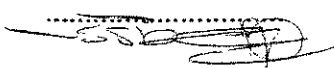




SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 2013/4487

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
DATE	6/12/2013
SIGNATURE	

In the matter between

SWISSING AG (PTY) LIMITED

VAN BRED, JOHN HILGON

SWISSING AG

Third Applicant

Second Applicant

First Applicant

and

In their capacities as trustees of

JUPITER 8 COMMERCIAL TRUST

First Respondents

STEYN, PHILDO

Second Respondents

JACQUES CHRISTIAAN BADENHORST,

HANLI BADENHORST and WILLIE JACOBUS SNYMAN

In their capacities as trustees of 66 PENINSULA BAY TRUST

Third Respondents

BADENHORST, JACQUES CHRISTIAAN

Fourth Respondents

CLOMPIQUE 241 (PTY) LIMITED

Trading as TOAD CAPITAL

Fifth Respondents

VELA ATM (PTY) LIMITED

Sixth Respondent

ENVALUE SA (PTY) LIMITED

Seventh Respondent

JUDGMENT

AC BASSON, J

[1] The applicants seek relief on the following grounds: In the first instance relief is sought in terms of section 163(1) of the Companies Act¹ for an order that the

first respondent (alternatively the second respondent) and third respondent (alternatively the fourth respondent) purchase their one-third shares in the fifth respondent at a fair and reasonable value to be determined by an independent auditor in terms of section 163(1) of the Companies Act. Secondly, and in the alternative, the applicants seek relief in terms of section 81(1)(d)(iii) of the Companies Act for the winding up of the fifth respondent on the basis that the winding-up would be just and equitable. Thirdly, the applicants are also seeking an order declaring that an agreement between the applicants and the second and fourth respondents regarding the purchase of certain shares be declared void as contemplated in section 44(5) of the Companies Act. (I will consider the latter issue separately as it constitutes a separate dispute despite the fact that a decision on this question will have an effect on the dispute as a whole.)

Disputing parties

[2] Although numerous entities are cited as either an applicant or a respondent, the entity at the centre of this dispute is the fifth respondent - Cloripique 241 (Pty) Limited trading as Toad Capital - which is incorporated as a domestic company (hereinafter referred to as "the company"). Also at the centre of the dispute are three individuals: The second applicant (Van Breda), the second respondent (Steyn) and the fourth respondent (Badenhorst). At the relevant time, Van Breda, Steyn and Badenhorst were the only three directors of the company with equal shareholding in the company. In effect therefore they were equal partners in the company. Due to the nature of the company as a *quasi-partnership*, the underlying relationship between the parties was based on

Background to the dispute

Steyn and Badenhorst in the company are held by other entities (nominees or trusts). Van Breda's one third is held by the first applicant (Swissing AG (Pty) Limited) as his nominee shareholder. Steyn's one third is held through his nominee – the first respondent (Phildo Steyn and Magdel Vos NO in their capacities as trustees of Jupiter 8 Commercial Trust) and Badenhorst's one third shareholding is held through his nominee - the third respondent (Jaques Christiaan Badenhorst, Hanli Badenhorst and Willie Jacobus Snyman in their capacities as trustees of 66 Peninsula Bay Trust). (I will for convenience sake refer to Van Breda, Steyn and Badenhorst in their individual capacities with the understanding that any reference to these parties includes, where appropriate, a reference to their nominee shareholders as indicated hereinabove. I will also refer to the first and second applicants jointly as "the applicants" and to Steyn and Badenhorst jointly as "the respondents".)

[3] It is common cause that as a result of emerging differences during the middle of 2011, the underlying relationship of mutual trust between Van Breda and the respondents had broken down irretrievably to such an extent that the parties are *ad idem* that their relationship in the form of the incorporated company needs to be severed.

[4] It is further common cause that following certain discussions (to which I will refer herein below) Van Breda resigned as a director of the company on 19 July 2011. As of this date Van Breda ceased to play any further role in the

company's affairs. The parties are also *ad idem* that for purposes of this dispute the effective date of any order severing the relationship between them will be 30 June 2011. (I will return to the relevance of this date herein below.)

[5] The parties are further *ad idem* that the main dispute before this Court is the basis upon which the relationship should be severed.

Parameters of the dispute

[6] According to the respondents the relationship should be severed on the basis of a settlement agreement concluded between the parties on 19 July 2011. According to the respondents, Van Breda resigned as a director from the company on this date following the conclusion of a settlement agreement primarily regulating the transfer of Van Breda's shareholding in the company to Steyn and Badenhorst and the price and method of payment to Van Breda for his shareholding.

[7] Van Breda disputes that the parties have reached a binding settlement agreement. As already pointed out, he seeks from this Court the relief provided for in section 163(1) of the Companies Act (alternatively the relief in terms of section 81(1)(d)(iii) of the Companies Act). In essence he seeks an order that his one-third shareholding in the company be purchased by Steyn and Badenhorst (or their nominees) at a fair and reasonable value to be determined by an independent third-party auditor in terms of section 163 of the Companies Act on the basis that the business of the company is being or has been carried on or conducted in a manner that is oppressive and unfairly

prejudicial to him. He further contends that, although he had resigned from the company as a director, the manner in which the company is being managed disregards his interest as a shareholder in that he has been excluded from all the operations and decision-making of the company. He contends that he has been denied access to the company's financial records and books, despite various requests for such information. Van Breda further contends that he is effectively imprisoned in the company as a shareholder because the respondents have no intention to acquire his shares in the company and that they are intent on denying him the right of participation in the company. In the alternative Van Breda seeks an order that the company be wound up in terms of section 81(1)(d)(iii) of the Companies Act. According to Van Breda, Badenhorst and Steyn have made it clear in their affidavits that neither of them has any interest in Van Breda retaining a shareholding in the company.

[8] The respondents contend that it was mutually agreed on 19 June 2011 that the parties would part ways. The respondents further contend that this settlement agreement regulate the terms of Van Breda's exit from the company and the sale of his shares in the company.

[9] The second and fourth respondents filed a counter application for an order directing Van Breda (or his nominee) to transfer his shares in equal portions to them against payment on the basis of the settlement agreement concluded on 19 July 2011 pursuant to which Van Breda exited the company.

[10] Van Breda disputes that an agreement had been reached regulating the terms of his exit from the company and the purchase of his one-third shareholding.

He claims that the agreement is not binding as the parties have not agreed on how the purchase price would be paid. Van Breda, however, contends in the alternative, that even if this Court should find that the parties have reached a settlement agreement (as contended by Steyn and Badenhorst), Steyn and Badenhorst had, in any event, repudiated the settlement agreement.

Question before this Court

[11] In summary therefore, the question before this Court is whether the incorporated relationship between the parties should be severed on the basis of a (binding) settlement agreement as contended by Steyn and Badenhorst.² In the event this Court finds that the parties are not bound by the settlement agreement, the Court will then have to consider on what basis the relationship should be severed. In deciding this question the Court will consider whether Steyn, Badenhorst and the company have engaged in oppressive and prejudicial conduct towards Van Breda and, if so, whether this warrants relief in terms of section 163 of the Companies Act, alternatively justifies the winding-up of the company under section 81(1)(d)(iii) of the Companies Act.³

² Paragraph [7] of the Applicants' Heads of Argument.

³ The relief sought in terms of section 81(1)(d)(iii) derives from the so-called "deadlock principle". The relief sought in terms of section 81(1)(d)(iii) derives from the so-called "deadlock principle" alternatively on the grounds analogous to those for the dissolution of a partnership. Where there is a breakdown in the trust relationship between the members, section 81(d)(iii) can find application. *Rand-Air (Pty) Ltd v Rae Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W); "Fifthly, there is oppression. Where the persons who control the company have been guilty of oppression towards the minority shareholders whether in their capacity as shareholders or in some other capacity, a winding up order in suitable cases may be made. This is in addition to other remedies in the Companies Act, which are available to oppressed minorities to obtain not only dissolution, but also a money judgment." See also: *Cilliers, NO and Others v DUIN & See (Pty) Ltd* 2012 (4) SA 203 (WCC); "[5] Jurisprudence concerning the winding up of companies on just and equitable grounds has employed the concept of 'deadlock' in two quite distinguishable senses. Deadlock in the strictly literal sense — what might be termed 'complete deadlock' — applies in the case where, because the directors or shareholders are equally divided, there is an inability to make decisions that are necessary for the company to function. The wider or looser sense of the concept is encountered in the context of the so-called 'deadlock principle', which is applied in respect of the consequences of a breakdown of trust and confidence between members of a company which, because of its peculiar character, is in substance akin to a partnership, and thus amenable — subject to important qualifications — to dissolution as a

Should the Court find that the relationship was severed in terms of a settlement agreement, the terms of the settlement agreement will determine the basis for the termination of the relationship. What is, however, not in dispute is the fact that all the parties demand the termination of the relationship.

Plascon-Evans Rule

[12] Some of the facts pertaining to this dispute - particularly in respect of the central question namely whether the relationship between the parties was severed in terms of a binding settlement agreement on 19 July 2011 are in dispute. I have already pointed out that Van Breda contends that no agreement had been reached because of a failure to agree on how the purchase price would be paid whilst Steyn and Badenhorst contend that an agreement had been reached. The applicants seek final relief in motion proceedings. It is trite that where a dispute exists on the papers, absent a referral to oral evidence, the *Plascon-Evans*⁴ principle applied. Where a dispute of facts exists such dispute will be decided bearing in mind the now trite principle as set out in *Plascon-Evans*. In deciding the counter-application, the principle will likewise apply.

Background facts

[13] The founding affidavit deposed to by Van Breda contains a detailed exposition of various incidents that led to the breakdown in the relationship between Van Breda and the respondents and the decision to part ways. The bulk of these

partnership would be, if relations between the partners became untenable through no fault of the partner claiming the dissolution. The dichotomy between the two concepts of deadlock is highlighted in the difference between the majority and the minority judgments in *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 (CA)."

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A) at 634

reasons are irrelevant for purposes of deciding this dispute especially in light of the fact that the parties are *ad idem* that the relationship has broken down irretrievably. I therefore intend to restrict the summary of the background facts to those facts which impact directly on the central question namely on what basis the relationship should be severed.

[14] It is common cause that Van Breda approached the respondents with a

proposal to buy him out. During a meeting between them some pertinent aspects of the agreement were worked out. It was agreed that Van Breda would sell his shares in the company to the respondents for R3.25 million; that the fifth and seventh respondents would exchange names (at the time the fifth respondent was called en Value SA (Pty) Ltd and the seventh respondent Cloripique 241 (Pty) Ltd). The name change was in fact done as is evident from the fact that the fifth respondent is referred to in these proceedings as Cloripique 241 (Pty) Limited trading as Toad Capital. It was also agreed that the 19% shares that the company has acquired in the 6th respondent (Vela ATM (Pty) Ltd) would be transferred to Van Breda against a valuation of R2 million of the shares (hereinafter referred to as "the Vela ATM transaction"). Vela ATM had acquired the right to install ATM machines in Soweto and elsewhere. The R2 million value placed on the Vela ATM shares was valued at the cost of the initial investment. The agreement further was that this R2 million would be set off against the R 3.25 million offered for the Van Breda's shares in the company.

[15] In summary therefore the agreement was that Van Breda would transfer his shares in the company in equal shares to the respondents against payment of

R3.25 million. The company would transfer its 19% interest in Vela ATM to Van Breda (more accurately his nominee – enValue SA (Pty) Ltd) and that the value of the Vela ATM shares would be set off against the purchase price of R3.25 million.

[16] As a result of this transaction Steyn and Badenhorst would acquire control of the company. Although Van Breda states in his papers that he was not comfortable with the offer as he was of the view that the R2million was not a fair assessment of the value of the 19% interest in Vela ATM, he, however, concedes that the respondents had offered to purchase his shares and that the purchase price was not the "sticking point" that led to the negotiations breaking down. It must also be pointed out that Van Breda himself proposed a value of R2 million in an email dated 27 June 2011 in which he stated that they have agreed on a value of R2million for the Vela ATM shares.

[17] Shortly following the discussions Steyn and Badenhorst resigned as directors and transferred the 19% shareholding held by the company in Vela ATM to the seventh respondent as part-payment of the purchase price for Van Breda's nominee's shareholding in the company. Consequently, upon transfer of the shares, at the very least, Van Breda has received partial payment for his shares. Moreover, it is clear from the papers that the Vela ATM transaction was at the initiative of Van Breda who expressed the view as early as 27 June 2011 in an email that Vela ATM was important to him. In fact, he expressly stated that he would take over the 19% shareholding "teen die prys wat ons daarvoor betaal het". In this email Van Breda requested that the respondents

send him a "term sheet" which would detail the figures. Emails were thereafter exchanged in which the respondents set out a breakdown of what they believed Van Breda's interest in the company was. Van Breda responded and demanded an audited financial statement for the company so that he could assess the value of his shares.

[18] On 20 July 2011, following a discussion on 19 July 2011, Steyn sent an email to Van Breda with subject matter "*Terms Sheet*". The respondents contend that as a consequence of these discussions, an agreement was reached on 19 July 2011 to give effect to the agreement between the parties to part ways. It is significant that Van Breda also resigned as a director of the company on the very same day the respondents contend that they have reached a settlement agreement.

[19] The agreement provided for three transactions: Transaction 1 entailed the purchase of Van Breda's shares in the company for a purchase price of R2 548 million. R2 million of this amount would be paid to Van Breda in Vela ATM shares and R 548 000.00 in cash. Transaction 2 and 3 entailed the repayment of two loan accounts to Van Breda and his wife. The total cost of the settlement was to be R3.250 million. The effective date of the transaction would be 30 June 2011.

[20] As already pointed out, Van Breda contends that no agreement had been reached because of the failure to agree on how the purchase price would be paid. (I will return to the alternative contention of Van Breda that even if it is

found that such a settlement agreement had been concluded, that Steyn and Badenhorst had repudiated the settlement agreement.)

[21] On 20 July 2011 Van Breda sent an email to the respondents in which he conveyed that he wished to retain his shareholding in the company. He then proposed three options to deal with the continuation of the relationship between the parties. One of the proposals was that he would keep his shareholding in Vela ATM and that the purchase price could be debited against his existing loan account with the company. It appears from this email that, although Van Breda was clearly reconsidering his position, he is not challenging the valuation of his shareholding. More in particular he did not challenge the value that was placed on the Vela ATM shares (of R2 million). In fact, Van Breda was quite prepared to keep the Vela Shares and debit the amount of R 2 million against his loan account in the company.

[22] A clearly annoyed Steyn responded to this email on 23 July 2011 wherein he made it clear that none of these options were acceptable to him. It is clear from this email was that Steyn was under the impression that the parties had an agreement: "In die eerste plek was ek onder die indruk dat ons nou 'n ooreenkoms gehad het. Nou wil jy dit heeltemal verander. Hoekom se jy nie eerder vir ons watter betalingsterme jou gelukkig sal maak nie." What is, in my view, apparent from this email is the fact that it was only the "betalingsterme" that was the sticky point and not the value of the transaction.

[23] An equally annoyed Badenhorst responded to the email on 27 July 2011 as follows: "Hi, hoop jy lewe nog! Skakel my as jy n kans kry asb, ek het 'n

moontlike oplossing vir terugbetalings voorwaarde probleem. Jy is egter 100% deel van die oplossing om dit te maak werk." On 28 July 2011 Badenhorst sent an email to Van Breda on 28 July 2011 in which he launches a severe attack on Van Breda for not being willing to assist the company in recovering an incentive fee from a consultancy agreement with Blue Financial Services (South Africa) (Propietary) Limited ("BFFS"). The email ended rather sarcastically with the following: "Welkom terug by Clorlique en ek hoop jy geniet dit om aandeelhouer te bly." On 29 July 2011 Badenhorst sent a further e-mail stating the following: "Hilgron, ek is total verstorm oor die fantasie wereld waarin jy leef. As jy dink dat jy op hierdie manier jouself verseker het van ons samewering is jy nou eers in vir 'n groot ontugtering! Cheers." On the same day Badenhorst sent a further email making it clear that the "deal" was off: "Hilgron, wat jy natuurlik ook nie in ag geneem het nie is dat, net soos dit jou keuse is om nie by the BFS eis betrokke te raak nie is dit ook ons keuse om jou aandeel te koop of nie. Ons keuse is dat ons nie langer belangstel nie – die deal is af. Cheers."

[24] The applicants rely on these e-mails in support of their contention that even if it is found that an agreement existed, that the respondent clearly reneged "on the in-principle agreement" that he exits from the company. Van Breda further relies on these emails to prove that the veiled threats contained in these emails effectively imprisoned him in the company.

[25] Whether these emails support the respective parties' contentions will be considered herein below. What these emails do, however, unequivocally demonstrate is that the relationship of trust between the parties has broken

down beyond repair and that finality needs to be brought to Van Breda's exit from the company.

[26] Following the blow-up between the parties, Steyn wrote an email on 27 February 2012 offering to purchase Van Breda's shares in the company in exchange for Steyn and Badenhorst taking over his securities with ABSA. Not surprising Van Breda refused to relinquish his shares for which effectively amounted to him giving his shares in the company away for nothing since all three of them were in any event bound as sureties to ABSA for R15 million.

[27] The parties thereafter communicated through their respective attorneys in an attempt to resolve the impasse.

Was a binding settlement agreement concluded?

[28] Despite the dispute between the parties in respect of whether a binding settlement agreement was concluded, I am of the view that the parties have in fact concluded a valid agreement and that the terms of the agreement were as set out in the "term sheet" dated 19 July 2011 agreement. In arriving at this conclusion, I had regard to the fact that it is clear from the papers that the respondents have complied with and fulfilled substantial conditions of the settlement agreement which, in my view, they would not have done had they not been in agreement in respect of the basis of the termination of the relationship between them.

(i) One of the terms of the settlement namely that the fifth and seventh respondents would exchange names was done and is not in dispute.

The fact that it was Van Breda who insisted on the name change is also instructive and, in my view, supports the conclusion that the parties have agreed on the terms of the separation.

- (iii) A crucial term of the settlement was the transferal to Van Breda (more accurately his nominee) of the 19% shareholding in Vela ATM (the so-called Vela ATM transaction). Again it was Van Breda who insisted upon this transaction and who has indicated early on in the negotiations that Vela ATM was important to him. The fact that Van Breda insisted upon this transaction and the fact that the parties have complied with this aspect of the agreement, also supports the existence of an agreement. Moreover, it is not in dispute that this transfer constituted part payment for Van Breda's (one-third) shares in the company. The value placed on the Vela ATM shares was R2 million. Van Breda accepted the transfer of the Vela ATM shares and even continued to insist upon retaining the Vela ATM shares after his email in which he sought to withdraw from the agreement. (I will return to this aspect herein below.)

- (iii) Steyn and Badenhorst resigned as directors of Envalue SA (Pty Ltd on 27 June 2011 in compliance with the agreement.

- (iv) Van Breda resigned as director of the company on 19 July 2011. This is, in my view, significant. The fact that Van Breda resigned as a director of the company on the very same day as the date upon which the settlement agreement was concluded, is in my view indicative of an

agreement on the terms of the said settlement agreement. Furthermore, his voluntary resignation from the company signified his agreement that he no longer had any interest in the conduct of the company's business nor in its profits and/or losses after 30 June 2011 which is the agreed affected date of the settlement agreement.

(v) Van Breda did not challenge the value placed on his shares in the email dated 22 July 2011 in which he informs the respondents that he no longer wished to sell his shares. In fact, he does not indicate in the email that he did not want to sell his shares because he was unhappy with the value placed on the shares. In fact, he wished to keep the Vela ATM shares (which were transferred to him as part payment for his shares in the company) and to debit it against his loan account.

(vi) The effective date of the transaction was to be 30 June 2011. The parties seem to be *ad idem* that whatever order this Court gives, this date will be regarded to be the effective date. This is also the date stipulated in the settlement agreement as the effective date of the transaction.

(v) Lastly, I am persuaded that the parties have reached an agreement on the value of the transaction. The payment of the said amount would be paid as follows: R2 million would be paid in the form of the shareholding that the company holds in Vela ATM. The balance of R 548 000.00 would be paid in cash. The balance is also tendered in the counter-

application against the transfer of Van Breda's one third shares in the company. The loan account of Van Breda and his wife would be settled. The total cost of the settlement was R 3 250 000.00.

Did the respondents repudiate the settlement agreement?

[29] Having found that the parties did in fact conclude a settlement agreement, the next question to be considered is whether the respondents have repudiated the terms of the settlement agreement as contended by Van Breda. I am not persuaded on the papers that this was the case. In fact, if regard is had to the email from Breda dated 22 July 2011 – shortly after the conclusion of the settlement agreement - I am persuaded that it was Van Breda who repudiated the agreement on 22 July 2011 and not the respondents. I have already referred to the fact that it was Van Breda who approached the respondents with an offer to buy his shares. It was Van Breda who proposed the name change (which was given effect to). It was Van Breda who proposed the transfer of the Vela ATM shares (which was given effect to). It was also Van Breda who voluntarily resigned as a director pursuant to an agreement to sever his ties with the company. Up until the email from Van Breda dated 22 July 2011 it has consistently been his attitude to sell his shares in the company. As already pointed out, substantial portions of the agreement had already been complied with and, at the very least, Van Breda has received partial payment for his shares in the form of the Vela ATM Shares. It was also Van Breda who gave the first indication on 22 July 22 that he no longer wished to sell his shares. From the papers it is, in my view, clear that up until that point, there was no animosity between the respondents and certainly not any

indication from the respondents that they no longer wished to fulfil their obligations in terms of the settlement agreement. In fact, they have fulfilled their side of the bargain.

[30] Having found on the papers that the parties have reached an agreement on 29 July 2011 there is nothing that prevents the court from granting the counter application to give effect to the only outstanding terms from the agreed exit of Van Breda from the company. The first applicant must transfer its shareholding in the company to Badenhorst and Steyn (or their nominees). The *quid pro quo* for the transfer of the shares has already been complied with partially with the transfer of the shares in Vela ATM to Envalue SA (Pty) Ltd. The remainder of the payment of the purchase price namely R 548 000.00 must be paid to Van Breda against transfer of his shareholding in the company to Steyn and Badenhorst. Steyn and Badenhorst have, in any event, tendered payment of the said amount.

Conclusion

[31] It is therefore concluded that the parties have concluded a settlement agreement on the terms as set out in the email dated 19 July 2011. Insofar as it is alleged by the applicants that it is the respondents that have repudiated the settlement agreement, it is this Court's finding that it is clear from the e-mail dated 22 July that it was Van Breda who attempted to renege from the said settlement agreement by refusing to sell his shares in accordance with the said agreement.

What would the position be if there was no settlement agreement?

[32] I have, despite my finding that the parties have reached a settlement

agreement which is binding, considered the position if no settlement agreement had been reached. The position of the applicants are that Van Breda is then entitled to the relief provided for in terms of section 163⁵ of the Companies Act on the basis that the company is being carried on or conducted in a manner that is oppressive or unfairly prejudicial to him. Van Breda further alleged that, for all intents and purposes, he had been completely excluded from all the operations and decision-making of the company and that he had also been denied access to the company's financial books and records.

[33] I am not persuaded on the papers that Van Breda has made out a case for the relief sought in section 163 of the Companies Act for the following reasons: Firstly, it is common cause that Van Breda resigned as a director on 19 July 2011. As already pointed out, his resignation signified that he no longer had any interest in the running of the affairs of the company. When Van Breda resigned there was no hint of the animosity that now blinishes the relationship

⁵ "163. Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company.—(1) A shareholder or a director of a company may apply to a court for relief if—

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or

(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant."

Subsection (2) provides for the powers of the Court in making an appropriate order.

between the parties. In fact, the breakdown occurred from 22 July 2011 onwards. There is no dispute that Van Breda voluntarily agreed to leave the company and that he factually exited the business of the company. There is certainly no suggestion on the papers that Van Breda was forced or coerced to resign as director. In fact, as already stated, this whole transaction was initiated by Van Breda. Secondly, and more importantly, the effective date of the severance of the relationship between the parties on whatever basis (whether it is in terms of a settlement agreement or in consequence to the application of section 163 of the Companies Act) is 30 June 2011. In fact, the applicants expressly records in the draft order handed up that, in the event the Court decides in their favour, the value of the applicants' shares in the company must be determined by independent auditors as the fair and reasonable value of the shares as at 30 June 2011. There can therefore, in my view, be no question of any oppressive behaviour after that date as Van Breda was no longer part of the running of the affairs of the company as the business of the company was by agreement *vis à vis* Van Breda ring-fenced on 30 June 2011.

[34] If it is accepted that no agreement was concluded on 19 June 2011, at best for the applicant the only remaining issue is the sum to be paid for his shares in the company. For purposes of assessing the value of the shares on the papers, it is clear that Van Breda has already received R2 million as partial payment for his shares. Van Breda himself has placed a value of R2 million on the Vela ATM shares in his e-mail as early as 27 June 2011. The applicants themselves have indicated a willingness to accept a valuation for the shares in the amount of R2.7 million (although it was made in the context of settlement

[37] Section 44 of the Companies Act is aimed at prohibiting a company to render financial assistance for the acquisition of its own shares. Section 44(3) of the Companies Act, however, provides for the circumstances in which the board may nonetheless authorise the financial assistance contemplated in this

[36] The applicants contend that the transfer constituted improper financial assistance for the acquisition by Steyn and Badenhorst (or their nominees) of Van Breda's (or his nominees) shares in the company.

[35] Despite the fact that the applicants have agreed to the so-called Vela ATM transaction and despite the fact that the parties have implemented the agreement, the applicants now seek to avoid the benefit that they have acquired through the acquisition of the company's 19% shareholding in Vela ATM by claiming that the disposal of the shareholding in Vela ATM to Envalue SA (at the request of Van Breda) is void as contemplated in section 44(5) of the Companies Act.

Section 44 of the Companies Act: The validity of the Vela ATM transaction

The applicants have already received R2 million. The respondents offers R 528 000.00 in the counter application for the shares. I am in agreement that the true dispute which serves before the Court is whether the complex and expensive valuation proposed by the applicants in the Notice of Motion is preferable to what appears to be a reasonable offer between the parties. I believe that the Court should err in favour of the respondents in concluding that a reasonable offer has been made to the applicants for payment of their shares.

section 44(2) of the Companies Act. Section 44(3)⁶ of the Companies Act requires that the following requirements be met for authorisation by the board for the provision of financial assistance:

- (i) The financial assistance should not contravene the company's Memorandum of Incorporation. There is no suggestion on the papers that the respondents contravened any portion of the company's Memorandum of Incorporation.

- (ii) The agreement must follow on a special resolution of the shareholders adopted within the previous two years which approved the assistance for the specific recipient. (I will return to this issue hereinbelow.)

⁶ "Financial assistance for subscription of securities.—(1) In this section, "financial assistance" does not include lending money in the ordinary course of business by a company whose primary business is the lending of money.

(2) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide financial assistance by way of a loan, guarantee, the provision of security or otherwise to any person for the purpose of, or in connection with, the subscription of any option, or any securities, issued or to be issued by the company or a related or inter-related company, or for the purchase of any securities of the company or a related or inter-related company, subject to subsections (3) and (4).

(3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless—

- (a) the particular provision of financial assistance is—
 - (i) pursuant to an employee share scheme that satisfies the requirements of section 97; or
 - (ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and
- (b) the board is satisfied that—
 - (i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and
 - (ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company."

[38] The essence of the applicants' criticism against this transaction appears to be the fact that no special resolution as prescribed in section 44(3)(a)(iii) of the Companies Act had been taken. Although it is so that Van Breda, Steyn and Badenhorst were not, in agreeing on the Vela ATM transaction, conscious of the provisions of section 44(3)(a)(ii) of the Companies Act that required a "special resolution", factually they did fact agree and approved the transaction. Furthermore, when the transaction was agreed upon, Van Breda, Steyn and Badenhorst were the only three directors and the only three shareholders. In other words, despite the fact that they did not record their transaction as a "special resolution" they in fact complied with what is contemplated with the requirement that a special resolution be taken. In fact, there was a unanimous agreement between the directors and the shareholders in respect of the disposal of the relevant shareholding. Subsequent to this unanimous decision, the shareholding was transferred as agreed. What also cannot be ignored is the fact that Van Breda, even when he had informed Steyn and Badenhorst that he no longer wished to sell his shares in the company, insisted that he was still desirous to retain the Vela ATM shares that were already transferred

(iv) The terms under which the financial assistance was proposed would be fair and reasonable to the company. There is no suggestion on the papers that the terms were not fair or unreasonable to the company.

(iii) The board had to have been satisfied that, immediately after providing the financial assistance, the company would satisfy the insolvency and liquidity test. There is no suggestion on the papers that the company could not satisfy the solvency and liquidity test.

to envalue SA at his request. Furthermore, the applicants have already received the shareholding against an agreed valuation of R2 million.

[39] In respect of the criticism that the parties did not take a "special resolution" sanctioning the Vela ATM transaction, I am therefore in agreement with the view that strict formalities may be dispensed with where there was unanimous assent in the sense that all the shareholders have acted in concert to attain "the same substantial results".⁷

[40] Therefore, in respect of the claim that the agreement in respect of the Vela ATM shares be declared⁸ void in terms of the section 44(5) of the Companies Act, the claim is dismissed.

The counter claim

[41] The only remaining issue is the counterclaim. The respondents seek the following order:

"1. Directing the first and/or second applicants, against a tender of payment by the second and fourth respondents of the sum of R528 000.00, to do all that is necessary to effect transfer in equal

⁷ See in this regard: *Gohlke and Schneider and Another v Westies Minerale (Edms) Bpk and Another* 1970 (2) SA 685 (A) at 694 where the principle of unanimous assent was accepted as settled law. See in this regard: *Gohlke and Schneider and Another v Westies Minerale (Edms) Bpk and Another* 1998 (4) SA 767 (W); "This contention derived from what has come to be known as the principle of unanimous assent. In *Blackman's formulation* in *Joubert (ed) The Law of South Africa (first reissue, 1996) vol 4 part 2 at para 40, even though generally company decisions are arrived at by means of formal resolutions taken at properly constituted meetings of the company, 'the courts have recognised that the unanimous assent of all the members, when fully aware of what is being done, is an alternative method of passing valid company resolutions - despite the fact that the procedures by the articles have not been observed'. The principle has been accepted and developed by the Appellate Division (now the Supreme Court of Appeal) (*Gohlke & Schneider and Another v Westies Minerale (Edms) Bpk and Another* 1970 (2) SA 685 (A) at 692D-694E; *Quadrangle Investments (Pty) Ltd v Witind Holdings Ltd* 1975 (1) SA 572 (A) at 581C-582B; *Alpha Bank Bpk en Andere v Registrateur van Bank en Andere* 1996 (1) SA 330 (A) at 348G-I), as well as in an increasing variety of first instance decisions."*

⁸ In terms of prayer [12] of the Notice of Motion.

proportions to the second and fourth respondents of the first applicant's one-third shareholding in the fifth respondent.

2. In the event of the first and/or second applicants failing to comply with the order in paragraph 1 hereof within ten days of service of this order upon their attorneys, directing and authorising the Sheriff of this Honourable Court to do all things and to sign all documents necessary to give effect to paragraph 1 above

3. Directing the first and second applicants, jointly and severally, the one paying the other to be absolved, to pay the costs of his application."

[42] In light of my finding on the facts that the parties have concluded a binding settlement agreement, I can find no reason not to grant the order sought in terms of the counter application.

Order

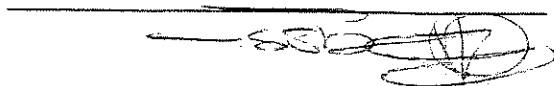
[43] The following order is made:

1. The application is dismissed with costs.
2. The order is granted in favour of the second and fourth respondents in terms of paragraphs 1, 2 and 3 of the Notice of Motion of the Counter-Application dated 27 March 2012 and which appears as "Annexure D" to the answering affidavit.

A C BASSON

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG



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DATE OF HEARING

6 November 2013

DATE OF JUDGEMENT

6 December 2013