REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

Case Number: 31329/2018

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

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DATE

In the matter between:

AFRICA WIDE MINERAL PROSPECTING AND EXPLORATION (PTY) LTD Plaintiff

and,

PLATINUM GROUP METALS (RSA) (PTY) LTD First Defendant

ROYAL BAFOKENG PLATINUM LIMITED Second Defendant

MASEVE INVESTMENTS 11 (PTY) LTD Third Defendant

ROYAL BAFOKENG RESOURCES (PTY) LTD Fourth Defendant

JUDGMENT

Summary:

Companies Act of 2008 – Scheme of Arrangement under sections 114 and 115.

Held - when a scheme of arrangement between a company and its members is approved under section 115(2)(a), its legal effectiveness is derived from the terms of the statute and it cannot be altered or affected by rights which a party may have had were it not for the statute.

Held - subject only to the provisions of sections 115(3) to (6), the scheme of arrangement comes into force on approval and may be implemented by the Board of the company.

Held – Any challenge by a shareholder which entails, either directly or indirectly, an attack against the resolution approving the scheme, regardless of the form of such challenge, can be brought only under section 115.

FISHER J:

Parties and introduction to dispute

[1] The plaintiff ('Africa Wide') and the first defendant ('PTM') were the shareholders of the third defendant ('Maseve'). Maseve owns the Maseve Mine, situated near Rustenburg, North West Province.

[2] Maseve was incorporated in 2008 by Africa Wide and PTM. Their respective shareholding has been adjusted over time as a consequence of Africa Wide's failure to make certain capital contributions to the joint venture. At the time of the transactions in issue in this case, PTM held 82.9% of the issued shares in Maseve and Africa Wide held 17.1%.

[3] Both PTM and Africa Wide are, themselves, wholly owned subsidiaries. PTM's parent-company is Platinum Group Metals Limited, registered in Canada (‘PTM Canada’) and Africa Wide's parent-company is Wesizwe Platinum Limited (‘Wesizwe’).

[4] Wesizwe's shareholders include a consortium in which the Jinchuan Group Ltd and the China-Africa Development Fund (‘CADF’) are involved.

[5] This case deals with a scheme of arrangement under section 115 of the 2008 Companies Act (‘the Act’). The scheme was aimed at transferring the entire shareholding of Maseve to the Royal Bafokeng and entailed the expropriation of the shareholding of Africa Wide. The scheme has been implemented which has resulted in the transfer of the shareholding in Maseve to the second defendant (‘RB platinum’). RB Platinum owns 100% of the shareholding of the fourth defendant (‘RB Resources’) which conducts a mining business.

[6] The plaintiff seeks to collapse the scheme on the basis that it attacks an agreement in terms of which Maseve sold its ore processing plant to RB Resources. This plant transaction was entered into simultaneously with a transaction for the sale of the shareholding of Maseve to the second defendant (‘RB Platinum’) and the approval of the scheme.

[7] It is not in dispute that this plant transaction is fundamental to the scheme. The defendants say that it is part of the scheme; the plaintiff says it is a separate agreement.

[8] The proper characterization of the plant transaction is central to both the plaintiff’s cause of action and a special plea raised by the defendants to the effect that the plaintiff’s claim is statutorily barred by the operation of section 115 of the Act.

[9] It is is thus important to understand the nature and composition of the scheme of arrangement. To do so, it is necessary closely to examine the relationships between the parties and the facts leading up to how the scheme was devised and its approval and implementation. For the most part these facts are common cause.

The scheme of arrangement

[10] The Shareholders' Agreement between PTM and Africa Wide makes provision for each shareholder to appoint one director to the Board of Maseve for every complete 10% of the shares held. From about December 2016, the PTM-nominated directors were, inter alia, Messrs Michael Jones and Frank Hallam; the Africa Wide-nominated director was Mr Mogale Mothomogolo.

[11] The Memorandum of Incorporation (MOI) of Maseve and the Shareholders Agreement each contain similar provisions which have as their purpose the protection of the minority shareholder - Africa Wide. The protections are of the usual type and relate to the following matters:

- the sale or disposal of substantially the whole of the assets or undertaking of Maseve;
- a material change in the business or objects of Maseve;
- a material transaction outside of the normal course of Maseve's business.

[12] Article 32 of the MOI requires 'the unanimous approval of the Shareholders' for resolutions which relate to these issues and clause 10.1 of the Shareholders' Agreement provides for the unanimous 'prior written consent' of shareholders.

[13] From about November 2016, Maseve experienced serious financial difficulties. PTM and PTM Canada had lent in excess of R4 billion to Maseve in the form of shareholder loans. PTM and PTM Canada had been compelled to secure a portion of these funds and had funded Maseve without any contributions from Africa Wide. The Maseve mine and its assets were pledged as indirect security for a loan of US$84 million. This loan was secured by PTM Canada by way of a pledge of 100% of its shares in PTM. These loans and advances had to be serviced by Maseve so that PTM Canada could meet its obligations to the lenders. This led to a shortage of running funds.

[14] The shortage of funds meant that Maseve could not undertake the substantial capital expenditure required for it to trade in a commercially viable manner. Poor production at the mine meant lower than expected revenue flow which, in turn, meant that Maseve was not able to service its debt obligations.

[15] Essentially Maseve was commercially insolvent. PTM and PTM Canada obtained some grace from their lenders, but those lenders required assurances that there would be repayment by 31 October 2017. Failing this payment or concrete assurances that it would be paid, there was a real risk of foreclosure against the security.

[16] This intractable predicament left Maseve and PTM with limited options. PTM could remain a partner in Maseve and obtain additional funding from Maseve's shareholders, including Wesizwe, Jinchaun and CADF. Alternatively, PTM would have to dispose of its interest in Maseve to settle the obligations to the lenders.

[17] From about March 2017 to about May 2017, there were extensive exchanges between PTM, Wesizwe, and Wesizwe's shareholders, for the purposes of discussing various funding proposals. PTM says that during this period it was apparent that Wesizwe had no serious interest in expediting or advancing the funding proposals.

[18] In the meantime, PTM initiated steps aimed at introducing an amendment to Maseve's MOl to facilitate a possible sale of the shares. In June 20I7, a special resolution of shareholders was adopted, amending the MOI by adding Article 10.7.

[19] The special resolution was passed by round robin. On 6 June 2017 PTM signed the special resolution. It was sent to Mr Mothomogolo on the same day. On 21 June 2021 he sent an email stating that he voted against the special resolution. The special resolution was, however, carried with PTM's vote, and there is no dispute that it was properly adopted.

[20] The new Article 10.7 read as follows:

"10.7 If a third party offers to purchase all (but not less than all) the Shareholders' equity on identical pro rata terms, and provided that Shareholders holding at least 80% (eighty

percent) of such Equity accept such offer in respect of the Equity held by them, then all the Shareholders shall be obliged to and shall be deemed to have accepted the offer of the third party in respect of their Equity. Each of the Shareholders irrevocably and in rem suam appoints the other Shareholder/s as its attorney and agent to do all such things as may be necessary to comply with the provisions of this clause."

This is a type of clause commonly called a ‘drag along’ clause.

[21] On 15 June 2017, PTM prepared a document headed ‘Business Outlook’ which set out the challenges for solvency facing Maseve. This was presented and discussed at a board meeting held on the same day. During the meeting, the Board (including Mr Mothomogolo) unanimously resolved that, in the event that the Maseve Mine was no longer able to be funded sufficiently by PTM Canada, Maseve ‘... is authorised to close the mine and sell assets, at management’s discretion and as might be necessary to meet obligations and manage the path towards a reasonable wind down or transaction, and if a transaction exceeds a threshold wherein shareholder approval is required, such approval will be sought.’

[22] The Royal Bafokeng had by this stage indicated its interest in Maseve. RB platinum had made an initial written offer during March 2017 to acquire all of Maseve's assets. PTM rejected this offer on the basis not only of the unsatisfactory price, but also because it was not prepared to dispose of Maseve's assets in isolation but wanted to dispose of its shareholding in Maseve. This is significant as I will deal with later.

[23] The Royal Bafokeng then proposed a transaction in terms of which it offered to purchase all of the shares in Maseve.

[24] Given the drag along clause such a sale of shares could not have been resisted by Africa Wide. A problem was however posed by the fact that the lenders were threatening imminent foreclosure on the securities. This urgency to obtain some liquidity from the transaction led to a reconfiguration of the original offer to buy the shares.

[25] This reconfiguration of the transaction lies at the heart of this case. The facts surrounding the motivation for the structure ultimately agreed to thus require close consideration. I move to deal with this aspect of the case.

The facts relating to the structure of the transaction.

[26] As I have said the intention was to dispose of the shareholding. This could have been achieved by means of a straightforward share purchase agreement. But there was a sticking point: any sale of shares transaction would have to be made subject to ministerial consent in terms of section 11 of the Mineral and Petroleum Resources Development Act, 2002 ('the MPRDA')[1]. It is notorious that achieving such consent can take time. There was little or no reason to assume that the approval would not be forthcoming; the only real question was how long it would take.

[27] The urgent flow of funds and access by RB Platinum to the plant were crucial objectives in the transaction. In order to speed up the process of getting as much cash up front as possible, it was decided to split the transaction into two parts. The first part would be the sale of the plant to RB Resources which required the use of the plant in its business and the payment of funds under the plant sale; the second part would be the sale of shares transaction. This structure allowed for payment up front of some of the funds whilst the section 11 consent was awaited on the share transaction.

[28] Mr Hallam testified for PTM as to the evolution of this structure. His evidence as to the progression of the transaction through the various draft iterations of the term sheet which ultimately described the transaction is instructive as to the true intention behind the split transaction.

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[1] Section 11 reads as follows:
"11. Transferability and encumbrance of prospecting rights and mining rights.—(1) A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies."

[29] It is evident from an early draft term sheet that a loan was initially contemplated to secure the flow of funds. This structure however changed in the next draft where the transaction is now reflected for the first time as being split into the two transactions.

[30] Mr Hallam explained that it had been impossible to set up the loan structure necessary to get the money to PTM in time. He explained that when the possibility of a secured loan was discussed it was discovered that this was unworkable because it would require inter-creditor agreements. So a different concept structure was explored which would ultimately achieve the same end of the acquisition of shares and assets. It was thus agreed simply to split the transaction into two and pay a large amount up front (reflected as being for the plant) and the rest (reflected as being for the shares) later when the necessary section 11 approval was obtained. This was ultimately the structure adopted in the signed term sheet of 6 September 2017.

[31] Mr Hallam testified that the price negotiated for Maseve was US$ 70 million. Initially the plant transaction price was reflected at US$ 60 million and the share transaction consideration was pegged at US$10 million. This split later changed to a US$ 58 million / US$ 12 million split.

[32] The structure meant that Maseve would get the cash purchase price attributed to its assets ($58 million), and pass it on to PTM in repayment of shareholder loans and RB Platinum, through RB Resources, obtained the concentrator plant which it could immediately start using for its normal processing requirements.

[33] Mr Nicholas Stevenson who was called by the second to fourth defendants. Mr Stevenson is a director of Questco (Pty) Ltd, a corporate advisory firm and he has been a corporate advisor to RB Platinum for in excess of ten years. He advised on the transaction in issue. He also testified to the evolution of the transaction from share purchase to split transaction and his evidence accorded with that of Mr Hallam in all material respects.

[34] Significantly then, the evidence redounds to the conclusion that the purchase price was actually a price agreed for the shares. The split between shares and plant

was not based on true value but on a fictional apportionment of the purchase consideration for the shares. Mr Hallam testified that his objective was to negotiate for as much money up front as possible.

[35] On 6 September 2017 PTM and RB Platinum signed the final term sheet which outlined the proposed transactions and how they interrelated.

[36] Wesizwe and Jinchuan were also participating in discussions for the possible purchase of Maseve. They fully understood the urgent need for funds but were not taking the actions required. When it became clear that there was an attractive offer on the table from the Royal Bafokeng, Wesiswe was galvanised to present its own offer. Thus, there was competitive bidding between Wesizwe and Royal Bafokeng. Wesizwe was actively participating in the bidding and it was understood that any proposed transaction was not aimed at a piecemeal disposal of some assets but at the acquisition of Maseve in its entirety. This emerges clearly from the evidence of Mr Hallam.

[37] On 9 November 2017, a meeting of the Board of Maseve was held and offers from both Wesizwe and Royal Bafokeng were discussed. It was unanimously decided that the due to the high degree of uncertainty and conditionality of the Wesizwe offer the Board was unable responsibly to consider it.

[38] the following resolutions in relation to the Royal Bafokeng offer were however unanimously approved:

‘ …the Royal Bafokeng Platinum offer dated September 6, 2017 as described herein with Phase 2 being subject to the approval of a scheme of arrangement and further subject thereto that the Board shall be entitled to consider any better offer with equal or greater certainty, that may be made before execution of the Royal Bafokeng Platinum transaction.’

‘ … that R Michael Jones andlor Frank R Hallam be and are duly authorised to: ~ retain, on behalf of the Company[Maseve], an independent expert to compile a report for the purposes of the scheme of arrangement take all steps to negotiate and finalise the Sale of Business Agreement and an agreement in regard to the implementation of Phase 2 with Royal Bafokeng Platinum on terms substantially as proposed in the term sheet and to sign all agreements and other documents as may be necessary to implement this resolution; on

receipt of the independent persons' report, to convene meetings of the Board and the Shareholders to consider and vote on the scheme of arrangement.' [Emphasis added.]

[39] The thrust of these resolutions is a clear understanding that the agreements would be negotiated and concluded in tandem.

[40] The fact that these resolutions where passed unanimously by the Board, which included Mr Mothomogolo is important. It shows that, at this early stage in the process aimed at achieving the approval of the scheme, the plaintiff was aware of the transaction including its structure.

[41] Notwithstanding his integral involvement in relation to approval relating to the transaction Mr Mothomogolo was not called by the plaintiff to give evidence.

[42] On 23 November 2017 the two agreements as envisaged in the term sheet and the resolution above were concluded to give effect to the transaction with the Royal Bafokeng. These were:

- an agreement called a sale of business agreement between Maseve, PTM and RB Resources ('the SOB Agreement') which allowed for the transaction in terms of which RB Resources would acquire Maseve's concentrator plant, five immovable properties and certain related assets held by Maseve at a purchase price of US$58 million ('the plant transaction');

- an agreement called the Scheme Implementation Agreement between Maseve, PTM and RB Platinum ('the Scheme Implementation Agreement') which provided that, following compliance with sections 114 and 115 of the Act, RB Platinum would acquire 100% of the issued shares in Maseve from PTM and Africa Wide and, in return, PTM and Africa Wide would receive shares in RB Platinum.

[43] It is significant that, in line with the two-phase structure, the agreements are inter-related on their terms as follows:

i. It is recorded in the preamble to the SOB Agreement that RB Platinum intended to acquire PTM's and Africa Wide's shares in Maseve 'subject to and after the implementation of the plant transaction';
ii. it is a suspensive condition of the SOB Agreement that Africa Wide's shares be purchased either by agreement (which it was anticipated would not occur) or by a scheme of arrangement; and
iii. the Scheme Implementation Agreement expressly stated in paragraph C of its preamble that it was being concluded 'subject to and following the implementation of the Plant Transaction.'
(Emphasis added.)

[44] Mr Hallam testified that, because the plant transaction was merely a device, the value of the plant transaction (US$58 million) did not in any way represent the value of the plant sold. He explained that it was an arbitrary figure arrived at pursuant to the negotiations in terms of which Mr Hallam was trying to get as much of the overall price of US$70 million paid up-front. This was confirmed by the evidence of Mr Stevenson and was not challenged on behalf of the plaintiff.

[45] Professor Harvey Wainer, who was the financial expert ultimately relied on by both parties, explained that the determination as to plant value was necessarily subject to substantial arbitrariness and subjectivity due to the allocation of value between assets and mineral rights being set by the parties for the purposes of convenience rather than actuality. He explained that the allocation is not a 'measure of the true economic fair value of the two elements.' He confirmed that the arbitrariness of the allocation of values applied to both the transaction values and the financial statements. He explained that the percentages and values set out in his report were subject to the arbitrary nature of the allocations.

[46] Prof Wainer's evidence was thus to the effect that the percentages used in order to determine the plaintiff's case on the minority protections are unreliable and not founded in reality.

[47] There is also no indication in the terms of the agreements evidencing the transaction that RB Platinum intended to alter Maseve's core business of mining.

[48] The plaintiff called Mr Robert Croll, a mining engineer of 40 years' experience to testify as to how, in his professional opinion, the nature of the business of Maseve was or would have been affected by the plant transaction. His evidence did not add much to the debate. The central inquiry raised by the evidence was whether Maseve could be seen to be conducting the same business once it had no plant. Mr Croll said that the disposal of the plant profoundly altered the business; the defendants disagreed that the business, which was mining, had changed in a manner proscribed in the minority protection clauses.

[49] It is not in dispute that the scheme was implemented. On 22 December 2017 a round-robin board resolution was circulated to approve all the steps statutorily required under the Act for the coming into force of schemes of arrangement. The resolution was approved, although Mr Mothomogolo voted against it. Following this, a shareholders' meeting was held on 12 January 2018 to approve the scheme of arrangement. It was approved by special resolution in terms of the provisions of section 114(1)(c) and 115(2) of the Act. Consequently, all steps required by the Companies Act to implement a scheme of arrangement under sections 114 and 115 were taken. Mr Mothomogolo attended the meeting. His dissenting vote, against the resolution, was recorded.

[50] The first iteration of the SOB Agreement had contained the condition that Africa Wide approve the transaction. It was later decided that Africa Wide was unlikely to give its approval and that this condition should be removed.

[51] The removal was effected in February 2018. This entailed the defendant's removal of clause 3.1.5 of the SOB Agreement which provided for the approval of Africa Wide and the replacement therewith of the following clause:

"the board of directors of Maseve having convened a meeting of shareholders of Maseve to consider a proposal to implement a scheme of arrangement in terms of section 114 of the Companies Act in terms of which PTM (RSA) and Africa Wide shall sell the PTM (RSA) Sale Equity and the Africa Wide Sale Shares to RB Plat substantially on the terms proposed in

the Scheme Agreement, the Maseve shareholders have approved the Scheme and if any of the Maseve shareholders voted against the resolution to approve the Scheme, such resolution not requiring court approval in terms of Section 115(3) or (4) of the Companies Act
"

[52] The defendant argues that suspensive conditions, in respect of both the SOB Agreement and the Scheme Agreement, were thus regarded as having been met and the transaction was finalised on 26 April 2018. The finalisation and unconditionality of each agreement was formally agreed in separate written documents, which were signed by the new shareholder of Maseve, RB Platinum.

[53] Prior to and leading up to the litigation, valuations were obtained by all parties as to the shares and assets. The upshot of these valuations is that the price ultimately obtained for the share transaction as a whole cannot be said to be unfair and I do not understand this to be the plaintiff's case.

[54] Against these facts, I move to deal in more detail with the issues to be decided.

Issues

[55] The defendants raise, in the first instance, that the plaintiff has not proved its case in that it has been unable to show on the facts that minority protections in the MOI and the shareholder agreements have been triggered.

[56] They raise further that, even if the plaintiff has shown, on the facts, that the SOB Agreement fell within any of the categories of transaction that required unanimous shareholder approval, the approval of the scheme of arrangement carried statutory authority under section 115 of the Act and cannot be attacked on the basis pleaded.

[57] Estoppel is also raised as an alternative defence on the basis that the other points fail. In light of my findings it is unnecessary to consider this defence.

[58] I move to deal with the first issue being whether the plaintiff has proved its case.

Has the plaintiff proved its case?

[59] The plaintiff's case has involved the parties entering into expert and factual inquiries as to value of the plant, the nature of the business conducted by Maseve, the percentage of assets or undertaking disposed of, and whether the disposals under the SOB Agreement were such that they brought about a change in the business.

[60] In light of the unchallenged facts relating to the fact that the two part transaction was no more than a device to achieve payment up-front, these inquiries are, to my mind, redundant.

[61] The protections accorded to minority shareholders have, as their general purpose, the protection from asset stripping and the devaluing of the business of the company in other ways.

[62] In this case it has been established that the true intention of the SOB Agreement was neither to dispose of the plant in a vacuum nor to change the nature of the business of Maseve. Neither did it have either effect.

[63] A court must look at the substance and purpose of an agreement in order to determine its true nature for a particular purpose.[2]

[64] A court will give effect to the true intention of the device and not enter into artificial inquiries as to value and purpose which have no foundation in the reality of the transaction.

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[2] See:*Roshcon v Anchor Auto Body Builders and Others* 2014 (4) SA 319 (SCA) at 332-334; *Atlas Packaging v Palierakis* (JA108/14) [2015] ZALAC 97 (21 October 2015).

[65] In this case it was understood that the clear intention of the parties to the SOB agreement was not the sale of the plant, leaving the plaintiff a disadvantaged minority shareholder, but the ultimate and inevitable transfer of the shares in accordance with the scheme of arrangement.

[66] When this is accepted, it is clear that the plaintiff neither needed nor was it entitled to the minority protections. The fact is that the scheme entailed that the existing shareholders would not be the shareholders when the plant transaction was effected.

[67] The plaintiff's attempt at characterising the SOB Agreement as having separate force and effect has led to artificial inquiries as to value of the plant, whether the plant transaction amounted to a disposal of substantially the whole of the business, whether it amounted to a material change in the business and whether it was a material transaction outside the normal course of the mining business.

[68] It has resulted also in semantic remonstrations as to whether the new shareholders under the scheme could bring the agreement to force and effect by giving their subsequent approval. It led also to unhelpful assertions as to the significance of the difference between the protection clause in the MOI (clause 32) as opposed to the equivalent clause in the shareholder's agreement (clause 10.1) the latter referring to 'unanimous prior written consent' and the former only to 'unanimous approval' and how this difference should be squared.

[69] Much of the trial was taken up by unhelpful examinations and excursus as to the text of the agreements in issue, their date of execution and other circumstances in an attempt to discern whether they were two parts of the same 'unitary' transaction or two separate transactions.

[70] These inquiries do not serve the point. As I have said, the question turns on the true purpose of the transaction which was ultimately an arrangement for the transfer of the shares.

[71] Once it is accepted that the SOB Agreement was intended to be an integral and indivisible part of the offer and acceptance implicated in the ultimate acquisition of the shares by RB Platinum, the implication of the drag along clause is that the

share transfer could be stymied by minority dissent. The fact that the intention of the SOB Agreement was no more than to facilitate the end – which was the share transaction- means that the plaintiff was forced thereby to go along with all of it.

[72] Clearly, there may be cases where a transfer of assets takes place prior to or as part of a scheme of arrangement where such transfer is nefarious. This was not the case here.

[73] The true inquiry, in all instances, is the intention of the parties in the context of the scheme. In this case the share transfer could have taken place as a normal share transaction aided by the drag along clause. The purpose of the resort to the separate agreement was to obtain liquidity before the share transfer. It would serve no purpose to allow Africa Wide to invoke minority protections for the purpose only of attempting to scupper the scheme.

[74] The plaintiff's hypothetical argument to the effect that the plant transaction could not have been reversed if the share transaction failed, does not take account of the fact that it was never established that this was a possible outcome. In truth there was no reason for the share transaction to fail.

[75] This hypothetical approach also fails to take account of the clear intention of the parties as expressed in the term sheet and the fact that the terms of both agreements are interdependent.

[76] The plaintiff's also shows a cynical disregard of the predicament of PTM as its fellow shareholder who had paid all the bills of Maseve on borrowed money. It also seeks to ignore that Maseve was commercially insolvent.

[77] The somewhat arch suggestion in the cross examination of Mr Hallam that ' Maseve was not in the business of selling concentrator plants' ignores the fact that Maseve was insolvent and needed liquid funds if it was to survive.

[78] To my mind, an inevitable impression of 'sour grapes' is created when one sees that ultimately there was a bidding war to buy the company by Wesiswe – which, on any version, made an offer that was 'too little to late'.

[79] I thus find that the plaintiff has failed to establish its case on the evidence. This notwithstanding, I will deal also with the statutory plea in that it is independently dispositive of the case.

The statutory special plea

[80] The question posed by this plea is whether a scheme can be challenged outside of the machinery prescribed by the statute or, put differently, whether the plaintiff's claim which is based on common law is barred by the statute

[81] In answering this question, it is helpful to look at the purpose of schemes of arrangement and the evolution of the company law relating thereto.

[82] The concept of the '*Scheme of Arrangement'* is a feature of company law in many jurisdictions the world over. The scheme of arrangement evolved to take account of the difficulty of minority resistance to fundamental proposals made in the interests of a company and, essentially, as a mechanism for obtaining or compelling consent of the minority where it is withheld for reasons which are irrational or self-serving.

[83] Whilst its precise nature is difficult to define because each scheme has its own identity and hallmarks, a scheme generally involves the imposition of majority rule as a way to sustain the company's continued survival or assist in its profitability. A scheme can allow for fundamental changes, including the expropriation of shares.

[84] The statutory structure under sections 114 and 115 of the Act enables the coming into force of schemes of arrangement and, most significantly for this case, sets out, in some detail, how they may be attacked.

[85] The defendants argue that it would be counter to the purpose of the legislation – which is driven by the need for expedition - to allow access to the usual compendium of common law remedies to attack a scheme. In other words, the legislation accepts that time is of the essence in these matters and that scope for undue interference must be curtailed if schemes are to serve their commercial purpose.

[86] A central feature of the process is that the scheme becomes binding on all the members regardless of opposition thereto. Majority rule will be imposed provided there is no manifest unfairness.

[87] In the 1973 Companies Act, schemes of arrangement achieved this binding status by a process of court approval (sanctioning). Sections 311 and 312 of the 1973 Act provided that once so sanctioned schemes were binding on the company and its members.

[88] A court was enjoined by the provisions of section 311 to have regard to the margin of majority in the vote as well as the Master's report when deciding whether to approve a scheme or not.

[89] Under the 2008 Act the Board's right to implement the scheme does not depend on court sanction.

[90] Section 115(1) of the Companies Act provides in relevant part as follows:

'115, Required approval for transactions contemplated in Part—(I) Despite section 65, and any provision of a company's Memorandum of Incorporation, or any resolution adopted by its board or holders of its securities to the contrary, a company may not dispose of, or give effect to an agreement or series of agreements to dispose of, all or the greater part of its assets or undertaking, implement an amalgamation or a merger, or implement a scheme of arrangement, unless—

(a) the disposal, amalgamation or merger, or scheme of arrangement—

(i) has been approved in terms of this section...'

[91] The section goes on, in section 115(2), to describe the nature of the approval contemplated in section 115(1) as follows:

> '(2) A proposed transaction contemplated in subsection (I) must be approved—
>
> (a) by a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient

persons are present to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised on that matter, or any higher percentage as may be required by the company's Memorandum of Incorporation, as contemplated in section 64 (2).

(b) by the court, to the extent required in the circumstances and manner contemplated in subsections (3) to (6)" [My emphasis]'

[92] The defendants argue that the effect of subsection (b) is that, when a scheme of arrangement is approved under section 115(2), its legal effectiveness is derived from the terms of the statute and cannot be altered or in any way affected by rights which a party may have had were it not for the statute, for example in a general meeting that has nothing to do with the scheme or, as in this instance, by attacking another agreement that relates to the scheme. They argue that, subject only to the provisions of sections 115(3) to (6), the scheme comes into force on approval and may be implemented by the Board. Such approval, they argue replaces the binding effect the court sanction required under the 1973 Act.

[93] The current provisions require the approval of the court only if it is asked for in the limited circumstances contemplated in subsections (3) to (6).

[94] Under the statute, the company is entitled, without more, to implement a properly approved scheme of arrangement unless there is a challenge brought under the Act. Subsection (3) reads as follows:

"(3) Despite a resolution having been adopted as contemplated in subsections (2)(a) and (b) a company may not proceed to implement that resolution without the approval of a court if—

(a) the resolution was opposed by at least 15% of the voting rights that were exercised on that resolution and within five business days after the vote, any person who voted against the resolution requires the company to seek court approval; or

(b) the court, on an application within 10 business days after the vote by any person who voted against the resolution, grants that person leave, in terms of subsection (6), to apply to a court for a review of the transaction in accordance with subsection (7).'

[95] Thus, in sum - the statute provides that a scheme no longer requires court sanction in the normal course. The company is only placed in a position where it is forced to obtain court approval if the special resolution is passed by a margin of 85% or less of the voting members. If this majority is exceeded (ie 86% or more) there is no scope for requiring the company to seek court approval. If the threshold is exceeded and the company is required to seek court approval the company has 10 days to seek court approval for which it must bear the costs or it can decide to treat the approval of the scheme as a nullity[3].

[96] Thus, in the same way that the 1973 Act imposed reference to majority margins, the new Act prescribes the same considerations, albeit in a more formulaic way.

[97] An analysis of the difference between the approval inquiry under section 115(3)(a) and the review process under section 115(3)(b) is beyond the scope of this judgment but it seems to that a court would not grant its approval of the scheme under section 115(3)(a) if there was any basis for review raised. However, even if there were no grounds for review made out in the context of the approval process under subsection (3)(a) the court's approval could still be withheld from the company. As I have said, if the resolution is passed by a slim margin this will be a relevant factor which a court will weigh up in deciding on whether to approve the scheme or not.

[98] The statute precludes the review of the scheme transaction without the court's leave. And this must be sought within 10 business days.

[99] The respective five and ten day limits within which court approval can be required or leave to bring a review can be sought are peremptory and there is no provision for their extension. The effect of their expiration is akin to the prescription of the right to challenge the scheme. The intention of the statute is that there be commercial certainty.

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[3] Section 115(5).

[100] Sections 115(6) and (7) imposes on a disaffected shareholder who wishes to bring a review of the approval under subsection (2) the burden of first of showing that he is acting in good faith and that he has a cause of action. These constraining provisions read as follows:

‘115(6) On an application contemplated in subsection (3)(b), the court may grant leave only if it is satisfied that the applicant—
(a) is acting in good faith;
(b) appears prepared and able to sustain the proceedings; and
(c) has alleged facts which, if proved, would support an order in terms of subsection (7)

(7) On reviewing a resolution … the court may set aside the resolution only if—
(a) the resolution is manifestly unfair to any class of holders of the company’s securities; or
(b) the vote was materially tainted by conflict of interest, inadequate disclosure, failure to comply with the Act, the Memorandum of Incorporation or any applicable rules of the company, or other significant and material procedural irregularity.’(Emphasis added.)

[101] Thus , not only does the disaffected shareholder have to show that he does not bring the review as a delaying tactic, but he can only succeed in the review on limited grounds being manifest unfairness or a vote which is materially tainted by the type of unlawfulness contemplated in the section.

[102] Clearly the intention of this legislative structure is to weed out unjustified obstruction to the scheme and to do this at an early stage.

[103] The defendants submit that, on the clear language of section 115, there is no remedy for a dissenting shareholder other than these limited challenges.

[104] The plaintiff submits that section 115 does not expressly exclude reliance on existing common law rights and that any interpretation of section 115 such as to exclude any extra-statutory relief should be rejected on the basis of the presumptions against alteration of existing law and deprivation of existing rights.

[105] The plaintiff places reliance on the case of *Fedlife Assurance Ltd v Wolfaardt*[4] which involved a determination of whether the legislative scheme in the Labour Relations Act of 1995 precluded a common law claim for damages for breach of an employment contract. The court applied the presumption against legislative alteration of existing law and held that a statute will be construed as limiting existing rights only if that appears expressly or by necessary implication.[5]

[106] The plaintiff argues that there is no such express exclusion or implication in the statutory scheme in section 115 and that such an exclusion cannot be read into the statute. I disagree. In my view, the legislative scheme which emerges from sections 114 and 115 is such that its purpose appears exclusionary of alternative process.

[107] Like all modes of interpretation, the application of the presumption on which the plaintiff seeks to rely is now informed by the Constitution. The question thus is whether the statutory structure is consistent with the spirit, purport and objects of the Bill of Rights.

[108] The need for schemes of arrangement in company law is well established. Such schemes are widely recognized as being necessary to protect commercial rights. It seems to me that if schemes of arrangement were susceptible to the unconstrained vagaries of review litigation, its purpose – which is, at its core to preclude, minority interference – would not be achieved. By analogy with the position in the 1973 Act, once the resolution has been taken and a review of the resolution is not brought in terms of section 115, the resolution cannot be reviewed in the same way as court approval under the 1973 Act could not later be attacked on the basis of an illegality which was not raised during the approval process.

[109] In any event, this is not, as it was in *Fedlife,* a case where the section provides a remedy, leaving open the question whether other remedies remain. It is a

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[4] [2001] ZASCA 91

[5] At para 16. See also *Stadsraad van Pretoria v Van Wyk* 1973 (2) SA 779 (A) at 784 D-H)

case where the section authorises the implementation of the scheme unless the specified remedy is followed. Thus the position here is distinguishable from *Fedlife.*

[110] The question of whether the statute precludes extra-statutory forms of attack on an approved scheme has recently been comprehensively considered by the Western Cape Division of the High Court (per Binns-Ward J) in the matter of *Sand Grove Opportunities Master Fund Ltd and Others v Distell Group Holdings Ltd and Others*[6] (' *Sand Grove*').

[111] In refusing an application for the amendment of a case involving a scheme of arrangement which amendment sought to introduce a challenge to the resolution approving the scheme, the learned Judge said the following:

'The terms of s 115(7)(b) give as two of the grounds on which a court can review and set aside a resolution in terms of s 115(2)(a) its having been 'materially tainted' by (i) 'failure to comply with the Act (ii) any 'other significant and material irregularity'. Those grounds broadly encapsulate the very bases upon which the applicants seek to apply for declarators that the meeting was unlawfully constituted, and the decision taken at it accordingly void. It would defeat the purpose of the carefully framed restrictions subject to which a review challenge can be mounted under s 115 of the Act were the courts to entertain such challenges brought in a different format outside the limitations of the provision.[7] [Emphasis added]

[112] With respect, I agree with these findings and I align myself with the careful reasoning adopted by the learned Judge in relation to this question.

[113] The statutory machinery which brings a scheme into effect would be rendered unworkable if a court challenge could be brought, at any time, outside of the statutory machinery. The scheme would be implemented and rights flowing from that implementation brought into force. The question of how to reverse a transaction where rights had vested in the company and in third parties could prove intractable or even impossible.

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[6] *(6378/2022) [2022] ZAWCHC 46 (13 April 2022*).
[7] Id at para 94.

[114] I am persuaded that the Legislature, in formulating the machinery to bring into force and effect a scheme of arrangement, decided to forgo the court sanction provided for in the 1973 Act in favour of a less cumbersome and expensive process which allowed for the scheme to have force and effect unless challenged within the periods allowed and in accordance with the prescripts of the section.

[115] The plaintiff submits *Sand Grove* is wrong. It submits that this cannot be a correct interpretation of the section because that would mean that if fraud was later discovered in relation to a resolution, this fraud would not be actionable to set aside the scheme. This submission is akin to an exception proving the rule. A fraud would, of necessity, entail a breach of the Act. It seems also that such a fraud would involve the culprit acting *in fraudem legis* – which comes with its own set of principles. It is furthermore unhelpful to speculate on hypothetical scenarios involving fraud which are not in issue here.

[116] A challenge, which could have been brought under section 115, but is not brought under that section because there has been a delay in bringing it, cannot be permissible because it is framed as a common law challenge, when in substance it is a late challenge under section 115.

[117] The plaintiff has attempted to escape the statutory stranglehold imposed by subsection 115(3) by attempting to cast its attack as being, not against the scheme but against the SOB Agreement, which brings it back to its argument that the SOB Agreement is not part of the scheme.

[118] The argument goes that, because the SOB Agreement was not between Maseve and its shareholders it cannot be interpreted as part of the scheme. The consequence of this, says the plaintiff, is that the SOB Agreement cannot be dealt with under the Act and thus must be dealt with as a separate challenge to what it refers to as ‘the substantive invalidity of the scheme’. It contends that it does not seek to impugn the scheme on any of the grounds available under section 115 of the

Act. But, it argues, if the SOB Agreement is set aside this will have the consequence that the scheme fails. It is this consequence that it ultimately seeks.

[119] This is a semantic argument which pays no heed to the versatile nature of the concept of a scheme of arrangement.

[120] In terms of section 114(1) the board may propose any 'any arrangement between the company and holders of any class of its securities'. There is nothing in the section which prevents a proposed scheme being made conditional on an agreement entered into by the company with a third party or, for that matter, any other agreement or event which lends functionality to the scheme.

[121] The Act does not provide a definition of a 'scheme of arrangement'. The only element that is required to make a scheme a 'scheme of arrangement' under section 114 is that it must be 'any arrangement between the company and holders…of its securities'.

[122] The versatility of schemes of arrangement under section 311 of the 1973 Act received the approval of the Appellate Division (as it then was) in *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste.*[8] This case involved a scheme of arrangement entered into by the liquidators of an insolvent company. The Court noted:

'In die sakewereld het art 311 skemas veel nut en waarde en met die oog daarop behoort ons howe nie 'n enge vertolking aan die bepalings van die artikel te gee nie.[9]

[123] It is clear from this decision that the Court regarded schemes of arrangement as versatile commercial vehicles for a variety of transactions, and the Court cautioned against limiting their scope.

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[8] *1994 (2) SA 265 (A)*.

[9] See Namex at 294E — F per Goldstone JA; Smalberger JA and Nicholas AJA concurring. Translated: 'in the business world, section 311 schemes have much utility and value and in view of this, our Courts should not give a narrow interpretation to the provisions of the section.'

[124] A scheme of arrangement may contain reference to a variety of conditions which fall outside the scope of the actual agreement between the company and its shareholders as contemplated by the scheme. Whether this is the occurrence of an event or the conclusion of an agreement by strangers to the scheme, is irrelevant.

[125] The argument also fails to take account of the fact of the approval under the statute. Even on the approach of the plaintiff, the scheme was approved in purported compliance with the legislative requirements and it is accordingly enforceable by and against the scheme participants in terms of s 115(9) unless reviewed and set aside.

[126] As Binns-Ward J aptly put the position in *Sand Grove* when making an analogy with an administrative review - ' …the point is that the forms in which challenges to reviewable decisions can be brought are manifold. Whatever the form, in essence it remains an application for review.[10]

[127] regardless of how a challenge is cast, if it entails either directly or indirectly an attack against the resolution approving the scheme then it can only be brought under section 115.

[128] The corollary to the argument that the action is not a review of the resolution is that the resolution stands.

Conclusion

[129] I agree with the defendants that the plaintiff's case, properly stated, is that the resolution was wrongly adopted because it was 'materially tainted' by a failure to 'comply with the Memorandum of Incorporation or any applicable rules of the company.'

[130] The attack on the resolution falls squarely within the type of challenge contemplated in section 115(7)(b).

[10] *Sand Grove -n 5 -para 92.*

[131] The only avenue of review was under section 115(7)(b). The fact that such review was not brought means that it cannot be brought and is thus statutorily barred.

[132] In any event, and even if this were not the case, the plaintiff has not shown, on the facts, that the minority protections in the MOI and the Shareholders agreement are implicated by the transaction.

Costs

[133] There is no reason why the costs should not follow the result

Order

[134] I thus make the following order:

1. The plaintiff's claim is dismissed.

2. The plaintiff is to pay the costs of the first defendant and the second to fourth defendants, such costs to include the costs of two counsel, where employed, and the costs of qualifying prof Wainer and leading his evidence.

FISHER J

HIGH COURT JUDGE

GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 1- 2 March 2022

Supplementary Heads delivered: 29 April and 03 May 2022

Judgment delivered: 14 June 2022.

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