



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

Case No: **23029/2016**

In the matter between:

**ABRAHAM ALBERTUS CILLIERS**

Applicant

and

**LA CONCORDE HOLDINGS LIMITED**

First Respondent

**KWV SOUTH AFRICA (PTY) LIMITED**

Second Respondent

**KWV INTELLECTUAL PROPERTY (PTY) LIMITED**

Third Respondent

and

**ABRAHAM ALBERTUS CILLIERS SNR**

Fourth Respondent

**BNS NOMINEES (PTY) LIMITED,**

**ON BEHALF OF JANNINE CILLIERS**

Fifth Respondent

**BNS NOMINEES (PTY) LIMITED,**

**ON BEHALF OF ABRAHAM ALBERTUS CILLIERS**

Sixth Respondent

**CATHARINA HELENA MARGARETHA JOHANNA**

**RETIEF**

Seventh Respondent

**FEBROS NOMINEES (PTY) LIMITED,**

**ON BEHALF OF OE VEGLIO DI CASTELLTO**

Eighth Respondent

**BRENN-O-KEM (PTY) LIMITED**

Ninth Respondent

## **JUDGMENT HANDED DOWN ON 14 JUNE 2018**

### **PAPIER, J**

#### **Introduction**

[1] This application, by agreement between the parties, is for the determination of a question of law in terms of Rule 6(5)(d)(iii) of the Rules of Court<sup>1</sup>.

[2] The court is required to determine whether or not shareholder appraisal rights were established in favour of a dissenting minority shareholders of a holding company, in terms of Section 164<sup>2</sup> of the Company's Act 71 of 2008

<sup>1</sup> Rule 6(5)(d) Any person opposing the grant of an order sought in the notice of motion must –

(iii) if he/she intends to raise any question of law only he or she must deliver notice of his or her intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question.

<sup>2</sup> Section 164: **Dissenting shareholders appraisal rights**

(2) If a company has given notice to shareholders of a meeting to consider adopting a resolution to–

- (a) ...
- (b) enter into a transaction contemplated in Section 112, 113, or 114, that notice must include a statement informing shareholders of their rights under this Section.

(5) A shareholder may demand that the company pay the shareholder the fair value for all of the shares of the company held by that person if–

- (a) the shareholder
  - (i) sent the company a notice of objection, subject to Section (6); and

(“the Act”), where the holding company’s subsidiary disposes of all or the greater part of its assets or undertaking, in circumstances where, having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary constituted a disposal of all or the greater part of the assets or undertaking of the holding company, in terms of Section 115(2)(b)<sup>3</sup> of the Act.

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- (ii) and in the case of an amendment to the company’s Memorandum of Incorporation, holds shares of a class that is materially and adversely affected by the amendment;
  - (b) the company has adopted the resolution contemplated subsection (2); and
  - (c) the shareholder–
    - (i) voted against that resolution; and
    - (ii) has complied with all of the procedural requirements of this section.

<sup>3</sup> Section 115 – **Required approval for transactions contemplated in Part**

(1) ... .

(2) A proposed transaction contemplated in subsection (1) must be approved –

- (a) by a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised on the matter, or any higher percentage as may be required by the company’s Memorandum of Incorporation, as contemplated in Section 64(2); and
- (b) by a special resolution, also adopted in the manner required by paragraph (a), by the shareholders of the company’s, holding company if any, if –
  - (i) the holding company is a company or an external company;
  - (ii) the proposed transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary, and
  - (iii) having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary constitutes a disposal of all or the greater part of the assets or undertaking of the holding company;
- (c) ...

- [3] Where a company resolves, in terms of Section 112<sup>4</sup> of the Act, to dispose of all or a greater part of its assets or undertaking, subject to compliance with various statutory requirements, an objecting shareholder may demand that the company pay the objecting shareholder fair value for its shares.
- [4] Section 164 could be said to, subject to compliance with certain requirements, create a right for a shareholder to exit the company, at fair value. The question is whether this appraisal right extends to the dissenting minority shareholders in the holding company, in circumstances contemplated in Section 115(2)(b) of the Act?

#### Brief factual background

- [5] Mr Abraham Albertus Cilliers (“the applicant”) is a minority shareholder in the first respondent, La Concorde Holdings Ltd (“the holding company”).
- [6] The holding company owned 100% of the shares in the capital of its wholly owned subsidiary, KWV SA (Pty) Ltd (“the subsidiary”), together with a significant interest in KWV Intellectual (Pty) Ltd (“the third respondent”).

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<sup>4</sup> Section 112 – **Proposal to dispose of all or the greater part of assets or undertaking**

- (1) A company may not dispose of all or the greater part of its assets or undertaking unless–
- (a) the disposal has been approved by a special resolution of the shareholders, in accordance with Section 115; and
  - (b) the company has satisfied all other requirements set out in Section 115, to the extent those requirements are applicable to such a disposal by that company.

- [7] On 11 May 2016, it was announced by SENS that the subsidiary would dispose of all its operational assets to a third party.
- [8] On 29 June 2016 the holding company gave notice to its shareholders of a general meeting, held on 29 July 2016, at which resolutions were put to the holding company's shareholders, on the basis that the disposal by the subsidiary constituted a disposal of all or the greater part of the assets or undertaking of both the subsidiary and holding company, regard being had to the latter's consolidated financial statements, as required by Section 115(2)(b) of the Act.
- [9] At the meeting the applicant, together with the fourth to ninth respondents, in their capacity as shareholders in the holding company, objected to and voted against the resolutions.
- [10] It is noteworthy that the holding company initially represented to its shareholders, in the Circular issued and at the general meeting, that Section 164 appraisal rights were available to them. The holding company changed their minds pursuant thereto. It is not surprising that the holding company initially understood and applied the relevant provisions in the way they did.

- [11] It is in this context, that the question for determination before this court, is whether Section 164 of the Act affords appraisal rights to the dissenting shareholders of the holding company whose subsidiary has implemented a transaction disposing of all or the greater part of its assets or undertaking in circumstances envisaged in Section 115(2)(b) of the Act.
- [12] I am required to interpret the meaning of the relevant parts of Section 164 of the Act, together with Section 115(8) of the Act.
- [13] For purposes of this judgment, it was not in issue between the parties, that all formalities and requirements in terms of Section 164 of the Act were complied with.
- [14] The holding company made an offer to acquire the shares held by the dissenting shareholders, including the applicant, and relied on a valuation of their shares, obtained from KPMG.
- [15] This offer was rejected by the applicant on the basis of it being inadequate, and he then instituted this application, in terms of Section 164 of the Act, for two appraisals to be appointed to enable the court to determine fair value in respect of the shares.

- [16] The parties agreed that this question be determined *in initio litis*, without compromising the right of the subsidiary to deal with the merits of the application, should the question be decided against them.

### The Law

- [17] Mr E.W. Fagan S.C., assisted by Mr P.J. Olivier, for the first, second and third respondents contended that the appraisal rights established in terms of Section 164 of the Act, are only granted to shareholders in the disposing company, the subsidiary in this matter. He asserts that the applicant is therefore incapable of holding an appraisal right in these circumstances.
- [18] Mr R.D.E. Gordon, assisted by Ms B.J. Vaughan, for the applicant, contended that Section 115(8)<sup>5</sup> of the Act afforded the dissenting shareholders, appraisal rights in terms of Section 164 of the Act, in these circumstances.
- [19] In the oft quoted decision of Wallis JA in **Natal Joint Municipal Pension Fund v N Endumeni Municipality NP 2012 (4) SA 593 (SCA)**, with regard to the interpretation of statutes, he states at 603 to 604 D;

*“The present state of the law can be expressed as follows:*

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<sup>5</sup> Section (115)(8) 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 the special resolution contemplated in this section; and
- (b) was present at the meeting and voted against that special resolution.

*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attended upon it coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or un-business-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."* (Footnotes omitted)

- [20] Mr Gordon contended that the point of departure was Section 115(8) of the Act. This section authorises the holder of any voting rights in a company to seek relief in terms of Section 164 of the Act. (My underlining).
- [21] Mr Fagan asserted that a distinction should be drawn between the words “the company” and “a company” (my underlining) used in the Section, and that the two references in the Section should be interpreted to mean “the disposing company”, not “the holding company”.
- [22] In my view, as a starting point, the only sensible meaning to be ascribed to the phrase, “the holder of any voting rights in a company”, taking into account its context, purpose, and background of the Act, is exactly what it says, in plain language, and must be what the legislature intended it to mean. If the legislature intended the meaning of “the holder of any voting rights in a company” to be limited to “the holder of voting rights in the disposing company”, it would have simply said so<sup>6</sup>. There is in my view, no ambiguity in the Section, nor is there any uncertainty about it that requires an interpretation, other than the plain meaning. It is more the correct application than the interpretation of the law.

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<sup>6</sup> Also, see *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others* [2017] 3 ALL SA 485 (SCA) at para 37: “The purpose underpinning the requirements of Sections 112 and 115 is to ensure that the interests and views of all shareholders are taken into account before the company disposes of the whole or the greater part of its assets or the undertaking itself.” (Own emphasis)

[23] The wording in my view, is clear and unambiguous. A holder of any voting rights in a company is entitled to seek relief in accordance with the provisions of Section 164 of the Act.

[24] Mr Fagan contended that “*shareholder*” as referred to in Section 164(5) of the Act clearly refers to the holder of the shares in “the Company”, as the subsection refers to “*shares of the company held by that person*” (“the Shareholder”). This he submitted the legislature reinforced by the repeated linking of “the Company” and “the Shareholder” in the other subsections of Section 164.

[25] In essence the first, second and third respondents contended that a dissenting shareholder of the disposing company has an appraisal right if the company in which it holds shares, adopted a resolution contemplated in Section 112 of the Act<sup>7</sup>, as resolved by the subsidiary in this matter.

[26] In this regard it is important to note that Section 112 of the Act is in fact subject to the provisions of Section 115 of the Act<sup>8</sup>.

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<sup>7</sup> According to Section 112(2):

“(2) A company may not dispose of all or the greater part of its assets or undertaking unless–

- (a) the disposal has been approved with a special resolution of the shareholders, in accordance with Section 115; and
- (b) the company has satisfied all other requirements set out in Section 115, to the extent those requirements are applicable to such a disposal by that company.”

<sup>8</sup> See Section 112(2).

[27] The transaction contemplated by the subsidiary is a transaction in terms of Section 112 of the Act. It is clear that Section 112 does not create an appraisal right; it contemplates the adoption of a special resolution by the shareholders, approving the disposal of all or the greater part of the assets or undertaking of a company, in terms of Section 115 of the Act.

[28] Section 115<sup>9</sup> sets out the manner in which shareholder approval must be obtained, but more so, creates a requirement and establishes an obligation for the shareholders in the disposing company's holding company if, having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary constitutes a disposal of all or the greater part of the assets or undertaking of the holding company<sup>10</sup>.

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<sup>9</sup> Section 115 - **Required approval for transactions contemplated in part**

- (1) ...
- (2) A proposed transaction contemplated in subsection (1) must be approved –
  - (a) ...
  - (b) by a special resolution, also adopted in the manner required by paragraph (a), by the shareholders of the company's holding company if any, if –
    - (i) the holding company is a company or an external company;
    - (ii) the proposed transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary; and
    - (iii) having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary constitutes a disposal of all or the greater part of the assets or undertaking of the holding company; and
  - (c) by the court, to the extent required in the circumstances and manner contemplated in subsections (3) to (6).

<sup>10</sup> Id Section 115(2)(b).

[29] The relevant provisions of the Act regulating the disposal of all or the greater part of the assets or undertaking are Sections 112, 113, 114, 115 and 164 of the Act. These Sections are interrelated, in the sense that they refer to each other in cascading sequence.

[30] Mr Fagan, relied on the Endumeni judgment, and asserted that when interpreting the relevant parts of the statutes, the court should have regard to the language used and its context, which are to be considered together, with neither predominating over the other.<sup>11</sup> He asserted that context includes textual context, together with the provision's purpose; that a sensible meaning is to be preferred to one that leads to insensible results.<sup>12</sup> Mr Fagan contended that the reference made to the shareholders in Section 112 of the Act, read in conjunction with the reference to "*a company*" referred to in Section 164(5)(b) creating the appraisal right, should be interpreted to mean, and in fact restricts the shareholders to, the shareholders of the disposing entity, which in this case would be the subsidiary, and should not be interpreted to extend to the shareholders in the holding company, in the context of present scenario before the court. In other words, he asserted that "*the company*" is the disposing company and the appraisal right is only available if the disposing company has adopted the relevant special resolution, which is only available to a shareholder of the disposing company.

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<sup>11</sup> Id para 19.

<sup>12</sup> Id para 19.

[31] In my view, this assertion is not in accordance with the clear wording of the relevant Sections. In this instance, the disposing company, as a subsidiary, may not proceed with the transaction unless a special resolution of the holding company approves it. If the shareholders of the holding company had no right to vote on the matter, then Sections 112 and 115 would be rendered meaningless. If the shareholders of the holding company do have the right to vote on the matter, then the procedure stipulated in Sections 115(2)(a) AND (b) must be followed. The moment the shareholders are given notice of a meeting to be held to consider adopting a resolution to enter into a transaction in terms of Section 112, the rights in terms of Section 164 are triggered by Section 164(2).

[32] With regard to the interpretation of the meaning of “assets” in the context of Section 112(2), Mr Fagan contended that the word “assets” should be given its ordinary meaning, and therefore refers to the disposal by a company of its assets. In the context of this matter, KWV SA disposed of its assets, and La Concorde did not. It follows, according to his argument, that the applicant, being a shareholder in La Concorde, does not hold a Section 164 appraisal right in these circumstances.

[33] Again, Section 112(2)(a) explicitly makes the transaction subject to Section 115, which means Section 115(2)(a) and (b) must be complied with. The applicant need not hold shares in the subsidiary, his shares in La Concorde secures such rights.

[34] The author Jacqueline Yeats, in her article – *Putting Appraisal Rights into Perspective*<sup>13</sup> - quoting from the DTI explanatory memorandum (on the objects of the Company's Bill, 2008), notes the legislature's commitment to minority shareholder protection, with one of the goals in the creation of a company law regime that would "*provide a protective and fertile environment for economic activity*", being a remedy "*to avoid locking in minority shareholders in inefficient companies*".<sup>14</sup> The introduction of appraisal rights effectively changed the nature of the rights and remedies which were previously available to minority shareholders that were lawfully outvoted. It effectively provides a statutory exit mechanism for minority shareholders. "*Not only does the shareholder have this exit right, but instead of having to find a willing purchaser, the company itself becomes the (possibly unwilling but obligatory) purchaser. Furthermore, the shareholder does not have to be satisfied with whatever price he would have been prepared to accept to facilitate his exit under the previous company law regime, but instead can*

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<sup>13</sup> Putting Appraisal Rights Into Perspective Stell LR 2014(2) page 328 at page 331.

<sup>14</sup> Page 331. See also page. 335 para 4 -

*insist on a “fair price” (payable in cash) which may ultimately be determined by the court”.*<sup>15</sup>

[35] Nigel Boardman, in his article, A critical analysis of the new South African takeover laws as proposed under the Company’s Act 71 of 2008<sup>16</sup>, states that:

*“the protection of the disenfranchised and minorities is of particular importance in South Africa, and it is for this reason that the new Act (and the 1973 Act before it) contains explicit prescriptive legislation to ensure that even non-public, non-listed company must subject disposals of “all or the greater part” of their assets to approval by a special resolution of shareholders.”*

[36] He observes that South Africa, while adopting the US model for business acquisitions, went further by adapting and extending the provision to provide even greater shareholder protection.<sup>17</sup>

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<sup>15</sup> Id. Page 335.footnote 52.

<sup>16</sup> Modern Company Law for a competitive South African economy, notes on page 306 at 312.

<sup>17</sup> Id page 313 para 5.

- [37] F Kassiem MF, Kassiem R et al, *Contemporary Company Law* in their chapter on *Fundamental Transactions, Takeovers and Offers*, at page 716, describes the appraisal rights of dissenting shareholders, as innovative safeguards for dissenting shareholders.<sup>18</sup>
- [38] It is clear that in the transaction envisaged herein, both sets of shareholders, in the disposing entity and the holding company were eligible for appraisal rights.<sup>19</sup>
- [39] According to Kassiem, this provision is a protective measure for shareholders of the holding company. – “*it gives them both voting rights and appraisal rights in respect of relevant Section 112 disposals by its subsidiary company*”.<sup>20</sup>
- [40] The *General Notice No: 26493 notice 1183 of 2004 – South African Company Law for the 21st Century: Guidelines for Corporate Law Reform; May 2004* - constitutes the policy document underpinning the Company’s Act. For the sake of clarity, a policy document does not constitute binding law, but records the contextual background and manifests the mind of the Legislature, to which regard must be had when interpreting legislation with the object of determining the intention of the Legislature, in the quest to give meaning and content to the legislation. The policy notes that: “*socio-political and economic*

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<sup>18</sup> Second edition – Juta page 715.

<sup>19</sup> Id Kassiem at page 723 – note the use of the word “and” at the end of paras (a) and (b) of Section 115(2).

<sup>20</sup> Id page 723

*change in South Africa has underscored the need for social responsiveness, transparency and accountability of enterprises”.*<sup>21</sup>

[41] The Act must also be consistent with the Constitution of South Africa, and the principals of equality and fairness that it enshrines, together with all other laws, including that of access to information.<sup>22</sup>

[42] In line with policy considerations, one of the key functions of the Act is to provide protection for investors in companies. *“They invest their capital in enterprises with the intention of obtaining a return on that capital. Thus, a primary goal of company law should be to ensure that shareholders, as the investors of equity, are granted explicit rights and that they have effective recourse when those rights are violated”.*<sup>23</sup>

[43] It is an express policy objective to give meaning, form and content to exit, and appraisal rights, and to provide smaller investors with the ability to make informed choices, where they are unable to influence company direction and decisions effectively or to pursue private actions against the company in civil courts.<sup>24</sup>

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<sup>21</sup> Id at page 13 para 2.2.1.

<sup>22</sup> Id page 14 para 2.2.2.

<sup>23</sup> Id at page 35 para 4.4.1

<sup>24</sup> Id at page 37 para 4.4.1

[44] It is important to note that the provisions do not dilute or negate the power of majority shareholders; but seeks to provide minority shareholders with equitable protection and fairness. In my view, a dissenting minority shareholder in the holding company is entitled to enjoy shareholder protection in the form of appraisal rights in terms of section 164 of the Act, in circumstances where section 115(2)(b) of the Act is applicable.

[45] In the 2007 Company's Bill, published by the Department of Trade and Industry, the intention of the Legislature is recorded in the following terms:

**3. *Corporate efficiency***

...

*(c) There should be a remedy to avoid locking in minorities shareholders in inefficient companies.*

...

**4. *Transparency***

...

*(c) The law should protect shareholder rights, advance shareholder activism, and provide enhanced protections for minority shareholders.*

...

## Conclusion

- [46] In the context of the clear policy objectives referenced above, and taking into account the purpose of appraisal rights, as a mechanism to protect all shareholders with voting rights, it is clear that minority shareholders too have a right to be treated fairly.
- [47] When shareholders choose to exit in the context of Sections 112; 115 and 164, they too must have the right and entitlement to be paid fair value for their shares. To treat the dissenting shareholder in the holding company any differently in the circumstances of this case, would undermine the clear purpose of minority shareholder protection embodied in the policy and Act.
- [48] A sensible and meaningful interpretation to be given to Section 164, read in conjunction with Section 112; and 115 of the Act, is that the applicant has an appraisal right as a shareholder in the holding company, when its subsidiary disposes of all or the greater part of its assets or undertaking, in circumstances where Section 115(2)(b) of the Act is applicable. The disposal of the assets of the subsidiary in this context, will have a material effect on the investment of the shareholders in the holding company.

[49] I am furthermore of the view that Section 115(8) of the Act extends the category of shareholders to all other shareholders (with voting rights), who are not necessarily envisaged in Section 164, affording to *“the holder of any voting rights in a company”* the right to seek relief in terms of Section 164 of the Act. All shareholders with voting rights are therefore granted appraisal rights in terms of Section 164 of the Act, on compliance with the relevant provisions of the Act.

[50] In the circumstances, I am satisfied that the following order be granted:

**Order**

- (a). This order is granted in favour of the applicant.
- (b). The applicant as a minority shareholder in the holding company is capable of holding a shareholder appraisal right.
- (c). Section 115(8) of the Companies Act No. 71 of 2008 (“the Act”) is interpreted to mean that Section 164 of the Act applies to dissenting shareholders of the holding company, who advised the company that they object to the resolution and have voted against it at a meeting called for that purpose, in compliance with the provisions of the Act.

- (d). This interpretation accords with the wording of Sections 115(8) and 164 of the Act, together with the context and the purpose of the Act.
- (e). The first, second and third respondents are ordered to pay the cost of this application, including the costs of two counsel, where used.

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**PAPIER, J**