Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 6378/2022

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 25 March 2022
Date of judgment: 13 April 2022

In the matter between:

SAND GROVE OPPORTUNITIES MASTER FUND LTD	First Applicant
SAND GROVE TACTICAL FUND LP	Second Applicant
INVESTMENT OPPORTUNITIES SPC	Third Applicant
NEW HOLLAND TACTICAL ALPHA FUND LP	Fourth Applicant
PRELUDE STRUCTURED ALTERNATIVES MASTER FUND LP	Fifth Applicant

and

DISTELL GROUP HOLDINGS LTD	First Respondent
HEINEKEN INTERNATIONAL B.V.	Second Respondent
SUNSIDE ACQUISITIONS LTD	Third Respondent

JUDGMENT

BINNS-WARD J

[1] This matter concerns a challenge to a shareholders' special resolution approving a scheme of arrangement.

[2] Distell Group Holdings Ltd ('Distell'), cited as the first respondent in the proceedings currently before the court, proposed a scheme of arrangement to its shareholders. Heineken

International B.V. ('Heineken'), the second respondent, and Sunside Acquisitions Limited ('Newco'), the third respondent, were also parties to the proposal. Distell is currently a listed company. It has two classes of issued shares, ordinary shares and B class shares. The company's ordinary shares are traded on the Johannesburg Stock Exchange.

[3] In summary, the proposed arrangement entails, firstly, and as a preliminary step, the restructuring of Distell's business into two components, described in the proposal as the '*In-Scope Business*' and the '*Out-of-Scope Business*'. The first mentioned will encompass Distell's cider, ready-to-drink beverages, and spirits and wine business. The Out-of-Scope Business will comprise of the rest of Distell's current operation, including its Scotch whisky business. The arrangement provides for the In-Scope Business to remain as part of Distell, whereas the Out-of-Scope Business will be housed in an unlisted company, Capevin Holdings (Pty) Ltd ('Capevin'), which is currently a wholly owned subsidiary of Distell but will cease to be such when the scheme is implemented.

[4] The In-Scope Business is the primary target of acquisition by Heineken under the scheme of arrangement proposal. As mentioned, it is to remain in Distell, which will become a wholly owned subsidiary of the newly incorporated entity, Newco, currently wholly owned by Heineken and in which, upon implementation of the scheme, Heineken will hold a minimum of 65% of the issued share capital. Heineken will move its current South African and other sub-Saharan African operations[1] into the restructured business operation under Newco. Newco is, and will remain, an unlisted company. Distell will be delisted.

[5] The essential workings of the proposal were summarised in the introduction to the combined circular issued by Distell's independent board and by Heineken and on behalf of

[1] Represented, or to be represented, by Heineken South Africa (RF) (Pty) Ltd, Heineken South African Export Company (Pty) Ltd and NBL Investment Holdings (Pty) Ltd (Namibia).

Newco in terms of s 112 (3) of the Companies Act 71 of 2008 ('the Act') and the Takeover Regulations[2] as follows:

- Distell will declare a dividend *in specie* of Capevin Ordinary Shares for distribution to the Distell Shareholders on a one-for-one basis;
- Heineken will acquire Capevin Ordinary Shares from those Distell Shareholders who accept the Capevin Offer in exchange for cash;
- Newco will acquire all the Distell Ordinary Shares and Distell B Shares from the Distell Shareholders in exchange for (i) cash, (ii) Newco Shares or (iii) a combination of cash and Newco Shares in a fixed ratio at the election of each Distell Shareholder; and
- upon successful implementation of the Scheme of Arrangement, the Distell Ordinary Shares will be delisted from the JSE.

(The '*Capevin Offer*' was defined in the circular in relevant part as '*the offer by Heineken to acquire the Capevin Ordinary Shares to be acquired by Scheme Participants pursuant to the Capevin Distribution for the Capevin Cash Consideration*'. The '*Capevin Distribution*' refers to the Capevin shares to be received by Distell shareholders in the forementioned distribution *in specie* of Capevin ordinary shares.)

[6] The stipulated cash consideration receivable in terms of the proposal for Distell ordinary shares is R165 per share and for Distell B shares R0.00001 per share. The cash

[2] The Takeover Regulations, which are incorporated as part of the Companies Regulations, 2011, made in terms of s 223 of the Companies Act, 2008, define (in reg. 81) '*independent board*' to mean '*those directors of an offeree regulated company whom that company has indicated are independent director*s'. '*Independent*' in the relevant context is defined as meaning '*a person who has no conflict of interest in relation to the offer and is able to make impartial decisions in relation to the offer without fear or favour*'. '*Regulated company*' is defined in s 117(1) of the Act. The term refers to a company to which Parts B and C of Chapter 5 of the Companies Act, 2008, and the Takeover Regulations apply, as determined in accordance with s 118(1) and (2) of the Act. Distell is a '*regulated company*' by virtue of s 118(1)(a).

consideration receivable for Capevin ordinary shares in terms of the 'Capevin Offer' is R15 per share.

[7] The scheme includes a mechanism that will, if necessary, limit a Distell shareholder's ability to exchange its ordinary shares for shares in Newco in preference to cash so as to ensure that the forementioned minimum 65% holding by Heineken in Newco is achieved. There is accordingly a possibility, depending on the extent of the uptake by Distell shareholders for shares in Newco, that such a Distell shareholder might have to accept its scheme consideration partly in cash and partly in Newco shares. If this happens a formula will be applied to ensure that all Distell shareholders who elect to take up shares in Newco will be treated equally.

[8] I shall say more about Distell's B class shares later. It suffices at this point to explain that they are linked to some of the ordinary shares and afford the holder of such linked shares premium voting rights. Remgro Limited is the only holder of B class shares. This has the effect that although Remgro holds just 31% of the total issued ordinary shares in the company with exercisable voting rights, it is able to exercise about 56% of the '*total voting rights*' (which is defined in clause 1.1.22 of Schedule 2 to the company's memorandum of incorporation ('MoI') as '*the aggregate of all voting rights which are exercisable by the Holders of all Ordinary Shares (including Linked Ordinary Shares) and B Shares in respect of a matter to be decided on by the Company*'). The scheme proposal provided that Remgro's current controlling interest in Distell would, upon implementation of the scheme, be replicated in Capevin, which, as mentioned, will own the contemplated out-of-scope business. Thus, if none of the holders of Distell ordinary shares accept the Capevin Offer, the shareholding composition in Capevin after implementation of the scheme will mirror that in Distell before implementation.

[9] The scheme of arrangement is a '*fundamental transaction*' within the purview of Chapter 5 of the Companies Act 71 of 2008 ('the Act'), s 114 in particular, and it was accordingly subject to the approval requirements prescribed in s 115(1) and (2). It is also an '*affected transaction*', as defined in s 117(1)(c)(iii), and consequently cannot be implemented without a compliance certificate being obtained from the Takeover Regulation Panel (an independent juristic person established by s 196 of the Act), or exemption by the Panel from that requirement.

[10] The Panel's function is to fulfil an oversight role in respect of affected transactions. It is charged, amongst other matters, with ensuring (i) that necessary information is provided to holders of securities of regulated companies to the extent required to facilitate the making of fair and informed decisions about proposed schemes of arrangement; (ii) that adequate time is given for regulated companies and holders of their securities to obtain and provide advice with respect to offers (iii) that all holders of any particular class of voting securities of an offeree regulated company are afforded equivalent treatment and (iv) satisfying itself that voting securities of an offeree regulated company are afforded equitable treatment, having regard to the circumstances. See s 119 of the Act. In terms of s 119(4)(a), the Panel is entitled to require the filing for approval or otherwise of any document with respect to an affected transaction or offer if the document is required to be prepared in terms of Parts B or C of Chapter 5 of the Act and the Takeover Regulations. Regulation 117 of the Takeover Regulations makes the submission of such documents for approval by the Panel mandatory.

[11] On 6 January 2022, the Panel gave written approval for the posting of the circular contemplated in s112(3) of the Act, including the independent expert's report required in terms of s 114(3). The approval letter, signed by the Deputy Executive Director of the Panel, recorded in relevant part that '(o)*ur approval is provided on the understanding that all relevant and complete information on the nature of the transaction has been fully disclosed.*

In approving the circular, and without limitation, we considered the contents of the Independent Board's Responsibility Statement, the Opinions and Recommendations of the Independent Board, as well as the contents of the report of the Independent Expert annexed to the circular as annexure 1'. The JSE also notified its approval of the circular for distribution to shareholders. The date by which Distell shareholders had to be recorded in Distell's securities register in order to be able to receive the circular was 7 January 2022. The circular was posted to shareholders on 17 January 2022. The notice convening the meeting to vote on the scheme on 15 February 2022 was included in the circular and also published on the Stock Exchange News Service (SENS).

[12] In terms of s 115(2)(a) of the Act –

> '*A proposed transaction contemplated in subsection (1)* [including a scheme of arrangement] *must be approved-*
>
> (a) *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)*'.

Paragraph (a) of the definition of '*special resolution*' in s 1 of the Act provides, insofar as currently relevant, that it means '*in the case of a company, a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution ....(i) at a shareholders meeting*'.

[13] At the meeting convened for that purpose on 15 February 2022, the scheme was approved by Distell shareholders holding 94.03% of the votes exercised on the resolution including votes exercised in respect of both ordinary and B class shares, which were counted together. Holders of 5.97% of the voting rights voted against the resolution and 0.01% abstained. At the voting record date (4 February 2022) there were 222 750 403 votable or

exercisable ordinary shares. Persons representing 179 927 703 ordinary shares were present at the meeting, which constituted 80.8% of the votable ordinary shares. The number of ordinary shares voted in favour of the resolution approving the scheme was 161 748 275, which constituted 89.9% of the ordinary shares that were voted. The number of ordinary shares voted against the resolution was 18 148 758, which constituted 8.2% of the ordinary shares voted. This demonstrates that even if the ordinary shares had been voted separately from the B class shares, the scheme resolution would still have obtained the requisite majority required by s 115(2)(a) of the Act.

[14] Section 115(3)(b) of the Act provides that a company may not proceed to implement the resolution without the approval of a court if '(t)*he court, on application within 10 business days after the vote by any person who voted against the resolution, grants that person leave in terms of subsection (6), to apply to a court for a review of the transaction in accordance with subsection (7)*'. (Underlining supplied to highlight the considerations arising from the emphasised text that are central to the determination of some of the issues in these proceedings.)

[15] In Part A of their notice of motion, the applicants, who claim to be, between them, the beneficial owners of 3,72% of the issued ordinary shares in Distell that are votable[3] have applied, in terms of s 115(3)(b) read with s 115(6) of the Act, for leave to proceed, in terms of Part B of the notice of motion, with an application, in terms of s 115(7), for the review and setting aside of a shareholders' resolution accepting a scheme of arrangement proposed by the board of Distell to the company's shareholders. The application is opposed by all three of the respondents. The hearing before me was concerned with the relief sought in Part A.

[16] At the conclusion of the oral arguments, the applicants applied for leave to amend their notice of motion by the insertion of a claim for orders declaring that the meeting at

[3] Treasury shares are obviously excluded from the count of votable shares.

which the resolution was adopted was not properly constituted and therefore invalid and void, and that the resolution purportedly adopted at it was accordingly also void. In terms of the proposed amended notice of motion, the relief originally sought by the applicants under s 115 of the Act is claimed only in the alternative to the forementioned declaratory orders. The application to amend the notice of motion was opposed. It will be convenient to deal with the amendment application later in the judgment.

[17] Proceedings were instituted on 1 March 2022, which was the tenth business day after the scheme had been approved by Distell's shareholders. The application was set down in terms of rule 6(12) of the Uniform Rules for hearing as a matter of urgency. All the parties accepted that the application required to be heard and decided out of the ordinary course, and its characterisation as an inherently urgent matter is supported by the strict time constraints imposed in the relevant provisions of the Act. Those provisions expressly impose urgency in respect of the institution of the application, and impliedly require its expeditious determination if the evident purpose of the tight timetables is not to be frustrated. To the extent necessary, the condonation requested for non-compliance with the rules of court will therefore be granted

[18] The Cayman Islands-registered applicant companies (to whom I shall hereafter, when convenient, refer collectively as 'Sand Grove' or 'the Sand Grove funds') are investment funds managed or advised by Sand Grove Capital Management LLP. The deponent to the principal affidavits for the applicants in these proceedings was Mr Anooj Unarket, who describes himself as 'a senior Member and Portfolio Manager' of Sand Grove Capital Management LLP'. Mr Unarket avers that Sand Grove Capital Management LLP is '*an alternative investment fund manager, focusing predominantly on equities, bonds and other assets that are undergoing a corporate catalyst such as a merger or acquisition*'. According to Mr Unarket, the Sand Grove funds initially acquired an exposure to Distell by means of

derivative instruments and more recently converted the nature of their investment by becoming the beneficial owners of Distell shares. I shall examine the timeline and progression of Sand Grove's investment later in the judgment in connection with the respondents' allegations that it demonstrates an ulterior motive by the applicants in the institution of these proceedings, a factor that I shall, to the extent necessary, have to consider at the appropriate stage under s 115(6) of the Act.

The Sand Grove funds' standing to bring these proceedings

[19] Before any consideration of the merits of the application for leave to review, it is necessary to deal first with the question of Sand Grove's standing to bring the proceedings in terms of s 115 of the Act. The deponent to the founding affidavit averred that the Sand Grove funds were registered holders of Distell ordinary shares. That allegation was retracted in reply, however, in the face of the evidence to the contrary adduced by the respondents. It transpired that the applicants have beneficial ownership of the shares, but none of the funds is the registered holder of such shares.

[20] The deponent to Sand Grove's founding affidavit averred in reply that at the time the application was launched he had been under the bona fide but mistaken belief that the Sand Grove applicants were the registered shareholders, as Sand Grove's intermediaries had been instructed on 27 January 2022 to procure such registration. Mr Unarket claimed that it was ascertained only after the delivery of the respondents' answering papers that the shares were in fact registered in the names of two local custodians, First National Nominees (Pty) Ltd and Standard Bank Nominees (RF) (Pty) Ltd.

[21] The shares owned by Sand Grove were voted at the meeting by one, Alexander Barber, an associate of the forementioned Mr Unarket at Sand Grove Capital Management LLP. Mr Barber exercised the voting rights under the authority of letters of representation

provided to him by the registered holders, First National Nominees (Pty) Ltd and Standard Bank Nominees (RF) (Pty) Ltd.[4] The letters of representation did not contain any mention of the identity of the beneficial owners of the shares.

[22] The respondents disputed Sand Grove's standing to bring the application. They pointed out that whatever the nature of the applicants' beneficial interest[5] in a block of Distell ordinary shares might be, only registered shareholders have voting rights for the purpose of any resolution required in terms of s 115 and only registered shareholders who voted against the proposed transaction are entitled to bring proceedings for the review of a shareholders' decision to approve the transaction.

[23] The respondents contended that, on the undisputed facts described above, Sand Grove's application fell to be dismissed for lack of standing, without any need for the court to go into the substantive issues in the case. Sand Grove, on the other hand, contended that the applicants did have standing despite them not having been registered shareholders.

[24] Distell and Heineken argued in summary that-

1. the Act does not permit any person other than a registered shareholder to vote in these circumstances;

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[4] I infer that the term '*letter of representation*', which is more commonly encountered in the context of auditing, derives from a practice under the English Companies Act of 2006, which makes a distinction between 'proxies' provided by natural person members of companies authorising another person to exercise their voting rights (ss 284, 285 and 324-333) and the appointment by corporate shareholders of a 'representative' to exercise their shareholder rights (s 323). The Australian Corporations Act, 2001, makes a similar distinction (in ss 249X and 250D). The SA Companies Act, 2008, encapsulates both those concepts under the rubric of 'representation by proxy' (s 58).

[5] The term '*beneficial interest*' is defined in s 1 of the Act as follows: '*when used in relation to a company's securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to—*
(a) receive or participate in any distribution in respect of the company's securities;
(b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or
(c) dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities,
but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002)'.

2. even if the Act potentially permits the holder of a beneficial interest to vote in these circumstances in other companies, the holders of a beneficial interest in Distell have no right to vote at a scheme meeting; and

3. even if the holders of a beneficial interest in Distell had a right to vote at the scheme meeting, the Sand Grove funds did not vote.

[25] Distell's counsel highlighted the phrase '*adopted by persons entitled to exercise voting rights on such a matter*' in s 115(2)(a) of the Act and argued, with reference to the defined meanings of '*voting rights'*[6] and '*shareholder*'[7] in s 1, that only registered shareholders were entitled to exercise votes. The highlighted phrase, however, speaks of persons entitled to <u>exercise</u> voting rights. Therefore, as the applicants' counsel correctly pointed out, it accordingly falls to be construed also with reference to the defined meaning of '*exercise*', which '*when used in relation to voting rights, includes voting by proxy, nominee, trustee or other person in a similar capacity*'. Insofar as the applicants sought to rely on s 56(9) of the Act, which provides, in para (b), that '*a person who holds a beneficial interest in any securities may vote in a matter at a meeting of shareholders only to the extent that - ... the person's name is on the company's register of disclosures as the holder of a beneficial interest, <u>or the person holds a proxy appointment in respect of that matter from the registered holder of those securities</u>*', counsel for the respondents pointed out that the provision was excluded from application by virtue of s 56(8), which provides that sub-secs (9) to (11) do not apply in respect of securities that are subject to the rules of a central securities depositary. It is common ground that Sand Grove's shares are dematerialised and

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[6] '*Voting rights'* is defined to mean '*with respect to any matter to be decided by a company, means-*

(a) the rights of any holder of the company's securities to vote in connection with that matter, in the case of a profit company; or (b) the rights of a member to vote in connection with the matter, in the case of a non-profit company;'.

[7] '*Shareholder*' is defined to mean '*subject to section 57 (1), means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be*'.

subject to such rules. The respondents' counsel stressed that in any event none of the applicants' names is listed on Distell's register of disclosures as a beneficial interest holder[8] and the applicant funds did not hold proxy appointments from the registered holders of the shares. The nominee companies, who were the registered holders of the shares, appointed Mr Barber as *their* representative to vote the shares.

[26] It seems to me that all the arguments advanced by the respondents' counsel in this regard were well founded.

[27] It is convenient at this stage also to dispose of an endeavour by the applicants to rely on the extended meaning of '*shareholder*' in s 57(1) Act.[9] The provision does not assist them. Apart from any other possible consideration, the holders' entitlement to exercise voting rights was determined by clause 9 of Distell's MoI. The clause is quoted in full in paragraph [30] below. The Sand Grove funds had no such entitlement because they were not registered shareholders and were not appointed by the registered shareholders as proxies. As explained elsewhere in this judgment, the applicants simply did not vote at the meeting.

[28] Sand Grove was aware before the meeting that the funds required to be registered holders of their shares to be able to vote them at the meeting and also, if necessary, to be able to exercise the appraisal rights afforded to dissenting shareholders in terms of s 164 of the Act. Their evidence is that instructions were given for that to be done. It is not in dispute that any such instructions were not carried out. It is not apparent how, in the circumstances of Sand Grove's professed belief that the funds manager's instructions concerning the

[8] Distell, which is a '*regulated company*', as defined in s 117 of the Act, is obliged, in terms of s 56(7) of the Act, to maintain a register of disclosures. Section 50 obliges a central securities depositary (as to which see the relevant provisions of the Financial Markets Act 19 of 2012) to maintain a record of, amongst other matters, the names and addresses of the holders of any beneficial interest in any uncertificated securities. As of March 2022, Tion GSI Equity Security Client and MLI GEF Client Account General ZAR, respectively, were recorded as the holders of a beneficial interest in respect of the shares in which the applicants are apparently actually the beneficial interest holders.

[9] Section 57(1) provides: '*In this Part* [Part F of Chap. 2]*, "shareholder" has the meaning set out in section 1, but also includes a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached*.'

registration of the applicants' shares had been carried out, Mr Barber came to exercise the votes against the scheme of arrangement as the corporate representative or proxy, not of the applicants, but instead of the forementioned nominee companies being then the still registered shareholders. Mr *Subel* SC, who (together with Mr *Howie*) appeared for the applicants, ventured that this could only be ascribable to oversight or mistake.

[29] Distell's counsel pointed out that their contention that the Sand Grove funds, as holders of beneficial rights in shares registered in another party's name, were not persons entitled to exercise voting rights at the meeting was supported by an earlier decision of this Court in *Marble Head Investments (Pty) Ltd and Others v Niveus Investments and Another (Ferberos Nominees (Pty) Ltd and Another Intervening)* [2020] ZAWCHC 36 (28 April 2020). In that case, Sievers AJ adopted the reasoning of Keightley J in *Standard Bank Nominees (RF) (Proprietary) Limited and Others v Hospitality Property Fund Limited* [2019] ZAGPJHC 263 (12 June 2019); [2019] 4 All SA 561 (GJ); 2020 (5) SA 224 (GJ)[10] in a matter concerning s 164 of the Act. A consideration of s 164 is indeed germane to the determination of who may exercise voting rights at a meeting in terms of s 115(2), for the appraisal rights thereunder are afforded only to dissenting shareholders who voted against the resolution at the meeting. It would be contrived to construe the relevant provisions in the Act as contemplating that any person entitled to avail of s 164 (which, subject to compliance with the relevant requirements of the Act, the holders of ordinary shares in Distell were) could be a different person from that entitled to exercise a vote at a meeting in terms of s 115(2) and who had availed of such entitlement by voting against the resolution.

[30] The effect of the foregoing construction of the applicable statutory provisions is mirrored in Distell's MoI', which provides as follows (in clause 9):

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[10] See para 35 in particular.

> '*Subject to clause 20 (**Transmission of Securities by Operation of Law**), only the Securities Holder shall be entitled to be vested with Voting Rights and to exercise the Voting Rights attaching to the Securities or appoint a proxy to do so. The Securities Holder shall not be entitled to cede any such Voting Rights to any other Person unless, at the same time, the acquirer is registered as the Holder of such Securities. The Company shall not permit Securities to be voted upon by the holder of a Beneficial Interest who is not a Securities Holder, unless such holder of the Beneficial Interest has been appointed as the Securities Holder's proxy, notwithstanding any agreement to the contrary.*'[11]

There is nothing in clause 9 of the MoI that is inconsistent with the Act's applicable provisions, and accordingly there was no basis on the given facts for Sand Grove to be able to exercise the voting rights in the shares in which the funds have a beneficial interest. Only the registered shareholders or their representatives by proxy could do so.

[31] The relevant scheme of the Act and Distell's MoI is reflective of the generally applied principle of company law that a company concerns itself only with the registered holders of its shares; cf. *Sammel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 666, *Oakland Nominees (Pty) Ltd v Geiria Mining & Investment Co Ltd* 1976 (1) SA 441 (A) at 453B, *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A) at 288*fin*-289B and *Smyth and Others v Investec Bank Limited and Another* [2017] ZASCA 147 (26 October 2017); [2018] 1 All SA 1 (SCA); 2018 (1) SA 494 (SCA) in para 21. The principle is informed by considerations of practicality and convenience too obvious to require explanation.

[32] There was no merit in the applicants' contention that Mr Barber qualified as the securities holders' proxy because each of the applicants had delegated authority to Sand Grove Capital Management LLP under their respective investment management agreements

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[11] The MoI contains the following special definitions: (i) '*Securities Holder*' is '*the registered holder of a Security issued by the Company*'; (ii) '*Shareholder*' as '*Shareholders as defined in the Act, subject to the restriction on Voting Rights contained in clause 9*'; (iii) '*Voting Rights*' as '*with respect to any matter to be decided by the Company, the rights of any holder of the Company's Securities to vote in connection with that matter*'

'*to vote all proxies on securities held from time to time*' and that by using the letters of representation from the nominee companies he therefore voted the shares as 'sub-agent', representing Sand Grove Capital Management LLP as an agent for the applicants. Distell was a stranger to the investment management agreements and the only way the applicant funds could exercise the votes was if they procured appointments as proxies from the registered shareholders and then appointed someone like Mr Barber to represent them in exercising such authority. What happened was quite different: the registered shareholders appointed Barber, rather than the applicants, as their proxy.[12]

[33] Inasmuch as Mr *Subel* also argued that the instructions given in the scheme circular to holders of dematerialised shares afforded rights to beneficial owners thereof to exercise the voting rights, I disagree. In my view, the relevant instructions did not purport to derogate from either the relevant provisions of the Act or clause 9 of the MoI, nor could they validly have done so.

[34] For these reasons all of the arguments outlined in paragraph [24] above that were advanced on behalf of Distell by Mr *Snyckers* SC, who appeared for the company together with Mr *Wild*, are upheld. Mr Barber exercised the votes at the meeting as the nominee companies' representative. Sand Grove did not have voting rights. It follows that the respondents' objection to the applicants' standing to bring the current application for relief in terms of s 115(3)(b) was well taken.

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[12] In *Nuwe Suid-Afrikaanse Prinsipale Beleggings (Edms) Bpk and Another v Saambou Holdings Ltd and Others* 1992 (4) SA 387 (W) at 390H-I, Zulman J said '*The word "proxy", as pointed out by Gower in Modern Company Law 4th ed at 538 footnote 81, is used indiscriminately in the authorities to describe both the agent and the instrument appointing him. In simple terms, a proxy, in the context of meetings of companies, is an authorisation to exercise voting rights which is given by a shareholder to another person who may also himself be referred to as "a proxy".*'

The application by the nominee companies for leave to intervene as applicants in terms of s 115(3)(b)

[35] The challenge to Sand Grove's standing gave rise to an application in the names of First National Nominees (Pty) Ltd and Standard Bank Nominees (RF) (Pty) Ltd for leave to intervene in the proceedings as co-applicants. As described, they are the registered holders of the ordinary shares in Distell in which Sand Grove has a beneficial interest, and their representative (Mr Barber) exercised the voting rights attached to those shares to vote against the proposed transaction at the meeting convened in terms of s 115(2)(a). The application for leave to intervene was, of course, contingent upon the court upholding the respondents' argument that the Sand Grove funds lacked standing. The contingency having been realised, it has become necessary to deal with the application.

[36] The respondents opposed the applications for leave to intervene on the grounds that the 10-business day time limit prescribed in s 115(3)(b) for the nominee companies to challenge the resolution had elapsed before they lodged their applications for leave to intervene. Insofar as condonation was sought for the lateness of the interventions, the respondents contended that it was not within the court's power to extend the statutorily prescribed period, alternatively, and in the event of the court not upholding that contention, that a proper case for condonation had in any event not been made out.

[37] In *Marble Head* supra, at para 31-33, Sievers AJ held that, provided an application in terms of s 115(3)(b) was instituted within the prescribed time by any person with capacity to litigate, even if such person lacked standing to be able to claim relief in terms of the provision, no difficulty presented with admitting an intervening applicant with the necessary standing to claim relief under the provision even after the prescribed time period had elapsed. He also held, at para 34, that the court in any event had the power to condone non-compliance with the prescribed time limit. Mr *Snyckers* argued that the judgment in *Marble*

Head was clearly wrong in these respects and should not be followed. Mr *Blou* SC, who appeared for Heineken together with Mr *Price*, lent his support to the contention.

[38] The first mentioned basis for the decision in *Marble Head* that a late entry by an intervening applicant was competent notwithstanding the expiry of the statutory time limit was premised on the judge's apprehension of the effect of the two meanings of the concept of *locus standi* described in AC Cilliers et al., *Herbstein & Van Winsen, The Civil Practice of the High Courts and the Supreme Court of Appeal*, 5ed (Juta), vol 1. at 143-144: '*This term is used in two senses. First, the term may be used to refer to the capacity of a natural or juristic person to institute and defend legal proceedings – ie capacity to litigate. Secondly, the term is used to refer to the interest which a party has in the relief claimed or the right to claim the relief.*' Having referred to that passage, the judge proceeded '*In the present matter the applicants have legal capacity to litigate but do not have the right in terms of section 115 (3) (b) to claim the relief sought. As a result, one is not dealing with a matter in which proceedings were a nullity from inception. The intervening parties are thus seeking to intervene in an application that was brought timeously but in which the applicants cannot succeed.*'

[39] It seems to me, with respect, that the learned acting judge was misdirected in apparently conceiving that proceedings instituted by anyone who did not have standing in *both* senses of the term were effectively instituted. That appears, however, to be the import of his somewhat cryptic statement that the institution of the application by a person with no standing to claim the relief was not 'a nullity'.

[40] In the given context, the only person with standing in terms of s 115(3)(b) to impugn a resolution approving a fundamental transaction is a person entitled to exercise voting rights on the matter who has voted at the relevant against approving the transaction. An application

for relief in terms of s 115(3)(b) by any person who does not satisfy the qualifying criteria to make such an application is not an application contemplated by the provision.

[41] Such an application cannot be saved by the intervention of a person who had the right to exercise a vote on the resolution and who voted against it but failed to take the resolution on review before his right to do so expired. Were it otherwise a person whose right to claim relief in terms of s 115(3)(b) had lapsed because he had failed to exercise it within the prescribed time limit could avoid the fatal consequences of his delay and resuscitate his lapsed right by piggybacking on proceedings instituted within the statutory time limit by someone who had no right to institute them. Just stating the proposition illustrates its inherent irrationality. It is untenable.

[42] Importantly, the implementation of the transaction is not prohibited by s 115(3)(b) unless the application is instituted within the prescribed time by a person who voted against the resolution. What right, one might ask, would a late intervener in an incompetently launched application to review the approving resolution, have by which to seek a prohibitory interdict to prevent implementation (without which any review remedy would in the circumstances go limping)? The answer must surely be 'no right at all, unless the intervener's non-compliance with the time limit had been condoned'.

[43] It was no surprise in the circumstances that Mr *Subel* in his oral submissions did not advance any argument in defence of the first of the aforementioned bases for the decision in *Marble Head* and appeared to concede its untenability. It was, with respect, clearly wrong.

Is non-compliance with the prescribed time limit condonable?

[44] Mr *Subel* did argue, however, that Sievers AJ had been correct in finding that the court was invested with the power to condone non-compliance with the statutory time limit. The judge's finding that the court could condone non-compliance with the prescribed time

limit was made relying on *Toyota South Africa Motors (Pty) Ltd v Commissioner for the South African Revenue Service* [2002] ZASCA 27 (28 March 2002), 2002 (4) SA 281 (SCA), para 10.

[45] In para 9 of that judgment, Howie JA concluded, on the basis of a textual analysis of s 86A(12) of the Income Tax Act, which provided '*Such notice of appeal shall be lodged within the period* [of 21 business days after notice of the judgment from the registrar of the Special Tax Court] *or within such longer period as may be allowed under the rules of the appeal court*', that the terms of the statute implied the existence of a power to condone the lodging of a notice of appeal outside the prescribed period. In para 10, the learned judge of appeal then added the following comment: '*These conclusions based on interpretation are strengthened, of course, by the separate consideration that the High Court has inherent jurisdiction to govern its own procedures and, more particularly, the matter of access to it by litigants who seek no more than to exercise their rights. It has been held that this jurisdiction pertains not only to condonation of non-compliance with the time limit set by a rule but also a statutory time limit: Phillips v Direkteur van Statistiek 1959 (3) SA 370 (A) at 374 G - in fine*'.

[46] I consider that the additional remarks in para 10 of the appeal court's judgment in *Toyota* were obiter, a view shared, albeit tentatively, by Snyckers AJ in *Vlok NO and Others v Sun International South Africa Ltd and Others* 2014 (1) SA 487 (GS) at para 37 and 41.

[47] It is evident from his judgment that Sievers AJ was alerted to the Constitutional Court's judgment in *Mohlomi v Minister of Defence* [1996] ZACC 20 (26 September 1996); 1996 (12) BCLR 1559; 1997 (1) SA 124. In that judgment reference was made to the wording of s 57(5) of the South African Police Service Act 68 of 1995, which provided that the time limitations for the institution of actions prescribed in subsections (1) and (2) should '*not be construed as precluding a court of law from dispensing with the requirements or*

prohibitions contained in those sub-sections where the interests of justice so require'. Didcott J noted that its somewhat peculiar wording appeared '*to have presupposed a power inherent in the courts to condone defaults of the kind covered which needed to be preserved*'. Of significance, he proceeded in the following sentence to say: *'But courts have no such inherent power, and none derived from any source unless and until it is conferred on them*'.[13]

[48] Sievers AJ did not regard himself bound by that statement, however, as he considered it to be obiter. He also observed that it had been made '*without referral to authority*'. He was of the view that s 173 of the Constitution in any event invested the court with the power to condone non-compliance with statutorily prescribed time limits for the institution of litigation.[14]

[49] I respectfully disagree that the forementioned statement by Didcott J in *Mohlomi* was an obiter dictum. For the reasons I shall explain below, I consider that the statement was part of the *ratio decidendi* in *Mohlomi*, and that it is binding. It is also consistent with the law as stated in a number of appeal court judgments.

[50] The Constitutional Court was concerned in *Mohlomi* with a challenge to the constitutional compatibility of the time bar provisions in s 113 of the Defence Act 44 of 1957. They required the institution of any proceedings for damages against the Department to occur within six months of the cause of action arising and then only after at least one month's prior written notice to the Department of the claimant's intention to litigate. The challenge to the provisions was mounted on the basis of their alleged incompatibility with a number of articles in the Bill of Rights, but the Court chose to decide the case with regard only to its impingement on a claimant's right of access to court under s 22 of the Interim Constitution;

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[13] In para 17.

[14] *Marble Head* supra, at para 36.

the right replicated in s 34 of the 1996 Constitution currently in force. The Court upheld the challenge.

[51] In *Mohlomi*, there had been marginal non-compliance by the claimant with the prescribed time limits in the proceedings he had instituted against the Minister in the Provincial Division of the Supreme Court. It is quite clear from the factual circumstances that attended the non-compliance, which are described in detail in para 4-7 of the judgment, that they cried out for condonation were it within the court's power to grant it. It was no doubt for that very reason that the Constitutional Court's judgment set them out so fully.

[52] On my reading of the judgment it is evident that the challenge would not have succeeded had the impugned legislation provided that a court could condone non-compliance with the prescribed time restrictions if it were in the interests of justice to do so. It was the absence of any escape from the vitiating consequences of mere non-compliance that resulted in a constitutionally incompatible inflexibility.[15] It was in that connection that Didcott J made comparative reference to the condonation provision in s 57(5) of the Police Service Act. He did so to illustrate how the constitutionally objectionable aspect of the time limitation might have been avoided. Writing in 1996, he described s 57(5) as an example of an innovation demonstrating '*what satisfies Parliament nowadays as a scheme sufficient yet effective for the protection of the state's legitimate interests in actions instituted against the police force*'. He identified the subsection as an example of post-Constitutional legislating that ameliorated the starkly unreasonable impingement on s 22 rights evident in the contrastingly rigid and unyielding counterpart found in s 113 of the old order Defence Act. The discourse on s 57(5) of the Police Services Act in *Mohlomi* would not have had any place

[15] My reading finds support, I think, in the remarks about the case in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 9, 62, 68 (per Ngcobo J) and 115 (per Moseneke DCJ).

in the judgment if the courts enjoyed inherent powers to condone non-compliance with the statutory time limits.

[53] Didcott J also referred to a series of judgments of the Appellate Division reaching as far back as *Benning v Union Government (Minister of Finance)* 1914 AD 180,[16] in which the potentially unfairly hampering effect of provisions restricting or limiting access to courts can have on the ability of deserving claimants to seek the assistance of the courts had been remarked upon.[17] The occasion for the repeated making of such remarks over the decades by eminent judges in our highest courts would not have arisen had there been some inherent power to avoid the ill effects of such restrictive provisions by granting condonation for non-compliance with them.[18] They show that the most the courts could do was construe such provisions restrictively or, if the facts of a matter allowed it, circumvent compliance with the time limits by applying the doctrine of *lex non cogit impossibilia*.[19]

[54] Reference was also made in *Mohlomi* to the recommendation in a report of the South African Law Commission in 1985[20] that special time limitations for the institution of actions for damages against departments of state should be scrapped and that only prior notice requirements should be retained, with the courts being expressly empowered to condone non-compliance with such requirements. Didcott J expressed the Court's concern ('*worry*') about the failure of many (but not all) of that type of statute '*to differentiate between excusable and inexcusable delays*', and identified s 57(5) of the Police Services Act as an example where

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[16] At p. 185.

[17] The other Appellate Division judgments mentioned were *Avex Air (Pty) Ltd v Borough of Vryheid* 1973(1) SA 617(A) at 621F-G, *Administrator, Transvaal, and Others v Traub and Others* 1989(4) SA 731 (A) at 764E and *Pizani v Minister of Defence* 1987 (4) SA 592 (A) at 602 D-G.

[18] See the third of the distinctions between s 32 of the Police Act 7 of 1958 and s 57 of the Police Service Act noted by Corbett CJ in *Minister of Safety and Security v Molutsi and Another* 1996 (4) SA 72 (A) at 96E-H. It is irreconcilable with any understanding by learned Chief Justice of the existence of an inherent power of condonation.

[19] See *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A) and *Road Accident Fund v Mdeyide (Minister of Transport intervening*) 2008 (1) SA 535 (CC) at para 40..

[20] *Investigation into Time Limits for the Institution of Actions against the State*: Project 42, October 1985.

the desirable differentiation had been made. [21] I have not in the time available been able to access the 1985 report, but a supplement to it (under the project leadership of Mr Justice Pierre Olivier) which was published in 1998 is available on the Government's website.[22] It is clear from the supplement that the Constitutional Court's judgment in *Mohlomi* was the catalyst for its production. The recommendations in the supplement informed the content of the subsequently enacted Institution of Legal Proceedings against certain Organs of State Act 40 of 2002, which expressly affords courts the power in appropriate circumstances to condone non-compliance with the prior notice requirements in litigation against departments of state.[23]

[55] It is evident from the report that the Commission considered that granting such a power to the courts would be desirable to permit account to be taken, in the interests of justice, of a '*claimant's fault or the lack of that and the prejudice suffered by the state or its absence by reason of the non-compliance*'. These recommendations would not have been indicated if the courts enjoyed an inherent power to grant condonation in such circumstances. As observed in the Constitutional Court's judgment in *Mohlomi*, there is no philosophical basis to distinguish the court-access limiting effect of a legislatively imposed time bar for the institution of litigation and one imposing a duty to give prior notice of the intention to institute the litigation.[24]

[56] Snyckers AJ, who in *Vlok v Sun International* supra, also had occasion to consider the conflict between Didcott J's statement in *Mohlomi* and Howie JA's passing comment in *Toyota* at para 10, came to essentially the same determination that I have done, concluding, at

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[21] In para 24. Compare in this regard, for example, s 9 of the Promotion of Administrative Justice Act 3 of 2000

[22] https://www.gov.za/sites/default/files/gcis_document/201409/rprj42time1998sep.pdf .

[23] In s 3(4).

[24] *Mohlomi* supra, at para 3 and see also *Masuku and another v Mdlalose and Others* 1998 (1) SA 1 (SCA) at 7B-E.

para 46-48, with useful reference to pertinent authority, that he could find no support for the existence of '*a free-floating power to condone non-compliance with statutory time limits ... independently of an exercise of interpreting the time limits themselves*'.

[57] It is most unlikely that the comments in para 10 of *Toyota* would have been made in the unqualified terms they were had the appeal court's attention been drawn to the judgment in *Mohlomi* and the other judgments cited therein that I have listed in note 17 above, as well as those cited in notes 18 and 19. As Snyckers AJ aptly noted in *Vlok*, the dictum by Didcott J was '*clear as can be*', and had the learned judge in *Toyota* been astute to it he could hardly have said what he did in para 10 without engaging with it. It bears reiterating, however, that the comment in para 10 of *Toyota* was not necessary to the result of that case, which was founded on the court's interpretation of the peculiar provisions there in issue to imply the conferment of a power of condonation.

[58] The judgment in *Phillips v Direkteur van Statistiek* referred to in *Toyota* loc. cit. was also founded on an interpretative analysis of the statutory provisions in issue in that case. In *Phillips*, the court did not purport to assert the existence of an inherent power in the courts to condone non-compliance with statutorily imposed time limits for the institution of litigation.

[59] It seems to me that the common law sources cited in *Phillips* at 374 and in *Le Roux and Another v Grigg-Spall* 1946 AD 244, which time and readily available resources have not allowed me to independently investigate, did not make it altogether clear whether the Courts of Holland's powers to condone non-compliance with the prescribed time limits for the noting of appeals were founded in statute, custom or rules of court; see *Le Roux* supra, at 249-250. The questions involved in the condonation of the late noting of appeals from judgments of lower courts (*Toyota* affords an example) in any event, by their very nature, involve the court's process and are, in my opinion, quite distinguishable from what would be entailed were a court to purport to elasticise a statutory prescript that has the effect of

extinguishing a right to prosecute a claim if the right is not exercised within a stipulated time. The body of authority pertaining to the effect of statutory expiry periods that I shall refer to below bears out this view.

[60] The sort of time limitation imposed in terms of s 115(3)(b) has an effect akin to, but not the same as, prescription. The right that can be exercised by means of the institution of proceedings in terms of the provision lapses or expires if the proceedings are not instituted by a person with the requisite standing within the prescribed period. The 10-business days' time limit stipulated in the provision constitutes what has sometimes been referred to in the jurisprudence as an 'expiry period' or '*vervaltermyn*'.[25] Sande, *Decisiones Friscae* at 1.7.3 has been quoted in this connection as speaking of '*prescription arising from a statute, which extinguishes the action ipso iure, and denies it after a lapse of time*'.[26] The authorities are clear that the courts enjoy no inherent power to ameliorate the shutting out effect of such statutorily determined expiry periods; cf. *Hartman v Minister van Polisie* 1983 (2) SA 489 (A) at 500.

[61] I agree with the respondents' submission that a power to condone the lateness of an application by the aspirant intervenors cannot be found in any interpretative exercise in

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[25] See e.g. *Vlok NO v Sun International* supra, at para 46, *Commissioner for Customs and Excise v Standard General Insurance Co Ltd* [2000] ZASCA 55 (29 September 2000); 2001 (1) SA 978 (SCA) at para 10 and 16, *Pharmaceutical Society of SA and Ors v Tshabalala-Msimang and Ano; New Clicks SA (Pty) ltd v Minister of Health* 2005 (3) SA 238 (SCA) in para 32 and *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A) at 780E-781A. In the latter case the following extract from De Wet and Yeats *Kontraktereg en Handelsreg* 2 ed at p.203 was quoted to explain the distinction between a '*vervaltermyn*' and extinctive prescription: '*Die reg kan onder omstandighede voorskryf dat 'n skuldeiser sy reg binne 'n vasgestelde tyd moet laat geld onder bedreiging van verval. Mens tref dit veral aan waar die skuldenaar die Staat is. In ons reg het ons 'n goeie voorbeeld van 'n vervaltermyn in art. 64 van Wet 22 van 1916, in verband met aksies teen die administrasie van Spoorweë en Hawens. Op so 'n vervaltermyn is die gewone beginsels betreffende verjaring nie van toepassing nie, bv. die vervaltermyn loop selfs teen 'n minderjarige. Of mens in 'n bepaalde geval met verjaring dan wel met 'n vervaltermyn te doen het, is 'n vraag van wetsuitleg, en welke reëls van verjaring op 'n bepaalde vervaltermyn toepaslik is en welke nie, is eweneens 'n vraag van uitleg.*'

[26] *Yu Kwam* supra, at 780 fin – 781A. In *Haviside v Jordan* (1903) 20 SC 149 at 153, De Villiers CJ quotes from Herbert's translation of *Grotius* (Introd. 3.46.2), wherein reference was made to a process whereby '*obligation ..., as some laws expressly enact, is considered as released, so that no claim can be founded thereon, whence it follows that the Judge, when the lapse of time is proved to him, ought to declare the plaintiff as inadmissible*'.

respect of the relevant part of the Act. On the contrary, the context weighs against any such construction of the provisions. As mentioned, absent an application in terms of s 115(3), the implementation of the scheme can proceed. Once the scheme is ripe for implementation, the rights afforded by it to the scheme participants vest and become enforceable; see s 115(9). It would accordingly not only be inimical to the objects served by the tight timetable specially prescribed by the legislation for dissenting shareholders, it would also introduce unwholesome uncertainty to the contractual position of other scheme participants that subsection (9) and the prescribed time limits were expressly designed to avoid. As argued by the respondents' counsel, the provisions would be rendered unworkable if one did not know after the expiry of periods provided in s 115(3) whether a court challenge could still be levelled. What to do about the rights already vested as a result of the absence of a timeous challenge? Without a material 'engineering' of the provisions,[27] one could not say.

[62] One of the Act's objects, as stated in the long title, is '*to provide for equitable and efficient amalgamations, mergers and takeovers of companies*'. The purpose of the review remedy in s 115 and the appraisal rights afforded in s 164 is to ensure that dissentient shareholders with a genuine cause for grievance are treated equitably. The statutory timetables for the exercise of such remedies are directed at the promotion of the certainty that comes with finality and efficiency.[28] Certainty and efficiency would be undermined were a power of to condone non-compliance with the timetables read into the Act. It would be misdirected to construe the statute to imply a granting to the court of unexpressed powers of condonation that would conduce to defeating or undermining the Act's stated objects.

[63] But even were I able to find some power of condonation in an interpretative exercise, I would not be prepared to exercise it in favour of the applicants for leave to intervene in the

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[27] The metaphor used in *Vlok v Sun International* in para 101 and adopted in *Marble Head* in para 36.

[28] Cf. *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 (CC) in para 101.

absence of an effective means of addressing the prejudice that entertaining a late application under s 115(3)(a) would entail for third parties' vested rights. The applicants have not suggested any.

[64] With regard to the applicants' reliance on s 173 of the Constitution as a suggested source for a power to condone non-compliance with the prescribed period within which the application had to be brought, I have little to add to what was said in this connection in *Vlok v Sun International* supra, at para 49-50, with reference to *Phillips and Others v NDPP* [2005] ZACC 15, 2006 (1) SA 505 (CC), 2006 (2) BCLR 274 at para 51-52. I am not persuaded that entertaining a claim instituted outside a statutorily prescribed time limit of the character of a '*vervaltermyn*' bears any relation to the regulation by the court of its own process.

[65] For all these reasons the application by the nominee companies for leave to intervene must be dismissed.

The application to amend the notice of motion

[66] The application referred to earlier to amend the relief sought in the notice of motion seeks to keep the Sand Grove funds' challenge to the scheme alive even in the face of findings that they lacked standing under s 115(3)(a) and refusing the nominee companies leave to intervene.

[67] The predicate that the meeting at which the scheme was approved had not been properly constituted was founded in the applicants' interpretation of the effect of s 114 of the Act. 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.'[29]

(Underlining supplied for highlighting purposes.)

[68] The applicants argued that the scheme was required to be put to the holders of each class of shares at separate meetings in terms of s 115(2)(a). Mr *Subel* sought to support the contention by contrasting the provisions of s 114(1) with those in its statutory predecessor, s 311 of the 1973 Companies Act. Section 311(1) of the 1973 Act spoke of a scheme of arrangement between a company and '*its members* or any class of them'. Mr *Subel* argued that the wording of s 114(1) of the current Act, particularly the words that I underlined in the previous paragraph, impelled recognising that the proposal comprised two schemes of arrangement, one with the holders of the ordinary shares and the other with the holders of the B shares. He characterised them as two classes by virtue of the existence of the affected shares in two classes as defined by the provisions of s 37(1) of the Act,[30] and also by comparing the rights held by the holders of the respective classes of shares before the scheme and after its implementation. As I understood his argument, if the effect of the implementation of the scheme affected the classes differently in any way at all it implied that the holders were being offered '*different deals for the shares they hold*' and thus demonstrated that more than one scheme of arrangement was being proposed.

[69] Mr *Subel* contended that, in conflict with s 114, and by holding a single meeting in terms of s 115(2)(a) for both the holders of ordinary shares and those of B class shares,

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[29] '*Securities*' is defined in s 1 of the Act to mean '*any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company*'.

[30] Section 37(1) provides:

'*All of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class.*'

Distell had sought to put forward a single arrangement to all the holders of Distell's securities irrespective of class. He submitted that a company wishing to propose an arrangement to the holders any class of shares in the company was required to procure a meeting of the holders of securities in each affected class to approve it by special resolution. Each such meeting would in effect be voting on a scheme of arrangement affecting only that class of securities. He allowed that there was nothing to prevent a company proposing two or more schemes of arrangements alongside each other, but maintained that it is impermissible to try to combine holders of different classes of share, as defined by s 37, into a single meeting.

[70] The approach of characterising a particular scheme of arrangement as in reality two or more interlinked schemes, each with a different 'class' of the company's shareholders or creditors, as determined with reference to the different effects on their pre- and post-implementation rights is not novel; see for example the leading English case *Re Hawk Insurance Company Ltd* [2001] EWCA Civ 241 (23 February 2001), [2001] 2 BCLC 480, [2002] BCC 300, [31] to which Mr *Subel* referred in argument. Examined in that way, what might seem at first sight to be a single scheme could, on analysis, be identified as actually constituting more than one proposal or offer, each directed to different shareholders or groups of shareholders; cf. *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste* 1994 (2) SA 265 (A) at 289H-290C.

[71] A consideration of a scheme of arrangement proposal on these lines was a central consideration in the first stage of the procedure provided for in s 311(1) of the 1973 Companies Act, where the court would give directions whether separate meetings had to be convened for different 'classes' of members or creditors, as determined by the court. For that purpose, the courts in our jurisdiction, as in other jurisdictions internationally in which equivalent statutory provisions were in force such as England and Australia, applied the

[31] In para 15-16.

principles set out in the Court of Appeal's judgments in *Sovereign Life Assurance Co v Dodd* (1892) 2 QB 573.[32]

[72] Those principles place the focus, for the purpose of differentiating shareholders or creditors into separate classes, on the dissimilarity of shareholders' or creditors' *rights*, as distinct from their *interests*. Bowen LJ famously observed in that connection that '(t)*he word "class" is vague, and to find out what is meant by it we must look at the scope of the section, which is a section enabling the Court to order a meeting of a class of creditors to be called. It seems plain that we must give such meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest*'. A manner of determining the question whether a relevant dissimilarity of rights was involved would be to ask the question of what was being offered to whom under the proposed scheme of arrangement and to see whether the answer demonstrated material differences in the impact on the affected shareholders if the scheme were to be implemented.

[73] This did not imply, however, that the courts would be too anxious to characterise a proposal as constituting more than one arrangement. In *Hawk*,[33] Chadwick LJ endorsed the cautioning by Lush J in *Nordic Bank plc v International Harvester Australia Ltd and anor* [1982] 2 VR 298 at 301 against making inappropriately nice distinctions when determining on the composition of class meetings, as that could conduce to an unwholesome multiplicity of meetings and subvert the rationale for schemes of arrangement or

[32] See, for example, *Rosen v Bruyns NO* 1973 (1) SA 815 (T) at 820-821, *Borgelt v Millman NO and Another* 1983 (1) SA 757 (C) at 763D-769C and *Ex parte Garlick Ltd* 1990 (4) SA 324 (C) at 331H-333F and the unreported judgment in *Verimark Holdings Limited v Brait Specialised Trustees (Pty) Limited NO and Others* [2009] ZAGPJHC 45 (28 August 2009), referred to quite extensively in argument in the current matter, in para 10. For examples of the application of the principles in other jurisdictions, see the judgments cited in fn. 11 in *Verimark*.

[33] In para 32.

compromise, which, in the context of the doctrine of unanimous assent that would otherwise be applicable, is that super-majority decisions should be able to bind dissenting minorities. Lush J stated (loc. cit.) '*The fact that two views may be expressed at a meeting because one group may for extraneous reasons prefer one course, while another group prefers another is not a reason for calling two separate meetings.*'

[74] The idea that the shareholders' rights should be sufficiently similar as to make it feasible for them to consult together did not imply that it had also to be apparent that they would agree with each other on whether or not to approve the scheme. Lord Millet, sitting as the non-permanent judge in the Hong Kong Final Court of Appeal, in *UDL Argos Engineering & Heavy Industries Co Ltd & Others-v-Li Oi Lin & others* [2001] HKCFA 19; [2001] 3 HKLRD 634; (2001) 4 HKCFAR 358; [2002] 1 HKC 172,[34] expounded on the position as follows in para 27(3), '*The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings*'. Thus, in the present matter where the applicants allege that some corporate shareholders would be adverse to the scheme because they cannot hold unlisted shares and accordingly cannot swap their Distell shares for Capevin and Newco shares, that is a consideration arising out of such shareholders' interests, not their rights. Distell's listing is not pursuant to any right inherent in the company's issued shares.

[75] Lord Millet also held in *UDL Argos Engineering*,[35] that the risk of empowering a majority to oppress a minority that concerned Bowen LJ in *Sovereign Life Assurance* had to be '*balanced against the opposite risk of enabling a small minority to thwart the wishes of*

[34] In which reference is made to pertinent authority in a wide range of jurisdictions, including to *Rosen v. Bruyns NO* supra, and *Borgelt v. Millman NO* supra.

[35] In para 26.

the majority. Fragmenting creditors into different classes gives each class the power to veto the Scheme and would deprive a beneficent procedure of much of its value. The former danger is averted by requiring those whose rights are so dissimilar that they cannot consult together with a view to their common interest to have their own separate meetings; the latter by requiring those whose rights are sufficiently similar that they can properly consult together to do so'.[36]

[76] In *DX Holdings Ltd & Ors* [2010] EWHC 1513 (Ch), Floyd J stated, in para 5, '(t)*hus it is not every difference in the rights of the members of a class which would mandate the creation of a separate class. That there can be differences is acknowledged in the way the* [Sovereign Life Assurance] *test is stated. A difference is only sufficient to mandate the creation of a separate class if it is sufficiently great to make consultation with a view to their common interest impossible. That is a value judgment which involves, amongst other things, the materiality of the difference in rights in comparison with the common rights under discussion*'.

[77] And in *Re: Organic Milk Suppliers Co-Operative Ltd* [2020] EWHC 1270 (Ch), in para 13, Birss J held '*The fact that there may be certain differences between the rights of members does not mean that they must be placed in separate classes for the purposes of considering a scheme. A broad approach is to be taken. Accordingly, differences may be material without leading to separate classes: Re: Telewest Communications plc [2005] 1 BCLC 752 at §37 and Hawk (above). If members have similar rights under a proposed scheme, but different commercial interests, this does not affect the issue of class constitution*

[36] The cautionary note was echoed in the Royal Courts of Jersey in *Representation of FRM Holdings Limited* [2012] JRC 120 (18 June 2012) at para 17, where the court observed '*Bowen LJ's test makes it clear that it is significant differences in the rights of members which determine that they constitute separate classes. Furthermore, it is also clear that a careful balancing act must be performed in determining whether or not certain members require the protection of a separate Court meeting, in order to prevent any "confiscation and injustice", which would result if artificial distinctions are taken.*'

but may be relevant to the exercise of the Court's discretion ... to sanction the scheme. The safeguard under Part 26 of the [2006 Companies] *Act against majority oppression is that the Court is not bound by the decision of the scheme meeting: Re: BTR plc [2000] 1 BCLC 740 at p. 747*'.[37] It seems to me that the safeguard under Part 26 of the English Companies Act there referred to[38] finds its counterpart, albeit in a different procedural form, in s 115(7) of our 2008 Companies Act, especially in s 115(7)(a).

[78] If I understood him correctly, Mr *Subel* contended that now that there was no longer any provision in the framework under Chapter 5 of the new Companies Act for the court to give directions concerning the composition of meetings to consider schemes of arrangement, the effect of s 114 is that where there is a proposal affecting the rights of the holders of more than one class of shares in a company, separate schemes have to be put up to the holders of each class and that it follows that separate meetings for each such proposed scheme must be held in terms of s 115 of the Act. The argument had been foreshadowed in a letter addressed to Distell (and courtesy copied to Heineken and Remgro) by Sand Grove Capital Management LLP's London solicitors more than two weeks before the meeting in terms of s 115(2) was held.

[79] Mr *Subel* sought support for the argument in s 37(1), which provides '(a)*ll of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class*'. The argument, as I understood it, was that there was no longer scope for the balanced weighing, with reference to similarity or dissimilarity of rights, that the courts used to do under the old s 311; s 114 of the current Act required the holders of each class of securities (as defined by s 37(1)) whose rights were affected by a scheme proposal to meet separately.

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[37] See also *Re Charles Stanley Group Plc* [2022] EWHC 103 (Ch) in para 42

[38] The third stage of the process in which, in terms of s 899, the court's sanction of the arrangement approved by members or creditors is required before the scheme can be implemented.

[80] I am not persuaded that the argument is sound. The evident intention of the regulation in s 37 of the issuance of different classes of securities is to promote clarity and certainty concerning any rights and limitations attaching to the issued shares in a company. The section requires that these rights and limitations must be set out in the company's MoI. The slightest difference in rights or limitations, irrespective of its materiality, mandates distinguishing the shares in different classes. The section also serves, subject to certain qualifications, to make appraisal rights, in terms of s 164, available to the holders of a class of securities within the meaning of s 37(1) if the MoI is amended to *materially and adversely* alter the preferences, rights, limitations or other terms of the class. It bears emphasis, however, that not every adverse alteration of rights triggers the remedy, only one that is materially adverse. Thus, materiality is introduced as a determining criterion whenever the question arises whether any alteration of the rights attached to any shares justifies a remedy.

[81] The 2008 Companies Act leaves it to the company to convene the required meeting in terms of s 115. The courts no longer play a role in determining ahead of the voting whether the shares should be voted at a single meeting or put separately to 'classes' of the members. The commentators appear to be unanimous in highlighting that the meeting provided for in s 115 is a company meeting and not a meeting of classes of shareholders as used to be the case under s 311 of the 1973 Act. In Delport et al, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis, SI 27) at p. 420(1) it is argued, however, that whilst s 115 '*does not expressly provide for class meetings of shareholders as was the case in s 311 (2) of the 1973 Act ... the words "**a special resolution adopted by persons entitled to exercise voting rights on such a matter**" in sub-s (2) would ... appear to indicate a subdivision into classes in respect of meetings and special resolutions at those meetings ... . To require a special resolution of all the classes of holders of securities, ie of the company as in terms of s 65, in respect of the arrangement in respect of a particular class would not be logical and lead to ".*

. . insensible or unbusinesslike results . . .": ... Therefore, for meetings to implement a s 114 arrangement, if the arrangement is in respect of a class of holders of securities and if there are more classes involved, the separate classes should have separate meetings' It seems to me that when the authors here speak of '*classes*' they mean classes in the sense that was comprehended by s 311 of the 1973 Act. That much is implied not only by the context in which the opinion is offered but also by the authors' use of the expression '*class of holders of securities'* as distinct from the language of s 114, which is '*holders of any class of* [a company's] *securities*'. The implication is that it is incumbent on the directors, presumably following the advice of the independent board and with due attention to the content of the independent expert's report, to consider and determine on the most appropriate manner in which to comply with s 115(2). (The Panel could conceivably also, in the exercise of its forementioned functions in terms of s 119, direct the holding of appropriately constituted separate meetings. This much appears to be confirmed if regard is had to the Panel's responsibility in terms of s 119(2)(b)(ii) of the Act to ensure that all holders of '*voting securities of an offeree regulated company are afforded equitable treatment, having regard to the circumstances*'.)

[82] The opinion expressed in *Henochsberg* loc. cit. commends itself. The reform of the processes by which a scheme of arrangement is approved and adopted in terms of Part A of Chapter 5 of the Act does not alter or affect the incidence of the considerations that informed the need under the previous dispensation to determine whether shareholders whose rights were differently affected by the proposal should vote separately on the proposals.

[83] The construction outlined in *Henochsberg* is sensible and pragmatic. Its adoption would conform to the purposive interpretation of the Act expressly enjoined in s 5(1). Having regard to the refrain in the English cases referred to above cautioning against the too ready holding of separate meetings where there are insufficiently material dissimilarities

between shareholders' affected rights to warrant it and to the legal policy and considerations of practicality on which that approach is based, I think it unlikely that there was any intention by the legislature, in s 114 of the Act, to introduce a new approach abolishing the sound and well-established policy and importing such obvious impracticalities.

[84] The usefulness of a consideration for interpretive purposes of comparable legislative reform abroad is endorsed in s 5(2) of the Act. The reformed legislative scheme in Chapter 5 of the Act is comparable in some significant respects with that introduced in New Zealand in Parts 14 and 15 of the New Zealand Companies Act, 1993.

[85] The comparable reduction or relative minimalizing of the role of the courts in schemes of arrangement introduced in the New Zealand statute was designedly to reduce the expense and complexity entailed in compliance with the previously applicable provisions, which closely resembled those under s 311 of our 1973 Act. It is notable that in New Zealand, which, in s 83 of its Companies Act, has a provision closely equivalent to s 37 of our new Act, the courts, in the limited circumstances in which they still do have to consider whether shareholders' or creditors' meetings convened by companies have been appropriately constituted, continue to be guided by the traditional approach founded in cases like *Sovereign Life Assurance*, *UDL Argos Engineering* and *Hawk*.[39] This provides comparative law support for the forementioned construction of s 114 and 115 of the 2008 Act that I am inclined to adopt.

[86] Moreover, the Memorandum on the Objects of the Companies Bill, 2008, whilst confirming that the drafters' objects in Chapter 5 of the Act included limiting the involvement of the courts in the processes of schemes of arrangement to those described in

[39] See e.g. *Trends Publishing International Ltd v Advicewise People Lt*d [2018] NZSC 62; [2018] 1 NZLR 903 and *Bank of Tokyo-Mitsubishi UFJ, Ltd v Solid Energy New Zealand Limited* [2013] NZHC 3458 in which the history of the New Zealand statutory reform is described and practical incidents of the reformed legislation are demonstrated.

s 115, nonetheless expressly reiterated the statement in the 2004 departmental policy paper that there was no intention by way of the reforms to '*unreasonably jettison the body of jurisprudence built up over more than a century. The objective of the review is to ensure that the new legislation is appropriate to the legal, economic and social context of South Africa as a constitutional democracy and open economy. Where current law* [ie pre-Act 71 of 2008 company law] *meets these objectives, it should remain as part of company law.*'

[87] I was not referred to any writing on the subject that suggested the effect of s 114(1) was that where different classes (within the meaning of s 37(1)) of securities were affected by a proposed scheme, separate meetings had to be convened of the holders of each class of securities. On the contrary, I am not aware of any criticism by the commentators of the forementioned view expressed in *Henochsberg* that the traditional considerations in respect of classification applied by the courts under s 311 of the 1973 Act would now fall to be weighed by the company in determining how to comply with s 115(2). If the company's determination were to give rise to any of the grounds for review under s 115(7), it would be open to challenge by any qualifying dissentient securities holder. This view appears to be supported by SM Luiz in her article '*Protection of holders of securities in the offeree regulated company during affected transactions: General offers and schemes of arrangement*' 2014 SA MercLJ 560 at 577, where, addressing the issues that might arise in a review in terms of s 115(7), the author ventures '(t)*he court may well focus on the question of class and whether the holders of securities who voted should have voted at the same class meeting*'. The opinion was ventured with reference (in fn 103) to *Sovereign Life Assurance* supra.

[88] To sum up on this issue, s 37 has the effect of making for different classes of shares even when the differences in attached rights and limitations are insignificant. The impracticalities and other disadvantages of dividing the total voting rights to be exercised

between too many separate meetings has long been recognised. It would be inimical to effectiveness and efficiency of the scheme of arrangement procedure to adopt an interpretation of s 114 that would require separate meetings of the holders of each class (determined with reference to s 37) notwithstanding the absence of a significant dissimilarity between their affected rights and merely because their rights were not identical. In my judgment, any company concerned with convening a meeting in terms of s 115(2) must conduct itself mindful of the same considerations that the court used to be when deciding an application in terms of s 311(1) of the 1973 Companies Act.

[89] It would not be necessary in the current proceedings to form any view on the question whether more than one meeting in terms of s 115(2)(a) should have been held to approve the Distell scheme of arrangement if the respondents are correct in their contention that a review in terms of s 115(7) is the only remedy available to attack the validity of an approved scheme of arrangement, and that relief of the nature sought by the applicants by way of the proposed amendment to their notice of motion is therefore not cognisable.

[90] The applicants' retort is that if the adopted scheme is invalid because separate, albeit interlinked, schemes were not put separately to the holders of the different classes of securities, the resolution adopted at a meeting at which both classes of shares were voted together did not constitute a resolution in terms of s 115(2) and that there is accordingly no basis to review it in terms of s 115(7). In other words, they argue that sub-secs 115(3), (6) and (7) do not apply in the circumstances.

[91] In my judgment, the respondents' argument that s 115 excludes the ability of anyone to challenge the approval of a scheme of arrangement other than by, in the circumstances therein described, requiring the company to make application to court in terms of s 115(3)(a) for approval of the transaction, alternatively, by review in terms of s 115(7) is correct. The approval of the scheme in terms of the impugned resolution is a fact. It was approved in

purported compliance with the legislative requirements and on the face of it is accordingly enforceable by and against the scheme participants in terms of s 115(9). Just as with administrative decisions, the fact of scheme's approval with the attendant consequences cannot be ignored, even by someone who contends that the adoption of the approving resolution was invalid for any reason; cf. *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA). Save where subsections 115(3)(a) and (5) apply,[40] it stands and must be treated as if valid until and unless set aside by a court. The aptness of the analogy gains some support, I think, from Mr *Syncker*'s submission that a scheme approved in terms of s 115 of the current Act is comparable to one sanctioned by the court under s 311 of the 1973 Act and his reference in that regard to the observation by Aldous LJ in *British and Commonwealth Holdings Plc v Barclays Bank Plc and Others* [1996] 1 WLR 1 (1995) of the status of the terms of a court-sanctioned scheme as indistinguishable from that of a court order, with the consequence that they could not be disregarded by an affected party on any grounds unless set aside.

[92] Leaving aside the requirement that leave to proceed must be obtained, it does not seem to me to matter whether the proceedings impugning a resolution purportedly adopted in terms of s 115(2)(a) are framed as an application to declare it or the meeting at which it was purportedly approved invalid or as an application for its review and setting aside. Prayers for orders reviewing and setting aside decisions or conduct are often coupled with prayers for

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[40] Section 115(3)(a) provides: '*Despite a resolution having been adopted as contemplated in subsections (2) (a) and (b), a company may not proceed to implement that resolution without the approval of a court if-*
(a) the resolution was opposed by at least 15% of the voting rights that were exercised on that resolution and, within five business days after the vote, any person who voted against the resolution requires the company to seek court approval; or
(b) the court, on an application within 10 business days after the vote by any person who voted against the resolution, grants that person leave, in terms of subsection (6), to apply to a court for a review of the transaction in accordance with subsection (7)'.
Section 115(5) provides: '*If a resolution requires approval by a court as contemplated in terms of subsection (3) (a), the company must either-*
(a) within 10 business days after the vote, apply to the court for approval, and bear the costs of that application; or
(b) treat the resolution as a nullity'.

orders declaring the impugned decision or conduct to be unlawful and invalid; see for example *Kouwenhoven v Minister of Police and Others* 2022 (1) SA 164 (SCA. In *Kouwenhoven* Wallis JA described that 'the aim of the review' was to obtain declaratory orders that the impugned decision and resultant conduct had been unlawful.[41] In *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 661 *in fine*, Kriegler AJA endorsed the observation made by Eloff DJP in *S v Baleka and Others* 1986 (1) SA 361 (T) that '(t)*here are numerous decisions in our ... Courts in which the validity of administrative rulings was considered and adjudicated on in proceedings other than conventional review proceedings* ...'. We are not dealing with the validity of administrative rulings, but the point is that the forms in which challenges to reviewable decisions can be brought are manifold. Whatever the form, in essence it remains an application for review.

[93] It is well established that courts are not given to granting declaratory relief unless there are interested parties upon whom the declarator would be binding; *Ex parte Nel* 1963 (1) SA 754 (A) at 760B-C. The obvious intention in the application that the Sand Grove funds belatedly seek to make for declaratory relief is to achieve by that method that which they apprehend they could not achieve by way of the originally sought review relief in terms of s 115. The binding effect of any order granting the declaratory relief would be that the resolution could not be implemented. There would be no point in a court making the declaration sought if it would not have that practical effect.

[94] The terms of s 115(7)(b) give as two of the grounds on which a court can review and set aside a resolution in terms of s 115(2)(a) its having been '*materially tainted*' by (i) '*failure to comply with the Act*' or (ii) any '*other significant and material irregularity*'. Those grounds broadly encapsulate the very bases upon which the applicants seek to apply for declarators that the meeting was unlawfully constituted, and the decision taken at it

[41] In para 3.

accordingly void. It would defeat the purpose of the carefully framed restrictions subject to which a review challenge can be mounted under s 115 of the Act, were the courts to entertain such challenges brought in a different format outside the limitations of the provision.

[95] For that reason, the application for leave to amend the notice of motion will be dismissed, without me needing to consider any of the other grounds upon which the respondents opposed it. A separate costs order is not warranted. The additional costs, if any, occasioned by the application would be negligible.

The merits of the application for leave to take the adoption of the resolution to approve the scheme on review

[96] It is unnecessary, by virtue of my findings on the applicants' lack of standing and the applications by the nominee companies for leave to intervene, to deal with the merits of the application for leave to take the approval of the resolution on review. It is nevertheless desirable that I should state my views in that regard in case the matter is taken further. I shall try to be brief, but because the exercise takes me into hitherto largely unexplored territory I am obliged in some respects to explain my approach more fully than might otherwise have been possible.

[97] Section 115(6) defines the parameters for the court's consideration of the relief sought in terms of Part A of the applicants' notice of motion. The court may grant leave to an applicant to proceed with a review '*only if it is satisfied*' that they are (a) '*acting in good faith*', (b) appear '*prepared and able to sustain the proceedings*', and (c) have '*alleged facts which, if proved, would support an order*' upholding an application for review under s 115(7).

[98] A court is empowered by s 115(7) of the Act to set aside a resolution approving a scheme of arrangement on review '*only if-*

(a) The resolution is manifestly unfair to any class of holders of the company's securities; or

(b) *The vote was materially tainted by conflict of interest, inadequate disclosure, failure to comply with the Act, the Memorandum of Incorporation or any applicable rules of the company, or other significant and material irregularity*'.

[99] The object of s 115(3)(b) read with sub-secs 115(6) and (7) is plainly to put in place a vetting process to prevent frivolous, vexatious or obviously unmeritorious review applications being proceeded with. The provisions place the burden of persuasion on an applicant who seeks leave to proceed with a review challenge. In *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at para 8, it was noted that '(t)*he phrase "if [the court] is satisfied" ... has long been recognized as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties. See eg Die Afrikaanse Pers Bpk v Neser 1948 (2) SA 295 (C) at 297*'.

[100] Regard to the context, in particular the strictly regulated timetable in the legislation for the processing and implementation, and also the commercially dislocating effect of challenge-related delays, justifies the inference that the requirement that leave be obtained to challenge a shareholders' resolution approving the transaction was intended to serve the purpose of quickly excluding all intended review applications under s 115(7) except those that are demonstrably bona fide, viably prosecutable by the applicant concerned and which, on their face, enjoy reasonable prospects of success. Obtaining leave to proceed with a review challenge under s 115(7) is not a mere formality.

[101] The provisions demand a rigorous interrogation of the intended review with reference to the criteria in s 115(6). In respect of the criterion in s 115(6)(c), a court seized of an application for leave is required not only to assess whether the facts alleged by the applicant,

if proved, would on their face support the conclusion by a reviewing court that the resolution was unfair to any class of the company's securities or that the vote was tainted by any of the considerations referred to in s 115(7)(b), it is also required to evaluate whether there is a reasonable prospect that a reviewing court might be persuaded on the basis of such alleged facts that the evident unfairness to a class of securities holders was '*manifest*', or that any feature identified by an applicant as having tainted the impugned vote was '*material*' in its effect, or otherwise constituted a '*significant and material procedural irregularity*'. This is so because satisfaction of the aforementioned qualifying criteria are essential prerequisites to any applicant's ability to obtain review relief under s 115(7). The qualifying criteria in s 115(7) are plainly intended to set a bar against challenges to resolutions based on anything other than grounds which strike at the very heart of their integrity or negate or materially undermine the security holder protections that the Act was designed to provide.

[102] It is also clear, I think, that the three aspects prescribed in s 115(6) by which an intended review application must be assessed for the purpose of determining whether leave to proceed should be given are not hermetically compartmentalised. They will usually work in a mutually interrelating way; cf. *Mbethe v United Manganese* 2017 (6) SA 409 (SCA) in para 19. So, for example, the allegation by an applicant of facts which, if proved, would demonstrate strong prospects of success on review, would in the majority of cases also weigh in favour of the court being satisfied that the applicant was proceeding in good faith and that it was prepared to sustain the intended proceedings.

[103] It is convenient in this matter to treat of the considerations to be weighed in terms of s 115(6)(a) to (c) in a different order to that in which they are set forth in the provision. I propose to start with the issue falling to be determined under paragraph (c): whether the applicants have alleged facts which if proved would support an order in terms of s 115(7). The pertinent facts are essentially common ground.

Do the facts alleged by the plaintiffs make out a prima facie case for an order in terms of s 115(7)?

[104] The applicants intended to impugn the resolution on review on any one or all of five bases; viz. (i) that the meeting convened to vote on the scheme was unlawfully constituted and that separate meetings should have been held for the holders of ordinary shares and the holders of B class shares, (ii) that the expert report distributed to the shareholders in compliance withs 114(3) contained deficiencies that resulted in inadequate disclosure; (iii) that the vote was materially tainted by a conflict of interest; (iv) manifest unfairness to a class of holders of the company's securities and (v) Remgro's votes should have been excluded from consideration.

Separate meetings

[105] It should be evident from the discourse on the subject earlier in this judgment that I reject the construction of s 114 of the Act on which this part of the applicants' case is essentially founded.

[106] Assessing the case upon what I consider is a proper construction of the applicable provisions, I am not satisfied on the facts alleged by the applicants that there is sufficient dissimilarity between the rights of the holders of the two classes of securities in the company and the effect of the scheme on such rights to warrant or mandate that voting on the resolution should have been undertaken in separate meetings. In my opinion the actual position was fairly summarised in Heineken's heads of argument:

1.1. 'The impugned resolution and transaction affect the interests [for which read 'rights'] of ordinary shareholders and B shareholders alike. Heineken's offer is made to all shareholders.

1.2. The differences between the two types of [Distell] share[s] are essentially these: while the ordinary shares have both economic and voting rights, the B shares (which are required to be linked to corresponding ordinary shares) have voting rights only. The B shareholder has nothing more than weighted voting rights.

1.3. The commercial considerations that one would expect to play a role in both sets of shareholders in deciding whether or not to accept the offer are similar if not the same, as Remgro will retain its control over Capevin ... (the out of scope assets) and both it and the other ordinary shareholders will have the right to receive shares in Newco (*pari passu* to their stake in the *ordinary share capital* of Distell) in exchange for disposing of their Distell shares.'

[107] The economic rights associated with the B shares are, as mentioned earlier, so infinitesimal that there is consequently no material difference between the economic rights attached to the two classes of issued shares. Remgro stands to be compensated for its B class shares only at their nominal issue price; a few thousand rand in total in a transaction of upwards of R40 bn determined by cash offer value. The difference (between the ordinary shareholders that are also B shareholders and the shareholders that hold only ordinary shares) is not economic. It is a difference in voting rights. To exclude the holders of B class shares from voting them together with their ordinary shares would be to divest them of the only right of any substance attached to their shares and result in a decision being taken in a manner wholly incompatible with the compact in the company's MoI, to which all the shareholders must be taken to have subscribed.

[108] The fact that some shareholders might because of their own interests or mandates have no choice but to accept cash for their Distell shares rather than shares in Newco and might have to sell their shares in Capevin because they are not permitted to hold shares in

unlisted companies bears no relationship to such members' shareholder holder rights in Distell. It does not afford a reason to put them in a separate class from other holders of ordinary shares.

[109] Had it been necessary to make a determinative finding, I would not have been satisfied that the facts alleged by the applicants supported a case that the meeting convened to approve the resolution was unlawfully constituted.

Was the expert report non-compliant?

[110] In terms of s 114(3) of the Act the independent expert retained by the company, as required by s 114(2), to evaluate the consequences of the arrangement and assess its effect on the value of securities and on the rights and interests of a holder of any securities is mandated to prepare a report '*which must at a minimum* –

a) state all prescribed information relevant to the value of the securities affected by the proposed arrangement;

(b) identify every type and class of holders of the company's securities affected by the proposed arrangement;

(c) describe the material effects that the proposed arrangement will have on the rights and interests of the persons mentioned in paragraph (b);

(d) evaluate any material adverse effects of the proposed arrangement against-

(i) the compensation that any of those persons will receive in terms of that arrangement; and

(ii) any reasonably probable beneficial and significant effect of that arrangement on the business and prospects of the company;

(e) state any material interest of any director of the company or trustee for security holders;

(f) state the effect of the proposed arrangement on the interest and person contemplated in paragraph (e); and

(g) include a copy of sections 115 and 164.

The prescripts in s 114(3)(a)-(g) are fleshed out in reg. 90 of the Takeover Regulations, which prescribes in considerable detail how the expert report should be composed.

[111] The report in the current matter was attached as schedule 1 to the circular that the company was obliged to distribute to shareholders. It was prepared by Mr Nick Lazanakis of BDO Corporate Finance (Pty) Ltd, an experienced practitioner in the field. A number of deficiencies were relied on in the applicants' heads of argument but, as Mr *Snyckers* pointed out, several of them were rendered irrelevant by the provision of the required information in the circular to which it was annexed. This aspect of the complaint could not but raise the suspicion that the applicants' had combed the expert report looking to find fault rather than finding themselves prejudiced before the meeting by a lack of information – a factor to be borne in mind in the assessment of whether the intended review application was being brought in good faith. In oral argument Mr *Subel* focused on the non-compliance of the expert's report with reg. 90(6)(e), which provides that '(t)*he content of the independent expert's fair and reasonable opinion in relation to an offer must, among other things, include – a statement of the valuation approach adopted, the methods employed and all material assumptions underlying the valuation approach and methodology*'.

[112] Even accepting, ex hypothesi, that the report was defective in that it failed to disclose all the assumptions that informed the expert's valuations (which was contested by the independent expert and another expert witness engaged by Distell), I have not been satisfied that the deficiencies would likely be considered a 'material or significant irregularity' or that the facts alleged by applicants show that the vote was materially tainted by it. To establish that *the vote* had been materially tainted by the deficiencies the applicants would have to

show that a significant number of shareholders had been influenced by them either not to vote or to vote in a way that they would not otherwise have done. There is no such evidence. Speculation not based on primary facts does not meet the requirement to make out a prima facie case.

[113] The report, read together with the circular and other documents that accompanied it, which, excluding the forms to be completed in connection with the meeting, ran to 266 pages of tightly formatted script, contained a wealth of information and data that would enable any reader in doubt of the validity of the expert's valuation to commission a valuation by another expert appointed by themselves. There is no evidence that any shareholder complained about the deficiencies in report before the meeting or asked for the information in it to be supplemented.

[114] When the applicants' London solicitors wrote to Distell on 28 January 2022 arguing that the scheme offer price was based on a valuation considerably lower than valuations that had supported comparable acquisitions and mergers and explaining why they considered the alleged undervaluation was 'particularly acute in respect of the Out of Scope Offer', they did not specify any of the deficiencies later identified in a critique subsequently obtained for the purpose of this litigation from Mr David Parapoulis. I think I am entitled to infer from the content of the solicitor's letter, which was annexed to the applicants' founding affidavit, that the applicants had been able, using the information provided in the report and other published sources, to undertake their own assessment of the fair value of the transaction. They appear to think, on the basis of that, that they were being sold short. That being the case, s 164 appraisal rights provided their obvious remedy. The applicants did indeed give notice to the company in terms of s 164(3). (Whether the notice given by the applicants was effective or not is not a matter for determination in these proceedings.)

[115] The lack of materiality in the deficiencies identified by Mr Parapoulis in his critique on the independent expert report is also suggested not only by the demonstration in the respondents' answer that equivalent reports authored by him for the purpose of s 114(3) have manifested the same deficiencies,[42] but also the fact that the Takeover Panel, whose functions I described above, did not raised any concern.

Was the vote tainted by conflict of interest?

[116] The applicants' heads of argument list the bases for the contention that there was a vitiating conflict of interest as follows: 'Remgro was in a position to exert significant influence over the negotiations with Heineken leading up to the scheme and to agree the direction of the post-scheme businesses, given that (i) Remgro and PIC are both related parties of Distell; (ii) there is a significant overlap between the boards of Remgro and Distell; (iii) Remgro has given an irrevocable undertaking to support the scheme, and there was a legitimate expectation that its largest shareholder, PIC, would be aligned with it; and (iv) following the scheme's implementation, Remgro intends both to exert control shareholder over Capevin and hold a substantial stake in Newco'.

[117] All of the aforementioned points appear to be taken with the provisions of s 115(4) in mind. Section 115(4) provides that any votes controlled by an '*acquiring party, a person related to an acquiring party or a person acting in concert with either of them*' must not be included in the percentage of voting rights included in calculating whether the prescribed quorum is achieved or the necessary votes to approve the resolution have been obtained. The term '*acquiring party*' is defined in s 1 to mean '*when used in respect of a transaction or proposed transaction, … a person who, as a result of the transaction, would directly or indirectly acquire or establish direct or indirect control or increased control overall or the*

[42] The independent expert report prepared by Mr Parapoulis in respect of the scheme of arrangement proposed by Sable Holdings Limited was placed under the microscope for comparative purposes.

greater part of a company, or all of the greater part of the assets or undertaking of a company'. Heineken and Newco are the acquiring parties under the scheme of arrangement.

[118] I understood Mr *Subel* to contend, however, that Remgro is an '*acquiring party*' because implementation of the scheme will place it in control of Capevin, in which the out-of-scope business will be conducted. I am not persuaded by the argument. In my view the '*company*' referred to in the definition of '*acquiring party'* is what is often called the '*offeree company*', in other words the target of the acquisition. That is Distell and its in-scope business. As I have described above, the shareholder composition of Capevin in which the out-of-scope business will be conducted after the scheme is implemented will mirror that of Distell prior to the implementation. That is consistent with the indication in the structuring of the scheme that the out-of-scope part of Distell's business was not the target of the acquisition that the transaction is intended to facilitate. The shareholder composition of Capevin may, of course, well change post-implementation depending on the extent to which existing Distell shareholders elect to take up the Capevin Offer by Heineken, but those transactions will entail dispositions by other Capevin shareholders to Heineken, not acquisitions by Remgro. It is also relevant in considering whether Remgro could properly be characterised as an 'acquiring party' to note that the maximum holding it could achieve in Newco upon implementation of the scheme would be 17.5%, which disposes of any notion that the scheme would enable it to obtain a controlling interest in one of the acquiring companies.

[119] Whether Remgro is a 'related party' falls to be determined with reference to s 2(1)(c) of the Act. It is a related party to Distell but not to either of the acquiring parties. There is no evidence to support the allegation that Remgro and the PIC collaborated in any way in respect of the framing of the scheme proposal or the vote thereon.

[120] It common ground that Remgro gave an irrevocable undertaking to support the approval of the scheme. The English jurisprudence to which I have had regard suggests that such undertakings are regarded as unexceptionable in that jurisdiction. In *Re: Telewest Communications PLC* [2004] BCC 356; [2004] EWHC 924 (Ch) at para 52-53, David Richards J, being concerned in that matter with an application to convene meetings to approve a scheme of arrangement with creditors, observed that there was much sense in securing such agreements in advance of the expenditure of time and money involved in pursuing a scheme. He did, however, consider that their existence might give rise to a relevant consideration when application was made for the court's sanction. See also *Re: The French Connection Group Plc* supra, in para 4. I did not understand the applicants' counsel to argue that Remgro' s giving of an irrevocable undertaking to vote to approve the scheme amounted to acting in concert with Heineken or Newco.

[121] The facts alleged by the applicants do not establish that there is a significant overlap between the boards of Remgro and Distell. There is only one director (with an alternate) appointed by Remgro to the board of Distell, comprising eleven directors. And there is in any event nothing to suggest that the proposal was not managed for Distell by an independent board, as required in terms of the Takeover Regulations.

[122] I would not have been satisfied that a prima facie case for review had been made out by the applicants under this heading.

Have the applicants alleged facts that if proven would demonstrate that the approval of the resolution resulted in manifest unfairness to a class of holders of the company's securities ?

[123] The ground for review asserted by the applicants under this head is inherently related to their contention that the holders of the two classes of securities in Distell should have voted in separate meetings. That contention has been addressed above.

Should Remgro's votes have been excluded from consideration

[124] I have set out my views on this issue above under in the discussion under the 'conflict of interest' heading.

[125] It follows that I would not have been satisfied that the applicants fulfilled the requirements of s 115(6)(c).

Did the evidence show that the applicants appear prepared and able to sustain the proceedings?

[126] The deponent to the applicants' founding affidavit averred that the respective Sand Grove funds had net assets ranging from over $US51 million, in the case of the fourth applicant, at the low end, to over $US955 million in the case of the fourth applicant, at the top end. No substantiating information was provided. The deponent to Distell's answering affidavit countered the allegation in the founding affidavit, saying '*It is important, however, to note that the Sand Grove Funds are funds that invest on behalf of their clients. The nett assets referred to are therefore assets held on behalf of those clients. There is no indication at all that Sand Grove* [Capital Management LLP]*, or the Sand Grove Funds are able to bring any of these assets to bear in this litigation or, if they can be applied to this litigation, that they cannot be withdrawn my clients or moved by Sand Grove from the current funds two other funds*'. The response in the replying affidavit was little more than a reiteration of the opaque averment in the founding affidavit. It was added that the applicants had put their attorneys of record in funds to provide irrevocable undertakings in favour of Distell and Heineken's legal costs in the amount of R300 000 each. It was also stated, again without substantiating detail, that the liquidity terms of the assets held by them invested for clients did not allow for any material redemptions 'during the life of these proceedings'.

[127] The applicants' counsel argued that the use of the word '*appears*' in s 115(6)(b) set a low threshold for the evidence that an applicant had to adduce to show its preparedness and ability to sustain the proceedings. I disagree. The effect of the provision is that an applicant for leave to challenge a resolution on review in terms of s 115(7) must make it appear to the court that it is prepared and able to sustain the contemplated proceedings. In the current case, the applicants should have been alerted by the point taken by the respondents in their answering affidavits that they needed to make an adequate disclosure of their readily exigible assets, other than assets held against their investment clients' claims. Their failure to do so was remarkable. They failed to do what should have been easy for them to have done. The R600 000 security for costs furnished thus far strikes me as modest, having regard to the costs that the respondents must have already incurred in the litigation. In the circumstances I find myself unable to say that I would have been satisfied about the applicants' financial ability to sustain the contemplated review proceedings.

[128] The applicants' preparedness to sustain the proceedings is an issue closely bound up with the question of whether they are acting in good faith in instituting the proceedings, a question I turn to next.

Would the applicants have succeeded in satisfying the court that they are acting in good faith?

[129] It is plain from the timeline and evolving nature of the Sand Grove funds' exposure to Distell that their investment was made because of their awareness of an impending acquisition of a major part of Distell's business by Heineken. As more detail of the impending acquisition was made known, so the funds increased their investment.

[130] The transaction was first brought to the notice of the market in May 2021 and Sand Grove began to obtain exposure to Distell through the purchase of derivative instruments

shortly thereafter. The funds increased their exposure significantly in the latter part of the year and in early 2022 after the terms of the proposed scheme of arrangement had emerged clearly enough for them to appreciate the incidence of the aspects they now complain about as unfair to minority shareholders, such as the delisting of Distell and the fact that any shares accepted in Capevin and Newco for their shares in Distell instead of cash would also result in holdings in unlisted companies. They confessedly altered the nature of their investment from derivatives to ownership of shares with a view to being able to take advantage of the unique remedy afforded in terms of s 164 of the Act. They also invested cognisant of the controlling interest that Remgro enjoyed in Distell by reason of its B class shares.

[131] The context of Sand Grove's investment in Distell was forcefully, and to my mind accurately, summarised as follows in Distell's heads of argument:

> 'The Sand Grove funds] double their exposure after the price, the voting structure and the attitude of the controlling shareholder to the transaction are made public. They increase their exposure after the transaction circular is issued. They then convert their derivative interest into a more direct interest on the eve of the vote, and have letters of representation taken from the registered shareholders of the relevant shares to vote the shares against the transaction. This they do knowing the transaction is likely to succeed, and knowing of its essential terms and voting methodology.'

[132] Against that background, Mr *Synckers* submitted, persuasively in my judgment, that it was apparent that the applicants' investment had been in the transaction, rather than the company. He contended that the current litigation was a strategy by the funds to leverage an increase in the offer price and turn their investment to greater profit. Attention was drawn to other transactions in which comparable investing strategies by the funds had succeeded in extracting improved offer prices. It is a type of investment strategy that even a cursory search on the internet shows is well documented. It has even been given a name:

'bumpitrage' - a pejorative label that the respondents' counsel found advantageous to adopt in argument.

[133] I think that 'bumpitrage' in some of its forms could be an unexceptionable strategy; for example, where it takes the form of investing in a company to qualify the investor to rally fellow minority shareholders to hold out for a higher price for their shares[43] or, in South Africa, in the context of the special remedy provided to dissentient shareholders in terms of s 164 of the Act, where, because of an assessment that the transaction was likely to proceed at a discount to fair value, exercising appraisal rights could render a profit. It is not a practice to be encouraged, however, if it involves resort to the courts in terms of s 115(7) with the aim not of setting the resolution aside, but rather to use the attendant prejudicial delay and uncertainty to extract an improved transaction price from the offeror. That would constitute an abuse of the statutory remedy and an unacceptable misuse of court resources.

[134] In the current matter the applicants have admitted that they took a long position in investing Distell, that is to make a profit out of their investment. The evidence shows that the listed share price improved on the announcement of the proposed transaction. It might therefore reasonably be inferred that a setting aside of the approval of the scheme of arrangement, thereby negating that which had caused the stock to rise, would have a dampening effect on the price. The applicants have failed to explain how defeating the proposed takeover would assist in achieving their object of profiting out of their investment made in the circumstances described above. The court was therefore left with the strong impression that the proceedings were instituted with the ulterior purpose of bringing pressure to bear on Heineken to improve its offer price rather than with the genuine intention of

[43] An example of this employment of the strategy seems to be illustrated in the PT Medco Energi International takeover offer in respect of Ophir Energy that was described in Distell's answering papers. Sand Grove is reported in that matter to have built a 6.4% stake in Ophir Energy at the time of the firm offer announcement and increased it to 19% during the course of the offer to use its resultant significant minority holding to extract an increase of the offer price from 55p per share to 57.5p, against which it gave the offeror an irrevocable undertaking to vote in favour of the scheme.

obtaining redress for any complaint sustainable in a review in terms of s 115(7). This conclusion is fortified by my views on the tenuous nature of the applicants' grounds for review, discussed above.

[135] In *Mbethe* supra, in circumstances which counsel on both sides accepted were analogous, the appeal court held (in para 11, 19 and 22) in the context of an application in terms of s 165(5) for leave to institute derivative proceedings that '*presence or absence of a collateral or ulterior purpose on the part of an applicant, may in itself constitute cogent evidence of an absence of good faith*'. Had it been necessary for me to decide whether to grant the applicants leave, I would not have been satisfied, for the purpose of s 115(6)(a), that they were acting in good faith.

Orders

[136] For all of the foregoing reasons, orders will issue as follows:

(a) It is confirmed that the application was deserving of being heard as one of urgency and, accordingly, in terms of Uniform Rule 6(12), condonation is granted, to the extent required, for any non-compliance with the prescribed rules and processes of the court.

(b) The applicants' application for leave to amend their notice of motion is refused.

(c) The application by First National Nominees (Pty) Ltd and Standard Bank Nominees (Pty) Ltd for leave to intervene is refused with costs, to include the fees of two counsel, the liability for such costs to be joint and several.

(d) The applicants' application in terms of s 115(3)(b) of the Companies Act 71 of 2008 for leave in terms of s 115(6) to apply for a review of the scheme of arrangement in terms of s 115(7) is refused.

(e) The applicants are ordered, jointly and severally, to pay the costs of suit of the first, second and third respondents, such costs to include the costs of two counsel.

A.G. BINNS-WARD
Judge of the High Court

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