

**THE APPLICATION FOR LEAVE TO APPLY  
TO COURT FOR REVIEW OF A SCHEME  
OF ARRANGEMENT IN TERMS OF SECTION  
115 OF THE COMPANIES ACT 71 OF 2008**

***Sand Grove Opportunities Master Fund Ltd v  
Distell Group Holdings Ltd [2022] ZAWCHC 46***

## **1 Introduction**

Schemes of arrangement in terms of section 114 of the Companies Act 71 of 2008 (the Companies Act) are a common mechanism for implementing business combinations, takeovers or restructurings of share capital in South Africa (see, for e.g., Luiz “Some Comments on the Scheme of Arrangement as an ‘Affected Transaction’ as Defined in the Companies Act 71 of 2008” 2012 *PER/PELJ* 105; Cameron “A Critical Analysis of the Continued Preference Displayed Towards Schemes of Arrangement in South Africa” 2016 *Journal of Corporate and Commercial Law & Practice* 77–87; Davis, Geach, Mongalo, Butler, Loubser, Coetzee and Burdette *Companies and Other Business Structures in South Africa* 3ed (2013) 233–234; Cassim FHI, Cassim MF, Cassim R, Jooste, Shev and Yeats *The Law of Business Structures* 2ed (2021) 482; see also Boardman “A Critical Analysis of the New South African Takeover Laws as Proposed under the Companies Act 71 of 2008” in Mongalo *Modern Company Law for a Competitive South African Economy* (2010) 314). A scheme of arrangement is basically any arrangement between a company and “holders of any class of its securities”, which includes the company’s shareholders (s 114(1) of the Companies Act). Such arrangement may involve a consolidation of securities of different classes, a division of securities into different classes, an expropriation of securities from the holders, an exchange of the company’s securities for other securities, a reacquisition by the company of its securities, or a combination of the above methods (s 114(1)(a)–(f)). The formulation of a scheme of arrangement in these broad terms dovetails well with the fundamental policy objectives of promoting flexibility for companies to restructure their businesses (see Cassim *et al The Law of Business Structures* 454).

A scheme of arrangement is a “fundamental transaction” under Chapter 5 of the Companies Act and, as such, a company may not implement a scheme of arrangement unless it has been approved by a special resolution adopted by “persons entitled to exercise voting rights” on the matter in terms of section 115(2) of the Companies Act. A scheme of arrangement is also an “affected transaction” if it is between a regulated company and its shareholders (s 117(1)(c)(iii) read with s 118(1)). As such, a company may

not implement a scheme of arrangement unless the Takeover Regulation Panel has issued a compliance certificate in respect of the scheme of arrangement in terms of section 119(4)(b), or has exempted it in terms of section 119(6) of the Companies Act.

In contrast to the Companies Act 61 of 1973, which required court approval for a company to implement a scheme of arrangement (see s 311), the implementation of a scheme of arrangement under the current Companies Act is initiated by the board of directors and is subject to the super-majority rule – that is, shareholder approval by way of a special resolution (s 115(2)(a)). One of the principal protective mechanisms for minority shareholders in a scheme of arrangement, as in the other fundamental transactions, is the appraisal remedy in terms of section 164 of the Companies Act. This remedy acts as an exit mechanism for dissatisfied minority shareholders rather than allowing them to thwart the implementation of a scheme of arrangement. Another protective mechanism for dissenting shareholders is the involvement of the court in schemes of arrangement, which is, however, limited to court approval (s 115(3)(a)) or court review (s 115(3)(b)) of the implementation of a scheme of arrangement in clearly circumscribed circumstances. Insofar as court review is concerned, a company may not proceed to implement the special resolution approving a scheme of arrangement without court approval if the court grants any person who voted against the resolution leave to apply to court for a review of the transaction (s 115(3)(b), (6) and (7)). Such an application must be brought within 10 business days after the vote (s 115(3)(b)).

In *Sand Grove Opportunities Master Fund Ltd v Distell Group Holdings Ltd* ([2022] ZAWCHC 46 (*Sand Grove*)), the Western Cape Division of the High Court (the court) dealt with some pertinent issues relating to the application for leave to apply for court review of schemes of arrangement under section 115(3)(b), (6) and (7) of the Companies Act. These issues included the applicants' standing to bring proceedings in terms of section 115, application for leave to intervene as co-applicants in such proceedings, and condonation of non-compliance with the prescribed period within which the application for leave to apply for court review must be brought, as well as the validity of the meeting and special resolution approving the scheme of arrangement. This case note examines the above key issues raised in *Sand Grove* and provides a critical discussion of the judgment and its significance. The case note also highlights the practical implications of this case for companies, directors, beneficial holders of shares, shareholders (especially dissenting minority shareholders) and other participants under schemes of arrangement.

## 2 Facts

The applicant companies were Cayman Islands-registered investment funds (collectively, the applicants or the Sand Grove funds), which claimed to be the beneficial owners of a total of 3,72 per cent of issued ordinary shares in Distell Group Holdings Ltd (Distell). The three respondents were Distell, Heineken International BV and Sunside Acquisitions Ltd (collectively, the respondents). Briefly, the board of Distell proposed a scheme of arrangement to Distell's shareholders in terms of which Distell's business

would be restructured to facilitate its acquisition by Heineken International BV (Heineken) through Heineken's wholly-owned subsidiary, Sunside Acquisitions Limited (Newco) (*Sand Grove supra* par 3 and 4). Distell was, at the time, a listed company and had two classes of issued shares – ordinary shares and B class shares (par 2). The B class shares were linked to some of the ordinary shares and afforded their holder premium voting rights. The effect of these premium voting rights was that Remgro Limited, which was the only holder of the B class shares and which held just 31 per cent of Distell's issued ordinary shares, was able to exercise about 56 per cent of the aggregate of all voting rights exercisable by the holders of all ordinary shares and B class shares in respect of any matter to be decided on by Distell (par 8).

At the meeting held for the purposes of considering and approving the scheme of arrangement (the scheme meeting), the voting rights of the shares beneficially owned by the applicants were exercised by Mr Barber, under the authority of letters of representation issued to him by the registered holders of those shares – namely, First National Nominees (Pty) Ltd and Standard Bank Nominees (RF) (Pty) Ltd (the local custodians or nominee companies) (par 21). There was no mention of the identity of the beneficial owners of the shares in those letters of representation (par 21). Mr Barber voted against the resolution to approve the scheme of arrangement (the scheme resolution) at the scheme meeting as a representative of the local custodians or nominee companies. However, the scheme resolution was adopted by an overwhelming majority of Distell's shareholders, holding 94,03 per cent of the voting rights that were exercised on the scheme resolution (par 13). These voting rights included the voting rights exercised in respect of both the ordinary and the B class shares, which were counted together (par 13). As the court observed, even if the ordinary shares and the B class shares had been voted separately, the scheme resolution would still have been passed with the requisite majority in terms of section 115(2)(a) of the Companies Act (par 13).

Dissatisfied with the scheme of arrangement, the applicants brought an application in terms of section 115(3)(b), read with section 115(6) of the Companies Act, for leave to apply to court for a review and setting aside of the scheme resolution in accordance with section 115(7) (par 15). The respondents opposed the application.

After oral arguments had been presented, the applicants applied for leave to amend their notice of motion to insert a claim for orders declaring that the scheme meeting was not properly constituted and, therefore, invalid, as well as that the scheme resolution purportedly adopted at such meeting was also void (par 16). In the amendment application, the applicants claimed the relief they had originally sought in terms of section 115 of the Companies Act only in the alternative to the above declaratory orders (par 16). The respondents opposed the amendment application.

When, as discussed later in this case note, the respondents challenged the applicants' standing to bring proceedings in terms of section 115 of the Companies Act, the local custodians or nominee companies sought to join the proceedings as co-applicants but only after the statutorily prescribed time limit of 10 business days for bringing the proceedings had expired (par

35–36). The local custodians, therefore, applied for condonation of their non-compliance with the time limit of 10 business days. The respondents opposed the application for condonation.

### **3 Issues before the court**

#### **3.1 *Standing***

One of the issues that the court had to decide related to the standing to bring proceedings in terms of section 115(3)(b) of the Companies Act for leave in terms of section 115(6) to apply to court for a review of the resolution to approve a scheme of arrangement in terms of section 115(7). The respondents' argument was that the Sand Grove funds did not have standing to bring the proceedings as these funds were not registered holders of Distell ordinary shares, but only had beneficial ownership of the shares (par 23–25). The respondents further argued that the Sand Grove funds were not entitled to vote at the scheme meeting and did not vote at the scheme meeting (par 23–25). As indicated above, the relevant Distell ordinary shares were registered in the names of the local custodians or nominee companies, which had, through letters of representation, appointed Mr Barber (not the Sand Grove funds) as their representative or proxy to exercise the voting rights associated with the shares (par 21 and 32).

#### **3.2 *Application for leave to intervene as co-applicants in the proceedings***

The court observed that the respondents' argument that the Sand Grove funds lacked standing prompted applications by the local custodians or nominee companies for leave to intervene as co-applicants in the proceedings in terms of section 115(3)(b) of the Companies Act in the event that the court upheld the respondents' argument (par 35). The issue was, therefore, whether the application instituted by the Sand Grove funds, which the court found to lack standing to seek the relief in terms of section 115(3)(b), could be saved by the intervention of the local custodians or nominee companies that had the right to vote on the scheme resolution and that had voted against it but failed to take the resolution on review before the expiry of the prescribed time limit of 10 business days.

#### **3.3 *Request for condonation for lateness***

A further issue that arose in *Sand Grove* was whether the court may condone non-compliance with the 10-business-day period provided for in section 115(3)(b) within which the application for leave to apply for court review of the resolution to approve the scheme of arrangement must be brought. When the applicants sought condonation for their non-compliance with the 10-business-day time limit, the respondents argued that the court had no power to extend the statutorily prescribed period (par 36).

### 3 4 *Validity of the scheme meeting and the scheme resolution*

Another issue that the court had to consider was whether the scheme meeting and the special resolution approving the scheme of arrangement were valid. This issue arose in light of the applicants' application for leave to amend their notice of motion to insert a claim for declaratory orders that the scheme meeting at which the scheme of arrangement was approved was not properly constituted and, therefore, invalid, and that the special resolution purportedly adopted at such meeting was also invalid (par 16). The applicants argued that the scheme of arrangement was required to be tabled for approval by the holders of each class of Distell's shares at separate meetings in terms of section 115(2)(a) of the Companies Act – that is, one meeting of the holders of Distell's ordinary shares, and another separate meeting of the holders of the B class shares (par 68). As Distell's ordinary shares and the B class shares had been voted together and not separately, the applicants argued that the resolution adopted at the meeting did not constitute a resolution at all in terms of section 115(2) of the Companies Act and that, as such, there was no basis to review the purported resolution in terms of section 115(3), (6) and (7) (par 90). Under the amendment application, the applicants claimed the relief they had originally sought in terms of section 115 of the Companies Act only in the alternative to the above declaratory orders (par 16). The respondents opposed the application to amend the applicants' notice of motion.

## 4 **Judgment**

With regard to standing, the court upheld the respondents' objection to the applicants' standing and held that the Sand Grove funds lacked standing to apply for leave in terms of section 115(3)(b) of the Companies Act (par 24–26 and par 34). It found that the Sand Grove funds were not registered holders of Distell's ordinary shares but were only holders of beneficial rights in those shares (par 27). The relevant shares were registered in the name of the local custodians or nominees. As such, the court held that the Sand Grove funds were not persons entitled to exercise voting rights at the scheme meeting, as contemplated in section 115 of the Companies Act. Furthermore, the court found that the Sand Grove funds were not appointed by the registered shareholders as proxies. Instead, the local custodians, being the registered shareholders, had appointed Mr Barber as their proxy to exercise the voting rights associated with the shares at the scheme meeting (par 32). Mr Barber had exercised the voting rights at the scheme meeting as a proxy or representative of the local custodians or nominees and not as a proxy or representative of the Sand Grove funds (par 34).

With regard to the applications by the local custodians or nominee companies for leave to intervene in the proceedings as co-applicants, the court held that the application instituted by the Sand Grove funds, which had no standing to seek the relief in terms of section 115(3)(b) in the first place, was a nullity (par 39–40). As such, the application could not be saved by the intervention of the local custodians or nominee companies, who had the right to vote on the scheme resolution and who had voted against it but failed to

take the resolution on review before the expiry of their right to do so (par 41). According to the court, it was inherently irrational and untenable that the local custodians or nominee companies, whose right to bring an application for relief in terms of section 115(3)(b) had lapsed owing to their failure to exercise it within the prescribed time limit, could resuscitate that right “by piggybacking on proceedings instituted within the statutory time limit by someone who had no right to institute them” (par 41).

Insofar as the request by the local custodians or nominee companies for condonation of the lateness is concerned, the court held that the right to seek relief in terms of section 115(3)(b) of the Companies Act lapses if the application is not instituted within the prescribed 10-business-day period by a person with the requisite standing (par 60). It held that the prescribed 10-business-day time limit constitutes an “expiry period” or “*vervaltermyn*” and the courts have no inherent power to grant condonation for non-compliance with such a statutorily determined expiry period (par 60).

With regard to the application to amend the applicants’ notice of motion to seek declaratory orders (to the effect that the scheme resolution or the meeting at which it was purportedly approved were invalid), the court upheld the respondents’ argument that the only way to challenge the approval of a scheme of arrangement is to seek court approval in terms of section 115(3)(a) of the Companies Act or, alternatively, to seek court review of the transaction in terms of section 115(7) (par 91). The court found that, through their application for declaratory orders, the applicants were essentially seeking to use a different format to achieve a court review belatedly and thus set aside the transaction outside the limitations of section 115 of the Companies Act (par 93). The court held that entertaining such an application “would defeat the purpose of the carefully framed restrictions subject to which a review challenge can be mounted under s 115 of the Act” (par 94).

Notably, the court concluded that it was not necessary for it to deal with the merits of the application for leave to apply for a review of the scheme resolution, as the court had already found that the applicants lacked the necessary standing and that the local custodians or nominee companies could not intervene as co-applicants (par 96). It is submitted that the remarks expressed by the court on the merits of the case (i.e., on the application of s 115(6) and (7)) are *obiter* (par 96) and these are not discussed for the purposes of this case note.

## 5 The court orders

In view of the court’s findings regarding the issues raised in this case, the court dismissed the application by the Sand Grove funds in terms of section 115(3)(b) of the Companies Act for leave to apply for a review of the scheme of arrangement (par 136). Furthermore, the court dismissed the application by the local custodians or nominees for leave to intervene in the proceedings (par 136). The court also dismissed the application by the Sand Grove funds for leave to amend their notice of motion to seek orders declaring that the meeting at which the special resolution approving the scheme of arrangement was adopted was invalid and that the resolution purportedly

adopted at that meeting was, as such, also invalid (par 136). The court ordered the applicants to pay the respondents' legal costs.

## 6 Further discussion

The issues highlighted in the judgment in *Sand Grove* are important and they warrant further analysis. These issues, as indicated above, include: standing to apply for leave to seek court review of a resolution approving a fundamental transaction; application for leave to intervene as applicants in such proceedings; condonation of non-compliance with the statutorily prescribed time limit for the institution of the application in terms of section 115(3)(b) of the Companies Act; and the validity of the scheme meeting and scheme resolution.

### 6.1 *Standing in terms of section 115(3)(b) to seek court review of a resolution approving a fundamental transaction*

It is submitted that one significant outcome of *Sand Grove* is that the court assessed and clarified the issue of standing to bring proceedings seeking court review of a resolution approving a fundamental transaction in terms of section 115(3)(b) of the Companies Act. The court dealt extensively with the issue of standing. Section 115(2)(a) of the Companies Act provides that a proposed fundamental transaction (i.e., a disposal of all or the greater part of a company's assets or undertaking, or an amalgamation or a merger, or a scheme of arrangement) "must be approved by a special resolution *adopted by persons entitled to exercise voting rights on such a matter*" (own emphasis) at the relevant meeting. Section 115(3)(b) further provides that, notwithstanding the adoption of the special resolution approving a fundamental transaction in terms of section 115(2)(a) of the Companies Act, a company may not implement that resolution without court approval if "the court, on an application within 10 business days after the vote by *any person who voted against the resolution*, grants that person leave, in terms of subsection (6), to apply to a court for a review of the transaction in accordance with subsection (7)" (own emphasis).

This right to apply to court for leave to apply for a review gives effective protection to the minority shareholders who voted against the resolution to approve a fundamental transaction, as this right is available regardless of the percentage support for the resolution (Cassim FHI, Cassim MF, Cassim R, Jooste, Shev and Yeats *Contemporary Company Law* 3ed (2021) 943).

According to the court in *Sand Grove*, the only person with standing in terms of section 115(3)(b) to seek court review of a resolution approving a fundamental transaction is a person who satisfies two qualifying criteria. First, it must be a person entitled to exercise voting rights on the matter at the meeting called for that purpose in terms of section 115(2)(a) of the Companies Act (par 40). Regarding this first qualifying criteria, the court agreed with the respondents' contention that the phrase "adopted by persons entitled to exercise voting rights on such a matter" in section 115(2)(a), when interpreted with reference to the meanings of "voting

rights”, “shareholder” and “exercise”, as defined in section 1 of the Companies Act, meant that only a registered shareholder or a person appointed as proxy by a registered shareholder could exercise voting rights on the resolution to approve a fundamental transaction in terms of section 115(2)(a) of the Companies Act (par 25–26 and 30).

Referring to *Sammel v President Brand Gold Mining Co Ltd* (1969 (3) SA 629 (A) (*Sammel*) 666), *Oakland Nominees (Pty) Ltd v Geiria Mining & Investment Co Ltd* (1976 (1) SA 441 (A) (*Oakland Nominees*) 453B), *Standard Bank of South Africa Ltd v Ocean Commodities Inc* (1983 (1) SA 276 (A) 288*fin*–289B) and *Smyth v Investec Bank Limited* (2018 (1) SA 494 (SCA) (*Smyth*) par 21), the court pointed out that the scheme of the Companies Act is reflective of the general principle of company law that “a company concerns itself only with the registered holders of its shares” and that this principle is “informed by considerations of practicality and convenience” (par 31).

Applying the above principles regarding the first qualifying criteria to the facts, the court held that the Sand Grove funds were not entitled to exercise voting rights for the purposes of the scheme resolution as they were not registered shareholders of Distell. Also referring to *Marble Head Investments (Pty) Ltd v Niveus Investments (Ferberos Nominees (Pty) Ltd Intervening)* ([2020] ZAWCHC 36 (*Marble Head Investments*)) and *Standard Bank Nominees (RF) (Proprietary) Limited v Hospitality Property Fund Limited* (2020 (5) SA 224 (GJ) (*Standard Bank Nominees*)), a matter in which a dissenting shareholder applied to court for the determination of fair value of its shares in terms of section 164 of the Companies Act, the court held that a consideration of section 164 was “indeed germane to the determination of who may exercise voting rights at a meeting in terms of s 115(2), for the appraisal rights thereunder are afforded only to dissenting shareholders who voted against the resolution at the meeting” (par 29). Notably, in *Standard Bank Nominees (supra)*, it was held that only registered shareholders (and not the beneficial holders of the shares) may exercise the right to approve a fundamental transaction in terms of section 115 of the Companies Act.

The second qualifying criteria for having standing to seek court review of a resolution approving a fundamental transaction is that such person (i.e., a person entitled to vote on the resolution to approve a fundamental transaction) must have voted against the resolution approving the transaction at the relevant meeting, as required by section 115(2)(b) of the Companies Act (par 40). In other words, to have standing to seek court review of a resolution to approve the transaction, a registered shareholder, or a person appointed by a registered shareholder as proxy, must have voted against the proposed transaction. The court found that the Sand Grove funds had simply not voted at the meeting (par 27).

The court concluded that the Sand Grove funds had no standing because, first, they were neither registered shareholders nor proxies appointed by the registered shareholders (and were, therefore, not entitled to exercise voting rights) and, secondly, they did not vote against the scheme resolution at the scheme meeting. In *Sand Grove*, the court has thus emphasised that the only person with standing to bring such proceedings is a registered shareholder of the company (i.e., a person entitled to exercise voting rights

on such a matter) who has voted against the resolution approving the transaction at the relevant meeting. In this regard, the court took a pragmatic approach that is, as indicated above, aligned with the general principle that “a company concerns itself only with registered holders of its shares”.

The decision in *Sand Grove* has significant implications for beneficial holders of shares, especially on their rights in relation to shareholder approval of fundamental transactions in terms of section 115(2) of the Companies Act, as well as in relation to the remedy of court review of fundamental transactions in terms of section 115(3)(b), as read with subsections (6) and (7). This includes holders of the beneficial interest in dematerialised shares that are subject to rules of a central securities depository.

Beneficial holders of shares are common in South Africa owing to the prevalent and acceptable investment practice of holding shares through investment institutions, intermediaries or nominees (s 56(1) of the Companies Act; *Oakland Nominees supra* 453A–B; Esser “Shareholder Interests and Good Corporate Governance in South Africa” 2014 77 *Journal of Contemporary Roman-Dutch Law* 42–43; Esser and Delpont “Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008” 2016 79 *Journal of Contemporary Roman-Dutch Law* 7–8; Wiese *Corporate Governance in South Africa: With International Comparisons* 2ed (2017) 107). Beneficial holders of shares generally do not exercise the voting rights associated with the shares. They are generally not able to seek court review of a resolution approving a fundamental transaction to which they object. However, this does not leave beneficiary holders’ interests unprotected. For example, if the beneficial holders of shares wish to participate actively and to vote on resolutions approving fundamental transactions, then such beneficial holders may obtain letters of representation or appointment as proxy from the registered shareholders (see *Sand Grove supra* par 32). This would entitle such beneficial holders of shares to vote on the resolution seeking the approval of a fundamental transaction at the relevant meeting and to later seek court approval in the specific circumstances outlined in section 115(6) and (7) of the Companies Act should they be dissatisfied with the approval of the transaction. Another option for beneficial holders of the shares, in the case of shares held through nominees, would be to terminate the nomination of their nominees and to have their names entered in the register of the company’s shareholders (see *Smyth supra* par 55). Obtaining letters of representation or appointment as proxy from the registered shareholders would, in most cases, be a more feasible option available to beneficial shareholders who do not wish to terminate the nomination of their nominees.

Otherwise, the beneficial holders of shares have to rely on the presumption that the management of investment institutions, intermediaries or nominees, through which the beneficiary holders hold their shares, have a better understanding of their investee companies and have expertise in monitoring their investments in such companies (see Esser 2014 *Journal of Contemporary Roman-Dutch Law* 43). The presumption is that the management of investment institutions, intermediaries or nominees would generally be competent to assess the costs and benefits of the board’s decisions regarding fundamental transactions, or other decisions by

company boards, and to make informed voting decisions on resolutions to approve such transactions. These investment intermediaries may further adopt transparent policies guiding them on how to assess and exercise their voting rights. Appropriate disclosure of such policies and the provision of explanations for voting in a particular direction would promote the accountability of these intermediaries to the beneficial holders of the shares. The courts have indicated that, in any event, intermediaries such as nominees are actually advancing the interests of the beneficial holders of shares and they act subject to the beneficial holders' instructions (*Smyth supra* par 55; see also *Sammel supra* 666; *Oakland Nominees supra* 453A–B; *Dadabhay v Dadabhay* 1981 (3) SA 1039 (A) 1047D).

It is also notable that the court in *Sand Grove* rejected the applicants' attempt to rely on section 56(9) of the Companies Act. This section gives the holder of a beneficial interest in any securities the right to vote in a matter at a shareholders' meeting if the beneficial interest includes the right to vote on the matter (s 56(9)(a)). In addition, such person's name must be listed on the company's register of disclosures as a beneficial interest holder, or such person must hold a proxy appointment in respect of that matter from the registered holder of the securities (s 56(9)(b); par 25). The court rejected the applicants' attempt to rely on section 56(9) because the Distell shares in which the applicants held a beneficial interest were dematerialised and were subject to the rules of a central securities depository (par 25). Section 56(9) was not applicable by virtue of section 56(8), which expressly excludes the application of section 59(9) to (11) in respect of securities that are subject to rules of a central securities depository (par 25). In any event, as the respondents pointed out, the applicants' names were not listed on Distell's register of disclosures as holders of a beneficial interest. The applicants also did not hold proxy appointments from the registered holders of the relevant Distell ordinary shares (par 25).

## 6.2 *Application for leave to intervene as applicants in terms of section 115(3)(b)*

A further significance of *Sand Grove* is that the court considered the issue of intervention as applicants in terms of section 115(3)(b) of the Companies Act, and the court took the view that the earlier decision of Sievers AJ in *Marble Head Investments (supra)* was clearly wrong (par 43). In *Marble Head Investments (supra)*, the court held that if an application in terms of section 115(3)(b) of the Companies Act was instituted within the prescribed 10-business-day period by any person with capacity to litigate, even if such person lacked standing to claim relief in terms of this section, an intervening applicant with the standing to claim the relief could be admitted even after the expiry of the prescribed time limit (*Marble Head Investments (supra)* par 37). In that case, the registered shareholders' applications to intervene were instituted after the expiry of the 10-business-day period in terms of section 115(3)(b) but the beneficial shareholders, who lacked standing, had instituted their application timeously (see *Marble Head Investments (supra)* par 31–33).

However, the court in *Sand Grove* rejected the approach taken by Sievers AJ in *Marble Head Investments (supra)* and, instead, held that an application to seek relief in terms of section 115(3)(b) of the Companies Act by a person who does not have standing, as discussed above) is a nullity (par 40). According to the court, such application cannot be resuscitated by the intervention of a person who had the necessary standing but failed to institute the application before the expiry of his right to do so (par 41). The court stressed that it would, otherwise, be inherently irrational and untenable if such person could “avoid the fatal consequences of his delay and resuscitate his lapsed right by piggybacking on proceedings instituted within the statutory time limit by someone who had no right to institute them” (par 41).

In rejecting the approach taken in *Marble Head Investments (supra)* regarding the issue of intervention as applicants in terms of section 115(3)(b) of the Companies Act, the court in *Sand Grove* further considered that section 115(3)(b) does not prohibit the implementation of the fundamental transaction unless the application to seek a court review of the transaction is instituted within the prescribed 10-business-day period by a person who voted against the resolution (par 42). In such circumstances, the “late intervener” will have no right to seek a court review of the transaction or to seek an interdict to prevent implementation unless the intervener’s lateness has been condoned (note however, as discussed below, that the court held that the courts have no power to grant condonation for the lateness in these circumstances) (par 42).

Considering the above conflicting authorities regarding intervening applications in terms of section 115(3)(b), it is submitted that the approach adopted by the court in *Sand Grove* is sound and courts are likely to follow *Sand Grove* in future rather than the approach adopted in *Marble Head Investments (supra)*. As pointed out by the court, the approach in *Marble Head Investments (supra)* could, if followed, lead to irrational and untenable outcomes where a late intervener’s right to seek relief that has lapsed is revived by his intervention in an invalid application instituted within the prescribed time limit by a person who had no right to institute such application in the first place (par 41).

### 6.3 *Condonation of non-compliance with the statutorily prescribed time limit for the institution of proceedings in terms of section 115(3)(b)*

Another important aspect of the *Sand Grove* judgment was that the court assessed the issue of condonation of non-compliance with the statutorily prescribed time limit for the institution of proceedings in terms of section 115(3)(b) of the Companies Act, and concluded that the earlier finding in *Marble Head Investments (supra)* (that the court had the inherent power to condone such non-compliance) was incorrect. Instead, the court in *Sand Grove* held that the 10-day time limit imposed in terms of section 115(3)(b) of the Companies Act constitutes an “expiry period” or “*vervaltermyn*” and the courts have “no inherent power to ameliorate the shutting out effect of

such statutorily determined expiry periods” (par 60, in which the court referred to *Hartman v Minister van Polisie* 1983 (2) SA 489 (A) 500).

Sievers AJ’s disputed finding, in *Marble Head Investments (supra)*, was that the court had the inherent power to condone non-compliance with the statutorily prescribed time limit for the institution of proceedings. The court in *Sand Grove* held that this finding was based on obiter remarks in *Toyota South Africa Motors (Pty) Ltd v Commissioner for the South African Revenue Service* (2002 (4) SA 281 (SCA) par 10) that the High Court has inherent jurisdiction to govern its own procedures and accessibility to litigants seeking to exercise their rights and that such jurisdiction has been held to pertain “not only to condonation of non-compliance with the time limit set by a rule but also a statutory time limit: *Phillips v Direkteur van Statistiek* (1959 (3) SA 370 (A) 374 G—*in fine*” (*Sand Grove supra* par 44–45). The court disagreed with Sievers AJ’s finding and, instead, took the view expressed by Didcott J in the Constitutional Court case of *Mohlomi v Minister of Defence* (1997 (1) SA 124 (CC) (*Mohlomi*)) that the courts have no inherent power to condone defaults on statutorily prescribed time periods for the institution of litigation unless and until such power is conferred on them. Rejecting Sievers AJ’s view that Didcott J’s statement was an *obiter dictum*, the court in *Sand Grove* held that Didcott’s statement was part of the *ratio decidendi*, binding and consistent with the legal position articulated in many appeal court judgments (*Sand Grove supra* par 47–49 and par 53, in which reference is made to *Benning v Union Government (Minister of Finance)* 1914 AD 180 185 and cases such as *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 (1) SA 617(A) 621F–G; *Administrator, Transvaal, v Traub* 1989 (4) SA 731 (A) 764E and *Pizani v Minister of Defence* 1987 (4) SA 592 (A) 602 D–G).

Significantly, the court also pointed out that the context of the provisions of section 115 of the Companies Act weighs against any interpretation that the court has the power to condone the lateness of an application by an aspirant intervenor (par 61). It also emphasised the practical challenges that condonation could present in the context of fundamental transactions and the rights of other participants under such transactions. For example, it pointed out that, in the absence of an application in terms of section 115(3), the implementation of a fundamental transaction (the scheme of arrangement in this case) can proceed and the rights of the other participants in terms of the transaction vest and become enforceable (see par 61, referring to s 115(9) of the Companies Act). Condonation of a late application in terms of section 115(3)(b) would, therefore, be undesirable, as it would run contrary to the purpose of the prescribed timeframes for dissenting shareholders to challenge the approval of the transaction (par 61). It would create uncertainty with regard to the rights of other scheme participants, which section 115(9) and the time limits in section 115(3) were designed to avoid (par 61). Such uncertainty would render the provisions of section 115 unworkable (par 61). In the court’s view, giving the court unstated powers of condonation would defeat the objectives of certainty that underlie the statutory time limit for instituting litigation, such as in section 115(3)(b) as well as the Companies Act’s stated objects of providing for equitable and efficient amalgamations, mergers and takeovers of companies (par 62; and see the long title of the Companies Act). It would be prejudicial

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to third parties' vested rights (par 63) and would undermine the objects of promoting equity, efficiency and certainty.

The court rejected the applicants' argument that section 173 of the Constitution gave the court the inherent power to condone non-compliance with the prescribed time period for the institution of the application (par 48 and 64). Notably, section 173 of the Constitution gives the Constitutional Court, the Supreme Court of Appeal and the High Court the "inherent power to protect and regulate their own process ... taking into account the interests of justice". Referring to *Vlok NO v Sun International South Africa Ltd* (2014 (1) SA 487 (GSJ) par 49–50), with reference to *Phillips* (*supra* par 51–52), the court took the view that entertaining a claim instituted outside a statutorily prescribed time limit that constitutes a "vervaltermyn" is different from the regulation by the court of its own process (*Sand Grove supra* par 64) as envisaged in section 173 of the Constitution.

Considering the above conflicting judgments in *Sand Grove* (*supra*) and *Marble Head Investments* (*supra*), the question of whether the court has inherent powers to condone non-compliance with the statutorily prescribed 10-business-day limit for the institution of the application in terms of section 115(3)(b) is yet to be clarified by the Supreme Court of Appeal or the Constitutional Court in an appropriate case in future. It is submitted that the court's view in *Sand Grove* that the prescribed 10-business-day time limit constitutes an "expiry period" or "vervaltermyn" and that the courts have no inherent power to grant a condonation for non-compliance with such a statutorily determined time limit is, as indicated above, well-substantiated as being consistent with the legal position expressed by the Constitutional Court in *Mohlomi* (*supra*), as well as by the then-Appellate Division in the cases referred to above. Furthermore, and as quite usefully emphasised by the court, it is consistent with the context of the provisions of section 115 of the Companies Act, which, in the absence of an application in terms of section 115(3), allow for the implementation of the scheme of arrangement (or other fundamental transaction) to proceed and for the rights afforded by it to the scheme participants to vest and to become enforceable. The decision in *Sand Grove* is also consistent with the Companies Act's stated objects of promoting equity and efficiency in amalgamations, mergers and takeovers of companies. The concern that giving the court unstated powers of condonation would create uncertainty, rendering the provisions of section 115, in their current state, unworkable is valid.

Therefore, in view of the court's decision in *Sand Grove*, the dissenting shareholders in a scheme of arrangement, or other fundamental transaction, who wish to take the approval resolution on review should ensure that they adhere to the 10-business-day time period within which they should institute the application to seek court review of the transaction. Failure to adhere to the prescribed time period will result in the lapse of their right to seek court review of the transaction. In such a case, according to *Sand Grove*, the court may not condone any delay in instituting the application in terms of section 115(3) of the Companies Act.

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#### 6.4 *Validity of the scheme meeting and the scheme resolution*

As far as the applicants' challenge to the validity of the scheme meeting and special resolution approving the scheme of arrangement is concerned, the decision in *Sand Grove* is significant in at least three aspects, which apply equally to other fundamental transactions. The first aspect relates to the fact and attendant consequences of the approval of a scheme of arrangement in terms of section 115(2)(a). In this regard, the court held that the approval of a scheme of arrangement, in terms of an approval resolution that is being challenged, is a fact and, accordingly, the scheme is enforceable by and against the scheme participants in terms of section 115(9). Once approved, and if section 115(3)(a) and (5) of the Companies Act is not applicable, the scheme of arrangement "stands and must be treated as valid unless set aside by a court" (par 91). Referring to *Oudekraal Estates (Pty) Ltd v City of Cape Town* (2004 (6) SA 222 (SCA)), the court compared the fact of the approval of a scheme of arrangement and its attendant consequences with administrative decisions and emphasised that these cannot be ignored, even by a party who is challenging the validity of the adoption of the approving resolution (par 91).

The second significant aspect of the decision in *Sand Grove*, in this regard, relates to the way in which the approval of a scheme of arrangement may be challenged. The court made it clear that the only way to challenge the approval of a scheme of arrangement is to seek court approval in terms of section 115(3)(a) of the Companies Act or, alternatively, to seek court review of the transaction in terms of section 115(7) (par 91). A disgruntled dissenting shareholder may not use a different format, such as an application for declaratory orders as in this case, to achieve a court review and setting-aside of the fundamental transaction outside the carefully constructed limitations in terms of which an application to review the transaction may be brought under section 115 of the Companies Act (par 93–94). It is submitted that the court's decision, in this regard, is in line with the context of section 115 of the Companies Act, which limits the role of the court in schemes of arrangement (and other fundamental transactions) to court approval in exceptional circumstances, as provided for in section 115(3)(a) read with subsection (5) and in section 115(3)(b) read with subsections (6) and (7).

The third significant aspect of *Sand Grove* in the context of the validity of the scheme meeting and scheme resolution relates to the circumstances in which a scheme of arrangement must be put to the holders of each affected class of securities for approval by a special resolution at separate meetings in terms of section 115(2)(a) of the Companies Act. The court provided pertinent guidelines in this regard. Notably, under section 311(1) of the 1973 Companies Act, the court could order a meeting of classes of creditors or of members to be convened in such manner as the court might direct. The court's power, in this regard, included directing whether separate meetings had to be convened for different classes of a company's creditors or members (par 71). However, the current Companies Act does not contain

any provision empowering the court to determine the way meetings to consider schemes of arrangement should be convened.

The applicants in *Sand Grove* argued that section 114(1) of the Companies Act (especially the wording that the board of a company may propose and implement “any arrangement between the company and holders of any class of its securities”) entailed that if a proposed scheme affected different classes of securities, as defined in section 37(1), the company must convene separate scheme meetings of the holders of each affected class of securities to approve the scheme (par 68–69 and par 78–79). Notably, section 37(1)(a) of the Companies Act provides that “all of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class”. According to the court, section 37 allows the issuance of different classes of shares even when the differences in the rights and limitations associated with those shares are insignificant (par 88). The applicants argued that each separate scheme meeting must be convened in terms of section 115 of the Companies Act and that it was impermissible to combine holders of different classes of shares, as defined in section 37(1), into a single meeting, as Distell had done (par 68–69 and 78–79).

The court correctly held that the current Companies Act leaves it to the company to convene the scheme meeting in terms of section 115 (par 81). It is, therefore, the company (i.e., the directors) that must determine the most appropriate way to comply with section 115(2) (par 81, also referring to Delpont *Henochoberg on the Companies Act 71 of 2008* 420(1)). Where a proposed scheme affects the shareholders’ rights differently, the directors should determine whether the proposal should be put to shareholder approval in terms of section 115(2) at a single scheme meeting or at separate scheme meetings. The court indicated that the directors may consider the independent board’s advice and the independent expert’s report when determining whether the company should hold separate meetings (par 81). The court further opined that the Takeover Regulation Panel could also direct that a company should convene appropriately constituted separate meetings (par 81). This is because section 119(2)(b)(ii) of the Companies Act gives the Takeover Regulation Panel the responsibility to regulate an affected transaction in a manner that ensures that all holders of “voting securities of an offeree regulated company are afforded equitable treatment, having regard to the circumstances” (par 81).

Significantly, the court held that, when determining whether the proposal should be put to shareholder approval in terms of section 115(2) at a single scheme meeting or at separate scheme meetings, the company must apply the principles that the court applied when determining whether separate meetings had to be convened for different classes of members or creditors under section 311(1) of the 1973 Companies Act (par 87–88, also referring to Delpont *Henochoberg* 420(1)). In this regard, the South African courts followed the balancing approach laid down in English case-law authorities, particularly the leading case of *Sovereign Life Assurance Co v Dodd* ((1892) 2 QB 573 (*Sovereign Life*)), in terms of which the courts looked at the similarity or dissimilarity of the shareholders’ or creditors’ rights. In *Sovereign Life Assurance* (*supra*), it was held that the test for calling separate meetings

was based on the similarity or dissimilarity of the shareholders' or creditors' rights, and not on the similarity or dissimilarity of their interests (par 71–72). A single meeting would be convened where the shareholders' rights were sufficiently similar such that the shareholders could properly consult together (par 74, referring to *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2001] HKCFA 19; [2001] 3 HKLRD 634; (2001) 4 HKCFAR 358; [2002] 1 HKC 172 (*UDL Argos Engineering*)). A difference in the legal rights of the shareholders was only sufficient to require the convening of separate meetings if the difference was such that it was impossible for shareholders to consult together (par 76, referring to *DX Holdings Ltd* [2010] EWHC 1513 (Ch) (*DX Holdings*) par 5).

In *Sand Grove*, the court pointed out how the English courts cautioned against the classification of a proposed scheme as constituting more than one scheme of arrangement and the convening of separate meetings where the differences between the shareholders' affected rights are not sufficiently material. (In this regard, the court referred to cases such as *Nordic Bank plc v International Harvester Australia Ltd* [1982] 2 VR 298 301; and *DX Holdings supra* par 5.) It held that the holding of multiple meetings could undermine the policy rationale underpinning a scheme of arrangement, namely that super-majority decisions should bind the dissenting minority shareholders (par 76, referring to *Nordic Bank plc v International Harvester Australia Ltd* [1982] 2 VR 298 301). Therefore, a balance had to be struck between the risk of enabling the oppression of the minority shareholders by the majority shareholders and the risk of allowing a small minority to obstruct the majority shareholders' wishes (par 75, referring to *UDL Argos Engineering supra* par 26 and to *Representation of FRM Holdings Limited* [2012] JRC 120 par 17). If even the slightest and immaterial differences were to require the holding of separate meetings, this could lead to multiple separate meetings to approve a scheme of arrangement, which would be impracticable.

The court therefore rejected the applicants' contention that, in view of section 37(1), the balanced weighing approach followed by the courts under section 311 of the 1973 Companies Act, that considered the similarity or dissimilarity of the rights, was no longer applicable under the current Companies Act. The court also rejected the applicants' interpretation that section 114 of the Companies Act required companies to convene separate meetings of the holders of each class of shares (as set out in section 37(1)), even where there is no significant dissimilarity between their affected rights (par 79 and 88). It emphasised that such interpretation would lead to the long-recognised impracticalities associated with the holding of multiple separate meetings, thereby undermining efficiency in schemes of arrangement (par 88). In the court's view, the legislature could not have intended, in section 114, to abolish a well-established and sound approach, and to replace it with a new approach that is beset with impracticalities (par 83).

According to the court, section 37 of the Companies Act serves simply to promote clarity regarding the rights and limitations associated with a company's issued shares (par 80) and to make the appraisal remedy available to holders of a class of shares, as defined in section 37(1), where a

company has proposed an amendment of its Memorandum of Incorporation to alter the preferences, rights, limitations or other terms in a manner that is “materially” adverse to that class of shares (par 80; s 164(2)(a) of the Companies Act). “Materiality” serves as a determining factor when considering whether an alteration of rights associated with shares warrants a remedy (par 80).

To summarise the court’s decision, the Companies Act leaves it to the company to convene a scheme meeting and to determine the most appropriate way to comply with section 115(2). Where a proposed scheme affects the shareholders’ rights differently, the directors should determine whether the company should hold separate scheme meetings, taking into account the independent board’s advice, the independent expert’s report and any relevant directives given by the Takeover Regulation Panel. The company must consider the similarity or dissimilarity of the shareholders’ rights, similar to the approach adopted by the courts under section 311(1) of the 1973 Companies Act. Caution should be exercised in the classification of a proposed scheme as constituting more than one scheme of arrangement and the convening of multiple separate meetings to approve a scheme of arrangement where the differences between the shareholders’ affected rights are not sufficiently material, as this would lead to serious impracticalities. Where the company’s determination triggers any of the grounds for review of the transaction in terms of section 115(7), a dissenting shareholder, with the requisite standing, will be entitled to challenge the determination within the parameters of section 115 (par 87, also referring to Luiz “Protection of Holders of Securities in the Offeree Regulated Company During Affected Transactions: General Offers and Schemes of Arrangement” 2014 SA Merc LJ 560 577).

## 7 Conclusion

This case note has analysed the judgment of the Western Cape Division of the High Court in *Sand Grove* regarding the application for leave to apply to court for a review of a scheme of arrangement in terms of section 115 of the Companies Act. The case note has highlighted the main issues raised by this judgment, which include a litigant’s standing to bring an application for leave to seek court review of a scheme of arrangement, application for leave to intervene as co-applicants in the proceedings, application for condonation of non-compliance with the statutorily prescribed period within which the application for leave to apply for court review of a scheme of arrangement must be brought, and the validity of the meeting and special resolution approving a scheme of arrangement. The question of the validity of the meeting and special resolution approving the scheme of arrangement raises further considerations such as the fact of the approval of a scheme of arrangement and its attendant consequences, the manner in which the approval of a scheme of arrangement may be challenged, and the way meetings to consider schemes of arrangement should be convened.

The court emphasised that the only person with standing to bring an application for leave to apply to court for a review of a scheme of arrangement in terms of section 115 of the Companies Act is a registered shareholder of the company (and not a holder of beneficial interest in

shares) who has voted against a resolution approving the transaction at the relevant meeting. The court's decision provides clarity regarding the rights of beneficial holders of shares, including holders of a beneficial interest in dematerialised shares that are subject to rules of a central securities depository, in relation to shareholder approval of fundamental transactions in terms of section 115(2), as well as the remedy of court review of fundamental transactions in terms of section 115(3)(b).

With regard to the issue of intervention as applicants in terms of section 115(3)(b) of the Companies Act, the court took the view that the earlier decision of Sievers AJ in *Marble Head Investments (supra)* was clearly wrong. Instead, the court held that an application to seek relief in terms of section 115(3)(b) by a person who does not meet the qualifying criteria to bring such an application is a nullity and such application cannot be resuscitated by the intervention of a person who had the necessary standing but failed to institute the application before the expiry of his right to do so. This case note has argued that the approach adopted in *Sand Grove*, in this regard, is sound and is more likely to be followed by the courts in future than the approach adopted in *Marble Head Investments (supra)*. As pointed out by the court, the approach in *Marble Head Investments (supra)* could, if followed, lead to irrational and untenable outcomes (par 41).

After assessing the issue of condonation of non-compliance with the statutorily prescribed time limit for the institution of proceedings in terms of section 115(3)(b), the court concluded that the position adopted in *Marble Head Investments (supra)* (that the court had the inherent power to condone such non-compliance) was incorrect. Instead, the court held that the 10-day time limit imposed in terms of section 115(3)(b) of the Companies Act constitutes an "expiry period" or "*vervaltermyn*" and the courts have "no inherent power to ameliorate the shutting out effect of such statutorily determined expiry periods". Giving the courts the unstated power to condone the lateness of an application by an aspirant intervenor would create uncertainty, rendering the provisions of section 115, in their current state, unworkable. Again, this case note has submitted that the position taken by the court in *Sand Grove*, in this regard, is sound but this is an issue that is yet to be clarified by the Supreme Court of Appeal or the Constitutional Court should an appropriate case reach these courts in future.

The court made it clear that, once approved, and if section 115(3)(a) and (5) of the Companies Act is not applicable, the scheme of arrangement "stands and must be treated as valid unless set aside by a court". It emphasised that the only way to challenge the approval of a scheme of arrangement is to seek court approval in terms of section 115(3)(a) or, alternatively, to seek court review of the transaction in terms of section 115(7). Therefore, a dissatisfied shareholder may not use a format to achieve a court review and setting-aside of a scheme of arrangement outside the carefully constructed limitations of section 115 of the Companies Act.

The court provided pertinent guidelines regarding the manner in which the scheme meeting should be convened, especially the circumstances in which a scheme of arrangement must be put to the holders of each affected class of securities for approval by a special resolution at separate meetings in

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terms of section 115(2)(a) of the Companies Act. The court pointed out that the company (i.e., the directors) should determine the most appropriate way to comply with section 115(2). Where a proposed scheme affects the shareholders' rights differently, the directors should determine whether the company should hold separate scheme meetings. In this regard, the company must consider the similarity or dissimilarity of the shareholders' rights, similar to the approach adopted by the courts under section 311(1) of the 1973 Companies Act. Caution should be exercised in the classification of a proposed scheme as constituting more than one scheme of arrangement and the convening of multiple separate scheme meetings if the differences between the shareholders' affected rights are not sufficiently material, as this would lead to impracticalities. Finally, a dissenting shareholder who is dissatisfied with the company's determination, in this regard, may challenge the determination within the parameters of section 115, but only to the extent that the company's determination triggers any of the grounds for review of the transaction in terms of section 115(7).

It is submitted that the court's decision in *Sand Grove* regarding the issues discussed in this case note is aligned with the sound policy objectives of minimising the involvement of the court, reducing administrative burdens, promoting certainty and creating efficiency in schemes of arrangement. Even though the facts of *Sand Grove* relate to a scheme of arrangement, this case is relevant to the topic of fundamental transactions, as section 115 also applies to the other fundamental transactions (i.e., disposals of all or the greater part of a company's assets or undertaking, and amalgamations or mergers) in Chapter 5 of the Companies Act.

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