THE TRANSFER OF RIGHTS, OBLIGATIONS AND PROPERTY UNDER A STATUTORY MERGER IN TERMS OF THE COMPANIES ACT 71 OF 2008

By

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ABSTRACT

With the onset of the new statutory merger in South Africa, the impact of the practical implementation of the procedure has revealed numerous holes and uncertainties readers concerning the reorganisation of assets and liabilities. One of the major stumbling blocks of the procedure stems from the lack of guidelines provided in the current legislation.

By way of normative methodology this paper will consider in detail and highlight discrepancies in the wording used to describe the process of the transfer of assets and liabilities. An attempt has been to provide an analysis through the minefield of the procedural requirements. The guidelines can be used to prevent delays in the implementation of the statutory merger and navigate the interaction between the Companies Act and other legislation.

To this end, it appears that the legislature will need to review the procedure as well as provide appropriate guidelines when dealing with inconsistencies in other legislation. The wording of the Companies Act should be amended in order to prevent ambiguous interpretations which may lead to delays upon implementation.

KEY WORDS

1. Amalgamating or merging company: means a company that is a party to an amalgamation or merger agreement

2. Amalgamated or merged company: means a company that either:

3. a) was incorporated pursuant to an amalgamation or merger agreement; or
   b) was an amalgamating or merging company and continued in existence after the implementation of the amalgamation or merger agreement; and hold any part of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement.

4. Minister: means the Minister of Minerals and Energy

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1 INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 *Introduction*

Prior to the Companies Act[1] coming into effect, South African company law did not have any statutory merger provisions. The concept of statutory 'amalgamations and mergers' was borrowed from the United States of America and introduced into South African company law by section 113 of the act, which provides a simple and uncomplicated method whereby two or more companies can merge. Maleka Femida Cassim states: "the adoption of the statutory merger marks a substantial liberalisation in legislative policy."[2] In her article, she further explains how the statutory merger is an additional procedure to and not a replacement of the already existing methods of obtaining control of a company, namely, business acquisitions, schemes of arrangement and takeover offers which a company can utilise to reorganise assets and liabilities between entities as well as the conversion of securities.

Companies that want to effect business combinations and fundamental transactions have been provided further with a very useful option. The biggest single change proposed by the act, in the context of takeovers, is the introduction of a US-style merger takeover method into South African law.[3] A significant shift in policy on the part of the legislature occurs in the statutory merger as a resultant effect of two conflicting underlying policies. "On the one hand, there is the value of facilitating the restructuring of businesses in the interests of economic growth, while, on the other hand, there is the interest of shareholders in retaining their investments in companies".[4] The act includes some innovations in company law, which should enhance the objective of balancing the encouragement of economic activity and prudent risk-taking with appropriate protection for the interests of all company stakeholders.[5]

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[1] 71 of 2008, and hereafter reference to "the act" refers to sections of the Companies Act unless otherwise indicated.
[2] Cassim "The introduction of the statutory merger in South African corporate law: majority rule offset by the appraisal right (part 1)" 2008 *SA Merc LJ* 1 1.
[3] Boardman "A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008" 2010 *Acta Juridica* 306 307.
[4] FHI Cassim, MF Cassim, R Cassim, Jooste, Shev and Yeats *Contemporary Company Law* 2 ed (2012) 677.
[5] Davids, Norwitz and Yuill "A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008" 2010 *Acta Juridica* 337 371.

The regulatory regime for fundamental transactions has been comprehensively reformed under the act to facilitate the creation of business combinations.[6]

At first glance, the concept of the statutory merger seems to work, but on implementing a transaction of this nature, a lack of guidance by the legislature has revealed holes and uncertainty. When referring to a practitioner's viewpoint of the statutory merger, Johan Latsky states: "they had to take a running leap into the unknown, relying on their experience of similar transactions built up under the previous Companies Act 61 of 1973."[7]

The ambiguous wording used in the stages of the merger transaction will need to be analysed in relation to the reorganisation of assets and liabilities of the newly amalgamated or surviving merged company or companies. Through an analysis of the wording, the aim is to ensure that the reorganisation of assets and liabilities occurs without confusion.

The act provides for a paragraph (*a*) and paragraph (*b*) merger structure.[8] The distinction is based on whether all or only some of the amalgamating or merging companies are deregistered. In the paragraph (*a*) structure, the parties to the merger are all deregistered and one or more new companies are formed. The paragraph (*b*) merger structure ensures that there is survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies. Central to the definition of each of these possibilities is what happens to the assets and liabilities of the merging or amalgamating companies.[9] The paragraph (*b*) structure is arguably more complex, because the surviving companies could possibly retain some of their assets or liabilities whereas in a paragraph (*a*) structure all the assets and liabilities will end up in one or more new companies.

A relevant provision that will be considered in detail is section 116(7) of the act, which deals with the transfer of "property" and "obligations" once an amalgamation or merger agreement has been implemented. The legislature has used different words to describe the process of transfer of assets and liabilities from the definitions to the relevant sections of the act. To determine the choice of words used by the legislature, a closer look at the discrepancies

[6] Cassim *et al* (n 4) 675.
[7] Latsky "The fundamental transactions under the Companies Act: a report back from practice after the first few years" 2014 *Stell LR* 1 1.
[8] See definition of an "amalgamation or merger" s 1.
[9] See 2.1.1 below.

arising in the act must be considered. The possible interpretation of the words used by the legislature in the definitions of “amalgamation and merger” as well as a detailed analysis of the wording in section 116(7), section 116(8) and section 113 of the act will be dealt with and considered in part 2 of the dissertation to gain a better understanding of at which stage transfer or reorganisation of assets and liabilities takes place.

In part 3, the structure and content of the merger agreement which forms the foundation of the statutory merger will be analysed. The transfer of ownership will be discussed in part 4 of the paper to ensure that the regulatory aspect of transfer of assets has been considered within the context of the statutory merger.

Although the act may provide a simplified method of transfer by operation of law, it has created confusion and room for misinterpretation with regard to the transfer of ownership of property and liabilities. Part 5 and 6 of the paper looks at the statutory restrictions created by the act within the Mineral and Petroleum Resources Development Act[10] and the Banks Act.[11] The Banks Act is a detailed statute which offers guidelines and insight as to the manner in which an amalgamation of banks occurs, the act provides detail in respect of the transfer of assets and liabilities. The MPRDA is one of the statutes where an analysis of the transfer of mining licenses will be expanded on. The MPRDA does not appear in section 5(4)(b) of the act and therefore is utilised to expose the interaction with statutes providing for regulatory approval of transfers of certain property and statutes

Three key aspects of the reorganisation and transfer of the assets, namely, the definitions used in the act, the merger agreement and procedure as well as the implementation of the merger will be analysed in this paper. The aim of the dissertation is to attempt to clarify the ambiguity created by the legislature regarding the manner and time of transfer of property and liabilities to the newly amalgamated or surviving merged company or companies.This may prevent uncertainty as to who is the owner of the assets and responsible for liabilities during the implementation stage of the transaction. The paper will aim to make proposals for clarification of the provisions to address the issues.

[10] Act 28 of 2002, hereafter the MPRDA.
[11] Act 94 of 1990, hereafter the Banks Act.

2 TERMINOLOGY USED IN THE ACT

2.1 *Introduction and ambiguous terminology*

To understand the manner in which the words used in the act can be interpreted, the Interpretation Act 33 of 1957[12] may be of assistance. When interpreting legislation, the Constitution of the Republic of South Africa[13] states in section 150 that when considering an apparent conflict between national and provincial legislation or between national and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict over any alternative interpretation that results in a conflict. Section 5 of the act provides for the manner in which the act is to be interpreted within the purposes of the act and generally provides that a court may consider foreign company law. If there is any inconsistency in concurrent acts the act provides guidelines in section 5(4) – (6)). The general rule is that in the event of a real conflict, the Companies Act will prevail over other legislation. However, the act has a limited number of statutes listed in section 5(4)(b) where that other legislation will prevail over the Companies Act.

The spirit and purport of the Constitution set the background for interpretation and is a good foundation to consider a number of judgments in South African courts. In *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[14] a sensible meaning was preferred to one that led to insensible or impractical results or undermined the apparent purpose of the document. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.[15] In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd,*[16] the judgment re-emphasised that words must be interpreted having regard to their plain meaning.

2.1.1 Definitions look at the result in respect of assets and liabilities

A useful starting point in a merger or amalgamation is to consider the definitions of an "amalgamation or merger," "amalgamated or merged company" and "amalgamating or

[12] Act 33 of 1957, hereafter referred to as Interpretation Act.
[13] Act 108 of 1996, hereafter referred to as the Constitution.
[14] 2012 (4) SA 593 (SCA).
[15] n 19 par 18.
[16] 2014 (1) All SA 375.

merging company" in the act. In an "amalgamation or merger,"[17] it is necessary to analyse the definition by beginning with its foundation:

"a transaction, or series of transactions pursuant to an agreement between two or more companies…"

When there is an "amalgamation" or "merger" there must be an agreement. However, the act fails to mention the specific type of agreement, whereas in section 116(7), specific mention is made of an amalgamation or merger agreement as well as "any other relevant agreement". The act uses the words pursuant to,[18] meaning "in accordance with", which is used before the word "agreement." It is evident from the wording that the agreement must exist first before transactions can occur. The act fails to give guidance to readers of a situation wherein another agreement exists and a conflict arises between the different agreements. The practitioner will need to guess which agreement prevails.

The definition can be divided into two parts, namely, a paragraph (*a*) and paragraph (*b*) merger structure. The paragraph (*a*) merger structure is:

> "the formation of one or more new companies, which together **hold** all of the assets and liabilities that were **held** by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies…"

The results of the implementation of a merger in a paragraph (*a*) merger structure is the formation of one or more new companies and the disappearance of the amalgamating or merging companies; therefore, a brand new company or companies will be formed, and all the assets and liabilities will be held by the new company or companies.

The paragraph (*b*) structure is:

> "the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the **vesting** in the surviving company or companies of all the assets and liabilities that were **held** by any of the amalgamating or merging companies immediately before the implementation of the agreement..." (own emphasis added).

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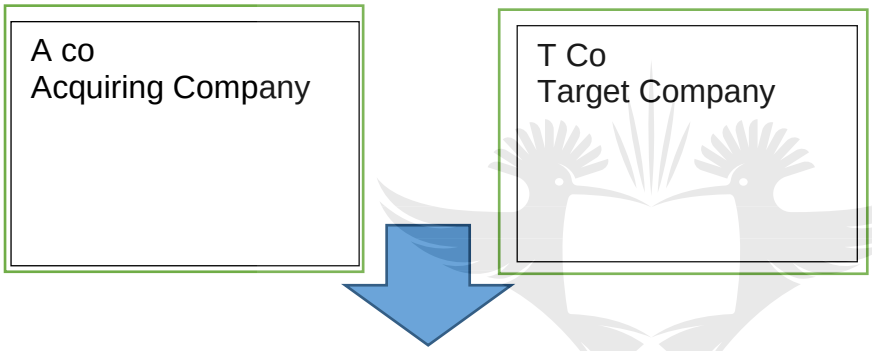
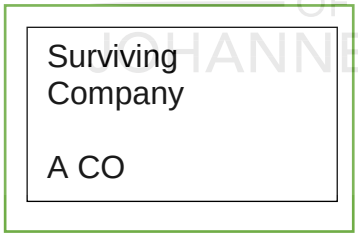
[17] s 1.
[18] Waite and Hawker *Oxford Paperback Dictionary and Thesaurus* (3rd ed) 746.

The paragraph (*b*) merger structure is capable of having the following results: there can be a survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies. Further, all the assets and liabilities of the merging companies will vest in the surviving company or companies that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement.

A sketch to illustrate possible paragraph (*b*) merger structures can be seen below.



1st possibility



2nd possibility

It is clear from the above that there are numerous ways in which parties will be able to structure the merger. In Cassim's article, she states that companies will not be able to use the procedure to transfer only part of the company's business.[19] However, Cassim's interpretation cannot be correct because should the amalgamating or merging companies survive and one or more new companies be created, the act provides that all the assets and liabilities will vest in the surviving company or companies and any new companies. All of the assets may have been allocated to the surviving amalgamating or merging companies and the new companies in the merger agreement in parts. A paragraph (*b*) type merger would thus include a situation where a surviving company continues to hold certain pre-merger assets.[20]

The words used in the definition of "amalgamation" or "merger" chosen by the legislature differ in part a and part b of the definition when referring to the assets and liabilities. The use of different words may indicate the manner in and stage at which the vesting of the assets and liabilities occur, and it will be necessary to analyse the use of specific words contained within the definition.

The only distinction between the terms "amalgamation" and "merger" seems to be that in the former, all the merging entities dissolve while in the latter, the existing companies are used, but it can also include a new company or companies. The terms appear to be regarded as synonymous or interchangeable under the act, which draws no distinction between these concepts.[21] The effect of these transactions is that the existing companies and the assets and liabilities of the companies are reorganised, with the disappearance of some of the companies and the survival of at least one of the original companies.[22]

2.1.2 An analysis of the words "hold" and "held"

The first possible result after the implementation of the agreement in part a of the definition is below.

"When an amalgamation or merger agreement has been implemented…"

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[19] Cassim (n 2) 6.
[20] Chong and Van der Linde "Tax Issues Arising from the Amalgamation or Merger Procedure in the Companies Act 71 of 2008" *Stell LR* 2014 471 483.
[21] Cassim *et al* (n 4) 680.
[22] Delport and Vorster (eds) *Henochsberg on the Companies Act 71 of 2008* (2011) 406.

"a) the formation of one or more new companies, which together **hold** all of the assets and liabilities that were **held** by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies…" (own emphasis added).

From the beginning of the act, the legislature gives an indication of the manner in which the assets and liabilities are organised. In the definition of an "amalgamation or merger"[23] the legislature uses the words "hold" and "held" to describe what happens to the assets and liabilities after implementation of the agreement.

In the case of *Ex parte Hassan*[24] a property transaction occurred whereby prior to registration of transfer of the property, the plaintiff "held" the properties even though registration of transfer only took place at a later period.[25] The words "held" and "hold" appearing in the section should not be construed as meaning "held" or "hold" in "ownership" but should be given a meaning wide enough to cover the arrangements between the parties.[26]

In the context of the act, the assets and liabilities which were "held" by any of the amalgamating or merging companies were most probably "held" by them as legal owners; however, when the legislature uses the word "hold" this could mean ownership without legal possession. By using the words "hold"; "held" and "vesting", the transfer by operation of law would have had to take place as if one is dealing with a paragraph (*a*) merger transaction, as the previous holders would disappear, and the assets and liabilities could not be without an owner. Therefore, the new company or companies would possess the assets and liabilities with legal ownership, and the regulatory aspects of transfer must have taken place upon implementation.[27] Accordingly, the parties will need to ensure appropriate time is allocated to allow the implementation of the agreement and the transfer and vesting to occur simultaneously.

[23] n 9 above.
[24] 1954 4 All SA 18 (T) 19.
[25] A discussion as to whether a person who held assets which were only transferred at a later stage was the legal owner.
[26] Ex parte Hassan (n 24) 18.
[27] A more detailed analysis of "transfer" will need to be made in order to determine if this was the legislature's intention.

2.1.3 An analysis of the word “vesting”

The second possibility after the implementation of the agreement in part b of the definition is:

> “(b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the **vesting** in the surviving company or companies of all the assets and liabilities that were **held** by any of the amalgamating or merging companies immediately before the implementation of the agreement...” (own emphasis added).

The legislature uses the word “vesting” when referring to the resultant position of the assets and liabilities into the surviving company or companies, or perhaps a company continuing to hold certain assets. The word “vesting” is defined as “a process where the authority, privilege or right to interest or asset unconditionally passes to a body.”[28] The word will bear a different meaning according to its context and whether or not the word gives the surviving company or companies a mere right in the assets and liabilities which will only pass subject to a condition in the agreement or whether it connotes immediate ownership is uncertain. In *Jewish Colonial Trust Ltd v Estate Nathan,*[29] it was said that when a right is vested in a person, what is usually meant is that such person is the owner of that right. The context as well as whether the word itself has been used in its strict, technical sense or in a somewhat loose manner as indicating the time when the enjoyment of the property was to have its commencement need to be considered.[30] The main function of the word “vesting” is to describe the default position of the assets being held in co-ownership.[31]

Words such as “hold,” “held” and “vesting” as discussed above are words which invoke a wide meaning, and the legislature should have used words aiding the reader in deciding whether the act merely envisages possession or if the entire act of transfer of ownership is immediate. The word “vesting” ending in “ing” points to a change in status which is somewhat problematic as the merging entity continues to hold its assets and liabilities and it is not clear as to whether transfer has taken place or not. It appears that the word is chosen because it avoids issue of whether there is a transfer or not.

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[28] Black’s Online Law Dictionary (2nd ed) http://thelawdictionary.org/vesting/ (12-9-2014).
[29] 1940 AD 163.
[30] *Samaradiwakara v De Saram* 1911 AD 465 468.
[31] Chong and Van der Linde (n 22) 483.

In addition to the definition of amalgamation or merger, the definition of "amalgamated or merged company"[32] is significant. It means a company that either:

> …"a) was incorporated pursuant to an amalgamation or merger agreement; or
>
> b) was an amalgamating or merging company and continued in existence after the implementation of the amalgamation or merger agreement…"

From the definition even though the definition is able to cover both types of mergers there is no longer mention of the word "vest" or "vesting, only "holds" and "held". So there is no indication of how property ends up in hands of newly formed entity.

2.2 *References to the word "allocation" in the merger agreement*

The merger agreement must set out how the assets and liabilities will be allocated.[33] The agreement must contain "details of the proposed allocation of the assets and liabilities of the amalgamating or merging companies that will be formed or continue to exist when the amalgamation or merger agreement has been implemented…."

2.2.1 An analysis of the word "allocation"

The legislature uses the word "allocation" to describe the parties' agreement as to what will happen to the assets and liabilities. Allocation is the action or act of setting aside or designating something as being a special share or responsibility of a particular person, department or having a particular purpose, apportionment or allotment.[34] The word will cover the transfer of the assets and liabilities as well as continuing to hold assets and liabilities if required by the agreement. Allocation is a term that is found in accounting principles, and perhaps the legislature used the word allocation as a reminder that the assets and liabilities must be allocated in such a manner that the companies satisfy the solvency and liquidity test after implementation of the agreement.

[32] s 1.
[33] s 113(2)(*f*).
[34] Oxford English Dictionary Online http://www.oxforddictionaries.com/definition/english/online (12-9-2014).

The property of the companies are "allocated" in ownership by operation of law in accordance with the amalgamation or merger agreement or any other relevant agreement,[35] but subject to the solvency and liquidity test and obviously subject to contractual or other restrictions in respect of the transfer of property. When referring to the "amalgamation or merger agreement" or any other relevant agreement, this emphasises that the section has been drafted widely and leaves room for the parties to decide on further terms and conditions to be included in the transaction.

However, the words "each … company … is liable for all the obligations … in accordance with the amalgamation or merger agreement…" has the effect that such agreement must provide that each company is liable for the obligations of every other company as set out in the amalgamation or merger agreement or any other relevant agreement. The effect of the provisions is thus to create liabilities which will be joint and several and which cannot apparently be amended in the agreement.[36]Delport singles out part (a) of the provision by commenting on liabilities only however the qualification which he uses to provide his commentary applies to part (b) of the provision as well dealing with property. Contextual interpretation forces us to interpret this sensibly and therefore it should apply to part (b) as well. However the legislature could not have intended that the liabilities of the company or companies would always be joint as the amalgamation or merger can have the result of one company which is solvent and another company which is not solvent. Therefore you must be able to split the liabilities. Further, if the assets and liabilities are to be jointly shared between the parties then the point of allocating assets in whole or part seems pointless. The result of the allocation of assets and liabilities for the parties will be the co-liability of the parties.

The specific reference to "merger agreement" and not to agreement does not prevent parties from setting out alternative terms in the other agreement whereby liabilities can be amended. The "other relevant agreement" should include aspects of the solvency and liquidity test and regulate how the parties should deal with the allocation of assets in whole or in part. When the merger agreement sets out the allocation or manner in which the assets "become" the property of the merged companies, there is no obstacle to a surviving company retaining

[35] s 116(7).
[36] Delport *et al* (n 22) 422.

some of its assets.[37] Upon the implementation of the amalgamation or merger agreement, the legislature does not refer to "assets and liabilities", which is used in section 113(2)(f) of the act and in the definition of "amalgamation or merger" in section 1 of the act, but refers to "property."

2.3 *Section 116(7) deals with the effect of the implementation of a merger*

Section 116(7) of the act deals with the effect of the implementation of a merger on "property" and "obligations". Section 116(7) reads:

> "When an amalgamation or merger agreement has been implemented ─
>
> (a) the property of each amalgamating or merging company becomes the property of the newly amalgamated, or surviving merged company or companies; and
>
> (b) each newly amalgamated, or surviving merged company is liable for all the obligations of every amalgamating or merging company, in accordance with the provision of the amalgamation or merger agreement, or any other relevant agreement, but in any case subject to the requirement that each amalgamated or merged company must satisfy the solvency and liquidity test, and subject to subsection (8), if it is applicable…"

2.3.1 Automatic transfer of property and obligations in section 116(7)

It is generally accepted that section 116(7) provides for the automatic transfer of property and obligations by operation of law.[38] Latsky, for instance, states that upon implementation of a merger or amalgamation, there is an automatic cession of rights and delegation of obligations of the merging and amalgamating companies by operation of law.[39] Although this is generally accepted this paper aims to reach a definite answer as to whether transfer of property and obligations is automatic.

[37] Chong and Van der Linde (n 22) 483.
[38] Cassim et al (n 4) 683.
[39] Latsky (n 7) 375.

Black's Law Dictionary defines "operation of law" as a means by which a right or a liability is created for a party regardless of the parties' actual intent.[40] Transfer by "operation of law" could be defined as the means by which a right or liability is transferred for parties, regardless of the actual intention of the parties. The maxim *huur gaat voor koop* applies to leases over immovable property. If there is a sale of the property and there is a lease the lease agreement can be transferred. A transfer by operation of law is not effected by consensus but by sole virtue of a statute[41] or common-law rule[42] which applies to a particular factual circumstance. A lease lapses by merger (confusio) when the lessee becomes the owner of the property which he is leasing, because the lessee cannot have a real right over his own property.[43]

2.3.2 An analysis of the word "property" within section 116(7)

When considering the meaning of the word "property" in the context of section 116(7) of the act, the word has not been defined. An interpretation of the word within its context would include both corporeal and incorporeal property. It is likely in this context to be interpreted in its wide sense to include all property, rights, powers and privileges.[44] Contractual rights are included in the meaning of property of the merging entities, as 'property' in section 116(7)(a) would include rights, and contractual obligations would fall within the ambit of section 116(7)(b). The wording of section 116(7)(b) goes further by making an assumption of obligations in accordance with the provisions of the amalgamation or merger agreement, or any other relevant agreement. The wording of section 116(7)(b) is unfortunately somewhat ambiguous in this regard, and it would have been useful if the section gave further clarification as to what is meant by making the assumption of obligations subject to any other relevant agreement.[45] .

2.4 *References to assets and liabilities dealing with implementation*

2.4.1 "the property becomes the property"

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[40] Garner *Black's Law Dictionary* (2009) sv "operation of law" http://thelawdictionary.org/operation-of-law/ (27-11-2014).
[41] For example, section 116(7) of the act.
[42] For example, the *huur gaat voor koop* rule. See *Migvoel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (A) 1050J – 1051B for the operation thereof.
[43] West (eds) *The Consolidated practice manuals of the deeds office of South Africa* (2006 Looseleaf) 3-12.
[44] Cassim *et al* (n 4) 681.
[45] Davids (n 5) 350.

The legislature uses the word “becomes” to describe what happens to the property of the amalgamating or merging company.[46] It was held in *Ex parte H J Ivens and Company Ltd*[47] that the word “becomes” means a change of condition. The judgment further refers to *Williams v Williams*[48] whereby the word was expanded on to mean entering into a new state or condition from some former state or condition. The interpretation of the word creates the possibility that at the stage where the agreement has been implemented, there has been a change of condition.

The paper expounds on the change of condition which occurs when the property becomes the property of the newly amalgamated or surviving merged company or companies. “Becomes” enables the change to occur through the operation of law, and it is to be determined at what point the change of condition occurs within section 116(7).

3 AMALGAMATIONS AND MERGERS

3.1 *Introduction*

The “fundamental transactions” governed by part A of chapter 5 of the act relate to the disposal of all or the greater part of the assets of a company, schemes of arrangement, and amalgamations and mergers. Only the amalgamation or merger is relevant to this dissertation.

3.2 The structure of the statutory merger procedure in South Africa

3.2.1 The merger agreement

The first step is that the two or more companies proposing to amalgamate or merge must enter into a written agreement that sets out the terms and manner of effecting the merger. One aspect specifically mentioned which must be set out is the proposed allocation of the assets and liabilities of the amalgamating or merging companies.

[46] s 116(7)(a).
[47] 1945 WLD 105.
[48] 1911,1 CH 45,110.

The merger agreement must be submitted to the shareholders of each company participating in the merger for consideration, not just the shareholders of the company which is to be acquired; also, the shareholders must be advised of their appraisal rights in terms of section 164 of the act. The act places very little limitation on the substance of the agreement, and companies should take advantage of this by ensuring that detailed clauses have been inserted elaborating on the "allocation" of the assets and liabilities in the agreement.

Two or more profit companies, including holding and subsidiary companies, may amalgamate or merge if, upon implementation of the amalgamation or merger, each amalgamated or merged company will satisfy the solvency and liquidity test.[49] Although prescriptive regarding those matters which must be included in the agreement, the Act appears to place very little limitation on the substance of the agreement, and it is clear that companies will have considerable latitude to structure the merger transaction in a manner that best meets their requirements.[50]

Two or more companies proposing to amalgamate or merge must enter into a written agreement setting out the terms and means of effecting the amalgamation or merger.[51]

For purposes of this analysis, the most important aspect of the merger agreement will be setting out the allocation of the assets in terms of which: "details of the proposed allocation of the assets and liabilities of the amalgamating or merging companies that will be formed or continue to exist when the amalgamation or merger agreement has been implemented…."[52]

The detailed manner in which the proposed allocation of the assets and liabilities is set out in the merger agreement will enable the board of directors to consider the solvency and liquidity test of each amalgamated or merged company as well as indicate clearly which amalgamated or merged company will keep all the assets and liabilities or the manner in which they will be shared.

[49] s 113(1).
[50] Delport *et al* (n 22) 344.
[51] s 113(2).
[52] s 113(2)(f).

3.2.2 Solvency and liquidity test

The board of each amalgamating or merging company must consider whether upon the implementation of the merger agreement each proposed amalgamated or merged company will satisfy the solvency and liquidity test.[53] If the board reasonably believes that each proposed amalgamated or merged company will satisfy the solvency and liquidity test, it may submit the agreement for consideration at a shareholders' meeting of that amalgamating or merged company, in accordance with section 115[54] of the act. The initial stage is when the board of directors considers whether the companies will satisfy the solvency and liquidity test and the second stage is when the board of directors submits the agreement for consideration at a shareholders meeting. The board of directors will inevitably guess what the future financials of the companies will be when they "consider" where the companies financials will be upon implementation as this could be years from the initial stage of considering whether the companies have satisfied the solvency and liquidity test The legislature should endeavour to require the board to reconsider the solvency and liquidity test within a minimum time period of three months prior to the implementation of the merger. During the period prior to implementation the companies may have acquired new assets and current assets may have depreciated. The "other agreement" can make provision for a reconsideration of solvency and liquidity upon implementation as well as a manner in which to deal with the allocation of new assets and liabilities. The merger agreement should further include provisions in respect of what process should be followed should any of the amalgamated or merged companies not meet the solvency and liquidity test at the implementation stage of the transaction.

3.2.3 Approval by special resolution

Section 115 of the act applies to statutory mergers, disposals of all or the greater part of the assets or undertaking of a company, and to the implementation of schemes of arrangement.[55] An interesting aspect of the section is that despite anything contained in the company Memorandum of Incorporation, or any resolution adopted by its board or holders of securities the section and the requisite approvals must be obtained.The section provides that the amalgamation or merger must be approved by a special resolution at a meeting called

[53] s 113(4)(a).
[54] s 113(4)(b).
[55]s 115(1)(a).

for that purpose and at which sufficient persons are present to exercise at least 25 per cent of all the voting rights that are entitled to be exercised on the matter.[56]

3.2.4 Implementation of the merger

After satisfying all the requisite requirements and obtaining approval as prescribed in section 115, the parties are able to proceed with the implementation of the merger provided that no creditors have applied to court for a review of the merger. To implement the merger or amalgamation, a notice must be filed with the commission.[57] The notice will include confirmation that the amalgamation or merger has satisfied the requirements of sections 113 and section 115;[58] it has been approved in terms of the Competition Act[59] if required; it has been granted the consent of the Minister of Finance in terms of section 54 of the Banks Act if so required;[60] and that it is not subject to further approval by any regulatory authority or any unfulfilled conditions imposed by any law administered by any regulatory authority.[61]

The existing criminal, civil, administrative actions or liability of directors (but excluding prescribed officers) and of the amalgamating or merging companies irrespective of the basis are retained. Amalgamating or merging companies are companies that continue to exist in some form.[62]

Upon the implementation of the merger or amalgamation agreement whereby the property becomes the property of the newly amalgamated or surviving merged company or companies, costs and legal formalities normally required for the transfer as well as the length of time it takes to transfer property will be expedited.

[56] s 115(2)(a).
[57] s 116(3).
[58] s 116(4)(a)(i).
[59] s 116(4)(a)(ii).
[60] s 116(4)(a)(iii).
[61] s 116(4)(a)(iv).
[62] s 116(6)(b).

3.2.4 Registering new companies and deregistering companies

After receiving a notice of amalgamation or merger, the Commission must issue a registration certificate for each company and deregister any of the amalgamating or merging companies that did not survive the amalgamation or merger.[63] There would be a split second where both the disappearing company and the new company or companies exist which might be the exact time of transfer. However, this does not address the issue of transfer of assets and liabilities to companies which are surviving companies.

4 TRANSFER OF OWNERSHIP[64]

4.1 *Stepping into the shoes of another company*

The purpose of the statutory merger, in essence, is for the acquiring company to step into the shoes of the disappearing company. Davids states that although the act specifically provides that the merged entity or entities assume the obligations of the merging entities, nowhere does it specifically provide that the merged entity or entities will automatically step into the shoes of the merging parties to the contracts to which the merging entities are parties and acquire such rights as they may have had under such agreements.[65] The appraisal rights has been used as an exit method for dissenting shareholders.Section 164(18) of the act uses the word "successor" to describe a company whose obligations arise as a result of an amalgamation or merger. The word "successor" could be evidence that the legislature intended that the companies would step into the shoes of the newly amalgamated or merged companies. The confusion arises where you need to establish who exactly is going to be the successor of the company whose shareholders exercise appraisal rights. Section 113(d) states that if securities are not to be converted the consideration that the holders of those securities are to receive must be set out. A disgruntled shareholder is able

[63] s 116(5)(a) and (b).

[64] The definition of "ownership" is imperative, and an acceptable definition is provided hereunder: "Ownership is the most comprehensive real right a legal subject can have in relation to a thing. The entitlements of the owner in relation to the thing are, however, not absolute and unlimited, but exist within the limits the law places thereupon. These limitations may originate from the provisions of the objective law or from rights of other legal subjects with or without permission of the owner." Van Schalkwyk and Van der Spuy *General Principles of the Law of Things* (2002) 78.

[65] Davids (n 5) 350.

to demand the fair value of their shares if the shareholder has followed the necessary and mandatory steps.[66]Should the shareholder have held shares in Company A which now merges with company B and C. In terms of the merger agreement the shareholder would receive two shares in Company B and one share in Company C for every 100 shares in Company A. The merger has resulted in Company A no longer being in existence. As a result the shareholder is unsure as to whether she will be paid the fair value of her share by Company B or Company C. In order to resolve this issue the parties should agree in the "other agreement" as to how the percentage of fair value will be allocated.

4.2 References to "transfer" as a consequence of an amalgamation or merger

Section 116(8) of the act states that if as a consequence of an amalgamation or merger, any property that is registered in terms of any public regulation is to be ***transferred*** from an amalgamated or merging company to an amalgamated or merged company, a copy of the amalgamation or merger agreement, together with a copy of the filed notice of amalgamation or merger, constitutes sufficient evidence for the keeper of the relevant property registry to effect a ***transfer*** of the registration of that property (own emphasis added).

With specific reference to the above extract from section 116(8), the act provides the manner in which transfer is effected, i.e. "a copy of the amalgamation or merger agreement, together with a copy of the filed notice of amalgamation or merger, constitutes sufficient evidence for the keeper of the relevant property registry to effect a transfer of the registration of that property…."

The Oxford English Dictionary defines the legal meaning of "transfer" as "conveyance from one person to another of property…" and "transferable" as "capable of being transferred or legally made over to another."[67] The ordinary meaning of "transfer" is simply to hand over or part with something.[68] However, in section 116(8) the word is used in relation to property registered in a public register.

In South Africa there are numerous registries, such as the shipping registry however for purposes of this paper our focus will solely be on the deeds registry.

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[66] s 164(2).
[67] n 54 above 455.
[68] *Lyle and Scott Ltd v British Investment Trust Ltd* [1959] 2 ALL ER 661 (HL) at 668.

In *Houtpoort Mining Estate Syndicate Ltd v Jacobs,*[69] Wessels J stated: "In Roman Law we find nothing about registration in the transfer of land. In Western Europe, however, a custom sprang up in many places which required the seller and the purchaser to appear before some official to state in the presence of witnesses that a sale of land had taken place. The transaction was then noted in a book kept especially for the purpose. The custom prevailed throughout the greater part of the Netherlands and was in the time of Grotius regarded as an inveterate custom. In many parts of the Netherlands, in addition to the registration, the sale had to be publicly proclaimed on three Saturdays…"

Although the system is based in practice on the registration of deeds, it is clearly more than a system of deeds registrations. Its purpose is to prove title. Nevertheless, it is a system in which the mere fact of registration always constitutes or maintains unchallengeable title, not one in which title is always wanted unless it has been registered.[70]

There are well-recognised instances where enforceable rights of ownership in immovable property do arise without registration. According to the principles of South African law, the rights of ownership of immovable property can only be vested in a person by means of an act of *traditio* ("delivery" or "transfer") – the only legally recognised and effective method of accomplishing transfer in the Deeds Registry.

Registration in all these instances achieves the dual object of vesting the ownership and making a public record thereof. On the other hand, ownership could vest in a person without *traditio* – it vests without the need for registration.[71]

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

Section 16 of the Deeds Registries Act provides the machinery for the transfer of land from one person to another and provides the following in this regard: "save as otherwise provided in the Act or in any other law the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the Registrar...." The

[69] 1904 TS 105 108.
[70] n 76 below 458.
[71] n 76 below 460.

Act fails to use the word “owner” as defined in section 102 of the Deeds Registries Act but uses the word “person” instead.

4.2.1 *A discussion of the Deeds Registries Act*

Registration of immovable property in South Africa is governed by the Deeds Registries Act[72] as well as the Mining Titles Registration Act.[73] For purposes of the analyses in this paper, both acts will be considered in the context of “transfer.”

Section 63(1) of the Deeds Registries Act provides that only real rights in land may be registered. The Deeds Registries Act has not been amended to specifically adapt the wording of section 116(7) and section 116(8) of the act for transfer by operation of law. How the Deeds Registries Act could be interpreted will be discussed hereunder.

4.2.2 Who is the owner in terms of the Deeds Registries Act?

Section 102 of the Deeds Registries Act defines “owner” as the person registered as the owner. This does no more than give a special meaning to the word owner wherever used in the Deeds Registries Act. It does not in any way subvert the general meaning of the word owner. It should be read to mean that whoever is registered in the Deeds Office as the owner of the property is in fact the legal owner.[74]

It is noted from the case of *Ex parte Menzies et Uxor*[75] that the main purpose of the Deeds Registries Act is publication, and that it is possible for transfer to pass without registration and through operation of law. Registration is mainly used to avoid confusion. The act provides that the relevant property registry is to be provided with two documents, namely, a copy of the amalgamation or merger agreement and a copy of the filed notice of amalgamation or merger. The documents provided could cause the “keeper”, referred to in section 116(8), from merely changing the title of ownership for the sake of clarity, as ownership would have passed through operation of law.

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[72] 47 of 1937, hereafter referred to as the Deeds Registries Act.
[73] 16 of 1967, hereafter referred to as MTRA.
[74] *Ex parte Menzies et Uxor* 1993 4 All SA (C) 455 462.
[75] n 65 above.

The Deeds Office provides guidelines as to a lease agreement which has been subject to a merger. The merger occurs at the moment upon which the property is registered in the name

of the new owner in the deeds registry. In practice, the property is transferred to the new owner, subject to the lease and simultaneously therewith a hand-written endorsement on the deed of sale.

4.3 *Practical aspects of the transfer of ownership*

4.3.1 Derivative acquisition of ownership

The derivative acquisition of ownership of movable things takes place when things are delivered.[76] Derivative transfer of ownership of immovable things takes place when it is registered in the Deeds Office. The crucial characteristic is that it is derived from the title of the previous holder.

In order for the transfer of an object to occur the law requires the completion of an objective and subjective test.[77] First, there must be an intention to transfer ownership. Secondly, there must be delivery or registration. As a result of the transfer, the new owner accepts all the rights that came about due to his predecessor's ownership, but he must also accept certain obligations or limitations.[78]

4.3.2 *Objective and subjective requirements*

The delivery of movables to the acquirer and registration of immovables in the name of the acquirer is necessary for the transfer of ownership. The delivery of movables fulfils the publicity function where immovables require that the transfer of ownership be made public. The subjective requirement represents the real agreement. The content of the real agreement is, on the one hand, the intention of the owner to transfer ownership and, on the other hand, the intention of the acquirer to receive ownership.[79] Neither the objective requirement nor the subjective requirement alone transfers ownership. The real agreement contains the intention of the parties to transfer ownership, but another obligation-creating agreement exists which contains the reason for the transfer of property. The merger

[76] n 77 below 125.
[77] N 77 below.
[78] Van der Walt and Pienaar *Introduction to the Law of Property* (2006) 125.
[79] n 72 above 125.

agreement is the obligation-creating agreement wherein the parties intend for the property to become the property of the amalgamating or merging company.

4.3.3 The abstract and causal system of transfer

In South African common law, the abstract system of transfer has been adopted as opposed to the causal system of transfer. Under the causal system of transfer, a valid cause giving rise to the transfer is a *sine qua non* for the transfer of ownership.[80]

In the abstract system, the most important point is that there is no need for a formally valid underlying transaction provided that the parties are *ad idem* regarding the passing of ownership. The abstract theory of transfer applies to immovable property as well as movable property.[81] Under the abstract system of transfer the passing of ownership is wholly abstracted from the agreement giving rise to the transfer, irrespective of whether the latter agreement is void or voidable.

The abstract system of transfer prevents prejudice to third parties acting in good faith, as well as providing commercial dealings with greater legal certainty.[82] The abstract system of transfer of ownership is followed in regard to the transfer of ownership of immovable things since the decision in *Brits and another v Eaton and others*.[83] If the common law or legislation prescribes certain requirements or conditions for the enforcement of the obligation-creating agreement, whether the obligation-creating agreement will be void depends on the intention of the legislature.[84]

5 A BRIEF ANALYSIS OF THE BANKS ACT IN RESPECT OF ASSETS AND LIABILITIES IN AN AMALGAMATION

5.1 *Assets and liabilities of amalgamating banks*

[80] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC & Others* (126/10) [2010] ZASCA 166 par 12.
[81] n 74 above 174.
[82] Du Bois *Wille's Principles of South African Law* (2002) 524.
[83] 1984 4 ALL SA 664 671.
[84] n 77 above 128 par 7.

The Banks Act has long provided for a statutory amalgamation and it is thus useful to compare its provisions with those of th enewly introduced procedure under the Companies Act which is available to companies in general. With regard to what happens to the assets and liabilities of amalgamating banks, in the case of a transfer of assets and liabilities, the legislature chooses a word similar to that used in the definition of an amalgamation or merger in the act, namely, "vesting."[85] The structure

that is created through the amalgamating banks results in one surviving bank with all assets and liabilities vesting in the survivor. The Banks Act further clearly sets out what could be included in the property of the amalgamating bank in section 3(b), 3(c) and 3(d).[86]

[85] s 3(a) of the Banks Act (n 9) states: "all the assets and liabilities of the amalgamating banks or, in the case of such transfer of assets, liabilities or assets and liabilities as approved in terms of subsection (1) or (1B), respectively, those assets, liabilities or assets and liabilities of the transferor bank that are transferred in terms of the transaction, shall vest in and become binding upon the amalgamated bank or, as the case may be, the bank or person taking transfer of such assets, liabilities or assets and liabilities; the amalgamated bank or, in the case of such transfer of all the assets and liabilities or a transfer of part of the assets, liabilities or assets and liabilities as approved in terms of subsection (1) or (1B), the bank or person taking transfer of such assets, liabilities or assets and liabilities, shall have the same rights and be subject to the same obligations as those which the amalgamating banks or, as the case may be, the transferor bank may have had or to which they or it may have been subject immediately before the amalgamation or transfer.

[86] 3) Upon the coming into effect of a transaction effecting the amalgamation of one bank with another bank as contemplated in subsection (2) (*b*), or effecting the transfer of such part of the assets, liabilities or assets and liabilities as approved in terms of subsection (1) or (1B) of one bank to another bank or person as contemplated in subsection (2) (*c*) or (2A) (*c*)—(*a*); (*c*) all agreements, appointments, transactions and documents entered into, made, drawn up or executed with, by or in favour of any of the amalgamating banks or, as the case may be, the transferor bank, and in force immediately prior to the amalgamation or transfer, but excluding such agreements, appointments, transactions and documents that, by virtue of the terms and conditions of the amalgamation or transfer, are not to be retained in force, shall remain of full force and effect and shall be construed for all purposes as if they had been entered into, made, drawn up or executed with, by or in favour of the amalgamated bank or, as the case may be, the bank or person taking transfer of the assets, liabilities or assets and liabilities in question; and (*d*) any bond, pledge, guarantee or instrument to secure future advances, facilities or services by any of the amalgamating banks or, as the case may be, by the transferor bank, which was in force immediately prior to the amalgamation or transfer, shall remain of full force and effect and shall be construed as a bond, pledge, guarantee or instrument given to or in favour of the amalgamated bank or, as the case may be, the bank or person taking transfer of such assets, liabilities or assets and liabilities, as security for future advances, facilities or services by that bank or person except where, in the case of such transfer, any obligation to provide such advances, facilities or services is not included in the transfer…"

The Banks Act specifically mentions assets and liabilities and clearly sets out that the assets and liabilities shall vest in and become binding on the amalgamated bank as set out below in section 3(a) of the Banks Act:

…"those assets, liabilities or assets and liabilities of the transferor bank that are transferred in terms of the transaction, shall vest in and become binding upon the amalgamated bank…"

The Banks Act uses the words "vest in" to refer to the assets of the amalgamating bank and they use the words "become binding" to refer to what happened to the liabilities. The Companies Act does not mention the word "binding" in respect of obligations and the act uses a vague word namely "becomes" which leaves the act open to interpretation.

The Banks Act further sets out hereunder in section 3(1)(b) that it is possible to transfer all of the assets and liabilities or alternatively to transfer part of the assets and liabilities:

…"such transfer of all the assets and liabilities or a transfer of part of the assets, liabilities or assets and liabilities"…

The Companies Act fails to mention the word "all" or "part" and requires the reader to figure out whether it is possible to transfer the assets and liabilities in whole or in part.

The Banks Act clearly sets out below in section 3(2)(c) that any agreement shall be construed if it had been entered into in favour of the amalgamated bank which clause does not appear in the Companies Act:

…"all agreements, appointments, transactions and documents entered into, made, drawn up or executed with, by or in favour of any of the amalgamating banks or, as the case may be, the transferor bank, and in force immediately prior to the amalgamation or transfer, but excluding such agreements, appointments, transactions and documents that, by virtue of the terms and conditions of the amalgamation or transfer, are not to be retained in force, shall remain of full force and effect and shall be construed for all purposes as if they had been entered into, made, drawn up or executed with, by or in favour of the amalgamated bank or, as

> the case may be, the bank or person taking transfer of the assets, liabilities or assets and liabilities in question"…

Unlike the Companies Act, the Banks Act grants authority to any officer who may be required to assist in the transfer of the assets and liabilities. South African courts have construed comparable examples, where assets and liabilities vest in and are transferred to new parties, as occurring automatically and by operation of law.[87] The effect of section 116(9) of the act and section 54 of the Banks Act will be discussed hereunder.[88]

It was held in *Absa Bank Ltd v Van Biljon*[89] that the substitution of the transferee bank (Absa) as plaintiff in an action previously instituted by the transferor bank (Bankorp) does not activate the provisions of section 15(2) of the Prescription Act. By virtue of section 54(3) of the Banks Act, it was held that Absa stepped into the shoes of Bankorp and became the plaintiff by operation of law.

If, with respect to a transaction involving a company that is regulated in terms of the Banks Act or Financial Markets Act, 2012, there is a conflict between a provision of subsection (7) and a provision of section 54 of the Banks Act or section 64 of the Financial Markets Act 2012 Act, as the case may be, the provisions of those Acts prevail.[90]

In *Nedcor Investments Bank Ltd v Visser No and Another*[91] the court stated:

> "hence, the effect of the provisions of section 54(3)(b)(c) and (d) in the present context is that UAL obtained the same rights and was subject to the same obligations as Syfrets had immediately prior to the transaction, i.e. all agreements, appointments, transactions and documents entered into, made, drawn up or executed with Syfrets immediately prior to the transaction were of full force and effect. They had to be construed for all purposes as if they had been entered into, made, drawn up or executed with or by or in favour of UAL. Furthermore, any reference in any bond, pledge, guarantee instrument or any other document, including pleadings of and to Syfrets had to be construed as a reference in such document initially to UAL and later to NIB. Thus, whenever the name Syfrets appears in any document, including any process on or after 12 March 1998, then the reference therein should be NIB. This substitution is brought about

[87] Latsky (n 7) 376.
[88] n 9 above.
[89] 2000 (1) SA 1163 1164.
[90] s 116(9).
[91] *Nedcor Investment Bank Ltd v Visser NO and Others* 2002 (4) SA 588 594 E-H.

by section 54(3) of the Banks Act. In the circumstances, it is evident that there was due compliance with the provisions of section 54 of the Banks Act and from the moment of compliance any reference to Syfrets is deemed to be a reference to NIB."

The Banks Act when dealing with what will become of the assets and liabilities refers first to the word "transfer"[92] and thereafter uses the word "vesting"[93] whereas the act states that the assets and liabilities will "vest"[94] and thereafter "become the property" of the amalgamated or surviving merged company, which occurs by operation of law. Further, the proviso in the act is that this occurrence or change of condition must be in accordance with the provisions of the amalgamation or merger agreement, or any other relevant agreement, and must satisfy the solvency and liquidity test. The Banks Act does not refer to an agreement specifically but refers to the transaction of the amalgamation or transfer when referring to the assets and liabilities.Ultimately, the Banks Act only mentions an amalgamated bank which means that there is only one survivor and assets and liabilities will end up in the amalgamated bank.

In the Supreme Court of Appeal judgment of *Tecmed v Nissho Iwai Corporation,*[95] the universal succession of all the plaintiff's rights and obligations after *litis contestation* under Japanese Law was considered. The case is based on foreign law and will not be considered in detail. The court explained that Sojitz had literally stepped into the shoes of Nisso by operation of law and therefore the plaintiff remained the same entity.

The resulting position is not materially different from the one created by the South African legislature in the case of an amalgamation or takeover agreements between banks under section 54(2)(b) of the Banks Act as discussed above. In such event, section 54(3) of the Banks Act essentially provides that all the rights and obligations of the amalgamating banks or transferor bank will vest in the amalgamated or transferee bank by operation of law. Although the Banks Act allows the party to step into the shoes of the other bank, they refer to the word "vesting," which is only used in the act in a paragraph (*b*) merger and therefore cannot be compared to the situation in *Tecmed*.

[92] n 9 above.
[93] n 9 above.
[94] n 9 above.
[95] *Tecmed v Nissho Iwai Corporation and another* [705/08/2009] (ZASCA).

The way in which the legislature has dealt with transfer in the Banks Act may provide guidance as to how the act can be amended to provide clarity for the reader with reference to what could be considered a relevant agreement in terms of the act. A relevant agreement

could be any agreement, appointment, bond, pledge, instrument, or guarantee which was drawn up or made immediately prior to the amalgamation or merger.

As stated above, if the relevant agreement contains clauses which may prevent a transfer, Latsky asks the question whether such assignment of a contract, by operation of law, under section 113 and 116 of the Act would breach a clause, thus prohibiting a cession of rights or a delegation of obligations.[96] Latsky points out that there is a viewpoint that where there is a transfer by operation of law, there is South African authority to the effect that there is no "alienation" by the party from whom the assets are transferred because such party did not act voluntarily endorsement is made on the title deed to the effect that the lease referred to in it, has lapsed by merger.[97]

[96] Latsky (n 7) 375.
[97] West (n 43) 3-12.

6 MINERAL RIGHTS AND TRANSFER

6.1 *Dealing with mining rights and transfer*

The act provides for the property and liabilities in a statutory merger to become the property and liabilities of the newly amalgamated or surviving merged company, which occurs through operation of law. A situation may arise where another statute requires additional consent or authorisation before a transfer is allowed, which will interrupt the automatic transfer of property and liabilities that the legislature in the act envisaged. The question arises as to whether the property and liabilities can be made subject to a suspensive condition of consent before implementation of the agreement can occur or what will happen if a conflict between pieces of legislation arises.

Move the paragraph starting with “Under the MPRDA” here. Explain first that consent is required for transfer (second sentence in that paragraph). Only after that you can deal with whether rights could lapse or be cancelled. Then explain the time requirements for transfer. Then finally deal with possible inconsistency with the CA.

If there is any inconsistency between any provision of the act and the MPRDA and the acts cannot be applied concurrently, the act will prevail.[98] The MPRDA enables prospecting and mining rights to be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of only if the Minister grants his or her written consent.[99] Should the act prevail and the MPRDA transaction fail due to lack of ministerial consent, this will defeat the object of the transfer. The act stipulates that a notice of amalgamation or merger cannot be filed unless it can be confirmed that any regulatory approval has been given.[100] As a result, if the agreement envisages the transfer of mining rights, ministerial consent must be given prior to implementation. The MPRDA gives a defined time limit of 60 days from the date of the request as to when the Ministerial consent must have been granted.[101] Prior to the implementation of the amalgamation or merger the notice which is to be submitted to the

[98] s 5(4)(a).
[99] s 56 of the MPRDA.
[100] s 116(4)(a)(iv).
[101] s 40 of the MPRDA.

Companies and Intellectual Commission must have a confirmation that the amalgamation or merger is not subject to further approval by any regulatory authority.[102] The Companies Act

does not set out a defined time limit in terms of which the confirmation should be submitted. The parties should ensure that the time limits imposed by the MPRDA are complied with in order to apply the acts concurrently.

Under the MPRDA, rights can also lapse or be cancelled if the holder of the right is sequestrated; liquidated or a company is deregistered in terms of the relevant Acts and no application has been made to the Minister for the consent in terms of section 11.[103] A prospecting right or mining right may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister.[104] In terms of the act, after receiving a notice of amalgamation or merger, the Commission must issue a registration certificate for each company, if any, that has been newly incorporated in terms of the amalgamation or merger agreement, and deregister any of the amalgamating or merging companies that did not survive the amalgamation or merger.[105]

The transfer of the prospecting rights by way of a statutory merger[106] will not circumvent the requirements of registration of the rights in the name of the newly amalgamated or surviving merged company or companies. Similarly, the transfer or disposal of the rights by the amalgamating or merging company through any other means other than through a statutory merger would similarly give rise to the requirements of section 11 of the MPRDA.

A situation to be considered is whether after conclusion of an agreement to transfer rights to the newly amalgamated or surviving merged company or companies the minister will have the power to refuse to consent to the transfer of the rights. Should the amalgamating or merging company apply for ministerial consent for the cession of mining rights held by the amalgamating or merging company to the newly amalgamated or surviving merged company or companies, the consent may be refused on the basis that it will result in a concentration of mineral rights.

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[102] s 116(4)(a)(iv).
[103] s 56 of the MPRDA.
[104] s 11(1) of the MPRDA.
[105] s 116(5)(a) and (b).
[106] n 9 above.

The provisions in the MPRDA[107] are peremptory and the Minister must grant consent to a cession applied for if the person to whom the right will be transferred can comply with the provisions of the applicable mining right and the provisions relating to the grant of such mining right.[108]

Insofar as compliance with the provisions of section 11(2)(b) and the requirements contained in section 23 of the MPRDA were concerned, section 23, which applies to mining rights, does not refer to a concentration of mining rights as a factor to be considered by the Minister before a mining right is granted, and therefore, should the Minister refuse to grant consent for the reasons that such a cession would concentrate mining rights in the hands of the newly amalgamated or surviving merged company or companies, the Minister would be acting *ultra vires*.

Section 116(4)(a)(iv) of the act states that a notice of amalgamation or merger must include a confirmation that the amalgamation or merger is not subject to further approval by any regulatory authority. Failure to acquire ministerial consent in terms of section 11 of the MPRDA could have one of two effects, depending on how one interprets the intention of the legislature. First, if one considers that it was not the intention of the legislature that a transfer concluded without obtaining consent under section 11 of the MPRDA not be rendered null and void, it would nevertheless constitute an offence under the MPRDA and potentially incur a penalty.[109] Secondly, if it is considered that the intention is that the transaction be null and void, the transfer would have to be set aside in its entirety and, also, would constitute an offence under the MPRDA. The latter is the most likely interpretation that will be applied by the Minister.

Further, the legislature sought specifically to clarify this silence by adding a subsection to section 11 of the MPRDA, which would render a transfer made in contravention of section 11 void. Therefore, any transaction which required the Minister's consent may be interpreted to be void *ab initio* with transfer of the rights never having taken place. However, the recent

[107] s 11(2) of the MPRDA.
[108] s 23 of the MPRDA.
[109] s 98 (a)(vii) of the MPRDA.

judgment of *Engelbrecht NO v Zuma and others*[110] may provide clarity in relation to the effect of ministerial consent. The case related to Aurora taking over the operations of mines in theinsolvent Pamodzi Group in an effort to prevent the lapsing of the mining licences. It was imperative to dispose of the mines while the Pamodzi Group was still holders of their mining licences; in this way, the Group could conceivably become fully operational again if they were acquired by a knowledgeable purchaser who possessed sufficient funds to rescue them. The transfer of the mining rights the companies held could not be effected unless and until the Minister of Minerals and Energy had granted written consent for such transfer.[111] Absent thereof, the argument runs that there never was any agreement to transfer the mines to Aurora. The successful transfer of the mining rights is described by the first respondent as a condition precedent which was never fulfilled and hence there never was an enforceable agreement. Bertelsmann J found that inasmuch as the consent of the Minister was required for the lawful transfer of a mining right – which stage was never reached in the current saga – it only needed to be given within 60 days after the transfer to a competent holder, providedfor in section 11(4) of the MPRDA, as amended.[112] The Companies Act however requires that before the implementation can occur the necessary regulatory approval mustbe given.[113]

In *Thorpe NO v Boe Bank Ltd,*[114] the appellant contended that the clear meaning of section 54(1) of the Banks Act was that the legal enforceability of any transaction referred to in the section was dependent upon the consent of the Minister being obtained prior to the conclusion of the transaction in question. It was accordingly argued that ministerial consent had to be obtained prior to entering into the arrangement for transfer. Should the necessary regulatory consent not be provided by the Minister on time the transaction in terms of the Companies Act will be delayed but it will not declare the transaction void.

[110] [2015] JOL 33491 (GP).
[111] n 103 44 par 52.
[112] n 103 44 par 53.
[113] s 116(4)(a)(iv).
[114] 2006 (3) SA 427 (SCA).

7 CONCLUSION

After considering the stages of the statutory merger the issues which were identified point directly to the vague and loosely used terminology of the legislature. The inconsistent use of words by the legislature around the concept of transfer caused uncertainty as to the manner and time of the transfer of assets and liabilities. The definitions used for the concept of "amalgamation and merger" in the context of transfer of assets, liabilities and property reinforce the abstract theory. It is submitted that the assets and liabilities which are referred to in the definitions of the act in respect of an "amalgamation or merger" creates the idea that assets and liabilities can be acquired without legal ownership in respect of a paragraph (*a*) merger. It was found that when dealing with a paragraph (*b*) merger, the assets and liabilities are first vested in the company or companies, and after meeting the requirements in terms of the merger agreement, they are then transferred by operation of law. When a brief analysis of the Banks Act was made, it is clear that the Companies Act is nowhere near as advanced and detailed as the Banks Act in respect of terminology and accuracy. The terminology used in the Banks Act makes specific reference to assets and liabilities and the terms are used strictly.

The Companies Act refers to the merger agreement and to the other agreement but has while the act has provided detail as to the content of the merger agreement no insight as to what is supposed to be included in the other agreement has been provided. This promotes confusion and uncertainty and forces the parties to come up with their own list of requirements, this also results in uncertainty as to whether the other agreement may override the merger agreement. Further, upon implementation of the statutory merger it was recommended that the solvency and liquidity test be revisited by the board of directors in order to account for new assets and depreciated assets.

There are undoubtedly a number of other issues which will arise in relation to the implementation of the statutory merger which will need to be regulated or dealt with in practice, and consequential amendments to a variety of different pieces of legislation will be required, in particular, the Deeds Registries Act which regulates the registration and transfer of immovable property.

It has been established that the act will only be subordinate to legislation as listed in section 5(4) of the act. The transfer of a mineral right can be assigned or ceded in terms of the MPRDA and the normal methods of acquisition of property; however, if the necessary regulatory authority is not obtained, the transaction will be void. It was recommended that the MPRDA and the Companies Act can be applied concurrently. The recent case of *Engelbrecht v Zuma*[115] was able to shed light on the consequences of a transaction whereby the necessary consent is not granted in time. Therefore, in this study, a conclusion was reached that the MPRDA allows a set time of 60 days to acquire the necessary consent after the transaction has been completed and will not necessarily result in the transaction being declared void. However, the parties need to ensure that they have first obtained the ministerial consent in order to supply the Companies and Intellectual Property Commission with confirmation of any regulatory approval.

The statutory merger has been designed to be flexible with regard to the numerous different structures the parties can choose from. The main issue identified was that it is possible for more than one company to be established through the statutory merger. However, the legislature has not provided guidance to the parties as to whether assets and liabilities are shared in whole or in part. It was suggested that the exact moment of transfer of the assets and liabilities could be the split second which occurs between the deregistration of companies that did not survive the merger and the incorporation of the new company or companies. However, this does not aid us in establishing what happens to the assets and liabilities in the companies which survived the amalgamation or merger.

[115] n 113 above.

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