IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: 4308/2015

In the matter between:

NICOLAAS JOHANNES DU PLOOY N.O.	First Applicant
CATHERINA MAGDALENA DU PLOOY N.O.	Second Applicant
NICOLAAS JOHANNES DU PLOOY	Third Applicant
HAROLD MEYER LIVERSAGE	Fourth Applicant
SANDRA VAN DER WESTHUIZEN	Fifth Applicant

And

DE HOLLANDSCHE MOLEN SHARE BLOCK LTD	First Respondent
THE SHAREHOLDERS OF ORDINARY A CLASS SHARES IN DE HOLLANDSCHE MOLEN SHARE BLOCK LTD	Second Respondent

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JUDGMENT: 11 November 2015

DAVIS J

Introduction

[1] This case has been fuelled by a major feud between third applicant personally as well as in his capacity as a representative of the NJ Du Plooy Trust ("the trust"), which is the majority shareholder of first respondent on the one hand and the board of directors of the first respondent ("the board') on the other. This feud has not only created significant problems for the running of first respondent, a

share block company, but it has now raised a veritable hast of intricate legal questions which, in some cases, go to the heart of company law.

[2] In essence, the first and second applicants seek an order that the trust, as a registered owner of a series of shares of first respondent, and alternatively, in the event of it being found that the trust has not been entered into the security register of the first respondent as the owner of these shares, that the first respondent be ordered to enter the name of the trust in the first respondent's security register as the owner of all the shares referred to as class B - F shares. In the alternative, applicants seek an order that the trust is entitled to exercise voting rights in respect of the shares at any meeting of the shareholders of the first respondent.

The broad factual background

[3] It appears to be common cause that first respondent was incorporated and registered as a company on 18 November 1991 with an authorised share capital of 35 600 shares comprising of the following classes of shares of 1c each:

6 980 class A shares,

540 class B shares,

10 000 class C shares,

6 000 class D shares,

2 080 class E shares, and

10 000 class F shares

[4] At all relevant times since 2004, the first respondent and the board recognised the trust as a majority shareholder of first respondent and the registered owner of all the class B – F shares. In September 2014, the board adopted the position that the trust was not the shareholder of first respondent because its name had not appeared on the document that the board contended is the share register of first respondent.

[5] Although the board adopted this decision in September 2014, the dispute had begun to brew somewhat earlier. During 2011 a dispute arose between the trust and the first respondent when the board took the position that the first respondent was obliged in terms of the Companies Act of 2008 to amend its memorandum and articles of association. The first respondent appointed Werksmans Attorneys to advise it on the implications of this amendment. On 10 July 2012 an attorney from Werksmans attended a board meeting to advise first respondent on these matters.

[6] First respondent alleged that, prior to this meeting, it had already engaged in discussions with the applicant with regard to various issues, inter alia, “greater voting rights” and “greater representation of the board” for class A shareholders.

[7] In 2012 negotiations took place between the board and the trust concerning the proposed draft of the new memorandum of incorporation in terms of the 2008 Companies Act.

[8] First respondent alleged that since early 2013 it "attempted to align its founding documents", that is the existing memorandum and articles of association with the provisions of the 2008 Companies Act. These negotiations between the trust and first respondent were protracted but ultimately proved to be unsuccessful. The board then began to raise a number of complaints with regard to third applicant's conduct as a director of first respondent. On 14 August 2014, in order to protect its interest, the trust requested first respondent, in terms of article 11.2 of the Articles read together with s 61 (3) of the 2008 Companies Act, to convene a general shareholders meeting in order to consider and vote upon a resolution for the removal of the then directors and the appointment of new directors in their stead. In the header to this notice the trust informed first respondent that it requested a shareholders meeting in its capacity as "the holder of 82% of the issued shared capital" of the first respondent.

[9] First respondent complied with this request and gave notice of a special general meeting of shareholders to be scheduled for 20 September 2014. It added to this notice a series of items that first respondent intended to put to the vote. The first order of business was 'to resolve the impasses between the board and the majority shareholder in the company, the Du Toit Plooy Trust relating to the company's memorandum of incorporation'. The first respondent attached a voluminous bundle of annexures to this notice, inter alia, a memorandum to the shareholders that contained the following paragraph:

'Company's share register

> It has furthermore come to the attention of the board that due to the amendments to the share blocks and the registered Plan, the Company's share register is incorrect for the reasons more fully set forth in Werkmans' e-mail dated 4 April 2014. (my emphasis)

In paragraph 9.1 of this memorandum, the shareholders were informed of the following matters that needed to be resolved:

> '9. To be resolved by shareholders
>
> 9.1 Whether or not the Outstanding Matters and any other matter to be raised by the Trust, as majority shareholder (approximately 83% shareholding) and contributor of approximately 4.3% to the levies raised by the Company from time to time, should simply be accepted, to ensure that the MOI is finalised and registered as soon as possible, OR should the Company seek the appropriate relief against Du Plooy and/or the Trust to ensure the finalisation of the revised MOI…' (my emphasis)

On 1 September 2014 the trust's attorney directed the following inquiry to the first respondent in regard to this paragraph:

> 'In view of the content of para 9.1 of the aforesaid memorandum, we require confirmation from the Board of Directors of the Company, that the Trust holds approximately 83% of the shareholding in the company and that they will be entitled to exercise their vote at the meeting to be held on 20 September 2014. If this is not the case, kindly inform us what according to the Board of Directors, is the shareholding of the Trust and/or (on) what basis the Trust would not be able to vote on the basis of such shareholding.'

The first respondent's attorney replied, inter alia, as follows:

> 'Lastly, your client will be permitted to vote in accordance with the provisions of the Companies Act, 71 of 2008, and your client's shareholding will be determined in accordance therewith at the envisaged meeting.'

[10] At the meeting of 20 September 2014 discussions took place which culminated in an agreement that the meeting be postponed and that the parties attempt to settle the issues pertaining to the amendment of the company's founding documents and the use agreement. It was during these discussions that first respondent's attorney stated that, according to his client, the trust was not reflected in the share register as a shareholder and, as a consequence, the trust would not be permitted to be present and vote at any shareholders meeting.

[11] A further meeting was held on 25 September 2014 to discuss the proposed terms of the Memorandum of Incorporation (MOI) and related issues. The trust attorney made it clear that the trust was not prepared to commence any discussions with first respondent on the basis that, in the event that the discussions were unsuccessful, the board would persist in its attitude that the trust was not entitled to be present and to vote at any reconvened meeting of shareholders.

[12] Pursuant thereto, first respondent's attorney informed the trust's attorney that, regardless of the outcome of the settlement negotiations, first respondent would not persist in the positions adopted, namely that the trust may not be present and vote at any reconvened shareholders meeting. However, it appears that the board did reconvene the postponed meeting which had been scheduled for 11 October 2014.

At this meeting the trust was allowed to vote, although upon the instructions of the board, the respective votes of the A class shareholders and the trust were counted and recorded separately. The outcome was that the majority of the A class shareholders voted for the adoption of the six proposals put up by the board and the trust, as well as the fourth and fifth applicants, and a substantial number of A class shareholders voted for the removal of the directors. Given the fact that the votes of the trust, supported by the fourth and fifth applicants, constituted the majority vote of the shareholders present at the meeting, the result was that the proposals of the board were not adopted but in their stead the proposals of the trust with regard to the removal of directors were adopted.

[13] This result elicited a further letter from first respondent's attorney emphasising that the trust was not reflected on first respondent's share register as a shareholder and further that:

> 'tot tyd en wyl hy (i.e. the Trust) nie in die Maatskappy se sekuritieitsregister aangetoon word as 'n aandeelhouer van the Maatskappy nie, ons Kliënt hom nie as 'n aandeelhouer sal erken nie.'

[14] On 13 November 2014 the parties' legal representatives again attended a meeting with a view to addressing the board's contention that the share register had not reflected the trust as a shareholder so that the trust could do whatever was required in order to remove this impediment to its status as a shareholder. According to the applicants, the board's attorney did not generate any such

response to the trust's attorney. However, on 28 November 2014, the board's attorney generated a letter in which he informed the latter as follows:

> 'Ons ontken dat skrywer onderneem het om u te voorsien van 'n skrywe waarin die maatskappy, (ons Kliënt) se sogenaamde vereistes vervat is ten eninde ons Kliënt se aandele register reg te stel. Wat wel gesê is, was dat ons u van 'n skrywe sal voorsien waarin die vereistes waaraan voldoen moet word (en hier is na wetlike en praktiese vereistes vereis, en nie na iets wat ons Kliënt na willekeur wil uitdink nie) ten einde u Kliënt as 'n aandeelhouer in die aandele register in te skryf, uiteengesit word.'

[15] According to the first applicant, he became aware on 27 February 2015 that the board had given notice to the shareholders of a special general meeting as well as an annual general meeting of shareholders to be convened on 21 March 2015. The purpose of this meeting was to adopt, inter alia, a special resolution that the ordinary class A shareholders be increased from 6 980 to 256 980.

[16] Central to this dispute is the allegation that the purpose and *modus operandi* of the board in adopting this resolution was to substantially increase the number of class A shares and the combined voting rights in terms thereof, before making any further attempts to address and resolve the issue pertaining to the status of the trust as a shareholder.

The central questions in this case

[17] Mr Vivier, who appeared on behalf of the applicants, correctly observed that there were three important initial questions which required determination, namely

the status of the original subscribers to shares in first respondent, the transfer of the shares from the so called Schoeman employees to the applicants and the further transfer of the shares from the applicants to the trust. He then raised two further issues, namely the implications of s 161 and 163 of the Companies Act of 2008 as well as the doctrine of estoppel.

The initial allotment of shares

[18] It is common cause that according to the Memorandum and Articles of Association, the seven subscribers to first respondent were the three subscriber applicants and four employees of Arthur Schoeman, then a practicing attorney and conveyancer, who practiced as a director of Arthur Schoeman Incorporated. Mr Schoeman specialised in property law, including share blocks and sectional titles. It was he who had been instructed to attend to the registration of the share block company. On 18 November 1991 Mr Schoeman caused the first respondent to be registered as a share block company in terms of the provisions of the Share Block Companies Act 59 of 1980. According to a clause entitled “Association Clause”, which appeared in the Memorandum of Association read together with sub paragraphs 1 to 7 thereof, the following persons were the initial subscribers: third applicant, fourth applicant, the fifth applicant as well as Ms Samantha Hall, Ms Cynthia Louw, Ms Isla Bouwer and Ms Verena Bull. The latter four subscribers were employed as secretarial personnel in Mr Schoeman’s office. It is they who have been referred to in these proceedings as the “Schoeman employees”.

[19] Mr Vivier submitted that, upon incorporation of the first respondent, and without more, the subscriber applicants and the Schoeman employees became

shareholders of first respondent and acquired the shareholding in a company as set out in the association clause in the Memorandum.

[20] In support of this proposition, Mr Vivier referred to Blackman's Commentary on the Companies Act at 5-291 which developes an analysis of s 103 of the 1973 Companies Act, which section provided for 'who are members of a company'. Professor Blackman writes thus:

> 'Although it is generally accepted that, in terms of s 103 (1), the subscribers of a company's memorandum become members of the company on incorporation (ie neither entry in the register not allotment of shares is a condition precedent to their becoming members of the company), s 103 (1) in fact does not say that; it merely says that such subscribers are deemed to have agreed to become members of the company upon its incorporation. And indeed there is very little authority for the proposition that the subscribers of the memorandum become members of the company on its incorporation. Perhaps the better view is that the subscribers of the memorandum do indeed become members on the incorporation, not by virtue of s 103 (1), but by virtue of s 65. Section 103 (1), then, merely accepts that that is the case and insist that the names of the subscribers be placed forthwith on the register. This, admittedly, leaves unexplained why s 103 (1) deems the subscribers to have agreed to become members. Perhaps this provisions was inserted merely to make it clear that, unlike other persons who subsequently become members, the subscribers are members regardless of whether or not they actually agreed to become members.'

[21] In support of this proposition, Blackman cites the case of *Moosa v Lalloo* 1957 (4) SA 207 (D) at 210, particularly where Caney J said:

> 'Even however if they were not so entered (as members) they are "'to be treated as having become members of the company, without the need for any allotment of shares.'

See also *Baytrust Holdings v IRC* [1971] WLR 1333 (ChD) and Gower and Davies' Principles of Modern Company Law (7th ed) at 639.

[22] Mr Le Grange, who appeared together with Mr De Wet on behalf of the respondents, submitted that, at best for the applicants, the third to fifth applicants and the Schoeman employees recorded the agreement to take up shares for a company to be formed; that is an application to take up an allotment of a certain number of shares.

[23] The association clause to which they appended their signatures went no further than a mere recordal of a statement of future intent to the effect that they agreed to take up the number of shares in the capital of the company, as set out opposite our respective names.' There was no evidence to suggest that any of these signatories to the association clause made good on their promises; in particular it was not even contended that the shares to which they subscribed were actually taken up by any of them and, importantly, they were never allotted nor issued to them.

[24] In addition Mr Le Grange submitted that the support derived by applicants from the decision in *Moosa, supra* was at best an *obiter dictum* as was evident from the following passage of that judgment at 210 C – F:

> 'Before proceeding any further, I should make some observations in regard to the one share each for which Mohideen and Noor had subscribed to the Memorandum. It has not appeared in evidence whether they ever paid for those shares, nor whether share certificates were ever issued to them, but, clearly, by reason of the provisions of s 24 (1) of the Act, they are to "be deemed to have agreed to become members of the Company", and upon its registration they should have provisions of s 25 (1) the Company was required to keep. Even, however, if they were not so entered, they are to be treated as having become members of the Company, without the need of any allotment of shares. Nicol's case. 29 Ch.D. 421 at pp 444, 445 (C.A.); *Longs Executrix v Rosemount G.M. Syndicate Ltd*. (in Liq.), 1905 T.S. 563 at pp. 566, 567. The facts in relation to these two shares were, however not fully canvassed.'

[25] Mr Le Grange also referred to s 92 of the 1973 Companies Act to the effect that no company shall allot or issue shares, unless the full issue price of or other consideration for the share has been paid to and received by the company. Any allotment or issue of a share which is contrary to s 92 is void.

[26] On the contested points, the balance of authorities appear to be in favour of applicant. Apart from the authority from Blackman, to which I have already made reference, Henochsberg on the Companies Act 71 of 2008 at para 15 states the following with regard to the relevant provision of the 1973 Act:

> 'The Companies Act, 1973, used to provide that subscribers of a company's memorandum were deemed to have agreed to become and in law become, members of the company upon its incorporation. There is no exact counterpart to his provision in the Companies Act, 2008. Indeed, the latter Act generally eschews the wider term "member" in favour of the narrower but more widely understood term, "shareholder", but of necessity retains the term "member" in relation to non-profit companies that elect to have members, since such companies do not issue shares and such persons cannot properly be called shareholders. Although the Companies Act 2008 defines "securities register" but not "members' register", it implicitly contemplates the creation and maintenance of a members' register by a non-profit company that has members. Under the Companies Act 1973, as soon as the company was incorporated, the subscribers had to be entered as members in its register of members; but neither entry in the register nor allotment of shares was a condition precedent to their becoming members of the company.'

[27] Relying on the old case of *Alexander v Automatic Telephone Company* [1900] 2 (CH) 56, Palmer Company Law Volume 2 at 7.005, contends that every subscriber to the memorandum of association on incorporation of the company becomes a member. No allotment is required, although it is a requirement that, on registration of the company, the name of each subscriber must be entered into the register of members. Thus, no entry on the register was formally necessary in order to constitute membership, although a legislative intervention has now made it clear that entry is such a requirement.

[28] In short, the relevant authorities appear to draw a distinction between an allotment which takes place after the company has effectively been born and the

position with regard to the initial subscribers who become members in terms of the founding memorandum of association. Although Caney J's observation, in *Moosa, supra* at 210 D to which I have made reference, can be construed to be an obiter dictum, the position as set out therein is supported by all the authorities to which I have made reference. See the express examination of this position in English law in the decision in *Baytrust Holdings Ltd* at 90 and 96-97.

The transfer of the shares by the Schoeman employees to the applicants

[29] It is clear that the Schoeman employees transferred their membership of first respondent to the fourth, fifth and third applicants. Mr Le Grange submitted that, in terms of the explanation provided in the founding affidavit, the process that was followed entailed that the Schoeman employees signed simultaneously with the signature of the registration documents, further documents to effect the transfer in due course (as soon as a number of members to the first respondent exceeded the minimum requirement) of all their rights, title and interest of subscribers to the originally intended subscribers. He submitted that these subscribers had no title in or to the shares. At best, they had a right to take up the shares allotted and issued to them provided that they had paid for their shares once the company was incorporated. As the Schoeman employees had never taken up, nor were allotted or issued with any shares in first respondent, a fact supported by the omission to enter their names into the share register of the first respondent, they were in no position to transfer shares to the applicants.

[30] From the applicants founding affidavit, it is clear that the subscriber applicants had instructed Mr Schoeman to attend to the registration of first respondent. On this account the Schoeman employees became subscribers expressly in order to comply with the statutory requirement of the 1973 Companies Act, namely that a public company must have at least seven members at the time of its incorporation. This requirement necessitated four additional subscribers to make up the total of the statutory minimum of seven members.

[31] The Schoeman employees, simultaneously with the signing of the relevant registration documents, signed a further document to effect the transfer of the shareholding in first respondent to the "nominee" subscribers, as soon as the number of members of first respondent exceeded seven.

[32] According to Mr Schoeman's recollection, as well as one of the Schoeman employees Ms Bull, this was the procedure which was often followed in these transactions. To the argument that this transaction was a sham, applicants provide a series of affidavits by Ms Du Plessis and Mr Dwinger, the latter who was head of the legal division employed at the Registrar of Companies. He confirmed that the office of the registrar of companies was aware of this practice followed by practitioners specialising in the registration of companies to use employees in the registration process in order to ensure compliance with the relevant provision in the 1973 Companies Act namely, that a public company must be registered with at least seven subscribers.

[33] Notwithstanding my previous finding, the question again arises, insofar as the disposition of this leg of the case is concerned, as to whether ownership of shares is dependent upon registration thereof in a company's share register. In this connection Blackman at 5-169 notes, in a passage clearly supportative of applicants' position:

> 'In the case of certificated shares, the complex of incorporeal personal rights which constitute a share is transferrable by way of cession. Thus the owner (may also be the registered member) can sell such shares and cede the rights attached to them, passing the property in them independently of and prior to the registration of the purchaser. See also *Oakland Nominees Ltd v Gelria Mining and Investment Company Limited* 1976 (1) SA 441 (A) at 453 A.'

The relevant passage in *Oakland, supra* at 453 A is extremely pertinent, for Holmes JA said:

> 'A nominee is an agent with limited authority: he holds shares in name only. He does this on behalf of his nominator or principal, form who he takes his instructions; see *Sammel and Others v President Brand Gold Mining Co. Ltd.*, 1969 (3) S.A. 629 (A.D.) at p 666. The principal, whose name does not appear on the register, is usually described as the "beneficial owner". This is not, juristically speaking, wholly accurate; but it is a convenient and well-understood label. Ownership of shares does not depend upon registration. On the other hand, the company recognises only its registered shareholders.'

The absence of the use agreement

[34] Mr Le Grange referred to s 16 and 17 of the Share Blocks Control Act 59 of 1980 ('Shareblock Act'). Section 16 provides as follows:

> 'A contract for the acquisition of a share and a use agreement entered into, and any amendment or cession of any such contract or agreement, after the commencement of this Act, shall be reduced to writing and signed by the parties thereto or by their representatives acting on their written authority, failing which the contract, agreement, amendment or cession, as the case may be, shall, subject to the provisions of s 18, be of no force of effect.'

Section 17 (1) provides that a contract for the acquisition of a share shall state the matter as required by Schedule 2 and be accompanied by the documents referred to in this Schedule. This schedule provides for matters to be stated in a contract for the acquisition of the share.

[35] Mr Le Grange then referred to clauses 5.3 and 5.6 of the Articles of Association. Clause 5.3 reads:

> 'The holder of a share block in the company shall not transfer or alienate or in any way dispose of the shares comprising such share block or any rights therein, except insofar as permitted in terms of the relevant use agreement between the company and him, and these articles.'

Clause 5.6 reads:

> 'No transfer of any shares shall be registered in the Share Register of the company, unless and until proof has been produced to the satisfaction of the directors that any existing agreement, including the relevant Use Agreement between the company and the transferor has been duly assigned by the transferor to the transferee, and the transferee has duly assumed all the transferor's rights and obligations to the company thereunder.'

[36] On the strength of these articles and the relevant provision of the Shareblock Act, Mr Le Grange submitted that the transfers of shares from the Schoeman employees to the applicants was in breach of the Shareblock Act and the provisions of the Association agreement set out above and accordingly the transfer had to be regarded as void.

[37] By contrast, Mr Vivier submitted that, upon a proper interpretation of articles 5.3 and 5.6 and having regard to the purpose of a use agreement, these clauses applied to formalities with which there must be compliance and did not constitute conditional restrictions against the alienation of the shares. Further, it did not have the effect that merely because of the subscriber applicants, the share block developer had not concluded a use agreement in respect of the unused share blocks linked to all the shares owned by them, the omission of which would have invalidated any transaction in terms of which they transferred shares to the relevant entity, that is to the trust.

[38] Unquestionably there is a significant problem for first respondent and its future operations if the arguments advanced by Mr Le Grange are correct. It would mean that the title of all the current class A shareholders is materially defective.

[39] Aware of this problem, Mr Le Grange contended that s 163 (2) of the Companies Act 71 of 2008 could be applied to justify an exercise by the court of a discretion in favour of the class A shareholders, because at all relevant times there had been use agreements which regulated the use of their respective share blocks. These shareholders paid the bulk of the levies and they had paid value for their

shares, albeit to the applicants. Accordingly, a failure to exercise the relevant discretion would mean that the class A shareholders would otherwise be victims of a breach of the relevant law, all of which has now given rise to this litigation.

[40] To this question I wish to return presently but only after examining the next aspect which has been raised in this case, namely the transfer of the shares by applicants to the trust.

The transfer of the shares to the trust

[41] Mr Vivier referred to events that took place prior to the special meeting of shareholders which was scheduled to take place on 20 September 2014. The trust's attorney contacted Mr Slabbert, who was described as the person who regularly attended to the administration of first respondent's affairs, with the view to obtaining a copy of first respondent's share register. Mr Slabbert provided him with a document entitled "De Hollandsche Molen Aandele Blokke Maatskappy BPK" in compliance with this request. In terms of this document, the trust reflected was a shareholder of the trust; in particular of the B – F class shares in the amount of 33 620 shares. Significantly, at the end of 2013 and at the beginning of 2014, the board instructed forensic investigators Nolands Forensics to investigate "the financial and administrative integrity" of first respondent together with certain other issues. After completion of its investigation Nolands furnished a report to first respondent on 18 March 2014. Of particular relevance to the present inquiry was the following finding: 'The N J Du Plooy Family Trust holds approximately 80% of the issued share capital of the company excluding the A class shares.' In the same context

on 27 February 2014 a letter was generated by respondent's attorney which confirmed inter alia 'the developer of the share block scheme is the registered owner of all the issued B, C, D, E and F class share'.

[42] On the available evidence, it appears difficult to hold that the shares were not transferred to the trust. All of the B, D, E, F class shares were transferred to the trust in July 2004, pursuant to a further agreement that had been entered into between the members of the Du Plooy family in terms of which all the shares held by the subscriber applicants and first respondent were transferred to and consolidated in the trust. The justification for this was to secure the financing that was required for the construction of 15 holiday chalets on the property. Pursuant to these agreements, share certificates in respect of these shares were issued to the trust. It is therefore difficult to conclude otherwise than that the trust is the holder of the share certificates in respect of all the class B – F shares of first respondent.

The argument regarding fractions

[43] This conclusion is subject to one final argument which was raised, namely that the C – F shares could never have been issued or allocated to the applicants and the Schoeman employees as they would then have received fractions of share blocks. According to Mr Le Grange, the number of shares comprising a single block varied and was determined by the articles as follows:

'Class A: 20 shares

Class B: 30 shares

Class C: 10 000 shares

Class D: 2 000 shares

Class E: 2 080 shares

Class F: 10 000 shares'

[44] Mr Le Grange contended that this decision meant that it would be impossible for any single shareholder legitimately to obtain or earn a fraction of a share block or anything less than a defined share block. For example, 10 class A shares or 25 class B shares. It would be impossible for any person or entity to own less than 10 000 class C shares, less than 2 000 class C share, less than 2 000 class D shares, less than 2 080 class E shares or less than 10 000 class F shares. The articles, particularly article 5.1, required that the rights and obligations in terms of the use agreement and occupancy rights connected to the share block had to be transferred simultaneously with the shares.

[45] This argument compels a return to an analysis of the initial subscription for shares. In the association clause, signatories to the memorandum of association were allocated an uneven number of shares. Take first applicant: he received 997 ordinary A class shares, 77 B class shares, 1 429 C class shares, 857 D class shares, 297 E class shares and 1 429 F class shares. Similar calculations can be done for the other subscribers.

[46] Significantly clause 4.3 of the articles of association provides thus:

> 'Every member shall be entitled without payment to one (1) certificate for all his shares or to several certificates each for one (1) or more of his share blocks. Every

certificate of shares shall specify the shares in respect of which it is issued. Where shares are registered in the name of two (2) or more persons they shall be treated as one (1) member for the purposes of this article.'

[47] It was envisaged that the shares should be consolidated in one certificate. All of the shares registered in the name of two or more persons were to be treated as one for the purpose of this article. In any event, in terms of the securities transfer form (CM 42), it is clear that the relevant shares had been transferred into the trust which meets the objection raised by the respondents. In summary, if the finding is, as I have set it out, that the trust is the owner of the B – F class shares, then these arguments which had been raised by the respondents cannot gainsay, this legal position.

The application of ss 161 and 163 of the 2008 Companies Act

[48] The class C shares were transferred to the trust in April 1998 pursuant to an agreement that had been entered into between the members of the Du Plooy family as subscribers and founder members of first respondent on 12 April 1998, in terms of which the C class shares linked to the original mill building on the property were transferred to the third applicant. Third applicant and his wife would reside in this building, which they had renovated and converted into a family residence at their own expense since 1988. The class B, D, E, F shares had been transferred to the trust in July 2004, pursuant to a further agreement that had been entered into between members of the Du Plooy family in terms of which all the shares held by the subscriber applicants in the first respondent were transferred to and

consolidated in the trust for purposes of the financing which was required for the construction of 15 holiday chalets on the property. There can be no doubt that the share certificates in respect of all of these shares had been issued to the trust.

[49] This background allows for an examination of the further argument that this Court should apply ss 161 and 163 of the 2008 Companies Act. Section 161 of the 2008 Companies Act provides, inter alia, as follows:

> (1) A holder of issued securities of a company may apply to a court for –
>
> (a) an order determining any rights of that securities holder in terms of this Act, the company's Memorandum of Incorporation, any rules of the company, or any applicable debt instrument, or
>
> (b) any appropriate order necessary to-
>
> (i) protect any right contemplated in paragraph (a); or
>
> (ii) rectify any harm done to the securities holder by –
>
> (aa) the company as a consequence of an act or omission that contravened this Act or the company's Memorandum of Incorporation, rules or applicable debt instrument, or violated any right contemplated in paragraph (a), or
>
> (bb) any of its directors to the extent that they are or may be held liable in terms of section 7.7.

[50] The aim of this provision is to provide a shareholder with the means to protect his or her rights. The manner in which this section is couched is that it

affords protection to a shareholder to obtain a declaratory order to determine his or her rights, whether in terms of the Act, "company's MOI, any rules of the company or any applicable debt instrument. Although I have been unable to find a decision dealing directly with s 161, there is the decision in *Barnard v Carl Greaves Brokers Ltd and 2 other cases* 2008 (3) SA 663 (C) which canvasses the implications of the predecessor provisions, s 252 of the 1973 Act. Insofar as this section is relevant it provided thus:

> '(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 for 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.'

[51] Binns-Ward AJ (as he then was) applied this section to provide relief for an owner of shares who had not obtained registration of his membership in the company because of opposition or lack of cooperation by a company. Accordingly the learned judge granted an order directing the enrolment on the register of members in terms of s 252 of the 1973 Companies Act.

[52] It appears to me to be equally appropriate in this case to bring clarity and certainty to the legal position, namely that the trust is the owner of all class B – F shares in first respondent. To order otherwise, as respondents would have it, would be to create chaos, where at present there is only ambiguity which arguably can be cured. Take for example the submission of Mr Le Grange that it was possible to have issued 14 of the 18 class B shares to the initial shareholders,

being two share blocks each. The remaining share blocks could only be issued in fractions. As a result, these shares would revert back to the first respondent to be reflected as authorised but unissued shared capital. Further, given that there were no use agreements for the class B shares, these shares could not have been transferred to the applicant's by the Schoeman employees. The question would then arise as to whether the Schoeman employees were still the shareholders of these shares or would the first respondent be possessed of the authorised but unissued shared capital. Even on respondent's argument, six class A share blocks would immediately revert back to first respondent as authorised unissued share capital.

[53] Mr Le Grange was forced to concede further that, if his argument was correct, namely that there was no evidence that the initial shareholders ever paid for the shares and that there was a disconnect between the individual share blocks and the registered lay out plan (the fractional argument) this would be fatal to the existence of any rights of these shareholders. He thus contended that 163 of the 2008 Companies Act should be employed in favour of the class A shareholders, notwithstanding that no counter application had been brought in the present case by the individual shareholders as opposed to the first respondent which, as I shall show, does not have *locus standi* itself, to gain relief in terms of s163 (1) of the Act.

Section 163

[54] Both parties invoked s 163 of the 2008 Companies Act for relief.

Section 163 (1) of the 2008 Companies Act provides:

a) Any act or omission of a company or related person that has had a result that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of the applicant.

b) The business of a company or related person being or has been carried on or conduct in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of the applicant or (the powers of a director or prescribed officer of a company or a person related to a company are being or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of the applicant.

[55] The section clearly provides that a shareholder or director of a company may make an application in terms of s 163 (1) for relief from any act in omission which has the result that is oppressive or unfairly prejudicial to the applicant as defined. Respondents contend that this Court should exercise a discretion in terms of s 163 (2) (d), (e) and (k) in favour of the class A shareholders for the following reasons:

1. At all relevant times there had been use agreements which regulated use of their respective share blocks;
2. These shareholders paid the bulk of the levies;
3. They actually paid value for their shares, albeit to the applicants;
4. They did not cause the problems, they were victims of it.

However there is simply no legally competent application brought by respondents which is before this Court in terms of s 163 (1).

[56] A competent application would require it to be brought by an applicant as specified in the section and would provide for a precise formulation of the relief sought. *Louw v Nel* 2011 (2) SA 172 (SCA) at para 32. None of this has been done by respondents.

[57] By contrast, in terms of s 163 (2) (k), first applicant is entitled, as it sought in its papers, for an order directing first respondent to reflect first respondent as the shareholder of the class B – F shares. First respondent has for all practical purposes always acknowledged the trust as the holder of all the class B – F shares. Having discovering the absence of the name of the trust on its share register, and declaring that it was prepared to cooperate with the trust to rectify the matter (which it merely viewed as a "technicality"), applicants contend that if they are entitled to s 163 relief. In applicants' view the about-turn by first respondent in February 2015 by taking position that the trust is not a shareholder, and by proceeding with the steps to increase the class A shares and to dilute the trust's voting rights, has a result that is unreasonably prejudicial to, alternatively unreasonably disregards, the interest of the trust.

Conclusion

[58] In summary, the applicant has made out a case in terms of s 161. It is common cause that Mr Slabbert, originally from Boland Rekendienste and thereafter as owner of the accounting firm Boland Finansiëlle Dienste, has since 1993 provided all the secretarial and administrative services required by first respondent, including the issues of share certificates and the updating of the first respondents share register. The papers show that Mr Slabbert acted as the

secretary of first respondent even though it does not appear that he was appointed to this position. The share certificates, to which I have made reference, were issued on behalf of first respondent by its "transfer secretaries" at first respondents "transfer office" being Boland Financial Services (BFS) 15 Ottowa Street Paarl. There can be no doubt, on these papers, that the share certificates held by the trust were issued by first respondent duly represented by Mr Slabbert and or BFS at the latest by 29 July 2004. A document entitled "Ooreenkoms" signed by all board members recorded 'dat Nico Du Plooy Trust die regmatige eienaar is van die eindom ter sprake onderneem om die voorwaardes na te kom per huur kontrakte soos gewys.' Attached to the founding papers was a document entitled 'De Hollandsche Molen Aandeleblok Maatskappy BPK' to the trust attorney by Mr Slabbert which reflects the shareholders in first respondent, including the trust as a shareholder of the B – F shares.

[59] Without having to canvass the various arguments with regard to estoppel, manifestly the court should exercise a discretion in terms of s 161 of the Act to clarify the position and thereby ensure that the securities register reflects the trust as the holder of the class B – F shares. There is nothing to gainsay third applicants claim in his replying affidavit :

> 'Be that as it may, it is evident that on the Company's version it does not have a share register, and I leave it to the Company to address the consequences of such conclusion as the hearing of this matter.'

[60] Had the respondents brought a counter application in terms of s 163 it would have been possible to arrive at a decision to order that a use agreement be entered

into in order to regulate the use of the class B – F share blocks. However, to date the parties, as in the *Barnard* case, have been unable to cooperate sensibly in the best interests of first respondent. In particular, it cannot be in the interests of first respondent nor, I might add in the interests of the applicants, to continue with this impasse, in circumstances where no use agreement to regulate the use of a class B – F share block. The Noland report, to the extent that it is material, indicates the urgent need to bring certainty to the present position and break the existing impasse.

[61] Given that s 161 was invoked by applicant, I propose to utilise the scope of this section in order to bring some harmony to first respondent and attempt by way of crafting the appropriate order to ensure an end to this litigation which cannot on any basis, enure to anyone's advantage whether applicants or respondents.

The order

[62] It is declared that the N J Du Plooy Trust is the registered owner of the following shares in the first respondent namely:

1.1 540 B – class shares

1.2 10 000 C – class shares

1.3 6000 D – class shares

1.4 280 E – class shares; and

1.5 10 000 F – class shares.

2. The N J Du Plooy Trust as holder of the class B – F shares shall enter into a use agreement with the first respondent in respect of each of the share blocks established in respect of the class B – F shares.

3. In the event that an agreement is not reached between the NJ Du Plooy Trust and first respondent in respect of the use agreements as set out in paragraph 2 above, the parties shall appoint an arbitrator whose decision in respect of the use agreement shall be final. In the event that the parties are unable to agree upon the identity of an arbitrator, the decision to appoint an arbitrator shall be made by the chairperson of the Cape Bar Council whose decision shall be final.

4. First respondent is ordered to pay the cost of the application.

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DAVIS J