Reportable

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

In the matters between:

CASE NO.8021/2006

JUAN BARNARD **Applicant**

and

CARL GREAVES BROKERS (PTY) LTD **First Respondent**

CAREL EDWARD GREAVES **Second Respondent**

DIRK CYRIL KNAPP **Third Respondent**

CASE NO.8263/2006

CARL GREAVES BROKERS (PTY) LTD **First Applicant**

CAREL EDWARD GREAVES **Second Applicant**

DIRK CYRIL KNAPP **Third Applicant**

and

JUAN BARNARD **Respondent**

CASE NO.10622/2006

JUAN BARNARD **Applicant**

and

PHILIP ALBERT BREDENHANN **First Respondent**

CAREL EDWARD GREAVES **Second Respondent**

DIRK CYRIL KNAPP **Third Respondent**

THE INSURANCE BROKING SHOP (PTY) LTD **Fourth Respondent**

CARL GREAVES BROKERS (PTY) LTD **Fifth Respondent**

JUDGMENT

Delivered on 22 January 2007

BINNS-WARD AJ

Introduction

[1] Pursuant to a consolidation of proceedings for purposes of hearing, four applications (one of which was a counter-application) were argued together before me.

[2] The most important was an application by one Juan Barnard ('Barnard') for the provisional winding up of Carl Greaves Brokers (Pty) Ltd ('the company'). By an amendment to the notice of motion in that application, moved during argument, Barnard seeks, in the alternative, relief - essentially of the sort contemplated in terms of s 252 of the Companies Act 61 of 1973 - in the form of an order directing Carel Greaves ('Greaves') and Dirk Knapp ('Knapp')[1] to purchase his shares in the company. The amendment was inspired by the company's counsel's argument that on any approach, and assuming that Barnard had made out an entitlement to relief as a shareholder, a winding up would be inappropriate in the context of the availability of

[1] Greaves and Knapp applied for and were granted leave to intervene as second and third respondents respectively in the application. Barnard did not oppose their application to intervene.

more appropriate remedies under s 252 of the Companies Act. The parties agree that in the event of relief being granted to Barnard in terms of that application the other applications will become largely moot.

[3] The second and third applications were the principal and counter-applications, respectively, in case no. 8263/06. Both went to the proper meaning, or intended effect of an order made by Motala J in an application previously brought by Barnard against the company for a *mandament van spolie* restoring him to the possession of the company's premises at 29 Douglas Carr Drive, Bellville. The issue which gave rise to the second and third applications was the subsequent relocation of the company's offices to different premises. Barnard contends that the ambit of Motala J's order (which was confirmed on appeal to the Full Bench in case no. A 894/05) affords him the right of joint possession, together with Greaves and Knapp, his 'partners'[2] in the business of the company, of the new premises. Barnard sought to obtain access to the new premises with the assistance of the Sheriff and the police, purportedly under the authority of Motala J's order. The company, Greaves and Knapp brought an application seeking an amplification of Motala J's order to make it clear that it pertained only to the company's former place of business. In the alternative, the applicants sought orders interdicting Barnard from trying to obtain access to the new premises and preventing him from interfering in the sale of the original premises. Barnard brought a counter-application for an order amending Motala J's order to include references to the new premises.

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[2] I use the term colloquially.

[4] Possession of the original premises of the company has also once again become an issue in contention. That is the subject matter of the fourth application. The company[3] has sold the original premises to an attorney, one Bredenhann. Transfer of the property has not yet been given, but Bredenhann has in the interim set up his offices and residence there. Bredenhann is excluding Barnard from access to the premises. Transfer of the property to Bredenhann is being delayed - in the main, it would seem, because of the inability of the company to give vacant occupation in the context of the persistent attempts by Barnard to exercise what he contends to be his right to joint possession of the property. The fourth application is a spoliatory application by Barnard for restoration of possession of the property now occupied by Bredenhann.

THE WINDING UP APPLICATION

[5] The ground upon which Barnard contends that the company should be wound up is that it would be just and equitable within the meaning of s 344(h) of the Companies Act 61 of 1973. Applications for winding up on this ground are usually brought by members of the company.[4] Barnard has emphasised his status as a shareholder, but in terms of s 346 of the Companies Act a member of a company bringing an application for its liquidation in terms of s 344 (h) must have been a

[3] The sale was in fact concluded by the wholly owned subsidiary of the company, The Insurance Broking Shop (Pty) Ltd, which is the registered owner of the property.

[4] Members of the company would ordinarily be the applicants in four of the oft-mentioned five categories of examples listed in *Rand-Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W)*, at 350, under which companies are wound up on just and equitable grounds. The exception might be in the case of the second category, being applications in terms of s 344(h) of the Companies Act founded on the alleged illegality of the objects of the company which it is sought to have wound up, and fraud committed in connection therewith.

registered shareholder of the company for a period of at least six months before the institution of proceedings. Barnard might be the owner of shares in the company (a matter in contention - about which I shall have more to say later), but it is common cause that he has never been registered as a member.[5]

[6] Barnard also founds his legal standing to bring the application on the basis that he is a creditor of the company. Whether it is competent for a creditor, who is not able to prove that a company is insolvent or unable to pay its debts, to obtain the winding up of a company on just and equitable grounds was fundamentally in issue between the parties.

[7] It is necessary to describe the history of Barnard's connection with the company. He and Knapp had originally been employees of the company, at a time when the issued shares in it were wholly owned by Greaves. In 1998, Barnard and Knapp had negotiated an agreement with Greaves in terms of which they would obtain a proprietary interest in the company. The resultant deed of agreement, entitled 'Shareholders' Agreement', provided that upon signature thereof by the parties Greaves would sell to Barnard 25 of his shares in the company[6] for R125000

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[5] In terms of para. 2 of the notice of motion, an order was sought for the 'rectification' of the company's register of members to include Barnard's name. I do not consider that rectification of the members' register would overcome the difficulty Barnard has in the context of the requirements of s 346(2) of the Companies Act. 'Rectification' in the context sought by Barnard would, if granted, amount to an order requiring the share register to be amended to reflect the current shareholders of the company, as contended by Barnard. It would not be a rectification in the true sense; that is a formal correction of a past mistake, or unlawful entry in or deletion from the register. A rectification in the true sense could operate retrospectively, correcting the mistake with effect from the time it was made- compare *In re M.I. Trust (Pty) Ltd and Others v Morrny's Motor Supplies (Pty) Ltd 1952 (3) SA 262 (W)*. I shall however return to amendment of the share register in a different context later in this judgment.

[6] The Shareholders' Agreement records that Greaves held 97 shares, but in the answering affidavit deposed to by him on behalf of the company Greaves averred that the Shareholders' Agreement was erroneous in this respect and that he had in fact held the 100 issued shares in the company.

and 23 of his shares to Knapp, also for R125000. Payment for the shares was to be effected to Greaves from the dividends subsequently payable by the company to Barnard and Knapp, qua shareholders. Greaves was effectively granted a preferent right to receipt of these dividends until the purchase price had been redeemed.[7] The agreement provided further that notwithstanding the unequal distribution of shares in the company between the three parties to the agreement, they would share equally in its distributed profits and in the distributed proceeds of any sale of the company's business or assets. The company, represented for that purpose by Greaves, was itself also a party to the Shareholders' Agreement.

[8] The agreement stipulated that 'the parties' (presumably meaning Greaves and the company) were obliged, within three months of the date of signature, to procure the transfer to the respective purchasers of the shares sold by Greaves in terms thereof. In the circumstances it is plain that the sale of shares was a credit sale. The contract provided that Knapp and Barnard were to serve together with Greaves as the directors of the company in an executive capacity. Furthermore, directors' meetings and shareholders' meetings would be quorate only if attended by all three of them. According to its tenor, the terms of the agreement were to prevail over any conflicting provisions in the memorandum and articles of association of the company.

[7] Clause 2.1.4.1 of the agreement also provides for the purchase price to be paid *'...from the commission and other amounts that Juan Barnard earns for the Company as insurance and property broker and such amounts will be left in the Company as capital investment and will be withdrawn by* [Greaves] *as and when such amounts are available*'. It is not apparent to me how such 'commission and other amounts' would become available to any of the shareholders, including Greaves or Barnard, if not as part of any dividends declared by the company. The evidence shed no light on this aspect, but it is unnecessary to make any determination upon it.

[9] The management of the company's affairs thereafter proceeded in accordance with the provisions of the agreement. The agreement unambiguously expresses the parties' common intention that all three of the shareholders were to be directly involved in the operation of the business on an essentially equal basis, subject only to Greaves having the deciding say when 'consensus' could not be reached between the three executive directors.

[10] One may accept that some form of constructive delivery of the shares took place by the seller to the purchaser. This is evident from the subsequent conduct of the parties and from the seller's demand for payment from Barnard, about which I shall I have more to say later.[8] Neither Barnard nor Knapp obtained registration of their ownership of shares in the company as contemplated in the agreement. Shares are ordinarily transferred by seller to purchaser by the delivery to the purchaser of an appropriate transfer form completed by the registered holder of the shares so as to enable the purchaser to require the company to amend its register of members accordingly. Notwithstanding advice that Greaves has apparently obtained to the contrary, I consider, however, that the purchasers were entitled in the peculiar circumstances of the present case, to require the company, by virtue its privity to the

[8] The finding that some form of constructive delivery of the shares has taken place is also supported by the averments made by Greaves in support of an application by him and Knapp for leave to intervene as second and third respondents in the winding up application. Having stated in his answering affidavit on behalf of the company that he held all 100 issued shares in the company (see fn 6), Greaves averred in the intervention application that he held 51 shares and that Knapp held 24 shares. In the absence of any explanation as to the ownership of the remaining 25 shares, this would suggest a recognition that they are held by Barnard, as contemplated by the Shareholders' Agreement. Furthermore, the resolution purportedly adopted on 11 April 2005 removing Barnard as a director of the company reflected the meeting as having been attended by the holders of 72 of the 97 issued shares in the company. Read in the context of the content of the Shareholders' Agreement (and the purported cancellation of the sale of shares thereunder on 22 April 2005), the 72 shares in question would appear to be those of Greaves (49) and Knapp (23); the 25 shares held by the non-attendee, Barnard, making up the balance.

contract, to amend its members' register within three months of the conclusion of the agreement to afford recognition to their acquisition of the shares without the necessity of tendering a share transfer form.

[11] It was also agreed that no further shares in the company could be issued other than by way of a pro rata rights offer to existing shareholders, unless otherwise agreed to in writing by the parties to the agreement. A contractual framework was established in terms of which the shares in the company would remain in the ownership of either Greaves or his daughter, Elizabeth, and Knapp and Barnard in the event of the death, mental illness or insolvency of any of the parties to the agreement. The contract provided that the shareholder parties to the agreement owed each other a duty of good faith and expressly characterised their relationship as that of 'quasi partners'.[9]

[12] In the circumstances I accept that Barnard has acquired effective ownership of the shares in the company sold to him by Greaves.

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[9] In *Robson v Wax Works (Pty) Ltd and Others 2001 (3) SA 1117 (C); [2001] 3 All SA 546 (C)*, I referred in passing (at para 37) to what I considered might be a 'technical difficulty' with the precise import of the concept of 'quasi-partnership'. (The 'tag' was spoken of as a 'loose' description in *Hulett and Others v Hulett 1992 (4) SA 291 (A)* at 307I-J.) In *Strachan v Wilcock [2006] EWCA Civ 13*, at para 18, the English Court of Appeal referred to it, in the context currently relevant, in a way which suggests that in the jurisdiction of its provenance the expression is one of (not always helpful) convenience rather than precise juristic implication. Lady Justice Arden held: '*In general, the relationship between shareholders is governed exclusively by the terms of the memorandum and articles of association of the company of which they are shareholders. Their rights and obligations are derived from those documents and those documents alone. In some circumstances, however, equitable obligations will arise between shareholders. The relationship where such equitable obligations exist is often labelled, not always helpfully, as a "quasi-partnership". The classic statement of the law as to when such a relationship will arise is set out in the speech of Lord Wilberforce in Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 at 371.*' The use of the label is well-established; it only becomes unhelpful if it is allowed to confuse the difference in law between being a member of a partnership and a shareholder in a company.

[13] The shareholders bound themselves in terms of the agreement to stand jointly as sureties for the company in favour of any third party to the extent that might be necessary from time to time to enable the company to conduct its business. Barnard annexed to his founding affidavit a deed of suretyship executed by himself, Greaves and Knapp, jointly and severally, on 22 March 2003, in favour of First Rand Bank Limited, trading as Wesbank, in an unlimited amount in respect of any debts which the company might owe to the bank from time to time 'from whatsoever cause and howsoever arising'.

[14] Relations between Barnard and his fellow shareholders deteriorated over time. Barnard was dissatisfied, amongst other things, with the manner in which the company's accounts were being prepared and considered that certain expenditure incurred by the company should have been attributed as remuneration paid to Greaves. He was also offended by what he regarded as a lack of transparency by Greaves and Knapp in regard to aspects of the management of the company. Barnard's unhappiness with the situation within the company resulted eventually in his convening a shareholders' meeting on 4 April 2006, at which he presented an offer to sell his shares to Greaves and Knapp for the sum of four million rand. (Greaves and Knapp had been apprised individually before the meeting by Barnard that he wished to dispose of his shares in the company. Greaves had responded to Barnard's initial approach, which was on 22 March 2005, by suggesting that Barnard should ask his brother, an attorney, to prepare appropriate documentation for execution by the shareholders in order to effect a fair basis for a parting of their ways.)

[15] At the meeting Greaves and Knapp requested time until 18 April 2005 to consider their reaction to Barnard's offer. Greaves, however, presented Barnard with a letter referring to an alleged intimation by Greaves that he had 'not been working for the company for the past year' and that he had been searching for alternative means of employment, albeit not in competition with the company. The letter from Greaves concluded, 'What would be your reaction towards a fellow director making such admissions? What would you expect of your fellow director? I await your advise (sic) by the 18th April 2005.'

[16] Barnard responded to the aforementioned letter on the evening of 6 April 2005. In his reply he alluded to the difficulties he had with what he considered to be the lack of transparency in the management of the company by his fellow directors and also his concerns about certain aspects of the personal life of Knapp. He pointed out that as marketing director of the company he was 'actively involved in the best interests of the company' and invited indications from Greave as to any area in which he might improve. He reiterated his wish to terminate his involvement in the company on mutually acceptable terms.

[17] Approximately half an hour after delivery of Barnard's reply to Greaves' letter, Barnard received a letter from the company's attorneys, which was delivered by Knapp to Barnard's home. The letter gave notice of the intention to institute proceedings for the removal of Barnard as a director of the company, and informed Barnard that pending the determination of his removal he was suspended as a director and prohibited from access to the company's offices or contact with its staff or business connections.

[18] Barnard did not comply with the instruction not to attend at the company's offices. It appears that various attempts of a somewhat melodramatic nature, which it is unnecessary to describe, were made to intimidate him into compliance. These were unsuccessful. The locks on the company's premises were then changed so that Barnard was prevented from exercising access. It was that conduct which led to the institution of the spoliation proceedings before Motala J that were mentioned in the introductory section of this judgment.

[19] On Friday, 8 April 2005, which was Barnard's last day in office before the locks were changed, he was handed a notice of a directors' meeting to be held on Monday 11 April. A draft resolution appended to the notice provided (i) for the convening of an extraordinary general meeting; (ii) waiver of the provisions of the Shareholders' Agreement; (iii) removal of Barnard as a director and (iv) removal of Barnard from 'all official positions within the company'. Barnard protested the short notice of the meeting, but it went ahead without him and a resolution, purportedly in compliance with the provisions of s 220 of the Companies Act, was carried removing him as a director. In my view the legal effectiveness of the resolution is not centrally relevant, but as I heard much argument on the question it is convenient to deal with its effect right away. Barnard's counsel pointed in argument to various features concerning the calling of the meeting, which demonstrated a vitiating non-compliance with the provisions of s 220. The company's counsel, realistically, did not take serious issue with the argument. The somewhat tentative submission by the company's counsel that Barnard would have been prevented by reason of conflict of interest from participating in a decision on his removal as a director and that non-

compliance with the statutory notice provisions was therefore not material is without merit. As a shareholder entitled under the aforementioned agreement to registration as a member of the company, Barnard would have been within his rights to participate in any decision in respect of the appointment or removal of directors, including any decision affecting his own position as such.[10] It is in any event cogently arguable that Barnard's removal without his consent was incompetent by virtue of the unanimity provisions of the Shareholders' Agreement.[11] But it is not necessary to determine that point. Effective or ineffective, the steps taken by Greaves and Knapp to remove Barnard as a director are relevant only insofar as they might constitute conduct by his co-shareholders and 'quasi-partners' justifying Barnard's application for the provisional liquidation of the company on just and equitable grounds, or for relief in terms of s 252 of the Companies Act.

[20] Barnard then received a demand from the company's attorneys that he pay the amount of R192786, allegedly due in respect of his loan account in the company's books. He disputed liability for the payment and requested information in support of the claim from the company's auditors. The auditors advised Barnard that they had been instructed by the company's attorneys to refuse to provide him with the information he had requested.

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[10] The position is quite distinguishable from the elementary principle that a director, qua director, is not permitted to participate in making decisions on behalf of the company in matters in which he or she has a personal interest.

[11] Cf. *Stewart v Schwab 1956 (4) SA 791 (T); Desai v Greyridge Investments (Pty) Ltd 1974 (1) SA 509 (A)* at 518-9 and *Amoils v Fuel Transport (Pty) Ltd 1978 (4) SA 343 (W)* at 347 and the discussion in *Henochsberg on the Companies Act* 5ed, vol I at 423 (looseleaf issue 2); sv s 220.

[21] On 20 April 2005, Barnard received notice that he was required to appear before a disciplinary enquiry on 22 April 2005 at the offices of the company's attorneys. He complained about the short notice and requested a postponement. This was declined. Barnard did not attend at the disciplinary enquiry. He was subsequently informed by letter, dated 26 April 2005, that he had been dismissed as an employee of the company. It appears from the reasons furnished by the disciplinary tribunal that the essential basis for its conclusion that Barnard should be dismissed was that it was clear 'that there is a breakdown in the relationship and that, whatever the cause, it is now impossible to restore the trust required for an employment relationship'

[22] Barnard challenged his dismissal in proceedings before the CCMA. His challenge was unsuccessful. Despite intimations that he would take the determination by the CCMA on review, as permitted in terms of s 145 of the Labour Relations Act[12], he has failed to do so.

[23] In the midst of the tumult just described, Barnard received a demand from the attorneys representing both Greaves and the company for payment of the R125 000 purchase price of the shares Barnard had acquired from Greaves. When Barnard failed to pay the demanded sum within the seven day stipulated period, Greaves gave notice through his attorneys that he had cancelled the agreement in terms of which Barnard had acquired the shares. Barnard disputes the validity of this cancellation on a number of grounds. I shall address this issue in my discussion later of the merits of the application.

[12] Act 66 of 1995.

[24] Barnard has been excluded from the business of the company since 8 April 2005.

Barnard's locus standi to apply for the company's winding up on just and equitable grounds

[25] Turning now to decide whether it is competent for Barnard to apply as a creditor for the provisional winding up of the company on just and equitable grounds: As mentioned, the company took issue with Barnard's standing in this respect, contending that in respect of a solvent company able to meet its commitments a winding up in terms of s 344(h) was a remedy peculiarly available to a member qualifying in terms of s 346(2) of the Companies Act. Barnard's counsel argued, however, that the company's contention was at odds with the law as declared in *Sweet v Finbain 1984 (3) SA 441 (W)*.

[26] In *Sweet v Finbain*, at 445D, O'Donovan J held

> '*Provided he can show that there is some ground for winding-up, such as exclusion from the management, or justifiable lack of confidence in the conduct and management of the company, grounded on the conduct of the directors, a creditor is entitled to apply to Court for a winding-up order on just and equitable grounds*'.

In my view it was unnecessary on the facts of the case for the judgment to have gone as far as it did in this respect. The learned judge had found that the applicant in that matter had had his name unlawfully removed from the register of members by his fellow shareholders. The unlawful removal of the applicant's name from the register would have been a nullity and it was open to the court to have disregarded it for the

purposes of determining the applicant's standing. The winding up application was therefore amenable to consideration as a member's application.[13] On my reading of the judgment that is indeed how it was determined – I refer in particular to the statement by O'Donovan J at 445 C-D: '*An applicant cannot be in a worse position where the management of a company unlawfully deletes his name from the register of members, or causes his shares to be transferred to another – a matter to which the Court cannot be required to shut its eyes.*'

[27] I admit to having been sceptical in any event about the correctness of the court's analysis in *Sweet v Finbain* of the effect of the provisions of s 346(1)(b) read with s 344(h) of the Companies Act. It seemed to me *prima facie* that there was cogency in the company's contention that a creditor's interest in the winding up of a company went to the ability of the company to pay its debts and that just and equitable grounds for the winding up of a company were therefore an issue of peculiar

[13] I do not consider that the authority of the judgment of Vivier J in *Rubenstein NO and Another v Langhold (Pty) Ltd 1983 (2) SA 228 (C)* is inimical to this conclusion. See the learned judge's distinction (at 230-1) of the Vice Chancellor, Sir James Bacon's judgment in *Re Patent Steam Engine Co (1878) 8 Ch D 464*, which, terse as it might be, appears to me to be more in point by way of comparative value on the facts in *Sweet v Finbain*. In *Patent Steam Engine* the court considered that it would constitute an intolerable technicality to strictly apply the statutory registered membership qualification in an application for winding up by a person whose name did not appear on the register of members because he had been refused allocation and registration of shares in the respondent company, notwithstanding a court order of more than six months' antiquity directing that he be allocated the shares. The correctness of the judgment in *Patent Steam Engine* has been subjected to doubt in the subsequent decisions noted by Vivier J. The judicial philosophy underpinning the judgment in *Patent Steam Engine* would however find a much firmer foundation for application on the facts in *Sweet v Finbain*. In the latter case the applicant had been a properly registered member of the respondent company. It would be a misdirected application of s 346(2) to hold that the absence of his name on the register when he brought the application, by reason of its unlawful deletion by his fellow members, served to divest him of the standing he otherwise enjoyed to bring a member's winding up application.

interest to members rather than creditors.[14] Such authority on the point that I have subsequently been able to find has however persuaded me that my scepticism was to a certain extent misplaced. But I remain of the opinion that the passage from the judgment quoted above is amenable to being construed more widely than probably intended. A creditor may indeed found an application for the winding up of a solvent company on just and equitable grounds, but only if it is shown that it has a cognisable interest *qua creditor*, in so doing. Where an applicant for the winding up of a company is both a shareholder and a creditor, the clear distinction between the applicant's rights and interests in each of those respective categories of standing must be recognised.[15]

[28] *Kia Intertrade Johannesburg (Pty) Ltd v Infinite Motors (Pty) Ltd [1999] 2 All SA 268 (W)*, at 277, was a case which involved a claim by a creditor of a solvent company for its winding up under the just and equitable ground. Wunsh J, having referred to the description in *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd*

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[14] I have come across textbook references which would have supported the company's contention, but the views expressed in those references have been reconsidered in more recent editions. Compare *Gower's Principles of Modern Company Law* (4th ed) p.658, where it was stated that 'a creditor's petition on the just and equitable ground is clearly inappropriate'. In the sixth edition, however, the the authors say instead (at p.749) that petitions for winding up may be brought by creditors on the just and equitable ground, though such applications are rare. Support for the company's contention might also be found in the approach of Coetzee J in *Rand Air*, supra, where the learned judge held (at 349I) that *'..the "just and equitable" basis is rather a special ground under which only certain features of the way in which a company is being run or conducted can be questioned to the point of requesting the court to wind it up*' and in the context of dismissing an application by a creditor of a solvent company for its winding up on just and equitable grounds stated (at 351) '*When one deals particularly with a solvent company, and it should be borne in mind that all these categories* [i.e the five categories mentioned in footnote 4, above, and referred to further in para [28] and [30], below] *that I have enumerated really relate to solvent companies, a Court will have to be persuaded on very adequate grounds that there is need for a further category, such as merely the advisability of having its affairs investigated in this particular way. In my view this does not lie within the general line of thrust of legislative intention as interpreted by Courts here and in England.*'

[15] Cf. *Choice Holdings Ltd and Others v Yabeng Investment Holding Co Ltd 2001 (3) SA 1350 (W); [2001] 2 All SA 539 (W)* at para 20-22. See also the discrete treatment of the claims for winding up by an executor of a deceased estate with reference to the deceased's standing as an alleged contributory and as a creditor in *Katsapas v Norvalspont Investments (Pty) Ltd 1969 (4) SA 403 (O)*.

1985 (2) SA 345 (W) of the five broad categories of cases in which the courts here and in England have considered it just and equitable that a company be wound up and having noted that the case before him did not fall into any one of those established categories, cited O'Donovan J's dicta in *Sweet v Finbain* at 444H–445A with approval and granted the application. It is significant however that in doing so, the learned judge specially listed a number of facts that in principle supported the applicant's interest, peculiarly qua creditor, in the winding up of the respondent company on just and equitable grounds.[16]

[29] Support is also to be found for O'Donovan J's approach - construed in the narrower sense in which I believe it falls to be applied - in various judgments of the Australian courts dealing with equivalent provisions in s 461(1)(k)[17] and s 462(2)(b)[18] of the Australian Corporations Act, 2001. See *Allstate Exploration v Batepro [2004]*

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[16] The learned judge held at 279-280, '*The just and equitable ground for winding-up is not a catch-all to simply liquidate a company that is, for example, running its business at a loss or reducing its scale. But, in my opinion, where a company (a) has closed a number of branches of its business, (b) has retrenched staff to a considerable extent, (c) has virtually closed its head office, (d) is diverting funds which should be used to pay its debts to an overseas concern on grounds which are not satisfactorily explained, (e) to excuse the non-payment of its liabilities sets up a contrived and baseless counterclaim, and (f) has transferred assets outside the ordinary course of business, it is just and equitable that the creditors should be protected from further losses and that it should be prevented from disposing of assets and incurring further liabilities.*'

[17] Sec 461(k): '*The Court may order the winding up of a company if:… the Court is of opinion that it is just and equitable that the company be wound up.*'

[18] Sec 462(2): '*Subject to this section, any one or more of the following may apply for an order to wind up a company:*

(a) the company; or

(b) a creditor (including a contingent or prospective creditor) of the company; or

(c) a contributory; or

(d) …..'

NSWSC 261[19] at paragraphs 20-26 and *Deputy Commissioner of Taxation of the Commonwealth of Australia v Casualife Furniture International Pty Ltd [2004] VSC 157*[20], especially from paragraph 448. [21]

[30] In the context of the reference to them in argument, it is necessary to point out that notwithstanding a tendency in some cases to have treated them as such, the five categories of just and equitable grounds cited in *Rand Air*, supra, are not juristic niches in any formal sense. They are merely the categorisation, in five groups, of examples of similar types of case in which a winding up has been granted under the just and equitable ground. Categorisation in this manner is helpful because it promotes greater predictability in the application of the relevant law; it does not connote, however, that establishing a case for relief under this head in a matter which on its facts falls outside the categorised examples requires a substantive development of the law. To the extent that some reported judgments might be read as suggesting

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[19] The judgment may be accessed at http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2004/261.html. In that case the court upheld the applicants' standing, but refused to appoint a provisional liquidator.

[20] The judgment may be accessed at http://www.austlii.edu.au/au/cases/vic/VSC/2004/157.html#fnB94. In that case the court recognized the standing of the Deputy Commissioner of Taxation, as a contingent creditor, to apply for the winding up of various companies on just and equitable grounds. Winding up orders were granted under this head in circumstances where the persons owning and conducting the business of the respondent companies were demonstrated to have had a history of operating a business through various companies and stripping those companies of their assets which would be transferred to other companies also owned and operated by themselves leaving the stripped companies unable to pay their tax liabilities. It was considered just and equitable that the respondent companies (which were solvent at the time of the applications) be wound up at the instance of the tax collector in circumstances in which it was reasonably anticipated that the owners would manage their affairs in a way which would be directed to render them ultimately unable to settle their tax obligations.

[21] In an earlier judgment in *Port Kennedy Golf Country Club Pty Ltd & Ors v Port Kennedy Resorts Pty Ltd & Ors [2000] WASC 205* (at para 6), a judge of the Western Australia Supreme Court remarked, in the context of deciding an exception to an action for winding up on the grounds that the that the plaintiffs were not members of the company: '*I was not referred to any authority for the proposition that the just and equitable ground in s 461(1)(k) should be treated as being presented only for the benefit of members. It is at least arguable that the ground is available to all of the persons mentioned in s 462.*'

otherwise,[22] I respectfully differ. The well established principle that an unrestricted breadth of considerations might, depending on the peculiar facts of a case, affect a finding as to what would be just and equitable in the given circumstances[23] makes it inappropriate that the enquiry should in any way be confined by the influence of the established categories. Recognising this does not however mean that the just and equitable ground may properly be treated as an unprincipled 'catch all' for obtaining the liquidation of a company.[24]

[31] In this matter I was impressed by the argument by Barnard's counsel that in the peculiar circumstances of Barnard being a contingent creditor of the company by virtue of his having bound himself as surety for its liability to FirstRand Bank - plainly only because of his relationship with the company under the Shareholders' Agreement - an objectively demonstrable and logical connection has been established, because of his exclusion from the company's management, between Barnard's

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[22] Cf. e.g. *Rand Air*, supra, at 350 I-351B; *Wiseman v Ace Table Soccer (Pty) Ltd 1991 (4) SA 171 (W)* at 181 fin-182H; and *Securefin Ltd v KNA Insurance and Investment Brokers (Pty) Ltd [2001] 3 All SA 15 (T)* at 48.

[23] Cf. .e.g. *Moosa, NO v Mavjee Bhawan (Pty) Ltd and Another 1967 (3) SA 131 (T)*, at 136H; *Sweet v Finbain*, supra, at 444H-445A; *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and Another 1989 (4) SA 31 (T)*, at 45B and *Kyle and others v Maritz & Pieterse Inc [2002] 3 All SA 223 (T)*, at para 30.

[24] See Wunsh J's remarks in *Kia Intertrade*, supra, quoted in fn 16. And compare Lord Hoffmann's comments in part 5, s.v. 'Unfairly Prejudicial', of his speech in *O'Neill and Another v Phillips and Others [1999] UKHL 24; [1999] 1 WLR 1092; [1999] 2 All ER 961 (HL):* '*Petitions under section 459* [of the of the English Companies Act, 1985- which is the equivalent of s 252 of the SA Act] *are often lengthy and expensive. It is highly desirable that lawyers should be able to advise their clients whether or not a petition is likely to succeed. Lord Wilberforce, after the passage which I have quoted* [the well known passage often referred to in SA judgments, see e.g. *Hulett and Others v Hulett 1992 (4) SA 291 (A)* at 307H; *Sweet v Finbain*, supra, at 445E], *said that it would be impossible "and wholly undesirable" to define the circumstances in which the application of equitable principles might make it unjust, or inequitable (or unfair) for a party to insist on legal rights or to exercise them in particular way. This of course is right. But that does not mean that there are no principles by which those circumstances may be identified. The way in which such equitable principles operate is tolerably well settled and in my view it would be wrong to abandon them in favour of some wholly indefinite notion of fairness.*'

position as a creditor-applicant (within the contemplation of s 346 of the Companies Act) and the grounding of his claim under the just and equitable ground (under s 344(h) of the Act). In the result the challenge to Barnard's *locus standi* to make the application on just and equitable grounds must be rejected.

Has a case been made out in terms of s 344(h) of the Companies Act?

[32] It remains necessary however, to consider whether Barnard has made out a good case as a contingent creditor for the winding up of the company. For the reasons mentioned earlier it will not suffice for this purpose for him merely to show that, apart from his inability to comply with s 346(2), he would have been entitled to the relief had he brought the application as a member.

[33] There is no evidence that the company is being managed by Greaves and Knapp in a manner that is likely to render it unable to pay its debts as and when they fall due. I do not consider it necessary to discuss the various allegations that Barnard has made about what on the face of things might amount to financial mismanagement by Greaves in particular. It suffices to say that the absence of sufficient substantiating detail renders them lacking in probative force, even in the *prima facie* sense. [25]

[34] There is also no evidence that the conduct of the company's affairs is likely to result in Barnard's position as surety being prejudiced in the sense of it having been shown that there is a probability that his contingent creditor status will be translated

[25] See *Kalil v Decotex (Pty) Ltd and another* at 1988 (1) SA 943 (A) at 979B–E; *Paarwater v South Sahara Investments (Pty) Ltd [2005] 4 All SA 185 (SCA)*, at para 3.

into actual creditor status as a consequence of him being called upon to make payment of the company's debts to First Rand Bank.

[35] It is clear that Barnard undertook the contingent liability on the basis that he would be in joint control of the company's business with the assurance that in terms of the Shareholders' Agreement the company could not increase its indebtedness without his acquiescence. There can be little difficulty in accepting Barnard's discomfort with the current position and, viewed from his perspective, it is easy to understand why he should consider that it would be fair to for his suretyship obligation to be terminated. The winding up of the company would not however achieve that result. He would still be contingently liable for the company's indebtedness to the bank; indeed a compulsory liquidation might increase the prospect of the contingent liability becoming a real one. All that a winding up would achieve is the avoidance of the company incurring further liability for which he might become contingently responsible.

[36] Considerations of justice and equity in a situation like this require taking account not only of the applicant's position, but also that of the other affected parties. It is not as if the suretyship cannot be terminated by other means.[26] The suretyship obligation is an issue that Barnard would have had to resolve with the Bank even if his proposal to withdraw from the company by selling his shares had been accepted

[26] Cf. *Kalil v Standard Bank Of South Africa Ltd 1967 (4) SA 550 (A)*, at 555G-H; *Langston Clothing (Properties) CC v Danco Clothing (Pty) Ltd 1998 (4) SA 885 (SCA)* at 888H. Counsel did not direct my attention to anything in the deed of suretyship which might exclude the incidence of the ordinary rule that liability under a covering suretyship for further debts can be excluded by notice given by the surety to the creditor. My own cursory consideration of the deed suggested on the contrary that its provisions appear to expressly reiterate the incidence of the ordinary rule.

by his co-shareholders. While the failure of the quasi partnership relationship in the circumstances mentioned earlier might - in the absence of a reasonable alternative remedy - have justified a winding up of the company at his instance as a member, I am not persuaded, in the absence of adequate proof that the company is being financially mismanaged in a way that would prejudice his position as surety, that a sufficient basis has been established for Barnard to obtain the liquidation of the company in his capacity as contingent creditor. Indeed the suretyship obligation, although described in some detail in the founding papers, was not a matter centrally relied on in those papers as the ground upon which Barnard sought the winding up. It was rather an aspect that was fastened on when the difficulty that he faced in obtaining a member's winding up was brought home to him.[27]

The claim for alternative relief in terms of s 252 of the Companies Act

[37] Turning then to consider the alternative relief of the nature contemplated in terms of s 252 of the Companies Act sought by Barnard. As mentioned, the application for this relief was introduced at a late stage in response to the argument by the company's counsel that if it were to be found that a case for a provisional winding up of the company had been made out, Barnard should nevertheless be deprived of success because of an unreasonable failure to avail himself of a less drastic remedy. In this respect the company's counsel called in aid my judgment in *Robson v Wax Works (Pty) Ltd and Others 2001 (3) SA 1117 (C); [2001] 3 All SA 546 (C)* and that

[27] Tellingly, in this connection, although of no significance to the result of the winding up application, Barnard did not apply for the winding up of the company's wholly owned property owning subsidiary, for which he had also stood as co-surety together with Greaves and Knapp, notwithstanding the concerns expressed by him in the spoliation application (described at para [61], below).

of Vinelott J in *Re a Company [1983] BCLC 151*. This defence had not been adumbrated in the company's answering papers and was raised for the first time in argument.

[38] Inasmuch as the respondents' argument implied that Barnard should have sought an order compelling either the company or his co-shareholders to buy him out, its advancement was not a little ironic in the context of the behaviour of Greaves and Knapp when Barnard had suggested that very course at the outset; and also in the context of the respondents' denial that Barnard is a shareholder in the company. Whereas the respondents advanced the alternative remedy argument to address the eventuality that I might have found that Barnard had otherwise made a case for provisional liquidation, Barnard introduced the application for alternative relief also to cater for the eventuality that his application for the principally sought relief might fail.[28] In the latter context the necessity to consider the alternative relief therefore arises quite independently of s 347(2) of the Companies Act. Accordingly, it would ordinarily not have been necessary to consider whether or not the respondents have discharged the onus contemplated in s 347 to demonstrate that another remedy should

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[28] In *O'Neill and Another v Phillips and Others [1999] UKHL 24; [1999] 1 WLR 1092; [1999] 2 All ER 961 (HL)*, at part 5 of his speech, Lord Hoffmann drew a useful illustration of the operation of the parallelism between the concept of justice and equity in a winding up application of the sort contemplated by s 344(h) of the SA Companies Act and unfairness in a s 252 context, stating that the parallel '*does not mean that conduct will not be unfair unless it would have justified an order to wind up the company…. As Mummery J. observed in In re A Company (No. 00314 of 1989), Ex parte Estate Acquisition and Development Ltd. [1991] B.C.L.C. 154, 161, the grant of one remedy will not necessarily require proof of conduct which would have justified a different remedy:*

> "*Under sections 459 to 461* [of the English Companies Act, 1985 – the statutory equivalent of our s 252 remedy] *the court is not. . . faced with a death sentence decision dependent on establishing just and equitable grounds for such a decision. The court is more in the position of a medical practitioner presented with a patient who is alleged to be suffering from one or more ailments which can be treated by an appropriate remedy applied during the course of the continuing life of the company.*"

The parallel is not in the conduct which the court will treat as justifying a particular remedy but in the principles upon which it decides that the conduct is unjust, inequitable or unfair.'

have been applied for.[29] However, because of an argument advanced by the respondents' counsel in respect of costs, with which I shall treat later, it is appropriate to record in that connection that in the absence of any relevant averments in the answering affidavits I am of the view that I could not have found on the papers, had it been necessary to determine the question, that the respondents had discharged the onus.

[39] Section 252 of the Companies Act provides insofar as is relevant:

> *(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable: to him or to some part of the members of the company, may, subject to the provisions of subsection (2), make an application to the Court for an order under this section…*
>
> *(3) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct, of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.*

[40] The alternative relief sought by Barnard is for orders directing Greaves and Knapp to purchase his shares in the company at a price determined by agreement between two chartered accountants, one appointed by Barnard and the other by Greaves and Knapp. Barnard seeks an order directing the aforementioned price to be

[29] Cf. *Moosa N.O. v Mavjee Bhawan (Pty) Ltd 1967 (3) SA 131 (T)* at 150-152.

determined as at 8 April 2005, being the date of his expulsion from the management of the company and seeks payment of that price plus interest thereon at the prescribed rate from 9 April 2005 to date of payment. Although the amended notice of motion does not expressly make reference to s 252 of the Companies Act, in the context of the allegations in the founding papers of unfairly prejudicial, unjust or inequitable conduct affecting him, the content of the alternative relief sought is plainly predicated on the provision.

[41] The provisions of s 252 are available to 'members' – i.e. registered shareholders. On the peculiar facts of the current matter I do not consider the fact that Barnard is not yet registered as a member is an obstacle to his resort to s 252. I have already found that Barnard is a shareholder entitled as against the company to obtain the insertion of his name on the members' register.[30] In paragraph 2 of the notice of motion, Barnard has sought an order in the following terms:

> *'That in as much as may be necessary, the* [company] *is ordered to rectify its Members Register to include and reflect* [Barnard] *as a shareholder of the* [company]*'*

In my view it is competent for a shareholder who has not obtained registration of his membership of the company because of opposition or lack of cooperation by the company or his fellow shareholders, but is entitled to such registration, to apply in the same proceedings for an order directing his enrolment on the register of members and, in anticipation of the grant of such an order, as a member for relief in terms of s 252. The requirements of s 346(2) of the Companies Act and the considerations thereanent

[30] See para [7]-[10], above.

traversed in *Rubenstein NO and Another v Langhold (Pty) Ltd 1983 (2) SA 228 (C)*, which would prohibit such an approach in the context of an unregistered shareholder seeking the winding up of a company in terms of s 344(h) of the Act, do not apply in the context of an application for relief in terms of s 252.

[42] It would be inappropriate to grant the alternative relief sought by Barnard if the contract in terms of which he had purchased the shares from Greaves had been cancelled, as contended by the latter. The respondents' counsel submitted that for the purposes of the application I was bound by the *Plascon Evans* evidentiary rule to accept the respondent's evidence that the sale had been cancelled. I do not agree. There are no relevant factual disputes. It is common ground that Greaves purported to cancel the contract. The circumstances in which he did so are also not contentious. The only aspect that is in dispute between Barnard and Greaves is whether or not Barnard has paid for the shares. I accept that I am obliged for present purposes to assume that Barnard has not yet paid for the shares. It does not follow, however, that Greaves was entitled to cancel the sale agreement.

[43] As described earlier, the sale agreement provided that payment for the shares was to be effected to Greaves from the dividends subsequently payable by the company to Barnard, qua shareholder. By purporting to place Barnard on terms to pay the purchase price on seven days notice, Greaves sought to impose an obligation on Barnard outside the agreement, and concomitantly purported to ascribe to himself a contractual right to payment at odds with anything provided in the contract. Even if one were to assume that Barnard had been lawfully removed as a director, that would not terminate his right to the dividends which Greaves had agreed to look to for

payment. It is clear that Greaves' purported cancellation of the sale on the grounds of alleged non-payment was unlawful. No other basis for a valid cancellation was suggested.

[44] It follows that Barnard has the required standing to make the application for relief in terms of s 252 of the Companies Act.

[45] It remains to consider whether Barnard has proven unfairly prejudicial, unjust or inequitable conduct. It would not be enough for him just to show that he was unhappy in his relationship with his fellow shareholders and wished to withdraw from the company. But the events after 8 April 2006, described earlier in this judgment, have taken Barnard's case further than that. It is clear that he has been excluded from the management of the company against his will in a manner inconsistent not only with the provisions, but also the spirit of the Shareholders' Agreement. The manner in which a shareholders' meeting was convened on improperly short notice to remove him as a director of the company, as well as the way in which a disciplinary enquiry was convened, also in circumstances redolent of procedural unfairness, substantiate Barnard's allegation that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him. The demand for payment of his loan account coupled with the instruction by the company's management to the company's auditors to refuse him access to the financial information reasonably required by him to confirm his account with the company provides further illustration of the validity of Barnard's complaint about his treatment. The manner in which he was despoiled of peaceful possession of his office at the company's premises is another relevant instance of unfair and prejudicial conduct by the company. This court has already

held in the judgments of Motala J and of the Full Bench in the spoliation proceedings referred to above that Barnard's occupation of the premises in question was connected with his position as shareholder in a company with a 'quasi-partnership' character. The allegation that Barnard was himself responsible for the breakdown in relations by failing to apply himself to his duties is unconvincing. There is no evidence of any complaint having been articulated before Barnard announced his wish to withdraw from the company. On the contrary, shortly before this Barnard had been awarded a salary increase.

[46] At part 6 of his speech in *O'Neill and Another v Phillips and Others [1999] UKHL 24; [1999] 1 WLR 1092; [1999] 2 All ER 961 (HL)* , Lord Hoffmann, delivering the principal opinion in an appeal to the House of Lords concerning a petition under the English equivalent of s 252, 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. 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 without giving him the opportunity to remove his capital upon reasonable terms.'* In my judgment the current matter is another such 'standard case'.

[47] The formulation of appropriate relief in terms of s 252 of the Companies Act is complicated by two issues that it is not possible for me to determine on the papers: firstly, the value at which Barnard's shares should be redeemed, and secondly, the issue of whether or not Barnard has paid Greaves for the shares, whether in whole or

in part.[31] (As to the second issue, notwithstanding my findings earlier on the payment provisions of the Shareholders' Agreement, it must follow that if the shares are to be sold back to his fellow shareholders Barnard must account *pari passu* to Greaves for any outstanding purchase consideration.)

[48] Both of these issues concern matters on which the parties would be well advised to reach agreement. With appropriate co-operation from the company's management (Greaves and Knapp), it should be feasible to obtain an independent valuation of Barnard's shareholding. An appropriate accounting by Greaves and the company should enable a determination whether Greaves has received any benefits from the company in lieu of dividends or other payments that would ordinarily have accrued to Barnard and which fell to be appropriated as payment for the shares purchased by Barnard. It is also desirable that any amount in which Barnard may be indebted to the company on loan account should be settled in the context of his ceasing to be a shareholder. Provision will be made for this in the order that will issue.

[49] If the parties are unable to co-operate sensibly the outstanding questions will have to be resolved in the context of further litigation.[32] The order I shall make, although directed as far as possible to try to bring an end to the disputes between the

[31] Although the indications on the papers appear to support Greaves' contention that he has not been paid for the shares in the manner contemplated by the Shareholders' Agreement, there is however some documentation which suggests that Greaves, Knapp and Barnard might have settled the issue of the outstanding purchase consideration by some form of division between themselves of the right to the value of the company's goodwill. The notion of such a division is to my mind somewhat unconventional and I refrain from making any finding on whether or not it was made, or to what effect.

[32] The respondents' counsel submitted a draft order which provided for a referral of various relevant outstanding issues for the purposes of relief in terms of s 252 for determination on oral evidence. I have however formulated an order which will give the parties the opportunity to avoid further litigation.

parties under this head without further litigation, will make contingent provision for such an eventuality. (I should emphasise, however, that nothing in this judgment should be construed to suggest that in the event that Greaves and Knapp are obstructive in giving effect to the relief granted in terms of s 252, or unable to pay for the shares that they are required to purchase, Barnard should be prevented by the order made in this matter from renewing his endeavour to wind up the company – next time as a registered member. Indeed, had Barnard's application in the current proceedings been properly brought, qua member, it may well have succeeded because of the conduct of Greaves and Knapp that suggested an unwillingness to allow Barnard to withdraw his capital in the context of his exclusion.[33])

[50] It is appropriate that Barnard should be compensated for his shares at the value they enjoyed when he was excluded from the management of the company. This will address the concerns that he has voiced about the assets of the company being subsequently transferred to another company in which Greaves and Knapp currently do business, Carl Greaves Financial Services (Pty) Ltd. It will also ensure, in fairness to Greaves and Knapp, that Barnard is not unduly favoured by any improvement in the value of the shares by their efforts after Barnard ceased to work in the company. In my judgment it is appropriate that Greaves and Knapps be directed to acquire 13 and 12 shares respectively of Barnard's 25 shares. This will mean that their current ratio *inter se* of shareholding in the company will be maintained. It will

[33] Cf. *Robins v Supscaf Limited [2006] NZHC 416* (and sub nom. *Jenkins v Supscaf Ltd [2006] 3 NZLR 264*), especially at para 141(b), in which the New Zealand High Court refused to accede to the respondent company's submission that it should refuse a winding up order sought by an excluded 'quasi partner' shareholder and direct instead that the remaining shareholders buy the applicant's shares, citing the historical failure of the shareholders to reach settlement on that basis despite ample opportunity to have done so.

also mean that they will be more or less equally advantaged or disadvantaged, as the case might be, by the effect of the relief granted to Barnard. As the two of them adopted a common position in respect of the exclusion of Barnard from the company, I consider this to be an equitable solution.[34] They are of course at liberty to rearrange matters between themselves after complying with the order.

[51] Barnard's claim for interest on the purchase consideration with effect from 8 April 2005 will not be granted. There is no reason for the second and third respondents to be penalised in this respect, particularly considering that the claim for relief in terms of s 252 was only instituted by amendment to the notice of motion effected on 25 October 2006, and then without any evidence being offered on the value of the shares. I shall however make provision for the payment of interest on the purchase consideration at the prescribed rate with effect from seven days after the independent valuation of the shares to be undertaken in terms of the order, provided transfer of the shares is tendered by Barnard within that period.

Costs

[52] As a factor of the parallelism mentioned earlier[35], the facts and much of the argument relevant to Barnard's unsuccessful application for the winding up of the company were equally applicable to the application for relief in terms of s 252. As Barnard has been successful in the latter application, I consider it appropriate that he

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[34] I gave consideration to directing that Greaves and Knapp should acquire the shares jointly, but decided against this course because of possible problems with the exigibility of such an order and because of the complication of the unresolved issue of whether Barnard must still pay Greaves in part or in full for the shares acquired by him in terms of the Shareholders' Agreement.

[35] See footnote 28.

should be awarded his costs, including the costs of the application for the principally sought relief and that liability for these costs should lie with the first, second and third respondents, jointly and severally. I am not willing to accede to the argument by the respondents' counsel that Barnard should get his costs only from the time that the prayers for alternative relief were introduced. That approach would be artificial and inappropriate because of the overlap that I have just described. Another factor that has weighed with me is that although it is so that the alternative application was introduced only in response to the argument advanced by the respondents' counsel, the failure of the winding up application was nevertheless not because the respondents had raised a defence in terms of s 347(2) of the Companies Act and successfully discharged the attendant onus.

THE APPLICATIONS CONCERNING THE MEANING AND EFFECT OF THE ORDER MADE BY MR JUSTICE MOTALA

[53] The background to the application and the related counter-application concerning the meaning and effect of the relief granted by Motala J in case no. 3110/2005 has been summarised in paragraphs [3] and [18], above.

[54] The relevant provision in the order made by Motala J was framed as follows (in paragraph 3): '*That the Respondents are interdicted and restrained from preventing or attempting to prevent the Applicant from lawfully being present at the Third Respondent's* [i.e. the company's] *place of business.*' Paragraphs 1 and 2 of the order directed the respondents to restore the original locks and access codes to the premises at 29 Douglas Carr Drive, Bellville so that Barnard could gain entry to the

premises and authorised the Sheriff to do so in the event of respondents failing to comply with the directive. The reasons for judgment make it clear that the learned judge had characterised the application (or at least that part of it in respect of which he granted any relief) as an application for a spoliation order. The judgment of the Full Bench also referred to the application as 'spoliation proceedings' and described the relief granted in the following terms: 'Appellants were ordered to restore possession to him of certain office premises situated at 29 Carr Drive, Bellville, Western Cape'.

[55] The *mandament van spolie* is a possessory remedy. It is used to restore possession to an applicant that has been despoiled of property or the use of property. It is most frequently used to restore the status quo ante spoliation so that due process must be followed to establish which of the protagonists has the legal right to possession of thing in contention. It is a restraint against inappropriate self help. It is not a remedy available to someone who seeks to obtain initial possession of property, or to take back property to which they contend they are entitled from someone with established possession of it.[36] Barnard was despoiled of possession of the offices at 29 Douglas Carr Drive. It was to restoring his possession of those premises that the relief granted by Motala J was directed. The order granted in case no. 3110/05 was not intended to achieve any more than to restore Barnard to the spoliated property.

[56] In my view there is nothing ambiguous about the order made by Motala J. The application by the company, Greaves and Knapp, by way of principal relief, for an amplification of paragraph 3 to refer expressly to 29 Douglas Carr Drive, Bellville

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[36] Cf e.g. *Boompret Investments (Pty) Ltd and Another v Paardekraal Concession Store (Pty) Ltd 1990 (1) SA 347 (A)* at 353A-F.

was accordingly unnecessary. The application in the alternative for interdictory relief was predicated on the assertion that Barnard was neither a director nor a shareholder of the company. Both these assertions have been found to be unfounded. It is not necessary in the context of the relief to be granted in terms of s 252 of the Companies Act to make a finding whether Barnard was entitled as director and shareholder to access to the new premises. I have however not been satisfied that a case was made out for the interdictory relief sought by the company.

[57] For the reasons stated in paragraph [55], there was no merit in the counter-application.

[58] In the result both the application and the counter application in case no. 8263/06 will be dismissed with costs.

THE SPOLIATION APPLICATION IN RESPECT OF THE PREMISES CURRENTLY OCCUPIED BY BREDENHANN

[59] I outlined the factual background to this application in paragraph [4], above.

[60] The *mandament van spolie* is intended to be a robust remedy for the purpose of restoring the status *ante quo* dispossession, irrespective of the underlying contested rights to the object or right in issue. These features have led to the remedy sometimes being described as an interim remedy.[37] An applicant for relief under the *mandament* is expected to act expeditiously in claiming it. The rationale for the remedy is undermined when, as in the current case, a lengthy interval and altered circumstances

[37] See C.G. van der Merwe, *Sakereg* 2ed at 119;

have intervened between the offending dispossessing act and the availment of the remedy. Although it has often been held that the scope for the exercise of judicial discretion to refuse the remedy is extremely limited, the cases show that the remedy will not be granted where it would be impractical or purposeless.[38]

[61] What was in issue when Barnard was dispossessed of the right of access to the premises at 29 Douglas Carr Drive was his right as a 'quasi-partner' shareholder in Carl Greaves Brokers (Pty) Ltd to obtain admission to the premises as the company's place of business. Owing to the passage of time and the intervening removal of the company's offices to a different address and also the sale of the property to a third party who is now in occupation, the restoration to Barnard of access to the premises in the current circumstances will not restore the status *quo ante*. Indeed Barnard appears to realise the artificiality of the restoration of the premises to him at this stage and explains that he seeks the relief so as to be able to ensure that the property is being properly maintained so as not to fall in value. I find it unnecessary to express any view on this explanation. It is sufficient to point out that Barnard's interest in the value of the property has been addressed in the order that I shall make in respect of his claim in term of s 252 of the Companies Act. His shares in Carl Greaves Brokers (Pty) Ltd, which is the parent company of the registered owner of the property, fall for the purposes of compliance with that order to be valued as at 8 April 2005, and accordingly, any subsequent change in the market value of the immovable property can be of no practical interest to Barnard.

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[38] Cf. e.g. *Van der Meulen v Greeff 1906 CTR 1090*; *Parker v Mobil Oil of Southern Africa (Pty) Ltd 1979 (4) SA 250 (NC)*.

[62] In the circumstances I consider that it would be inappropriate to grant the relief sought by Barnard to have the property restored to him. In my judgment the institution of the application by Barnard when he had a pending winding up application already set down for hearing was also inappropriate. I however have an unresolved discomfort about the propriety of the sale of the property at the instance of Greaves and Knapp and the consequent installation there of Bredenhann while the right to possession of it was subject to their appeal against the order made by Motala J. I intend to give effect to this by declining, when dismissing the application, to make a costs order in their favour or the companies controlled by them. I shall however make a costs order in favour of Bredenhann because I have, in effect, upheld his contention against the grant of the order on grounds of impracticability.

ORDERS

[63] In the result the following orders are made:

A. <u>In case no. 8021/06 (the winding up application):</u>

(a) The winding up application is dismissed.

(b) The first respondent (i.e. Carl Greaves Brokers (Pty) Ltd) is directed, insofar as may be necessary, to rectify its register of members to reflect that Juan Barnard is the holder of 25 of the 100 issued shares in the company pursuant to the Shareholders' Agreement concluded between the applicant and first, second and third respondents, dated 12 March 1998. The first respondent is further directed forthwith to issue the applicant with

an appropriate certificate in respect of the registration of his aforementioned holding so as to enable him to tender transfer thereof in terms of the further relief granted in paragraph (c), below.

(c) In respect of the application for alternative relief in terms of s 252 of the Companies Act 61 of 1973, the following relief is granted:

(i) The second and third respondents (i.e. Greaves and Knapp, respectively) are directed to purchase 13 and 12 shares respectively of the applicant's 25 shares in the first respondent at fair value calculated pro rata the total issued share capital, that is, without any discount for the shares representing a minority holding and without any discount on account of the contractual restrictions agreed upon between the shareholders on the disposal of the shares other than as between themselves.

(ii) For the purpose of the said purchase of the applicant's shares by the second and third respondents, the fair value of the shares shall be determined with regard to the financial condition of the first respondent as at 8 April 2005.

(iii) The total purchase consideration payable to the applicant for his shares shall be adjusted downwards in

an amount equivalent to any the sum, if any, in which he is indebted to the company in respect of any loan account. In consideration for this the applicant's indebtedness, if any, to the company will be assumed by second and third respondents, respectively, pro rata the shares to be acquired by them and the applicant's indebtedness, if any, to the company shall thereupon be extinguished.

(iv) The second and third respondents shall be liable to pay mora interest at 15.5% per annum on the purchase consideration determined in respect the aforementioned 25 shares-

(aa) with effect from the date upon which the purchase consideration of the said shares is independently determined as directed in this order, provided that such interest shall be payable only in the event of the applicant having tendered transfer of the shares to the second and third respondents at a consideration equivalent to the said determination within seven days of the publication to the parties of the determination, or

(bb) in the event of such determination being successfully challenged, as further provided below, mutatis mutandis with effect from the date of the determination of the relevant litigation.

(v) The parties are directed to endeavour to agree upon the appointment of a practising chartered accountant of not less 10 years' standing, who shall not be the company's auditor, nor have been previously professionally engaged in any capacity by any of the parties, to undertake the valuation of the shares in accordance with the directions in sub-paragraphs (i) and (ii), above and to determine the purchase consideration in accordance with sub-paragraph (iii). In the event of the parties being unable so to agree within 10 days of the date of this order, the valuation and determination shall be undertaken by a Cape Town based practising chartered accountant of not less 10 years' standing to be nominated by the President of the South African Institute of Chartered Accountants.

(vi) The costs of the said valuation and determination shall be borne as to one half by the applicant of the one part and one half by the second and third respondents jointly

of the other part; and in the event of any party paying more than their share of the costs that party shall be entitled to recover the excess from the other parties pro rata.

(vii) The applicant and the first, second and third respondents are directed to furnish the person appointed in terms of sub-paragraph (iv) with all such information, appropriately vouched, as he or she might reasonably require in order to undertake the valuation and determination, failing which the said person is authorised to make application through the chamber book to a judge for such further directions and relief as might be appropriate.

(viii) The person appointed in terms of sub-paragraph (iv) shall complete the valuation and determination and furnish each of the parties with a reasoned report thereon in writing within six weeks of his or her appointment, or such extended period as the parties may agree to in writing, failing which he or she shall file a written statement with the Registrar, a copy of which shall be furnished to each of the parties, setting out the reasons for the failure to complete the valuation and setting out the period within which and the conditions

subject to which he or she then expects to be able to complete the work. Without limitation of rights, any of the parties shall be entitled in the context of such statement to apply through the chamber book to a judge for such further directions or relief as might be appropriate.

(ix) In the event of the applicant or the second or third respondents being unwilling to accept the determination of the person appointed in terms of sub-paragraph (iv), proceedings to obtain a judicial substitute valuation shall be instituted by the dissatisfied party or parties within 20 days of the publication of the valuation, failing which the independent determination made in terms of this order shall be final and binding on the parties.

(x) The first and second respondents are directed to furnish an accounting in writing to the applicant within 15 days of the date of this order in respect of-

(aa) all dividends declared and paid by the company subsequent to the conclusion of the Shareholders' Agreement and any appropriation

by the second respondent (in terms of clause 2.1.4.1 of the Shareholders' Agreement) of such dividends as might ordinarily have been payable to the applicant;

(bb) all other benefits paid by the company to shareholders;

(cc) all commission and other amounts earned for the company by Barnard and the appropriation of such by the company;

(dd) all amounts left in the first respondent as 'capital investment' within the meaning of clause 2.1.4 of the Shareholders' Agreement;

(ee) all withdrawals by the shareholders of amounts left in the first respondent as 'capital investment' within the meaning

of clause 2.1.4 of the Shareholders' Agreement;

(ff) any other information reasonably required in order to determine whether, and if so by how much, the applicant's liability to make payment to the second respondent in the sum of R125000 in terms of clause 2.1.4.1 of the Shareholders' Agreement has been liquidated or reduced.

(xi) The first and second respondents shall file a copy of the aforementioned statement of account with the Registrar under cover of a filing notice indicating the case number in these proceedings.

(xii) In the event that the applicant and the second respondent are unable on the basis of the account furnished in terms of sub-paragraph (x), above, within 10 days to determine and reach agreement on the amount, if any, by which the purchase price of R125000 in respect of the shares sold in terms clause 2.1.4.1 of the Shareholders' Agreement has been reduced, the

applicant shall institute proceedings within 20 days of the date upon which he is furnished with the statement of account for a debatement of the said account together with appropriate declaratory relief, failing which it may be presumed (without prejudice to the applicant's actual rights) for the purposes of computing the purchase consideration payable by the second respondent to the applicant in terms of sub-paragraph (i), above, that the applicant has not paid for the shares, alternatively that he has not paid such part of the price of the shares payment of which remains in dispute, and the said consideration payable by the second respondent may be adjusted as if a set-off were applicable.

(xiii) The applicant shall be deemed to have resigned as a director of Carl Greaves Brokers (Pty) Ltd with effect from 8 April 2005.

(d) The first, second and third respondents shall be liable jointly and severally to pay the applicant's costs of suit, which shall include the costs of the winding up application.

(e) There shall be no order as to costs in the application by the second and third respondents for leave to intervene.

B. In case no. 8263/06 (the application and counter-application concerning the meaning and effect of the order made by Motala J in case no. 3110/05):

(a) The application is dismissed with costs.

(b) The counter-application is dismissed with costs.

C. In case no. 10622/06 (the application for joint possession of the property occupied by Bredenhann)

(a) The application is dismissed.

(b) The applicant is directed to pay the first respondent's (i.e. Bredenhann's) costs of suit.

(c) Save as provided in terms of paragraph (b), no order is made as to costs.

A.G. BINNS-WARD
Acting Judge of the High Court