THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case number : 601/05

In the matter between :

SENWES LIMITED	**FIRST APPELLANT**
SENWESBEL LIMITED	**SECOND APPELLANT**
VAALHARTS CO-OPERATIVE LIMITED	**THIRD APPELLANT**

and

JAN VAN HEERDEN & SONS CC	**FIRST RESPONDENT**
CHARLES ENGELBRECHT	**SECOND RESPONDENT**
LOUIS J FOURIE	**THIRD RESPONDENT**
CHARLES H DU P MARTINSON	**FOURTH RESPONDENT**
TIELMAN C L MEYER	**FIFTH RESPONDENT**
SUSANNA K OTTO NO	**SIXTH RESPONDENT**
PETRUS P V VAN WYK	**SEVENTH RESPONDENT**

CORAM : **SCOTT, BRAND, VAN HEERDEN, COMBRINCK**

JJA *et* SNYDERS AJA

HEARD : **26 FEBRUARY 2007**
DELIVERED : **23 MARCH 2007**

Neutral citation: This judgment may be referred to as *Senwes v Van Heerden & Sons* [2007] SCA 18 (RSA)

Summary: Vaalharts agricultural co-operative taken over by another co-operative, Senwes, which was subsequently converted into company – the plaintiffs, former members of Vaalharts, agreed to take up shares in Senwes in exchange for members' levies – whether transaction

constituted an 'arrangement' in terms of s 169A of Co-operatives Act 91 of 1981

JUDGMENT

BRAND JA/

BRAND JA:

[1] The seven respondents (plaintiffs), together with about 160 others, each instituted separate actions, on substantially the same grounds, against the appellants (defendants) in the Kimberley High Court. The actions of the seven plaintiffs were consolidated by agreement between the parties. The fourth plaintiff's action fell away when his estate was sequestrated. The remaining six then proceeded to trial. The plaintiffs' pleadings in the consolidated action still bear the scars of many amendments. They also retained numerous factual allegations pleaded in support of causes of action no longer relied upon at the trial. The trial was postponed on many occasions and it ran for an inordinate number of days. From its date of commencement on 19 February 2002 it stretched over more than three years. In the end the court *a quo* (Majiedt J) gave judgment in favour of the plaintiffs on 19 August 2005. The appeal against that judgment, which has since been reported *sub nom Jan van Heerden en Seuns BK v Senwes Bpk* [2006] 1 All SA 44 (NC), is with the leave of the court *a quo*.

[2] The issues between the parties will best be understood in the light of the background facts. The third defendant, Vaalharts Co-operative Limited, had been established as an agricultural co-operative in 1944. Until December 1996 all the plaintiffs were members of that co-operative. The first defendant, Senwes Limited, also started out life as an agricultural co-operative. During April 1997, it was, however,

converted into a public company pursuant to the provisions of the Co-operatives Act 91 of 1981 ('the Act').

[3] On 30 December 1996 Senwes and Vaalharts entered into a written deed of sale, ('verkoop van besigheid'), in terms of which Senwes essentially took over the business of Vaalharts as a going concern. It acquired all the assets of Vaalharts in exchange for most of the latter's liabilities. Some liabilities were, however, expressly excluded from the deal. Most prominent amongst these exclusions was the liability of Vaalharts towards its members for the contributions they had made to its members' fund. For the sake of brevity and convenience I will refer to these contributions as 'members' levies', though the term is not entirely accurate in that some contributions were in fact voluntarily made.

[4] These members' levies, which played the central role in the dispute between the parties, were governed by s 99 of Vaalharts' statute. In terms of s 99(1), members were obliged to contribute a certain percentage of the income they received from agricultural produce to the members' fund. Members were also entitled, however, to make additional voluntary contributions to the fund. At some stage in the history of Vaalharts, these voluntary contributions were quite popular as creating something in the nature of a pension fund for members.

[5] From the members' point of view, the disadvantage of these levies as an investment was the restrictions imposed on repayment. In substance, s 99(5) of the statute provided that members were only entitled to repayment upon termination of their membership and then only if the directors were of the opinion that the co-operative was in a financial position to do so. Probably as a result of this discretion whether or not to make repayment, levies were, for accounting purposes, looked

upon as akin to share capital and not as unsecured loans to the co-operative, which, from a legal perspective, they obviously were.

[6] During the negotiations preceding the final conclusion of the sale agreement with Senwes at the end of 1996, the directors of Vaalharts were understandably anxious to secure repayment of members' levies as part of the deal. The formula they eventually assented to, in principle, appears from a circular which was distributed by the directors of Vaalharts to all its members during November 1996. Since this document was annexed to plaintiffs' particulars of claim as 'annexure C', it was given that description in the court *a quo*. I propose to follow the same terminology.

[7] Annexure C starts with an explanation by the directors of Vaalharts as to why, as a result of the deteriorating financial situation of the co-operative, it was compelled to sell its business as a going concern to Senwes. The latter was, at the time, still a co-operative but on the verge of converting into a public company. It was pointed out in the document that, while the total sum of members' levies owing amounted to about R50m, the financial statements of the co-operative reflected an excess of assets over liabilities (excluding the members' levies) of only R44m. But for the fact that members' levies were regarded as akin to share capital, the co-operative would thus be trading in insolvent circumstances. Nevertheless, annexure C explained, Senwes was prepared, as part of the package deal offered, to absorb the shortfall and to afford the members of Vaalharts the full benefit of the members' levies standing to their credit in the co-operative's accounts.

[8] The package deal offered also included the condition that all members of Vaalharts should resign. Upon resignation, members would

be entitled to repayment of their levies. But, so annexure C stated, repayment would not necessarily be in the form of cash. Members were given two options: (a) to receive payment in cash; or (b) to acquire, in lieu of a cash repayment, shares in Senwes in exchange for two thirds of their levies and shares in Senwes' holding company, Senwesbel Ltd, in exchange for the other third. According to annexure C, the prices at which these shares would be allocated were calculated with reference to their nett asset value and amounted to R4,50 per share in Senwes and R6,00 per share in Senwesbel. Another important part of the package deal set out in annexure C was that Senwes reserved the right to resile from the transaction if it were not satisfied with the percentage of members who opted for shares. In fact, the deed of sale eventually entered into in December 1996 was expressly made subject to the suspensive condition in favour of Senwes that at least 95% of the members take repayment of their levies in the form of shares.

[9] Attached to annexure C was a resignation form. According to its content, the signing of this form by a member would constitute both resignation of membership and the formal consent by the member that the directors could proceed with the Senwes deal. It also called upon each member to indicate which of the two options available for repayment of his or her levies the member preferred. An election of the share option, so the form stated, would be regarded as an irrevocable mandate to the directors of Vaalharts to subscribe to the number of shares to which the member would be entitled in accordance with the agreed formula.

[10] All the plaintiffs signed the resignation form. Though the issue was not specifically canvassed at the trial, all available evidence seems to indicate that every member of Vaalharts did the same. About 90% of the

members, including the plaintiffs, chose the share option. This apparently satisfied Senwes not to invoke the 95% suspensive condition, but to go on with the sale.

[11] During 1997 effect was given to the terms of the sale. All assets and liabilities of Vaalharts (that were not excluded from the sale) were transferred to Senwes. Levies standing to the credit of members who opted for shares were ceded to Senwes. When Senwes became a public company in April 1997, these members received the number of shares in Senwesbel and Senwes that were allocated to them in accordance with the agreed formula.

[12] However, before long, remorse set in among some of the lastmentioned group. They felt that they had been misled by the representatives of Senwes, who were assisted in the process by the directors and the auditors of Vaalharts. Though a number of reasons for their dissatisfaction were advanced, their main complaint related to the value of the Senwes shares. While they were given the assurance, they said, that they were acquiring these shares at substantially below market value, it turned out that there was in fact a very limited market for the shares which, in the event, traded at a price far below R4,50 per share.

[13] In November 1999 the dissatisfaction led to the institution of proceedings by the plaintiffs and another 160 erstwhile members of Vaalharts against Senwes, Senwesbel and Vaalharts, as well as against the auditors of Vaalharts as the fourth defendant. Originally the plaintiffs relied on two alternative causes of action. Their main claim was for payment of the amounts credited to their levy accounts that had been transferred to Senwes, against return of the shares they had received.

They based this claim on the cancellation of a contract they allegedly concluded with Senwes, Senwesbel and Vaalharts. This claim was brought only against the first three defendants. In the alternative they sought to hold all four defendants liable in delict for the damages they suffered as a result of the Senwes transaction. Both claims were founded on allegations of negligent misrepresentations made on behalf of the defendants, including misrepresentations about the value of the Senwes and Senwesbel shares.

[14] Two years after the actions were instituted, the plaintiffs introduced a further alternative cause of action by way of an amendment to their particulars of claim. The gravamen of this new cause of action was that annexure C – inclusive of the resignation form – constituted 'an arrangement' between Vaalharts and its members as contemplated by s 169A of the Act which, in terms of the section, required the sanction of the High Court. Because this sanction had not been sought and obtained, so the amended particulars averred, the arrangement was *void ab initio*. The defendants' main response consisted of a denial that the transaction constituted an 'arrangement' between Vaalharts and its members as envisaged by s 169A.

[15] At the commencement of the proceedings the court *a quo* ordered, on application by the defendants, that the question regarding the applicability of s 169A be decided as a point *in limine*, prior to the hearing of evidence. In the event, the court decided the preliminary issue in favour of the plaintiffs. Consequently it declared both the 'arrangement' between Vaalharts and its members and the ensuing agreement of sale between Vaalharts and Senwes, void *ab initio*. The

court's reasons for this conclusion appear from its reported judgment (see paras 16 – 40 at 49g – 62h).

[16] The effect of the declaratory order of invalidity on the further proceedings turned out to be far-reaching. First, it led to the summary dismissal of the plaintiffs' claim against the fourth defendant, ie the auditors of Vaalharts. Seeing that the plaintiffs' claims against this defendant were squarely based on the proposition that they gave up their members' levies pursuant to a valid agreement, the court *a quo* found that these claims could no longer be sustained (see para 41 at 62h-63a of the reported judgment). Secondly, it caused the plaintiffs to reformulate their cause of action against the remaining defendants. What they now sought to recover was an unjustified enrichment on the part of the defendants on the basis of what the plaintiffs labelled the *condictio indebiti.*

[17] In answer to this new cause of action, the remaining defendants filed a special plea of prescription, contending that the plaintiff's claim based on enrichment had become prescribed before it was introduced for the first time in February 2002. In addition they filed a plea on the merits in which several defences were raised against the enrichment claim. But, as is evident from the outcome, neither the plea of prescription nor any of the defendant's answers on the merits found favour with the court *a quo*.

[18] For the most part the various issues decided by the trial court again arose on appeal. The question antecedent to all these issues is, however, whether the transaction between the plaintiffs and Vaalharts constituted 'an arrangement' between a co-operative and its members

as envisaged in s 169A of the Act. The material provisions of the section read as follows:

'169A. Compromise and arrangement between co-operative, its members and creditors

(1) If any compromise or arrangement is proposed between a co-operative and its creditors . . . or between a co-operative and its members, the court may, on the application of the co-operative or any creditor or member of the co-operative . . . order a meeting of the creditors . . . or of the members of the co-operative, as the case may be, to be summoned in such manner as the court may direct.

(2) If a compromise or arrangement is agreed to by –

(i) a majority in number representing three fourths in value of the creditors . . . present and voting either in person or by proxy at the meeting; or

(ii) a special resolution,

as the case may be, such compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors . . . or on the members, as the case may be, and also on the co-operative . . . .'

[19] It is clear that there are a number of transactions contemplated by s 169A with which we are not concerned. First among these are transactions arising from the relationship between a co-operative and its creditors. Though the plaintiffs were obviously also creditors of Vaalharts, they did not suggest that that relationship is of any consequence in the present context. The section also deals with 'compromises'. According to the authorities, these transactions presuppose a dispute between the parties (see eg *Ex Parte Cyrildene Heights (Pty) Ltd* 1966 (1) SA 307 (W) at 308G-H). Again it is not suggested that we are dealing with a transaction of that nature. The sole question for consideration is therefore whether there was 'an arrangement' between Vaalharts and its members, including the plaintiffs, which required the court's sanction in terms of s 169A.

[20] In identifying the transaction at issue, the court *a quo* adopted the plaintiffs' contention by referring to the transaction under consideration as the one 'embodied in annexure C' (see eg para 20 at 50d-g). It is clear, however, that this cannot possibly be correct. Annexure C did not in itself embody any transaction. It was no more than a circular ('omsendbrief') advising the members of Vaalharts of the reasons for a recommended transaction between their co-operative and Senwes and of the proposed terms of that transaction. What the document required of members, if they supported the proposal, was to sign the resignation form which was attached to annexure C.

[21] Signature of the resignation form brought about an agreement between the member and the co-operative. That seems to be the only transaction between Vaalharts and its members that can legitimately be considered in the present context. It will be remembered that members who signed the resignation form: (a), authorised the directors of Vaalharts to proceed with the proposed transaction with Senwes; (b) formally resigned their membership of Vaalharts; and (c) exercised an election whether they wanted payment of their levies in cash or in the form of shares. Did this agreement constitute an 'arrangement' under s 169A? The answer to this question will determine the outcome of the appeal.

[22] There appears to be no reported decision on the meaning of 'arrangement' in the context of s 169A of the Act. That in itself does not result in any serious disadvantage. The wording of the section was clearly taken over from s 311 of the Companies Act 61 of 1973 and the meaning of 'arrangement' in that section has indeed enjoyed judicial

consideration in a number of cases. As was pointed out in some of them, the term is not one of any great technical complexity. As a matter of ordinary English it is often used in everyday life. It usually bears a wide meaning, extending to transactions which would not even qualify as contracts.

[23] As was also stated in some of the cases, s 311 serves a useful purpose in the commercial world. The same can be said about s 169A. The potential application of the mechanism created by the section should thus not be hampered by affording a restricted meaning to the term of wide general import utilised by the legislature. So, for example, it was said by Trollip J – with reference to the similarly worded s 103(4) of the previous Companies Act 46 of 1926 – in *Du Preez v Garber: In re Die Boerebank Bpk* 1963 (1) SA 806 (W) 813C-D:

'*Gower on Modern Company Law, 2nd ed. pp. 554-5*, says that 'arrangements' covered by the section are of the widest character, and that "the only limitations are that the scheme cannot authorise something contrary to the general law or wholly *ultra vires* the company . . ."'

(See also eg *Namex* 1994 (2) SA 265 (A) 294E-F.)

[24] Nevertheless, it is clear that, despite these general statements, some restrictions have been imposed in previous decisions on the term 'arrangement' in s 311. The restriction most pertinent for present purposes derives from what Coetzee DJP described in *Ex Parte NBSA Centre Ltd* 1987 (2) SA 783 (T) 785G-H as the 'inner logic' of the section as gathered from its history and purpose. In this context he said (at 787D-H):

'The history and purpose of this section show that it is appropriate in cases where the normal mechanisms for reaching agreement between members on the one hand and the company on the other are not available due to the context of the particular scheme . . .
The corollary is that where the normal mechanisms are available the scheme of arrangement machinery is inappropriate.' (My emphasis.)

[25] The same principle appears from the judgment of Trollip J in *Cyrildene Heights (Pty) Ltd supra*. After referring to his own previous statement in *Du Preez v Garber supra* at 813C-D, regarding the wide general ambit of 'arrangement' quoted earlier, the learned judge continued as follows (at 309A-C):

'Despite that wide connotation I do not think that the offer in the present case has been shown to be an "arrangement". In terms of the offer the company is to pay most of its creditors in full and they are obliged and entitled to receive such payments. The remainder of the creditors are to be paid amounts which they have already agreed to accept in settlement. As the company is not in liquidation there is no difficulty in effecting such proposed payments. It is not shown, for example, that the bondholder cannot, because of the terms of its bond, be repaid in full at this stage. Consequently there seems to be nothing that requires to be arranged between the company and its creditors which necessitates the invocation of sec. 103 [of Act 46 of 1926].
I cannot therefore find that the so-called compromise is an 'arrangement'. That conclusion is supported by *Ex parte British Mining Supply Co. Ltd*., 1942 W.L.D. 96.'

(See also eg *Ex Parte Lomati Landgoed Beherende (Edms) Bpk* 1985 (2) SA 517 (W) at 521E-523D; Blackman, Jooste, Everingham *Commentary on the Companies Act*, Vol 2, Revision Service 2004, 12.4 – 12.5; Meskin *Henochsberg on the Companies Act* 601.)

[26] I can find no reason to depart from the principle thus established. On the contrary, in my view it accords with the dictates of logic and pragmatism. The machinery of the section was created for those arrangements which cannot conveniently be achieved by obtaining the consent of every individual member. Where the same result can be achieved by obtaining the consent of every member, the section does not apply.

[27] This is even more so where the agreement is subject to the condition that it will be agreed to by every member. In such a case, the court's sanction can serve no purpose and can only result in a costly and wasteful exercise. What is more, where the whole transaction is predicated on every member's consent, insistence on the court's sanction will enable those who agreed but, for some or other reason, no longer wish to be bound, to avoid the consequence of a perfectly valid agreement by subsequently invoking the provisions of s 311 or s 169A. That result is, in my view, untenable. After all, s 311 and s 169A were not intended to enable the court to save members from entering into bad bargains, but to facilitate transactions which would otherwise be practically impossible or at least very difficult to conclude.

[28] In the present case, the proposed offer by Senwes, as explained in annexure C, postulated that every member would sign the resignation form. In the event, this goal appears to have been achieved. On the authorities I have referred to, that excludes the transaction from the ambit of s 169A. What the plaintiffs are therefore trying to do is precisely what, in my view, s 169A was not intended for, that is, to avoid the consequences of a bargain which they have voluntarily concluded.

[29] The court *a quo* found support for its conclusion to the contrary in the argument that the transaction was intended to have a dramatic and far-reaching ('ingrypende') effect on the rights of members. They lost their membership of and their claims against one entity, so the court pointed out, in exchange for membership of a different entity (see para 35.5 at 59a-c of the judgment). Of course all this is perfectly true. But it seems, with respect, to miss the point. What lies at the heart of the transaction is the precondition that all this would only happen to members who gave their express consent to the transaction.

[30] The other argument that found favour with the court *a quo* was that the agreement between Senwes and Vaalharts made no provision for members who did not wish to resign. Of what entity, the court rhetorically asked, would they then be members? From whom would they claim repayment of their membership levies? (See para 35.4 of the judgment at 58j-59a.) The problem is that these questions were never pertinently asked of those who structured the transaction since the point *in limine* was decided before any evidence was led. Three rather obvious solutions, however, come to mind. The first is the pragmatic answer that in the end there were no members who did not resign. As a fact only those who agreed were therefore held bound. Any sanction by the court would thus have been redundant. The question as to what would have happened if every member did not agree, can therefore be of no more than academic interest. The second possible answer to this question is that, if every member did not agree, the arrangement would not have gone through. This prospect seems to be supported by the fact that the Senwes proposal was expressly predicated on the consent of every member. The third possible answer is that, in that event, Vaalharts could

have sought the court's sanction for the transaction in terms of s 169A, which would then have bound any non-agreeing member as well.

[31] In this court a further argument was raised on behalf of the plaintiffs as to why the agreement between Vaalharts and its members constituted an arrangement under s 169A. This argument relied on the provisions of s 169C of the Act. As I understood the argument, it was built on the proposition that s 169C automatically rendered every agreement between a co-operative and its members an 'arrangement' under s 169A if the purpose of the agreement was to facilitate the amalgamation of two or more co-operatives. There is no merit in this argument. Section 169C operates the other way round. It only applies to transactions which can properly be described as 'arrangements' under s 169A. If not, the fact that the transaction satisfies the other requirements of s 169C is of no consequence. The section does not apply. The question whether or not a particular transaction can properly be described as an 'arrangement' thus remains to be determined by reference to s 169A.

[32] Since the one issue underlying all the others must therefore, in my view, be decided against the plaintiffs, that, in reality, is the end of the matter. The court *a quo's* judgment cannot stand and the appeal must succeed. It is therefore not necessary to deal with any of the other conclusions arrived at by the court *a quo* and this court's failure to do so must not be construed as an endorsement of their correctness. However, I propose to deal with one of these to prevent any confusion in the future. It relates to the question of which party bore the onus with regard to the quantum of the plaintiffs' enrichment claims.

[33] The plaintiffs' claims were essentially for the amounts standing to their credit in the Vaalharts members' levy account at the time of the Senwes transaction. The defendants denied that these amounts represented the true value of the plaintiffs' claims against Vaalharts, inter alia, on the basis that, at that time, the assets of the co-operative were exceeded by its liabilities. The question then arose as to who bore the onus of proof in this factual dispute. The court *a quo* decided that the onus rested on the defendants (see para 47.5 at 70e-71f). Its underlying reasoning appears to have been that, because the defendants had admittedly derived some benefit from a transaction which was found to be invalid, they had to prove that the quantum of their enrichment was less than the amount alleged by the plaintiffs. The origin of this reasoning appears from the court's reference (at 70h-i) to *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 713H and to the following statement in *LAWSA*, 1st re-issue, Vol 9 para 80:

'The onus to prove non-enrichment (or diminution of enrichment) is on the defendant and should he fail to prove it, he remains liable for the full value of the property'.

[34] The flaw in the court *a quo's* line of reasoning in this regard is that the defence raised by the defendants in this case was not one of non-enrichment. A typical non-enrichment defence is to be found in *African Diamond Exporters*, upon which the court *a quo* relied. In that case the defendant admitted that it had received a specific sum of money *indebitum*, but then pleaded that it had subsequently parted with some of it without any fault of its own. It was against this background that Muller JA stated (at 713H):

'I agree . . . that, where a plaintiff has proved an overpayment recoverable by the *condictio indebiti*, the onus rests on the defendant to show that he was, in fact, not enriched at all or was only enriched as to part of what was received.'

[35] According to established principle, the point of departure in enrichment cases is that the onus rests on the plaintiff in respect of every element of the cause of action relied upon (see eg *Willis Faber Enthoven (Pty) Ltd v The Receiver of Revenue* 1992 (4) SA 202 (A) 224H-I). In *casu* the dispute related to the value of what was transferred *indebitum* in the first place. There is no reason why this should constitute an exception to the general rule. It follows that, in my view, the plaintiffs bore the onus of proving the value of their members' levies that were transferred to Senwes.

[36] Finally, it was contended on behalf of the plaintiffs that, if the appeal were to succeed, the matter should be referred back to the court *a quo* for the hearing of further evidence on their original causes of action in contract and in delict, based on allegations of negligent misrepresentation. It seems, however, that this contention is based on a misunderstanding of the rules of civil procedure. Barring a separation of issues, a plaintiff is required to prove the elements of all causes of action upon which he or she seeks to rely, albeit in the alternative. Since the plaintiffs in this case elected to pin their colours exclusively to the enrichment mast, there was no factual basis upon which the court *a quo* could hold in their favour on any alternative ground. In the view that I hold on the enrichment claim, it should therefore have dismissed the plaintiffs' claims with costs. That then is the order I propose to make.

[37] It is accordingly ordered:

(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The order of the court *a quo* is set aside and replaced with the following:

'(i) The plaintiffs' claims are dismissed with costs, including the costs of two counsel.

(ii) All costs previously reserved shall be costs in the cause.'

.....
F D J BRAND
JUDGE OF APPEAL.

CONCUR:

SCOTT JA
VAN HEERDEN JA
COMBRINCK JA
SNYDERS AJA