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

Reportable

CASE NO: 4501/2014

In the matter between:

CHARLES BRENT GEFFEN	First Applicant
DECADENT DINING CC	Second Applicant
THE TRUSTEES FOR THE TIME-BEING OF THE DECADENT DINING TRUST	Third Applicant
THE TRUSTEES FOR THE TIME-BEING OF THE RAE TRUST	Fourth Applicant

and

VICTORIANO DOMINQUEZ-MARTIN	First Respondent
THE ESTATE OF THE LATE MALCOLM JOHN GRIFFIN	Second Respondent
THE TRUSTEES FOR THE TIME-BEING OF THE SOUTHERN SEAS TRUST	Third Respondent
10 MELLVILLE PLACE CC	Fourth Respondent
THE TRUSTEES FOR THE TIME BEING OF THE WITKRUISAREND TRUST	Fifth Respondent
MADAME ZINGARA HOLDINGS (PTY) LTD	Sixth Respondent
MIDNIGHT FEAST PROPERTIES 100 (PTY) LTD	Seventh Respondent
MIDNIGHT FEAST PROPERTIES 97 (PTY) LTD	Eight respondent
CAVEAU DES MARCAIRES SOUTH AFRICA (PTY) LTD	Ninth Respondent
BEADICA INVESTMENTS 12 (PTY) LTD	Tenth Respondent
ALTIUS TRADING 444 (PTY) LTD	Eleventh Respondent
MZ ENTERTAINMENT (SA) (PTY) LTD	Twelfth Respondent
BARLEDA 745 CC	Thirteenth Respondent
BRAVOPIX 585 CC	Fourteenth Respondent

BEADICA INVESTMENTS 5 (PTY) LTD Fifteenth Respondent
NATHAN JACK SAREMBOCK Sixteenth Respondent

JUDGMENT: 17 October 2017

DAVIS J

Introduction

[1] This is an application in which third applicant seeks relief in terms of s 49 of the Close Corporation Act 69 of 1984 ('CC Act') while second and fourth applicants be granted relief in terms of s 163 of the Companies Act 71 of 2008 ('Companies Act').

[2] Both of these provisions afford protection to minority shareholders against unfairly prejudicial conduct on the part of majority shareholders. The present dispute turns on whether applicants have made out a case for the relief contemplated in these two sections.

The factual matrix

[3] It appears that much of the background to the present dispute is common cause. It involves a veritable 'whose who' of Cape Town eateries. Richard Griffin ('Richard') the son of the late second respondent was a prominent and creative participant in the restaurant and entertainment industry. At some point, Richard's enterprise, by which a particular dining experience would take place in a circus tent, hit the financial wall and the entity in terms of which he was trading, Madame

Zingara CC, was liquidated. It appears that first respondent, who was involved in this venture, suffered a considerable financial loss.

[4] First applicant is a practising dentist. In 2001 he bought a restaurant known as Amigos. It proved to be a financial disaster and seven years later it was closed. First applicant was left with a long term lease for the premises.

[5] When Richard returned from a further financial disaster in London, he began a restaurant which was located on these premises. It was called the Bombay Bicycle Club. Second applicant was employed as the holding entity of the Bombay Bicycle Club, with first applicant as its sole member. At a later stage, first applicant and Richard started the Side Walk Café, with second applicant again being the holding entity thereof.

[6] At some point thereafter, it was decided that Richard should develop a plan to restart the dining experience in the tent. At the same time, second respondent and Richard considered that first respondent should be given an opportunity to recuperate the losses that he had suffered in the earlier venture. Sixth respondent was incorporated and acted as the holding company for the various restaurants and ventures to be established in the future. The trademark 'Madame Zingara' was also transferred to sixth respondent. In the initial stages, the Southern Seas Trust, set up by first respondent, became a 50% shareholder in sixth respondent, while the balance of shares was held by Melville Place CC in which the initial members were second respondent, Richard, Margaret Jean Griffin and Wendy Gayle Kruger. In 2011 they were replaced by the Witkruisarend Trust which nominated the late second respondent as its representative trustee.

[7] On 3 June 2010 the Southern Seas Trust represented by Victor, Melville Place represented by second respondent and sixth respondent also represented by second respondent entered into a shareholders agreement to regulate the relationship between the shareholders in sixth respondent.

[8] Twelfth respondent was then incorporated to act as the operating company for the restaurant and circus entertainment business. The initial shareholders were sixth respondent and second applicant, the shareholding being spilt as to 80% held by sixth respondent and the balance held by second applicant. These parties also entered into a shareholders agreement to regulate their relationship in sixth respondent.

[9] Thereafter sixth respondent obtained an 80% interest in the Sidewalk Café by acquiring 80% of the shares in eighth respondent with the remaining 20% being held by second applicant. A further agreement was entered into between sixth respondent, second applicant and eighth respondent with Richard being the sole director of the eighth respondent.

[10] At the same time, sixth respondent obtained an 80% interest in Bombay Bicycle Club by acquiring 80% of the shares in seventh respondent with second applicant holding the balance of the shares.

[11] According to first applicant, Melville Place and the Southern Seas Trust each sold 10% of their shares in sixth respondent to second applicant for a total amount of R 1 750 000.00, at which stage second applicant held 20% in sixth respondent.

[12] At this point, the shareholding in sixth respondent was as follows: Southern Seas Trust 40%; Melville Place 40% and second applicant 20%. At some time thereafter, sixth respondent also acquired Café Paradiso and Café Mozart.

[13] Suffice to say that history repeated itself. Enthusiasm for the business increased and it was decided that the restaurant experience conducted by twelfth respondent should expand. Costs spiralled out of control and inevitably this led to the demise of the business. According to first applicant, he decided to approach sixteenth respondent, a chartered accountant to assist in the clearing up of what he termed "the financial chaos". Pursuant to these investigations, it was clear that twelfth respondent was insolvent. In January 2016 Richard disappeared, having resigned as a director of all the companies in the so called Madame Zingara group. At this point, first applicant and first respondent decided that sixteenth respondent should replace Richard as a director of the various companies. Subsequent thereto, twelfth respondent was liquidated and the liquidators commenced with an enquiry into its financial affairs. According to the founding affidavit, the liquidators established claims against various entities in the Madame Zingara group in excess of R 7 million.

[14] As expected, given the scale of the financial disaster, first applicant, first respondent and sixteenth respondent could not agree on whom to blame for the broken relationship and the lack of trust between the respective parties.

[15] In January 2017 first respondent's attorneys wrote to first applicants attorneys advising that first respondent was willing to pay first applicant R 2.4 million for his interest in the group, an offer which was not accepted. In April 2017 first respondent's attorneys sent first applicant's attorneys their valuation of the

business and thus of first applicant's interest therein. Subsequent thereto, a discussion took place between the respective attorneys with first respondent's attorney expressing the hope that first applicant, having been supplied with the valuation and the information supporting it, would appreciate that the offer was a fair and reasonable one. By this stage, first applicant had launched the application, which the subject matter of these proceedings.

[16] Although I shall return to the nature of the offer presently, suffice at this stage of the judgment to note that first applicant adopted the view that in his valuation first respondent used a price/earnings multiple to determine the price and then deducted potential liabilities, such as unpaid VAT and claims of twelfth respondent from such price, a calculation mechanism, in the view of first applicant was unjustified. Furthermore, first applicant contended that when the price of a business, as determined by a PE multiple, is less than the net asset value of the business, the latter has to be used to determine the value of the business as opposed to the PE multiple. Furthermore, no value had been placed on the trademark of Madame Zingara.

[17] One further acquisition, which was relevant to the present case, was the purchase of a building at 158 Kloof Street Garden from where Bombay Bicycle Club traded. This transaction was implemented through fifteenth respondent, the shareholding of which consisted of equal shares held by Southern Seas Trust, Melville Place and fourth applicant.

Applicants' complaints of unfairly prejudicial, unjust or inequitable acts

[18] The various allegations which first applicant has made in the founding affidavit can be summarised as follows:

1. Sixteenth respondent would replace Richard as the director of the various companies. This favoured first respondent over first applicant. As first applicant puts it 'it also seems that Nathan is ignoring his fiduciary duties as a director and is acting merely as Victor's puppet'.
2. There is a free flow of information between first respondent and sixteenth respondent. Nonetheless, insofar as first applicant is concerned, there are no audited financial statements, the unsigned financial statements that exist are more than two years old. There is a lack of monthly financial information, no biannual meetings have been held in accordance with the shareholders agreement and no general meetings of the shareholders have been conducted.
3. No financial statements have been provided for sixth respondent which, according to first applicant, is a significant problem, as, in his view, there has been a massive increase in management fees.
4. First applicant contends that he no longer has any viewing rights to the bank accounts of the group of companies or the close corporations.
5. First applicant has been treated as 'a mere silent investor'.
6. First applicant alleges there has been secrecy around 'which Victor had been working on a full time basis since January 2016'.
7. Second respondent refuses to comply with first applicant's pre-emptive rights in terms of a shareholders agreement in relation to sixth respondent and in the manner in which the purchase of second

respondent's shares in sixth respondent took place. According to first applicant, this conduct prevented him from increasing his shareholding above the threshold of 26 % which would have allowed him to appoint a director in sixth respondent,

8. First respondent has refused to acknowledge that first applicant is a party to this shareholder's agreement and hence this conduct was also unfairly prejudicial, unjust or inequitable.
9. Even though first applicant is the sole director of fifteenth respondent, first respondent, without any authority, negotiated and entered into new lease agreements with a tenant of fifteenth respondent (Bombay Bicycle Club and Liquorice and Lime). According to first applicant, the extent of the rent which fifteenth respondent receives influences the value of the building
10. The abrupt cancellation of the use of the loyalty card enjoyed by first applicant was done on the strict instructions of first respondent, without any notice.

[19] The relief sought in the notice of motion, includes the appointment of a chartered accountant who is requested to compile a report which has to be submitted to this court within sixty days of the granting of this order and which would include the financial statements of the sixth to the fifteenth respondent for the financial years 28 February 2011 to 28 February 2017, a determination whether any amounts are due to applicant's by sixth to fifteenth respondent and, if so, the actual amounts, a determination of whether amounts are due to the first and / or third respondent by sixth to the fifteenth respondent, and, if so, the actual amounts, as well as amounts due to the second, fourth and fifth respondents and finally the

determination of the fair and reasonable values of the third applicant's membership interest in the thirteenth and fourteenth respondents, second applicant's shareholding in the sixth respondent and the fourth applicant's shareholding in the fifteenth respondent. First applicant insists that all this relief is justified as a practical and pragmatic suggestion on how conclusively to resolve the issues between the parties.

[20] Given that applicant contends that the conduct complained of has had an oppressive and/or prejudicial result for applicant, within the meaning of s 163 of the Companies Act and s 49 of the CC Act, it is necessary to examine the basis of this legislation before proceeding to deal with the complaints raised by applicant and the answers provided by respondent.

The legal framework

[21] As noted the legal edifice of this case depend on s 163 of the Companies Act and the comparable s 49 of the Close Corporation Act. To the extent relevant, s 163 provides that a shareholder or a director of a company may apply to court for relief if:

> '(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
>
> (b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interest of, the applicant; or
>
> (c) the power of a director or prescribed officer of a company, or a person related to the company, are being or have been exercised in a manner that

is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.'

[22] The court is empowered in terms of s 163 to make any interim or final order including:

'(a) an order restraining the conduct complained of; ...

(e) an order directing an issue or exchange of shares; ...

(i) an order requiring the company ... to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine.'

[23] In *Grancy Property Limited v Manala* 2015 (3) SA 313 (SCA), Petse JA, on behalf of a unanimous court, noted that the substantial body of case law dealing with s 252 of the Companies Act 61 of 1973 which was repealed by the 2008 Companies Act, is, in material respects, equivalent to s 163 of the Companies Act. Thus there is a benefit to be derived from considering the previous jurisprudence as to what constitutes oppressive or unfairly prejudicial conduct. Unfortunately, this judgment did not lay down its own test but it is fair to say that it relied upon and thus confirmed a number of decisions, in which the court had engaged previously with what constitutes oppressive or unfairly prejudicial conduct. What emerges therefrom, is that an applicant for relief under the section cannot simply make a number of vague and generalised allegations but has to establish:

1. The particular act or omission that has been committed, or that the affairs of the company have been conducted in the manner so alleged.

2. Such act or omission or conduct of the company's affairs is unfairly prejudicial, unjust or inequitable to the applicant or some part of the members of the company.

3. The nature of the relief that must be granted to bring to an end the matters of which there is a complaint; and

4. It is just and equitable that the relief be so granted.

See in this connection also *Louw and others v Nel* 2011 (2) SA 172 (SCA) at para 23.

[24] The judgment in *Grancy Property Ltd, supra* also makes it clear that the conduct of the majority shareholders has to be evaluated in the light of a fundamental principle of company law, namely by becoming a shareholder, the latter undertakes to be bound by the decisions of the majority shareholder/s. It therefore follows that not all acts which prejudicially effect a minority shareholder or which disregard his or her interests will entitle a minority group to the relief set out in the section.

[25] Section 163 has also been canvassed with his customary rigour by Rogers J in *Visser Sitrus v Goedehoop Sitrus* 2014 (5) SA 179 (WCC). Rogers J correctly noted, in my view, that, whereas the old Act only employed the concept of 'oppressive' in the heading to s 252, its use in the text of s 163 appears to imply that the conduct which falls within the section must be of 'a more egregious kind than conduct which is unfairly prejudicial to' or that 'unfairly disregards the interest of 'the applicant'. (at para 54) However, as Rogers J also points out, the

consequence of the act or omission must either be oppressive or unfairly prejudicial which, at the very least, connotes a significant element of unfairness.

[26] In *Re Coroin Ltd* [2012] EWHC 2343 (Ch) at para 630 ff (which was affirmed on appeal in [2013] EWCA Civ 781) Richards J provided an extremely useful analysis of both the concept of prejudice and unfairness. He noted:

> 'Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member. So, for example, removal from participation in the management of a company and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice in those cases where the members have rights recognised in equity if not at law, to participate in that way. Similarly, damage to the financial position of a member in relation to a debt due to him from the company can, in the appropriate circumstances, amount to prejudice. The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such without any financial consequence may amount to prejudice falling within the section.
>
> Where the acts complained of have no adverse financial consequence, it may be more difficult to establish relevant prejudice. This may particularly be the case where the acts or omission of the breaches of duty owed to the company rather than the shareholders individually.'

[27] With regard to unfairness, two points were made in this judgment: first that the court was required to ask whether the conduct complained of was in

accordance with the basis upon which the petitioner agreed that the affairs of the company would be conducted and that, in most, cases, this basis is adequately and exhaustively laid down in the articles of association, the material statutory provisions and sometimes in collateral agreements between the shareholder'. (at 633) Of equal importance is the reliance by Richards J on the earlier decision in *O'Neill and another v Phillips and others* [1999] 2 All ER (HL) 961 in which Lord Hoffmann said at 967:

> 'One of the traditional roles of enquiry, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms of which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.
>
> This approach to the concept of unfairness in s 459 runs parallel to that which your Lordships' House, in *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492, [1973] AC 360, adopted in giving content to the concept of 'just and equitable' as a ground for winding up. After referring to cases on the equitable jurisdiction to require partners to exercise their powers in good faith, Lord Wilberforce said ([1972] 2 All ER 492 at 500, [1973] AC 360 at 379):

> "The words ['just and equitable'] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act 1948 and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provisions does not, as the respondents [the company] suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.'

I would apply the same reasoning to the concept of unfairness in s 459. The Law Commission, in its report on *Shareholder Remedies* (Law Com No 246) (1997) para 4.11, p43 expresses some concern that defining the content of the unfairness concept in the way I have suggested might unduly limit its scope and that 'conduct which would appear to be deserving of a remedy may be left unremedied'. In my view, a balance has to be struck between the breadth of the discretion given to the court and the principle of legal certainty. Petitions under s 459 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, 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.'

[28] Returning to South African shores, in his judgment in *Visser Sitrus*, *supra* Rogers J noted that many of these cases had been decided in relation to small quasi partnership companies. Mercifully, this judgment does not require this court to troll into the deeper waters with regard to widely held companies and I do not intend to do so.

[29] To sum up, the use of the words 'oppressive or unfairly prejudicial or unfairly disregard of the interest' of the applicant are key. Not only must the conduct be prejudicial but it must be unfairly so; at the very least unreasonable or unethical. See *Count Gotthard SA Pilati v Witfontein Game Farm* (Pty) Ltd [2013] 2 All SA 190 (GNP) at para 90.5.

[30] Gower Principles of Modern Company Law (10th ed) at provides the following summary:

> 'The test of whether the prejudice was unfair is an objective one, but this means no more than that unfair prejudice may be established even if the controllers did not intend to harm the petitioners. The question is whether the harm which the petitioner has suffered is something he or she is entitled to be protected from. It has been suggested that a fall in the value of the petitioners' shares is a touchstone of unfairness, but this seems to be incorrect. The exclusion of petitioners from the management of the company in breach of their legitimate expectation of involvement would not necessarily have any impact upon the value of the

company's shares, whilst, on the other hand, those shares might fall in value as a result of a managerial misjudgement which was in no way unfair to the petitioners.'

[31] Henochsberg on the Companies Act at 574 (4) gives the following analysis:

'Provided that the courts will adopt the same approach as under s 252, *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA 517 (C) and authorities there referred to indicate a willingness on the part of the Court to intervene where the circumstances show e.g. "that the majority shareholders are using their greater voting power unfairly in order to prejudice" a minority shareholder or "are acting in a manner which does not enable" such a shareholder "to enjoy a fair participation in the affairs of the company" (per Tebbutt AJ (as he then was) in the *Aspek Pipe* case *supra* at 527)' or where the shareholders have entered into an association upon the understanding that each of them will participate in the management of the company, but the majority 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".'

The inquiry is thus about whether, objectively speaking, applicants have suffered prejudice which is sourced in the conduct of the majority shareholders and which is unfair, or at least, unreasonable or unethical. However, in this case there is a further inquiry which must be canvassed before applying the law to the factual matrix. See also *De Sousa and another v Technology Corporate Management (Pty) Ltd and others* 2017 (5) SA 577 (GJ) at paras 34-53.

The offer by first respondent

[32] Apart from the analysis of s 163, and its implication to the present case, the fact that an offer was made by first respondent to purchase first applicant's interests requires further legal analysis.

[33] In *Bayly v Knowles* 2010 (4) SA 548 (SCA) at para 24 the court said the following concerning the implication of such an offer:

> 'In English law the making of a reasonable offer for the shares of an oppressed minority is enough to counter reliance by the complainer on s 459 on the Companies Act (the equivalent of s 252). Pursuant of the complaint in the face of such an offer is evidence of abuse of the process sufficient to strike out such reliance *in limine*. The principle of encouraging affected parties to use the procedures provided in the articles (or in a shareholders agreement) to avoid "the expensive money and spirit" is laudable. In the context of s 252 the failure of a minority shareholder to accept a reasonable offer for his share and leave the company in the hands of the majority is, at least, strong evidence of a willingness to endure treatment which is prima facie inequitable despite the choice of a viable alternative. If that is so it would not ordinarily behove him to continue to complain about oppression. The rule, however, cannot be absolute.'

The court went on to say that it was possible to conceive of cases where the offer, although reasonable, was so tainted by bad faith or ulterior motive so as to justify non acceptance.

[34] The general approach adopted in *Bayly v Knowles, supra* is given eloquent expression in the judgment of Lord Hoffman in *O'Neil supra* at 974-975. In his judgement, after expressing the view that the parties ought to be encouraged, where at all possible, to avoid the expense of money and spirit inevitably involved in litigation by making an offer to purchase at an earlier stage. Lord Hofmann set out guidelines to assist participants to know what counts as a reasonable offer:

1. The offer must be to purchase the shares at a fair value. This would ordinarily be the value which represents an equivalent proportion of the total issued shared capital without a discount for its being a minority holding.

2. The value, if not agreed, should be determined by a competent expert.

3. The offer should ensure the value is determined by the expert, as opposed to the employment of the full machinery of arbitration.

4. The offer should provide equality of arms between the parties; that is both should have the same right of access to information about the company which bears upon the value of the shares and both should have the right to make submissions to the expert.

The implications of this position require careful examination, after a description of respondent's case, particularly that of first, third, sixth to eleventh, thirteenth to sixteenth respondents.

Respondent's case

[35] Based on the law as I have set it out, Mr Goodman, who appeared together with Ms Reynolds on behalf of the first, third, sixth to eleventh, thirteenth to sixteenth respondents, and Mr Randall who appeared on behalf of second, fourth and fifth respondent submitted that there were a number of reasons why the relief should not be granted, apart that is from the offer which had been made. In summary, these grounds were the following:

1. Applicants did not allege that they are a minority "oppressed" by the majority.
2. There was no underlying agreement or understanding between the various shareholders and within the various entities envisaging participation in the management and the conduct of the business by the applicants and, in particular, by first applicant from which participation he had been unfairly excluded.
3. There was no underlying agreement applicable to the applicants, justifying recourse to or disclosure of financial details or documentation beyond that to which a shareholder would ordinarily be entitled.
4. There was no quasi partnership between the parties involving the applicants which would result in a particular application of such relationship to the evaluation of relief to be granted in terms of s 163.
5. These was specifically regarding the alleged prejudice suffered, particularly with regard to the lack of financial information relating to first applicant's alleged inability to evaluate offers made for the first applicant's shareholding and member's interest. According to Mr Goodman, the first applicant possessed the financial statements which were attached to his founding affidavit and did not seriously contest their reliability or veracity.
6. Applicants have offered no reasoned opposition to the offer which were made by first respondent for first applicant's interest prior to the institution of proceedings.
7. There was no justification as to why the relief sought was just and equitable.

Analysis

[36] As Mr Goodman correctly observed, it is trite law that an applicant must make out his or her case in the founding papers. As was stated a long time ago in *Bayat v Hansa* 1955 (3) SA 547 (N) at 553:

> 'An applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it in his affidavits filed with the notice of motion whether he is moving ex parte or on notice to the respondent and is not permitted to supplement in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his answering affidavit) still less to make a new case in his replying affidavits.'

See also *Betlane v Shelly Court* CC 2011 (1) SA 388 (CC) at para 29

[37] The question therefore arises as to what case was made out in the founding papers.

[38] In brief first applicant's case as contained in the founding affidavit can be summarised thus:

1. Payments to first respondent, and, particularly, the question how the quantum thereof was determined and the reason as to why first applicant's consent was never sought as to whether any payment to first respondent, should be made.
2. The lack of financial information provided to applicants. First applicant contends he regularly received management accounts of the respective businesses until July 2016. From August 2016 he avers that the only contact he engaged with the Madame Zingara group was through lawyers and accountants.

3. The lack of audited financial statements, particularly the absence of financial information after 28 February 2015.
4. The purchase of second respondent's stake and, in particular, the non compliance with the relevant shareholders agreement in respect of sixth respondent.
5. A lack of meetings and, in particular, the absence of any shareholders meeting.

6. First applicant notes that two restaurants, namely Bombay Bicycle Club and Liquorice and Lime, rent space from respondent. He claims that the rent paid by Liquorice and Linme, in particular, was below the market value. The lease agreement was coming up for renewal and "I will certainly demand a substantial increase in the rent. However unbeknown to him, first respondent was in the process of negotiating with the tenant. First respondent was not a director of fifteenth respondent and had no mandate to act on behalf thereof. His conduct showed "how the lack of communication between us is hurting the business of Beadica 5".

7. Several years ago second respondent, first respondent, and first applicant were issued with loyalty cards to be used at all the restaurants in the Madame ZIngara group as a perk of being a shareholder. First applicant's use of the loyalty card had been suspended by first respondent.

[39] I should further note, in summary of the essential allegations made in the founding affidavit, that two issues which were argued in great detail before this

court, namely the reasonable nature of the offer made by first respondent to buy out first applicant and an argument that relief sought in terms of s 163 of the Companies Act in respect of fifteenth respondent and sixth respondent, in particular, should be based upon the lifting of the corporate veil. It was also contended that the same principle should apply in respect of the relief sought in terms of s 49 of the CC Act with regard to thirteenth and fourteenth respondents. These issues were never raised in the founding affidavit nor, significantly, in the further affidavit deposed to by first applicant, on 5 June 2017 that is some three and a half months after the founding affidavit was signed on 21 February 2017.

[40] It is probably for this reason that the initial heads of argument prepared on behalf of the applicant's by Mr De Wet suggested that there were three principle questions which this court was required to answer namely:

1. was first applicant through his entity second applicant a party to the shareholders agreement relating to sixth respondent?;

2. was first applicant an active shareholder or merely a silent investor?;

3. was first applicant and/or his entities the victim of unfairly prejudicial, unjust or inequitable acts or omissions and/or are the affairs of the various companies, to which reference has already been made, being conducted in a manner which is unfairly prejudicial, unjust or inequitable to first applicant or to his interest.

In this connection, Mr De Wet submitted that these questions had to be answered in the affirmative because sixteenth respondent, the sole director of these companies, favoured first respondent over first applicant. The free flow of information between

first applicant and first respondent had dried up. First applicant no longer had any viewing rights to the banking accounts of the group or an entitlement to current and relevant financial management or information as he was treated as a silent investor. There was secrecy surrounding the appointment of first respondent at the Madame Zingara group and, further, there had been non-compliance with first applicant's pre-emptive rights in terms of sixth respondent's shareholders agreement (which reverts of course to the first question posed by Mr De Wet). Further there was a unilateral decision relating to the lease agreements of the fifteenth respondent and an abrupt cancellation of the use of the loyalty card.

Evaluation

[41] These questions must be answered on the basis of the founding and answering affidavit. It is trite to note that it is impermissible to make out new grounds for an application of this nature in a replying affidavit (see *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635 – 636. I thus turn to examine the three questions posed by Mr De Wet which then permit an application of the applicable law to applicant's case.

Question 1: The purchase by first respondent's entities of second respondent's entities interest in the group

[42] Clause 15.1 is the relevant shareholders agreement entered into on 02 June 2010. It provides that any shareholder: wishing to sell or transfer all or any of its Shares 'shall be obliged to offer such shares to the other Members'. The question that requires an answer is whether the applicant established that second applicant

was a party to this agreement. On the papers before this court, there is no express evidence that second applicant signed the shareholders agreement or a deed of adherence or accession in relation to this agreement. The first applicant has produced no document to support his case. In the founding affidavit he said the following:

> 'I do not doubt (although I cannot now specifically recall) that Decadent Dining, as represented by myself, signed a document, in terms of which Decadent Dining bound itself to comply with the MZ Holding shareholders agreement (CG14) in accordance with paragraph 11.2 of the said agreement. Victor seems convinced that I signed such a document as is evident from his email dated 11 February 2016.' (my emphasis)

[43] First applicant thus appears to rely exclusively on emails of first respondent. An email of 11 February 2016 directed to first respondents attorney says:

> 'Thank you very much for your advice and I confirm that Charles Geffen did sign a shareholders agreement with Rapitrade (Madame Zingara Holdings Pty Limited) and the Southern Seas trust equal to the signed between the South Seas trust and Rapitrade. On further consideration I have notified Charles Geffen that I would no go ahead with the transaction and he has agreed to it (sic).'

[44] In his answering affidavit, first respondent said the following:

> 'Rather than producing a document or relying on his own memory of having signed such a document, Geffen purports to rely on an email from me to my attorney stating that Geffen signed a shareholders agreement 'equal to the signed [agreement] between The Southern Seas Trust and Rapitrade'.
>
> ...

I wrote that email in February 2016, some five years after Decadent Dining acquired its shares in MZ Holdings (in 2010). I wrote the email prompted by a request from Geffen's attorney to my attorneys for a copy of the shareholders agreement in respect of MZ Holdings signed on behalf of Decadent Dining or any deed of adherence in regard thereto. At the time I assumed, without giving must consideration to the matter, that Geffen had signed an appropriate document.

However, I thereafter searched my record and my attorneys (who had drafted the various shareholders agreements including the MZ Holdings shareholders agreement) also searched their records, so that we could respond properly to Geffen's attorney's request. No shareholders agreement signed by Geffen or deed of adherence, whether in draft or signed form, has been found in any of the records and there are no references to such documents. My attorneys sent Geffen's attorneys what they could find in their records – namely the final draft (i.e. unsigned) shareholders agreement in respect of MZ Holdings.

In the circumstances, I deny that Decadent Dining (or Geffen or any other entity representing Geffen) is party to the shareholders agreement in respect of MZ Holdings. Geffen is therefore not entitled to rely on its provisions.'

[45] It is difficult, on the basis of the rules relating to affidavit evidence, as set out above, to see how it is possible to justify the speculative position advanced by first applicant, who has not produced a single relevant document, nor on oath stated that he signed the document over factual averments made by first respondent and his attorney who searched for the alleged document at first applicant's request but could not find one nor any reference to one.

[46] It is difficult to understand on what basis it could be contended by Mr De Wet that somehow, notwithstanding that there had been no agreement entered into between the first applicant and the balance of the parties with regard to the

shareholders agreement, that, at some later stage, first applicant enjoyed rights without having any concomitant obligations which flowed from this agreement.

[47] To recapitulate: on the basis of the founding affidavit, read with the supplementary founding affidavit, the case made out by the first applicant was to the effect that second applicant was a party to the shareholders agreement and, accordingly, clause 15.1 had to apply to it once second respondent sought to dispose of his shares. Clause 15.1 provides thus:

> 'Subject to the provisions of clauses 11 and 12 above, the remaining provisions of this clause 15 or any other provision of this agreement permitting such sale or transfer, any member ("the selling member"), wishing to sell or transfer all or any of its shares shall be obliged to offer such shares and all or a corresponding portion of its loan account (if any) against the Company ("the equity"), to the other member(s)) ("the remaining member(s)") by giving notice in writing thereof ("the transfer notice") to the company and the remaining member(s) pursuant to the remaining provision of this clause 15.'

Members did not, on the basis of this agreement, include first applicant.

[48] It also appears that applicant seeks to rely on s 37 of the CC Act in relation to the acquisition of the member's interest in Café Manhattan and the Company Gardens both of which entities are close corporations. It appears that the interests in these entities were divided in the same proportions between first respondent, first applicant and second respondent as were their respective shareholdings in sixth respondent.

[49] In this context, the argument appears to be, notwithstanding a finding that clause 15.1 of the relevant shareholder's agreements is inapplicable given that first

and second applicants were not parties thereto, that s 37 covers the problem. It provides that every disposition by a member of the corporation of his or her interest (save for certain exceptions which are not relevant in this case) shall be done

(a) in accordance with the association agreement; or

(b) with the consent of every other member of the corporation.

[50] Unlike clause 15.1, this section does not oblige a seller to make an offer to other members. It is merely a formal requirement in respect of these dispositions. It does not appear to support a complaint that there was a failure to comply therewith by not making an offer to first applicant. As Henochsberg on the Close Corporations Act writes at Com-92:

> 'The section is deficient in that it contains no provision to cater for the situation that, there being no association agreement in existence, a member refuses his consent to a disposition of an interest. It may also be observed that the consent may be withheld for any reason and, indeed, even capriciously. Whether it is commercially desirable that the exercise by a member of his rights in respect of his own property (eg of sale or donation) should be at the mercy of the other members, or some, or even one, of them may be debatable. But unless the withholding of the consent enables him successfully to exercise his other rights under the Act (eg under ss 36, 49 or 66), the member concerned has no remedy.'

[51] It would appear that the complaint in these particular cases did not aim at the acquisition of second respondent's interest in the group. The relief sought by the first applicant was targeted at the consequences of the acquisition of second respondent's shareholding either in the various companies on the close corporation. I should add that s 37 does not appear to support this cause of application.

Question 2

[52] I searched in vain in the founding affidavit deposed to by first applicant for any assertion that it was intended or that he did participate actively in the management of the various companies. By contrast, in the founding affidavit the following appears at para 73:

> 'The appointment of Richard as a sole director of MZ Entertainment and Sidewalk Café confirmed and acknowledged the critical role that Richard would play in these businesses. We Malcolm, Victor and myself would primarily act as investors and silent partners.'

In the same affidavit, to the extent that there is any uncertainty thereon, first applicant clarifies the position at para 40:

> 'Apart from a short period at the outset, I had not been intimately involved in the day to day management of the restaurants and/or the entities in the group. Although I regularly received financial information from Richard and later from Nathan, I did not study and/or scrutinise the financial information to any great degree. With the benefit of hindsight, this is certainly an aspect I would have dealt with differently.'

[53] Arguably, in realising this problem, first applicant, in his replying affidavit, suddenly contended that 'he was intimately involved in and in some cases was instrumental in all the important strategic decision of the group'. But there is no basis to reconcile this claim with that which appears in the founding affidavit, namely that it was Richard who was to manage and play 'the critical role in respect of the businesses and that he would be a silent partner'. Further, as Mr Goodman pointed out, even when first applicant suggests that he was instrumental in important strategic decisions, his claims are exquisitely vague. Thus, when he says

he was instrumental in regard to 'the funding, structuring and financing of the Madame Zingara group', no details are provided.

[54] The best that first applicant can do is to refer to an annexure marked VDM1 in the papers which provides a summary of emails sent by him to sixteenth applicant, all of which began in January 2016 and which were attached to the answering affidavit. In this affidavit first respondent says that these emails support his claim that 'Geffen's persistent repetitive bombardment or Sarembock a director of each of the restaurant businesses entities with emailed request (frequently several a day) for information and documents pertaining to the finances and operations of the business'. There emails were attached to first respondent's affidavit not to show that these emails were incongruent with the initial claim that first applicant was a passive investor but were part of a narrative to the effect that, after Richard resigned as a director, it was agreed that sixteenth respondent should replace him. Only then did these emails begin to be generated by first applicant.

Question 3 allegations of unfair prejudicial conduct

[55] Much of the answer in this particular instance depends upon the answer to the previous two questions, namely that second applicant was not a party to a shareholders agreement and that, on the papers, it appears that the first applicant regarded himself as a passive investor without any day to day involvement with the businesses which were owned by the various companies.

[56] Under this heading I need to deal with the question of the provision of financial information. In terms of s 26 (1) (d) of the Companies Act, shareholders have a right to inspect and copy 'the annual financial statements' contemplated in s

24 (3)(c) (ii) of the Act. In relation to a CC the latter's accounting records are to be kept at the corporation's place of business and are open for inspection at reasonable times by members (s 56 of the CC Act).

[57] In *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) at para 14 it was held that a shareholder is not entitled to the minutes of directors and management meetings, '[n]or, unless the articles of association otherwise provide is he or she entitled to inspect the accounting records of first entry maintained by the company'.

[58] In the present case, applicants are in possession of the annual financial statements in respect of each entity for the financial years ending February 2011 to 2015, save for those in respect of the eleventh respondent which first applicant concedes are less important, twelfth respondent, which is in liquidation, and the Company Gardens.

[59] The first set of annual financial statements which were required to be prepared under the guidance of sixteenth respondent are in respect of the years ending February 2016 and 2017. According to first respondent's affidavit, sixteenth respondent 'inherited a situation in which annual financial statements had been prepared in respect of each entity up until the financial year ending February 2015 but none of them was signed... Richard Griffin simply refused to sign them. Nor did he ever call a shareholders meeting for the shareholders to consider them... Since his appointment as director, Sarembock has over time worked through the unsigned annual financial statements together with the company's other financial information to determine the accuracy. His assessment is, although the unsigned statements were not perfect, they are reasonable.'

[60] First respondent then says 'the first set of annual financial statements required to be prepared under Sarembock's watch as director were in respect of the financial year ending February 2016. Sarembock is currently engaged in finalising these as well as the statements for the year ending February 2017. Both sets of statements are far advanced. Sarembock has had a meeting with the groups external auditors in relation to the draft statements, certain adjustments have been made, and Sarembock have to finalise the statement and present them to the shareholders soon.' However, as noted by first respondent, first applicant has been provided by sixteenth respondent with short form management accounts until July 2016. Thereafter, that is after July 2016, sixteenth respondent began to communicate with first applicant through the latter's attorneys and accountant. According to first respondent 'after July 2016 Sarembock ceased sending management accounts directly to Geffen himself and instead made financial information available to Geffen's representatives. Sarembock ceased sending information directly to Geffen because by July or August 2016 Sarembock was receiving requests for the information from Geffen's representatives i.e. his attorneys and his own accountant David Frymer.' Furthermore in August 2016, first respondent sent first applicant 'a pack of financial information' relating to the group, receipt of which was not acknowledged.

[61] When, on 5 October 2016, Mr Frymer wrote to sixteenth respondent requesting further information, sixteenth respondent replied as follows:

> 'Charles Geffen is entitled to annual financial statements (AFS) which has been conveyed to his attorney by Howard Rubenstein via email on 28 September 2016. Should you require copies of the unsigned AFS for years ended 2014 and 2015 and management accounts for year ended 2016, they can be sent to you electronically.

Pease advise. Signed AFS for year ended 2013 and prior can be obtained from our auditors Valentine Sargent.'

[62] Significantly, Mr Frymer did not request any further information following upon this exchange. In April 2017, that is after these proceedings were launched, applicants were provided by respondents with the valuation of the group and the information supporting that valuation including income statement and bank account statements.

[63] Significantly, in a letter sent by Ms Melis on behalf of the respondents to applicant's attorneys the following appears.

'We transmit herewith copies of our client's valuation of the Madame Zingara Group (and your client's 20% share) as well as the documentation which supports the figures relied upon by our client in arriving at such valuation. The offer to purchase annexed to this email is made by our client without prejudice to his rights in regard to the application and purely in an attempt to reach a commercial settlement of the disputes between our respective clients in the hope that further legal and other costs can be minimised.

Should you and/or your clients financial advisors wish to meet with us to query or discuss the contents of the attached documentation with a view to negotiating a commercial settlement we will of course make ourselves available to do so.'

[64] Returning to the judgment in *Clutchco, supra* at para 14 Comrie AJA wrote:

'Arguably - I express no views – there may be special instances where a court could order some form of access in terms of s 252 (the members then remedy in case of oppressive or unfairly prejudicial conduct) but that section is not applicable here.'

[65] Comrie AJA then went on to say:

'[t]he respondent failed to lay such a foundation. His complaints were not of a serious nature and no detailed criticism of the auditors was advanced. In addition the respondent's proposed modus operandi was lacking in specificity. He claimed that access to the books of first entry would enable him to 'reconstruct' them and that the reconstructed version would enable him to place a proper value on his shares. These broad and general assertions were not supported by, for example, an affidavit by an experienced accountant and auditor.' (para 18)

[66] In the present case, no special circumstances were alleged in the founding affidavit. Given the significant amount of financial information provided to first applicant, the least that could have been expected, insofar as his papers were concerned, was a detailed affidavit from an expert accountant explaining why that which had been provided was inadequate. By contrast, all that appears in the papers is silence from the auditors, who were the recipients of the documentation to which I have made reference.

[67] As an indication of the unsubstantiated nature of this part of the case, reference can be made to first applicant's replying affidavit where, in particular, he replies to first respondent's claim that the unsigned statements, while not perfect, are reasonable. To this all that first applicant says is, 'I do not agree that the unsigned statements reasonably reflect 'the trading and operations of the various businesses.' To the valuation received he says; 'I deny the correctness of such' and further 'it is denied that a fair and unreasonable offer was made to me'.

[68] To be fair to first applicant he raises a series of questions about the valuation, including how to value an anticipated VAT liability, especially where insufficient information regarding the alleged liability is provided. Further, similar questions

could be asked relating to the anticipated claims by the liquidators of twelfth respondent against other entities in the group, and further, disputes concerning the true value of the property held by sixteenth respondent. None of these questions are however supported by any affidavit from an experienced accountant or auditor.

[69] With regard to the question of access to bank accounts, no basis was suggested as to why a shareholder had an entitlement to a daily viewing of the company's bank accounts. Significantly, with respect to the fifteenth respondent's bank account, of which first applicant is a sole director, it is he who has refused to allow other shareholders viewing rights in respect of this account or indeed copies of the bank statements.

[70] Turning to the question of the shareholders meeting, s 61 (2) of the Companies Act provides that a company must hold a shareholders meeting;

> (a) at any time that the board is required by this Act or the Memorandum of Incorporation to refer a matter to shareholders for decision;
>
> (b) whenever required in terms of s 70 (3) to fill a vacancy on the board;
>
> (c) when otherwise required in terms of subsections (3) or (7) (s 3 refers to one or more written demands by the holders of at least 10% of the voting rights who are to be exercised in relation to the matter proposed to be considered at the meeting) or by the company's Memorandum of Incorporation.

Again no basis is laid out in the papers as to a failure by the respondents to call a shareholders meeting in one of the circumstances set out in this section. It is clear however, from what I have set out, that the applicants are themselves entitled, in

the case of sixth respondent or, in the case of one of the close corporations, to call for such a meeting, which has not happened.

[71] Responding to reference to the payments made to first respondent, in the answering affidavit first respondent points out that he had no existing relationship with sixteenth respondent when the latter was appointed for 'it was after all Geffen who had brought Sarembock into the business.' It also disputed that first applicant only became aware in May 2016 of sixteenth respondent's role and the fact that the group were paying him for services rendered.

[72] In this connection first respondent refers to the an email of 31 May 2016 where sixteenth respondent writes to first applicant thus:

> 'You are well aware that Victor has been assisting me on a full time basis since late January. After all I was employed as a financial controller and subsequently a director and certainly don't have time to deal with all the matters. In addition Doctor has historical knowledge on most aspects of the business and I feel comfortable working with him and could certainly not cope with the workload without his assistance and guidance. He is earning 50k per month and I believe in my capacity as director this is fair remuneration for his services.'

Significantly this paragraph meets with a bare denial in first applicant's replying affidavit.

[73] Turning to the leases of fifteenth respondent and the averment of first applicant that first respondent initiated unilateral decisions relating to the lease agreement in respect of fifteenth respondent', first respondent contends that it was common cause that in May 2016 first applicant used R 50 000 of fifteenth respondent's funds to pay Distry-Liq Debt Consumers. There has been no reply,

even after a request to first applicant as to whether he refunded this amount, neither did first applicant provide the shareholders with annual financial statements in respect of fifteenth respondent. First respondent claims that he saw the draft annual statements in respect of February 2012 to 2015 for the first time in annexures to the founding affidavit. These annual statements have not been signed.

[74] The averment on behalf of first respondent is that the first applicant has neglected his functions as a director of fifteenth respondent. With regard to the leases, fifteenth respondent owns an immovable property which it leases out under two leases, one to an independent party, Liquorice and Lime, and the other to the Bombay Bicycle Club. The ten year lease in an agreement between fifteenth respondent and Liquorice and Lime came up for renewal in 2017. It contained a lower than market value escalation (5% in respect of rent). It was common cause that by 2017 when the lease had to be renewed, the rent significantly lagged behind market value. It is also common cause that the lease contained an option in favour of Liquorice and Lime to renew the lease for a further ten years and that they held this option. After negotiations between first respondent and Liquorice and Lime, it was agreed to conclude a new five year lease containing a higher escalation (8%) and hence on terms far more favourable to fifteenth respondent.

[75] In the view of the first respondent, it cannot seriously be disputed that the new lease was to the advantage and the commercial interests of fifteenth respondent.

[76] Turning to the Bombay Bicycle Club lease, Mr Goodman noted that the lease was due for renewal before 1 July 2017. First applicant took no steps to renew it.

In the end, first respondent had a lease drawn up and presented it to sixteenth respondent as a director of the Bombay Bicycle Club. The lease was then signed. The lease is for two years at a market related rental. The majority of the shareholders of fifteenth respondent considered to be in the company's best interests. In summary, on the papers, applicants have failed to show on objective grounds that prejudice as defined in the cases analysed in this judgment has been shown sourced in unfair conduct of the majority shareholders.

[77] The complaint does not concern the financial advantage of the lease but rather focuses on the result of "the lack of communication" between himself and first respondent. It is difficult to see how a complaint can be justified that there has been oppressive or unfairly prejudicial conduct in circumstances where there is no argument about the financial advantages of the two leases concluded. Finally, it appears that the loyalty card was terminated for all shareholders and not only in respect of first applicant and accordingly the purpose is not to humiliate first applicant but rather was withdrawn because, according to first respondent, the card were considered to be outdated, unnecessary and a waste of money.

[78] In summary, on the papers, applicants have failed to show on objective grounds that prejudice, as defined in the cases analysed in this judgment, has been shown to be sourced in unfair conduct of the majority shareholders. On the papers, there has not been a showing by applicants that the alleged conduct has adversely affected or was detrimental to the financial interests of applicants. Further, on the basis of first applicant's affidavits, no right nor legitimate expectation to participate in management was shown, on the probabilities, in terms of the evidence as presented.

[79] So much for the basis of the case made out by applicant in his founding papers and his further affidavit read together with the replying affidavit where proper account can be taken thereof.

Matters which were not raised on the papers

[80] In his heads of argument Mr De Wet attacked first respondent's offer of R2.4 million. As I have indicated, the argument was that either a price / earnings multiple of three had to be taken into account or the valuation needed to concentrate on the balance sheet (that is assets less liabilities). Furthermore, questions were raised about the valuation of the property owned by fifteenth respondent. Mr De Wet also attacked the valuation on the basis that it could not include negative values for certain restaurants, being the Company Gardens Cafe Manhattan and Café Mozart.

[81] The problem with this dispute about the valuation is that it was raised from the bar by counsel without any support from the papers whatsoever. No basis was laid for this very interesting set of argument with regard to the proper valuation of the business. As was noted by Heher JA in *Bayly, supra* at para 21:

> 'As a matter of fact, there was no averment or admission in the affidavits (or in the correspondence that preceded them) the Knowles had rejected Bayly's draft offer because the price offered was 'far below the true value of the shares' (or was otherwise unreasonable in its terms). On the contrary, both in correspondent and under oath Knowles confined himself to the assertion that the offer was 'unacceptable' to him, without, as one might have expected, offering reasons for his refusal to take it up.'

[82] The same set of facts confronts this court. Apart from the innovative arguments raised by Mr De Wet, there was nothing on the papers, save for a few questions with regard to VAT liability and ancillary matters as to why the offer was unreasonable. En passant, I remain uncertain as to why a valuation cannot take account of a significant VAT liability owed by various companies, the shares of which are the subject of the offer. But the point remains: none of this was raised by way of an expert affidavit to substantiate the rejection thereof. On the strength of the dictum in *Bayly's* case, this clearly is insufficient for this Court to simply ignore the offer without assessing the justification for the relief so sought in the notice of motion.

[83] Mr De Wet then raised the question of the lifting of the corporate veil in order to argue that, if the Madame Zingara group functioned as a single economic unit, then oppressive and prejudicial conduct against first applicant and thirteenth and fourteenth respondent would also lead to relief in terms of s 163 as far as sixth respondent and fifteenth respondent was concerned.

[84] Before dealing with the corporate veil argument, for the sake of completion, I note that thirteenth respondent owns and manages a restaurant known as Café Manhattan and 20% of the member's interest therein is owned by third respondent. Similarly, insofar as fourteenth respondent was concerned, third applicant has a 20% membership therein. It owns and manages a restaurant known as the Company Gardens.

[85] The same complaint was made with regard to Café Manhattan and Company Gardens as was made to the balance of the entities, namely that the acquisition by first respondent of second respondent's 40% membership therein was undertaken

without due compliance of s 37 of the Close Corporation Act and further that the shareholders in sixth respondent did not trust each other. Thus it followed that the members in the thirteenth and fourteenth respondent would also not trust each other and similar consequences would follow.

[86] I have already dealt with s 37 of the CC Act. Beyond this argument there is very little else which would justify the relief sought in respect of the close corporations. Suffice it further to say that in neither of the affidavits, including the replying affidavit nor in the heads of argument filed before the hearing, was a factual legal foundation pleaded or referred to, to justify an argument that this Court should lift the corporate veil and somehow grant relief in respect of the close corporations and possibly in respect of the various companies.

Corporate veil

[87] I remain uncertain as to how, given the decision in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 690 (A), there exists a justification for the lifting of the corporate veil in this case. But assuming that there was, other than the attempt to invoke s 37 of the CC Act, the only two issues relating to thirteenth and fourteenth respondent were that first applicant was entitled to access the VAT records of these two close corporations. Suffice to say that in a letter of 28 April 2017 the first applicant's attorneys wrote to respondent's attorneys requesting that they confirm that the VAT liability outstanding by the two Close Corporations amounted to R 5 591 677.00 in respect of Café Manhattan and R 4 644 499.00 in respect of Company Gardens respectively. To this, respondent's attorneys replied:

> 'At the outset we wish to record that the valuation of the entities in question and the VAT figures referred in your letter on reply were provided to your client at his specific request that great effort and expense to our clients and in the contents without prejudice corresponded exchange between our parties... the historical VAT position of the various entities in so called Madame Zingara Group... is unknown to your client.'

The papers do not contain any challenge to any of these statements made in the letter of 05 May 2017. During oral argument, unanticipated in terms of the papers as became somewhat typical in this case, reference was made to s 56 of the CC Act which relates to accounting figures. It was suggested that the failure to afford first applicant viewing rights of the bank statements constituted non compliance with the statutory requirements. No case was made out on the papers as I have indicated. In terms of section 56 of the CC Act, a corporation is obliged to keep the relevant records 'at the place or places of business or at the registered office of the corporation' and that they 'be open at all reasonable times for inspection by another member.' There does not appear to be any evidence of non compliance with this section.

The offer: again

[88] In a further note prepared with regard to the question of the corporate veil, Mr De Wet seized upon the opportunity to deal yet again with question of the offer made by first respondent to first applicant, in the amount of R 2.4 million. Mr De Wet made much of the following statement which was included in the calculations provided to first applicant:

> 'The offer to purchase annexed to this email is made by our client without prejudice to his rights in regard to the applicant and purely in an attempt to reach a commercial settlement of the disputes between our respective clients in the hope that further legal and other costs can be minimise.'

Accordingly, he contended that as these statements had been made without prejudice, they could not be disclosed in evidence without the consent of both parties. For this reason, he submitted that first applicant could only deal with the offer in his founding affidavit, if it had been marked "with prejudice", once it was referred to in the answering affidavit. Only then could first applicant respond in his replying affidavit. The problem with this submission is that it overlooks a pertinent fact, namely after the offer was made in January 2017 it was followed on 22 April 2017 with full disclosure of the supporting documentation which provided the base for the valuation. This was accompanied by an offer to the applicants and their financial advisors to discuss the contents of this documentation. Surely it could not have been expected of the respondents that they would hide behind privilege when they had clearly made an offer and substantiated it in the manner described. But significantly, first applicant avoided dealing with this in his founding papers, not even alluding to the fact that there had been a without prejudice settlement attempt on the part of the respondents. In the event, as I have indicated, the attempt to deal with it in the replying papers was wholly inadequate in terms of the law as I have outlined it, which deals with affidavit evidence.

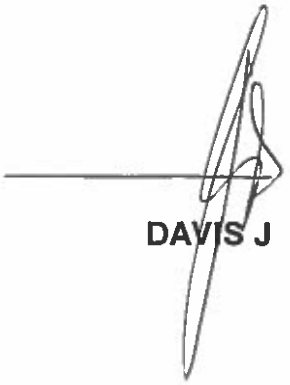
Conclusion

[89] This case, as is generally the position with regard to matters of this nature, is fact specific. In other words, the law and its application in general were hardly

placed in dispute. The question for determination was based on the facts set out in the founding affidavit together with the further affidavit. Did the applicants make out a case which firstly showed that the acts or omissions of any of the corporate entities or related person resulted in oppressive or unfairly prejudicial consequences to the applicants or had unfairly disregarded their interests? Further, were any of the businesses of any of the entities referred to in this judgment carried out or conducted in a manner that was oppressive or unfairly prejudicial to the interest of the applicants?

[90] As I have been at pains to emphasise in this judgment, applicant's case has to be based on the founding papers. The court must then, in examining the founding papers and the averments contained in the answering affidavit, determine whether the conduct was oppressive or unfairly prejducial to the applicants. As I have noted, some of the relief was misdirected particularly with regard the conduct of second respondent in the sale of shares owned by him. In other cases, when the factual matrix of first applicant's two affidavits and the answering papers are taken into account, there was no justification for finding that either the conditions in terms of s 163 of the Companies Act or s 49 of the CC Act had been met. Accordingly, there is no basis to proceed to grant the additional relief sought by applicants namely the appointment of an independent chartered accountant.

[91] Accordingly, for all of these reasons therefore, the application is dismissed with costs, including the costs of two counsel, in respect of first, third, sixth to eleventh, thirteenth to sixteenth respondents and costs incurred by second, fourth and fifth respondents.



DAVIS J