REPORTABLE

CASE NO.: SA 80/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WEATHERLY INTERNATIONAL PLC **Appellant**

and

DAVID JOHN BRUNI AND IAN ROBERT McLAREN
(THE RECEIVERS) **First Respondents**
DEPUTY SHERIFF **Second Respondent**

Coram: MAINGA JA, CHOMBA AJA and O'REGAN AJA

Heard: **2 July 2013**
Delivered: **15 November 2013**

APPEAL JUDGMENT

CHOMBA AJA (MAINGA JA and O'REGAN AJA concurring):

[1] The main issue which was hotly contested and which this Court has been called upon to consider and resolve is whether a compromise or arrangement which a

debtor corporate body enters into with its creditors and receivers becomes executable solely by reason of it having been sanctioned by order of the High Court pursuant to s 311 of the Companies Act, No 61 of 1973 (the Act). Before entering upon a discussion of that issue, it is apposite to briefly refer to two minor issues which were raised on the papers but which never raised much controversy. The first was condonation and the second related to competence to raise on appeal a legal issue which was never canvassed in the Court *a quo*.

The condonation issue

[2] The Court below in this matter delivered its judgment on 14 September 2011. It is prescribed under sub-rule (5)(b) of rule 5 of the Rules of the Supreme Court that the record of an intended appeal against such judgment must be filed within 3 months from the date of judgment. In the present case, therefore, the appeal record should have been filed by 13 December 2011, but it was not. By sub-rule (6)(b), *ibid,* it is provided that if an appellant has failed to lodge the record within the prescribed period, he or she shall be deemed to have withdrawn his or her appeal. In order to pursue the appeal in the instant case, Ms Elize Mutaleni Angula, legal practitioner for the appellant, applied for condonation for the late filing of the record and the reinstatement of the appeal pursuant to rule 18 of the said Rules. In the affidavit accompanying the application she explained that, acting on the appellant's instructions to appeal, and having thereafter received a favourable opinion from counsel regarding the prospects of success, she diarised that the record of appeal should be filed on 16 January 2012. She subsequently filed the record on 19 January

2012. However, she later realised that in doing so she had failed to comply with the rules of this Court as reflected above and therefore apologetically deposed that she was genuinely mistaken in filing the record on the said date. She has added that contemporaneously with the making of that mistake, she experienced personal difficulties at her place of work, leading to her resignation temporarily. It was only upon her return to work, that she caused the appeal record to be compiled and later filed as stated. She finally deposed that despite the late filing of the record, the respondents had not been prejudiced. The latter did not oppose the application. Against that background, and as the delay was for just over one month, the Court felt that a good case had been made out for granting condonation for the late filing of the record and the reinstatement of the appeal and, therefore, made an order accordingly.

Competence to raise a legal point not raised at trial

[3] The second minor moot point concerned the propriety of raising at appellate level a legal issue which was never raised at first instance. Counsel on both sides were, however, *ad idem* in recognising that there was ample authority to the effect that a legal issue not previously raised at a trial could be raised on appeal if the legal issue is covered by the pleadings and no unfairness to the other party would result. This was also the approach adopted by this Court in *A.J. Nekwaya t/a Checkers Wholesalers & Supermarket v Younus Cachalia t/a Younus Cachalia Wholesales and Another, SA 12/2001* (unreported) delivered on 18 March 2003. In that case we held that a party to an appeal can raise a legal issue for the first time on appeal even though no prior notice of it was given to the other side, provided that the issue was

covered in the printed record of proceedings obtaining in the Court below and it is in the record of appeal; in such case the other side will be granted an adjournment in order to prepare its response. Further, *Metals Australia Ltd and Another v Amakutuwa and Others* 2011 (1) NR 262 (SC) presented the same issue for consideration by this Court. After full argument by counsel for the parties the Court adopted the following approach:

> 'Where a new legal point is raised on appeal, two questions arise: is the point covered by the pleadings and would there be any unfairness to the other party were it to be raised on appeal. If the legal point is covered by the pleadings, and no unfairness to the other party would arise, then "the court is bound to deal with it".' (at para [22])

As stated already, this issue did not raise any controversy and the Court therefore resolved to, and did, allow counsel for the appellant to raise the new issue. It is worthy of note that the new issue was in fact the one which was hotly debated as stated in the opening paragraph hereof.

[4] Before discussing the new legal point I must mention that in the Court *a quo* the platform on the basis of which the parties fought this case related to the issue whether it was competent in law for a debtor company to delegate or cede its obligations (in this case Weatherly's alleged indebtedness in the sum of N$10 492 084,39) under a compromise to a third party without the consent of the company's receivers as representatives of its creditors. The learned Judge in the Court *a quo* resolved that it was not so competent. In fact, he held that a delegation of obligations

made in such circumstances produces a sham cession. The debtor, which is the present appellant, was aggrieved by that verdict and hence the appeal. Initially the appeal was tailored to impugn that verdict, but in the intervening period the appellant resolved instead to base its appeal principally on the main issue aforementioned.

Factual background

[5] For a better appreciation of the circumstances surrounding the new legal point, it is opportune to outline the background from which the compromise ensued. In doing so, I shall begin by identifying the parties in the present matter. Weatherly International Plc (Weatherly) is a public listed company under the laws of the United Kingdom of Great Britain. Its registered address is City Point, Ropemaker Street, London, EC2Y 9AW, United Kingdom. It is a holding company with several subsidiary companies operating in Namibia. None of these operating companies is a player in these proceedings and therefore it is unnecessary to identify them by name. Roderick John Webster, an adult male businessman resident in London, U K, is Weatherly's Chief Executive Officer. He is the one who instituted the Court action leading to the current appeal. David John Bruni and Ian Robert McLaren, having their business address at Hidas Centre, 21 Nelson Mandela Avenue, Klein-Windhoek, Windhoek, are the joint receivers standing in for the creditors of Weatherly. They are the first respondents. The Deputy Sheriff of Windhoek, having his/her principal place of business at 4 Hamman Street, Klein-Windhoek, Windhoek, is the second respondent. I hasten to mention that the inclusion of the Deputy Sheriff in the litigation was a mere formality as no claim was made against him/her in the proceedings.

On 19 June 2006 Weatherly presented an *ex parte* application before Honourable Lady Justice van Niekerk for an order in terms of s 311 of the Act. That order was replicated by a similar *ex parte* order granted by Honourable Justice Acting Botes on 17 July 2006. The two orders constituted one order the effect of which was the sanctioning of the compromise termed an 'offer of compromise between Ongopolo Mining and Processing Limited (the company), its subsidiaries (the group) and its/their creditors, in terms of s 311 of the Companies Act No 61 of 1973, as amended, which has been proposed by Weatherly International Plc'. This is the compromise which is at the centre of these proceedings. By clause 12 of the compromise, Weatherly was empowered '… at any time and whether before or after the date of sanction, to cede, assign or delegate all its rights and obligations hereunder'. (Emphasis added.)

[6] The compromise stipulated that, to avoid the operating companies going under, Weatherly would undertake to pay their debts by instalments. Weatherly thus became the principal debtor. By the same instrument, the first respondents were appointed receivers on behalf of Weatherly's creditors. In the proceedings *a quo* the stance taken by the respondents was that because Weatherly had defaulted in its instalment payments to the tune of N$10 492 084,39, they were entitled to execute on the compromise and, therefore, on 1 June 2009 they had obtained a writ of execution against it. However, Weatherly contended that by virtue of the power vested in it under clause 12 of the compromise, on 26 March 2009, it had ceded and delegated all its rights and obligations under the compromise to a third party, namely Weatherly

SMF St. Lucia Limited (Weatherly SMF), a company having its registered office at 46 Micoud Street, Castries, St. Lucia. Therefore, so Weatherly's contention went, as of 1 June 2009 it no longer owed the said debt as its indebtedness had been transferred to Weatherly SMF. It, consequently, further argued that the receivers' attempt to execute was directed against the wrong party. For the foregoing reason, Weatherly applied to the High Court for an order to the following effect, *viz:*

> 'That the warrant of execution dated 1st June 2009 and issued by the Registrar of the High Court in favour of the Receivers against the Applicant … be set aside;
>
> Alternatively that the said warrant be suspended pending further litigation by any interested party.'

For reasons which I need not go into for the purpose of this judgment, the application was unsuccessful.

Whether it is competent to execute on a compromise

[7] Since the new legal issue revolves around the interpretation of s 311 of the Companies Act, it is necessary to reproduce in full its relevant provisions. They are as follows:

> **311. Compromise and arrangement between company, its members and creditors.**
>
> (1) Where any compromise or arrangement is proposed between a company and its creditors or any class of them or between a

company and its members or any class of them, the Court may, on the application of the company or any creditor or member of the company or, in the case of a company being wound up, of the liquidator, or if the company is subject to a judicial management order, of the judicial manager, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be) to be summoned in such manner as the Court may direct.

(2) If the compromise or arrangement is agreed to by –

(a) a majority in number representing three-fourths in value of the creditors or class of creditors, or

(b) a majority representing three-fourths of the votes exercisable by members or class of members,

(as the case may be) present and voting either in person or by proxy at the meeting, such compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or class of creditors, or on the members or class of members (as the case may be) and also on the company or on the liquidator if the company is being wound up or on the judicial manager if the company is subject to a judicial management order.

(3) – (5) …

(6) (a) An order by the Court sanctioning a compromise or arrangement shall have no effect until a certified copy thereof has been lodged with the Registrar (of Companies) under cover of the prescribed form and registered by him.'

[8] The new legal issue was fully canvassed by both sides in their heads of argument and therefore the respondents did not complain of not having had adequate notice to prepare to argue it. Consequently, counsel who appeared before us at the hearing of the appeal, namely Mr Coleman, representing the appellant, and Mr Mouton, for the respondents, made full submissions on it. In the opening paragraph I stated that issue in terse terms, but it is important to couch it amply. The issue is whether upon its being sanctioned by Court as shown above, the compromise *per se* sufficed as a spring-board for obtaining a writ of execution against Weatherly so as to enforce a term of the compromise (namely to recover the amount of N$10 492 084,39 which Weatherly had allegedly defaulted in paying), without first going through the process of obtaining a regular Court judgment against Weatherly. In short, is a sanctioned compromise executable? Mr Coleman's contention was that it was not, but Mr Mouton argued to the contrary. However, before embarking on a consideration of the arguments which both counsel put forward to buttress their respective positions, let me begin by examining some basics.

[9] *Black's Law Dictionary* defines a writ of execution as: 'A Court order directing a sheriff or other officer to enforce a judgment . . .'. By way of illustration it adds, 'A writ of execution is an authorization to an executive officer, issued from a Court in which a final judgment has been rendered, for the purpose of carrying the judgment into force and effect. It is founded upon the judgment . . .'. (My emphasis.) And to the term 'judgment' are assigned two definitive examples, viz: '1. A Court's last action that settles the rights of the parties and disposes of all issues in controversy. 2. A Court's

final determination of the rights and obligations of the parties in a case'. (My emphasis.) (See the 8th ed, pp 609 and 859). So, it may be said that the essence of a judgment is to finally prescribe parties' rights and thereby dispose of all issues in controversy. With the judgment in hand a judgment creditor, as of right, can then proceed to secure a writ of execution as a means of enforcing the judgment. The judgment is, therefore, the bedrock from which the writ of execution springs. It is a condition precedent to obtaining a writ of execution.

[10] In an effort to conform to the definitions afore-stated, the respondents couched their writ of execution in words suggesting that the amount of N$10 492 084,39 was awarded consequent upon court judgments obtained on 19 June and 17 July 2006. However, in the affidavit verifying the application for the writ, Ian Robert McLaren, one of the two respondents, swore that on those very dates of 19 June and 17 July 2006, the Court sanctioned the subject compromise in terms of s 311. In other words, what happened in this case is that the respondents believed that the very act of sanctioning the compromise was sufficient to constitute the compromise as a springboard for obtaining the writ of execution. This suggests that the sanctioned compromise was by implication equated to a judgment. The question is whether such equation was properly drawn.

[11] The sanctioning of a compromise begs the question whether that action by itself finally disposes of all matters in controversy amongst the parties. One or two examples will suffice to glaringly show that that is not the case. As already stated,

clause 12 of the compromise in the present case empowered Weatherly to, ‘at any time and whether before or after the date of sanction, to cede, assign or delegate all its rights and obligations hereunder.’ Further, clause 3.2.3 gave Weatherly power at any time to waive in whole or in part some conditions precedent to the offer of compromise. Both these provisions in the compromise can therefore be said to have created potential bases for arousing controversy notwithstanding the sanctioning of the compromise. Those bases remained intact even after the sanctioning. In other words, the sanctioning did not finally dispose of them.

[12] The fact that matters of potential controversy are not finally disposed of by virtue of the sanctioning, must inevitably mean that they remain litigable even after sanctioning. To the contrary when a Court delivers a judgment, the issues in dispute are finally disposed of and the judgment is etched in stone. It usually takes full effect immediately after it is pronounced and any terms of it can only be changed by the Court itself, either *suo motu* or on application and notice to other interested parties. In the ultimate, I have come to the conclusion that the apparent equation which the respondents drew between a compromise and a judgment was fallacious.

The nature of a sanctioned compromise or arrangement

[13] It will be helpful to analyse more fully the nature of a compromise or scheme of arrangement that has been sanctioned by a Court in terms of s 311 of the Companies Act. That section creates a mechanism whereby a company may enter into an agreement with its members and/or creditors without requiring the agreement of every

single member and/or creditor. (see *Ex parte NBSA Centre Ltd* 1987 (2) SA 783 (T) at 787G; see also discussion in Meskin *Henochsberg on the Companies Act,* 5th ed. Vol.1 *(*Butterworths, Durban) at 601 where the author states that s 311 '… provides the means by which a compromise or arrangement between a company and its creditors or members, or any class of either, may be established. Its salient features are that (i) unanimous agreement to the compromise or arrangement is not required but (ii) the agreement to the compromise or arrangement by the majorities envisaged by sub-sec (2) has no effect without its being sanctioned by the Court'.) Once a Court has sanctioned the compromise or scheme of arrangement, the compromise or arrangement becomes binding on all, even those who have not consented to it. (See s 311(2) of the Act). The nature of the sanctioned compromise was described by Coetzee DJP in *Ex Parte Kaplan NNO: In re Robin Consolidated Industries* 1987 (3) SA 413 (W) at 419B-C as follows:

> 'Because the purpose of the section is to create the machinery to bind a dissenting recalcitrant minority to the agreement between the company and the majority, "agreement" would have been inapposite to describe the result. Hence "arrangement". But that does not detract from its central characteristic which is plainly contractual, albeit compulsory in respect of the minority.'

[14] There are clear dicta by both Namibian and South African Courts affirming that an arrangement or compromise sanctioned by a Court does not constitute an order of Court. For example, Hiemstra J in *Ex parte De Wet NO: in re Mackville Motors (Pty) Ltd (in liquidation)* 1971 (1) SA 256 (W) at 258A reasoned as follows:

> '…. To sanction the compromise does not mean that its terms become an order of Court. It means that the parties to the arrangement are authorized to go ahead with it, and they are bound to it.'

He continued:

> 'As I have said the sanctioning of a compromise does not turn the compromise into an order of the Court. To contravene its terms is not contempt of Court. The compromise is contract which derives its binding force from the fact that it was approved by the Court in terms of a statute. This provision was necessary in order to make the minority, which would otherwise not be bound, subject to the arrangement.'

(*Id.* at 258C–D; see also *Administrateur-Generaal vir SWA v Hotel Onduri* 1983 (4) SA 794 (SWA) at 801 (per Strydom J); *Ex parte Ensor NO: In re Cape Natal Litho (Pty)* Ltd 1978 (3) SA 908 (D) at 911A – D (per Didcott J).

It is also clear; as the respondents' counsel argued that the effect of the sanctioning of a compromise or arrangement will often, depending on all the circumstances, result in the novation of the earlier debts or contracts. (See *Ex parte Currie, NO* 1966 (4) SA 546 (D) at 554E–F.) However, the novation does not in law change the character of the compromise or arrangement; it remains rooted in contract.

[15] The Zimbabwean courts have endorsed a similar approach. In *Parker v WGB Kinsey & Co (Pvt)* 1988 (1) SA 42 (ZS) at 47D–H, Gubbay JA, as he then was, reasoned as follows:

> ‘To my mind, it is of fundamental importance to have regard to the effect of the sanctioning of a compromise or arrangement, … I comprehend it to be this: the sanction is not an order of the Court *ad factum praestandum*, a contravention of which is punishable by contempt of Court. It merely gives the compromise or arrangement contractual force as between those bound by it, deriving such force, not from their actual consent, but by operation of law. The rights and obligations of the parties bound are determined by the terms of the compromise or arrangement, express or implied. They are not to be sought outside the confines sanctioned by the Court. Questions relating to the validity and interpretation follow normal contractual principles, for the act of sanction does not convert the compromise or arrangement into an order of the Court.’

[16] One of the cases to which counsel for the respondents referred us was a case in which a litigant was seeking to enforce the terms of a compromise. In *Cohen NO v Nel and Another* 1975 (3) SA 963 (W), the applicant who had been appointed receiver for the creditors of the company in respect of which an arrangement had been sanctioned by a court, approached the court for payment of amounts alleged to be due in terms of the arrangement. The procedure followed by the receiver makes it plain that the arrangement was not itself an order of the court upon which a writ of execution could be issued. Failure by a party to comply with the compromise required a further application on the part of the aggrieved party to court for an order before execution could be sought. Moreover, the need to approach a court makes good sense, because a dispute may well arise as to whether some or all the terms of a sanctioned arrangement have been observed. Permitting a dissatisfied creditor to immediately issue a writ of execution on the terms of the arrangement will not allow any determination of such disputes.

[17] In the light of the foregoing, I am satisfied that properly understood, the sanctioning of an arrangement by a Court in terms of s 311 of the Act does not mean that its terms become an order of the Court. Counsel for the respondents urged us to consider a different approach to the section. He asked us to treat the sanctioning of a compromise as an order of the court having the consequence of directing that amounts of money be paid. In this regard, he cited the early decision of *Swanepoel v Bovey* 1926 TPD 457. That case concerned an application for the committal of a judgment debtor who had failed to pay instalments due in terms of an order of court. The debtor had entered into an agreement with the creditor, which agreement was then made an order of court. The court held that a judgment debtor who fails to pay instalments in terms of a court order may not be committed for contempt unless a court order concerned a matrimonial suit. The remedy available to the creditor, held the court, were the remedies of execution against movable property. This case does not assist the respondents, however, for it does not concern a compromise or arrangement entered into in terms of s 311, nor any of its predecessor provisions. It appears to concern an ordinary agreement between two litigants (who, it must be emphasized, were a judgment creditor and judgment debtor) presumably in settlement of pending litigation, which they agreed to have made an order of the Court. As mentioned before, the sanctioning of a compromise in terms of s 311 is a different process. The role of the court arises, by and large, from the fact that the compromise or arrangement is not consented to by all parties, and the effect of the court sanctioning the arrangement or compromise is to render it binding, even on parties who did not consent to it.

[18] It was also argued on the respondents' behalf that an order by the court sanctioning the compromise or arrangement under s 311 is an order *ad pecuniam solvendam* (i.e. an order to pay a certain amount of money). Such orders are generally contrasted with orders where the Courts require a person to do something (an order *ad factum praestandum*). Non-compliance with the former does not entitle a dissatisfied judgment creditor to seek the committal of the judgment debtor who has failed to pay in terms of the court order. (See e.g*. Metropolitan Industrial Corporation (Pty) Ltd v Hughes* 1969 (1) SA 224 (T) at 230B–C; *Ferreira v Bezuidenhout* 1970 (1) SA 551 (O) at 554A-B.) There is a wealth of authority asserting that an order sanctioning a compromise or arrangement does not constitute an order *ad factum praestandum.* (See *e.g. Cohen NO v Nel and Another, supra,* at 968H.)

[19] It does not follow, however, that because an order sanctioning a compromise or arrangement is not an order *ad factum praestandum,* it is therefore an order *ad pecuniam solvendam.* There are at least two reasons why the respondents' counsel's argument in this connection cannot succeed. First, many compromises or arrangements sanctioned by a court will not sound in money: they may involve the transfer of shares or assets or the assignment of liabilities. Courts have held firmly that orders sanctioning compromises that impose such obligations are not orders *ad factum praestandum* as mentioned above. Accordingly, it would be inconsistent for a Court to conclude that an obligation imposed in a sanctioned compromise or arrangement that required the payment of money would constitute an order *ad pecuniam solvendam.* Secondly and more fundamentally, however, and as mentioned

above, the obligations that arise from a sanctioned compromise are contractual, albeit that the contract, at least in respect of the dissenting parties, has been imposed by the court's sanction rather than undertaken by consent.

[20] Counsel for the respondents also argued, apparently relying on *Morris NO v Airomatic t/a Barlows Airconditioning Co* 1990 (4) SA 376 at 398, that this approach to s 311 compromises is 'not complete nor jurisprudentially satisfying'. That case concerned the question whether a scheme of arrangement sanctioned under s 311 included claims that had been satisfied before the company had been provisionally liquidated. It is not readily apparent what the relevance of this case is to the appeal before us here. It is also not clear precisely what counsel meant by arguing that the outcome is not 'jurisprudentially satisfying'. What is clear is that s 311 is a provision that has an important role to play in permitting arrangements or compromises to be entered into, even where not every member or every creditor agrees. The consequence of a sanctioned compromise or arrangement, as set out above, is a form of court sanctioned contractual obligation that cannot, without more, give rise to an entitlement to execution.

[21] That a compromise or arrangement is in nature part of contract law is now so settled, as is shown by the authorities cited in this judgment, that one cannot start redefining it in the manner suggested by the respondents' counsel. Doing so would render the law unnecessarily uncertain. In the light of the views expressed in the preceding paragraphs, I find this appeal to be meritorious and would allow it.

[22] Regarding the question of costs, I feel that there is good reason in the present case to justify departure from the usual principle that the costs should follow the event on appeal. This is because the issue on which this appeal has succeeded was not raised in the Court below. Had the appellant raised it there, the possibility of an appeal might have been avoided. In any event, the likelihood of the Court not making any order as to costs was put to the appellant's counsel and he seemed not to have had any vigorous opposition to it. In the final analysis, therefore I make the following orders:

1. The appeal is allowed.

2. The order made in the High Court in this matter is set aside and replaced with the following order:

   '(a) The writ of execution dated 1 June 2009 and issued by the Registrar of the High Court against Weatherly International PLC is hereby set aside.

   (b) The applicant is ordered to pay the costs of the respondents in the High Court, on the basis of one instructed and one instructing counsel.'

3. Each party will bear its own costs in respect of the appeal to this Court.

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CHOMBA AJA

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MAINGA JA

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O’REGAN AJA

APPEARANCES

APPELLANT:	G Coleman Instructed by LorentzAngula Inc
1ST & 2ND RESPONDENTS:	C J Mouton Instructed by Koep & Partners