)(a) of the 2008 Act contemplate in the context of who should be invited to take part in the subject matter of a meeting to reacquire own shares by a company. This is despite the fact that *Verimark* was decided under a different statutory regime. However, *Verimark* can only serve as a point of departure and/or point of reference, subject to any changes the 2008 Act aims to make to improve on the previous position, if any. In terms of section 48(2)(a), the 2008 Act contemplates that at the time when company directors determine that the company must buy-back its own shares, and at the same time recommend from which class that repurchase be made, the shareholders would have already been categorised. From that point, there could hardly be doubt in which class each shareholder belongs.³⁸ This requirement, and the permission given by the Act in sections 36 and 37 for formation of

³⁷In *CSARS v Logikal*, Van Der Linde J held that the South African Revenue Service (SARS) and the employees of the company could not possibly form a class with a view to consult, as they had no common interests.

³⁸ See sections 36 and 37 of the 2008 Act.

classes by companies, appears aimed at the reduction or elimination of like contestations.

In *Verimark*, the respondents opposed the sanctioning of the scheme on two grounds: that Verimark, as directed by the Van Straaten Family Trust (VSFT) as the majority shareholder, and the “excluded members” were not “scheme participants” and should not have been permitted to vote; and VSFT and the “excluded members” were a class of ordinary shareholders different from the remaining 37% of the shareholders and should not have been permitted to vote.³⁹ Conversely, and as is relevant in the context of section 115(2)(a) of the 2008 Act, it can be argued that effectively what the challenge was based on was the fact that VSFT and the “excluded members” should not have been invited to the meeting, since the manner in which the proposed scheme was designed was for the parties not to have voting rights on the matter – and not necessarily that the excluded parties had no voting rights per se. Besides, in the definition of “scheme participants” in the offer to the invitees, these parties were not included at all.⁴⁰ In response, the court first acknowledged and made it clear that a “proposer”, the “excluded members” and “minorities” may all be ordinary shareholders, thereby causing their rights or the bundle or conglomerate of personal rights to entitle the holder thereof to a certain interest in the company, being the company’s assets and its dividends; by virtue of this entitlement, the parties may be identical and all may belong to the same class of shareholders.

On whether VSFT and “excluded members” should have been allowed in the meeting and to vote, the court held that the enquiry as to whether separate meetings should have been held arose only after the determination of the identity of the offeree, the relevant question being, “Between whom is it proposed that a compromise or arrangement is to be made?”⁴¹ In the author’s view, the latter question has been the hallmark of the formation of class meetings over time, *and will continue to do so*. It clarifies the classification of shareholders entitled to vote where a buy-back scheme between them and their company is proposed. In simple terms, the question asks, “Who is invited in terms of the proposal?”, suggesting that persons with interests in the matter have already been identified or established. What remains at this stage is further talks on the proposed buy-back. In the author’s view, and based on what has been suggested in the discussion of the test above, the question tells us something else, namely, that even within a class of ordinary shareholders it is possible that an offer might not have been made to all, but rather to a certain category of shares held by holders whose shares occupy a certain status within the classes of shares of that company.

In response to the question of who is invited, the court in *Verimark* referred to three relevant possible scenarios that might arise and for which clarification might be

³⁹ *Verimark* (2009) at para 3.

⁴⁰ *Verimark* (2009) at para 5.

⁴¹ See *Verimark* (2009) at para 12.

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

needed.⁴² With respect to the first scenario, what the court appears to have had in mind is a situation where a company makes an offer to buy-back from all shareholders. In the context of the 2008 Act, this would mean repurchase from both persons under section 48(8)(a) and those under section 48(2)(a) who are expected to approve the proposed buy-back based on section 115(2)(a). (The two sections are discussed below.) In the second, it would be where the company proposes to buy-back from shareholders who hold shares under a special scheme for a certain period based on an agreement between them and the company, for example an employee scheme. The third category is where an offer is made to what appears to be a single class of shareholders, but on closer scrutiny it is realised that the shareholders should have been classified differently because they hold dissimilar and distinct interests. The first and the last scenarios appear to be what could be determined under section 48(2)(a) and be voted for as directed under section 48(8)(a) and (b), thus also invoking section 115(2)(a), as the case may be. The second scenario may fall to be voted for by all shareholders with voting rights on the matter in terms of section 48(8)(a) since it appears to be directed at an employee scheme, these being directors, prescribed officers or their related persons or another class of employees. What the three scenarios prove, as the court said in *Verimark*, is that the correct answer would depend on the circumstances peculiar to that case. Amongst the three, one considers the first and the third instances as are the more relevant and the ones that could arise in the context of the proposed buy-back schemes discussed in this article.

If the approach suggested in *Verimark* finds support from courts under the current regime, analogously it suggests that sufficiency of similarity of interests will on the one hand, rest on the determination made by directors under section 48(2)(a) in regard to the question of with whom they determined the company should propose to enter into a buy-back scheme. The question will be whether the proposal is made to directors, prescribed officers and their related persons regulated under section 48(8)(a), or also with shareholders generally whose approval shall only be adopted under section 115(2)(a), or only to one of the class of shareholders falling within the respective sections. It will also depend, on the other hand, on whether or not the directors intend to create a scheme. Once the category of persons to whom a proposal shall be made is identified, the formation of a scheme will then depend on how the persons have

⁴² First, the cases would be those where it would be plain that the compromise or arrangement proposed is between the company and all its creditors. In this regard, section 425(4) of the 1985 Act provided for the court to order a single meeting of all the creditors. The second instance would be where it would be plain that the compromise or arrangement was proposed between the company and one distinct class of creditors, for example unsecured trade creditors whose debts accrued before a given date. The third is where what “appears at first sight to be a single ... arrangement between the company and all its creditors ...” (it may be all creditors of a particular description, for example unsecured creditors), but “on a true analysis to be two or more linked ... arrangements” with creditors whose rights put them in several and distinct classes. The “arrangements” would be linked in the sense that each would be conditional upon the other or others taking effect. See *Verimark* (2009) at para 12. An example here might be *Logikal*.

negotiated to vote and/or have voted, and in the latter instance, whether based on individual interests or those of the group/class generally.

In sum, from the discussion above, the holding of meetings depends on four issues: (i) classes, where these are created; (ii) common interests of shareholders; (iii) whether or not holder's interests are sufficiently similar; and (iv) voting rights. It was upon the four that in *Verimark* the court classified the offer in question made in the case to have been made only to minority shareholders who were "scheme participants" as defined. The proposal was not made to the "proposer", nor was it made to the "excluded members".⁴³ As a result, the court held that only the "scheme participants" were entitled to accept or reject the offer; only they should have been permitted to vote on the matter.

The court held as it did despite the fact that holders of shares were all ordinary shareholders. In the latter respect, it reasoned that the same ordinary shareholders may be from a single class, but the same class may be divided into different classes based on what the proposer intended. Thus, the two approaches by which an offer may be made from the category of persons specified in the Act, and for that offer to gain an approval either as contemplated under section 48(8)(a) or contemplated from shareholders determined in terms of section 48(2)(a), is not far-fetched from the *Verimark* judgment. The latter decision shows that simply because the persons from whom shares are proposed to be bought back are all ordinary shareholders, that in itself is not determinant that all shareholders shall belong to the same class in terms of the purpose of the proposed scheme. Within the one class there might still be further categorisation or classification of members. What will be paramount is how the participants are defined, for example by a published circular making the offer.

Therefore, the court in *Verimark* agreed with the respondents to the effect that VSFT and the "excluded members" should not have been permitted to vote on the matter, as these parties were not part of the class of holders envisioned under the proposed scheme of arrangement; thus, the court refused to sanction the scheme.⁴⁴

3.2 Dissecting the adoption of special resolution

It is apt to note that to approve a transaction, courts favour that a company follow the procedure set out in that specific legislation.⁴⁵ Approval of fundamental transactions

⁴³ See *Verimark* (2009) at para 13.

⁴⁴ See *Verimark* (2009) at para 13.

⁴⁵ In other words, the procedure by which a scheme of arrangement is approved, as set out in sections 114 and 115 of the 2008 Act, is an example of a procedure laid out in a legislation, and for this reason cannot be negated. It also cannot be used to effect disposals or mergers if there is specific legislation dealing with these. See *Henochsberg on the Companies Act 71 of 2008* at 208(1). This point has been confirmed, albeit indirectly by inference in *Juspoint*. However, this statement does not apply in all instances. At times, exemptions might apply, especially in instances where the scheme of arrangement is used to effect a black economic empowerment initiative and this is found appropriate, and there is no other means by which the agreement could be achieved. *Ex parte Standard Bank Group Limited, Ex parte Liberty Group Limited* [2006] ZAGPHC 58 (*Ex parte Standard Bank Group Limited*); *Cassim et al* (2005) at 726; *Gouws N.O v Chapman Fund Managers (Pty) Ltd* [2019] ZAGPPHC 959; [2020] 1 All SA 428 (GP)

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

either to dispose of or to acquire shares are governed by the same procedural rules under section 115(1) of the 2008 Act.⁴⁶ For shareholders to approve or adopt a board decision, first section 65(11) of the 2008 Act prescribes transactions which are subject to special resolution.⁴⁷ Under that part, section 65(11)(g) with (l) is particularly relevant when companies re-acquire own shares in circumstances contemplated under section 48(8) and any fundamental transaction. Moreover, section 115 is sequentially interrelated with other sections of the Act cascading from each other, these being sections 48, 65, 112, 113 and 114, which also bear relevance to the regulation of the disposal by a company of its assets,⁴⁸ or where the company re-acquires its own shares, as the case may be. This part interprets the adoption of a special resolution by shareholders of a company under sections 48(8) and 115(2).

3.2.1 Adoption of a special resolution under section 48(8)(a)

The operation of the sections on buy-backs was recently dealt with in *First National Nominees (Pty) Ltd v Capital Appreciation Ltd*.⁴⁹ In that case, Windell J's interpretation of section 48 arrangements implicitly confirmed that the adoption of proposed schemes through buy-back of own shares may be directly activated by a company by following the procedure in section 114(1) and (4). Section 114(1) provides as follows:

“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 re-acquisition by the company of its securities.”⁵⁰

As the preceding paragraph illustrates, a board of a company is empowered to propose and implement any arrangement. Because a proposed scheme in terms of section

(Gouws); *Australian Securities and Investments Commission v Malborough Gold Mines Ltd* (1993) 177 CLR 485.

⁴⁶ See Cassim et al (2005) at 690.

⁴⁷ Section 65 of the 2008 Act regulates how shareholder resolutions must be adopted.

⁴⁸ See *Cilliers* (2018) at para 29.

⁴⁹ *First National Nominees (Pty) Ltd v Capital Appreciation Ltd* [2021] ZAGPJHC 17 (*Capprec*).

⁵⁰ This subsection was inserted by section 70 of the 2011 Companies Amendment Act. Companies in business rescue are excluded from forming schemes of arrangement. The business rescue plan is set out in Chapter 6 of the 2008 Act; see sections 128–155. Part D of the Chapter speaks directly to the development and approval of a business rescue plan for a company in business rescue. Perhaps this is because all the constituencies of the company would be expected to make contributions to the business rescue practitioner as to whether or not the scheme to re-acquire own shares would be desirable, considering the predicament in which the company would be in at the time or whether or not such re-acquisition would be economically viable for the survival of the company. Further, the provisions of section 118(3)(a), (b) and (c) excludes the application of Parts B, C and the Takeover Regulations to the provisions of section 117(1)(c)(i), (ii) and (iii) if the affected transaction is pursuant to or contemplated in an approved business rescue plan in terms of Chapter 6.

114(1)(e) results in an acquisition,⁵¹ section 114(4) activates the formal procedure provided for under section 48 for companies to follow to approve a proposed share buy-back scheme.⁵² So, to have a proposed scheme approved, the route must pass through section 114(4) of the 2008 Act, which supplements section 114(1) by being the bridge through which section 48 is activated. Section 114(4) provides that:

“[s]ection 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.”⁵³

Once section 48 of the 2008 Act is activated, section 48(2)(a) of the same Act empowers a company’s board of directors to determine a buy-back that a company proposes to make. Section 48(2)(a) of the 2008 Act does not at first sight specify from whom the board must determine to buy-back shares. Nevertheless, the latter section goes on to subject a board’s determination to section 48(8) of the same Act. Consequently, in section 48(8)(a) the Act specifies persons from whom shares may be acquired by a company for which shareholder approval is required. These are directors, prescribed officers or their related persons.⁵⁴ There is no provision in section 48(8) which makes mention of buy-backs from shareholders themselves.

This is surprising because not all shareholders become company directors, prescribed officers or become related to the two. Perhaps, section 48(2)(a) is designed to play the determinative role when a company repurchases shares from its shareholders, since section 48(8) of the Act is silent. This is so because the opening words of section 48(2)(a) are open-ended, namely: “a board of a company may determine that the company will acquire a number of its own shares ...”.⁵⁵ The latter wording is not directed at any particular person; implicitly, the wording refers generally to all shares of that company held by a person irrespective of the holder. The silent posture the Act has adopted under section 48(8) to refer specifically to shareholders is puzzling, especially when compared to section 114(1). The latter section authorises implementation of any arrangement between the “*company and holders of any class of its securities*”. Obviously, the section refers to holders who might not necessarily be directors, prescribed officers or their related persons as articulated or stipulated under section 48(8)(a).

⁵¹ Regulation 81(a) defines “acquisition” to include “any act or transaction as a result of which a person acquires or has an increased voting power in a company, irrespective of whether that person acquired any securities of the company in or as a result of that act or transaction”. Companies Act Regulations, 2011. GG 34239, GN 351 Reg 9526 of 26 April 2011. *CSARS v Logikal Consulting (Pty) Ltd* (unreported Case No. 96768/2016) (29 March 2018) at para 24 (*Logikal*).

⁵² Section 65(9) and (10) of the 2008 Act regulates the voting majority which a company must achieve for a special resolution to be passed. See *Moraitis* (2017) at para 37.

⁵³ This subsection was inserted by section 70 of the 2011 Companies Amendment Act.

⁵⁴ Section 1 of the 2008 Act defines “related”, when used in respect of two persons, to mean persons who are connected to one another in any manner contemplated in section 2(1)(a) to (c).

⁵⁵ This part was inserted by section 32 of the 2011 Companies Amendment Act.

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

In *Capprec*, the court's judgment partially agreed with the approval proposition expected to unfold to pass a special resolution under section 48(8)(a) of the 2008 Act, and that approval is consistent with the inference that one draws from the preceding different wording. The court did not expressly acknowledge, but indeed, it seemed to agree that companies may at times aim to buy-back shares only from persons mentioned in section 48(8)(a), or alternatively from those expressly determined by directors under section 48(2)(a) or section 114(1), but whose rights shall eventually be subjected only to the section 48(8)(b) and section 115(2)(a) procedures.⁵⁶

The question which arises is whether the Act aims to have all shareholders of a company approve a buy-back under section 48(8)(a). Section 48(8)(a) appears to respond adequately to the question.⁵⁷ The relevant words from the latter section responding to the question are that approval must be by "special resolution of shareholders of the company".

The section does not mention approval by "shareholders of a class". The inference therefore is that all shareholders with voting rights are expected to cast a special resolution. The summary reflected in Figure 1 below is meant to illustrate repurchase of shares under section 48(8)(a) as already discussed above and were a determination has already been made by the board of directors under section 48(2)(a).

⁵⁶ However, Windell J's judgment did not elaborate because the judge did not venture to consider in detail a scheme under section 48(8)(b) of the 2008 Act. That notwithstanding, her judgment is important on two counts: first, she did affirm that, where the buy-back from either class of holders of shares surpasses the 5% threshold which in effect will be classified as a fundamental change, section 48(8)(b) will be activated. What, however, shall be activated is only the procedure under sections 114(2) and (3) of the 2008 Act for the fair treatment of those from whom shares are proposed to be reacquired; and secondly, observing the latter procedure shall not necessarily make that proposed buy-back arrangement a scheme. The arrangement shall remain a section 48 arrangement. This position would be maintained even in instances where the proposed buy-back would be more than 5%, as long as a company's aim was for the proposal to remain a section 48(8)(a) arrangement. The author suspects, or assumes, that the second point is the reason which may have influenced Windell J not to consider in detail an analysis of schemes in the case. To some extent, Windell J has, with the judgment, clarified what has remained uncertain for some time. See arguments from SM Luiz "Some comments on the scheme of arrangement as an 'affected transaction' as defined in the Companies Act 71 of 2008" (2012) 15 *Potchefstroom Electronic Law Journal* 102 at 112–113; and Latsky J "The fundamental transactions under the Companies Act: A report back from practice after the first few years" (2014) 2 *Stell LR* 361 at 369–370.

⁵⁷ The section provides that a decision by the board of a company contemplated in subsection (2)(a) must be approved by special resolution of the shareholders of the company if any of the 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.

Figure 1: Reacquisition of Own Shares by Company Z in terms of section 48(8)(a) of the 2008 Act

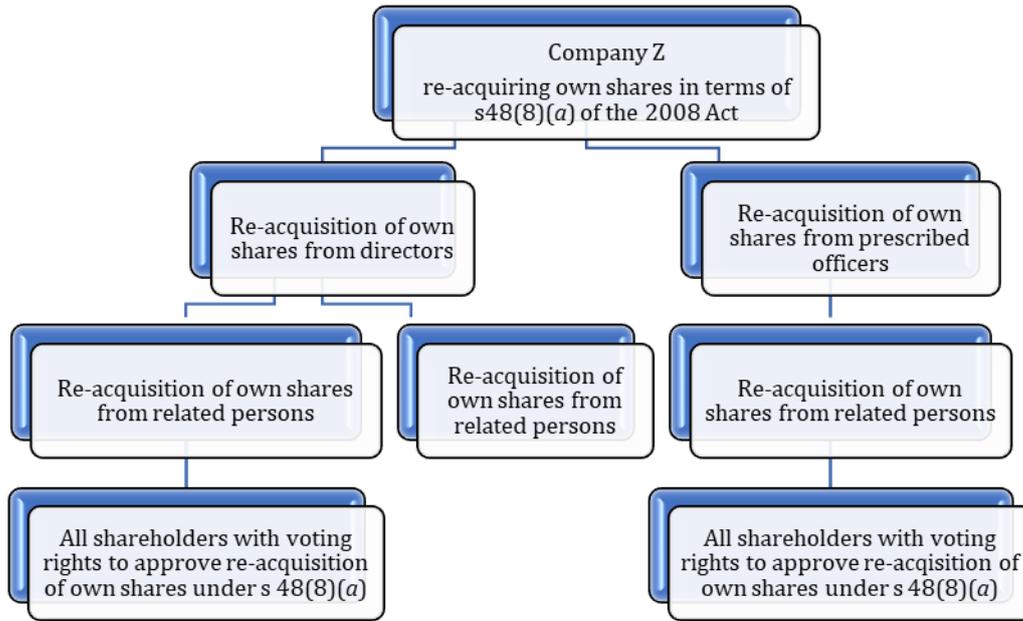


Figure 1 informs parties about two processes before a meeting is called by Company Z: (a) that shares are repurchased only from directors, prescribed officers or their related persons; and (b) that it is expected that all shareholders of that company with voting rights are present in a meeting to exercise those voting rights on the proposed transaction. Consequently, the section 48(8)(a) procedure does not lead to the activation of section 115(2)(a); the section provides for its own collective shareholder approval mechanism.⁵⁸ Therefore, accepting that the above approach shall remain as the court determined in *Capprec*, and the latter case's decision is ultimately affirmed by higher courts to be correct; and assuming as well that the scheme to buy-back own shares is proposed only to shareholders who, within the meaning of section 48(8)(a) are not directors, prescribed officers or their related persons, it then appears safe to submit that the procedure under section 48(8)(a) cannot apply to approve a scheme. The above procedure makes it clear that when a company intends to create a scheme, and a transaction is proposed through section 114(1) of the 2008 Act, only the section 48(8)(b) procedure shall be activated.⁵⁹

⁵⁸ Also see section 61 of the 2008 Act.

⁵⁹ See also arguments in Latsky (2014) at 380–383.

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

The challenge for the Act is that the proposition that only section 48(8)(b) shall be activated does not show clearly from the provisions. The conjunction “and” linking both the section 48(8)(a) and (b) paragraphs exacerbates the uncertainty. The word “and” appears to suggest that the Act contemplates that the two paragraphs under section 48(8) must always be read conjunctively, rather than be read disjunctively, at the relevant moment. At a glance, it appears that the drafters of section 48(8) should not have inserted “and” to link the two paragraphs; perhaps “or” would have been preferable. Disjunctively, the paragraphs would have read much more clearly, assuming that “and” was not inserted, that is, that either paragraph applies in a particular circumstance of a proposed buy-back application. One can but wonder whether there is a reason why “and” was used by the legislature. There seems to be a possible reason as explained later hereunder. Assuming that the possible reason to be explored below is not what could plausibly have been contemplated by the legislature. In that case, a solution to resolve a similar challenge between “and” and “or” was proposed in *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others*.⁶⁰ The contention in the case related to the drafting of the provisions of section 130(5)(a)(i) and (ii) of the 2008 Act. Sub-paragraphs (i) and (ii) are divided by the disjunctive “or”. The aim of the court was to find common ground between the provisions so that there would be no inconsistency when shareholders held meetings. The court ruled that it was appropriate to read “or” conjunctively as if it were “and”. The result would be a reconciliation between sections 130(1)(a) and 130(5)(a) so as to limit the grounds on which an application to set aside a resolution could be brought.⁶¹ Surely, in the context of section 48(8)(a) and (b), “and” could just as well be read as “or” where appropriate. What must be emphasised for now however, is that, from the aforesaid, it does not matter whether the proposed buy-back would simply be an arrangement under section 48(8)(a) or (b), or a scheme facilitated under section 114(1) – shareholders must nonetheless approve a proposed share buy-back.

3.2.2 Adoption of special resolution under s 115(2)(a)

Having disposed of the section 48(8)(a) route, what follows is an examination of the procedure a company must follow in order for shareholders of that company to have validly approved a proposed buy-back scheme under section 115(2)(a) of the 2008 Act. From the onset, what companies must note is that the adoption of a special resolution in a proposed buy-back scheme does not, after a proposal under section 114(1)(e), automatically proceed directly to approval under section 115(2)(a). First, the provisions of section 48 must be observed. To that extent, section 114(4) activates section 48 where the aim is to create a buy-back scheme under section 114(1)(e). Once section 48 is activated, first in line is that a board of a company has another hurdle or procedural step to navigate. Pursuant to the proposal agreed to by the board in terms of

⁶⁰ *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (5) SA 63 (SCA).

⁶¹ See *Panamo* (2015) at para 31.

section 114(1), the board has to determine and adopt a resolution as section 48(2)(a) directs. Before this time, no board resolution need be adopted or is required. The wording under section 114(1) is that a board “proposes”, whilst under section 48(2)(a) a board “determines”. For example, under section 48(2)(a) the wording is “the board of a company may determine”, whilst under section 114(1) the wording provides that “the board of a company may propose”. In the author’s view, it is clear that the Act aims to convey different legal meanings between “determine” and “propose”, as the two words have a vast difference in legal meaning. In the context in which the two phrases are used, “determine” connotes “*decide, find out, discover, establish, ascertain, or approve*”, while “propose” connotes “*suggest, submit, recommend, or initiate*”. The difference in wording under both the latter sections seems to accord credence to the preceding thinking. Contextually compared together, the determination a board is empowered to make under section 48(2)(a) seems to carry more legal weight than the proposal envisaged under section 114(1).

One wonders whether the difference in wording between sections 114(1) and 48(2)(a) is justified, considering that the sections are meant to kick-start different processes but have the same aim ultimately. The difference appears to be unnecessary and tedious. In the author’s view, it would have been preferable if a similar wording to that in section 48(2)(a) had been inserted where a board intended to propose a buy-back in terms of section 114(1)(e). Had that been the approach, the Act would simply direct the board to observe sections 46, 48(3) and (8) in the same manner that section 48 mandates. As the sections currently stand, there is no justification that a share buy-back must first be “proposed”, and later a “determination” be made, and a board resolution be adopted under section 48(2)(a), where a similar process could equally be initiated under section 114. It appears that had the sections been similarly worded, the determination which would have been made in terms of section 114(1) would have been equally adequate, and thus do away with the two-pronged “proposal” and “determination” processes. Alternatively, the “proposal” and “determination” could be added as a requirement under section 114(1).

In the author’s view, the approval process would be less tedious than it is if the legislation incorporated similar wording under section 114(1), as it does in section 48(2)(a), given that both sections are in any case directed at the same aim, which is to ensure that shareholder rights or interests are adequately safeguarded. It is submitted that, as the sections currently stand, their approach to the approval of a proposed buy-back is cumbersome and unnecessary.

Once the above process has been observed, section 48(8)(b) is activated, which by its nature results in the requirement for approval by special resolution of the particular proposed arrangement under section 115(2)(a) of the 2008 Act. The section begins by providing that the decision of the board of a company contemplated in section 48(2)(a) be 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.”

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

It must be stated upfront that the Companies Amendment Bill, 2021 (Bill, 2021) proposes to completely repeal the latter section, with no alternative replacement provided.⁶² Currently, the section still applies. Accordingly, in order for a proposed share buy-back scheme to activate section 115(2)(a), the transaction must be at more than the 5% threshold, otherwise, if it is below, the latter section is not activated. In the context of this part, the aim must be to buy-back shares from shareholders with the intent to create a scheme, as the heading to section 114(1) specifies. Under the discussion on section 48(8)(a), it was highlighted that the 2008 Act contemplates approval from all shareholders only if the buy-back is made by the company from directors, prescribed officers or their related persons. Where a buy-back is to be approved by shareholders in terms of section 115(2)(a), the position is different. However, one must be mindful that it is likely that the latter persons may form part of the broad term “shareholders” and hold shares within the class or group of shareholders from whom a buy-back is proposed. The question is whether a share buy-back proposal that is not aimed at resulting in a scheme and is more than 5% can or must as well be approved through section 115(2)(a). The answer is not clear from the Act. The question arises because under section 48(8)(a) shareholder approval is contemplated only if a repurchase is from directors, prescribed officers or their related persons (for example, these persons may hold preference shares), and no approval is

⁶² Department of Trade, Industry and Competition “Invitation for the public to comment on the Draft Companies Amendment Bill, 2021” at 28–29 available at <http://www.thedtic.gov.za/invitation-for-the-public-to-comment-on-the-draft-companies-amendment-bill-2021/> (accessed 13 October 2021) (the “DTIC Draft Companies Amendment Bill, 2021”) published on 1 October 2021. On 1 October 2021 the Department of Trade, Industry and Competition (DTIC) published an invitation to comment on the Draft Companies Amendment Bill, 2021 as a result of subsequent public representations and consultations with stakeholders pursuant to its first published invite. Initially, the proposals were published on 21 September 2018 in the Companies Amendment Bill, 2018 by the DTIC (initial or previous Bill). According to the Bill’s Explanatory Memorandum, one change which Clause 12 of the current Bill proposes to make in the context of this article is to repeal section 48(8) of the 2008 Act and streamline the requirements for a special resolution where a company contemplates acquiring its own shares. Clause 12 of the Bill, 2021 provides that a decision by the board of a company as contemplated in subsection (2)(a) must be approved by a special resolution of the shareholders of the company: (a) if any shares are to be acquired by the company from – (i) a director of the company; (ii) a prescribed officer of the company; (iii) a person related to a director of the company or a prescribed officer; or (b) if it entails the acquisition of shares in the company, other than shares acquired as a result of – (i) a *pro rata* offer made by the company to all shareholders of the company or a particular class of shareholders of the company, notwithstanding that the *pro rata* offer made to all shareholders may also include shareholders who are one or more of the persons referred to in paragraph (a) above; or transactions effected on a recognised stock exchange on which the shares of the company are traded. See Clause 12 of the Companies Amendment Bill, 2021; Explanatory Memorandum on the Companies Bill at 1 and 28–29. The current Bill sets out three further policy objects it seeks to achieve: (i) ease of doing business; (ii) achievement of equity between directors and senior management in one hand, and shareholders and workers on the other, as well as addressing public concerns regarding high levels of inequality in society; and (iii) countering money laundering and terrorism. See DTIC “Background note and explanatory memorandum on the Companies Amendment Bill” (2021) 5–6 at para 2.2 and 8 at para 3.1.

contemplated under this section if the repurchase is proposed to shareholders who are not directors, prescribed officers or their related persons.⁶³ For the latter reason, the literal reading of the wording of the Act suggests in one's mind that the approval of a buy-back from persons listed under section 48(8)(a) should at all times be distinguished from approval contemplated under section 48(8)(b).

Only under section 114(1) does the Act expressly refer to the term "class" within the shareholder's voting process. Consistent with the observations made earlier, this obviously signals that the Act contemplates that voting by shareholders for proposed buy-back schemes orchestrated under sections 114 and 115(2)(a) shall be by class as opposed to being by all shareholders generally. Thus, the appearance is that the approval procedure under sections 48(8)(b) and 115(2)(a), unlike the approval process contemplated under section 48(8)(a), does not contemplate approval of a proposed share buy-back scheme by special resolution by all shareholders combined. It is the author's opinion that the wording of the sections does not suggest or support that approval be sought from all shareholders in order for a company to comply with the shareholder approval procedure envisioned under sections 48(8)(b) and 115(2)(a). Perhaps one may pause here to emphasise the point made above, that it is comforting that the section 48(8)(b) route is currently proposed to be repealed by the Bill, 2021. Clearly, the aim is to reduce uncertainties about how the shareholder approval procedure applies. However, under the proposed repeal, the sections 115(2)(a), 114(1) and (4) procedures as well as the section 48(8)(a) procedure remain intact.⁶⁴ Thus, even after the repeal the procedures in the latter sections will remain the same.

⁶³ For example, some of these persons may hold both preference and ordinary shares, or only the latter type of shares. For example, in *Juspoint* the first circular issued in December 2015 was specific that the repurchase was proposed from particular shareholders and excluded certain classes of shareholders.

⁶⁴ Necessarily, Clause 12, inter alia, proposes to repeal the section 48(8)(b) principles procedure. Section 48(8)(a) shall remain intact. The explanatory memorandum on the Companies Bill appears misleading in its explanation because it expresses the aim as to repeal only the second part of section 48(8)(b), which is paragraph (i)(a). The Memorandum is silent on the changes the Bill makes in the first part of the paragraph under section 48(8)(b), which refers to "if it entails the acquisition of shares in the company". The heading to section 48 provides for "Company or subsidiary acquiring company's shares". The heading suggests that the section regulates instances where a company acquires its own shares or where a subsidiary acquires shares from its holding company. Therefore, the words "*if it entails acquisition of shares in the company*" contemplated by the Bill, 2021 are distinct. More precisely, the words "*in the company*" appear to be what constitutes the new addition. Because section 48(8)(a) is proposed to remain intact, to the extent proposed, one's instinct leads to the conclusion that the interpretation proffered by Windell J in *Capprec* under section 48(8)(a) as well as the one proposed in this paper shall remain unaffected or operational. If the latter proposition is correct, then the interpretation favoured by the Bill going forward is, for example, similar to how buy-back of shares operates under the Canada Business Corporations Act, 1985 (CBCA). The author notes that under the CBCA, the regulation of buy-back of shares by a company does not pay attention to how buy-backs are proposed per se, and in what number or percentage, as was the case under section 48(8)(b) of the 2008 Act. What the Act focuses on is the approval by shareholders, irrespective of what number of shares a company buys back. Clause 12 of the Bill, 2021 makes no reference to acquisition from a class of shareholders. Thus, after the amendment there will be no reference to a class under section 48(8). Reference to class remains only under sections 36 and 114(1) of the 2008 Act.

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

Earlier, a conjecture was made as to whether the inclusion by the legislature of the word “and” linking paragraphs (a) and (b) under section 48(8) was deliberate. The word causes confusion because when read in context it seems to direct courts to undertake a conjunctive interpretative posture when analysing the effect of the paragraphs, rather than a disjunctive one. The word suggests, contrary to the submission made earlier, that before any repurchase of shares by a company, shareholders with voting rights combined must first approve any type of a proposed share buy-back whether or not it will result in a scheme, and thereafter class members must also approve. Indeed, when one looks at the current proposed repeal of the 2008 Act, by the Bill, 2021, the Bill suggests this alternative observation. Earlier, it was submitted that section 48(8)(a) as it currently stands envisages that all shareholders of a company entitled to exercise voting rights shall vote. Therefore, it makes sense to conclude that the contemplated change by the Bill, 2021, to discard the section 48(8)(b) procedure, and remain only with the procedure under section 48(8)(a), suggests that a proposed share buy-back, determined by directors, must be approved by all shareholders combined. This change would then mean that for an approval of a proposed buy-back scheme, section 48(8)(a) will have to be complied with as well, in addition to sections 114(1)(e) and 115(2)(a) of the 2008 Act. After the repeal, section 48 will not have a provision cross-referring to sections 114 and 115.

Further, once the repeal is through, the class factor will still remain informed by section 36(2)(a) of the 2008 Act, which refers generally to approval by shareholders. But the latter section does not refer to approval by class of shareholders. It simply permits authorisation by a company of shares by class.⁶⁵ The wording in section 114(1) buttresses the absence of voting by class, as it is to the effect that the board shall “propose and ... implement any arrangement between the company and holders of any class of its securities ...”. Again, the wording does not suggest that shareholders must exercise their voting rights by class. It is not clear why the 2008 Act has not found it appropriate to expressly authorise that shareholder approval of a matter be by class, seeing that it does permit companies to cause their shares to be allocated according to class, and in addition be allocated preferences and rights, as the case may be.⁶⁶

Under the 1973 Act, the position was much clearer than under the current one. Section 311 of the latter Act expressly provided for the court to order that there be summoned separate meetings of each of the distinct classes of creditors. It appears that the common law approach to formation of classes for purposes of voting shall apply to distribution of company money or property, as was determined in *Verimark* and *Logikal*. In *Marble*, the company only had one class of shareholders who voted.⁶⁷ However, there were shareholders who were excluded from the offer to acquire shares from shareholders.

⁶⁵ See section 36(1) of the 2008 Act.

⁶⁶ See section 36 and 37 of the 2008 Act.

⁶⁷ See *Marble* (2020) at para 61.

The case is a confirmation that at a particular time an offer to buy-back company shares may not be made to all shareholders of a company even if the company has one class of shares. It will depend in the circumstances of that offer or proposal.⁶⁸ The summary provided in Figure 2 below exhibits the reacquisition option the 2008 Act provides for under section 115(2)(a). Company Z's shares are divided into three classes, namely A, B and C.

Figure 2: Reacquisition by a company of more than 5% of own shares from shareholders of any particular class

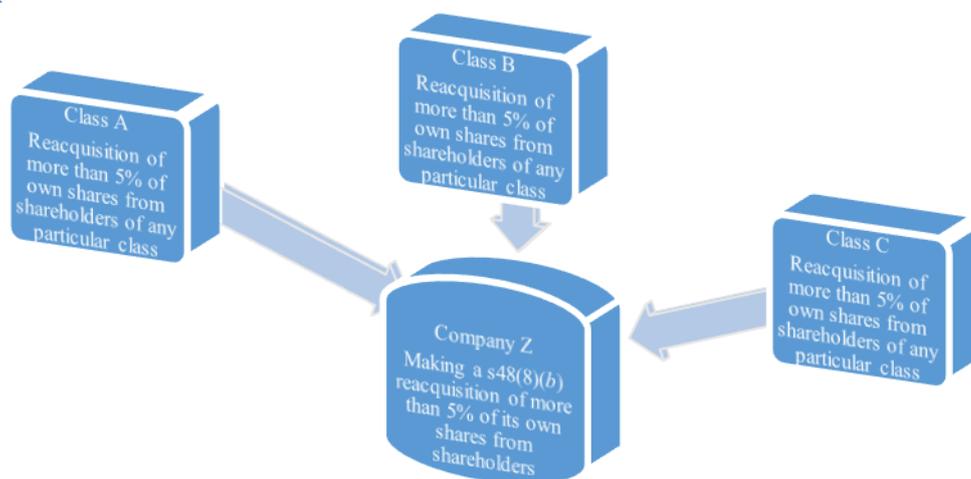


Figure 2 illustrates the classes of shareholders of Company Z who must adopt a special resolution contemplated under section 115(2)(a). Put briefly, the illustration clarifies, for the benefit of all parties forming part of a proposed scheme before a meeting is called, that it is only the shareholders constituting that particular class and whose rights shall be affected who must be present at the meeting and will be entitled to exercise voting rights.⁶⁹ The position will remain the same until the changes proposed by the Bill, 2021 are in effect. One must not lose sight of other ancillary challenges which at times may arise as to who is entitled to vote and pose a conundrum for companies that contemplate engaging in a buy-back scheme.

One such was addressed in *Cilliers*. In that case the court had to address the question of whether a shareholder in the holding company had a right to exercise his voting rights where it was the holding company's subsidiary which was the disposer of

⁶⁸ The two excluded shareholders were Hosken Consolidated Investments and Johnnic Holdings Management Services (Pty) Ltd. In the case, the applicants sought leave in terms of section 115(6), read with section 115(3)(b) of the 2008 Act, to apply for the review of three resolutions passed at a shareholder's meeting of the respondent company in December 2019. In the second instance, the application was for the resolutions to be set aside. The three resolutions passed at the meeting were (i) a special resolution approving a scheme of arrangement in terms of section 114(1) proposed by the board; (ii) an ordinary resolution authorising the directors of first respondent to implement the company's resolutions; and (iii) an ordinary resolution to delist the first respondent's shares from the main board of the securities exchange operated by the Johannesburg Securities Exchange. See *Marble* (2020) at paras 1, 51 and 52.

⁶⁹ See *Verimark* (2009); *Logikal* (2018) at para 59.

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

its own assets. The shareholder held no shares in the subsidiary company. From the case, a different picture appears if the decision is considered in the context of a buy-back of shares by a subsidiary company. The court held that the shareholders of the holding company will as well have to adopt a resolution approving the repurchase. It cannot exclusively be shareholders of the subsidiary disposing company who vote, otherwise section 115 would be rendered meaningless. However, only shareholders who have a right to vote on the matter shall vote.⁷⁰ That will be so even if a shareholder does not hold securities in the subsidiary company, but only in the holding company; nevertheless, section 115 will have to be complied with. A shareholder would not need to specifically hold shares in the subsidiary company in order to exercise voting rights, where the argument is that the disposal or matter only relates to the subsidiary's shares.⁷¹

4 EXAMINATION OF THE ADOPTION OF SPECIAL RESOLUTION OF BUY-BACK SCHEMES IN AUSTRALIA

4.1 Adoption of resolution under section 411 and 257D of the Corporations Act of 2001

The roadmap to adopt proposed buy-back schemes differs between the 2008 Act and the Australia Corporations Act of 2001. Although, under both statutes, separate provisions regulate schemes and buybacks, under the 2008 Act companies are required to adopt a streamlined procedure. Under the Corporations Act, companies have to follow two parallel procedures. As the discussion under this part shows, the two contrasting procedures suggest dissimilarities with respect to what the statutes expect with regard to shareholder approval of proposed buy-back schemes. In Australia, arrangements are regulated under Part 5.1 of the Corporations Act 2001 alongside Regulation 5.1 and Schedule 8, and Part 3 of the Corporations Regulations which prescribe the procedural rules for schemes.⁷² The procedure followed in Australia to vary class rights is similar to the UK Companies Act.⁷³ *Village Roadshow* shows that how shareholder rights must be construed shall be determined based on what a company has scribed in its constitution.⁷⁴ The Corporations Act 2001 defines an arrangement

⁷⁰ See *Cilliers* (2017) at para 31.

⁷¹ See *Cilliers* (2017) at para 33. Another debatable challenge which Latsky reported from practice is whether approval may be procured only through physical voting or as well by written resolution in terms of s 60 of the 2008 Act, that is, by round-robin. The challenge proffered here is with respect to the fact that the appraisal remedy under section 164 of the 2008 Act may be unworkable when using round-robins because of the numerous procedural steps section 164 requires to be undertaken by an aggrieved party to exercise its rights. Latsky (2014) at 363.

⁷² McConvill J "Schemes of arrangement, selective buy-backs and Village Roadshow's preference share tussle: Entering the matrix" (2005) 2 *MqJBL* 203 at 206.

⁷³ See sections 701(1), 630(2) and 895–901 of the Companies Act 2006.

⁷⁴ As is the case in South Africa, Canada and some other jurisdictions, in Australia shareholders have the option to set out the criteria by which class rights may be altered in the company's constitution. *Re*

under section 9 to include a reorganisation of the share capital of a body corporate by the consolidation of shares of different classes.⁷⁵ These shares are divided into different classes or by both methods.⁷⁶ The challenge for companies and shareholders alike tends to be the translation of what is in a company's constitution into the document proposing the share buy-back scheme, and whether the meaning of what is scribed conforms to what the provision of the Act contemplates when the matter a statute regulates is interpreted or construed. Obviously, this would arise because in the main such proposed arrangements are normally concerned with the affecting of the rights and interests of members and obligations of companies.

Approval of proposed schemes of arrangement is regulated by section 411 of the Corporations Act 2001. For companies to comply with the Corporations Act where class rights are varied, they must not only comply with the solvency and liquidity test – for example where buy-backs must not materially prejudice the company's ability to pay its creditors⁷⁷ – but must also comply with the procedure by which that buy-back must be conducted.⁷⁸ From *Village Roadshow*, the latter means that whether or not a company proposes a scheme, companies must in addition comply with the procedure provided under one of the five share buy-back methods permitted by the Corporations Act. Accordingly, when a company proposes a scheme, section 411(4)(a)(ii)(A) and (B) of the Corporations Act specifically sets out the member's voting procedure a company is expected to satisfy to obtain shareholder or member approval.⁷⁹ Compared to section 115(2)(a) of the 2008 Act, the approval contemplated is similar for companies with share capital, and is by a special resolution passed at a meeting of the class of members

Village Roadshow Limited [2003] VSC 440, Supreme Court of Victoria, 14 November 2003, per Mandie J, where the court had to determine whether the constitution of the company provided preference shareholders with the right to vote on a buy-back per the requirements of s 254A(2) of the Corporations Act 2001.

⁷⁵ Bottomley S et al. *Contemporary Australian Corporate Law* 2nd Cambridge University Press (2020) at 224–225.

⁷⁶ *Re NRMA Ltd* (2000) 33 ACSR 595 at para 603 & 606.

⁷⁷ Note 1 under section 257A provides that, if a company has a constitution, that company may include provisions in its constitution that preclude that company from buying back own shares, or impose restrictions on the exercise of the company's power to buy-back its own shares. The company must also follow the procedures laid down in Part 2J.2 of the Corporations Act 2001. These include lodgement of offer documents with the Australian Securities and Investments Corporation (ASIC), requisite approval from shareholders, disclosure of material information, as well as cancellation of shares bought back. See further the requirements of sections 257C(1) and 257D(1)(a) and (b) of the Corporations Act 2001.

⁷⁸ See McConvill (2005) at 206.

⁷⁹ The section provides as follows: "A compromise or arrangement is binding on the creditors, or on a class of creditors, or on the members, or on a class of members, as the case may be, of the body or, if the body is in the course of being wound up, on the liquidator and contributions of the body, if, and only if: (a) at the meeting convened in accordance with an order of the Court under subsection (1) or (1A): ... (ii) in the case of a compromise or arrangement between a body and its members or a class of members – a resolution in favour of the compromise or arrangement is: (A) passed by a majority in number of the members, or members in that class, present and voting (either in person or proxy); (B) if the body has share capital – passed by 75% of the votes cast on the resolution: (b) it is approved by order of the Court".

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

holding shares in the class, or of the class of members whose rights shall be varied. Before voting, shareholders must be apprised of their rights through the explanatory statement companies are obliged to prepare (scheme booklet).⁸⁰ Similar to section 114(2) and (3) of the 2008 Act, the scheme booklet must set out all the material information regarding the proposed scheme and its effect on shareholder's rights. It must also reflect on the independent expert's report stating whether or not the proposed scheme shall be in the best interests of shareholders.⁸¹ The latter requirement, similarly to the 2008 Act, does not refer to the interests of the company but to those of shareholders. A further similarity is that, under the 2008 Act, the Panel must issue a certificate before a proposed share buy-back scheme is approved.⁸²

The same is contemplated under the Corporations Act, where a proposed scheme must have been assessed by ASIC before being approved by a court.⁸³ The scheme booklet must be assessed by ASIC to ascertain whether or not its terms reflect fairness and comply with the Corporations Act before the scheme is referred to court for the first time, so that the court can grant the company an order to convene the first meeting with shareholders for a vote on the proposed scheme. Consequently, ASIC is empowered by the Corporations Act to raise any terms in the proposed scheme that it might consider to be unreasonable or unfair to shareholders or the company before the issue of a certificate. Where all the substantive steps are adhered to, the court shall consider, and where according to its discretion it sees fit, grant the order.⁸⁴ It is at this stage that a company sends out the booklet to shareholders for purposes of consultation, based on the test that each have sufficient similar interests. Separate meetings are required to be held for different classes of shareholders (for example, ordinary, preference or option shareholders).⁸⁵ Contrary to the silent position adopted by the 2008 Act when arranging meetings for shareholders to approve a proposed scheme by special resolution, the Corporations Act specifically and expressly directs companies that such meetings should be held by different classes of holders.⁸⁶ As was argued earlier, there is no such provision under the 2008 Act. However, the route to section 115(2)(a) begins in section 114(1), which contemplates a scheme to be proposed to a class of

⁸⁰ Schedule 8, Part 3 of the Corporations Regulations.

⁸¹ Regulation 8303–8306 only requires an independent report to be prepared where the offeror has a 30% or more shareholding in the company. However, it is common practice that the report is prepared by companies nonetheless. See McConvill (2005) at 207. See also section 411(2) of the Corporations Act 2001.

⁸² See section 119(4)(b) of the 2008 Act. Inserted by section 74 of the 2011 Companies Amendment Act. In Australia, ASIC must issue a certificate for a court to approve a scheme. See section 411(17)(b) of the Corporations Act 2001. See to the contrary in *Re ACM Gold Ltd* (1992) 7 ACSR 231.

⁸³ Section 411(2)(a) and (b) of the Corporations Act 2001. See *Re Mincom Ltd [No 3]* [2007] QSC 207 at paras 30–40 on what role ASIC's recommendation plays when a scheme is submitted for approval by a court. Paine J *Schemes of arrangement: Theory, structure and operation* (2014) Cambridge University Press.

⁸⁴ See McConvill (2005) at 208.

⁸⁵ Section 411(1) of the Corporations Act 2001; McConvill (2005) at 208.

⁸⁶ McConvill (2005) at 208.

shareholders. By implication therefore, only this class shall vote to approve that proposed scheme.

Notwithstanding that companies make offers to shareholders to buy-back their own shares, McConvill submits that in Australia companies are required to enter into an agreement with their shareholders in order to buy-back shares.⁸⁷ As a result, it is essential that “any shareholder to whom the company makes an offer to buy-back may decide whether or not to sell”.⁸⁸ This suggests that even where companies propose a buy-back through a scheme, all shareholders to be affected have a right to approve. On the day of voting, it is only the relevant shareholders with the right to vote who must be present and vote. Share buy-backs are currently regulated under sections 257A–257J of the Corporations Act of 2001.⁸⁹ On considering approving a proposed buy-back scheme under section 411 of the Corporations Act 2001, the relevant procedures under section 257J (providing for signposts of other applicable/related sections to buy-backs) or sections 256 and 257D, are not cross-referred similarly to the 2008 Act under section 114(4). When a scheme is contemplated, section 411 of the Corporations Act does not, for example, cross-refer to the section 257D procedure. Notwithstanding the omission, *Village Roadshow* shows that, where companies in Australia have proposed a scheme of arrangement where a share buy-back will be the subject of the transaction, then one of the five buy-back modes has to be utilised or activated and the relevant requirements for that buy-back must be met.⁹⁰ Thus, in proposed share buy-back schemes, section 257D, which regulates selective buy-backs,⁹¹ should be satisfied alongside section 411, which scribes its own procedure as demonstrated above and which companies are

⁸⁷ McConvill (2005) at 210.

⁸⁸ McConvill (2005) at 210.

⁸⁹ Since 1995 Australia has simplified its share buy-back rules, removing mandatory procedures sparingly applied until 1989. See <https://asic.gov.au/for-business/running-a-company/shares/share-buy-backs/> (accessed 10 January 2021). In Australia, five types of buy-backs are permitted: a minimum holding buy-back; an employee share scheme buy-back; an on-market buy-back; an equal-access scheme; and a selective buy-back. Once bought, they cannot be re-issued: they must be cancelled, and rights attached to them are suspended in terms of section 257H. Dharmawan GV & Mitchell JD “The legislative framework of share buy-backs: A comparison of the ‘old’ and ‘existing’ requirements” 1999 (18) *University of Tasmania Review* 283–308.

⁹⁰ Sections 256C(2)(a) and 257D of the Corporations Act. See also McConvill (2005) at 213.

⁹¹ Section 9 of the Corporations Act 2001 defines a selective buy-back to mean “a buy-back that is none of the following: (a) a buy-back under an equal access scheme within the meaning of subsections 257B(2) and (3); (b) a minimum holding buy-back; (c) an on-market buy-back; (d) an employee share scheme buy-back”. Buy-backs classified under other buy-backs have similarities to the approval procedure contemplated under section 48(8)(a). These consists of shares which can be bought from employees and company directors or a related company. The buy-backs require an ordinary resolution if over the 10/12 limit. However, if a buy-back is below the 10/12 limit it does not invite a resolution. The other is the equal access buy-back which is the most straight forward buy-back. It is offered to all shareholders and they are offered a reasonable opportunity to consider an offer which proposes to buy-back the same percentage of their ordinary shares from each holder. An ordinary resolution is required if over the 10/12 limit. Shareholders should not be unfairly disadvantaged and this buy-back allows companies to devise their own schemes to suite particular circumstances. See also McConvill (2005) at 212–213.

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

expected to satisfy when proposed schemes are to be approved. Under the 2008 Act, the obligation to utilise the section 48 procedure to adopt a proposed share buy-back scheme is made pertinently clear through section 114(4) of same Act. Disappointingly, under the Corporations Act this is not as clear-cut. The approval route under both sections 257D and 48(8)(a) contemplates that the first resolution be passed by “all shareholders of that company” in a general meeting of the company.⁹² The position under section 411(4)(a)(ii) of the Corporations Act and section 115(2)(a) of the 2008 Act is different.

Ultimately, in Australia courts play a pivotal role,⁹³ as is the case in Canada⁹⁴ and the United Kingdom (UK), in approving the setting up of the first meeting by a company, and in eventually approving a proposed scheme.⁹⁵ Under the 2008 Act, the latter procedure has since been discarded; instead, a court’s role comes subsequent to application by a party.⁹⁶ The test used is multi-fold: (i) the common law test established in cases similar to *Verimark*; and (ii) voting based on a two-fold test approach: a majority in number (numerosity test); and that 75% or more votes in value be cast by shareholders to support a resolution.⁹⁷ Notably, approval by shareholders under section

⁹² An important rider, however, one which appears missing from the 2008 Act and other statutes discussed here, is the prohibition of a vote cast in favour of the resolution by any person whose shares are proposed to be bought back or by their associates, or that a resolution must be one agreed to at a general meeting by all ordinary shareholders. Thereafter, a second resolution by shareholders of that class must approve it. Where parties concluded an agreement for a buy-back, that agreement must be concluded subject to shareholder approval. See section 257(D)(1)(a) and (b) of the Corporations Act 2001. Further, similar to the position in Canada under s 38 of the CBCA and other jurisdictions, in Australia shareholder approval by special resolution is required if a company contemplates reducing its share capital. This requirement is regulated under s 256B(1) of Part 2J.1 of the Corporations Act 2001. Shareholders have to be provided with notice of the meeting setting out all material information related to the decision how to vote on the resolution (unless it would be unreasonable to do so because the company had previously disclosed the information to its shareholders), s 257D(2). The notice must be lodged with ASIC, along with any related document. *Village Roadshow Limited v Boswell Film GmbH* [2004] VSCA at para 6; McConvill 2005 *MqJBL* 203. In terms of s 256(C)(3), a resolution, once passed, must be lodged with ASIC within 14 days of its having been passed.

⁹³ Section 411(2) of the Corporations Act.

⁹⁴ In Canada section 192(1)(a) –(h) of the CBCA. Under the latter section, no special resolution is required from shareholders. Government of Canada “Policy on arrangements – *Canada Business Corporations Act, section 192*” at para 3.09, available at <https://corporationscanada.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs01073.html> (accessed 1 September 2021), which confirms that the CBCA does not “require security holder approval as a pre-condition to a court order approving an arrangement”. The latter was also confirmed in *BCE v 1976 Debentureholders* [2008] 3 S.C.R. at para 115; Chan K “Share repurchases as a potential tool to mislead investors” (2010) *Journal of Corporate Finance* 16 (2) 137–158. Chakraborty T “Share repurchases in India, U.S.A. and U.K: A comparative study” 2002–2004 *Caluniv BS Journal* 159–171 at 164.

⁹⁵ Section 411(1) of the Corporations Act 2001.

⁹⁶ See section 115(3), (6) and (7) of the 2008 Act.

⁹⁷ Section 411(4)(a)(ii)(A) and (B) of the Corporations Act 2001; *Re Ranger Minerals Ltd; Ex parte Ranger Minerals Ltd* [2002] WASC 207 at para 44. McConvill (2005) at 208 and 218–219, citing *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573, 583.

411 is similar in contemplation to section 115(2)(a) of the 2008 Act only so far as the 75% threshold requirement.⁹⁸ Otherwise, it is different with respect to the lower threshold (head-count of majority in number), since the 2008 Act does not require a head-count in number, but requires shareholders to be “sufficiently present to exercise 25 percent of voting rights”. The rationale behind the numerosity test is that it provides for checks and balances and protects those in the minority, especially where a small group of large shareholders could pass a resolution that is against the interests of a large number of small opposing shareholders. A court is therefore unable to approve a scheme at the sanctioning stage if the numerosity test is not met even if the 75% majority in value is achieved.⁹⁹ Once a scheme is approved by the requisite percentages of shareholders it is referred back to court for final approval.¹⁰⁰ At this last approval stage, the court assesses whether the scheme is fair and reasonable, using the honest and intelligent business person test.¹⁰¹ Where the 50/75 test has clearly been achieved, it is rare that Australian courts do not approve a proposed scheme.¹⁰² However, they normally make it essential that it be shown that there is a commercial reason for a scheme.¹⁰³

4.2 *Village Roadshow Limited v Boswell Film GmbH*¹⁰⁴

In the Australian Supreme Court of Appeal in *Village Roadshow Limited*, Callaway JA of Victoria’s Supreme Court of Appeal had to rule on an appeal on the operation of section 257D of the Corporations Act.¹⁰⁵ Callaway JA narrowed the issues the court had to decide to two questions. The first was whether section 257D prevented a person whose shares were proposed to be bought back pursuant to a selective buy-back from voting

⁹⁸ See also section 65(9) of the 2008 Act on the majority of 75% requirement.

⁹⁹ If used as a tactical tool, the latter scenario may cause many schemes to be defeated.

¹⁰⁰ Section 411(4)(b) of the Corporations Act 2001; McConvill (2005) at 208.

¹⁰¹ See McConvill (2005) at 208, citing *Re Chevron Ltd (Sydney) Ltd* [1963] VR 249.

¹⁰² See McConvill (2005) at 208.

¹⁰³ Paine J *Schemes of arrangement: Theory, structure and operation* (2014).

¹⁰⁴ *Village Roadshow Limited v Boswell Film GmbH* [2004] VSCA.

¹⁰⁵ In the case, the company’s issued capital was divided between ordinary as well as class A preference fully paid shares. Between 2002–2003 the company proposed a buy-back from all its class A preference shareholders due to a dispute which arose as a result of the company taking a decision to suspend payment of dividends. The reason for the suspension of the dividend was so that the company could invest into the expansion of its film production business. The company opted to facilitate the transaction through a selective buy-back which had to be approved by special resolution at a general meeting. Section 257D of the Corporations Act 2001 had to be satisfied as well. Since the proposed buy-back was to be compulsory, it had to be channelled through a scheme of arrangement. See *Village Roadshow* at paras 1 and 20 for how the company defined its proposed scheme. However, it should be stressed that a selective buy-back need not be compulsory: accepting an offer resides with the offerees. See *Village Roadshow* at para 25. Consequently, two meetings were held in November 2003, the general meeting as well as the meeting of preference shareholders. The proposed resolutions were adopted in both meetings. However, when an application was made to court for approval, Mandie J rejected the scheme. Apparently, in the court’s *a quo* view, the scheme exhibited some procedural defects. It was the latter decision which was the subject of an appeal.

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

against a special resolution of the kind referred to in section 257D(1)(a). The second was, if section 257D had the effect of preventing a person to vote, the court had to establish whether preference shareholders were entitled to vote against the special resolution that was proposed pursuant to section 257D at the general meeting held on November 2003.¹⁰⁶

4.2.1 *Appellants and respondent's contentions*

In the appeal, the appellants contended for an affirmative answer to the first issue, and a negative to the second. Their contention revolved around the argument that provisions regulating reduction of share capital, and those regulating buybacks, should be read as requiring separate treatment, and as such, the two provisions gave the impression that such provisions may be interpreted as requiring separate action. Hence, the company drafted article 2.4(a)(i) of the company's constitution in the manner it did. On the other hand, the respondents, who were holders of both ordinary and preference shares and successfully opposed the scheme in the court *a quo*, contended for a negative answer to the first question and an affirmative to the second because their view was that they were not prevented from "voting against" the proposed scheme.¹⁰⁷

4.2.2 *Court's analysis of the company's constitution, the notice and the booklet*

The court, as it had to, began its interpretation by reference to section 257D(1) of the Corporations Act as well as article 2.4(a)(i) of the company's constitution (which specified what rights preference shareholders held with respect to voting).¹⁰⁸ The judge set out what the constitution's articles provided for on capital reduction, what article 2.4 provided for on the entitlement of shareholders to adopt special resolutions, as well

¹⁰⁶ *Village Roadshow* (2004) at para 3. The court *a quo*, per Mandie J, decided both questions in favour of the respondent. However, whilst arguing the appeal, the company developed another scheme and structured its meetings in accordance with the reasons proffered by the court *a quo* when it rejected the first application.

¹⁰⁷ In their initial argument, the holders of class A shares held the view that payment of dividends could not be suspended because being a preference shareholder is ordinarily tied to the fact that as shareholders they could not vote and if payment of dividends is suspended, then preference shares would end up owning non-voting zero dividend-paying shares. As a result, the company employed two eminent experts to investigate and give an opinion on its decision. Both experts recommended that suspension of the payment would be legal and would not be a breach of the company's constitution. A buy-out scheme was therefore organised. For its own verification processes, ASIC employed its own expert as well to give an opinion on the suspension. The expert submitted recommendations similar to the other two experts that the suspension was legal. ASIC as *amicus curiae* and as the scheme's regulatory body supported the respondent's contentions to the first question, but made no submissions with respect to the second. See *Village Roadshow* (2004) at para 4.

¹⁰⁸ Article 2.4(a)(i) of the company's constitution prohibited class A preference shareholders from voting except in certain prescribed circumstances. All the circumstances listed in the case had an effect on the holders of class A's rights. See *Village Roadshow* (2004) at para 7.

as the booklet and the notice of the general and scheme meetings.¹⁰⁹ Callaway JA's deduction was that the company drafted the scheme booklet and the notice of general meeting based on the belief that none of the exceptions in article 2.4(a)(i) applied.¹¹⁰ Both the booklet and the notice were drafted on the belief that, by reason of section 257D, members of the company who held ordinary and preference shares (combined shareholders) were not entitled to vote on the resolution required by the section, even on the bases of their ordinary shares. The booklet and the notice expressly stated this fact.¹¹¹ Accordingly, the manner in which the articles and the booklet were drafted gave the impression that preference shareholders were not entitled to vote at all at the general meeting. The notice was also silent on whether or not the said holders were entitled to attend.¹¹² ASIC's view on the interpretation of section 257D was that the combined shareholders were not prevented from "voting against the scheme", but agreed that they could not "vote in favour".¹¹³ After engaging with ASIC on the wording of the notice and booklet, and before voting took place, the company issued another notice to the effect that the combined shareholders could not vote for, but could "vote against".¹¹⁴ However, not all members were aware of this notice, and as such, on the day of voting some did not exercise their right to vote on the basis of the initial notice.

Callaway JA answered the first question in the negative.¹¹⁵ The judge put the wording of s 257D into perspective. Contrary to the view of the appellants, he interpreted the phrase "no votes in favour of" scribed in section 257D as not suggesting "no votes in favour of *or against*".¹¹⁶ Further, the judge reasoned that the drafting of the words by the Australian legislature was aimed at ensuring that persons seeking to comply with the law, or to enforce it such as ASIC, could rely on the words.¹¹⁷ Therefore, the court held that the combined shareholders were "entitled to vote against" the buy-back resolution in respect of their ordinary shares, and that section 257D did not prohibit preference shareholders, or the combined shareholders in respect of their preference shares, from "voting against" the resolution if they were otherwise entitled to do so pursuant to article 2.4(a)(i) of the company's constitution.¹¹⁸ The latter suggests that if, according to the company's constitution, the excluded shareholders had

¹⁰⁹ See *Village Roadshow* (2004) at para 5 and 7–11.

¹¹⁰ These exceptions related to when the holders of preference shares would be entitled to cast a vote. They would be permitted if a matter to be voted on would affect their rights, for example, where the matter related to the reduction by the company of its share capital. However, the company felt that on the proposal made the preference shareholders were exempted from voting even though a buy-back is a reduction of a company's capital.

¹¹¹ See *Village Roadshow* (2004) at paras 11–12.

¹¹² However, the court noted that the booklet did mention that they were entitled to attend. See *Village Roadshow* (2004) at para 11.

¹¹³ *Village Roadshow* (2004) at para 14.

¹¹⁴ *Village Roadshow* (2004) at para 15.

¹¹⁵ *Village Roadshow* (2004) at para 18.

¹¹⁶ *Village Roadshow* (2004) at para 15.

¹¹⁷ *Village Roadshow* (2004) at para 15.

¹¹⁸ *Village Roadshow* (2004) at para 18.

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

voting rights in terms of the constitution, but in the instant case they however were excluded only on the basis of a deliberate exercise or mistake of interpretation of the law, then the excluded were entitled to vote against the resolution as the law did not prohibit them from “voting against”. From the notice and the scheme booklet, the excluded shareholders were not excluded from voting if a matter pertained to their rights or interests, such as voting for reduction of a company’s share capital. If they were excluded by the notice or booklet, then their exclusion was legally untenable.

4.2.3 *Was the company justified not to have regarded the buy-back as distribution?*

The appellant’s arguments were predicated on the preference shareholders being excluded from exercising their voting rights on a proposed reduction of a company’s share capital. Thus, the question here is whether the company was justified in not having regarded the buy-back as a reduction of share capital so that shareholders could vote? In response, the court confirmed that a share buy-back was a reduction of the share capital of the company. Consequently, a reduction has an effect on shareholder rights.¹¹⁹ For the court, the determinative words were “a proposal to reduce the share capital of the Company” scribed in the notice. As a result, Callaway JA reasoned that preference (combined) shareholders had an interest in a proposal of such a nature, as much as they would do in any proposal to wind up a company or for the sale of its undertaking.¹²⁰ The judge of appeal emphasised that when a vote is passed pursuant to section 257D, the shares would have to be cancelled by a company; thus, any argument which suggests that to merely vote does not reduce share capital is misplaced. Critically for shareholders, no other opportunity would arise *so that they protect their rights or interests* by voting on the proposal, except in the general meeting. Thus, the position would be the same in a proposed vote to approve a scheme *which includes a proposed share buy-back*.¹²¹ So, where a holder of preference shares is as a matter of ordinary language (that is, language in section 257D of the Corporations Act) permitted to vote in terms of article 2.4(a)(i)(C) of the company’s constitution *to adopt a buy-back*, then the position should be no different in a case of voting in a proposed scheme.¹²²

The above manner of reasoning led the court to hold affirmatively on the second question.¹²³ The court saw no reason justifying differentiation in the voting of preference shareholders; that is, if such shareholders are allowed to vote to reduce a company’s ordinary or preference share capital, why could they not be allowed to vote in a proposed share buy-back? Ultimately, Callaway JA reasoned that a proposed

¹¹⁹ *Village Roadshow* (2004) at para 21.

¹²⁰ *Village Roadshow* (2004) at para 27.

¹²¹ *Village Roadshow* (2004) at para 25.

¹²² *Village Roadshow* (2004) at para 25.

¹²³ *Village Roadshow* (2004) at para 32.

reading of a provision – article 2.4(a)(i)(C) of the company’s constitution – should not cause anomalies as the appellants had suggested.¹²⁴

5 COMMENTS, OBSERVATIONS AND CONCLUSION

What the preceding discourse avers is that, essentially, section 115(2)(a), like similar provisions from Australia, are proactively aimed at guarding against adverse decisions which might have *ex post facto* effects detrimental to shareholder rights or interests. From that context, section 115(2)(a) and similarly intended provisions are essential as tools to safeguard shareholder rights or interests. When directors determine the disposal of assets of their companies, or decide to amalgamate or merge or to enter into schemes of arrangement which include re-acquisition of own shares without shareholder contribution in the decision-making process, the rights or interests of shareholders are at the mercy of the choices which directors make on their behalf. The scale of balance between the rights of these parties would therefore cause disconcertment in favour of company directors to the disadvantage of shareholders. Judgments in cases such as *Juspoint*, *Village Roadshow*, and *Cilliers* patently show the predicament to which shareholder rights or interests might be subjected or exposed where the interests of shareholders are entirely placed in the hands of company directors as the ultimate decision-makers. They show that the end product would be legally untenable, to say the least.

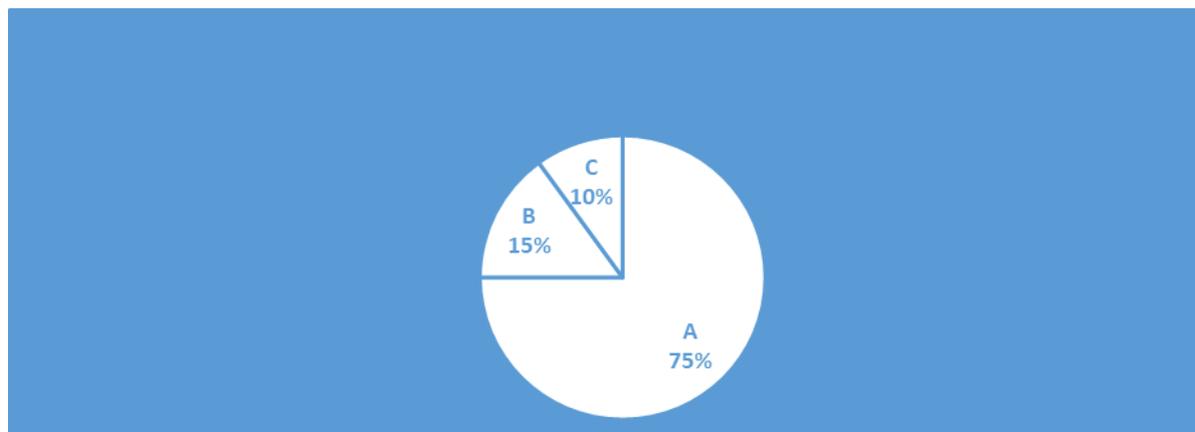
5.1 Practical illustration of the operation of s 115(2)(a)

Figure 3 below illustrates the intended operation of section 115(2)(a) of the 2008 Act, assuming, as was referred to earlier, that Company Z classified its shares into three classes, namely: A, B and C, in the percentages shown.

¹²⁴ *Village Roadshow* (2004) at para 31. Apparently, in constructing their booklet, the company used old precedents. In this regard, the court held that old precedents could not be used to construct company constitutions and thus deny shareholders their right to participate in company affairs in which they had a vested interest. The court concluded that the preference shareholders and the combined shareholders in respect of their preference shares were wrongly denied the right to vote against the buy-back resolution; thus, the court dismissed the appeal. *Village Roadshow* (2004) at paras 27, 31 and 32–33.

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

Figure 3: Percentages in classes of shares



The understanding that the graph seeks to reveal is the different categories into which companies may divide their shares. For a company to be able to buy-back own-issued shares from its directors and prescribed officers or persons related to them, under section 48(8)(a) of the 2008 Act two pertinent questions will have to be addressed:

- (i) whether that person has *locus standi* as a shareholder of that company to vote on the proposed special resolution;¹²⁵ and
- (ii) whether the securities' holding of that person is endowed with voting rights.

The preceding questions appear more or less similar to the issues determined in *Village Roadshow* seeking to interpret section 257D of the Corporations Act 2001. However, the difference is that, under section 48(8)(a), a repurchase is made to directors, presiding officers and their related persons, whilst section 257D of the Corporations Act does not specify persons in the same way as section 48(8)(a), but simply refers to members of the body. That notwithstanding, the character of persons to whom the buy-back may be made appears to be the same, since section 257D regulates selective buy-backs. To answer the latter questions, the court in *Village Roadshow* referred to the wording of section 257D, article 2.4(a)(i) of the company's constitution, the notice sent to shareholders as well as the scheme booklet. The court did not refer to the particular section in the Corporations Act which regulates how class rights may be varied by companies.

Under the 2008 Act, to answer the questions one might start by referring to section 37(2). The latter section is instructive because it accords a general voting right to each issued company share regardless of its class, not unless excepted by the Act or that

¹²⁵ See *Marble* (2020) at paras 7–22. See also a comprehensive discussion on obtaining *locus standi* in Bidie SS “Dismantling obstacles impeding better governance in companies: Affirming the expansion of the interpretation of ‘shareholder and director’ in section 163 of the 2008 Act” 2021 (25) *Law, Democracy & Development* 377–410.

company's MOI.¹²⁶ The latter was the argument made in *Juspoint*. Unlike the position under section 257D of the Corporations Act, which required the second question posed in *Village Roadshow* to be answered in the negative, under the 2008 Act both questions must be answered in the affirmative. Where that occurs, a shareholder shall be entitled to vote under section 115(2)(a) of the 2008 Act in the adoption of a resolution approving a proposed share buy-back scheme. However, if either of the questions is answered in the negative, the person shall not vote even if the person holds securities in the company. That shall be so even if the securities are held through a nominee. In the latter instance, *Juspoint* and *Marble* inform us that the nominee shall assume the right to vote in the stead of the beneficial owner.¹²⁷ So, it is possible that some shareholders may not vote on certain company matters because their shares might be held by a nominee, or because they might not have been endowed with voting rights. If all shareholders are entitled to vote under section 48(8)(a) as owners of and/or investors in the company, then all of them shall cast a vote to approve or disapprove, as the case may be, the determination made by directors to buy-back own issued shares.

Secondly, under section 115(2)(a) of the 2008 Act, and assuming that the board of directors would also have recommended a buy-back from shareholders belonging to a particular class, that is, either class A, B or C, as one anticipates they would have, then, where the proposed buy-back is offered only to class C, both the section and *Verimark* direct that only shareholders holding shares in class C shall be entitled to pass a special resolution, as does section 257D and section 411(4)(a)(i) of the Corporations Act. Furthermore, fundamentally, it shall be the “*presence of a sufficient number of persons to constitute 25 percent of voting rights of the class of shareholders*” who are entitled to vote that the 2008 Act contemplates at the meeting, as opposed to the majority expected under the Corporations Act.

Assuming therefore that, in the context of the 2008 Act, each of the three classes consist of five members, then if, for example, out of the five members in Class C the voting rights of three of the shareholders constituted 75% and these shareholders are present on the day the particular buy-back is to be voted on, then the threshold minimum sufficient number of persons to vote 25% of their shares required by the 2008 Act, as well as the provisions of section 64(3) of same Act, shall be satisfied.¹²⁸ Figure 4 below illustrates the point.

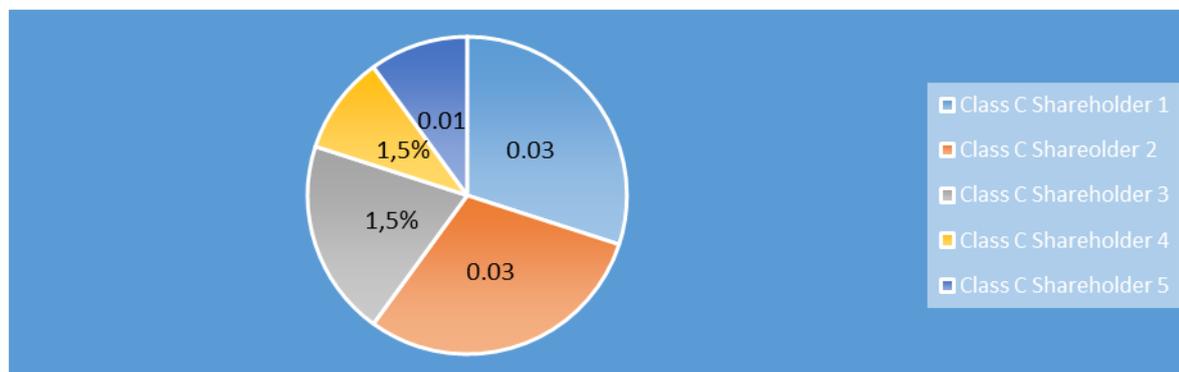
¹²⁶ However, a company's MOI may except preferences, rights, limitations and other terms determined by or in terms of the company's MOI as provided for under section 36 of the 2008 Act.

¹²⁷ See also *Smyth v Investec Ban Ltd* [2017] ZASCA 147.

¹²⁸ Section 64(3) of the 2008 Act provides that “despite the percentage figures set out in subsection (1), or in any applicable provisions of a company's Memorandum of Incorporation, if a company has more than two shareholders, a meeting may not begin, or a matter begin to be debated, unless – (a) at least three shareholders are present at the meeting; and (b) the requirements of subsection (1) or the Memorandum of Incorporation, if different, are satisfied”.

EXAMINING THE INTERPRETATION OF SECTION 115(2)(a) OF THE COMPANIES ACT 2008

Figure 4: Class C shareholders



Assuming that shareholders 1, 2 and 3 of the five shareholders in the graph have a combined shareholding constituting voting power of 75%, and are present and have voted in terms of s 115(2)(a), then according to the 2008 Act as well as *Juspoint*, the proposed buy-back shall be adopted irrespective of whether shareholders 4 and 5 were present but did not vote or were present but voted opposing the proposed scheme of arrangement. In the context of the Corporations Act, the 75% will also pass muster, but if the majority had voted against the resolution, the proposal would not pass even if the 75% was attained.

Under the 2008 Act, if shareholders 4 and 5 intend to challenge the adoption of the special resolutions, then to be entitled to do so in terms of section 115(3), (6) and (7) of the 2008 Act or make a demand in terms of section 164 of same Act, their “presence and voting” shall automatically qualify them to embark on either course.¹²⁹ However, depending on which course they opt for, that is, section 115(3), (6) and (7) or a section 164 challenge, the shareholders will have to satisfy the requirements provided for by the sections. Of importance for companies to note is that shareholders – those contemplated to vote in terms of sections 48(8)(a) and 115(2)(a) – would be entitled to be informed, through a notice, of the meeting and their rights, and be provided with sufficient, clear and unambiguous information to be in a position to make informed decisions whether or not to vote in favour or to oppose a proposed scheme.¹³⁰ In *Juspoint*, *Capprec* and *Village Roadshow*, the correct procedure to inform shareholders about the proposed changes was followed. However, what was in contention was the unfairness by which the arrangements were structured so as to prejudice shareholders. For example, in *Village Roadshow*, the court found that the notice and the booklet were deliberately crafted to mislead the preference and combined shareholders.

¹²⁹ See section 164 of the 2008 Act.

¹³⁰ See section 65(4) of the 2008 Act.

5.2 Conclusion

In sum, there are slight variances in the wording of provisions intended to protect shareholders between the statutes consulted. This notwithstanding, it is commendable that under all the statutes the passing of special resolutions to approve a buy-back is the norm. This norm is adhered to in Canada as well, even though the CBCA does not expressly provide for shareholder approval within its provisions on fundamental changes but only where a company's capital is to be reduced.¹³¹ The exception is with respect to the UK Companies Act 2006, the CBCA, and the Corporations Act 2001 jurisdictions, where a court-approval process is mandatory as well.

Until recently, the challenge to shareholder protection regulated under section 115(2)(a) of the 2008 Act as well as its veracity have been slow to be determined before South African courts. It is encouraging that, currently, the paucity of case law interpreting the provision is beginning to be supplemented. Indeed, in time more case law will unravel and provide proper clarity and context to the application of the section. Such clarity will especially be welcome when coming from the Superior Courts so that section 115(2)(a) can firmly find its footing. The judgments consulted, such as *Juspoint*, *Moraitis*, *Marble*, *Village Roadshow* and *Cilliers*, exhibit how important shareholder participation is to approve, but in the same breathe, for shareholders to participate in company affairs where their rights/interests are at stake. The 2008 Act has made it the responsibility of shareholders to protect themselves against contemplated changes in the capital structure of their companies and guard themselves against adverse effects.

¹³¹ See section 38 of the CBCA.

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