

NEW FLASH

Amendment to Section 38 of the Companies Act

The provisions of Section 38 of the Companies Act have been amended by the introduction of the new sections 38(2A) and 38(2B). The amendments become effective on 14 December 2007 and significantly effect the ability of a company to provide financial assistance for the purchase of shares in that company.

These amendments will now provide clients with more flexible options when structuring mergers and acquisitions. For advice on the application and impact of the aforementioned amendments, kindly contact our Commercial Department.

The amended Section 38 is set out below:

Section 38 No financial assistance to purchase shares of company or holding company

- (1) No company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares of the company, or where the company is a subsidiary company, of its holding company.
- (2) The provisions of subsection (1) shall not be construed as prohibiting-
 - (a) the lending of money in the ordinary course of its business by a company whose main business is the lending of money; or
 - (b) the provision by a company, in accordance with any scheme for the time being in force, of money for the subscription for or purchase of shares of the company or its holding company by trustees to be held by or for the benefit of employees of the company, including any director holding a salaried employment or office in the company; or

- (c) the making by a company of loans to persons, other than directors, bona fide in the employment of the company with a view to enabling those persons to purchase or subscribe for shares of the company or its holding company to be held by themselves as owners; or
 - (d) the provision of financial assistance for the acquisition of shares in a company by the company or its subsidiary in accordance with the provisions of section 85 for the acquisition of such shares.
- (3) (a) Any company which contravenes the provisions of this section, and every director or officer of such company, shall be guilty of an offence.
- (b) For the purpose of this subsection 'director', in relation to a company, includes any person who at the time of the alleged contravention was a director of the company.
- (c) It shall be a defence in any proceedings under this section against any director or officer of a company if it is proved that the accused was not a party to the contravention.

NB: Sections (2A) and (2B) have been inserted by section. 9 of the Corporate Laws Amendment Act 24 of 2006, these provisions came into operation by proclamation. No. 47 of 2007 and are effective as of 14 December 2007, being the date of publication in Government Gazette No. 30594.

Section 38 (2A)

Subsection (1) does not prohibit a company from giving financial assistance for the purchase of or subscription for shares of that company or its holding company, if-

- (a) the company's board is satisfied that-
 - (i) subsequent to the transaction, the consolidated assets of the company fairly valued will be more than its consolidated liabilities; and

- (ii) subsequent to providing the assistance, and for the duration of the transaction, the company will be able to pay its debts as they become due in the ordinary course of business; and
- (b) the terms upon which the assistance is to be given is sanctioned by a special resolution of its members.

Section 38 (2B)

For the purposes of paragraph (2A) (a), the directors must account for any contingent liabilities which may arise to the company, including any contingent liability which may result from giving the assistance.
