

THE MEANING OF 'ARRANGEMENT' IN THE COMPANIES ACT 71 OF 2008

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DECLARATION

I, Thembinkosi Muntu Sithole, declare that this dissertation entitled “The Meaning of ‘arrangement’ in the Companies Act 71 of 2008” is my own independent work and all the sources used herein are acknowledged with appropriate reference.

Student's signature

Date

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CHAPTER 1

INTRODUCTION

1.1. Introduction

Takeovers and company reorganizations have formed part and parcel of corporate markets since time immemorial. A takeover can be defined as the acquisition of a controlling interest in a target company by another person or company through the acquisition of a sufficient proportion of the target company's shares or assets¹.

A scheme of arrangement (a "Scheme") is one of the methods of effecting a take-over. A scheme is particularly useful because it allows for the offeror to use the target company to negotiate with its shareholders collectively and then bind them to the arrangement agreed to by the 75% majority². Ordinarily, the common law and company law rights of the shareholders of the target company can only be modified with the consent of each of them, however a Scheme provides a mechanism for effectively obtaining consent from shareholders without having to obtain it from each individual shareholder³. Once implemented, the Scheme will also bind the shareholders who did not approve it⁴. However, the advantages and disadvantages of the scheme as well as the procedural requirements for effecting a scheme are beyond the scope of this paper.

The study and research on this subject matter is well documented. However, despite the notoriety of the study on takeovers, there are few other areas which still remain debatable due to the complexities and uncertainties in the establishment of principles and the laws relating to those particular topics. Takeovers and reorganizations effected through a scheme of arrangements are one such example. This mode of takeovers has proven to inspire a debate amongst corporate law scholars and the judicial fraternity. Most of these debates have centred on the meaning of 'arrangement' in the transactions where a takeover or a restructuring was effected through a scheme of arrangement. In

¹Gullifer, L and Payne J. (2011) "Corporate Finance Law; Principles and Policy". Pg 620

²Section 311 of the Companies Act 61 of 1973

³Ex Parte NBSA Centre (1987) 4 All SA 33 (T)

⁴Cilliers HS et al, (2000) "Corporate Law" 3rd Ed, pg469

South Africa particularly, there are few landmark cases⁵ upon which the controversy arose. These cases will be discussed in detail in the chapters below.

1.2. Background

It is axiomatic that the Companies Act has always been an important instrument in regulating takeovers and rearrangements of companies in South Africa. The new Companies Act was enacted simply to reinforce these regulations and to improve the economic viability of the South African market, where the previous legislations fell short. One of the reinforcements are those found in the section dealing with scheme of arrangements. Schemes of arrangements are consistently being utilized by various companies in their quest to restructure the capital or the ownership structure of the company. Due to the complex and sometimes unclear mechanisms of effecting a scheme of arrangement, companies sometimes find themselves failing to comply with the requirements of the law. Thus, the introduction of the new provisions of effecting a scheme of arrangement was necessary in an attempt to curb these difficulties. However, it has been noted that while retaining the basic structure of pre-existing South African takeover law, the new Act includes some new innovations in the company law, which should enhance the objective of balancing the encouragement of economic activity and prudent risk-taking with appropriate protections for the interests of all company stakeholders⁶.

1.3. PROBLEM STATEMENT

It has been argued by legal scholars that circumstances under which a transaction constitutes an arrangement within the meaning of relevant companies act provisions have been uncertain. It has been noted particularly that the circumstances under which the procedure contemplated in s311 of the 1973 Act finds proper application have in the

⁵ See NBSA (footnote 3) supra and Natal Coal cases as will be discussed hereunder

⁶ Davids E; Norwitz T; and Yuills D, (2010). "A Microscopic Analysis of the New Merger and Amalgamation Provision in the Companies Act 71 of 2008". Acta Juridica, pg 337

past been a subject of controversy⁷. In fact Coetzee DJP, as he then was noted that “whether a particular scheme qualifies an ‘arrangement’ within the meaning of s311 of the Companies Act can be vexing”⁸. Further, it has been stated that “previous uncertainties regarding the application of section 311 and 312 of the Companies Act 61 of 1973 appear to have been cleared, while some new ones came to light”⁹. It is apparent that the debate has revolved around how wide a construction should be given to the term ‘arrangement’ as used in s311 of the Companies Act of 1973¹⁰. In the mid-1980s, for example, a series of contradictory decisions were handed down which demonstrated just how divided judicial opinion on the issue was. The courts in *Ex parte Satbel (Edms) Bpk*¹¹ and *Ex parte Natal Coal Exploration Co Ltd*¹² considered whether instances of expropriation or compulsory purchase by a company or a third person of member's shares constituted an ‘arrangement’ within the meaning of the Companies Act. In both cases such schemes were regarded as falling outside the scope of s 311. The courts ruled that in order to qualify as an ‘arrangement’, a scheme must give the members whose shares are to be cancelled, a ‘compensating advantage’ in the form of other rights as opposed to a mere cash payment¹³. These cases will be discussed in detail in the chapters below.

However, the new Act introduces modes in which a scheme can be effected. More importantly for the purposes of this study is the insertion of ‘expropriation’¹⁴ as an arrangement and re-acquisition of shares¹⁵ as an ‘arrangement’ within the context of section 114.

⁷ Lehloenya, P.M. “The Debate on the Meaning and Application of ‘Arrangement: Before and After *Senwes v Van Herdeen & Sons*” (2007) pg 527.

⁸ NBSA Centre footnote 3 supra at 34

⁹ Delport P, (1994) “Section 311 of the Companies Act and the ‘share cases’”. *De Jure*

¹⁰ Lehloenya, P.M. Ibid

¹¹ (1984) (4) SA 279 (W)

¹² (1985) 4 SA 279 (W)

¹³ These cases will be discussed in detail in the chapters below

¹⁴ Section 114(1)(c) of the Companies Act 71 of 2008

¹⁵ Section 114 (1)(e) of the Companies Act 71 of 2008

The intention of this research is to analyse the meaning of arrangement as it has been developed and interpreted, with particular reference and comparative analysis of the new Companies Act and the 1973 Act.

1.4. RESEARCH PROBLEMS AND RESEARCH QUESTION

As already stated above, there has been some divided opinion on what constitutes an arrangement or what an arrangement means. The courts have not sought to provide a definition of the term 'arrangement'. All the courts have done is to provide features and circumstances under which a transaction falls within an arrangement as contemplated in relevant sections of the Companies Act. It is not clear whether the courts have deliberately avoided giving the term a narrow meaning within the meaning of s311 of the 1973 Act and its predecessor. The courts have in some cases avoided dealing or rather giving a meaning of the word 'arrangement' within the meaning of a particular provision, an example being where the court left open the question whether an expropriation of shares would constitute an arrangement¹⁶. On the other hand, the new Companies Act seems to provide a more detailed description on the meaning of 'arrangement'.

However, for the purposes of this research an analytical approach to the definition of arrangement in section 114 of the new Companies Act will be utilized in order to highlight the certainties, if any, provided by the section in terms of which the meaning of arrangement is defined. Of particular importance is also an analysis of whether any gaps left by the courts and s311 of the 1973 Act have been subsequently closed by section 114 of the new Act.

In essence, the most important question which this research seeks to engage and answer is:

Whether the Companies Act, 71 of 2008 provides more certainty on the meaning of 'arrangement' as contemplated in the Act. More specifically whether the insertion of

¹⁶See *Satbel and Natal Coal* case (supra 11 and 12)

'expropriation' and the re-acquisition of shares addresses the difficulties found in the 1973 Act.

1.5. SIGNIFICANCE OF THE RESEARCH

The importance of this research is that it seeks to identify the gaps and shortcomings between the 1973 Act, the subsequent court decisions and the new Companies Act. The juxtaposition of the between the old and new provisions will help identify and rectify inefficiencies in our current corporate takeovers law regime. The comparative analysis will thus be followed by a recommendation on how these inaccuracies and inefficiencies can be addressed. Clarity and accuracy in our company law will enable the Companies Act to achieve its objectives in section 7¹⁷ in ensuring the “promotion of compliance with the Bill of rights as provided for in the Constitution in application of company law; and the promotion of the South African economy.”

1.6. RESEARCH METHODOLOGY

The approach to this study is the focus on review and analysis of various literatures, case law and the legislation. Given that the topic on this study hasn't been extensively dealt with in company law scholarship, the analytical nature of the study will only be limited to primary and secondary sources¹⁷. The primary sources which this study places heavy reliance on include South African textbooks authored by renowned authors of company law, case law, and legislation. The secondary will include journal articles, general public legal opinions and other internet sources. A comparative approach will also be utilized wherein other jurisdictions' legislations and cases will be compared to the South African ones, and older South African cases and legislation will be compared to the newer one. This comparative analysis will be utilized for the purposes of establishing inconsistencies in the legislation and case law, and to discuss how these

¹⁷Section 7 of the Companies Act 71 of 2008

inconsistencies have been rectified, if indeed they have been, and if the opposite is applicable to comment and how these can be rectified.

1.7. PROPOSED STRUCTURE OF THE DISSERTATION

Chapter 1- presents a basic overview of the dissertation and includes introductory concepts, discourses and historical backgrounds of the study. It also contains the research problem, research methodology, and significance of the research.

Chapter 2- will assess the early developments of schemes of arrangements and relevant provisions that governed them.

Chapter 3-will assess and analyse the provisions of section 311 of the 1973 Act and the cases which dealt with the interpretation of that section.

Chapter 4-will discuss the provisions of section 114 of the Companies Act and the how the term 'arrangement' is defined under that section.

Chapter 5-this is the concluding chapter with final conclusive analysis of the issues dealt with under chapter 3 and 4.

1.8. SCOPE AND DELINEATION OF STUDY

The focus of this study is only limited to the meaning of 'arrangement' as contemplated in the 1973 Act, the new Companies Act, and how the courts have interpreted the term. The study will not address the mechanisms and the procedural requirements for the approval of a scheme of arrangement in its entirety. The focus will only be restricted to analysing the meaning of the term as contemplated in both the new and the old Act.

CHAPTER 2

2. COMPANY REORGANIZATIONS/RESTRUCTURING

2.1. INTRODUCTION

Schemes of arrangement are an extremely valuable tool for manipulating a company's capital. A scheme of arrangement involves a compromise or arrangement between a company and its creditors, or any class of them, or its members, or any class of them. Scheme of arrangements can be used in a variety of ways¹⁸. A company can therefore use a scheme to effect almost any kind of internal reorganization, merger or demerger, as long as the necessary approvals have been obtained¹⁹. It is important to note that a scheme of arrangement is an act of the company, as opposed to other methods of takeovers where the bidder is from outside the company. The effect of a scheme is to enable those who promote the scheme to impose those proposals on a minority of the shareholders²⁰.

2.2. SCHEMES OF ARRANGEMENT IN SOUTH AFRICA

It is important that I state from the outset that at the core of scheme of arrangements lies the importance of shareholders' rights and the protection of these rights.

The primary and residual organ of the company is the general meeting and normally anything resolved upon by a bare majority of those voting at the meeting binds the company and all the members²¹. All investors and creditors are subject to the risk of action being taken at a general meeting which will affect their position. To this general principle there are certain obvious exceptions, for the general law or the company's Memorandum of Incorporation (MOI) may entrench certain rights by providing that they shall only be alterable with additional formalities. However, it is a general principle of company law that the shareholder rights embodied in the company's MOI cannot be varied or abrogated, and that they are inviolable unless the MOI provides a procedure

¹⁸ Gower L, (1979) "Modern Company Law". 4th Ed at page 619

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid at page 563

for variation. In the absence of this, they cannot be varied, even with the individual consent from each shareholder, except under a scheme of arrangement.

Accordingly, scheme of arrangements should be understood in the context of the above general principle of company law.

It is trite law that the common law plays an important part in company law. This is so because at common law the company is obliged to obtain consent of its members in any transaction it intends to do. The consent of all members is required before a company can alter their rights²². As the corporate market grew larger with participation and the formation of group companies, the membership also grew larger. This meant that the process of acquiring consent from all members became lengthy, costly and ineffective²³. A further challenge for companies was that it often happened that the individuals with whom they wanted to negotiate, were often not party to the particular contract or that the rights under consideration were encumbered by a contract prohibiting their amendment²⁴. The machinery of schemes of arrangement was introduced solely to curb this difficulty.

The power of a scheme of arrangement comes as a result of the wide definition of the term 'arrangement' that it can incorporate compromises as well as offers; that is effected merely by a stroke of a court issuing an order (thereby reducing what would otherwise be an amount of paperwork with separate agreements being entered into between the company and relevant scheme participants); that is binding on dissentient and non-voters provided that the requisite majority approved the scheme and the court exercises its discretion in favour of the scheme. It is important also to note that at the core of the schemes of arrangement lies the fundamental principles of shareholder rights and interests as well as the minority protection.

²² Lehloenya PM, *supra* 7 at page 530.

²³ Blackman MS, Jooste RD, and Everingham K (2002) "Commentary on the Companies Act", at 12.2

²⁴ Cilliers HS & Benade ML (2000) "Corporate Law" at page 450

2.3. USES OF SCHEMES OF ARRANGEMENT

As already stated above, given the fact that the phrase ‘arrangement’ has been construed very widely by the courts, as it was stated that “the ‘arrangement’ contemplated by this section are of the widest character and the only limitations are that the scheme cannot authorize something contrary to the general law or wholly *ultra vires* the company...”²⁵. Thus, given the wider meaning of the phrase arrangement, a scheme can be used to effect, among other things; (i) a takeover; (ii) to effect a merger; (iii) to effect an arrangement between the company and its shareholders; (iv) to reorganize the capital of the company, many other transactions. It is the broad nature of the scheme that companies found solace in effecting various transactions affecting the company and its shareholders.

²⁵Gower L, footnote 16 supra at page 619

CHAPTER 3

3. MEANING OF 'ARRANGEMENT' IN THE 1973 COMPANIES ACT

3.1. INTRODUCTION

It is common cause that our company law have in most part been imported from the English company law²⁶. Schemes of arrangement found their legal existence first under the Joint Stock Companies Arrangement Act²⁷. It is noted that no definition of arrangement is found under this pioneer of the schemes of arrangement regime²⁸. The omission of the definition of arrangement carried through from the inaugural companies legislation, to the 1973 Companies Act. Under the 1973 Act an arrangement is rather described more so in terms of its features or characteristics rather than its literal definition. It appears that this description or definition of 'arrangement' was adopted from sec 206 of the English Companies Act²⁹. However, the interpretation of the meaning of arrangement under section 311 has proven to be difficult for our courts. The foreign jurisdictional interpretation, such as section 206 of the English Companies Act played a little role in alleviating the difficulty of interpreting section 311.

It is also argued that although the scheme was probably not originally intended to be used for the purposes of eliminating shareholders, the trend has been that the companies use the scheme mostly, if not entirely for that purpose³⁰ subsequent to the decision in *In Re National Bank Ltd*³¹. This trend by companies to use a scheme to

²⁶Delpont P et al (1999) "Hahlo's South African Company Law through the cases". At page 1

²⁷Act 33 of 1870

²⁸Ex parte NBSA, Coetsee DJP at page 35 (footnote 3) supra

²⁹38 of 1948

³⁰Luiz S, (2010) "Using a Scheme of Arrangement to Eliminate Minority Shareholders". *Mercantile Law Journal*, at page 443

³¹(1966) 1 All ER 1006 (ChD)

eliminate the minority shareholders resulted in a series of controversial and divided opinion in the legal fora, particularly around meaning of the phrase 'arrangement'.

An interesting interpretation of the word 'arrangement' took a mixed opinion from the courts where the main issues which the court sought to establish was whether an expropriation and/or confiscation of minority shares fell within the ambit of section 311³²; and also whether a scheme involving an extinction of shares could be used when there are specific provisions dealing with the acquisition of shares³³. The court quoted from a foreign jurisdiction case where it was stated by the court, albeit in obiter, that "confiscation is not my idea of an arrangement. A member whose rights are expropriated without any compensating advantage is not, in my view, having his rights rearranged in any legitimate sense of that expression"³⁴. This quote would subsequently become a premise upon which our courts deal with the meaning of arrangement. Furthermore, it has been stated that "there is controversy as to whether a scheme for a takeover having the feature that members are to lose their rights as such in return solely for a payment for their shares upon cancellation or acquisition thereof by another is an arrangement within the meaning of section 311"³⁵. These issues henceforth featured and were referred to in subsequent cases in South Africa where the meaning of 'arrangement' within the ambit of section 311 of the 1973 Act had to be determined.

3.2. MEANING OF 'ARRANGEMENT' IN SECTION 311

Section 311 (8) provides that "in this section....and the expression of 'arrangement' includes a reorganization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods."

³² Ex parte Natal Coal, (footnote 9), supra

³³ Ex parte Federale Nywerhede Bpk (1971) 1 SA 826

³⁴ Re NFU Development Trust Ltd (1973) 1 All ER 135

³⁵ Delpont et al (2006) "Henochsberg on the Companies Act" at page 601

However, for the purposes of this study the ‘consolidation of shares of different classes’ will be discussed in the same light with ‘the division of shares into shares of different classes’. This is simply because the two methods almost entail the same end result, and therefore have similar principles and methods.

3.2.1. REORGANIZATION OF THE SHARE CAPITAL

It is clear from the provision of section 311(8) that a scheme can be utilized to reorganize the share capital of the company. However, the courts have in some instances maintained different views on whether a reduction of capital can be done using an arrangement. The court in *Ex parte Federale Nywerhede Bpk*³⁶ accepted that s311 could be used to effect a reduction of capital³⁷. However, the court merely stated that for section s311 to apply, the scheme must be between the company and its shareholder because after the cancellation of the shares of outside shareholders, FN has an obligation to ensure that the shareholders receive the consideration of FVB shares³⁸. However, it is important to state that the court never dealt extensively with the issue of reorganization and/or reduction of capital.

This issue came up once again in *Ex parte JR Starck & Co (Pty) Ltd*³⁹. In this case the court dealt with question whether a reduction of capital could be used to extinguish the shares instead of acquiring them. The court stated that as long as the requirements of a valid reduction of capital are met there is nothing wrong, in principle, to effect a scheme in conjunction with the reduction of capital requirements. The court further stated that a s311 procedure could also be used to the exclusion of the resolution to amend the memorandum to achieve the same result, if the same requirements are complied with. If the shares are however extinguished through a reduction in capital, the reduction of

³⁶(1975) 1 SA 826 (W)

³⁷Delport supra 9

³⁸Ibid

³⁹(1983) 3 SA 41 (W)

capital procedure must also be complied with. This distinction was noted with concern since it created more confusion⁴⁰.

The use of a scheme in conjunction with other requirements of reduction of capital can be problematic as it was correctly noted by various legal scholars and the courts. It is our positive submission that schemes should be used only in the absence of other available procedures to effect a takeover. This is a widely accepted view by legal scholars⁴¹, the courts⁴² and other jurisdictions. The Australian takeover regime provides a good example on how to effectively regulate a scheme. The Corporations Act⁴³ provides that a scheme cannot be sanctioned by the court unless it is satisfied that the scheme has not been proposed for the purposes of enabling any person to avoid the operation of any of the takeover provisions in the Act. Furthermore, the court had stated that the history and purpose of the section point to it being applicable where the normal mechanisms for reaching agreement between members and the company are not available due to the context of the particular scheme⁴⁴.

It appears that under the capital reorganization provision the common view was that where this method of arrangement is effected through the scheme, the capital reduction procedures should also be complied with.

3.2.2. DIVISION OF SHARES INTO SHARES OF DIFFERENT CLASSES

The meaning of 'class' as far as the scheme of arrangements are concerned is also not a settled matter. The main debate being whether shareholders' rights and interests should be treated equally in the scheme of arrangement processes. Section 311 (8)

⁴⁰ Delpont supra 9. Page 196. Particularly noting that it is not clear why the distinction was made.

⁴¹ Ibid pg 179

⁴² E.g in *Ex parte Cyrildene Heights (Pty) Ltd (1966) (1) SA 307 (W)* where it was stated that the court should not exercise its discretion in favour of the scheme if the proposed 'arrangement' can conveniently and effectively be carried out by the company and its creditors without invoking the provisions of the section.

⁴³ Section 411 of the Corporations Act 2001

⁴⁴ *Ex parte NBSA* at 785 G-H (footnote 3) supra

clearly states that; an arrangement may mean, inter alia, rearrangement of class of shareholders. It has been argued that to hold different meetings for different 'parts' of a class according to their interest, would be a case of form over substance because the net result would be the same⁴⁵. It would thus be preferable, so the argument goes, that the courts should, when it exercises its discretion to sanction the scheme, take the fact into account that the interest of part of a class differ from that of another part.

In *Ex parte Satbel*⁴⁶ the court expressed some doubts about the meaning of class⁴⁷. Class for the purposes of s311 might mean all the members of the same class of shares, while for the purposes of the meeting might have the meaning conferred upon it in *Sovereign Life Assurance Co*⁴⁸ where it was stated by Bowen LJ that "we must give such a meaning to the term 'class' as will prevent the section being so worked as to provide confiscation and injustice, and that we must confine its meaning 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". It is my humble submission that this view is correct. It is this difference in the proprietary interest that may necessitate a separate meeting for shareholders. However, we have observed from the *Verimark* case that the court seems to have held a different view on this matter. It seems therefore that the court, in reaching its decision, might have had in mind the dictum of Plowman J in *Re Robert Stephen Holdings Ltd*⁴⁹ where he stated where one class of equity shareholders is treated differently from another part of the same class, it is better to proceed by way of scheme of arrangement because the interest of minority shareholders will be better protected under section 206 of the Companies Act of 1948 (which was the equivalent of s311).

⁴⁵ Delport supra at page 170

⁴⁶ *Ex parte Satbel* (Edms) Bpk: In *Re Meyer v Satbel* (Edms) Bpk (1984) 4 SA 41 (W)

⁴⁷ Delport supra 9 at page 169

⁴⁸ *Sovereign Life Assurance Co v Dodd* (1891) 94 ER 246 (CA)

⁴⁹ (1968) 1 All ER 195

The recent case in point where the issue of shareholders' class rights was raised is *Verimark Holdings Limited v Brait Specialised Trustees (Pty) Ltd NO and Others*⁵⁰. It is important to note that although the issue of 'class' came to the court's attention, the court did not make any finding on it. However, for the purposes of this study it is important that we mention what the court had said regarding the issue of class. The facts of the case were as follows: Verimark and its ordinary shareholders, other than certain excluded members, would enter into a scheme of arrangement in terms of which the ordinary shareholders (scheme participants) would dispose all of their shares in Verimark to the proposer in exchange for a scheme consideration. The scheme proposer (the Van Straaten Family Trust-VSFT), which was the majority shareholder of Verimark would acquire all the shares of the scheme participants. The scheme participants were defined as Verimark shareholders (other than the excluded members) who would dispose of their shares and be entitled to receive the scheme consideration if the scheme becomes operative. The effect of the scheme was that the proposer (VSFT), along with the excluded members would become the sole holders of Verimark shares, wherefore Verimark would be delisted from the JSE. In terms of the proposal the scheme was required to be approved by the scheme participants. However, this definition somehow included all members including those who were specifically excluded from the definition of scheme participants.

At the outset it appeared as if Malan J, as he then was, sought to deal with the meaning of 'class'. In his endeavor to achieve this, he quoted the words of Bowen LJ as were referred to in *Satbel*. He stated that all shareholders of the scheme, including the proposer, the excluded members as well as the scheme participants, were of the same class⁵¹. According to him, they were all ordinary shareholders and enjoyed the same rights against the company. However, the judge found it unnecessary to address the meaning of class because according to him class can only be determined once it has been determined as 'to whom is the proposal/offer made'. He then held that on the

⁵⁰(2009) SGH 45

⁵¹Ibid at paragraph 11

proper analysis of the scheme, the offer was made only to the scheme participants (these being the minority shareholders)⁵². Thus, VSFT and the excluded members did not fall under the definition of scheme participants.

It is respectfully submitted that this judgment was made erroneously. In fact, it is clear that Malan J made contradictory remarks in arriving at his conclusion. At the outset he rightfully noted that the all shareholders were ordinary shareholders and enjoyed the same rights against the company. However, he nonetheless finds that the shareholders had different classes of shares and voting rights. Furthermore, even if the court addressed the issue of who the parties to the arrangement are, the scheme was still between the company and its holders and therefore should have been sanctioned on that basis. In addition to error in the judgment the court never decided on the meaning of classes. It is respectfully submitted that had the judge dealt with the meaning of 'class' he would have arrived at a different conclusion.

3.3. CASE LAW

It is worth noting that prior to the enactment of s311 of the 1973 Act, the leading South African authority on the meaning of arrangement was the judgment in *Du Preez & Another v Garber*⁵³ where approval was given to the statement by Gower (Modern Company law, 4th Ed at 687) that arrangements are of the widest character, limited only by law and to matter not *ultra vires* the company⁵⁴.

It has also been stated that the English courts have held that some elements of 'give and take' is implicit in the notion of an arrangement. Mere confiscation without any

⁵²Ibid at para 13

⁵³1963 (1) SA 806 (W)

⁵⁴Beck AC, (1987). "Give and Take, Compensation and Expropriation". *The Company Lawyer*, Vol 7 at page 83

'compensating advantage' therefore doesn't fall within the definition⁵⁵. While it cannot be denied that the purpose of s311 was not to permit confiscation of shares, it was enacted to facilitate negotiations between the company and creditors⁵⁶. In such circumstances, it is quite possible that a creditor would end up with only monetary compensation, possibly worth considerably less than his rights had been worth previously⁵⁷.

I now turn to deal with the cases in detail below.

Ex parte Sabtel

The concept of expropriation in the interpretation of s311 of the 1973 Act first came under scrutiny in *Ex parte Satbel*⁵⁸. In this case, a scheme of arrangement was approved at a meeting of the scheme shareholders, which were all the shareholders other than Satbel and the two insurance companies, and the companies in which they had a direct or indirect interest. Arrangement essentially entailed that the shares of the scheme shareholders were to be converted into redeemable preference shares. Ordinary shares would then be issued to FVB at a premium and the previously converted redeemable preference shares of the scheme shareholders would be redeemed at an amount equal to the issue price and share premium of the ordinary shares. The court rejected the scheme on the grounds that, on one hand because of the inadequacy of the section 312 statement and because, and most importantly for the purposes of this study, there was an expropriation and not a reorganization or rearrangement of the rights of the shareholders⁵⁹.

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ *Ex parte Satbel* (footnote 46) supra

⁵⁹ Ibid at 359

Ex parte Natal Coal Exploration

In *Natal Coal Exploration*⁶⁰ the court had to deal with the question whether a scheme of arrangement under section 311 of the 1973 Companies Act which seeks to deprive shareholders of their shares, qualifies as an arrangement in terms of the Act. The court stated that if s311 is used in the present scheme, the reduction of capital procedure must also be employed, and cannot be substituted for a scheme procedure. Accordingly, the court stated that scheme shareholders will be protected if the scheme is used in conjunction with reduction of capital reduction requirements in that (i) the scheme shareholders would meet as a separate class; (ii) the scheme shareholders would have the benefit of the explanatory statement required in terms of section 312; (iii) three-quarters of the scheme shareholders must approve the scheme; and (iv) the minority that is dependent on the protection of the court is three-quarters of the scheme shareholders.

However, for the purposes of this study, the court stated that an arrangement was not something akin to a compromise. On the contrary, the court further stated, the only limitation upon the nature of an arrangement are that it should not arrange something that is illegal or ultra vires the company. Referring to the *NFU Development* case, the court stated that neither a compromise nor arrangements imply a total surrender, but both connote some form of give and take⁶¹. However, it stated that 'arrangement' excludes the concept of confiscation and 'expropriation without a compensating advantage'. The court further relied on the judgment of *Federal Nywerhede* and *Satbel*, and stated in that regard that the aforementioned case were authority for the proposition that where shareholders are to be deprived of their rights without receiving some form of compensating advantage in the form of rights enforceable against the company itself, the scheme cannot be called an arrangement within the meaning of the Act.

⁶⁰Ex parte Natal Coal Exploration (footnote 12) supra

⁶¹Ibid at 284 B-C

Furthermore, Stegmann J sought to explain why monetary compensation would be sufficient. A shareholder has a basket of rights—a right to dividends, to receive annual financial statements, to vote at meetings etc. to replace these with money, he said, is not what s311 envisaged⁶². This reasoning found heavy criticism on the basis that it is fallacious. Apart from the fact that it is not an arrangement of rights that is involved, there is nothing sacred about the nature of these rights. After all, a shareholder also has the right to sell his shares if he wishes and obtain monetary value. Furthermore, it has been accepted that the substitution of shares in a holding company for those of the new subsidiary is acceptable, yet in such a situation the shareholder receives rights in a totally different company and, if he is minority shareholder, remains in a position where he is unable to control the direction taken by either the holding or subsidiary company.

The court accordingly held that “the concept of expropriation of the rights of a shareholder, compensated by such a sum of money, however fair the assessment of the amount of the compensation may be, is a concept which lies outside the legitimate sense of the term ‘arrangement’ in the context of s311. To qualify as an ‘arrangement’, a scheme between a company and its shareholders which seeks to deprive a shareholder of his shares must give him a compensating advantage which consists of or includes other rights”⁶³.

It is noted that the court did not give a detailed description of what these rights should be⁶⁴. The court’s rationale was articulated per Stegmann J that “a shareholder is a participant in a risk venture embarked on with a view to making profits. He has the prospect that if profits are made a dividend may be paid. The prospect of a future stream of dividends may serve to enhance the capital value of his shares. He is entitled to annual financial statements and other information. He has voting rights that can be

⁶² Ibid at 284 E-G

⁶³ Ibid at 284 E-G

⁶⁴ Sher JL. (1985). “The Expropriation of Minorities under a Scheme of Arrangement”. Page 111

used to influence the course of the company's business. An 'arrangement' in relation to rights of this kind must truly arrange such rights. A scheme that seeks to subvert all of such rights and to replace them with a mere cash payment and nothing remotely resembling the rights in question is not an arrangement contemplated by s311"⁶⁵.

The above reasoning has been severely criticized. It is notably stated that the reasoning was based on the faulty logic and a misinterpretation of earlier decisions⁶⁶. It was then submitted that the words compromise or arrangement as used in the Joint Stock Companies Arrangement Act 1870 mean very little, if anything, more than an agreement⁶⁷. With the extension of the applicability of schemes of this nature to situations other than winding up, it is submitted that the same meaning should be given to these words. It is truly submitted that it is not an arrangement of rights that is involved but an arrangement between the company and its shareholders as to what is to happen to those rights⁶⁸. There is therefore no objection, so the argument goes, to the substitution of a right to claim payment in cash from a third party for the rights previously held by a shareholder⁶⁹.

Ex parte Suiderland Development Corporation

A different judgment was handed down by the court in *Ex parte Suiderland Development Corporation; Ex parte Kaap-Kunene Beleggings Bpk*⁷⁰. In this case, the court adapted a different approach in deciding on the issue of whether an expropriation of shares constitutes an arrangement within the meaning of s311. It particularly addressed with concern and disapproval the ratios and dictum adopted in *Satbel* and *Natal Coal* case. For the sake of convenience, the scheme was proposed as follows; (a)

⁶⁵ *Natal Coal* (footnote 12) supra at 284 E-G

⁶⁶ See Sher, footnote 43 supra at page 111 where this view is not supported.

⁶⁷ Beck AC, footnote 39 at page 84

⁶⁸ *ibid*

⁶⁹ *ibid*

⁷⁰ (1986) 2 SA 442 (C)

The cancellation of the shares of the minority shareholders in S company in return for the 130c share in cash; (b) the reduction of in the nominal value of the shares of the majority shareholder in S company; (c) the winding up of K company and the paying to outside shareholders a liquidation dividend of 420c per share; (d) transferring the assets of K company to S company as a liquidation dividend in specie after the conversion of the latter's ordinary shares into A ordinary shares, its Articles of association being amended for this purpose;(e) S company would provide the liquidator of K company with sufficient cash to discharge the debts of K company, including the costs of liquidation, and pay the aforementioned 420c to the ordinary shareholders and the capita preferential dividends payable to the holder of preferential shares; (f) M company would resolve voluntarily to wind itself up.

The court held, per Van den Heever J that the NFU case was distinguishable because it was not an expropriation, but a confiscation in that shareholders were to be deprived of their rights in return for nothing⁷¹. She observed that the ration of the former latter case was that a confiscation scheme did not contain the element of 'give and take' referred to in that case. The court further held that it was not seized with an expropriation case scheme but rather a scheme involving 'expropriation without any compensating advantage'⁷². The learned judge added that she fails to see why this 'compensating advantage' should mean that members of the company should retain their existing rights, as rearranged. This reasoning has found some support in the legal scholarly⁷³. It can be noted from the *Natal Coal* case that the substituted or rearranged rights must not be illusory. However, it is argued that the attitude which was then adopted by courts created considerable uncertainties.

⁷¹Ibid at page 5

⁷²Ibid

⁷³See for example Sher, JL, footnote 43 supra where she argues that the logic of this proposition is impeccable. It is further argued that the logic adopted in the *Suiderland* case is unassailable and should be followed instead of the decisions in the Transvaal Division.

It appears therefore that the opposite of two ends has created more disparities in the interpretation of s311. This can be attributed to the misinterpretation of the dictum in the *NFU Development* case as well as, in the instance of *Natal Coal Exploration*, an incorrect interpretation of the dictum in *Satbel*. Thus, a confirmatory decision had to come through to settle these divergent views from the courts in the cases referred to above. Accordingly, an important case of *Ex parte NBSA Centre Ltd*⁷⁴ emerged and set a milestone interpretation of section 311.

Ex parte NBSA Centre Ltd

The facts in this case can be summarized as follows: The issued capital of company A was 3million Euros divided into 6 million shares of 10c each. Seven of these shares were held by company B. The proposed scheme involved the cancellation of all the shares other than those held by company B. In consideration of this cancellation the holders of the cancelled shares would receive a monetary payment in respect of each share so cancelled. There would be credited to capital reserve an amount equal to the capital cancelled. The authorized share capital of company A would then be increased to its former amount and E2 999 996 10s if its capital reserve would be applied in paying up in full 5 999 993 share of 10c each to be issued to company B. The effect would be that company A would become a wholly owned subsidiary of B.

The court stated, per Coetsee DJP that the legal question concerns mainly the position where shares of a class of shareholders are to be cancelled against payment thereof by the company; in other words a typical expropriation or a kind of compulsory purchase by either the company or a third party⁷⁵. The court thus had to determine where the aforesaid could be regarded as 'arrangement' within the meaning of s311 of the 1973 Act.

⁷⁴(1987) 2 SA 783 (T)

⁷⁵Ibid at page 34

The court merely mentioned in obiter that an expropriation for cash can be an arrangement. It was rather stated as per Goldstone J that “why it should not be an ‘arrangement’ within the ambit of section 311 if some shareholders agree to their shares being expropriated by another shareholder. In principle there seems to be no objection, as long as the second requirement is met, namely that the arrangement must be between the company and its members”⁷⁶. Thus, the court considered it unnecessary to deal with the issue of expropriation, for reasons unbeknownst to us.

Furthermore, the court stated that the following requirements must be met for an arrangement to qualify as a scheme; (a) only a scheme or part of it which necessitates the invocation of s311 is an arrangement, provided further that it is not illegal or *ultra vires* the company; (b) a *fortiori*, any scheme or part of it in respect of which an exclusive procedure for its attainment is prescribed is not an arrangement, it can only be achieved by employing the prescribed machinery. Such a scheme is the one that involves a reduction of capita when the applicable procedure under s83-89 are followed; (c) if one part of a scheme involves a reduction of capital and the other part is an arrangement as it necessitates the invocation of s311, the first part does not thereby become an arrangement or part of an arrangement; (d) the court is not allowed to allow what is not an arrangement to be dealt with as arrangement under s311; (e) only an arrangement between the company and its members or creditors or a class thereof can be an arrangement. Thus, the court stated that the application in Natal Coal was correctly refused, however the refusal was supposed to be based on the fact that the cancellation of shares was supposed to be effected through the reduction of capital procedure as opposed to the s311 procedure.

The s311 procedure has obviously been found to be flexible and suited for a number of purposes; this is presumably why it has gradually been extended. Our courts have been loath to allow its use where the same effect can be achieved by an ordinary business

⁷⁶Ibid

transaction. However, it has been stated by the courts in the cases referred to above that the protection afforded to shareholders is greater in terms of s311 than it would be using other means to achieve the same end; it is hardly in the interest of minorities to refuse to allow the use of this procedure.

Delport⁷⁷ makes a very crucial observation, and correctly so, in that the blurring of the distinction between the two elementary requirements of s311; namely, that the scheme must be an arrangement, and that the arrangement must be between the company and its member, have dire consequences on the interpretation of the section. This is a mistake commonly adopted by the courts in the cases aforementioned. The courts have rather delved on the latter requirement and in most cases completely left open the enquiry of the former. It is my submission that it is for this reason that the question of expropriation as an arrangement in terms of s311 was an unresolved matter.

The meaning of 'arrangement' recently came into the courts attention, albeit under s169A of the Co-operatives Act⁷⁸ in *Senwes v Van Heerden & Sons*⁷⁹. The court relied and approved the decisions taken in NBSA case. In this regard, the court stated that the history and purpose of the section point to it being applicable only where normal mechanisms for reaching an agreement between members and the company are not available due to the context of the particular scheme⁸⁰. In expressing its approval for the decision taken in NBSA, the court stated that the procedure contemplated in s169A (the equivalent of s311 of the 1973 Act) was meant for those instances where it was not easy to reach an agreement by securing consent for each member. The court further stated that the offer made by the proposer (Senwes) has specified that a signing of the resignation form would be an indication of a member's consent to the proposal, and the members had signed accordingly. The court then held that this did not fall within the meaning of 'arrangement' in the context of s169A.

⁷⁷Delport, P. footnote 9 supra at page 172

⁷⁸Co-operatives Act 14 of 2005

⁷⁹(2007) 3 All SA 24 (SCA)

⁸⁰Ibid at 785G-H

It is noted from the decision that the courts approach in these instances is that it will not approve a scheme where other mechanisms of doing so are available. Indeed it is clear from the facts of this case that an agreement was successfully reached between the company and its shareholders. There was no need to sanction the scheme simply because the machinery of the schemes is for the purposes of impossibility in obtaining consent from all members. It stated that this decision finds support in legal academia⁸¹. It is stated that the use of s311 procedure to alter the respective rights between a company and its members has to be necessary in the sense that it cannot be achieved any other way⁸². Indeed, one can argue that it is now settled law that the scheme of arrangement provisions cannot be used where there are other mechanisms available.

⁸¹Lehloenya PM (footnote 7) at page 531. Particularly noting that the decision has been referred to with approval by Cilliers and Benade.

⁸²Ibid

CHAPTER 4

6. MEANING OF 'ARRANGEMENT' IN THE COMPANIES ACT 71 OF 2008

6.1. INTRODUCTION

The machinery of the scheme of arrangements is now regulated by section 114 of the Companies Act. The new provisions for scheme of arrangements now appear to have been reworked and extended. Furthermore, and particularly of great interest for the purposes of this study, is how an 'arrangement' is defined/described in this section. Section 311, the predecessor of section 114, had a much narrow and/or a less extended definition of what constitutes an arrangement. As already indicated in the previous chapter, it simply provided that an 'arrangement' may entail; (a) reorganization of the share capital; (b) consolidation of shares of different classes; (c) a division of shares into different classes.

Based on the foregoing it can be presumed that the intention of the drafters of the new Act was to perhaps bring the Act in harmony with case law as far as the schemes of arrangement are concerned. This can be noted from the insertion of 'expropriation' as an arrangement within the meaning of section 114 (1)(c). As already discussed above, the question whether an 'expropriation' of shares for cash is an 'arrangement' within the meaning of the then applicable provision was not authoritatively dealt with by the courts and therefore section 311 of the 1973 Act was open to interpretation in that regard.

In contrast, section 114 contains a wider definition/ description of what an 'arrangement' is. Of particular importance in this section is that it now embodies a transaction of share re-acquisition falling within the meaning of 'arrangement'. It is also important to note that, in the new section the word 'securities' instead of 'shares' is used under the

definition of ‘arrangement’. However, this distinction is not important for the purposes of this study.

6.2. MEANING OF ARRANGEMENT IN SECTION 114

In terms of section 114(1)⁸³ “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) 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”

It is correctly observed that the above description of an ‘arrangement’ is not a closed list⁸⁴. The section contain the words ‘any arrangement’ and also the words ‘among other things’. It can therefore be argued that some of the methods not included in the list may still fall within the ambit of section 114.

However, for the purposes of this study subsections 114(1)(a),(b),(d),(f) will not be discussed in this chapter because these were retained from section 311 of the 1973 Act and were thus extensively discussed in the previous chapter. Furthermore, there is yet to be uncertainties or difficulties in the application of these methods/provisions. Therefore, the only provisions which will be discussed and which are of particular interest for the purposes of this study are section 114(1)(c) and 114(1)(e).

⁸³Section 114 (1)(a)-(f)

⁸⁴Cassim F, et al (2012) “Contemporary Company Law”. 2nd Edition, Juta at page 726

6.2.1. AN EXPROPRIATION OF SECURITIES FROM THE HOLDERS

It is observed that this section retains the two legged requirements of its predecessor for a scheme to be effected; namely that (i) there must be an arrangement; and (ii) the arrangement must be between the company and holders of any class of its securities⁸⁵. The latter enquiry has been substantially dealt with by the courts as well as in academia as demonstrated in the previous chapter of this study. The former appears to still have uncertainties concerning its proper application. In the expropriation cases discussed in the previous chapter, it was noted that the general view of the courts was that an expropriation of the shares of one holder of securities by another, or the substitution of securities in one company for securities in another company cannot qualify as an arrangement as envisaged by the section as it is not one between the company and its holders of securities. However, these cases did not per se deal with the issue of whether an 'expropriation' constitutes an arrangement within the meaning of the Act. The expropriation cases merely indicated that confiscation is not an 'arrangement' within the meaning of the applicable provisions. However, it can be argued that; now that section 114 was intended to deal more broadly with the first enquiry; namely, whether there is an 'arrangement' in terms of section 114(1)(a)-(f), therefore it appears that any form of expropriation is an arrangement within the meaning of the Companies Act.

Thus, what remains unclear is whether the expropriation contemplated in the Act is a form of an expropriation for cash and/or with an expropriation without compensating advantage, a form of confiscation. However, it has been submitted, and probably quite correctly so, that the question raised by Goldstone J in his minority judgment in the *NBSA*⁸⁶ case, i.e. "if some shareholders agree to their shares being expropriated by another shareholder, why should that not be an 'arrangement' within the ambit of s311", is that such an expropriation is permissible, but it must occur as a result of an

⁸⁵ Delpont et al "Henochsberg on the Companies Act of 2008"

⁸⁶ NBSA case, footnote 3 supra

arrangement between the company and its shareholders⁸⁷. Most crucial in support of this submission are the comments made by the court in the *Federale*⁸⁸ case where it was stated that the importance of the rearrangement of rights lies at the requirements that such an arrangement must have enforceable rights and obligation between the company and the shareholders. Furthermore, it is rightfully submitted that section 114 allows that the proprietary rights of shareholders in the company, as distinct from her rights as a shareholder, be affected by an arrangement⁸⁹.

As already discussed in detail in the previous chapter, the courts have had to determine whether a scheme where shareholders are to lose their rights as such in return solely for a payment for their share upon the cancellation or acquisition thereof by another is an arrangement within the ambit of s311. It is argued that if expropriation is allowed in terms of s114, there is no reason why the compensating advantage is to be restricted to anything other than cash. However, if the expropriation for cash is by anybody else but the company and it is not for and on behalf of the company, it is not an arrangement between the company and the holders of the securities⁹⁰. It is our humbly submission that the courts have substantially dealt with the issue of an arrangement being between the company and its shareholders. This is apparent from almost all the cases referred to above. It remains to be seen whether section 114(1)(c) will assist the courts in settling the issue of expropriation as an arrangement.

However, what it is clear from section 114(1)(c) is that an expropriation is an arrangement within the meaning of the Act. This section particularly answers the questions which were raised by the courts in the expropriation cases discussed above; i.e. whether an expropriation for cash is an arrangement. It is also noted that the courts have left this question opened in almost instances where it had to decide on the term.

⁸⁷ Ibid

⁸⁸ Ex Parte Federale (footnote 35) supra

⁸⁹ Ibid

⁹⁰ Ibid

Finally, the answer to that question is now authoritatively answered to the positive under section 114(1)(c).

6.2.2. A RE-ACQUISITION BY THE COMPANY OF ITS SECURITIES

Of significance in this provision is the fact that the re-acquisition of a company of its own shares forms the fundamental part of the doctrine of capital maintenance. The capital maintenance rule was entrenched into company law in *Trevor v Whithworth*⁹¹ where the court held that a company could not acquire its own shares even if so permitted by its Memorandum of Association. The reasons advanced by the court were that; a company could not become a member of itself and that a company could not legally either re-sell the shares, as this would be ultra vires, or cancel them, as this would be a reduction of capital⁹². This principle remained part and parcel of our corporate law until 1999 when it was repealed by the Companies Amendment Act⁹³. The enactment of the Companies Amendment Act meant that companies in South Africa could now re-acquire their own shares in terms of section 89 of the Companies Amendment Act. The re-acquisition provisions are now retained in section 48 Companies Act.

The 1973 Companies Act did not contain any re-acquisition provisions with correlation to the s311 scheme of arrangement provision. However, as it is apparent from the new Companies Act, section 114 also includes re-acquisition as an arrangement. This means that the company intending to acquire its own shares will have to comply with the solvency and liquidity test on the one hand, as well as a special resolution and other requirements of section 114 and 115 on the other hand. In terms of section 48 (8)(b)⁹⁴, a share buyback is subject to the requirements of sections 114 and 115 “if, considered alone or together with other transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company’s shares”.

⁹¹(1887) 12 App Cas 409 (HL)

⁹²Lord Macnaghten at 435

⁹³37 of 1999

⁹⁴Section 48(8)(b) of the Companies Act 71 of 2008

Accordingly, where a company acquires at least 5% of any class of its shares in terms of section 48, whether in terms of a single transaction or otherwise, that re-acquisition would amount to an arrangement and is subject to the requirements of section 114 and 115. However, it can be argued that there is only a small category of share buyback which can be implemented without both section 48 and 114 being applicable. These are the transactions implemented solely in terms of section 48, i.e. transactions which do not reach the 5% threshold. Thus, it automatically follows that any share buyback transaction which does not reach the 5% threshold does not constitute an arrangement in terms of section 114.

A scheme is a statutory mechanism and is by its nature coercive and binding on the company and the relevant class members, including those who did not vote or who voted against it. On the other hand, a section 48 re-acquisition by a company of its own shares is distinguishable in that a voluntary offer and acceptance between the company and the scheme members is required to the extent that it gives rise to an agreement between the parties.

Furthermore, the question that remains to be answered is whether any proposal by a company to re-acquire some of its shares in terms s48 would constitute an arrangement as contemplated in s114. It is suggested that if the proposed arrangement contemplated in s114 may have as a result the re-acquisition by the company of any of its previously issued shares, section 48 will apply to the proposed arrangement⁹⁵. However, so the argument goes, this does not indicate when an arrangement is of the kind contemplated in section 114⁹⁶. The question therefore is whether *any* re-acquisition by a company of its own securities constitutes an arrangement? For the Act in section 48 makes it clear that “if considered alone or together with other transactions..”. This can mean that if the

⁹⁵Luiz SM (2012) “Some Comments on the Scheme of Arrangement as an ‘affected transaction’ as Defined in the Companies Act 71 of 2008” at page 2

⁹⁶Ibid

company proposes to re-acquire its shares above the 5% threshold as a single transaction it will constitute an arrangement within the ambit of section 114(1)(e).

It is argued that the thinking behind s48(8) appears to be to reconcile the requirements of s 48 with those of s114 because, so the argument goes, “why can the board alone make a share buy-back decision in terms of s 48 but a special resolution is required to approve a share buy-back in terms of s114”⁹⁷. It seems that the distinction is that s48 is designed to deal with casual or once-off decisions to re-acquire shares on a scale that does not amount to a restructuring of the company’s capital structure, while s114 is designed to address wholesale fundamental changes to the company’s capital structure⁹⁸. However, I respectfully submit that the above distinction does not address the potential conflicts inherent in the two sections, particularly in that why a share buy-back an arrangement in terms of s114.

My humble submission is that if a re-acquisition is effected as a single transaction, and ‘if is considered alone’ should not constitute an arrangement within the ambit of section 114 regardless of the 5% threshold being exceeded. This type of re-acquisition should not comply with section 114 and 115 if the Act. On the other hand, if the transaction is done in conjunction with other transactions, e.g. consolidation and/or division of shares,(i.e. considered together with other transactions) it should then be an arrangement within the context of section 114(1)(e). The reason for this submission is that, given the complex group structures of companies the restructuring of the company may require to be achieved through a variety of methods. It is only under these circumstances where the re-acquisition considered together with other transaction should also comply with the requirements of section 114 and 115 of the Act.

⁹⁷Ibid at page 304

⁹⁸Ibid

CHAPTER 5

CONCLUSION

It is apparent from section 114(1)(c) that the drafters of the new Act had in mind the difficulties which the courts encountered when determining whether an expropriation for cash or otherwise is an arrangement within the meaning of the relevant provisions. It may be that the courts deliberately omitted to give the meaning to the phrase 'arrangement'. It can therefore be concluded that by the inclusion of the word 'expropriation' the drafters had in mind the courts approach that the word be interpreted in its widest sense.

However, it is my humble proposition that the insertion of 'expropriation' in section 114(c) creates more controversy than it does certainty. As alluded to in the previous chapters, the shareholder rights must be enforceable between the parties, i.e. between the company and its members. Thus, an expropriation may eliminate this important principle of corporate law. The shareholders' rights can be 'rearranged' but they cannot be taken away from them altogether. This will cause companies to avoid other methods of effecting a takeover and rely on this all encompassing approach of the scheme of arrangement. Even more so now that the new Act makes it abundantly clear that schemes can be used to effect a takeover, specifically s114(1)(c) and (d).

A concern was raised, correctly so, that reconstructions and also takeovers should not be effected through the then s311 procedure where there are other available

mechanisms⁹⁹. It is my submission that this view should be upheld. Same should have been the case with the new Companies Act, i.e. in the words of Coetzee DJP “where the normal mechanisms for reaching agreement between members on the one hand the company on the other is not available due to the content of the particular scheme”¹⁰⁰. However, the insertion of re-acquisition provision in section 114 will create more difficulties in the near future regarding the above statement.

It is also not clear why the section 48 share re-acquisition is prescribed to be compliant with the requirements of section 114 and 115. This creates a more convoluted procedure which will create difficulties in the formulation of schemes, both in practice and in theory. It is also difficult to follow the logic behind this because the meaning of ‘arrangement’ under section 114 does not have as one of the methods ‘the reorganization of capital’ as it was so provided in section 311 of the 1973 Act. If the reorganization of capital was retained in the new Act it would have been logical therefore to argue that a share buy-back is a form of reorganization of capital and therefore falls within the meaning of arrangement.

In conclusion, the insertion of ‘expropriation’ in section 114 seems to approve the famous statement of Gower that “the ‘arrangement’ contemplated by this section are of the widest character and the only limitations are that the scheme cannot authorize something contrary to the general law or wholly *ultra vires* the company”¹⁰¹. It now remains unimaginable if there will a transaction which falls outside the scope of section 114 except of course for those which are not between the company and its shareholders. The new expropriation clause effectively indicates an all inclusive approach on the schemes of arrangements. Effectively, these provisions override all the

⁹⁹Delport supra (9)

¹⁰⁰NBSA at (footnote 3) supra

¹⁰¹Gower L, footnote 16 at page 619

previous decisions and dictum by the courts where they indicated that an 'expropriation' is not an arrangement within the ambit of the relevant section.

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