IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 22760/2019

In the matter between:

MARBLE HEAD INVESTMENTS (PTY) LTD	First Applicant
NPORT INVESTMENT HOLDINGS (PTY) LTD	Second Applicant
ESTELLE WASSERFALL	Third Applicant

And

NIVEUS INVESTMENTS LTD	First Respondent
HCI NIVEUS HOLDCO 1 (PTY) LTD	Second Respondent

And

FERBROS NOMINEES (PTY) LTD	First Intervening Applicant
STANDARD BANK NOMINEES (RF) (PTY) LTD	Second Intervening Applicant

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JUDGMENT DELIVERED 28 APRIL 2020

SIEVERS AJ

INTRODUCTION

[1] The present application is brought in two parts. This judgment concerns the relief sought in part A of the notice of motion in which the applicants seek leave in terms of section 115 (6), read with section 115 (3) (b), of the Companies Act 71 of 2008 ("the Act") to apply for the review of three resolutions passed at a meeting of the shareholders of the first respondent on 4 December 2019 ("the Resolutions"). In part B the applicants ask that the Resolutions be set aside.

[2] The respondents oppose the relief sought in part A on four grounds.

[3] Firstly, respondents contend that the applicants lack *locus standi* as they are not the shareholders who "voted against" the Resolutions, within the meaning of section 115 (3) (b) of the Act.

[4] Secondly, it is contended that the relief sought in prayers 1.2 and 1.3 of part A of the notice of motion (the ordinary resolution authorising the directors of the first respondent to implement the special resolution approving the scheme of arrangement and the ordinary resolution to delist the first respondent from the JSE) is incompetent as the setting aside of these two resolutions does not fall within the purview of section 115 (3) (b) of the Act.

[5] Thirdly, it was submitted that the applicants were not acting in good faith in relation to this application, within the meaning of section 115 (6) (a) of the Act.

[6] Fourthly, no facts were alleged in the founding affidavit, which if proved, would support the order sought in terms of section 115 (7) of the Act as required by section 115 (6) (c) of the Act.

LOCUS STANDI

[7] The first applicant holds a beneficial interest in 900 116 ordinary no par value shares in the first respondent. The shareholder registered in the first respondent's securities register in respect of these shares is a nominee company, Standard Bank Nominees (RF) (Pty) Ltd ("SB Nom").

[8] The second applicant holds a beneficial interest in 2 830 552 ordinary no par value shares in the first respondent. The shareholder registered in the securities register in respect of these shares is also a nominee company, Ferbros Nominees (Pty) Ltd ("FB Nom").

[9] The third applicant holds a beneficial interest in 30 000 ordinary no par value shares in the first respondent. The shareholder registered in the securities register in respect of these shares is FB Nom.

[10] SB Nom and FB Nom have brought applications to intervene.

[11] Section 112 (2) (a) of the Act provides that a company may not dispose of all or the greater part of its assets or undertaking unless the disposal has been approved by a special resolution of the shareholders, in accordance with section 115.

[12] Section 115 (1) of the Act provides that a company may not implement a scheme of arrangement unless it has been approved in terms of section 115.

[13] Section 115 (2) requires that the proposed transaction must be approved by a special resolution adopted by persons entitled to exercise voting rights on such a matter

at a meeting called for that purpose and by the court, to the extent required and in the circumstances and manner contemplated in subsections (3) to (6).

[14] Section 115 (3) (b) provides that despite a resolution having been adopted as contemplated in subsection (2), a company may not proceed to implement that resolution without the approval of a court, if the court, on an application within 10 business days after the vote by any person who voted against the resolution, grants that person leave in terms of subsection 6, to apply to a court for a review of the transaction in accordance with subsection (7).

[15] Section 1 of the Act defines –

15.1 "voting rights" as "the rights of any holder of the company's securities to vote in connection with that matter, in the case of a profit company."

15.2 "shareholder" is defined as "the holder of a share issued by a company who is entered as such in the certified or uncertified securities register."

[16] Section 115 (3) (b) provides for a person who voted against the resolution to be granted leave to apply to a court for a review of the transaction. In order to have voted against the resolution the person must have had voting rights. To do so the person must be the holder of the company's securities. To be such a shareholder the person must be registered in the securities register.

[17] It is common cause that the applicants are all beneficial owners of their shares in the first respondent. The registered shareholders are their nominees, SB Nom and FB Nom.

[18] When the resolutions were put to the first respondent's general meeting on 4 December 2019 it was the registered shareholders who exercised their voting rights, namely SB Nom and FB Nom.

[19] In **Standard Bank Nominees (RF) (Pty) Ltd and Others v Hospitality Property Fund Ltd** [2019] 4 All SA 561 (GJ) a dissenting shareholder, for the purposes of section 164 of the Act, applied to court for a determination of fair value in respect off its shares. The court held that it is the registered shareholder who may exercise its right of approval and not the beneficial holder of the shares.

[20] In this regard it is to be noted that section 115 (8) of the Act provides that the holder of any voting rights in a company is entitled to seek relief in terms of section 164 if that person (a) notified the company in advance of the intention to oppose a special resolution contemplated in s 115 and (b) was present at the meeting and voted against that special resolution.

[21] In **Smyth and Others v Investec Bank Ltd and Another** 2018 (1) SA 494 (SCA) the beneficial owner of shares brought an application under section 252 of the Companies Act 61 of 1973 which provided for members of a company to apply for relief. The court held that the purposive interpretation of section 252 favoured by the beneficial owners, that given that it was the beneficial owner who sustained the prejudice sought to be redressed by the section, such beneficial owner should be considered a member for purposes of that section, could not be accepted. Such an interpretation, it was held would do violence to the language of the provision by placing upon it a meaning of which it was not reasonably capable. In conclusion Petse JA noted that:

"[55] It was a simple matter for the appellants, if they wished to avail themselves of the remedy provided for in s 252 of the Act in their own names, to terminate the nomination of their respective nominees so as to procure the entry of their names in the register of Randgold members. Instead, they obdurately elected 'to saddle what has proven to be an unruly horse' by seeking to invoke the s 252 remedy in their own names as beneficial owners. They were ill-advised in doing so. As I see it, for as long as the nominees' names remained in the register of members, the beneficial owners lacked a legal interest in the subject-matter of the litigation. (Compare *Bowring NO v Vredendorp Properties CC and Another* 2007 (5) SA 391 (SCA) ([2007] ZASCA 80) paras 19-20.) This is all the more so when regard is had to the fact that in any event the nominees are in truth advancing the interests of the beneficial owners. In particular, they also act subject to the latter's instructions."

[22] The applicants are accordingly not persons who voted against the resolutions and accordingly do not qualify to bring an application in terms of section 115 (3) read with 115 (6).

THE INTERVENTION APPLICATIONS

[23] SB Nom and FB Nom have applied for leave to intervene as applicants in order that, in the event that the applicants are held to lack *locus standi*, they might in their name be granted the same relief as that sought by the applicants.

[24] On 19 December 2019 the beneficial interest holders ("the applicants") launched the main application in terms of section 115 of the Act for leave to apply to court for a

review of the three resolutions passed at a general meeting of first respondent's shareholders on 4 December 2019.

[25] On 14 February 2020 FB Nom in its capacity as nominee shareholder for second and third applicants launched an application in which it seeks leave to intervene as fourth applicant in the main application; to the extent necessary condoning its non-compliance with the ten day period provided for in section 115 (3) (b) of the Act and its delay in bringing the intervention application; and that in the event of the relief sought in the main application by the second and third applicants being declined on the grounds that they lack *locus standi*, that FB Nom be granted an order on the same terms as that sought by the applicants. It was lastly asked that any respondent who opposes the intervention application pay the costs thereof.

[26] In the affidavit filed in support of the intervention it is recorded that the intervening party, on the instructions of the beneficial shareholders, seek the same relief which they seek on the same basis upon which they rely.

[27] On 18 February 2020 SB Nom brought an identical application in respect of first applicant in which it seeks to be joined as the fifth applicant in the main application.

[28] The applicants filed confirmatory affidavits in support of the intervention applications.

[29] The respondents oppose the intervention applications. In their heads of argument, they submit that they should be dismissed on the following three grounds.

[30] The first ground of opposition to the intervention applications is that they were instituted out of time, that the court has no power to condone non-compliance with the

time period in section 115 (3) (b) of the Act, and that no proper case has been made out for condonation.

[31] The intervention applications were instituted well after the expiration of the ten business day period in section 115 (3) (b). The beneficial shareholders, who lacked standing, had timeously brought their application.

[32] The intervening applicants correctly submitted that the term *locus standi* is used in two senses. (See **Herbstein & Van Winson**, **The Civil Practice of the High Courts and the Supreme Court of Appeal**, 5th edition, Vol 1 at 143-144). The first is the capacity of a person to institute and defend legal proceedings, namely the capacity to litigate, whilst the second relates to a person's right to claim the relief sought.

[33] In the present matter the applicants have legal capacity to litigate but do not have the right in terms of section 115 (3) (b) to claim the relief sought. As a result, one is not dealing with a matter in which proceedings were a nullity from inception. The intervening parties are thus seeking to intervene in an application that was brought timeously but in which the applicants cannot succeed.

[34] In any event, I am of the view that a court does have the power to condone non-compliance with the ten-day time period. In **Toyota South Africa Motors (Pty) Ltd v Commissioner, SARS** 2002 (4) SA 281 (SCA) Howie JA stated as follows:

> "These conclusions based on interpretation are strengthened, of course, by the separate consideration that the High Court has inherent jurisdiction to govern its own procedures and, more particularly, the matter of access to it by litigants who seek no more than to exercise their rights. It has been held that this jurisdiction

pertains not only to condonation of non-compliance with the time limit set by a Rule but also a statutory time limit: *Phillips v Direkteur van Sensus* 1959 (3) SA 370 (A) at 374G-*in fine*."

[35] Thereafter in **Samancor Group Pension Fund v Samancor Chrome** 2010 (4) SA 540 (SCA) it was held that:

"[19] As stated earlier, the High Court granted Samancor condonation for the late launching of the application. Section 30P (1) of the Act stipulates that any party aggrieved by the determination of the adjudicator may apply to the High Court for relief, within six weeks after the date of the determination. The adjudicator's determination was made on 15 February 2005 and Samancor launched the application only on 12 May 2008. Samancor launched their application almost three and a half years after the date of the determination by the adjudicator.

[20] The High Court, because of its inherent jurisdiction, has powers to govern its own procedures. The said jurisdiction pertains not only to non-compliance with the Rules of Court, but also to statutory time limits-see *Toyota South Africa Motors (Pty) Ltd v Commissioner, South African Revenue Service.* In this matter the High Court was entitled to deal with Samancor's application for condonation. As will appear hereunder, the High Court should not have granted condonation because of prejudice to the Pension Fund and the fact that the appeal was perempted."

[36] This principal is given constitutional recognition by s 173 of the Constitution. An obiter observance to the contrary by Didcott J in **Mohlomi v Minister of Defence** 1997 (1) SA 124 (CC) at 133C-D, without referral to authority, was referred to by Snyckers

AJ in **Vlok NO v Sun International SA Ltd** 2014 (1) SA 487 (GSJ). Snyckers AJ held that:

> "[54] I believe that the role played by the authority apparently favouring the existence of the free-floating power, and by s 173, in the interpretive process, apart from adding the bias conceded by SISA, is this: when it comes to statutory provisions that relate to what someone must do to engage the jurisdiction of the court, all else being equal, the jurisdiction of the court will tend to include the jurisdiction to condone non-compliance with time periods for engaging it. The bias in favour of construing a statutory time limit as providing for, or allowing, a power to condone is most compelling when the provision in question deals with the subject's engaging the courts to enforce rights.
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> [101] Critical is *Mr Trengove's* submission that, if a condonation power were to be read into s 124 (2), relatively radical engineering would be required to be effected also to other parts of the section – especially ss (5). Reading a condonation power into ss (2) would in effect require relegislating the transaction mechanism set out in the section.
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> [110] I am therefore of the view that, despite the power of the principles relied upon by the plaintiffs, and despite the fact that the words of the subsection itself are concededly neutral and contain no express exclusion of a power to condone, the exclusion of a power to condone must be implied into the subsection by way of necessary construction."

[37] In the present matter a condonation power would not require any engineering to be effected to other parts of Section 115 and thus the exclusion of a power to condone need not be implied into the subsection by way of necessary construction. To do so would preclude a person from pursuing a remedy before a court. To imply such an inclusion would be to adopt an approach contrary to that prescribed in section 5 (1) of the Act, which requires the Act to be interpreted and applied in a manner which gives effect to the purposes set out in section 7.

[38] Accepting that the court has the power to do so the next issue is whether a basis has been established to grant condonation? An applicant for condonation must show good cause. This requires, firstly, an affidavit explaining the delay which furnishes a sufficiently full explanation of its default to enable the court to understand how it really came about and to assess its conduct and motives (see **Laerskool Generaal Hendrick Schoeman v Bastiaan Financial Services (Pty) Ltd** 2012 (2) SA 637 (CC) at 640 H-I). Secondly, the applicant must satisfy the court that its action is clearly not ill founded (see **Dalhouzie v Bruwer** 1970 (4) SA 566 (c) at 571 F, 572 C). Thirdly, the grant of the indulgence sought must not prejudice the other parties in a way that cannot be compensated for by a suitable order as to postponement and costs.

[39] In each intervention application a detailed and manifestly honest explanation is given as to why the nominee shareholders were not initially cited as the applicants. Neither application is ill founded and the respondents are not prejudiced. The intervention applications have been enrolled with the main application to ensure that there will be no delay in the finalisation of the matter.

[40] The second ground upon which the respondents oppose the intervention application is that the founding affidavits in the intervention applications fail to aver that the registered shareholders have their own direct and substantial interests in the main application and fail to make out a *prima facie* case. It is submitted by the respondents that the intervening parties merely piggyback on the alleged interest of parties who lack *locus standi* and on the averments made by those parties in the main application.

[41] An applicant who seeks leave to intervene in terms of Uniform rule 12 must demonstrate a direct and substantial interest in the subject matter of the application. In **Sarda v Land Claims Commissioner** 2017 (1) SA 1 (CC) Jafta J stated as follows:

> "[9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.
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> [10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. In *Greyvenouw CC* this principle was formulated in these terms:

> 'In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.'"

[42] The notices of motion in the intervention application contain a prayer that in the event that the court decides to grant the relief sought in the main application to the first three applicants in the main application, on the grounds that they lack *locus standi,* that the intervening parties be granted an order in the same terms as that sought by the said applicants in part A of the main application.

[43] It is the respondent's case that the beneficial shareholders lack the necessary *locus standi* to bring an application in terms of section 115 (3) and that it is the registered shareholders who must do so. The intervening parties are thus seeking to do so in their capacity as nominees for the beneficial shareholders, and on their instructions. They would not have been non suited had they brought the main application in their own names from the outset. They are advancing the interests of the beneficial owners as envisaged by Petse JA in **Smyth and Others** *supra*. They thus clearly have a direct legal interest. To require them to set out the detail of the merits of the main application in their intervention application would serve no useful purpose and result in unnecessary duplication.

[44] The third ground upon which the respondents oppose the intervention applications is that it has not been established that the applicants' attorneys of record have the authority to represent the intervening parties or that the deponents to the founding affidavits in the intervention applications have authority to represent the intervening parties in these proceedings.

[45] In **Eskom v Soweto City Council** 1992 (2) SA 703 (WLD) Flemming DJP held at 705 C as follows:

> "I find the regularity of arguments about the authority of a deponent unnecessary and wasteful."

[46] He continued at 705 E to I that:

> "The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. (Compare *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 752D-F and the authorities there quoted.)
>
> The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be

authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney's authority should be proved, the Rule-make made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants, especially certain financial institutions.

(See further **Ganes & Another v Telekom Namibia Ltd** 2004 (3) SA 615 (SCA) para 19)

[47] In the present matter respondents delivered Rule 7 (1) notices in respect of the intervention applications dated 24 February 2020. Resolutions passed by the intervening parties were thereafter filed ratifying all actions taken by their representatives and attorneys were then filed together with a power of attorney. There is thus no merit in this ground of opposition.

[48] As a result FB Nom and SB Nom have satisfied the requirements for leave to intervene and to join the main application as fourth and fifth applicants.

THE BASIS FOR THE RELIEF SOUGHT IN THE MAIN APPLICATION.

[49] Section 115 (6) and (7) of the Act provide that:

"(6) On an application contemplated in subsection (3) (b), the court may grant leave only if it is satisfied that the applicant-

(a) is acting in good faith;

(b) appears prepared and able to sustain the proceedings; and

(c) has alleged facts which, if proved, would support an order in terms of subsection (7).

(7) On reviewing a resolution that is the subject of an application in terms of subsection (5) (a), or after granting leave in terms of subsection (6), the court may set aside the resolution only if-

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

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

[50] In the main application the applicants seek leave in terms of sections 115 (3) (b) and 115 (6) of the Act for leave to apply to court for a review of three resolutions of first respondent passed at a general meeting of shareholders on 4 December 2020.

[51] At the meeting the following resolutions were passed:

(1) a special resolution approving a scheme of arrangement in terms of section 114 (1) of the Act proposed by the board of directors to its shareholders;

(2) an ordinary resolution authorising the directors of first respondent to implement the company's resolutions; and

(3) an ordinary resolution to delist the first respondent's shares from the main board of the securities exchange operated by the Johannesburg Securities Exchange.

[52] The passing of the resolutions constituted the shareholders' acceptance of an offer by the second respondent to acquire for R2.40 per share all the issued shares save for those held by two excluded shareholders, Hosken Consolidated Investments Ltd and Johnnic Holdings Management Services (Pty) Ltd.

[53] The respondents contend that the relief claimed in the notice of motion is overbroad and incompetent as section 115 (3) (b) authorises the review *inter alia* of special resolutions approving schemes of arrangement and other fundamental transactions. It does not authorise a review of the implementation and the delisting resolutions.

[54] The applicants contend that on a proper construction of section 115 (7) any resolution may be set aside if an applicant has demonstrated what is contained in s 115 (7) (b). This not correct. Part A of Chapter 5 of the Act (which includes s 115) provides for the approval for certain fundamental transactions. This is reflected in section 115 (1) of the Act. It is accordingly only the relief sought in respect of the special resolution approving the scheme of arrangement that is competent.

[55] There remain the three requirements set out in section 115 (6) of the Act, namely that the court is satisfied that the applicant-

(a) is acting in good faith;

(b) appears prepared and able to sustain the proceedings; and

(c) has alleged facts which, if proved, would support an order in terms of subsection (7).

GOOD FAITH

[56] The respondents contend that the applicants have failed to discharge the onus with regard to the requirement that the court be satisfied that they are acting in good faith by virtue of the following submissions.

(1) The central complaint in the applicants' founding affidavit is that the offered price for shares was too low. But the appropriate remedy for this complaint would be to assert a dissenting shareholder's appraisal rights under section 164 of the Act, not to seek to apply for leave to review a fundamental transaction in terms of section 115(3)(*b*).

(2) The first and second applicants have not successfully triggered section 164 by virtue of the same deficiency that has beset their attempt to seek leave to review the transaction under section 115, namely an incompetent initiation by the beneficial interest holders rather than the registered shareholders. Their failure to trigger section 164 does not mean that they may *bona fide* pursue relief under section 115. Nor can the first and second applicants legitimately claim that they have *"no option but to seek the relief now sought in the application"*. That assertion is in any event belied by the

fact that, in the same breath, the first and second applicants persist in an attempt to trigger section 164 in parallel to the main application.

(3) A shareholder who has sent a demand in terms of sections 164(5) to (8) "*has no further rights in respect of those shares*". Since the first and second applicants adopt the position that they sent a lawful demand in terms of sections 164(5) to (8), they have no further rights in respect of the shares. They have nevertheless sought to exercise their rights in the shares by bringing this application in terms of section 115(3)(*b*).

(4) The first and second applicants are thus playing fast and loose with two discrete remedies under the Act, as well as motivating these actions with inconsistent and implausible averments. That is not consonant with good faith. Their conduct is, consistent with, and best explained by, a concerted effort on the part of the applicants to scupper the corporate reforms properly and lawfully proposed by the circular and adopted at the general meeting. The applicants have failed to explain how their conduct could be construed otherwise, or thus rebut the inferences raised. They have accordingly not established their good faith, as section 115(6) requires.

[57] By virtue of this court's finding above that the first three applicants backed *locus standi* to apply in terms of section 115 (3) the competent relief (in respect of the special resolution) is now sought at the instance of SB Nom and FB Nom who have been given leave to intervene as fourth and fifth applicants. As they never sent a demand in terms of sections 164 (5) to (8) of the Act they cannot be hit by the bar in section 164 (9) of the

Act. They are not acting in bad faith, nor is there evidence of bad faith on behalf of the first two applicants which can be imputed to them. The requirement section 115 (6) (a) is accordingly met.

[58] With regard to the requirements of section 115 (6) (b), the first and second applicants are companies of means who are prepared and able to sustain the proceedings. The same applies to the third applicant. Their nominees are thus clearly in a position to do so.

[59] Have there been facts alleged which, if proved, would support an order in terms of section 115 (7)? The facts alleged to support an order under section 115 (7) must demonstrate that (i) the resolution is manifestly unfair to any class of holders of the company's securities; or (ii) the vote was materially tainted by conflict of interest, inadequate disclosure, failure to comply with the Act, the Memorandum of Incorporation or any applicable rules of the company, or other significant and material procedural irregularity.

[60] The word "or" in section 115 (7) means that an applicant need only demonstrate one of either (i) or (ii) above.

[61] It is common cause that Section 115 (7) (a) is not applicable in the present matter as there is only one class of shareholder.

[62] The stated grounds for the review proposed are the low scheme consideration and the discounted net asset value (NAV) of the first respondent.

[63] The applicants allege the following:

(1) The applicants dispute the fairness of the low scheme consideration, offered at a deep discount to NAV to shareholders under the scheme.

(2) They wish to be paid fair value for their shares and contend that the current offer does not remotely represent fair value.

(3) This is because, they contend, the NAV of La Concorde Holdings must be taken into account when calculating the value of the shares, in light of first respondent's majority stake in La Concorde Holdings.

(4) This NAV can be determined with reference to the La Concorde interim financial statements, which reflect an NAV of R224 000 000. Artworks to the (conservative) value of R41 000 000 must be added back, and the value of the Paarl Valley Bottling plant must be adjusted, by adding back another R9 000 000. These additions/adjustments substantially increase the NAV - without even taking into account the additional fact that fixed properties reflected in the interim financial statements are probably worth far more.

(5) Also significant is that the Hosken Consolidated Investments Ltd ("HCI") offer to minority shareholders of La Concorde Holdings dated 20 November 2019 was for R3.25 a share.

(6) Moreover, the scheme circular reflects the value per share as R3.28, which includes cash of R2.14, at least. This is calculated as follows: mid-year

results reflect cash of approximately R215 000 000, to which must be added the R40 000 000 proceeds from a transaction concerning Alphawave, bringing cash or cash equivalents to R255 000 000, which equates to R2.14 per share.

(7) This, it is submitted, clearly demonstrates how manifestly untenable was the offer of R2.40 per share; it implies that a mere R0.26 per share is the value of the remaining assets. This is clearly inconsistent with HCI's own offer made to the La Concorde Holdings minorities.

(8) First respondent has also sought to value its interest in Betcoza at R25 000 000, even though it has received independent third party offers for Betcoza in the region of R50 000 000.

(9) If first respondent was adopting a fair market value approach to the presentation of its interim balance sheet in September 2019 in order to justify the write down of Paarl Valley Bottling, then it is inconsistent that the value of Betcoza would not have been increased to the value of the independent third party offers.

(10) There is also an unaudited deferred tax error in respect of which no information is provided.

(11) Thus, the R3.28 per share referred to in the circular should clearly be increased in light of what is stated above regarding the higher NAV of La Concorde Holdings coupled with the higher value of Betcoza.

(12) The only inference that can plausibly be drawn is that the first respondent is aware that the scheme consideration is well below true market value, and so is actively blocking any interrogation of the issue; if it were confident that the scheme price was fair to shareholders, it would not have hesitated to make an offer to the dissenting shareholders for their shares in terms of s164(11) as part of the appraisal process, accompanied by a statement showing how the value is determined. It elected not to do so.

(13) The first respondent was called on to disclose the valuation methodology and calculations used to arrive at the scheme consideration, with a view to refuting the inference that the first respondent has concerns as to the scheme consideration but has not done so.

(14) In the premises, this artificially low scheme consideration alone warrants the grant of the relief sought.

[64] These allegations, if proved, would support an order in terms of section 115 (7) as the vote was clearly tainted by inadequate disclosure. The requirements of section 115 (6) (c) of the act are accordingly satisfied.

[65] It is accordingly ordered that:

(a) Ferbros Nominees (Pty) Ltd is granted leave to intervene as the fourth applicant;

(b) Standard Bank Nominees (RF) (Pty) Ltd is granted leave to intervene as the fifth applicant;

(c) the fourth and fifth applicants are granted leave in terms of section 115 (6) read with section 115 (3) (b) of the Companies Act, 71 of 2008 to apply to court for a review of the special resolution of the shareholders of the first respondent on 4 December 2019 approving the scheme of arrangement in terms of section 114 (1) read with section 115 of the Companies Act;

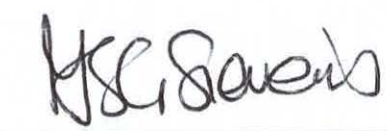
(d) the fourth and fifth applicants are permitted to apply on the same papers, duly supplemented within 15 days of this order for the relief sought in part B.

(e) in respect of the costs of part A of this application:

(i) the first, second and third applicants, jointly and severally, shall pay the respondents' costs incurred in opposing their applications;

(ii) the respondents jointly and severally, shall pay the fourth and fifth applicants' costs, including the costs of the intervention applications;

(iii) each award of costs shall include the costs of two counsel, where briefed.



SIEVERS AJ

JUDGE OF THE HIGH COURT