IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE JOHANNESBURG STOCK EXCHANGE .....1st appellant

THE EXECUTIVE PRESIDENT OF THE JOHANNESBURG STOCK EXCHANGE .....2nd appellant

and

WITWATERSRAND NIGEL LIMITED.....1st respondent

BRUCE MALAM BROTHERS .....2nd respondent.

CORAM: CORBETT, VAN HEERDEN, SMALBERGER, JJA, NICHOLAS et KUMLEBEN AJJA.

DATE OF HEARING: 15 February 1988

DATE OF JUDGMENT: 22 March 1988

J U D G M E N T

CORBETT JA:

The first appellant in this matter is the Johannesburg Stock Exchange (the "JSE"), a stock exchange duly

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incorporated and licensed in terms of sec 11 of the Stock Exchanges Control Act 1 of 1985 ("the Act"). The second appellant is the executive president of the JSE, a Mr R A Norton, who is cited in his official capacity. The first respondent is Witwatersrand Nigel Limited ("Wit Nigel"), a gold-mining company on the Witwatersrand with its registered office in Bryanston. The second respondent is a Mr B M Brothers, a shareholder in Wit Nigel.

The shares in Wit Nigel are listed on the JSE. On 28 June 1987 and purporting to act in terms of sec 17(3) of the Act second appellant suspended the listing of Wit Nigel's shares. This eventually led to Wit Nigel and second respondent, on 27 July 1987, filing an urgent application in the Witwatersrand Local Division in which they cited appellants as respondents and claimed an order reviewing and setting aside the suspension of Wit Nigel's shares and other relief, which I shall detail later. The matter

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came before PREISS J, who made an order reviewing and setting aside the share suspension and also granted certain of the other relief claimed. Appellants (respondents below) were ordered to pay the costs of the application jointly and severally. With leave of the Court a quo appellants appeal against the whole of the judgment and order of PREISS J.

The facts and circumstances giving rise to the suspension of the Wit Nigel shares, as they appear from the affidavits filed in the application proceedings, may be summarized as follows. The executive chairman of Wit Nigel is a Mr P J George. He and others assumed control of the management of Wit Nigel in December 1983. The company operated a small gold mine. George's intention at the time was to revitalize the company and expand its gold production. To this end he wished to extend the company's capital base by increasing its authorized and

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issued share capital and by issuing shares in exchange for assets, both in order to diversify the company's interests and in order to acquire assets against which the company could borrow. In pursuance of these general intentions and in January 1984 the board of directors of Wit Nigel announced to shareholders a plan to increase the authorized share capital of the company from R2 200 000 divided into 8 800 000 shares of 25c each to R4 000 000, divided into 16 000 000 shares of 25c each by the creation of 7 200 000 new shares of 25c each, such new shares to rank pari passu with the existing shares. And at a general meeting of the company held in March 1984 a special resolution was passed increasing the authorized share capital in this way. At the same meeting an ordinary resolution was passed placing the unissued share capital of the company under the control of the directors until the next ensuing annual general meeting. This latter resolu-

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tion was repeated from year to year at subsequent annual general meetings.

The first transaction in terms of which this increased share capital was utilized consisted of the acquisition by Wit Nigel of 1 771 275 ordinary shares in a company known as The Afrikander Lease Limited ("Aflease") in return for which Wit Nigel issued 3 542 550 of its shares to shareholders in Aflease. This transaction had previously been authorised by a general meeting of shareholders of Wit Nigel passed on 22 August 1984.

During May 1985 and as a result of the expansion programme embarked upon during 1984 Wit Nigel found itself very short of cash assets with which to meet the claims of a large number of its creditors, including its bankers, who were pressing for the repayment of what was owed to them. In order to avoid liquidation Wit Nigel decided

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to sell its Aflease shares. This it did during June 1985 for a total consideration of R6,5 million. The purchasers were overseas investors. One block of 500 000 shares was sold to an English unit trust fund called "Save and Prosper".

Subsequently the financial position of Wit Nigel improved and the opportunity arose to re-acquire the shares sold to Save and Prosper when the latter decided to dispose of its entire portfolio of South African investments. This was done towards the end of 1986. In terms of the transaction negotiated Wit Nigel acquired the 500 000 Aflease shares in consideration of the issue of 1 million shares in itself.

Thereafter application was made to the JSE for the grant of a listing for the 1 million newly issued shares. In reply to this application a letter (dated

13 January 1987) was received by Wit Nigel from Mr D T Gair, the assistant general manager (listings) of the JSE, in which he stated that he had been directed to enquire from Wit Nigel —

> "whether there is any direct or indirect arrangement or understanding relating to a buy-back of the Afrikander Lease Limited shares in question which would indicate that this was not a genuine commercial transaction but one of accommodation".

The letter further indicated that the listing of the shares would be deferred pending receipt of a reply to this enquiry. On 15 January 1987 George replied to this letter. He interpreted the enquiry as suggesting that at the time of Wit Nigel's original "forced sale" of its Aflease shares for cash the parties arrived at a direct or indirect arrangement or understanding in terms of which Wit Nigel agreed to buy back the Aflease shares at some time in the future and at an agreed price;

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and went on to give the assurance (at some length and with reference to considerable circumstantial detail) that no such arrangement or understanding had ever been reached. This letter was placed by Gair before the listings sub-committee of the JSE, which resolved to grant the listing as from 21 January 1987. In a letter (dated 20 January 1987) notifying Wit Nigel of this decision Gair stated further:

> "I have been directed by my Committee to advise that in its view, there appeared to be a pattern building up regarding the exchange of Wit Nigel shares for Afrikander Lease shares and accordingly your company is now placed under notice, that no listing will be granted to shares issued by Wit Nigel in similar transactions unless the Committee is satisfied in advance that it is a commercial transaction and not one of accommodation".

During early April 1987 an opportunity arose for Wit Nigel to acquire shares in a mining company known as Springs Dagga Gold Mines Limited ("Springs Dagga")

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from a Johannesburg mining house, Johannesburg Mining and Finance Corporation Limited ("JMFC"). The matter was considered by Wit Nigel's board of directors at a meeting on 15 April 1987. The board decided to take up 3 215 000 Springs Dagga shares in exchange for the issue to JMFC of 1 995 000 Wit Nigel shares, which represented 14,99% of the existing issued share capital of the company. The transaction was made conditional on the JSE approving the listing of the new shares.

Rule 2.3 of section II of the Listings Requirements of the JSE (which I shall refer to again later) provides as follows:

> "All announcements other than Dividend Announcements and Interim Reports on behalf of listed companies, must be submitted for approval by the Manager (Listings) prior to publication.
>
> Such proposed announcements will be scrutinised by the Manager (Listings) in order to ensure, as far as may be possible in the circumstances, that

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all relevant facts are adequately disclosed in the clearest manner possible, and approval of the announcements will be granted on this basis.

Approval of announcements by the Manager (Listings) will not in any way reflect the Committee's views as to the fairness or reasonableness of the underlying transactions which are the subject of such announcements. Neither does such approval constitute a guarantee by the JSE or its officials of the accuracy of the contents of such announcements".

On 15 April 1987 Wit Nigel's stockbroker, Mr J Blersch of Ed Hern, Rudolph Incorporated ("Ed Hern"), acting on behalf of Wit Nigel, submitted a draft announcement to shareholders of this transaction to Gair, in his capacity as manager (listings) of the JSE, for approval in terms of rule 2.3. The draft announcement gave details of the transaction and indicated certain financial advantages to be derived from the acquisition of the Springs Dagga shares (and in this connection made reference to a proposed merger of Springs Dagga and Con-

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solidated Modderfontein Mines Ltd ("Modder"). The second paragraph of the announcement read as follows:

> "Application will be made to The Johannesburg Stock Exchange and The Stock Exchange, London for a listing of these additional shares in Wit Nigel. The transaction is conditional upon The Johannesburg Stock Exchange approving the listing of the new shares. This transaction would increase the issued capital of the Company by 14,99% to 15 295 407 ordinary shares of 25 cents each".

The submission of this announcement to Gair took place at a meeting held in Gair's office. At the meeting Gair told Blersch that he was unable to approve the announcement and was referring it to the next meeting of the listings sub-committee. He read out to Blersch his letter of 20 January 1987 and apparently indicated that he was not satisfied that the proposed transaction was not one of accommodation, ie he was not satisfied that it was indeed a commercial transaction to be concluded

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at arm's length. This intimation was conveyed by Blersch to George. George was concerned by what appeared to him to be an unreasonable attitude on the part of the JSE, since (according to him) the Springs Dagga deal was indeed a commercial transaction concluded at arm's length and did not involve any arranged "buy-back".

On his instructions and on 15 April 1987 Ed Hern addressed a letter to Gair in the following terms:

> "In response to your request that the Committee be satisfied by the Company that the acquisition of Springs Dagga Gold Mines Limited shares in exchange for new Witwatersrand Nigel shares is a commercial transaction and not one of accommodation, the Company has instructed us to advise you as follows:
>
> '1. the meaning of the term 'a transaction of accommodation' is not clear to the Company
> 2. the transaction is being entered into with a party that hitherto has had no interest in or association with the Company
> 3. the transaction is being entered into on an arm's length basis'".

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In reply to this letter the JSE (presumably in the person of Gair) orally advised Ed Hern that after further consideration and despite the assurances given by Wit Nigel he was not prepared to approve the announcement unless and until the following conditions were met:

(1) that the transaction be approved by the shareholders of Wit Nigel in general meeting, and

(2) that at the general meeting the allottees of the new shares would not vote.

(This notification was in accordance with a decision of the listings sub-committee taken at a meeting held on 21 April 1987.) When told of this decision by Ed Hern, George indicated that the conditions were unacceptable to Wit Nigel. George was of the view that there was no basis for the imposition of these conditions by the JSE. At George's suggestion a meeting was arranged between representatives of Wit Nigel (consisting.....

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sisting of George, second respondent and Blersch) and Gair in order to discuss the issue. This took place on 7 May 1987. According to George it was finally agreed at this meeting that Wit Nigel would submit a fresh application for approval of the announcement. Gair, on the other hand, says that nothing was resolved at the meeting, other than that George said that he intended making further representations to the JSE.

At all events, thereafter on 11 May 1987 George, on behalf of Wit Nigel, addressed a letter to Gair setting out in detail facts and arguments concerning the Aflease and Springs Dagga transactions and contending that there was no basis for regarding the Springs Dagga transaction as being one of accommodation and not a commercial transaction. The letter also dealt with certain statements by Norton to the press which were interpreted by George as being to the effect that the board of Wit Nigel, either

by its continued existence or by reason of the Springs Dagga deal, was "flouting the wishes of the shareholders".

The letter concluded:

> "I trust that the information I have now made available to you and your Listings Committee will clarify the matter and clear the way for approval of the Springs Dagga deal as originally contemplated by the Board of Wit Nigel.
>
> The Board of this Company looks forward to receiving a speedy reply to these additional representations".

To this letter the following reply was sent to George by Gair on 20 May 1987:

> "Thank you for your letter of the 11th May 1987 contents of which have been noted.
>
> In reply I have been instructed to repeat my Committee's decision that the second paragraph of the announcement be amended to include the statement that 'The transaction is conditional upon the Johannesburg Stock Exchange granting the listing of these additional shares and is also subject to the approval of shareholders in general meeting, at which meeting the allottees of the new shares will not vote' ".

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Upon receipt of this letter, Wit Nigel, having taken legal advice, decided to "restructure" the transaction. As appears from the second paragraph of the draft announcement to shareholders (quoted above) the original transaction had been made conditional on the Wit Nigel shares, issued in exchange for the Springs Dagga shares, being listed on the JSE. The transaction was now altered by the omission of any such condition and the draft announcement was amended accordingly.

The first two sentences of the second paragraph of the original draft were omitted and there was inserted at the end the following:

> "A formal application will be made to The Johannesburg Stock Exchange and the Stock Exchange, London for a listing of the additional shares in Wit Nigel. However, the transaction is not conditional upon such listing being granted".

Other minor alterations, flowing from the change from

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a conditional to an unconditional transaction and from further developments in the Springs Dagga/Modder merger were made, but otherwise the terms of the announcement remained substantially the same. The conditions which Gair had sought to impose were not included in the announcement.

This amended announcement to shareholders was published on Friday 25 June 1987. The suspension of the listing of the Wit Nigel shares on the JSE by Norton followed on Monday 28 June 1987. On the following day, 29 June 1987, the JSE announced the suspension by means of a news release reading —

> "In terms of Section 17(3) of the Stock Exchanges Control Act the President has exercised his powers and suspended the listing of the shares of Witwatersrand Nigel Ltd.
>
> The reason for the suspension is due to non-compliance of the JSE's specific instructions and requirements".

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On the same day Gair wrote to George a letter the body of which reads —

> "ANNOUNCEMENT TO WITWATERSRAND NIGEL SHAREHOLDERS REGARDING THE SPRINGS DAGGA TRANSACTION
>
> I refer to my letter dated 20 May 1987 and to an announcement by Witwatersrand Nigel Limited, which was not approved by the Stock Exchange and published in the press on the 25 June 1987.
>
> In view of the foregoing I wish to advise that in terms of Section 17(3) of the Stock Exchanges Control Act, the President has exercised his powers and suspended the listing of your Company's shares".

That day Gair also telephoned Mr Hern of Ed Hern and advised him of this development. Hern undertook to inform his client thereof immediately. The letter was apparently sent to Hern, who did not pass it on to Wit Nigel, but George concedes that he was advised of the suspension on 29 June 1987.

On 7 July 1987 Gair addressed a further letter

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to George, the relevant portions of which read —

> "I refer to my letter dated 29 June 1987 and am directed to advise that a special meeting of the General Committee will be held at 14h30 on Tuesday, 28 July 1987, to consider whether or not the listing of the shares of Witwatersrand Nigel Limited should remain suspended or, alternatively, whether the listing of the shares should be terminated.
>
> The meeting arises due to your company's non-compliance of the Johannesburg Stock Exchange's specific instructions and requirements.
>
> Should you wish to make representation to the above, the representative/s of your company should attend the meeting. The company will, however, not be entitled to be legally represented at the meeting".

Wit Nigel responded with a letter dated 14 July 1987

and addressed to the executive president of the JSE

in which it requested —

> "..... answers to the points listed below:
>
> 1. Exact details of the company's non-compliance with the Johannesburg Stock Exchange's specific instructions and requirements.

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2. In terms of what rule is legal representation not allowed.

3. What Rule, Directive, or Requirement did the company breach or break".

Norton replied by letter on the same date, stating —

> "I regret that I cannot enter into any correspondence which could pre-empt the hearing of the JSE Committee set down for the 28th July, 1987, and notice of which has been sent to you".

The application to the Court a quo was thus launched on the eve of the proposed meeting of the general committee of the JSE to consider whether the listing of Wit Nigel's shares should remain suspended or not or alternatively terminated. The application came before the Court on 27 July 1987, when an order was made by consent postponing the hearing and ordering the JSE to postpone the meeting of 28 July 1987 until 18 August 1987. At the postponed hearing on 17 August 1987 PREISS J heard argument and gave judgment immediately. At

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the hearing certain of the relief asked for in the notice of motion was abandoned or not pursued by the respondents and certain other relief had become unnecessary. In the end the Court granted prayers 2(a), 2(b) and 2(c) of the notice of motion and the relevant paragraphs of the order issued read:

> "1(a) Reviewing and setting aside the decision of the Second Respondent issued on or about 28th June 1987 suspending the listing of the shares of the First Applicant;
>
> (b) Declaring that the refusal of the First Respondent to approve a proposed announcement by the First Applicant bearing the date 20th May 1987 and being annexure "Z" to the attached affidavit, unless it contained the provision that:-
>
> > 'The transaction is conditional upon The Johannesburg Stock Exchange granting the listing of these additional shares and is also subject to the approval of shareholders in general meeting, at which meeting the allottees of the new shares will not vote'
>
> was in breach of the agreement between the First Applicant and the First Respondent.

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(c) Declaring that the First Respondent's requirement that the said announcement be amended to contain such provision was ultra vires the powers of the First Respondent.

2. That the Respondents pay jointly and severally, the one paying the other to be absolved, the costs of the application including the costs of the appearance on 27th July 1987 to be taxed on the basis of the appearance of two counsel".

The appeal raises the questions as to whether the Court a quo was justified in setting aside the decision of the second appellant suspending the listing of Wit Nigel's shares and in declaring the refusal of the JSE to approve the proposed announcement to shareholders and its requirement that it be amended in the manner indicated to be a breach of contract and ultra vires. This entails an enquiry into the relevant powers of the JSE and its office-bearers.

The JSE may be described as an association which conducts a market for the buying and selling of

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shares, debentures and other securities. It was founded in 1887 (see 26 LAWSA 3) and it is today the only such association in South Africa (see Herbert Porter and Co Ltd and Another v Johannesburg Stock Exchange 1974 (4) SA 781 (W), at pp 786 D and 791-2). It is licensed in terms of the Act, which regulates and controls it.

In terms of sec 11 of the Act it is a juristic person capable of suing or being sued in its licensed name and of acquiring property, etc. The executive authority which manages the affairs of the JSE is its committee and the chief executive officer, appointed by the committee, is its president. The committee is empowered to appoint sub-committees and the chairmen and vice-chairmen of such sub-committees and may delegate certain powers to them. One such sub-committee is the listings sub-committee, to which reference has already been made.

The constitution of the JSE and the regulations

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governing its powers and functions and those of its officers and committees are to be found in its Rules (a copy of which in booklet form constitutes part of the record in this appeal) and, to some extent, also in the Act. In terms of sec 12 of the Act the Rules have to conform, to the satisfaction of the Registrar of Financial Institutions, to certain stipulated requirements. Sec 12(4) of the Act requires that the Rules be published in the Government Gazette; and all proposed amendments thereto must be approved by the Registrar and similarly published (sec 12(5) and (6)).

The Act obliges the committee of the JSE to keep a list of the securities which may be dealt in on the stock exchange and generally forbids dealings on the stock exchange in securities not included in the list (sec 16(1)(a)). Sec 17, which provides for the removal or suspension of securities from or in the list,

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is important in the present case. The relevant portions of it will be quoted later in this judgment. The listing of securities is also dealt with in sec 10 of the Rules, which, inter alia, empowers the committee to prescribe from time to time the minimum requirements with which an issuer shall comply before each security issued by it is granted a listing. The rules, requirements and procedure for the listing of securities are contained in a booklet published by the JSE and entitled "Listings Requirements of the Johannesburg Stock Exchange", a copy of which also forms part of the record. Unlike the Rules, the Listings Requirements are apparently not required to be published in the Gazette (see Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others 1983 (3) SA 344 (W), at p 365 E). It is common cause in this case that the Rules and the Listings Requirements are contractually binding as between Wit Nigel and the

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JSE (cf also the Herbert Porter case, supra, at pp 788 B-C, 790 H - 791 H; see also Saunders v Johannesburg Stock Exchange 1914 WLD 112, at p 115).

Respondents' case against the appellants before us and in the Court a quo may be summed up as follows:

(1) That at all material times the only application put by Wit Nigel before the JSE was an application in terms of Rule 2.3 of section 11 of the Listings Requirements for the approval of its draft announcement to shareholders: at no stage up to the time when motion proceedings were initiated was there before the JSE any application for a listing of the Wit Nigel shares which were to be issued to JMFC.

(2) That in deciding whether or not to give his approval to the draft announcement all that the manager (listings) was obliged and entitled

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to have regard to was whether or not —

> "all relevant facts (were) adequately disclosed in the clearest manner possible".

(3) That the conditions which Gair, in his capacity as manager (listings), sought to have incorporated in the announcement, as set forth in his letter of 20 May 1987, related to the merits and substance of the transaction referred to in the announcement and in fact amounted to an imposed alteration of the terms of the transaction.

(4) That in purporting to impose these conditions Gair acted beyond the powers conferred upon him by Rule 2.3 and in breach of the contractual rights and obligations constituted by the Rules.

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(5) That in the circumstances, Gair having raised no objection to the announcement on the ground that it did not adequately disclose all the relevant facts in the clearest manner possible, Wit Nigel was entitled to proceed with the publication of the announcement as if approval had been given.

(6) That the suspension of the listing of Wit Nigel shares was ordered by Norton, in his capacity as president of the JSE, because Wit Nigel had published the announcement without approval.

(7) That in the circumstances the suspension was beyond the powers granted to the president in terms of sec 17(3) of the Act and should be set aside upon that ground.

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(The above summary is expressed in my own language, but it nevertheless constitutes, in my view, a reasonably accurate summary of respondents' case as presented to us and in the Court a quo.)

Respondents' case turns to a large extent upon the ambit of the powers conferred on the manager (listings) by Rule 2.3 of the Listings Requirements and on the president by sec 17(3) of the Act. As regards Rule 2.3, the Court a quo, relying upon the judgment of COETZEE J in the Herbert Porter case, supra, held that under the rule —

> "The manager's discretion is limited. He has what has been termed in a previous decision 'an auditing function'. He has to consider whether a proper disclosure has been made of the facts. He cannot impose conditions. He can refuse to approve the circular if the facts are not fully disclosed, but that is all".

Applying this approach to the facts, PREISS J stated —

> "In this application the first applicant submitted a circular for approval.

/ Whatever.....

> Whatever the merits for the underlying transaction, all that the manager (listing) was entitled to do was to see if it made adequate disclosure. As an accurate and adequate disclosure of the facts of the transaction it should have been approved. One thing that the manager could not do was to require that the first applicant refer the transaction to shareholders. This has nothing to do with the disclosure of the details".

The circumstances in the Herbert Porter case resembled those in the present case. In that case application had been made in terms of an earlier rule, similar to Rule 2.3, for the approval of a circular to shareholders giving details of a scheme which involved the creation and issue by a company of certain new shares and their listing in the secondary action of the JSE. The committee of the JSE objected to certain features of the underlying transactions referred to in the circular on the ground that they involved what was termed "back door listing" and refused to approve the scheme and the circular.

COETZEE J, who heard the application, granted an order declaring the JSE's refusal to approve the circular to have been improper and in breach of the agreement between the parties. In the course of his judgment the learned Judge drew a distinction between the approval granted to a circular and the granting of an application for a listing (see 1974 (4) SA at p 793 B - 794 A); and further held that in terms of the rule relating to the former what the committee did bore an analogy to an auditing function (p 794 A). If there was substantial compliance with the disclosure requirements in the rule or "any additional reasonable ad hoc requirement" which the committee might make in order to fill a gap in the information required by the shareholder, the committee could not withhold approval (p 795 B-C). On the facts of the case before him COETZEE J stated (at p 795 D-E):

/ "Employing .....

> "Employing their own jargon, one may say that the Johannesburg Stock Exchange have *in casu* perpetrated a 'back door' veto of the proposed transactions by withholding approval of the circular, instead of waiting for the 'front door' occasion when the application for a listing is made to it! .....Its failure or refusal to approve was a simple breach of contract....."

Though it dealt with a differently worded rule, the decision in the *Herbert Porter* case would appear to be in point and I am broadly in agreement with the conclusions of the Court *a quo* as reflected in the above-quoted passages from the judgment. In my opinion, the power vested in the manager (listings) by Rule 2.3 is to ensure that the proposed announcement makes proper disclosure of the relevant facts in accordance with the standard laid down by the rule. He is not concerned with the merits or demerits of the transaction or transactions to which the announcement relates. This is made clear by the penultimate sentence of Rule 2.3, which

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amounts to a disclaimer of any approval of underlying transactions by reason of approval of the announcement. Consequently, if the announcement makes adequate disclosure, he must approve it; and he cannot refuse to approve it because he has objections to or reservations about the underlying transaction. Nor can he seek to use his power of approval under Rule 2.3 to impose conditions or restrictions upon the underlying transaction, via "the back door", as COETZEE J put it. That can be done, if at all, only when an application for listing is made. In the present case this is precisely what happened. This was an application to Gair for approval of an announcement under Rule 2.3. At no stage was any application for a listing of the new shares made to the JSE. Gair did not appear to have any objection to the draft announcement on the ground of inadequate disclosure, but sought to impose certain conditions on the underlying transaction and demanded that the announce-

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ment be amended to include these conditions. This he could not do. And in purporting to do so he, in my view, exceeded the powers accorded to him under Rule 2.3 and was in breach of the contract constituted by the Rules.

It was submitted on appeal by appellants' counsel that the parties had, as he put it, "telescoped" the two procedures (ie the application for approval under Rule 2.3 and the application for a listing) and that the conditions imposed by Gair were in fact listing requirements and as such perfectly competent. This submission, which does not figure in counsels' heads of argument, was mainly founded on George's letter of 11 May 1987, which is referred to above, and more particularly on the concluding portion thereof, which is quoted above. It is true that in the letter George deals generally with the Springs Dagga transaction and in the concluding portion he speaks of

/"approval.....

"approval of the Springs Dagga deal as originally contemplated by the Board of Wit Nigel". But it is clear from the various exchanges between the parties that George canvassed these matters because they had been raised by Gair apropos the application for approval of the announcement to shareholders, not because he had any intention of "telescoping" the procedures. In any event, the procedures could hardly be "telescoped" when no listing application, in any shape or form, had been placed before the JSE. And in this connection it should be stressed that according to the booklet "Listings Requirements" a listing application would appear to be a fairly complex procedure involving, inter alia, the posting of a notice thereof on the notice board of the JSE, the submission of a formal listing application accompanied by statements and other documents and the publication of a pre-listing statement. In my view, there is no factual foundation

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for this alleged "telescoping", whatever the legal consequences thereof might be.

Appellants' counsel argued, in the alternative, that the decision embodied in Gair's letter of 20 May 1987, quoted above, in which the conditions are imposed, was a decision of the Committee of the JSE; and that this committee was entitled to take such a decision by virtue of sec 10.10.3 of the Rules, which reads —

> "10.10 The Committee shall have the sole and unfettered power —
>
> .....
>
> 10.10.3 to prescribe from time to time the minimum requirements with which an issuer shall comply while a security issued by it remains listed; ....."

It is clear from the Rules that the committee referred to is the committee of the JSE. This was accepted by appellants' counsel.

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There is, in my opinion, no substance in this argument. The power accorded to the committee by Rule 10.10.3 (which incidentally is duplicated by Rule 1.1.3 of section 1 of the Listings Requirements) appears to me, in its context, to relate to a general prescription pertaining to all issuers of listed securities (cf. Read v SA Medical and Dental Council 1949 (3) SA 997 (T), at p 1009; Goldberg and Others v Minister of Prisons and Others 1979 (1) SA 14 (A), at p 48 B); and I doubt whether it would comprehend an ad hoc decision directed at an individual issuer of listed securities. Be that as it may, the argument fails because it is clear on the facts that the decision in question was not taken by the committee of the JSE, but by the listings sub-committee. It emerges from Gair's affidavit that, as one would expect from the terms of Rule 2.3, all along the Wit Nigel application for the approval of the draft

/ announcement.....

announcement to shareholders was dealt with by Gair and the listings sub-committee. The original notification to Ed Hern of the conditions imposed was based upon a decision of the listings sub-committee. This is stated in terms by Gair in his affidavit and in fact the relevant minute is on record. The letter of 20 May 1987 was written after the meeting on 7 May 1987 and after receipt of the further representations contained in George's letter of 11 May 1987. In the letter of 20 May 1987 Gair stated in reply to the letter of 11 May 1987 —

> ".....I have been instructed to repeat my Committee's decision...."

This obviously has reference to the aforementioned decision of the listings sub-committee.

In the heads of argument filed by appellants' counsel a further contention was raised in regard to the procedure followed in respect of the relief sought which resulted in the grant of paras 1(b) and 1(c) of

the order of the Court a quo. It was said that the appropriate procedure was a review and not a declaration of rights. I have difficulty in understanding this submission, but fortunately I do not have to deal with it since it was abandoned at the hearing of the appeal.

It follows from the aforegoing that paragraphs (1) - (4) of respondents' case, as summarized above, are well-founded and that the Court a quo had good grounds for granting orders 1(b) and (c) — quoted above. I turn now to deal with the suspension of Wit Nigel's listing and the relief granted by the Court a quo in terms of order 1(a).

In suspending the Wit Nigel shares on 28 June 1987 the president of the JSE purported to act in terms of sec 17(3) of the Act. The relevant portions of sec 17 provide as follows:

/ "17. (1) .....

"17. (1) Notwithstanding any arrangement entered into under which securities may be dealt in on a stock exchange, the committee of the stock exchange may, subject to the other provisions of this section, if after investigation in accordance with the rules of the stock exchange the committee is of opinion that it is desirable to do so —

(a) remove from a list of securities referred to in section 16(a) any securities previously included therein, or suspend the inclusion in the list of those securities; or

(b) omit from a list of quotations of prices of securities issued for publication on the authority of the stock exchange, the prices of any securities previously quoted in the list: Provided that a transfer of the price of securities from one section of the list to another section of that list shall not be regarded as an omission as contemplated in this paragraph.

(2) No removal, suspension or omission referred to in subsection (1) shall be effected by the committee on a ground in respect of which the person who issued the securities has not had the opportunity of making representations

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to the committee in support of the continued inclusion of the securities or prices in the relevant list.

(3) A suspension or an omission referred to in subsection (1) for a period not exceeding 30 days may be effected by the president after consultation with the head of the department of the stock exchange dealing with the listing of securities.

.....

(5) The committee shall not remove securities from the list of securities in terms of subsection (1), unless the inclusion of those securities in the list has first been suspended in terms of this section.

..... "

The section thus makes provision for two separate powers of suspension of listed "securities" (which by definition includes shares). The first of these is vested in the committee of the stock exchange; the second in the president. The committee may suspend the listing of shares if after an investigation in

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in accordance with the Rules of the JSE the committee is of opinion that it is desirable to do so. The committee also has an alternative power to remove shares from the list on the same grounds, provided that their listing has first been suspended. It may not, however, remove or suspend on a ground in respect of which the issuer of the shares has not had an opportunity to make representations in support of their continued inclusion in the list. The president may suspend shares (he has no power of removal) for a maximum period of 30 days after consultation with the head of the department dealing with the listing of securities. If the committee decides to remove shares or suspend them for a period which together with any suspension under sec 17(3) exceeds 30 days, then the person who issued the shares is entitled to be furnished with the reason for the removal or suspension and may appeal against the decision of the committee

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to the board of appeal constituted in terms of sec 21, which may confirm, vary or set aside the decision and whose decision is binding upon both the committee and the issuer of these shares, subject to review by a court of competent jurisdiction (see sec 20). These provisions for the furnishing of reasons and for a right of appeal do not, it would seem, apply to a suspension of up to 30 days ordered by the president under sec 17(3).

Sec 17(3) clearly confers a discretion upon the president and, provided that his decision to suspend shares is taken after due consultation with the head of the listings department, it cannot be challenged in a court of law except upon what are known as review grounds. Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the "behests of the statute and the tenets of natural justice" (see

National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726 (A) at p 735 F-G; Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd 1976 (1) SA 887 (A), at p 895 B-C; Theron en Andere v Ring van Wellington van die N.G.Sendingkerk in Suid-Afrika en Andere 1976 (2) SA 1 (A), at p 14 F-G). Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated. (See cases cited

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above; and Northwest Townships (Pty) Ltd v The Administrator Transvaal and Another 1975 (4) SA 1 (T), at p 8 D-G; Goldberg and Others v Minister of Prisons and others, supra, at p 48 D-H; Suliman and Others v Minister of Community Development 1981 (1) SA 1108 (A), at p 1123 A.) Some of these grounds tend to overlap.

There is no explicit indication in sec 17(3) of how or according to what criteria or for what purposes the president should exercise his discretionary power to suspend. The suspension of the listing of a company's shares, even for a limited period of 30 days or less, can have very serious consequences for the parties concerned and it seems obvious that the Legislature did not intend the president to have carte blanche in this regard. The general tenor of the Act evinces a concern that a stock exchange licensed thereunder should conduct its business with due regard for the public interest

/ (see.....

(see eg. sec 8(1)(a) and sec 12(1)(n) and cf. the Dawnlaan Beleggings case, supra, at pp 361 F - 362 G). The public interest is served by the stock exchange, inter alia, controlling the securities which are bought and sold on the market which it conducts. This control is exercised by way of the listing system, which enables the committee to refuse a listing in respect of securities, if it so decides, and also to remove or suspend listed securities, if it is of opinion that it is desirable to do so. Where sec 17(1) speaks of "desirable" it means, in my view, desirable in the public interest, which in practice means, for the most part, in the interests of the company concerned or its shareholders or persons who might wish to purchase the shares on the stock exchange. The president's power of suspension under sec 17(3) is clearly a temporary measure designed to protect this public interest and it would no doubt be exercised in many instances where there was the prospect of an

/ investigation.....

investigation by the committee which might lead to the shares being removed from the list or suspended. Obviously such an investigation, which entails hearing representations, could take time and sec 17(3) provides a procedure whereby interim action can be taken.

I now come to the exercise of this power by Norton in the present case. I have described the background and the chain of events which led up to the suspension of the Wit Nigel shares. To complete the picture I should add that at about this time there were apparently certain internal dissensions within the company. It is not necessary to go into any detail, but it would appear that certain members of the board of directors were opposed to George and some of his policies and that during April 1987 an attempt was made to unseat him as chairman and as a member of the board. This was defeated in circumstances which were controversial.

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The reasons which actuated Norton to order the suspension of the Wit Nigel shares appear from the news release of 29 June 1987 and Gair's letter of the same date, which have been quoted above. In the news release the reason for the suspension is said to be "non-compliance of the JSE's specific instructions and requirements". Gair's letter is more explicit. It refers to the announcement to shareholders which was not approved by the JSE and was published in the press on 25 June 1987 and continues that "(i)n view of the foregoing..... the President has exercised his powers and suspended the listing of your company's shares". It is clearly to be inferred from these two statements that Norton suspended the shares because (in his view) Wit Nigel had failed to comply with the JSE's specific instructions and requirements by publishing the announcement to shareholders without including the amendment

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stipulated by Gair in his letter of 20 May 1987.

During the period 3 May 1987 to 30 June 1987 Norton made a number of statements to the press critical of what George did at the meeting called to unseat him; critical of the Springs Dagga deal, saying that the deal was "potentially an accommodation transaction" and that "We require that the transaction be voted on by all shareholders....."; and critical of Wit Nigel's "unacceptable and offensive action" which led to the suspension of its shares. These statements show that Norton drew no distinction between the announcement to shareholders and the merits of the Springs Dagga transaction and regarded the suspension as a disciplinary measure for George's non-compliance with the requirements of the JSE. One of the statements attributed to Norton by Business Day on 29 June 1987 (and not denied by him) was:

> "George threw down the gauntlet and now he will suffer the consequences".

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There are two points to be made in regard to this exercise by Norton of his power to suspend under sec 17(3). Firstly, in law the entire gravamen of Norton's complaint against George and Wit Nigel is without foundation. As I have held, Gair was not entitled to seek to impose the conditions which he did, nor was he entitled to require the announcement to be amended to incorporate reference to these conditions. It was held by the Court a quo (following the Herbert Porter case, supra, at p 795 G) - and in my view correctly - that consequently Wit Nigel was entitled to ignore the conditions and publish the announcement. In doing so the company did not breach any obligation owed to the JSE in terms of its Rules and Listings Requirements. The JSE had no valid cause for complaint. It follows that the whole substratum of Norton's decision to suspend the shares had proved to be non-existent. In the circumstances there is much to be said for the view

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that Norton's decision may be reviewed and set aside on the ground that it was based upon an irrelevant consideration. But it is not necessary to decide this, as there is, in my view, another valid ground for review.

This brings me to my second point, which is that, as I have shown, the purpose of the suspension was not to protect the public interest, as I have broadly identified it, but rather to discipline or punish Wit Nigel for disobeying what was thought to be a valid instruction given by Gair. It seems to me that this was an improper purpose — not one contemplated by sec 17(3) — and that this vitiates the decision taken by Norton to suspend the Wit Nigel shares and renders it liable to be set aside on review.

It was submitted in the heads of argument filed by appellants' counsel that where an investigation is pending in terms of sec 17(1)(a) the president may

exercise the power of suspension under sec 17(3) in order to protect the public in the interim. This proposition is unexceptionable, but it does not fit the facts of this case. When the suspension was ordered by Norton there was no investigation pending in terms of sec 17(1)(a), nor was this the avowed reason for the suspension. This submission was not pursued in oral argument before us; rightly so, in my view.

It is, however, argued by appellants' counsel that the announcement was defective and, therefore, in breach of contract because it failed to inform shareholders of the attitude of the manager (listings). I cannot agree. I fail to see why Wit Nigel should have been obliged to inform shareholders of an attempt by the manager (listings) to impose conditions and to amend the announcement which was beyond his competence. And, in any event, there is no suggestion that this is why the shares were

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suspended.

There were, as I have indicated, minor differences between the draft announcement submitted to Gair for his approval and that eventually published, but no point was made of this fact in argument and it does not seem to me to have any relevance.

For these reasons I hold that paragraph 1(a) of the order of the Court a quo was also well-founded.

The appeal is dismissed with costs.

M M CORBETT.

VAN HEERDEN JA)
SMALBERGER JA)
NICHOLAS AJA) CONCUR
KUMLEBEN AJA)