

CapeVin offer shows how to neutralise dissenters' rights

■ Section 164 of Companies Act causes uncertainty, legal advisers contend

Ann Crotty

AFTER less than a year, corporate advisers have found a simple and ingenious way of neutralising one of the most controversial features of the new Companies Act.

Section 164 of the act, which came into effect on May 1 last year, provides for shareholders who do not approve the conditions of an offer – that has been made to them as part of a “fundamental transaction” – to have their shares bought out by the company for cash. This process could be lengthy and could involve the courts.

Legal advisers say that these so-called appraisal rights introduced an unacceptable level of uncertainty to the implementation of corporate

transactions and so had to be neutralised.

That “neutralising” process has resulted in it becoming standard practice for companies involved in “fundamental transactions” such as a merger, the disposal of the greater part of its assets or a scheme of arrangement, to make the transaction conditional on no shareholder seeking to enforce its section 164 rights.

The most recent example is contained in an offer that has been made to shareholders of CapeVin Investments (CVI) by its holding company CapeVin Holdings (CVH). CVI is part of a pyramid structure whose only operational asset is a controlling stake in drinks group Distell.

In terms of that offer CVH

will acquire all the ordinary shares in CVI that it does not already hold. CVI shareholders will receive CVH shares on an exchange rate of 21 CVH shares for each CVI share. CVH is not providing a cash alternative for the CVI shareholders.

The conditions that are attached to the CVH offer include conditions that partially “neutralise” the appraisal rights that were granted to CVI shareholders by the act. Thus it is a condition of the offer that “no CVI shareholders give notice objecting to the scheme as contemplated in section 164(3) of the Companies Act, and vote against the resolution proposed at the general meeting to approve the scheme”. The CVH offer, which CVI shareholders have described as generous,

will allow the scheme to go through as long as it is not challenged by shareholders with more than a 5 percent stake.

Gareth Driver of Werkmans’ law firm said it had become common practice to include this sort of condition in fundamental transactions in a bid to address the uncertainty created by section 164.

“One of the biggest threats to any transaction is uncertainty. Section 164 creates uncertainty in relation to the cash demands that will be made by the shareholders of the target company and this uncertainty may take some time to resolve.

“Transacting parties therefore use conditions to put themselves in a position where they can decide whether to proceed with the transaction, depend-

ing on the extent of such demands.” Driver added that legal advisers had expressed concerns about this section of the act ahead of its implementation and believed that its inclusion was influenced by the North American lawyers involved in drafting the act.

In the textbook *Contemporary Company Law*, Maleka Femida Cassim, one of South Africa’s leading legal academics, states that the appraisal right of dissenting shareholders has been a feature of US corporate law for over 100 years and has recently been adopted in Canada and New Zealand.

The proposed transaction, which will result in CVH assuming CVI’s JSE listing, will improve the liquidity of the listed entity.

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