further the notes on s 297). Its provisions are concerned, however, solely with such disclosure and not in any way with approval by the company or the failure to obtain such approval.

228. Disposal of undertaking or greater part of assets of company.—(1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save with the approval of a general meeting of the company, to dispose of—

(*a*) the whole or substantially the whole of the undertaking of the company; or

(*b*) the whole or the greater part of the assets of the company.

(2) No resolution of the company approving any such disposal shall have effect unless it authorizes or ratifies in terms the specific transaction.

(3) The requirements contained in this section in respect of transactions falling within the provisions of subsection (1), shall be in addition to any other requirements, including the limitation of voting rights, relating to such transactions that may be imposed by the Securities Regulation Panel in terms of section 440C or in terms of any other law.

[Sub-s. (3) added by s. 10 of Act No. 35 of 1998.]

Notes

[Formerly 70*dec*(2)]

General Note.—A company has no power to dispose of its undertaking or any of its assets otherwise than in furtherance of its objects (*Ridge Securities Ltd* v *IRC* [1964] 1 All ER 275 (Ch) at 287-288). A disposal which is not in furtherance of the company's objects is *ultra vires* the company. It is submitted that it is not intended by the words "Notwithstanding anything contained in its memorandum or articles" to alter this situation. The intention is merely to discount the operation of a provision in the memorandum or articles which purports to empower the directors to effect a disposal contemplated by the section without the approval of a general meeting or a provision which prohibits any such disposal by the directors (*cf Levy* v *Zalrut Investments (Pty) Ltd* 1986 (4) SA 479 (W) at 485; *Ben-Tovim* v *Ben-Tovim* 2001 (3) SA 1074 (C) at 1085). A disposal, therefore, which is not in furtherance of the company's objects remains *ultra vires* and void even if purportedly effected by the directors with the approval of a general meeting, subject, of course, to the operation of s 36 (*ibid* at 486).

However, a disposal which is not *ultra vires* the company but which is effected contrary to the provisions of s 228 is not one in respect of which s 36 has any application. *Ex hypothesi*, the company will have had the power to effect the disposal and accordingly its invalidity will not have been at all by reason of the fact that it lacked such power.

Since s 228(2) makes provision for the ratification of a disposal contemplated by sub-s (1), it is submitted that an agreement evidencing the relevant disposal which has not been authorised by the shareholders of the company prior to its conclusion is not invalid or void (*Farren v Sun Service SA Photo Trip Management (Pty) Ltd* [2003] 2 All SA 406 (C) at 441; and see *Ally NO v Courtesy Wholesalers (Pty) Ltd* 1996 (3) SA 134 (N) at 145 in which Magid J considered *obiter* that it is strongly arguable that the prohibition under sub-s (1) ought to relate to the implementation rather than the conclusion of the contract). Approval could be given by way of ratification even under s 70*dec*(2) of

the 1926 Act (*cf In re Olympus Consolidated Mines Ltd* 1958 (2) SA 381 (SR)). Sub-section (2) now expressly contemplates approval of a contract already entered into by the directors as well as authorisation of the contract in advance of its being made by the directors.

There is controversy as to whether a third party to whom the invalid disposal was made is entitled to enforce it against the company by means of the application of the rule in the *Turquand* case (as to which, see the notes on s 69), since the invalidity does not entail that the related contract between the company and the third party is, as between them, void or unenforceable. For the view that this is the case, see, eg, the *Levy* case *supra* at 486-487; *cf* also DS Ribbens 1976 *THRHR* 162 at 164; MJ Oosthuizen 1979 *TSAR* 169 at 173-174; PEJ Brooks 1987 *THRHR* 226 at 228-229; Michele von Willich 1988 *MBL* 7 at 12-15; and Basil Wunsh 1992 *TSAR* 545. For the contrary view, see, *inter alia*, L Hodes 1978 *SACLJ* F6 at F12-F13; JSA Fourie 1992 *TSAR* 1. The counterargument is that the intention of the Legislature is to preclude the very existence of a lawful disposal without the requisite approval and this intention cannot be frustrated by the application of the *Turquand* rule or by estoppel. (For an informative analysis of the controversy, see the *Farren* case, *supra*, in which the Court, relying on the judgment of EM Grosskopf JA in *Bevray Investments (Edms) Bpk v Boland Bank Bpk* 1993 (3) SA 597 (A) at 622-623, held (at 415) that the Turquand rule could not be applied if, to do so, would negate the clear intention of the Legislature in relation to the provisions of s 228, and that a contract concluded in contravention of the section has no legal effect and, hence, cannot be enforced until it is ratified by the shareholders. The Court held further (at 415) that the relevant contract is not enforceable on the basis of estoppel since, to do so, would be to allow a result contrary to the Legislature's intention.)

However, it is submitted that, notwithstanding the absence of a formal resolution of the shareholders as envisaged by s 228(2), a disposal envisaged by the section may ensue and be enforced on the basis of the principle of unanimous assent (as to which, see further the **General Note** on s 180). In *Sugden* v *Beaconhurst Dairies (Pty) Ltd* 1963 (2) SA 174 (E) at 181, it was held by O'Hagan J that, "where the only two shareholders and directors express – whether at the same time or not – their joint approval of a transaction contemplated by s 70*dec*(2), their decision is as valid and effectual as if it had been taken at a general meeting convened with all the formalities prescribed by the Act". (See also *Morgan-Smith* v *Elektro Vroomen (Pty) Ltd* 1977 (2) SA 191 (O) at 195; *Levy* case *supra* at 485; *Ally* case *supra* at 145-146).

It is submitted that a meeting convened in order to ratify an agreement for a disposal envisaged by the section may ratify such agreement with any amendment thereof agreed after notice of the meeting has been given, without having to reconvene such meeting by fresh notice, provided that the essential nature of the "transaction" is not altered by the amendment.

Dispose.—It is submitted that, in the context, the word "dispose" has its ordinary meaning of "to part with" or "to get rid of" (as to the ordinary meaning of the word, see *Cullinan Properties Ltd* v *Transvaal Board for the Development of Peri-Urban Areas* 1978 (1) SA 282 (T) at 285-286) and accordingly the only disposal to which it is intended to refer is one which would have the effect of permanently depriving the company of its right to ownership of the assets involved.

Thus, the grant of a right of first refusal to purchase is not within the section (*Lindner* v *National Bakery (Pty) Ltd* 1961 (1) SA 372 (O)). Neither is a pledge nor a cession in security (*Alexander NO* v *Standard Merchant Bank Ltd* 1978 (4) SA 730 (W)), notwithstanding, it is submitted, the divestitive effect of such a cession (see further the notes on s 342 *sv* **Costs, charges and expenses**), having regard to the residual interest which the company retains in relation to the right ceded. It is submitted that passing a mortgage bond is not within the section (*cf Advance Seed Co (Edms) Bpk* v *Marrok Plase (Edms) Bpk* 1974 (4) SA 127 (C) at 132; and see L Hodes *op cit* in the **General Note** at F7-F9)). But a sale subject to a suspensive condition is, it is submitted, a disposal within the meaning of the section notwithstanding that until the condition is fulfilled the sale has no effect as such (*Corondimas* v *Badat* 1946 AD 548; but *cf Tuckers Land and Development Corporation (Pty) Ltd* v *Strydom* 1984 (1) SA 1 (AD)). "The disposal of a right connotes some legal act on the part of the person of inherence of that right. In the case of a contract disposing of a right by one party to the other, the making of the contract is the legal act which disposes of the right concerned. If the contract is subject to a casual suspensive condition, then it is impossible to say, before the condition is fulfilled, whether or not the making of the contract disposed of the right concerned. If the condition is fulfilled, then the making of the contract was the legal act of disposal, and if

(continued on page 443)

the condition is not fulfilled the making of the contract had no legal effect at all" – *per* Hoexter JA in *Peri-Urban Areas Health Board* v *Tomaselli* 1962 (3) SA 346 (A) at 351. The grant of an option to purchase would also, it is submitted, qualify as a disposal for the purpose of this section.

The whole or substantially the whole of the undertaking.—Giving the word "undertaking" its ordinary meaning, the intention is to refer to the company's enterprise as such, ie in all its components (*cf* L Hodes *op cit* in the **General Note** at F9–F10). Thus, the application of these provisions in a particular case may be difficult since it is not clear how one is to measure the company's enterprise for the purpose of determining whether there has been a disposal of "substantially the whole" thereof (*cf ibid*; DS Ribbens *op cit* in the **General Note** at 166). The intention clearly is to distinguish between a disposal of the enterprise as such and a disposal of particular assets forming part thereof. A disposal of "the greater part" of such assets may or may not involve the disposal of "substantially the whole of the undertaking"; but it is immaterial whether or not it does, because the disposal in any event will be hit by s 228(1)(*b*). It is respectfully submitted, accordingly, that whether a disposal is of "substantially the whole of the undertaking of the company", does not depend on the nature or value *per se* of the assets disposed of, but on whether the enterprise retained by the company after the disposal is materially different from the enterprise it owned as at the date thereof.

The greater part of the assets.—The test to be applied for the purpose of determining whether the affected assets constitute the greater part of the company's assets is the test of market value (*Novick* v *Comair Holdings Ltd* 1979 (2) SA 116 (W) at 145).

Subsection (2).—The object of these provisions is to prevent directors obtaining a general authority to effect any disposal as they might in future deem advisable (*Lindner* v *National Bakery (Pty) Ltd* 1961 (1) SA 372 (O) at 379). The resolution required is not a special resolution.

The specific transaction.—The intention is to refer to a particular disposal considered independently of any other or others; thus, it is not intended to require shareholders' approval to a plurality of disposals which collectively would qualify as a disposal of either the whole or substantially the whole of the company's undertaking or the whole or the greater part of its assets (*Novick* v *Comair Holdings Ltd* 1979 (2) SA 116 (W) at 147–148).

Subsection (3).—As a consequence of the amendment (with effect from 14 August 1998) of the definition of **"affected transaction"** in s 440A, a disposal envisaged by sub-s (1) now falls within the ambit of those transactions which are, in certain circumstances (as to which see the **General Note** on s 440A; and see SM Luiz *An Evaluation of the South African Securities Regulation Code on Takeovers and Mergers* (LLD thesis University of South Africa (July 2003)) 611) to be regulated by the provisions of Chapter XVA of the Act and those of the Code (see Appendix VI *post*). The intention of the legislature is to afford protection to minority shareholders whose rights may be adversely affected by a disposal envisaged by sub-s (1). As to voting rights generally, see ss 193–197 and the notes thereon.

Interests of and Dealings by Directors and Others in Shares of Company

229. . . . . . .

[S. 229 amended by s. 22 of Act No. 64 of 1977 and repealed by s. 6 of Act No. 78 of 1989.]