IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE : 2009/22928

In the matter between :-

Verimark Holdings Limited	Applicant
and	
Brait Specialised Trustees (Pty) Limited NO	First Respondent
Brait Multistrategy Trustees (Pty) Limited NO	Second Respondent
Securities Regulation Panel	Third Respondent

Judgment

Malan J:

[1] On 4 June 2009, the applicant applied for leave to convene a meeting in terms of s 311 of the Companies Act 61 of 1973. In terms of the proposed scheme of arrangement, the Van Straaten Family Trust ('VSFT'), the majority shareholder in the applicant, offered to acquire all the minority shares (being 37% thereof) in the applicant, a company listed on the JSE, for 50 cents per share. On 15 June 2009, Gildenhuys J granted an order convening a meeting of the ordinary shareholders of the applicant to be held on Monday, 13 July 2009 for the purpose of considering the scheme proposed by VSFT.

[2] The scheme meeting was held on 13 July 2009 under the chairmanship of Mr David Leibowitz. As appears from the chairman's report, the results of the poll taken at the meeting of 'scheme members' reflect that 80.06% of 'scheme members' voted in favour of the scheme; 19.93% of 'scheme members' voted against the scheme; and .01% of 'scheme members' abstained from voting. It is common cause that VSFT and what are defined as 'excluded members' under the scheme voted in favour of it.[1]

[3] The three respondents having been granted leave to intervene all oppose the sanctioning of the scheme essentially on two grounds: first, that VSFT and the 'excluded members' are not 'scheme participants' and should not have been permitted to vote; and, secondly, VSFT and the 'excluded members' are a class of

[1] VSFT holds 45.94% of the shares; Prime Rentals CC (an excluded member) 7% of the shares and these shares are beneficially owned by MJ Van Straaten and his family. Mirror Ball Investments and Selcovest (both excluded members) are not controlled by Van Straaten and hold 6,6% and 3,5% of the shares respectively.

ordinary shareholders different from the remaining 37 per cent of the shareholders and should not have been permitted to vote. In addition, the adequacy of the offer price is challenged.

[4] The order of court made on 15 June 2009[2] makes reference to a scheme of arrangement proposed by the proposer between Verimark 'and its ordinary shareholders substantially in the form attached to the founding affidavit in this matter'. The scheme circular to Verimark shareholders describes the scheme of arrangement as one between Verimark

'and the shareholders of Verimark (other than the excluded members) in terms of which VSFT will acquire all of Verimark's issued shares held by the scheme participants on the consideration record date ...'.[3]

[5] The 'excluded members' is defined as, collectively, Prime Rentals CC (a close corporation, an associate of the proposer holding 7% of the issued share capital in Verimark and which close corporation is beneficially owned by Mr MJ Van Straaten and his family), Mirror Ball Investments 49 (Pty) Limited (a Black Economic Empowerment entity holding 6,6% of the shares in Verimark) and Selcovest 35 (Pty) Limited (an employee entity holding 3,5% of the shares in Verimark).

The 'scheme participants' is defined as:

'Verimark shareholders, other than the excluded members, recorded in the register on the scheme consideration record date, who will dispose of [their] scheme shares and become entitled to receive the scheme consideration, if the scheme becomes operative.'

---

[2] D59.

[3] C44 para 1. The scheme contemplates a subsequent delisting of Verimark from the JSE.

The 'scheme shares' is defined as:

'42 272 328 shares, representing 37% of the shares in the issued share capital of Verimark held by scheme participants on the scheme consideration record date.'

'Scheme members' is defined as

'Verimark shareholder[s] recorded in the register on the scheme voting record date, who are entitled to vote at the scheme meeting.'

'Scheme meeting' is

'the meeting of scheme members convened in terms of an Order of the Court, to be held at 09:00 on Wednesday, 8 July 2009 at the registered office of Verimark ... or any adjournment thereof ... at which scheme members will consider and vote on the scheme, the notice of which is attached to and forms part of this circular.'

The 'scheme' or 'scheme of arrangement' is

'a scheme of arrangement in terms of section 311 of the Companies Act, proposed between VSFT and the shareholders of Verimark (other than the excluded members), in terms of which VSFT will acquire all of Verimark's issued shares held by the scheme participants on the consideration record date in exchange for the scheme consideration, the terms and conditions of which are contained in the scheme of arrangement ...'.

[6] The scheme is therefore one directed at the proposer's acquiring the 37 per cent shareholding held by the 'scheme participants' (ie 'shareholders, other than the excluded members, recorded in the register on the scheme consideration record date, who will dispose of [their] scheme shares and become entitled to receive the scheme consideration, if the scheme becomes operative'). The proposer is not a 'scheme participant' because, although a shareholder, it is not envisaged that VSFT

will dispose of any of its shares and receive the scheme consideration: albeit a 'scheme member' it holds no 'scheme shares'. However, the scheme envisages that the offer contained in the scheme documents be accepted, not by the 'scheme participants' (the holders of 37 per cent of the shares) to whom the offer was addressed, but by the 'scheme members' (all the shareholders) at the 'scheme meeting'.

[7] Section 311 provides:[4]

'(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 ... 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 sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members (as the case may be) and also on the company ...'

[8] At common law an offer may be accepted by the addressee only.[5] An offer for a composition, at common law,[6]

---

[4] The parties appear to have accepted that the scheme is an 'arrangement' within the contemplation of the Act. The term should be given a wide meaning: Blackman 12-4 ff; *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste* 1994 (2) SA 265 (A) 298; *NRMA Limited NRMA Insurance Limited* [2000] NSWSC 82 para 20.

'to be binding and effective ... must be accepted by all to whom it is proposed. Whilst the composition may or may not have to be accepted by all debtor's creditors to whom the proposal is addressed and for whom it is intended; if any such creditor(s) refuse or reject the offer, it is an end to the matter.'

[9] Because the number of creditors and members of a company are often large making it difficult to negotiate with each individual to secure his or her consent, s 311 and its predecessors were enacted.[7] In *Re The Dominion of Canada Freehold Estate and Timber Company Limited*[8] Chitty J said:[9]

'[O]ne of the difficulties that there always is in dealing with matters of this kind when the company gets into difficulty, and when more money is required, is to deal with the debenture holders as a class. That is the difficulty which the Legislature itself felt when it passed the Act of 1870, allowing a majority, and a sufficient majority – that is to say, not a mere absolute majority, but a majority that is larger than that – to bind the minority. Then it was known that, before the legislation of 1870, any particular individual could hold out against a scheme, however meritorious and however beneficial it might be, in order

---

[5] Schalk van der Merwe, LF van Huyssteen, MFB Reinecke and GF Lubbe *Contract General Principles* (2007) 54 ff.

[6] *De Wit v Boathavens CC (King and Another Intervening)* 1989 (1) SA 606 (C) 611 IJ.

[7] MS Blackman, RD Jooste and GK Everingham *Commentary on the Companies Act (Volume 2)* (2002) 12-2.

[8] (1886) 55 LT 347 at 351. The resulting scheme of arrangement or compromise may therefore not be a contract in the strict sense because the consent of all the members or creditors to it may be lacking; *Ilic v Parginos* 1985 (1) SA 795 (A) 803 HI, *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste* 1994 (2) SA 265 (A) 290 A.

[9] Also cited by Blackman 12-2. Cf *Re Bond Corporation Holdings Ltd* (1991) 5 ACSR 304 (SC(WA)) 317 and *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] H 213 where Bowen LJ observed: 'The object of this section is not confiscation. It is not that one person should be a victim, and that the rest of the body should feast upon his rights. Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such ...'.

that he might get, generally speaking, some special advantage for himself, or because he was a person who did not even get a fair view of the advantages to be gained. It was for the purpose of preventing that the Legislature passed the Joint Stock Companies Arrangement Act 1870 ...'

[10] In defining what is meant by a 'class' in s 311, our courts have generally followed the statement of Bowen LJ in *Sovereign Life Assurance Co v Dodd*:[10]

'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.'

In the cases that have followed since *Sovereign Life*, this passage has virtually hardened into law.[11] It became well established that the categorisation of a class of either members or creditors for the purposes of s 311, involves a determination of the similarity of rights and not the similarity of interests.[12]

---

[10] [1891-94] All ER Rep 246; [1892] 2 QB 573 at 583.

[11] See, for example, in addition to the cases referred to in the next note: *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241 para 31 and the references cited; *Re Equitable Life Assurance Society* [2002] EWHC 140 (Ch), [2002] 2 BCLC 510 paras 43 ff; *Re Hills Motorway Ltd* [2002] NSWSC 879 paras 10 ff; *Re Bond Corporation Holdings Ltd* (1991) 5 ACSR 304 (SC (WA)) 314 ff; *Re Hills Motorway Ltd* [2002] NSWSC 897 paras 11 ff; *Australian Co-Operative Foods Ltd* (2000) 38 ACSR 71 (SC(NSW)) para 81.

[12] *Ex Parte Colman, In re Argyle Dental Supplies Limited (In Liquidation)* 1933 WLD 177 190 ff; *Rosen v Bruyns NO* 1973 (1) SA 815 (T) 820-1; *Ensor NO v South Pine Properties (Pty) Limited and Another* 1978 (2) SA 755 (N) 763-4; *Ex parte Klopper and Another NNO: Re Rena Finansieringsmaatskappy (Pty) Ltd (In Provisional Liquidation)* 1979 (1) SA 254 (T) 259 ff; *Borgelt v Moolman NO and Another* 1983 (1) SA 757 (C) 763 ff; *Ex Parte Garlick Ltd* 1990 (4) SA 324 (C) 331 ff. But see *Ex parte Venter*

[11] The proposer, the 'excluded members' and minorities are all ordinary shareholders in the applicant. Their rights, or the 'bundle, or conglomerate, of personal rights entitling the holder thereof to a certain interest in the company, its assets and dividends',[13] are identical and they all belong, it seems to me, to the same class of shareholder. This, however, is not the issue. The inquiry whether separate meetings should be held arises only after determination of the identity of the offeree. The relevant question, 'at the outset', is 'between whom is it proposed that a compromise or arrangement is to be made?'[14] It was remarked that:[15]

---

and Another, NNO: In re Rapid Mining Supplies (Pty) Ltd (In Provisional Liquidation); African Gate and Fence Works Ltd Intervening 1976 (3) SA 287 (O) 276.

[13] *Standard Bank of SA Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A) 288.

[14] *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241; [2001] BCLC 480 para 23 and see paras 13-5, 32-3 (and see *In the matter of PT Garuda Indonesia* 2001 WL 1171948 (Ch D (Companies Ct)).

[15] In *Kleena Industries (Pty) Ltd v Senator Insurance Co Ltd* 1982 (2) SA 458 (W) Slomowitz AJ at 462. Cf *Cohen NO v Nell and Another* 1975 (3) SA 963 (W) 968. Referring to the word 'all' in the section Slomowitz AJ in *Kleena* said at 463: 'To my mind this passage is clear authority that where the Act refers to a sanctioned composition as being binding on all creditors or on all members of a particular class of them, the word "all" must be qualified to mean no more than all those to whom the offeror intended, on a proper construction of the offer, should be bound.' He continued at 464: 'In the result, I see nothing in the Actor in any of the authorities which were quoted to me which would, all other things being equal, preclude an offeror from making an offer to acquire only some of the claims which lie against the company or perhaps only one of them, or from directing his offer to only some of the members of a class of creditors and not to others. No doubt, if such offer is calculated to produce inequality, sanction would be withheld. I have little doubt that a creditor, or, for that matter, a member, to whom the offer is not directed, would have locus standi, either when it is sought to obtain leave to convene meetings or at the later stage when approval of the Court is asked, to make his complaint known.' He, however, left open the question whether a 'class' was constituted by virtue of the terms of the offer (at 464). Cf *Morris NO v Airomatic (Pty) Ltd t/a Barlows Air Conditioning Co* 1990 (4) SA

'in order to determine what the rights of creditors are and indeed whether they are bound at all, one looks to the terms of the contract. Although the Act apparently enjoins that all creditors are bound by a duly sanctioned offer, the cases explain, at least by necessary implication, that this only applies to those creditors who were parties to it, that is to say, to those to whom the offer was intended to be directed.'

[12] The reference to 'all' the creditors or members in s 311(2) is thus a reference to those creditors or members to whom the offer is made. Only when this primary

---

3756 (A) 397-8. In *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste* 1994 (2) SA 265 (A) 289 G – 290 C the court remarked: ' 'Ek het reeds daarop gewys dat as 'n voorgestelde reëling in wese 'n aanbod is wat aan oa 'n maatskappy se skuldeisers gemaak word. Dit is gerig op hul aanvaarding daarvan. Wat betref die wat wel aanvaar, kom daar natuurlik 'n ooreenkoms tot stand, onderhewig egter aan die Hof se goedkeuring van die reëling. Word goedkeuring verleen, bind die ooreenkoms ook ander skuldeisers van die maatskappy; nie omdat hulle dan ook kontrakspartye is nie, maar eenvoudig omdat art 311(2) so bepaal. Dit volg egter nie dat die sinsnede "al die skuldeisers" in die subartikel streng letterlik vertolk moet word nie. Eerstens is dit duidelik, meen ek, dat die sinsnede slegs betrekking kan hê op daardie skuldeisers aan wie die aanbod gerig was. En so 'n aanbod hoef natuurlik nie alle skuldeisers van 'n maatskappy te betrek nie. So byvoorbeeld kan dit slegs vir bepaalde konkurrente skuldeisers bestem wees. Tweedens kon die Wetgewer nooit beoog het dat 'n goedkeuringsbevel bindend is op skuldeisers wat nie regtens by magte is om die aanbod te aanvaar nie. Dit is die geval omdat, hoewel die statutêre meganismes meebring dat indien die vereiste meerderheid sou instem ander skuldeisers na goedkeuring ook gebonde is, die aanbod juis bestem was om aanvaar te word.' See *Kleena Industries (Pty) Ltd v Senator Insurance Co Ltd* 1982 (2) SA 458 (W) 463 and cf *Re Hellenic & General Trust Ltd* [1975] 3 All ER 382 ('No one can be both a vendor and a purchaser and, in my judgment for the purpose of the class meetings in the present case, MIT were in the camp of the purchaser') although this case is distinguishable.

question has been answered does the question whether one or several classes are involved arise. In *Re Hawk Insurance Co Ltd*[16] Chadwick JL said:

[13] The question whether to summon more than one meeting – and, if so, who should be summoned to attend which meeting – has to be made at the first stage. If the matter were free from authority, I would have regarded the basis upon which that decision has to be made as self-evident. The relevant question is: between whom is the proposed compromise or arrangement to be made? There are, as it seems to me, three possible answers to that question. Which answer is correct in any particular case will depend upon the circumstances peculiar to that case.

[14] First, there will be cases where it is plain that the compromise or arrangement proposed is between the company and all its creditors. In such a case, s 425(1) of the 1985 Act provides for the court to order a single meeting of all the creditors.

[15] Second, there will be cases where it is plain that the compromise or arrangement is proposed between the company and one distinct class of creditors; for example, unsecured trade creditors whose debts accrued before (or after) a given date. Or it may be plain that there are two (or more) separate compromises or arrangements with two (or more) distinct classes of creditors; for example, one compromise with unsecured trade creditors whose debts accrued before a given date and a separate compromise (on different terms)with unsecured trade creditors whose debts accrued after that date. In such a case, the section provides for the court to order a meeting of each class of creditors with whom the compromise or arrangement is to be made. that is the plain meaning of the words in the section: "Where a compromise or arrangement is proposed between a company and its

---

[16] [2001] EWCA Civ 241; [2001] BCLC 480 paras 13 ff. In para 22 the court asked how it was to be determined that separate meetings were to be held and stated in para 23: 'As I have indicated, I would have regarded it as self-evident, in the absence of authority, that the relevant question at the outset is: between whom is it proposed that a compromise or arrangement is to be made? Are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought the scheme to be regarded, on a true analysis, as a number of linked arrangements? The question may be easy to state; but, as the cases show, it is not always easy to answer. Nor can it be said that, hitherto, the courts have posed the question in quite those terms.'

creditors, or any class of them, .. the court may ..., order a meeting of the creditors or class of creditors, (as the case may be)" ...

[16] Cases which fall into one or other of the two categories which I have described above are likely to be recognised without difficulty. More difficult to recognise are cases in a third category. Those are cases where what appears at first sight to be a single compromise or arrangement between the company and all its creditors (or all creditors of a particular description; say, unsecured creditors) can be seen, on a true analysis, to be two or more linked compromises or arrangements with creditors whose rights put them in several and distinct classes. The compromises and arrangements are linked in the sense that each is conditional upon the other or others taking effect. In such a case, the section provides for the court to order – and the court should be asked to order – that there be summoned separate meetings of each of the distinct classes of creditors.'

[13] The offer in question, 'on a true analysis', was made to the minority shareholders, ie the 'scheme participants'. It was not made to the proposer, nor to the 'excluded members'. Only the 'scheme participants', as defined, were entitled to accept or reject it. Only they should have been allowed to vote on it.[17] It follows that I do not have the power to sanction the scheme of arrangement.[18]

---

[17] See the remarks in the opposing affidavit of Mr Richard John Connellan, the executive director of the Securities Regulation Panel, at D 46 paras 11 ff.

[18] *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241; [2001] 2 BCLC 480 at para 17: '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 s 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 (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). So, if what has been put forward at the first stage as a single compromise between the company and all its members, or all of a single class of members, is seen by the court, at the third stage, to be (on a true analysis) a number of linked compromises or arrangements with creditors whose rights put them in several and distinct classes,

The application that the proposed scheme of arrangement be sanctioned is dismissed with costs including the costs of two counsel.

Malan J

Judge of the High Court

Counsel for the applicant: DM Fine SC and J Blou

Attorneys for the applicant: Glyn Marais Inc

Counsel for first and second respondents: A Subel SC and AJ Eyles

Attorneys for first and second respondents: Cliffe Dekker Hofmeyr Inc

Counsel for third respondent: WGH van der Linde SC and T Massyn

Attorneys for third respondent: Edward Nathan Sonnenbergs Inc

Date of hearing: 7 August 2009

Date of judgment: 28 August 2009

---

the court will find that the condition that gives rise to its power to sanction absent; none of the linked compromises or arrangements will have been approved by the requisite majority at a relevant meeting because there will have been no meetings of the distinct classes.'