IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

In the ex parte application of:

CASE NO: 04/17352

STANDARD BANK GROUP LIMITED Applicant

AND

CASE NO: 04/19223

LIBERTY GROUP LIMITED Applicant

J U D G M E N T

HUSSAIN, J:

[1] On 17 August 2004 I granted an application brought by Standard Bank Group Limited (hereinafter referred to as "*SBG*") for the convening of a meeting in terms of section 311 of the Companies Act No. 61

of 1973 (hereinafter referred to as "*the Act*").

On 7 September 2004 I granted a similar application brought by Liberty Group Limited (hereinafter referred to as "*Liberty*").

I granted the orders, after hearing counsel, and indicated that I will be giving full reasons for my decision. These are the reasons:

Introduction

[2] The applicants' commitment to Black Economic Empowerment in South Africa lies at the root of these applications. SBG is the holding company of a banking and financial services group. Liberty is a member of this group. The Standard Bank of South Africa Limited is also a member of this group. The Standard Bank of South Africa is, by asset value, the country's largest commercial bank.

[3] The applicants have committed themselves to Black Economic Empowerment. They recognised the need for black people to participate and increase their participation within the main stream economy of South Africa. This the applicants accept is essential for long-term sustainability. To this end the applicants became party to the Financial Sector Charter (hereinafter referred to as "*the Charter*") which was adopted on 17 October 2003 by the Association of Black Security and Investment Professionals, the Banking Council of South Africa, the Foreign Bankers Association of South Africa and

other participants within the financial sector. The Charter has as its objective, *inter alia*, the promotion of Black Economic Empowerment within the financial sector. The Charter is a transformation charter as contemplated by the Broad-Based Black Economic Empowerment Act 2003. One of the objectives of the Charter is black ownership and control of a financial institution.

[4] The Charter establishes a framework for the promotion of Black Economic Empowerment in order to achieve the constitutional right of equality, increase Broad-Based and effective participation of Black people in the economy, and increase employment and more equitable income distribution. An integral part of the Charter is a scorecard which provides an objective set of measuring indicators for the purpose of measuring Black Empowerment progress by financial institutions. The scorecard will be used *inter alia* by the Charter Council to evaluate Black Economic Empowerment progress in the financial sector, and by Government and the private sector in the awarding of contracts and other business to financial institutions. In terms of the Charter, Black Economic Empowerment must take place within a number of key areas in a company, namely ownership and control, human resources development, procurement and enterprise development, access to financial services, empowerment financing and corporate social investment.

<u>The Scheme of Arrangement – SBG</u>

[5] Although I am not called upon, at this stage, to deal with the merits of the Scheme of Arrangement, an understanding of the Scheme is important in order to consider granting the order sought by the applicants in their respective Notices of Motion. The presiding judge cannot exercise a discretion without being informed of the nature and structure of the Scheme.

[6] At the outset it must be said that the purpose of the Scheme of Arrangement is for the applicants to achieve the objectives of the Charter. Put very simply SBG's proposed Scheme of Arrangement requires individual ordinary shareholders to participate in the Black empowerment initiative by dispensing of such number of ordinary shares held by each of them to wholly owner subsidiaries of SBG and a trust for employees of SBG as equates in value to 10% of the South African banking operation. SBG will provide the finance to those subsidiaries for the acquisition of the shares.

[7] SBG's ordinary shares are listed on the JSE Securities Exchange South Africa ("*JSE*") and the Namibian Stock Exchange. SBG in essence will facilitate the acquisition of an effective 10% interest in the South African banking operations by broad-based groupings of Black entities. To this end SBG identified two Black empowerment companies being Safika and MBI as empowerment partners. They form the Tutuwa Consortium. In addition SBG decided to empower its Black employees. To this end SBG intends to establish three Managers' Trusts for the benefit of current and future

employees and non-executive directors of SBG. In order to broaden the base of Black ownership SBG established the Community Trust representing local business leaders and community and charitable organisations in different regions of the country. SBG also has a General Staff Scheme. To this end the General Staff Trust was formed for the purpose of acquiring ordinary shares in the issued share capital of the applicant for the benefit of employees of the applicant and its subsidiaries who are not beneficiaries under the Managers' Trust or participants under the applicants' existing share incentive scheme. The SBG subsidiaries under General Staff Trust do not own any shares in the applicant.

[8] The SBG subsidiaries are as follows:

Tutuwa Strategic Holdings 1 (Pty) Ltd, Tutuwa Strategic Holdings 2 (Pty) Ltd, Tutuwa Staff Holdings 1 (Pty) Ltd, Tutuwa Staff Holdings 2 (Pty) Ltd, Tutuwa Staff Holdings 3 (Pty) Ltd and Tutuwa Community Holdings (Pty) Ltd.

In terms of the Scheme members of the applicant holding ordinary shares will dispose of 6,5 ordinary shares for every 100 ordinary shares held to the SBG subsidiaries and the trustees of the General Staff Trust and the said subsidiaries and Trust will acquire ownership of all the shares free from any encumbrances. The price paid to each shareholder by the subsidiaries and General Staff Trust is the Scheme consideration as defined being R40,50 per share. This price represents the closing price of SBG ordinary shares on Friday, 9 July 2004, of R42,50 less a discount of 4,71%, which the Board of

SBG considers important for the sustainability of the Black ownership initiative, reducing as it does the eventual cost of redemption of the preference share. The ordinary shareholders will, however, dispose of the shares "*ex div*", retaining a probable dividend of 50,5 cents per ordinary share payable on 13 September 2004, resulting in an overall discount of 3,57%.

In order for the SBG subsidiaries to acquire the shares in terms of the Scheme SBG will subscribe for redeemable preference shares in each of the subsidiaries. SBG is in funds to capitalise the SBG subsidiaries in this way.

I must also mention that there are a number of conditions precedent to the Scheme. They are those which are appropriate to a Scheme of this nature, and involves special or ordinary resolutions of SBG, and court sanctions of the Scheme. The Registrar of Banks has given the requisite approval and the Committee of the JSE approved the circular to shareholders. I was satisfied, on the papers presented to me, that all conditions precedent were met or will be met in due course.

The Scheme of Arrangement – Liberty

[9] The Liberty Scheme of Arrangement is essentially in its structure form and substance similar to the SBG Scheme. Accordingly I do not intend to set out this Scheme in great detail.

[10] Liberty's ordinary shares are listed on the JSE. Liberty is also registered as a long-term insurer in terms of the Long-Term Insurance Act No. 52 of 1998. Liberty's authorised share capital of R40 000 000,00 comprises 400 000 000 ordinary shares of 10 cents each and its issued share capital of R27 584 773,00 comprises 275 847 728 ordinary shares of 10 cents each. All of Liberty's issued shares are fully paid up.

[11] As in the case of SBG, Liberty acquired certain wholly-owned empowerment subsidiaries. The object of the subsidiary is to hold shares in Liberty acquired in terms of the Scheme. In terms of the Scheme each shareholder of Liberty who is recorded in the Register of Members on 5 November 2004 will be deemed to dispose of 9,35 ordinary shares for every 100 ordinary shares held by that Scheme participant in the issued share capital of the applicant to the empowerment subsidiaries. In consideration for the disposal by a Scheme participant of each share, each Scheme participant will receive R48,50 per Scheme share from the empowerment subsidiaries jointly and severally. In order to enable the empowerment subsidiaries to pay the Scheme consideration, Liberty will, immediately prior to the time at which the Scheme consideration becomes payable by the empowerment subsidiaries to the Scheme participants in terms of the Scheme, subscribe for variable rate, redeemable, cumulative preference shares having a nominal value of R0,01 each in each empowerment subsidiary. Liberty will pay each empowerment subsidiary a subscription price equal to the aggregate Scheme consideration payable by that empowerment subsidiary to the Scheme participants. The aggregate subscription price payable by Liberty to the empowerment subsidiaries is R1 251 116 000,00. After implementation of the Scheme Liberty will dispose of all the ordinary shares it holds in the

subsidiaries to Black companies. Thereafter Liberty will hold only preference shares in the empowerment subsidiaries and the Black companies will, through the empowerment subsidiaries and subject to the rights of the preference shares, enjoy ownership of the Scheme shares.

[12] Thus Liberty Life has identified two Black Empowerment companies being Safika Holdings (Pty) Ltd and Shanduka Group (Pty) Ltd as Black Empowerment partners. They form the Tutuwa Consortium. In addition, Liberty Life believes that one of the most effective ways to achieve broad-based empowerment is to empower its Black staff. To this end, the ordinary shares in the empowerment subsidiaries will ultimately be acquired by certain Trusts for the benefit of Black managers and Black directors of the Liberty Life Group. In addition, Liberty Life intends to facilitate the empowerment of selected Black regional, education, community and other empowerment groups. As I have already stated, to implement the Scheme Liberty acquired four wholly-owned subsidiaries. These subsidiaries are: Lexshell 620 Investments (Pty) Ltd, Lexshell 621 Investments (Pty) Ltd, Lexshell 622 Investments (Pty) Ltd and Lexshell 623 Investments (Pty) Ltd. Liberty also provided for the participation of its Black employees, community-based organisations and Black business. I was satisfied that Liberty was in funds to capitalise the empowerment subsidiaries. I am equally satisfied that Liberty can and will comply with a number of conditions precedent.

[13] Liberty will also require approval in terms of the Long-Term Insurance Act. It is not within the scope of this judgment to deal with this aspect. Suffice to say that the matter can be dealt with at the next hearing after the Registrar of Long-Term Insurance files his report.

Section 311 of the Act

[14] Before the applicants can move for the order that they seek they must satisfy the court that the procedure in section 311 of the Act is appropriate and that no other procedure is practically available. The applicants must also persuade the court that all the requirements for an order in terms of section 311 have been met.

See: *Ex Parte Lomati Landgoed Beherende (Edms) Bpk; Ex Parte Lomati Landgoed (Edms) Bpk* 1985 (2) SA 517 (WLD).

The authorised share capital of SBG is R193 000 000,00 divided into 1 750 000 000 ordinary shares of R0,10 each, 8 000 000 6,5 % first cumulative preference shares of R1,00 each and 1 000 000 000 non-redeemable, non-cumulative, non-participating preference shares of R0,01 each. The issued share capital of SBG is R142 950 000,00 divided into 1 346 483 867 ordinary shares of R0,10 each, 8 000 000 6,5% first cumulative preference shares of R1,00 each and 30 000 000 non-redeemable, non-cumulative, non-participating preference shares of R0,01 each.

Liberty has some 275 000 000 shares in issue spread between a multiplicity of shareholders.

It is plainly not practically possible for the applicants to enter into and reach agreement over the Scheme transaction with each of their respective shareholders. It is section 311 of the Act that provides the solution to this problem. Section 311 of the Act provides:

> "***311. Compromise and arrangement between company, its members …***
>
> *1) Where any compromise or arrangement is proposed between a company and … its members or any class of them, the court may, on the application of the company, … order a meeting of … the members of the company or any class of them … to be summoned in such manner as the Court may direct.*"

Section 312 of the Act deals with the form of notice required to summon a meeting. Section 312(1) provides:

> "*312(1) Where a meeting of creditors or any class of creditors or of members or any class of members is summoned under s. 311 for the purpose of agreeing to a compromise or arrangement, there shall –*
>
> *a) with every notice summoning the meeting which is sent to the creditor or member, be sent also a statement –*
>
> *(i) explaining the effect of the compromise or arrangement;*
>
> *(ii) stating all relevant information material to the value of the shares and debentures concerned in any arrangement; and*
>
> *(iii) in particular stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement,*

insofar as it is different from the effect on the like interests of other persons; and

b) in every notice summoning the meeting which is given by advertisement, be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement. "

The purpose of section 311 of the Act is to provide a solution of the problem attendant upon attaining an agreement in the case of a large number of widely distributed people who must be contacted with a view to negotiating the same agreement with each one. Section 311 of the Act is applicable, as in the present case, where it is practically not possible to approach each of the shareholders individually in order to submit the offer.

See: *Ex Parte Lomati (supra)* at page 517I-J.

The arrangement contemplated by section 311 are of the widest character and the only limitations are that the Scheme cannot authorise something contrary to the general law or wholly *ultra vires* the company.

See: *Du Preez v Garber: In re Die Boerebank Bpk* 1963 (1) SA 806 (W) at 812.

However, this does not mean that literally any arrangement between a company and its members or creditors is an arrangement within the meaning

of section 311. What is contemplated is a Scheme that has as its object the affecting of the respective rights and obligations *inter se* of the company and its members or creditors.

See: *Ex Parte NBSA Centre Ltd* 1987 (2) SA 783 (T) at 786-789.

Henochsberg on the Companies Act – Meskin page 601-602.

Having considered the Scheme of Arrangement in the applications before me, I am persuaded that the procedure in section 311 is appropriate and that agreement over the Scheme transaction cannot be practically achieved by some other convenient means.

See: *Ex Parte Mielie-Kip Ltd* 1991 (3) SA 449 (WLD).

[15] The court has a discretion whether or not to order a meeting under section 311 of the Act. The court's discretion is wide-ranging and it is therefore not appropriate to formulate a precise method of approach that can be regarded as correct in all cases. However, the following guidelines are helpful.

What is required is that:

15.1 The circumstances under which the proposed arrangement arises ought to be set out in the application.

15.2 The proposal must fall within the ambit of section 311 of the Act.

15.3 The nature of the meeting and the terms of the proposal must be brought to the attention of the members concerned. In this regard it is the practice of this Court to require a draft explanatory statement in terms of section 312(1)(a) to be attached to the application for the court's perusal.

15.4 The court should be satisfied that it is reasonable to believe that the required majority will approve the proposal at the meeting.

15.5 There should be nothing in the proposal or in the circumstances in which it is put forward to show that no court could possibly sanction the proposal even if approved by the necessary majority.

15.6 If the proposal is subject to any conditions (that is over and above the court sanction), it should appear that the circumstances are such that it is likely that those conditions will be fulfilled before the sanction stage.

15.7 In addition to the aforegoing, it is the practice of this Court that the proposed Chairman is shown to be independent.

See LAWSA, First Reissue, Volume 4 Part 3 paragraph 67 page 71.

On the papers before me the applicants have met the above requirements. I am further satisfied that the applicants have complied with the provisions of section 312 of the Act. An explanatory statement explaining the effect of the proposed Scheme of Arrangement was provided. A valuation statement setting out information material to the value of the shares was attached to the papers. I also had access to the information required in terms of the JSE Listings Requirements in which the nature and purpose of the transactions is simply explained. (This is a useful document for the presiding judge to read when considering an application of this nature.) As is required a statement from independent merchant bankers, in this case J P Morgan, was provided and there was full disclosure of the interests of the directors. A notice which the applicants intend to give by advertisement and the form of the proxy was presented to me. I am satisfied that all the relevant information is given. It is a requirement or practice that the chairperson of the proposed meeting be independent. In this case the applicants proposed Mr I V Maleka SC be the chairperson of the Scheme Meeting. I am satisfied that he will act properly and with the independence expected of him.

Section 38 of the Act

[16] As appears from the Scheme of Arrangement, an essential element is that S BG and Liberty, as holding companies, provide finance to their respective subsidiaries to acquire shares in their holding company. Prior to

1999 a Scheme of Arrangement of this nature would not have been possible by virtue of section 38(1) of the Act. Section 38(1) precludes a company "*from giving, whether directly or indirectly, any financial assistance for the purpose of or in connection with the purchase or subscription of shares*" in itself, and it similarly precludes a subsidiary from financing the acquisition of shares in its holding company. This provision was a reflection of the common law prohibition on the purchase by a company of its own shares. The common law was directed at capital maintenance and the prevention of abuse of creditors and minority shareholders. The passing of Act No. 37 of 1999 ("*the Amendment*") has changed the position dramatically. The Amendment has effectively swept away much of the previously existing capital maintenance provisions of both the common law and under the Act. In my opinion the previous provisions under the common law and the Act became outdated and fell out of step with modern commercial reality.

[17] Since the Amendment, section 38(2)(d) expressly permits a holding company to give financial assistance to a subsidiary to enable it to purchase shares in the holding company. Section 38(2) of the Act, as now amended by the introduction of subsection (d), reads as follows:

> "*(d) The provisions of subsection (1) shall not be construed as prohibiting:*
>
> *a)* …
> b) …
> c) …

d) *The provision of financial assistance for the acquisition of shares* ***in a company by the company or its subsidiary*** *in accordance with the provisions of section 85 for the acquisition of such share.*" (my emphasis)

Before dealing with section 38 further, it is necessary to mention, for purposes of this judgment, sections 85 to 89 of the Act, again as amended by Act No. 37 of 1999. In particular section 85(1), 85(2) and 85(4) are relevant and provide as follows:

"*85(1) Subject to the provisions of this section and any other applicable law, a company may by special resolution of the company, if authorised thereto by its articles, approve the acquisition of shares issued by the company.*

(2) The approval by special resolution may be a general approval or a specific approval of a particular acquisition.

(3) …

(4) A company shall not make any payment in whatever form to acquire any share issued by the company if there are reasonable grounds for believing that -

a) the company is, or would after the payment be, unable to pay its debts as they become due in the ordinary course of business; or

b) the consolidated assets of the company fairly valued would after the payment be less than the consolidated liabilities of the company. "

Section 89 of the Act is relevant to the Scheme Arrangement proposed by the applicants and it reads as follows:

"*89. Subsidiary companies may mutatis mutandis in accordance with sections 85, 86, 87 and 88, acquire shares in their holding company to a maximum of 10% in the aggregate of the number of issued shares of the holding company: …* "

This is the type of transaction which forms part of the Scheme of Arrangement in this application. A subsidiary of a company may now acquire up to a maximum of 10% of its holding company's issued shares in accordance with sections 85 to 88 of the Act. The effect of section 89 is that if a company has more than one subsidiary, the subsidiary companies may not between them, acquire more than 10% in the aggregate of the shares in their holding company.

See: Henochsberg (*supra*) page 186 (2).

In this application, the subsidiaries of both SBG and Liberty will acquire, in terms of the Scheme of Arrangement, no more than 10% of the issued shares in SBG and Liberty.

[18] With the coming into effect of the amendment, the position is that, subject to compliance with the provisions of section 85, a company may acquire its own shares. Section 85(1) of the Act now allows a company to approve the acquisition of its own shares subject only to two requirements namely that the acquisition be authorised by the articles and that approval be given by way of special resolution. This effectively repealed the common law rule that a company could not purchase its own shares and replaced the outdated requirement of capital maintenance with the modern dual requirement of solvency and liquidity.

See: *Capitex Bank Ltd v Qurus Holding Ltd and Others* 2003 (3) SA 302.

"*The new statutory provisions on Company Shares Repurchases: A Critical Analysis* – F H I Cassim (1999) 116 SALJ 760.

[19] Returning to section 38 of the Act, section 38(2)(d) must be interpreted against the background of the prohibition contained in section 38(1). Section 38(1) contains two separate prohibitions namely that a company whose shares are being acquired is prohibited from giving financial assistance for that purpose, and a subsidiary was also prohibited from giving financial assistance for the purpose of acquisition of shares in its holding company. With the coming into effect of section 38(2)(d) a company may acquire its own shares in terms of section 85 and a subsidiary may acquire shares in its holding company in terms of section 85. Section 89 allows a subsidiary to acquire shares in its holding company, section 89 refers to sections 85 to 88. Section 38(2)(d) does not mention section 89. In my view this does not create any problems of interpretation.

See: "*Financial Assistance for the Acquisition of Shares in Accordance with Section 85 of the Companies Act – A Reply to Delport*" – Kathleen van der Linde (2001) 13 SA Merc LJ.

In *Blackman et al, Commentary on the Companies Act* Vol 1, pages 4-66; 5-67, the authors question whether the reference in section 38(2)(d) to section 85 is a mistaken reference to section 89. Mr H Slomowitz SC, who appears for the applicants, pointed out in this regard that if they are correct, then, by their own definition, a subsidiary may obtain assistance from its holding company to buy shares in the latter. Patently, however, they are wrong, because if the reference to section 85 is incorrect, the words "*by the company*" in the subsection have no meaning. In addition, they must perforce ignore the express words in section 38(2)(d), which permit of financial assistance being afforded to subsidiaries to acquire shares I their holding companies. They also overlook the fact that section 89 makes section 85 applicable *mutatis mutandis* to such transaction.

[20] I am satisfied that section 38(2)(d) permits a holding company to give financial assistance to a subsidiary to purchase shares in the holding company. Note that the section provides in express terms that section 38(1) is not to be read as prohibiting "*the provision of financial assistance for the acquisition of shares in a company by the company or (by) its subsidiary*". Since a company could not, prior to 1999, at common law purchase its own shares, and since formally, section 39(1), now amended, precluded a subsidiary from being a member of its holding company, it seems plain that the introduction of section 38(2)(d) was to facilitate the very transactions now permitted by sections 85 and 89 by exempting them from the rigour of section

38(1). I am further in agreement with the views expressed by Van der Linde (*supra*) at page 442. Section 38(2)(d) is indeed a useful provision. Plainly but for the amendment many Black economic empowerment transactions will not see the light of day. Consequently section 38(2)(d), in my view, plays an important role in transformation within main stream commerce in our country. Accordingly, section 38(2)(d) can be summarised as having the following effect:

A subsidiary may give financial assistance (to its holding company or any other person) in connection with the acquisition by the holding company of its (the holding company's) own shares.

A holding company may render assistance (to its subsidiary company or to any other person) in connection with the acquisition by the subsidiary of shares in the holding company.

A co-subsidiary of a subsidiary acquiring shares in its holding company may give assistance (to the subsidiary or any other person) in connection with the acquisition by the subsidiary of shares in the holding company.

If it were not for the exception created by section 38(2)(d), the financial assistance would in all these three instances have been prohibited by section 38.

[21] I was persuaded that, in respect of both applicants, the required

majority will approve the proposal at the meeting. Moreover, there is nothing in the proposal or in the circumstances under which it is brought to show that no court could possibly sanction the proposal after approval by the necessary majority.

Accordingly I granted the orders that are annexed to this judgment marked “A” and “B”.

In conclusion I must express my gratitude to Mr H Z Slomowitz SC for his assistance in these applications.

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I HUSSAIN
JUDGE OF THE HIGH COURT

ACTING FOR THE APPLICANTS IN BOTH APPLICATIONS	MR H Z SLOMOWITZ SC MR J BLOU MR M ZULU
ATTORNEYS FOR SGB	BOWMAN-GILFILLAN INC
ATTORNEYS FOR LIBERTY	WERKSMANS ATTORNEYS
DATE OF JUDGMENT:	5 JUNE 2006