DISSERTATION

ON

COMPROMISE AND ARRANGEMENT BETWEEN A COMPANY AND ITS CREDITORS AND/OR MEMBERS IN TERMS OF SECTION 311 OF THE COMPANIES ACT NO.61 OF 1973, AS AMENDED

by

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CONTENTS

Page

Bibliography i

Table of Cases ii

Chapter One:

Introduction 1

Chapter Two:

The Provisions of Section 311 and Ancillary Provisions 3

Chapter Three:

Applications and Procedure 22

Chapter Four:

Arrangement and Compromise between a Company and its Creditors and Arrangement between a Company and its Members 33

Chapter Five:

Conclusion 53

Footnotes: 55

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CHAPTER ONE

INTRODUCTION

The need often arises for a company to negotiate an agreement with its members and/or creditors, in order to modify an existing set of circumstances affecting the interests of the parties to the agreement (1). In certain circumstances the situation arises where due to large numbers involved, or unwillingness to participate in such an agreement difficulties are experienced to enter into and conclude negotiations with every single member or creditor.

Accordingly the legislature has laid down a statutory procedure in Section 311 of the Companies Act No 61 of 1973 in order to achieve the desired result. In terms of the section, a company can, subject to the supervision of the courts, bind its members and/or creditors to proposals agreed to by a majority of them.

The terms of the section, such as "arrangement" and "compromise" have been the subject of several court decisions. Furthermore, in order to achieve a desired result, the terms of the section often have to be viewed in conjunction with provisions contained in the Companies Act itself, as well as other legislation.

The compromises and arrangements referred to in the section have a wide application as expounded by court decisions (2) and commercial practice (3). The procedure to obtain the sanctioning thereof, is laid down in the Companies Act (4), and is to be seen in conjunction with the Rules concerning procedural conduct in the courts, as well as procedural precedent.

A standard scheme was developed in our practice for the achievement of an arrangement or compromise in terms of Section 311, (5) and applications for the sanctioning of such schemes were granted for a number of years as a matter of routine. The practice and industry active in the field was thereafter thrown into some confusion especially in the Transvaal and the Cape Province, primarily in view of the fact that the courts could find no active involvement of the company in a standard scheme (6). As a result of this various alternative schemes were devised in an effort to obtain the sanction of the courts in terms of section 311. The Appellate Division has now in the matter of Namex (7) heralded a return to the standard scheme in our law.

In reflecting upon the above issues this dissertation will refer to the historical background to the Namex case, in view of the existence of schemes persuant to the decisions in Robin and Multi-Bou. Furthermore decisions involving the legislation ancillary to Section 311 will also be briefly dealt with.

CHAPTER TWO

THE PROVISIONS OF SECTION 311 and ANCILLARY PROVISIONS

"ARRANGEMENT" and "COMPROMISE"

The term "arrangements" as contemplated by the section is "....of the widest character and...the only limitations are that the scheme cannot authorise something contrary to the general law or wholly ulra vires the company...."(1), and an arrangement will not be sanctioned if it is contrary to the general law or in fraudem legis (2). An arrangement has been stated to occur between a company and its members (3), whereas a compromise between a company and its creditors, although this distinction has been diminished by interchangeable useage. However, the Australian description of the term (4) has been referred to and approved (5), in that

> "The word "arrangement" is not restricted in its meaning by its association with the word "compromise". The former word has been given a liberal meaning and, generally speaking, unless the arrangement is ultra vires the company or seeks to deal with a matter for which a special procedure is laid down or to evade a restriction imposed by the Act, almost any arrangement otherwise legal which touches or concerns the rights and obligations of the company or its members or creditors...."(6)

The concept "arrangement" implies that there must be an element of a compensating advantage to the relevant members or creditors which must

relate to a degree of enforceable consideration for the parties concerned in an arrangement.

Generally, a "compromise" implies the settlement of a dispute between a company and/or members over rights, or the modification of rights not the subject of dispute but with some difficulty of enforcement. The agreement must partly consist of a "mutual giving up of rights" (7).

In the Namex case (8) it has been accepted by Van Heerden JA that an "arrangement" and a "compromise" are not synonymous, partly in view of the use of the two words by the legislator. In this respect, he rejected the view held in the Multi-Bou case (9), that for the purposes of the section, an "arrangement" must contain an element of compromise. The reason for this, is that underlying a compromise, there must be the resolution of a dispute, and this need not be the purpose of an arrangement. Further explanation for this is the apparent figurative use by Berman J of the word "compromise" in that he characterised an adjustment of rights between the company and its creditors as "distinctive feature of a compromise".

It is therefore clear that the main distinctive feature is that of the resolution of a dispute. Should there be an element thereof, then a "compromise" is being dealt with; and if this be absent, the term "arrangement".

PROPOSED BETWEEN A COMPANY AND ITS CREDITORS ET SEQ

The well known "standard scheme", in respect of a company under provisional liquidation as set out by Van Heerden JA in Namex, entails the following:

(a) An offer by an initiator of a scheme of a certain amount to be distributed amongst the creditors of the company.

(b) Upon proof in a prescribed manner of their claims the creditors receive payment thereof.

(c) Upon a certain event, predominently the approval of the scheme,the creditors are deemed to have ceded their rights of recovery against the company, to the initiator of the scheme.

(d) The deemed cession is a reduced amount of the full claim, mostly ninety-nine percent.

(e) Upon approval of the scheme the company is released from provisional liquidation.

The section makes it quite clear that the compromise or arrangement is to be proposed between a company and its creditors or members, and that the involvement of a company is a central feature. This has then been in issue in the cases where the validity of these scehemes has been placed in doubt. In the Robin case (10) it was held that in a scheme of this nature there was an arrangement between the initiator and the creditors of the company, and not

between the company and its creditors. This decision was thereafter followed in the Cape Provincial Division, in the Multi-Bou case (11), but not in the Strydom case in the Durban and Coast Local Division (12). In Multi-Bou (13) it was held that an agreement of creditors to reduce their claims against the company by one cent in the rand did not involve the company in the transaction between the creditors and the third party, as an instruction to the company to reflect reductions in the books of account of the company did not constitute an arrangement between the company and its creditors. This view that a reduction of a creditor's claim against a company can be achieved without the company's co-operation, has been rejected by the minority in Namex (14), as the settlement or partial settlement of a debt required the co-operation of the debtor. It was stated that the view had been based on an incorrect construction of Robin (15), in which it was held that the reduction of a claim was not part of the basic content of a standard scheme as implementation merely required entries in the books of the company. The deemed cession was the basic content of the scheme, and was aimed at an arrangement between the creditors and the third party, and not between the company and the creditors. Van Heerden J.A. was in agreement that merely because a provision pertaining to the reduction of a claim is contained in the agreement, it does not mean that a standard scheme has an arrangement between the company and its creditors as its object, but he held that a provision of this nature does involve the company.

In the recent past doubt has also been cast on the so-called standard scheme on the grounds that supposed cession - terms in an agreement did not bring about an arrangement between a company and its creditors (16). Coetzee AJP in the Robin case stated his position on the issue as follows:

"In any such cession the company as debtor plays no role beyond having to pay its debts to its new creditors in respect of the same claims according to their tenor. It is a contract purely between cedent and cessionary. The only relevance of mentioning the company at all is purely to identify the subject-matter of the debt which is being ceded."(17)

The Strydom case (18) in its disagreement with Robin cast greater uncertainty upon the matter. This disagreement was based on an acceptance that a cession flows from an agreement only between the cedent and the cessionary, but that a supposed cession is only deemed to be a consensual cession. In terms of this view, the company would be bound to a cession of a right to claim without the necessity of a consensual cession (19).

The issue appears to have been settled in that the statutory mechanisms to bring about a certain result, that is, that contained in Section 311, make the debate around a consensual cession irrelevant. By virtue of the acceptance and approval in the prescribed manner, all creditors become statutory parties, and Section 311(2) is the reason why a cession eventually takes place. For this purpose there is no requirement that the company should consent or co-operate (20).

In practice however, especially in the event of a provisional liquidation, a cession of a right of recovery by creditors to an initiator is a central issue. This cession is only dependent on the recovery of the company, or its release from provisional liquidation, in that it would in the event of a final liquidation order be of no consequence. The recovery of the company therefore then goes hand in hand with an arrangement between the company and its creditors (21).

It has been held that there is no requirement in section 311(1) that a scheme should only contain an arrangement between a company and its creditors(22). Clearly therefore there should mostly be some element of agreement between the initiator and the company's creditors; it is indeed inconceivable, especially in the event of insolvency that there would mostly be instances of an arrangement between only the company and its creditors. In the same manner, in the event of a provisional liquidation, a liquidator would be a party to the agreement, in that he is to be instrumental in the release from liquidation, and in the event of the acceptance of an offer the involvement of the company is beyond dispute (23).

CLASS OF MEMBERS AND/OR CREDITORS

The initiator, in consideration of the purpose of the arrangement or compromise, is to decide which class of members and /or creditors should be made parties to the scheme. The section is of no assistance in determining a class, but members and creditors can be separated into classes with reference to similarity of voting rights at meetings. However, it has been held that upon consideration of the sanctioning or otherwise of an arrangement or compromise the court may have regard to the dissimilarity of the interests of members or creditors of a particular class(24). The approach of the court in respect of a class, is that the meaning must be confined to persons whose rights are similar to such an extent, that it would be possible for them to "consult together with a view to their common interest" (25). The true distinguishing factor however, is that of the similarity of rights; and the reference to a common interest is therefore merely ancillary. Interests may be divergent among members with similar rights. Such divergent interests cannot

be considered as a basis of classification for meetings to consider a compromise or arrangement. However, the interests of an idividual member or creditor may be considered by the court when it considers whether such creditor or member has acted in good faith towards the interests of his class. Too much emphasis on the interests of a member or creditor may unduly protract the process of decision (26).

The rights and obligations inherent in a class of shares issued to a member will determine the class of a member; and the nature of the claim of a creditor, that is, whether preferent, secured or concurrent, will determine the class of the creditor.

A matter which has often been in issue, is whether the term "creditor " also includes a "contingent creditor". In Australian Law (27) the view has been taken that the term also includes provisional creditors,as well as those with unliquidated claims. Section 311(2) provides that an arrangement must be accepted by a majority in number representing three quarters in value of the creditors. There is no provision in our legislation as to how the claim of a contingent creditor is to be valued, nor is there an indication how such a claim is to be valued by a receiver or any other person after the approval of an arrangement. Flowing from this, there is a difficulty to calculate the dividends accruing to a concurrent contingent creditor.

Accordingly, it was suggested in the Namex case (28) that a solution would be to treat each such creditor as a "class" of its own, unless the same condition relates to the claims of a number of creditors. In effect then, Section 311(2) would be applicable to contingent creditors, but every such creditor would have to accept the arrangement in so far as it relates to

him at a separate meeting. However, the offer would then have to contain one to contingent creditors, if the intention is to bind them; and it is to stipulate the value to be placed on their claims for purposes of payment in terms of the scheme.

It has now been held that the phrase "all the creditors or the class of creditors"should not be strictly literally interpreted (29). It has reference only to those creditors to whom the offer has been addressed; and the offer needs not involve all creditors of the company. There is no difficulty with it being only intended for certain stipulated concurrent creditors of the company. An approval is not binding on creditors who by law are not empowered to accept an offer. Thus an unknown claim for future income tax cannot be waived by the Treasury (30). The underlying intention behind Section 311(2), is that creditors who are entitled to, should accept.

In respect of an unknown tax claim (31) it is to be stressed that creditors are bound to an arrangement not by virtue of the approval, but by agreement and/or by statute. If upon interpretation of "creditors" certain creditors are not included, they are not bound and they need not oppose the approval. Such creditors are not affected by the order, even though the order stands.

ANCILLARY PROVISIONS

Section 311(3)

In terms of this subsection, the liability of a surety for a company shall not be affected by an arrangement or compromise, and accordingly there needs be no

reference to the rights of creditors against sureties in the agreement (32). However, it has been held (33) that the subsection did not prevent parties from "contracting out of" the position brought about thereby, and therefore the court could consent to an arrangement containing a cancellation of a guarantee in favour of debenture holders of which a majority had voted in favour of the acceptance of the arrangement. The result was that the minority, having voted against the acceptance of the arrangement, was still bound by the cancellation of the guarantee.

In the IGI case (34) the Appellate Division expressed doubt that the court could consent to a creditor who has voted against the acceptance of a scheme of arrangement, being held bound to a term providing for the termination of his right to proceed against a surety, as he has not contracted out of the protection contained in Section 311(3). The court considered a deemed cession by creditors to the initiator of a scheme, of claims against the company, together with their right, title and interest in and to security for such claims (35). The respondent had been successful in the court a quo in a claim against the appellant on the grounds of a suretyship by the appellant in favour of the respondent for payment of the debts of the company which were the subject matter of the scheme. The Appellate Division upheld the decision of the court on the basis that by virtue of Section 311(3), the deed of suretyship could not be seen to have been included in "security" as referred to in he scheme. It was held that the legislator could not have intended that it was possible for creditors to give up their protection under Section 311(3) gratuitously, that is without receiving any compensation or advantage, by including a suretyship in this manner.

INCOME TAX AND OTHER PUBLIC MONIES

For some time schemes of arrangement were sanctioned in terms of which the claims of public bodies were diminished or compromised, and such bodies considered such schemes to be binding upon them. This position was however temporarily changed by the judgement of Schabort, J in the Mercian case (36), who held that the sanctioning of a scheme by court was not intended by the legislature to serve as a statutory mechanism to grant a municipality the capacity to "contract in defiance of its relevant right and violation of its relevant duty" (37). This case dealt with the refusal by the municipality to issue a rates clearance certificate persuant to a sale of immovable property by the company, on the basis of an outstanding balance in local levies payable from the pre-liquidation period, in terms of Section 48 of the Local Government Ordinance of 1939. The company sought a declaratory order that these claims had been compromised by an offer of compromise duly sanctioned by court. In effect the court held that it had been ultra vires the municipality to have submitted to the scheme as established (38), and accepted the view of Pennington (39) that a court could only sanction a scheme which would be valid without the court's sanction if every creditor or member agreed to it. It could not sanction what the parties could not do by agreement, and all it could do was to make it binding on dissenting creditors or members.

This view was accepted a quo in the Namex case, and it was stressed that the court would not sanction a scheme which is contrary to the general law or in fraudem legis; nor did Section 311 empower the court to sanction a transaction which the parties cannot themselves undertake. Section 311 could not be used to enable a company to do anything ultra vires.

Van Heerden JA in the Namex case (40) had no difficulty with the principle that in general, a tax collector is not competent to remit tax, to diminish it through compromise, or to cede the right of recovery thereof. Any departure should be authorised by the common aw or legislation.

He cited the Union College case (41) in which Voet (42) was relied on as a basis in common law for a tax collector to enter into a binding compromise for an amount less than that of his claim. De Villiers JA in the Union College case could see no reason why a legal persona in the position of a municipality should not have the power, for the purpose of carrying out its statutory functions, of settling disputes and questions of liability without being compelled to have recourse to a court of law (43). Such compromise must be entered into in the case of a problematical dispute, and the rule is that the state, in particular the tax collector, must not be prejudiced by a waiver. There can be no prejudice to the fiscus, if the tax collector waives part of his tax claim, upon certainty that he would not otherwise be able to collect more than the remaining portion. Indeed, a compromise in respect of a problematical question may also contain benefits for the fiscus, in that it does not run the risk of discovering after a lenghty and costly recovery process that the putative amount was never due. The tax collector may, after the noting of an appeal upon the rejection of an objection, come to a compromise in respect of a problematical dispute.

He therefore came to the conclusion that a government body can indeed under common law validly consent to an arrangement in terms of Section 311, if it is to receive no less than what it would have received in the event of a final liquidation. Furthermore, even in the event of the absence of a consent, it will be bound by an approved arrangement, as it will not be held bound to something it could not contractually do.

The decision in the Mercian case (44) did not change the above common law exception, as Schabort J (45) stressed that there was no suggestion that the municipality was saddled with a void or slender prospect of recovering the taxes due to it. The company had ample assets with which to settle the claims of the municipality. Van Heerden JA indeed pointed out that there had not been any argument in the Mercian case (46) that the municipality received by concurrent dividends as much as or more than it would have received in the event of final liquidation.

This common law position is indeed furthermore confirmed by Section 31(1)(i) of the Treasury Act, in that it empowers the Treasury to approve a compromise or abandonment of a state claim. Section 31(2) qualifies this power, in that the Treasury may in its discretion approve the full or partial writing off, of an amount owing to the state if it is convinced that the amount is not recoverable, or that it would be to the benefit of the state to enter into the waiver or compromise. Therefore Sections 31 and 32 provide a mechanism therefore for a government body to wholly or partially waive a claim for tax. Subject to the requirements thereof, an arrangement in terms of Section 311 (1) of the Companies Act including an offer in respect of such a claim, may be accepted by the government body. Also, should it not accept the arrangement, and the Court approve it, the government body would be bound to something it could have achieved contractually.

Normally an arrangement will make provision for the full payment of a known tax claim, as same is preferent in terms of Section 342 of the Companies Act, read with Section 101(a) of the Insolvency Act. In instances however where the free residue may not be sufficient to settle the claim in full, an amount

more than, or equal to what the state would have received through liquidation procedures may be included in the scheme. Approval of the scheme will bind the state, and the balance of the tax claim cannot be later claimed from the company (47).

There is a general rule that carelessness cannot prejudice the fiscus, and on this basis it was contended in the Namex case (48) that should the tax collector not have proved his claim as a result of carelessness or otherwise, the full amount of the tax claim could still be recovered from the company, notwithstanding the fact that the scheme had stripped him of his claim. The court held that there was no reason why the state could not agree to the scheme simply because failure to comply with a procedural requirement could lead to the loss of a determined state claim.

A further general rule is that a state official cannot cede a claim such as one for tax (49). In this respect Van Heerden JA held in the Namex case (50) that it can make no difference to the company whether the relevant amount is owing to the tax collector or the initiator. Such an agreement is one between the company and its creditors including the tax collector (51), and the company through the liquidator agrees to the cession or supposed cession.

The initiator receives cession of the right to recover the (possibly reduced) amount from the company, and cannot assume the special powers which by statute vest in the tax collector, and which powers cannot be transferred with the right of recovery. In practice there will be problems inherent in the proof and recovery of a claim, but the efffectiveness and validity of the cession is not affected by these. Even if a tax claim could under no circumstances be ceded, a tax collector would be bound by all the other provisions of a standard

scheme, one of which is that that after approval a creditor may only enforce his former claim against the receiver. A transfer of the claim to someone else is of no importance to a creditor, and if it cannot be ceded it falls away (52).

THE CODE AND RULES

The Securities Regulation Code on Takeovers and Mergers aknowledges that takeovers and mergers may be effected by schemes of arrangement. A scheme of arrangement is defined as a compromise or arrangement between a company and its members or any class of them in terms of Section 311 to Section 313 of the Companies Act.

In terms of Section 440B the Securities Regulation Panel was established, and this Panel brought the Code into being. Section 440C empowers and requires the Panel to make rules on and regulate all transactions and schemes which may be defined as affected transactions (53). The Code is an attempt to ensure fair and equal treatment for all holders of shares in takeovers and mergers, and to act as a framework for the conduct of such transactions. The Code has the force of law, and affected transactions must comply with it (48).

The fields of application of the Code are where the company is a public one, whether listed on the Johannesburg Stock Exchange or not; and where the company is a private one, where the shareholders' interest valued at the offer price, and the shereholders' capital, exceed R5 million and there are more than ten beneficial shareholders. The proviso is that the executive director of the Panel may exempt any transaction affecting a private company, if he is satisfied that there is no possibility of prejudice to minority shareholders.

The Code provides that all holders of shares in the same class should be treated similarly by an offeror. Should an offer be made to more than one class of shares, a separate offer should be made to each class. The Code defines an offer as including one in respect of an affected transaction, howsoever effected.

Rule 29 provides that upon the implementation of an offer by a scheme of arrangement, the company in respect of which the scheme is proposed shall be deemed to be the offeree company for the purposes of the Rules, and the holders of the relevant shares of the company after the sanctioning of the the scheme, shall be deemed to be the offeror. Furthermore the Rules pertaining to disclosure and notice shall apply to offers implemented by scheme of arrangement,unless an order to the contrary has been made by the Supreme Court,or unless the Panel has permitted otherwise.

SECTION 424(1)

A matter deserving some consideration is whether a person who ceases to be a creditor of the company by virtue of a sanctioned compromise or arrangement, can institute an action in terms of Section 424(1) to render persons who had knowingly participated in any fraudulent or reckless conduct of business of the company, personally liable. In general, creditors will never receive payment of their entire claim persuant to a compromise or arrangement. If such creditors could proceed in terms of Section 424(1), they could possibly recover full payment, as opposed to a dividend in a sanctioned scheme. If such creditors should however lose their locus standi to proceed in terms of Section 424(1), such loss of locus standi deserves consideration by

the court when deciding upon the sanctioning or otherwise of an arrangement or compromise. The question which therefore arises is whether the rights of creditors in terms of Section 424(1) are ipso iure extinguished when an arrangement or compromise is sanctioned; and if not, whether the person acting after the sanctioning and implementation of an arrangement or compromise is a creditor within the meaning of "creditors of the company" contained in Section 424(1).

In the MSL case (55) a creditor would in terms of an arrangement receive a nominal dividend in respect of his claims, and the unpaid balance would be ceded to the initiator; and upon the payment and cession the creditor would have no further claims against the company. It was held by Stegmann J in this case and subsequent ones (56) that in such an instance such a creditor would not be entitled to proceed in terms of Section 424(1). Upon the sanctioning of an arrangement containing a cession of a creditor's claims to the proposer, a right to proceed in terms of Section 424 passes from the cedent (creditor) to the cessionary (proposer). On the one hand, the creditor would have no locus standi to proceed against the company in terms of Section 424 and on the other, should the debts and liabilities of the company be extinguished upon the sanctioning of an arrangement, Section 424(1) cannot operate as in order for this to happen, the company must have debts or other liabilities (57).

The Cape Provincial Division expressed a different view in the Pressma case (58). The court could not accept the loss of the remedy of Section 424(1) by the sanctioning and implementation of a compromise in terms of Section 311. To give effect to one of the objectives of Section 424, that is, a remedy against abuse, the court was of the opinion that "creditors of the company"

had to include a person in respect of whom there had been an existing indebtedness upon the sanctioning of the compromise.

Stegmann J again rejected this view in the Carbon Developments case (59). He again held that Section 424 could not operate if the company had no debts or other liabilities, which would be the position if creditors were to extinguish or novate their claims against the company. In the event of the cession of a claim and not the extinction or novation thereof, the right to proceed in terms of Section 424(1) will pass to the cessionary as an ancillary right to the ceded claim.

The Appellate Division (60) unfortunately did not express itself on the question whether a sanctioned compromise or arrangement with the effect of the extinction of the debts of a company would preclude a declaration in terms of Section 424(1). Arguments were however raised that a reference to debts in Section 424(1) is to debts incurred by the company at the time of the alleged wrongful conduct and not necessarily to ones still owing by the company at the time of the application under Section 424(1).

In the light of the aforegoing, creditors should weigh up the certainty of a dividend, against the effect of the line of decisions in the courts, as well as the costs of court procedure. Furthermore the deductibility of the unpaid amounts of the claims for tax purposes could also be a positive consideration. Finally, an arrangement under Section 311 would not preclude criminal proceedings at a later stage (61).

SECTION 312

This section provides that when any meeting is summoned under Section 311, every notice shall be accompanied by a statement explaining the effect of the compromise or arrangement. In the statement, all relevant information regarding the value of the shares or debentures involved in the arrangement should be contained, as well as the material interest of directors of the company, that is, whether as directors, members, creditors or otherwise, and the manner in which it may have a different effect from the like interests of other persons, on the compromise or arrangement.

The statement should as far as possible give all information reasonably necessary to enable the recipients to decide on their votes. The court should be provided with a copy of the statement when a sanction is sought, to determine whether adequate information has been given to the creditors or members pertaining to the effect and implications of the compromise or arrangement.

Material non-compliance with Section 312 will usually deter the court from sanctioning a scheme (62).

SECTION 313

The underlying reason for this Section, is to facilitate a compromise or arrangement in terms of Section 311. If it is shown to the court that a compromise or arrangement is proposed for the purpose of the reconstruction of a company, or the amalgamation of two or more companies, and under the

scheme the whole or part of the undertaking or property of a company is to be transferred to another company, the court may make the issues referred to in Section 313(1)(a)-(f) applicable in order to give effect to the compromise or arrangement (63). In terms of Section 313(2), should an order under Section 313(1) provide for the transfer of property or liabilities, such property or liabilities shall vest in the transferee company. Transfer of property must however be effected in due form.

CHAPTER THREE

SECTION 311: APPLICATIONS AND PROCEDURE

APPLICATIONS OF SECTION 311

The only arrangements to which the section expressly refers, is to ones concerning companies in liquidation (1). Practically speaking it is then mostly applications of this nature which are most commonly brought, namely by liquidators of companies in liquidation, persuant to shemes of arrangement proposed by the liquidators. It has in fact been suggested by the Appellate Division that possibly only the liquidator of a company would have locus standi to bring the application (2). It may be stated that provisional liquidation affords the company in financial difficulty some respite from claimants, and then "an honest broker" enters the scene to revive the company (3). The procedure has indeed become a standard one, although its use has until recently been filled with uncertainty. It must however be remembered that the proceedings under the section in fact cover arrangements of the widest possible character(4), and that it would be impossible to determine an exhaustive list of instances of application.

The underlying reasons for the section are that the impossibility or impracticality of obtaining the individual consent of every member or creditor of the class intended to be bound by a scheme, is being overcome, and the frustration of a beneficial scheme by a minority of members or creditors of a class is being avoided (5). Furthermore, the initiator of a scheme will not have to face numerous claims by unknown creditors in future. The procedure

in terms of the section enables a potential investor to invest in a company in difficulty, without having to negotiate a compromise with each creditor individually.

Assessed Loss

Apart from the disharge from provisional liquidation, enabling the company to recover and continue business as before, a well-known instance is the availability of an accumulated assessed loss to potential investors in a company in financial difficulty. Often the acquisition of the assessed loss and its preservation is a chief object of the initiator of a scheme of arrangement or compromise in terms of Section 311.

An assessed loss and its utilisation is covered by Section 20 of the Income Tax Act; and briefly it may be defined as the amount by which the admissible deductions exceeded the income in respect of which they are so admissible, or should the context so require, an assessed loss as determined under Section 36. Section 20(1) provides that in order to determine the taxable income of a person carrying on trade in the Republic, any balance of assessed loss incurred during any previous year which has been carried forward from the preceding year of assessment, shall be set off against the income derived by the taxpayer from such trade. However, the balance of the assessed loss is to be reduced by the amount or value of any benefit received by or accruing to a person as a result of a concession granted by or a compromise made with his creditors whereby his liabilities to them have been reduced or extinguished, if such liabilities arose in the ordinary course of trade. Should the value of the benefit received which reduces the assessed loss exceed the assessed loss,such excess is not added to the income in the current or future years.

In the Zinn case (6) it has been held that a benefit of compromise accruing to a company reduces the balance of the assessed loss, but this should not be added to the gross income of the company. Furthermore, it was held in the case that such compromise benefit reduces the balance of the assessed loss to be carried forward at the end of the year of assessment, and that it does not reduce the assessed loss carried forward from the previous year. The provisions of Section 20(1)(a)(ii) should therefore be kept in mind, and the operation thereof may be avoided by minimizing compromises with creditors.

Cession of Rights of Recovery by Creditors

Usually in the event of a company in provisional liquidation, a determined or determinable amount is made available by the initiator, which is mainly intended for distribution amongst the creditors of the company. Secured and preferent creditors are normally to be paid in full, or to the extent of their security or preference, and concurrent creditors are to receive a dividend. Once the scheme is approved by court, the company is released from provisional liquidation. It must be kept in mind that as soon as a company is placed under provisional liquidation, all creditors of the company have an interest in the fate of the liquidation process, and any one of them may oppose confirmation of the provisional order or in circumstances join the application as joint applicant. The issue of the cession of creditors'rights of recovery to the initiator of a scheme is therefore also an important characteristic of a scheme under the Section.

Recovery from Liquidation

Upon the approval of a scheme by court, and the simultaneous release from provisional liquidation the company can once again act freely through its directors. Futhermore the company has only one known creditor,and the old

creditors cannot again apply for liquidation on the basis of their previously existing claims (7). This situation reflects an arrangement between a company and its creditors, but in view of the insolvency of a company it is seldom that in such an event the arrangement will only be made between the company and its creditors (8). The standard offer is also made to the liquidator; and particularly where a company has obtained a provisional order of its own accord, the offer is also aimed at getting the consent of the liquidator to a release form liquidation. In practice therefore, the liquidator is the suitable (and possibly the only) person to launch an application in terms of Section 311(1) (9). The company must be passive in these proceedings, simply because after the provisional liquidation the control over the company vests in the provisional liquidator. In a secondary sense however,the arrangement, as seen, contains one between the company and its creditors.

Variety of Uses

A company in financial difficulty, or on the verge of, but in an attempt to avoid liquidation,can utilise the procedure in order to seek concessions from creditors to avoid liquidation, to raise additional funds from existing shareholders or from an outside party, to modify the rights of creditors and shareholders inter se, and to determine a dispute over rights and their enforcement.

Furthermore other advantageous uses, would be to effect amalgamations or reconstructions (10), or mergers and takeovers (11). A general underlying policy issue, is that of the retention of the benefit of assets, goodwill, trademarks, permits etcetera, as a reason for applying for he approval of a scheme.

All the above reasons for the proposal of an arrangement or compromise, require and result in the alteration of established rights. Such alteration of rights may be contractually created, and Section 311 offers a procedure by which the fairly common impossibility or difficulty to negotiate with each creditor or member may be overcome. Apart from that,it assists in the prevention of the frustration of a beneficial scheme by a minority of class members.

PROCEDURE

The procedure followed in respect of Section 311, corresponds largely with those followed in terms of similar legislation in England and Australia (11). There are four identifiable phases to the procedure to be followed. In the first place an application is made to court to summon the requisite meetings. Once the court has granted an order for the meetings to be held, the meetings are convened and held where the proposed scheme is discussed and voted upon. Thereafter a further application is to be made to court in order to obtain sanction for the proposed compromise or arrangement. If the court sanctions the scheme, the compromise or arrangement will have no effect until the sanction order has been registered with the Registrar of Companies in terms of Section 311(6)(a).

Consent to Convene

In the papers for the application for consent to convene meetings, sufficient information must be set out in order to convince the court that there is a reasonable probability that the requisite statutory majority of creditors or members of the company may accept the scheme. Furthermore, the bona fides

of the initiator of the scheme should be fully dealt with in order to convince the court that on the face of it, the scheme appears to have been made made honestly and in good faith. The terms of the proposed scheme should be set out in unambiguous and understandable terms. Sufficient background information as well as information concerning the scheme itself should have been gathered and set out in full. This information should be set out in such a manner that when it is furnished to the creditors or members it may be reasonably expected that on the basis thereof they will be able to assess the relative merit to the scheme and any alternatives thereto (13).

When the court consents to the meetings being held, it will also set out in its order certain directions according to which the meetings are to be held. Section 311(2) refers to the requisite statutory majorities being attained by members or creditors present and voting either in person or by proxy at the meetings. Often the voting is a mere formality by reason of this provision, brought about by the non-attendance of creditors or members to protect their interests.

Sanctioning of Scheme

When the requisite majority approval has been obtained, the court has to be approached yet again by means of an application to exercise its discretion in favour of the sanctioning of a compromise or arrangement. The applicant bears the onus of proof that on the basis of his averments, the court ought to grant the sanction. The applicant should inter alia state in his affidavit that the statutory provisions (including the matter contained in Section 312) have been complied with, and that there has been a fair representation by those present of the classes of creditors or members. The court will investigate the motives of those voting in favour of the compromise or arrangement; and accordingly it

must be clearly established in the papers that such persons have been acting bona fide in the interests of a particular class. At the same time, the rights and to an extent the interests of all the different classes of creditors and/or members will be weighed up in order to ascertain as to whether they all receive reasonably fair treatment within the scheme.

Furthermore the scheme will be evaluated objectively in order to to determine whether it may be reasonably expected to be approved by an average businessman. An important underlying issue in all instances, is one of public interest and commercial morality. In this respect the provisions of Section 424 (14) will be brought into consideration, in particular whether the submission of the scheme itself, or any action relating to it may give rise to proceedings in terms thereof, to obtain an order rendering personally liable all persons who had knowingly participated in any fraudulent or reckless conduct of the business of the company.

Company discharged from Winding Up

In the event of an offer of arrangement or compromise pertaining to a company being woundup, there is a term providing for the discharge of the winding up order, or the dissolution of the company without winding up, the liquidator must submit a report to the Master in terms Section 400(2), as well as a report as to whether or not any director or officer or past director or officer of the company is or appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company under any provision of the Companies Act. The Master shall then apply his mind to these reports, and render a report thereon to the court (15). The report of the liquidator is to be requested well in advance and the report of the Master obtained in good time for filing with the papers at court.

The sanctioning or otherwise of the scheme is entirely in the discretion of the court, and for the exercise of this discretion there have been certain guidelines set out in the case law, and these guidelines should not be seen as limitations on the discretion of the court. In spite of an approval by the requisite majority, the court still exercises its discretion and does not act as a mere rubberstamp (16).

The Appellate Division (17) has given consideration to these issues, and stated the position as follows:

> "'At the stage of an application for leave to convene meetings the court is primarily concerned with the probable response to the offer of the creditors:
> 'If the Court, on a consideration of all the information at its disposal, comes to the conclusion that there is a reasonable probability that the requisite majority of the creditors of the company may accept the offer, it will, generally speaking, order a meeting of creditors to be convened; on the other hand, if it is not so satisfied, it will refuse to make such an order.'

Per Trengrove J in Ex parte Bruyns NO: In re Mammoth Construction & Drilling Co (Pty) Ltd (under Provisional Liquidation) 1973 (3) SA 721 (T) at 722B-C.

While that is the primary question, the Court is also concerned that the offer, on the face of it, appears to be made in good faith and honestly, and that its terms are unambiguous and understandable.

Over a century ago, Fry LJ posed the question as to the circumstances in which a Court should sanction a resolution approving a compromise or

arrangement under the relevant provisions of the 1870 Joint Stock Companies Arrangement Act. He said the following in In re Alabama New Orleans, Texas and Pacific Junction Railway Company [1891] 1 Ch 213 at 247:

> 'I shall not attempt to define what elements may enter into the consideration of the Court beyond this, that I do not doubt for a moment that the Court is bound to ascertain that all the conditions required by the statute have been complied with; it is bound to be satisfied that the proposition was made in good faith; and, further, it must be satisfied that the proposal was at least fair and reasonable, as that an intelligent and honest man, who is a member of the class, and acting alone in respect of his interest as such a member, might approve of it. What other circumstances the Court may take into consideration I will not attempt to forecast.'

I would respectfully adopt that formulation. It is clearly the proper approach at the sanction stage. Although compliance with the statutory conditions will not be relevant at the stage of convening meetings, the other considerations referred to by Fry LJ are no less appropriate. They strike a balance between the duty of the Court to be satisfied that the offer appears to be fair and honest, and the recognition that it should not dictate to men of business what is in their own interests.

It would be inappropriate to attempt to formulate a more precise rule in a matter of discretion and in a context where the variety of facts and circumstances is endless."

The Court considering such an application should also be satisfied that sufficient information has been gathered and can be furnished to the creditors

to enable them to assess the relative merits of the proposal and of the alternatives thereto. Indeed Section 312(1) of the Act requires that, where meetings are summoned under Section 311, every creditor or member must be sent a statement containing the information set out in subparagraph (a) thereof. A draft of that statement need not be placed before the Court at the stage of an application for leave to convene meetings. At the sanction stage it must clearly be before the Court in order that it may satisfy itself that the provisions of Section 312(1) have been observed.

When a compromise or arrangement has been sanctioned by the court,a contract, although not yet effective, comes into being between the company, and the creditors or members of the company.

In the case of Ex Parte Ensor (18) it was stated by Didcott J that even though the compromise comes into being through the order of the court, it is still intrinsically a contract. In spite of the contract being brought into operation by the court, it has the same level of control over it as with any other sort of contract. Also in the Robin case (19) an arrangement was characterised as "plainly contractual, albeit compulsory in respect of the minority". This contractual nature remains just that, even though third persons like the proposer or a receiver must make finance available or execute certain administrative or other acts.

In terms of Section 311(6)(a) an order of the court sanctioning a compromise or arrangement shall have no effect until the lodgement in the prescribed form of a certified copy thereof with the Registrar of Companies, and the registration thereof by him. Section 311(6)(b) provides that every copy of the memorandum of the company issued after the date of the order shall be

accompanied by a copy of the court order as annexure; and a failure to do so shall be a criminal offence in terms of section 311(7).

CHAPTER FOUR

ARRANGEMENT AND COMPROMISE BETWEEN A COMPANY AND ITS CREDITORS, AND ARRANGEMENT BETWEEN A COMPANY AND ITS MEMBERS

THE COMPANY AND ITS CREDITORS:

For some years, firstly under Section 103 of the Companies Act of 1926, and thereafter under the present Section 311 a standard procedure was developed and in common use, consisting of certain uniform elements. In the case of a company under provisional liquidation, an outsider would offer to make a certain amount available for distribution amongst creditors of the company. Secured creditors would be paid in full or to the extent of their security or preference, and a concurrent creditor would receive a dividend. Such payment would only be received by creditors who submitted proof of their claims in a prescribed manner. Usually upon approval of the scheme, the creditors would be deemed to have ceded their rights of recovery against the company to the offeror. The fictitious cession would not be the full claim, but one diminished by a certain portion thereof. Once the scheme was approved the company would be released from provisional liquidation (1).

Earlier (2) the "uniform elements" appear to have been an offer by an outsider to acquire by cession the claims of creditors against payment; and secured and preferent creditors would not receive less thereof than they would have

received upon winding up of the company. Concurrent creditors would receive a greater dividend than what they would receive upon winding up of the company. The issue was then cast into disarray on the basis that a scheme such as this could not be termed a compromise between the company and its creditors, as there was no element of an adjustment of rights present between the parties as debtor and creditor. Accordingly the matter was thought to have been cleared up by the insertion of a term containing a reduction of the claim of each creditor by a nominal amount, thus inserting an element of compromise (3). This nominal reduction became a common feature in every compromise, and schemes of this nature became known as the standard scheme (4). These schemes were expressed to be commercially beneficial, as the initiator gained control over the company, often with an assessed loss usable for income tax purposes whilst the company could continue trading as before, not in insolvent circumstances (5).

The standard scheme was however temporarily brought to a halt in the Transvaal and the Cape, where a fatal defect was identified therein (6), whilst in Natal the validity thereof was upheld (7). The basis for the rejection of the scheme was that a scheme of this nature was in reality an arrangement between the initiator and the creditors of the company, and not one between the company and its creditors. The Appellate Division albeit with a minority decision, has now by its rejection of the view that the company is not involved in a scheme of this nature, opened the door for the return of the standard scheme (8). The result is that the door has now apparently once again been opened for the use of the standard scheme in its later form, without the permutations used in order to overcome the problems arising from the rejection thereof.

The later form consisted of an agreed nominal reduction of claims by the creditors, and thereafter a deemed cession of these reduced claims to the initiator against payment of the amount payable in terms of the arrangement or compromise. The reason for the nominal reduction, was that it was believed that the jurisdictional requirements concerning an arrangement or compromise between the company and its creditors as contained in section 311 were being satisfied by such reduction.

Robin

Coetzee DJP, in the Robin case (9) rejected the standard scheme on the basis that the court could only order a meeting to consider an arrangement between a company and its creditors or members. A third party could be involved, but if he is a party to the exclusion of one of the others the prerequisites of Section 311 are not being complied with. Accordingly in this case it was held that in the event of the cession of the reduced claim, there was merely a compromise between the offeror and the creditors of the company. The view that the nominal reduction of the claim validated the arrangement between the company and its creditors was rejected by the court.

It identified two parts to any ordinary compromise or arrangement, namely the substance which can be the subject of an order under Section 311, and the conditions for the implementation of the scheme, which conditions could not stand alone. The substance of the particular scheme was a nominal reduction of creditors' claims, and the proposed cession thereof was not related to the implementation thereof. The court held that the ancillary conditions were included for the implementation of the cession and not the reduction part of the contract. The cession part of the contract, as an arrangement between the creditors and the offeror, was disregarded leaving the reduction aspect only which was not relevant to anyone.

Multi-Bou

The Cape Provincial Division in the Multi-Bou case (10) held as in the Robin case , that the substance of a standard scheme is the cession of the reduced claims of the creditors of the company. As the cessions did not involve the consent or participation of the company, it could not be described as an arrangement between the company and its creditors. Berman J held that the scope and purpose of the section is limited to the consideration of an arrangement between the company and its creditors, and not one between its creditors, or its creditors and a third party. Unless there is an arrangement with or without the inclusion and participation of a third party, between the company and its creditors, an application to have the scheme referred to meetings of creditors cannot succeed. Furthermore, if there is no reduction of creditors' claims, the cession against payment between the creditors and the offeror, is an arrangement which does not involve the company. An agreement to reduce, likewise does not involve the company, being merely an instruction to the company to reflect reductions in its books of account. The reduction is also not a compromise as this presupposes a dispute. The court further rejected counsel for the applicant's argument that the company's agreement would be necessary for the partial cession to be effective and enforceable.

Strydom

The position in Natal was however different, in that Friedman J (11) held that the standard scheme fell within the ambit of Section 311, as the deemed cession was indeed an arrangement between the company and its creditors. In view of the fact that the cession was "deemed", the participation of the company was necessary, as it has to acknowledge a fictitious situation; and the deemed cession was an arrangement between the company and its

creditors for the purposes of Section 311. The court could differ with the judgement in the Multi-Bou case, in view of the fact that in it there was no deemed cession present. It rejected the judgement in the Robin case in view of the fact that it stressed the acquisition of the claims of the creditor, without keeping in mind its means of achievement, namely a deemed cession. Important issues referred to by the court as reasons for the standard scheme to be viewed as an arrangement between the company and its creditors, are that it is a device to obtain cession of all the creditors' claims, even those who are unknown or unwilling; and it is a device by which a company may arrange with its creditors for the equal treatment of all of them (12).

Namex

It is submitted that the Appellate Division by its minority decision in Namex (13) has now brought some clarity in respect of the use of the standard scheme. It held that if a scheme does in fact involve the company, it would fall within the ambit of Section 311(1). The terms "arrangement " and "compromise" are not synonymous; and a compromise presupposes a dispute, which an arrangement does not. Reference was made to Berman J using the word "compromise" figuratively in the Multi-Bou case(14) in classing an adjustment of rights between the company and its creditors as "the distinctive feature of compromise". A scheme in which creditors of a company would receive less than their full unopposed claim, would be an adjustment of rights .

The contention concerning the creditors' claims against the the company being reduced without its co-operation (15) was rejected, as a partial settlement of a debt requires the co-operation of the debtor (16). Van Heerden JA agreed with Coetzee AJP in the Robin case, that the mere existence of a deminution provision does not mean that a standard scheme has an arrangement between the company and its creditors as its object. The company is however involved by such a provision.

In respect of the issue of deemed (supposed) cession, it was held not to be a consensual cession, but merely deemed to be such. Such a term involving a deemed cession then implies that the company is bound to the cession by the creditor without the necessity of a consensual cession.

The aims of the initiator and the statutory mechanisms to bring them about should not be confused. In the event of all creditors accepting the offer a contract comes into being, whether Section 311 is used or not. The very purpose of the existence of the section in the statute books however is that it is a mechanism by which to hold all creditors bound to an accepted scheme, especially in the event of impossibility to obtain acceptance by all creditors. On approval, those who have not accepted become statutory parties. The reason why a cession comes into being is the binding provision of section 311(2) alone, and no consent or co-operation of the company is required . This therefore makes the debate around the deemed cession of recovery rights in schemes of arrangement irrelevant.

The point is also that a deeming provision is not aimed at an arrangement between a company and its creditors. However the scheme may still be brought into the field of Section 311(1). In this respect Van Heerden JA approved of the statement in the Multi-Bou case (17) that the section does not require that a scheme should only involve an arrangement between a company and its creditors. As a result of the insolvency it will hardly happen that an arrangement will only be between the company and its creditors. With a company in liquidation it appears to play a passive role; and the offer is also directed at the liquidator in order to release the company from liquidation. The fact that the control of the company in liquidation vests in the liquidator, indeed explains the apparent passivity of the company in such an instance.

However, even though on the face of it the company does not appear to be an active party to an arrangement, it still contains an arrangement between the company and its creditors. Without considering the issue pertaining to reduction of claims, a standard scheme may be brought under Section 311(1).

Assessed Losses

A point which the courts do not often appear to consider and pronounce on, is the important underlying purpose of a compromise or arrangement, namely, to retain the benefit of an assessed loss of a company in financial difficulty or in the process of winding up, should the company be placed on a profitable footing again. In drafting a scheme the requirements both of Section 311 and Section 20(1)(a)(i) are therefore important in respect of an arrangement or compromise between a company and its creditors. When considering the retention of an assessed loss the provisions of Section 103(2) of the Income Tax Act must however be kept in mind by the draftsman of the scheme. The section deals with the disallowance of the setting off of an assessed loss against income received, if the sole or main purpose of an agreement is the avoidance of tax. The sole or main reason for an agreement affecting the company should therefore be a commercially sound one, like obtaining the benefit of the company's assets, goodwill, trademarks, tradenames, permits etcetera, in order to avoid the operation of the section.

In order to retain the benefits of the assessed loss in respect of a particular year of assessment, the company must have carried on trade during the following year, even if it was only for a part of the particular year. The reason is that Section 20(1)(a) of the Income Tax Act requires that there should be a continuity in setting off of an assessed loss in every succeeding year after it was originally incurred, as long as the company has continued trading. A continuity in trading with the intention of earning an income therefrom is the important issue, even though no income at all is derived therefrom.

Another important provision to be kept in mind, is that contained in Section 20(1)(a)(ii), in that it provides that the balance of an assessed loss is to be reduced by the value of any benefit received or accrued as a result of a compromise with creditors as a result of which liabilities to them are reduced or extinguished. The implication of this is therefore that any concession by or compromise with the company's creditors must be limited as far as possible in the scheme. This was successfully attained in the later standard scheme by means of the minimal reduction of creditor's claims, until at least in Transvaal and the Cape the decisions in Robin and Multi-Bou temporarily demanded some rethought. The rethought involved a continued effort to retain the advantages of Section 311, and to design schemes preventing a reduction of assessed loss to the company in terms of Section 20(1)(a)(ii). It appears that now after the minority decision of the Appellate Division in the Namex case the way has been opened for a return to the use of the standard scheme.

Preference Share Schemes

During the preceding period and as a result of the Robin and Multi-Bou cases, certain attempts have been made to preserve the assessed loss of the company by amending the nature of the scheme proposed. One such scheme, known as the "preference share scheme", was approved in the Sackstein case(18) as being an arrangement between the company and its creditors. In terms of the scheme the reduced claims of the creditors are converted into preference share capital, and the creditors renounce their rights to the allotment of such shares in favour of a person nominated by the company, such person usually being the proposer of the scheme. Payment to creditors is then limited to the dividends payable in terms of the scheme. Such dividends are derived from loans to the company, usually by the proposer, or the issue and allotment of shares in the company, usually to the proposer. In the Sackstein case the preference shares were redeemable in nature, although the court makes no express reference to this. A scheme of this nature falls

within the requirements of Section 311, but relating to Section 20(1)(a)(ii) the courts have made no clear pronouncement on whether it would be able to preserve the assessed loss of the company.

Serious doubt was expressed about the scheme by Urquhart (19), inter alia because there is an extinction or reduction of liabilities to the company, which could result either from a concession by, or compromise with the creditors, and the receipt of dividends by creditors results from their renunciation of rights to the preference shares. Section 20(1)(a)(ii) applies to concessions as well as to compromises, and according to Urquhart the creditors may well be making a concession to the company as contemplated by the section. Reasons advanced for this view, are that the acceptance of preference shares instead of liabilities is a concession as liabilities rank prior to the shares on liquidation and the shares are issued at par value, but their actual value will be less.

Hope was expressed by Jooste (20) that Section 20(1)(a)(ii) could be overcome by the preference share scheme. Subsequent to the Sackstein case, on the assumption that it dealt with preference, and not redeemable preference shares, the same author was not as positive(21). In respect of preference shares the view was that the company would receive a clearly defined benefit. It has subsequently been submitted that by the adoption of a preference share scheme the company may well lose a substantial portion of its assessed loss, as a result of which the scheme would not be effective from a tax point of view (22).

On the assumption that the first article by Jooste, and the Sackstein case may be seen as dealing with the issue of redeemable preference shares, it appears

that with the issue of such shares the form of the liability of the company simply changes, with the amount thereof remaining the same. The liability to repay the debt is substituted with an obligation to redeem the shares at a par value equal to the amount of the debt.

Subordination and Capitalisation

In the standard scheme the liabilities of a company remained the same, and one creditor was merely substituted for another by means of the cession of claims of creditors. By virtue of the fact that the inherent financial position of the company did not change by such an arrangement, the court in the Robin case (23) felt that in view of possible harm by disreputable persons, public interest demanded that a scheme of this nature should not be perpetuated. As a result of an argument by counsel it was tendered that the ceded claims be subjected to subordination or be converted to new capital to render the company solvent, and the last suggestion was found to be preferable by the court.

In the Strydom case (24) the court disagreed both in respect of the stated problem in Robin, namely the insolvent company being free to continue trading in an insolvent state, as well as the proposed solution, namely, the conversion to new capital. It was in agreement that the company was insolvent in the sense that its liabilities exceeded its assets, but stated that the true test for the solvency of a company was its ability to pay its debts. There was nothing commercially and legally unsound to allow a company to continue trading in such circumstances, and there was no reason why later creditors should receive greater protection in the event of release from liquidation in terms of a sanctioned scheme of arrangement in terms of Section 311. Furthermore, in terms of Section 20(5) of the Public Accountants and Auditors Act No 80 of 1991, upon failure of a shareholder/creditor of a company trading in insolvent

circumstances to subordinate his claims against the company to those of other creditors the continued trading of the company must in any event be reported as a material irregularity. Furthermore, the capitalisation requirement was stated to be of little practical effect, in view of the fact that immediately after the sanctioning of the agreement the company was free to reduce its capital back to the situation as before. Although this issue was not canvassed by the Appellate Division in the Namex case, there was acceptance of the recovery of the company from insolvency.

Stegmann J rejected the idea of the restoration of a company to solvency by means of a subordination agreement in several judgements. He likewise rejected the view that it would provide a material safeguard for future creditors (25).

The Cape Provincial Division (26) however held that it was possible to restore a company to solvency, provided that where the liabilities in terms of the balance sheet exceed the assets, the subordinated debt remains a contingent liability. Further factors the court will take into consideration, will be if the company appears to be solvent immediately after the sanction, and the improbability of being made insolvent again by pre-sanction liabilities, as well as the availability of sufficient working capital to conduct the business of the company. It was furthermore held that subordination as opposed to capitalisation would preserve the assessed loss of the company.

The judgements by Stegmann had a wide-ranging influence on the issues surrounding subordination, until the Appellate Division brought some clarity. In effect the court held that by agreement the enforceability of a debt is made dependent upon the solvency of the debtor, and prior payment to other

debtors. Furthermore, the fact that the liabilities of the company exceed its assets, will not necessarily entail fraudulent or reckless conduct if further debts are incurred. In the event of insolvency the subordination of a claim would not interfere with statutory ranking on insolvency. There is no claim unless the other creditors are paid in full. The court pointed out that there were numerous companies trading with practically no share capital conducting business by means of loans by shareholders, and these loans will often be subordinated to ensure that it does not exceed the assets of the company. Should the views of Stegmann be accepted, the effect would be that numerous officers of private companies would have been acting unlawfully or dishonestly for decades (27).

Section 20(1)(a)(ii) applies only if all the requirements thereof are satisfied, including a reduction or removal of liabilities arising out of the compromise between the company and its creditors (28). A concession made by the company does not necessarily involve the reduction or extinction of a liability.

Excluded Creditor Scheme

The Cape Provincial Division was in support of the view that the solvency of a company could be obtained by subordination and not capitalisation (29) and on the basis of this and subsequent to the Robin and Multi-Bou cases the "excluded creditor scheme" was developed. In this sort of scheme the proposer lends money to the company, but certain creditors are excluded from the operation of the scheme. A compromise of the claims of scheme creditors takes place and are discharged fully, against payment of a monetary dividend, and often from the proceeds of the sale of company assets. The claims of the excluded creditors are dealt with outside the scheme, by means of cession between the creditor and the proposer without involving the company. Usually the proposer pays the creditor the same dividend for such cession, as the

scheme creditors receive. As the claims of the excluded creditors usually form a large portion of the total of the claims against the company, the total value of the scheme creditors is relatively small. The assessed loss is then reduced in terms of Section 20(1)(a)(ii) by this relatively small amount. The cession of the excluded creditors is no cause for setoff against the assessed loss, as it is not part of the scheme. The result of the scheme is the complete discharge of the claims of the scheme creditors, and the vesting of the excluded claims, subject to the subordination.

New Cape Scheme

Inter alia due to difficulties in agreeing with all creditors, as well as the dangers of the proposers being held at ransom by creditors outside the scheme, further attempts were made to devise alternatives in terms of Section 311 whilst retaining most or all of the assessed loss. The result was a judgement by the Cape of Good Hope Provincial Division concerning a scheme of arrangement in terms of which the proposer would lend the company a capital sum for the payment of dividends to its creditors subject to certain conditions (30). The conditions are that should the scheme be sanctioned, the creditors would only be entitled to receive their dividend in terms of the scheme, and no creditor shall have further claims against the company thereafter apart from this. Any outstanding claims of the creditors shall furthermore be deemed to have been ceded to the proposer who shall be deemed to have purchased and acquired them, and the capital sum and the ceded claims shall be subject to subordination.

In practice the effect of this new scheme, is that the company will be solvent and in a position to continue trading. It furthermore differs materially from the standard scheme, and no reliance is placed upon the varied standard scheme as encountered in the Multi-Bou case. The absence of the claims of scheme

creditors, embodies a compromise between the company and the scheme creditors. The company itself acquires funds for the compromise, and this constitutes an arrangement between the company and its creditors in accordance with Section 311. This sort of scheme is not subject to the objections raised in the Robin and Multi-Bou cases primarily because of the clear involvement of the company itself in the operation of the scheme.

Debenture Scheme

A further sort of scheme to which brief reference may be made, and which was developed subsequent to the Robin case, is the so-called "debenture scheme". The principles therein contained are the same as those in the preference share scheme, except that instead of the issue of redeemable preference shares, debentures are created and issued. Advantages of this sort of scheme are again that the company is directly involved, in that it issues the debentures, and accordingly it may be termed a scheme which encompasses an arrangement between the company and its creditors. Furthermore the assessed loss of the company is preserved, and the debentures are subordinated.

In spite of the "new Cape scheme" and other forms serving an important purpose in commerce, the submission is that there is now no necessity to endeavour to bypass the implications of the Robin and Multi-Bou decisions by putting together complicated schemes of arrangement or compromise, in order to come within the ambit of Section 311, and to preserve the assessed loss of a company. The way is now clear for a return to the standard scheme as discussed above.

THE COMPANY AND ITS MEMBERS

The procedure under Section 311, as opposed to other procedures under the Companies Act is often used in order to bring about takeovers and mergers (31), mostly by reason of the voting procedures for the approval of a scheme in Section 311(2). What usually happens in the event of the acquisition of all the shares, or the shares of a particular class, the reorganisation of the authorised and issued share capital of the offeree company takes place, whereby the offeror becomes the holder of such shares. The courts have rather inconsistently approached the question whether such takeover may be effected by means of Section 311, especially where there are other procedures in the Act to effect the same result (32).

Federale

In the Federale case (33) the company holding the majority of the ordinary shares in another, would become the only ordinary shareholder of such company by way of the cancellation of the ordinary shares of the minority sharehoders therein. In accordance with this, the company would effect a reduction of capital. The minorities on the other hand would receive shares in the takeover company. It was held by the court that one could view the events in the company being taken over as an arrangement between it and its minority shareholders in terms of section 311. The shares in the takeover company, represented the compensating advantage to the minority shareholders of the other company. At the same time it was held not to be a takeover as defined in Section 314(1) as there was no offer for the acquisition of shares. The court also implied that provided there was indeed an arrangement between a company and its members, the existence of the provisions for a takeover in Sections 314-321 did not militate against the use of the arrangement procedure in section 311 in order to effect a takeover (34).

Satbel

After the Satbel case (35) the use of Section 311 to effect takeovers was severely limited. In this case the shares of existing shareholders would be taken over by means of a payment in cash. According to the court, in order to comply with section 311(1), there must at least be a re-arrangement of shareholders' rights; and where the rights of shareholders disappear completely against payment, there is no re-arrangement, but an expropriation. An arrangement meant not a disappearance, but the survival of rights in a different form.

Natal Coal

In the Natal Coal case (36) the minority shareholders were to receive money in return for the compulsory acquisition of their shares. Here the court was of the same view as in the Satbel case.

Suiderland

The Suiderland case (37) dealt with two schemes of arrangement in respect of two associate companies. Here the Cape Provincial Division differed from the decisions in the Natal Coal and Satbel cases. There was to be a reduction of capital, and the majority shareholders were to take over the shares of the minority shareholders. Shares of the minority were to be cancelled against payment of cash. It was held that the scheme was an arrangement within the meaning of Section 311, and the cash payment was the compensating advantage. Only in the event of a confiscation, namely the loss of rights without receiving anything in return, would there not be the requisite element of give and take.

NBSA

The NBSA case (38) dealt with a proposed scheme in which the entire issued share capital in various property owning companies was to be acquired by a management company, during the formation of a property fund in terms of the Unit Trusts Act. An arrangement was proposed in terms of Section 311 between the company and its members, which arrangement would involve the reorganisation of the capital structure of the company, and the transfer of the resulting shares to the property fund against payment of cash. It was held that the arrangement was one between the company and its members, and fell within the ambit of section 311. Coetzee DJP stated that it was incorrect to hold, as he did in the Satbel case, that a cancellation or an acquisition of shares against payment of money could not fall in with Section 311. Goldstone J stated that a cash payment for shares removed the matter from the operation of Section 311.

In respect of the use of Section 311 in order to attain a reduction of capital, Coetzee DJP disagreed with the Suiderland case in that he felt that the Section 311 procedure was not an alternative to other statutorily prescribed procedures. He was of the opinion that once a scheme involved a reduction of capital, it could not be attained by the procedure in Section 311. However he did not find anything wrong with a reduction of capital being done in conjunction with the Section 311 procedure. He concluded therefore that the decision in the Natal Coal was correct, although not for the same reasons.

It may be noted that the view in the Suiderland case is supported by English and Australian authorities (39). Therefore, where the totality of the scheme is in the ambit of Section 311, then notwithstanding the fact that part of the scheme has a reduction of capital as a result, Section 311 may be followed, as the reduction of capital is but one step in a whole series.

Meyer

In the Meyer case (40) the court heard an application in terms of section 311 for the sanctioning of a scheme of arrangement, in terms of which the applicant company would become the wholly owned subsidiary of its majority shareholders. Certain minority shareholders opposed the sanction. The scheme was sanctioned by the court, and inter alia held that good and sufficient reasons for the proposed scheme had been advanced, adequately supported by the documentation filed. Furthermore Section 314 required an offer by the offeror company directly made to the shareholders, without consideration of the offeree company, and this was not being complied with. Even if the requirements of Section 314 had been met this was no bar to proceedings in terms of Section 311, if the requirements thereof could be met. The only limitations in respect of an arrangement in terms of Section 311, were that the court could not authorise something contrary to general law or wholly ultra vires the company, and upon the reduction of capital the formalities must also be complied with.

Mielie-Kip

In the Mielie-Kip case (41) an arrangement was proposed for the acquisition of all the shares of the minority shareholders in one company by another, in return for which the minority would receive a certain amount in cash. The essential element was a purchase and sale of shares, and therefore the court decided that the proposed scheme was not an arrangement as provided for in Section 311. Flemming DJP held that Section 311 essentially required an absence of unanimous consent to a beneficial scheme when the scheme involved an adjustment of rights. What is required is a binding adjustment or altered basis with some bearing on what had previously been in existence, and this could relate only to a transaction directly affecting the proprietary rights

of shareholders in their shares. The relationship between the company and its members must be affected. The court held further that a purchase of shares is an arrangement between a purchaser and seller, and not between the company and its members. An important statement in this case, is that the court will look at the totality of the proposed arrangement to see if it creates a sufficient arrangement between the company and its members to fall within Section 311. A question raised obiter was why Section 311 should be available to a party about to attempt a takeover, when section 314 can be utilised for that purpose.

Garlick

In the Garlick case (42) the applicant had leave to convene a meeting of shareholders to consider a scheme of arrangement proposed in terms of Section 311. The proposal entailed the acquisition of all the issued ordinary shares of the company not owned by it or its wholly owned subsidiaries and their nominees. Shareholders would receive cash for each existing share of the company. The scheme of arrangement was sanctioned by the court. As in the Mielie-Kip case the final effect of the scheme was the acquisition of shares of members against payment of cash, but the scheme differed materially from the Mielie-Kip case in the sense that the manner in which the scheme was structured and proposed reflected the company very much as an involved party to the scheme.

The object of the scheme, that is the acquisition of shares, according to the court, did not remove the scheme from the ambit of an arrangement as contemplated by Section 311.

Therefore, Section 311 as opposed to the repealed Section 314 can be used to effect a takeover, provided the scheme of arrangement is between the company and its members. It may be remembered that the Code acknowledges takeovers can be effected by means of an arrangement in terms of Section 311. The applicable provisions of the Code must however be followed.

CHAPTER FIVE

CONCLUSION

Central issues in the struggle around the application of section 311 and the ancillary legislation have been the involvement or not of the company, and the preservation of the assessed loss to the company. The Appellate Division has now especially in its acceptance of the fact that a standard scheme may be brought home under Section 311, (1) ensured that the standard scheme will be available for beneficial use, especially in the instance of companies in provisional liquidation. Admittedly the majority found it unnecessary to decide whether the standard scheme represented an arrangement or compromise between the company and its creditors. It was however held by the majority that in view of their usefulness and value to the business sector the provisions of the section should not be narrowly interpreted. Importantly the involvement of the company does not need to be significant. The submission is nonetheless that the judgment by Van Heerden JA will weigh heavily in favour of the sanctioning of a standard scheme by our courts in future.

It would appear that from the point of view of the industry, and with the benefit of hindsight that the period of uncertainty before the Namex decision had some favourable effect. The Robin and Multi-Bou decisions namely had the effect that members of the industry were forced to devise a variety of alternate schemes, which will continue to be of application with suitably favourable effect for some time in a wide variety of circumstances which may present themselves.

Clearly there is no certainty in respect of the matters in which the courts will exercise their discretion, and an attempt to formulate exact rules for the exercise of such discretion would be unwise. The term "arrangement" for instance is accepted to have a wide meaning, and in fact if an arrangement is not contrary to general law or wholly ultra vires the company, and it touches the rights and obligations of the company and its members and/or creditors, such arrangement may be brought under Section 311. The courts, without limiting their discretion, will constantly weigh up the jurisdictional requirements of section 311, and the interests of the majority and any dissenting minority, as well as public policy. They will attempt as far as possible not to interfere in ordinary well-established business practices.

FOOTNOTES

Chapter 1

1. Examples of such instances are dealt with in Chapter 3.

2. See the cases discussed in Chapter 3.

3. Examples are dealt with in Chapter 3.

4. Section 311(2) and Section 312.

5. See Chapter 4 and *Namex (Pty) Ltd v CIR 1994 (2) SA 265 (A).*

6. See *Ex parte Kaplan & Others NNO: In Re Robin Consolidated Industries Limited 1987 (3) SA 413 (W).*

7. See reference in footnote 5 above. The submission is that the Van Heerden JA minority judgment will have the effect that the courts will henceforth give positive consideration to applications for the sanctioning of standard schemes. Accordingly, reference throughout is to the judgment by Van Heerden JA, unless expressly indicated otherwise.

Chapter 2

1. Henochsberg on the Companies Act, 4Ed, note on compromises and arrangements, page 496.

2. *Ex parte NBSA Centre Ltd 1987 (2) SA 783 (W) at 787G.*
   Paterson & Ednie, 2 Ed, Vol II at 2374.

3. Henochsberg supra, page 499.

4. Paterson & Ednie supra Footnote 2.

5. NBSA Centre supra, footnote 2.

6. *Re:International Harvester Company of Australia (Pty) Ltd (1955) VLR 669 (FC)* per Louw, ACJ at 672 quoted in Paterson & Ednie supra at 2375 (see footnote 2).

7. *Ex parte Cyrildene Heights (Pty) Ltd 1966 (1) SA 507 (W).*

8. *Namex (Pty) Ltd v CIR 1994 (2) SA 265 (A).*

9. *Ex parte Millman & Others NNO in re Multi-Bou (Pty) Ltd & Others 1987 (4) SA 405 (C).*

10. *Ex parte Kaplan & Others NNO: In Re Robin Consolidated Industries Ltd 1987 (3) SA 413 (W).*

11. See reference footnote 9.

12. *Ex parte Strydom NO: In Re Central Plumbing Works (Natal) (Pty) Ltd, Ex parte Spendiff NO: In Re Candida Footwear Manufacturing (Pty) Ltd, Ex parte Spendiff NO: In Re Jerseyside (Pty) Ltd 1988 (1) SA 616 (D).*

13. Multi-Bou supra footnote 9 at 411F.

14. See Namex supra Footnote 8.

15. Ibid, and Robin supra, footnote 10 at 426 B-C.

16. See Multi-Bou supra Footnote 9 at 411 E.

17. See Robin supra Footnote 10 at 420C-E.

18. See Strydom supra footnote 12.

19. See Strydom supra footnote 12 at 622A.

20. See Namex supra footnote 8.

21. Ibid.

22. Multi-Bou supra footnote 9, at 411D and Namex supra footnote 8.

23. *Ex parte Dayananden: In Re Windsor Supply Stores (Pty) Ltd (inliquidation) 1953 (1) SA 28 (N) at 29F,*
Namex supra footnote 8.

24. *Ensor v South Pine Properties (Pty) Ltd 1978 (2) SA 755 (N)*
Borgelt v Millman NO 1983 (1) SA 757 (C)
Ex parte Garlick Limited 1990 (4) SA 324 (C),
CCH Australian Company Law & Practice at 33, 324-33, 332; 33, 601-33, 603.

25. *Sovereign Life Assurance Company v Dood [1892] QB 573 (CA) at 583.*

26. See footnote 24.

27. CCH Australian Comapny Law & Practice Vol 243-500.
Ex parte Goldreich: In Re Goldleiff Stores (Pty) Ltd and Lane-Bryant (Pty) Ltd 1956 (2) PH (N).

28. See Namex supra footnote 8.

29. Ibid. Compare with Goldstone JA (majority decision): reference to a narrow interpretation.

30. Ibid.

31. Ibid.

32. *Incorporated General Insurances Ltd v Cement Distributors (SA) (Pty) Ltd 1990 (1) SA 132 (A) at 136H-I.*

33. *Ex parte Voysey Bond Property Investment Ltd 1978 (2) SA 134 (D).*

34. See footnote 32.

35. Compare later case of Robin footnote 10.

36. *Mercian Investments (Pty) Ltd v Johannesburg City Council 1990 (1) SA 560 (W).*

37. See quote in Mercian of *Parker v WGB Kinsey & Co (PVT) Ltd.*

38. See Mercian footnote 36 at 573B-G.

39. Ibid at 573I-J.

40. Namex supra footnote 8, referring to the Income Tax Act No 58 of 1962 as amended and the Treasury Act of 1975, and the authorities relied on in the a quo decision.

41. *City of Cape Town v Claremont Union College 1934 AD 414,450.*

42. Voet 2.15.2.

43. See *Collector of Customs v Cape Central Railways (1888) 6 SC 402,408,*
Burgersdorp Municipality v Coney 1936 CPD 305,308 quoted in Namex supra, footnote 8.

44. See footnote 36

45. Ibid. at 573B.

46. See footnote 8.

47. Ibid.

48. Ibid., arguments of counsel.

49. *South African Board of Executors & Trust Company Limited (inliquidation) v Gluckman 1967 (1) SA 534 (A).*

50. See footnote 8.

51. *Densam (Pty) Ltd v Cywilnat (Pty) Ltd 1991 (1) SA 100 (A) 112-3.*

52. See footnote 8. This conclusion by Van Heerden JA is, with respect, logically correct. The submission is however that the point may be taken up by the Appellate Division again, should for the falling away of a claim of the fiscus be in issue.

53. Affected transactions are defined in the Code.

54. Section 440L of the Companies Act.

55. *Ex parte De Villiers in re MSL Publications (Pty) Ltd (inliquidation) 1990 (4) SA 59 (W).*

56. *Ex parte Lebowa Development Corporation Ltd 1989 (3) SA 71 (T),*
Singer NO v MJ Greeff Electrical Contractors (Pty) 1990 (1) SA 530 (W),
Ex parte De Villiers & Another NNO in re: Carbon Developments (in liquidation) 1992 (2) SA 95 (W), subsequently on appeal.

57. See Carbon case footnote 56.

58. *Pressma Services (Pty) Ltd v Schuttler & Another 1990 (2) SA 411 (C).*

59. See footnote 56.

60. 1993 (1) SA 493 (A).

61. *Du Preez v Garber in re Die Boerebank Bpk 1963 (1) SA 806 (W).*

62. *Ensor NO v South Pine Property & Another 1978 (2) SA 755 (N) at 760.*

63. See the provisions in the subsections.

Chapter 3

1. Section 311 inter alia provides "... in the case of a Company being wound up, of the liquidator, or if the Company is subject to a judicial management order...".

2. Per Van Heerden JA in *Namex (Pty) Ltd v CIR 1994 (2) SA 265 (A), quoting Ex parte Dyananden: in re Windsor Supply Stores (Pty) Ltd (in liquidation) 1953 (1) SA 28 (N) 29F.*

3. Mark Stranex: 1989 *Overseas Business Law,* page 177 in "The Scheme of Arrangement in South African Company Law".

4. See *re: International Harvester Company of Australia (Pty) Limited (1955) VLR 669 (FC)* per Louw ACJ at 672 in Paterson & Ednie, 2 Ed, Vol 11 at 2374 quoted in *Ex parte NBSA Centre Limited 1987 (2) SA 783 (W) at 787G.*

5. See reference in footnote 4.

6. *CIR v Louis Zinn Organisation 22 SATC 85, and 1958 (4) SA 477 (A).*

7. *Serein Investments (Pty) Ltd v Myb (Pty) Ltd 1967 (4) SA 437 at 439B* quoted in *Namex (Pty) Ltd v CIR 1994 (2) SA 265 (A).*

8. Per Van Heerden JA in Namex - see reference footnote 7.

9. See footnote 8.

10. See Sections 311-313 of the Companies Act; and The Securities Regulation Code on Takeovers and Mergers ("The Code") and The Rules of the Securities Regulation Panel ("The Rules").

11. Compare Sections 83-90, and Section 98 of the Companies Act.

12. Section 425 of the Companies Act 1985 and Section 315 of the Companies Code.

13. See Section 312, and *Ensor NO v South Pine Property & Another 1978 (2) SA 755 (N) at 760.*

14. The provision in the Companies Act rendering all persons personally liable who knowingly had participated in any fraudulent or reckless conduct of the business of the Company.

15. See the wording of Section 311(4).

16. See Henochsberg pp 510-511, and the cases relied on; CCH Australian Company Law and Practice at 33, 351-33, 354 and Gower: Principles of Modern Company Law, 5 Ed (1992) at 696-697; *Carbon Developments (Pty) Ltd (in liquidation) 1993 (1) SA 493 (A) at 507H-508G.*

17. See Carbon Developments case, footnote 16

18. *Ex parte Ensor: In Re Cape Natal Litho (Pty) Ltd (in liquidation) 1978 (3) SA 908 (D).*

19. *Ex parte Kaplan and Others NNO: In Re Robin Consolidated Industries Limited 1987 (3) SA 413 (W).*

Chapter 4

1. See *Namex (Pty) Ltd v CIR 1994 (2) SA 265 (A).*

2. Until amongst others the decision in *Ex parte Millman & Others NNO in re: Multi-Bou (Pty) Ltd & Others 1987 (4) SA 405 (C) at 408.*

3. Ibid at 409.

4. Approved in Namex (footnote 1).

5. Ibid.

6. See *Ex parte Kaplan NNO: in re Robin Consolidated Industries Limited 1987 (3) SA 413 (W).*

7. *Ex parte Strydom NO: In Re Central Plumbing Works (Natal) (Pty) Ltd, Ex parte Spendiff NO: In Re Candida Footwear Manufacturing (Pty) Ltd, Ex parte Spendiff NO: In re Jerseyside (Pty) Ltd 1988 (1) SA 616 (D).*

8. See Namex-footnote 1.

9. Reference footnote 6.

10. Reference footnote 2.

11. Reference footnote 7.

12. Reference footnote 7, at 622 B-D.

13. Reference footnote 1.

14. Per Van Heerden JA: Berman J stated that an arrangement must contain an element of compromise. See Multi-Bou (footnote 2) at 409 C.

15. See Multi-Bou (footnote 2) at 411F.

16. Van Heerden JA felt that this contention rested on a misinterpretation of the remarks of Coetzee AJP in the Robin case (footnote 6), at 426 B-C.

17. Reference in footnote 2 at 411D.

18. *Sackstein NO v Boltstone (Free State) (Pty) Ltd (in liquidation) 1988 (4) SA 556 (O).*

19. Gavin Urquhart in *Finance Week (August 27 - September 2, 1987).*

20. R J Jooste (1987) 26 *Income Tax Reporter 323 .*

21. R J Jooste (1989) 28 *Income Tax Reporter 7.*

22. *The Taxpayer,* Vol 38, No 2 Feb 1989 at 30.

23. Robin case supra (footnote 6) at 427 A-B.

24. Strydom case supra (footnote 7) at 623.

25. *Ex parte Lebowa Development Corporation Ltd 1989 (3) SA 71 (T). Ex parte De Villiers NO in re MSL Publications (Pty) Ltd (in liquidation) 1990 (4) SA 59 (W). Ex parte De Villiers & Another NNO: In Re Carbon Developments (in liquidation) 1992 (2) SA 95 (W).*

26. *Cooper v A&G Fashions (Pty) Ltd: ex parte Millman & Another 1991 (4) SA 204 (C).*

27. *Ex parte De Villiers & Another NNO: In Re Carbon Developments (in liquidation) 1993 (1) SA 493 (A).*

28. *The Taxpayer,* Vol 38 No2 Feb.1989.

29. *Cooper v A&G Fashions (Pty) Ltd: ex parte Millman & Another (reference footnote 26).*

30. *R J Walters NO & Others : In Re Lansdowne Textile Industries (Pty) Ltd Case No 12972/1991 (C) (unreported).*

31. Compare Reduction of Capital in Sections 83-90 and Redemption of Redeemable Preference Shares under Section 98.

32. See procedures in terms of Sections 83-90.

33. *Ex parte Federale Nywerhede Bpk 1975 (1) SA 826 (W).*

34. Ibid at 832-833.

35. *Ex parte Satbel: In Re Meyer v Satbel 1984 (4) SA 349 (W).*

36. *Ex parte Natal Coal Exploration Company Ltd 1985 (4) SA 279 (W).*

37. *Ex parte Suiderland Development Corporation, ex parte Kaap-Kunene Beleggings Bpk 1986 (2) SA 442 (C).*

38. *Ex parte NBSA Centre Ltd 1987 (2) SA 783 (W).*

39. See *Ex parte Suiderland (footnote 36) at 444 H-J. Also Gower op cit at 694 and cases relied on therein.*

40. *Ex parte Satbel (Pty) Ltd (Meyer NO Intervening) 1987 (3) SA 440 (W).*

41. *Ex parte Mielie-Kip (Pty) Ltd 1991 (3) SA 449 (W).*

42. *Ex parte Garlick Ltd 1990 (4) SA 324 (C).*

Chapter 5

1. *Namex (Pty) Ltd v CIR 1994 (2) SA 265 (A).*