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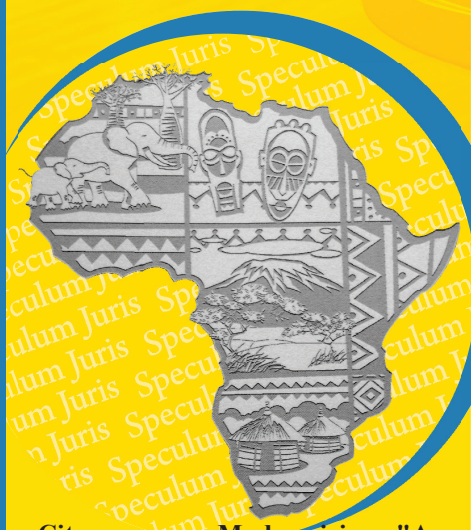

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An Assessment of Some Sticky Issues in the Regulation of Schemes of Arrangement through the Lense of *Sand Grove Opportunities Master Fund Ltd and Others v Distell Group Holdings Ltd and Others* [2022] 2 All SA 855 (WCC)

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Abstract

Schemes of arrangement form part of broader fundamental transactions and affected transactions. These transactions are regulated under the Companies Act 71 of 2008 (2008 Act) and the Companies Regulations, 2011 (Takeover Regulations). Neither the 2008 Act nor the Takeover Regulations provide a concise definition of a scheme of arrangement. The only attempt made by the legislature to shed light on what constitutes a scheme of arrangement is an array of transactions listed under section 114(1) of the 2008 Act. Notably, the character of the transactions that constitute schemes of arrangement is that they either have the effect of altering the control structure in a regulated

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company and/or at least alter securities holding in a company. A major implication for shifting control and altering ownership in a company is the conflicts of interest between different company stakeholders, in particular, directors and shareholders and/or amongst the shareholders themselves. To regulate the schemes of arrangement appropriately and adequately there is a need to align their regulation with the objectives of the 2008 Act and Takeover Regulations. Particularly, the regulation must promote investment through schemes of arrangement while at the same time balancing the obligations and rights of the directors and shareholders. This case note, grapples with the contentious issues surrounding locus standi, the prescribed time limits to access the section 115 remedy, and the prerequisites of accessing the section 115 remedy. Another contentious issue dealt with in this contribution concerns the shareholder special resolution in the context of schemes of arrangement. The above-mentioned contentious issues are evaluated through the lenses of Sand Grove Opportunities Master Fund Ltd and Others v Distell Group Holdings Ltd and Others [2022] 2 All SA 855 (WCC). This commentary applauds the judgment in Sand Grove and accepts it as an important one in that it reinforces the existing law and gives further instructional guidelines on section 115 in a manner that promotes investment whilst balancing the rights of directors and shareholders.

Keywords: scheme of arrangement; fundamental transaction; affected transaction; shareholder special resolution; *locus standi*; non-compliance; condonation

1 INTRODUCTION

The regulation of schemes of arrangement should reflect the ethos of and align with the overarching objectives of the Companies Act 71 of 2008 (2008 Act). In this context, the most relevant 2008 Act objectives that ought to be aligned with schemes of arrangement are the promotion of innovation and investment in the South African market and, conversely, balancing the rights and obligations of shareholders and directors within companies.[1] The nature and character of the schemes of arrangement affect the above-mentioned 2008 Act objectives both positively and/or negatively, for instance, facilitating the sale of shares in companies promotes investment and economic growth, however, it may potentially create conflicts of interest.[2] Hence, the regulation must ease the approval of schemes of arrangement to promote innovation and investment in South Africa, but, it must also, safeguard the checks and balances between the rights and duties of directors and shareholders and ensure compliance and minority shareholder protection.[3] The legislature has eased the implementation and attainment of schemes of arrangement by dispensing with the Court approval when implementing such transactions save for in exceptional circumstances listed under section 115(3) of the 2008 Act below.

Schemes of arrangement are not defined under the provisions of the 2008 Act and the Companies Regulations, 2011 (Takeover Regulations). However, under section 114 of the 2008 Act, there is a list of transactions that form part of schemes of arrangement. In particular, any arrangement between a company and holders of its securities, by way of, among other things, a consolidation of securities of different classes, a division of securities into different classes, exchanging any of its securities for other securities, a re-acquisition by a company of its securities, an expropriation of shares from holders and/or any combination of the methods contemplated in section 114(1).[4] In its current form, the 2008 Act distinguishes and clarifies the provisions

1 Section 7(c) and 7(i) of the Companies Act 71 of 2008 (Act 71 of 2008).

2 Luiz "Some Comments on the Scheme of Arrangement as an 'Affected Transaction' as defined in the Companies Act 71 of 2008" 2012 *PELJ* 104.

3 See ss 114 and 115 read together with ss 7, 163, and 164 of Act 71 of 2008.

4 Section 114 of Act 71 of 2008.

regulating compromises and schemes of arrangement. Cassim *et al.* applaud the 2008 Act for separating the provisions that regulate the schemes of arrangement between a company and its shareholders and sections that regulate a compromise between a company and its creditors, a distinct position from the previous Companies Act 61 of 1973 (1973 Act) which regulated these transactions under one provision.[5]

What is further known in the 2008 Act is that schemes of arrangement form part of both fundamental transactions and affected transactions.[6] The implication of the schemes of arrangement forming part of fundamental transactions and affected transactions is that apart from following the prescribed requirements unique to schemes of arrangements when implementing the transactions they must also be compliant with the general rules applicable to fundamental and affected transactions.[7] Fundamental transactions are not defined under the 2008 Act save for an indication that amalgamation or merger, disposal of all or greater part of assets or undertaking of a company, and schemes of arrangement fall under its ambit.[8] In the same light, according to section 117(1)(c) of the 2008 Act; affected transactions are constituted by all three fundamental transactions, mandatory offers, compulsory offers, section 122 acquisitions, and announced intention to acquire beneficial interest in the remaining voting rights in a regulated company.[9] This contribution focuses on the schemes of arrangement transactions, and, by implication, the rules that exclusively apply to them will be assessed as well as the broader rules that regulate fundamental and affected transactions.

One major implication of schemes of arrangement is their consequence of rearranging the ownership structure of securities and shifting control in the company.[10] Thus, these transactions often result in conflicts of interest between company stakeholders, in this context, between directors and shareholders; and also between minority and majority shareholders.[11] It is against the backdrop of the 2008 Act and Takeover Regulations that schemes of arrangement are regulated in a manner that protects the shareholders' interests by ensuring their participation in the implementation of schemes of arrangement alongside other remedies. These include section 114 protections, section 115 protection, and the appraisal and oppression remedies. In the context of schemes of arrangement, directors have limited powers in that there must be compulsory involvement of other external parties namely an independent expert and the Takeover Regulation Panel (TRP) to ensure checks and balances and importantly compliance.[12] This note applauds the involvement of third parties as potentially impartial arbiters who are expected to reasonably and objectively give their opinion on the schemes of arrangement in a manner that could increase the chances of shareholder protection, especially, the minorities, similarly, promoting the corporate objectives of accessing economic benefits.

The selected overarching contentious conflicts of interest inherent to schemes of arrangement in this commentary are based on the case of *Sand Grove Opportunities Master Fund Ltd and*

5 Cassim FHI *et al. Contemporary Company Law* 3 edn (2022) 979. See also ss 114 and 155 of Act 71 of 2008 and compare to Chapter XII of the Companies Act 61 of 1973.

6 Chapter 5 and s 117(1)(c) of Act 71 of 2008.

7 Sections 114, 115, 117, 118, 120 and 121 of Act 71 of 2008.

8 Chapter 5 of Act 71 of 2008.

9 Section 117(1)(c) of Act 71 of 2008.

10 *Sefalana Employee Benefits Organisation v Haslam* 2000 2 SA 415 (SCA) para 10. Luiz 2012 *PELJ* 104–105.

11 Seligson "Regulating Schemes of Arrangement under the New Companies Act 71 of 2008: Innovations in Minority Shareholder Protection" 2013 *Business Tax and Company Law Quarterly* 6.

12 Sections 114(2) and 114(3) read together with 115(1) of Act 71 of 2008.

Others v Distell Group Holdings Ltd and Others (*Sand Grove*).[13] The contentious queries to be addressed, include: who has *locus standi* to bring a section 115(3) application to the Court and whether bringing a section 115(3) application to Court after the prescribed period can be condoned by the Court.[14] Such questions will be considered taking cognizance of the overarching objectives of the 2008 Act and the Takeover Regulations as well as the policy rationales for schemes of arrangement in particular.

After this introduction, the case note deliberates on the facts, issues, and the Court's decision in *Sand Grove*. Then, the commentary provides some policy and scholarly debates as the yardstick in critically assessing the decision in *Sand Grove*. Thereafter, the commentary critically assesses the decision of the Court in *Sand Grove* by considering the extant policy and scholarly debates. Lastly, the case note offers some concluding remarks.

2 *SAND GROVE*: SPECIAL RESOLUTION, *LOCUS STANDI*, CONDONATION, AND BURDEN OF PROOF IN SCHEMES OF ARRANGEMENT

2 1 Fact Complex

In this matter, the applicants challenged the shareholders' special resolution that approved a scheme of arrangement proposed by the first respondent, Distell Group Holdings Ltd (Distell) to its shareholders.[15] Heineken International BV (Heineken) and Sunside Acquisitions Limited (Newco), the second and third respondents respectively were parties to the proposal.[16] Distell was at the time listed on the Johannesburg Stock Exchange (JSE) and had two classes of issued shares, namely, ordinary shares and B-class shares.[17] In summary, the proposed scheme entailed a preliminary step, the restructuring of Distell's business into two components, described in the proposal as the "In-Scope Business" and the "Out-Of-Scope Business".[18] The former was to encompass Distell's cider, ready-to-drink beverages, and spirits and wine business while the latter was to comprise the rest of Distell's current operation, including its "Scotch Whisky Business".[19] The scheme provided for in-scope business to remain as part of Distell, whereas the out-of-scope business was to be housed in an unlisted company, Capevin Holdings (Pty) Ltd (Capevin), which is currently a wholly owned subsidiary of Distell but was to cease after the arrangement was implemented.[20]

The scheme of arrangement qualified to be a "fundamental transaction" within the purview of Chapter 5 of the 2008 Act, section 114 in particular, and subject to approval prescribed in sections 115(1) and (2) of the 2008 Act.[21] Such a scheme cannot be implemented without a compliance certificate being obtained from the TRP.[22] The TRP gave its written approval for posting of a circular and independent expert's report as required by section 114(3) on 6 January 2022.[23] Section 115(2)(a) of the 2008 Act, prescribes that a scheme of arrangement must be approved

13 *Sand Grove Opportunities Master Fund Ltd and Others v Distell Group Holdings Ltd and Others* [2022] 2 All SA 855 (WCC).

14 *Sand Grove* para 35 and 44.

15 *Sand Grove* paras 1 and 2.

16 *Sand Grove* para 2.

17 *Ibid.*

18 *Sand Grove* para 3.

19 *Sand Grove* para 3.

20 *Sand Grove* para 3.

21 *Sand Grove* para 9.

22 *Sand Grove* para 11.

23 *Ibid*.

by a special resolution (75 per cent) adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose in aggregate, of at least 25 per cent of all the voting rights that are entitled to be exercised on that matter, or any higher percentage prescribed by the MOI.[24] In the present matter, the meeting was convened for a scheme of arrangement on 15 February 2022, and the scheme was approved by Distell shareholders holding 94.03 per cent of both ordinary shares and B-class shares together.[25] Holders of 5.97 per cent of the voting rights voted against the resolution and 0.01 per cent abstained.[26] As of 4 February 2022, there were 222 750 403 votable or exercisable ordinary shares, and persons representing 179 927 703 of the ordinary shares were present at a meeting which constituted 80,8 per cent of the votable ordinary shares.[27]

The number of ordinary shares that voted in favour of the resolution approving the scheme was 161 748 275, which constituted 89.9 per cent of the ordinary shares that voted.[28] The ordinary shares that voted against the resolution were 18 148 758, which constituted 8.2 per cent of the ordinary shares voted.[29] Accordingly, even if ordinary shares have voted separately from the B-class shares, the scheme resolution would still have obtained the requisite majority in terms of section 115(2)(a) of the 2008 Act.[30] Section 115(2)(b) of the 2008 Act prohibits the implementation of a resolution without Court approval if, within ten business days, any person who voted against the resolution is granted leave by the Court to apply to the Court in terms of section 115(7).[31] The contents of the subsection will be dealt with below. In this matter, the beneficial owners of the 3.72 per cent of the issued ordinary shares in Distell that are votable, applied in terms of section 115(3)(b) read together with section 115(6) of the 2008 Act, for leave to proceed, in terms of a notice of motion, in accordance with section 115(7).[32] In their application, the applicants sought reviewing and setting aside the shareholders' resolution accepting a scheme of arrangement proposed by the board of Distell to the company's shareholders.[33] The application was opposed by all three respondents.[34]

2 2 Issue(s)

The Court grappled with several issues in reaching its conclusions. First, whether Sand Grove had *locus standi* to bring an application to the Court as holders of beneficial rights in shares.[35] Second, whether the application by nominee companies for leave to intervene as applicants in terms of section 115(3)(b) of the 2008 Act when the stipulated period elapsed could be condoned.[36] Third, whether the application to amend the relief sought in the notice of motion is based on the fact that the scheme was required to be put to holders of each class of shares at separate meetings in terms of section 115(2)(a).[37] Lastly, whether the applicants had a *prima facie* case to make the Court review the resolution to adopt a scheme of arrangement under section 115(7) of the 2008 Act.

2 3 Rule of Law, Application, and Decision

The first question that the Court grappled with was establishing whether the applicants had the *locus standi*, before considering the merits of the application made in terms of section 115 of the 2008 Act.[38] The deponent of the affidavit averred that Sand Grove funds the registered holders of Distell ordinary shares.[39] However, such averment was disputed by the respondents who pointed out that the applicants only had the beneficial ownership of the shares and that the shares were registered in the names of two local custodians, First National Nominees (Pty) Ltd

25 *Sand Grove* para 13.

38 *Sand Grove* para 19.

39 *Ibid*.

and Standard Bank Nominees (RF) (Pty) Ltd.[40] The respondents disputed Sand Grove's legal standing to move the application and pointed out that beneficial owners have no *locus standi*.[41] Further, the respondents argued that only registered shareholders have voting rights for the purpose of any resolution in terms of section 115, and particularly, those registered shareholders who voted against the proposed transaction are entitled to bring motion proceedings for the review of shareholders' decision to approve a fundamental transaction.[42] The respondents made a three-pronged argument that: (i) The 2008 Act does not permit any person other than a registered shareholder to vote in such circumstances.[43] (ii) Even if the 2008 Act potentially permits beneficial holders to vote in these circumstances, the Distell beneficial interest holders had no right to vote at a scheme meeting.[44] (iii) Even if beneficial interest in Distell had a right to vote at a scheme meeting, the applicants did not vote.[45]

The Court correctly upheld the generally accepted company law principle that the company concerns itself with the registered holders of its shares.[46] Then the Court concluded that the respondents' objection to the applicant's legal standing to bring the current application for relief in terms of section 115(3)(b) of the 2008 Act was well taken.[47]

In addition, the Court held that Sand Grove lacked *locus standi*, and the applicants had to rely on a contingent application to the Court seeking leave to include First National Nominees and Standard Bank Nominees as co-applicants.[48] As discussed above, the above-intervening co-applicants were the registered shareholders of the ordinary shares in Distell in which Sand Grove had a beneficial interest.[49] The respondents opposed the application to intervene on the basis that the ten-business-day time limit as prescribed in section 115(3)(b) for nominees to challenge the resolution had elapsed before the co-applicants lodged their applications to intervene.[50] The Court correctly held that the right to impugn section 115(3)(b) resolution approving a fundamental transaction is given to a person who voted against approval of such a transaction.[51] The Court further held that in the current case, even though the co-applicants had *locus standi*, they could not save the application since they failed to do so timeously before their right to do so expired.[52] In entrenching its decision of not condoning non-compliance, the Court held that one of the objectives of the 2008 Act is to provide "equitable and efficient amalgamations, mergers and takeovers of companies."[53]

Further, the purpose of section 115 and the appraisal remedy in section 164 is to ensure that dissenting shareholders with genuine cause for grievances are treated equitably.[54] It was held, by

40 *Sand Grove* para 20.

41 *Sand Grove* para 22.

42 *Ibid*.

43 *Sand Grove* para 24.

44 *Ibid*.

45 *Ibid*.

46 *Ibid*. In reaching its decision that the principle is well established the Court sought precedence from *Sammel and Others v President Brand Gold Mining Ltd* 1969 3 SA 629 (A) 66; *Oakland Nominees* 453B; *Standard Bank of South Africa Ltd and Another v Ocean Commodities Incorporated and Others* 1983 1 SA 276 (A) 288 and *Smyth and Others* para 21.

47 *Sand Grove* para 34.

48 *Sand Grove* para 35.

49 *Sand Grove* para 35.

50 *Sand Grove* para 36.

51 *Sand Grove* para 40.

52 *Ibid*.

53 *Sand Grove* para 62.

54 *Ibid*.

the Court, that the timelines provided under the 2008 Act provide certainty and efficiency, hence, granting powers to the courts to condone non-compliance would defeat the objectives of the 2008 Act.[55] The Court accurately held that the courts are not prepared to condone non-compliance in the absence of an effective means of addressing the prejudice that entertaining a late application under section 115(3)(a) would entail for third parties.[56] In conclusion, the Court dismissed the application by nominee companies for leave to intervene.[57]

More so, then the applicants sought to amend the notice of motion.[58] This application sought to ensure that Sand Grove funds' challenge to the scheme would be alive even if there was a finding that they lacked legal standing under section 115(3)(a) and refused the nominees leave to intervene.[59] The applicants challenged the meeting at which the scheme was approved and argued that the scheme was required to be put to the holders of each class of shares at separate meetings. The applicants based their challenge in terms of section 115(2)(a) and also referred to section 311(1) of the 1973 Act which provided for a scheme of arrangement between a company and "its members or any class of them."[60] The applicants referred to ordinary shares and holders of class B shares and categorised them as two classes in accordance with section 37(1) of the 2008 Act.[61] The Court held that to determine whether a relevant dissimilarity of rights was involved, one must ask a question; what was being offered to whom under the proposed scheme and to see whether the answer demonstrated material differences in the impact on the affected shareholders if the scheme were to be implemented.[62] The Court held that the 2008 Act leaves it to the company to convene the required meeting in terms of section 115 and not the courts.[63] The Court quoted Delport and appropriately held that to require a special resolution of all classes of holders of securities would not be logical and "… would lead to insensible or unbusinesslike results."[64] The Court further held that the application to amend the notice of motion should be dismissed, but went on to determine the two grounds that courts could review and set aside a resolution in terms of section 115(7)(b) and (a).[65]

The fact that the Court held that the applicants lacked legal standing and that the application for leave to appeal failed made the Court not concern itself too much with the merits of the case.[66] However, the Court expressed its views briefly, probably, simply to guide for future reference since the area of fundamental transactions is seldomly litigated and there is scanty jurisprudence.[67] The Court recited its statutory powers under section 115(6); namely, the courts are empowered to grant leave to an applicant to proceed with review "only if it is satisfied" that the applicant is/are: (i) acting in good faith, (ii) appear prepared and able to sustain the proceedings, and (iii) alleged facts which, if proved, would support the order upholding the review under section 115(7).[68] In particular, section 115(7) empowers the Court to set aside a resolution approving a scheme of arrangement on review, only if: (a) a resolution is manifestly

55 *Ibid*.
56 *Sand Grove* para 63.
57 *Sand Grove* para 65.
58 *Sand Grove* para 66.
59 *Ibid*.
60 *Sand Grove* paras 67 and 68.
61 *Sand Grove* paras 68 and 69.
62 *Sand Grove* para 72.
63 *Sand Grove* para 81.
64 *Ibid*.
65 *Sand Grove* para 94.
66 *Sand Grove* para 97.
67 *Ibid*.
68 *Ibid*.

unfair to any class of holders of the company's securities; or (ii) the vote is materially tainted by a conflict of interest, inadequate disclosure, failure to comply with the Act, MOI or any applicable rules of the company, or other significant material irregularity.[69]

In light of the above, the Court held that the object of section 115(3)(b) read together with sections 115(6) and 115 (7) is to weed out the frivolous, vexatious, or unmeritorious review of applications being proceeded with.[70] It appears that the Court's reasoning is sensible to the extent that it gives effect to the literal interpretation of the relevant provisions that offer protection to minority shareholders in the context of schemes of arrangement. The applicants intended to impugn the resolution on review on any one or all five bases below. (i) That the meeting convened to vote on the scheme was unlawfully constituted and that separate meetings should have been held for holders of ordinary shares and the holders of B-class shares.[71] (ii) That the expert report distributed to the shareholders in compliance with section 114 of the Act contained deficiencies that resulted in inadequate disclosure.[72] (iii) That the vote was materially tainted by a conflict of interest.[73] (iv) Manifest unfairness to a class of holders of the company's securities[74] and (iv) Remgro's votes should have been excluded from consideration.[75]

In determining whether there were supposed to be separate meetings as prayed for by the applicants the Court held that upon proper construction, it was not convinced by the arguments of the applicants. The Court opined that there were insufficient facts on the dissimilarity between the rights of the holders of two classes of securities in the company and the effect of the scheme on such rights to warrant or mandate that voting on the resolution should be undertaken in separate meetings.[76] The Court further held that there was no material difference between the economic rights attached to the two classes of issued shares in question.[77] In the circumstances, the difference between ordinary shares and B-class shares was not economic but was only in voting rights.[78] The Court, therefore, was not convinced by the applicants' submissions that the meeting convened to approve the resolution was unlawfully constituted.[79]

In answering whether the expert report was non-compliant the Court revisited sections 114(3) and (2) of the 2008 Act as well as regulation 90 of the Takeover Regulations, which prescribes the components of the expert report.[80] The Court held that the applicants failed to establish the deficiencies of the expert report and find fault as well as defectiveness that would likely be considered as "material significant irregularity".[81] The Court held that there was no evidence that any shareholder complained about the deficiencies in the report before the meeting or asked for the information in it to be supplemented.[82] The Court held further, that, the TRP did not

69 *Sand Grove* para 98.
70 *Sand Grove* para 99.
71 *Sand Grove* para 104.
72 *Ibid*.
73 *Ibid*.
74 *Ibid*.
75 *Ibid*.
76 *Sand Grove* para 106.
77 *Sand Grove* para 107.
78 *Ibid*.
79 *Sand Grove* para 109.
80 *Sand Grove* para 110.
81 *Sand Grove* para 112.
82 *Sand Grove* para 113.

highlight and/or raise concerns about any material deficiencies.[83]

In determining the extent of alleged conflicts of interest alleged by the applicants the Court considered the following arguments by the applicants. In particular, the applicants averred that Remgro was in a position to exert significant influence over negotiations with Heineken leading up to the scheme and to agree on the direction of the post-scheme business, given the following circumstances.[84] (i) Remgro and PIC were both parties of Distell;[85] (ii) there was a significant overlap between the boards of Remgro and Distell;[86] (iii) Remgro had given an irrevocable undertaking to support the scheme, and there was a legitimate expectation that its largest shareholder, PIC, would be aligned with it;[87] and (iv) following the scheme's implementation, Remgro intended both to exert shareholder control over Capevin and hold a substantial stake in Newco.[88] The Court considered section 2(1)(c) of the 2008 Act and upheld that Remgro was a "related party" to Distell but not to other acquiring parties and there was no evidence of collusion between Remgro and PIC in framing the scheme proposal as alleged by the applicants.[89] The Court further held that the applicants failed to establish that there was a significant overlap between the boards of Remgro and Distell.[90] The Court held that the applicants failed to prove conflicts of interest that could warrant the exclusion of Remgro's votes under section 115(6)(c) of the 2008 Act.[91]

Moreover, the Court held that had it been necessary for it to determine whether the applicants had satisfied the leg of good faith in terms of section 115(6)(a) of the 2008 Act, it would not have been satisfied.[92] The Court further held that the applicants failed to explain how defeating the proposed takeover would assist in achieving their objective of profiting from their investment in these circumstances.[93] Accordingly, the Court held that such failure gives the Court a strong impression that the applicants had an ulterior motive to put pressure on Heineken to increase price rather than a genuine intention to redress any complaint sustainable in a review in terms of section 115(7) of the Act.[94]

83 *Sand Grove* para 115.
84 *Sand Grove* para 116.
85 *Ibid*.
86 *Ibid*.
87 *Ibid.*
88 *Ibid*.
89 *Sand Grove* para 119.
90 *Sand Grove* para 121.
91 *Sand Grove* para 125.
92 *Sand Grove* para 135.
93 *Sand Grove* para 134.
94 *Sand Grove* para 134.

3 A CRITICAL ASSESSMENT OF THEORETICAL AND POLICY RATIONALES FOR SCHEMES OF ARRANGEMENT REGULATION

This part of the case note now critically assesses the broader legal and economic aspects of schemes of arrangement and the scholarly, theoretical, and policy rationales for their regulation in providing a benchmark for analysing the Court's judgment in *Sand Grove*. Generally, schemes of arrangement are regulated under section 114(1) of the 2008 Act which provides that the board may propose any arrangement between a company and holders of any securities holders subject to approval in terms of Chapter 5 and section 48 reacquisitions by the company of any of its previously issued securities.[95] Particular recent developments in the South African case law saw an extension of the reach of the application of appraisal remedy in *Capital Appreciation Ltd v First National Nominees (Pty) Ltd and Others* where the Court *a quo*, and SCA placed particular focus on section 48(8) of the 2008 Act.[96] Importantly, the extension of the reach of appraisal remedy in *Capital Appreciation Ltd* by both the Court *a quo* and SCA confirms that the statutory position that the requirements of sections 48(8)(b), 114, 115 and 164 of the 2008 Act apply when share buy-back transaction(s) reach(es) a five per cent threshold of the company's issued shares.[97] Notably, section 114(1) of the 2008 Act provides that arrangements contemplated by the board(s) to qualify as schemes of arrangements may take one or a combination of the following methods.[98] First, consolidation of securities of different classes.[99] Second, the division of securities into different classes.[100] Third, expropriation of securities from the holders.[101] Fourth, exchanging any of its securities for other securities.[102] Fifth, reacquisition by the company of its securities.[103] Lastly, a combination of the methods contemplated in section 114(1)(a).[104]

In addition, section 114 of the 2008 Act prescribes unique regulatory requirements on schemes of arrangement that do not apply to the other forms of fundamental transactions. Further, hurdles applicable to fundamental transactions and affected transactions also ought to be complied with when implementing schemes of arrangement. The unique prescribed requirements for schemes of arrangements include that the company at its own cost,[105] must retain a qualified, competent, and experienced independent expert who understands the type of proposed arrangement, and its consequences and, thereafter, give an opinion.[106] Such an independent expert must not be related to the company or any person contemplating the transaction to the extent of impairing the expert's integrity, impartiality, and objectivity.[107] The statute correctly excludes related persons from acting as independent experts when the company contemplates implementing a scheme of arrangement for obvious reasons that such would defeat the rationales for seeking an independent expert's opinion altogether, because, having a related individual raises the potential

95 Section 114(1) of Act 71 of 2008.

96 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd and Others* (Case no. 280/2021) [2022] ZASCA 85 (8 June 2022) para 13.

97 *Capital Appreciation* para 13. Apart from the prescribed requirements under ss 114, 115, and 164 of Act 71 of 2008. It appears that the independent expert's report in the context of share-repurchases in terms of s 48(8) of Act 71 of 2008 should include an independent opinion on the solvency and liquidity test.

98 Section 114(1)(f) of Act 71 of 2008.

99 Section 114(1)(a) of Act 71 of 2008.

100 Section 114(1)(b) of Act 71 of 2008.

101 Section 114(1)(c) of Act 71 of 2008.

102 Section 114(1)(d) of Act 71 of 2008.

103 Section 114(1)(e) of Act 71 of 2008.

104 Section 114(1)(f) of Act 71 of 2008.

105 Delport *et al. Henochsberg on the Companies Act 71 of 2008* (2019) 415.

106 Section 114(2)(a) of Act 71 of 2008.

107 Section 114(2)(b) of Act 7 of 2008.

for conflicts of interest.

The expert must prepare a report to the board and cause it to be distributed to all companies' securities holders.[108] The specifics that must be included in the report include; all relevant information relating to the value of securities affected by the proposed scheme, the type and class of securities holders affected by the scheme, and material effects and material adverse effects of the proposed arrangement on the rights and interests of different persons.[109] Further, the report must include the material interests of any director of the company or trustee of the securities holder as well as a copy of sections 115 and 164 of the 2008 Act.[110] In agreement with Luiz, the expert report has the effect of assisting the securities holders on whether to support or dissent from the resolution to effect a scheme of arrangement.[111] Delport *et al.* assert that it appears as if the directors do not have a choice to accept or reject the report from the independent expert.[112] The section does not prescribe the information that needs to be included in the report, but regulations 89(4) and 90 read together with sections 117 and 118 show that the report must be on the matters prescribed and not recommend acceptance of the offer or not.[113] Further, in determining the material interests of the directors and/or trustees the independent expert may request them to draft affidavits.[114]

Delport *et al.* assert that the arrangements contemplated in section 114 are wide and they can only be limited in circumstances where the scheme seeks to implement transaction *ultra vires*.[115] Further, Delport *et al.* emphasise that the transactions contemplated under section 114, must be an arrangement and secondly must be between the company and its securities holders.[116] In agreement with Delport *et al.*, I submit that by implication the arrangements between securities holders only *do not fall* under the ambit of schemes of arrangement.[117]

3 1 Policy and Scholarly Debates I: Fundamentals of Fundamental Transactions

Section 115 of the 2008 Act prescribes the approvals for all the fundamental transactions. In particular, the section provides that, "[d]espite section 65, and any provision of the company's Memorandum of Incorporation (MOI), or board resolution …" all fundamental transactions must be approved in terms of section 115; or pursuant to or contemplated in an approved business rescue plan.[118] A company proposing any of the fundamental transactions must have been issued a compliance certificate by the TRP in terms of section 119(4)(b) or be exempted under section 119(6).[119] Any proposed fundamental transaction must be approved by a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for such a purpose of which at least 25 per cent of voting rights entitled to be exercised in that matter or any higher percentage as required by the company's MOI as prescribed under

108 Section 114(3) of Act 71 of 2008.

109 *Ibid*.

110 Section 114(3) of Act 71 of 2008.

111 Luiz 2012 *PELJ* 111.

112 Delport *et al*. *Henochsberg* 415.

113 Delport *et al. Henochsberg* 415. Regs 89 and 90 of the Companies Regulations, 2011.

114 Delport *et al. Henochsberg* 415.

115 *Ibid.* 410.

116 *Ibid.* 412.

117 *Ibid. Ex parte Federale Nywerhede Bpk* 1975 1 SA 826 (W); *Ex parte NBSA Centre Ltd* 1987 2 SA 783 (T) at 787 and *Jan van Heerden & Seuns BK v Senwes Bpk* (2006) 1 All SA 44 (NC) 58.

118 Section 115(1)(a) of Act 71 of 2008.

119 Section 115(1)(b) of Act 71 of 2008.

section 64(2) were present.[120]

Conversely, a company may in certain circumstances not proceed with a resolution that has been approved by a special resolution of a 25 per cent *quorum* entitled to vote or a higher percentage prescribed in the MOI. The two exceptions where a special resolution of a 25 per cent *quorum* cannot be implemented are namely: on the one hand, when a resolution is opposed by at least 15 per cent of the voting rights that were exercised on that resolution and, within five business days after the vote, then, any person who voted against the resolution (my emphasis) seeks Court approval.[121] On the other hand, within ten business days of application by a person who voted against the resolution (my further emphasis) the Court grants the person leave in terms of section 115(6) to apply for a review of the transaction in terms of section 115(7).[122] The literal interpretation of the above two subsections clearly shows that *only shareholders who voted against* the resolution can apply to Court. Emphasis must be put that only registered shareholders have *locus standi* and not beneficial owners at least from the literal interpretation of the statutory provision. Notably, in computing what constitutes the percentage of the *quorum* the voting rights controlled by the acquiring party and its related person are excluded from the computation.[123] Should a resolution require the Court's approval as contemplated under section 115(3)(a), the company must either apply to the Court for approval and tender the costs of the application or treat the resolution as a nullity.[124]

The Court may grant leave only if it is satisfied that the applicant is acting in good faith, able to sustain the proceedings, and if the alleged facts are proved will support an order in terms of section 115(7). In particular, in terms of section 115(7), the Court can review the resolution if either it is manifestly unfair to any holders of the company's securities;[125] or the vote was materially tainted by conflicts of interest, inadequate disclosure, and failure to comply with the Act or the MOI or any other significant irregularity.[126] In addition, dissenting shareholders will still have access to the section 164 appraisal remedy, if they notify the company in advance that they will oppose a special resolution and they actually attend the meeting and vote against the special resolution.[127] If any fundamental transaction, I argue, except merger or amalgamation (my emphasis),[128] is approved, any person to whom assets are, or undertaking is, to be transferred, may apply to the Court for an order to *inter alia* transfer the whole or any part of the undertaking; allotment of appropriation of any shares; and transfer shares from one person to another.[129]

3 2 Policy and Scholarly Debates II: Special Shareholder Resolutions and *Locus Standi*

Section 1 of the 2008 Act provides that subject to section 57(1) of the 2008 Act a shareholder means a holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be.[130] Similarly, section 1 of the 2008 Act defines a beneficial interest and provides that when used in the context of a company's securities

120 Section 115(2) of Act 71 of 2008.

121 Section 115(3)(a) of Act 71 of 2008.

122 Section 115(3)(b) of Act 71 of 2008.

123 Section 115(4) of Act 71 of 2008.

124 Section 115(5) of Act 71 of 2008.

125 Section 115(7)(a) of Act 71 of 2008.

126 Section 115(7)(b) of Act 71 of 2008.

127 Section 115(8) of Act 71 of 2008.

128 Section 1 read together with s 116(7) of Act 71 of 2008, shows that assets and liabilities automatically transfer from amalgamating or merging companies to newly amalgamating or surviving companies.

129 Section 115(9) of Act 71 of 2008.

130 Section 1 of Act 71 of 2008.

it entails the right or entitlement of a person, through ownership, agreement, or relationship, alone or together with another person.[131] Beneficial interest entitles the right holder to receive or participate in any distribution in respect of the company's securities; exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities and dispose or direct the disposition of company's securities or any distribution of securities.[132] It, however, excludes disposition and distribution of interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002.[133]

Section 56(1) of the 2008 Act provides that except where the MOI provides otherwise the company's issued securities may be held by and registered in the name of, one person for the beneficial interest of another person.[134] A person is regarded to have a beneficial interest in a security of a public company if the security is held *nominee officii* by another person on that first person's behalf, or if that person has one of the following relationships.[135] Examples, of *nominee officii*, include being married in a community of property, a parent of a minor with a beneficiary interest, in terms of an agreement, a holding company who has a beneficial interest in that security, is entitled to exercise or control the exercise of the majority of the voting rights at a general meeting of a juristic person that has a beneficial interest and gives directions or instructions to a juristic person with beneficial interest.[136]

The 2008 Act expressly provides that a person who holds a beneficial interest in any securities may vote in a matter at a meeting of shareholders only to the extent that the beneficial interest includes the right to vote on the matter and the person's name is on the company's register of disclosures as the holder of a beneficial interest.[137] It is submitted that generally the beneficial securities holders are excluded from voting unless they meet the criteria set in section 56(9) of the 2008 Act in particular when they have an express right to vote and their name is in the company's register. Thus, if they fail to satisfy the requirements in the criteria set above then the position will be that beneficial shareholders will not vote and will not have the *locus standi* to institute both sections 115(3) and 164 remedies.[138] A holder of beneficial interest in any securities that are entitled to be voted on at a meeting of a company's shareholders may demand a proxy appointment from the registered holders of those securities to the extent of that person's beneficial interest.[139] Such demand is sent to the registered holder, in writing, as required by the applicable requirements of the central securities depository.[140]

The South African courts have authoritatively upheld that company law is concerned with registered shareholders and not with beneficial shareholders. In particular, in *Oakland Nominees (Pty) Lt v Gelria Mining and Investment Company (Pty) Ltd*,[141] the Court held that ownership of shares does not depend on registration, however, the company recognises only its registered shareholders. In *Marble Head Investments (Pty) Ltd and Others v Niveus Investments and Another (Ferberos Nominees (Pty) Ltd and Another Intervening)* the Court grappled with the scope of *locus standi* and held that it is used in two senses. First, is the capacity of a person to

131 *Ibid*.

132 *Ibid.*

133 Section 1 of Act 71 of 2008.

134 Section 56(1) of Act 71 of 2008. *Capital Appreciation* para 2.

135 Section 56(2) of Act 71 of 2008.

136 *Ibid.*

137 Section 56(9) of Act 71 of 2008.

138 *Standard Bank Nominees (RF) (Proprietary) Limited and Others v Hospitality Property Fund Limited* (18/17451) 2019 ZAGPJHC 263; 2019 4 All SA 561 (GJ); 2020 5 SA 224 (GJ) (12 June 2019) para 35.

139 Section 56(11) of Act 71 of 2008.

140 *Ibid*.

141 *Oakland Nominees (Pty) Lt v Gelria Mining and Investment Company (Pty) Ltd* 1976 1 SA 441 (A) 453A-B.

institute and defend legal proceedings, namely the capacity to litigate. The second relates to a person's right to claim the relief sought.[142] The Court held that beneficial shareholders lack *locus standi* since only registered shareholders have legal standing to institute a section 115(3) application, thus, their application was null and void from inception.[143] Similarly, the Court held that courts have no power to condone non-compliance with the ten-day period set in section 115 of the 2008 Act.[144] In *Marble Head Investments*, the Court further held that although section 115(3) of the 2008 Act does not expressly exclude the power to condone; it must be implied in the section by the way of necessary construction.[145]

In addition, in *Standard Bank Nominees v Hospitality Property Fund Limited*,[146] it was held that the nominees as the registered holders of securities have the requisite rights and *locus standi* to vote against a resolution and bring an application to the Court, in this case, it was a section 164 application. Similarly, in *Smyth and Others v Investec Bank Ltd,* the Court held that only registered shareholders have the *locus standi* to approach the courts for an oppression remedy under section 252 of the 1973 Act and not the person who owns the ultimate economic interest in shares registered in somebody else's name.[147] By implication, beneficial owners have no legal right to participate as applicants in section 252 proceedings.[148] Therefore, it has been established in the South African statutes and courts that beneficial owners do not have *locus standi* to vote and institute claims in court against any contemplated resolution that affect them, for example, in this context, fundamental transactions.

4 ANALYSIS OF THE *SAND GROVE* JUDGMENT

This commentary assesses the Court's decision in *Sand Grove* by considering the Court's *ratio decidendi* against the backdrop of the above-discussed scholarly and policy rationales for regulating schemes of arrangement. Additionally, as an overarching remark, in agreement with Cassim MF, this note submits that when remedies are provided for under statutory provisions, for instance, for this note — the section 115 remedy — the courts must ensure that the said remedy is accessible to the targeted beneficiaries.[149] Section 158 of the 2008 Act expressly provides a benchmark to measure the court decisions, particularly, in determining any matter the courts must consider promoting the spirit, purpose, and objects of the Act and develop the common law to improve the realisation and enjoyment of rights encapsulated in the 2008 Act.[150] In evaluating the decision in question, this commentary utilises the policy rationales of sections 158, 5, 7, 164 and chapter 5 of the 2008 Act together with the scholarly debates and judicial precedence in the context of schemes of agreement as discussed above. Particularly, against the backdrop of scholarly, statutory and case law (judicial precedence) this note argues that the judgment in *Sand Grove* is a welcome and cogent one because it reinforces the established company law statutory and case law principles in schemes of arrangement regulation. The judgment further confirms the overarching objectives on the functional purposes of the fundamental transactions, contemplated in the then Companies Bill, 2007, and the proposed

142 *Marble Head Investments (Pty) Ltd and Others v Niveus Investments and Another (Ferberos Nominees (Pty) Ltd and Another Intervening)* (22760/2019) [2020] ZAWCHC 36 (28 April 2020) para 32.

143 *Ibid.* para 43 and 53.

144 *Ibid.* para 34.

145 *Ibid.* para 110.

146 *Standard Bank Nominees* 35, 94 and 96.

147 *Smyth and Others v Investec Bank Ltd* [2018] 1 All SA 1 (SCA) paras 30 and 54.

148 *Ibid.* paras 54 and 55.

149 Cassim MF "The Appraisal Remedy and the Oppression Remedy under the Companies Act of 2008, and the Overlap between them" 2017 *SA Merc LJ* 312.

150 Section 158 read together with ss 7 and 5 of the of Act 71 of 2008.

linkages with the then-proposed shareholder remedies under sections 115 and 164 in the 2008 Act.[151] This note concurs with the judgment and applauds the Court for reinforcing the extant precedence and providing some foundational and instructive guidelines to interpret sections 114 and 115; particularly, the schemes of arrangement rules relating to *locus standi*, shareholder special resolution, and access to section 115(3) remedy.

This contribution evaluates the *Sand Grove* judgment, particularly through the lenses of the two objectives of the 2008 Act, namely, to promote the incidence of schemes of arrangement to ensure investment in South Africa and, conversely, to balance the rights and obligations of shareholders and directors within companies.[152] It is submitted that the judgment at hand balances the said objectives in that the section 115(3) remedy is granted to minority shareholders who genuinely have a case against a particular resolution. Accordingly, it is not an escape hatch for minority shareholders who would want to sabotage a resolution to implement a scheme of arrangement that is compliant with the law. The law is clear that registered shareholders who voted against the resolution have access to the section 115(3) remedy.[153] The Court's ability to maintain that the shareholders who did not vote against the resolution have no *locus standi*, is the correct and consistent interpretation of the law. Such an interpretation gives hope to the majority shareholders contemplating schemes of arrangement that they will not be delayed by minority shareholders who bring *de minimis* or unsubstantiated claims to court while lacking *locus standi* and outside the prescribed period.

In the same light, ensuring the proper interpretation of section 115 and not allowing the intervening parties to intervene after the prescribed period promotes the idea of certainty of the law, which provides a fertile ground for promoting investments through fundamental transactions. It is argued that timelines are set for a reason, in particular, in this context, timelines exist to ensure that investors know the processes needed and that they will not be ambushed and surprised by court applications that emanate beyond the prescribed periods only to frustrate schemes of arrangement. If the Court had decided otherwise and condoned non-compliance, such a decision would have implied uncertainty and disincentive for investments.

Further, this judgment is important in that it also clarifies the criteria for determining whether there must be one or separate meetings and special resolutions when voting for a particular scheme(s). The Court upheld that where a relevant dissimilarity of rights is involved one must ask a question of what was being offered to whom under the proposed scheme and to see whether the answer demonstrates material differences in the impact on the affected shareholders if the scheme were to be implemented.[154] The Court held that the 2008 Act leaves it to the company to convene the required meeting in terms of section 115 and not the courts.[155] The Court referred to Delport and held that to require a special resolution of all classes of holders of securities separately would not only be illogical but would lead to "… insensible or unbusinesslike results …".[156] The rationale for the Court's decision is sensible and it reduces the number of times the companies would call different meetings for securities that do not have material differences in the impact posed on security holders. Such a decision also could sensibly increase the incidence of schemes of arrangement in that companies will not be burdened by red tape to hold separate meetings for securities which have a relatively analogous impact on securities holders.

151 Draft Companies Bill, 2007 (*Government Gazette* (GN) 166 *GG* 29630 of 12 Feb 2007 13.

152 Section 7(c) and 7(i) of Act 71 of 2008.

153 Section 153 of Act 71 of 2008.

154 *Sand Grove* para 72.

155 *Sand Grove* para 81.

156 *Ibid*. Delport *et al. Henochsberg* 420.

Notably, this judgment also ensures that the rights and obligations of the directors and shareholders remain unscathed. Particularly, it must be maintained here that the *Sand Grove* decision does not have the effect of depriving the minority shareholders of protection in any way. This is so because, in as much as in the circumstances the Court did not decide in favour of minorities, the Court maintains that section 115 is accessible to dissenting shareholders but only if they meet the criteria set under the section. In particular, if the shareholders are registered securities holders, and they voted against the resolution, apply to the Court within the prescribed period, and if they satisfy the requirements of sustaining the proceedings, they will access the section 115 remedy. Importantly, the dissenting shareholders need to establish the above requirements in section 115 to successfully apply to the Court and access their rights in terms of the 2008 Act. The dissenting shareholders must *inter alia* also read and understand the independent expert's report in determining their position when deciding on the securities. In addition, they must also be wary of the TRP's compliance certificate if any is given. The reason for enquiring whether there was an independent expert report and the TRP compliance certificate ensures that the dissenting shareholders' court application has the necessary cause of action that sustains the proceedings. Thus, dissenting shareholders would consider aborting the proceedings if there is no cause for action to avoid costs and wasting time. Importantly, in such circumstances, the dissenting shareholder may pursue other accessible remedies like appraisal and oppression remedies.

5 CONCLUDING REMARKS

The importance of schemes of arrangement as investment vehicles cannot be downplayed. Similarly, evidence shows that schemes of arrangements may pose some serious conflicts of interest between company stakeholders. Hence, their regulation must foster a balance of seemingly conflicting company law objectives provided under section 7 of the 2008 Act. The particular objectives relevant to this note that ought to be balanced are namely: the promotion of innovation and investment in South Africa whilst balancing the rights and obligations of directors and shareholders. As shown, schemes of arrangement are regulated under extensive and technical provisions under Chapter 5 of the 2008 Act and the Takeover Regulations. In particular, it was established that schemes of arrangement are regulated under sections 114 and 115 of the 2008 Act and regulations 89 and 90 of the Takeover Regulations. This case note observed that schemes of arrangement result in shifting control in companies and they form part of both fundamental and affected transactions which must be regulated in a manner that promotes the objectives of the 2008 Act. Particularly, the commentary evaluated some controversial issues surrounding schemes of arrangement through the lenses of the *Sand Grove* judgment. It is reiterated that this contribution applauds the Court for reinforcing the generally accepted company law principles in judicial precedence, statutes, and scholarly debates in the context of the regulation of schemes of arrangement in general. The Court answered several contentious issues related to the interpretation of section 115, particularly, the question on *locus standi*, condonation of non-compliant applications, the proper ambit of shareholder special resolution, and the requisite burden of proof to sustain proceedings in terms of section 115(3) of 2008 Act.

The *Sand Grove* judgment answers the above contentious questions to promote investment through the incidence of schemes of arrangement while balancing the rights and obligations of shareholders and directors within companies.[157] The decision provides the investors with the certainty needed when contemplating implementing schemes of arrangement to be compliant with the requisite statutory procedures. Similarly, dissenting shareholders must ensure that they have the requisite *locus standi* to apply to the Court within the requisite period and that

157 Sections 7(c) and 7(i) of Act 71 of 2008.

they have sustainable claims under section 115 of the 2008 Act. Following the *Sand Grove* judgment the position remains that only registered shareholders have access to the section 115 remedy. In addition, the Court upheld the position that it ought not to condone applications by intervening parties who are non-compliant with the prescribed periods. It is reiterated that the *Sand Grove* judgment provides hope to investors who will rely on the certainty of the law to the extent that when they follow the prerequisites of schemes of arrangement no shareholder can easily frustrate the scheme after the prescribed period lapses. Accordingly, to a larger extent, the judgment promotes certainty in the law, thus, promoting the broader goal of investment in the South African market.

It is argued that this judgment did not negate the goal of protecting the minority shareholders who may have a genuine cause for action, with *locus standi*, and acting within the prescribed period. In particular, the Court upheld that when the dissenting shareholders meet the prescribed requirements under section 115 such minorities can successfully apply to Court and the Court when satisfied will grant an order in favour of such applicants. The Court's judgment is an informed and reasonable one in that, the idea of shareholder remedies is to ensure that they access the remedies when they face unjust resolutions and not simply to defeat resolutions by majority shareholders. Lastly, should courts second-guess compliant resolutions and condone non-compliance by minority shareholders it would be bad law and bad precedence with far-reaching consequences of potentially inhibiting investments and resulting in unfair treatment of majority shareholders instead.