# Unpacking some thoughts around share buyback transactions

By **ROBYN SHEPHERD**

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A share buyback transaction is utilised when a company purchases its shares from shareholders. This is in contrast with a sale between shareholders. The shareholder's agreement governs the sale of a private company's shares. In most instances, several pre-emptive rights are included. These usually deal with voluntary exist and deemed disposals. The latter usually involves matters such as long-term illness or death as examples.

There could be a situation where the shareholders are not individually able to buy shares from each other. In these instances, the company could consider a buyback of its shares. However, the provisions of the company's MOI and the Companies Act 71 of 2008 as amended (the "Companies Act") should be carefully considered.

In terms of section 15 of the Companies Act, the MOI will "trump" all provisions except where there is an inconsistency with the Companies Act. It is therefore essential to consider the provisions of the MOI before shifting focus to the Companies Act.

## The Companies Act

Share buyback transactions are governed by section 48 of the Companies Act, providing guidelines to ensure that the process complies with the King IV Report on Corporate Governance principles.

Section 48 requires the following:

1. After finalising the transaction, the company must reasonably satisfy the solvency and liquidity test. The solvency and liquidity test refers to the assets of the company being fairly valued, being equal to or exceeding the liabilities of the company. Further, the company can pay its debt as it becomes due in the ordinary course of business for 12 months.
2. A decision of the board of a company is required to attend to a share buyback and must be approved by a special resolution of the shareholders of such a company if any of the shares forming part of the buyback will be acquired from a director or prescribed officer of the company or any person related to a director or prescribed officer of the company.
3. The company must comply with sections 114 and 115 of the Companies Act, where the

shareholders. Section 115 of the Companies Act defines the special resolution required by the shareholders.

Further, a share buyback transaction, depending on the structure, is subject to capital gains tax or paid as a dividend, which can have tax consequences.

## Conclusion

It is essential to consider your circumstances and weigh them against the collective. Assess the financial, legal and tax consequences before electing the recourse.

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See also:

- Share buybacks – The latest the do's and don'ts
- Good news and not so good news for companies undertaking share buybacks
- Drafting of share buyback agreements – Important considerations
- The approval of a scheme of arrangement by shareholders

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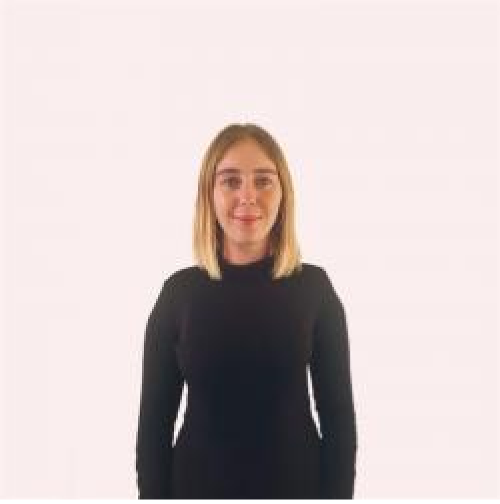

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