IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

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

(3) REVISED.

15/11/19 ..... DATE

..... SIGNATURE

Case No: **72514/2018**

In the matter between:

MWRK ACCOUNTANTS & CONSULTANTS (PTY) LTD **APPLICANT**

and

HLB INTERNATIONAL (SOUTH AFRICA) (PTY) LTD **FIRST RESPONDENT**

PAR EXCELLENCE FINANCE & LEASING (PTY) LTD **SECOND RESPONDENT**

JUDGMENT

DAVIES AJ:

[1] The applicant is MWRK Accountants & Consultants (Pty) Ltd, a company that conducts business in the financial services industry. Its sole shareholder and director is Anne Reynolds. It is in fact her husband Michael Reynolds, a Chartered Accountant, who is the main protagonist on behalf of the applicant.

[2] Michael Reynolds conducted his accounting business through the similarly named entity MWRK Accountants & Auditors, which is referred to below as MWRK Accountants. On 1 March 2017, MWRK Accountants was merged into the business of Certified Master Auditors (Pty) Ltd ('CMA'), represented by Marius Johannes Maritz, who is the other protagonist in this dispute.

[3] At the time of the merger of MWRK Accountants into CMA, it was agreed that the former would enter into a joint venture with Par Excellence Finance & Leasing aimed at the acquisition of the immovable property situated at Erf 3726, Benoni. The vehicle for this collaborative venture was the first respondent, HLB International, a company which has been in existence since 2006. The first respondent was a pre-existing dormant company formed by Maritz as appears from annexure 'RA4'. The company had no assets or liabilities, and was selected because it already had a VAT registration. It is significant that Maritz indicates that "*If it will make you feel better I will for the interim be the only director…*". It is common cause that this company is solvent.

[4] At the time of the merger, the respective parties envisaged that CMA, being the business into which MRWK Accountants was merged, would lease the immovable property that had already been purchased.

[5] The relationship between the protagonists has soured under the circumstances described more fully below. As a consequence, the applicant seeks the winding -up of the first respondent *alternatively* equitable relief as contemplated in s163 of the Companies Act, 2008. The latter relief was based upon the order granted in the matter of ***McMillan NO v Pott 2011 (1) SA 511 (WCC)*** and embodied in annexure X to the notice of motion.

[6] In terms of the relevant shareholders agreement (attached as '**LA2**') which was concluded on or about 6 March 2017, Par Excellence Finance & Leasing (Pty) Ltd was allocated 51% of the issued shareholding, and the remaining 49% of the shareholding was allocated to MWRK Accountants & Consultants (Pty) Ltd. Anne Reynolds represented MWRK, and Maritz represented Par Excellence. Also recorded as signatories to the shareholders agreement were Michael Wayne Reynolds who is described as an 'interested party', as well as HLB International, also represented by Maritz in his capacity as director.

[7] The shareholders agreement records that HLB purchased Erf 3726, Benoni, and deals also with the conversion of HLB International to a private company incorporated with limited liability, indemnities and so forth. In clause 6, the payment of the purchase price of the immovable property is divided *pro rata* according to the shareholding as described above.

[8] Clause 7.1 records the fact that the audit practice of Michael Reynolds had been merged into the business of CMA Inc, and clause 7.2 provides that:

> *"7.2 The parties agree that in the event of Michael Wayne Reynolds giving notice of intent to withdraw his audit practice from Certified Master Auditors Inc, that the first shareholder [Par Excellance] shall have the right to offer to the second shareholder [MWRK Accountants & Consultants] to purchase (sic) the first shareholder's interest in HLB International (South Africa) Inc within 5 business days of the event, and in that instance, the second shareholder will have 22 business days from the date of the election of the first shareholder to sell it shares, to settle the purchase price. The purchase price for the first shareholder's shares shall be the highest of:*
>
> *7.2.1 51% of the market value of the property; or*
>
> *7.2.2 the purchase price of the 51% shares plus escalation of 8% per year compounded;"*

[9] Clause 8 proceeds to record that the property will be rented exclusively to CMA for an initial period of nine years, renewable for an additional nine years at the election of CMA on the basis that CMA will pay all operating costs in relation to the immovable property under consideration. I mention that in the course of the hearing,

Ms Fourie SC who appeared on behalf of the respondents correctly conceded that the above-mentioned election to renew would in all probability be exercised.

[10] This concession was rightly made, and has an important bearing on the matter since the applicant is confronted with the situation where it cannot realise its investment or withdraw its capital for the better part of eighteen years, during which time the first respondent would be paying a nominal rental calculated largely according to the operating costs.

[11] Clause 7.2 referred to above contains the *fons et origo* of the dispute between the parties: while the clause refers to a notice of withdrawal giving rise to the right of first of first refusal, it does not provide for the situation where the second respondent is unwilling or unable to purchase the balance of the shareholding in the first respondent.

[12] The aforesaid terms as to rental contained in the shareholders' agreement are reproduced in the agreement of lease entered into between HLB International (South Africa) Inc and Certified Master Auditors on 31 May 2017, in terms of which Erf 3726, Benoni was leased to CMA for an initial period of nine years, renewable for a further nine years at the election of CMA.

[13] The rental price was recorded as "*payment of the operating costs is fair compensation for the lease of the premises*". Clause 18 proceeds to reiterate the option of renewal for a further nine year period as described above, while clause 25 relating to the sale of premises records that the validity of the lease shall not be

affected by the transfer of the premises from the lessor, and in essence embodies the common law "*huur gaat voor koop*" principle.

[14] The value of the shareholding in the first respondent would obviously be impacted by the fact that the rental is therefore not market-related for the benefit of the lessee, and the return on investment is commensurately constrained. The commercial rationale underlying this arrangement is dependent upon the merger of MWRK into CMA.

[15] On 1 March 2018, Michael Reynolds gave notice of the applicant's intention to demerge from CMA and associated companies, with effect from 31 March 2018. The shareholders agreement implies that he had a right to do so, although Maritz thought otherwise. On behalf of the respondents, Fourie SC did not press the issue.

[16] The notice of withdrawal gave rise to a terse response from Maritz on 6 March, followed shortly by a more petulant response on 10 March 2018. In the latter correspondence, Maritz purports to reject the notice to demerge in his capacity as Chairman of CMA. The grounds for rejecting the demerger were not persisted with in these proceedings, and the letter concluded in a personal and spiteful way, with Maritz alleging that Reynolds was playing "*a strategic game*", that he abused Maritz's generosity and, ominously, that Reynolds had "*crossed a line*".

[17] Thereafter, on about 19 April 2018, Griesel Breytenbach Attorneys on behalf of the applicant wrote to their counterparts addressing allegations of unethical behaviour, which according to the correspondence were made without giving

reasons therefore. Germane to the present dispute, the applicant's attorneys tendered to purchase the 51 % shareholding held by Par Excellence "*at the market value of the property*". Carel Van Der Merwe Attorneys responded on 23 April 2018, stating their client's intention to institute criminal proceedings, advising that a forensic audit would be completed by June 2018, that civil proceedings based *inter alia* on breach of fiduciary duties would be instituted. Of great importance is their recordal of their clients' instructions that they will not sell the 51% shareholding held by Par Excellence, nor would they purchase the balance of 49%.

[18] It is alleged that an e-mail was sent to a thousand addressees, in which it is alleged that Reynolds was in breach of his fiduciary duties and contracts with the firm, that he had acted unilaterally and in breach of his contracts to exit the firm, and that CMA were apparently in the process of conducting a forensic audit which could lead to criminal charges. I pause to mention that the insinuations that Reynolds was guilty of fraudulent or otherwise unethical conduct were persisted with, and no doubt would have contributed to any animosity that might already have existed.

[19] Certainly, it is an unsavoury practice to make such allegations without corroborating same, especially when the allegations are made in the public domain. The founding affidavit attributes the decision to demerge to "*personality difference between [Reynolds] and Maritz and a declining profit earned by [Reynolds] since the merger…*".

[20] In the answering affidavit, it is stated that the relationship has indeed irretrievably broken down, but the reasons are ascribed to Reynolds' unspecified

repudiation of the various agreements, and fraud being committed pending a decision by a court of law. It is further alleged that "*The involvement of the director of the applicant in the alleged fraud committed by Michael Wayne Reynolds with her husband still needs to be determined by the forensic audit since she is very closely involved in the management operations of her husband's business operations* (sic)".

[21] Bearing in mind that according to the correspondence of 6 April 2018, a forensic audit had already commenced, it is anomalous that the allegations remained unclarified or unsubstantiated, notwithstanding the filing of supplementary papers immediately prior to the hearing of this dispute. Bearing in mind that the parties are auditors, one would expect that if there had been a grain of truth to the allegations of fraud, this would have been put before the court. I find that the allegations of fraud against Michael and Anne Reynolds have not been substantiated in these proceedings, and observe further that the Supreme Court of Appeal has found that such allegations can be inimical to the continuation of the business relationship between the parties concerned.

***APCO Africa (Pty) Ltd and Another v APCO Worldwide* 2008(5) SA 615 (SCA) at [29].**

[22] The fundamental question before me is whether equitable considerations are present in this matter that are so compelling as to allow the applicant to terminate the business relationship with the first respondent, and withdraw its capital. If so, the question arises whether the equitable relief should take the form of winding-up, or some other form of relief in terms of s163 of the Companies Act. The court enjoys a

wide discretion with regard to both remedies, and will have regard to all relevant circumstances.

[22] Foremost amongst the circumstances to be considered is the principle of certainty in business relations, which is fundamental to contractual and corporate law.

Equitable principles are more readily superimposed on the parties where their relationship exhibits features of a quasi-partnership. Certainly, there are features of the relationship between the parties that can be so characterized.

[23] It is common cause that the first respondent is utilized as a property holding company in respect of property to be leased by CMA subsequent to the merger of the businesses of MWRK Accountants and CMA; the purchase of Erf 3726 was funded in equivalent proportions, and the rental to be paid was determined by reference to those proportions; the acquisition of the aforesaid property was based on financial considerations that inured to the benefit of the merged business. Michael Reynolds' income from CMA would be reduced by 49% of the lease operating costs. The shareholding in HLB is closely held by two parties who are effectively nominees of Maritz and Reynolds respectively.

[24] It was contended that the elaborate corporate structures utilised by the parties are in fact indicative of a carefully considered business strategy that should be given effect to. While I consider that the corporate arrangements underlying the merger bear the hallmarks of a domestic company, it is not necessary for me to

make a definitive finding in this regard, because the applicant has suitable effective remedies at its disposal.

[25] On behalf of the respondents it was contended that the winding application should be dismissed because HLB is a commercially solvent and viable company, the applicant does not come to court with clean hands, and liquidation should be a last resort. In this regard, I accept the argument based upon *Henochsberg*'s view that winding-up on just and equitable grounds must of necessity be a remedy of last resort and that all other remedies must be considered before such a step is taken.
***Henochsberg on the Companies Act, 71 of 2008* (Vol1), p332(4).**

[26] Oppression is one of the recognised grounds for winding-up on just and equitable grounds. There is a considerable overlap between the winding-up of a company based on just and equitable grounds due to oppression, and the grounds for equitable relief under s163 of the Companies Act.
***Wiseman v S Table Soccer (Pty) Ltd* 1991 (4) SA 171 (W) at 182G-H**
***Robson Wax Works (Pty) Ltd* 2001 (3) SA 1117 (C) at 1127G**

[27] Ordinarily it is a fundamental principle of company law that each shareholder is bound by the decision of the majority even where it is prejudicial to his own interests, provided that the decision was lawfully taken.
Sammel v President Brand Gold Mining Co. Ltd 1969 (3) SA 629 (A) at 678

[28] Mere disillusionment with the management of the company's affairs is insufficient to justify a winding-up order or relief under s163. It is pertinent to observe

that in this regard s81 must be interpreted and applied in the same way as its predecessor, s344(h) of the 1973 Companies Act.

[29] The equitable provisions of section 163 of the Companies Act No 71 of 2008 (and its predecessor s 252 of Act 61 of 1973) are usually employed by minority shareholders. However, it is trite that the equitable provisions can be invoked by any grouping that does not enjoy *de facto* administrative, managerial or voting control over the company and which is therefore vulnerable.

***Benjamin v Elysium Investments (Pty) Ltd* 1960 (3) SA 467 (E) at 477A**

***Livanos v Swarzberg* 1962 (4) SA 395 (W) 396-397**

[30] The statutory evolution of the equitable remedy contained in s163 is an important guide to establishing the scope and ambit of the section. The previous section 252 of the erstwhile Companies Act initially referred to "*oppressive conduct*". Thereafter, it was accepted by the courts that the introduction of the words "*unfairly prejudicial, unjust or inequitable*" into s252 of the Companies Act 1973 significantly extended the concept of prejudice.

***Garden Province Investments v Aleph (Pty) Ltd* 1979 (2) SA 525 (D) at 531; and**

***Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd* 1979 (3) SA 713 (W) at 209**

[31] As stated by Mr Justice Corbett (as he then was), the remedy for oppression must be given such a construction as will advance the remedy rather than limit it. This is as true now as it was then. I observe in passing that it has been held that public policy requires, in broadly analogous circumstances, that dissenting shareholders may demand that the

company pay the objecting shareholder fair value for its shares in terms of s112, s115 and s164 of the Companies Act.

Cillier v LA Concorde Holdings Ltd and Others **2018 (6) SA 97 (WCC)**

Bader v Weston **1967 (1) SA 134 (C);**

Donaldson Investments (Pty) Ltd v Anglo-Vaal Collieries (supra) **at 209**

[32] The examination of prejudicial conduct therefore requires not only an examination of the member's respective rights, but also the legitimate expectations arising from the Companies Act, and generally accepted notions of fairness and good corporate governance. The purpose and effect of section 163 is to avoid the need to show an infringement of legal rights in the narrow sense, introducing an external and objective standard of reasonableness.

Fexuto (Pty) Ltd v Bosnjak Holdings (Pty) Ltd **(1998) 28 ACSR 688 740 SC (NSW);**

Garden Province Investments (supra) **at 531;**

Gatenby v Gatenby **1996 (3) SA 118 (E) at 125**

[33] In order to succeed under section 163, the applicant must show (1) an act or omission of the company that is unfairly prejudicial, unjust or inequitable to the minority members; or that the affairs of the company are being managed in a manner that is unfairly prejudicial, unjust or inequitable; oand (2) the nature of the relief claimed which must be granted to bring an end to the matters complained of; and (3) that it is just and equitable that such relief be granted. This was in essence the position pertaining under the erstwhile s252 of Act 61 of 1973.

Lourenco v Ferela (Pty) Ltd (1) **1998 (3) SA 281 (T) 395 F-H**

[34] It must be emphasised that the test to be applied is fairness, and not unlawfulness, and consequently the need for an objective assessment is universally accepted. The test as pointed out by Blackman, is essentially an ethical one based on a value judgment. However, I observe that the courts have cautioned against a facile "*reasonable company watcher*" test or "*sitting under a palm tree*" in determining fairness.

See: Lord Hoffmann in *O'Neill and another v Phillips and others* [1999] 2 All ER 961 966 (HL)

[35] As Lord Hoffmann has been at pains to emphasise, the context and the background of the dispute are all important:

> "*The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles ... Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ("it's not cricket") it may be unfair in some circumstances to take advantage of them. ... So, the context and background are very important.*"

***O'Neill and another v Phillips and others, supra*, p 966**

[36] In the seminal judgment of ***O'Neill and another v Phillips and others***, referred to above, Lord Hoffmann highlights two important facets in evaluating

fairness in the rational way suggested: firstly, the conduct is considered in the light of the constitution of the company and then in the light of equitable principles which have evolved as a feature of company law since Roman times.

***O'Neill and another v Phillips and others, supra*;**

***Carlisle v Adcorp Holdings* 2000 CLR 261 (W) at 266 paras 2-3**

[37] It is submitted that the courts will always have regard to substance as well as form, and just as the courts are willing to have regard to the essential character of a business, as for instance in a quasi-partnership, in assessing obligations of members *inter se* and the appropriateness of equitable relief.

***Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 at 501;**

[38] A company's constituting documents are generally held to be akin to contractual terms which govern the relationships of the shareholders with the company and each other, and which determine the powers of the Board and the members in general meeting. The exercise of legal rights not in good faith and contrary to good faith constitutes unfairness. Unfairness, therefore, may consist not only in breach of the rules of the contractual relationships between the parties, but also in using those rules in a manner contrary to good faith.

***Emphy v Pacer Properties (Pty) Ltd* (supra) at 366 H -367H;**

***Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W);**

***Pienaar NO and others v Bohbot and others* [2007] 3 All SA 60 (T);**

[39] Fairness should be considered in the light of the contractual relationship between the parties, and should be considered against the background of keeping

promises and honouring agreements, which constitutes probably the most important element of commercial fairness.

Erasmus v Pentamed Investments (Pty) Ltd 1982 (1) SA 178 (W) at 181-183;

Hulett & Another v Hulett 1992 (2) SA 178 (W) at 307A-I;

[40] In the above-mentioned case of ***O'Neill and Ano v Phillips and Others***, Lord Hoffmann gave as a standard case of unjust, inequitable or unfair treatment the example 'in which shareholders have entered into association upon the understanding that each of them who has ventured his capital will also participate in the management of the company. To this I would add that the shareholders have expected to benefit by their capital expenditure. That fundamental assumption of the parties has now fallen away to the clear prejudice of the applicant and the Reynolds family, and to the commensurate unwarranted benefit of CMA and Maritz.

[41] In such a case it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management or enjoying rewards, without giving the minority shareholder the opportunity to remove his capital upon reasonable terms.

***Barnard & Carl Greaves Brokers (Pty) Ltd v and Two Other Cases* 2008 (3) SA 663 (C) at 683A**

[42] The applicant alleges (at par 25 of the founding affidavit) that the unfairly prejudicial conduct imposed on it by Par Excellence lies in the failure to co-operate in the proper severance of their commercial relationship on fair and equitable terms. In essence, this amounts to a complaint that the applicant cannot realise or withdraw its

investment in HLB, and particularly in the immovable property which is its primary asset.

[43] On behalf of the respondents, it was argued that a minority shareholder should not be allowed to withdraw from the enterprise and withdraw his investment at will, simply because it disagrees with the manner in which the company's affairs are conducted. Ms Fourie SC drew the court's attention to cases that embody this principle, such as ***Zukiswa Japhta v Ilifu Trading 330 CC*** **[2013] JOL 30407 (ECG)**, in which the aggrieved member wished to dispose of her membership interest on her own terms. The case is distinguishable because it was found that the applicant had stoked the fires of conflict in the first place, and had thereafter withdrawn from the enterprise, which was a successful trading entity. The court refused a winding-up order precisely on the basis that there were "*other remedies*" open to the applicant, and that the winding-up of the respondent would impact extremely harshly on the applicant's co-members. These considerations are not applicable in the present inquiry based upon s163, which is precisely an alternative remedy militating against winding-up.

[44] Similarly, the respondents' reliance on ***Robson v Wax Works*** is misplaced, and for the same reason. The winding-up application was dismissed, *inter alia*, because the respondents were willing to buy the applicant's shares at fair value as determined by an independent and appropriately qualified third party. The court noted that the applicant was by this mechanism likely to recoup a greater sum in respect of the sale of his shares, and concluded that an order in terms of s252(3) of the erstwhile Companies Act could indeed afford appropriate relief.

[45] In contrast, I am of the considered opinion that the applicant cannot be faulted for its decision to demerge, and the consequences which the respondents seek to visit upon it are highly prejudicial. The principle of certainty must give way to the dictates of justice and equity.

[46] The respondents' insistence that the *status quo* should remain intact for a decade and a half or more, during which time the applicant cannot withdraw or benefit from its capital investment, is to my mind a clear injustice that falls squarely within the ambit of s163 of the Companies Act. In the context of the relationship between the parties, and in particular the failure of the merger that was the fundamental *raison d'être* of the first respondent, I hold that the applicant must be allowed to realise its investment.

[47] The remedy for this mischief lies in the proposal on behalf of the applicant when the dispute as to the demerger arose, as appears in the correspondence of Griesel Breytenbach Attorneys. The most equitable remedy lies in ascertaining the value of the applicant's shares, and realising same effectively and timeously. I have misgivings about the appointment of a third party to valuate the shareholding: the case law indicates that this is by no means a final solution and further litigation is perfectly possible. While I am mindful of the decision in ***McMillan NO v Pott* (*supra*)**, ordinarily the jurisdiction of an arbitrator, valuator or referee in terms s38 of the Superior Courts Act rests upon the consent of the parties. Instead of delegating this

function, I intend that the parties should be afforded the opportunity to guide their own destiny.

***See also: Benjamin v Elysium Investments (Pty) Ltd* 1960 (3) SA 467 (E) at 478 A-B;**

[48] The primary question is the value of Erf 3726, Benoni, and the open market is the best arbiter of its value. The parties should therefore be given an opportunity to sell the immovable property through normal channels, to their mutual advantage. If the parties are unable to agree on an acceptable offer within three months of this order, then the relevant property must be sold by public auction.

[49] I am mindful of the fact that there may be accounts to settle relating to the business of HLB, but the annual financial statements and the nature of the first respondent's business suggest that these can be settled separately and independently of the sale of Erf 3726.

[50] I am mindful of the fact that clause 7.2 of the Shareholders Agreement makes mention of an escalation of 8% per year, compounded, as a means of arriving at a value for the shareholding. I do not think that this figure necessarily represents the true appreciation of the property's value, and again the market is the best arbiter. The proceeds of the sale must be distributed to the relevant shareholders in accordance with their pro-rata shareholding.

[51] During the course of Mr Swart SC's reply, the question arose whether a Master's certificate of security was required. The matter stood down for the

applicant to obtain same, which was duly done. When the matter resumed, further argument took less than half an hour, and I accede to Mr Swart's request that this be noted for the purposes of taxation. An order has already been made in respect of supplementary affidavits, which was marked annexure 'X'.

In the premises I make the following order:

1. The parties are directed forthwith to mandate at least three registered estate agents to procure the sale of the relevant immoveable property, Erf 3726, Benoni Extension 10, Ekurhuleni.

2. If the applicant and second respondent are unwilling or unable to agree on and accept an offer to purchase within three months of this order, then Erf 3726 must be sold by public auction.

3. The aforesaid public auction must be held within two months of the expiry of the three-month period referred to in paragraph 2 above.

4. The nett proceeds of the sale of Erf 3726 must be distributed between the applicant and the second respondent *pro rata* according to their respective shareholdings.

5. The respondents are directed to pay interest on the applicant's share of the purchase price at the prescribed rate, calculated from 14 February 2019 until the date of final payment.

6. The applicant is directed to pay the wasted costs occasioned by the matter standing down on 21 May 2019.

7. The respondents, jointly and severally, are directed to pay the costs of this application.

S W DAVIES AJ

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Date of hearing	: 24 May 2019
Date of Judgment	: 15 November 2019
For the Applicant	: Adv BH Swart SC
Instructed by	: Griesel & Breytenbach Attorneys
For the Respondent	: Adv HR Fourie SC
Instructed by	: Carel Van Der Merwe Attorneys