Short notes on:

EMPLOYEE SHARE SCHEMES WHERE (INTER VIVOS) TRUSTS ARE SHAREHOLDERS

Introduction

In recent years (inter vivos) trusts have become a popular vehicle to use for purposes of employee share schemes to facilitate empowerment transactions within the private sector.

Also, in many instances trusts are still valuable business continuity planning tools. In many instances companies endeavour to comply with the requirements of Broad Based Black Economic Empowerment or “BBBEE”, but the benefactors are not in the financial position to “buy in” in lumpsum. Interestingly, the Companies Act (71 of 2008) (the Act) has introduced section 40(5), which permits a company to issue shares to a subscribing party before the company has received the subscription consideration. This would have been void under section 92 of the Companies Act of 1973.

Using the trust structure together with appropriate financial arrangements makes it possible for these persons to now buy in. This may also facilitate a long term strategy of grooming young and dynamic employees into tomorrow’s directors in the boardroom.

Accordingly, this is a positive improvement in terms of empowerment transactions, particularly in facilitating many opportunities for businesses to comply and grow their businesses in a strategic manner.

Section 40(5) of the Companies Act 71 of 2008
According to Buckland, the following requirements must be met in terms of section 40(5):¹

- “There must be consideration for the subscription shares in the form of either an instrument such that the value of the consideration cannot be realised by the company until a date after the time the shares are to be issued, or an agreement for future services, future benefits or future payment by the subscribing party (hence a subscription agreement);

- The company must receive the subscription agreement;

- The company must, against receipt:
  - Issue the shares immediately; and
  - “cause the issued shares to be transferred to a third party, to be held in trust and later transferred to the subscribing party in accordance with a trust agreement”; and
  - The issued shares must be transferred from the third party to the subscribing party at a later stage in accordance with the trust agreement.”

Generally, at the time when a company issue shares, the rights associated with the shares will come into existence and will then be capable of being owned. The subscribing party (person who the shares are issued to) thus becomes the original owner of the shares by virtue of the shares being issued to it in terms of the subscription agreement. A share so issued is then transferred in the manner provided for in section 51 of the Act once it has been recorded in its securities register.

It is however the name of the third party (aka the trust) that is usually entered into the securities register of the company in cases of employee share schemes.²

Therefore a transfer of shares, for purposes of the Act, comprises nothing more than the company changing the details of the shareholder in the certificated securities register from those of the registered person (the transferor) to those of a new person (the transferee) pursuant to an agreement to such transfer between the transferee.

---

¹ Buckland, Without Prejudice August 2013.
² Subject to section 40(4) to (7) of the Companies Act 71 of 2008. See section (40)(5)(b)(ii) specifically.
Importantly, there must also be compliance with any requirement in the MOI restricting the “transferability” of the shares.

The subscription agreement and trust deed therefore become important documents that need to be properly aligned. In some instances the trust deed does provide for the subscribing party and not the trust to be the shareholder. This should however be done with proper consideration to the risks involved.

**The risks**

The risks hereof posed to the company are where the subscribing party or third party is:

- Placed under business rescue (in the case of a company that is the shareholder) or goes insolvent;

- If the value of the subscription consideration is not paid or realised in the future; or

- If future services, benefits or payments, contemplated by section 40(5), are not delivered.

**Conclusion**

It is important to have a proper purpose and to ensure that the legal structure is strategically aligned with this purpose when embarking on implementing empowerment based structures in any business. Importantly, although not covered in this article, the implications of any tax consequences should also be properly considered.