IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED

APPEAL CASE NO. A695/2016

GP CASE NO. 48111/2014

18/4/2019

In the matter between:

PIETER DANIeL DU PLESSIS **APPELLANT**

Identity number [….]

and

BONNOX PROPRIETARY LIMITED **1ST RESPONDENT**

REG NO. 1957/002963/07

ANITA JULIA GENT **2ND RESPONDENT**

Identity number [….]

JUDGMENT

INTRODUCTION

1. The *genesis* of this appeal is the irretrievable breakdown in the relationship between the shareholders of the First Respondent. The First Respondent is a private company with limited liability duly registered and incorporated in accordance with the provisions of the Companies Act, No 71 of 2008

(hereinafter referred to as *"the Act").*

1.1 The Appellant (as Applicant) initiated an application in the Court a *quo* on 30 June 2014 in terms of which he applied for an order that the First Respondent be finally wound-up, alternatively directing the Second Respondent to purchase 47% of the issued share capital of the First Respondent consisting of 70 ordinary shares of R1,00 each from him at a price to be determined by Prof Harvey Wainer, an independent expert, alternatively by such independent expert as may be nominated by the Court.

1.2 It is the Appellant's case that it is just and equitable to liquidate the First Respondent, as envisaged in Section 344(h) of the old Companies Act, No 61 of 1973, as amended (hereinafter referred to as *"the old Act"),* read together with item 9 of Schedule 5 of the Act, as a result of the following:

1.2.1 The First Respondent is a *"private domestic company",* the affairs of which have been conducted in a manner akin to that of a partnership;

1.2.2 The relationship between the members of the First Respondent, i..e himself and the Second Respondent, has broken down irretrievably;

1.2.3 He has been excluded from the management of the First Respondent and from the First Respondent's board of directors;

1.2.4 A *"deadlock"* has arisen between the shareholders of the First Respondent, which is incapable of resolution; and

1.2.5 The Second Respondent's conduct is oppressive in nature in that it undermines his rights as the minority shareholder of the First Respondent.

1.3 In the alternative the Appellant applied for an order in terms of which the Second Respondent is directed to purchase his shares in the First Respondent at a fair value to be determined by an independent

expert appointed by the Court.

2. The Second Respondent opposed the application on the following grounds:

2.1 The First Respondent is a solvent company, as envisaged in Section 81 of the Act, and that it will not be just and equitable for the First Respondent to be wound-up, as provided for in Section 81(1)(c)(ii) of the Act;

2.2 The *"deadlock"* relied upon by the Appellant is non-suited in the particular circumstances, by virtue of the fact that:

2.2.1 The nature of the First Respondent's affairs is not tantamount to that of a partnership or a *quasi* partnership; and

2.2.2 No deadlock exists between the directors of the First Respondent.

2.3 The Appellant has failed to make out a case in terms of which the affairs of the First Respondent have been conducted by the Second Respondent in a manner oppressive and unfairly prejudicial to him as a shareholder, which conduct has contrived a cause of action calculated from excluding him in participating in the management and the business of the First Respondent, as envisaged in Section 163 of the Act;

2.4 The Appellant's *"hands are dirty"* in that his conduct caused the irretrievable breakdown of the relationship between him and the Second Respondent (hereinafter referred to collectively as *"the parties");* and

2.5 lrresolutable factual disputes exist on the papers, which disputes should have been foreseen, by the Appellant.

3. The Court *a quo* (Hughes J) dismissed the application on 30 March 2016 and referred the dispute with regard to the ownership of the two

machines, namely the Hinge Joint No 250/1 and the Hinge Joint No 120, to trial. The Appellant was ordered to pay the costs of the application, including the costs of the employees of the First Respondent who opposed the application and the costs occasioned by an earlier postponement on a party and party scale.

4. The Appellant initiated an application for leave to appeal on 12 May 2016, which application was dismissed by the Court *a quo* on 27 May 2016.

5. The Appellant applied to the Supreme Court of Appeal (hereinafter referred to as *"the* SCA") for leave to appeal, in accordance with the provisions of Section 17(2)(b) of the Superior Courts Act, No 10 of 2013. The SCA granted leave to appeal against the judgment and the order of the Court *a quo* to this Court on 13 September 2016.

6. The Appellant was unfortunately unable to file the record of appeal within the time period envisaged in Rule 49(7) of this Court's rules. The record was filed 15 days late. The Appellant applies for the condonation for the late filing of the appeal record.

7.1 The First and Second Respondents oppose the application for condonation for the late filing of the appeal record.

7.2 The First and Second Respondents also initiated an application on 10 March 2017, in which they apply for an order declaring that the appeal has lapsed. This application was. however, withdrawn in accordance with a notice of withdrawal dated 11 April 2017.

7.3 The First and Second Respondents' attorney addressed a letter to the Appellant's attorney dated 22 August 2018 in terms of which it is confirmed that the First and Second Respondents have decided not to pursue their opposition of the Appellant's application for condonation for the late filing of the appeal record.

7.4 The Appellant's attorney of record informed this Court of the aforementioned developments in a letter dated 29 August 2018. We were requested not to read the *"voluminous interlocutory applications"* which forms part of the record. The costs of the

interlocutory applications are still alive and should be dealt with.

THE *DRAMATIS PERSONAE*

8. The First Respondent was, as its registration number suggests, established in 1957. The First Respondent's memorandum of association and articles of association were registered by the Registrar of Companies on 21 September 1957. The initial subscribers of the First Respondent were Mr Maurice Gavshon, a pharmacist, and Mr Paul Andries Wojtowtiz, a production manager. On the papers before us it is common cause that the First Respondent was established by Mr Volker Harmen Shadewaldt (hereinafter referred to as *"Mr Shadewaldt").* Mr Shadewaldt was for the best part of his life the majority shareholder of the First Respondent and he was furthermore the Managing Director of the First Respondent.

8.1 The Second Respondent is Mr Shadewaldt's only child. She procured her shareholding in the First Respondent from three sources, namely:

8.1.1 Her late grandmother (Mr Shadewaldt's mother);

8.1.2 Her late mother (Mr Shadewaldt 's spouse); and

8.1.3 Mr Shadewaldt.

8.2 At the time when the application was initiated in the Court *a quo* on 30 June 2014 the shareholding in the First Respondent comprised of:

8.2.1 70 ordinary shares out of the 150 shares which represents 47% of the issued share capital of the First Respondent belong to the Appellant; and

8.2.2 80 ordinary shares out of the 150 shares which represents 53% of the issued share capital of the First Respondent belong to the Second Respondent.

8.3 The parties are therefore the only shareholders of the First Respondent. The Appellant describes himself as the *"minority shareholder".*

8.4 The Appellant was employed by the First Respondent in June 1986 as a general technician and clerk. He was subsequently promoted to the position of a fitter and turner, whereafter he became the First Respondent's general manager during 2010, upon Mr Shadewaldt's resignation as general manager.

8.5 Mr Shadewaldt became very fond of the Appellant and, according to the Appellant's evidence, they *"operated as a quasi-partnership to the benefit of the First Respondent, consulting on a daily basis in regard to business decisions which were taken by consensus between them".* Eight years after he became an employee of the First Respondent Mr Shadewaldt, in recognition of his endeavours, gave the Appellant 15 shares in the First Respondent. This allegedly transpired during 1994.

8.6 Four years later, during 1998, Mr Shadewaldt transferred a further 45 shares to the Appellant in recognition of his service to the First Respondent, which meant that the Appellant held 60 shares in the First Respondent. At the same time Mr Shadewaldt transferred 80 shares to the Second Respondent. A further 10 shares were transferred to the First Respondent's accountant, Mr SND Smith (hereinafter referred to as *"Mr Smith").* The Second Respondent was appointed as a non- executive director of the First Respondent.

8.7 Later in the same year (1998) Mr Shadewaldt resigned as a director of the First Respondent, but he remained the general manager of the First Respondent. Mr Shadewaldt's resignation resulted therein that the Second Respondent became the sole director of the First Respondent.

8.8 Mr Shadewaldt continued to fulfil the role of general manager from 1998 until 2010 when he went into semi-retirement and appointed the Appellant as the First Respondent's general manager. Although Mr Shadewaldt withdrew from the active day-to-day management of the First Respondent, he nevertheless remained interested in

the activities of the First Respondent and the Appellant allegedly sought his advice and consulted with him when making decisions in relation to the First Respondent. Mr Shadewaldt continued to attend the First Respondent's premises from time-to-time and he regularly met with the Appellant at his home to discuss what was happening in the business and to keep abreast of all developments.

8.9 The First Respondent flourished financially. The First Respondent's turnover increased from R10,5 million in 2002 to nearly R23 million in 2010. The Appellant alleges that one of Mr Shadewaldt's guiding principles was to build up the First Respondent's cash reserves. In 2002 the First Respondent's cash reserves were less than R3 million and at the end of 2010 the First Respondent's cash and investments exceeded R20 million. At the same time the nett current assets increased from R3,5 million in 2002 to approximately R18,5 million at the end of 2010.

8.10 The Second Respondent informed the Appellant in November 2011 that she had no interest in the First Respondent and she invited the Appellant to buy her shares. The parties jointly instructed the First Respondent's auditors, namely BDO International, to calculate a value of the shares. The First Respondent's nett asset value based on annual financial statements as well as the adjusted market value as at 30 June 2011 were determined by BDO International. These negotiations, however, did not result in a sale.

8.11 The Second Respondent resigned as the director of the First Respondent at her own instance during January 2012 and the Appellant was subsequently appointed as the First Respondent's director. He continued to run the First Respondent as before and remained the First Respondent's general manager.

8.12 The First Respondent's financial results improved substantially from 2010 to 2012. During this period the First Respondent's annual turnover increased from approximately R23 million per annum to

more than R29,5 million per annum. The First Respondent's cash and investments increased from more than R20 million to an amount exceeding R27 million. The nett assets remained constant.

8.13 Mr Smith retired at the end of February 2012 and offered his 10 shares to the Appellant *"as a gift".* The Appellant allegedly informed the Second Respondent as a matter of courtesy that he was interested in Mr Smith's shares. The Appellant purchased Mr Smith's 10 shares at an agreed nominal price of approximately R500,000,00, as he (the Appellant) was not prepared to take over Mr Smith's shares without compensating him. Notwithstanding the fact that the shares were given to the Appellant as a gift, the Appellant did not feel comfortable with this and therefore decided to pay Mr Smith a nominal value for the shares. The purchase of Mr Smith's 10 shares increased the Appellant's shareholding to 70 shares, giving him 47% of the First Respondent's issued shares.

8.14 The Second Respondent was subsequently re-appointed as a co-director of the First Respondent, together with the Appellant, on 18 January 2013. The Second Respondent disseminated a request for a shareholder's meeting on 8 February 2013, for purposes to appoint her husband , Mr Bruce Gent, as a co-director of the First Respondent. It seems that the relationship between the parties became extremely hostile and volatile during the beginning of 2013. It is evident that the parties were drifting apart and that they were not pursuing the same ideological views pertaining to the manner in which the affairs of the First Respondent should be attended to and conducted. The battlefield was set.

THE FACTUAL MATRIX

9. The Second Respondent addressed a letter dated 20 February 2013 to the Appellant in which she gave notice of an ordinary shareholders' meeting scheduled to be held on 6 March 2013. The purpose of this meeting was to table a resolution in terms of which the Appellant is removed as a director of the First Respondent. No reasons were provided for the Appellant's

removal as a director of the First Respondent.

10. The Appellant sought legal advice from an attorney in Centurion. Counsel was briefed and it was decided to initiate an urgent application in terms of which the First Respondent is placed under supervision and commencing business rescue proceedings, as envisaged in Section 131(4)(a) of the Act. This application to begin business rescue proceedings was orchestrated by the Appellant. The Appellant and his legal representatives (the attorney and counsel) embarked on a process to stifle the Second Respondent's attempt to remove the Appellant as a director of the First Respondent. Two employees of the First Respondent, Messrs Russel Zietsman and Chari Daniel de Beer, were masqueraded as the Applicants in the business rescue application that was initiated in this Court under case no. 10059/2013.

11. The Appellant and the Applicants in the aforementioned application (Messrs Russel Zietsman and Chari Daniel du Beer) were advised not to give notice of their intention to apply for an order in terms of which the First Respondent is placed under supervision and commencing business rescue proceedings to any affected party, i.e. the First Respondent or the Second Respondent. This Court (Prinsloo J) made an order on 5 March 2013 in terms of which the First Respondent was placed under supervision, as provided for in Section 131(4)(a) of the Act. This order was made the day before the shareholders meeting was to be held at the offices of the Second Respondent's attorneys in Centurion. The Appellant, for obvious reasons, did not attend the aforementioned meeting on 6 March 2013.

12. The Second Respondent phoned the Appellant on his cellular telephone on 6 March 2013 to establish the reason why he was not present at the shareholders meeting. The Appellant informed the Second Respondent that he was too ill and too stressed out to attend the meeting. The Appellant told the Second Respondent that *"he cannot take it anymore".*

    12.1 The Appellant omitted to inform the Second Respondent that an order was obtained the previous day (on 5 March 2013) in terms of

which the First Respondent was placed under supervision. The Appellant furthermore alleges that he decided not to attend the shareholders meeting by virtue of the animosity and the hostility between him and the Second Respondent. The Appellant laboured under the apprehension that *"the business rescue practitioner was in charge"* of the First Respondent.

12.2 The Second Respondent, however, continued with the shareholders meeting and the Appellant was removed as a director of the First Respondent in his absence. The Second Respondent's husband, Mr Bruce Gent, was appointed as the First Respondent's director.

12.3 The Appellant conceded in his founding affidavit in the Court *a quo* that the application to commence with business rescue proceedings was fundamentally misconceived and ill-founded.

12.4 The Second Respondent initiated an urgent application in this Court under case no. 16169/2013 in terms of which she applied for an order setting aside the order that was made by Prinsloo J on 6 March 2013 and that the business rescue proceedings be discontinued, alternatively set-aside. This application was enrolled and set-down for hearing on 2 April 2013. The Appellant and Messrs Russel Zietsman and Chari Daniel de Beer opposed this application, which opposition seems to have been futile. This Court (Vorster AJ) made an order on 2 April 2013 as applied for by the Second Respondent and, in addition, ordered Messrs Russel Zietsman and Chari Daniel de Beer to pay the costs of the application on the scale as between attorney and own client.

12.5 The Appellant alleged in his founding affidavit that he *"was extremely disappointed"* when the business rescue proceedings in relation to the First Respondent were set-aside by Vorster AJ on 2 April 2013.

13. The Second Respondent scheduled a shareholders meeting on 20 May 2013, the purpose of which was to appoint two additional directors to the

First Respondent's board of directors, namely Mr Warren Gent, the Second Respondent's brother-in-law, and Mrs Cornelia Elizabeth van den Berg, a former receptionist in the employ of the First Respondent who was subsequently promoted to an executive sales director. The Appellant and his former attorney, Mr David Barn, attended the shareholders meeting on 20 May 2013 and opposed the appointment of Mr Warren Gent and Mrs van den Berg as directors of the First Respondent. The Appellant submitted that he was not represented on the First Respondent's board of directors, notwithstanding the fact that he owns 47% of the shares. Despite the Appellant's aforementioned opposition, Mr Warren Gent and Mrs van den Berg were appointed to the First Respondent's board of directors.

14. An annual general meeting of the First Respondent's shareholders was held on 17 April 2014. The Appellant attended this meeting and initiated an application to have himself re-appointed as a director of the First Respondent. This application was unsuccessful.

15. It seems that the line in the sand was already drawn on 4 April 2013. A meeting was held on this day which was attended by the Appellant, the Second Respondent and her former attorney. During this meeting it was agreed that the Second Respondent would purchase the Appellant's shares. The Second Respondent suggested that the Appellant should employ the services of an expert to valuate the shares of the First Respondent on condition that he should pay the costs occasioned by the aforementioned valuation.

    15.1 The Appellant instructed MFG Accountants to conduct a valuation of the First Respondent's shares. MFG Accountants prepared a valuation report dated 14 August 2013 in terms of which the nett asset value of the First Respondent was determined at R64 464 612,00. The Appellant's 47% shares would therefore be worth R30 298 368,00.

    15.2 The Appellant dispatched a written offer to the Second Respondent

in accordance with the provisions of clause 11(d) of the First Respondent's articles of association, in terms of which the Appellant communicated his intention to sell his 47% shareholding to the Second Respondent in an amount of R30 million.

15.3 The Second Respondent is firmly of the view that R30 million is not a fair valuation of the Appellant's 70 shares and she is accordingly not prepared to purchase the Appellant's shares in such an amount. The Second Respondent is furthermore afraid that the Appellant will establish a new business in competition with the First Respondent in the event that she acquires his 70 shares. The Second Respondent's concerns are premised on the Appellant's contention that the value of his shares should be higher if a restraint of trade was imposed upon him. The absence of a restraint of trade provides no comfort to the Second Respondent.

15.4 The Appellant played his hand and disclosed his intentions in his founding affidavit in the Court *a quo* regarding the disposal of the parties' respective shareholding in the First Respondent. The Appellant confirmed that he is willing and able to buy the Second Respondent's 80 shares if he is ordered to do so. The Appellant furthermore confirms that it would not be detrimental to the First Respondent if he is ordered to purchase the Second Respondent's shares.

15.5 The Second Respondent instructed her counsel to make the following submission in his heads of argument:

> *"The fact remains that the Second Respondent is not in a financial position to purchase the Appellant's shareholding and cannot afford to do* so."

15.6 It is therefore inevitable that the only logical and sensible solution to the current *impasse* is that the Appellant should be afforded an

opportunity to initiate a buy-out option in terms of which he is ordered to purchase the Second Respondent's 80 shares at a fair and reasonable value.

16. The Appellant was suspended on 27 September 2013.

16.1 A charge sheet was prepared and the disciplinary hearing was set-down for hearing on 16 October 2013. A notice to attend the disciplinary hearing was provided to the Appellant on 9 October 2013. The Appellant was charged with the following transgressions:

16.1.1 Count 1

Gross misconduct : insubordination and/or insolence.

16.1.2 Count 2

Gross misconduct : insubordination and/or insolence.

16.1.3 Count 3

Gross misconduct : blatant and deliberate disregard for company policies and procedures - leave.

16.1.4 Count 4

Gross misconduct: insubordination and/or insolence - dishonesty.

16.1.5 Count 5

Gross misconduct : verbal abuse - intimidation and causing disharmony at the company.

16.1.6 Count 6

Gross misconduct : theft and/or fraud - dishonesty and misappropriation of company funds.

16.2 The Appellant instructed Mr Barn to represent him in the disciplinary hearing. Mr Barn was unavailable on 16 October 2013 and requested for the disciplinary hearing to be postponed. This request was refused.

16.3 The disciplinary hearing, however, commenced on 21 October 2013. Shortly after the commencement of the hearing the initiator, Adv Goosen, added a further charge of gross misconduct to the charge sheet, namely:

16.3.1 Count 7

Gross misconduct : theft and/or fraud - dishonesty and misappropriation of company funds.

16.4 As a result of the introduction of the new charge (count 7) the disciplinary hearing was remanded to 4 and 5 November 2013.

16.5 As the Appellant exited the premises two detectives of the SAPS apprehended him and requested him to accompany them to the Erasmia Police Station. The Appellant was informed that the Second Respondent laid a charge of theft against him and that the value of the goods which were allegedly stolen by him was in excess of R1 million. This charge was allegedly withdrawn after the Appellant and Mr Barn explained the situation to the members of the SAPS.

16.6 The disciplinary hearing kick-off on 4 November 2013 and was conducted over a period of 7 days, being 4 and 5 November 2013, 9, 10 and 13 December 2013, 21 and 22 January 2014.

16.7 The disciplinary hearing was presided over by a member of the Pretoria Society of Advocates, namely Adv Delene Gianni. Adv Gianni prepared a written ruling dated 4 April 2014, consisting of 75 pages. She found the Appellant guilty on counts 1, 2, 4 and 7.

16.8 Adv Gianni invited the parties' respective legal representatives to make submissions to her in relation to an appropriate sanction on the same day, i.e. 4 April 2014. Submissions were made in

aggravation on behalf of the First Respondent and the Appellant's legal representative made submissions in mitigation.

16.9 Adv Gianni prepared a written sanction dated 4 August 2014 in terms of which she came to the conclusion that the aggravating circumstances outweighed the mitigating circumstances. The Appellant was summarily dismissed on 4 August 2014.

16.10 The Appellant, in the meantime, instructed his former attorney, Mr Barn, to initiate the application for the First Respondent's liquidation in the Court *a quo* on 30 June 2014. It seems that this decision was not a mere co-incidence.

16.11 It is evident from a proper reading and interpretation of the papers that the Appellant saw the writing on the wall. The Appellant was effectively snookered by virtue of the following:

16.11.1 He is the minority shareholder of the First Respondent and owns 47% of the shares;

16.11.2 He was not represented on the First Respondent's board of directors;

16.11.3 He was suspended on 27 September 2013 and eventually dismissed on 4 August 2014; and

16.11.4 He realized that the prospects of resuscitating the relationship with the Second Respondent was extremely slim, if not impossible.

16.12 An acrimonious *"divorce"* between the parties loomed. The fly in the ointment was the manner in which an exit strategy was supposed to be created or designed. The First Respondent stood in the center of the *"divorce proceedings",* by virtue of the fact that it was the sole asset of the *"joint estate".*

16.13 The fact of the matter is that the parties were unable to communicate effectively with each other and to attend to the affairs of the First Respondent as one would expect from directors

or shareholders in normal circumstances. The Appellant deposed to a confirmatory affidavit in support of the application to begin business rescue proceedings, under case no. 10059/2013, in which he declared as follows:

> *"Mrs Gent and I have irreconcilable differences relating to the manner in which the Respondent company should be managed more particularly the financial management thereof."*

And:

> *"I submit respectively that it* is *not in the best interests of the Respondent to be bled dry by reckless and ill-considered financial decisions taken by the shareholders."*

16.14 Regard being had to the aforementioned, it is evident that the parties have reached the end of the road.

STATUTORY FRAMEWORK AND THE APPLICABLE LEGAL PRINCIPLES

17. Hoffmann J, as he then was, made the following appropriate remark in the Chancery Division in the matter of **In Re a Company (No. 004377 of 1986) [1987] BCLC 94 at 101:**

> *"They often bear some resemblance to divorce petition in the days before Wachtel v Wachtel [1973] 1 ALL ER 829, [1973] Fam 72. Voluminous affidavit evidence is served which tracks the breakdown of* a *business relationship commenced in hope and expectation of profitable collaboration. Each party blames the other but often it* is *impossible, even after lengthy cross-examination , to* say *more than the petitioner* says *in this case, namely that there* was *a "clear*

conflict in the personalities and management style". It is *almost always clear from the outset that one party will have to buy the other's shares and it is usually equally clear who that party will be. The only real issue is the price of the shares.* "

18. This appeal is no exception. The entire record consist of 2 800 pages. It is, on the papers, impossible to throw the blanket of blame on the shoulders of either the parties. Both parties are to blame. There is, fortunately, a golden threat can runs through the entire record. This golden threat can be described as the *"irretrievable breakdown of the trust relationship"* between the parties. The parties are totally incompatible and their relationship is dysfunctional.

19. Section 81 of the Act underpins the winding-up of solvent companies by virtue of a Court order. Section 81(1)(d) of the Act is for purposes of this appeal applicable:

> *"The company, one or more directors or one or more shareholders have applied to the Court for an order to wind up the company on the grounds that -*
>
> *(i) the directors are deadlocked in the management of the company , and the shareholders are unable to break the deadlock, and -*
>
> *(aa) irreparable injury to the company is resulting, or may result, from the deadlock; or*
>
> *(bb) the company's business cannot be conducted to the advantage of the shareholders generally,* as *a result of the deadlock;*
>
> *(ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or*
>
> *(iii) it is otherwise just and equitable for the company to be wound-*

up."

20. The Appellant is not a director of the First Respondent. The Appellant is, however, a shareholder or member of the First Respondent, as envisaged in Section 346(c) of the old Act. The Appellant therefore has *locus standi* to initiate an application for the winding-up of the First Respondent.

21. It is the Appellant's case in his founding affidavit in support of the application in the Court a *quo* that it is just and equitable to liquidate the First Respondent, as provided for in Section 344(h) of the old Act, read with Item 9 of Schedule 5 of the Act, for the following reasons:

    21.1 The First Respondent is a private company, the affairs of which have been conducted in a manner akin to that of a partnership;

    21.2 The relationship between the parties has broken down irretrievably;

    21.3 The Appellant has been excluded from the management of the First Respondent and from its board of directors;

    21.4 A deadlock has arisen between the parties as shareholders, which is incapable of resolution; and

    21.5 The Second Respondent's conduct is oppressive of the Appellant in his capacity as the minority shareholder of the First Respondent[1].

22. The Appellant furthermore applies for relief in accordance with the provisions of Section 163 of the Act, by virtue of the fact that the Second Respondent allegedly acted in an unfairly prejudicial and oppressive manner towards him and she (the Second Respondent) has disregarded his rights and interests as a shareholder of the First Respondent[2].

23. This Court is therefore confronted with the following two questions:

    23.1 Is it *"just and equitable"* to wind-up a solvent company, and if it is found that it is just and equitable to wind-up a solvent company, under what conditions should a Court exercise its discretion in this regard ?

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[1] See: par 13 of the founding affidavit - pages 11 to 14

[2] See: par 15 of the founding affidavit - page 14

23.2 Is it just and equitable to wind-up a solvent company at the instance of a minority shareholder, or not ?

24. An order for the winding-up of a solvent company is a drastic and draconian remedy. It has been aptly described as a *"bludgeon"*[3]*.*

24.1 The Court's discretion to grant *"equitable or reasonable or fair"* relief is not unbounded. This discretion must be exercised judicially, on a principle basis, and in recognition of the Court's disinclination to interfere lightly in the internal affairs of a private company.

24.2 The Appellant consequently bears a formidable *onus* of establishing that a winding-up order in relation to a solvent company is warranted on the ground that such an order would be just and equitable.

24.3 The provisions pertaining to the winding up of a solvent company on the just and equitable ground are increasingly being tested before the Courts. The question addressed by the SCA in the matter of **Thunder Cats Investments 92 (Pty) Ltd v Nkonjane Economic Prospecting & Investments (Pty) Ltd**[4] (hereinafter referred to as *"Thunder Cats")* provides much needed guidance on the deadlock principle as well as the breadth and scope of the *'just and equitable"* ground for winding- up.

24.4 **Thunder Cats Investments 92 (Pty) Ltd** and **Turquoise Moon Trading 8 (Pty) Ltd,** together with the Second and the Third Respondents, namely **Bosasa Operations (Pty) Ltd** and **Bosasa Youth Development Centers (Pty) Ltd** were the shareholders of **Nkonjane Economic Prospecting & Investment (Pty) Ltd** *("the company"),* each holding 25% of the issued shares. The shareholders appointed directors who vote in blocks in proportion to their shareholding. The warring parties were equipollent at

[3] See: Re Levine Developments (Israel) Ltd 1978 5 BLR 164 at 172
[4] 2014(5) SA 1 (SCA)

management and shareholding level. The rights of the shareholders to dispose of their shares were limited so that a shareholder could not sell its shares without the approval of the other shareholders. The company was solvent and its main asset is an 11% shareholding in **Ntsimbintle Mining (Pty) Ltd** which is worth some R132 million[5].

24.5 The Court a *quo* (Vermeulen AJ) made an order in terms of which the company was wound-up on the basis that it was *'Just and equitable"* to do so, as provided for by Section 81(1){d){iii) of the Act. He founded his judgment on the general breakdown of the relationship between the shareholders and, in exercising his discretion whether to liquidate, said that the company was of the kind envisaged in **Re Yenidje Tobacco Co Ltd [1916] 2 Ch 426 (CA),** that is, in substance a partnership in the guise of a company[6].

24.6 The Appellants in **Thunder Cats** contended that the application for winding-up is based on a *"deadlock"* between the parties at both shareholder and director level, but that deadlock, **as a** ground for liquidation, is excluded by clause 8.2 of the shareholders agreement.

24.7 The Respondents had stated at various places in their founding affidavit that the directors were not able to operate and make decisions commercially because of a deadlock at both levels. They also alleged that the directors were deadlocked concerning the management of the company and that the shareholders were unable to break the deadlock, given the terms of the shareholders agreement.

24.8 The result of the deadlock at both levels was that the business of the company could not be conducted and its assets managed to the advantage of the shareholders generally.

24.9 The Appellants also submitted that there was no evidence that the relationship between the parties had irretrievably broken down and

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[5] See: par 1 of Thunder Cats

that the Court *a quo* erred in coming to that conclusion. The further submission was made that a winding-up order may not be made on the application of a party responsible for the situation giving rise to the application. The Respondents were, in other words, not approaching the Court with *"clean hands"*[7].

24.10 The *"just and equitable"* phrase is found in a number of related pieces of legislation as well as in the remedial provisions of the Constitution[8].

24.11 If not ubiquitous, then the phrase is at least exceedingly well travelled[9].

24.12 The words *'just and equitable"* are intended to be elastic in their application to allow the Courts to intervene and to relieve against an injustice or inequity[10].

24.13 A Court retains a broad discretion to make a winding-up order under Section 81(1)(c) and (d) of the Act or any other order it considers appropriate. In its application, the just and equitable ground does not admit of a strict categorical approach. As Ponnan JA observed:

> *"There is no necessary limit to the words 'Just and equitable".*"[11]

24.14 A Court must therefore be careful not to construe the authorities as setting out a series of restrictive principles which would confine the phrase *'Just and equitable"* to rigid categories[12].

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[6] See: par 2 of Thunder Cats
[7] **See:** par 6 of Thunder Cats
[8] Section 172(1)(b) of the Constitution of the Republic of South Africa, 1996 provides that following upon a declaration of constitutional in- validity a Court *"may make any order that is just and equitable".*
[9] Section 8(1) of the Human Rights Act, 1998 (UK) provides that where the Court finds that an act of a public authority is unlawful, it *"may grant such relief or remedy, or make such order, within its powers as it considers just and equitable".*
[10] See: Moosa v Mavjee Bhawan (Pty) Ltd 1967(3)SA 131 (T) at 136 H - I
[11] See: Apco Africa v Apco Worldwide Inc 2008(5) SA 615 (SCA)
[12] See: Sweet v Finbain 1984(3) SA 441 (W) 181 C - H

24.15 Each case depends to a large extent on its own facts. The judicial enquiry must extend beyond an examination of the legal rights of the shareholder to include a broader spectrum of equitable rights[13].

25. The decisive question therefore is: when is it *"Just and equitable"* for the Court to order that a company be wound-up on the *'Just and equitable"* ground ?

26. Messrs TC Maloka and S Muthugulu-Ugoda are lecturers at the Nelson R Mandela School of Law, University of Fort Hare. They published a well-reasoned and extremely handy publication with the following title:

> *"The deadlock principle as* a *ground for the just and equitable winding- up of a solvent company : Thunder Cats Investments 92 (Pty) Ltd v Nkonjane Economic Prospecting Investment (Pty) Ltd 2014(5) SA 1 (SCA)."*

27. The aforementioned article was published on 17 May 2016 under the editorship of Prof C Rautenbach. The learned authors of the aforementioned article came to the following well-reasoned conclusion:

> *"The judgment of the* SCA *in Thunder Cats is welcomed for three obvious reasons:*
>
> - *First, it has provided a much needed clarification on the breadth and scope of the 'Just and equitable ground" in terms of Section 81(1)(d)(iii) of the Act.*
> - *Second, it has elucidated the extent to which the clean hands doctrine may bar the granting of just and equitable relief.*
> - *Finally, the SCA spared the evolving just and jurisprudence the confusion inherent in the conflicting opinions held by different divisions of the High Court* as *to whether the just and equitable*

[13] See: Erasmus v Pentamed Investments (Pty) Ltd 1982(1) SA 178 (W) at

relief in Section 81(1)(d)(iii) was as wide as it had been under Section 344(h) of the old Companies Act, No 61 of 1973, or was limited by subparagraph (i) and (ii) so as to preclude all other grounds of deadlock.[14]

28. Levine J, as he then was, provided a succinct statement of the types of situations in which it will be just and equitable to order a winding-up on the grounds of *"deadlock":*

> *"Some of the circumstances ..... that will lead to a finding that it is just and equitable to wind-up the company because of deadlock are:*
>
> - *There are no other effective and appropriate remedies;*
> - *There* is *an equal split or nearly equal split of shares and control;*
> - *There is a serious and persistent disagreement as to some important questions respecting the management or functioning of the corporation; or*
> - *There is* a *resulting deadlock and the deadlock paralyzes and seriously interferes with the normal operations of the corporation.*[15]

29.1 The shareholder feud and *impasse* in **Thunder Cats** is not too dissimilar to the corporate stalemate in **APCO Africa,** cited in footnote 11. In **Thunder Cats** shareholders were hopelessly at loggerheads. The shareholder relationship was strained from the moment the Respondents gave notice of their intention to extricate themselves from **Nkonjane.** They could not do so because the provision in the shareholder agreement dealing with the disposal of shares required that all other shareholders consent thereto in writing. The Appellants were unwilling to consent to the

[14] **See:** par 6 of the Article

Respondents selling their shares or to meet to discuss a reasonable basis for their leaving the company. The Appellants considered disinvestment before **Ntsimbintle** began mining and disposing of its minerals as likely to diminish the full value of their long term investment. The strain on the parties' relationship intensified as time went on.

29.2 The obstructive conduct of both sides did little to help the situation. Mediation efforts floundered due to the confrontational attitude of the warring shareholders. The internal wrangling, mutual disillusionment and distrust, and the consequent breakdown of the relationship between the shareholders paralyzed the company. The shareholder agreement could not provide a resolution to the stalemate as there was no deadlock breaking method. If there was a reasonable hope of tiding over the period of deep conflict and of **Nkonjane** emerging from its malaise to carry on at a profit, there may well have been insufficient reason for a Court to wind-up the company on the just and equitable provision.

29.3 However, the evidence demonstrated a justifiable breakdown of mutual trust and confidence between the shareholders regarding the conduct and management of the company's affairs. In particular, the state of animosity precluded all reasonable hope of co-operation in the attainment of the company's financial goals.

30. The facts and issues for determination by the SCA in **APCO Africa,** cited in footnote 11, appropriately capture the problem of *"deadlock".* The somewhat simple question confronting Ponnan JA was whether the First Appellant, APCO Africa (Pty) Ltd *("the company"),* ought to be wound-up on the ground that this cause was just and equitable within the meaning of Section 344(h) of the old Act, or more accurately, whether such an order was properly granted by the Court *a quo.*

30.1 The company was set-up as a joint venture partnership between the

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[15] See: Palmieri v AC Paving Co Ltd 1999 48 BLR (2d) 130 (BCSC)

Second Appellant, Arcay Communications Holdings (Pty) Ltd *("Arcay")* and the Respondent, APCO Worldwide Inc. The Appellant and the Respondent held a-n interest in the company in the same proportion. APCO was to refer client's work required to be performed on the African continent to the company. The residual profit generated by the company was to be shared on an equal footing while the directors seconded by Arcay were to manage the affairs of the company.

30.2 The parties disagreed from the outset on important corporate decisions and Arcay's response to matters relating to performance and accountability. There were complaints from disgruntled clients concerning the services rendered by the company.

30.3 Another bone of contention was the fact that Arcay had been appropriating for itself 90% of the revenue generated by the company. A director seconded by APCO to help salvage matters was met with hostility by the local directors of the company.

30.4 As a result of the animosity and altercation with the company's local directors, she had to operate from another office until the dispute between the shareholders could be resolved. The flurry of Court applications involving shareholders underscored the failure of the business relationship.

30.5 Several attempts by the Respondent to convene a shareholders meeting in order to discuss its exit proved futile. As a result, the company lost its ability to function and the board became unable to take decisions. The state of affairs prevailing in the company would compel any Court to exercise its discretion to wind-up the company on the just and equitable basis.

31. In our view there must be a serious and persistent disagreement on some important questions respecting the management or functioning of the First Respondent and deadlock which has the effect of paralysing or seriously interfering with its normal operations, for a winding-up order to be justified

on the grounds of *"deadlock"* or *'just and equitable ".*

32. This brings to focus the partnership analogy, that is, circumstances in which it may be appropriate to apply the kind of equitable considerations that govern the dissolution of partnerships to applications to wind-up the business of a company.

32.1 Where the relationship between the parties resembles a partnership between more than arm's length shareholders such that it can be said that the entity is, in substance, a partnership in the guise of a private company, Courts have been prepared in some circumstances to liquidate a corporation on the same grounds that would justify the winding-up of a partnership.

32.2 In determining to apply the partnership analogy in the famous English case of **Ebrahimi v Westbourge G tllerles Ltd,** Lord Wilberforce made it clear in his judgment that it was a fact of *"cardinal importance"* to the determination of that case that, prior to its incorporation, the business had been carried on by the shareholders as a partnership, with each other partner equally sharing the management and profits of the firm[16].

32.3 The equitable intervention of the Court on the *"partnership analogy"* ground requires the satisfaction of two conditions:

32.3.1 Firstly, the existence of an undertaking that it is in substance a partnership in the guise of a private company; and

32.2.2 Secondly, a breakdown of the mutual trust and confidence upon which the original undertaking was founded[17].

33. It is in this regard that the judgment of the Court a *quo* in **Thunder Cats** is instructive for applying the partnership analogy to the shareholder relationship that had been clearly marred by difficulty and disagreement.

33.1 According to the Court a *quo* the application of the just and

[16] See: Ebrahimiv Westbourne Galleries Ltd 1972 2 ALL ER 492 (HL)

equitable ground does not require a finding that the company was in fact a partnership or quasi-partnership, but rather requires a finding that it has some of the attributes that also describe a partnership.

33.2 In importing the partnership analogy to **Nkonjane** the Court *a quo* took into consideration the fact that the company comprised of only four members, each having the right to appoint a director. Each of the shareholders had the right to participate in the management of the company.

33.3 Furthermore, there was no body of shareholders separate from the board. In the view of the Court *a quo* no deep analysis was required but rather the bare facts spoke for themselves.

33.4 Not surprisingly, the SCA concluded that the disagreement between the shareholders affected the operation of the company so as to impair the attainment of its economic ends. In those circumstances it seemed just and equitable to dissolve the company pursuant to the relevant legislative provision[18].

34. There can be no dispute that the contribution of the contending parties to the breakdown of the relationship is a weighty factor. Thus the question arises : to what extent is the degree of the moral turpitude attributable to the Applicant for winding-up material to the enquiry whether it is just and equitable to liquidate the company?

35. This leads squarely to the argument pressed by the Appellant's in **Thunder Cats** in their challenge against the granting of the winding-up order. It was contended that as the Respondents were the *causa causans* of the management paralysis, they could not insist upon the company being wound- up.

36. It is a cardinal principle that in the interpretation of the *'Just and equitable"* ground, general rules regarding equitable remedies apply such that a person seeking relief must come to Court with *"clean hands".* It is a principle that Lord Mildew expressed equally well, if less decorously:

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[17] See: Ebrahimi v Westbourne Galleries, *supra,* at 495

"A dirty dog will get no dinner from the Courts. "[19]

37. Trite and obviously necessary as this equity principle may be, it must not be thought of as being of universal application. If the rigid application of the clean hands principle would work manifest unfairness on one of the parties, a departure would be justified on the grounds that *"public policy should properly take into account the doing of simple justice between man and man."*[20]

38. Where all the parties lack clean hands, the policy behind the clean hands doctrine is not applicable. It should always be remembered that at stake here is the best interests of the company. Where a company is effectively deadlocked and paralysed, the granting of an order for dissolution coupled with the appointment of a liquidator may be the only viable option for bringing an end to the paralysis and securing the company's best interests[21].

39. This Court finds solace in the following sentiment expressed by Binns-Ward J:

> *"It* is *clear that the legislature has recognized that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidence of such adverse socio-economic consequences should be avoided where reasonably possible."* [22]

40. Since the application before the Court *a quo* was initiated by the Appellant under the auspices of Section 344(h) of the old Act, we were invited to consider the a pproach that was adopted by Coetzee J in the matter of

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[18] See also Muller v Lilly Valley Ltd 2012(1) ALL SA 187 (SGJ)
[19] See: French Plays Ltd v The Mayor of Hackney 1910 2 KB
[20] See: Jajbhay v Cassim 1939 AD 537
[21] See: Thunder Cats at par 28
[22] See: Koen v Wedgewood Village Golf & Country Estate 2012(2) SA 378 (WCC) at par 14

Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd[23] in which the following was postulated:

> *"Since the time that the grounds for winding-up which now appear in Section 344 of the Companies Act were introduced, the 'Just and equitable" basis referred to in Section 344(h) has become* a *rather special ground under which only certain features of the way in which* a *company is being run can be questioned.*
>
> *It is an independent ground for winding-up and it is no longer necessary that the circumstances should be analogous to those which justify an order on one or more of the specific grounds preceding it in Section 344.*
>
> *Consequently new kinds of cases may be brought under this head by judicial interpretation. However, five brought categories of cases may be isolated under the 'Just and equitable" ground:*
>
> 1. *Disappearance of the company's substratum;*
> 2. *Illegality of the objects of the company and fraud in connection therewith;*
> 3. *A deadlock in the management of the company's affairs which can only be resolved by winding it up;*
> 4. *Grounds analogous to those for the dissolution of partnerships; and*
> 5. *Oppression.*
>
> *While these categories do not constitute any kind of numerus clausus, the Courts have, for a number of decades, not found it necessary to devise further categories and it is difficult to think of anything else which might fall into the existing genus of categories. The 'just and equitable" ground is not* some *"catch all" ground for*

[23] 1985(2) SA 345 (WLD)

winding-up a *company."*

41. We align ourselves with the principles alluded to by Coetzee J in the matter of **Rand Air (Pty) Ltd v Ray Bester Investments (Ptv) Ltd.** On a proper interpretation and analysis of Coetzee J's judgment the following is evident:

41.1 The First Respondent's substratum is still intact;

41.2 The objects of the First Respondent are not illegal;

41.3 No deadlock exists pertaining to the management of the First Respondent's affairs. The Appellant is not a director of the First Respondent;

41.4 The evidence does not support the submission that the relationship between the parties resembles a partnership between more than arms- length shareholders such that it can be said that the First Respondent is, in substance, a partnership in the guise of a private company; and

41.5 The *"oppression"* alluded to and compliant of by the Appellant does not justify the winding-up of the First Respondent.

42. In the premise we answer the questions, referred to and contained in paragraph 23 *supra,* as follows:

42.1 Question 1

Logic and common sense dictate that it is not just and equitable to wind-up a solvent company. It furthermore doesn't make business sense to wind-up a solvent company. A solvent company should, in our view, only be wound-up in the following circumstances:

i) Where the company's *substratum* has disappeared or fallen away completely;

ii) Where the company's entire board of directors resign or are dismissed, and the shareholders are unable to appoint a new

board of directors;

iii) Where the company has committed a serious criminal offence, such as theft, fraud, racketeering or money laundering, or that the income which the company derives originates from criminal activities;

iv) Where the company's entire client base (income) has been eroded and the company is unable to make a profit (its income is insufficient to satisfy its expenses) for a period of more than 6 months, notwithstanding the fact that the company has sufficient investments or cash reserves;

v) Where a complete deadlock in the management of the company's affairs is present, which deadlock cannot be resolved by means of alternative mechanisms;

vi) Where the minority shareholder is oppressed by the majority shareholder and no alternative remedy is available to the parties, i.e. the majority shareholder is not prepared or cannot afford to purchase the minority shareholder's shares or *visa versa;*

vii) Where a situation analogous to those for the dissolution of partnerships is present; and

viii) Where it is evident that the company is in a financial meltdown and will soon experience significant financial turmoil.

42.2 Question 2

A solvent company should only be wound-up at the instance of a minority shareholder in exceptional circumstances. Exceptional circumstances mean there are no alternative remedies available to the shareholders to salvage the company from being wound-up.

43. This is, however, not the end of the matter. It is furthermore the Appellant's case that the affairs of the First Respondent have been and

continue to be conducted by the Second Respondent in a manner oppressive and unfairly prejudicial to him as a shareholder of the First Respondent. The Appellant furthermore suggests that the Second Respondent has contrived a cause of action calculated to exclude him from participating in the management and the business of the First Respondent. The Appellant is therefore "a *passive shareholder in the First Respondent".*[24]

44. The Appellant relies in this regard on the provisions of Section 163(1) of the Act, which provides for relief in certain instances from oppressive or prejudicial conduct or from abuse of the separate juristic personality of a company. Section 163(1) of the Act provides for the following:

> *"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".*

45. The provisions of Section 163 of the Act are similar to the provisions of Section 252 of the old Act. The SCA (Ponnan JA) pronounced in this regard as follows:

> *"[21] The wording of the section indicates the conferment of a very*

[24] See par 10 of the founding affidavit - pages 9 to 10

wide discretion upon the Court. The Court has the power to do what is considered ***fair and equitable*** *in all the circumstances of the case, to put right and cure the unfair prejudice which a minority shareholder has suffered at the hands of the majority of the company.*

> *'The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the Courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than* a *mere judicial entity, with a personality in Jaw of its own : that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act 1948 and by the Articles of Association by which shareholders are to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the Court to dispense him from it. It does, as equity always does, enable the Court to subject the exercise of legal rights to equitable considerations; considerations, that is, o(a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.*
>
> *It would be impossible, and wholly undesirable, to define*

the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is *adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements:*

i) An association formed or continued on the basis of a personal relationship, involving mutual confidence. This element will often be found where a *pre-existing partnership has been converted into a limited company;*

ii) An agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business;

iii) Restriction on the transfer of the member's interest in the company. So *that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.*

It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so *many of the* cases *do, to "quasi partnerships" or "in substance partnerships" may be convenient but may* a/so *be· confusing. It may be convenient because it* is *the law of partnership which* has *developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant*

once such factors as *I have mentioned are found to exist : the words 'just and equitable"* sum *these up in the law of partnership itself And in many, but not necessarily all, cases there* has *been* a *pre-existing partnership the obligations of which it* is *reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possible former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however* small, *however domestic is* a *company not* a *partnership or even* a *quasi partnership and it* is *through the just and equitable clause that obligations, common to partnership relations, may come in.'*

[22] The same *reasoning, I dare* say, *must apply to the concept of unfairness encompassed by Section 252. Fairness, according to Lord Hoffmann, is the criterion by which a Court must decide whether it has jurisdiction to grant relief. Generally speaking, an application of this kind, based upon partnership analogy, cannot succeed if what is complained of is merely a valid exercise of the powers conferred on the majority. To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him. For, as Trollip JA put it in Samuel and others v President Brand Goldmining* Co *Ltd:*

'By becoming a shareholder in a company a *person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder .... That principle of the supremacy*

of the majority is essential to the proper functioning of companies.'

[23] The combined effect of subsections (1) and (3) is to empower the Court to make such order as it thinks fit for the giving of relief, if it is satisfied that the affairs of the company are being conducted in a manner that is unfairly prejudicial to the interests of the dissident minority. The conduct of the minority may thus become material in at least the following two obvious ways. First, it may render the conduct of the majority, even though prejudicial to the minority, not unfair. Second, even though the conduct of the majority may be both prejudicial and unfair, the conduct of the minority may nevertheless affect the relief that a Court thinks fit to grant under subsection 3. An applicant for relief under Section 252 cannot content himself or herself with a number of vague and rather general a/legations, but must establish the following: that the particular act or omission has been committed, or that the affairs of the company are being conducted in the manner alleged, and that such act or omission or conduct of the company's affairs is unfairly prejudicial, unjust or inequitable to him or some part of the members of the company; the nature of the relief that must be granted to bring to an end the matters complained of," and that it is *just and equitable that such relief be granted. Thus, the Court's jurisdiction to make an order does not arise until t e specified statutory criteria have been satisfied."*[25]

46. The Appellant relies on the following grounds in support of the relief he applies for as provided for in Section 163 of the Act:

46.1 The Second Respondent has excluded him from the management of the First Respondent;

46.2 The Second Respondent refused to provide him with management

[25] See: Lauw v Nel 2011(2) SA 172 (SCA)

and financial information in relation to the First Respondent;

46.3 The Second Respondent refused to engage in a *bona fide* manner with him in relation to the sale of his shares;

46.4 The Second Respondent removed him as a director of the First Respondent and replaced him with her husband and her brother-in-law;

46.5 The Second Respondent unlawfully and unfairly dismissed him from the employment with the First Respondent;

46.6 The Second Respondent excluded him from any decision making within the First Respondent;

46.7 The Second Respondent ignored his requests for a shareholders meeting and convened a contrived disciplinary enquiry to dismiss him as an employee; and

46.8 The Second Respondent actively blocked the purchase of his shares by *inter alia* offering to purchase it through Court papers simply to directly thereafter withdraw such offer.

47. The Court *a quo* found that the Appellant has failed to demonstrate that the Second Respondent's conduct towards him was oppressive, unfairly prejudicial or that his interests have been unfairly disregarded. In support of this finding the Court *a quo* relied upon the judgment of **Graney Property & another v Manala & others 2013(3) ALL SA 111 (SCA).**

48. The grounds relied upon by the Appellant, referred to in paragraph 46 *supra,* do not fall within the ambit of Section 163(1) of the Act. This finding is bolstered by the following objective facts:

48.1 The Appellant has been removed as a director of the First Respondent, as provided for in Section 71 of the Act;

48.2 The Appellant is at liberty and entitled to apply for the management and financial information pertaining to the First Respondent, as provided for in Section 26 of the Act;

48.3 The Appellant is entitled to dispose of his shares, in accordance with the provisions of paragraph 11(d) of the First Respondent's

Articles of Association;

48.4 The Second Respondent indicated that she is not in a financial position to purchase the Appellant's shares and cannot afford to do so;

48.5 The Appellant was dismissed as a consequence of him being found guilty on four counts of misconduct in a disciplinary hearing presided over by Adv Gianni. The Second Respondent did not dismiss the Appellant from his employment; and

48.6 The Appellant had no right or entitlement to participate in the decision- making process within the First Respondent, by virtue of him being dismissed as a director of the First Respondent.

49. Mr Schadewaldt deposed to an affidavit on 26 September 2014 in which he stated the following:

49.1 He fully supports the Second Respondent in all her endeavours, including but not limited to her attempt to oppose the liquidation application initiated by the Appellant against the First Respondent; and

49.2 He denies that the First Respondent was ever run **as a** *quasi*-partnership. According to him the First Respondent has at all time been run as a private company in accordance with the provisions of the Act.[26]

50. We are therefore not persuaded that it is just and equitable to wind the affairs of the First Respondent up in the hands of the Master of this Court. Common sense and logic dictates that the First Respondent should not be wound-up.

CONDONATION

51. The Appellant applies for condonation for the late filing of the appeal

record. The First and Second Respondents opposed the application for condonation and have initiated an application for an order declaring that the appeal have lapsed. The First and Second Respondents decided to withdrew the aforementioned application on 11 April 2017, by way of a notice of withdrawal.

52. Condonation is not to be had merely for the asking. This Court may, upon good cause shown, condone the late filing of the appeal record, as envisaged in Rule 49(7)(a)(ii) of this Court's rules.

52.1 The Appellant is required to furnish a full, detailed and accurate account of the causes of the delay and their effects so as to enable this Court to understand clearly the reasons and to assess the responsibility.

52.2 If the non-compliance is time related, the date, duration and extent of any obstacle on which the Appellant placed reliance must be spelled out.

53. The principle *"upon good cause shown"* has been held to be firmly established that, in all cases of time limitation, whether statutory or in terms of the rules of Court, the High Courts have an inherent right to grant condonation where principles of justice and fair play demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of this Court.

54. The overriding consideration is that the matter rests in the judicial discretion of this Court, to be exercised with regard to all the circumstances of the matter.

55. It is well settled that, in considering applications for condonation, this Court has a discretion, to be exercised judicially upon a consideration of all the facts, and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the Respondents interest

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[26] See: Mr Schadewaldt's affidavit - page 1272 to p 1274

in the finality of the Court *a quo's* judgment, the convenience of this Court, and the avoidance of unnecessary delay in the administration of justice.

56. The aforementioned factors are not individually decisive but are inter-related and must be weighed one against the other. Thus a slight delay and a good explanation may assist to compensate for prospects of success which are not strong. This Court is empowered, on sufficient cause shown, to excuse parties from compliance with its rules. What constitutes good or sufficient cause must be decided upon the circumstances of each particular matter.

57. The appeal record was filed 15 days late and a proper explanation was provided for this delay. We are therefore inclined to grant condonation to the Applicant for the late filing of the appeal record.

58. The general rule that costs follow the event is not applicable to successful applications for the grant of an indulgence by this Court. In respect of such applications the general rule is that costs do not follow the event. The general rule is that the Applicant *(in casu* the Appellant) should pay the costs of the application for condonation. This principal has been formulated· as follows:

> *"Die pasvermelde algemene reel dat koste die resultaat volg, is egter nie so algemeen in geval/e waar 'n party kondonasie vir nie-nakoming van die hofreels vra nie. In die geval waar 'n litigant weens sy versuim 'n vergunning vra, is hy aanspreeklik vir alle koste redelikerwys aangegaan, insluitende koste van redelike opposisie tot sy aansoek."*[27]

59. The First and Second Respondents withdrew their application for an order declaring that the appeal has lapsed. This application was withdrawn by way of a notice of withdrawal dated 11 April 2017. The costs of this application should follow the result.

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[27] See: Maloney' s Eye Properties BK v Bloemfontein Board Nominees Bpk 1995(3) SA 249 (0) at 257 G - H

CONCLUSION

60. The business affairs of the First Respondent are managed by and under the control of its board of directors and not its shareholders.

61. No deadlock exists between the First Respondent's board of directors and there is accordingly no deadlock at the management of the First Respondent.

62. The fair and reasonable value of the Second Respondent's shares should be determined. This cannot be achieved by means of the mechanism suggested by the Appellant in paragraph 2 of the notice of motion. This Court is not in a position to determine the value of the Second Respondent's shares in the First Respondent on the basis as suggested to us during argument. We were invited to give consideration to the regime implemented by Binns-Ward AJ, as he then was, in the matter of **McMillan NO v Pott**[28]**.**

63. The Court in the McMillan-matter had sufficient information at it's disposal to design a mechanism which formed the basis upon which the Sixth Respondent was ordered to buy the Applicant's shareholding in the Seventh Respondent. We, unfortunately, are not privy to the necessary information which could have enabled us to follow the same methodology. The only fair, reasonable and equitable solution is for the Appellant to be directed to purchase the Second Respondent's 80 shares.

64. We were furthermore invited to consider the relief that was granted by this Court in similar circumstances, i.e. in the situation where two members in a close corporation were unable to pursue the best interests of the close corporation. They were also the only shareholders and directors of a private company. This Court (Murphy J) made an order in terms of which the Plaintiff was directed to pay an amount of more than R5,9 million to the First Defendant upon and as consideration for the transfer of his members interest and shares as provided for in the order.[29]

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[28] 2011(1) SA 511 wee

[29] See: De Klerk v Ferreira & others 2017(3) SA 502 (GP)

65. We are, unfortunately, not in the privileged position that Murphy J was when he made the appropriate order in the matter referred to in paragraph 64 *supra.* It is impossible to determine the fair and reasonable value of the Second Respondent's shares on the papers before us. Various contingencies may come into play in the determination of the value of the Second Respondent's shares, which determination can only be done if all the relevant evidence is placed before a Court. This can only be achieved in a trial.

66. We are therefore satisfied that it is not just and equitable to grant an order in terms of which the First Respondent is wound-up. The Court a *quo* exercised its discretion in this regard correctly. The manner in which the Court a *quo* arrived at this decision cannot be criticized.

67. To dismiss the appeal in its entirety does not assist the parties in the prevailing circumstances. This Court is duty bound to design or to formulate a mechanism which will achieve a clean break between the parties. The relationship between the parties has broken down irretrievably and it is not in their best interest to remain *"in the same bed".* It is therefore appropriate to direct the Appellant to purchase the Second Respondent's shares at a fair and reasonable value.

68. Apart from dismissing the application the Court a *quo* made ancillary cost orders in relation to certain procedural aspects. We are satisfied that the Court *a quo* exercised its discretion correctly in granting the aforementioned cost orders and we do not intend to interfere therewith.

69. The Court a *quo* furthermore made an order in terms of which the dispute regarding the ownership of the two machines, referred to in paragraph 3 *supra,* is referred to trial. We endorse the Court a *quo's* approach in this regard and we do not intend to interfere therewith.

70. The Appellant is therefore partially successful, specifically to the extent that we are persuaded that a proper case has been made out in terms of which he should be directed· to purchase the Second Respondent's shares.

WHEREFORE an order is made in the following terms:

1. Condonation is granted to the Appellant for the late filing of the appeal record, in accordance with the provisions of Rule 49(7)(a)(ii) of the Uniform Rules of this Court;
2. The Appellant is ordered to pay the costs of the condonation application;
3. The First and Second Respondents are ordered to pay the costs of the application in which they applied for a declarator that the appeal has lapsed, which application was withdrawn on 11 April 2017;
4. The appeal is upheld and the Court *a quo's* order is set-aside and substituted with an order in the following terms:
   "1. Prayer 1 of the notice of motion dated 30 June 2014 is *dismissed with costs, including the costs consequent upon the employment of senior counsel;*
   2. *The Applicant* is *directed to purchase the Second Respondent's 80 shares in the First Respondent at a fair and reasonable value;*
   3. *The determination of the fair and reasonable value of the Second Respondent's 80 shares in the First Respondent is referred to trial;*
   4. *The notice of motion stands as simple summons;*
   5. *The Second Respondent's opposing affidavit stands as her notice of intention to defend;*
   6. *The Applicant is directed to file and deliver his declaration within a period of 30 days from date hereof·,*
   7. *The Second Respondent is directed to file and deliver her plea and counterclaim, if any, within a period of 20 days thereafter;*
   8. *The provisions of the Uniform Rules of the High Court shall regulate the process thereafter, with specific reference to requests for further particulars, discovery, experts, etc.;*

9. *The Applicant is ordered to pay the costs incurred by the First Respondent's employees in opposing the application; and*

10. *The Applicant is ordered to pay the costs occasioned by the postponement of the application to enable him to serve the application on the First Respondent's employees".*

5. The costs of this appeal are costs in the trial.

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F W BOTES

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree.

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N M MAVUNDLA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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N P MALI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA