



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no. 280/2021

In the matter between:

CAPITAL APPRECIATION LTD

Appellant

and

FIRST NATIONAL NOMINEES (PTY) LTD

First Respondent

NEDBANK LTD

Second Respondent

ROZENDAL PARTNERS (PTY) LTD

Third Respondent

Neutral citation: *Capital Appreciation Ltd v First National Nominees (Pty) Ltd and Others* (Case no. 280/2021) [2022] ZASCA 85 (8 June 2022)

Coram: Ponnann, Plasket and Nicholls JJA and Tsoka and Phatshoane AJJA

Heard: 12 May 2022

Delivered: 8 June 2022

Summary: Companies Act 71 of 2008 – repurchase by company of more than five percent of its shares – s 48(8)(b) – transaction requires compliance with ss 114 and 115 – s 115(8) triggers appraisal right, in terms of s 164, in favour of dissenting shareholders.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Windell J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

Plasket JA (Ponnan and Nicholls JJA and Tsoka and Phatshoane AJJA concurring)

[1] First National Nominees Ltd (First National), the first respondent in this appeal, along with Nedbank Ltd (Nedbank), the second respondent, and Rozendal Partners (Pty) Ltd (Rozendal), the third respondent, brought an application in the Gauteng Local Division of the High Court, Johannesburg (the high court) in which Rozendal on behalf of First National sought an order that an appraiser be appointed in terms of s 164 of the Companies Act 71 of 2008 (the 2008 Act) to assist the Court in determining the fair value of its shares in Capital Appreciation Ltd (Capital Appreciation), as also, for detailed ancillary relief. Windell J granted the order sought. She later granted Capital Appreciation leave to appeal to this court.

The background

[2] First National is the registered holder of 18 039 829 ordinary shares in the issued share capital of Capital Appreciation (the shares). Although the shares are registered in the name of First National as nominee they are held on behalf of and for the benefit of Nedbank, the beneficial owner of the shares, as envisaged by s 56

of the Companies Act. Rozendal is a fund manager that manages a portfolio of assets within a fund scheme in terms of a portfolio management agreement. The shares form a part of the scheme's assets.

[3] In July 2019, Capital Appreciation issued a circular to its shareholders in which it notified them of its intention to repurchase 245 million of its shares from specific shareholders for a total purchase price of R196 million. The shareholders were advised that because the proposed repurchase would result in the acquisition of more than five percent of its issued share capital, it was subject to ss 48, 114 and 164 of the 2008 Act. They were also informed that the repurchase required their approval by means of a special resolution passed at a general meeting, in terms of s 115 of the 2008 Act.

[4] First National gave notice that it objected to the proposed repurchase, and that it would vote against the resolution. At the general meeting, it did just that. The special resolution was passed nonetheless by a large majority of shareholders. First National then made a demand that Capital Appreciation purchase its shares for fair value. Capital Appreciation made an offer of R0.80 per share, which First National rejected. The application was then launched for the high court to determine the fair value of the shares in terms of s 164(14) of the 2008 Act.

[5] It was at this point that Capital Appreciation changed tack and indicated for the first time that, in its current view, s 164 of the 2008 Act did not apply, with the result that First National had no right to an appraisal by the court of the fair value of its shares and no right to have its shares bought by Capital Appreciation at the price so determined. That was the sole issue that the high court was required to deal with, and the sole issue on appeal. It concerns the proper interpretation of the regime created by ss 48, 114 and 115 of the 2008 Act and whether, in this scheme, s 164 finds application.

[6] In the high court, Windell J found that s 164 applied and that First National had established its entitlement to the appraisal remedy provided by that section. She made a detailed order pertaining to the appointment and authority of an appraiser to

assist the court in determining the fair value of the shares and concerning the obligations of the parties in the appraisal process.

The purchase by a company of its own shares

[7] It was, for many years, a well-established principle of company law that a company was not able to purchase its own shares even if its memorandum or articles of association provided that it may. In *Trevor v Whitworth*,¹ the House of Lords, in articulating this prohibition, held that its purpose was the preservation of the capital of the company and the prevention of a company trafficking in its own shares: it should, after all, preserve and devote its resources to pursuing its core business, and not extraneous purposes. The rule was described by Coetzee J in *Unisec Group Ltd and Others v Sage Holdings Ltd*² as a common law rule so fundamental to company law that, for many years, it was not regarded as necessary to include it in the companies legislation. The rule was aimed at protecting two sets of interests. In *Sage Holdings Ltd v Unisec Group Ltd and Others*,³ Goldstone J explained that a company's capital had to be preserved, in the first place, in the interests of creditors and, secondly, to protect shareholders against directors who may have wanted to strengthen their hold on the company.

[8] The predecessor to the 2008 Act, the Companies Act 61 of 1973 (Act 61 of 1973) was amended by the Companies Amendment Act 37 of 1999 (the Amendment Act) to allow a company to purchase its own shares. This followed a trend in Britain, other Commonwealth jurisdictions and the United States of America from the 1970s onwards to relax the once strict prohibition.⁴ The Amendment Act substituted s 85 of Act 61 of 1973. In essence, it provided that, subject to a solvency and liquidity test, a company could 'by special resolution . . . if authorized thereto by its articles, approve the acquisition of shares issued by the company'.

¹ *Trevor v Whitworth* (1887) 12 AC (409 (HL) at 416-417.

² *Unisec Group Ltd and Others v Sage Holdings Ltd* 1986 (3) SA 259 (T) at 264H-265A.

³ *Sage Holdings Ltd v Unisec Group Ltd and Others* 1982 (1) SA 337 (W) at 349A.

⁴ See J L Yeats, R A de la Harpe, R D Jooste, Helena Stoop, Rehana Cassim, Joanne Seligmann, Lauren Kent, Richard S Bradstreet, R C Williams, Maleka Femida Cassim, Etienne Swanepoel, F H I Cassim and Katherine Anne Jarvis *Commentary on the Companies Act of 2008* (2018) (Vol 1) at 2-460 (hereafter referred to as Yeats et al (Vol 1) or Yeats et al (Vol 2)).

[9] The effect of the amendment was commented on by Malan J in *Capitex Bank Ltd v Qorus Holdings Ltd and Others*.⁵ He explained that while the residue of the capital maintenance principle may have been retained, one aspect of it – that a company could not purchase its own shares – was abolished, replacing the 19th century concept of capital maintenance with the contemporary safeguard of a solvency and liquidity test.

[10] Section 48 of the 2008 Act now enables and regulates the acquisition by a company or its subsidiary of that company's shares. In its original form, s 48 consisted of seven subsections. In 2011, the Companies Amendment Act 3 of 2011 added s 48(8). The underlying rationale for the safeguards contained in s 48 flow from the risks inherent in the repurchase of a company's shares. Yeats et al summarised these risks thus:⁶

'Because a repurchase is (i) a distribution of the company's assets and (ii) a re-organisation of issued share capital (and hence of ownership), achieved by (iii) a transfer to the company of its shares, it invites all the abuses associated with each of these three functions. Indeed, a given repurchase may involve abuses of all three of these functions. Repurchase thus has significance for corporate governance, takeover regulation, creditor protection, discrimination between shareholders, oppression of minorities, and the proper functioning of the securities market.'

[11] I now turn to the terms of s 48 that are relevant to this appeal, and the terms of the sections to which s 48 refers. I do so for an obvious reason: as this case concerns a repurchase by Capital Appreciation of its shares, s 48 is the necessary starting point in determining whether First National has the appraisal right that it asserts, arising from its opposition to the repurchase.

An application and interpretation of the relevant provisions of the 2008 Act

[12] Section 48(1)(a) provides that s 48 does not apply to 'the making of a demand, tendering of shares and payment by a company to a shareholder in terms of a shareholder's appraisal rights set out in section 164'. This means no more than

⁵ *Capitex Bank Ltd v Qorus Holdings Ltd and Others* 2003 (3) SA 302 (W) para 10. See too F H I Cassim 'The New Statutory Provisions on Company Share Repurchases: Critical Analysis' (1999) 116 SALJ 760 at 764-767.

⁶ Yeats et al at 2-463.

that the exercise by a shareholder of their appraisal right and the payment of the fair value of the shares by the company 'is not treated as an acquisition by a company of its own shares requiring compliance with the requirements of s 48'.⁷ Section 48 also does not apply to the 'redemption by the company of any redeemable securities in accordance with the terms and conditions of those securities'.⁸

[13] In terms of s 48(2)(a), 'the board of a company may determine that the company will acquire a number of its own shares'. The power is restricted in three ways. First, it is made subject to compliance with s 46, which requires inter alia that the board apply the solvency and liquidity test in s 4 and conclude on reasonable grounds that the company will satisfy that test after the proposed transaction. Secondly, s 48(3) prohibits the acquisition by a company of its shares, despite 'any provision of any law, agreement, order or the Memorandum of Incorporation of a company', if, as a result, 'there would no longer be any shares of the company in issue other than' shares held by one or more of its subsidiaries or 'convertible or redeemable shares'. Thirdly, in terms of s 48(8)(b), a decision by a company's board to acquire its own shares 'is subject to the requirements of sections 114 and 115 if, considered alone, or together with other transactions in an integrated series of transactions,⁹ it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares'.

[14] In this case, it is common cause that the repurchase of shares by Capital Appreciation exceeds the threshold set in s 48(8)(b). (That, one assumes, is the reason that Capital Appreciation set upon its original course, described above.)

⁷ Farouk H I Cassim, Maleka Femida Cassim, Rehana Cassim, Richard Jooste, Joanne Shev and Jacqueline Yeats *Contemporary Company Law* (2 ed) (2012) at 300 (hereafter referred to as Cassim et al).

⁸ Section 48(1)(b).

⁹ A 'series of integrated transactions' is defined in s 1 with reference to s 41(4)(b). That section, in turn, states that 'a series of transactions is integrated if-

- (i) consummation of one transaction is made contingent on consummation of one or more of the other transactions; or
- (ii) the transactions are entered into within a 12-month period, and involve the same parties, or related persons; and-
 - (aa) they involve the acquisition or disposal of an interest in one particular company or asset; or
 - (bb) taken together, they lead to substantial involvement in a business activity that did not previously form part of the company's principal activity.'

When the threshold has been exceeded, ss 114 and 115 find application. It is to those sections that I now turn.

[15] Sections 114 and 115 are part of Chapter 5 of the Act. This chapter is concerned, inter alia, with the approval of what it terms 'fundamental transactions'. These transactions are: the disposal by a company of the greater part of its assets or undertaking;¹⁰ amalgamations or mergers;¹¹ and schemes of arrangement.¹² Section 114(1) provides:

'Unless it is in liquidation or in the course of business rescue proceedings in terms of Chapter 6, the board of a company may propose and, subject to subsection (4) and approval in terms of this Part, implement any arrangement between the company and holders of any class of its securities by way of, among other things-

- (a) a consolidation of securities of different classes;
- (b) a division of securities into different classes;
- (c) an expropriation of securities from the holders;
- (d) exchanging any of its securities for other securities;
- (e) a re-acquisition by the company of its securities; or
- (f) a combination of the methods contemplated in this subsection.'

[16] Cassim et al make two points in relation to s 114 in the context of share repurchases: first, that the section is designed to cater for share repurchases of a particular magnitude – those that amount to 'wholesale fundamental changes to the company's capital structure'; and secondly, that it 'allows the board to propose and – if approved – to implement a scheme of arrangement which, among other things, might involve a share buy-back'.¹³

[17] When any of the transactions listed in s 114(1) are contemplated, the company must, in terms of s 114(2), retain the services of an independent expert to compile a report on the possible consequences of the proposed course of conduct. That report must, in terms of s 114(3), be furnished to the board by the independent expert who must also 'cause it to be distributed to all holders of the company's

¹⁰ Section 112.

¹¹ Section 113.

¹² Section 114.

¹³ Cassim et al at 304.

securities, concerning the proposed arrangement'. It is required, for instance, to 'state all prescribed information relevant to the value of the securities affected by the proposed arrangement';¹⁴ detail the 'material effects that the proposed arrangement will have on the rights and interests' of those holders of securities likely to be affected by it;¹⁵ and evaluate the 'material adverse effects of the proposed arrangement' any compensation that may be paid to those adversely affected and any other beneficial effects.¹⁶ In terms of s 114(3)(g), the independent experts must include copies of ss 115 and 164 in their report.

[18] Section 114(4) provides that s 48 'applies to a proposed arrangement contemplated in this section to the extent that the arrangement would result in any re-acquisition by a company of any of its previously issued securities'.

[19] Section 115 deals with the required approval for transactions contemplated in Part A of Chapter 5. Section 115(1) provides:

'Despite section 65, and any provision of a company's Memorandum of Incorporation, or any resolution adopted by its board or holders of its securities, to the contrary, a company may not dispose of, or give effect to an agreement or series of agreements to dispose of, all or the greater part of its assets or undertaking, implement an amalgamation or a merger, or implement a scheme of arrangement, unless-

- (a) the disposal, amalgamation or merger, or scheme of arrangement-
 - (i) has been approved in terms of this section; or
 - (ii) is pursuant to or contemplated in an approved business rescue plan for that company, in terms of Chapter 6; and
- (b) to the extent that Parts B and C of this Chapter, and the Takeover Regulations, apply to a company that proposes to-
 - (i) dispose of all or the greater part of its assets or undertaking;
 - (ii) amalgamate or merge with another company; or
 - (iii) implement a scheme of arrangement,
 the Panel has issued a compliance certificate in respect of the transaction, in terms of section 119(4)(b), or exempted the transaction in terms of section 119(6).'

¹⁴ Section 114(3)(a).

¹⁵ Section 114(3)(c).

¹⁶ Section 114(3)(d).

[20] In terms of s 115(2)(a), any of the transactions referred to in s 115(1) must be approved 'by a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised on that matter, or any higher percentage as may be required by the company's Memorandum of Incorporation, as contemplated in section 64(2)'. In terms of s 115(2)(b), a similar procedure must be followed by a holding company of a company that contemplates a share repurchase. In terms of s 115(2)(c), a transaction contemplated by s 115(1) requires the approval of a court in certain circumstances.¹⁷

[21] Section 115(8) refers expressly to s 164. It provides:

'The holder of any voting rights in a company is entitled to seek relief in terms of section 164 if that person –

- (a) notified the company in advance of the intention to oppose a special resolution contemplated in this section; and
- (b) was present at the meeting and voted against that special resolution.'

[22] Section 164 is headed 'Dissenting shareholders appraisal rights'. Yeats et al define an appraisal right as 'the right of dissenting shareholders, on the occurrence of certain events, to have their shares bought out by the company in cash, at a price reflecting the fair value of the shares'.¹⁸

[23] Section 164(2)(b) provides that if a company has given notice to shareholders of a meeting to consider a resolution to approve a transaction contemplated, inter alia, by s 114, it must include in that notice 'a statement informing shareholders of their rights under this section'. Section 164(3) provides that at any time before that resolution is voted on 'a dissenting shareholder may give the company a written notice objecting to the resolution'. The company is required by s 164(4) to notify dissenting shareholders who gave the company notice of their dissent, who did not

¹⁷ See ss 115(3) to (7).

¹⁸ Yeats et al (Vol 2) at 7-24.

withdraw their notice of objection and did not vote for the resolution, of the passing of the resolution within ten business days of its adoption.

[24] Section 164(5) provides that a 'shareholder may demand that the company pay the shareholder the fair value for all of the shares of the company held by that person if they had sent a notice of objection to the company; the company had adopted the resolution objected to; and the shareholder had voted against it and had complied with the procedural requirements of the section'.¹⁹ Such a shareholder must, in terms of s 164(7), make their demand by delivering a written notice to the company within 20 business days of receiving the notice that the resolution had been passed or, if no such notice had been received, within 20 business days of learning of the adoption of the resolution.

[25] The company is required by s 164(11), within five business days of receiving a demand, to 'send to each shareholder who has sent such a demand a written offer to pay an amount considered by the company's directors to be the fair value of the relevant shares, subject to subsection (16), accompanied by a statement showing how that value was determined'. Section 164(12)(b) provides for the lapsing of an offer if it has not been accepted within 30 business days of being made. If, however, the offer is accepted, the company must, in terms of s 164(13)(b), pay the shareholder the agreed amount within ten business days.

[26] Section 164(14) creates the right that is in issue in this case. It provides: 'A shareholder who has made a demand in terms of subsections (5) to (8) may apply to a court to determine a fair value in respect of the shares that were the subject of that demand, and an order requiring the company to pay the shareholder the fair value so determined, if the company has-

- (a) failed to make an offer under subsection (11); or
- (b) made an offer that the shareholder considers to be inadequate, and that offer has not lapsed.'

Conclusion

¹⁹ In terms of s 164(6), a failure to give the company a notice of objection is not held against a dissenting shareholder if 'the company failed to give notice of the meeting, or failed to include in that notice a statement of the shareholders rights under this section'.

[27] From the discussion above of the relevant sections of the 2008 Act, the following points stand out. In terms of s 48(8)(b), a share repurchase above a particular threshold is regarded as a fundamental transaction. That is achieved by making those transactions that meet the threshold prescribed in that section subject to ss 114 and 115. Yeats et al say that this simply means that 'ss 114 and 115 must be complied with'.²⁰ Cassim et al explain that the 'thinking behind s 48(8) appears to be to reconcile the requirements of s 48 and s 114, because why can the board alone make a share buy-back decision in terms of s 48, but a special resolution is required to approve a share buy-back in terms of s 114'.²¹

[28] The reference in s 48(8)(b) to s 114 establishes a direct link between share repurchases envisaged by s 48 and schemes of arrangement as envisaged by s 114 (1)(e). Section 115 prescribes how the fundamental transactions set out in s 114 are to be approved. In doing so, s 115(8) makes provision for dissenting shareholders to enjoy the benefit of an appraisal right in terms of s 164 – the 'right of dissenting shareholders, who do not approve of certain triggering events, to opt out of the company by withdrawing the fair value of their shares in cash'.²²

[29] From this summary, it is apparent that there is a direct connection between s 48(8)(b), via ss 114 and 115, to s 164, and the appraisal right contended for by First National. It is common cause that First National complied with the procedural requirements of s 115 and s 164 and thus is entitled to be paid the fair value of its shares by Capital Appreciation. Moreover, this approach accords with the recognition that in transactions of this nature and magnitude, it is the minority shareholders who require some measure of protection. Those statutorily ordained protections are afforded by the legislature and provided to minority shareholders in ss 114 and 115. Accordingly, Capital Appreciation's appeal must fail.

The order

[30] The appeal is dismissed with costs.

²⁰ Yeats et al (Vol 1) at 2-481.

²¹ Cassim et al at 304. See too Yeats et al (Vol 1) at 2-482.

²² Cassim et al at 698-699; Yeats et al (Vol 2) at 5-33.

C Plasket
Judge of Appeal

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