DLA CLIFFE DEKKER HOFMEYR

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Also at Cape Town

"AA5"

ENS Africa
Attention: L Field

PER EMAIL: lfield@ensafrica.com

CC: pmarsden@matusonassociates.co.za
CC: goertel@ensafrica.com

"URGENT"

Our Reference	J Jones
Account Number	20152604
Your Reference	
Direct Line	(011) 562 1189
Direct Telefax	(011) 562 1662
Direct e-mail	julian.jones@dlacdh.com
Date	1 July 2015

Dear Madam

HIGHVELD STEEL (IN BUSINESS RESCUE)

1 Thank you for your earlier correspondence enclosing under cover thereof the various documentation requested by ourselves.

2 We are somewhat alarmed by the fact that SARS has only agreed to an extension until 8 July 2015. In the event that the SARS assessment becomes a claim, the aforementioned will have dramatic effects on any potential business rescue and will no doubt shift the voting power within a business rescue to SARS. Given the tight time frames within which you and your team have to work, can you please confirm today that you will make the necessary arrangements to meet with KPMG, who were previously instructed by the shareholders of the company, to provide tax advice in regards to the issues now raised in the SARS correspondence. Will you revert to us as a matter of urgency in respect of the aforementioned issue as it is imperative that the SARS "claim" either be expunged or determination of the aforementioned be delayed for as lengthy a period as possible.

3 Mr. Pavel Tatyanin, Evraz Chief Financial Officer, is scheduling a business trip to South Africa next week and has tentatively suggested a meeting on 8 July 2015 with the business rescue practitioner to discuss the developments in the matter. This meeting is likely to be in substitution for the meeting of 10 July 2015 you have proposed before and we would appreciate if you could advise on the business rescue practitioners' availability.

4 Can you please advise as to when the next creditors committee meeting will be held. It was our understanding that the aforementioned would be held on a monthly basis and according to our records, the last meeting was held more than two months ago.

5 Lastly, we were informed by our client that a letter was addressed to the business rescue practitioners yesterday requesting suspension of payments of Highveld directors' fees (which is due to the fact that Highveld board is currently dormant). Please advise on the steps taken/to be taken in connection with such suspension.

Yours faithfully

JULIAN JONES
CLIFFE DEKKER HOFMEYR INC

"AA6"

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DLA Cliffe Dekker Hofmeyr
Attention: Julian Jones
By email: julian.jones@dlacdh.com

G Oertel / L Field our ref

J Jones/20152604 your ref
3 July 2015 date

Dear Sirs

RE: EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED (IN BUSINESS RESCUE) ("HIGHVELD")

1. We refer to your letter of 1 July 2015.

2. As you are aware, our clients have commenced with investigating the potential SARS claim and have already instructed our firm to furnish tax advice. We confirm that our clients have received substantial documentation, which includes documentation from KPMG, relating to the potential SARS claim and accordingly it is unnecessary for our clients to engage further with KPMG.

3. In addition, our clients are obliged to act independently and comply with their statutory duties. To this extent, our clients will not seek to delay the exercise of their statutory duties and/or any process relating to the determination of claims. Our clients therefore do not agree to your request to do so.

4. In regard to the next creditors' committee meeting, we do not understand your concern relating to same in the light of the fact that regular update meetings have and will be held with your client. Notwithstanding the aforesaid, you are aware of the fact that our clients have commenced with the sales process and that they are still waiting for indicative offers, which are due for submission by 15 July 2015. It would be premature to have a creditors' committee meeting prior to the receipt of same. In the circumstances, our clients will convene the second creditors' committee meeting after receipt of the indicative offers.

5. We are instructed that our clients have not authorised payment of directors' fees and are in the process of obtaining further legal advice relating to same.

6. We confirm that our client is available to meet on 8 July 2015.

Yours faithfully

EDWARD NATHAN SONNENBERGS INC.

Per: 

LETITIA FIELD

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"AA7"

ENS Africa
Attention: L Field

PER EMAIL: lfield@ensafrica.com

CC: pmarsden@matusonassociates.co.za
CC: goertel@ensafrica.com

Our Reference	J Jones
Account Number	20152604
Your Reference	
Direct Line	(011) 562 1189
Direct Telefax	(011) 562 1662
Direct e-mail	julian.jones@dlacdh.com
Date	3 July 2015

Dear Sir

HIGHVELD STEEL (IN BUSINESS RESCUE)

1 I refer to our previous correspondence, a copy of which is enclosed herewith for your ease of reference, to which we have as yet not received a reply.

2 Can you please revert to us in regard to the issues raised, especially the issues surrounding the SARS liability and more importantly whether arrangements have been made to meet with KPMG who should be fully aware of the issues raised in the correspondence.

3 Furthermore, can you also confirm the availability of your client to meet with Mr Pavel Tatyanin, our client's CFO on 8 July 2015

4 As such, we await your urgent response to the issues raised in our letter of 1 July 2015.

Yours faithfully

JULIAN JONES
CLIFFE DEKKER HOFMEYR INC

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ENS Africa
Attention: L Field

PER EMAIL: lfield@ensafrica.com

CC: pmarsden@matusonassociates.co.za
CC: goertel@ensafrica.com

Our Reference	J Jones
Account Number	20152604
Your Reference	
Direct Line	(011) 562 1189
Direct Telefax	(011) 562 1662
Direct e-mail	julian.jones@dlacdh.com
Date	6 July 2015

Dear Madam

HIGHVELD STEEL (IN BUSINESS RESCUE)

1 Thank you for your earlier correspondence, the contents of which have been duly noted.

2 We suggested that your client meet with KPMG as it may remove the need for your client to peruse the voluminous documentation pertaining to the SARS claim. Can you please furnish, for our records, a copy of your response to SARS once same has been transmitted?

3 Our client will unfortunately not be travelling to South Africa this week. We however hope to be in a position to arrange a teleconference between our client and yourselves on 8 July 2015. We will furnish you with details of the aforementioned during the course of tomorrow.

4 As you may recall, at the outset of the business rescue, certain issues arose in respect of the Sasfin indebtedness, which I understand has now been settled by virtue of Sasfin applying a set off. If I recall correctly, Sasfin proceeded to set off not only the amount owing, but also included an amount in so far as penalties were concerned. Due to Sasfin being the cause of the penalties arising, the practitioners disputed the aforementioned entitlement to set off the penalties.

5 Can you advise as to whether the aforementioned has been resolved, as I understand, the practitioners were preparing to institute legal action against Sasfin in order to recover this amount. In the event that it has been settled, can you please advise us as to the terms upon which it was settled and if not settled, can you advise us as to whether legal action has been instituted and if so, can you please furnish us with a copy of these papers.

Yours faithfully

JULIAN JONES
CLIFFE DEKKER HOFMEYR INC

"AA8"

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Matuson & Associates
Attention: Piers Marsden

PER EMAIL: pmarsden@matusonassociates.co.za
CC: lfield@ensafrica.com
CC: goertel@ensafrica.com

Our Reference	J Jones
Account Number	20152604
Your Reference	
Direct Line	(011) 562 1189
Direct Telefax	(011) 562 1662
Direct e-mail	julian.jones@dlacdh.com
Date	30 June 2015

Dear Sirs

HIGHVELD STEEL (IN BUSINESS RESCUE)

1 As per our meeting during the course of last week, can you please furnish us with a copy of the holding letter which was addressed by yourselves to the South African Revenue Services requesting an extension in which to respond to their letter.

2 In addition, can you also furnish us with copies of your correspondence to Eskom as well as advise as to the outcome of the meeting which was held with Eskom on Friday, 26 June 2015.

3 In addition, can you also furnish us with a copy of your letter to the South African government.

4 Lastly, can you furnish us with a formal response in regard to the calculation in respect of the vote for the extension of the time period in which the business rescue plan was to be published. We have addressed various correspondence to you in this regard and have yet to receive any formal response.

5 We look forward to your reply.

Yours faithfully

JULIAN JONES
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DLA Cliffe Dekker Hofmeyr
Attention: Julian Jones
By email: julian.jones@dlacdh.com

G Oertel / L Field our ref

J Jones/20152604 your ref
30 June 2015 date

Dear Sirs

RE: EVRAZ HIGHVELD STEEL AND VANADIUM LIMITED (IN BUSINESS RESCUE) ("HIGHVELD")

1. We refer to your letter of 30 June 2015.

2. As requested, we attach hereto a copy of:

   2.1. the letter addressed to the South African Revenue Services and the response thereto;

   2.2. the letter addressed to the Minister of the Department of Trade and Industry; and

   2.3. the documents relating to the extension of the date of publication of the business rescue plan.

3. In regard to Eskom:

   3.1. Highveld has now made full payment of the May 2015 invoice;

   3.2. we confirm that a meeting was held at Eskom on Friday, 26 June 2015. Our client's role at this meeting was merely to facilitate discussions between Eskom and certain end-users, namely Air Liquide and Afrox. In this regard, the end-users wish to secure a continuous supply of electricity from Eskom. The parties are accordingly considering a short-term proposal which would have to be regulated in terms of a tripartite agreement. Eskom will revert with its comments to the short term proposal within 2 – 3 weeks; and

   3.3. during the course of yesterday, our client received Eskom's draft amendment to the existing electricity supply agreement in terms whereof Eskom proposes that:

      3.3.1. payment of invoices be made within 5 days of due date; and

3.3.2. a guarantee be furnished to cover one month's electricity supply.

Our client is in the process of considering the draft amendment.

4. We confirm the next update meeting scheduled for 10h00 on 10 July 2015 at your offices.

Yours faithfully

EDWARD NATHAN SONNENBERGS INC.

Per:

LETITIA FIELD

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Thabang Mochusi
The South African Revenue Service
1st Floor, Blocks A and B
Megawatt Park, Maxwell Drive
Sunninghill, Sandton

Andries Myburgh our ref
your ref

25 June 2015 date

RE: Evraz Highveld Steel & Vanadium Limited (Taxpayer reference number 9250/026/60/7)

Request for extension of period to submit response to letter of findings

1. We have been appointed to act on behalf of the Evraz Highveld Steel and Vanadium Limited (**"the taxpayer"**) in relation to the matters set out in the letter of audit findings dated 27 May 2015 (**"the letter of findings"**), issued by the South African Revenue Service (**"SARS"**) to the taxpayer.

2. In terms of the letter of findings, the taxpayer is advised that it may provide written reasons and/or supply relevant information to SARS within 21 business days where it is not in agreement with any of the adjustments proposed therein. The 21 day period for the taxpayer to submit a response expires on 26 June 2015.

3. We request that the period for the submission of the taxpayer's response to the letter of findings be extended by a further period of 21 business days to 27 July 2015 due to the reasons set out below:

   3.1. The taxpayer is currently undergoing voluntary business rescue, and to this end, has been placed under the supervision of a business rescue practitioner.

   3.2. While the letter of findings was addressed to the business rescue practitioner, the email address to which it was dispatched for the attention of the practitioner was incorrect (please refer to page 1 of the letter of findings, which is marked for the attention of businessrescue@mazarz.co.za, as opposed to businessrescue@mazars.co.za, the latter being the correct email address).

   3.3. The letter of findings was brought to the taxpayer's attention during the course of the week of 15 June 2015, however, as the practitioner who has been tasked with the supervision of the affairs of the taxpayer had been travelling overseas, he has been unavailable to attend thereto.

4. The extension of the period is requested to allow us to draft a comprehensive response to the letter of findings.

We look forward to your response.

Yours sincerely,

Edward Nathan Sonnenbergs Inc

Andries Myburgh
Tax Director

Large Business Centre

South African Revenue Service

Office
Megawatt Park

Enquiries
Thabang Mochusi

Switchboard
(011)602-2000

Direct line
(011)602-3764

E-mail
tmochusi@sars.gov.za

Reference
9250/026/60/7

Date
29 June 2015

Evraz Highveld Steel & Vanadium Ltd
c/o ENSafrica
P O Box 783447
Sandton
2146

Email: amyburgh@ensafrica.com

Large Business Centre

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Sunninghill, Sandton
(No postal deliveries to this address)

Private Bag, X170, Rivonia, 2128

SARS online: www.sars.gov.za

Dear Sir/ Madam

EVRAZ HIGHVEL STEEL & VANADIUM LTD (PTY) LTD
REQUEST FOR AN EXTENSION
YEARS OF ASSESSMENT: FY2007 – FY 2009

We refer to our letter of findings dated 27 May 2015 and your letter dated 25 June 2015. In your letter, you are requesting SARS to grant Evraz Highveld an extension of 21 days to respond to our letter of findings. Below, please find SARS response to your request:

1. SARS is aware that Evraz Highveld is undergoing a voluntary business rescue and that it has been placed under supervision of a business rescue practitioner.

2. In response to point 3.2 of your letter, kindly note that the letter of findings was initially sent to businessrescue@mazarz.co.z on 27 May 2015; however the email address was corrected on the same day to businessrescue@mazars.co.za. An acknowledgement of our email was received from Daniel Terblanche on 27 May 2015. The public officer of Evraz Highveld, Mr Jacques Findlay was also copied on the email sent to Mazars. Based on the above, we are of the view that the letter of findings was not delayed and was sent to the correct address on 27 May 2015.

3. Based on the reasons stated above, SARS is granting Evraz Highveld a 10 days extension to respond to the letter of findings. Your response is due to be submitted to SARS on 8 July 2015.

Should you have any queries relating to this letter, please contact the SARS official mentioned above.

Yours faithfully

Thabang Mochusi
Auditor

Tebogo Mathosa
Manager

MATUSON
ASSOCIATES

The Honourable Minister R Davies
Department of Trade and Industry
Block A, Floor 3
77 Meintjie Street
Sunnyside
Pretoria

By email: lneethling@thedti.gov.za
CC : ministry@economic.gov.za ("EDD")
geoffreyq@idc.co.za ("IDC")
minister@environment.gov.za ("DEA")
thomas@dwa.gov.za ("DWS")
Nonhlanhla.Mokoena@dpe.gov.za ("DPE')
mary.marumo@treasury.gov.za Treasury
irvinJ@numsa.org.za NUMSA
Gideon@solidarity.co.za Solidarity

30 June 2015

Dear Honourable Minister Davies

RE: UPDATE ON BUSINESS RESCUE PROCEEDINGS AND REQUEST FOR MEETING

1. We address this letter to you in our capacity as the joint business rescue practitioners ("the practitioners") of Evraz Highveld Steel and Vanadium Limited ("Highveld" or the "Company"). We wish to provide you with an update of the business rescue proceedings of Highveld, which commenced on 13 April 2015.

FUNDING

2. The IDC granted initial funding of R150 million to Highveld which agreement was signed by Highveld on 29th May 2015. This was made available as a senior secured revolving facility available until the end of August 2015. This was to enable the practitioners to find a prospective purchaser ("the purchaser") for Highveld in terms of a sales process to which the practitioners refer more fully below. The first tranche of this funding, amounting to R48 million, was drawn down on Friday, 19 June 2015.

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3. The practitioners are very appreciative of the funding provided and the speed at which the IDC responded.

4. The funding provided by the IDC will only afford the practitioners with a short window of opportunity to conduct the sale process in an attempt to find the purchaser to either recapitalise the Company or acquire the business of the Company as a going concern.

5. The practitioners believe that it is highly unlikely that existing shareholders will provide any further funding.

CHALLENGES IN THE CURRENT MARKET ENVIRONMENT

6. The steel price has reduced significantly (around 15-18% for structural steel) since the start of the business rescue proceedings. This is largely due to an on-going decline in local demand for steel as well as import parity reducing prices as global competitors dump their excess supply into South Africa.
7. This reduction in both demand and pricing has resulted in the temporary closure of four furnaces with only two furnaces remaining in operation. The practitioners are in the process of communicating the impact of this to both unionised and non-unionised employees.

CHALLENGES IN THE HIGHVELD INTERNAL ENVIRONMENT

Eskom:

8. Eskom has been supportive of the business rescue proceedings to date. The practitioners are in the process of concluding an interim supply agreement with Eskom for the supply of electricity during the business rescue proceedings. The major outstanding issues are:
    8.1. We have been formally advised that a guarantee of R411 million is required to support the ongoing supply of electricity. We are in the process of reviewing this based on shorter credit terms and reduced peak usage. We have been advised that we should be able to reduce this significantly. However, there will be a requirement for the new investor to put funds aside for the purposes of securing the supply of electricity;
    8.2. The peak winter tariffs are exorbitant and the company simply cannot run its operation effectively at these rates. The company has requested dispensation with

regards to these tariffs, but this has not been agreed to. Furthermore, the losses are as a result of interrupted production for five hours of the day are significant.

SARS:

9. A query of R1.437 billion has been raised by SARS relating to income tax assessments for the 2007 / 2008 and 2009 years of assessment. The practitioners are presently investigating the nature and the reason for this substantial assessment, which, if correct, would adversely affect the possibility of the purchaser taking over the Company.

Environmental Issues:

10. The Company is currently being reviewed by both the DEA and DWS although no report has been issued yet. The Company is committed to complying with all regulatory aspects, but requires sufficient time to remedy all potential non-compliance in line with an agreed remedial schedule. In the absence of an agreed framework, the purchasers are likely to raise this as a material issue.

BUSINESS RESCUE PROCEEDINGS

11. The business rescue proceedings have provided the practitioners with the opportunity to consider the continued implementation of management's recommended turnaround plan and to find a purchaser to either recapitalise the Company or to sell the business as a going concern. A recapitalisation is essential to make Highveld a sustainable business despite the current commodity cycle.

12. On 6 June 2015, a sales process letter was issued to potential purchasers. To date, 27 parties have expressed an interest in partaking in the sales process. However, at present, only 7 have complied with the conditions of the sales process and have been provided with an information memorandum. In terms of the sales process, indicative offers are due on 15 July 2015.

13. The ability to finalise the sales process will obviously depend on the future cash flow requirements of the Company to extend the business rescue proceedings, should it be necessary (i.e. any delays likely to affect a sale due to statutory and regulatory requirements).

14. The cash flow requirements are significant in several aspects, notably:

Capital required for operations:

15. It is the practitioners' firm view that the majority of cash raised needs to be applied into the Company to fund working capital, pay for necessary capital expenditure and cover operational losses whilst the commodity cycle remains at these unprecedented low levels. Without some form of price protection, the Company will be at the mercy of international markets dumping excess inventory into the market and the operational losses will be unsustainable. The likelihood of finding a party to recapitalise the business will diminish accordingly.

Capital required restoring operational capacity:

16. A number of historic items highlighted in this letter need to be addressed to be able to operate going forward. These include the guarantee required for Eskom as well as the remedial work required on the environmental issues. The practitioners are in the process of evaluating the quantum of these costs, but the larger these requirements the less likely it will be to find a funder.

Capital required for pre-business rescue creditors:

17. In terms of any possible business rescue plan, there would be a need to make a payment, either in cash or equity, to pre-business rescue creditors. This would include both trade creditors as well as statutory creditors such as SARS.

ASSISTANCE REQUIRED

18. To assist the Company in the business rescue proceedings, it is anticipated that the practitioners will require the following support from the Department of Trade and Industry. , Any support would greatly increase the prospects of the practitioners being able to ensure the success of the business rescue proceedings and avoiding the liquidation and or closure of Highveld:

    18.1. To consider imposing import protection in respect of foreign companies dumping steel products in South Africa. This would be critical for the long-term sustainability

of Highveld, particularly the protection of large structural steel of which Highveld is the only local producer. Highveld has prepared the necessary ITAC documentation;

18.2. Support in respect of expedited timeframes with the South African competition authorities' merger control processes, especially if a potential competitor is the potential strategic investor, as well as in respect of the complaint matter which has been referred to the Competition Tribunal;

18.3. Assistance with finding a commercial solution with the relevant government departments (i.e. DMR, DEA, DWS), regarding a remedial action plan for potential non-compliance on environmental matters; and

18.4. Possible assistance to resolve the queries raised by SARS expeditiously.

19. The practitioners need to point out that if there is no suitable purchaser obtained by 15 July 2015, due to the cash flow constraints of the Company. The practitioners in terms of the provisions of the Companies Act, 71 of 2008, will have no other alternative but to arrange for a forced sale of Highveld's assets through a business rescue plan. Alternatively they may be compelled to apply urgently for the conversion of the business rescue proceedings to liquidation proceedings.

20. The practitioners would welcome your feedback and any input on the issues raised in this letter. As such, the practitioners are available to meet on an urgent basis to discuss any of the key points outlined in this letter.

The practitioners appreciate your continued support during the business rescue proceedings.

Yours sincerely

Piers Marsden

Vote for the Extension of the Business Rescue Plan

Total Trade Payables	640,820,685
Total Trade Accruals	372,862,779
Total Sundry / Other Creditors	42,194,419
Loan from East Metals	379,117,063
Short Term Provisions (Payroll)	101,215,769
Total Creditors	**1,536,210,714**
majority vote required	*51%*
Amount required for Approval	783,467,464
Approval received	**799,011,752**

comprising 184 creditors (including East Metals AG)

Vendor	Category	Balance	Vote
EMAG		-378,838,480.27	YES
HIGHVELD COAL (PTY) LTD Total	Coal	-85,816,778.80	YES
SILICON SMELTERS (PTY) LTD Total	Ferroalloys	-51,165,094.68	YES
SAMANCOR CHROME LIMITED Total	Service Other	-47,319,303.22	YES
BOUWER AND SCROOBY (PTY) LTD Total	Service Other	-23,817,006.40	YES
SMS SIEMAG SOUTH AFRICA (PTY) LTD Total	Auxilary Mat for Rep exStore	-18,687,401.82	YES
VESUVIUS Total	Auxilary Mat for Rep exStore	-11,318,271.41	YES
A & G ENGINEERING CC Total	Auxilary Mat for Rep exStore	-9,341,187.05	YES
FREIGHT EXCELLENCE (PTY) LTD Total	Inbound Transport	-9,103,928.79	YES
BEARING MAN (PTY) LTD Total	Auxilary Mat for Rep exStore	-9,060,241.23	YES
AMG ENGINEERING (PTY) LTD Total	Auxilary Mat for Rep exStore	-7,769,715.80	YES
CARL BECHEM AFRICA (PTY) LTD Total	Service Other	-7,499,590.96	YES
INTOCAST SA (PTY) LTD Total	Auxilary Mat for Rep exStore	-7,197,558.94	YES
RFA INTERNATIONAL LP CALGARY (KANAD Total	Ferroalloys	-7,173,384.69	YES
C.STEINWEG NOMAD FREIGHT (PTY) LTD Total	Service Other	-6,650,785.11	YES
souht african roll com		-6,118,843.70	YES
VEREENIGING REFRACTORIES (PTY) LTD Total	Auxilary Mat for Rep exStore	-5,405,046.30	YES
HERAEUS ELECTRO-NITE (PTY) LTD Total	Auxilary Mat for Rep exStore	-5,135,286.39	YES
TEKPORT CC Total	Capital Expenditure	-4,591,844.00	YES
IMPROCHEM (PTY) LTD Total	Service Other	-4,491,095.72	YES
ANDERSON & KERR ENGINEERING Total	Auxilary Mat for Rep exStore	-3,912,736.50	YES
ELCA ENGINEERING (PTY) LTD Total	Service Other	-3,788,394.12	YES
ETIS MVELAPHANDA ENGINEERING (PTY) Total	Auxilary Mat for Rep exStore	-3,782,627.83	YES
P & I ENGINEERING WORKS CC Total	Services Repairs	-3,206,206.01	YES
DT PROJECTS Total	Service Other	-3,042,494.67	YES
DANGO DIENENTHAL (PTY) LTD Total	Service Other	-3,022,722.54	YES
THORBURN SECURITY SOLUTIONS (NORTHE Total	Service Other	-2,978,820.61	YES
TRAFIGURA SERVICES SOUTH AFRICA (PTY) LTD		-2,840,406.62	YES
VOITH TURBO (PTY) LTD Total	Services Repairs	-2,816,751.66	YES
REFRALLOY ENGINEERING IMPORTING (Total	Auxilary Mat for Rep exStore	-2,756,231.25	YES
DICKINSON GROUP (PTY) LTD Total	Services Repairs	-2,678,113.23	YES
AIRES PUMPS SPARES ENGINEERING CC Total	Services Repairs	-1,966,046.28	YES

CYLINDER SERVICES CC Total	Auxilary Mat for Rep exStore	-1,965,581.82	YES
SUPERCARE SERVICES GROUP (PTY) LTD Total	Service Other	-1,953,592.25	YES
STELOY CASTINGS (PTY) LTD Total	Auxilary Mat for Rep exStore	-1,933,265.16	YES
ELECTRO FIELD SERVICES Total	Auxilary Mat for Rep exStore	-1,689,147.95	YES
THORBURN TECHNICAL SOLUTIONS (NORTH Total	Service Other	-1,605,749.04	YES
MOHOLI MINING SUPPLIES Total	Auxilary Mat for Rep exStore	-1,581,026.24	YES
X METALE CC Total	Auxilary Mat for Rep exStore	-1,470,247.48	YES
VESUVIUS SOUTH AFRICA (PTY) LTD Total	Auxilary Mat for Rep exStore	-1,334,544.35	YES
KUTTING MPUMALANGA Total	Auxilary Mat for Rep exStore	-1,327,965.79	YES
EVAPCO S.A. (PTY) LTD Total	Auxilary Mat for Rep exStore	-1,323,125.04	YES
SW AFRICA FENCING CONSTRUCTION & Total	Service Other	-1,288,683.35	YES
SUCCESS MAINTENANCE AND LIFTING SER Total	Service Other	-1,174,014.05	YES
FRASER ALEXANDER TAILINGS (PTY) LTD Total	Service Other	-1,143,768.78	YES
VESUVIUS GMBH Total	Other Raw Material	-1,092,497.27	YES
DOT STEEL (PTY) LTD Total	Other Raw Material	-1,031,038.80	YES
AIR BLOW FANS (PTY) LTD Total	Services Repairs	-1,011,755.70	YES
CALDERYS SOUTH AFRICA (PTY) LTD Total	Other Raw Material	-1,010,330.47	YES
GEGA-LOTZ (PTY) LTD Total	Auxilary Mat for Rep exStore	-1,000,509.79	YES
ANGSTROM ENGINEERING (PTY) LTD Total	Auxilary Mat for Rep exStore	-962,324.16	YES
McKeown Industries SA (Pty) Ltd		-934,743.05	YES
EMERSON INDUSTRIAL AUTOMATION Total	Auxilary Mat for Rep exStore	-914,481.76	YES
VERREF SHAPED (PTY) LTD Total	Service Other	-913,448.26	YES
SUPPLYTECH Total	Auxilary Mat for Rep exStore	-888,465.92	YES
PROTEA COIN GROUP (SECURITY SERV) Total	Service Other	-840,944.80	YES
REMAG (PTY) LTD Total	Auxilary Mat for Rep exStore	-798,350.66	YES
LTM MULONDO HOLDINGS (PTY) LTD Total	Auxilary Mat for Rep exStore	-788,620.09	YES
ROTECH SYSTEMS AND ENCODERS CC Total	Auxilary Mat for Rep exStore	-783,034.08	YES
GLOBE WITBANK Total	Auxilary Mat for Rep exStore	-769,269.95	YES
GOSSWELL DEVELOPMENTS CC Total	Other Raw Material	-762,489.00	YES
CONSTRUCTION TYRES (PTY) LTD Total	Auxilary Mat for Rep exStore	-740,932.73	YES
THWAITES ENGINEERING CC Total	Service Other	-740,040.10	YES
DE KAAP ELECTRICAL CC Total	Service Other	-733,092.96	YES
TRI CORPORATION CONSTRUCTION CC Total	Auxilary Mat for Rep exStore	-651,376.63	YES

MONITOR ENGINEERING (PTY) LTD Total	Auxilary Mat for Rep exStore	-650,340.64	YES
WAVE ELECTRIC CC Total	Services Repairs	-641,056.20	YES
ROSCON PROJECTS Total	Service Other	-624,969.07	YES
MPUMALANGA PUMPS CC Total	Services Repairs	-618,881.34	YES
JR MACKAYS DIESEL MOTOR ENGINEERING Total	Services Repairs	-612,703.50	YES
WITBANK CHEMICAL MANUFACTURING COMP Total	Auxilary Mat for Rep exStore	-565,000.75	YES
Vibramech		-550,617.72	YES
REPLACEMENT SPARES UNLIMITED CC Total	Auxilary Mat for Rep exStore	-527,738.67	YES
MS COMPONENTS CC Total	Auxilary Mat for Rep exStore	-484,776.20	YES
NASHUA MPUMALANGA Total	Service Other	-473,618.12	YES
EFFICIENT ENGINEERING TECHNICAL & M Total	Auxilary Mat for Rep exStore	-472,718.03	YES
CONVEYOR HOSE WITBANK A DIV OF INMI Total	Auxilary Mat for Rep exStore	-469,305.97	YES
YANKA LABORATORIES (PTY) LTD Total	Auxilary Mat for Rep exStore	-466,785.33	YES
WIKA INSTRUMENTS (PTY) LTD Total	Service Other	-431,512.80	YES
INDUSCO SUPPLIES CC Total	Auxilary Mat for Rep exStore	-428,577.34	YES
BEARINGS INTERNATIONAL (PTY) LTD A Total	Auxilary Mat for Rep exStore	-426,505.92	YES
VAPSCO ENGINEERING CC Total	Services Repairs	-398,750.20	YES
EDUARDO CONSTRUCTION (PTY) LTD Total	Service Other	-363,620.49	YES
MID HYDRAULIC PUMP REFURBISHING Total	Service Other	-363,379.01	YES
AGE TECHNOLOGIES JHB (PTY) LTD Total	Auxilary Mat for Rep exStore	-347,245.88	YES
TLALIS CONSTRUCTIONS (PTY) LTD Total	Service Other	-345,055.76	YES
CONWAY JOHNSON Total	Auxilary Mat for Rep exStore	-344,862.50	YES
SIMOTECH CC Total	Auxilary Mat for Rep exStore	-343,580.04	YES
DEGASITY PRETORIA (PTY) LTD Total	Service Other	-339,727.63	YES
NEVEN MATTHEWS (PTY) LTD Total	Auxilary Mat for Rep exStore	-306,136.51	YES
W FEARNEHOUGH AFRICA (PTY) LTD Total	Auxilary Mat for Rep exStore	-293,721.82	YES
SPEDDICK INDUSTRIAL TYRES CC Total	Services Repairs	-285,381.89	YES
OSTER ENGINEERING CC Total	Auxilary Mat for Rep exStore	-283,996.80	YES
WCJ ELECTRICAL (PTY) LTD Total	Service Other	-274,855.14	YES
CLYDE BERGEMANN AFRICA (PTY) LTD Total	Service Other	-270,041.79	YES
LETS TRADE 1238 Total	Auxilary Mat for Rep exStore	-261,738.86	YES
INDUSTRIAL LOCOMOTIVE SERVICE CC Total	Auxilary Mat for Rep exStore	-259,596.81	YES
RITCHIE CRANE HIRE Total	Service Other	-215,049.60	YES

GLOBAL STRAP CC Total	Service Other	-213,546.39	YES
ECONOFLEX (PTY) LTD Total	Auxilary Mat for Rep exStore	-211,992.35	YES
SEBENZA SUPPLIES CC Total	Auxilary Mat for Rep exStore	-208,187.56	YES
EAST AUTO RADIATORS (PTY) LTD Total	Services Repairs	-206,524.38	YES
TRACEABILITY SOLUTIONS Total	Auxilary Mat for Rep exStore	-193,877.52	YES
UNIVERSAL RIGGING & MOVING Total	Service Other	-179,911.35	YES
ERNEST LOWE TRADING Total	Services Repairs	-179,482.69	YES
NEW HEIGHTS		-174,146.40	YES
EARTHMOVING MECHANISMS CC Total	Services Repairs	-171,315.09	YES
DIAMOND ABRASIVES (PTY) LTD Total	Auxilary Mat for Rep exStore	-167,682.60	YES
VIKELA ROAD DEMARCATION & SAFETY CC Total	Service Other	-157,365.03	YES
ML ASSET MANAGEMENT (PTY) LTD Total	Service Other	-153,749.55	YES
INDUSTRIAL NOZZLES AND SYSTEMS CC Total	Service Other	-145,541.52	YES
CONSULTLINK CC Total	Auxilary Mat for Rep exStore	-145,224.11	YES
MECHANICAL ROTATING SOLUTIONS CC Total	Service Other	-142,737.12	YES
PNET (PTY) LTD Total	Service Other	-136,629.00	YES
TRACTOR GRADER SUPPLIES CC Total	Auxilary Mat for Rep exStore	-117,629.96	YES
C & I SERVICES CC Total	Auxilary Mat for Rep exStore	-107,091.14	YES
Bumatech		-106,257.69	YES
PENTAX TRADING (PTY) LTD Total	Auxilary Mat for Rep exStore	-103,084.69	YES
TEMPERATURE CONTROLS (PTY) LTD Total	Auxilary Mat for Rep exStore	-100,206.00	YES
STEELWORX CONSULTING CC Total	Other Creditors	-98,820.00	YES
TRANSFIRE (PTY) LTD Total	Service Other	-96,532.89	YES
MECHANIQUIP CC Total	Auxilary Mat for Rep exStore	-91,485.15	YES
WITBANK TACHOGRAPH TIME SUPPLIES Total	Auxilary Mat for Rep exStore	-91,061.72	YES
Det Norske Veritas (Pty) Ltd		-78,090.00	YES
ACTOM (PTY) LTD Total	Auxilary Mat for Rep exStore	-77,862.00	YES
EME PCB S CC Total	Auxilary Mat for Rep exStore	-74,006.66	YES
MARINS PRINTING CC Total	Other Creditors	-70,233.57	YES
EB ELECTRONICS Total	Service Other	-69,986.88	YES
RHETOR CC Total	Service Other	-69,973.20	YES
Control systems technology		-62,244.00	YES
MPUMULANGA LABOUR RELATIONS		-54,600.00	YES

B-Logic Verification Agency		-45,600.00	YES
PROJECT PRESENTATIONS CC Total	Auxilary Mat for Rep exStore	-44,511.53	YES
MEGA BAGS GROUP		-43,890.00	YES
WATER PURIFICATION Total	Auxilary Mat for Rep exStore	-43,420.19	YES
PROCOL CC Total	Auxilary Mat for Rep exStore	-38,771.12	YES
LECO AFRICA (PTY) LTD Total	Auxilary Mat for Rep exStore	-35,140.00	YES
FE POWDER SUPPLIES (PTY) LTD Total	Other Raw Material	-33,789.60	YES
STERLING PLANT HIRE CC Total	Service Other	-32,963.10	YES
FLEXICOR CABLES (PTY) LTD Total	Services Repairs	-31,771.80	YES
KRABO LOCKSMITHS CC Total	Auxilary Mat for Rep exStore	-31,393.09	YES
HYTORQ (PTY) LTD Total	Service Other	-28,403.10	YES
POWER QUALITY CO (PTY) LTD Total	Service Other	-26,694.24	YES
PLAN PROJECTS Total	Service Other	-25,171.20	YES
travellers corner		-24,873.10	YES
BLAHA MAINTENANCE CC Total	Service Other	-21,108.51	YES
S BUYS SCRIPTWISE (PTY) LTD Total	Other Creditors	-20,573.23	YES
S Roopa Consultants (Pty) Ltd		-20,480.00	YES
ruschem@mweb.co.za		-7,524.00	YES
Sunfox 106 cc t/a ExecuAir		-3,477.00	YES
LABRITE CC Total	Auxilary Mat for Rep exStore	-1,316.70	YES
Pop a Daisy t/a Marisca Fleurette&Guesthouse 4 u		-1,100.10	YES
WORKFORUM PERSONNEL PLACEMENTS AND SERVICES		-	YES
Hardox Wear Parts		-	YES
AIRPOLGUYS		-	YES
FBMINING		-	YES
Secure Access		???	YES
Rapid Freight		???	YES
Dewald Faber		???	YES
www.dumisanimabuza		???	YES
svendbor brakes		???	YES
SARS		???	YES
Spec Savers		???	YES
Reinforcing Steel Contractors		???	YES

Industrial Equipment Technology & Engineering (Pty) Ltd		???	YES
Dredging		???	YES
Netactive		???	YES
IEMAS		???	YES
Specialised Belting Products (Pty) Ltd		???	YES
EID Weighing Systems		???	YES
Magnum Metals		???	YES
Communication Services		???	YES
B&S Mining		???	YES
Vanchem Vanadium Products		???	YES
Skyjacks		???	YES
Execulab		???	YES
NEUMATICS		???	YES
CGIC		???	YES
NGA AFRICA		???	YES
H PISTORIUS & COMPANY		???	YES
WERKSMANS		???	YES
LOMASCREEK		???	YES
Jiangsu Gong Chang Roll Company		???	YES
AIRLIQUIDE		???	YES

Vendor	Category	Balance	Vote
COALVEST (PTY) LTD Total	Coal	-19,386,024.93	NO
IDWALA INDUSTRIAL HOLDING LIMITED Total	Other Raw Material	-3,839,754.26	NO
SOUTHWAY REFRACTORIES (PTY) LTD Total	Service Other	-3,265,252.47	NO
WITBANK RELIABLE SERVICES T/A WITBA Total	Services Repairs	-1,977,105.99	NO
CTS EAST (PTY) LTD Total	Service Other	-609,993.91	NO
JACHRIS CC Total	Auxilary Mat for Rep exStore	-133,358.09	NO
CABLE CONSTRUCTION Total	Auxilary Mat for Rep exStore	-104,946.89	NO
LUBRICATOR KING DISTRIBUTONS CC T/A Total	Auxilary Mat for Rep exStore	-27,223.20	NO
DNA LOGIC (PTY) LTD Total	Service Other	-20,994.81	NO
CARMICA MEDICAL DISTRIBUTORS CC Total	Auxilary Mat for Rep exStore	-8,904.92	NO
Bidvest Steiner		-	NO
Mpumalanga Belter		-	NO
Welding Alloya SA		-	NO

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PER EMAIL: lfield@ensafrica.com

CC: pmarsden@matusonassociates.co.za
CC: goertel@ensafrica.com

Our Reference	J Jones
Account Number	20152604
Your Reference	
Direct Line	(011) 562 1189
Direct Telefax	(011) 562 1662
Direct e-mail	julian.jones@dlacdh.com
Date	13 July 2015

Dear Madam

HIGHVELD STEEL (IN BUSINESS RESCUE)

1 I refer to the above matter and previous correspondence herein. Can you please furnish us with a copy of the correspondence which was addressed to the South African Revenue Services on Friday 10 July 2015.

2 Furthermore, can you please furnish us with an agenda for the creditors' meeting which is to take place on Thursday, 16 July 2015.

Yours faithfully

pp.

JULIAN JONES
CLIFFE DEKKER HOFMEYR INC

Letitia Field

From: Letitia Field
Sent: 13 July 2015 16:55
To: 'Julian Jones'
Cc: Gary Oertel
Subject: RE: HIGHVELD STEEL (IN BUSINESS RESCUE) [CDH-JHBDocs.FID3699444]
Attachments: Evraz Highveld Steel and Vanadium Limited - Response to SARS letter of f....pdf; Power of Attorney.pdf

Dear Julian

I refer to your letter attached to your email below.

Please see attached hereto the letter to SARS.

The proposed agenda for the second creditor's committee meeting is as follows:

1. Opening and attendance
2. Update by practitioners
3. Potential investors
    1. Presentation of summary offers
    2. Discussion of summary offers
4. Way forward
5. General and questions
6. Closing

Regards

From: Julian Jones [mailto:Julian.Jones@dlacdh.com]
Sent: 13 July 2015 14:54
To: Letitia Field; 'pmarsden@matusonassociates.co.za'; Gary Oertel
Subject: HIGHVELD STEEL (IN BUSINESS RESCUE) [CDH-JHBDocs.FID3699444]

Please find enclosed herewith our correspondence for your kind attention.

Julian Jones
Director - Dispute Resolution
Cliffe Dekker Hofmeyr Inc
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The South African Revenue Service
1st Floor, Blocks A and B
Megawatt Park, Maxwell Drive
Sunninghill, Sandton

our ref
your ref
10 July 2015 date

RE: Evraz Highveld Steel and Vanadium Limited (Taxpayer Reference 9250/026/60/7)

Response to Letter of Audit Findings

1. We refer to the letter of audit findings dated 27 May 2015 (**"letter of findings"**) issued by the South African Revenue Service (**"SARS"**) to Evraz Highveld Steel and Vanadium Limited (**"Evraz Highveld"**) wherein various bases of assessment are set out in respect of Evraz Highveld's 2007, 2008 and 2009 years of assessment (**"period under review"**).

2. Evraz Highveld denies all the allegations and conclusions set out in the letter of findings that are inconsistent with what is stated in this letter.

3. To the extent that any particular allegation or conclusion may not be specifically addressed in this letter, this should not be construed as an admission by Evraz Highveld or an acceptance by it of the correctness of any such statement or allegation. Evraz Highveld will amplify its contentions and raise additional defences if and when appropriate.

4. Prior to setting out the responses to each of the audit findings, Evraz Highveld requests clarification regarding the specific matters listed in paragraphs 4.1 to 4.4 below. We are not in a position to formulate a comprehensive response with regard to same, and:

   4.1. We note that identical queries raised in the letter of findings have been raised with regard to Evraz Highveld's 2010, 2011 and 2013 years of assessment. With respect, the contents of the letter of findings appears to be essentially a "copy and paste" of the letter of audit findings in relation to the 2010, 2011 and 2012 years of assessment issued by SARS to Evraz Highveld dated 3 July 2014. This is evidenced by the fact that section 9D of the Act, as it currently reads, is incorrectly quoted in relation to the period under review. This clearly illustrates that SARS has not applied its mind in concluding that Evraz Highveld did not qualify for the foreign business establishment (**"FBE"**) exemption in the years of assessment to which the letter of findings relates. We therefore request details regarding the methodology adopted by SARS in carrying out its audit in relation to period under review.

   4.2. In terms of the letter of findings, SARS states that it is not in possession of the 2007 financial statements of HH, and has based its determination of the income attributable to Evraz Highveld upon an estimation of deductible expenditure based on the audited 2010 to 2012

financial statements. In this regard, we submit that there is no reasonable basis upon which SARS may simply elect to estimate the income and deductible expenditure based on future years of assessment. We request that you provide a detailed written submission regarding the reasonableness of the estimate in terms of section 102(2) of the TAA.

4.3. With regard to the 2008 year of assessment, expenditure amounting to EUR 44 488 is classified as non-deductible on the basis that it has not been incurred in the production of income. Please clarify the basis on which SARS has made the determination that the expenditure is non-deductible and what facts were taken into account to make such determination.

4.4. SARS has also determined that expenditure amounting to EUR 40 978 incurred in the 2009 year of assessment was non-deductible on the basis that it was not incurred in the production of income. Please clarify the basis on which SARS has made the determination that the expenditure is non-deductible and what facts were taken into account to make such determination.

5. We are unable to respond to the above matters set out in the letter of audit findings without sufficient detail regarding what facts have been taken into account in reaching the above conclusions and accordingly reserve our right to amend/amplify our responses following the receipt of additional details from SARS.

6. We submit that the raising of an additional assessment encompassing the proposed adjustments without addressing our request as outlined in paragraph 4 above would amount to "administrative action" as envisaged in section 1 of the Promotion of Administrative Justice Act No. 3 of 2000 (**"PAJA"**) and is potentially subject to review in terms of section 6(2) of the PAJA on the basis that irrelevant considerations were taken into account, or relevant considerations were not considered.

7. We address the findings of SARS in the sequence in which they are raised in the letter of findings.

8. **Background**

8.1. Hochvanadium Handels GmbH (**"HH"**) a wholly owned subsidiary of Hochvanadium Holdings AG incorporated in Austria, which in turn is a wholly owned subsidiary of Evraz Highveld, constitutes a controlled foreign company (**"CFC"**) in relation to Evraz Highveld. During the 2007, 2008 and 2009 years of assessment, the income of HH was not included in Evraz Highveld's income on the basis that such income was exempt from inclusion in Evraz Highveld's income.

8.2. Following the conclusion of an audit, SARS seeks to make the following adjustments to the taxable income of Evraz Highveld based on the reasons set out in the letter of findings:

Tax period	Description	Amount included in income
2007	Net income of CFC included in income by virtue of section 9D(2) of the Income Tax Act No. 58 of 1962 (**"the Act"**).	R401 888 367
2008	Net income of CFC included in income by virtue of section 9D(2) of the Act.	R879 290 410

2009	Net income of CFC included in income by virtue of section 9D(2) of the Act.	R156 005 177
Total		**R1 437 183 954**

9. **Reopening of the prescribed tax assessments**

9.1. Due to the fact that the assessments for the period under review were concluded prior to the enactment of the TAA, we submit that the provisions of section 79(1) of the Act, as it read at the relevant times, and not the provisions of section 99 of the TAA, should be applied.

9.2. In terms of the first proviso to section 79(1), the Commissioner was prohibited from raising an assessment under that section:

> *"(i) after the expiration of three years from the date of the assessment (if any) in terms of which any amount which should have been assessed to tax under such assessment was not so assessed or in terms of which the amount of tax assessed was less than the amount of such tax which was properly chargeable, unless –*
>
> *(aa)* ***the Commissioner is satisfied that the fact that the amount which should have been assessed to tax was not so assessed or the fact that the full amount of tax chargeable was not assessed, was due to fraud or misrepresentation or non-disclosure of material facts****; or*
>
> *(bb) the Commissioner and the taxpayer agree otherwise prior to the expiry of that three year period;"* **(our emphasis)**

9.3. An "assessment" was defined in section 1 of the Act as –

> *"the determination by the Commissioner, by way of a notice of assessment (including a notice of assessment in electronic form) served in a manner contemplated in section 106(2) –*
>
> *(a) of an amount which upon which any tax leviable under this Act is chargeable; or*
>
> *(b) of the amount of any such tax; or*
>
> *(c) of any loss ranking for set-off; or*
>
> *(d) of any assessed capital loss determined in terms of paragraph 9 of the Eighth Schedule;*
>
> *and for the purpose of Part III of Chapter III includes any determination by the Commissioner in respect of any of the rebates referred to in section 6 and any decision of the Commissioner which is in terms of this Act subject to objection and appeal."*

9.4. The dates of the assessments of Evraz Highveld for the period under review are as follows:

Year of Assessment	Date of original assessment	Expiry of 3 year period
2007	2008/09/30	2011/09/30
2008	2009/09/04	2012/09/04
2009	2011/01/15	2014/01/15

9.5. From the above, it is evident that the three year period contemplated in section 79(1) of the Act has expired in respect of the period of review. Consequently, the Commissioner is prohibited from raising additional assessments. In order to raise an assessment outside of the prescribed three year period, the Commissioner must be satisfied that there was fraud, misrepresentation, or non-disclosure of material facts, which caused the amount that should have been correctly assessed, not to be so assessed. SARS therefore bears the onus of proving the presence of these behaviours on the part of the taxpayer, and proving that such behaviour gave rise to an inaccurate assessment.

9.6. In this regard, the court in *CSARS v Bosch and Another*[1] held as follows –

> "*It was not sufficient that the Commissioner was satisfied that there was fraud, misrepresentation or non-disclosure of material facts.* ***He must have been satisfied that the fact that the amount which should have been assessed to tax was not so assessed...was due to such fraud, misrepresentation, or non-disclosure of material facts.***" **(our emphasis)**

9.7. A "misrepresentation" has been defined as "*a wrongful and intentional false representation of fact which induces another to act and which causes patrimonial loss*"[2]. A misrepresentation therefore relates to an expression of ascertainable facts as opposed to the expression of opinion or interpretation of law.

9.8. The fact that the taxpayer's interpretation of the law differs to the interpretation adopted by SARS does not amount to a misrepresentation by the taxpayer, particularly where the taxpayer has satisfied the required level of duty and care. The taxpayer's duty was held by the court in *ITC 1594*[3] to be to render an accurate and full return on which he can be assessed, and not do so in a vague or ambiguous manner casting the onus upon the revenue authorities to elicit the complete picture by a series of queries.

9.9. We address the matters raised by SARS below.

2007 and 2008 years of assessment

9.10. SARS contends that Evraz Highveld misrepresented the true state of affairs by claiming the FBE exemption or alternatively did not disclose material facts in its disclosure to SARS as it could not rely on the FBE exemption because it outsourced its core functions and failed to obtain the ruling provided for in section 9D(10)(1)(a) confirming the exemption of the income of HH.

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[1] [2015] JOL 32547 (SCA)
[2] *Meskin v Anglo-American Corporation of SA Ltd* 1968 (4) SA 793
[3] 57 SATC 259

9.11. In the 2007 and 2008 years of assessment, the applicable provisions of section 9D(10) of the Act provided –

> *"(a) The Commissioner may issue a ruling that –*
>
> *(i) deems a place of business of a controlled foreign company as fulfilling the requirements of paragraph (a)(i) and (ii) of the definition of 'foreign business establishment' in subsection (1) by taking into account the utilisation of employees, equipment and facilities of any other controlled foreign company that has the same country of residence as that controlled foreign company where that other controlled foreign company forms part of the same group of companies as the controlled foreign company;"*

9.12. We refer to the Explanatory Memorandum on the Taxation Laws Amendment Bill, 2006, in which amendments to section 9D of the Act are discussed in detail. Paragraph 6 on page 59, in which the ruling contemplated in section 9D(10) is discussed, provides as follows –

> *"The proposed amendment allows for a ruling system in terms of which the Commissioner can grant various CFC waivers on a case-by-case basis (so business practices can be properly balanced against avoidance without going too far in the extreme). The process will allow for a series of informal rules to be developed that can later be legislatively codified. Rulings will only be given to the extent that the Commissioner is satisfied that these rulings will not lead to an unacceptable erosion of the tax base. Any ruling issued by the Commissioner under these circumstances will generally be subject to the same procedures, terms and conditions as a SARS binding private ruling (with appropriate modifications)."*

9.13. The Explanatory Memorandum then provides the instances in which the Commissioner may issue a ruling deeming the FBE exemption to apply where there are elements present in the arrangement which may cause it to fall short of the FBE definition (e.g. diversionary transaction waivers, passive income waivers, etc.). In respect of section 9D(10)(a)(i), the Commissioner is given the power to allow a taxpayer to place reliance on the employees, equipment and facilities of a related group CFC.

9.14. We submit that the operations of HH independently satisfied the objective criteria of the FBE definition, without having to rely on the employees and infrastructure of Treibacher, as set out in paragraph 9 below. There was therefore no requirement for SARS to be approached for a ruling to provide clarity in this regard.

9.15. In addition, we point out that section 9D(10)(1)(a) allowed the taxpayer to apply for a ruling from SARS taking into account the employees, equipment and facilities of another CFC that formed part of the same group of companies as that CFC. As Treibacher is an independent third party and not a CFC in relation to Evraz Highveld, and does not form part of the same group of companies as HH, Evraz Highveld was precluded from applying for a ruling on the basis of section 9D(10)(1)(a) in any event.

9.16. From the above, it is apparent that Evraz Highveld was under no obligation to obtain a ruling from SARS, and was precluded from doing so in any event.

9.17. Section 72A(1) of the Act(as it read at that time) which governs the disclosure obligations of taxpayers in relation to CFCs, provided –

> *"(1) Every resident who on the last day of the foreign tax year of a controlled foreign company or immediately before a foreign company ceases to be a*

controlled foreign company directly or indirectly, together with any connected person in relation to that resident, holds at least 10 per cent of the participation rights in any controlled foreign company (otherwise than indirectly through a company which is a resident), must submit to the Commissioner together with the return contemplated in section 66 in respect of that year of assessment, a return containing such information as may be prescribed by the Commissioner.

(2) A resident must have available for submission to the Commissioner when so requested, a copy of the financial statements of the controlled foreign company for the relevant foreign tax year, as defined in section 9D, of that controlled foreign company."

9.18. During the 2007 and 2008 years of assessment, Evraz Highveld submitted to SARS its tax returns, as well as the IT10 returns in relation to HH. Evraz Highveld therefore furnished SARS with all the necessary information and material facts necessary for the accurate assessment of its income by SARS. The disclosure obligations imposed by the Act were therefore complied with by Evraz Highveld.

2009 year of assessment

9.19. In relation to the 2009 year of assessment, SARS contends that Evraz Highveld misrepresented the state of affairs or alternatively did not disclose material facts by claiming the FBE exemption where it outsourced its functions to a company which did not form part of the same group and thus did not qualify to claim the exemption.

9.20. We submit that in relation to the 2009 tax year, Evraz Highveld did not misrepresent material facts from SARS as it provided SARS with all the requisite information to enable SARS to make an assessment. As set out above, the interpretation of a statute in a different manner than that adopted by SARS cannot give rise to a "misrepresentation" or "non-disclosure".

9.21. There is no basis for SARS' allegation that Evraz Highveld intentionally misrepresented or did not disclose material facts as such allegation arises from a difference of interpretation of statute. A taxpayer's opinion cannot amount to a misrepresentation where such taxpayer holds an honest opinion that its affairs are correctly reflected in its tax returns and supporting documentation, even if SARS holds a different opinion.

9.22. Even in the instance where the merits of the matter at hand as interpreted by Evraz Highveld are disputed by SARS, the onus on SARS to demonstrate the alleged misrepresentation and/or non-disclosure of material facts has not been discharged. SARS cannot seek to deprive Evraz Highveld of the immunity conferred by section 79 of the Act where it has not shown evidence that the behaviour of the taxpayer amounts to misrepresentation or non-disclosure, which behaviour resulted in non-assessment.

9.23. This would highly prejudicial to the rights of Evraz Highveld, conferred by the legislation.

9.24. From the above, it is evident that the assessments for the period under review have prescribed and SARS is therefore precluded from issuing additional assessments. Should SARS persist with the issuance of additional assessment, any such assessments would be resisted on the basis that the issue thereof would amount to administrative action capable of review by the High Court in terms of the provisions of the PAJA.

10. **Response to audit findings: Application of FBE exemption**

10.1. Notwithstanding the fact that we are of the view that the assessment for the period under review have prescribed, we continue to respond for the sake of completeness.

2007 year of assessment

10.2. We note that in the letter of findings, the definition of an "FBE" which is set out is the definition as it currently stands in the Act, and not the definition as it read during the 2007 year of assessment.

10.3. In the 2007 year, an FBE was defined as –

> *"(a) a place of business with an office, shop, factory, warehouse or other structure which is used or will continue to be used by that controlled foreign company for a period of not less than one year, whereby the business of such company is carried on, and where that place of business –*
>
> *(i) is suitably staffed with on-site managerial and operational employees of that controlled foreign company and which management and employees are required to render services on a full time basis for the purposes of conducting the primary operations of that business;*
>
> *(ii) is suitably equipped and has proper facilities for such purposes; and*
>
> *(iii) is located in any country other than the Republic and is used for bona fide business purposes (other than the avoidance, postponement or reduction of any liability for the payment of any tax, duty or levy imposed by this Act or by any other Act administered by the Commissioner)..."*

10.4. From the definition it is clear that the first requirement that must be met is that the CFC must have a place of business through which it conducts the primary business operations of such company.

10.5. As stated in the letter of audit findings, HH's activities are described as the manufacturing of vanadium and ferrovanadium and the marketing thereof. However, in our view, establishing the primary business operations of an entity is a factual enquiry the result of which shall be borne out of the nature of the functions performed and risks assumed by such an entity in conducting its operations. Notwithstanding the description set out in the IT10s submitted by Evraz Highveld, HH primary business operations are as described above.

10.6. HH, during the period under review, was the principal in respect of a toll manufacturing arrangement and was responsible for the marketing and sales of the vanadium slag. HH's activities in particular included:

10.6.1. Managing the toll manufacturing arrangement with Treibacher;

10.6.2. Negotiating pricing and concluding sales agreements with Treibacher;

10.6.3. Procuring the vanadium slag of the appropriate quality and delivering it to Treibacher in the required quantities, and ensuring that the availability of the required stocks. This included managing the logistic in ensuring the efficient delivery of the vanadium and negotiating the terms of the transportation costs

10.6.4. contributing know-how in production, technology, process development and quality control system to Treibacher through HH's chemical engineers.

10.7. Although HH did not conduct the actual manufacturing of the vanadium slag, it is integrally involved in monitoring the manufacturing arrangements and performed operations which included the procurement of an efficient delivery of the vanadium, stock and quality control, technical support, but these activities' did not require HH to have its own manufacturing plant and manufacturing staff. HH's primary activities therefore did not included the performance of the main manufacturing activities, but rather the activities and functions specified above.

10.8. The question that needs to be considered is therefore not whether HH satisfied the FBE requirement in relation to the main manufacturing activities which is the subject matter of the tolling agreement, but whether Evraz Highveld had an FBE in relation to the actual functions it performed based on HH's primary activities as listed above.

10.9. We address each of the relevant requirements of the FBE exemption below:

Fixed place of business for a period exceeding 1 year

10.9.1. HH entered into a lease agreement with Treibacher in terms of which it leases premises from which its conducts its operations and rents office equipment that enabled it to carrying on such activities.

The place of business must be suitably staffed with full time employees who conduct the primary operations of that business

10.9.2. HH employs six employees on a full time basis, which staff complement consists of a managing director, logistics clerks, a controller, an operations manager and an assistant plant manager. The employees carry out the activities required for the operation of the business as set out above.

Is suitably equipped and has proper facilities for such purposes

10.9.3. Due to the nature of HH's activities set out above, it is not necessary for HH to operate its own manufacturing plant, as its primary operation is to provide input to the manufacturing process to Treibacher. The premises and equipment leased from Treibacher allows for the execution of HH's primary business operations, and is thus suitably equipped for its purposes.

Is located in any country other than the Republic and is used for bona fide business purposes

10.9.4. HH is located in Austria for the commercial expediency provided by being in the same location as Treibacher, in order to ensure the supply of vanadium and fulfilment of the agreement concluded with Treibacher for the provision of the agreed services. The location of HH's business has therefore been selected for *bona fide* business purposes.

10.10. Based on the above we are of the view that HH satisfied the requirements of an FBE as set out in section 9D of the Act and correctly relied on the FBE exemption contained in section 9D(9) of the Act.

10.11. Accordingly, there was no need for Evraz Highveld to obtain a ruling as envisaged in section 9D(10) of the Act.

2008 and 2009 years of assessment

10.12. With effect from 1 January 2008, and applicable during the 2008 and 2009 years, the definition of an FBE was amended to read –

> *"(a) a fixed place of business located in a country other than the Republic that is used or will continue to be used for the carrying on of the business of that controlled foreign company for a period of not less than one year, where –*
>
> *(i) that business is conducted through one or more offices, shops, factories, warehouses or other structures*
>
> *(ii) that fixed place of business is suitably staffed with on-site managerial and operational employees of that controlled foreign company who conduct the operations of that business;*
>
> *(iii) that fixed place of business is suitably equipped for conducting the primary operations of that business;*
>
> *(iv) that fixed place of business has suitable facilities for conducting the primary operations of that business; and*
>
> *(v) that fixed place of business is located outside the Republic solely or mainly for a purpose other than the postponement or reduction of any tax imposed by any sphere of government in the Republic:*
>
> *Provided that for the purposes of determining whether there is a fixed place of business as contemplated in this definition, a controlled foreign company may take into account the utilisation of structures as contemplated in subparagraph (i), employees as contemplated in subparagraph (ii), equipment as contemplated in subparagraph (iii), and facilities as contemplated in subparagraph (iv) of any other company –*
>
> *(aa) if that other company is subject to tax in the country in which the fixed place of business of the controlled foreign company is located by virtue of residence, place of effective management or other criteria of a similar nature;*
>
> *(bb) if that other company forms part of the same group of companies as the controlled foreign company; and*
>
> *(cc) to the extent that the structures, employees, equipment and facilities are located in the same country as the fixed place of business of the controlled foreign company;"*

10.13. In terms paragraph 5.1.16 to 5.1.18 of the letter of findings, SARS contends that the proviso to the definition of an FBE which allows a taxpayer to place reliance on the equipment, employees and related infrastructure of another group company would not be applicable to HH with regard to its arrangement with Treibacher as they do not form part of the same group of companies.

10.14. We do not disagree with your contentions in this regard, but wish to point out that Evraz Highveld did not place reliance on this proviso in the determination of whether HH qualified as an FBE.

10.15. The reasons discussed above in respect of the 2007 year of assessment similarly apply in respect of the 2008 and 2009 years of assessment. Accordingly, HH satisfied the requirement of the FBE definition in respect of its primary business operations.

11. Imposition of penalties and interest

11.1. In paragraph 6 of the letter of findings, SARS states its intention to impose relevant penalties and interest in terms of the TAA. The letter of findings does not stipulate which provision of the TAA will be relied on in levying understatement penalties and what you refer to as "the relevant penalties and interest". We have therefore prepared this response on the assumption that, for purposes of understatement penalties, you have relied on section 270(6D) of the TAA, which applies in circumstances where an understatement penalty is imposed on understatements occurring prior to the commencement of the TAA.

11.2. Section 102(2) of the Tax Admin Act places an onus on SARS to prove the facts on which it imposes an understatement penalty. Therefore, SARS is required to first prove that Evraz Highveld has made 'understatements' in its tax returns for the period under review and provide the Evraz Highveld with sufficient reasons for its decision to impose understatement penalties in respect of such understatement. Furthermore, SARS is required to stipulate the behavioural category contained in section 223. In the current instance, the letter of findings merely informs us of your intention to impose understatement penalties and fails to indicate the basis on which SARS believes there to be sufficient evidence to prove an understatement (i.e. a prejudice to SARS or the fiscus). In addition, you have failed to indicate which behavioural category you believe applies to Evraz Highveld.

11.3. Evraz Highveld requests, in terms of Rule 3 of the Tax Court Rules and the PAJA, that SARS provides adequate reasons for the proposed imposition thereof. This will enable Evraz Highveld to formulate a proper response to the letter of findings in order to successfully avoid understatement penalties and/or the other penalties being imposed against it.

11.4. Sections 221 to 223 of the TAA which provide for the imposition of understatement penalties came into effect on 1 October 2012, subsequent to the period of review. In terms of section 270(1) of the TAA, acts occurring prior to the commencement of the TAA will be subject to the provisions of the TAA.

11.5. Although the provisions of the TAA provide for the imposition of understatement penalties in respect of years of assessment occurring prior to the commencement of the TAA, we are of the view that this practice is unfair towards the taxpayer and fails to take into account the constitutional challenges raised against such retrospective application.

11.6. The retrospective application of legislation is contrary to the requirement that legislation be interpreted *contra fiscum*, and is prejudicial to a taxpayer which submitted a return prior to the commencement of the TAA and could not have complied with the provisions thereof which were not yet in existence.

11.7. We submit that the imposition of understatement penalties in terms of the provisions of the TAA would amount to an infringement of Evraz Highveld's right to right to lawful, reasonable and procedurally fair administrative action under the PAJA, as entrenched in section 33 of the Constitution and violate the principle of the 'Rule of Law' entrenched in section 1(c) of the Constitution read with section 2 thereof. Specifically, we note that such retrospective

application of the provisions of the TAA amount to a deprivation of Evraz Highveld's vested rights which it held under the provisions of section 76 of the Act, including the right to request the Commissioner to remit the amount of additional tax imposed under section 76(1) of the Act.

11.8. The TAA makes no provision for the remittance of understatement penalties, save in instances where the penalty relates to a 'substantial understatement' to which section 223(3) would apply, or where the understatement was due to a *bona fide* inadvertent error. Previously, a taxpayer had a vested right in terms of section 76(2) to request remittance of a penalty imposed for the same actions which would give rise to an understatement penalty under the TAA, without any restrictions or limitations.

11.9. There is a general presumption in our common law that amendments to legislation cannot operate retrospectively. In this regard, we draw your attention to The court in *Mahomed NO v Union Government*[4] considered the retrospective application of legislation and held as follows -

> "*... the principle that (in the absence of express provision to the contrary) no Statute is presumed to operate retrospectively is one recognised by the civil law as well as by the law of England. The law-giver is presumed to legislate only for the future...*"

11.10. In *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*[5] Chaskalson P stated the following with approval -

> "*In addition, the rule of law embraces some internal qualities of all public law:* ***that it should be certain, that it is ascertainable in advance so as to be predictable and not retrospective in its operation...***" **(our emphasis)**

11.11. The presumption against retrospectivity and the requirement that it can be rebutted only by express terms or clear implication is based on elementary considerations of fairness and dictates that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.

11.12. Therefore, the imposition of understatement penalties in terms of legislation which was not in existence at the time of submission of the tax returns for the period of review and has the effect of depriving a taxpayer of its vested rights conferred in terms of section 76 of the Act would be irrational and unfair, and amount to a violation of the taxpayer's right to lawful, reasonable and procedurally fair administrative action as entrenched in section 33 of the Constitution.

11.13. In this regard, we note that in the event that additional assessments are raised with regard to the period under review, section 270(6B) of the TAA provides that where a return was due by the commencement date of same, the requirement under section 223(3)(b)(i) will be regarded as being met for purposes of the remission of substantial understatement penalties.

11.14. No understatement penalties may therefore be levied in respect of any substantial understatements, where such understatements have been proven.

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[4] 1911 AD 1
[5] (2002) SA 674 (CC)

We trust that you find the above in order.

Yours faithfully

pp

Andries Myburgh

Tax Director

"AA9"

Letitia Field

From: Tobie Jordaan <Tobie.Jordaan@dlacdh.com>
Sent: 10 July 2015 11:15
To: Letitia Field
Cc: Gary Oertel; Julian Jones; pmarsden@matusonassociates.co.za; Ruaan van Eeden
Subject: RE: Evraz Highveld Steel and Vanadium Limited (in business rescue) - Draft response to SARS [CDH-CDH.FID3699444]
Attachments: Evraz Highveld Steel & Vanadium Ltd - Comments on SARS response (10 Jul ....pdf

Dear Letitia

Given the brevity of the time period within which our client has been requested to provide comments, our client has not been able to exhaustively and substantively comment on the draft response prepared by yourselves. The attached response is therefore subject to any additional comments that our client may have. Our client would have preferred for its cooperation or assistance to have been requested on receipt of the correspondence from SARS and not at the eleventh hour, as which is now being done.

Subject to the above, we attach herewith our comments to the draft response to SARS

Regards

Tobie Jordaan
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From: Letitia Field [mailto:lfield@ensafrica.com]
Sent: 10 July 2015 10:02 AM
To: Tobie Jordaan
Cc: Gary Oertel; Julian Jones; pmarsden@matusonassociates.co.za
Subject: RE: Evraz Highveld Steel and Vanadium Limited (in business rescue) - Draft response to SARS

Dear Tobie

I refer to the draft letter to SARS, attached to my email below.

Please be advised that we are required to submit our response to SARS today.

In the circumstances, we require any comments before 12h00 today.

Regards

From: Letitia Field
Sent: 09 July 2015 11:12
To: 'Tobie.Jordaan@dlacdh.com'
Cc: Gary Oertel; pmarsden@matusonassociates.co.za; 'Julian Jones'
Subject: Evraz Highveld Steel and Vanadium Limited (in business rescue) - Draft response to SARS

Dear Tobie

We refer to the earlier telecon with your clients.

Please see attached hereto the draft letter to SARS.

We further confirm that the practitioners have formally suspended payment of the directors' fees in terms of s136(2)(a) of the Companies Act, 71 of 2008.

Regards

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Date	10 July 2015

EVRAZ HIGHVELD STEEL & VANADIUM LIMITED - RESPONSE TO SARS AUDIT LETTER

1 We refer to the draft Response to Letter of Audit Findings ("**Response Letter**") prepared by ENSafrica ("**ENS**") and dated 8 July 2015.

2 We have been requested to review the Response Letter and provide appropriate comments and recommendations where necessary.

3 Overall, we are in agreement with the approach and structure taken by ENS in the Response Letter. It is clear from the correspondence issued by the South African Revenue Service ("**SARS**") that there has not been a proper application of the mind from the relevant SARS officials, leading to a seemingly haphazard approach in reaching conclusion on the issuing of additional assessments in respect of the 2007 to 2009 years of assessment ("**Relevant Years of Assessment**").

4 Given what transpires in practice in respect of dispute resolution, we are further mindful of the fact that SARS may seek to expand or address issues not specifically dealt with in the letter of audit findings. We therefore agree with the inclusion of paragraphs 2 and 3 of your letter that provides adequate protection for Evraz Highveld. In any event, as this is a letter of audit findings only, any subsequent issues can be fully addressed in a notice of objection to the extent required.

5 We have certain grammatical comments which would likely be rectified in the final version, which are noted below –

5.1 par 8.2 – in the *'description'* column for the Relevant Years of Assessment, *'include'* to be replaced with *'included'*;

5.2 par 10.7 – full stop at end of paragraph; and

5.3 par 10.11 – unused paragraph to be deleted.

6 Our substantive comments are as follows –

6.1 We are in agreement with the arguments put forward as it pertains to the prescription of the additional assessments for the Relevant Years of Assessment, as detailed in paragraph 9 of the Response Letter. In particular, SARS' stance on what appears to be an obligatory ruling process is misplaced in our view. We agree with ENS' arguments that there was no obligation to obtain a ruling and the fact that there is an interpretation of statute issue, does not amount to *'misrepresentation'* for purposes of section 79(1) of the Income Tax Act 58 of 1962 (the "**Act**") or section 99(2)(a) of the Tax Administration Act 28 of 2011 (the "**TAA**") for that matter;

6.2 We are in agreement with the application and interpretation of the Controlled Foreign Company ("**CFC**") principles for the Relevant Years of Assessment, as detailed in paragraph 10 of the Response Letter;

6.3 In respect of paragraph 11 of the Response Letter, our comments are as follows –

6.3.1 In the Response Letter, ENS deals with the interpretation and application of the CFC rules for the Relevant Years of Assessment, on the basis that SARS will ignore the prescription arguments raised (which is highly likely). We agree with the aforementioned approach;

6.3.2 We recommend that a similar approach be followed as it pertains to the potential imposition of understatement penalties.

6.3.3 We are in agreement with ENS' view that the understatement penalty provisions are not applicable in respect of the Relevant Years of Assessment, but that a response should be provided in mitigation of any potential penalties. In the event that Evraz Highveld becomes liable for understatement penalties (which is correctly denied in the Response Letter), the understatement penalties will be imposed as a result of an understatement made in a return submitted before the commencement date of the TAA;

6.3.4 It is therefore appropriate, in our view, to address the provisions of section 270(6D) of the TAA. We recommend that a senior SARS official should be provided with *"extenuating*

circumstances" (as contemplated in section 270(6D) of the TAA). Various factors have been dealt with in the Response Letter which should be amplified – for example Evraz Highveld not acting with any intent to evade or postpone any of its obligations imposed under the Act (in particular section 9D and 72A(1) of the Act) and that full disclosure was made at the time of lodging its tax returns for the Relevant Years of Assessment.

7 We will be pleased to discuss the above with you if required further.

Yours faithfully

RUAAN VAN EEDEN
CLIFFE DEKKER HOFMEYR SERVICES (PTY) LTD

"AA10"

Letitia Field

From:	Letitia Field
Sent:	16 October 2015 10:31
To:	'O'Connor, Callum'
Cc:	Bell, John; Malan, Berna; Rudolph, Gerhard; Gary Oertel; Paul Winer; Michelle du Preez
Subject:	Evraz Highveld Steel and Vanadium Limited (in business rescue)
Attachments:	Spitskop business rescue application.pdf; ScanDoc15101609_31_3027719.pdf

Dear Callum

Further to our letter of yesterday and our meeting this morning, please see attached judgments dealing with the status of SARS as a creditor prior to an assessment being raised.

Paragraph 7 of *Spitskop* relies on p289E-G of *Namex* and states:

> debt, is not correct. The Supreme Court of Appeal has held that an income tax debt, even prior to the raising of an assessment, is not a contingent debt.[1] For the above reasons I was satisfied that SARS is a creditor of Spitskop, and as such, qualified as an affected person in terms of s 128(1)(i) of the Act. These are the considerations which led me to make the order referred to in para 3 above, allowing SARS to intervene as a party in these proceedings.

Page 289E-G of *Namex* states:

> uitgerelk is.[28] Dié betoog is gegrond. Uit bedoelde beslissings blyk dit dat hoewel die uitreiking van 'n aanslag 'n vereiste vir die afdwingbaarheid van 'n belastingskuld mag wees, die skuld as sulks reeds voor daardie gebeurlikheid bestaan. Dit is dus nie onderhewig aan 'n voorwaarde die vervulling waarvan kan meebring dat verskuldigheid nie sal ontstaan nie of sal verval. Ten opsigte van onaangeslane inkomstebelastingpligtigheid is die respondent gevolglik nie 'n voorwaardelike skuldeiser wat in 'n klas anders as die algemene klas van preferente skuldeisers van 'n belastingbetaler val nie.

In the circumstances, SARS is a creditor, as opposed to a contingent creditor, and therefore our clients were obliged to accept SARS' second claim at the meeting and allow them to vote.

All of our clients' rights are reserved.

Regards

REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 76408/2013

Not reportable

Not of interest to other Judges

In the matter between:

DANIEL FRIEDERICH BURMEISTER	First Applicant
LESEDING DEVELOPMENT LIMITED	Second Applicant
and	
SPITSKOP VILLAGE PROPERTIES LTD	First Respondent
JOHAN FRANCOIS ENGELBRECHT N.O.	Second Respondent
COMMISIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Intervening Party

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REASONS FOR JUDGMENT

MAKGOKA, J

[1] On 16 September 2015 I made an order dismissing this application with costs. I undertook to furnish the reasons later. These are the reasons for that order. The first and second applicants seek an order placing the first respondent (Spitskop), which is in liquidation, under supervision and to commence business rescue proceedings pursuant to s 131(4)(a) of the Companies Act 71 of 2008 (the Act), and for the appointment of a business rescue practitioner for that purpose. The first applicant is a creditor and shareholder of Spitskop, having invested R200 000.00. The second applicant has taken cession of the claims of 589 investors of Spitskop as and such, 'owns' the claims of approximately 49% of the total investors of Spitskop. The second applicant therefore represents a majority of the creditors and accordingly qualifies as 'an affected party' as defined in s 128 of the Act.

[2] Spitskop was liquidated by an order of this court on 21 August 2009. Three joint liquidators were appointed in November 2009. For reasons which are not relevant to this application, two of those were removed from office, and the third resigned voluntarily, in June 2011. The second respondent was appointed as the liquidator of Spitskop during 2012. For convenience's sake I would refer to him simply as 'the liquidator'. He opposes the relief sought by the applicants. He is supported in his opposition by the intervening party, the South African Revenue Service (SARS), represented by its Commissioner.

Application for leave to intervene

[3] SARS applied for leave to intervene in these proceedings. That application, which I heard before the main application was argued, was opposed by the applicants. SARS contended that it is an affected person, as envisaged in s128 of the Act and therefore has the right to oppose the application for commencement of rescue proceedings in terms of s131(3) of the Act. The applicants opposed the application on the ground that SARS does not possess the necessary *locus standi* to intervene in the main application. After hearing argument I granted an order allowing SARS to intervene as a party in the main application, with ancillary refief, and ordered the applicants to pay the costs of the opposition, inclusive of costs consequent upon employment of two counsel. I undertook to furnish reasons for that order as part of this judgment. Here briefly, are the reasons.

[4] Spitskop is indebted to SARS in excess of R36 million in respect of assessed Value Added Tax in terms of the Value Added Tax Act 89 of 1991. This claim was proven at a general meeting on 2 October 2012 convened by the liquidator. The claim was accepted by the liquidator, and was included in the Liquidation and Distribution account submitted by the liquidator during October 2013. The claim is not disputed by the applicants. In addition, SARS contends that Spitskop is also liable for assessed income tax in excess of R117 million in terms of the Income Tax 58 of 1962. The liquidator has not yet accepted the income tax claim and if the dispute in this regard cannot otherwise be resolved, it will have to be adjudicated upon by the Tax Court in the course of a tax appeal in terms of the Tax Administration Act 28 of 2011.

[5] In their opposition to SARS' intervention application, the applicants contended, in the main, that the investment payments provided by the investors cannot be regarded as 'income' for the purpose of calculating an income tax component on these payments due to SARS. According to the applicants, the VAT component of SARS' claim cannot be separated from the income tax component of the claim and the status of the whole claim represents 'a claim still under investigation'. On that basis, so is the argument, SARS cannot be considered to be a creditor but only a contingent and/or prospective creditor.

[6] In my view, there is no merit in this contention. While it is correct that different considerations apply to each of VAT tax and income tax, I agree with SARS' contention that the splitting of SARS' claim between VAT and income tax does not have an effect on the validity of the claim already submitted, proven and accepted by the liquidator. What is more, in terms of s 170 of the Tax Administration Act, the production of a document issued by SARS purporting to be a copy of or an extract from an assessment is conclusive evidence of the fact that such assessment was raised and that all the particulars of the assessment are correct, save where such assessment is the subject in a tax appeal.

[7] The provisions of s 164 of the Tax Administration Act should also be borne in mind, in terms of which the obligation to make payment for tax is not suspended by the filing of an objection or an appeal against the raising of an assessment. What is more, Spitskop has not filed objections in respect of the VAT and/or Income Tax Assessments within the relevant time frames. But in any event, the main thrust of the applicants' contention that the raising of an assessment creates only a contingent debt, is not correct. The Supreme Court of Appeal has held that an income tax debt, even prior to the raising of an assessment, is not a contingent debt.[1] For the above reasons I was satisfied that SARS is a creditor of Spitskop, and as such, qualified as an affected person in terms of s 128(1)(i) of the Act. These are the considerations which led me to make the order referred to in para 3 above, allowing SARS to intervene as a party in these proceedings.

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[1] *Namex (Edms) Bpk v Kommisaris van Binnelansde Inkomste* 1994 (2) SA 265 (A) at 289E-G.

Jurisdiction

[8] A preliminary issue, concerning jurisdiction was raised by the liquidator. It was argued that this Court lacks jurisdiction to hear this application because Spitskop's registered address is in Stellenbosch, Western Cape, thus outside the territorial jurisdiction of this Court. Counsel for the liquidator placed reliance for this submission on *Sibakhulu Construction v Wedgewood Village* [2] in which Waglay J concluded that in the wake of the Companies Act, 71 of 2008, only a High Court in the area where the registered office of the company is situated would have jurisdiction to liquidate a company and to adjudicate business rescue proceedings concerning that company, as provided for in s 23(3) of the Act. The learned Judge premised his reasoning on the fact that s 23(3) of the 2008 Act, unlike the repealed section 12(1) of the repealed 1973 Act, requires the registered office of a company to be the same as its principal office. The argument was also that since Spitskop is in liquidation, it no longer has a place of business, and therefore jurisdiction cannot be assumed under the rubric of the main place of business.

[9] The judgment in *Sibakhulu* was not followed in two subsequent High Court cases: *Lonsdale Commercial Corporation v Kimberley West Diamond Mining Corporation*[3] and *Firstrand Bank Ltd v PMG Motors Alberton* [4] and was impliedly overruled by the Supreme Court of Appeal (the SCA) in *PMG Motors Kyalami (Pty) Ltd and another v Firstrand Bank Ltd, Wesbank Division.*[5] In *Lonsdale*, Lacock J said the following, with which I fully and respectfully agree:

'A finding that the legislature intended the provisions of s 23(3) of the 2008 Act to be construed "for purposes of jurisdiction" (a phrase repeatedly used by Binns-Ward J in *Sibakhulu* (Supra) is, to my mind, tantamount to a finding that the legislature intended to limit or oust a local- and provincial division's jurisdiction derived from the common law and/or section 29 of the Supreme Court Act in respect of the liquidation and or business rescue proceedings of a company that "resides" or has its principal place of business within that Court's area of jurisdiction, but not also its registered address. I am not persuaded that the reasons advanced by the learned judge justify such a drastic limitation of a Court's

[2] *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* 2013 (1) SA 191 (WCC) para 23.

[3] *Lonsdale Commercial Corporation v Kimberley West Diamond Mining Corporation (Pty) (Cohen N.O. and another intervening* (312/2012) [2013] ZANCHC 11 (17 May 2013)

[4] *Firstrand Bank Ltd, Wesbank Division v PMG Motors Alberton (Pty) Ltd* [2013] 4 All SA 117 (GSJ)

[5] *PMG Motors Kyalami (Pty) and another v Firstrand Bank, Wesbank Division* [2015] 1 All SA 437 (SCA).

jurisdiction. Had the legislature intended to limit a Court's jurisdiction as suggested by Binns-Ward, I would have expected the legislature to have made provision for such drastic limitation in clear and unambiguous terms. This was not expressly done when the 2008 Act was promulgated or since.'

[10] The SCA also had occasion to deal with a similar argument in the *PMG Motors* case, which was an appeal against the judgment in the *Firstrand* matter (above). Although neither of the *Sibakhulu* nor *Lonsdale* matters were specifically considered by the SCA, it is clear from its reasoning that the judgment in *Sibakhulu* was not approved. The SCA concluded that the jurisdiction of a court arising from the location of the principal place of business of a company is unaffected by its liquidation. The principal place of business remains unchanged by liquidation and affords the basis for jurisdiction in respect of the applications such as business rescue.[6] The conclusion is therefore that this Court has the necessary jurisdiction to determine this application.

Factual background

[11] Having disposed of the preliminary issues, I turn now to the substance of the application. I commence with a brief factual background. Spitskop was a syndication scheme through which capital was raised from the public to finance a residential development outside Steelpoort in Mpumalanga Province. The persons in charge of the scheme were Hendrik Christoffel Lamprecht (Lamprecht) and Jacobus Johannes van Zyl (Van Zyl), and the company of which they were directors, Bluezone Property Investments (Pty) Ltd (Bluezone). Bluezone was incorporated to carry on business by means of property syndication schemes and for this purpose ten other companies were incorporated in 2005. Later, during 2006 Spitskop was added to the group. Lamprecht was a director of all these companies. Among these companies, was Blue Dot Properties 1330 (Pty) Ltd (Blue Dot), of which Lamprecht and Van Zyl were the sole shareholders and directors. Blue Dot purchased portions 6 and 7 of the farm Spitskop 333 in Mpumalanga Province, for just over R1 million on 23 April 2003.

[6] Motors above para 13.

[12] On 3 July 2006 Spitskop and Blue Dot entered into an agreement in terms of which Spitskop purchased the two portions of the farm Spitskop (the property) from Blue Dot for a purchase price of R118 300 000. The intention was to rezone the farm as residential property and to establish a township of approximately 2500 residential erven and subsequently to sell the erven. The scheme was intended to raise R425 million through 425 000 units of R1000, each consisting of one ordinary share with a par value of R1 and one secured debenture of R999, irrevocably linked to the R1 share. Bluezone was the promoter of the units, charged with their marketing, on the basis of a disclosure document.

[13] On the same day Spitskop and Blue Dot concluded the purchase agreement, 3 July 2006, Spitskop also concluded a Trust Deed with Steelpoort Debenture Trust. The obligations of the trust were to:

(a) administer the rights of the debenture holders (the holders of the linked units to be issued by Spitskop);

(b) ensure that Spitskop was properly administered insofar as was necessary for the purposes of the Deed;

(c) register and hold for the purposes of the Deed the mortgage bond to be registered over the property in favour of the Trustees to secure the debentures;

(d) enforce the rights of the debenture holders against Spitskop in the event of a default of Spitskop as set out in the debenture terms and conditions.

[14] About 1 213 investors invested approximately R361 million in Spitskop. However, by June 2009 the development of a township had not materialized, despite the local municipality having already, during January 2009, approved of such establishment. It is not clear from the founding affidavit what the impediments were. It is simply stated that the project was 'exposed to the vagaries of a range of factors and influences which are beyond the control of the developer and the professional consultant and which impact *inter alia* on both the costs and the duration of the project.' According to the first applicant, the process of on-going evaluation of the project resulted in the board of directors of Spitskop deciding that due to the cost escalations, coupled with the then prevailing adverse economic environment, it

would not be in the long term interests of investors to persist with the Spitskop project to final completion as initially envisaged. As a result, the directors called a special meeting on 25 June 2009, during which a resolution was taken that Spitskop's property be sold for R260 million. As it turned out, the sale never materialized.

[15] In August 2009, Mrs MA Benn, an investor in Spitskop, supported by a number of other investors, brought an urgent application in this Court for the liquidation of Spitskop. On 21 August 2009 the Court (Bertelsmann J) granted a final order placing Spitskop in liquidation. On 6 October 2009 the learned Judge furnished reasons for the order, in which the following findings were made: (a) that Spitskop was factually and commercially insolvent; (b) that it was common cause that Spitskop had lost its substratum and was unable to continue its operations. I shall later return to the relevance of these findings, especially the latter one. Despite that an amount in excess of R400 million was received from investors, only an amount of R70 million was still held by Spitskop at the time of the liquidation application. This is evident from the first liquidation and distribution account submitted during October 2013.

Issues for consideration

[16] The following six aspects would be taken into consideration to determine whether Spitskop needs to be placed under supervision in business rescue proceedings. First, the legislative and jurisprudential framework of business rescue proceedings. Second, the circumstances which led to the liquidation of Spitskop. Third, the findings of the Court when placing Spitskop in liquidation. Fourth, the applicants' business rescue plan. Fifth, comparison of the liquidation and business rescue scenarios. Sixth, the weight to be accorded to the view of SARS.

Legislative and jurisprudential framework

[17] The essential requirements to be satisfied before a business rescue order can be granted are set out in s 131(1) and (4) of the Act, which reads:

'(1) Unless a company has adopted a resolution contemplated in section 129 [which provides for voluntary business rescue proceedings], an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.

(2) . . .

(3) . . .

(4) After considering an application in terms of subsection (1), the court may –

(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that -

(i) the company is financially distressed;

(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or

(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.

[18] An applicant must therefore satisfy at least one of the requirements in s 131(4)(a)(i)-(iii), and in addition, demonstrate a reasonable prospect of rescuing the company. A company is deemed to be 'financially stressed' in terms of s 128(1)(f) if two jurisdictional facts are met. First, if it appears to be reasonably unlikely that the company will be able to pay all its debts as they become due and payable within the immediately ensuing six months. The second consideration, in the alternative, is if it appears reasonably likely that the company will become insolvent within the immediately ensuing six months.

[19] The Supreme Court of Appeal explained in *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) Pty Ltd & others*[7] that the potential

[7] *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2013 (4) SA 539 (SCA).

business rescue plan in s 128(1)*(b)*(iii) has two goals: a primary goal, which is to facilitate the continued existence of the company in a state of insolvency and, a secondary goal, which is provided for as an alternative, in the event that the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation. The question is therefore whether a business rescue application can succeed where the proposed rescue plan provides for the secondary goal only. In other words, whether the requirement of 'rescuing the company' as contemplated in s 131(4)*(a)* is satisfied where it is clear from the outset that the company can never be saved from immediate liquidation and that the only hope is for a better return than that which would result from liquidation.[8]

[20] In the present case, the relevant requirements are those set out in (i) and (iii). I must therefore determine whether Spitskop is financially stressed or if it is equitable, for financial reasons, to place it under supervision. In respect of the latter requirement, a determination must also be made as to whether there is a reasonable prospect for rescuing Spitskop. Counsel for both the liquidator and the intervening party argued that Spitskop, by reason of being in liquidation, being commercially and factually insolvent, cannot be categorized as financially stressed within the meaning of s 128.

[21] That argument is no longer sustainable in the light of the judgment of the Supreme Court of Appeal in *Richter v Absa Ltd*,[9] which was handed down on 1 June 2015, after the matter was argued. There, it was concluded that a proper interpretation of 'liquidation proceedings' in relation to s 131(6) of the Act must include proceedings that occur after a winding-up order.[10] The simple effect of that judgment is that final liquidation is no bar to supervision and commencing business rescue proceedings. That means a court determining an application such as the present, is still required to determine, among others, whether a company is 'financially stressed.'

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[8] *Oakdene v Farm Bothasfontien* para 23.

[9] *Richter v ABSA Bank* 2015 (5) SA 57 (SCA).
[10] Para 18.

[22] It is difficult to imagine how a company which has been liquidated on the basis of commercial and factual insolvency, as Spitskop was, can at the same time be found to be 'financially stressed' within the context of the deeming provisions of s 128(1)(f). This is particularly relevant in the present case, as at the time of the liquidation application, Spitskop was commercially and factually insolvent, without even taking SARS' claims into account. However, for the present purpose, I assume, without finding, that by virtue of being in liquidation, Spitskop is 'financially stressed.'

[23] Having concluded thus, the overriding consideration in s 128(1)(b) and (h) still seems to be that a court may not grant an application for business rescue unless there is a reasonable prospect for rescuing the company i.e facilitating its rehabilitation so that it continues on a solvent basis or, if that is not possible, yields a better return for its creditors and shareholders than what they would receive through liquidation. The question as to what would constitute a 'reasonable prospect' has been subject of a number of decisions in the various divisions of the High Court.[11]

[24] In *Propspec Investments v Pacific Coasts Investments 97 Ltd*[12] the court cautioned against setting the bar too high, but at the same time warned that 'vague averments and mere speculative suggestions' will not suffice in this regard. In order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect. Van der Merwe J explained:

'I agree that vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt that, in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved. But with respect to my learned

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[11] See, for example, *Southern Palace Investments 265 v Midnight Storm Investments 386* 2012 (2) SA 423 (WCC); *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC); *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments Ltd (Reg no:2007/019270/06) and Another (Grayhaven Riches 9 Ltd and others as Interested Parties; First Rand Bank Ltd as Intervening Creditor)* [2012] 4 All SA 590 (WCC); *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd & Others (Marley Pipe Systems (Pty) Ltd & Another Intervening)* 2012 (5) SA 515 (GSJ); *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and Others* 2012 (5) SA 497 (WCC).

[12] *Propspec Investments (Pty) v Pacific Coast Investments 97 Ltd* 2013 (1) SA 542 (FB).

colleagues, I believe that they place the bar too high. In my judgment it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect in this regard. It also seems to me that to require, as a minimum, concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary cash resource in order to enable the company to meet its day-to-day expenditure, or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company , as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of a probability, and unjustifiably limits the availability of business rescue proceedings.'[13]

[25] The Supreme Court of Appeal had occasion to consider the issue, for the first time, in *Oakdene*, above, where it described the concept of 'reasonable prospect' as a yardstick higher than 'a *mere prima facie* case or an arguable possibility' but lesser than a 'reasonable probability' – a prospect based on reasonable grounds to be established by a business rescue applicant in accordance with the rules of motion proceedings.[14] Brand JA, referred with approval the remarks of Van der Merwe J in *Propspec Investment*, above.

The circumstances of Spitskop's liquidation

[26] The circumstances which led to Spitskop's liquidation are not clear from the founding affidavit. The applicants cannot assert that they did not know of those circumstances. Accepting that the applicants were not in control of the property syndication scheme (Lamprecht and associates were), the circumstances that led to the demise of Spitskop were set out in detail in a related judgment of the SCA in *Dulce Vita CC v Van Coller and others* [15] (the *Dulce Vita* matter). The applicants were certainly aware of those circumstances, as the outcome of that case was a springboard to this application, and much reliance was placed on that judgment for a number of the applicants' contentions. Any business rescue plan had to address the circumstances which led to financial meltdown. That this has not been done in these proceedings is a weakness in the applicants' case, because a rescue plan must,

[13] Propspec Investment, above paras 11 and 15.
[14] *Oakdene* para 29.
[15] *Dulce Vita CC v Van Coller and others* [2013] 2 All SA 646 (SCA). This was an appeal against a finding by this Court (Ismail J) that the syndication scheme operated by Spitskop contravened s 11 of the Banks Act 94 of 1990 by accepting deposits from investors in a 'property syndication scheme' as defined in Notice 459 issued in terms of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988. The Supreme Court of Appeal reversed the finding of this Court.

among others, seek to address and rectify those circumstances. In *Southern Palace* [16] Eloff AJ said the following in this regard:

'While every case must be considered on its own merits, it is difficult to conceive of a rescue plan in a given case that will have a reasonable prospect of success of the company concerned continuing on a solvent basis, unless it addresses the cause of the demise or failure of the company's business, and offers a remedy therefor that has a reasonable prospect of being sustainable. A business plan which is unlikely to achieve anything more than to prolong the agony, i.e. by substituting one debt for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice. One would expect, at least, to be given some concrete and objectively ascertainable details going beyond mere speculation in the case of a trading or prospective trading company...'[17]

[27] Fortunately, some light is shared in this regard in the *Dulce Vita* matter, and for that reason I have decided against non-suiting the applicants. I would therefore quote liberally from the judgment. The following appear in paras 11- 16 of the judgment:

"[11] Bluezone provided brokers with brochures and copies of the disclosure document and they commenced the marketing of the scheme to investors. In terms of the scheme the investors were required to complete the application form and pay the purchase price of the units to Honey Attorneys. Some investors did this before the offer was formally made in the disclosure document on 3 July 2006. By that date Honey Attorneys had already received more than R20 million from investors. Subsequently, about twelve hundred investors subscribed for the units and by early 2009 all the units were taken up. Between 3 July 2006 and 31 December 2007 Spitskop received approximately R350 million and by May 2008 the full amount of R425 million.

[12] On 23 July 2007, without insisting on transfer into its name, Spitskop paid the full purchase price of the property (R118 300 000) to Blue Dot. Spitskop also paid VAT on the transaction which amounted to R16 million. The directors of Blue Dot immediately divided the proceeds of the sale. Lamprecht received R95 653 000; Van Zyl received R5 500 000 and Bluezone R11 223 000.

[13] On 20 November 2007 Blue Dot transferred the property into the name of Spitskop and Spitskop registered a mortgage bond in favour of the Trust to secure the indebtedness of Spitskop to the Trust in an amount of R425 000 000 and an additional amount of R850 000 for costs.

[14] In the meantime, Spitskop had from 3 July 2006 disbursed large amounts to Bluezone and the various professionals that it had employed. By 31 December 2007 Spitskop had received R351 491 254 and disbursed R269 939 305. Despite making little or

[16] See fn 11 above.
[17] Para 24.

no progress with the development, Spitskop continued to disburse its funds. Although a large proportion of the professional fees were disbursed by 4 March 2009, there had been no physical development of the property.

[15] It seems clear that the property development was doomed to fail. Land claims had been registered in terms of the Restitution of Land Rights Act 22 of 94; the holders of mineral rights over the property had not consented to the development; Spitskop had difficulty in complying with the Provincial and Local Authorities' requirements for the establishment of the township and there was no certainty that the company would be able to provide the bulk services of water, electricity and sewerage.

[16] In August 2009 a number of investors brought an urgent application for the liquidation of the company. It was common cause that Spitskop had lost its substratum and was unable to continue its operations. On 21 August 2009 the North Gauteng High Court, Pretoria (Bertelsmann J) granted a final order of liquidation."

Court's findings in the liquidation application

[28] As stated in para 15 above, granting the final order placing Spitskop in liquidation, Bertelsmann J, as part of his reasoning, made a finding that Spitskop's had lost its substratum and was unable to pursue its objective. The applicants seek to argue in these proceedings that Bertelsmann J's judgment and order were premised on a mistaken assumption that the land claims that were pending in respect of the properties constituted a potentially insurmountable impediment to the realization of the objective of Spitskop. It seems that subsequent to the granting of the order placing Spitskop in final liquidation on 21 August 2009, but before the furnishing of the reasons for the order on 6 October 2009, the land claims had been set aside and de-gazetted, as a result of which they were no longer a consideration.

[29] The applicant spent considerable amount of time in these proceedings seeking to demonstrate that Bertelsmann J's order was premised on the existence of the land claims lodged against the property. The applicants emphasized that, those claims having been set aside, the thrust of the order had been eroded. Needless to state the obvious, I am not sitting as a Court of appeal over that finding. But that argument seems misplaced, in any event. Although in its judgment certain remarks were made about the land claims as a potential hurdle, the Court's judgment was not based solely on that aspect. The key considerations were the commercial and

factual insolvency of Spitskop, and a finding that Spitskop had 'lost its substratum and its inability unable to continue its operations.

[30] These findings have not been challenged on appeal. In the *Dulce Vita* matter, the Supreme Court of Appeal accepted it as a fact that Spitskop had lost its substratum.[18] Having not appealed against that finding, it was expected of the applicants, at the very least, to demonstrate that post-liquidation, that position had somewhat changed. They have not. It is very instructive how this aspect was dealt with by the first applicant. To start with, this was not addressed at all in the founding affidavit.

[31] In his answering affidavit, the liquidator pertinently raised the issue, in approximately 8 instances,[19] pointing out the applicants' failure to address the issue. In his replying affidavit, the first applicant contends himself with bald denials, or 'taking note' of the liquidator assertions, without dealing with the contents. The standard reply was: 'I have taken note of the contents of these paragraphs. I confirm that these issues will be dealt with in more detail during argument of the matter.' Overlooking, for the moment, that this is an impermissible manner of dealing with pertinent issues raised in an answering affidavit (which should have been addressed in the founding affidavit, in any event) the promise to deal with the issue during argument came to nought, as there was no meaningful submissions on what had changed since the liquidation to demonstrate, at the very least, that this was no longer the position.

[32] To my mind, this constitutes a hurdle for the applicants – not necessarily fatal, but a formidable one, nevertheless. This is so because, absent the company's substratum, it is difficult to see how it can be said that business rescue would provide a return for its creditors and shareholders better than they would receive in liquidation. What is more, the applicants are silent about any plans to recover money which has been expended without any development taking place. The liquidator points out that he has determined that despite the fact no final township approval has been granted, the persons in control of Spitskop had expended an amount of over

[18] Para 16.
[19] Paras 44.2, 4.43, 48.5, 48.6, 48.7, 48.10 and 49.4 of the Answering Affidavit.

R3,5 million. There is no explanation of any plan as to how, in business rescue, these vast sums would be recovered.

The applicants' business rescue plan

[33] The applicants' avowed intention is to provide a better return for Spitskop's creditors and shareholders through the proposed business rescue proceedings than what they would receive as opposed to the probable dividend the creditors are likely to receive in the current liquidation proceedings. When considering the applicants' business rescue plan, it is to be borne in mind that the only asset owned by Spitskop is the immovable property comprising portions 6 and 7 of the farm Spitskop. In that regard, it is worth mentioning that since the date of its purchase on 3 July 2006, to date, the property remains an undeveloped agricultural land. Its development requires a rezoning of the property from agricultural land to that of a township. The business plan proposed by the applicants is premised on the assertion that the development of the property has reached a stage between the issuing of the conditions of establishment of a township by the local authorities and the issuing of a certificate in terms of s 101 of the Town-Planning and Township Ordinance 15 of 1986.

[34] According to the applicants, the issuing of a s 101 certificate is a significant step, in that it would have an influence on the value of the property. To that end, the applicants rely on costs estimate for the expected duration of the project to the point where a s 101 certificate is obtained. It would require R10 million to obtain the certificate. That amount would be accessed from the money currently available as indicated in the liquidation and distribution account of October 2013. The applicants say that as soon as the s 101 certificate is issued, Spitskop 'the value of the properties will automatically increase by almost three fold.' The statement is not supported by any evidence.

[35] The applicants rely on various valuations it obtained in respect of the property, ranging from R63 million to R170 million. The most recent valuation, dated 1 May 2013, is for R51,9 million, procured on behalf of the applicants by Simunye Valuers and Property Consultants. As correctly pointed out on behalf of the liquidator and the

intervening party, none of these valuation reports are presented under oath, and can safely be disregarded as inadmissible hearsay evidence. In the applicants' favour, I will consider the contents of the valuation report. But before I do so, I make the following observations. First, the fact that the reports attribute such differing amounts to the same property should bring into doubt their accuracy and reliability.

[36] Secondly, the first applicant himself had earlier made an offer to purchase the property for R7,5 million, which offer was rejected by the liquidator. Although it is not clear from the papers as to the lapse of period between the date of the offer and the valuation by Simunye, it is still a huge jump from R7,5 million to R51,9 million. This brings into question the first applicant's sincerity and *bona fides* when he made that offer, more so that he does not disclose on what basis he made that offer, i.e. whether it was based on a valuation or any other scientific method. Interestingly, the first applicant says that he does not intend proceeding with the purchase of the property as such sale 'would in any event not be to the benefit of all creditors/investors in the Spitskop project...'

[37] I turn now to the contents of the *Simunye* valuation report. First, as correctly pointed out by the liquidator, the eventual valuation of R92,5 million envisages the land after zoning has taken place, and there is partial servicing. This clearly does not pertain to the land as it currently is, being an undeveloped agricultural land. It pertains to a property on which final township approval would have taken place, and a s 101 had been issued and a part of the internal engineering services had been installed. Second, consideration must be given to the costs. According to Simunye report, an amount of R332 461 210 is required to complete the township development. This means that a potential purchaser must, in addition to the purchase price, have this amount available. I agree with the liquidator that it cannot simply be assumed that the potential purchaser would have such funding. Third, there is no certainty whether electricity will be available for the proposed development.

[38] Fourth, it appears from the Simunye report that the proposed development is currently hampered by a servitude registered in favour of the owners of portions 1- 27 of the farm Spitskop to enjoy the reasonable right of aqueduct over the

property. An opinion is expressed that the right of aqueduct should be incorporated in the proposed township development. The applicants have failed to deal with this aspect, and the related costs, in their founding affidavit.

[39] Lastly, it appears that one of the conditions for the establishment of the township is that a right of way servitude has to be registered against portions 3, 4 and 5 of the farm Spitskop. The owner of those portions is an entity involved in mining, and would have to consent to the registration of such servitude on the condition that it does not interfere with its mining activity. There is no indication that such consent has been obtained. Despite this, the Simunye report assumes that registration could take place within two years prior to proclamation and construction of internal services. There is no basis for this assumption. The upshot of the above criticisms is that the applicants' business rescue plan is premised on 'vague averments mere speculative suggestions' cautioned against in *Propspec,* above.

Liquidation compared to business rescue supervision

[40] It is clear from the circumstances which led to the demise of Spitskop and its eventual liquidation, that its business was carried on recklessly and fraudulently by Lamprecht and those who controlled the property syndication scheme. Despite the conclusion by the Supreme Court of Appeal in the *Dulce Vita* matter, above, that the syndication scheme did not contravene the provisions of Notice 459 and s 11 of the Banks Act, the Court made the following pertinent observations:

'[I]t is clear that the promoters of the scheme, Lamprecht, Van Zyl, Durandt van Zyl, Van Niekerk and Bester, used a number of legal instruments to induce the gullible and the injudicious to invest large amounts of money in a scheme which, when properly analysed, never had a reasonable prospect of succeeding. It is also clear that some of the promoters abused their positions to pay themselves very large amounts from the funds which Spitskop had received. The evidence indicates that some, if not all, of the promoters, and possibly others, carried on the business of Spitskop recklessly or with intent to defraud the investors and are both civilly and criminally liable in terms of section 424 read with s 441 of the Companies Act 61 of 1973; that the promoters, and possibly others, did not comply with the requirements of Notice 459 and therefore committed a criminal offence...'[20]

[20] *Dulce Vita* (above) para 37.

[41] In my view, these observations, and in particular the fact that there were 'transactions of dubious validity and other sinister aspects in the management'[21] of Spitskop's affairs, make the present case pattern-made for liquidation rather than business rescue supervision. As Brand JA explained in *Oakdene*, these are the very circumstances at which the investigative powers of the liquidator – under s 417 and 418 of the *1973 Companies Act* – and the machinery for the setting aside of improper dispositions of the company's assets – provided for in the Insolvency Act 24 of 1936 – are aimed. There is no comparable provision in business rescue proceedings for such wide-ranging statutory powers.

[42] In this regard, the liquidator has already convened enquiries in terms of s 417 of the *1973 Companies Act*, at which the evidence of a number of witnesses has been heard. Through that evidence, the liquidator has been able to uncover that Lamprecht had moved substantial amounts of money to Zambia, and that he was, despite him having been sequestrated, channeling such funds into trusts and corporations in South Africa. Evidence presented at the s 417 enquiry had also established that the funds moved to Zambia formed part of the Spitskop estate.

[43] The liquidator has secured the agreement of the proprietor of the business in Zambia in whose account is paid by Lamprecht, to no longer make payments directly to the trusts or corporations nominated by Lamprecht, but to start paying such funds to the estate of Spitskop. It also important that the enquiries and litigation that the liquidator has initiated and authorized, have the approval of SARS, the major creditor of the estate. What is more, the liqudator is involved in no less than five applications and actions aimed at recovering monies siphoned off by Lamprecht and his associates.

[44] Closely associated with the above considerations, is the lapse of time since Spitskop was placed in final liquidation. It has been a period close to 4 years between the granting of the liquidation order and the launching of this application. I appreciate the fact that the delay was not so much of the applicants' doing, as the decision of the SCA in the *Dulce Vita* matter had a direct bearing on the timing of this

[21] Phrases used by Brand JA in *Oakdene* para 35.

application. But whatever the explanation might be, the fact is that a considerable period of time has elapsed since Spitskop was placed in liquidation. I have earlier indicated far-reaching steps that have been taken by the liquidator, in the winding-up process. That cannot be undone without undesirable consequences.

[45] In *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation and Others*[22] the Court was faced with the choice between liquidation and business rescue, where the company had been in business rescue and provisional liquidation for more than a year. Van Eeden AJ made the following observations:

'The passing of more than a year without any solution renders the reasonable prospect of a plan being developed remote. It seems the reasonable prospects of rescuing the company have been exhausted ... [a]s already stated, I do not think it has been demonstrated that Newcity, the shareholder, will receive a better return if business rescue is ordered and the biggest creditor is in favour of liquidation. A creditor will normally know best whether a better return will be achieved by business rescue or not. In my view balancing the rights and interests of these stakeholders require that finality now be reached.[23]

[46] The above remarks are apposite and trenchant. What is more, the company in the present case, Spitskop, is in a far worse position, as it is in final liquidation, as compared to the one referred to in *Newcity*, above, which was in a provisional liquidation.

SARS' views

[47] I must also take into account the views of the major creditor of Spitskop, SARS, which does not support the application for placing Spitskop under supervision and commencing business rescue proceedings. I can only ignore SARS' views if they were unreasonable or *mala fide*.[24] It was further emphasized in *Oakdene* that the court is unlikely to interfere with the creditors' decision unless their attitude was

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[22] *Newcity Group (Pty) Ltd v Pellow N.O. and others ; China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and others* (12/45437, 16566/12) [2013] ZAGPJHC 54 (28 March 2013).
[23] Para 25.
[24] *Oakdene*, above, paras 37 and 38.

unreasonable. In the present case, it admits of no debate that SARS' opposition to the proposed business rescue plan is both reasonable and *bona fide.*

Conclusion

[48] To sum up, in all circumstances I take a view that there is a very real possibility that liquidation will in fact be more advantageous to creditors than the proposed business rescue supervision proposed by the applicants. There remains the issue of costs. Both the liquidator and the intervening party made use of two counsel. I am of the view that such employment was warranted, given the nature of issues canvassed in the application. I would therefore allow for costs of two counsel in each instance.

[49] For all of the above reasons I made the order referred to in para 1. For the sake of completeness I repeat the order below:

1. The application is dismissed;
2. The first and second applicants are ordered to pay the costs, including the costs of two counsel for each of the first and second respondents, on the one hand, and those of the intervening party, on the other. Such costs are to be paid by the applicants jointly and severally, the one paying the other to be absolved.

T.M. Makgoka
Judge of the High Court

Order granted:	16 September 2015
Reasons furnished:	21 September 2015
Appearances:	
For the Applicants:	Adv. L.K. Van der Merwe
Instructed by:	Cawood Attorneys, Pretoria
For the First and Second Respondents:	Adv. M. M. Rip SC Adv. J Vorster
Instructed by:	Leahy & Van Niekerk Inc., Pretoria
For the Intervening Party:	Adv. H.G.A Snyman SC Adv. C. Naude

NAMEX (EDMS) BPK v KOMMISSARIS VAN BINNELANDSE INKOMSTE 1994 (2) SA 265 (A)

Citation	1994 (2) SA 265 (A)
Case No	314/92
Court	Appèlafdeling
Judge	van Heerden AR, SMALBERGER AR, GOLDSTONE AR, VAN DEN HEEVER AR, NICHOLAS Wn AR
Heard	November 2, 1993
Judgment	November 26, 1993
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Maatskappy - Reëling - Reëling in terme van art 311 van Maatskappywet 61 van 1973 - 'Standaardskema' ingevolge waarvan alle skuldeisers se C vorderings teen maatskappy geag word gesedeer te word, teen betaling, aan 'n derde party - Of standaardskema binne raamwerk van art 311 val - Artikel 311 skemas het veel nut in sakewêreld en met oog daarop behoort Howe nie enge vertolking aan bepalings van artikel te gee nie - Alhoewel skema nie op reëling 'voorgestel . . . tussen 'n maatskappy en sy skuldeisers' neerkom indien betrokke maatskappy slegs 'n passiewe rol D speel nie, is dit nie nodig dat aktiewe rol aansienlik moet wees nie - In casu het klousule van skema voorsiening gemaak vir tersydestelling van ooreenkoms aangegaan deur voorlopige likwidateurs van maatskappy (appellant) met ander maatskappy waarkragtens sekere van appellant se E bates aan die ander maatskappy verkoop is - Klousule het appellant se toestemming vereis en hom as nodige en aktiewe party tot skema betrek - Dus onnodig in casu om te beslis of standaardskema skikking of reëling tussen maatskappy en skuldeisers daarstel.

F Inkomste - Inkomstebelasting - Inkomstebelasting verskuldig deur maatskappy ingevolge Inkomstebelastingwet 58 van 1962 - Skema van reëling tussen maatskappy en sy skuldeisers goedgekeur ingevolge art 311 van Maatskappywet 61 van 1973 - Of Kommissaris van Binnelandse Inkomste ten opsigte van sy vorderings vir maatskappy se aangeslane of bekende G belastingpligtigheid kan ressorteer onder skuldeisers wat kragtens

A art 311(2) deur goedgekeurde skema gebind word - Argument dat art 311 reëling nie Kommissaris kan bind nie omdat hy nie regtens bevoeg is om (1) afstand te doen van belastingvordering of (2) dit te sedeer nie - Wat betref (1) blyk dit dat in geval van netelige geskil belastinggaarder B gemeenregtelik wel bindende skikking vir bedrag minder as dié van sy eis kan aangaan, solank hy nie deur afstanddoening benadeel word nie - Gemeenregtelike posisie bestendig deur subarts 31(1) en (2) van Skatkiswet 66 van 1975, in terme waarvan Staatstruktuur of amptenaar afstand kan doen van belastingvordering mits hy oortuig is dat bedrag oninbaar is - C Kommissaris kan dus toestem tot reëling ingevolge art 311 indien hy niks minder daarvolgens staan te ontvang nie as wat hy sou ontvang het in geval van alternatief van finale likwidasie - Ook geen rede waarom Kommissaris, selfs in die afwesigheid van sy toestemming, nie deur goedkeuring van reëling gebonde sou wees nie - Wat betref (2) blyk dit dat alhoewel D amptenaar soos Kommissaris in reël nie belastingvordering mag sedeer nie, posisie anders waar bepaling dat sessie moet geskied 'n integrale deel vorm van reëling waartoe Kommissaris mag

toestem en waar skuldenaar nie deur sessie geraak kan word nie - In geval van reëling kragtens art 311 E van Maatskappywet wat ook op belastingvordering betrekking het, is posisie juis dat dit aan maatskappy geen verskil maak of die betrokke bedrag aan Kommissaris of aan inisieerder van reëling verskuldig is nie - Kommissaris gebonde aan sessie of veronderstelde sessie van sy eis - Kommissaris kan F dus (mits aan bogenoemde vereistes voldoen word) wel aan goedgekeurde art 311 reëling gebonde wees ten opsigte van sy vorderings vir aangeslane of bekende belastingpligtigheid.

Inkomste - Inkomstebelasting - Inkomstebelasting verskuldig deur maatskappy ingevolge Inkomstebelastingwet 58 van 1962 - Skema van reëling G tussen maatskappy en sy skuldeisers gemagtig ingevolge art 311 van Maatskappywet 61 van 1973 - Of Kommissaris van Binnelandse Inkomste ten opsigte van sy vorderings vir maatskappy se onaangeslane of onbekende belastingpligtigheid kan ressorteer onder skuldeisers wat kragtens art H 311 (2) deur goedgekeurde skema gebind word - Belastinggaarder in reël nie bevoeg om van belastingvordering afstand te doen nie, en art 31(2) van Skatkiswet 66 van 1975, wat enigste tersaaklike statutêre bepalings waarvolgens sodanige afstand gedoen kan word bevat, vereis dat Tesourie of I gedelegeerde oortuig moet wees dat betrokke bedrag geheel of gedeeltelik oninbaar is, of dat dit tot voordeel van Staat sal strek om deur skikking geheel of gedeeltelik daarvan afstand te doen - Wat betref reëling ingevolge art 311 van Maatskappywet sal sodanige oortuiging selde kan bestaan waar belastingvordering teen maatskappy onbekend is - Goedkeuring van skema bind dus nie Kommissaris ten opsigte van maatskappy se J onaangeslane of onbekende belastingpligtigheid nie.

1994 (2) SA p267

Headnote : Kopnota

A Die appellant het in sy opgawe van inkomste vir sy 1982 belastingjaar aanspraak gemaak op 'n aftrekking, in terme van art 15*(a)* saamgelees met arts 36 en 37 van die Inkomstebelastingwet 58 van 1962, van meer as R6 miljoen, wat gelyk gestaan het aan die waarde van verskeie myneiendomme ('die ontwikkelingsbates') wat hy gedurende die jaar aangekoop het en verkry het binne die raamwerk van art 37(1) van die Inkomstebelastingwet. Alhoewel die bedoelde waarde ingevolge art 37(4) deur die Staatsmyninginieur vasgestel moes word, en dit nog nie ten tyde van die indiening van die opgawe gedoen is nie, het die respondent die appellant B se 1982 aanslag bereken op die grondslag dat die appellant wel op die genoemde aftrekking geregtig was. Die respondent het egter opgemerk dat die aanslag indien nodig hersien sou word na die Staatsmyninginieur se vasstelling. Nadat die appellant in 1984 in voorlopige likwidasie geplaas is, het 'n sekere maatskappy 'n aanbod ingevolge art 311 van die Maatskappywet 61 van 1973 gemaak, welke aanbod, nadat dit aanvaar is ('die C skema'), in 1985 deur 'n Plaaslike Afdeling goedgekeur is. Ingevolge die skema is die voorlopige likwidasiebevel ook deur die Hof opgehef. Die skema het voorsiening gemaak vir die indiening van eise van die appellant se skuldeisers by sogenaamde ontvangers, maar die respondent het nie 'n eis ingedien nie. In 1986 het die Staatsmyningenieur ingevolge art 37(4) van die Inkomstebelastingwet die effektiewe waarde van die bogenoemde ontwikkelingsbates op slegs sowat R3,5 miljoen vasgestel en 'n aanvullende aanslag vir die appellant se 1982 belastingjaar uitgereik, in terme D waarvan die bogenoemde bedrag gesubstitueer is vir die meer as R6 miljoen wat oorspronklik as aftrekking toegelaat is. Dit het meegebring dat die appellant ten opsigte van die betrokke jaar met 'n addisionele R756 587,26 belas is. In 1987 het die appellant in 'n Provinsiale Afdeling 'n geding teen die respondent aanhangig gemaak wat gerig was op die verkryging van 'n bevel waarvolgens verklaar sou word dat vanweë die goedkeuring van die skema die appellant nie verplig was om die addisionele heffing te betaal E nie. Die respondent het vier alternatiewe verwere geopper:

1. Dat die skema nie binne die raamwerk van art 311 van die Maatskappywet val nie, en goedkeuring daarvan dus nie skuldeisers van die appellant, of altans dié wat (soos die respondent) nie daartoe toegestem het nie, kon bind nie.
2. Dat die skema in elk geval nie op die respondent van toepassing gemaak kon word nie omdat dit behels het dat die respondent afstand moes doen van 'n belastingaanspraak en/of dit moes sedeer - iets wat F respondent as openbare amptenaar nie regtens kon vermag nie.

3. Dat art 311 nie van toepassing was nie op 'n eiser wie se vordering bloot 'gebeurlik' was - soos die respondent se vordering ten opsigte van addisionele belasting vir die appellant se 1982 belastingjaar wel was.

4. Dat die bepalings van die skema slegs van toepassing was op skuldeisers wie se skuldoorsake voor goedkeuring van die skema ontstaan het. Omdat die respondent se skuldoorsaak egter eers G ontstaan het by uitreiking van die addisionele aanslag, of vroegstens toe die Staatsmyningenieur die waarde van die ontwikkelingsbates bepaal het, was die skema nie op die respondent van toepassing nie.

Die Verhoorhof het die tweede verweer gehandhaaf en die appellant se vordering afgewys, waarna verlof verleen is om na die Appèlafdeling te appelleer. Al vier verwere is weer voor die Appèlafdeling beredeneer en H die Hof het hulle een vir een behandel.

Die eerste verweer

Die Hof *(per* Goldstone AR; Smalberger AR en Nicholas Wn AR samestemmend) was die mening toegedaan dat dit onnodig was om in die onderhawige appèl te beslis of 'n sogenaamde 'standaardskema' soos die onderhawige een wel 'n skikking of reëling tussen 'n maatskappy en sy skuldeisers daarstel. In I die onderhawige geval het die skema naamlik 'n klousule bevat wat voorsiening gemaak het vir die tersydestelling van 'n ooreenkoms aangegaan deur die voorlopige likwidateurs van die appellant en 'n ander maatskappy waarkragtens sekere bates van die appellant aan die ander maatskappy verkoop is. Daardie beding het stellig die toestemming van die appellant vereis en hom as nodige en aktiewe party tot die reëling betref. (Op 294C/D-E/F.) Die Hof het verder opgemerk dat art 311 skemas in die sakewêreld veel nut het en dat die Howe met die oog daarop nie 'n enge J vertolking aan die bepalings van die

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1994 (2) SA p268

A artikel moes gee nie. Alhoewel so 'n skema nie 'n skikking of reëling 'voorgestel . . . tussen 'n maatskappy en sy skuldeisers' was nie indien die maatskappy slegs 'n passiewe rol gespeel het nie, was dit egter nie nodig dat die maatskappy se aktiewe rol aansienlik moes wees nie. Gevolglik moes die eerste verweer van die hand gewys word. (Op 294E/F-F/G en G/H.)

Die tweede verweer

B In sy bespreking van hierdie verweer het die Hof *(per* Van Heerden AR; Smalberger AR, Goldstone AR, Van den Heever AR en Nicholas Wn AR samestemmend) hom beperk tot vorderings vir aangeslane of bekende (in teenstelling met onaangeslane onbekende) belastingpligtigheid. (Op 284C.) Die Hof het toegegee dat 'n belastinggaarder in die reël nie bevoeg was om belasting kwyt te skeld, deur 'n skikking te verminder, of sy vordering C daarop te sedeer nie; maar gewys op die beslissing in *City of Cape Town v Claremont Union College* 1934 AD 414 op 452 dat in die geval van 'n netelige geskil 'n belastinggaarder wel 'n bindende skikking vir 'n bedrag minder as die van sy eis kon aangaan. Die logiese grondslag van hierdie uitsondering was dat die Staat nie deur 'n afstanddoening benadeel moes word nie. Daar was dus geen rede waarom 'n belastinggaarder soos die respondent nie ter voorkoming van benadeling van die *fiscus* afstand kon doen van 'n gedeelte van sy belastingvordering nie indien dit sou vasstaan D dat hy andersins niks meer as die oorblywende gedeelte sou kon verhaal nie. Gevolglik kon die respondent gemeenregtelik geldiglik toestem tot 'n reëling ingevolge art 311 indien hy niks minder daarvolgens sou ontvang nie as wat hy deur die likwidateur, in geval van die alternatief van finale likwidasie, uitbetaal sou word. (Op 284D en 284E/F-285C.) Die Hof het verder daarop gewys dat die gemeenregtelike posisie bestendig is deur arts 31 en 32 van die Skatkiswet, wat 'n meganiek geskep het ingevolge waarvan 'n Staatsstruktuur - of amptenaar - geheel of gedeeltelik van 'n belastingvordering afstand kon doen. Dus, indien 'n reëling ingevolge art E 311(1) van die Maatskappywet 'n aanbod ten opsigte van so 'n vordering behels, kon dit aanvaar word mits die vereistes van art 31 van die Skatkiswet bevredig is. (Op 286A/B en C/D-D/E.) Wat betref die sessie van 'n belastingvordering het die Hof daarop gewys dat alhoewel dit so was dat 'n amptenaar soos die respondent in die reël nie so 'n vordering kon sedeer nie, die posisie anders was waar 'n bepaling dat 'n sessie moes geskied 'n integrale deel gevorm het van 'n reëling waartoe die F belastinggaarder wel kon toestem, altans waar die skuldenaar nie deur die sessie geraak sou word nie. In die geval van 'n reëling kragtens art 311 van die Maatskappywet was die posisie juis dat dit aan die

maatskappy geen verskil kon maak of die betrokke bedrag aan die belastinggaarder of aan die inisieerder van die reëling verskuldig was nie. Al wat egter op die inisieerder sou oorgaan was die reg om die betrokke (verminderde) bedrag van die maatskappy te verhaal, en hy kon nie *qua* nuwe skuldeiser aanspraak maak op bevoegdhede wat statutêr slegs die respondent toekom nie en dus nie saam met die blote vorderingsreg oorgedra kan word nie (soos G byvoorbeeld insae in die maatskappy se tersaaklike geheime dossiere). (Op 287E/F-G en H-I.) Uit die voorafgaande het die Hof tot die slotsom geraak dat, in soverre die tweede verweer berus het op die premisse dat 'n belastinggaarder soos die respondent onder geen omstandighede aan 'n goedgekeurde reëling gebonde kon wees nie, dit nie kon slaag nie. (Op 288E.)

Die derde verweer

H Volgens die Hof *(per* Van Heerden AR; Smalberger AR, Goldstone AR, Van den Heever AR en Nicholas Wn AR samestemmend) was die woord 'skuldeiser' wyd genoeg om voorwaardelike skuldeisers, asook die met ongelikwideerde vorderings, in te sluit, maar kon so 'n wye vertolking van die woord in art 311(2) van die Maatskappywet tot probleme lei, en was die enigste sinvolle oplossing om elke voorwaardelike skuldeiser as 'n 'klas' van sy eie te behandel. Dit sou meebring dat die bepalings van art 311(2) wel op I voorwaardelike skuldeisers van toepassing was, maar dat elke sodanige skuldeiser die reëling, in soverre dit op hom van toepassing was, op 'n aparte 'vergadering' sou moes aanvaar. (Op 289B-C/D gelees met 288H/I.) Die Hof het egter benadruk dat die respondent nie 'n voorwaardelike skuldeiser was nie: alhoewel die uitreiking van 'n aanslag 'n vereiste vir die afdwingbaarheid van 'n belastingskuld mag wees, bestaan die skuld as sulks reeds voor daardie gebeurlikheid. Dus was die skuld nie onderhewig aan 'n voorwaarde die vervulling waarvan kon meebring dat verskuldigheid J nie sou ontstaan nie of sou verval nie. Ten opsigte

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A van onaangeslane inkomstebelastingpligtigheid was die respondent gevolglik nie 'n voorwaardelike skuldeiser wat in 'n 'klas' anders as die algemene klas van preferente skuldeisers van 'n belastingbetaler geval het nie. (Op 289E-G.) Die Hof het egter daarop gewys dat daar besondere oorwegings was wat gegeld het vir die respondent as skuldeiser van 'n onbekende belastingskuld: art 31(2) van die Skatkiswet, wat die enigste tersaaklike statutêre bepalings bevat waarvolgens afstand van 'n inkomstebelasting- B vordering gedoen kan word, vereis dat die Tesourie of sy gedelegeerde oortuig moet wees dat die betrokke bedrag geheel of gedeeltelik oninbaar is, of dat dit tot voordeel van die Staat sal strek om deur 'n skikking geheel of gedeeltelik daarvan afstand te doen. Wat 'n reëling ingevolge art 311 van die Maatskappywet betref, sou so 'n oortuiging kon bestaan ten opsigte van 'n bekende belastingvordering, maar indien dit egter onbekend was of die maatskappy 'n verdere belastingpligtigheid het, sou heel selde besluit kon word of 'n afstanddoening die Staat sou bevoordeel, of dat die C onbekende bedrag waarop so 'n afstanddoening betrekking sou hê, oninbaar was. Dus kon goedkeuring van 'n reëling in so 'n geval nie die respondent bind nie, selfs nie indien 'n reëling met hom as 'n aparte 'klas' van skuldeiser voorgestel was nie. In die onderhawige geval was daar egter nooit sprake van onbekende belastingpligtheid nie: totdat die Staatsmyningenieur handelend opgetree het deur 'n waarde op die betrokke ontwikkelingsbates te plaas, was die appellant nie geregtig op 'n aftrekking nie, en was hy verplig om 'n bepaalde bedrag - sonder toelating D van die tersaaklike aftrekking - as belasting te betaal. Dat daardie verskuldigheid in die toekoms kon verminder, het nie afgedoen nie aan die feit dat op elke tersaaklike stadium die omvang van die appellant se belastingpligtigheid bekend was. Ingevolge die onderhawige skema sou die respondent as preferente skuldeiser ten volle betaal word, en indien hy 'n eis sou bewys het sou hy nie minder nie, en stellig meer, ontvang het as wat hy in 'n likwidasieproses sou ontvang het. (Op 289G/H en 290H-291A/B, 291B/C-C en 292H/I-293B.) Gevolglik kon die derde verweer (gedeeltelik E saam met die tweede verweer beskou) ook nie slaag nie.

Die vierde verweer

Volgens die Hof *(per* Van Heerden AR; Smalberger AR, Goldstone AR, Van den Heever AR en Nicholas Wn AR samestemmend) het hierdie verweer, wat berus het op die premisse dat die respondent se skuldoorsaak vroegstens eers by F die Staatsmyningenieur se bepaling van die waarde van die genoemde ontwikkelingsbates

ontstaan het (dit wil sê, lank na die registrasie van die skema), weinig om die lyf gehad het omdat, soos reeds aangetoon is, die respondent te alle saaklike tye 'n eis gehad het vir meer as die belasting wat in die aanvullende aanslag gehef is. (Op 293C-D/E.)
Gevolglik het die appèl met koste geslaag, en is die bevel van die Kaapse Provinsiale Afdeling in *Namex (Pty) Ltd v Commissioner for Inland Revenue* G *1992 (2) SA 761 (K) vervang met 'n bevel wat verklaar dat die verweerder se aanvullende aanslag vir die 1982 belastingjaar oneffektief was.*

Flynote : Sleutelwoorde

Company - Compromise - Scheme of arrangement in terms of s 311 of H Companies Act 61 of 1973 - 'Standard' scheme whereby all creditors' claims against company deemed to be ceded, as against payment, to third party - Whether standard scheme falling within scope of s 311 - Section 311 schemes very useful in business world and Courts should not give too narrow a construction to their provisions - Although scheme not amounting to 'arrangement proposed between a company and its creditors', where I company plays only a passive role, not necessary for active role to be substantial - In casu, clause of scheme having provided for setting aside of agreement between provisional liquidators of company (appellant) and another company, in terms of which certain assets of appellant sold to other company - Clause requiring consent of appellant and involving it as necessary and active party to arrangement - Accordingly not necessary in casu to decide whether standard scheme embodied compromise or arrangement J between company and its creditors.

1994 (2) SA p270

A Revenue - Income tax - Income tax due by company in terms of Income Tax Act 58 of 1962 - Scheme of arrangement between company and its creditors sanctioned in terms of s 311 of Companies Act 61 of 1973 - Whether Commissioner for Inland Revenue to be classed amongst those creditors that are bound by scheme sanctioned in terms of s 311(2) in respect of his claims for company's assessed or known tax liability - Contention that s 311 arrangement cannot bind Commissioner because he is not legally B entitled (1) to waive or (2) to cede claim for taxes - As to (1), receiver of revenue at common law entitled, in case of dispute, to conclude binding settlement for amount less than his claim, provided that he is not prejudiced by such waiver - Common-law position consolidated by ss 31(1) and (2) of Exchequer Act 66 of 1975 in terms of which State structure or official may abandon tax claim if it is satisfied that amount owing irrecoverable - Commissioner accordingly entitled to agree to s 311 arrangement provided that he does not stand to receive less in terms C thereof than he would have received in event of final liquidation - No reason why Commissioner should not also be bound by sanction of arrangement even where he does not agree thereto - As to (2), although official such as Commissioner as a rule not entitled to cede claim for taxes, situation different where provision that cession must take place forms integral part of arrangement to which Commissioner is entitled to agree and where debtor is not affected by cession - In case of arrangement D in terms of s 311 of Companies Act involving claim for taxes, matter of indifference to company whether it owes sum in question to Commissioner or to person initiating arrangement - Commissioner bound by cession (or deemed cession) of its claim - Commissioner accordingly bound by s 311 scheme in respect of his claims for assessed or known tax liability of company, provided that abovementioned requirements complied with.

Revenue - Income tax - Income tax due by company in terms of Income Tax E Act 58 of 1962 - Scheme of arrangement between company and its creditors sanctioned in terms of s 311 of Companies Act 61 of 1973 - Whether Commissioner for Inland Revenue to be classed amongst those creditors that are bound by scheme sanctioned in terms of s 311(2) in respect of his claims for company's unassessed or unknown tax liability - Tax collector as a rule not entitled to waive claim for taxes, and s 31(1) of Exchequer Act 66 of 1975, which contains only pertinent statutory provisions in terms of which such waiver may take place, requiring that Treasury or F delegated person be satisfied that amount owing is wholly or partially irrecoverable, or that it would be to advantage of State to effect settlement of claim - As far as arrangement in terms of s 311 of Companies Act is concerned, such official will seldom be so satisfied where company's tax liability unknown - Sanction of arrangement accordingly not binding Commissioner in respect of company's unassessed or unknown tax liability.

Headnote : Kopnota

G In its income tax return for the 1982 tax year the appellant claimed a deduction, in terms of s 15*(a)* read with ss 36 and 37 of the Income Tax Act 58 of 1962, of more than R6 million, which amount was equivalent to the value of several mining properties

('the development assets') which it had purchased and acquired that year in accordance with the provisions of s 37(1) of the Income Tax Act. Although s 37(4) provides that the effective value of such assets has to be determined by the Government H Mining Engineer, and this had not yet been done by the time the appellant had filed its return, the respondent had calculated the appellant's 1982 assessment on the basis that the appellant was entitled to the said deduction. The assessment contained a note informing the appellant that the assessment would, if necessary, be revised after the Government Mining Engineer's determination. After the provisional liquidation of the appellant in 1984, a certain company made an offer in terms of s 311 of the Companies Act 61 of 1973, which offer was, after it had been agreed I to, sanctioned by a Provincial Division in 1985 ('the scheme'). Pursuant to the terms of the scheme, the Court also discharged the provisional liquidation order in respect of the appellant. The scheme made provision for the submission of the claims of appellant's creditors to so-called receivers, but the respondent did not attend any meetings of creditors, nor did he submit any claims to the receivers. In 1986 the Government Mining Engineer, in terms of s 37(4) of the Income Tax Act, fixed the effective value of the develoment assets at about R3,5 million and the respondent thereupon issued an additional tax assessment in respect of J appellant's 1982 tax

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1994 (2) SA p271

A year, in terms of which the abovementioned figure was substituted for the R6 million deduction previously allowed. The result was that the appellant was taxed an additional amount of R756 587,26 in respect of the 1982 tax year. In 1987 the appellant instituted proceedings against the respondent in a Provincial Division. The order sought was to the effect that the appellant was, by virtue of the sanction of the scheme, not obliged to pay the additional levy. The respondent raised four defences to the appellant's claim:

1. That the scheme did not fall within the scope of s 311 of the B Companies Act, and that it was accordingly, notwithstanding its sanction by the Court, not binding upon the appellant's creditors, or at least not upon those, such as the respondent, who had not agreed to it.
2. That the scheme could in any event not bind the respondent because it required the respondent to waive and/or cede a claim for income tax - something he was not, as a public official, entitled to do.
3. That respondent's claim for the additional taxes for the appellant's C 1982 tax year was of a purely contingent and unquantified nature, and that s 311 did not apply to such claims.
4. That the provisions of the scheme applied only to a creditor whose claims and/or right to claim had arisen before the sanction of the scheme: inasmuch as respondent's claim had only arisen at the time of the issue of the 1986 assessment, or at the earliest during 1986 upon D the Government Mining Engineer's determination, the respondent was not bound by the scheme.

The Court *a quo* upheld the second defence and dismissed the appellant's claim, after which leave to appeal to the Appellate Division was granted. The Court again considered each of the four defences.

The first defence

The Court *(per* Goldstone JA; Smalberger JA and Nicholas AJA concurring) E was of the opinion that it was not necessary for the purposes of the instant appeal to decide whether a 'standard scheme' such as the one under consideration embodied a compromise or arrangement between the company and its creditors. This was so because the scheme contained a clause which made provision for the setting aside of an agreement concluded between the provisional liquidators of the appellant and another company in terms of which certain assets of appellant were sold to the other company, which F clause doubtless required the consent of the appellant and involved it as a necessary and active party to the arrangement. (At 294C/D-E/F.) The Court further noted that s 311 schemes were very useful in the business world and that the Courts should not give a too narrow construction to their provisions. Although a scheme in terms of which the company played a merely passive role did not amount to 'an arrangement proposed between a company and its creditors', it was not necessary

that the company's active role be a substantial one. Accordingly, the first defence had to fail. (At G 294E/F-F/G and G/H.)

The second defence

In its discussion of this defence the Court *(per* Van Heerden JA; Smalberger JA, Goldstone JA, Van den Heever JA and Nicholas AJA concurring) limited itself to claims for known or assessed (as opposed to unassessed or unknown) tax liability. (At 284C.) The Court conceded that it was not as a rule competent for a tax collector to waive, settle or H cede a claim for taxes, but referred to the decision in *City of Cape Town v Claremont Union College* 1934 AD 414 at 452 where it was held that in the event of a thorny dispute a receiver of revenue was entitled to conclude a binding settlement for an amount less than that of his claim. The logical basis for this exception was the rule that the State should not be prejudiced by a renunciation of its claims. There was accordingly no reason why a tax collector such as the respondent could not, in order to prevent harm to the *fiscus*, waive part of his claim where it was certain I that he would not otherwise be able to recover the remaining portion thereof. The respondent was accordingly entitled at common law to agree to a s 311 arrangement provided that he did not stand to receive less in terms thereof than he would have received in the event of a final liquidation. (At 284D and 284E/F-285C.) The Court further pointed out that the position at common law had been consolidated by ss 31 and 32 of the Exchequer Act 66 of 1975, which created a mechanism which enabled a State structure - or official - to write off the whole or any portion of a tax J claim. Accordingly, if an arrangement in terms of s 311(1) of the

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A Companies Act contained an offer in respect of such a claim, such offer could be accepted provided that the requirements of s 31 of the Exchequer Act were complied with. (At 286A/B and C/D-D/E.) Regarding the cession of a tax claim, the Court pointed out that, although an official such as the respondent could as a rule not cede such a claim, the situation was different where the provision that cession must take place formed an integral part of an arrangement to which such an official was entitled to agree, provided the debtor was not affected by the cession. In the case of B a cession in terms of s 311 of the Companies Act, the position was precisely that it could make no difference to the company whether the amount in question was owed to the receiver of revenue or to the offeror, so that the receiver was bound by the cession (or deemed cession) of his claim. However, all that was passed on to the offeror was the right to recover the said sum, and he was not entitled *qua* the new creditor to any of the statutory powers vesting in the respondent (such as the right of access to a company's relevant secret documents). (At 287E/F-G and H-I.) C The Court accordingly concluded that, insofar as the second defence was based on the premise that a collector of taxes such as the respondent could not under any circumstances be bound by a s 311 arrangement, it could not succeed. (At 288E.)

The third defence

D The Court *(per* Van Heerden JA; Smalberger JA, Goldstone JA, Van den Heever JA and Nicholas AJA concurring) was of the view that, although the term 'creditor' was broad enough to embrace contingent creditors and creditors with illiquid claims, such a broad construction of the word in s 311(2) of the Companies Act could lead to difficulties. The only sensible solution was to treat every contingent creditor as a separate 'class' of creditor. This would mean that s 311(2) applied to contingent creditors, but that every such creditor would have to agree to the arrangement at a separate E 'meeting' of creditors. (At 289B-C/D read with 288H/I.) The Court pointed out, however, that the respondent was not in fact a contingent creditor. This was because tax claims came into existence before the relevant assessments were issued (although the issue of an assessment was a prerequisite for the enforceability of the claim). In other words, a tax claim was not subject to a condition which, if fulfilled, would result in F the debt not arising, or else expiring. The respondent was accordingly not, with regard to an unassessed tax claim, a contingent creditor falling into a different 'class' from the general class of preferent creditors. (At 289E-G.) The Court pointed out, however, that there were special considerations that applied to the respondent as creditor of an unknown tax claim: s 31(2) of the Exchequer Act, which contained the only pertinent statutory provisions in terms of which the whole or part of

a tax claim could be waived, stipulated that the Treasury or the person G delegated by it had to be satisfied that the sum in question was either wholly or partially irrecoverable or that it would be to the advantage of the State to effect a settlement of the claim. As far as an arrangement in terms of s 311 of the Companies Act was concerned, such satisfaction could exist in respect of a known tax claim, but where it was not known whether there was any further tax liability, it would seldom be possible to conclude either that the waiver of such a possibly existing but unknown claim would be to the advantage of the State, or that the unknown sum to H which the waiver related was irrecoverable. Accordingly the sanction of an arrangement could not bind the respondent in such cases, even where the arrangement provided that the respondent would fall into a separate 'class' of creditor. In the instant case there had never been any question of an unknown tax liability. Until the Government Mining Engineer had placed a value upon the development assets, the appellant had not been entitled to a deduction: he had been required to pay a certain amount - without the allowance of the relevant deduction - in taxes. The fact that I that indebtedness might have decreased in the future did not detract from the fact that the extent of the appellant's tax liability was known at all relevant times. In terms of the instant arrangement the respondent, as preferent creditor, stood to be paid out in full: if he had proved a claim he would not have received less, and probably more, than he would have obtained in the event of a final liquidation. (At 289G/H and 290H-291A/B, 291B/C-C and 292H/I-293B.) Accordingly the third defence (considered in J part with the second defence) had to fail as well.

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A *The fourth defence*
The Court *(per* Van Heerden JA; Smalberger JA, Goldstone JA, Van den Heever JA and Nicholas AJA concurring) held that this defence, which was based on the premise that the respondent's cause of action had arisen at the earliest upon the Government Mining Engineer's determination of the effective value of the development assets (ie long after the registration of the scheme), had little merit: as was demonstrated above, the respondent had at all relevant times had a claim for more taxes than it B had levied in the additional assessment. (At 293C-D/E.)
The appeal was accordingly upheld with costs, and the order in the Cape Provincial Division in *Namex (Pty) Ltd v Commissioner for Inland Revenue*1992 (2) SA 761 (C) substituted with an order declaring void the respondent's assessment for the appellant's 1982 tax year. C

Case Information

Appèl teen 'n beslissing in die Kaapse Provinsiale Afdeling (Selikowitz R), gerapporteer te 1992 (2) SA 761. Die feite blyk uit die uitspraak van Van Heerden AR.

D *S A Cilliers SC* (bygestaan deur *A P Blignault SC)* namens die appellant het na die volgende gesag verwys. *Serein Investments (Pty) Ltd v Myb (Pty) Ltd*1967 (4) SA 437 (K) op 438H-439B; *Cohen NO v Nel*1975 (3) SA 963 (W) op 967F-969F; *Metal Box Co of South Africa Ltd v A G Dunstan (Pty) Ltd*1974 (2) SA 208 (T) op 213A-H; *Morris NO v Airomatic (Pty) Ltd t/a Barlows Airconditioning Co*1990 (4) SA 376 (A) op 396F-397F, 398E-G; *Chief* E *Commissioner of Pay-roll Tax v Group Four Industries (Pty) Ltd* 8 ACLR (1983-4) 973; *Barclays National Bank Ltd v H J de Vos Boerdery Ondernemings (Edms) Bpk*1980 (4) SA 475 (A) op 480F-H, 481B-C, 481F-G, 482A-E, 484A-C; *Ex parte Strydom NO: In re Central Plumbing Works (Natal) (Pty) Ltd*1988 (1) SA 616 (D) op 620C-E; *Ex parte Millman and Others NNO:* F *In re Multi-Bou (Pty) Ltd*1987 (4) SA 405 (K); *Kleena Industries (Pty) Ltd v Senator Insurance Co Ltd*1982 (2) SA 458 (W) op 463G-H; *Ex parte Ensor NO: In re Cape Natal Litho (Pty) Ltd*1978 (3) SA 908 (D) op 911A-D; *Ilic v Parginos*1985 (1) SA 795 (A) op 803G-804A; *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* [1981] 2 All ER 93 op 101; *S v Rosenthal*1980 (1) SA 65 (A) op 75G-76A; *Bond* G *Corporation Holdings Ltd v Western Australia* vol 7 (1991-2) Australian Corporations and Securities Reports 472 op 475-7; *Ex parte Currie NO*1966 (4) SA 546 (D) op 549H-550C, 550G-E, 554C-D; *Midland Coal Coke and Iron Co* [1895] 1 Ch 267 op 277; *Glendale Land Development Ltd (in Liquidation)* 7 ACLR (1982-83) 171 op 175; *Re International*

Harvester Credit Corporation H *(Australia) Ltd* 7 ACLR (1982-83) 415 op 416; *Re Huon Valley Springs (Pty) Ltd* 10 ACLR (1985-86) 883 op 891; *Re Asia Oil & Minerals Ltd* 10 ACLR (1985-86) 333; *Re BDC Investments Ltd* 13 ACLR (1987-88) 201 op 203; *Friedman v Bond Clothing Manufacturers (Pty) Ltd*1965 (1) SA 673 (T) op 677F-H; *Ex parte Goldreich; In re Goldleiff Stores (Pty) Ltd and Lane-Bryant (Pty) Ltd* 1956 (2) PH E19 (D); *CCH Company Law and Practice* I *para 43-500; Strydom v Die Land- en Landboubank van Suid-Afrika*1972 (1) SA 801 (A) op 812G-H; *S v Naidoo*1985 (1) SA 36 (N) op 43B-C; *Commissioner for Inland Revenue v Janke* 1930 AD 474 op 481; *Reed v Warren*1955 (2) SA 370 (N) op 372E-H; *Secretary for Finance v Esselmann*1988 (1) SA 594 (SWA); *Commissioner for Inland Revenue v Bowman NO*1990 (3) SA 311 (A) op J 314F-G.

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A *W G Burger SC* (bygestaan deur *S A Jordaan)* het na die volgende gesag verwys: *Ex parte Kaplan and Others NNO: In re Robin Consolidated Industries Ltd*1987 (3) SA 413 (W) op 425J-426A; *Ex parte Millman and Others NNO: In re Multi-Bou (Pty) Ltd and Others*1987 (4) SA 405 (K); *Ex parte Strydom NO: In re Central Plumbing Works (Natal) (Pty) Ltd* 1988 (1) B SA 616 (D) op 619C-D, 620B-C, 621A-C, 621G-H; *Barclays National Bank v De Vos Boerdery Ondernemings (Edms) Bpk*1980 (4) SA 475 (A); *Administrateur-generaal vir die Gebied Suidwes-Afrika v Hotel Onduri (Edms) Bpk en Andere*1983 (4) SA 794 (SWA) op 802A-C; *SA Sentrale Koöp Graanmaatskappy v Shifren and Others*1964 (1) SA 162 (O) op 164; *Trade* C *Fairs and Promotions (Pty) Ltd v Thomson and Another*1984 (4) SA 177 (W) op 183B-F; *Serein Investments v Myb (Pty) Ltd*1967 (4) SA 437 (K); *Ex parte Ensor NO: In re Cape Natal Litho (Pty) Ltd*1978 (3) SA 908 (D) op 911; *Ex parte De Wet NO: In re Mackville Motors (Pty) Ltd (in Liquidation)*1971 (1) SA 256 (W) op 258; *Cohen NO v Nel and Another*1975 (3) SA 963 (W) D op 968; *Morris NO v Airomatic (Pty) Ltd t/a Barlows Airconditioning Co*1990 (4) SA 376 (A) op 396; *Commissioner for Inland Revenue v Delfos* 1933 AD 242 op 248; *Collector of Customs v Cape Central Railways* 6 SC 402 op 406; *Commissioner for Inland Revenue v The Master and Another*1957 (3) SA 693 (K); *Kommissaris van Binnelandse Inkomste v Boedel Du Toit*1985 (4) SA 594 (NK) op 605; *Vanroux Motors v Kommissaris van Doeane en Aksyns*1959 (1) SA 605 (T) E op 609; *Diedericks v Minister of Lands*1964 (1) SA 49 (N) op 58; *Mercian Investments (Pty) Ltd v Johannesburg City Council*1990 (1) SA 560 (W) op 573; *Burghersdorp Municipality v Coney* 1936 CPD 305 op 307; *Ritch & Bhayat v Union Government (Minister of Justice)* 1912 AD 719 op 735; *SA Board of Executors and Trust Co Ltd (in Liquidation) v Gluckman* F *1967 (1) SA 534 (A) op 541; Gunn and Another NNO v Victory Upholsterers (Pty) Ltd*1976 (1) SA 127 (D) op 135; *Ilic v Parginos*1985 (1) SA 795 (A); *Mostert v Mostert* 1913 TPD 225 op 259; *Benson and Another v Walters and Others*1981 (4) SA 42 (K) op 49; *The Master v IL Back & Co Ltd*1983 (1) SA 986 (A) op 1005; *Hamilton Plase (Edms) Bpk v Stadler*1977 (3) SA 361 (NK); *King's Transport v Viljoen*1954 (1) SA 133 (K) op 135; *Big Rock (Pty) Ltd* G *v Hoffman*1983 (1) SA 534 (T) op 539.

Cur adv vult.

Postea (November 26.) H

Judgment

Van Heerden AR: In Mei 1983 het die appellant 'n opgawe van inkomste vir sy 1982 belastingjaar ingedien. Daarin is aanspraak gemaak op 'n aftrekking van meer as R6 miljoen. Dié aanspraak was gebaseer op die bepalings van art 15*(a)*, saamgelees met arts 36 en 37, van die Inkomstebelastingwet 58 van 1962. Die appellant het naamlik gedurende die I betrokke belastingjaar koopkontrakte met drie maatskappye aangegaan en daarvolgens myneiendomme, insluitende ontwikkelingsbates, binne die raamwerk van art 37(1) verkry. Gevolglik was die appellant geregtig op 'n belastingaftrekking gelykstaande aan die effektiewe waarde van sodanige bates. Soos art 37(4) toe gelui het, moes bedoelde waarde deur die J Staatsmyningenieur bepaal word. Ten tye van die indiening van die opgaaf

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VAN HEERDEN AR

A was so 'n bepaling nog nie gemaak nie en voornoemde bedrag van meer as R6 miljoen was die totaal van die bedrae wat in die koopkontrakte as die waardes van die ontwikkelingsbates beraam was.

In Junie 1983 het die respondent die appellant ten opsigte van sy 1982 belastingjaar aangeslaan. Dit was 'n negatiewe aanslag in die sin dat 'n B verlies bepaal is. Hierdie verlies is bereken op die grondslag dat die appellant op die genoemde aftrekking geregtig was. Die volgende nota het egter op die aanslag verskyn:

> 'This assessment is subject to revision, if necessary, once the Government Mining Engineer's determination of the effective value of the various C assets acquired, is received.'

Op 11 September 1984 is die appellant in voorlopige likwidasie geplaas. Hierna het die Trans Hex Groep Bpk 'n aanbod gemaak. Hierdie aanbod was bestem om ingevolge art 311 van die Maatskappywet 61 van 1973 behandel en oorweeg te word. Nadat blykbaar aan die prosessuele bepalings van die D artikel voldoen is, is die 'aanvaarde' aanbod ('die onderhawige skema') in Maart 1985 kragtens 'n bevel van die Witwatersrandse Plaaslike Afdeling goedgekeur en daarna geregistreer. Ingevolge 'n bepaling van daardie skema is die voorlopige likwidasiebevel ook deur die Hof opgehef.

Die onderhawige skema het oa voorsiening gemaak vir indiening van eise van E die appellant se skuldeisers by sogenaamde ontvangers. Hoewel die respondent kennis gekry het van die bepalings van die skema, van vergaderings van skuldeisers en van die goedkeuring van die skema, het die respondent nie 'n vergadering van skuldeisers bygewoon of 'n eis by die ontvangers ingedien nie.

F In Maart 1986, dws na ontheffing van die appellant uit voorlopige likwidasie, het die Staatsmyningenieur ingevolge art 37(4) van die Inkomstebelastingwet die effektiewe waarde van bogenoemde ontwikkelingsbates op slegs sowat R3,5 miljoen bepaal. Daarna het die respondent 'n aanvullende aanslag vir die appellant se 1982 belastingjaar uitgereik. In effek is bedoelde bedrag toe gesubstitueer vir die som van G meer as R6 miljoen wat in die oorspronklike aanslag as aftrekking toegelaat is. Dit het meegebring dat die respondent ten opsigte van die betrokke jaar met R756 587,26 belas is.

In 1987 het die appellant in die Kaapse Provinsiale Afdeling 'n geding teen die respondent aanhangig gemaak. Dit was gerig op die verkryging van H 'n bevel waarvolgens verklaar sou word dat vanweë die goedkeuring van die onderhawige skema die appellant nie verplig was om die addisionele heffing te betaal nie. In die respondent se verweerskrif is 'n aantal verwere, waaroor hieronder meer, opgewerp en daarna het die partye 'n relaas van sogenaamde ooreengekome feite ingedien. Nadat onder andere bostaande I verloop van sake uiteengesit is, het die relaas soos volg voortgegaan:

> '16. Daar was in die hande van die ontvangers vermeld in die goedgekeurde skema voldoende fondse om die belasting van R756 587,26 . . . ingevolge die bepalings van klousule 4.9 van die skema te betaal indien die verweerder (die respondent) 'n eis ingevolge die skema bewys het.
>
> 17. Die verweerder en die amptenare wat die bepalings van die Wet op Inkomstebelasting onder sy beheer, leiding en toesig uitvoer, J ressorteer as 'n

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VAN HEERDEN AR

> A aparte afdeling onder die Departement van Finansies soos geïllustreer in die dokument hierby aangeheg gemerk "X".
>
> 18. 18.1 Gedurende die tydperk vanaf en insluitend 1983 tot die huidige is verskeie eise vir inkomstebelasting deur verweerder ingedien by die betrokke "ontvangers" ingevolge die bepalings van skikkings en/of reëlings wat kragtens die bepalings van art 311 B van die Maatskappywet goedgekeur is.
>
> 18.2 In elk van die tien voorbeelde van sulke gevalle hieronder gemeld,

(a) was die betrokke maatskappy in voorlopige of finale likwidasie;
(b) het die verweerder 'n eis vir inkomstebelasting as preferente skuldeiser ingedien;
C *(c)* het die skikking en/of reëling onder meer bepalings bevat dat die eise van skuldeisers sedeer word of geag sedeer te word aan 'n aanbieder en dat die skuldeisers in ruil daarvoor betaling van die geheel of 'n gedeelte van hul eise van die betrokke "ontvanger" sou ontvang;
(d) is daar in elke geval 'n bedrag deur die "ontvanger" aan die D verweerder in sy verdelingsrekening toegeken en betaal wat meer was as die bedrag wat die verweerder waarskynlik ten opsigte van sodanige eis in likwidasie van die maatskappy sou verhaal het, maar wat minder was as die sigwaarde van die eis. . . . (Dan volg die name van tien maatskappye.)

18.3 In talle ander soortgelyke gevalle het verweerder soortgelyke eise ingedien en is verweerder ten volle deur E die betrokke "ontvanger" betaal.

18.4 Al die gemelde eise is ingedien en hanteer deur amptenare in verweerder se gemelde afdeling wat gehandel het ingevolge staande instruksies deur verweerder aan hulle uitgereik ingevolge art 40 van die Skatkis- en Ouditwet 66 van 1975. 'n Afskrif van die instruksies word hierby aangeheg, gemerk "Y1", "Y2" en "Y3". F

18.5 Daar is nie gedurende die gemelde tydperk soortgelyke eise namens verweerder by "ontvangers" ingedien of hanteer deur enige ander amptenare (dit is deur amptenare van 'n ander afdeling as dié van verweerder) in die Departement van Finansies nie.'

G Dit is duidelik dat die partye dit eens was dat indien die goedkeuring van die skema buite rekening gelaat word, die respondent tereg addisionele belasting van R756 587,26 vir die appellant se 1982 belastingjaar gehef het. Die relaas het dan ook afgesluit deur te vermeld dat die appellant slegs op die effek van die goedgekeurde (en geregistreerde) skema gesteun het vir sy aanspraak dat dit nie verplig was om daardie bedrag te betaal nie.

H Die dokument waarna in para 17 van die relaas verwys is, toon slegs aan dat die respondent as't ware hoof van 'n sub-departement van die Departement van Finansies is, terwyl die instruksies vermeld in para 18.4 voorgeskryf het hoe belastingamptenare moes optree wanneer skemas ingevolge art 311 van die Maatskappywet voorgestel was.

Die vier alternatiewe verwere wat deur die respondent geopper is, is die I volgende:

(1) Die onderhawige skema val nie binne die raamwerk van art 311 nie, en goedkeuring daarvan kan dus nie skuldeisers van die appellant, of altans dié wat nie daartoe toegestem het, bind nie. Aangesien die respondent nie die skema aanvaar het nie, is dit J nieteenstaande bekragtiging daarvan nie daaraan gebonde nie.

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VAN HEERDEN AR

A (2) Die onderhawige skema kon in elk geval nie op die respondent van toepassing gemaak word nie, en wel omdat dit behels het dat die respondent afstand moes doen van 'n belastingsaanspraak of dit moes sedeer - iets wat die respondent nie regtens kon vermag nie.

(3) Hoewel goedkeuring van 'n skema volgens art 311 alle skuldeisers B van 'n maatskappy bind, is die artikel nie van toepassing nie op 'n eiser wie se vordering bloot 'gebeurlik' is - soos die respondent se vordering ten

opsigte van addisionele belasting vir die appellant se 1982 belastingjaar wel was.

(4) Die bepalings van die skema was slegs van toepassing op skuldeisers wie se skuldoorsake voor goekeuring van die C onderhawige skema ontstaan het. Die respondent se tersaaklike skuldoorsaak het egter eers ontstaan by uitreiking van die addisionele aanslag, of vroegstens toe die Staatsmyningenieur in Maart 1986 die waarde van die ontwikkelingsbates bepaal het. Gevolglik was die skema nie op die respondent van toepassing nie.

D Vanweë die feite waarop ooreengekom is, en die aard van bogenoemde verwere, is dit onnodig om die bepalings van arts 36 en 37 van die Inkomstebelastingwet in besonderhede uiteen te sit. Ek kom egter later op die effek van sommige van daardie bepalings terug.

Die Verhoorhof het net die eerste twee verwere bespreek maar dit nie nodig E geag om tot 'n bevinding aangaande die eerste daarvan te kom nie. Omdat die tweede verweer gehandhaaf is, is die appellant se vordering egter met koste afgewys. Daarna het die Regter-president van die Kaapse Provinsiale Afdeling aan die appellant verlof verleen om na hierdie Hof te appelleer.

(Die uitspraak van die Verhoorhof is gerapporteer: *Namex (Pty) Ltd v* F *Commissioner for Inland Revenue*1992 (2) SA 761 (K).)

Al vier verwere is weer voor ons beredeneer. Ek bespreek hulle agtereenvolgens.

G *Die eerste verweer*

Die tersaaklike bepalings van art 311 van die Maatskappywet lui soos volg:

'(1) Wanneer 'n skikking of reëling voorgestel word tussen 'n maatskappy en sy skuldeisers of 'n klas van hulle, . . . kan die Hof op aansoek van die maatskappy of 'n skuldeiser . . . of, in H die geval van 'n maatskappy wat gelikwideer word, van die likwidateur . . . beveel dat 'n vergadering van die skuldeisers of klas van skuldeisers . . . van die maatskappy . . . (na gelang van die geval) byeengeroep word op die wyse wat die Hof gelas.

(2) As tot die skikking of reëling toegestem word deur -

(a) 'n meerderheid in getal wat drie-kwart in waarde van die skuldeisers I of klas van skuldeisers verteenwoordig; of

(b) . . .

(na gelang van die geval) wat óf persoonlik óf deur 'n gevolmagtigde op die vergadering aanwesig is en stem, bind die skikking of reëling, as die Hof dit goedkeur, al die skuldeisers of die klas van skuldeisers . . . (na gelang van die geval) en ook die maatskappy of, as die maatskappy J gelikwideer word, die likwidateur. . . .'

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VAN HEERDEN AR

A Artikel 311(6)*(a)* skryf voor dat 'n goedkeuringsbevel kragteloos is totdat 'n gesertifiseerde afskrif daarvan op 'n voorgeskrewe wyse by die Registrateur van Maatskappye ingedien en deur hom geregistreer is. Om onnodige herhaling te voorkom, verwys ek egter voortaan nie na hierdie vereiste nie. Wanneer ek dus die woorde goedkeuring en goedkeuringsbevel B gebruik, het ek in die oog 'n goedkeuring wat wel geregistreer is.

Die kern van die eerste verweer is dat die onderhawige skema nie 'n 'reëling' tussen die appellant en sy skuldeisers, of 'n klas van hulle, daargestel het nie, en dat die goedkeuring van die skema dus nie enige van die skuldeisers van die appellant, of altans nie dié wat nie tot die skema toegestem het nie, gebind het nie. Dit word bestry

deur die appellant wat C bowendien aanvoer dat totdat die goedkeuring tersyde gestel is, die respondent nie op die onreëlmatigheid, indien dit wel een was, kan steun nie.

Dit is op hierdie stadium dienstig om te verwys na sogenaamde standaardskemas wat gereeld in Provinsiale en Plaaslike Afdelings D ingevolge art 311(2) goedgekeur is - altans tot betreklik onlangs. So 'n skema, wat betrekking het op 'n maatskappy onder voorlopige likwidasie, behels in essensie die volgende:

> *(a)* Die aanbieder van die skema ('die inisieerder') bied aan om 'n bepaalde of bepaalbare bedrag beskikbaar te stel. Daardie bedrag E is hoofsaaklik bestem vir verspreiding onder skuldeisers van die maatskappy. In die reël staan versekerde en preferente skuldeisers ten volle betaal te word - altans tot die omvang van hul sekuriteit of voorkeur - terwyl voorsiening gemaak word vir betaling van 'n dividend aan konkurrente skuldeisers.
>
> *(b)* Slegs skuldeisers wat hul vorderings op een of ander voorgeskrewe F wyse bewys, meestal op 'n vergadering van skuldeisers of teenoor 'n ontvanger benoem in die skema, verkry sodanige betaling en wel vanaf die ontvanger.
>
> *(c)* By die plaasvind van 'n bepaalde gebeurtenis, gewoonlik goedkeuring van die skema, word dit geag dat skuldeisers 'n sessie G van hul vorderingsregte teen die maatskappy aan die inisieerder (of sy genomineerde) gee.
>
> *(d)* Wat op fiktiewe wyse gesedeer word, is egter nie die volle vordering nie. Die omvang daarvan word naamlik verminder met 'n gedeelte daarvan - meestal met een persent.
>
> *(e)* By goedkeuring van die skema word die maatskappy uit voorlopige H likwidasie onthef.

Onderworpe aan enkele afwykings wat nie vir huidige doeleindes van belang is nie, het die onderhawige skema al die wesenskenmerke van 'n standaardskema bevat. Ek hoef slegs na para 5 daarvan te verwys. Daarin is onder andere gestipuleer dat

> I 'met sanksie van die aanbod en registrasie daarvan:
>
> 5.3 sal die eise (van skuldeisers van die maatskappy)
>
> 5.3.1 verminder word met 'n bedrag van R10 000; en
>
> 5.3.2 onderworpe aan die vermindering in 5.3.1 geag word aan die aanbieder sedeer te wees en sal dit in die aanbieder setel en die regte van alle skuldeisers sal daarna beperk wees tot die reg om J betaling kragtens daardie aanbod te eis . . .'.

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A Sover my bekend, is die juridiese aanvaarbaarheid van 'n standaardskema vir die eerste keer in *Ex parte Kaplan and Others NNO: In re Robin Consolidated Industries Ltd.*[1] *('Robin')* betwyfel. Die resultaat was dat 'n Volle Hof van die Witwatersrandse Plaaslike Afdeling beslis het dat 'n standaardskema nie binne die raamwerk van art 311 (1) tuisgebring kan word nie. Die *ratio decidendi* was dat so 'n skema 'n reëling tussen die B inisieerder en die skuldeisers van die maatskappy is, en nie een tussen die maatskappy en sy skuldeisers nie. Hierdie beslissing is kort daarna deur 'n Volle Hof van die Kaapse Provinsiale Afdeling gevolg.[2] Daarna het 'n Volle Hof van die Durban en Kus Plaaslike Afdeling egter afgewyk.[3]

C Indien *Strydom* verkeerd beslis is, sal dit nodig wees om 'n aantal verdere argumente van die appellant aangaande die al of nie geldigheid van die respondent se eerste verweer te oorweeg. Indien dit egter reg beslis is, verval daardie verweer. Dit is gevolglik aangewese om terstond die teenstrydige judisiële opvattings in oënskou te neem.

D Ter aanvang is enkele algemene opmerkings aangewese. Eerstens word algemeen aanvaar dat die woord 'reëling' waar dit in die frase 'skikking of reëling' in art 311(1) voorkom, 'n wye betekenis het. Presies hoe wyd, is nie tans ter sake nie. Die sentrale vraag wat in bogenoemde drie sake ter sprake was, was naamlik nie of 'n standaardskema wel 'n 'reëling' is E nie, maar of dit die maatskappy betrek. Indien die Howe in *Robin* en *Multi-Bou* van oordeel was dat 'n standaardskema wel aan hierdie vereiste voldoen, ly dit geen twyfel nie dat dit na hul mening binne die raamwerk van art 311(1) sou val. Met so 'n konklusie sou ook geen fout gevind kon word nie.

Tweedens is dit eintlik vanselfsprekend dat 'n 'reëling' nie sinoniem met F 'n 'skikking' is nie, want anders sou die Wetgewer twee woorde met dieselfde betekenis gebruik het. In hierdie verband dien daarop gewys te word dat in *Multi-Bou*[4] met blykbare goedkeuring verwys is na 'n opvatting dat vir die doeleindes van art 311(1) 'n 'reëling' 'n skikkingselement ('an element of compromise') moet bevat. Dit kan nie juis wees nie omdat 'n skikking 'n geskil voorveronderstel, en 'n reëling G klaarblyklik nie die oplossing van 'n geskil ten doel hoef te hê nie. Dit kom egter voor dat Berman R die woord 'compromise' in 'n oneigenlike sin gebruik het, want hy het ook 'n 'adjustment of rights' tussen die maatskappy en sy skuldeisers tipeer as 'the distinctive feature of a compromise'. En so 'n aanpassing sou kon geskied by wyse van 'n skema waarvolgens die skuldeisers van 'n maatskappy, of sommige van hulle, ter H delging of verlies van hul *onbestrede* vorderings bedrae minder as die omvang daarvan staan te ontvang.

Ek gaan nou oor tot oorweging van die vraag of 'n standaardskema wel I

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A 'n reëling tussen die maatskappy en sy skuldeisers behels. Soos reeds geblyk het, bepaal so 'n skema oa dat by goedkeuring daarvan (of soms later) die vorderings van skuldeisers verminder sal word, en dat dit dan geag sal word dat hulle sessies van die verminderde vorderings aan die inisieerder gegee het. (Gerieflikheidshalwe verwys ek voortaan na so 'n 'sessie' as 'n veronderstelde sessie.) Wat eersgenoemde bepaling betref, B het Berman R in *Multi-Bou*[5] die volgende gesê:

> 'Nor does the agreement of the creditors to reduce their claims against the company by 1 cent in the rand in any way involve the company in the transaction between the creditors and the third party, for an instruction to the company to reflect reductions in creditors' claims in its books of C account does not constitute an arrangement between the company and its creditors.'

In soverre hierdie passasie te kenne gee dat, afgesien van statutêre meganismes, 'n vermindering van 'n skuldeiser se vordering teen 'n maatskappy sonder laasgenoemde se medewerking bereik kan word, kan ek nie D saamstem nie. 'n Delging, of gedeeltelike delging, van 'n skuld vereis immers die medewerking van die skuldenaar.[6] Dit kom my dan ook voor dat die passasie berus op 'n wanvertolking van uitlatings van Coetzee ARP in *Robin*.[7] Hy het naamlik gesê dat die bepaling betreffende vermindering van vorderings nie deel van die *basiese* inhoud van 'n standaardskema is E nie aangesien implementering daarvan niks meer as 'the requisite entries in the books of the company' vereis nie; dat dit skeibaar is van die bepaling betreffende 'n veronderstelde sessie; dat laasgenoemde bepaling die wesensinhoud van die skema is, en dat dit gerig is op 'n reëling tussen skuldeisers en die inisieerder en nie op een tussen die maatskappy en die skuldeisers nie.

F Om die redes deur hom vermeld, stem ek saam met Coetzee ARP dat 'n blote verminderingsbepaling nie meebring dat 'n standaardskema 'n reëling tussen die maatskappy en sy skuldeisers ten doel het nie. So 'n bepaling betrek egter wel die maatskappy en moet dus in samehang met ander bepalings van die skema oorweeg word.

Ek kom vervolgens by para 5.3.2 van die onderhawige skema en G ooreenstemmende bepalings van die standaardskema. Soos reeds aangedui, is in *Robin* bevind dat 'n bepaling aangaande 'n veronderstelde sessie nie 'n reëling tussen 'n maatskappy en sy skuldeisers daarstel nie. In *Multi-Bou*[8] was die Kaapse Hof blykbaar dieselfde mening toegedaan. Maar in *Strydom* is 'n strydige gevolgtrekking bereik.

H Klousule 22 van die standaardskema wat in *Robin* ter sprake was, het bepaal dat 'n veronderstelde sessie op 'n toekomstige datum sou plaasvind. Met verwysing na hierdie klousule het Coetzee ARP die volgende gesê:[9]

> 'I turn now to the present scheme. It purports to be an "arrangement between the company and its creditors", but when it is stripped of the large number of I

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> A ancillary provisions required to put it into operation, it is no more than an acquisition by Sassari (die inisieerder) of creditors' claims in these five companies. As such it is an arrangement between it and the creditors, no more, and not one between the company and the creditors. This is evident from my description of the scheme - particularly para 22. It does not postulate even a tripartite agreement between Sassari, the creditors and the company. It is simply one between Sassari and the creditors B whereby they cede their claims to Sassari against payment of the stipulated consideration.
>
> 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 C subject-matter of the debt which is being ceded.'

Die redes waarom die Hof in *Strydom* van hierdie benadering verskil het, kan soos volg saamgevat word. Dit is waar dat 'n sessie nie medewerking of selfs kennis van die skuldenaar verg nie. 'n Sessie spruit naamlik voortuit 'n ooreenkoms tussen slegs die sedent en sessionaris. 'n D Veronderstelde sessie is egter nie 'n konsensuele sessie nie. Dit word bloot geag laasgenoemde te wees. 'n Veronderstellingsbepaling in 'n standaardooreenkoms bring gevolglik mee dat die maatskappy gebonde is aan 'n oordrag van vorderingsregte sonder die nodigheid van 'n konsensuele sessie. Dus:[10]

> E 'The arrangement . . . whereby the company will recognise the offeror as its new creditor in place of its old seems to us to be not only notionally and linguistically, but also in its basic content, an arrangement between it and its creditors.'

Dit kom my voor dat hierdie benadering berus op 'n verwarring tussen die F gevolge wat die inisieerder teweeg wil bring en die statutêre meganiek wat bestem is om effektiewe gevolg daaraan te gee. Aanvanklik maak die inisieerder 'n aanbod dat op sekere voorwaardes skuldeisers hul vorderingsregte aan hom moet sedeer. Aanvaar alle skuldeisers (of al dié waarop dit van toepassing is) die aanbod, kom 'n kontrak tot stand ongeag of al of nie van die bepalings van art 311(1) gebruik gemaak is. Al sou die aanbod 'n veronderstellingsbepaling bevat, word dan nietemin 'n G konsensuele sessie teweeg gebring. Artikel 311 is egter op die Wetboek geplaas omdat voorsien is dat dit heel dikwels onmoontlik sou wees om aanvaarding deur alle skuldeisers te verkry. Daarom is bepaal dat indien die reëlingsaanbod op die voorgeskrewe wyse aanvaar en goedgekeur word, dit alle skuldeisers bind. Dié wat nie toegestem het nie word dan by H goedkeuring as't ware statutêre partye tot die voorgestelde ooreenkoms. 'n Veronderstellingsbepaling word nou juis in 'n standaardskema ingevoeg omdat besef word dat 'n aantal skuldeisers nie die aanbod mag aanvaar nie, en dat betreffende hulle van 'n fiksie gebruik gemaak moet word om oordrag van hul vorderingsregte te bewerkstellig. Die rede waarom 'n oordrag in I sodanige gevalle uiteindelik plaasvind, is egter uitsluitlik die bindende bepaling van art 311(2). En daarvoor is toestemming of medewerking van die maatskappy nie 'n vereiste nie. Of 'n reëling nou ook bepaal dat skuldeisers hul vorderingsregte aan die inisieerder moet sedeer, en of dit J

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VAN HEERDEN AR

A 'n veronderstellingsbepaling bevat, is gevolglik, gesien uit die oogpunt van die maatskappy, irrelevant. In beide gevalle bring goedkeuring 'n oordrag mee sonder betrokkenheid van die maatskappy.

Ek stem dus saam met Coetzee ARP dat 'n veronderstellingsbepaling nie op 'n reëling tussen 'n maatskappy en sy skuldeisers gerig is nie. Dit bring B egter nie mee dat 'n standaardskema nie binne die raamwerk van art 311(1) tuisgebring kan word nie.

Sodra 'n maatskappy onder voorlopige likwidasie geplaas word, het alle skuldeisers daarvan 'n belang by die lotgevalle van die likwidasieproses. Enige van hulle sou bekragtiging van die voorlopige bevel kon bestry, of onder gepaste omstandighede as mede-aansoeker tot die verrigtinge kon C toetree. Een van die hoofoogmerke van 'n standaardskema is ongetwyfeld die oordrag van skuldeisers se vorderingsregte aan die inisieerder. So 'n oordrag bereik egter niks indien 'n finale likwidasiebevel nogtans verleen word nie. Die ander hoofoogmerk is gevolglik die ontheffing van die maatskappy uit voorlopige likwidasie. By bereiking van daardie oogmerk het D én die maatskappy én sy skuldeisers 'n belang. Op dié van die skuldeisers het ek hierbo gewys. Uit die maatskappy se oogpunt lê die voordeel van 'n ontheffing daarin dat dit weer, deur sy direksie, vry doende kan wees. Al die nadele van die voorlopige bevel verval. Wat meer is, die maatskappy het nou net 'n enkele vriendskaplikgesinde skuldeiser en die ou E skuldeisers kan nie op grond van hul voorheen bestaande vorderings opnuut om likwidasie aansoek doen nie.[11] 'n Voorgestelde 'herrysing' van 'n maatskappy is dus wel deeglik op 'n reëling tussen 'n maatskappy en sy skuldeisers gerig.

Dit is natuurlik waar dat, soos reeds meermale genoem, 'n standaardskema ook 'n reëling tussen die inisieerder en die maatskappy se skuldeisers F behels, maar in *Multi-Bou*[12] is tereg bevind dat art 311(1) nie verg dat 'n skema *slegs* 'n reëling tussen 'n maatskappy en sy skuldeisers moet beliggaam nie. Trouens, juis vanweë die insolvensie van die maatskappy sal dit heel selde gebeur dat 'n reëling net tussen hom en sy skuldeisers aangegaan word.

G Vanweë die oënskynlike passiewe rol wat 'n maatskappy in likwidasie vir die doeleindes van art 311 speel, is 'n mens geneig om die regsgevolge wat bekragtiging van 'n reëling vir die maatskappy meebring, uit die oog te verloor. 'n Standaardaanbod word egter ook aan die likwidateur gerig. Veral wanneer 'n maatskappy uit eie beweging 'n voorlopige likwidasiebevel H verkry het, is die aanbod dus ook gerig op verkryging van die likwidateur se toestemming tot 'n ontheffing uit likwidasie. In die praktyk word 'n aansoek ingevolge art 311(1) dan ook deur die likwidateur aanhangig gemaak. Trouens, dit mag wees dat hy die enigste persoon met die nodige *locus standi* is.[13]

Die juistheid van bostaande kan soos volg geïllustreer word. Veronderstel I dat nadat 'n aansoek om voorlopige likwidasie deur 'n maatskappy aanhangig gemaak is, 'n inisieerder 'n aanbod aan die maatskappy en sy

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VAN HEERDEN AR

A skuldeisers maak, en dat dit die kern van 'n standaardskema bevat met die uitsondering dat die aansoek teruggetrek moet word (in teenstelling tot 'n ontheffing uit voorlopige likwidasie). Indien die aanbod aanvaar word, sou nouliks gesê kan word dat die maatskappy nie 'n party tot die ooreenkoms is nie, of dat die ooreenkoms nie 'n reëling tussen die maatskappy en sy skuldeisers behels nie.

B Die passiewe rol waarna ek hierbo verwys het, is natuurlik toe te skryf aan die feit dat na voorlopige likwidasie die beheer oor die maatskappy op die voorlopige likwidateur oorgaan. Maar hoewel die maatskappy op die oog af nie 'n aktiewe party tot 'n goedgekeurde standaardskema mag wees nie, bevat dit om bogenoemde redes nog steeds 'n reëling, en 'n vername een, C tussen die maatskappy en sy skuldeisers. Selfs sonder inagneming van die verminderingsbepaling is ek derhalwe van oordeel dat 'n standaardskema wel onder art 311(1) tuisgebring kan word.

Dit volg dat die eerste verweer misluk. Dit is derhalwe onnodig om te verwys na eiesoortige bepalings van die onderhawige skema waarop die D appellant se advokaat gesteun het, of om te besin oor die vraag of indien 'n goedgekeurde skema nie aan die vereistes van art 311(1) voldoen nie, 'n skuldeiser, en veral een wat kennis van 'n statutêre vergadering gekry het, hom daarop kan beroep sonder om eers die goedkeuringsbevel tersyde te laat stel.

E *Die tweede verweer*

Soos reeds geblyk het, is die kern van hierdie verweer dat die respondent nie ressorteer onder skuldeisers met wie 'n reëling ingevolge art 311(1) aangegaan kan word nie, en wel omdat die respondent nie regtens bevoeg is om afstand te doen van 'n belastingsvordering of om dit te sedeer nie. Die F beredenering van die Verhoorhof waarvolgens die verweer gehandhaaf is, kan soos volg saamgevat word:

(a) Artikel 311 magtig nie die goedkeuring van 'n reëling wat 'n skuldeiser bind tot iets wat hy nie uit vrye wil kan bereik nie.[14]

(b) 'n Openbare amptenaar soos die respondent, wie se plig dit is om G belasting in te vorder, is nie bevoeg om geheel of gedeeltelik afstand van betaling van 'n belastingskuld te doen nie.[15]

(c) Die respondent is ook nie bevoeg om 'n belastingvordering te sedeer nie. Retories is gevra of so 'n sessie sou meebring dat die sessionaris insae in die respondent se dossiere sou kon verkry, en welke bevoegdhede H hy in verband met onaangeslane belastingpligtigheid - en bepaaldelik die verpligting wat in *casu* uit 'n toekomstige bepaling van die Staatsmyningenieur kon voortspruit - sou kon uitoefen.[16]

(d) Dit was derhalwe nie die oogmerk nie van die inisieerder (Trans Hex

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VAN HEERDEN AR

A Groep Bpk), of van die Hof wat die onderhawige skema goedgekeur het, om die respondent in te sluit by die skuldeisers waarop dit betrekking gehad het.[17]

Die vierde oorweging is klaarblyklik 'n konklusie gebaseer op die eerste drie oorwegings. Dit verval gevolglik indien laasgenoemdes nie houdbaar is B nie. Wat dus nou pertinent ter sprake is, is of die bepalings van art 311(2) waarvolgens 'n goedgekeurde skema skuldeisers van die maatskappy bind, ook die Staat, en meer bepaald die respondent, kan insluit.

Dit is duidelik, meen ek, dat volgens die Verhoorhof art 311(2) nie van C toepassing is op enige vordering ten opsigte van belasting nie, al sou die bedrag daarvan reeds aangeslaan of andersins bekend wees. Om onnodige komplikasies te vermy, beperk ek my dan ook onder die onderhawige hoof tot vorderings vir aangeslane of altans bekende belastingpligtigheid.

Behoudens bepalings van die Inkomstebelastingwet 58 van 1962 wat tans nie D ter sake is nie, en moontlik ook dié van die Skatkiswet 66 van 1975 waarop ek later terugkom, kan in die lig van die gesag aangehaal deur die Verhoorhof toegegee word dat 'n belastinggaarder in die reël nie bevoeg is om belasting kwyt te skeld, dit deur 'n skikking te verminder, of sy vorderingsreg daarop te sedeer nie. Maar, tensy die gemene reg of wetgewing dit magtig, is geen amptenaar bevoeg om sulke resultate ten opsigte van enige Staatsvordering te bereik nie. Indien die Verhoorhof dit E reg het, kan art 311 in die reël dus ook nie op die Staat as kontraktuele of deliktuele skuldeiser van toepassing wees nie.

In *City of Cape Town v Claremont Union College*[18] het Beyers AR klaarblyklik aanvaar dat in die geval van 'n netelige geskil 'n belastinggaarder wel 'n bindende skikking vir 'n bedrag minder as dié van F sy eis kan aangaan. Die Villiers AR het ook hierdie uitsondering erken. Met 'n beroep op *Voet* 2.15.2 het hy die volgende gesê:[19]

> 'I take it to be an elementary general proposition of law that when any dispute or question of liability arises between two persons, they are competent to settle the matter between themselves by agreement, without being compelled to have recourse to a court of law, and I see no cogent G 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.'[20]

Die logiese grondslag van hierdie uitsondering lê voor die hand. Die reël is dat die Staat - en bepaaldelik 'n belastinggaarder - nie deur 'n H afstanddoening benadeel moet word nie. 'n Skikking, altans een van 'n netelige kwessie, hou egter ook voordele vir die Staat (of 'n owerheidsliggaam) in. Dit loop dan nie die risiko om na 'n moontlik uitgerekte proses en die aangaan van substansiële koste uit te vind dat die gewaande bedrag nooit verskuldig was nie. Die bepalings van die Skatkiswet daargelaat, is daar dus niks wat die respondent verhinder om bv nadat appèl teen 'n afwysing I

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A van 'n beswaar aangeteken is, 'n skikking betreffende 'n netelige geskilpunt te bereik nie. En aangesien bogenoemde reël geld ter voorkoming van benadeling van onder andere die *fiscus*, is daar geen rede waarom

'n belastinggaarder nie ook afstand kan doen van 'n gedeelte van sy belastingvordering indien dit vasstaan dat hy andersins niks meer as die oorblywende gedeelte kan verhaal nie. In so 'n geval is daar immers geen B sprake van benadeling van die Staatskas nie.

Ek kan gevolglik nie insien waarom die respondent nie gemeenregtelik geldiglik kan toestem tot 'n reëling ingevolge art 311 indien hy niks minder daarvolgens staan te ontvang as wat hy deur die likwidateur, in geval van die alternatief van finale likwidasie, uitbetaal sou word nie. Net so min is daar 'n rede waarom in die gepostuleerde omstandighede hy C selfs in die afwesigheid van toestemming nie deur 'n goedkeuring van die reëling gebonde sou wees nie. Hy word dan immers nie gebonde gehou aan iets wat hy nie kontraktueel kon vermag het nie.

Dit is egter nodig om te verwys na die beslissing in *Mercian Investments (Pty) Ltd v Johannesburg City Council*[21] waarop beide die Verhoorhof en D die advokaat vir die respondent gesteun het. In daardie saak het 'n munisipaliteit, as skuldeiser van 'n maatskappy ('Mercian'), 'n eis vir plaaslike belasting bewys en gedeeltelike betaling ontvang nadat 'n reëling ingevolge art 311(2) van die Maatskappywet goedgekeur was. Toe Mercian later die betrokke grond wou vervreem, het die munisipaliteit geweier om sogenaamde belastingbewyse uit te reik omdat die belasting nie E ten volle betaal was nie. Schabort R het die munisipaliteit gelyk gegee en gesê[22] dat

> 'the sanctioning by the Court was not intended by the Legislature to serve as a statutory mechanism to clad the respondent (die munisipaliteit) with a capacity to contract in defiance of its relevant right and violation of F its relevant duty'.

Al wat ek oor hierdie uitspraak hoef te sê, is dat die munisipaliteit blykbaar heelwat minder ontvang het as wat dit in 'n likwidasieproses sou ontvang het. Dit was die geval omdat art 50(1) van die Ordonnansie op Plaaslike Bestuur 17 van 1939 (T) in effek bepaal het dat transport van G grond binne 'n munisipale gebied nie bewerkstellig kon word nie tensy plaaslike heffings daarop wat vir 'n omskrewe tydperk aan 'n munisipaliteit verskuldig was, wel betaal was. Schabort R het dan ook gesê:[23]

> 'There is not the slightest suggestion . . . that the respondent's prospects of recovering its relevant imposts from the applicant were at any material time slender or void. There would, indeed, appear to have been ample value in the applicant's assets for satisfying the respondent's H claims.'

Alhoewel Schabort R slegs na die 'applikant' (dws Mercian, wat ingevolge 'n goedgekeurde reëling uit likwidasie onthef is) verwys het, is dit duidelik, meen ek, dat hy ook die maatskappy-in-likwidasie in gedagte gehad het. Hoe dit ook al sy, is die aangeleentheid nie beredeneer nie op I die grondslag dat die munisipaliteit by wyse van konkurrente diwidende net soveel of meer ontvang het as wat dit sou toegeval het indien die reëling

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A nie goedgekeur was nie en finale likwidasie gevolg het. Die beslissing in *Mercian* staan dus nie in die weg van erkenning van bogenoemde uitsondering nie.

Die Skatkiswet bestendig nou juis dié gemeenregtelike posisie. Artikel 31(1)(i) verleen naamlik aan die Tesourie die bevoegdheid om goedkeuring B te verleen vir die skikking van 'n eis van die Staat of vir die afstanddoening van so 'n eis. Dit is egter duidelik dat hierdie bevoegdheid deur art 31(2) gekwalifiseer word. Daarvolgens, vir sover tans ter sake, kan die Tesourie na goeddunke goedkeur dat 'n bedrag wat aan die Staat verskuldig is in die geheel of ten dele afgeskryf kan word indien dit oortuig is dat die bedrag oninbaar is of dat dit tot voordeel van die C Staat sal strek om 'n skikking van die betrokke vordering aan te gaan of daarvan afstand te doen. Of die respondent ten opsigte van 'n belastingvordering hierdie bevoegdhede kan uitoefen slegs indien hy spesifiek kragtens art 32 daartoe gemagtig is, is nie ter sake nie. Feit is dat arts 31 en 32 'n meganiek skep waarvolgens 'n Staatstruktuur - of amptenaar - geheel of gedeeltelik van 'n belastingvordering afstand kan D doen. Indien 'n reëling ingevolge art 311(1) van die Maatskappywet dus 'n aanbod ten opsigte van so 'n vordering behels, *kan* dit aanvaar word mits die vereistes van art 31 van die Skatkiswet bevredig word. En indien dit nie aanvaar word nie en die reëling goedgekeur sou word, sou dan nie gesê kan word dat die goedkeuringsbevel die Staat bind tot iets wat dit nie kontraktueel kon bereik het nie.

E Daar is natuurlik verskillende soorte belastinggaarders en die belastingpligtigheid van 'n maatskappy ten opsigte waarvan 'n reëling voorgestel word kan dus van uiteenlopende aard wees. Spesifiek wat inkomstebelasting betref, sal dit uiteraard nie dikwels gebeur nie dat die respondent volgens 'n reëlingsaanbod minder as die volle omvang van sy F bekende belastingvordering sal staan te ontvang. So 'n vordering is immers vanweë die bepalings van art 342 van die Maatskappywet, saamgelees met art 101*(a)* van die Insolvensiewet, 'n preferente een. 'n Reëlingsaanbod sal dus normaalweg voorsiening maak vir volle betaling daarvan. Dit is egter moontlik dat die vrye oorskot nie voldoende mag wees om die vordering in sy geheel te delg nie, en dat die inisieerder van die skema mag aanbied om G aan die respondent 'n bedrag te betaal gelykstaande aan of meer as dit wat hy in 'n likwidasieproses sou ontvang het. Indien dit sou gebeur, kan ek geen rede vind waarom goedkeuring van die skema nie die respondent sou bind nie. Hy sou dus nie later kon omdraai en die balans van die belastingskuld van die maatskappy kon vorder nie.

H Die respondent het in essensie nie bostaande betwis nie. Inderdaad is toegegee dat indien die respondent 'n eis ingevolge 'n standaardskema sou bewys en dan 'n bedrag sou ontvang nie minder as dit wat hy in 'n finale likwidasie sou ontvang het nie, hy nie later sou kon aanvoer dat die 'herrese' maatskappy nog steeds die balans van sy eis aan hom verskuldig I is nie. Wel is aangevoer dat indien die respondent as gevolg van onagsaamheid of andersins nie 'n eis bewys het nie, hy nog steeds die volle bedrag van sy belastingsvordering van die maatskappy kan verhaal, en dit ondanks die bepalings van die skema waarvolgens hy as't ware van sy vordering ontdaan word. Ek kan nie akkoord gaan nie. Dit is natuurlik waar dat onagsaamheid normaalweg nie die *fiscus* kan benadeel nie. Indien die J wesensinhoud van 'n skema egter die Staat bevoordeel vind ek geen

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A rede waarom die Staat nie daartoe sou kon instem nie bloot omdat 'n versuim om aan 'n prossessuele voorskrif te voldoen tot verlies van 'n Staatsvordering sou kon lei nie. Die uitgangspunt is immers dat die Staat dit wel sal nakom.

Die onhoudbaarheid van bostaande betoog word bes geïllustreer wanneer op B die regskonsekwensies van aanvaarding daarvan gelet word. Dit gaan tans oor die vraag of die 'skuldeisers' wat kragtens art 311(2) deur 'n goedkeuringsbevel gebind word ook die respondent kan insluit. Volgens bedoelde betoog sal dit wel die geval wees indien hy onder die omstandighede hierbo geskets 'n eis sou bewys, maar nie indien hy sou versuim om sulks te doen nie. Die vertolking van die woord is dus afhanklik van die

respondent se optrede, of gebrek daaraan. In wese kan C die respondent dus self besluit welke uitleg aan die woord gegee moet word. Blote formulering van hierdie konsekwensie lei onmiddellik tot verwerping daarvan.

Alhoewel reeds meermale so aangedui, moet ek duidelikheidshalwe weer noem D dat die voorgaande opmerkings bestem is om van toepassing te wees op 'n geval waarin die omvang van 'n maatskappy se belastingpligtigheid vasstaan; met ander woorde, indien daar nie sprake is of kan wees van 'n addisionele belastingskuld wat die onderwerp van 'n toekomstige addisionele aanslag of heffing mag wees nie. Gerieflikheidshalwe kom ek onder die volgende hoof terug op die vraag of goedkeuring van 'n reëling E die Staat ook ten opsigte van sodanige addisionele skuld kan bind.

Ek moet nou aandag gee aan die probleme geopper deur die Verhoorhof in verband met 'n sessie, of veronderstelde sessie, van 'n belastingvordering. Daar is analogiese gesag vir die stelling, wat ek veronderstel juis te wees, dat 'n amptenaar soos respondent in die reël nie so 'n vordering kan sedeer nie.[24] Wanneer 'n bepaling dat 'n sessie F moet geskied egter 'n integrale deel vorm van 'n reëling waartoe die belastinggaarder mag toestem, is die posisie myns insiens anders; altans wanneer die skuldenaar nie deur die sessie geraak kan word nie. In geval van goedkeuring van 'n reëling wat ook op 'n belastingvordering betrekking het, is die posisie nou juis dat dit aan die maatskappy geen verskil kan maak of dit die betrokke bedrag aan die belastinggaarder of aan die G inisieerder verskuldig is nie. En soos reeds bevind, is so 'n reëling een tussen die maatskappy en sy skuldeisers, insluitende die belastinggaarder. In wese stem die maatskappy deur die likwidateur, dus toe tot die sessie, of veronderstelde sessie.

Die praktiese probleme waarop die Verhoorhof gewys het, is van H denkbeeldige eerder as substansiële aard. Al wat oorgaan op die inisieerder is die reg om die betrokke (verminderde) bedrag van die maatskappy te verhaal. Hy kan klaarblyklik nie *qua* nuwe skuldeiser aanspraak maak op bevoegdhede wat statutêr slegs die respondent toekom, en dus nie saam met die blote vorderingsreg oorgedra kan word nie. Hy is gevolglik nie geregtig op insae in die respondent se tersaaklike dossiere I wat statutêr aan geheimhouding onderworpe is nie. Dat dit in sekere gevalle vir hom moeilik mag wees om die vordering te bewys, raak die effektiwiteit van die

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A sessie en die geldigheid daarvan nie (vgl die analogiese posisie wanneer 'n geneesheer of bank sy vorderingsreg teenoor sy pasiënt of klant sedeer).[25] Begriplik sou 'n maatskappy voor goedkeuring van 'n reëling appèl kon aangeteken het teen 'n aanslag, maar daaruit volg nie dat die maatskappy daarna die appèl sou kon voortsit nie. Hoewel art 311(2) nie in B soveel woorde so bepaal nie, is dit naamlik duidelik dat 'n goedgekeurde reëling die maatskappy ook na ontheffing uit likwidasie bind. Indien die respondent dus ingevolge die bepalings van 'n reëling 'n eis bewys het, sou die maatskappy daardeur gebonde wees. Eweseer sou dit gebonde wees aan 'n sessie of veronderstelde sessie van so 'n eis. Dit is bowendien ondenkbaar dat 'n maatskappy sou volhard met 'n appèl nadat die C vriendskaplikgesinde inisieerder in wie die belastingvordering dan setel, beheer daaroor verkry het.

Maar al sou 'n belastingvordering onder geen omstandighede vir sessie vatbaar wees nie, bring dit op sigself nie mee dat 'n belastinggaarder nie aan die ander bepalings van 'n standaardskema gebonde is nie. Een van die D wesentlike bepalings van so 'n skema is immers juis dat na goedkeuring 'n skuldeiser sy voormalige vordering slegs teenoor die ontvanger kan afdwing. Of sy vordering op iemand anders oorgaan, is gevolglik vir die skuldeiser van geen belang nie. Indien die vordering nie vir oordrag vatbaar is nie, is die enigste konsekwensie dus dat dit tot niet gaan.

E Uit die voorgaande volg dat in soverre die tweede verweer berus op die premisse dat 'n belastinggaarder soos die respondent onder geen omstandighede aan 'n

goedgekeurde reëling gebonde kan wees nie, of altans nie indien hy nie 'n eis bewys nie, dit nie kan slaag nie.

Die derde verweer F Soos sal blyk, is die tweede en derde verwere tot 'n sekere mate oorvleuelend. Die kern van die derde verweer is egter dat die respondent ten opsigte van die bedrag van meer as R700 000 wat later aangeslaan is, ten tye van goedkeuring van die onderhawige skema 'n besonderse soort skuldeiser, nl 'n 'gebeurlike' een, van die appellant was, en dat waar art G 311(2) van die Maatskappywet bepaal dat 'n goedgekeurde reëling skuldeisers van 'n maatskappy bind, dit nie sodanige skuldeiser insluit nie.

Bepalings van Australiese maatskappywetgewing stem in breë trekke ooreen met dié van art 311 van ons wet. Die appellant het hom dan ook beroep op H 'n aantal Australiese gewysdes waarin die draagwydte van die woord 'creditors' - wat deur 'n goedkeuringsbevel gebind word - ter sake was. Daarvolgens is die heersende mening dat die woord voorwaardelike skuldeisers, asook dié met ongelikwideerde vorderings, insluit.[26] So 'n wye vertolking van 'skuldeisers' in art 311(2) van ons Wet kan, indien nie gekwalifiseer nie, tot probleme lei. Eerstens vereis die subartikel dat 'n reëling aanvaar moet word deur "n meerderheid in getal wat drie-kwart in I waarde van die skuldeisers . . . verteenwoordig'. Die Wetgewer het egter

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A nie bepaal of, en indien wel, hoe 'n waarde op die vordering van 'n voorwaardelike skuldeiser geplaas moet word nie. Tweedens word geen voorsiening gemaak nie vir 'n waardasie van sodanige vordering deur 'n ontvanger of enige ander persoon nadat 'n reëling goedgekeur is. Hoe moet dus die diwidende wat 'n konkurrente, voorwaardelike skuldeiser toekom, B bereken word? (Vergelyk art 48 van die Insolvensiewet 24 van 1936.)

Toegegee dat die woord 'skuldeisers' wyd genoeg is om ook 'n voorwaardelike een in te sluit, mag die enigste sinvolle oplossing wees om elke sodanige skuldeiser as 'n 'klas' van sy eie te behandel (tensy, C natuurlik, dieselfde voorwaarde op meerdere skuldeisers se vorderings betrekking het).[27] Dit sou meebring dat die bepalings van art 311(2) wel op voorwaardelike skuldeisers van toepassing is, maar dat elke sodanige skuldeiser die reëling, in soverre dit op hom van toepassing is, op 'n aparte 'vergadering' sou moes aanvaar. Die probleem wat ek ten opsigte van die stemkrag van so 'n skuldeiser geopper het, sou dan vanselfsprekend D wegval. Klaarblyklik sou die voorgestelde reëling dan 'n aanbod ook aan voorwaardelike skuldeisers moes bevat (indien beoog word om hulle te bind), en sou die aanbod moes bepaal welke waarde op hul vorderings geplaas staan te word vir doeleindes van betaling kragtens die skema. In die lig van wat volg, is dit egter nie nodig om 'n oorwoë mening oor die E aspek onder bespreking te huldig nie.

Was die respondent wel 'n voorwaardelike skuldeiser? Met 'n beroep op 'n aantal beslissings het die appellant se advokaat betoog dat inkomstebelastingpligtigheid laasstens aan die einde van 'n belastingjaar ontstaan, dws nog voordat 'n aanslag uitgereik is.[28] Dié betoog is gegrond. Uit bedoelde beslissings blyk dit dat hoewel die uitreiking van 'n aanslag 'n vereiste vir die afdwingbaarheid van 'n belastingskuld mag F wees, die skuld as sulks reeds voor daardie gebeurlikheid bestaan. Dit is dus nie onderhewig aan 'n voorwaarde die vervulling waarvan kan meebring dat verskuldigheid nie sal ontstaan nie of sal verval. Ten opsigte van onaangeslane inkomstebelastingpligtigheid is die respondent gevolglik nie 'n voorwaardelike skuldeiser wat in 'n klas anders as die algemene klas G van preferente skuldeisers van 'n belastingbetaler val nie.

Nietemin geld besondere oorwegings vir die respondent as skuldeiser van 'n onbekende belastingskuld (en dit is die enigste soort skuld waaroor ek dit voortaan het). Ek meen naamlik dat goedkeuring van 'n reëling nie die respondent kan bind nie, selfs nie indien 'n reëling met hom as aparte H 'klas' van skuldeiser voorgestel was nie.

Ek het reeds daarop gewys dat 'n voorgestelde reëling in wese 'n aanbod is wat aan oa 'n maatskappy se skuldeisers gemaak word. Dit is gerig op hul aanvaarding daarvan. Wat betref dié wat wel aanvaar, kom daar natuurlik 'n ooreenkoms tot stand, onderhewig egter aan die Hof se goedkeuring van die reëling. Word I goedkeuring verleen, bind die ooreenkoms ook ander skuldeisers van die

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A maatskappy; nie omdat hulle dan ook kontrakspartye is nie, maar eenvoudig omdat art 311(2) so bepaal.[29] Dit volg egter nie dat die sinsnede 'al die skuldeisers of die klas van skuldeisers' in die subartikel streng letterlik vertolk moet word nie. Eerstens is dit duidelik, meen ek, dat die sinsnede slegs betrekking kan hê op daardie skuldeisers aan wie die B aanbod gerig was.[30] En so 'n aanbod hoef natuurlik nie alle skuldeisers van 'n maatskappy te betrek nie. So byvoorbeeld kan dit slegs vir bepaalde konkurrente skuldeisers bestem wees. Tweedens kon die Wetgewer nooit beoog het dat 'n goedkeuringsbevel bindend is op skuldeisers wat nie regtens by magte is om die aanbod te aanvaar nie. Dit is die geval omdat, hoewel die C statutêre meganisme meebring dat indien die vereiste meerderheid instem ander skuldeisers na goedkeuring ook gebonde is, die aanbod juis bestem was om aanvaar te word.

Die appellant het egter aangevoer dat 'n goedkeuringsbevel ingevolge art 311(2) 'n statutêre skuldvernuwing teweeg bring. In dié verband het hy gesteun op 'n beslissing van hierdie Hof wat op 'n akkoord aangegaan D ingevolge art 119(7) van die Insolvensiewet betrekking gehad het.[31] Om te sê dat 'n goedkeuringsbevel so 'n skuldvernuwing tot gevolg het, help egter geensins nie om te bepaal wie daardeur gebonde is, of welke skuldeisers se vorderings vernu word. Indien so 'n bevel dus nie die respondent ten opsigte van onaangeslane - of altans onbekende - E belastingvorderings bind nie, baat dit ook nie om te argumenteer, soos die appellant wel gedoen het, dat na goedkeuring die respondent vanweë die aangevoerde novasie nie sy pligte sou versaak indien hy nie later ongeinde belasting sou opeis nie.

Die appellant het tereg nie betwis dat 'n belastinggaarder in die reël nie afstand van 'n belastingvordering kan doen nie.[32] Wel is betoog dat die F respondent ingevolge arts 2 en 3 van die Inkomstebelastingwet breë bestuursbevoegdhede betreffende die administrasie en uitvoering van die Wet het, en derhalwe bevoeg is om tot 'n reëling ingevolge art 311(2) van die Maatskappywet toe te stem. Ek kan egter nie in die artikels waarop die appellant steun 'n bevoegdheid om van 'n belastingvordering afstand te G doen naspeur nie, op welke wyse so 'n afstanddoening ook al bereik staan te word. Inteendeel plaas arts 2(1), 77(1) en 91(1)*(a)* van die Inkomstebelastingwet 'n verpligting op die respondent om inkomstebelasting aan te slaan en in te vorder.

Artikel 31(2) van die Skatkiswet, waarna ek reeds verwys het, bevat dan H ook die enigste tersaaklike statutêre bepalings waarvolgens afstand van 'n inkomstebelastingvordering gedoen kan word. Soos reeds aangedui, moet die Tesourie (of sy gedelegeerde ingevolge art 32) dan egter oortuig wees dat, vir sover art 31(2) tans ter sake is, die betrokke bedrag geheel of gedeeltelik oninbaar is, of dat dit tot voordeel van die Staat sal strek om I

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VAN HEERDEN AR

A deur 'n skikking geheel of gedeeltelik daarvan afstand te doen. Spesifiek wat 'n reëling ingevolge art 311 van die Maatskappywet betref, sal so 'n oortuiging kon bestaan ten opsigte van 'n bekende belastingsvordering. So, byvoorbeeld, indien 'n spesifieke aanslag ter sprake is, kan geredelik vasgestel word of die respondent daarvolgens meer, of net soveel maar vroeër, sal ontvang as wat die geval sou wees indien die maatskappy finaal B gelikwideer sou word. In beide gevalle sou goedkeuring van die reëling die Staat bevoordeel. Indien dit egter onbekend is of die maatskappy 'n verdere belastingpligtigheid het, sal heel selde besluit kan word of 'n afstanddoening

van 'n moontlik bestaande, maar onbekende, belastingvordering die Staat sal bevoordeel, of dat die onbekende bedrag waarop so 'n afstanddoening betrekking mag hê, oninbaar is. Dit baat dus c nie om aan te voer, soos die appellant wel gedoen het, dat die respondent ingevolge die bepalings van die Skatkiswet die aangewese persoon is om namens of as die Tesourie ten opsigte van inkomstebelastingvorderings op te tree nie.

Bostaande kan bes aan die hand van 'n voorbeeld geïllustreer word. D Inkomstebelasting hoef natuurlik nie slegs eenmalig gehef te word nie. Daar kan trouens 'n onbepaalde aantal aanslae vir enige belastingjaar wees. Anders as gewone skuldeisers sou die respondent dus vonnis vir addisionele belasting kon verkry selfs indien hy reeds vir die betrokke jaar ten opsigte van 'n oorspronklike aanslag vonnis verkry het - gestel dat dit nodig was. Die rede hiervoor is dat wanneer die respondent 'n belastingbetaler aanspreek, hy sy eis slegs op 'n aanslag hoef te berus. E Normaalweg kan aanspreeklikheid dan nie in 'n gewone geregshof betwis word nie. Inteendeel is die belastingbetaler aangewese op die bepalings van die Inkomstebelastingwet betreffende besware en appèlle na 'n Spesiale Inkomstebelastinghof.

F In die reël is die respondent natuurlik in eerste instansie aangewese op inligting wat 'n belastingpligtige in sy opgaaf openbaar. Informasie kan ook egter uit ander bronne verkry word. Veronderstel nou dat die appellant in sy opgaaf vir die 1982 belastingjaar nie inkomste van, sê, R3 miljoen verklaar het nie, en dat die respondent eers na verlening van die goedkeuringsbevel en implementering van die onderhawige skema daarvan G bewus geword het. Behoudens besondere omstandighede is dit na my mening ondenkbaar dat die respondent - of wie ook al namens of as die Tesourie - by voorbaat van so 'n onbekende vordering afstand sou kon doen. Indien die appellant dit reg het, sou die respondent egter vanweë die bepalings en goedkeuring van die onderhawige skema in effek afstand gedoen het van sy H reg om enige verdere belasting vir die 1982 jaar - of trouens enige belastingjaar - te hef. Die angel het naamlik gelê in bepalings waarvolgens 'n eis ingedien moes word laastens binne 'n omskrewe tydperk nadat goedkeuring van die skema tot kennis van 'n skuldeiser gekom het, by gebreke waaraan hy 'geag word afstand te doen van sy reg om deel te neem I kragtens die aanbod'.[33] Wat die inisieerder dus beoog het, is dat by goedkeuring van die onderhawige skema skuldeisers se vorderingsregte teen die maatskappy nie meer in hulle sou setel nie; dat daardie vorderingsregte vervang sou word deur soortgelyke eise teen die J Vergelyk *Ex parte Ensor NO: In re Cape Natal Litho (Pty) Ltd*1978 (3) SA 908 (D).

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A ontvangers, en dat daardie eise sou verval indien hulle nie bewys sou word nie. Indien die appellant dit reg het, sou die onverkwiklike resultaat dus wees dat indien die respondent nie 'n belastingeis waarvan hy onbewus is, sou bewys nie, hy geen verhaal ten opsigte daarvan teen óf die maatskappy óf die ontvanger sou hê nie.

B Die appellant het egter ook aangevoer dat indien hierdie standpunt onjuis is, die respondent aan die goedkeuring van die onderhawige skema gebonde is totdat dit op appèl of andersins tersyde gestel word. Hierop voortbordurende is geargumenteer dat alle skuldeisers van die appellant aan die goedkeuringsbevel gebonde is omdat die Witwatersrandse Plaaslike Afdeling sulks beveel het. *Ergo*, solank die bevel staan is alle C skuldeisers daaraan gebonde.[34]

Hierdie betoog faal om die eenvoudige rede dat die gebondenheid van skuldeisers aan 'n goedgekeurde reëling nie deur die goedkeuringsbevel as sulks meegebring word nie. Al wat die Hof doen, is om sy stempel op die reëling af te druk. Sodoende tree gebondenheid in van skuldeisers wat D daartoe ingestem het. Ander skuldeisers is egter gebonde juis, en slegs, omdat art 311(2) so bepaal. Anders gestel, hul gebondenheid word suiwer statutêr gereguleer. En indien op 'n behoorlike vertolking van die woord 'skuldeisers' dit sekere skuldeisers nie insluit nie, is hulle net nie

gebonde nie. Hulle hoef dus nie die goedkeuring aan te veg nie. Wat hulle E betref, bly die bevel staan maar tref dit hulle nie.[35]

Die laaste vraag, onder die huidige hoof, is of die appellant se belastingpligtigheid ten opsigte van die 1982 belastingjaar 'n bekende of 'n onbekende een was. Wat vasstaan, is dat die appellant se inkomste vir daardie jaar bekend was en aangeslaan kon word. Die appellant was egter F geregtig op 'n aftrekking mits die Staatsmyningenieur 'n waarde op die aangekoopte ontwikkelingsbate - indien enige - sou plaas. Anders gestel, was die appellant nie geregtig op 'n aftrekking nie tensy en totdat so 'n waardebepaling gemaak was. Gevolglik kon die respondent die waarde wat die appellant in sy opgawe op bedoelde bates geplaas het, geïgnoreer het en die appellant sonder inagneming van die betrokke aftrekking belas het. Dit G kon die respondent ook gedoen het toe die onderhawige skema voorgestel is. Daarna kon die respondent 'n eis teen die ontvangers bewys het vir die belasting verskuldig vir die 1982 jaar sonder inagneming van die aftrekking. Die ontvangers sou dan uitbetaling van die respondent se eis agterweë kon gehou het totdat die Staatsmyningenieur die waarde van die ontwikkelingsbates bepaal het, wat sou meegebring het dat die respondent H 'n verdere gewysigde aanslag sou uitreik en nie betaling vir sy volle bewese eis sou verkry het nie.

Dit volg dus dat daar nooit sprake van onbekende belastingpligtigheid was nie. Totdat die Staatsmyningenieur handelend opgetree het, was die appellant verplig om 'n bepaalde bedrag - sonder toelating van die I tersaaklike aftrekking - as belasting te betaal. Dat daardie verskuldigheid

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VAN HEERDEN AR

A in die toekoms kon verminder, doen nie af aan die feit dat op elke tersaaklike stadium die omvang van die appellant se belastingpligtigheid bekend was nie.

Ingevolge die onderhawige skema sou die respondent as preferente skuldeiser ten volle betaal word. Indien hy 'n eis sou bewys het, sou hy nie minder nie, en stellig meer, ontvang het as wat hy in 'n B likwidasieproses sou ontvang het. Gevolglik kan die derde verweer, gedeeltelik saam met die tweede verweer beskou, ook nie slaag nie.

Die vierde verweer

Die onderhawige skema het gegeld vir eise 'die skuldoorsaak' waarvan voor C die datum van registrasie van die goedgekeurde skema ontstaan het. Die vierde verweer berus op die premisse dat die respondent se onderhawige skuldoorsaak vroegstens eers by die Staatsmyningenieur se bepaling van die waarde van die meermaal genoemde ontwikkelingsbates ontstaan het - dws lank na registrasie van die onderhawige skema - en dus nie deur die skema D betrek is nie.

Hierdie verweer het weinig om die lyf. Soos reeds hierbo aangetoon, het die respondent te alle saaklike tye 'n eis gehad vir meer as die belasting wat in die aanvullende aanslag gehef is. Bowendien baat dit nie om te let op die betekenis wat die woord 'skuldoorsaak' in 'n bepaalde verband het nie. In die onderhawige skema is 'eis' naamlik so wyd omskryf dat dit ook E onopeisbare en voorwaardelike vorderings, en spesifiek 'n eis vir onaangeslane belasting, ingesluit het.

Ek tabuleer nou my vernaamste bevindinge soos volg:

(1) 'n Standaardskema waarvolgens 'n maatskappy uit (voorlopige) likwidasie onthef staan te word, en 'n sessie of veronderstelde F sessie van hul vorderings deur skuldeisers van die maatskappy aan die inisieerder van die skema (of sy genomineerde) gegee staan te word, kan wel ingevolge art 311 (2) van die Maatskappywet goedgekeur word.

(2) Indien so 'n skema ook op bekende belastingpligtigheid van toepassing is, kan die belastinggaarder vanweë goedkeuring deur die Hof daaraan G gebonde wees indien hy nie minder staan te ontvang as wat hy in 'n likwidasieproses sou ontvang het nie.

(3) 'n Voorwaardelike skuldeiser val moontlik in 'n klas van sy eie vir die doeleindes van die hou van vergaderings ingevolge art 311.

(4) Selfs ten opsigte van onbekende belastingpligtigheid is die H respondent in die reël nie 'n voorwaardelike skuldeiser nie.

(5) Goedkeuring van 'n skema bind egter nie die respondent ten opsigte van sodanige belastingpligtigheid nie.

(6) Die respondent kan op (5) steun sonder om eers die goedkeuring tersyde te laat stel.

Ten slotte is dit ons onaangename plig om die aandag te vestig op 'n faset I van die verrigtinge in die Verhoorhof. Na beredenering is die verhoor afgesluit in September 1988. Uitspraak is egter eers op 6 Januarie 1992 gegee; dws 'n tydperk van naastenby 40 maande later. Ons weet nie of daar 'n rede vir die uitsonderlike versuim was nie, en kan dus nie sensuur uitspreek nie. Dit is egter nouliks nodig om te sê dat die regsadministrasie, en bepaaldelik die Regbank, ligtelik deur 'n sodanige J vertraging oneer aangedoen kan word.

1994 (2) SA p294

GOLDSTONE AR

A Die appèl slaag met koste, insluitende dié van twee advokate, en die bevel van die Verhoorhof word deur die volgende vervang:

(1) Dit word verklaar dat die verweerder se aanvullende aanslag vir die eiser se 1982 belastingjaar oneffektief is.

(2) Die verweerder word gelas om die eiser se gedingskoste, insluitende die koste van twee advokate, te betaal. B

Van den Heever AR het met die uitspraak van Van Heerden AR saamgestem.

Judgment

Goldstone AR: Ek het die voorreg gehad om my Kollega Van Heerden se C uitspraak te lees. Ek stem saam dat die appèl behoort te slaag en met die voorgestelde bevel wat aan die einde van sy uitspraak verskyn.

Ek is die mening toegedaan dat dit onnodig is om in hierdie appèl te beslis of die sogenaamde standaardskema 'n skikking of reëling tussen 'n maatskappy en sy skuldeisers daarstel.

D In die onderhawige saak was daar wel 'n beding in die skema wat die appellant as 'n nodige en aktiewe party betrek het. Ek verwys na klousule 2.1.5 van die skema wat voorsiening maak vir die tersydestelling van die ooreenkoms aangegaan op 19 November 1984 deur die voorlopige likwidateurs van die appellant met Buffelsbank Diamante Bpk waarkragtens sekere bates E van die appellant en sy filiaal-maatskappye aan Buffelsbank verkoop is. Daardie beding het stellig die toestemming van die appellant vereis.

In die sakewêreld het art 311 skemas veel nut en waarde en met die oog daarop behoort ons Howe nie 'n enge vertolking aan die bepalings van die artikel te gee nie. Maar indien die betrokke maatskappy slegs 'n passiewe F rol speel is die skema nie 'n skikking of reëling *voorgestel tussen 'n maatskappy en sy skuldeisers* nie. Dit is nie nodig dat die maatskappy se aktiewe rol aansienlik moet wees nie: sien *Re Savoy Hotel Ltd* [1981] 3 All ER 646 (Ch). In die onderhawige saak is ek tevrede dat die appellant se toestemming tot die tersydestelling van die Buffelsbank-ooreenkoms voldoende was om die gevolgtrekking te regverdig dat hy 'n party tot die G skema was.

Om daardie rede stem ek saam dat die eerste verweer van die respondent van die hand gewys moet word. Behoudens die voorgaande stem ek met eerbied saam met die uitspraak van Van Heerden AR.

H Smalberger AR en Nicholas Wn AR het met die uitspraak van Goldstone AR saamgestem.

Appellant se Prokureurs: *Jan S de Villiers & Seun*, Kaapstad; *Naudes*, Bloemfontein.
Respondent se Prokureurs: *Staatsprokureurs*, Kaapstad en Bloemfontein.

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1 1987 (3) SA 413 (W)

2 *Ex parte Millman and Others NNO: In re Multi-Bou (Pty) Ltd and Others*1987 (4) SA 405 (K) *('Multi-Bou')*.

3 *Ex parte Strydom NO: In re Central Plumbing Works (Natal) (Pty) Ltd; Ex parte Spendiff NO: In re Candida Footwear Manufacturers (Pty) Ltd; Ex parte Spendiff NO: In re Jerseytex (Pty) Ltd*1988 (1) SA 616 (D)*('Strydom')*.

4 Op 409C.

5 Op 411F.

6 Vgl *Union Free State Mining and Finance Corporation Ltd v Union Free State Gold and Diamond Corporation Ltd*1960 (4) SA 547 (W) op 549.

7 Op 426B-C.

8 Op 411E.

9 Op 420C-E.

10 Op 622A.

11 *Serein Investments (Pty) Ltd v Myb (Pty) Ltd*1967 (4) SA 437 (K) op 439B.

12 Op 411D.

13 *Ex parte Dayananden: In re Windsor Supply Stores (Pty) Ltd (in Liq) 1953 (1) SA 28 (N) op 29F.*

14 Met 'n beroep op *Mercian Investments (Pty) Ltd v Johannesburg City Council*1990 (1) SA 560 (W) op 573, en Pennington *Company Law* 5de uitg op 585 (sien op 771D-G van die Verhoorhof se gerapporteerde uitspraak).

15 Met 'n beroep op onder andere *Commissioner for Inland Revenue v Delfos* 1933 AD 242 op 248; *Collector of Customs v Cape Central Railways Ltd* (1889) 6 SC 402 op 408; en *Commissioner for Inland Revenue v The Master and Another*1957 (3) SA 693 (K) (sien op 772 van die Verhoorhof se uitspraak).

16 Sien op 773 van die Verhoorhof se uitspraak.

17 Sien op 774 van die Verhoorhof se uitspraak.

18 1934 AD 414 op 452.

19 Op 452.

20 Sien ook *Collector of Customs v Cape Central Railways Ltd (supra* op 408) en *Burghersdorp Municipality v Coney* 1936 CPD 305 op 308.

21 1990 (1) SA 560 (W).

22 Op 573B.

23 Op 568G.

24 *South African Board of Executors and Trust Co Ltd (in Liquidation) v Gluckman*1967 (1) SA 534 (A).

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

26 Ek volstaan deur te verwys na *CCH Australian Company Law and Practice* band 2 op 43-500 en gewysdes aldaar gesiteer. Wat ons reg betref, sien *Ex parte Goldreich: In re Goldleiff Stores (Pty) Ltd and Lane-Bryant (Pty) Ltd* 1956 (2) PH E19 (D).

27 Vgl *Re International Harvester Credit Corporation (Aust) Ltd* 7 ACLR (1982-1983) 415.

28 *Reed and Another v Warren*1955 (2) SA 370 (N); *Secretary for Finance v Esselmann*1988 (1) SA 594 (SWA); en vgl *Commissioner for Inland Revenue v Janke* 1930 AD 474.

29 *Morris NO v Airomatic (Pty) Ltd t/a Barlows Airconditioning Co*1990 (4) SA 376 (A) op 396-7.

30 *Kleena Industries (Pty) Ltd v Senator Insurance Co Ltd*1982 (2) SA 458 (W) op 463G.

31 *Ilic v Parginos*1985 (1) SA 795 (A).

32 Sien bv *Commissioner for Inland Revenue v Delfos* 1933 AD 242 en *City of Cape Town v Claremont Union College* 1934 AD 414.

33 Vergelyk *Ex parte Ensor NO: In re Cape Natal Litho (Pty) Ltd*1978 (3) SA 908 (D).

34 Met 'n beroep op *Chief Commissioner of Pay-roll Tax v Group Four Industries Pty Ltd* 8 ACLR (1983-84) 973 en *Elric Pty Ltd v Taylor and Another* (1986) 4 ACLC 327, wat egter nie gesag vir sulke wye proposisies bied nie.

35 Vergelyk *Barclays National Bank Ltd v H J de Vos Boerdery Ondernemings (Edms) Bpk*1980 (4) SA 475 (A) op 483-4.