THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 553/97

In the matter between

SEFALANA EMPLOYEE BENEFITS ORGANISATION
Appellant

and

HASLAM, WILLIAM JEFFERY **First Respondent**
BARNETT, MICHAEL
Second Respondent
HENDERSON, RONALD BRYDEN **Third Respondent**
RAMSAY, WEBBER & COMPANY **Fourth Respondent**
THE 3 MEYER STREET TRUST **Fifth Respondent**

CORAM: Smalberger, Marais, Zulman, Plewman JJA et Melunsky AJA

DATE HEARD: 18 February 2000

DATE DELIVERED: 03 March 2000

Securities Regulation Code on Takeovers and Mergers - whether mandatory offer to acquire shares of minority in a company must be made where transaction which would have resulted in change of control no longer to be implemented.

JUDGMENT

MARAIS JA:

[1] The issue in this appeal is as novel as it is narrow. May shareholders in a company to whom a mandatory offer to purchase their shares would have had to be made if a transaction with another shareholder had resulted in the purchaser acquiring control of the company, sue for damages if no such offer is forthcoming because the purchaser repudiated the transaction, the selling shareholder accepted the repudiation and successfully claimed damages, and the purchaser did not acquire control of the company? Cameron J answered the question in the affirmative but granted leave to appeal to this court. His judgment is reported in 1998(4) SA 964(W). The circumstances of the case are set out there and repetition of the details is unnecessary. (References in this judgment to the Act, the Code and the panel are references respectively to the Companies Act 61 of 1973, the Securities Regulation Code on Takeovers and Mergers promulgated under GN R29 of 18 January 1991 and the Securities Regulation Panel established by sec 440 B of the Act. The references to the legislation are to provisions as they were at the relevant time. Subsequent amendments have been disregarded.)

[2] In essence what occurred was that appellant agreed to buy from Concor Holdings (Pty) Limited ("Concor") its "effective controlling share holding in Time Life (Insurance Limited) of 66%". The agreed price was R2,50 per share. It was common cause at least that the transaction was an "affected transaction" within the meaning of the definition of that expression in the Act and the Code, that the provisions of Chapter XVA of the Act and the Code were applicable and that, if it had been implemented, it would have been necessary for appellant to make a similar offer to respondents who were minority shareholders in Time Life. However, before any such offer was made, appellant repudiated the agreement. Concor accepted the repudiation and claimed damages. Appellant admitted that it was liable to Concor for the payment of damages for breach of the agreement. Appellant made no offer to purchase respondents' shares in Time Life. These and other facts were placed before the court *a quo* by way of a stated case and the questions posed were:

1. Whether or not on the agreed facts appellant incurred an obligation to offer to purchase the shares of respondents as minority shareholders in Time Life Insurance Limited at R2,50 per share pursuant to the provisions of the Act and the Code.

2. If so, whether appellant's failure to offer to purchase respondents' shares constituted a contravention of such obligation.

The learned judge answered yes to both questions.

[3] What led the court *a quo* to its conclusion was, in the main, the interpretation which it considered should be placed upon certain expressions in the statutory provisions which govern such situations (especially the definition in sec 440 A (1) of the Act of "security"), its "overall appreciation" of those provisions and "the principle that informs the Code as a whole, namely, that minority shareholders should, when an affected transaction takes place, receive equal treatment". There were additional considerations which were thought to support that conclusion but the dominant factors were those I have mentioned. The learned judge was alive to what might be thought to be an inconsistency between the Act and the Code's rationale and purpose and his interpretation of appellant's obligations under them. He acknowledged that the Code "is directed in the first instance at actual takeovers, not aborted takeovers", that the would-be acquirer of control " abandons the booty when he or she resiles from the deal", and that the minority shareholders "are left with the shares they bought in the company, controlled as when they bought into it". He posed the question: "Why, then, should the plaintiffs be permitted to leap onto the bandwagon that SEBO's [appellant's] admitted breach of its agreement with Concor has created?" Notwithstanding his

acknowledgment of the factors mentioned, he concluded that, properly interpreted, the Code did indeed permit the plaintiffs (now respondents) to benefit from the situation in order to bring about the equal treatment of shareholders which lay at its heart. That control of Time Life had not changed, nor would change, does not seem to have been regarded as important. More about that anon.

[4] What requires to be appreciated at the outset, so it seems to me, is that shareholders are not ordinarily entitled to equality of treatment when offers to purchase their shares are made. A purchaser who sets out to acquire control of a company, not in one fell swoop, but incrementally by way of a succession of purchases from different shareholders over an extended period of time, is under no legal or moral obligation to offer or to pay the same price from the inception of and throughout the exercise. It is only when the stage is reached at which an intended or proposed transaction will, if consummated, result in a change of control within the meaning of the Code that the hand of the panel is laid upon the transaction. That, in my view, is the plain meaning of the relevant provisions in the Act and the Code and I did not understand counsel for respondents to contest that interpretation of them.

[5] However, it does not necessarily follow that, whether or not the last

mentioned transaction does eventuate, or, if it has been entered into, is consummated, a mandatory offer must be made to purchase the shares of shareholders other than the particular shareholder or shareholders who are, or are to be, or were, privy to the particular transaction which has or will have, or would have had, the effect of control of the company passing to the offeror. The same can be said when the attempted takeover is (as here) not by way of incremental transactions over a period of time, but by way of a transaction or proposed transaction with a single shareholder relating to a number of shares sufficient to result in a passing of control. To assume that simply because such a transaction has been proposed or entered into, it follows inexorably that such a mandatory offer to other shareholders must be made, even although, for example, the proposed transaction has been rejected out of hand by the principal offeree (using the word offeree in its ordinary sense and not in its artificially defined sense in the definition of "offeree company" in Section B 1 of the Code), or if entered into, cancelled by mutual consent between offeror and principal offeree, would be, to my mind, a *petitio principii* and would beg the question which arises in the circumstances of this case.

[6] The learned judge *a quo* regarded it as unnecessary to consider questions of that nature and purported to confine his holding to the facts of this case, namely, an admitted repudiation by appellant of the transaction

which, if implemented, would have resulted in a transference of control, and an admission of liability to pay Concor damages for breach of the agreement.
When interpreting a statute one is not obliged of course to conjure up all 7
manner of fanciful and remote hypotheses in order to test the implications of a construction which one is considering placing upon it. However, where readily conceivable and potentially realistic situations spring immediately to mind it is a salutary practice to test the proposed construction by applying it to such situations. If the exercise produces startling (as opposed to merely anomalous) results, it may become clear that the proposed construction is not correct. This, in my view, is just such a case**.** If the legislation does not oblige an offeror in the hypothetical circumstances postulated in the examples given earlier to make an offer to other shareholders, it is difficult to see how it could have obliged appellant to do so.

[7] Common to all the situations under consideration is the stark fact that the sole rationale for the existence of an obligation to make a similar offer to other shareholders, namely, a transference of control, has fallen away prior to the making of an offer to them and there no longer exists any present prospect of the offeror acquiring control. Whose "fault" that is (and there may be none) is of no consequence; the fact of the matter is that shareholders who were in jeopardy of finding themselves locked into a company the control of which has changed without their concurrence, are no longer in such jeopardy. The mischief which the relevant provisions of the Act and the Code were enacted to counter is entirely absent. (See *Spinnaker Investments (Pty) Ltd v Tongaat Group Ltd.* 1982 (1) SA 65 (A) at 72 H - 73 A.)

[8] What warrant then is there for interpreting those provisions and the Code as imposing an obligation to make an offer to other shareholders? In considering the question I shall not lose sight of the possibility raised in *AG v Prince Ernest Augustus of Hanover* [1957] AC 436 by Viscount Simonds LC at 462 that "Parliament may well intend the remedy to extend beyond the immediate mischief". As against that, I bear in mind that it should not lightly be presumed that the legislature intended (to borrow the words of Bennion, *Statutory Interpretation*, 3 ed (1997) 725) "to apply coercive measures going wider than was necessary to remedy the mischief in question".

[9] Counsel for respondents (as did the court *a quo*) sought to found the existence of such an obligation upon an extensive interpretation of the word "acquires" where it occurs in Section F, Rule 8.1(a) of the Code, the words "acquisition" and "security" in their respective definitions in sec 440 A of the Act, and the principle, for which the Act and the Code provide, of fair and equal treatment of all shareholders in relation to affected transactions. Counsel for respondents made much of what he called the factor of timing and submitted that once a situation arose which fell squarely within the ambit of the Code, corresponding rights accrued and obligations arose and were

"crystallised". Without the consent of the beneficiaries of that crystallisation, nothing which happened thereafter could deprive them of those rights. When pressed, he acknowledged that the proposition might be too broadly stated and that in the hypothetical situations postulated earlier, and in others which could be conceived, the result might well be different, but argued that it would be unfair and would infringe the principle of equality of treatment to deny respondents the right to do what their fellow shareholder, Concor, had done, namely, sue for damages. 8

[10] It is of course so that there appears superficially to be inequality of treatment but the respective positions of Concor and respondents are not the same. If an offeror has contracted unconditionally to buy shares from a shareholder a repudiation by the offeror of the agreement may well entitle the offeree to damages. But a shareholder to whom no offer has been extended, let alone accepted, and with whom there is therefore no contractual privity, is in a very different position. The appeal to the principle of equality of treatment ignores the undeniable fact that the only circumstance which led the legislature to enjoin equality of treatment, namely, a change in control, is absent. In short, the provisions of the Act and the Code should not be construed in isolation and without taking sufficient account of the mischief which it was manifestly enacted to combat. A reading which gratuitously confers upon shareholders with whom there is no contract the same benefits as those with whom there is a contract when the position as shareholders of the former is quite unaffected by what has occurred and remains precisely

what it was, is, to my mind, unjustified and inherently unlikely to have been intended. Thus, even if it be assumed in respondents' favour that the mere conclusion of the agreement amounted to an acquisition of shares conferring control upon appellant within the meaning of the Code (a questionable assumption), the transaction envisaging a change of control was aborted before any offer had been extended to respondents, the rationale for the making of a mandatory offer for respondents' shares no longer existed, and it would have been pointless to require an offer to be made to them. No discernible legislative purpose would have been served by it.

[11] The learned judge thought that what he called "certainty regarding market dealings" and a perceived need for the "market" to be able "to judge that a takeover has occurred" were reasons to adopt the interpretation which he favoured. I do not find this consideration persuasive. The legislation is not concerned with the "market" in general; it is concerned with the rights of existing shareholders in a company in which a change of control has occurred or is to occur. In any event, there is no prohibition in the Act or the Code against an offeree seeking and obtaining the offeror's agreement to undo his, her or its acceptance of an offer or, against, where grounds exist, the cancellation by an offeree of a transaction, even although the implementation of that transaction is essential to the transference of control. Discernible certainty in that regard, thought to stem merely from the conclusion of an agreement, may therefore be illusory.

[12] In the present case the learned judge correctly rejected a submission by counsel for respondents that ownership of the shares sold by Concor and the voting rights which they carried passed to appellant upon conclusion of the agreement and satisfaction of the conditions upon which it was

dependent. The price was payable against transfer of the shares and it had not been paid. The shares were not transferred. Unlike the case of *Botha v Fick* 1995(2) SA 750 (A) in which the particular facts led the court to conclude that there was a reciprocal intention to pass and acquire ownership of the relevant shares *simul ac semel* with the conclusion of the agreement, there is no such indication here and the stated case does not contain any admission that such was the intention of the parties.

[13] However, the learned judge proceeded to hold that appellant had acquired ownership of at least "rights or interest ..... in respect of [the] shares" and that such "rights or interests" were, in terms of the definition of "security" in the Act and the Code, securities in their own right. He concluded that inasmuch as Rule 8.1(a) required a mandatory offer to be made when "securities" were acquired, the "rights or interests" were securities by definition, and because, whatever meaning be attached to the word "acquires", those "rights or interests" (and therefore "securities") had been acquired by appellant, appellant became bound to extend an offer to respondents. The short answer to this line of reasoning may well be that "rights or interests ..... in respect of ..... shares" are not what appellant agreed to acquire; it agreed to acquire the shares themselves and only if, in

the result, it did so or continued to intend to do so would the obligation to extend an offer to respondents have arisen. 11

[14] Be that as it may, for the reasons given earlier, I consider that even if there had been an acquisition of that nature, because it was cancelled prior to the making of any offer to respondents and without the *situs* of control having been disturbed in any way, no obligation to make an offer to respondents arose.

[15] There was some tentative discussion during argument of the possibility that control may have passed to appellant and remained with it until Concor's acceptance of appellant's repudiation simply by virtue of appellant having acquired the right to obtain ownership of the shares even although ownership of the shares had not yet passed. I know of no principle of law, and we were not referred to any, which, in the absence of anything more, would have entitled appellant, who had not yet acquired ownership of the shares or paid for them, to dictate to the seller how the seller was to vote pending the passing of ownership. Such a purchaser would obviously not be entitled to vote as if he, she or it were a registered shareholder.

[16] Lest it be thought that too little attention has been paid to the definition of "security" and too much given to the passing of control, it should be pointed out that the central thrust of the legislation is to regulate "affected transactions". The recurring use of the expression in sections 440 C (1), (2) and (3) (functions of panel) 440 K (1), (3) and (5) (compulsory

acquisition of securities of minority in affected transaction) and 440 L (restrictions in respect of affected transaction) of the Act and in explanatory notes 1 (a), (c) and the rules in Section A 2 (a) and Section C 1, 2.10, 2.11 of the Code, coupled with the use of the word "offer" in numerous rules in the Code, makes that plain. 12

[17] The word "offeror" is defined in the Act (sec 440 A (1)) and the Code (Section B 1) as meaning "any person or two or more persons acting in concert who enter into or propose any affected transaction" and "offer" is defined in Section B 3 of the Code as including "an offer in respect of an affected transaction, however effected."

[18] The definition in both the Act (sec 440 A (1)) and the Code (Section B 1) of "affected transaction" centres around a change in control. It reads:

"'affected transaction' means any transaction including a transaction which forms part of a series of transactions or scheme, whatever form it may take, which -

(a) taking into account any securities held before such transaction or scheme, has or will have the effect of -

(i) vesting control of any company (excluding a close corporation) in any person, or two or more persons acting in concert, in whom control did not vest prior to such transaction or scheme; or

(ii) any person, or two or more persons acting in concert, acquiring or becoming the sole holder or holders of, all the securities, or all the securities of a particular class, of any company (excluding a close corporation); or

(b) involves the acquisition by any person, or two or more persons acting in concert, in whom control of any company (excluding a close corporation) vests on or after the date of commencement of section 1 (c) of the Companies Second Amendment Act, 1990, of further securities of that company in excess of the limits prescribed in the rules;".

[19] "Control" is defined in the same provisions as meaning "subject to subsection (2) (b) [of section 440 A], a holding or aggregate holdings of

shares or other securities in a company entitling the holder thereof to exercise, or cause to be exercised, the specified percentage or more of the voting rights at meetings of that company, irrespective of whether such holding or holdings confers *de facto* control."

[20] "Specified percentage" is in turn defined as meaning "the percentage, or different percentages in respect of different types of companies, prescribed in the Rules for the purpose of determining control as defined above".

[21] What all this shows, in my opinion, is that the coming into existence of a transaction or proposed transaction which involves the acquisition of securities which will, if implemented, result in a change of control within the meaning of the Code is a necessary, but not a sufficient, state of affairs to trigger the obligation to make an offer to other shareholders. Its **continuing** existence is a *sine qua non.*

[22] Even General Principal 2 in Section C of the Code upon which reliance was placed by counsel for respondents as an indicator of the need for equality of treatment shows that to be so. It reads: "All holders of the same class of securities of an offeree company shall be treated similarly by an offeror." But an "offeree company" is by definition in both sec 440 A (1) of the Act and Section B 1 of the Code a company "the securities or part of the securities of which are or are to be the subject of any affected transaction or proposed affected transaction". And, as we have seen, the definition of "affected transaction" makes a change of control a *sine qua non* of an affected transaction.

[23] The appeal is upheld with costs including the costs of two counsel.

The

following order is substituted for the order of the court *a quo*.

1. On the agreed facts the defendant did not incur an obligation to offer to purchase the shares of the plaintiffs as minority shareholders in Time Life Insurance Limited at R2,50 per share pursuant to the provisions of the Companies Act and the Securities Regulation Code.

2. The defendant's failure to offer to purchase the plaintiffs' shares did not constitute a contravention of an obligation to make such an offer.

3. The plaintiffs are to pay the costs of the proceedings including the costs of two counsel.

R M MARAIS
JUDGE OF APPEAL

SMALBERGER JA)
ZULMAN JA)
PLEWMAN JA)
MELUNSKY AJA) CONCUR