THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 13902/2015

In the matter between:

INHOUSE VENUE TECHNICAL MANAGEMENT (PTY) LTD	**1st Applicant**
GEARHOUSE SOUTH AFRICA (PTY) LTD	**2nd Applicant**
SANDRAGASEN GOVENDER	**3rd Applicant**
OFER LAPID	**4th Applicant**
NASSER ABBAS	**5th Applicant**

And

ASHRIF OMAR	**1st Respondent**
STUART HENDLER	**2nd Respondent**

In re:

ASHRIF OMAR	**Applicant**

And

INHOUSE VENUE TECHNICAL MANAGEMENT (PTY) LTD	**1st Respondent**
GEARHOUSE SOUTH AFRICA (PTY) LTD	**2nd Respondent**
SANDRAGASEN GOVENDER	**3rd Respondent**
OFER LAPID	**4th Respondent**
NASSER ABBAS	**5th Respondent**

Coram: **KOEN AJ**
Heard: **22 February 2016**
Delivered: **26 February 2016**

JUDGMENT

KOEN AJ

[1] This case concerns the meaning of an order made, on 6 February 2015, by this court in case number 14227/2014. The judgment and order in issue have subsequently been reported as *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC). I propose, for convenience, to refer to that case as the main case, and to refer to the parties in this judgment as they were referred to in the main case.

[2] Mr Omar was the applicant in the main case. He is a minority shareholder in, and director of, Inhouse Venue Technical Management (Pty) Ltd ("Inhouse"). He alleged that he was the victim of oppressive and prejudicial conduct perpetrated by his fellow directors and shareholders. The dispute between him and the others had resulted in an offer to purchase his minority shareholding in Inhouse for R 2 million. Omar considered the offer to be unfair. He then instituted proceedings in which he sought, in terms of section 163 of the Companies Act, 71 of 2008 ("the Act"), an order directing that he be fairly compensated by the applicants for his minority shareholding in Inhouse.

[3] Precisely how it happened is not entirely clear from the judgment but Omar's claim was expanded upon and what the court was concerned with when the matter came to be heard was not only a claim by Omar to an order in terms of which the second and third applicants were to acquire Omar's shares in Inhouse *"for the fair market value thereof as at 27 June 2014"*, consequent upon the application of section 163 of the Act, but also a declaratory order that the fourth and fifth applicants had acted in contravention of the provisions of section 75 of the Act. Section 75 of the Act has to do with the disclosure by directors of their personal financial interests in the affairs of a company.

[4] Omar was successful on both counts. The order made by the court in the main application read as follows:

> *"1. The Second and Third Respondents (pro rata to their current shareholding in the First Respondent) are to acquire Applicant's forty five percent (45%) of the issued share capital in the First Respondent for the fair market value thereof as at 27 June 2014.*

2. A chartered accountant shall be appointed by agreement between the parties (or failing such agreement by the chairperson for the time being of the South African Institute of Chartered Accountants), to determine the fair market value of the Applicants shareholding in the First Respondent as a 27 June 2014 in accordance with the procedure contemplated in clause 18 of annexure "AO1" to the founding affidavit herein.

3. The Fourth and Fifth Respondents are declared to have acted in contravention of section 75 of the Companies Act, 71 of 2008 ("the Act") in failing to disclose their personal financial interests in transactions undertaken by the First Respondent.

4. The aforesaid chartered accountant is directed, in the determination of the fair market value, to take into account the contraventions of section 75 of the Act in respect of purchases from related parties, rental paid to related parties and management fees paid by the First Respondent for the financial years ending 30 June 2011 to date.

5. To the extent that clause 18.5 of Annexure AO1 permits the Applicant to make representations to the chartered accountant, the First Respondent is directed to furnish and make available to the Applicant, all documentation reasonably required by him.

6. The Respondents, save for the Third Respondent, shall pay the costs of this application jointly and severally, the one paying the other to be absolved."

[5] I mention for the sake of completeness that the costs order was subsequently amended to provide for the payment of the costs of two counsel where two were employed.

[6] Paragraph 4 of the order refers to three categories of expenses incurred by Inhouse. These are rental payable by Inhouse, purchases from fellow subsidiary companies, and the payment of so-called management fees. The judgment explains that the decisions to incur these expenses were not properly taken at board level and that *"had the decisions been taken in accordance with proper corporate governance while having regard to the prescripts of section 75 and 76, the profitability of the company may have been enhanced."*

[7] A dispute has arisen between the parties as to how the chartered accountant appointed in terms of paragraph 2 of the order is to treat these three expense items in valuing Omar's shareholding in Inhouse. This dispute has given rise to the present application in which the respondents in the main application seek a declaration that in determining the fair market value of Omar's shares, and taking into account the contraventions of section 75 of the Act, the chartered accountant is to attribute market related values for each of the three categories of expense items. Omar, in turn, counterclaims for an order declaring, *inter alia*, that the chartered accountant must assume a zero cost in respect of the three categories of expense items. Omar bases his counterclaim upon the fact that the court made a declaration that section 75 of the Act had been contravened, and that in respect of the three categories of expense items referred to above, this meant that the transactions in terms of which those expenses were incurred were legally invalid, and the expenses had thus to be left entirely out of account. This is, essentially, where the battle lines are drawn.

[8] The legal principles governing the construction of court orders have been considered in a number of cases. In *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 Kotzé JA said *"The Court can … declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced."*

[9] In *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) it was made clear that the rules governing the construction of documents generally apply equally to court orders. In *Firestone* the principle was articulated as follows: *"Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and*

unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it" (at 304). *Firestone* was approved of subsequently in *Administrator, Cape and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) where the following was said *"It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment"* (at 716).

[10] In interpreting a document the starting point, of course, is an examination of the words used in the document. But, as was observed in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) *"... the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being"* (at paras [24] to [25]). *Bothma-Batho* referred with approval to *Society of Lloyd's v Robinson* [1999] 1 All ER (Comm) 545 at 551 where the principle was described as follows: *"Loyalty to the text of a commercial contract, instrument or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which the reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language."* Whilst *Society of Lloyd's* was concerned with the interpretation of a commercial document and not a court order I see no reason why the same principles would not apply to a court order governing a commercial transaction. One does not apply different rules to different kinds of documents in order to interpret them.

[11] The most recent judgment on the question is *Novartis SA v Maphil Trading* 2016 (1) SA 518 (SCA). *Novartis*, referring to *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA), and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), reaffirms that context is everything.

[12] Finally, in interpreting the order I am bound to accept it and, the judgment which explains it, at face value. I am not at liberty to enquire into whether or not the issues before the court were correctly formulated or the facts before it correctly recorded. With these principles in mind it is necessary to turn to the present case.

[13] What, then, is the context in which the judgment and order were handed down? In the main application the court was concerned, firstly, with the consideration of a claim under section 163 of the Act. In paragraph [50] of the judgment it had this to say: *"As the preamble to sec 163 (2) suggests, the court has a wide power to make both interim and final orders which it considers fit in the circumstances. The orders set out in sec 163(2) (a) to (l) are but some of the suggested options available to a court. In the ultimate draft order put up by* [Omar], *the court is asked to direct* [the second and third respondents in the main application] *to acquire Omar's shares for their fair market value as at 27 June 2014 which coincides with the time of Omar's suspension."*

[14] The court then observed that *"To calculate that value the court is asked to sanction the appointment of a chartered accountant to fulfil the function contemplated in clause 18 of the shareholders agreement"*. Having said this the court observed "*Omar asks that when the calculation is made, the accountant should make an appropriate adjustment in his favour due to the fact that* [certain of the respondents in the main application] *have allegedly acted in contravention of sec 75 of the Act. I shall deal more fully with sec 75 below, but pause to mention that the rationale behind this claim is that their repeated contraventions of that section have had a deleterious effect on Inhouse's profitability, and hence the value of its shares."*

[15] In its judgment the court then dealt with advice which Omar had received to the effect that the expense items would have to be reversed as a consequence of the invalidity of the transactions pursuant to which they were incurred. The court quoted from Omar's founding affidavit in the main application in which he said *"Nevertheless, my complaints will be satisfactorily addressed were the court to order the deemed reversal of the transactions so that all amounts paid by* [Inhouse] *pursuant to these transactions would again reflect as monies to the credit of* [Inhouse]. *These amounts which have been deemed to be reversed would then be taken into account in the determination of the value of my shareholding in order that my shareholding is given its true value."* It will not go unnoticed that Omar's initial suggestion that the costs be adjusted, developed into a suggestion that they be left entirely out of account.

[16] Having observed that Omar had not originally sought any relief pertaining to contraventions of section 75 of the Act and that his approach had been to call for a debatement of account and an adjustment to be made in respect of *"irregular and unilaterally imposed business expenses for the aforesaid period in respect of, but not limited to, lease payments, group charges and transactions with related persons"* the court went on to consider section 75 of the Act. It ultimately found that Mr Omar had made a case for a declaration of invalidity in regard to *"transactions involving"* the three controversial categories of expense items.

[17] The court, then, went on to say the following: *"The extent to which such a declarator finds application is another question altogether. While the decisions* [of certain respondents in the main case] *to ratchet up the so-called 'Group charges' and rentals were not properly taken at board level, it does not follow that Inhouse is totally exempt from any disbursements in that regard. To be sure, the company would, of necessity, have incurred reasonable expenditure on that score. It is conceivable, however, that had the decisions been taken in accordance with*

proper corporate governance while having regard to the prescripts of sections 75 and 76, the profitability of the company may have been enhanced."

[18] Immediately thereafter the court said: *"Improved profitability does not, in my view, however necessarily mean an enhanced share price: this would depend on the method adopted by the person valuing the shares. And, establishing what reasonable or market related expenses would have been, is manifestly not an exercise which this court could or would want to undertake."*

[19] And finally, in explanation of the order it was about to make, the Court said: *"In an attempt to overcome this hurdle* [Omar's counsel] *proposed a mechanism cast in the broadest of terms so as to enable the person charged with determining the value of Omar's shareholding to have regard to the consequences of the alleged breaches of section 75."* The Court observed, further, as follows: *"Whether this is a workable option at the end of the day remains to be seen, but I am not persuaded that it is entirely impracticable… the parties will have to utilise their best endeavours to give effect to it".*

[20] I have attempted to extract the relevant passages from the judgment in the main application to give context to the dispute and the judgment and order which resolved it. In the light of these is it possible to resolve the dispute between the parties as to the meaning of the order?

[21] The starting point is the language used in the order. What the court ordered was that the chartered accountant must *"in the determination of the fair market value, take into account the contraventions of section 75"* of the Act. The court found that the contraventions meant that the transactions underlying the incurring of the expenses in question were invalid. But does this mean that the court meant that the accountant leave those expenses entirely out of account? Or

does it simply give the accountant a basis to reassess the expenses incurred by Inhouse and, if he finds them to be unreasonable, substitute the actual expenses with reasonable and market related expenses so as to arrive at a fair market value for Omar's shares?

[22] What is clear in the judgment is that the court said, after making the declaratory order in relation to the section 75 contraventions, that *"it does not follow that Inhouse is totally exempt from any disbursements in that regard. To be sure, the company would, of necessity, have incurred reasonable expenditure on that score"*. Moreover, it is also clear from the judgment that the court envisaged a mechanism involving the parties' participation in the valuation exercise to be undertaken by the chartered accountant. They would be nothing to discuss if the effect of the declaration of invalidity in regard to the section 75 transactions meant simply that the expense items in question were to be entirely excluded.

[23] Moreover, it must be remembered that the court was cognisant of the advice that Omar had received to the effect that the expenses had to be left out of account. It went on, however, to hold that Inhouse was not exempt from paying anything. In my view, it cannot be implied that the court intended that, as a necessary consequence of the order, those expenses be reversed in their entirety. If any implications are to be drawn it can only be that the court did not consider that Omar was right, when he suggested that the expenses be reversed. As I see it the relevance of the declaration of invalidity was that it provided a basis for the costs to be adjusted to market related values, so that a true and fair value of the shares could be calculated.

[24] One must also bear in mind that the court was concerned with the granting of relief from oppressive or unfairly prejudicial conduct under section 163 of the Act. The section affords a remedy to a shareholder or director who is found to have been oppressed or to the victim of unfairly prejudicial conduct. To be oppressed is by definition unfair (see *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) at para [55]). The same cannot

be said of other conduct which might result in prejudice. For such conduct to form the basis of a claim under section 163 it must be found to be unfair. Unfairness is the golden thread which runs through the section. And, to use the words of Lord Hoffmann in *Re: a Company (no. 006834 of 1988), Ex parte Krema* [1989] BCLC 365 (Ch D) *"... fairness requires that the minority shareholder should not have to maintain his investment in a company managed by the majority with whom he has fallen out. But the unfairness disappears if the minority shareholder is offered a fair price for his shares." Bayly v Knowles* 2010 (4) SA 548 (SCA) referred with approval to Lord Hoffman's statement.

[25] It was argued on behalf of Omar that fairness required that the respondents be visited with a consequence in view of the contraventions of section 75 which were found to have taken place. That consequence, so the argument went, was that the expenses would be left entirely out of account in calculating the value of the shares. Thus the profitability of Inhouse would be enhanced with the result that it was more likely that its shares would be accorded a higher value. I do not think that there is merit in this argument. There is nothing in section 163, or in any case to which I was referred, which indicates that it is permissible for a court, when exercising the wide equitable jurisdiction conferred upon it by the provisions of section 163, to impose a penalty or sanction upon a party found to be guilty of oppressive or unfairly prejudicial conduct. The purpose of section 163 is to provide redress when unfairness between directors or shareholders is found to exist. Furthermore, had the court intended to punish the wrongdoers by directing that the expense items referred to be excluded from account in calculating the value of the shares then it would of necessity have had to find that the expenses had been unfairly inflated. It expressly refrained from making such a finding. The unfairness which forms the basis of the exercise by it of its powers under section 163 was located in the fact that the relevant expenses were not approved of or discussed at board level, not in the fact that the expenses had been artificially manipulated so as to impoverish Inhouse.

[26] In my view, when consideration is given to the order and judgment which explains it, the primary consideration in granting Omar the relief he claimed was to ensure that he obtained a fair market related value for his shares. The value of Inhouse would be contrived if expenses incurred in purchasing goods and services were left out of account in the calculation, but the advantage it had obtained by receiving those goods and services remained in account. That would not be fair or commercially sensible, and cannot be what the court intended.

[27] I think that it is clear from the order read with the judgment of the court that it intended that the chartered accountant, in calculating the value for Omar's shares, was to attribute a market related value to the expense items in question. He would obviously substitute the expenses in question only if he were satisfied that they were not market related. And to assist him in coming to this decision the parties were entitled to participate in the process in the manner contemplated in their shareholders agreement which was incorporated by reference in the order. In my view, on this interpretation, it cannot be argued that the order does not provide for a sensible, practical and fair resolution to the dispute which forms the subject matter of the main application.

[28] In the circumstances I am satisfied that the respondents are entitled to an order that upon a proper interpretation of the order of his Lordship Mr Justice Gamble, as read with the judgment of the learned judge, the chartered accountant, being the second respondent in this application, in determining the fair market value of Omar's shares and taking into account the contraventions of section 75 of the Act is to attribute, where necessary, market related values for all related party transactions. Conversely, I am satisfied that the counter application must be dismissed.

[29] As to costs I see no reason why they should not follow the result. I also see no reason why the cost of two counsel should not be allowed.

[30] As regards the order sought I have taken the liberty of rephrasing what was sought in the notice of motion slightly so as to make it quite clear what I have found the order in the main case to mean. I do not think that in so doing I have changed the meaning of what was sought in the notice of motion.

[31] In the order I intend to make, for clarity, I shall revert to referring the parties in the manner in which they are referred in this application. I therefore make the following order:

A. Upon a proper interpretation of the Order of his Lordship Mr Justice Gamble made in case number 14227/2014 on 6 February 2015, as read with the judgment of the Learned Judge in that matter, it is declared that the chartered accountant appointed in terms of paragraph 2 of the order must, in his determination of the fair market value of the first respondent's shares in the first applicant as at 27 June 2014 take into account the contraventions of section 75 of the Act in respect of purchases from related parties, rental paid to related parties and management fees paid by the respondent for the financial years ending 30 June 2011 to date and attribute, where necessary, market related values for all the aforesaid related party transactions.

B. The first respondent's counter application is dismissed.

C. The first respondent shall pay the costs of this application and of the counter application. Such costs include the costs of two counsel where two have been employed.

KOEN AJ

APPEARANCES
For the Applicant: Mr A Subel SC

Mr J Meiring
Instructed by:
Smith Tabata Buchanan Boyes

For the Respondents:

Mr M Fitzgerald SC
Instructed by:
Cliffe Dekkker Hofmeyr