SCHEMES OF ARRANGEMENT IN TERMS OF CHAPTER 5 OF THE COMPANIES ACT 71 OF 2008

by

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1. INTRODUCTION

1.1 Research Overview

A change in or the consolidation of a company can be achieved in many different ways and one way is to use a scheme of arrangement.[1] Part A of Chapter 5 of the Companies Act 71 of 2008 (hereafter 'the Act') provides for three types of fundamental transactions, namely, an amalgamation or merger, a disposal of all or the greater part of the assets or the undertaking of a company and for schemes of arrangement.[2] The research will be limited to schemes of arrangement (hereafter 'arrangement'), specifically on the meaning of the term 'arrangement'. Schemes of arrangement are provided for in section 114 of the Act which provides that the board of a company may propose and 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, a division of securities into different classes, an expropriation of securities from the holders, exchanging any of its securities for other securities, a re-acquisition by the company of its securities or a combination of the methods mentioned above. The list of the methods mentioned above does not constitute a closed list of the methods that could be employed to effect a scheme of arrangement. This is so because the list is preceded by the words 'may include' and 'by way of', 'among other things'.[3]

Section 114 also requires the retention of an independent expert, who must, as part of the report to the shareholders, include a copy of sections 115 and 164 of the Act. Section 115 deals with the requisite approval for all fundamental transactions and section 164 deals with appraisal rights of minority shareholders. Section 114 of the Act lists methods with which a scheme of arrangement may be effected, including, *inter alia*, an expropriation of securities from the holders and a reacquisition by the company of its securities; however, the Act fails to define what a scheme of arrangement is. As a result of the legislature's failure to

[1] Luiz "Some Comments on the scheme of arrangement as an 'affected transaction' as defined in the Companies Act 71 of 2008" 2012 PER/PELJ 102.
[2] Section 112-114 of the Act.
[3] Cassim et al in Contemporary Company Law 2 (2012) 675.

define what an arrangement is, case law provides insight into discerning the parameters of what may or may not constitute a scheme.

There has been much controversy regarding what constitutes an arrangement, especially in the area of the nature of the consideration given *in lieu* of shareholders' shares, with courts differing in the interpretation of what qualifies as an arrangement. Of importance to note on this point is the addition of the expropriation of securities from the shareholders in section 114 of the Act[4] because with the Companies Act 61 of 1973 (hereafter 'the 1973 Act'), the expropriation of securities for cash was held by the courts to fall outside the scope of an arrangement in *Ex Parte Sabel (EDMS) Bpk,*[5] which approach was later followed by the court in *Ex Parte Natal Coal Exploration Co Ltd.*[6] *Ex Parte Suiderland Development Corporation*[7] rejected this approach. In this case Van den Heever J stated that he did not understand why the 'compensating advantage' should have to take the form of retention of rights as members of the company and that if the legislature wished to limit the ambit of an 'arrangement' it would have done so by definition in the Act.[8]

The current Act has potentially resolved this controversy by including expropriation as one of the methods that could be employed as a means of effecting a scheme of arrangement. In an *obiter* in *Ex Parte Mielie-Kip Ltd,*[9] Flemming DJP, stated that a scheme of arrangement may provide for the termination of the relationship between a company and its shareholders, with or without substitution of a new relationship between the said parties. The differing court rulings will be discussed in detail below. Schemes of arrangement have not been challenged in court under the Act, and as such, the legal precedents that will be discussed in this paper are based on the predecessor of the Act, the 1973 Act.

[4] Section 114(1)(c).
[5] (1984) (4) SA 279 (W).
[6] (1985) (4) SA 279 (W).
[7] 1986 (2) SA 442 (C).
[8] *Ex Parte Suiderland supra* 445-446.
[9] 1991 (3) SA 449 (W) 453.

Another important question to be considered is whether section 48 buy-backs by the company constitute a scheme of arrangement. The said section[10] of the Act states that if a company reacquires its previously issued shares in excess of five per cent, it has to comply with the requirements of section 114 and 115. However, it does not state whether this means that the transaction is now a scheme of arrangement. Furthermore, a reacquisition of previously issued securities by a company is listed in section 114(1)(c) as one of the methods that can be used to effect a scheme of arrangement; however, as with section 48 of the Act, section 114 does not state whether or not this reacquisition will now be a scheme of arrangement. Due to the fact that schemes of arrangement are included in the definition of affected transactions in section 117(1)(c)(iii) in Part B of Chapter 5 of the Act, they must comply with the Takeover Regulations and Part C of the Act. It is thus necessary to consider the parameters of what a scheme of arrangement will constitute so as to align the transactions within the regulatory framework of the Act.

1.2 Research Problem

The lack of a definition of “arrangements” presents interpretation challenges.

1.3 Research Question

When will an arrangement fall within the ambit of section 114 of the Companies Act 71 of 2008?

1.4 Research limitations

This research will be limited to the delineating which arrangements may fall within the ambit of section 114 schemes of arrangements and which transactions are excluded from the section 114 schemes of arrangement.

[10] Section 48(8)(b).

1.5 Brief Synopsis

The Act does not define the term 'arrangement', however, section 114 lists a range of methods with which a scheme of arrangement can be effected, albeit not a *numerus clausus*. Coetzee DJP stated in *Ex Parte NBSA Centre Ltd*,[11] referring to the term 'arrangement' that "no dictionary, judge or textbook writer has succeeded in explaining it or defining it in less abstruse terms".[12] There is a need for a set criterion on what constitutes an arrangement. Latsky, states that because there is no definition of schemes of arrangement, it seems that just about any arrangement between the company and holders of a class of securities would qualify as a scheme if the company has complied with all the requirements of the Act.[13] This could hold true because the methods contained in section 114 do not constitute a closed list and the lack of a definition of a scheme of arrangement leaves much to be desired.

The court in *Ex Parte Standard Bank Group Ltd and Liberty Group Ltd*[14] stated that the fact that there is no definition of the term 'arrangement' does not mean literally any arrangement between a company and its members or creditors is an arrangement within the meaning of section 311. What is contemplated is a scheme that has as its object the affecting of the respective rights and obligations *inter se* of the company and its members or creditors.

What section 114 of the Act provides is that the arrangement has to be between the company and its shareholders and has to comply with the provisions of section 115 of the Act. In *Du Preez v Garber: In re Die Boerebank Bpk,*[15] the court quoted Gower on Modern Company Law which stated that, a scheme cannot authorize something contrary to the general law or wholly *ultra vires* the company.

In *Ex Parte NBSA Centre supra,* the court stated that the history and purpose of section 311 of the 1973 Act show that the ambit of an arrangement is

[11] 1987 (2) SA 783 (T).
[12] *Ex Parte NBSA supra* 786.
[13] Latsky "The fundamental transactions under the Companies Act: a report back from practice after the first few years" 2014 Stell LR 369.
[14] 2007 (4) SA 1298 (W).
[15] 1963 (1) SA 806 (W) 812.

appropriate in cases where the normal mechanisms for reaching agreement between members on the one hand and the company on the other are not available due to the content of the particular scheme. The court stated further that the corollary is that where the normal mechanisms are available, the scheme of arrangement is inappropriate.[16] The court in *Senwes v van Heerden and Sons*[17] supported this decision. The requisite approval of a scheme of arrangement is a special resolution at a meeting called for that purpose. Court intervention is no longer required by the Act as was previously the position with section 311 of the 1973 Act, unless minority shareholder rights are exercised in the case of section 115(3), (8) and (9) and section164 of the Act.

Owing to the fact that case law under the 1973 Act is used as precedent in interpreting the Act, reference to the 1973 Act is important in appreciating the context of the interpretation. The Act is silent on whether or not a section 48 reacquisition of more than 5 per cent of the company's issued shares qualifies as a scheme of arrangement, section 48 merely states that the transaction 'is subject to the requirements of sections 114 and 115 but does not state that *it is* a scheme of arrangement".[18]

What is clear from legal precedent is that something which can be achieved through other means does not fall within the scope of an arrangement. In *Ex Parte NBSA supra*, the court stated that any scheme or part of it in respect of which an exclusive procedure for its attainment is prescribed is not an arrangement and can only be achieved by employing the prescribed machinery.[19] The effect of this *dictum* is that using section 114 of the Act for a reacquisition of a company's previously issued securities to the exclusion of the section 48 procedure is prohibited. The protection of minority shareholders is important in the area of company law. Cassim, states that the proper protection of minority shareholders is the cornerstone of every well-developed corporate law system.[20]

[16] At 787.
[17] 2007 (3) SA 24 (SCA) 30.
[18]Latsky 2014 Stell LR 382.
[19] At 801.
[20] Cassim in *The new derivative action under the Companies Act. Guidelines for judicial discretion* (Juta, 2016) 1.

A study into the Corporations Act 50 of 2001 of Australia and the Companies Act 2006 of the United Kingdom shows similarities with section 311 of the 1973 Companies Act. Moreover, both jurisdictions appear to have no definition of what an 'arrangement' constitutes, similar to the position in the current South African Companies Act. Schemes of arrangement in both the UK and Australia are court approved arrangements entered into between the company and its creditors or members. Schemes of arrangement in the UK are regulated by the Companies Act 2006 and the City Code,[21] which comprises of six general principles and 38 rules. The City Code was made and is administered by the Panel on Takeovers and Mergers (the Panel)[22]. The Panel regulates takeovers subject to the City Code. One of the general principles of the City Code is that all shareholders of the same class must be treated equally and have adequate information to reach an informed decision.[23]

In Australia, schemes of arrangement are regulated by section 411, Part 501 of the Corporations Act 2001. There is no definition of an arrangement either, however, section 9 of the Corporations Act provides for methods with which an arrangement can be effected which includes a reorganization of the share capital of a body corporate by the consolidation of shares of different classes, the division of shares into shares of different classes or both methods combined, quite similar to the South African context. In *Re NRMA Ltd*[24] Justice Santow stated, referring to the term 'arrangement', that

> "the word has been given a liberal meaning. Generally speaking, unless the arrangement is ultra vires the company or seeks to deal with the matter for which a special procedure is laid down by the Corporations Act, almost any arrangement otherwise legal which touches or concerns the rights and obligations of the company or its members or creditors, and which is properly proposed, may come under section 411".

[21] Slaughter & May *A guide to takeovers in the United Kingdom* http://www.slaughterandmay.com, accessed on 04 May 2019.
[22] *Ibid.*
[23] Slaughter & May *A guide to takeovers in the United Kingdom* http://www.slaughterandmay.com, accessed on 04 May 2019.
[24] (2000) 33 ACSR 595 at 603.

Latsky[25] also shares the same sentiments as the court in *Re NRMA Ltd supra*.

1.6 Expected contribution of study

This research is a study of the meaning of what constitutes an arrangement as contemplated in section 114 of the Companies Act 71 of 2008. The court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[26] stated that when interpreting a document, consideration must be given to the purpose and nature of the document. To that effect, section 7 of the Act contains the objectives of the Act, which include, *inter alia*, the promotion of the development of the South African economy, which entails creating flexibility and simplicity in the creation and maintenance of companies.[27] Furthermore, the Act seeks to balance the rights and obligations of shareholders and directors within companies[28] and to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all stakeholders.[29]

This paper further aims to examine the scope of schemes of arrangement in South Africa, with specific focus on the meaning of arrangement. Furthermore, it seeks to examine whether the application of the relevant sections of the Act is in line with the Act's stated objectives. It will look at the origin of schemes of arrangement, its application and implementation and the effect thereof. Furthermore, the study will seek to determine to what extent a scheme of arrangement may be used and whether or not certain transactions fall within the ambit of what is contained in section 114 of the Act.

1.7 Research methodology

Use of literary sources will be made and the reference appears in the bibliography. The scope of the research will be limited to primary and secondary

[25] Latsky 2014 Stell LR 382.
[26] 2012 (4) SA 593 (SCA) 18.
[27] Section 7(b)(ii) of the Act.
[28] Section 7(c)(i) of the Act.
[29] Section 7(c)(k) of the Act.

sources, in the form of textbooks, case law, legislation, journal articles and internet sources. A comparative study between South African company law and international company laws' best practice will be made, the purpose of which will be to outline strengths and shortcomings between the two and, where possible, examine how any inconsistencies may be addressed. The comparative study will be based on the United Kingdom (UK) and Australian company laws. Both the South African and Australian company law were influenced by the UK company laws and it is noteworthy to state that the current South African Companies Act has commendably abandoned some procedures at the core of UK's law on takeovers.

1.8 Structure of the dissertation

In addition to this chapter, this dissertation consists of four more chapters.

Chapter 2 outlines the history, nature and framework of schemes of arrangement.

Chapter 3 contains a thorough discussion of the challenges presented by the lack of a definition of the term "arrangement", the different transaction falling within the ambit of schemes of arrangements as envisaged by section 114 of the Act, the transactions that fall outside the scope of section 114 and the differing court rulings and principles laid down.

Chapter 4 explores how schemes of arrangements are regulated in international jurisdictions, specifically in the UK and Australia.

Chapter 5 is the concluding chapter of this research and it contains a summary of the previous chapters and recommendations on how some of the challenges mentioned can be resolved.

2. SCHEMES OF ARRANGEMENT

2.1 Introduction

Historically, arrangements and compromises were previously applicable to companies in liquidation. It was stated in *Ex Parte NBSA Centre supra,* referring to the case of *Re Guardian Assurance Company* [1917] 1 Ch 431 where Younger J, in the court *a quo,* described it as follows:

> "The section was there applicable only to compromises or arrangements with creditors of a company, and then only if the company was in liquidation. In 1900, by s 24 of the Companies Act of that year, the earlier section was made applicable not only as between the company and the creditors or any class thereof, but as between the members or any class thereof and the company. The section still applied only when the company was in liquidation. In 1907, by s 38 of the Companies Act of that year, the Act of 1870 was made applicable whether the company was or was not in the course of being wound up. Section 120 of the new Act is merely a re-enactment of s 2 of the 1870 Act as so modified. It would appear, therefore, that there is attached to the section throughout its history the idea of some difficulty to be resolved by a compromise or arrangement of rights on one side or the other- a situation which before 1907 could only arise in a winding up, and after 1907 would still naturally so arise except in a case where the paramount considerations against liquidation were present".[30]

[30] At 786-787.

In the current company law regime, companies in liquidation or business rescue proceedings are excluded from using schemes of arrangements.[31] When a company has a larger shareholding, negotiating contracts or concluding other transactions with each shareholder, on the same terms, can sometimes prove to be an impossible task. In *Ex Parte NBSA Centre Ltd supra,* Coetzee DJP stated as follows:

> "it is difficult to and at times impossible to negotiate individually with large classes of persons where the agreement of all of them individually is necessary to a proposal which is binding on them and the company-".[32]

Oberholzer[33] wrote the following, quoting Cilliers *et al* in Korporatiewe Reg 2ed (1992):

> "From time to time companies are required to negotiate with persons such as creditors and shareholders, who have claims against the company, in order to amend such claims in the interest of all parties. However, these claims are often held by large groups of persons, making it impossible for the company to negotiate with every individual person. There is therefore a need for a procedure in terms whereof the company may negotiate collectively with such a group. A mechanism is also necessary which enables the company to bind all members of the specific group to an agreement which has been reached with the majority of that group. Such procedure and mechanism have been created in section 311 of the Companies Act 61 of 1973."

Schemes of arrangement were previously regulated by section 311 of the 1973 Act before the coming into effect of the current Act. In terms of section

[31] Section 114(1) of the Act.
[32] At 787.
[33] Oberholzer Legal Aspects of the Regulation of Mergers and Acquisitions (LLM dissertation 1997 UNISA) 6-7.

311, an arrangement or compromise could be concluded between a company and the holders of its securities or creditors.

Currently, schemes of arrangement are regulated by section 114 of the Act, which provides only for arrangements between a company and its members. Its salient features are that unanimous agreement to the compromise or arrangement by the securities holders concerned is not required.[34] This is so because the arrangement is approved by means of a special resolution reached by members who are entitled to exercise voting rights on the matter, taking into account quorum and class issues.[35]

In *Ex Patre NBSA Centre Ltd supra* the court stated as follows in reference to section 311 of the 1973 Act, that "the history and purpose of this section show that it is appropriate in cases where the normal mechanisms for reaching agreement between members on the one hand and the company on the other are not available due to the content of the particular scheme.[36] Normally the members meeting together formally in general meetings achieve that goal and the majority vote effectively produces results which are binding on the minority''.[37] The court said the following:

> "It is put concisely as follows in Australian Company Law 2nd ed by Paterson and Ednie vol II at 2374: 'the section is intended to provide machinery (i) for overcoming the impossibility or impracticability of obtaining the individual consent of every member of the class intended to be bound thereby; (ii) to prevent in appropriate circumstances a minority of class members frustrating a beneficial scheme-'.[38]

Although probably not originally intended for that purpose, the section 311 of the 1973 Act's scheme of arrangement began to be used to eliminate minority shareholders in order to achieve a takeover of a company after the decision in

[34] Delport 410.
[35] Section 115 (2) of the Act.
[36] At 787.
[37] *Ibid.*
[38] *Ibid.*

Re National Bank Ltd [1966 1 WLR 819; [1966 1 All ER 1006 (ChD).[39] The court sanctioned a scheme that in essence involved an acquisition by an outsider of all the issued share capital of a company.[40] As fair and equal treatment of shareholders is a fundamental principle of company law,[41] it was important for legislature to protect the rights and interests of minority shareholders against possible abuse from majority shareholders.

A fundamental concept of corporate law is the principle of majority rule.[42] One who becomes a shareholder in a company generally undertakes to be bound by the lawful decisions of the majority shareholders on the affairs of the company.[43] The principle must however, be balanced against the need to protect minority shareholders.[44] The main concern underlying most of the issues relating to section 311 schemes of arrangement was whether shareholders (especially minority shareholders whose shares would usually be eliminated and extinguished as a result of the scheme) were being adequately protected in the circumstances.[45] In terms of section 115 of the Act, all fundamental transactions have to be approved by means of a special resolution adopted at a meeting which has been called for that purpose.[46] A resolution passed at this meeting is binding on all shareholders of the company. Juxtaposed with this special resolution requirement is a requirement which seeks to protect the rights of minority in the form of appraisal rights contained in section 164 of the Act, which is further contained in section 115(8) of the Act.

In terms of section 164,[47] any dissenting shareholder may demand that the company pay them the fair value of all the shares held by them in the company. The introduction of the appraisal remedy has facilitated a great reduction in the role of the court in fundamental transactions.[48] This is so because with the 1973 Act, the company had to first apply to court to grant the

[39] Luiz Using a scheme of arrangement to eliminate minority shareholders 2010 SA Merc LJ 443.
[40] *Ibid.*
[41] Section 7(a) and (c)(i) of the Act.
[42] Cassim 1.
[43] *Ibid. Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 678.
[44] Cassim 1.
[45] Luiz 2010 SA Merc LJ 444.
[46] Section 115(2)(a) of the Act.
[47] Section 164(5) of the Act.
[48] Cassim *et al* 675.

permission to hold a scheme meeting and to subsequently sanction the scheme if all the requisite requirements were met. Accordingly, the scheme of arrangement procedure has also been reformed, in that the conventional protective measure of judicial sanctioning of schemes of arrangement is now replaced with the appraisal remedy together with the requirement for a report from an independent expert.[49]

With all these new additions to the Act regarding schemes of arrangement, one big gap still remains; the lack of a definition of the term 'arrangement'. It is thus important to determine which arrangements between a company and its shareholders will fall within the ambit of section 114 of the Act as envisaged by the Act. Although not an easy task, the courts have laid down principles which sought to decipher this somewhat confusing and ambiguous term.

2.2 A scheme as a regulated transaction

There is no definition of fundamental transactions in the Act, however, schemes of arrangement are listed as a fundamental transaction in Part A of chapter 5 of the Act.[50] In terms of section 117(1)(c)(iii), a scheme of arrangement between a regulated company and its shareholders is an affected transaction. A regulated company is in turn defined as a company to which Part B, C and the Takeover Regulations apply, provided the company is not in the process of business rescue proceedings or liquidation. Regulated companies are ones which fall under the following categories, *to wit,* a public company, a state-owned company and private companies whose securities, of which at least 10 per cent, have been transferred within 24 months immediately before the date of a particular affected transaction or the offer exceeds 10 per cent of the company's issued securities[51] as prescribed by the Minister (which is currently 35 per cent).[52]

The definition of an affected transaction in the 1973 Act covered transactions which resulted in the vesting of control of a company in a person (or concert

[49] *Ibid*. Section 114(2) of the Act.
[50] Section 114(1) of the Act.
[51] Section 118(1).
[52] In terms of section 118(2).

parties) who previously did not have control and transactions which resulted in a person (or concert parties) acquiring or becoming the sole holder of all the securities of a company or of a particular class.[53] This is no longer the case with the Act. The regulation of transactions which are affected transactions (as defined) would now seem to be more about the regulation of situations involving what could be seen as an alteration of the fundamental nature of a regulated company rather than exclusively about the regulation of transactions which would result in a change or a consolidation of control of the voting securities of a company.[54] The focus is on the scheme itself and not the effect of the scheme.[55]

The involvement of the court has been significantly reduced, albeit not completely eliminated. If 15 per cent of the voting rights present at the scheme meeting oppose the scheme resolution, or a person who voted against the resolution is granted leave by the court to review the transaction, the company cannot implement the scheme without the approval of the court.[56]

As previously stated, the Act does not define what a scheme of arrangement is, nor did its predecessor, the 1973 Act; however, section 114 of the Act contains methods which a company may employ in order to effect a scheme of arrangement. Coetzee DJP stated in *Ex Parte NBSA Centre supra* that whether a particular scheme qualifies as an 'arrangement' in terms of section 311 of the Companies Act can be vexing.[57] Schemes of arrangement involving regulated companies and their shareholders are a common occurrence and a commercial reality.[58] It is thus important to know what constitutes such a scheme.[59] This is so because an arrangement "outside the section" is void even if every individual shareholder agreed to it.[60]

[53] Luiz 2012 PER 103.
[54] *Ibid* at 105.
[55] *Ibid.*
[56] Section 115(3).
[57] At 785.
[58] Luiz 2012 PER 105.
[59] *Ibid.*
[60] *Ex Parte NBSA Centre Ltd* at 795.

A scheme of arrangement has to, as a general rule, be one between the company and its shareholders. Given the prescribed list of methods that can be used in order to effect a scheme of arrangement which falls within the ambit of section 114 of the Act, "the arrangements 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 and that if capital is to be reduced the formalities must also be complied with'".[61] The courts do not have the power to allow what is not an arrangement to be dealt with as an arrangement.[62]

It is; however, stated in Henochsberg that the statement that a court does not have the power to allow what is not an arrangement to be dealt with as an arrangement, should not be construed as meaning that literally any arrangement between the company and its holders of any class of securities which is not contrary to the general law or wholly *ultra vires* the company is an arrangement within the meaning of the section: the relevant scheme must have as its object the affecting of the respective rights and obligations *inter se* the company and its holders of securities; the achievement of such object by way of the use of the machinery of the section must be necessary in the sense that it cannot otherwise be conveniently achieved.[63]

2.3 Conclusion

The fact that schemes of arrangement as fundamental and affected transactions are a common commercial occurrence means that it is vital that the provisions regulating them are clear and understandable.[64] With the need to define the parameters of what constitutes lawful schemes of arrangement, the subsequent chapters will examine in greater detail what schemes of arrangement entail and when the transaction will fall within the ambit of the regulating provisions. Furthermore, the nature of the consideration that may be given for the transactions will also be discussed.

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[61] *Ex Parte NBSA Centre Ltd supra* at 788.
[62] *Ibid* at 801.
[63] Delport 410(5).
[64] Luiz 2012 PER 129.

3. MEANING OF ARRANGEMENT

3.1 Meaning of arrangement in terms of section 311 of Act 61 of 1973

It is generally accepted that with schemes of arrangement, there has to be an arrangement of the rights of the parties involved.[65] Coetzee DJP stated in *Ex Parte NBSA Centre Ltd,* referring to Younger J in *Re Guardian Assurance Company* [1917] 1 Ch 431, that the purpose of the regulating provisions at the time is strictly limited: it does not confer powers; its only effect is to supply, by recourse to the procedure thereby prescribed, the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity.[66] Prior to the coming into effect of the Act, schemes of arrangement were regulated by section 311 of the 1973 Act which provided as follows:

> "(1) Where any compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them, the Court may, on the application of the company or any creditor or member of the company, or in the case of a company being wound up, of the liquidator, or if the company is subject to a judicial management order, of the judicial manager, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the Court may direct.
>
> (2) if the compromise or arrangement is agreed to by (a) a majority in number representing three-fourths in value of the creditors or class of creditors; or (b) a majority representing three-fourths of the votes exercisable by the members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, such compromise or arrangement shall, if

[65] Delport 410(5).
[66] At 787.

> sanctioned by the Court, be binding on all of the creditors, or on the members or class of members (as the case may be) and also on the company or on the liquidator if the company is being wound up or on the judicial manager if the manager if the company is subject to a judicial management order".

The procedure under section 311 of the 1973 Act provided for two court applications. The procedure was that there first had to be an application to the court to convene a scheme meeting and; if granted, a majority representing three-fourths (75 per cent) of votes exercisable on the matter had to agree to the arrangement. Subsequent to the scheme meeting, there had to be a lodgement of the court order with the Registrar of the court and the registration thereof in order to make it effective.[67] Only after sanctioning by the court did the scheme become binding on the shareholders of the company. Although this procedure has been removed entirely in the Act, the process had two important implications: first, the shareholders of the company enjoyed the automatic protection of the court's scrutiny of the substance of the scheme as well as the procedure that followed at the scheme meeting.[68] Secondly, the majority required to approve the scheme of arrangement was only 75 per cent of the members present and voting in person or by proxy.[69] The lower voting threshold and lack of a quorum requirement made schemes of arrangement the preferred takeover mechanism.[70]

The section provided for both compromises and arrangements, however, this dissertation will be limited to arrangements. Coetzee DJP stated in *Ex Parte NBSA Center Ltd* that there is attached to the section throughout its history the idea of some difficulty to be resolved by a compromise or arrangement of rights on one side and or the other.[71] It is presumed that the difficulty referred to here is the act of binding every shareholder to the same agreement. As stated in the previous chapter, the purpose of a section 311 arrangement was

[67] Cassim *et al* 727.
[68] *Ibid.*
[69] *Ibid.*
[70] *Ibid.*
[71] At 787.

to reach an arrangement that is binding on all shareholders and the section created a machinery which enables a company to negotiate with its shareholders collectively and bind all the shareholders concerned to the agreement reached by the majority of that particular class. However, the machinery of the section cannot be used where other means to achieve a particular goal are available.

The issue regarding the meaning of 'class' in the context of a section 311 scheme of arrangement was raised in *Verimark Holdings Ltd and Brait Specialised Trustees (Pty) Ltd*.[72] A scheme of arrangement was used in an attempt to eliminate minority shareholders (being 37 per cent thereof). The issue that arose was that the proposer of the scheme was present at the scheme meeting and voted on the scheme. The case once again highlights the conflicts of interest that could potentially arise where a scheme of arrangement is used to achieve a takeover and the need to adequately protect shareholders (especially minority shareholders) in the circumstances.[73]

In *Sovereign Life Assurance Co v Dodd*,[74] the court stated that "the word 'class' used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a 'class of creditors' to be summoned. It seems to me that we must give such a meaning to the term 'class' as will prevent the section being so worked as to produce 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 became well established that the categorization of a class of either members or creditors for the purposes of section 311, involves a determination of the similarity of rights and not the similarity of interests.[75] The class test laid down in *Sovereign Life Assurance Co supra* was adopted by the court in *Ex Parte Garlick Ltd.*[76]

Section 311(8) provided as follows:

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[72] Luiz (2010) SA Merc LJ 445.
[73] *Ibid.*
[74] [1892] 2 QB 573 at 583.
[75] *Verimark Holdings Ltd v Brait Specialised Trustees supra* at 10.
[76] 1990 (4) SA 324 (C) at 331-332.

> "In this section, 'company' means any company liable to be wound up under this Act and the expression '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."

Looking at the wording of section 311 above, one is inclined to say the section listed two methods within which a scheme of arrangement could be effected and by the use of the word 'includes' in subsection (8), it appears that schemes of arrangement could be used for other arrangements outside of the consolidation or division of shares. The fact that the term 'arrangement' was undefined under section 311 gave rise to a number of debates regarding section 311 schemes of arrangement, with courts differing in their interpretation. The debate revolved around how wide a construction should be given to the term 'arrangement'.[77] In their interpretation of schemes of arrangement, the courts refrained from defining the term 'arrangement' because their role is limited to interpretation. As Coetzee DJP put it in *Ex Parte NBSA Centre Ltd supra,* the court cannot supply a definition which limits or modifies the ordinary meaning of a word which was left undefined by the legislature.[78] The different court rulings will be discussed below.

As a general principle, an arrangement has to be between a company and its shareholders.[79] It therefore follows that any arrangement which does not include any of these parties cannot be sanctioned as an arrangement falling within the ambit of section 311. In *Re Hawk Insurance Co Ltd [2001] EWCA Civ 241; [2001] 2 BCLC 480*, the UK appeal court stated that "if the correct decision is not made at the first stage, the court may find, at the third stage, that it is without jurisdiction. The reason is that the court's jurisdiction under section 425(2) of the 1985 Act is limited to sanctioning a compromise or arrangement between the company and its creditors or any class of creditors

[77] Lehloenya (2007) SA Merc LJ 527.
[78] At 789.
[79] Section 311 of the 1973 Act.

(as the case may be) which has been approved by the requisite majority at a meeting of the creditors or that class of creditors (as the case may be)."

Furthermore, as per the court in *Du Preez v Garber supra* (quoting Gower in Modern Company Law 2ed), arrangements contemplated in this section are of the widest character and cannot authorize something contrary to the general law or wholly *ultra vires* the company and if a reduction of capital is involved, the formalities as prescribed in the Act had to be complied with. In the mid-1980s, a series of contradictory decisions were handed down to demonstrate just how divided judicial opinion was on the issue of transactions that fell within the ambit of section 311.[80] It thus stands to be determined which arrangements qualify as schemes of arrangement and which ones do not, as envisaged by the prevalent legislation. In as much as section 311(8) provided for a reorganization of a company's share capital through the division or consolidation of shares or a combination of the two methods, the courts expressed different views regarding the use of section 311 to reduce a company's share capital.

Ex Parte Federal Nywerhede

The court in *Ex Parte Federale Nywerhede Bpk*[81] had to consider whether a reduction of capital could be used to effect a scheme of arrangement. The scheme proposed involved the cancellation of the shares of "outside-shareholders" (shares which did not belong to the holding company of Federale Nywerhede Bpk (the company), Federale Volksbeleggings Bpk (FVB)) in return for which shares in the holding company would be issued to such shareholders, which the court accepted that the scheme of arrangement procedure was available subject to the proviso that it was indeed between the company and its shareholders. Delport, in Henochsberg, did not agree with the court's interpretation of arrangements falling within the ambit of section 311 in this case. He states that an arrangement for 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

[80] Lehloenya (2007) SA Merc LJ 528.
[81] 1975 (1) SA 826 (W).

company and its holders of securities.[82] I respectfully agree with Delport *supra* because the Act states that the arrangement has to be between the company and its shareholders. Considering the fact that the company was not excluded from the arrangement with FVB, the shareholders are that of the company and not shareholders of FVB, it thus cannot be said that the arrangement was between the company and its shareholders.

Ex Parte J R Starck & Co[83]

In this case the company applied to court for leave to summon a scheme meeting in which it was proposed that all the minority shareholders' shares would be expropriated by cancelling the shares, against a cash payment thereof, thus reducing the share capital in the company. In determining whether section 311 of the 1973 Act was applicable, the court, per Margo J, stated that the expropriation cases in England involving minority shareholders' shares' resolution were upheld where it was not in conflict with the Companies Act, it was *intra vires* the company's memorandum of association, it was *bona fide* and it was for the benefit of the company.[84] The court held that the proposed scheme was not valid and refused to grant leave to convene a scheme meeting on the basis that it would not be in the interests of the company. I agree with the decision taken by the court because the scheme of arrangement procedure should only be invoked where no other mechanism is available to reach an intended goal.[85] In this case, the company could have altered its memorandum of incorporation. Furthermore, although the expropriation would have been in the interest of the company, it would have been unfairly prejudicial to Mrs. Starck, who had in no way acted to the detriment of the company.

Re NFU Development Trust[86]

When considering the issue of whether the expropriation of shareholder's shares qualified to be sanctioned as a scheme of arrangement, the decision of the court in *Re NFU Development Trust Ltd* is important. The brief facts of the

[82] At 412.
[83] *Ex Parte J R Starck & Co (Pty) Ltd* 1983 (3) SA 41 (W).
[84] At 43.
[85] *Ex parte NBSA Centre Ltd.*
[86] [1973] All ER 135 at 139-140.

case were that the company proposed a scheme of arrangement to its shareholders wherein the membership of the company would be reduced, for the purpose of reducing administration expenses. The court refused to sanction the scheme because the terms were that it did not qualify as a 'compromise or arrangement' between the company and its members within section 206 of the 1948 Act. Following the approach in *Re Savoy Hotel Ltd,*[87] where the court stated that the scheme required some element of give and take and not simply amount to a total surrender or confiscation. Furthermore, the court stated that the words 'compromise' or 'arrangement' implied some element of accommodation on each side and were not apt to describe a total surrender of the rights of each side. It stated further that since the rights of the members were being expropriated without any compensating advantage, it could not be said that they were entering into a compromise or arrangement with the company.

The court followed the decision in *Re Alabama, New Orleans, Texas Pacific Junction*,[88] where Bowen LJ stated that the court is bound to ascertain that all the conditions required by the statute have been complied with and that a reasonable compromise must be one which can, by reasonable people conversant with the subject, be regarded as beneficial on both sides who are making it. The learned judge went on to say that he had no doubt that it would be improper for the court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supported by sensible business people to be for the benefit of that class.

Ex Parte Satbel

In *Ex Parte Satbel (EDMS) Bpk: In Re Meyer and Another v Satbel (EDMS) Bpk,*[89] the matter before the court was the sanctioning a proposed scheme of arrangement wherein one of the majority shareholders would acquire the shares of the minority shareholders at a sum of R6 per share. Coetzee J stated that to qualify as an arrangement, there had to be a rearrangement of

[87] [1981] Ch 351 at 359.
[88] [1891] 1 Ch 213 at 243.
[89] 1984 (4) SA 347 (W).

the shareholders' rights.[90] The court stated that the scheme in question entailed a destruction of the shareholders' interests and that it was not a rearrangement but expropriation of the shareholders' rights.[91] Furthermore, the scheme was not one between the company and its shareholders but disguised as such in order to hide the reality that it was actually one between majority shareholders and minority shareholders, thus *in fraudem legis*. As such, the court refused to sanction the scheme and found that the arrangement was not one falling within the ambit of section 311 of the 1973 Act. The supposition that a shareholder's shares cannot be expropriated for cash was supported by Delport in Henochsberg.[92] One of the things a scheme should not be, as stated in *Du Preez v Garber supra*, is that it should not be contrary to general laws and disguising a scheme as one between the company and its shareholders when it is not, defeats the whole purpose of schemes of arrangement and definitely does not meet the first requirement being that it has to be one between the company and its shareholders.

Ex Parte Natal Coal Exploration Co Ltd[93]

In this case, the court adopted the approach in *Ex Parte Satbel supra*. Briefly, the facts of the case are that a scheme of arrangement was proposed to the shareholders whereby Natal Coal Exploration Co Ltd (the company) would become a wholly-owned subsidiary of Kangra Coal. The scheme entailed that the company would reduce its capital in two ways involving the disappearance of the scheme shares and the payment by the company of monetary compensation to the former holders thereof against the cancellation of the former holders' shares. The court quoted Brightman J, in *Re NFU Development Trust Ltd*[94] that the concept of arrangement does not entail a total surrender and entails an element of give and take.

The court *in casu*, per Stegmann J, stated that a scheme in which the compensating advantage or "give" that is offered by a company in return for the "take" (or expropriation) of shares, is merely a right to a fixed or

[90] At 359.
[91] *Ibid.*
[92] At 412.
[93] 1985 (4) SA 279 (W).
[94] *Supra.*

determinable sum of money, does not qualify as an arrangement for the purposes of section 311.[95] The court went further to say that 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.[96] Furthermore, the court stated that 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 section 311.[97] As such, the court refused to sanction the scheme of arrangement and stated that to use the machinery of section 311, the company had to commit itself to secure a compensating advantage (other than the mere cash payment) for the scheme shareholders, as was required in the cases of *Ex Parte Federale Nywerhede* and *Ex Parte Satbel supra*.[98]

Ex Parte Suiderland Corporation

In this case,[99] the court had to consider whether a scheme of arrangement whereby the shares of minority shareholders of Suiderland Development Corporation (the company), would be cancelled in consideration of the payment of a cash amount qualified as a scheme of arrangement falling within the ambit of section 311 of the 1973 Act. The proposed scheme was that the minority shareholders' shares would be cancelled against the payment of 130 cents per share. Referring to the earlier case of *Ex Parte Satbel supra* and disagreeing with Stegmann J's reasoning in the case of *Ex Parte Natal Coal supra*, Van Den Heever J stated as follows:

> "Why the 'compensating advantage' should have to take the form of retention of rights as members of the company escapes me. If the legislature had intended what Stegmann J says it does, it has failed abysmally to express its intent and should tell companies and shareholders what it really had in mind when using such a

[95] At 284.
[96] *Ibid.*
[97] *Ibid.*
[98] At 285.
[99] *Ex Parte Suiderland Corporation: Ex Parte Kaap-Kunene Beleggings Bpk* 1986 (2) SA 442 (K).

> vague word capable of so many meanings. Until it does so by its own definition, the section may be used for schemes such as the present, particularly when there is no other equally practical manner by which a plan involving many links and interdependent moves could be orchestrated, and should be used when the minorities affected consequently have greater protection than they otherwise would have."[100]

The scheme was held to be a scheme of arrangement within the meaning of section 311 as the "compensating advantage" could take the form of the payment of money.

Ex Parte Lomati Landgoed (Edms) Bpk[101]

The court stressed the importance of section 311 and stated that the machinery of section 311 cannot be employed where an agreement has already been reached or can be reached along ordinary business channels. This position was confirmed by Coetzee DJP in *Ex Parte NBSA Centre Ltd* when he stated that "once a particular scheme does not require anything to be arranged which '*necessitates* the invocation of this section' it is not an arrangement falling within the meaning of the section".[102]

Ex Parte Garlick[103]

The matter before the court required the court to consider for sanctioning an offer made by Jano Retail Holdings (Pty) Ltd (Jano) to acquire, by way of a scheme of arrangement, all the issued ordinary shares of Garlick Ltd (the company), which were not owned by Jano or its wholly-owned subsidiaries. In terms of the scheme, the shareholders would receive a cash payment in respect of each share. The scheme shares would be converted into redeemable preference shares and new capitalization shares equal to scheme shares would be allocated to all ordinary shareholders. Scheme shares would be redeemed and the ordinary shareholders would be deemed to have

[100] At 445-446.
[101] 1985 (2) SA 517 (W).
[102] At 796.
[103]1990 (4) SA 324 (C).

renounced their rights to the capitalization shares to Jano. The sanctioning of the scheme was objected to on the basis that it was not an arrangement between the company and its shareholders but an acquisition in terms of which Jano acquired all the shares in the applicant, without the applicant being a party to the arrangement.

In determining whether the scheme was an arrangement as contemplated by section 311 of the 1973 Act, Friedman J stated that "it is true that the object of the scheme is the acquisition by Jano of all the issued ordinary shares in the applicant. However, if one has regard to the actual terms of the scheme, it becomes clear that the arrangement proposed is simply not one between Jano and the shareholders of the applicant".[104] He stated further that "the implementation of the scheme as outlined in the facts show that the company is very much party to the scheme which involves a reconstruction of the applicant's capital, without which it cannot be carried into effect, is not merely one between Jano and the applicant's shareholders."[105] The learned judge stated that he was satisfied that the scheme qualified as an arrangement as contemplated by section 311 and it was sanctioned as such.

Ex Parte NBSA Centre Ltd

The applicant applied for leave to convene meetings with classes of its shareholders to consider a proposed scheme of arrangement in terms of section 311 of the 1973 Act and the application was granted. The court laid down a number of principles regarding schemes of arrangement, *to wit*: (1) only a scheme or part of it which necessitates the invocation of section 311 is an arrangement, provided further that it is not illegal or *ultra vires* the company (adopting the principles laid down in *Du Preez v Garber supra*);[106] (2) *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 one which involves a reduction of capital when the applicable procedure under sections 83-89 of

[104] At 330.
[105] At 331.
[106] At 801.

the Act must be followed.[107] (3) If one part of a scheme involves a reduction of capital and the other part is an arrangement as it necessitates the invocation of section 311, the first part does not thereby become an arrangement or part of the arrangement. To accomplish that, legally, the reduction procedure must be resorted to and followed. Even if it is embodied in the scheme document which the court sanctions as an arrangement, it does not thereby become an arrangement which has statutory or any force of law. It must therefore not be embodied as part of the arrangement when the latter is drafted. It is a collateral matter which can only be dealt with as a condition precedent to the coming into force of the arrangement and its particular procedural requirements must be complied with.[108] (4) The court has no jurisdiction to sanction or to allow what is not an arrangement to be dealt with as an arrangement under section 311(5). Only an arrangement between the company and its members or creditors or a class thereof can be an arrangement within the ambit of section 311.

Ex Parte Mielie-Kip Ltd[109]

In this case, the court had to decide whether an arrangement was one falling within the ambit of section 311. The facts of the case are that Kanhym Ltd proposed to purchase all the minority shareholders' shares at Mielie-Kip Ltd (the company) at 88 cents per share. Provided that the scheme became binding, Kanhym Investments, the majority shareholder of Kanhym Ltd, would provide the funds for the payment of the minority shareholders' shares, which payment would be supervised and administered by the company. The question is what is adjusted or affected? It is not any arrangement between the company and any other person but something affecting the relationship between the company and its members.[110] Possible subject-matters for an arrangement between a company and its members are therefore e.g. the continued existence or not of issued or issuable shares; consolidation or

[107] *Ibid.*
[108] At 802.
[109] 1991 (3) SA 449 (W).
[110] At 453.

splitting of shares; the rights of redemption, to dividends, in regard to voting, amongst others, attaching to the shares.[111]

Flemming DJP, stated that he accepted that an arrangement may come within section 311 even if it arranged, for example, the termination of the relationship between the company and its members, with or without substitution of a new relationship between the parties. The court stated that if a mere offer to buy shares of a number of shareholders is not a proposal that as between the company and those shareholders something to be arranged, that which forms the true substance of the present proposal is no such arrangement between a company and its members as is contemplated by section 311. The proposed scheme was therefore held to not be one between the company and its shareholders but one between the buyer and the seller and that the section 314 takeover procedure should have been followed.

Senwes v Van Heerden & Sons[112]

In this case, the court had to decide on a proposed scheme of arrangement regarding section 169A of the now obsolete Cooperatives Act 91 of 1981, which dealt with, *inter alia*, arrangements between a cooperative and its members or creditors in South Africa, an equivalent of section 311 of the 1973 Act. The brief facts of the case are that Vaalharts Co-operative Ltd (hereafter 'Vaalharts'), sold its business to Senwes (hereafter 'the company') as a going concern. The company started out as an agricultural co-operative but later converted to a public company. It agreed to purchase Vaalharts with all its assets and some of its liabilities. One of the liabilities excluded from the purchase agreement involved monetary contributions that were made by the members of Vaalharts to the co-operative, to which the court referred as members' levies. It appears from the papers that Vaalharts' liabilities exceeded its assets, not taking into account the members' levies. In the proposed agreement, the company was going to cover the members' levies of Vaalharts' members. The agreement included a condition that all the members of Vaalharts would resign and either get a cash payment or acquire shares, *in lieu* of the cash payment, shares in the company, in exchange for

[111] At 453.
[112] 2007 (3) All SA 24 (SCA).

two thirds of their levies and shares in Senwesbel Ltd, the holding company of the company. It appears that all the members of Vaalharts signed the resignation form, which had the effect that they were agreeing to the proposed deal as is. About 90 per cent of the members chose the share option. The applicants in the court *a quo* averred the inclusion of the resignation form in the deal constituted an arrangement as envisaged by section 169A of the Co-operatives Act *supra* and that the agreement was void *ab initio* as there was no court sanctioning. The respondents denied that the agreement amounted to an arrangement between the members and the company. The court *a quo* found in favor of the applicants.

Section 169A of the Co-operatives Act *supra* essentially operated the same way as section 311 of the 1973 Act. There had to be an application for leave to convene a scheme meeting, approval of three-fourths of the co-operatives members and further sanctioning by the court for the scheme to be binding on all members. The decision of the court *a quo* was brought on appeal. The question that had to be answered was whether there was an arrangement which required sanctioning by the court. As there was no definition of the term 'arrangement' in the Co-operatives Act, the appeal court stated that the potential application of the mechanism created by the section should not be hampered by affording a restricted meaning to the term of wide general import utilized by the legislature.[113] The court referred to the statement of Coetzee DJP in *Ex Parte NBSA Centre supra*, regarding the history and purpose of the section as stated *op cit* and that the scheme of arrangement mechanism is not appropriate where normal mechanisms are available.[114]

Brand JA stated that he could find no reason to depart from the established principles.[115] The court stated that the machinery of the section is available where the arrangement cannot be conveniently achieved by obtaining the consent of every individual member and that the section does not apply where the same result can be achieved by obtaining the consent of every member.[116] The learned Acting Judge said "this is even more so where the

[113] At 11.
[114] *Ibid.*
[115] At 13.
[116] *Ibid*.

agreement is subject to the condition that it must be agreed to by every member". The court stated that where every member has agreed to an arrangement, the court's sanction can serve no purpose and can only result in a costly and wasteful exercise, and may also enable a person to avoid the agreement, a result for which the section was not intended. The decision of the court *a quo* was thereby overturned.

This decision is in line with *Ex Parte NBSA Centre supra* in that the purpose of the section was to avoid having to obtain consent of every single shareholder. Delport states in Henochsberg[117] that if the individual consent of every member that is affected, is obtained, it will be a common law arrangement. Furthermore, he states that the achievement of such object by way of the use of the machinery of the section must be necessary in the sense that it cannot otherwise conveniently be achieved.[118] Lehloenya[119] argues that the support received in *Senwes v Van Heerden & Sons* would make it difficult to argue for a different view and that the principles laid down in *Ex Parte NBSA Centre Ltd* have never been challenged and have been reinforced in the *Senwes* case.

3.2. Meaning of arrangement in terms of Act 71 of 2008

Under the current company law dispensation, schemes of arrangement are regulated by section 114 of the Act. As previously stated, schemes of arrangement have not been challenged under section 114 of the Act, as such; the legal precedents of its predecessor, section 311 of the 1973 Act continue to apply. Section 114 provides as follows:

> (1) 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;

[117] At 411.
[118] At 410(5).
[119] 2007 SA Merc LJ 532.

(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-

In as much as the 1973 Act did not restrict schemes of arrangement to the reorganization of share capital by means of a reduction or division of shares, the Act appears to have extended the application of schemes of arrangement, albeit the methods contained in section 114 do not constitute a *numerus clausus*. This means that more and more transactions can be brought under section 114 of the Act. The section requires that there first be an arrangement and that it be one between the company and holders of any class of its securities.[120] The objective of an arrangement in terms of section 114 is to affect the respective rights and obligations *inter se* the company and its holders of securities in a manner which otherwise could conveniently be achieved by independent agreement between the company and each holder of securities.[121]

While the Act does not define an arrangement, there are conflicting interpretations on the matter. Latsky[122] states that the lack of a definition of an arrangement means that it seems just about any arrangement can qualify as a scheme of arrangement between the company and its shareholders, as long as the company complies with the requirements of the Act. However, legal precedent differs with him. The court in *Ex Parte NBSA Centre Ltd* stated that this does not mean that literally any arrangement between the company and its holders of any class of securities which is not contrary to the general law or *ultra vires* the company is an arrangement within the meaning of the section.[123] As stated above, the machinery has to be the only means to achieve the stated object of the transaction.

One of the issues that was debated on under section 311 of the 1973 Act was whether an expropriation of shares constituted an arrangement within the

[120] Delport 412.
[121] Latsky 2014 Stell LR 381-382.
[122] *Ibid* at 369.
[123] At 786-789. See also Delport at 410(5).

ambit of section 311. As stated in the case of *Re NFU Development Trust Ltd*,[124] both the concepts of compromise and arrangement imply some element of give and take. Moreover, in this context, the concept of 'arrangement' terminates where the concepts of 'confiscation' and 'expropriation without a compensating advantage' begin.[125] The approach was adopted by Coetzee J in *Ex Parte Federale Nywerhede Bpk supra* at 834. The proposition that there is no 'arrangement' between a company and its members if the latter are merely to be deprived of their rights without receiving a compensating advantage in the form of other rights enforceable against the company itself is a proposition that formed an essential step in the reasoning underlying the decision in the case.

The Act provides that the board of a company proposes the scheme of arrangement and that the arrangement has to be between the company and its shareholders. This has the effect that the scheme cannot to be concluded to the exclusion of the company. Delport[126] states that third parties are not excluded from being a party to the arrangement, however, the third party cannot propose the arrangement and must not be party to the arrangement without the company being involved in the process. Third parties are parties that are not part of either the company or the shareholders involved in a scheme of arrangement. For example, if a scheme of arrangement is proposed between company A and its shareholders, the shareholders of company A cannot be said to have entered into a scheme of arrangement with company A if the object of the arrangement lies in company B, as seen in *Ex Parte Federale Nywerhede supra.* If that is the case then the arrangement is between the shareholders of company A and company B and is not an arrangement between the company and its shareholders as envisaged by the Act. In addition to the scheme being between the company and its shareholders, the Act provides that the scheme must be approved by a special resolution, 75 per cent majority of persons present at the meeting called for that purpose.[127]

[124] [1973] 1 All ER 135; [1972] 1 WLR 1548 (Ch)
[125] Pretorius Hahlo's South African Company Law through cases 6ed (1999) 499.
[126] At 414(1).
[127] Section 115(2)(a).

The Act introduced a quorum requirement of 25 per cent of the votes exercisable on the scheme, a requirement that was not a prerequisite in the 1973 Act.[128] Furthermore, the company must retain the services of an independent expert.[129] If the company involved is a regulated company, regulation 90(3) requires that the independent expert be able to demonstrate to the Panel that he is independent and would reasonably be perceived as such and that he is competent in his position. Among his duties, the independent expert has to prepare a report and make it to be available to all shareholders of a class of rights that are the subject of the proposed scheme. The information contained in the report must be such that it would assist shareholders to make an informed decision on whether to vote for or against the proposed scheme.

The exact ambit of a scheme of arrangement is important as all such schemes will be subject to the authority of the Panel as an affected transaction if it is in respect of regulated companies, irrespective of the effect thereof on the control of the company.[130]

3.3. Nature of consideration

In the past, when interpreting what qualified as a scheme of arrangement within the meaning of section 311 of the 1973 Act, the nature of the consideration that could be given *in lieu* of shares was a bone of contention for the courts as they could not agree on the matter. A scheme of arrangement which entailed shareholders being given monetary compensation in exchange for their shares in the company was held to fall outside the ambit of the section. The court in *Ex Parte Satbel supra* stated that a scheme whereby shareholders' rights disappear completely against monetary consideration amounted to expropriation and not a rearrangement. This approach was adopted by the court in *Ex Parte Natal Coal Exploration supra*. Both these courts accepted that a rearrangement of rights meant that the shareholders had to be compensated in the form of other shares. This interpretation almost comes as a shock because, regardless of the fact that it

[128] Cassim 727.
[129] Section 411(2).
[130] Delport 414.

found favor from textbook writers, nothing in section 311 of the 1973 Act precluded a cash consideration being given in exchange for a shareholder's shares.

There appeared to be some form of relief when the court in *Ex Parte Suiderland Corporation* rejected the approach in *Satbel* and *Natal Coal supra*. The court accepted that a cash consideration was an appropriate compensation and that it did not make the scheme one that fell outside the ambit of section 311. The courts in *Satbel and Natal Coal* essentially adopted the approach of Brightmann J. He put is as follows in the case of *Re NFU Development Trust Ltd supra*: "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". Goldstone J asked a question in *Ex Parte NBSA Centre Ltd supra*: "if some shareholders agree to their rights being expropriated by another shareholder, why should that not be an arrangement within the ambit of section 311?" and in answering this question, Delport,[131] stated that such expropriation is permissible, but that it must occur as an arrangement between the company and its shareholders and that it must not be contrary to general law or *ultra vires* the company.

The issue appears to have been resolved by section 114 of the Act by including expropriation as one of the methods to effect an arrangement. This proposition has found support from academic writers.[132] The implication is that under the current dispensation, schemes of arrangement whereby a company expropriates shareholders' rights in exchange for money will be an arrangement falling within the ambit of section 114 of the Act, provided it is not contrary to general law or wholly *ultra vires* the company and complies with all the requirements of the Act. This; however, Delport states, it is doubted that it can, on its own, be seen as authority for expropriation for cash.[133] He; however, states that a distinction has to be drawn between confiscation and expropriation.[134] In confiscation, there is expropriation without a compensating

[131] At 412.
[132] See Cassim *et al* 728 and Lehloenya 2007 SA Merc LJ 532.
[133] At 412.
[134] *Ibid.*

advantage, as stated in *Re NFU Development Trust Ltd supra*. If confiscation is effected in conjunction with section 114, there is no reason why the compensating advantage is to be restricted to anything other than cash.[135]

This position is also strengthened by the decision in *Ex Parte Suiderland Corporation supra*, which stated that if the legislature intended to exclude the payment of cash as consideration for shares, it would have stated so in the Act. Furthermore, owing to the fact that there is nothing in the Act barring the use of a cash consideration *in lieu* of a shareholder's shares, it appears the decision of *Ex Parte Suiderland supra* will find favor in the application of section 114 of the Act, in that a cash consideration is a legitimate consideration for shareholders' shares and if the shareholders agree to being paid a fair sum of money in exchange for their cash, that should also be taken into consideration. The element of give and take as laid down in *Re NFU Development Trust supra* is still maintained, give in the form of cash and take in the form of shares, or vice versa. Furthermore, it is highly doubted that it was the legislature's intention to have shareholders' shares being expropriated without any form of compensation. A cash consideration is neither contrary to the general laws nor wholly *ultra vires* the company, and if shareholders have no problem receiving fair value for their shares, it would not make sense why this would not be allowed under the Act.

As Delport[136] puts it, it is not the nature of the consideration that is important but whether the consideration is as a result of enforceable rights and obligations as between the company and the shareholders.

3.4. Reacquisitions of a company's issued securities

One of the methods listed in section 114 for effecting a scheme of arrangement is a reacquisition by a company of its securities,[137] which reacquisitions are regulated by section 48 of the Act. An important question arising from this is whether such reacquisitions qualify as a scheme of arrangement as envisaged by the section. The Act is silent on the matter; however, the answer is important, as it will determine the sections and rules

[135] *Ibid.*
[136] At 412.
[137] Subsection (e).

that regulate the proposed transaction and the procedure that must be followed and the approvals that must be obtained.[138]

Section 48 of the Act applies to a proposed arrangement contemplated in this section to the extent that the arrangement would result in any reacquisition by a company of any of its previously issued securities.[139] In terms of section 48, if a company reacquires more than 5 per cent of any class of its issued shares, the transaction is subject to the requirements of sections 114 and 115 of the Act.[140] The Act does not state that the transaction will constitute (or must be carried out only by means of) a scheme of arrangement as contemplated in section 114(1), nor that it will be deemed a scheme of arrangement.[141] It is, however, important to understand whether or not the transaction would constitute a scheme of arrangement because if the transaction involves a regulated company, it is an affected transaction as contemplated in section 117(1)(c) and the implications are quite vast.[142] As a scheme of arrangement, there would be many compliance issues that come to the fore. In addition to compliance with sections 114 and 115 of the Act, the Panel would have to issue a compliance certificate or an exemption. Another implication is that the transaction may trigger a mandatory offer as contemplated in section 123 of the Act, which requires that a person who acquires any securities to the effect that they would then be entitled to exercise more than 35 per cent of the voting rights in the company, must offer to purchase all the remaining securities of that company. As stated above, it is important that the legislature makes it clear whether the proposal is a scheme of arrangement or not and if it is an affected transaction as it impacts on the procedure to be followed and approval requirements.[143]

A scheme of arrangement has to, by its nature, be an arrangement between a company and any holders of a class of its securities. If, for example, a company reacquires more than 5 per cent of its issued securities from a single shareholder within a class of shareholders, Latsky *supra,* argues that that

[138] Luiz 2012 PER 107.
[139] Section 114(4).
[140] Section 48(8)(b).
[141] Latsky 2014 Stell LR 380.
[142] Luiz 2012 PER 108.
[143] Luiz 2012 PER 110.

transaction cannot be deemed a scheme of arrangement because it does not meet the requirements set out in section 114, *to wit*, being an arrangement between the company and its holders of a class of securities. This is so because the agreement is only binding as between the company and that particular shareholder from whom the shares were acquired and does not bind every shareholder of that particular class.[144]

In addition to this, section 48(2)(a) of the Act provides that if the decision to do so satisfies the requirements of section 46 of the Act, the board of a company may determine that the company will acquire a number of its own shares. Section 46(1) prohibits a distribution by a company unless it was authorized by a resolution taken by the company and the company will satisfy the solvency and liquidity test, to which the company has acknowledged that it will indeed satisfy the test. A distribution is in turn defined in section 1 of the Act as any direct or indirect transfer of money or property of the company as consideration for the acquisition by the company of any of its shares, as contemplated in section 48.[145] Thus, section 46 will be triggered if the consideration for the reacquisition of shares will be company money or property. This has the effect of bringing the solvency and liquidity test to the fore, which will provide protection for creditors and shareholders whose shares are not being acquired.[146]

Furthermore, taking into account the requirement of retaining the services of an independent expert aforementioned, if reacquisitions of more than 5 per cent of the company's shares are regarded as schemes of arrangement, then the requirement of retaining an independent expert will be required as it is a requirement in terms of section 114(2) of the Act.

Based on the aforementioned, it was important for the legislature to have stated in clear terms whether or not the reacquisition by a company of its securities constitutes a scheme of arrangement or not, as this would clear all doubt and provide direction as to the procedures to be followed.

[144] Latsky Stell LR 381-382.
[145] Section 1(a)(iii)(aa).
[146] Luiz 2012 PER 115.

It is therefore submitted that section 114 of the Act does not, by merely stating that the requirements of sections 114 and 115 be complied with in respect of a reacquisition of securities in excess of 5 per cent, have the effect of deeming that transaction to be an arrangement if, by its nature, the transaction is not an arrangement, as this term is interpreted in terms of our common law: put another way, the section merely states that the transaction 'is subject to the requirements of sections 114 and 115 but does not state that *it is* a scheme of arrangement.[147] If it was a scheme of arrangement, the legislature would have stated so in clear terms.

Section 48 can be seen as an example of a combination of methods mentioned in section 114 because, although it is not a scheme of arrangement, both sections 48 and 114 are used if a company reacquires its own shares. If a company reacquires more than five per cent of its securities, it cannot do so without complying with section 114. Furthermore, section 114 cannot be used to the exclusion of section 48 for the reacquisition.

3.5 Conclusion

The lack of a definition of an arrangement leads to legal uncertainty, however, the principles laid down by the courts provide a good foundation; albeit they are not all in agreement on certain issues. Whether the nature of the consideration that can be given for shares can be monetary and still fall within the ambit of section 114 and whether the inclusion of expropriation for shares in the Act means that shares can be expropriated for cash; or the uncertainty regarding section 48 reacquisitions and whether or not they, on their own, should be deemed schemes of arrangement or not are issues the legislature needs to provide direction on. It will also be interesting to see to what extent the courts will adopt the approaches of the courts under section 311 of the 1973 Act in applying section 114 of the Act. Although some may argue that a rigid definition may cause certain transactions to fall outside the ambit of arrangements, there exists sound arguments that the lack of a definition leads to legal uncertainty with regards to; *inter alia*, transactions involving the reacquisitions of a company's previously issued securities, the extent to which

[147] Latsky 2014 Stell LR 382.

3rd parties can be involved in the scheme of arrangement as discussed in *Ex Parte Federale supra*, and what the inclusion of expropriation of shares in section 114(1)(c) means from an interpretation point of view. The principle is clear; that schemes of arrangement have to be between the company and its shareholders; however, each case is to be decided on its own merits, having regard to the delineating parameters set out above.

4. SCHEMES OF ARRANGEMENT IN INTERNATIONAL JURISDICTIONS

4.1 The legal position in the United Kingdom

Schemes of arrangement in the UK are regulated by Part 26 of the Companies Act 2006 and provisions of the City Code on Takeovers and Mergers (hereafter 'the City Code'). Section 895(2) of the Companies Act 2006 states as follows:

> "In this Part- 'arrangement' includes a reorganization of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods-"

Schemes of arrangement in the UK are proposed by the board of a company. A scheme of arrangement may be proposed to achieve a compromise or arrangement between a company and its shareholders or creditors.[148] Arrangement is interpreted broadly and does not require something analogous to a compromise.[149] Ultimately, all that is needed is some element of give and take so that a creditor (or shareholder) is not being asked to give something up and get nothing in return.[150] The Companies Act 2006 bears no definition of what a scheme of arrangement is. Section 895(2) above only states what schemes of arrangement may take the form of. Nothing in the Companies Act 2006 prescribes the subject matter of a scheme.[151] Furthermore, the term "includes" in section 895(2) indicates that is not a closed list of what transactions may fall within the ambit of the section. In theory, a scheme could be a compromise or arrangement between a company and its creditors or members about anything which they can properly agree to amongst themselves.[152]

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[148] Paterson "Reflections on Schemes of Arrangement and the Insolvency Service Consultation on the Corporate Rescue Framework" page 2.
[149] *Ibid. Re Guardian Assurance Co ltd* [1917] 1 Ch 431.
[150] *Re NFU Development Trust supra* 1548.
[151] Payne "Schemes of Arrangement, Takeovers and Minority Shareholder Protection" Legal Research Paper Series (University of Oxford) May 2012 page 1.
[152] *Ibid.*

The main aspects that set the schemes of arrangement procedure of the UK apart from that of South Africa are that schemes of arrangement in the UK can be between the company and either its creditors or its members; it is still a court-driven process and there are no quorum requirements. An application has to be made to the court by either the company, a creditor or member of the company or a liquidator or administrator if the company is being wound up or under administration; to summon a scheme meeting in terms of section 868 of the Companies Act 2006 and a further application has to be made for the court to sanction the resolution taken at the meeting in terms of section 899 of the Companies Act 2006. The scheme will become binding on every shareholder or creditor once it is sanctioned by the court.[153] Furthermore, the order of the court has no effect until it is delivered to the registrar.[154]

For the court to consider the sanctioning of a scheme of arrangement, 75 per cent of the majority of shareholders or creditors, voting either in person or by proxy, at the meeting summoned under section 896 (a meeting called for the purpose of voting on a proposed scheme of arrangement or compromise), agree to the proposed scheme or compromise. The lack of a quorum requirement means that even if the meeting is attended by ten per cent of shareholders or creditors with voting powers, if 75 per cent of those shareholders or creditors agree to the scheme and it is subsequently sanctioned by the court, it is binding on all shareholders or creditors.

As mentioned above, schemes of arrangement are regulated by both the Companies Act 2006 and the City Code. The City Code is administered by the Panel on Takeovers and Mergers (hereafter 'the Panel'), a body which regulates takeovers of companies subject to the City Code.[155] A scheme is an offer for the purpose of the City Code.[156] The rules of the City Code have statutory powers in respect of all offers and other transactions to which the City Code applies.[157] The powers conferred upon the Panel are to be found in Part 28 of the Companies Act 2006. Important to note is that any ruling by the

[153] Section 899(3) of the Companies Act 2006.
[154] Section 899(4) of the Companies Act 2006.
[155] Slaughter and May 2.
[156] *Ibid* 12.
[157] Slaughter and May 3.

Panel has binding effect as stated in section 945(2) of the Companies Act 2006. The City Code comprises of six general principles and 38 rules and its underlying objective can be summed up in three underlying principles; *to wit*: all shareholders of the same class in a target company must be treated equally and must have adequate information so that they can reach a properly informed decision; a false market must not be created in the securities of the offeror or the target company and lastly, the management of the target company must not take any action which would frustrate an offer without the consent of its shareholders.[158] A company entering into a scheme of arrangement in the UK must produce a statement explaining the effect of the scheme and disclosing any material interests of the directors, as failure to comply with this requirement is a criminal offence.[159]

It appears that the UK adopts a flexible approach when it comes to schemes of arrangement and that the objectives of the City Code mentioned above are similar to that of the Companies Act 71 of 2008 (the Act). Though the Act was mostly influenced by the UK company law, the changes made on the Act to suit the South African market and the offered protection to minority shareholders that is unique to South African law is commendable. However, the challenges that still remain with the lack of a definition of schemes of arrangement need to be addressed by the legislature.

4.2 The legal position in Australia

Similar to the position in the UK, a scheme of arrangement in Australia is a court-driven process on arrangements and compromises. The procedure is regulated by Part 5.1, section 411 of the Corporations Act 2001. In terms of section 9 of the Corporation Act 2001, an arrangement includes a reorganization of the share capital of a body corporate by the consolidation of shares of different classes, by the division of shares into shares of different classes, or by both of those methods. Schemes of arrangements are

[158] *Ibid.*

[159] Boardman A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008 2010 Acta Juridica 316.

proposed by the board of a company and have to be between the company and its members or creditors.[160]

Section 411 of the Australian Corporations Act is worded similarly to section 311 of the Companies Act 61 of 1973. It appears that Australia also adopted a flexible approach as the UK. In *Re NRMA Ltd*[161] it is stated that the term arrangement has been given a liberal meaning. It is put as follows:

> "Generally speaking, unless the arrangement is ultra vires the company or seeks to deal with the matter for which a special procedure is laid down by the Corporations Act, almost any arrangement otherwise legal which touches or concerns the rights and obligations of the company or its members or creditors, and which is properly proposed, may come under section 411".

The first application is made to the court to summon a scheme meeting as per section 411(1). Schemes of arrangement in Australia have to be approved by a 75 per cent majority of the shareholders present and voting at a meeting called in accordance to an order of court under section 411(1).[162] Following approval by the requisite majority, a second application is made to court to sanction the resolution.[163] In terms of section 411(10) the scheme will not have any effect until a copy of the court order is lodged with the Commission.

An explanatory statement has to be sent to every shareholder who has to vote at the meeting, setting out the effect of the proposed scheme and all the information material to the making of the decision.[164] In practice, the scheme will be approved only if the Eggleston principles are upheld.[165] These principles were that the acquisition of control takes place in an efficient, competitive and informed market; the identity of the offeror is known to the shareholders of the target company, that they have had enough time to consider the proposal and are given enough time to assess the merits of the

[160] Section 411(1).
[161] (2002) 33 ACSR 595 at 603.
[162] Section 411(1) and (4)(a).
[163] Section 411(4)(b).
[164] Section 411(3).
[165] Boardman 2010 Acta Juridica 317.

transaction ; the shareholders have a reasonable and equal opportunity to participate in any benefits accruing to holders through the offer; and an appropriate procedure is followed as a preliminary to compulsory acquisition.[166]

Due to the flexible nature of schemes of arrangement and the array of transactions that may be brought under schemes of arrangement, the legislature has refrained from giving a rigid definition of the term "arrangement". The general tone is that schemes should not be wholly *ultra vires* the company or contrary to general laws.[167] Furthermore, they should have as their object the affecting of the rights and obligations as between the company and its shareholders (or creditors in the case of Australia and the UK).

[166] *Ibid.*
[167] *Du Preez v Garber supra.*

5. SUMMARY AND CONCLUSION

5.1. Summary

A scheme of arrangement is one of the ways in which a change in or consolidation of a company can be achieved; however, it is important to understand which transactions may be deemed to be schemes of arrangement and which ones would not be deemed as such. Both sections 311 of the 1973 Act and 114 of the Act contain no rigid definition of the term "arrangement". It therefore falls on the courts to outline the parameters of what may or may not be deemed to be schemes of arrangement. The lack of a definition of the term 'arrangement' led to writers such as Latsky,[168] stating that this means that just about any agreement between the company and its shareholders could qualify as schemes of arrangement if all the requirements of the Act are complied with. Owing to the fact that there are a number of transactions that can be implemented in terms of a scheme of arrangement, it is important to determine which transactions fall within the ambit of section 114 of the Act.

The general principles laid down are that schemes of arrangement should not be contrary to general laws and should not be wholly *ultra vires* the company.[169] Furthermore, the scheme of arrangement procedure was said to only be used where there are no other means to achieve a certain objective and not as a substitute for other available procedures.[170]

The lack of a definition of the term 'arrangement' under section 311 of the repealed Companies Act 61 of 1973 gave rise to a number of problems with regards to the interpretation of the term, specifically in the area of the nature of the consideration that could be given *in lieu* of shareholders' shares. The most controversial issues with regards to section 311 of the 1973 Act were whether expropriation of shareholders' shares qualified as a scheme of arrangement. Differing principles were laid down by the courts, with the likes of *Ex Parte Satbel* and *Ex Parte Natal Coal Exploration supra* agreeing that

[168] 2014 Stell LR.
[169] *Du Preez v Garber supra.*
[170] *Ex Parte NBSA Centre Ltd supra.*

because an arrangement entailed a rearrangement of shareholders' rights and that the expropriation of shareholders' for cash was not an arrangement falling within the ambit of section 311. In contrast to the decision in the two aforementioned cases, the court in *Ex Parte Suiderland Corporation supra* accepted that money was an acceptable compensating advantage and stated that the legislature would have said if an arrangement involved the retention of rights as members in the company. To resolve this issue, expropriation was included as a method by which to achieve an arrangement in section 114(1)(c) of the Act. The result of the inclusion of section 114(1)(c) is that it is interpreted to mean that cash can be given as consideration *in lieu* of shareholders' shares and that such a transaction will be deemed a scheme of arrangement, provided all the other requirements are complied with.

Another issue which still presents difficulty is whether the inclusion of the reacquisition of a company's previously issued securities in section 114(1)(e) means that such reacquisitions are arrangements falling within the ambit of section 114 of the Act. The assumption is that that is not the case and that they only need to comply with the requirements set out in sections 114 and 115 of the Act. Such reacquisitions do not comply with the basic requirement of section 114, being that it is not an agreement between the company and its shareholders but between the company and particular shareholders and as such, cannot be deemed an arrangement within the meaning of section 114. Owing to the fact that the inclusion of reacquisitions as a means of achieving a scheme of arrangement is causing such difficulties, the confusion might be cleared if subsection 114(1)(e) was removed from the list in section 114(1).

Furthermore, it will also be important to clear the confusion around the issue that arose in *Ex Parte Federale Nywerhede supra* insofar as whether an agreement between a company and its shareholders regarding the cancellation of their shares in the company in exchange of shares in another company may indeed be deemed to be an arrangement between the company and its shareholders as envisaged by section 114 of the Act. This is especially important because although the company is still the one proposing the scheme of arrangement; the nature of the consideration lies in a third party. It is therefore unfathomable that this is what the legislature intended,

because the transaction cannot be said to be an arrangement *between the company and its shareholders* (my emphasis), with the consequence that section 114 would find no application.

5.2. Recommendations

In addressing some of the problems created by the lack of a definition of the term 'arrangement' in the Act, which were outlined in the preceding chapters and in paragraph 5.1 above, it is recommended that the legislature, courts and companies structuring schemes of arrangements consider the following:

I. The decisions of both the courts in *Ex Parte Satbel* and *Ex Parte Natal Coal supra* regarding the exclusion of a monetary consideration as a means of compensating shareholders for their shares must be disregarded in order to give effect to section 114(1)(c) of the Act and the decision of the court in *Ex Parte Suiderland Corporation* must be upheld.

II. Section 114(1)(e) must be removed from the list of the methods that can be used to achieve a scheme of arrangement; alternatively, the legislature can state in clear terms that the reacquisition of a company's previously issued securities does not constitute a scheme of arrangement. This is especially important because it will ensure that only the applicable requirements in connection with schemes of arrangement are complied with when dealing with reacquisitions.

III. The decision of the court in *Ex Parte Federale Nywerhede* must be disregarded because it does not comply with the requirement of schemes of arrangement being between the company and its shareholders.

5.3. Conclusion

While the lack of a definition of the term 'arrangement' in section 114 of the Act may be argued to be a result of the many transactions that may be brought under section 114 (by virtue of the methods listed therein not consisting a *numerus clausus*) and that a strict definition may cause some transactions to fall outside the ambit of the section, it is undeniable that the

lack of a definition presents some legal gaps and uncertainties. As such, it is important that the legislature address these issues by making the necessary amendments to the Act. Furthermore, it will be important for the courts to take into account the recommendations in paragraph 5.2 above when faced with schemes of arrangement proceedings under the Act. Although the practice appears to be the same in international jurisdictions as well, the comparative study was important in the sense that it confirms the challenges faced by the lack of a definition of the term ‘arrangement’.

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