REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/7655

DATE:10/08/2011

NOT REPORTABLE

In the matter between:

VERASH KUMAR SHANTILAL BHAGWANDAS	**First Applicant**
ASHESH ISHWARLAL RANCHOD	**Second Applicant**
DIPESH HIMATLAL JOGI N.O.	**Third Applicant**
and	
DR GOOLAM OMAR INC	**First Respondent**
GOOLAM MAHOMED OMAR	**Second Respondent**

CASE NO: 09/07656

In the matter between:

VERASH KUMAR SHANTILAL BHAGWANDAS	**First Applicant**
MYSTIC BLUE TRADING 193 (PTY) LTD	**Second Applicant**

VIRESH BHAGWANDAS (PTY) LTD	**Third Applicant**
DIPESH HIMATLAL JOGI N.O.	**Fourth Applicant**
HEMA HIMATLAL JOGI N.O.	**Fifth Applicant**
MAYA NATHU PATEL N.O.	**Sixth Applicant**
and	
GMO IMAGING (PTY) LTD	**First Respondent**
GMO HOLDINGS (PTY) LTD	**Second Respondent**
GOOLAM MAHOMED OMAR	**Third Respondent**

JUDGMENT

KATHREE-SETILOANE J:

[1] The applicants, in two separate but related applications, seek final orders for the winding up of GMO Imaging (Pty) Ltd ("GMO Imaging") and Dr Goolam Mahomed Omar Incorporated (GMO Inc") (" the companies"), in terms of section 344 (h) of the Companies Act, No.61 of 1973. ("the Act"), on the grounds that it is just and equitable to do so, primarily, because the relationship between the parties has irretrievably broken down. On 30 November 2009, Claasens J granted a provisional order for the winding up of the companies.

[2] GMO Imaging is inextricably linked to GMO Inc, which is a company through which a radiology practice is conducted. GMO Inc is a corporate expression of a partnership of radiologists. The radiology services at GMO

Inc were rendered by radiologists Dr VKS Bhagwandas ("Dr Bhagwandas"), Dr AI Ranchod ("Dr Ranchod") Dr DH Jogi ("Dr Jogi"), all of whom are applicants in both applications, and Dr M. Omar ("Dr Omar"), a respondent in both applications. Drs Omar and Bhagwandas were full time professional staff in the practice, whilst Drs Ranchod and Jogi were locums.

[3] The applicants as well as Dr Omar have an ownership interest in the companies. Dr Omar, who is currently in his late sixties, founded GMO Inc in 1994. He holds 50% of the shares in GMO Inc and 52.14% of the shares in GMO Imaging held in the name of GMO Holdings (Pty) Ltd (the second respondent in the second application. He is a director of both GMO Inc and GMO Imaging. Dr Bhagwandas became a shareholder in GMO Inc in 2002 at the invitation of Dr Omar. On the applicant's version Dr Bhagwandas holds 40% of the shares in GMO Inc. However, the respondents maintain that he only owns 37.86% of the shares in GMO Inc. Dr Bhagwandas also owns 40% of the shares in GMO Imaging held in the name of Viresh Bhagwandas (Pty) Ltd (the third applicant in the second application). He is a director of both GMO Inc and GMO Imaging. Dr Jogi is a 5% shareholder in GMO Inc, and a 5% shareholder in GMO Imaging, held in the name of the Dipesh Jogi Family Trust. Dr Ranchod also owns 5% of the total 100 shares in GMO Inc, and 5% of the total 100 shares in GMO Imaging held in the name of Mystic Blue Trading 193 (Pty) Ltd (the second applicant in the second application).

[4] GMO Imaging was formed to provide a structure to allow for certain functions ancillary to GMO Inc to be performed by it, thereby generating an

income for GMO Imaging. GMO Imaging owns the radiological equipment which is used by GMO Inc in return for financial consideration. These monies are apparently GMO Imaging's primary source of income. The applicant's allege that the business of the two companies was conducted in a manner in which GMO Imaging was used to siphon profits from GMO Inc, thus allowing non-radiologists, in the form of GMO Imaging and some of its shareholders which included members of Dr Omar's family, to share in the profits of a radiology practice, under the guise of this being compensation for the use of GMO Imaging's radiological equipment. They submit that this is in contravention of the applicable rules of the Health Professional Council of South Africa ("HPCSA") and the Radiological Association of South Africa ("RASA") because it results in non-radiologists sharing in the profit of radiologists. The applicants accordingly contend that the so-called improper structure of the relationship between GMO Inc and GMO Imaging is a further reason why it would be just and equitable that the companies be liquidated.

[5] GMO Inc conducted its radiology practice from premises, at Lenmed Clinic, leased by GMO Imaging from Lenmed Clinic. The applicants allege that although there was no sub-lease, GMO Inc occupied the leased premises and conducted its business from here in contravention of the provisions of the head lease between Lenmed Clinic and GMO Imaging. On 11 February 2009, GMO Imaging received a letter of breach from Lenmed Clinic placing it in breach of the lease, arising from the sub-letting of the premises to GMO Inc, which was prohibited in terms of the lease. On 16 March 2009, a meeting was held between Lenmed Clinic, Dr Omar, his son Farhad Omar (the

practice manager), and Dr Bhagwandas at which Lenmed Clinic raised its concerns. On 29 June 2009 a further letter was received from Lenmed Clinic cancelling the lease and ordering GMO Inc, which conducted the radiology practice, to vacate. Lenmed Clinic gave notice of termination of the lease on 30 June 2009, and the lease was terminated with effect from 31 December 2009.

[6] Since the granting of the provisional order on 30 November 2009, GMO Imaging and GMO Inc have ceased to trade. The premises, at Lenmed Clinic, from which the radiology practice operated has been vacated since 31 December 2009, following the cancellation of the lease of the premises by Lenmed Clinic. The radiologists that actively served the practice (the applicants) have resigned and found alternative practice opportunities, and the staff who worked for the companies have also resigned. This notwithstanding, on 30 April 2010, some five months after the grant of the provisional orders for the winding up of the companies, and four months after the termination of the lease of the practice's premises by Lenmed Clinic, and the cessation of the radiology practice engaged in by the companies, the respondents brought a counter application in which they *inter alia* seek an order:

(a) discharging the provisional orders for the winding up of the companies;

(b) ordering and directing the applicants to purchase Dr Omar's shares in the provisionally liquidated and non-trading companies at fair market value as at 1 December 2010 as if the businesses were sold between a willing buyer and willing seller without any encumbrances and/or regard being had to the current dispute between the shareholders and the respondents, and the respondents and the Lenmed Clinic in respect of the lease with the value of the shares to be determined on the basis that the companies are going concerns, and the valuer shall not take into account the provisional liquidation orders in respect of the companies or the cancellation of the lease and shall not discount the price by reason of the aforesaid; and

(c) ordering that the purchase consideration for the shares and claims in the respondent companies shall be determined by an expert valuer agreed upon between the parties within 10 days of the grant of an order and failing such agreement, the valuer shall be appointed by the president for the time being of the South African Institute of Chartered Accountants, provided that if so appointed, the valuer shall be a registered chartered accountant of not less than 15 years standing.

Irretrievable breakdown of the parties

[7] Central to the determination of both final winding up applications, and the counter-application, is the question of whether sufficient grounds exist for the provisional order to be made final or be discharged. It is common cause

that there has been an irretrievable breakdown in the relationship between the parties. This commenced with the deterioration in the relationships resulting from the so-called N17 matter, which is the subject of a different application, in which *inter alia* Drs Bhagwandas, Jogi and Ranchod, and Dr Omar's son, Farhad are involved. The N17 dispute was extremely acrimonious and led to increased animosity and dissension between the parties in relation to the management and functioning of the companies. This acrimony had spilled over to affect the relationship of Dr Omar and Farhad, on the one hand, with that of Drs Bhagwandas, Ranchod and Jogi on the other.

[8] Dr Omar, and his sons Farhad and Azim (Azim was employed at GMO Inc as its bookkeeper) had as a result sought to have Dr Bhagwandas removed as a director of the companies. They had also made numerous allegations of fraud and misconduct against Drs Bhagwandas, Jogi and Ranchod, culminating in a physical altercation between Farhad and Dr Jogi that resulted in the pressing of assault charges. The applicants allege that the Omar's attempts to remove Bhagwandas as director of GMO Inc were part of a campaign of harassment by Dr Omar and Farhad against Drs Bhagwandas, Ranchod and Jogi in retaliation for having taken legal action against Farhad in the N17 matter. The applicants, in turn, accuse Dr Omar and Farhad, in particular, of having committed numerous financial irregularities, and general mismanagement of the companies thus causing difficulties in paying staff and creditors. In this regard, they contend that irrespective of the shareholding in the entities through corporate persons or trusts, the personal relationship between the parties, primarily as partners in a medical practice, is what

underpins the companies, and the breakdown in the relationship between the partners is thus fatal to the survival and future of the companies , and hence the primary ground for the confirmation of the provisional liquidation orders.

Unclean Hands

[9] However, in an effort to avoid the confirmation of the provisional liquidation orders, the respondents contend that the applicants have come to court with “unclean hands” as the confirmation of the provisional liquidation orders are sought with an ulterior or improper motive. They allege that the winding up applications are part of a scheme to obtain control of GMO Inc, by setting up a competing business, and the applicants have acted in breach of their fiduciary duties in doing so. Significantly, the respondents allege that subsequent to the grant of the provisional liquidation order, the applicants opened a new competing practice next door to GMO Inc’s premises, at Lenmed Clinic, under the name and style of Ranchod & Jogi Inc (“R&J Inc”). The establishment of this new practice, they contend, had been planned and orchestrated months prior to the set down of the provisional liquidation applications. They allege further that Drs Bhagwandas, Ranchod and Jogi had contrived to bring about a situation where Dr Omar could no longer function in GMO Inc, and in so doing created a deadlock so as to establish grounds for the winding up of GMO Inc and GMO Imaging.

[10] Having regard to the evidence presented in this application, I am not persuaded by the respondents’ argument that Drs Bhagwandas, Jogi and Ranchod had concocted a scheme to bring about the demise of GMO Inc so

as to establish a competitor to the companies. As indicated earlier, the irretrievable breakdown in the relationship of the parties has its genesis in a dispute, which had arisen between certain of the parties in this application in relation to a company by the name of the N17 Imaging (Pty) Ltd, in which Drs Bhagwandas, Ranchod and Jogi and Farhad Omar, in particular, came into conflict with each other. The acrimony generated by those proceedings, which is evidenced by the laying of criminal charges of assault by Farhad against Dr Jogi negatively affected the parties working relationship in the companies and was the cause of the ultimate collapse of the effective management and administration of the companies .

[11] This then resulted in a letter being sent in June 2008, on behalf of Dr Omar, calling on Dr Bhagwandas to resign as a director of the companies. The letter precipitated the launching of these applications. The applications to wind up the companies were launched in February 2009, following the failure of attempts to arrange a buy-out of the parties' respective interests in the companies amicably. The applicants tendered to sell their interests in the companies to the respondents, but the tender was rejected. The respondents filed their answering affidavits in April 2009. The stance adopted by the respondents, in this affidavit, only served to aggravate and elevate the acrimony between the parties due to the allegations made therein, and quite expectedly, the companies' management, administration and functioning began to suffer irreparable damage. Meetings between the members failed to consider the business on the agenda and resulted in deadlock and conflict. In fact, it is clear from the evidence that the breakdown in the governance of the

companies as a result of the deteriorating relationships between the parties was already evident in the last quarter of 2008.

[12] During the course of the second half of 2009, it became clear that the companies would be unable to survive much longer due to the deadlock. The aging equipment, adverse effect on staff morale and consequent loss of confidence from referring practitioners ─ the companies primary source of income-generating work ─ further exacerbated the situation. On 25 June 2009, Dr Omar and his son Farhad abandoned the practice, by absenting themselves. In fact, Dr Omar made himself unavailable to render any professional work to the companies. Within days of the Omar's abandoning the practice, and on 29 June 2009, Lenmed Clinic gave notice of termination of the lease (the lease was recorded as terminating on 31 December 2009), having already placed GMO Imaging in breach of the lease in February 2009. The cancellation of the lease by Lenmed Clinic sounded the death knell for the companies, severely jeopardising their future operation and continuation. I am unable to place much weight on Dr Omar's allegations that "[d]uring the entire period that the application[s] for liquidation were being defended, the operation of [the companies] were continuing" and that he "was under the impression that the practice of GMO Inc was continuing during September, October and November 2009", as the evidence demonstrates that he never visited the practice subsequent to his abandonment of it on 25 June 2009. Nor did he play a constructive part in the operation of the practice since that date.

[13] In October 2009, Drs Ranchod and Jogi resigned as locums, and started making arrangements to set up a new radiology practice under the name and style of R&J Inc. At the end of October 2009, they informed the staff at GMO Inc that they were setting up a new practice, and extended an offer of employment to them. The staff of GMO Inc then resigned in November 2009, and the provisional winding up order was granted soon thereafter on 30 November 2009.There is no merit in the contention that the majority of staff at GMO Inc were coerced into resigning from GMO Inc and joining R&J Inc. The evidence clearly demonstrates that the GMO Inc staff resigned on becoming aware of the new practice that was to be opened by Drs Ranchod and Jogi. This was completely understandable, and expected, as it was futile for the staff to remain in a practice that was fraught with dissension and conflict amongst its protagonists, as a result of which two of the locums had resigned, the founding director and practice manager had abandoned ship, and the lease had been cancelled.

[14] There was, in my view, a clear recognition, by the staff, that it was just a matter of time before the staff and the patients would become victims of the internecine strife in the practice — which in all likelihood was soon to be provisionally liquidated . In any event, I see nothing wrong with inducing staff to join a new company, provided the motive is to benefit from their service, and not to cripple or eliminate the business competitor (*Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T)). I therefore find no basis on the papers to make a finding that Drs

Ranchod and Jogi had coerced the staff of GMO Inc to leave the practice with the motive to destroy the practice.

[15] Therefore, and in so far as it is alleged that Drs Ranchod, Jogi and Bhagwandas have breached their fiduciary duties, I am of the view that Drs Ranchod and Jogi do not owe a fiduciary duty to the companies as neither of them are directors. As shareholders, they do not owe a fiduciary duty to the companies. As young professionals, it was not unreasonable or inappropriate, for that matter, for them to free themselves from the affairs of the companies, which were by that stage plagued by animosity, deadlock, and the lack of a cohesive, functional and effective administration and management. It was equally reasonable and appropriate for them to have sought to ensure their continued professional development and survival by setting up another practice at Lenmed Clinic.

[16] Likewise, Dr Bhagwandas cannot be accused of breaching his fiduciary duties. He is not a member of R&J Inc but is merely an employee. He continued his employment and execution of his management and administration duties for the companies until his resignation, effective 31 December 2009. Unlike Mr Omar, he attended at the companies' premises until his resignation. He then took up employment with R&J Inc since it was pointless to persist in effectively unpaid employment for the companies. I am also of the view that there is no cogency in the respondents' contention that R&J Inc is in unlawful competition with the companies, and in breach of a purported exclusivity arrangement contained in the lease with Lenmed Clinic.

The lease was cancelled with effect from 31 December 2009, notice having been given on 29 June 2009. As contended for by the applicants, the lawful cancellation of the lease renders its provisions inoperative and of no continuing legal force and effect. It is therefore difficult to see how R&J can be in unlawful competition with the companies, since they no longer have any contractual entitlement or exclusivity to the premises located at Lenmed Clinic. As contended, correctly so, by the applicants, the lease was, in any event concluded with GMO Imaging, and GMO Inc had no legal right to occupy the premises in the first place.

[17] Dr Omar, however, disputes that the lease was breached and that Lenmed Clinic was entitled to terminate it. In addition, Dr Omar contends that the failure to exercise the option to renew the lease was brought about by the applicants. Although the applicants deny any such wrongdoing, the respondents have failed to adduce evidence to the contrary. Nor have they, for that matter, pursued the dispute relating to the termination of the lease with Lenmed Clinic, the landlord. It accordingly serves little purpose for the respondents at this stage of the proceedings, and when there is little hope of restoration of the companies, having regard to the irretrievable breakdown in the relationship of the parties, to dispute that the lease was breached and was unlawfully terminated.

[18] The respondents also contend that the applicants caused the freezing of the companies' bank accounts, and filed a "self serving" complaint to the HPCSA regarding the relationship between the companies in order to attempt

to justify their winding up. With respect to the freezing of the companies' bank accounts, that step was taken by the companies' bank in an effort to create a mechanism to address conflicting instructions from the parties with respect to the handling of the funds of the companies, and not by the applicants. The accounts are strictly speaking not frozen, and continue to be used to make payments to creditors of the companies as needed. I also see no basis, on the papers, for the contention that the complaint filed with HPCSA was "self-serving" or improper. To the extent that the applicants were of the view that the structure of the companies contravened the applicable professional regulations governing the conduct of a radiology practice, they were entitled to file a complaint with the HPCSA, in an effort to put right the affairs and structure of the companies. In fact as a director of both companies, Dr Bhagwandas was under a fiduciary duty to lodge a complaint with the HPCSA once he became aware that the structure of the companies was in contravention of the applicable professional regulations governing the conduct of the practice.

[19] It is alleged by the respondents that R& J Inc commenced its operations by making use of the radiology equipment belonging to GMO Imaging at no cost to themselves, and without obtaining the prior consent of the liquidators. They further allege that R&J Inc currently makes use of the MRI scanner at a nominal rental. I am of the view that there is no merit in the respondents' allegations that the applicants have improperly used the companies' equipment, as the evidence demonstrates that arrangements have been made with the provisional liquidators for the payment of rental or

usage fees for certain equipment. As submitted by Mr Bam SC, the precise calculation of the extent of any usage and attendant fees likely will form part of a final accounting and reconciliation by the liquidators. Dr Omar's attempts to cast this as wrongful and unlawful conduct by the applicants is thus rejected.

[20] Similarly, Dr Omar's contention that the applicants have misappropriated confidential trade information belonging to GMO Inc such as its data base, customer lists, service supply agreements with certain hospitals, and referral lists of certain doctors in order to "springboard" and carry on the new practice, is rejected as the respondents have presented no evidence of misuse of this information. The respondents furthermore submit that the "substratum" of GMO Inc's practice and GMO Imaging has in effect been hijacked and is now being conducted by the applicants under the guise of a new practice. This conduct, they argue, amounts to the stripping of the goodwill, assets and income of the companies for the applicants own benefit. In response, the applicants contend that Dr Omar has manufactured an exorbitant and artificial value for the goodwill of the companies, when the only possible source of any goodwill in the companies ─ the professional services rendered by the radiologists who participated in the practise ─ has been extinguished by the operation of the provisional orders of liquidation and subsequent events which include the cancellation of the lease, the cessation of the practice, and the resignation of the staff and the professionals in the companies. Accordingly, I am of the view that whilst historically there may

have been goodwill in the companies, this has dissipated since the granting of the provisional orders of liquidation.

[21] Significantly, in addition to alleging that Drs Bhagwandas, Jogi and Ranchod have shown improper motive by bringing about the demise of the company and setting up a radiology practice in direct competition with GMO Inc, they allege that the applicants have acted unreasonably in seeking to have the companies wound up instead of pursuing alternative remedies. As indicated earlier in this judgment, they seek an order, in terms of the counter application, that the applicants be compelled to purchase Dr Omar's shares at a fair value to be determined by an independent third party. The respondents contend, in this regard, that the applicants did not make reasonable endeavours to pursue an alternative remedy as contemplated in section 347(2) of the Companies Act 61 0f 1973. They allege that on 26 January 2009 the applicants' attorney addressed a letter to the respondents' erstwhile attorney in which it gave the following undertaking:

"We confirm that we will take instructions from our respective clients in relation to the possibility of a non-litigious split (premised upon a buy-out of shares in GMO Inc and GMO Imaging at a value to be determined by an independent expert). We will then revert to each other in due course. In the interim, and until further notice, no steps of a legal or litigious nature will be taken."

However, they contend that on 20 February 2009, notwithstanding this undertaking, the applicants launched the winding up application, having

declined to further engage the second respondent on a proposed buy-out of shares in the companies.

[22] I remain unconvinced by the respondents' contention that the applicants had declined to engage the respondents on the buy-out of Mr Omar's shares in the companies prior to the launch of the winding up application. The efforts to negotiate a buy-out of the parties' respective interests in the companies most certainly pre-dated the launch of the winding up application. Prior to launching the main applications, the applicants sought to avoid litigation by *inter alia* proposing that GMO Inc and GMO Inc be valued, and that the applicants buy out Dr Omar and the other shareholders that hold shares in the companies, for a fair and reasonable price.

[23] However, Dr Omar unreasonably rejected these attempts to resolve the impasse between the parties while the companies were still commercially viable entities. This much is evident from the following events. At a shareholders' meeting on 8 October 2008, a proposal that the companies be voluntarily wound-up was defeated by Dr Omar's vote against the proposed resolution. Thereafter, in early November 2008, discussions aimed at an amicable and equitable parting of ways were held, which initially canvassed both the possibility of the applicants buying out Dr Omar's shares in the companies, and *vice versa*. This proposal resulted in Dr Omar proposing that the applicants buy out his shares, to which the applicants agreed in principle. Shortly thereafter, however, Dr Omar changed his mind and indicated that he wished to be afforded the opportunity to find a suitable purchaser for the

entire shareholding of the two companies and, unrealistically so, indicated that he thought that R21 million would be a fair price for his shares in the two companies. On 12 November 2008, the applicants addressed a letter to Dr Omar *inter alia* seeking Dr Omar's agreement in principle that the applicants buy out his shares at a fair value to be determined by an expert from one of the "big four" accounting firms, which they viewed as a fair and objective manner of valuing a business.

[24] Dr Omar's responded in a letter dated 17 November 2008. His response was so absurd as to lead to the interference that it was not written in good faith. Dr Omar i*nter alia* purported to record an "agreement" that, in the event of him buying the applicants' shares, Dr Bhagwandas would become indentured labour for the practice for a period of five years. Understandably so, Dr Bhagwandas contends that he would never have willingly agreed to such a proposal, not least because of the breakdown in the relationship between himself and Dr Omar. In addition, he says, agreeing to such a proposal would effectively leave him to maintain the practice without Dr Omar's input (as was the case), but without sharing the profits – something that would never have been within his contemplation. Dr Omar furthermore purported to record an "agreement" that, in the event of him introducing a purchaser for the entire shareholding of the companies, he would be entitled to retain any amount received above R30 million. The applicants contend that there was no such agreement, and there is no reasonable possibility of the business being valued at anything close to R30 million, let alone a purchaser being found who is willing to pay this amount. Dr Omar also insisted upon the

applicants furnishing “guarantees” for R15 million to be “lodged” with him as a precursor to any valuation being undertaken, when there was no basis for the furnishing of such guarantees.

[25] Dr Omar also wished to retain the right, after a valuation had been obtained, to decide at his sole discretion whether he would purchase the applicants’ shares or *vice versa.* The applicants, nevertheless, persisted in their attempt to achieve a non-contentious split from Dr Omar by addressing a letter, dated 21 November 2008, to Dr Omar, in which they attempted to reason with Dr Omar in relation to his proposal. Amongst other things, the applicants attempted to convince him that it would be preferable and fair to determine, at the outset, who will buy out whom. It was argued that, in light of the long careers still ahead of the applicant’s, as well as the fact that Dr Omar had indicated to them on several occasions that he wished to retire shortly (he is in his late sixties), the most sensible and practical course would be for the applicants to buy his shares. The applicants indicated their agreement with his suggestion that the appointed valuator be someone with expertise in the industry.

[26] However, Dr Omar’s reply, dated 1 December 2008, made it clear to the applicants that Dr Omar had no desire to settle the dispute on equitable terms. He persisted in his contention that Dr Bhagwandas had agreed to be employed by him for a period of five years after any buy- out. He also continued to insist upon the furnishing of “guarantees”, even though ostensibly he had not yet decided whom he would prefer to be the seller and

whom the purchaser in the transaction. I am of the view that this letter unequivocally demonstrated an unwillingness on the part of Dr Omar to resolve the dispute on amicable and equitable terms.

[27] Dr Omar and Farhad subsequently terminated their attorney Eliott's mandate, and retained the services of Duncan Okes Inc. On 25 January 2009, the applicants' attorney received a letter from Duncan Okes Inc. Significantly, the letter acknowledged that "…the shareholding relationship is at an end…", but did not propose any mechanism by which a split may be achieved. Indeed, it accused the applicants of acting in bad faith for having attempted to achieve a non-litigious parting of ways in the terms outlined above.

[28] The applicants argue that had their efforts at negotiating a buyout been successful, the deleterious effects on the business of the irretrievable breakdown in the relationship between the parties could have been avoided. They are now adamant, however, that a buy-out is simply no longer a viable, just or equitable alternative to the final winding up of the companies in view of the current circumstances of the parties and the companies. GMO Inc currently has no premises from which to operate; and there are neither professional nor administrative or clerical staff available to generate fees or run a radiology practice. GMO Imaging basically exists on the back of labour performed by the radiologists in GMO Inc. Hence, the income stream on which GMO Imaging depends is entirely reliant on the sustainability of GMO Inc. The breakdown in the relationship between the parties in GMO Inc, and

its subsequent termination has effectively put an end to GMO Imaging's existence as well.

The buy-out counter-application

[29] The relief sought by the respondents in the buy-out counter-application is legally novel , and unprecedented. Whilst such relief may be sought under section 252 of the Act where a member of a company is able to demonstrate that the affairs of the company are being conducted in an unfairly prejudicial, unjust or inequitable manner in relation to that member, there is no precedent for the grant of such relief in a section 344(h) winding up application. The relief sought in the counter-application, moreover, in my view, seeks to ignore the facts and the circumstances before the Court, replacing them with several layers of fiction which I deal with below.

[30] The first of these fictions is apparent from prayers 5 and 6 of the notice of motion in buy-out counter-application, in terms of which the respondents seek a "fair market value" for Dr Omar's interest in the companies. Given the termination of the lease for the premises by Lenmed Clinic, and the resultant termination of the business of the practice, there is no going concern extant and available for purchase. It therefore follows that a fair market value of an interest in a non-trading provisionally-liquidated company without premises, staff or a professional source of business or fee earners is unlikely to be very high. Such value would be the realisable value of the companies' radiology

equipment, and the cash in the bank, less extant liabilities ─ or those likely to be realised through liquidation. Accordingly, and in order to circumvent this problem, the respondents ask this Court to create a fiction and value the businesses on the basis of a fantasy – namely, as if the businesses were sold between a willing buyer and willing seller without encumbrances and/or regard being had to the current dispute between the applicants and the respondents, and the respondents and Lenmed Clinic in respect of the lease, with the value of the shares determined on the basis that the companies are going concerns and the liquidator should not take into account the provisional liquidation orders or the cancellation of the lease.

[31] The buy- out application seeks resolution of the terms of a buy-out on the willing buyer and willing seller principle when the evidence clearly demonstrates that the applicants are not willing buyers, and in fact oppose being forced to purchase a business of little value for an inflated sum. This buy-out counter-application, in my view, ought to be dismissed on the mere fact that a buy-out was proposed by the applicants, at a time when the companies were still viable concerns, but was unreasonably rejected by Dr Omar. The relief sought in the buy-out application, moreover, ignores the fact that the companies' creditors will suffer prejudice. It is important to recognise, in this regard, that the companies are not without encumbrances, given that they have debts owing to creditors, which a final liquidation would more effectively address and resolve. I cannot be expected to simply ignore these important considerations.

[32] The respondents are in effect calling upon this Court, in the buy-out counter application, to endorse a fiction by ignoring the consequences of the current dispute, the provisional liquidation order, the cancellation of the lease by Lenmed Clinic, and by treating the companies as if they remain going concerns. A buy-out is simply no longer a viable option given the cancellation of the lease by Lenmed Clinic of the premises from which the practice operated. This has the inevitable and unavoidable consequence that the practice has ceased to exist, and there is therefore no business to purchase in resolution of this dispute. In view of the uncertainties, conjecture and imprecision that is likely to follow from the respondents proposed fictional approach to the valuation of the companies, the grant of the relief sought in the buy-out counter-application is clearly inappropriate.

[33] The grant of such relief is also pointless, having regard, in particular, to the fact that there is a feasible alternative available, which is grounded in settled law and reality ─ not fantasy or fiction. This would involve the sale of assets by the court appointed liquidators and division of all proceeds between the parties, following the discharge of the companies' obligations. In short, I am of the view that the buy-out proposed in the counter-application is legally and factually unsustainable, and the time for a buy-out of the companies has long passed. I am similarly of the view that the applicants had made good faith endeavours to resolve the problems experienced by the companies prior to launching the winding up applications. The conduct of Dr Omar, in these endeavours, however, speak for itself. It was he who prevented a sensible and reasonable solution to the dispute. In fact, he categorically

stated, in the answering affidavits in both applications, that “in any event I do not wish to sell” and “Bhagwandas, Jogi and Ranchod do not have the funds to purchase my shares” thus rejecting the proposed buy-out of his interests in the companies by the applicants. Dr Omar, now conveniently seeks to undo the damage of his rejection by creating a legally impermissible fiction in order to punish the applicants for his rash and unreasonable conduct.

[34] Basically, the essence of the buy-out application is to compensate the Dr Omar for damages and loss which he perceives to have occurred to him personally. This, in my view, is tantamount to seeking punitive relief in the form of punitive damages against the applicants. This is simply not countenanced by our law. Even in circumstances relating to infringement of constitutionally guaranteed rights, our courts have declined to allow such damages. Awarding damages in terms of section 252 of the Act is also legally novel, and the power to do so is not evident from the wording of the section. Whilst it may be appropriate, under section 347(1)A of the Act, for a court to award damages where it is satisfied that an application for the winding up is an abuse of the court’s procedure or is malicious or vexatious, I am of the view no such case has been made out by the respondents.

[35] A further material factor that the buy-out counter application seems to ignore is that the applicants were entitled to act as they did seeking the provisional liquidation of the companies, and securing their professional livelihoods with alternative employment. They are each young professionals with decades of fee-generating practice ahead of them, and should not be

held hostage by the paralysis of the companies as a result of, first, the irretrievable breakdown in the relationship between the parties and, second, the operation of the provisional orders.

[36] Accordingly, I am of the view the most appropriate, just and equitable resolution to this dispute, for all the parties involved, is to realise the companies' value by the liquidator and distribute any proceeds to the parties, thus ensuring a final and certain end to their entanglement. Accordingly, the final liquidation of the companies would be the most just and equitable outcome to these proceedings. Such an outcome would accurately, justly and equitably address the actual circumstances that the parties find themselves in as a result of the breakdown in their relationship and, as a consequence, the demise of the companies. In the premises I am of the view that given the current state of the companies it would not be appropriate for this court to grant the relief sought in the buy-out counter-application. A buy-out is no longer a viable, just or equitable alternative to the final winding up of the companies. In the circumstances, I am satisfied that no other remedy is available to the applicants, and they have not acted unreasonably in seeking to have the companies wound up instead of pursuing a buy-out of the companies. The buy-out counter-application accordingly falls to be dismissed, with costs.

[37] I am of the view that the applicants have satisfied this Court, on a balance of probabilities, that it is just and equitable for it to grant a final order for the winding up of the companies as the relationship between the parties

have irretrievably broken down. This has resulted in the deadlocked administration of the companies, continuous quarrelling, heightened animosity, and the absence of any hope of restoration of the companies to a functional state of affairs, which are common cause. These circumstances have been further exacerbated by the cancellation of the lease of the companies' premises by Lenmed Clinic, and the consequent fatal impact of this on the companies' prospects of future business and income generation, which are again common cause facts.

[38] The respondent have submitted in somewhat vague and generalised terms that the affidavits filed by the parties are extremely voluminous and give rise to various disputes of fact. They have, however, failed to set out with any specificity what the nature of these disputes are. Not surprisingly therefore, the applicants have submitted that there are no material disputes of fact, and that on the *Plascon-Evans* test the applicants are entitled to the relief sought. Having considered the submissions of both the applicants and the respondents, I am of the view that there are indeed no bona fide disputes of fact on the papers, and to the extent that they may have been disputes relating to the shareholding of the applicants and their *locus standi* to bring the winding up applications, this has been conceded by the respondents.

[39] I am therefore of the view that the common cause facts, and in particular those relating to the irretrievable breakdown of the parties, warrant the granting of the relief sought in the two winding up applications. The applicants cannot reasonably be expected to continue their association with

Dr Omar, in view of the manifest ill will and mistrust which currently exists between the parties. The generation of income by GMO Inc, and the resultant income of GMO Imaging is dependant on the labour of the medical professionals that work in GMO Inc. The relationship of these professionals is therefore crucial to the success of the entities. Their breakdown has, however, now rendered the companies non-functional and unsustainable with no hope of being resuscitated. Accordingly, on the common cause facts there is no business to be carried on, the lease has come to an end, the staff and professional radiologists have resigned, the relationship between the parties has irretrievably broken down – and the partners are unable to work with one another or deal with one another and there is no hope for reconciliation between them.

[40] In the circumstances, I am of the view that it is just and equitable for the companies to be finally wound up. Having regard to the conclusion which I have arrived at, there is no need to make a determination on whether it would, in addition, be just and equitable for the companies to be wound up on the grounds of the so-called improper relationship between GMO Inc and GMO Imaging.

[41] I am satisfied that the applicants have complied with the requirements of section 346(4A) of the Act, and that they have complied with the notice requirements prescribed in the provisional winding up order.

1. In the result I make the following order in respect to the GMO Inc application under case no. 09/07655:

(a) winding up of GMO Inc in the hands of the Master

(b) the costs of this application be costs in the winding up, which costs shall include the costs of three counsel.

(c) the second respondent is ordered to pay the reserved costs of 28 July 2009, 23 February 2010, 10 May 2010 and 12 October 2010.

2. In the result I make the following order in respect of the GMO Imaging application under case no. 09/07656:

(a) winding up of GMO Imaging in the hands of the Master

(b) the costs of this application be costs in the winding up, which costs shall include the costs of three counsel.

(c) the second and third respondents are ordered to pay the reserved costs of 14 April 2009, 23 February 2010, 10 May 2010 and 12 October 2010.

3. The counter-application is dismissed with costs, including the costs of three counsel.

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F.KATHREE-SETILOANE

JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

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	MR S KUNY
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	ASSOCIATES

DATE OF JUDGMENT: 10 AUGUST 2011

DATE OF HEARING: 8 FEBRUARY 2011