

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

APPEAL CASE NO: A5076/ 2021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES ☒ NO

(2) OF INTEREST TO OTHER JUDGES: YES ☒ NO

(3) REVISED.

DATE: 7.9.2022

SIGNATURE: 

In the matter between:

MARCELLE PROPS 118 CC

First Appellant

NANCY JEANE HOSSACK N.O.

Second Appellant

BRAVO ZULU PROPERTIES (PTY) LTD

Third Appellant

and

SANDRA BRYAN

Respondent

JUDGMENT

Todd AJ

Introduction

1. This is an appeal against a decision of Senyatsi J in an application brought by the respondent (**Bryan**) in which she sought certain relief under the provisions of sections 49 and 36 of the Close Corporations Act, 1984 (**the Act**).
2. The background to the matter is that Bryan holds a 25% member's interest in the first appellant close corporation. When the proceedings commenced Mr Jack Mitchell (**Mitchell**) held the remaining 75% member's interest. Mitchell passed away after all affidavits in the proceedings had been delivered but before the matter was argued. His position in the litigation has been assumed by the second appellant, the executor of his estate.
3. The sole business of the close corporation was to own immovable property in the form of portion 9 of the farm Lake Lyndhurst, in Kwa-Zulu Natal. The property was used by the close corporation's members as a holiday home.
4. It was common cause in the proceedings that the relationship between Bryan and Mitchell had deteriorated to an extent that it was no longer possible for the close corporation to function effectively. In her founding affidavit Bryan referred to an impasse between them in their relationship *vis a vis* the close corporation, and asserted that the relationship "needs to be terminated".
5. The affidavits traversed in detail allegations and counter-allegations of conduct on each side which the other regarded as unacceptable. Bryan contended that various actions taken by Mitchell ostensibly aimed at resolving the impasse in fact constituted unfairly prejudicial conduct of the kind contemplated by section 49 of the Act, and that a just and equitable resolution was to require Mitchell to transfer his 75% interest to her at a price derived from an independent valuation of the underlying property that

Mitchell had procured. Mitchell contended that an appropriate solution was to authorize the third appellant (**Bravo**), an entity controlled by him, to purchase the underlying property at a price higher than the independent valuation, alternatively to direct Bryan transfer her 25% interest to him at a price derived from Bravo's offer.

6. The primary point of contention in the proceedings was whether Mitchell's approach to resolving the impasse amounted to an abuse of his position of control of the corporation as holder of a 75% member's interest, and whether his *de facto* control of Bravo rendered Bravo's offer a sham that could or should be ignored in determining what was just and equitable in the circumstances.
7. Before dealing with how these questions were decided by the court *a quo* and evaluating the parties' respective submissions on appeal, I set out a summary of the material facts.

Summary of material facts

8. The close corporation was incorporated and registered during 1998. Initially it had four members, each with a 25% interest. It was incorporated solely for the purpose of acquiring the Lake Lyndhurst property. Bryan and Mitchell were two of the initial four members. The others were one Townsend, who had originally owned the property and had transferred it to the close corporation, and Conynham.
9. Mitchell soon acquired other property interests in the same area through Bravo, a company of which he was the sole director and which was incorporated in 1999. During the course of 1999 Bravo acquired six other portions of the farm Lake Lyndhurst and some years later, during 2005, it acquired three further portions of the farm.

10. In 2004 and 2007 Conyham and Townsend disposed of their respective interests in the close corporation. Mitchell acquired both, in each case after Bryan had expressed no interest in doing so.
11. During 2012 Bryan did not pay her share of the close corporation's expenses timeously and Mitchell was unable to get in contact with her. He appointed a firm of attorneys to trace her whereabouts. This led to a series of interactions between them in November and December 2013 which disclosed a sharp deterioration in their interpersonal relationship.
12. I do not think it necessary or appropriate in the context of this appeal to attempt to apportion blame as between Mitchell and Bryan for the tone and content of their exchanges in 2013. It is sufficient to state that those interactions marked the beginning of the end of an amicable personal relationship between them.
13. Over the following three years Mitchell was dissatisfied with what he regarded as Bryan's disinterested approach and failure to pay her share of the administration and other related costs of running the close corporation timeously. Bryan was dissatisfied with the way in which Mitchell exercised his majority interest in the close corporation and complained that decisions were being made unilaterally and imposed on her.
14. By early 2017 Mitchell had started giving thought to acquiring Bryan's interest in the close corporation. At his request his son, Jerome Mitchell, sent an email to Bryan in January 2017 asking what she believed her member's interest was worth.
15. Bryan's response, in February 2017, was that the value of an asset of this nature was "*whatever the buyer is prepared to pay for it*" and that this was not necessarily a market related value. She indicated that she would be prepared to sell her 25% interest in the close corporation for an amount of R1 million. This would value the

close corporation in round numbers at R4 million, a sum considerably higher than what either party considered the market value of the underlying property to be.

16. In the replying affidavit Bryan characterized this offer as “tongue-in-cheek” and asserted that she had in fact held no intention of selling her interest at the time. The full text of her email communicating this does not, however, bear this out. In any event, whether or not this was a seriously intended offer Bryan was certainly communicating that she placed a high premium on her interest in the property and would not be interested in disposing of it at a market related rate.
17. Mitchell considered the R1 million price tag on a 25% interest to be excessive, but he also took Bryan’s response to indicate that she would be willing to sell at the right price. In May 2017 he procured a valuation of the underlying property from Mr Errol Ansara. Ansara provided a report valuing the property at R1.2 million. This was referred to in the papers as the Ansara valuation.
18. In December 2017 and on the strength of the Ansara valuation Mitchell offered Bryan an amount of R320,000 for her 25% interest in the close corporation. Bryan did not accept this.
19. By February 2018 Mitchell had decided that he would use his majority position to bring things to a head, by disposing of the property and winding up the close corporation. In his view at that stage the best way to resolve the issue was for the close corporation to sell the property for not less than R1,2 million (the amount of the Ansara valuation) plus R50,000 for the movables on the property.
20. According to Mitchell, he had by then already formed an intention that Bravo should purchase the property. He was Bravo’s sole director. He considered that in light of Bravo’s other holdings in the area and its intention to develop the area the property

would be worth more to Bravo than to an outside purchaser who owned no adjoining portions of the farm. Mitchell wanted, however, "to invite offers by third parties so as to establish a ballpark figure by an informed seller and an informed buyer, which could then be countered by a Bravo offer."

21. With the assistance of his son, Mitchell arranged a members' meeting with a view to passing resolutions that the close corporation's property and movables should be sold for an amount of not less than R1,250,000, and that the corporation would then be wound up. A member's meeting was scheduled for 2 March 2018.
22. In the run up to the meeting Bryan communicated her opposition to the proposed resolutions and stated that holding the meeting would "serve no purpose". She advised that she was not prepared to sell her member's interest to Mitchell, but now offered to acquire Mitchell's 75% member's interest for an amount of R937,500. This effectively valued Mitchell's interest at 75% of the Ansara valuation, although the offer was expressed as being "subject to auditor's final calculations".
23. In response, by email dated 28 February 2018, Mitchell referred to the breakdown in the relationship between the members of the close corporation and indicated that this was what had prompted him to propose its liquidation. Since this would be a costly exercise that would diminish the value distributable to members, he suggested that it would be preferable for one member to buy out the other, and inquired what Bryan's "top price" would be to buy his share.
24. On 2 March 2018 the scheduled member's meeting duly convened. Bryan made a further request to cancel the meeting, again stating that it would serve no useful purpose, but Mitchell did not agree to this. Various resolutions were passed at the

meeting, including that the close corporation should sell the property for an amount of not less than R1,250,000, and that its affairs should then be wound up.

25. On 8 March 2018 Mitchell sent Bryan a copy of the minutes of the 2 March 2018 meeting and advised that if she wished to submit a bid on either the property or the movables, only bank guaranteed bids would be acceptable and that the bidding process had been set at 60 days and would therefore close at midnight on Tuesday, 8 May 2018. In effect, the resolutions established an auction process in which it was contemplated that the property would be disposed of to the highest bidder.
26. On 23 March 2018 Bryan sent an email to Mitchell again stating that she was prepared to offer R937,500 for Mitchell's interest, and that it was consequently not necessary to liquidate the close corporation.
27. On 24 April 2018 Bryan's attorneys addressed a letter to Mitchell advising (i) that Bryan offered R937,500.00 for Mitchell's member's interest, alternatively that if there was a dispute as to the value of the close corporation's assets then Bryan was prepared to pay 75% of the market value of the assets as reasonably determined by the auditors; and (ii) that Bryan required Mitchell to provide her with written acceptance of the offer by 17h00 on 26 April 2018 or written confirmation that he would not proceed with the liquidation of the corporation's assets, failing which Bryan would institute proceedings against Mitchell and the corporation in terms of section 49 of the Close Corporations Act.
28. Bryan had not presented an offer to purchase the property pursuant to the 2 March 2018 resolutions, as she had been invited to do. But her offer to purchase Mitchell's 75% interest in the close corporation for R973,500 placed a value on the corporation as a whole in an amount equivalent to the Ansara valuation. Mitchell then decided,

in his capacity as the sole director of Bravo, “to make an offer at a price that Bravo was prepared to pay for the property”.

29. As a result, on 7 May 2018 Mitchell’s attorneys communicated to Bryan *inter alia* (i) that Bryan’s offer of R937,500 for Mitchell’s 75% member’s interest was rejected; (ii) that Mitchell had procured that Bravo offer to purchase the property for R2,150,000; (iii) that a member’s meeting would be called to pass a resolution in terms of section 46(b)(iii) of the Act disposing of the corporation’s property to Bravo for R2,150,000; and (iv) that Mitchell abandoned his reliance on the resolutions passed at the member’s meeting on 2 March 2018.
30. On 13 June 2018 Bravo submitted a formal written offer to purchase the corporation’s property for R2,3 million. A meeting was scheduled for 12 July 2018 for members of the corporation to decide whether or not to accept the Bravo offer.
31. In the papers Bryan contended that the Bravo offer was a sham designed to frustrate her own reasonable offer to acquire Mitchell’s interest, and that Mitchell’s relationship with Bravo had been concealed. Mitchell, by contrast, asserted that his relationship with Bravo was widely known, including to Bryan. Although little turns on this, I am satisfied on the papers that there was nothing surreptitious about the manner in which Mitchell procured and presented Bravo’s offer. From Mitchell’s perspective the situation was one in which both he and Bryan were at large to make offers themselves or to procure offers from third parties. It would not have been necessary to seek to conceal his relationship with Bravo in these circumstances, and on the established facts he did not.
32. On 20 June 2018 Bryan’s attorneys wrote to Mitchell’s attorneys contending (i) that Mitchell had fabricated and engineered a breakdown of the relationship between the

parties; (ii) that Bravo's offer to purchase was a sham; (iii) that Mitchell's conduct constituted unfairly prejudicial conduct as envisaged in terms of section 49 of the Close Corporations Act; and (iv) that Mitchell was required to give a written undertaking that neither he nor the corporation would proceed with the member's meeting or sign the offer to purchase with Bravo failing which an interdict would be sought on an urgent basis.

33. In her replying affidavit Bryan explained her reasons for objecting to the Bravo offer in these terms:

"As previously stated, the true reason for the grossly inflated offer (which [Mitchell] knows I cannot afford to match) made by [Bravo] was simply to force me to pay an amount far in excess of the fair market value for [Mitchell's] member's interest (which Mitchell knew I could not afford to do) or to price me out of the market so that [Mitchell] could acquire sole ownership and control of the property through his alter ego, being [Bravo]."

34. On 24 June 2018 Mitchell's attorneys responded (i) advising that the breakdown of the relationship between the parties was a matter of record; (ii) suggesting that if Bryan was *bona fide* and serious about purchasing Mitchell's 75% member's interest she was invited to make an offer to acquire Mitchell's interest for 75% of R2,250,000 plus R50,000 for the corporation's movable property – in other words 75% of R2,3 million or R1,725,000; (iii) stating that the contention that Bravo's offer was a sham was cynical and there was no basis for that contention; (iv) rejecting Bryan's assertions of unfairly prejudicial conduct; and (v) subject to Bryan instituting interdict proceedings by 11 July 2018, agreeing that the meeting scheduled for 12 July 2018 to discuss and decide on the Bravo offer would be postponed.

35. On 5 July 2018 Bryan then launched her application in the court *a quo*.
36. The appellants opposed the application and brought a counter application, dated 7 August 2018. They contended that the amount of the Bravo offer should be treated as the market value of the underlying property and sought an order either that the Bravo offer be implemented or that Mitchell be permitted to acquire Bryan's 25% member's interest for consideration equivalent to 25% of the Bravo offer. Bravo paid R2,3 million into the trust account of the close corporation's attorneys.

The decision of the court *a quo*

37. The court *a quo* concluded that Mitchell's conduct as holder of a 75% member's interest in the close corporation fell within the ambit of section 49 of the Close Corporations Act.
38. The specific acts of Mitchell that the court considered to be unjustly prejudicial were (i) causing the value of the underlying property to be determined by Ansara; (ii) having received the Ansara valuation which valued the property at R1,25 million making an unsolicited offer to sell his member's interest to Bryan; and (iii) having received Bryan's acceptance of that offer performing an about turn and procuring a much higher offer for the property from an entity that he controlled (Bravo).
39. The court further considered that the Bravo offer was not based on the market value, that it had been contrived to frustrate Bryan, and that there were no just and equitable grounds for Mitchell to frustrate Bryan's offer in this way. The court considered this conduct by Mitchell to be unfair, unjust and unequitable, and that an appropriate remedy in response was to authorize Bryan to acquire Mitchell's 75% member's interest in the corporation for a value based on the Ansara valuation.

40. The court took into account the fact that Bravo held other portions of the Lyndhurst Farm adjacent to the property of the close corporation and considered this to indicate that there would be no injustice or inequity if Mitchell was ordered to sell his share in the close corporation to Bryan.
41. In the circumstances the court *a quo* considered that Bryan had demonstrated that the conduct complained of was unfair, unjust and unequitable within the ambit of what is contemplated in section 49.
42. As regards the counterclaim, the court considered that Mitchell had failed to demonstrate that it would be in the best interests of all members that the property be sold to Bravo for an amount of R2,3 million, first because that valuation had not been supported or provided by an independent valuer, and secondly because Bravo was not an independent third party and the offer was consequently not made at arm's length.
43. Consequently the court ordered Mitchell to dispose of his 75% interest in the close corporation to Bryan against payment of R1,027,500, being 75% of the Ansara valuation plus an equivalent proportion of the value of the corporation's movable property.

The parties' contentions on appeal

44. On appeal the appellants contend, in summary, (i) that there were no grounds on which to have found that Mitchell's conduct fell within the ambit of section 49 of the Act, particularly when one has regard to the provisions of section 46 of the Act and the powers held by a person holding a 75% members interest in a close corporation; (ii) that an appropriate order would be for the court to authorize the disposal of the property to Bravo for a price of R2,3 million; (iii) in the alternative that there were

grounds for the court to make an order under the provisions of section 36 of the Act; and (iv) that the appropriate order to make under the provisions of section 36 was to order the transfer of Bryan's interest in the close corporation to Mitchell's executor against payment of 25% of R2.3 million, being an amount of R575,000.

45. The respondent, by contrast, defends the decision of the court *a quo*, contending that Mitchell's conduct fell within the ambit of section 49 and that there are no grounds to interfere with the order permitting Bryan to acquire Mitchell's 75% interest at 75% of the Ansara valuation plus a pro rata amount for the corporation's moveable property.

Evaluation

The applicable legal principles

46. Section 49 of the Act provides members of a close corporation with protection against acts or omissions by the corporation or one or more of its other members that are unfairly prejudicial, unjust or inequitable:

"49(1) Any member of a corporation who alleges that any particular act or omission of the corporation or of one or more other members is unfairly prejudicial, unjust or inequitable to him, or to some members including him, or that the affairs of the corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to him, or to some members including him, may make an application to a Court for an order under this section."

47. Section 36 of the Act deals with other circumstances in which a court may order the transfer of a member's interest in a close corporation –

"36(1) On application by any member of a corporation a Court may on any of the following grounds order that any member shall cease to be a member of the corporation:

(a) Subject to the provisions of the association agreement (if any), that the member is permanently incapable, because of unsound mind or any other reason, of performing his part in the carrying on of the business of the corporation;

(b) that the member has been guilty of such conduct as taking into account the nature of the corporation's business, is likely to have a prejudicial effect on the carrying on of the business;

(c) that the member so conducts himself in matters relating to the corporation's business that it is not reasonably practicable for the other member or members to carry on the business of the corporation with him; or

(d) that circumstances have arisen which render it just and equitable that such member should cease to be a member of the corporation: Provided that such application to a Court on any ground mentioned in paragraph (a) or (d) may also be made by a member in respect of whom the order shall apply.

(2) A Court granting an order in terms of subsection (1) may make such further orders as it deems fit in regard to-

(a) the acquisition of the member's interest concerned by the corporation or by members other than the member concerned; or

- (b) *the amounts (if any) to be paid in respect of the member's interest concerned or the claims against the corporation of that member, the manner and times of such payments and the persons to whom they shall be made; or*
- (c) *any other matter regarding the cessation of membership which the Court deems fit."*

48. The remedies afforded by these sections provide statutory protection for members of close corporations that is essentially similar to the protection provided to shareholders in company law. The general principles that underpin provisions of this kind were collected and comprehensively set out by this court in *De Sousa v Technology Corporate Management*.¹ The purpose of section 49 specifically has been described in a number of cases that were referred to by both parties.² Its object is to provide a mechanism for a member who is a "victim of oppressive conduct"³ to secure relief from the court.

49. To come within the ambit of section 49 conduct must be prejudicial to a member and must also be unfair. For present purposes I do not need to consider whether there is any distinction of significance between conduct that is "unfairly prejudicial" on the one hand or conduct that is "unjust" or "inequitable". On the face of it these are simply different ways of describing the same thing. For the section to be invoked a member must have suffered some adverse consequence in a practical sense, and that adverse consequence must be unfair, unjust or inequitable to the member.

¹ 2017 (5) SA 577(GJ)

² See *Gatenby v Gatenby and others* 1996 (3) SA 118 (E) at 112D-F; *De Franca v Exhaust Pro* CC 1197 (3) SA 878 (SC) at 893C-I; *Feni v Gxothiwe* 2014 (1) SA 594 (ECG) at para [26]; *Kanakia v Ritz Shelf 1004 CC t/a Passage to India* 2003 (2) SA 39(D) at 49C-D

³ *Gatenby v Gatenby*, *supra*

50. The requirement of prejudice means that the conduct must be shown to have caused harm in a commercial sense and not merely in an emotional sense.⁴

51. As to when conduct that is prejudicial will be regarded as unfair, our courts have generally followed the “reasonable bystander test”:⁵

*“The test of unfairness must, I think, be an objective, not subjective, one. In other words, it is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test... is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner’s interest.”*⁶

52. Fairness is “an elastic concept” and what is fair or unfair will depend on the context.⁷

The notion of unfairness in this context “transcends the strict legal rights of the shareholders”, with the result that “there may be cases where it would be unfair for the majority to exercise or take advantage of their legal rights or powers under the articles of association or agreements between them.”⁸

53. The key distinction between the circumstances in which a party may have recourse to the provisions of section 49 of the Act as opposed to section 36 is a lack of probity by a member in the conduct of the corporation’s affairs. Section 49 applies where

⁴ *De Sousa* supra at paragraph [53]

⁵ As set out in *Re RA Noble and Sons (Clothing) Ltd* [1983] BCLC 273 at 290-291, and applied in *De Sousa* supra at paragraph [35]

⁶ Followed in *De Sousa* at paragraph [35]

⁷ *De Sousa* at paragraph [36]

⁸ *De Sousa* at paragraph [37]

powers are being abused, or where there is “a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder that entrusts his money to a company is entitled to rely”.⁹

54. Where there has been a serious breakdown in relations it may be regarded as unfair for a minority member, even in the absence of any abuse or lack of probity by members, to have her assets locked up in a company in circumstances in which the majority can determine the course of the company’s affairs. This is the kind of situation in which the provisions of section 36(1)(d) of the Act may be invoked.
55. When there is a breakdown of confidence between shareholders fairness may dictate that a minority is offered an opportunity to exit at a fair price:

*“In such circumstances, fairness requires that the minority shareholder should not have to maintain his investment in a company managed by the majority with whom he has fallen out. But the unfairness disappears if the minority shareholder is offered a fair price for his shares. In such a case, s459 was not intended to enable the court to preside over a protracted and expensive contest of virtue between the shareholders and award the company to the winner.”*¹⁰

56. Despite the protection offered to minority shareholders by provisions of this kind courts will be slow to interfere in the management of companies:

“In judging the conduct of the majority, regard must be had to the principle that by becoming a shareholder in the company a person undertakes by his

⁹ *De Sousa* at paragraphs [39] and [40], referring *inter alia* to *Elder v Elder and Watson Ltd* 1952 SC 49

¹⁰ *Ex parte Kremer* [1989] BCLC 365 (ChD), approved in *Bailey and others v Knowles* 2010 (4) SA 548 (SCA) at paragraph 23, *De Sousa* at paragraph [46] and as pointed out in

contract to be bound by the decisions of the majority of shareholders if those decisions are arrived at in accordance with law, even if they adversely affect his rights as a shareholder or prejudice his interests.”¹¹

57. I turn now to applying these principles to the facts in the present matter.

Was Mitchell's conduct unfairly prejudicial in the sense contemplated in s49?

58. In my view the established facts provide no basis for a conclusion that Mitchell's conduct fell within the ambit of section 49. In my view Mitchell did nothing unfairly prejudicial, unjust or inequitable by procuring the Ansara valuation and presenting it to Bryan. He did not as a matter of fact at any stage offer to sell his member's interest to Bryan at a price determined by the Ansara valuation, and there are no grounds to hold that he performed an about turn, or that he procured the Bravo offer in a manner or for a reason “contrived to frustrate” Bryan.

59. All that can properly be concluded from the relevant sequence of events is that Mitchell, like Bryan, preferred to retain control of the property. Bryan was willing to demand a high premium for the purchase of her member's interest, but could not afford, and was not willing, to offer any premium for Mitchell's interest, and she could not and would not either match the Bravo offer or offer corresponding value for Mitchell's interest.

60. In my view Mitchell reasonably concluded that there was an irresolvable impasse between members of the close corporation. Bryan had reached the same conclusion.

¹¹ *De Sousa* at paragraph [49], referring to *Sammel and others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A)

In those circumstances Mitchell was entitled to set in motion steps to resolve the impasse, including by resolving to wind up the close corporation if necessary.

61. His decision to procure the Ansara valuation was a perfectly rational first step in the circumstances. After procuring that valuation he shared it with Bryan and offered to acquire her interest on the strength of that valuation. Bryan was not obliged to accept that offer, and did not. Mitchell was similarly not obliged to accept her counter proposal that valued Mitchell's member's interest on the same basis. The fact that Mitchell had procured the Ansara valuation was neither improper nor did it oblige him to accept it as a basis for disposing of his member's interest to Bryan.
62. When the impasse persisted it was not unreasonable for Mitchell to propose the sale of the property and the winding up of the close corporation. In formulating this proposal he treated the Ansara valuation as a floor price. That was something that protected the interests of the close corporation and its members. He knew that Bravo would be willing to pay a significant premium over the Ansara valuation, and he gave Bryan a reasonable opportunity to put forward her own offer. The resolutions of 2 March 2018 effectively established a bidding process.
63. When Bryan was only willing or able to make an offer to acquire Mitchell's interest at a price determined by reference to the Ansara valuation, Mitchell procured an offer from Bravo at a very significant premium to the Ansara valuation.
64. I do not agree that this could reasonably be construed as being contrived to frustrate Bryan's aspirations or as being prejudicial to the interests of the close corporation or its members. Certainly Mitchell was determined to retain control of the property. There was nothing wrong with that. He held 75% of the members' interests in the corporation that owned the property. Bryan was equally determined, and remains so,

despite holding only a 25% members' interest. There was nothing wrong with that either.

65. Nor, in my view, was there anything wrong, or prejudicial as regards the close corporation or its members, about the fact that Mitchell had deeper pockets than Bryan, and consequently was willing, through Bravo, to pay a significant premium on the market value to retain that control.
66. If Mitchell had used his majority position to accept an offer from Bravo in an amount equivalent to the Ansara valuation without giving Bryan an opportunity to make an offer of her own this might have raised concerns that he was effectively bypassing pre-emptive rights enjoyed by Bryan as a member of the close corporation, or using his majority position unfairly to secure the property for himself at a value that Bryan was equally willing to pay. I do not express any view on whether that might have constituted conduct of the kind contemplated in section 49 because it is not what happened here.
67. In fact Mitchell's stance was to accept, at least at the level of principle, that he should be willing to sell his interest at the price that he was willing to pay for Bryan's interest. This contrasted with Bryan's stance, which communicated a willingness to sell her interest only at a price far exceeding what she was prepared to pay Mitchell for his.
68. That one or both of the members was prepared to put forward their best offer to purchase the interest of the other could not by itself constitute any form of improper conduct.
69. As indicated earlier, the evidence does not support Bryan's contention that Mitchell concealed his relationship with Bravo. In any event, Mitchell was perfectly entitled to make an offer himself to acquire the property at the value that he considered worth

paying for it, and there is no reason why he should not have been able to procure a similar offer from Bravo. Bryan, too, was free to offer to sell her member's interest for an amount of R1 million (as she did) if that is what she was prepared to do, or alternatively to make an offer in the amount she was prepared to pay to buy Mitchell's share in the corporation. None of this constituted improper, unfair or prejudicial conduct.

70. The Bravo offer did not seek to or in fact deprive Bryan of value or reduce the value of the corporation. On the contrary, it undoubtedly increased the value that could be placed on the corporation. All that can be said of Mitchell's conduct is that he was determined to pay the highest price reasonably necessary to secure the property. That is not unfair conduct, and it cannot properly be characterized as prejudicial to Bryan in any commercial sense.
71. In summary, there were no grounds on the established facts to conclude that Mitchell's conduct in procuring the Ansara evaluation, in inviting an offer for his member's share, or in procuring the Bravo offer was prejudicial to Bryan. Nor was it unfair, unjust or inequitable in the sense contemplated in section 49.
72. It follows that the decision of the court *a quo* stands to be corrected, and the relief flowing from its finding that Mitchell's conduct did fall within the ambit of section 49 must be overturned.
73. What is left to be determined are the appellants' contentions in the counter-application, and the respondent's submissions in the alternative concerning the application of section 36 of the Act.
74. In their counter-application in the court below, with which they persist on appeal, the Appellants sought an order declaring that that the corporation may sell the property

to Bravo. This court has the power to grant declaratory relief of this kind. The remedy is a discretionary one.

75. I do not, however, think it an appropriate remedy in the circumstances, for a number of reasons. It is common cause between the parties that that there had been a complete breakdown in relations between them. Both sides accept and submit, albeit in the alternative, that the provisions of section 36 of the Act can and if necessary should be invoked.
76. The sale of the underlying property without first granting a remedy under section 36 would leave the parties in their existing relationship as members of the corporation, and would require them to continue to make further decisions regarding their own interests and those of the corporation in circumstances in which there is a demonstrated breakdown in mutual trust and confidence. The next steps, following a sale to Bravo, would require ongoing decision and co-operation, and would provide fertile grounds for further disputes between the members. Moreover Mitchell, in his email to Bryan of 28 February 2018, pointed to various disadvantages associated with winding up the corporation which he said would result in a significant diminution of value to its members. In summary, the sale of the underlying property would not solve the problem of the breakdown in relations between members of the corporation.
77. Both sides invited the court, in the alternative to their principal submissions, to make an order that is fair and equitable in the sense contemplated in section 36 of the Act.

Are the provisions of s36 engaged?

78. Both sides agreed that relations within the close corporation had broken down to an extent that the business of the close corporation could not continue to be conducted, and both agreed, albeit in the alternative, that grounds exist to invoke the court's

jurisdiction under the provisions of section 36 (1) of the Act on one or more of the grounds set out in that subsection.

79. Since it is clear that relations between the members of the close corporation had indeed broken down irretrievably I do not think it useful to debate whether s36(1)(c) or s36(1)(d) is more apposite. I regard the matter as “an ordinary case of breakdown of confidence between the parties”,¹² and consider that circumstances have arisen that render it just and equitable that one of the two members should cease to be a member of the corporation. The situation is certainly one contemplated by s36(1)(d).
80. In summary, I am satisfied that in the particular circumstances of the matter this court is entitled to determine a remedy under the provisions of s36(2).

What remedy is appropriate?

81. That leads to the question which member should cease to be a member, and on what terms.
82. In my view I should not, in determining the appropriate remedy, take into account either the conduct of the parties leading up to the breakdown in their relationship or their respective personal reasons for seeking to acquire the property - in the case of Bryan because of emotional attachment to the property and in the case of Mitchell a desire to consolidate the holdings of Bravo and potentially to incorporate the properties into a protected area.
83. Instead the matter should in my view be determined simply with regard to the reasonable commercial interests that the respective parties have in the joint enterprise. It seems to me that it would be just and equitable to value the property at

¹² as in *Bayly v Knowles* (supra)

the highest price that either party is willing to pay or able to procure, whether they make that offer themselves or through any third party.

84. As a result, it seems to me to be just and equitable that Bryan should cease to be a member and should transfer her member's interest to the second appellant at a price established by the Bravo offer, in other words R575,000.
85. I have considered whether there are any grounds to order that Bryan be given a further opportunity to make an offer to acquire Mitchell's 75% interest at a price similarly established by the Bravo offer, but I do not think that this is reasonably required.
86. First, Bryan was unequivocally invited to make such an offer on two previous occasions and declined to do so. Second, Bryan has repeatedly asserted in the pleadings that the Bravo offer was unrealistically high and that she could not afford to acquire the property, or Mitchell's members' interest, at that level. In the circumstances there seem to me to be no equitable grounds on which the second appellant should be obliged to invite Bryan to make any such offer again.
87. As a result, I intend to grant the alternative remedy sought by the appellants, directing the respondent to transfer her member's interest to the second appellant against payment by the second appellant of the amount of R575,000, being 25% of R2,3 million.
88. Although I have decided against making the declaratory order sought by the appellants, for reasons explained earlier, the corporation is not precluded from disposing of the property to Bravo and may yet resolve to do so. This does not, however, affect the remedy that this court intends to order under the provisions of section 36 of the Act.

89. As regards costs, both parties sought costs. The appellants sought the costs of two counsel. The respondent employed one counsel. In my view this is not a matter in which costs of two counsel should be ordered.

Order

In the circumstances I make the following order:

1. The order of the court *a quo* is set aside and substituted with the following:

"1. The applicant is ordered to transfer her 25% member's interest in the corporation to the second respondent, against payment by the second respondent of an amount of R575,000 to the applicant in terms of the further paragraphs of this order;

2. The second respondent is directed to pay the amount of R575,000 to Attorneys Kern & Partners to hold in trust, to be released to the applicant by payment into her bank account forthwith upon transfer of the applicant's 25% member's interest in the corporation into the name of the second respondent;

3. The applicant is ordered, within seven (7) days of the date of this order, to take all steps necessary, including signature of the form CK2 and any other documents that may be required, in order to effect transfer of her 25% member's interest in the corporation into the name of the second respondent;

4. Failing compliance by the applicant with paragraph 4, the Sheriff is hereby authorised to take all steps and to sign all documents required in order to give effect to the transfer of the applicant's 25% member's interest in the corporation into the second respondent's name;

5. The applicant is ordered to pay the respondents' costs.

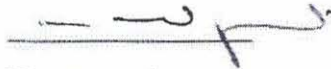
2. The respondent is ordered to pay the appellants' costs in the appeal.



C Todd

Acting Judge of the High Court of South Africa.

I agree:



Wepener J

Judge of the High Court of South Africa.

I agree:



Mudau J

Judge of the High Court of South Africa.

REFERENCES

For the appellants:

PT Rood SC

Instructed by:

Kern & Partners

For the respondent:

Adv. L Hollander

Instructed by:

Jason Michael Smith Inc Attorneys

Judgment reserved:

10 August 2022

Judgment delivered:

7 September 2022