

## 10.5 COMPROMISE IN TERMS OF SECTION 311 OF THE COMPANIES ACT 61 OF 1973

1. Every chairperson and alternate chairperson must be identified by name. It must be proved that such person is not a professional advisor of and has no direct or indirect interest in the offeror, in the company or in a holding company or a subsidiary of any of them.
- 2.1 The proposed statement in terms of section 312 must be attached to the application. To limit costs, the facts therein which require proof must be repeated in the affidavit only by way of an appropriate reference to the statement as is meant in *Ex parte De Villiers 1993 1 SA 493 (A) at 508H-I*.
- 2.2 The statement must not amount to an abbreviated repetition of the terms of the compromise but must explain its impact in terms which are readily understandable by a layman. The statement must explain what will happen to an affected party's interest if the scheme is approved; what conditions precedent and other risks of failure are operative and what the prospects are about those risks; what must be done to obtain and to enforce rights created by the scheme; how those rights may be lost; how the party will be informed of or can gain knowledge of fulfilment of conditions like approval of some third party; and what must be done to enable the party to vote.
- 2.3 The statement may be compiled by an accountant, liquidator or other person with adequate knowledge of the facts and must state the name of its author.
  - 2.3.1 The statement in terms of section 312(1)(a)(i) must be approved of by the court in advance and must therefore form part of the application.
  - 2.3.2 That statement must be in a document which is separate from the applicant's statement in compliance with section 312(1)(a)(ii) and separate from any other information (the information which explains why the scheme is a good idea rather than what its impact will be) which the applicant intends putting before interested parties, whether in order to comply with a requirement of some body or of its own volition.
  - 2.3.3 The statement and the actual scheme of arrangement must be forwarded to interested parties in a way which contrast them from documents about which the court made no finding, by way of binding them separately, using pages with a different colour, or making the distinction with a blank page and clear headings.
  - 2.3.4 The papers sent to interested parties must commence with the said statement, followed by the scheme of arrangement and then followed by such other documents as the applicant may have in mind.
  - 2.3.5 Reasons for any opinion that the offer is fair and reasonable must be stated in an affidavit by the individual or individuals who provided the opinion.
3. The court must be informed about the extent to which parties who are entitled to vote are not from the Witwatersrand. If the court is not so informed it will incline to require publication in a newspaper with

national circulation in its dominant language and in another official language in a national newspaper which is in circulation in the province wherein the company carried on business.

4. The order must -
  - 4.1 require proof of giving notice in accordance with membership according to both the company's register and the sub-register of all CSDP's;
  - 4.2 allow shareholders sufficient time to obtain powers of attorney from their CSDP's;
  - 4.3 if relevant information is to be ascertained or published only in the future, allow shareholders sufficient time to receive that information, to consult with their advisers and to get a response to the place where the meeting is to be held.
5. Unless expressly otherwise directed, the court order need not be published in any newspaper. The application must be drafted so as not to ask for such publication. The notice convening the scheme must be published.
6. The chairperson must forthwith
  - 6.1 cause a notice convening the meeting which substantially conforms with the annexure hereto to be published in an official gazette and such newspaper as the court directs, on a date which is at least two weeks prior to the date of the meeting; and
  - 6.2 send the following by prepaid registered post to each creditor of the company:
    - 6.2.1 A copy of the court order.
    - 6.2.2 A copy of the offer to compromise.
    - 6.2.3 A copy of the statement in terms of sections 312(1) and (2) of the Act.
    - 6.2.4 A form which can be used as proxy.
    - 6.2.5 A statement showing
      - 6.2.5.1 the amount for which the creditor is reflected in the company's records as a creditor of the company and the extent to which he is reflected as a preferent or as a secured creditor;
      - 6.2.5.2 the company's asset and the values thereof;
      - 6.2.5.3 the aggregate amounts due to (a) secured, (b) preferent and (c) concurrent creditors;
      - 6.2.5.4 the amount which creditors claim to be owing to them, the validity of those claims; and what security is held therefor;
  - 6.3 A notice which accords with the annexure hereto should form the front page of the documents sent to a creditor. If not, the front page must explain the essence of the scheme in simple terms. In either event the words explaining the scheme must appear in bold print.
7. If reason arises for regarding one or more creditors as a class of creditors which possibly should, in the order authorising the convening of the meetings, have been recognised as a further class of creditors, the votes of any creditor who may be in that class shall be cast, counted and reported on separately.

8. The chairperson must report to the court on
  - 8.1 the grounds, if any, for concluding that one or more creditors constitute such an additional class of creditors;
  - 8.2 the number of creditors who attend in person;
  - 8.3 the number of creditors who were represented by proxies and which thereof was represented by the chairperson in terms of proxies;
  - 8.4 the amount of the claims of those creditors;
  - 8.5 which proxies were rejected;
  - 8.6 each resolution taken at any meeting with particulars of the number of votes cast in favour and against each resolution and the number of abstentions, stating the number of votes cast by the chairperson by virtue of proxies;
  - 8.7 each ruling of the chairperson at a meeting;
  - 8.8 the salient qualities of every other offer of compromise which was open for consideration at a meeting.