

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED.
.....L. Windell.....	5/02/2021.....
SIGNATURE	DATE

CASE NUMBER: **19/41679**

In the matter between:

FIRST NATIONAL NOMINEES (PTY) LIMITED

First Applicant

NEDBANK LIMITED

Second Applicant

ROZENDAL PARTNERS (PTY) LIMITED

Third Applicant

and

CAPITAL APPRECIATION LIMITED

First Respondent

AFFECTED DISSENTING SHAREHOLDERS

Second Respondent

JUDGMENT

INTRODUCTION

[1] This is an application wherein the first applicant, a private company by the name of First National Nominees (Pty) Ltd (“Nominees”), seeks to exercise appraisal rights afforded to dissenting shareholders in terms of section 164 of the Companies Act, 71 of 2008 (“the Act”).¹ It asks for a determination by the court of the fair value of the shares it holds in the first respondent, Capital Appreciation Limited (“Capprec”), a public company listed on the Main Board of the Johannesburg Stock Exchange.

[2] It is common cause that, on or about 29 July 2019, Capprec issued a circular to its shareholders (“the Circular”). The shareholders were advised that Capprec would be repurchasing 245 000 000 of its shares held by specific shareholders, (defined as “Relevant Persons” in the Circular) for the amount of R196 000 000. The Circular further advised the shareholders that the proposed buy-back was subject to the provisions of sections 48, 114 and 164 of the Act in that it would “....*result in Capprec acquiring in excess of 5% of (its own) issued share capital...*” The mention of Capprec acquiring in excess of 5% of its own issued share capital, is a direct reference to section 48(8)(b) of the Act that provides that a decision by the board of a company to acquire a number of its own shares “*is subject to the requirements of sections 114 and 115 if, considered alone, or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued*

¹ Section 164(15)(c)(iii)(aa) of the Act provides that a court may, in its discretion appoint one or more appraisers to assist it in determining the fair value in respect of the shares.

shares of any particular class of the company's shares." The Circular informed the shareholders that the transaction required their specific authority and would be tabled at a general meeting of the company to be held on 27 August 2019 at 14h30, for approval of a special resolution in terms of section 115 of the Act.

[3] In accordance with section 164 of the Act, in order to enjoy the benefits of an appraisal remedy, a dissenting registered shareholder is required to object in writing to the adoption of the special resolution before the resolution in question is put to the vote, to attend the meeting and to vote against the resolution.² If the resolution is nevertheless adopted and the transaction proceeds, the dissenting registered shareholder may demand that the company acquire its shares and pay it the fair value thereof.³ The company is then required to make a written offer to the dissenting shareholder, who may either accept or reject that offer. If the offer is rejected, the dissenting shareholder may approach the court requesting a judicial appraisal, or determination, of the fair value of the shares in question.

[4] Nominees was, as at 10 September 2019, the registered holder of *inter alia* 18 039 829 ordinary shares (hereinafter referred to as "the shares") in the issued share capital of Capprec. The aforesaid shares are, beneficially owned by the second applicant, Nedbank Limited, as envisaged in section 56 of the Act. The shares form part of a

² Section 164 (3) and 164(5) of the Act. ² Section 164(3) provides: "*At any time before a resolution referred to in subsection (2) is to be voted on, a dissenting shareholder may give the company a written notice objecting to the resolution.*" Section 164(5) provides that: "*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 subsection (6); and*
 - (ii) *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 in subsection (2); and*
- (c) *the shareholder-*
 - (i) *voted against that resolution; and*
 - (ii) *has complied with all of the procedural requirements of this section.*

³ Section 164 (7) of the Act.

portfolio of assets within the Prescient Qualifying Investor Hedge Fund Scheme, which is managed by the third applicant, Rozendal Partners (Proprietary) Limited, a private company registered as such in terms of the Act.⁴

[5] On 21 August 2019, Nominees gave written notice in accordance with section 164(3) and section 115(8) of the Act, that it objected to and intended to oppose (i.e. vote against) the adoption of the relevant special resolution, referred to and set out in the Circular.⁵

[6] At the general meeting held on 27 August 2019, Nominees was represented by proxy and voted against the applicable resolution, and by extension against the transaction. On 10 September 2019, Capprec, gave notice in terms of section 164(4) of the Act that the applicable resolution was adopted by the general meeting (97, 7% of Capprecs' shareholders voted in favour thereof) and that the buy-back transaction had been approved. On 12 September 2019, Nominees transmitted a demand to Capprec, in terms of sections 164(5) and 164(7) of the Act, requiring Capprec to pay to it the fair value of its shares.

[7] On 18 September 2019, Capprec transmitted correspondence to Nominees in which it informed Nominees that Capprec would provide a written offer to pay the fair value of its shares by 16 October 2019. In this letter, Capprec specifically adverted to its obligations under section 164 of the Act and more particularly subsection

⁴ The third applicant, Rozendal Partners (Proprietary) Limited, manages the Rozendal World Wide Flexible Prescient Qualifying Investor Hedge Fund, which is a portfolio of assets with the Prescient Qualifying Investor Hedge Fund Scheme. The relationship and nexus between the applicants are set out in detail in the papers but are not relevant for purposes of the judgment.

⁵ 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 a special resolution contemplated in this section; and
- (b) was present at the meeting and voted against that special resolution.

164(11).⁶ On 16 October 2019, Capprec, made a written offer in terms of section 164(11) to acquire the shares for an amount of R0.80 (eight cents) per share.

[8] The applicants rejected the section 164 offer as inadequate and accordingly brought an application within the time limit contemplated in section 164(12)(b) of the Act. In answer to the application, Capprec's attorneys addressed correspondence to the applicants' attorneys, in which, for the first time, it was indicated on behalf of Capprec that "*the provisions of s 164 of the Companies Act had not been triggered*"; and that "*(while Capprec had) previously suggested that s 164 had been triggered, ... that position was based on a misunderstanding of the legal position.*"

[9] Capprec's adopted stance (as set out above) was encapsulated in Capprec's answering papers, and constitutes the only basis upon which Capprec opposes the applicants' exercise of section 164 appraisal rights and now this application. It contends that the rights afforded to a dissenting shareholder in section 164 is only triggered under very specific circumstances which are set out in section 164(2)(a) and (b) of the Act. This section reads as follows:

"164 Dissenting shareholders appraisal rights

(1)

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

(a) amend its Memorandum of Incorporation by altering the preferences, rights, limitations or other terms of any class of its shares in any manner

⁶ 164(11) Within five business days after the later of-

- (a) the day on which the action approved by the resolution is effective;
- (b) the last day for the receipt of demands in terms of subsection (7) (a); or
- (c) the day the company received a demand as contemplated in subsection (7) (b), if applicable, the company must send to each shareholder who has sent such a demand a written offer to pay an amount considered by the company's directors to be the fair value of the relevant shares, subject to subsection (16), accompanied by a statement showing how that value was determined.

materially adverse to the rights or interests of holders of that class of shares, as contemplated in section 37 (8); or

(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.”(Emphasis added)

The transaction contemplated by section 112 is a “*proposal to dispose of all or the greater part of the assets of undertaking of a company*”; the transaction contemplated in section 113 is a “*proposal for an amalgamation or merger of two or more profit companies*”; and the transaction contemplated in section 114 is “*a scheme of arrangement.*” It is agreed between the parties that section 112 and 113 are not applicable in the present circumstances, and that the real issue for determination between the parties are the interpretation of section 114 and section 48(8)(b) of the Act.

[10] As stated earlier, the Circular advised the shareholders that the reacquisition of the shares would result in Capprec acquiring in excess of 5% of its own issued share capital and was subject to the provisions of sections 48, 114 and 164 of the Act. Capprec contends that section 114 is only applicable to a “scheme of arrangement” and as the proposed buy-back did not constitute a scheme of arrangement as envisaged in section 114 of the Act, there is accordingly no basis upon which the applicants can rely on section 164 of the Act. It further contends that when Capprec previously communicated to its shareholders that section 114 was applicable, and if they oppose the proposed reacquisition they would have rights under section 164 of the Act, it was made in error.

[11] The applicant anticipated that there are other potential parties who have not accepted an offer in terms of section 164(11). They have been cited as the second respondent (affected dissenting shareholders).

[12] Notwithstanding the above, Nominees contends that in the event that the court determines that only a transaction which is a scheme of arrangement would attract the appraisal remedy as set out in section 164 of the Act, Capprec is estopped from denying the applicants' rights to assert a claim in terms of section 164 of the Act. In the circumstances the only questions which call for adjudication in this matter are as follows:

- (a) Whether or not Nominees, in the circumstances pertaining to the transaction in question, is entitled to exercise the appraisal rights afforded to it in terms of section 164 of the Act; and if not;
- (b) Whether or not Capprec is estopped from denying the circumstances which have given rise to Nominees exercising its section 164 appraisal rights.

THE COMPANIES ACT

[13] The transactions which give rise to the issues for determination in this application comprised of share repurchases by Capprec in terms of four Share Acquisition Agreements ("the Relevant Transactions"). Section 48(2)(a) of the Act specifically permits that "*the board of a company may determine that the company will acquire a number of its own shares.*" There is no dispute between the parties that the Relevant Transactions constituted an acquisition by Capprec of its own shares in terms of section 48(2)(a) of the Act.

[14] Prior to an amendment to the 1973 Companies Act in 1999, a company in South Africa could not repurchase its own shares even though expressly empowered to do so by its memorandum of articles or association. The rule was established in the House of Lords in *Trevor v Whitworth*⁷ and became a fundamental rule of company law as practised in Commonwealth jurisdictions.⁸ The purpose of the prohibition was two-fold; its first and primary purpose was to protect a company's creditors by preventing what would amount to an unlawful reduction of the capital of a company, and secondly it protected the company's shareholders by preventing the company from trafficking in its own shares and from favouring one group of shareholders over another.⁹

[15] In 1999, the prohibition against share repurchases was relaxed and introduced into the 1973 Companies Act the power to repurchase shares through authorisation in its articles of association and by means of a special resolution of its shareholders approving the acquisition and subject to a liquidity test.¹⁰ When the Act was first promulgated in 2008, the power to approve the acquisition by the company of its own shares was granted to the board of directors but such power was subjected to the caveats and conditions set out in section 48(1) to 48(7) of the Act. In 2011 sub-section 48(8) was introduced into the Act and it specifically adverted to and circumscribed the board's power in relation to particular types of shares acquisitions. It provides as follows:

“48 Company or subsidiary acquiring company's shares

⁷ (1887) 12 App Ca 409 (HL)

⁸ Yeats *et al* Commentary on the Companies Act of 2008 at p2-459 to 2-460.

⁹ The many and varied harms which a company can visit on its shareholders and particularly minority shareholders through the mechanism of a share repurchase are well expressed and substantially set out in Yeats *et al* Commentary on the Companies Act of 2008 at 2-461-2-465.

¹⁰ Section 85 of the 1973 Act.

(8) *A decision by the board of a company contemplated in subsection (2) (a)-*

(a) must be approved by a special resolution of the shareholders of the company if any shares are to be acquired by the company from a director or prescribed officer of the company, or a person related to a director or prescribed officer of the company; and

(b) is subject to the requirements of sections 114 and 115 if, considered alone, or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares."

[16] Two scenarios are catered for here: Firstly, if any shares are repurchased from a director or prescribed officer of the company, or a person related to a director or prescribed officer, the repurchase is subject to approval by special resolution of the company. Secondly, when the repurchase transaction (or series of transactions) breaches a threshold level of 5% of the company's shares the requirements of sections 114 and 115 of the Act are applicable to the transaction.

[17] It is common cause that the Relevant Transactions fall within the scope of section 48 (8)(a) and (b), in that it involves the acquisition by Capprec of its own shares from, *inter alia*, directors, and amounts to an acquisition of more than 5% of Capprec's issued share capital. It follows accordingly, and on an ordinary grammatical reading of section 48(8)(b), that the Relevant Transactions are subject to the requirements of sections 114 and 115 of the Act.

[18] Capprec's contention is that the legislature, in section 164(2)(b), only included repurchase transactions contemplated in section 114 and did not include repurchase transactions contemplated in section 48. This is so because section 48 deals with the

acquisition by a company of its own shares in a manner different from section 114: section 48 deals with a consensual agreement between the company and the seller of shares, and section 114 deals with a scheme of arrangement between the company and the holders of any class of its shares in a manner contemplated in paragraphs 114(1)(a) to (f), where in all of these instances there must be the requirement of coercion. It is contended that although section 114(1)(e) specifically deals with a reacquisition of shares by the company itself, it is different from section 48 in that a reacquisition in terms of section 48 involves a voluntary seller. In terms of section 114, a reacquisition by the company of its securities is achieved through a "scheme" and in such an event, in terms of section 114(4), the provisions of section 48 apply. The reference to section 48 in section 114(4) thus distinguishes "transaction contemplated" in section 114(1)(e) from the "transaction contemplated" in section 48 - if it did not, there would be no need for the inclusion of section 114(1)(e).

[19] Capparec submits that the Relevant Transactions are not a scheme of arrangement as understood in the authorities related to the old Companies Act. It further submits that although section 48(8)(b) requires that the Relevant Transactions are subject to the requirements of sections 114 and 115, it is only a reference to the procedural requirements of sections 114 and 115. It does not deem a transaction which is not a scheme into a scheme. Capparec contends that section 48(8)(b) only makes reference to sections 114 and 115 and no reference is made to section 164. If the legislature had intended that section 164 would be triggered in the circumstances referred to in section 48(8)(b), reference would have been made to it in section 48.

[20] Nominees argues that the requirements of section 114 of the Act are not made applicable to the transaction because the transaction is a scheme of arrangement. The

requirements of section 114 and 115 of the Act are made applicable to the transaction because the transaction crosses the 5% threshold for a repurchase by the company of its own shares and because that is what section 48(8)(b) stipulates. Consequently, whether or not the transaction is an "arrangement" as provided for in section 114(1) is irrelevant because section 48(8)(b) of the Companies Act makes the requirements of section 114 and 115 applicable.

Is Nominees entitled to exercise the appraisal rights afforded to it in terms of section 164 of the Act?

[21] Both sections 48 and 114 of the Act provide mechanisms through which a company can acquire its own shares. Section 48(2) provides that a company may, to the extent that it is solvent and liquid, buy back its own shares. The only requirement is the approval or decision of the board of the company. It is only if the re-acquisition by the company falls within the provisions of section 48(8)(a) and (b) that approval by special resolution is specifically required.

[22] Section 114 provides for the reacquisition of shares through a scheme of arrangement. There is no definition for scheme of arrangement under the Act. Section 114 is however part of a broader category of transactions referred to in the Act as "fundamental transactions". Fundamental transactions are subject to, amongst other things, more stringent legislative requirements for their implementation. Common to all fundamental transactions is that they must be approved by a special resolution.

[23] In terms of section 48(8)(b) of the Act, a share buy-back is subject to the requirements of sections 114 and 115 where a company acquires at least 5% of any

class of its shares, whether in terms of a single transaction or otherwise. The reality is therefore that the vast majority of share buy-back transactions must comply with both the provisions of section 48 and 114, and it is only a small number of share buyback transactions which can be implemented without having to comply with both sections. In turn, section 114(4) of the Act provides that any share buy-back implemented in terms of the provisions of that section is also subject to the provisions of section 48. Accordingly, all share buy-back transactions implemented in terms of a scheme of arrangement must also comply with section 48.¹¹

[24] The question is if a transaction falls within the ambit of section 48(8)(b), is the transaction also deemed to be a “scheme of arrangement” as contemplated in section 114? Or is the repurchase merely subject *mutatis mutandis* to the requirements of a scheme of arrangement?

[25] Section 114(1) of the Act characterises a scheme of arrangement as “*any arrangement between the company and holders of any class of its securities*”. As stated an “arrangement” is not defined in the Act. Johan Latsky,¹² in an article, “*The fundamental transactions under the Companies Act: A report back from practice after the first few years*”, opines that if one however compares the arrangement in terms of the Act with an arrangement in terms of a section 311 scheme under the 1973 Act, the objective of an arrangement in terms of section 114 is to affect the respective rights and obligations *inter se* of the company and its holders of securities in a manner which cannot otherwise be conveniently achieved by independent agreement between the

¹¹ See article by Martin Mota dated 4 October 2012 “*Share buy-backs: Interaction between sections 48 & 114*”.

¹² 2014 Stell LR 361.

company and each holder of securities. Although one cannot use a section 311 scheme to do something that could not have been done by agreement, its function is to take the place of an agreement. The repurchase by agreement from a shareholder is not such an arrangement. It does not legally bind any holder of securities whose agreement has not been obtained.

[26] Yeats¹³ opines that because a repurchase is (i) a distribution of the company's assets and (ii) a re-organisation of issued share capital (and hence of ownership), achieved by (iii) a transfer to the company of its shares, it invites all the abuses associated with each of these three functions and may even involve abuses of all three of these functions. Repurchase thus has significance for corporate governance, takeover regulation, creditor protection, discrimination between shareholders, oppression of minorities, and the proper functioning of the securities market. Yeats comments as follows:

“Although repurchase appears to have the virtue of a voluntary transaction, in reality, because it is both a distribution and a reorganisation, it has a significant element of coercion. If targeted, those to whom the offer is not made have no choice but to accept an increase of ownership participation. And whether targeted or not, offeree shareholders cannot participate in the distribution unless willing to relinquish shares. They are forced to decide whether to 'participate in profits and relinquish their shares or forswear the distribution and increase ownership participation'. 'It is always possible that a shareholder may wish to do neither'. Many shareholders may not view the distribution of profits as a sufficient reason for parting with their shares but at the same time may not

¹³ At 2-464.

view the alternative (in effect a further investment in the company) as a wise investment decision. The shareholder must either sell at a price nominated by the company; or retain his shareholding on terms different from those upon which he first invested in the company—that is to say, increase his participation without the benefit of legal protection.”

[27] Given the legislative history behind the section, as set out above, and given the potential abuses, particularly of minority shareholders, which share repurchases can facilitate, the express wording of section 48(8)(b) **is, in my view, clear**. It does not state that the transaction is a scheme of arrangement, but rather that it is subject to the requirements of section 114 and 115. To put it differently, by merely stating that the requirements of section 114 be complied with in respect of a reacquisition of securities in excess of 5%, does not have the effect of deeming a transaction to be an arrangement if, by nature, the transaction is not an arrangement as this term is interpreted in terms of our common law. One can only accord meaning to section 48(8)(b) if it is dealing with a situation which would not ordinarily be subject to sections 114 and 115, and hence the specific statutory exhortation to apply such sections in the particular threshold circumstances adumbrated in the subsection, namely 5%. A section 48(8)(b) transaction therefore remains a section 48 transaction, but because it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares, the legislature deemed it fit to include and provide additional protection to minority shareholders.

[28] It is understandable that the legislature saw fit to impose particular and further conditions on the type of transaction identified in sub-section 48(8)(b). It recognised that not all transactions involving a repurchase by the company of its own shares

should be subjected to further conditions, but those which involved a significant and substantial repurchase (more than 5%) should be. The legislature also recognised that, in transactions of this nature and of this magnitude, it was minority shareholders which required protection and this was best achieved by imposing on the transaction, the ready-made protections afforded and provided to minority shareholders in sections 114 and 115 of the Act.

[29] As stated, sections 114 and 115 of the Companies Act are provisions which appear in the statute at Part A of Chapter 5, which part deals with the approvals necessary for certain transactions referred to as fundamental transactions. Read together they set out various procedural requirements for transactions which fall within their purview and provide various rights and remedies to shareholders affected by transactions subject to the sections. What section 48(8)(b) does is to impose on transactions falling within section 48(8)(b) "the requirements" of sections 114 and 115. The question which arises is what then is contemplated by the words "requirements of sections 114 and 115"?

[30] It is trite that a statutory interpretation which gives meaning and efficacy to a provision, is to be preferred to one which renders a provision superfluous or nugatory.¹⁴ In my view, by making reference to section 114 and 115 as a whole, the legislature intended for all the procedural conditions and rights set out in section 114 and 115 to apply. From a practical procedural perspective this would, *inter alia*, involve the appointment of an independent expert as contemplated in section 114(2) (which Capprec did), the proposing and passing of a special resolution as contemplated in section 115(2)(a) (which Capprec did) and, importantly for the purposes of this

¹⁴ *National Credit Regulator v Opperman and Others* 2013(2) SA 11 (CC) at par [41]

application, the condition set out in section 115(8) of the Act entitling shareholders to exercise appraisal rights in terms of section 164 of the Act, which is precisely what Capprec represented to the applicants and indeed all its shareholders in the Circular. Professor Cassim¹⁵ in an article titled, “*The appraisal remedy and the oppression remedy under the Companies Act of 2008, and the overlap between them*”, observes that in terms of s 114(1)(e), if a re-acquisition of the securities of a company is effected in terms of a scheme of arrangement, shareholders are entitled to the relief afforded by appraisal rights. This creates a perplexing anomaly: minority shareholders are entitled to appraisal rights protection if the board decides to effect a (substantial) re-acquisition of the company's shares in terms of a scheme of arrangement but not if it decides to do so in terms of section 48. This does not make sense, especially if the rationale underpinning the additional requirements for share repurchases which exceed 5% is that such transactions merit additional protection because they potentially affect minority shareholders more radically as they may amount to a restructuring of the shares of the company. If there was still any doubt, section 114(3) specifically states that the report must be distributed to all holders of the company's securities which must, *inter alia*, include a copy of sections 115 **and 164**. (Emphasis added). If the drafters did not intend appraisal rights to apply in these circumstances, more specific cross-referencing would have been provided.

[31] As stated, the legislature was clearly particularly concerned that adequate protection be afforded to minority shareholders. Appraisal rights empowers minority shareholders to withdraw from a company while obtaining a fair value for their shares. The appraisal remedy is aimed at maintaining the equilibrium between

¹⁵ 2017 SA Merc LJ 305 Maleka Femida Cassim “*The appraisal remedy and the oppression remedy under the Companies Act of 2008, and the overlap between them*”

minority shareholders and controlling shareholders.¹⁶ But, although section 164 appraisal rights enable the shareholder to "sell" her shares to the company at their fair value, it will afford limited protection against coercive and proportionate repurchases, except that the shareholder will be able to ensure a fair price. It may be a useful remedy in the case of a selective repurchase from which the dissenting shareholder is excluded.¹⁷ The appraisal right is intended to thwart not only opportunism, but also ill-advised business decisions by the board of directors. In this regard, the board will be more easily swayed to abandon an unwise transaction if a substantial number of shareholders dissent from it and invoke their appraisal rights. This is in view of the cash drain that the company would otherwise face in having to buy out the dissenters' shares at a fair value in cash.¹⁸ In essence the appraisal right enables a dissenting shareholder, in certain statutorily prescribed circumstances, to force the company to purchase his shares in cash at a price reflecting the fair value of the shares and to exit the company.¹⁹

[32] In the circumstances, regardless of whether (as a fact) the transaction which Capprec has sought to implement was a scheme of arrangement or not, it was a transaction which crossed the 5% share repurchase threshold contemplated in section 48(8)(b) of the Act, thereby invoking the requirements of the provisions of section 114 and 115 of the Act, which in turn have vested the applicants in this application with the right to obtain the judicial determination of fair value for their shares as contemplated in Section 164 of the Act.

¹⁶ 2017 SA Merc LJ 305 Maleka Femida Cassim *"The appraisal remedy and the oppression remedy under the Companies Act of 2008, and the overlap between them"*

¹⁷ 2010 TSAR 288. Professor Kathleen van der Linde. *"Share repurchases and the protection of shareholders"*.

¹⁸ *Supra* 2017 SA Merc LJ at 313.

¹⁹ MF Cassim *"The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part I)"* (2008) 20 SA Merc LJ 1 19.

[33] In the result the following order is made:

- 1.1 that an appraiser be appointed as an appraiser in terms of section 164(15)(c)(iii)(aa) of the Companies Act to assist this Court in determining the fair value in respect of the shares held by the First Applicant and the other affected dissenting shareholders in the First Respondent as at 27 August 2019 and as further contemplated in the order sought;
- 1.2 the appraiser shall be:
 - 1.2.1 nominated by agreement between the Third Applicant and the Other Respondents by no later than 10 days after the date of the order herein;
 - 1.2.2 a chartered financial analyst, who has at least 10 (ten) years post-qualification experience;
 - 1.2.3 independent, as that term is understood in section 114(2) of the Companies Act and as defined in regulation 81(i) of the Company Regulations 2011; and
 - 1.2.4 appointed as such by this Court;
- 1.3 if the parties are unable to agree on the nomination of the appraiser within a period of 10 days of an order to that effect, then the appraiser shall be nominated, at the request of this

Court, by the President for time being of the CFA Society South Africa, or the successor body thereto;

- 1.4 subject to further directions of this Court, the appraiser shall be vested with entire discretion as to the procedure and manner to be followed in determining a range of values that comprise fair value;
- 1.5 the appraiser shall, subject to making the necessary arrangements with regard to confidentiality, be entitled to engage and consult any appropriately qualified professionals, the costs of which shall be paid for by the Parties in accordance with paragraph 1.7 of the Notice of Motion. All documents and information provided to the appraiser by any Party must also simultaneously be provided to all other Parties;
- 1.6 the Parties shall co-operate with the appraiser and promptly provide all documents and information reasonably requested by the appraiser;
- 1.7 save as otherwise ordered by this Court, the costs consequent upon the appointment of the appraiser shall be costs in the cause;
- 1.8 that the First Respondent shall provide the following documentation to the appraiser and the Applicants, and any

other dissenting shareholders, within 15 days of the date of this order:

1.8.1 all of the sources of information relied upon by the Independent Expert, referred to on pages 21 and 22 of the circular of the First Respondent, dated 29 July 2019 ("**the Circular**"), applicable to the repurchase, including, but not limited to:

1.8.1.1 the Share Repurchase Agreements and Umbrella Agreement;

1.8.1.2 audited annual financial statements of the First Respondent and its subsidiaries for the year ended 31 March 2019;

1.8.1.3 forecast financial information of the First Respondent and its subsidiaries for the financial year ended 31 March 2020;

1.8.1.4 unaudited annual financial statements of Resonance Australia for the year ended 30 June 2017 and 30 June 2018, and management accounts for the 11-month period ended 31 May 2019; and

- 1.8.1.5 three-year forecast financial information (FY19, FY20 and FY21) of Resonance Australia,
 - 1.8.2 the corroborating evidence from third parties, referred to on page 22 of the Circular;
 - 1.8.3 all contracts which the First Respondent concluded in the past year insofar as they relate to the Uplink IP, the Subsidiaries and Capital Appreciation Management;
 - 1.8.4 the asset register of the First Respondent, the Subsidiaries and Capital Appreciation Management;
 - 1.8.5 all and any documentation provided to the Independent Expert for the purposes of the production of the Independent Expert Opinion; and
 - 1.8.6 any other documents and information reasonably requested by the appraiser.
- 1.9 that the documentation provided to the appraiser(s) is provided on a confidential basis and solely for the purposes of rendering the written report as contemplated herein;

1.10 that the appraiser(s), the Applicants and the dissident shareholders shall:

1.10.1 only use the documentation and the information therein contained for the purposes of this application;

1.10.2 not disclose the contents of the aforesaid documentation to any third party (other than the party in question's legal representatives for the purposes of obtaining legal advice in relation to this application);

1.11 that within 30 days of the receipt of the documentation contemplated in paragraph 1.8 above, the appraiser shall compile and provide a written report (including working papers) to the Court (with copies thereof to the Applicants and each of the Respondents of his opinion as to the fair value of the applicable shares in the First Respondent as of 27 August 2019;

1.12 that within 15 days of the receipt of the appraiser' report contemplated in paragraph 1.11 above:

1.12.1 the Third Applicant shall be entitled to supplement its founding papers herein;

- 1.12.2 the Other Respondents shall be entitled to file papers;
- 1.13 that within 20 days of the Third Applicant supplementing its founding papers and the Other Respondents filing their papers as aforesaid, the First Respondent shall file answering papers in this application;
- 1.14 that within 15 days thereafter, the Third Applicant and Other Respondents shall file their replying papers, if any;
- 1.15 that the matter shall thereafter be set down for hearing for the purposes of this Court making a determination of the fair value of the applicable shares in the First Respondent as at 27 August 2019;
- 1.16 that pursuant to the determination referred to in paragraph 1.15 above, this Court shall:
 - 1.16.1 allow a reasonable rate of interest on the amount payable to each of the Applicants and the other affected dissenting shareholders from the date the action approved by the special resolution adopted by the First Respondent on 27 August 2019 become effective until the date of final payment;

- 1.16.2 make on appropriate order of costs, having regard to the offer made by the First Respondent (as referred to in the founding papers herein) and the final determination of the fair value of the Applicant's and any other affected dissenting shareholders shares in the First Respondent as at 27 August 2019;
2. That the costs of the application to date and insofar as it relates to the order granted herein shall be paid by the First Respondent.

L. WINDELL

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 5 February 2021.

APPEARANCES

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Attorneys for applicant:	Pike Law
Counsel for respondent:	Adv A.E. Bham SC
Attorneys for respondent:	Edward Nathan Sonnenbergs Inc
Date of judgment:	5 February 2021