REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **96768/2016**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

~~28~~ 29/3/18

Date:

WHG VAN DER LINDE

29/3/18

In the matter between:

The Commissioner for the South African Revenue Service	Applicant
and	
Logikal Consulting (Pty) Ltd	First Respondent
Gerald Naidoo	Second Respondent
Rhyna Viljoen	Third Respondent
Eddie Malan	Fourth Respondent
L Mpofu	Fifth Respondent
ZE Mbuli	Sixth Respondent
GE Chirwa	Seventh Respondent
A Rana	Eighth Respondent

S Biswal	Ninth Respondent
Standard Bank of South Africa Ltd	Tenth Respondent
Companies and Intellectual Property Commission	Eleventh Respondent

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Judgement

Van der Linde, J:

Introduction

[1] This is an application under rule 42(1)(a) of the uniform rules of court, alternatively the common law, for the rescission of a judgment granted in the applicant's absence under case number 50356/16 on 29 June 2016, sanctioning an offer of compromise under s.155(7) of the Companies Act 71 of 2008 ("the Companies Act"). An order liquidating the first respondent (interchangeably, "Logikal") is also sought.

[2] The compromise was between Logikal and its preferent creditors only. There were six preferent creditors: five of them were employees of Logikal, each for the statutory preference[1] of three months' salary of R5 476.75 amounting in the aggregate to R27 383.73, and the sixth was the applicant (interchangeably, "SARS") with its claim of R6 273 434.12, the lion's share (R5 598 669.47) of which represented PAYE deducted by the first respondent but not paid over to the applicant.

[3] The individual bases of the application are multiple: that the applicant was not given proper notice of the meeting of creditors at which the compromise was voted; that the applicant as preferent creditor did not belong to the same class as the five employees with their

[1] S.98A of the Insolvency Act 24 of 1936.

preferent claims for three months' salary, so that their vote in favour of the compromise did not bind the applicant to the compromise; that in any event the applicant did not have the statutory power to approve of the proposed scheme of arrangement, because its claim was being prejudiced compared to those of the other creditors; that the applicant should have been but was not notified of the application for sanctioning; that there were material non-disclosures to the court when the application was moved; and that substantively there was no basis on which the court could have found that it was just and equitable to have granted the application.

[4] At a more profound and holistic level, the applicant argued that taking all these features into account, the scheme of arrangement was in fact a fraud on it, the individual bases referred to above being symptomatic of a larger strategy aimed at ridding the first respondent of the greater part of the applicant's claim.

[5] Some of these bases of attack were, in a recent similar application by the applicant, upheld by my colleague Raulinga, J who rescinded a judgment sanctioning an offer of compromise under similar circumstances.[2] The applicant submitted that the judgment was in point and binding on me. The first three respondents, who were the only respondents represented in the matter before me, submitted that that judgment was clearly wrong and that I was not bound to follow it.

[6] A short reference to relevant aspects of compromises and schemes of arrangement under the predecessor act, the Companies Act 61 of 1973, serves as an appropriate backdrop to the issues that arise in this application. Thereafter the essential facts are traversed, and after that the individual bases for the relief sought are discussed.

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[2] Commissioner of the South African Revenue Services v Cross Atlantic Properties (Pty) Ltd and Others (43580/2015) [2017] ZAGPPHC 554 (4 August 2017).

The statutory background to compromises under s.155 of the Companies Act[3]

[7] The previous Companies Act, Act 61 of 1973, originally provided in Chapter XII for *"Compromise, Amalgamation, Arrangement and Take-Overs."*[4] S.311(1) referred to *"...any compromise or arrangement (is) proposed between a company and its creditors or any class of them or between a company and its members or any class of them ..."*. It thus covered both compromises between a company and its creditors, and arrangements between a company and its members.

[8] The section had a rich history.[5] In 1870 in England the predecessor to the current legislation was applicable only to compromises or arrangements between a company and its creditors, and then only when the company was in liquidation. In 1900 it was extended to apply also to compromises or arrangements between a company and its members, but still only in liquidation.

[9] In 1907 it was extended also to cases where the company was not in winding-up. This was done to render arrangements possible in cases where the mere commencement of a winding-up would otherwise prejudice the company by involving forfeiture of leases, concessions, contracts and the like.

[10] Locally, s.103 of the Companies Act 46 of 1926 was the predecessor to s.311 of the 1973 Companies Act which, in turn, was in essence the same as s 206 of the 1948 English Act and s 425 of the 1985 English Act. With the establishment of the new Securities Regulation Panel and its jurisdiction over *"affected transactions"*, the new Chapter XVA, *"Regulation of Securities"*, was introduced by s.4 of Act 78 of 1989.[6] Ss.314 to 321 were repealed with effect from 1 February 1991, leaving ss. 311 to 313 to continue dealing with schemes of arrangements.

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[3] The current Act came into operation on 1 May 2011, and repealed the previous Act, except for Chapter XIV, *"Winding-up of Companies"*, which remains in force until repealed.
[4] Ss. 311 to 321.
[5] This is conveniently set out in, amongst others, Re Savoy Hotel, [1981] 3 All ER 646 (Ch) at 651g – 652e.
[6] With effect from 26 January 1990. Ss.440A to 440J.

[11]At base, the notion of a scheme of arrangement referred to in s.311 is that a court is empowered to approve a transaction between a company and its members or creditors, even where all of those affected by it do not agree. The threshold support requirement was three-fourths of the value of creditors (or the relevant class), or three-fourths of the votes of members (or the relevant class), present and voting (in person or by proxy) at meetings convened for this purpose. Once approved by the court, the transaction, or scheme of arrangement, was binding on all.

[12]The road to court approval, referred to as *"sanction"*, was first to apply to the court for leave to convene the relevant meetings at which the voting would take place. If the proposed scheme cleared the threshold, this would be reported to the court, who would then consider all aspects of the matter then before it, including the nature of any objections raised, before deciding whether or not to sanction the scheme of arrangement.

[13]There were a myriad of qualifications to these basic propositions, and a substantial body of case law and academic literature developed around many aspects not only of the statutory procedure but also of the conceptual scope of the power conferred upon a court. Courts were particularly concerned about the rights and interests of the dissenting minority, whether creditors or members.[7] They were astute to protect the rights of persons unaware of the compromise or arrangement, and they were concerned about the commercial morality of the proposal and with the interests of the general public.[8]

[14]Two other relevant features of the substantive law under the old s.311 regime were these. First, perhaps self-evidently, the section was not permitted to be used to attain what was in

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[7] Compare generally Henochsberg on the Companies Act, 61 of 1973, and Commentary, p601 ff. One such issue, falling into the latter category, was the debate about whether a scheme of arrangement that involved simply the buy-out of members, a so-called expropriation of shareholders, qualified as a scheme of arrangement capable of being sanctioned by a court. See generally the discussion in Ex Parte NBSA Centre Limited 1987 (2) SA 783 (T). Another issue was whether a compromise whereby the proposer took cession of creditors' claims against the company – less a nominal deduction – actually involved the company, this being a necessary prerequisite for the operation of s.311; see Ex parte Kaplan and Others NNO; In re Robin Consolidated Industries Ltd, 1987 (3) SA 413 (W).

[8] Blackman, Jooste & Everingham, Commentary on the Companies Act, vol 2, Juta & Co, 2002, p12- 47.

effect an unlawful result; *"The compromise or arrangement must be in line with the general law and must not be in fraudem legis."*[9] Allied to this notion was the accepted proposition that the compromise or arrangement could not involve the company in an *ultra vires* act.[10] In other words, the power of a court under s.311 of the previous Companies Act did not extend to legitimising conduct otherwise prohibited by the general law.

[15]An extension of this last proposition was the second relevant feature of substantive law: the pronouncement by the then Appellate Division on the question whether the court had the power to sanction a scheme of arrangement that implied that the revenue authorities were compromising their statutory duty to collect taxes. That issue came before that court in Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste.[11] The court commenced by discussing the templet of schemes of arrangement then in vogue in view of conflicting full court judgments concerning its legitimacy, and resolved the conflicting judgments.[12]

[16]The court then went on to discuss the position of the Commissioner for Inland Revenue, and the question whether a court could sanction a scheme of arrangement that involved the abandonment of part of a tax obligation owed to it. The court held that, provided it was clear that the CIR would in any event not receive a greater dividend in liquidation of the tax payer, nothing prevented a such claim being compromised to the recoverable extent, whether by the creditor's actual consent or by sanction of the scheme by the court.[13] In effect therefore, the court held that the revenue authorities did not have the power to compromise their statutory duty to collect taxes.

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[9] Blackman op cit, p12-7.
[10] Ex Parte NBSA Centre op cit.
[11] 1994 (2) SA 265 (AD); [1994] 2 All SA 111 (A).
[12] Op cit, p115 in fin, ff. The judgment, which was in Afrikaans, referred to a compromise between a company and its members interchangeably as a *"skema"* (a *"scheme"*) or a *"reëling"* (an *"arrangement"*), therefore not reserving the nomenclature of a *"compromise"* to the arrangement between a company and its creditors, and a *"scheme of arrangement"* to that between a company and its members.
[13] Op cit, p121.

[17]Salient aspects of the procedure that was followed in s.311 applications in the then Witwatersrand Local Division are set out in Ex parte Federale Nywerhede Beperk.[14] An important feature of the procedural law under s.311, involved that of notice to affected parties. The application for leave to convene meetings was brought ex parte, and if leave was granted, then of course the affected parties would be appropriately notified of the meetings.

[18]But the court confirmed that the order granting leave to convene meetings would also notify all affected parties of the date on which the report-back to court, meaning the application for sanction, would be made. Quoting from his unreported judgment in this regard in Ex parte Cape and Transvaal Printing and Publishing Co. Ltd,[15] Coetzee, J said (my emphasis):[16]

"It flows from what I have said that even a shareholder who attended the meeting and who voted in favour of the scheme could possibly be one who thereafter may persuade the Court not to sanction the scheme if—and I merely give an example which occurs to me—he should subsequently discover facts which he could put before the Court and which would indicate that the statement which accompanied the papers was an over-statement which influenced him to vote in a particular way. A fortiori would it be a case that those shareholders who did not vote are entitled to put their views before the Court on the full spectrum of matters which Courts are entitled to investigate when sanction of the scheme is sought. I think this consideration demonstrates the wisdom of established South African practice. I do not have sufficient warrant for deviating therefrom in this regard. When I say established South African practice, I do not allude to the practice relating to applications under sec. 103 specifically, but refer to it rather generally.

I must deal briefly with an argument against this view which Mr. Schwartz pressed strongly. He says that under the Companies Act there are numerous orders which the Court can make on ex parte applications without notice to affected shareholders or other persons, and that in this particular field, namely company law, different considerations apply—particularly where shareholders have so resolved in general meeting. He gives instances, resolutions to alter objects, to reduce capital and applications to domesticate foreign companies under sec. 203 of the Act as amended by sec. 8 of Act 90 of 1969. He referred me to Ex parte General Chemical Corporation Ltd., 1971 (2) S.A. 159 (W); Dage Properties v. General Chemical Corporation Ltd. and Another, 1973 (1) S.A. 163 (A.D.) and the judgment of VILJOEN. J., in the Court a quo in the last-mentioned case.

I think that the essential difference between a meeting of shareholders held under sec. 103 and a general meeting of shareholders who resolve that the company should act in a

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[14] 1975 (1) SA 826 (W); [1975] 1 All SA 228 (W).
[15] (W.P.A.—24.1.1973).
[16] At p236. I make no excuse for the comprehensive quotation.

particular way is obscured by putting his argument in this way. A sec. 103 meeting is an integral part of a statutory proceeding which results in the creation of a statutory régime. A general meeting of a company on the other hand functions as an organ of the company in accordance with different rules of procedure. When the company thereafter makes an application to Court in pursuance of such a resolution, it does what the members acting together as an organ, have already authorised it to do. The rule in Foss v. Harbottle applies and the Court will not ordinarily interfere with the internal management of a company. A contrario, the sec. 103 meeting is not an organ of the company and the Court is given express power to undo at the instance of any of the shareholders what the majority had done. It is perfectly clear to me that the interests of shareholders which a Court can protect, differ toto caelo in the two classes of cases mentioned and I should be careful not to use the one as an example of how to deal with the other. At all events, the judgment of HIEMSTRA, J., in the General Chemical Corporation case, supra at p. 160C-D shows that there were no persons in that case 'who could be interested' and that that was the sole reason why the learned Judge did not order the issue of a rule nisi."

[19]These remarks were made in the context of shareholders and arrangements between them and their companies, and not specifically in the context of creditors and a compromise between them and their debtor company. But the reasoning which I have underscored above applies equally. And the underlying twin thesis, that those potentially affected by the sanction of the compromise have the right to be heard, and that the court has a concomitant interest in being assisted by their views, resonates with an essential principle of our adjectival law, affirmed in the then Appellate Division, which is *"... that the Court should not make an order that may prejudice the rights of parties not before it."*[17]

[20]No good purpose is served by drawing nice distinctions between whether such a party needs formally to be joined, or whether mere notice would suffice; the founding concept is that the party must at least have knowledge of the proceedings at which an order may be given prejudicial to its rights and, taking modern developments into account, prejudicial to perhaps even its legitimate interests.[18]

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[17] Per FAGAN AJA in Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 651, quoted by Le Grange, J in Clegg v Priestley, 1985 (3) SA 950 (W); [1985] 3 All SA 339 (W) at 341.

[18] Fagan AJA op cit, at 659, with reference to the Appellate Division (emphasis supplied): *"... has consistently refused to deal with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests."*

[21]In conclusion then on this part of the background, I believe it can safely be said, on the basis not only of Ex parte Cape and Transvaal Printing and Publishing Co. Ltd but also the reported judgments in which objections were raised and heard on the sanctioning date,[19] that under s.311 the practice was firmly established that all affected parties were required to have knowledge of the report-back, the "sanctioning", date. This applied even to those creditors who voted in favour of the compromise, and thus a fortiori to those who did not vote.

The new legislative arrangement

[22]Under Act 71 of 2008 schemes of arrangements between companies and their members, and compromises between companies and their creditors, have been split up. The former is now regulated by s.114, part of Chapter 5, *"Fundamental Transactions, Takeovers and Offers"*, whereas the latter is regulated in s.155, part of Chapter 6, *"Business Rescue and Compromise with Creditors."*

[23]More fundamentally, as Cassim et al write, in *"an attempt to simplify the process, the role of the court under the Act has been reduced."*[20]Before there were two applications: first, for leave to convene the meetings at which the vote would be taken,[21] and second, if the vote is carried, the application for sanction.[22] Under the new Act, the convening of the meetings takes place without prior court sanction, and it is only upon subsequent application that the court has the power to *"...sanction the compromise set out in the adopted proposal..."*.[23]

[24]But, as the authors point out,[24] the fundamental reason for enlisting the court's assistance under these provisions, has remained the same:

"A compromise is appropriate in cases where the normal mechanisms for reaching an agreement between the company and its creditors or class of creditors are not available. It is intended to provide the machinery for overcoming the practical difficulty that a company,

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[19] Compare Ex parte NBSA Centre, op cit.
[20] Cassim et al, Contemporary Company Law, 2nd ed, Juta & Co Ltd, at p910, par 18.10.1.
[21] S.311(1).
[22] S.311(2).
[23] S.155(7)(b) of the 2008 Act.
[24] Cassim, et al, op cit.

and particularly a company with a large number of creditors, may experience in obtaining the individual consent of every creditor of the company to the settlement of their claims. It also prevents, in appropriate circumstances, a minority from impeding a beneficial scheme or from obtaining special advantages for themselves."

[25]The new legislative arrangement therefore did not detract from embedded principles of our law concerning notice, and joinder, of interested parties generally, but particularly not from the practice concerning notification of the report-back, or sanctioning, date when the court would be asked to sanction the compromise.

The essential facts

[26]The first respondent is an employer representative tax payer who pays PAYE on behalf of employees. It also pays UIF SDL. By December 2015 it owed the applicant R5, 598 669 in respect of arrear PAYE taxes, R73 600 in respect of UIF, and R601 164 in respect of SDL. On 1 December 2015 SARS and Logikal concluded a written Deferral of Payment Agreement whereby the arrears would be paid in six monthly instalments with effect from 30 December 2015 to 30 June 2016. Logikal defaulted.

[27]Before 30 June 2016, and on 23 June 2016, a meeting took place of Logikal's creditors to vote a compromise in terms of s.155 of the Act. The compromise involved only Logikal's preferent creditors, being the five employees and SARS. The vote was carried, and on 29 June 2016 the compromised was sanctioned. It is that order that SARS now applies to set aside.

[28]SARS did not know of the meeting. What it established afterwards is this. A copy of the notice convening the meeting had been sent by registered post to SARS, and the registered item was delivered to SARS at 10h20 on 22 June 2016, the day before the meeting. SARS say that having regard to its size, a notice received less than 24 hours before a meeting will not reach the relevant person in time; and as a fact, it did not.

[29]This is compounded by the fact that the notice was sent to SARS' offices in Alberton, whereas the relevant SARS offices are in Bronkhorst Street, Pretoria. SARS also have a dedicated email address to receive all notices relating to s.155 compromise proposals. That email address, sarsdebtmanagement2@sars.gov.za, is checked on a daily basis, and notices received are therefore brought effectively to the notice of the relevant individual.

[30]Earlier that year, on 18 April 2016, Ms Richie, a SARS employee, was attending a s.155 creditors' compromise meeting in an unrelated matter. The meeting was chaired by the fourth respondent's partner, Mr Nigrini, and the third respondent, Ms Viljoen, was also present. On this occasion Richie explained to both Nigrini and Viljoen that since SARS was such a large organisation, it had a dedicated central email address where all notifications for proposes s.155 compromises should be sent.

[31]This was not the first time Richie had so advised Viljoen. She wrote an email to Viljoen the year before on 14 August 2015: *"Kindly take note that all Section 155 Compromises should be sent to the following address: Sarsdebtmanagement2@Sars.gov.za. This address serves as the entry point for these notifications and will be forwarded to the person dealing with the case."*

[32]It is not disputed that Viljoen received this email, and in fact corresponded with Richie at that address. On 28 September 2015 Viljoen took the point that in that matter – also now taken in this matter – *"we are in compliance with the Companies Act and did give notice in terms thereof. Should you decide to apply for a recession (sic) of the orders we will oppose same."* It appears that there too the notice had been sent by registered post, as here.

[33]Against this background then here too SARS' dedicated email address was not used to notify SARS of the meeting of creditors. SARS contends that the intention of the first four respondents was to create a situation where SARS does not receive proper and timeous notice of the meeting of creditors.

[34] SARS explains that the less than 24 hours' notice was inadequate, given that within SARS a specially designated SARS internal committee is convened once a week to consider whether to reject or accept any proposed compromises affecting SARS. An agenda is prepared several days in advance to allow the participants time to study the documents.

[35]SARS submits that the compromise was not advanced on a bona fide basis, and that essential issues were not brought to the attention of the court when the application was made to sanction the compromise. It appears the application was made only four days after the creditors' meeting.

[36]The proposed compromise involved only two sets of preferent creditors, being SARS (R6, 075 000) and five employees for arrear salaries (in the aggregate, R27 383.73). No other employees were owed any salaries. In an affidavit of 25 May 2016 the second respondent ("Naidoo"), Logikal's director, explained that Logikal had R690 000 in cash. There is no explanation for why this amount was not applied to pay the arrear salaries of the five employees.

[37]The proposed compromise says that the assets of Logikal are R3, 456 868, and points to the Naidoo affidavit in support. It in turn says the assets are R3, 886 189. Its liabilities are said to be R9, 170 471. Naidoo says in his affidavit supporting the application to sanction the compromise: *"The Applicant is clearly factually and commercially insolvent."*

[38]SARS submit that the five employees' arrear salaries are clouded in substantial suspicion, and they should not simply have been accepted at face value. Had they been rejected, no preferent creditors would have voted and the proposed compromise would not have been accepted.

[39]SARS submit too that the fourth respondent ("Malan"), who chaired the meeting, should not have allowed the five employees to vote (they were represented by proxies submitted to Malan), because the proposed compromise involved no compromise at all of their claims. They were to be paid the full face value of their claims; it is only SARS that was required to

accept 20c/rand of its claim. The compromise required thus that 80% of SARS's claim be expunged, to the value of some R4, 860 000.

[40]SARS submits that Logikal is in fact incapable of earning an income. The proposed compromise does not deal with any existing contracts or with anticipated future business. It should therefore be wound up.

[41] SARS asks for a special costs order against the first, second and third respondents. It relies amongst others on the submission that the entire s.155 proposed compromise was a pre-planned scheme to obtain a compromise of tax debts through the Companies Act and that there was never an intention to give SARS notice of the creditors' meeting.

[42]Against this background I turn next to consider the individual points identified at the outset of this judgment.

<u>The applicant was not given proper notice of the meeting of creditors at which the compromise was voted</u>

[43] The first, second and third respondents ("the respondents") submit that proper notice as required by the Act and the regulations was in fact given. Regulation 7(1) says that a notice or document to be delivered for any purpose contemplated in the Act of the regulations *"may"* be delivered in any manner contemplated in s.6(10) or (11), or set out in table CR 3.

[44]S.6(10) provides that it is sufficient if a notice is transmitted electronically directly to that person. S.6(11) is not relevant. Table CR 3 provides for three methods: fax; or email; or registered post; or any other means authorised by the High Court. If registered mail is used, the deemed date and time of delivery is the seventh day following the day on which the notice was posted as recorded by a post office, unless there is conclusive evidence that it was delivered on a different day.

[45]The letter was posted on 9 June 2016, and so it would be deemed – absent conclusive evidence otherwise – to have reached the Alberton branch of SARS on the 16 June 2016, a public holiday, and thus the next day, 17 June 2016. If 16 June 2016 had not been a public

holiday, then a week's notice would have been given. Based on this provision, the respondents accordingly contend that there has been proper compliance with the statutory provisions.

[46]The background has been set out above. The uncontested evidence is that the addressee in this case expressly elected a method of notification, one that was evidently reasonable, and one that the third respondent had actually used before.

[47]In my view the proper approach to this issue is as follows. The notice provisions, like any other statutory provision, must be interpreted purposively.[25] The purpose here is that the notice should reach the addressee. The provisions of s.6(1) and of table CR 3 were intended to achieve that result. They were also intended, it must be accepted, to lay down methods of giving notice that are reasonably practicable from the despatcher's perspective; and so they are all methods that are well-known in normal commercial communication. They were selected too, I suggest, because in the run-of-mill vanilla case, they are likely to reach the addressee.

[48]And so the despatcher had a choice of one of the three methods. Self-evidently, those methods only availed if in fact the addressee possessed the required infrastructure. A fax could only be sent, according to the table, *"if the person has a fax number"*; and an email could only be sent, according to the table, *"if the person has an address for receiving electronic mail"*.

[49]The third option, that of sending the notice *"by registered post to the person's last known address"*, could by parity of reasoning only be used if it was apposite in the circumstances. Take the case of a government department; it can hardly be said to have *"a last known address"* if it has addresses in every city throughout the land. Registered post is thus an inappropriate method in that instance.

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[25] Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others, 2002 (2) SA 797 (SCA); Minister of Land Affairs v Slamdien, 1999 (4) BCLR 413 (LCC) 422 at [144]; general Council of the Bar and Another v Mansingh and Others, 2013 (3) SA 294 (SCA) at [10].

[50]And so with SARS. The addressee expressly communicated with the despatcher and explained why postage was inappropriate, and why instead a particular method (email) at a particular address was required. The addressee did not prescribe a method not identified by the legislature. Instead, it explained why postage, the third method identified by the legislature, was not appropriate, and it selected one of the remaining two methods identified by the legislature.

[51]Was the addressee's selection binding on the despatcher? In my view it was. The legislature was concerned, in s.6(1) and regulation 7, with designing a practicable, inexpensive, and likely successful way of ensuring that notices reach addressees. It was not concerned with the case where the addressee had communicated with and to the despatcher that only one particular (practicable and inexpensive) method would be effective. There would in that case be no purpose in insisting that the despatcher should retain the power to select a method of despatch which it knows will not be successful in that particular case.

[52]The despatcher deliberately did not comply with the addressee's request, and provided no rational explanation for its failure to have done so. In my view, the respondents' reliance on s.6(1) and regulation 7 accordingly does not in the circumstances avail it, and the respondents therefore did not give proper notice of the creditors' meeting to SARS. On this basis alone, the application must succeed.

[53] But if I am wrong in the view I take, it seems to me that at the very least the respondents ought to have disclosed the fact of the SARS selection of method of notification, and the respondent's disavowal of it, to the sanctioning court. In my view, that is a consideration relevant to the exercise by that court of its judicial discretion and, had it been done, the court would not have sanctioned the compromise without insisting that notice, at least of the sanction application, be given to SARS at its selected email address.

[54]On this basis the judgment and order cannot stand as the compromise was not approved by a meeting of creditors duly convened in terms of s.155(2) of the Act. In the alternative, the

judgment and order cannot stand as it was erroneously given[26] in the absence of a party that should have been notified of the application for sanction.

<u>The applicant as preferent creditor did not belong to the same class as the five employees with their preferent claims for three months' salary, so that their vote in favour of the compromise did not bind the applicant to the compromise</u>

[55] S.155(2) does not define what comprises a *"class"* as there envisaged. SARS submits that creditors whose rights are so dissimilar that it would not be possible for them to consult together with a view to common interest, cannot form a class.[27] The respondents do not cavil that this is the appropriate test for defining separate classes.

[56]But they submit that *"... preferent creditors of different hues and stripes may be grouped together as a class, and as the applicant and the fifth to ninth respondents are all preferent creditors, they form a class of creditors as contemplated in section 155 of the Act."*

[57] In terms of s.98A of the Insolvency Act 24 of 1936, after the preferent claims relating to the costs of execution, and before SARS' preference relating to tax, comes: *" ... to any employee who was employed by the insolvent ... any salary or wages, for a period not exceeding three months, due to an employee;..."*.

[58]The rights of the five employees and the rights of SARS were therefore not the same. The former rights enjoyed preference above the latter rights. On the face of it, although they are both preferent rights, the five employees were in a stronger position. Add to that the fact that their claims were in terms of the proposal not being compromised at all, while the claim of SARS was being expunged for its major part, and it is difficult to see how these six parties could meaningfully consult together with a view to their common interest. Indeed, it is difficult to conceive of any common interest at all.

[59]This was also the view of Raulinga, J in Cross Atlantic Properties. His lordship held on similar facts:

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[26] See rule 42(1)(a); Erasmus, Superior Court Practice, 2nd ed, D1-566.
[27] See Re Hawk Insurance Co Ltd, [2001] 2 BCLC (CA) at 518 [30] per Chadwick, LJ.

"27. The applicant and the employees of the first respondent could not have formed one class of creditors, and could not validly have met and voted as one class of creditors under section 155 of the Act. The procedure under section 155 cannot be invoked if the first respondent would have achieved the same objective of a compromise between the first respondent, its employees and the applicant without the court's intervention. Moreover, the applicant was precluded by sections 201and 203 of the Tax Administration Act, 28 of 2001, from entering into the alleged compromise; it thus was not a valid compromise under the section 155 of the Act."

[60] In my view, the respondents have thus not shown that their grouping together of SARS with the five employees into one class complied with the requirements of s.155(2) of the Act.

<u>In any event the applicant did not have the statutory power to approve of the proposed scheme of arrangement, because its claim was being prejudiced compared to those of the other creditors</u>

[61] Here the submission on behalf of SARS was that SARS was by law[28] precluded from supporting a compromise of a tax debt, *" ... if other creditors will be placed in a position of advantage relative to SARS."* It was submitted that *"compromise"* as defined in chapter 14 of the Tax Administration Act 28 of 2011, read with s.199 of that Act, particularly the fact that *"compromise"* is placed in quotes in s.119, covers a compromise under s.155 of the Companies Act; and thus under s.203 of the Tax Administration Act, a senior SARS official *"may not"* compromise any amount of tax debt if other creditors will be placed in the relative advantageous position as referred to above.[29]

[62]Raulinga, J held in Cross Atlantic Properties[30] in similar circumstances that SARS was in any event precluded from entering into the compromise. I am bound by that judgment and have not been persuaded that his lordship was clearly wrong in arriving at the conclusion to which he came. On this basis too the judgment and order cannot stand and, in fact, since SARS had

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[28] S.203 (d) of the Tax Administration Act 28 of 2011.
[29] See too the use of *"must"* in s.199(2) of the Tax Administration Act.
[30] At [27] op cit.

no power in law to compromise the claim, the judgment and order could not have been granted, and is a nullity.

The applicant should have been but was not notified of the application for sanctioning

[63] In Cross Atlantic Properties Raulinga, J held (emphasis supplied):

"25. Sanction orders under section 155 of the Act should not be moved or granted ex parte. It is a basic principle that a court does not ordinarily grant orders affecting the right of third parties without them being joined as parties to the proceedings. Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa 5th Ed pages 289/9. In Bowing NO v Vrededorp Properties CC and Another 2007{5) SA 391(SCA) at 21, the Court held:
"The substantial test is whether the party that alleged to be a necessary party for purposes of joinder has a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the Court in the proceedings concerned". In view of the fact that the applicant has a claim for over 7 million rands and is purported to be compromised to 20c in the rand by virtue of a court order which under section 155(8) purports to be final and binding on the applicant from the date of filing of the order with the first respondent, therefore the applicant had a legal interest which would ordinarily require it to be joined as a party in the sanction application. The fact that the applicant was not joined ought to have prompted the court not to entertain the sanction application.
26. In section 311 applications under the 1973 Companies Act, the courts required that notice be given to all interested parties of the date on which the application for sanction will be moved before the court, because such parties must have the opportunity to be heard and to persuade the court not to sanction the proposed compromise. Ex parte Federate Nywerhede Bepade 1975 (1) SA 826(W) at 835 C- F. There was therefore no good reason why the applicant was not given notice, by electronic means or registered post. Had the applicant been given notice, it would have opposed the application given the fact that it was owed an amount in excess of R7 million."

[64]As I have pointed out above, the practice followed in Johannesburg was that all creditors who were notified of the meeting of creditors were also necessarily notified of the report-back date. They were thus, self-evidently, entitled to oppose the application to sanction the compromise.

[65]The respondents submit that an ex parte application was the correct from and process to follow. But that submission skirts around the real issue, which was whether SARS should have been notified of the application that was being made to the court to sanction the

compromise. On that issue, given the pre-existing practice and SARS' interest, SARS ought at least to have been but was not notified of the application.

[66]Raulinga, J went further and held that in that matter SARS ought to have been joined as a party,[31] and that the ex parte form of procedure was inappropriate. I am bound by the judgment of Raulinga, J unless I am persuaded that my colleague was clearly wrong. To the contrary, with respect to my colleague, his judgment accords with accepted practice that has been followed for considerable time, at least insofar as notification is concerned. The submission by the respondents that the judgment was clearly wrong thus cannot be supported.

[67]Raulinga, J was dealing with a case in which, as here, there was only one party that was not, but should have been, notified. Joining one party is not procedurally inhibiting; joining a hundred may involve different considerations. That does not arise here, nor did it in the matter before Raulinga, J.

[68]I conclude, following Raulinga, J, that on the facts of this case SARS ought to have been joined as a party to the application to sanction the compromise. On this basis alone the order sanctioning the compromise cannot stand.

<u>There were material non-disclosures to the court when the application was moved</u>

[69] SARS submitted that the attention of the court was not drawn to the following feature arising from the financial statements of Logikal. In Naidoo's report of 5 May 2016 a shareholder's loan of R11, 591 218 is recorded as owing to Naidoo, and it is said to be repayable only at the end of the current year, on 31 December 2018. Yet only twenty days later, when the compromise is put up by Naidoo, no concurrent creditors appear. On the face of it, therefore, the R11m was repaid to Naidoo in the interim.

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[31] Compare Brand, JA in Bowring NO v Vrededorp Properties CC and Another, 2007 (5) SA 391 (SCSA) at [21]; Snyders v De Jager, [2016] ZACC 54.

[70]The likely source of the funds used to repay the shareholder's loan are the debtors. In the annual accounts of 5 May 2016, reflecting the financial position of Logikal as of 28 February 2016, accounts receivable (debtors) amounted to R 11, 021 289. Yet when the compromise was proposed, debtors were presented as amounting only to R942 845.10. It had reduced by R10, 078 443.

[71] There may be an answer to all this, but since the annual financial statements were not before the sanctioning court, it was not in a position to query this feature. But it should have been brought to the attention of the court, because a large amount being disgorged from the company for the benefit of the shareholder/director is obviously a matter for concern, particularly when the director says the company in factually and commercially insolvent, and the SARS debt is being expunged for its greater part.

Substantively there was no basis on which the court could have found that it was just and equitable to have granted the application.

[72]The issues that count under this head have, to some extent, already been dealt with, and there is thus some overlap. There is the fact that there was sufficient cash with which to pay the employees. There is the fact that a compromise and its sanctioning was not necessary since the other interested party, SARS, was a single entity with whom an agreement could have been reached without employing the coercing machinery of s.155.

[73]There is the feature that the SARS debt could not, in law, have been compromised. There is the feature that the SARS debt comprised, for the larger part, of taxes deducted by Logikal from its employees and simply not paid over to SARS.

[74]On the whole, it is difficult to conclude that had all these issues been brought to the attention of the sanctioning court, the order would nonetheless have been granted. In my view it would not.

Conclusion and relief

[75]The order of this court under case number 50356/16 granted on 29 June 2016, sanctioning an offer of compromise under s.155(7) of the Companies Act 71 of 2008 in respect of Logikal, cannot stand and must be set aside and rescinded.

[76]As to the first respondent being wound up, the respondents submitted that since the offer of compromise the financial position of the first respondent may have changed. SARS' retort was that no detail was furnished in this regard, and that there was no reason to adjudicate the matter on hypotheses.

[77]I agree. Naidoo, the first respondent's sole director, unqualifiedly proclaimed the factual and commercial insolvency of the first respondent. He knew that SARS would ask for the final winding up of the first respondent at this hearing. He was in a position to explain the up to date financial position of the first respondent but did not.

[78]The first respondent is unable to pay its debts as its history with SARS has shown, and it is accordingly liable to be wound up in terms of s.344(f) of the Companies Act 61 of 1973. It is also just and equitable to do so, having regard to the foregoing, as envisaged in s.344(h) of the said Act. The applicant asked for a final order but the position of potential creditors and employees is an unknown factor.

[79]The applicant asked for a special costs order. On reflection, I believe it is warranted, for three reasons. The first is the attitude taken by the first three respondents concerning the manner of notification of the meeting of creditors. They were explicitly told that SARS should be notified at the selected email address, and yet they ignored it for no apparent reason, insisting that the Act allowed it.

[80]The second is the attitude taken by them concerning notification to SARS of the application to sanction the compromise. Again, compounding their earlier attitude, the respondents for no apparent reason persisted in contending that there was no duty on them to have notified

SARS of the application. Had their attitude been different, the application to sanction the compromise would have had a different outcome.

[81]The third reason is the way the answering affidavit has been drawn. Instead on engaging paragraph by paragraph with the applicant's case, as is required,[32] the answering affidavit deal with the matter on a topic by topic basis, in declamatory style. That makes it difficult to assess precisely what the factual disputes are.

[82]In the result the following order issues:

(a) The order of this court under case number 50356/16 granted on 29 June 2016 by Madam Justice Khumalo, sanctioning an offer of compromise under s.155(7) of the Companies Act 71 of 2008 in respect of the first respondent, is rescinded and set aside.

(b) It is declared that the aforesaid order is not final and binding on the persons who were secured, preferent and/or concurrent creditors of the first respondent as at 29 June 2016 and, in particular, not binding on the applicant.

(c) The first, second and third respondents are directed to pay the costs of this application on the scale as between attorney-and-client, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel.

(d) The first respondent is placed under provisional winding-up in the hands of the Master of the High Court, Pretoria, and a rule nisi hereby issues, returnable on 27/6/18, calling upon all interested parties to show cause why the rule should not be made final.

(e) This order is to be –

(i) Served on the first respondent;

(ii) Served on every registered trade union that, as far as the applicant can reasonable ascertain, represents any of the employees of the first respondent;

(iii) Published once in the Government Gazette; and

[32] Wightman t/a JW Construction v Headfour (Pty) Ltd and another [2008] 2 All SA 512 (SCA);[2008] JOL 21447 (SCA); 2008 (3) SA 371 (SCA).

(iv) Published once in the Citizen newspaper.

WHG van der Linde
Judge, High Court
Johannesburg

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