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

(Coram: Holderness, AJ)

[Reportable]

Case No: 8307/2016

In the matter between:

NOLA ADRé OOSTHUIZEN	Applicant
and	
PIERRE ADRIAAN OOSTHUIZEN	First Respondent
ANTON GERALD OOSTHUIZEN	Second Respondent
JACQUES ANDRE OOSTHUIZEN	Third Respondent
SWAN LODGE CC (1989/034551/23)	Fourth Respondent

JUDGMENT DELIVERED ON 14 MARCH 2017

HOLDERNESS, AJ

INTRODUCTION

[1] The applicant and the first, second and third respondents ('the respondents') are siblings. Each holds 25% of the members' interest in the fourth respondent ('Swan Lodge' or 'the corporation').

[2] The applicant seeks final relief on motion. The relief sought is two-fold. The applicant firstly seeks an order in terms of section 49 of the Close Corporations Act 69 of 1984 ('the Act'), *inter alia* directing the respondents to purchase her member's interest in Swan Lodge. Secondly, she seeks an order postponing the instant application, to a date to be determined by the Court, to adduce evidence to establish the fair market value of her member's interest in Swan Lodge. In the interim she seeks an order that she be *'granted full access to all relevant financial information pertaining to Fourth Respondent so that Applicant might be in a position to adduce cogent and relevant evidence relating to the value of her membership interest.'*

THE ISSUES

[3] The issues, which this Court is required to determine, are the following:

3.1 Was there an act or omission by Swan Lodge, or by one or more of its members, which was unfairly prejudicial, unjust or inequitable to the applicant, or were the affairs of Swan Lodge conducted in a manner unfairly prejudicial, unjust or inequitable to the applicant? If there was such an act, did it have results that were unfairly prejudicial, unjust or inequitable?

3.2 If both questions are answered in the affirmative, is it just and equitable for the court to make an order with a view to settling the dispute between the applicant and the respondents?

[4] The relevant legal principles applicable to relief in terms of section 49 of the Act ('section 49') will be set out in greater detail below.

THE FACTS

[5] Swan Lodge is the registered owner of two commercial properties, Erf 3042 Kommetjie, where the Swan Lodge building is situated, and Erf 3043, a commercial vacant plot adjacent to Erf 3042 ('the properties'). Swan Lodge is principally a property letting entity, and has its principal place of business and registered address at KEA Estate Agency in Kommetjie. No relief is sought against Swan Lodge.

[6] Swan Lodge was formed in 1989 by Pierre Crowther Oosthuizen ('Pierre Senior'), the late father of the applicant and the respondents. Pierre Senior died on 18 September 2010. The applicant and the third respondent were appointed as the executors of the estate.

[7] Swan Lodge owns the single biggest building in the seaside village of Kommetjie. The building is comprised of residential, retail and commercial units. The seven commercial units are presently occupied by a restaurant, a cafe, a hairdresser, an estate agency, Kommetjie Estate Agency ('KEA'), a veterinary clinic, a bric-a-brac shop and a surf shop. There are eight residential units, which vary in extent. The applicant estimates the rental income for the building to be approximately R150 000 per month or R1 800 000 per annum. Although no formal valuations have been undertaken in respect of the properties, according to the applicant, informal valuations estimate Erf 3042 to have a value of between R16 million and R18 million, and Erf 3043 to have an estimated value of R3.5 million. The applicant contends that all the members agreed during 2014/2015 to sell the properties, but that the failure to obtain a valuation by a suitably qualified professional has impeded the sale.

[8] Prior to Pierre Senior's death, Swan Lodge was wholly owned and controlled by him. The first respondent acted as the manager of KEA, which was owned and run by Pierre Senior from approximately 2003.

[9] After the winding up of the estate of Pierre Senior, the applicant and the third respondent remained the sole signatories to the business account held by Swan Lodge at First National Bank ('FNB'), under the name 'Swan Lodge Maintenance'. All rental and other income due to Swan Lodge was paid into this account. In addition, a money market account was opened into which interest earned from surplus funds could be deposited. The relevance of the so-called bank account issue will become apparent from what is set out below.

The acts or omissions relied upon by the applicant for relief in terms of section 49 of the Act

Kommetjie Estate Agency – KEA

[10] The applicant avers that, whilst Pierre Senior's estate was being wound up, the first respondent, in a 'somewhat devious manner', pressurised the applicant, and the second and third respondents to sell KEA to him and to deduct the purchase price from his share in the inheritance. The applicant raised the fact that shortly after Pierre Senior's death, the first respondent phoned the Estate Agents Board to inform them that KEA was no longer 'legitimate' as the principal was deceased, and that prior to the sale of KEA even being discussed, took steps to have KEA registered in his 'personal capacity' and finalised the registration of KEA CC with CIPC on or about 24 January 2011.

[11] It bears mentioning, that it appears from the CIPC records annexed to the founding affidavit, that the applicant and the respondents were only appointed as members of Swan Lodge on 18 December 2012. The complaint about KEA relates to events in 2011. In any event, these events do not constitute acts or omissions by Swan Lodge or by its members, and thus cannot form the basis for a section 49 complaint. KEA CC is a separate corporate entity, is not a party to this application.

[12] It is common cause that KEA was not required to pay any rental to Swan Lodge for the first year, which presumably ran from 24 January 2011 until 24 January 2012 (before the date on which the other siblings were appointed as members of Swan Lodge). The applicant and the other respondents had to debit the first respondent's loan account in Swan Lodge with the first year's rental. The applicant states that, to date, the first respondent has also failed to sign the written lease agreement on behalf of KEA with Swan Lodge.

[13] The applicant's last complaint regarding KEA was that one of the terms of the sale agreement was that KEA's rental would be increased by 9% per annum and that the first respondent of his own accord informed the other members that KEA is only prepared to pay an increase of 8% per annum, and not the 9% agreed upon. The applicant contends that, based on an initial rental of R4,000 per month in 2011, KEA should now be paying rental of R6,708.38 per month. She states that, from a recent bank statement, it appears that KEA only paid rental in an amount of R5,441.96 for March 2016. This complaint thus appears to be based on KEA or the first respondent receiving preferential treatment, and the applicant not having full access to the documentation relating to the KEA lease and rentals.

[14] The respondents addressed each of the issues raised regarding KEA, in some detail. In the answering affidavit, which was deposed to by the third respondent, it is pointed out that as neither the applicant nor the third respondent are estate agents, and because the second respondent has his own agency, the first respondent was the obvious choice to take over the business of KEA. The third respondent denies that the first respondent acted in a devious manner. To illustrate that the first respondent was not treated preferentially, the respondents mention that prior to the sale to the first respondent, KEA was valued at R382 340. The first respondent initially objected to this valuation, claiming that the business had been overvalued, as he had valued KEA at R80 000 in January 2011. The applicant, the third respondent and the accountant who valued the business, Roger Reece ('Reece'), held the first respondent to the valuation, 'against his protestations'.

[15] It appears from contemporaneous correspondence annexed to the answering affidavit, that the applicant supported the decision to defer the payment of rental by KEA for the first year, and, as an alternative to KEA receiving 10% on Pierre Senior's residential property, agreed that KEA could stay its rentals until it had built up some capital.

[16] Lastly, the first respondent did in fact sign a draft lease agreement on behalf of KEA, however the applicant sought to impose stricter requirements on KEA than on other tenants, which delayed the signing of a lease by both parties. On 16 May 2016, prior to the application being launched, the respondents proposed as a resolution that the draft lease agreement for KEA be accepted and brought to final approval, with the necessary terms and conditions. This resolution was duly adopted by Swan Lodge on 20 May 2016. Regarding the

annual escalation, the respondents annexed a schedule, prepared by the applicant, in which she recorded that from 1 April 2012 (one year after the sale of KEA to the first respondent), there was an 8% escalation in the KEA rental, which they submit was fair as KEA only charges 5% (half the industry norm) in respect of commission for the work which it does for Swan Lodge. Accordingly, there appears to be no merit to this complaint.

Alleged failure to provide documentation

[17] I now turn to deal with the second ground relied upon by the applicant for relief in terms of section 49. The applicant alleges that the first respondent, as a member of KEA, acted unilaterally in concluding lease agreements with new tenants without consulting with the applicant and the other members. She states that Swan Lodge had become his 'personal fiefdom', and that he did not regard himself as being answerable to the other members.

[18] According to the applicant, an issue which caused significant tension between the applicant and the first respondent was that he allegedly failed to provide her with copies of rental invoices until she consulted with an attorney in 2014. To the applicant's consternation, the invoices which she was provided with reflected rental income, but also reflected apparent deductions where such deductions ought 'more properly to have been reflected as general expenses of the fourth respondent.' This caused the applicant to address a formal demand to the respondents to provide her with all relevant documentation pertaining to the financial affairs of the fourth respondent. The applicant states that she previously requested this documentation from Reece, however he never responded to such requests. Reece, apparently does not use the internet, and therefore does generally reply to emails.

[19] The applicant made much ado about the fact that there was no indication that the 'purported deductions' reflected on the rental invoices were necessary or reasonable expenses, and she was not consulted regarding the inclusion of such expenses. As an example, deductions were made for palisade fencing between certain of the tenants' properties, which the applicant claims to have been unaware of and which she could not understand.

[20] The respondents' answer to these complaints was that it was never a condition of KEA's appointment that lease agreements had to be signed by all the members. They alleged

that there was a well-balanced tenant mix, which has been to the benefit of Swan Lodge, as confirmed by Reece. It is apposite to note that the applicant does not complain that the tenants selected by KEA have defaulted or acted in breach of their agreements to the detriment of Swan Lodge. It appears that the sole basis for her complaint, is that she was not consulted prior to the selection of the tenants, nor the conclusion of lease agreements with them. She does not even go so far as to say that there is any specific tenant which she would have objected to, had she been consulted prior, or the basis of her objection to any of the tenants. It is also not clear when the lease agreements complained of were concluded and whether this was before or after the breakdown of her relationship with the respondents.

[21] The respondents confirmed in their answering affidavit that the members were often involved in important issues concerning the tenants, including, if it was of sufficient significance, the selection thereof. Where members were not consulted, KEA acted in accordance with its mandate, which included the selection of tenants to occupy the properties. The respondents' evidence was that the applicant was granted full access to the financial documentation relating to Swan Lodge. In 2014, she spent four days at KEA's office, where she had full access to all relevant documentation, and could make copies of any documentation required, including lease agreements, rental invoices and rental schedules. It bears mentioning that the respondents alleged that a majority was not required to select new tenants, and that KEA was mandated to select tenants on Swan Lodge's behalf. Based on the *Plascon-Evans* rule, I am bound to accept the evidence of the respondents in this regard.

[22] On 19 March 2015, after the applicant had already involved her attorneys, copies of, *inter alia* rental invoices were made available to the applicant for collection at the offices of the respondents' attorneys. On 7 May 2015, the applicant collected what she described as a 'jumble of documents'. According to Natalie Szot-Myburg ('Szot-Myburg'), an employee of the respondents' attorneys, the documentation was neatly collated in a file and was not a jumble. During argument, a dispute arose as to whether the documents made available for collection in fact included all the documents requested by the applicant in a letter from her former attorneys, Strauss Daly. There is a handwritten annotation on the memo which the applicant signed confirming collection of the documents, which provides that 'docs not checked according to letter from Strauss Daly'. To my mind this is a storm in a teacup. The fact is that approximately 650 pages of documents were provided to the applicant. If any specific documents which she required was not in the bundle, it was incumbent upon the

applicant to point this out to the respondents and to request such documents. It must be borne in mind that the evidence regarding alleged non-disclosure of relevant documentation is relevant only to show whether there was in fact such non-disclosure, and, if there was, whether this omission was unfairly prejudicial, unjust and inequitable to the applicant. This is the onus which the applicant is required to discharge.

[23] Reverting to the deductions, and specifically the deduction for palisade fencing, it appears for the first time from the respondents' affidavit that, not only did the respondents consult with the applicant prior to taking the decision to erect palisade fencing, but that it was in fact the applicant that suggested that such fencing be erected. This appears from an email from the applicant, which suggestion was accepted by the respondents. It is peculiar that this expense is relied upon by the applicant to cast aspersions on the other members and KEA, and that her involvement in the decision to put up the fencing is not disclosed in the founding affidavit. It is unfortunate that this appears to be one of several examples where the conduct complained of by the applicant was in fact agreed to by her, or was undertaken with her knowledge and in the absence of any objection by her. This will be further dealt with below.

[24] It is common cause that the applicant was afforded access to the financial documentation pertaining to Swan Lodge. Despite clear evidence to the contrary, the applicant relies on a breakdown of trust, and her subjective perception that she was being disregarded and marginalised by the respondents. She states that 'in the latter part of 2014' she was 'totally in the dark' regarding:

a) an accurate and up to date account of the income and expenditure of Swan Lodge; and

b) why no clear steps were being taken to sell Swan Lodge or thee properties, despite all the members agreeing to sell in 2014.

[25] The respondents aver that they did not ignore the applicants' requests, and that as it was not feasible to continually send specific documents to her on an *ad hoc* basis, they granted her unfettered access to the KEA offices to access and copy any documents which she required. The applicant avers that she contacted Reece regarding her concerns in January 2014, and that he failed to respond, which gave her the impression that 'he regarded himself as being answerable only to First Respondent.' In response, the respondents point out that

Reece was not the accounting officer of Swan Lodge and that it is thus clear that the applicant was under a mistaken impression regarding to whom Reece considered himself answerable.

[26] A further cause for concern is the allegation by the applicant in paragraph 21.12 of her founding affidavit that '*by September 2014, it had become apparent to me that my requests for financial information relating to Fourth Respondent were being ignored particularly by First Respondent and the accounting officer of Fourth Respondent (Reece).'* This is not borne out by the undisputed facts. Consistent with the evidence of Szot-Myburg, in the minutes of the members meeting of 14 December 2015 it is recorded that:

> 'Nola acknowledges has (*sic*) received all account information as well as all rentals payments and financials for 2015 as requested by Nola.'

[27] The final issue raised relating to this aspect is that 'after it had become apparent that her requests were being ignored and she felt that she was not receiving any support from the second and third respondents', the applicant consulted attorney Chris Fick, who addressed a letter to the respondents, on behalf of the applicant, on 26 September 2014, in which he stated as follows:

'I have been consulted by your sister, Mrs Nola Oosthuizen, and write to you on her behalf.

With regard to your joint interests in the properties owned by Swan Lodge CC as well as the house and plot owned by the siblings jointly, she would appreciate to meet with you in a mediation session to discuss the current situation and the way forward. Of specific importance would be a discussion in regard to the sale or buying out of her share in the properties and her membership interest in the CC.

It is of importance to our client that a proper negotiation can be entered into in an amicable and civil manner in order to resolve all issues in this regard and to agree on the way forward. Negotiation under the guidance of a mediator seems to us the preferred option in this matter and we would appreciate your agreement to the process and the appointment of a mediator.

In regard to these matters, please correspond/contact us without referring to her directly.'

[28] In response, the respondents stated that they consulted with Guthrie regarding the proposal, and as none of the members had the means to buy the applicant out, Guthrie's advice was that a mediation would be fruitless and would result in the incurrence of unnecessary costs. The respondents furthermore remained committed to selling the business or property of Swan Lodge, so there was nothing to mediate in that regard. It was not a case of the applicant and the respondents disagreeing about selling Swan Lodge. All the members wished to sell at the earliest possible opportunity.

[29] It is apposite to note that no mention is made in Fick's letter of any unjust, inequitable or unfairly prejudicial conduct, entitling the applicant to relief in terms of section 49.

[30] On 18 December 2014, the applicant addressed an email to the respondents advising them that she did not object to 'a legitimate new account with proper agreements', provided she could obtain copies of each lease agreement and the lease invoices 'from 1 April 2014 to date'. The applicant also asked for a meeting to be held to 'discuss all concerns', and requested the other members to respond within seven days, which expired on Christmas Day.

[31] The third respondent replied on the same day, advising that he was happy to meet, but that as it was a busy time of the year, the applicant would need to arrange a suitable date and time for all the members. On 23 December 2014, before the expiry of the seven-day period, the applicant wrote the following email to the respondents:

'Jacques pierre and anton I have requested as a matter of urgency dates and times which will be suitable for a meeting but it is ignored. My last mail addresses the urgency for a meeting which also addresses the account. <u>If by the end of today I receive no response from the members giving date and times that would suit them for an URGENT ONE HOUR meeting I will accept this as a blatant refusal to act in the best interest for the business</u>.*'* (underlining added)

[32] According to the respondents, the applicant had access to the documents but did not want to attend at KEA's offices. In any event, there was no urgency to the request nor any reason given why the meeting was required to be held as a matter of urgency on 23 December. Furthermore, the respondent failed to give notice of a meeting in terms of section

48 of the Act, which she was entitled to do. Considering the applicant's unreasonable demand for a meeting at a very busy time of year, the refusal or failure by the respondents to meet on short notice was neither unjust nor unfairly prejudicial.

The bank account issue

[33] It is appropriate to now deal with what would appear to be the last arrow in the applicant's quiver, the issue regarding Swan Lodge's bank accounts. In her founding affidavit, the applicant states that, on 3 October 2014, the applicant was given notice of a meeting of the members of Swan Lodge on 10 October 2014. One of the resolutions proposed at the meeting was for a new bank account to be opened in the name of the corporation and for all funds held in the Swan Lodge Maintenance account to be transferred to the new account. It was proposed to resolve that two of the existing members would have to act together to operate any bank account, save for major capital expenditure which would requirement the agreement of three of the four members. A copy of the Notice of Meeting was annexed to the founding affidavit.

[34] The applicant stated that during October 2014, without any prior consultation with her, the respondents approached the manager at FNB in Fish Hoek, and requested that the Swan Lodge Maintenance current account be closed, and that a new current account for Swan Lodge be opened. It is puzzling that the applicant alleges that this was done without any consultation with her. On her version, she received notice of the meeting at which it was proposed to resolve that the partnership accounts be closed and new current account in the name of Swan Lodge be opened. A new account was opened at another branch, and the applicant was called upon to sign the necessary forms for the Financial Intelligence Centre Act, 38 of 2001 ('FICA') compliance.

[35] On 13 October 2014, after the meeting on 10 October 2014, the applicant addressed an email to the respondents, annexing a 'response' to the meeting. It is not clear whether she objected to the proposed resolutions, and it appears that the only new issue raised in this response is the VAT issue, which is dealt with more fully hereunder, to the effect that VAT

registration above a certain level is mandatory and as Swan Lodge has exceeded this threshold amount this issue needs to be regularised.

[36] In November 2014, after the resolution to open a new bank account and for the transfer of all funds from the old bank accounts, the applicant used a blank cheque which the third respondent had signed, without his knowledge, to transfer the sum of R280 000 of Swan Lodge's fund to the Swan Lodge Money Market account. Because this partnership account required the applicant's and the third respondent's joint authorisation, the third respondent was unable to access the funds to pay Swan Lodge's expenses. The respondents alleged that in so doing the applicant knowingly acted in direct contravention of resolutions passed by Swan Lodge, thereby placing Swan Lodge at significant financial and reputational risk. As a result, the debit order for the mortgage bond instalment was returned as unpaid from the transactional account from which the funds had been transferred.

[37] The applicant used the account in which the funds were held as leverage to bargain for payment of the sum of R150,000 to her in 'part settlement of her loan account'. The respondents contend that this demand was neither lawful, nor appropriate, and constituted a breach of her fiduciary duties towards Swan Lodge. The respondents accordingly deny that the issue of the bank account could legitimately support the applicant's application.

[40] In an email to FNB on 15 December 2014, the applicant states that the new account was opened illegally as she did not give permission for the account to be opened, and did not sign the necessary documents. She threatened to sue FNB for any fraud committed. Even if the applicant opposed the resolution regarding the bank account, there was still a quorum and the resolution complied with the Act.

Swan Lodge Meetings held in December 2015 and May 2016

[41] A meeting of the corporation was held on 14 December 2015. All four members were in attendance. The applicant addressed a letter to the other members in which she acknowledged receiving the agenda for the meeting on 2 December 2015, but demanded copies of the proposed resolutions to obtain legal advice and consider her position. Curiously this letter is dated 14 December 2015 and the meeting was to be held, and in fact went ahead, at 08h00 on the same day. In the letter the applicant noted as follows:

'The above has resulted in me not being able to meaningfully participate in this meeting. I suspect that what was going to be discussed at this meeting was more fully known between the three other members than me.

Whilst I understand that the principle of the majority prevails, this is counterbalanced by the provisions of the Close Corporations Act which does not allow a member to be unfairly treated or prejudiced by other members.'

[42] It appears that the only contentious issues raised at this meeting were that the applicant required R300,000 towards the repayment of her loan account, and as there were insufficient funds, the other members agreed to a payment of R100,000 to each member. The minutes of this meeting are instructive, and include a recordal of issues which the applicant purports to rely upon in the present application. The minutes recorded *inter alia*, the following:

a) 'Nola still objects that FNB had opened an account in the name of the Swan Lodge CC;

b) Nola was again informed and noted that she was informed to go to FNB and sign documents as a signatory on the account, but still refuses to do so;

c) Nola had been advised to go to FNB and sign banking documents to allow access to information, and that all other information had been distributed. It was further noted that the applicant acknowledged that she had received all information requested, including account information, rental payments and financials for 2015;

d) Nola acknowledges that she has received all account information as well as rentals payments and financial for 2015 as requested..;[1]

e) Nola unhappy with the cheqs and accounting practice and wants proper invoices?? We have given invoices;

[1] Emphasis added

f) Suggested Pierre to draft a document re sale of Swan lodge that the new owner will be liable to take over all the rental/lease contracts with KEA;

g) According to Nola no mandate was given to Pierre to sell Swan Lodge;[2]

h) Pierre, Nola and Jacques had agreed on a selling net price no less than 16 million and 3,5 net for the plot, Noted that Anton disagreed on selling price and wanted 18 million net for swan lodge and 4 million for the plot; and

i) Nola confirmed that litigation will continue against all members.'

Section 49 of the Act – What is the applicant required to prove?

[43] The applicant seeks final relief on motion. As stated above, the facts must thus be adjudicated in accordance with the *Plascon-Evans* rule.[3] There is no suggestion that the respondents' version is far-fetched or implausible, or that there is any basis upon which to reject it.

[44] Section 49 (1) and (2) entitles a member of a corporation to apply for relief under the section as follows:

'(1) Any member of a corporation who alleges that any particular act or omission of the corporation or of one or more other members is unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, or that the affairs of the corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, may make an application to a Court for an order under this section.

(2) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable as contemplated in subsection (1), or that the corporation's affairs are being conducted as so contemplated, and if the Court

[2] Emphasis added.
[3] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) para 2.

considers it just and equitable, the Court may with a view to settling the dispute make such order as it thinks fit, whether for regulating the future conduct of the affairs of the corporation or for the purchase of the interest of any member of the corporation by other members thereof or by the corporation.'

[43] Approaching the facts, on this basis, the court must be satisfied that the applicant has demonstrated that:

a) A particular act or omission of the close corporation (or a member) was itself unfairly prejudicial, unjust or inequitable; and

b) that it had results that were unfairly prejudicial, unjust or inequitable;

c) or if reliance is placed on the manner in which the close corporation's business is conducted, that both the conduct and the result of the conduct is unfairly prejudicial, unjust or inequitable;[4] and

d) it just and equitable, with a view to settling the dispute, to make such order as it thinks fit.

[44] The provisions of section 49 are modelled on those of section 252 of the Companies Act 61 of 1973 ('the 1973 Act'), the antecedent of section 163 of the Companies Act 71 of 2008 Act ('the 2008 Act'). Section 163 differs markedly from section 252 of 1973 Act. In interpreting the principles applicable to section 49, it is therefore appropriate to obtain guidance from the cases dealing with section 252.

[45] Interestingly, the term 'oppressive' does not appear in the body of either section 49 or section 252, however the title of section 252 is 'Relief from Oppression'. It thus appears that from the legislature's point of view, the purpose of the remedy was to provide minority member's with relief from oppressive conduct.

[4] Emphasis added. *Gatenby v Gatenby & others* 1996 (3) SA 118 (E) at 124B-H;*Feni v Gxothiwe and another* 2014 (1) SA 594 (ECG) para 24.

[46] The commentary by *Henochsberg* on section 252 is instructive.[5] The purpose of the section is described as empowering the Court to come to the assistance of a member of a company who legitimately complains of any act or omission by the company or the conduct of its affairs.[6]

[47] The starting point is for the Court is to determine whether the applicant has proved that the act or omission or the manner of the conduct of the company's affairs was or is unfairly prejudicial, unjust or inequitable to the complainant. Thereafter, the Court must also consider whether it is just and equitable that it should intervene. The court's powers to intervene are wide and are designed 'with a view to bringing to an end the matters complained of.'[7] Put differently, the question which the Court must answer is, has the member's rights been adversely affected by the conduct complained of?

[48] The SCA in *Louw and Others v Nel,*[8] held that its: 'jurisdiction to make an order does not arise until the specified statutory criteria had been satisfied. As Buckley J put it in *Re Five Minute Car Wash Service Ltd:* "The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted…".'[9]

[49] In *Louw* supra, Ponnan JA went on to say that:

'Fairness, according to Lord Hoffmann […] is the criterion by which a court must decide whether it has jurisdiction to grant relief. Generally speaking, an application of this kind, based upon the partnership analogy cannot succeed if what is complained of is merely a valid exercise of the powers conferred on the majority. To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him. For, as Trollip JA put it in *Sammel and Others v President Brand Gold Mining Co Ltd*: "By becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own

[5] *Henochsberg on the Companies Act,* Vol 1 (Issue 33), at 477.
[6] Emphasis added
[7] s 252 (3) of the 1973 Act.
[8] 2011 (2) SA 172 (SCA).
[9] *Louw* n 7 paras 23 – 24.

rights as a shareholder, […] that principle of the supremacy of the majority is essential to the proper functioning of companies."'[10]

[50] To invoke section 252 (or section 49), it is not sufficient for an applicant to show that an act or omission is prejudicial. It must further be shown to be unfair.

[51] Analogous to the present case and as quoted, with approval, by the SCA in *Louw supra*, in *Re a company*[11] , Lord Hoffman put it thus:

> "Mr Hollington's submission comes to saying that, in a quasi-partnership company, one partner ought to be entitled at will to require the other partner or partners to buy his shares at a fair value. All he need do is to declare that trust and confidence has broken down…'
>
> 'I do not think that there is any support in the authorities for such a stark right of unilateral withdrawal. There are cases, such as *Re a company (No 006834 of 1988), ex p Kremer* [1989] BCLC 365, in which it has been said that if a breakdown in relations has caused the majority to remove a shareholder from participation in the management, it is usually a waste of time to try to investigate who caused the breakdown. Such breakdowns often occur (as in this case) without either side having done anything seriously wrong or unfair. It is not fair to the excluded member, who will usually have lost his employment, to keep his assets locked in the company. But that does not mean that a member who has not been dismissed or excluded can demand that his shares be purchased simply because he feels that he has lost trust and confidence in the others. I rather doubt whether even in partnership law a dissolution would be granted on this ground in a case in which it was still possible under the articles for the business of the partnership to be continued. And as Lord Wilberforce observed in *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 at 500, [1973] AC 360 at 380, one should not press the quasi-partnership analogy too far: A company, however small, however domestic, is a company not a partnership or even a quasi partnership. . . ."'[12]

[10] *Louw* n 7 para 22.
[11] *(No 00709 of 1992) O'Neill and another v Phillips and others* [1999] 2 All ER 961 at 966.
[12] *Louw* n 7 para 24.

[52] In the recent decision of Plasket J in *Feni v Gxothiwe ('Feni"),*[13] the court was called upon to decide an application in which relief was claimed in terms of section 49. The facts in that case were markedly different to that in the present case. In *Feni* there was not simply a breakdown of trust leading the disgruntled member to seek an order that the other member buy her interest in the corporation. The applicant's relief was premised upon facts placed before the court which showed that her co-member had effectively hijacked the management and business of the corporation. In summing up the grounds made out for the relief sought, the learned judge stated as follows:

'Indeed, so gross in its oppression of the applicant was the conduct of the first respondent that his acts and omissions only have to be stated for their unreasonableness to be manifest […]'[14]

[53] In *Feni* the first respondent refused to repay a loan, despite the funds to do so being available, resulting in the applicant forfeiting her security for such loan; unilaterally donated 500 ewes and 8 rams, belonging to the corporation, to his brother, with the result that the ability of the corporation to farm profitably was compromised; and the assets of the corporation were unreasonably diminished to the detriment of the applicant's interest in it. Moreover, he in the absence of any authority to do so, withdrew over R1 600 000 from the corporation for his own purposes, and used the funds of the business to purchase motor vehicles for two nephews and the brother of his lover, with the result of prejudicing the applicant's interest in the corporation. Lastly, he ejected the applicant from the farm and totally excluded her from the management and the benefits of the business of the corporation, amounting to the hijacking of her interest in it.

[54] The learned judge went on to say that, whilst he accepts that section 49 was designed for 'extraordinary situations', as was held by Jones J in *Gatenby v Gatenby and Others*[15], so oppressive was the conduct of the first respondent in *Feni*, that it is a 'case study' of precisely the type of circumstances that section 49 is intended to remedy.[16]

[13] *Feni* n 4.
[14] *Feni* n 4 para 30.
[15] *Gatenby* n 4 at 123G-H.
[16] *Feni* n 4 para 31.

[55] In *Gatenby*[17] supra, the following *dictum* of Cillié J in *Livanos v Swartzberg and Others*[18] was cited:

> 'In any event it is not the motive for the conduct that the Court must look at *but the conduct itself and the effect* which it has on the other members of the company.'

[56] Unfair conduct, in the context of section 252 of the 1973 Act, is described by Preiss J in the case of *Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Collieries Ltd: SA Mutual Life Assurance Society and Another Intervening:*[19]

'[…] the applicants must establish a lack of probity or fair dealing, or a visible departure from the standards of fair dealing, or a violation of the conditions of fair play on which every shareholder is entitled to rely. Couched in another form, I agree that the applicants must establish that the majority shareholders are using their greater voting power in a manner which does not enable the minority to enjoy a fair participation in the affairs of a company. The emphasis is upon the unfairness of the conduct complained of. It must be conduct which departs from the accepted standards of fair play, or which amounts to an unfair discrimination against the minority.'

[57] If the applicant can overcome the first, and not insignificant, hurdle of proving that the conduct or omission of the other members was unfair and that she was prejudiced thereby, she must still overcome the further hurdle of showing that the result of the conduct of the affairs in that manner is unfairly prejudicial.[20]

[58] Lastly, an application under section 252 (or under section 49), ought not to be brought with the object, of obtaining the relief claimed, but of exerting pressure to achieve a collateral purpose which can otherwise not readily be achieved.[21]

Failure to adduce evidence necessary to determine fair value

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[17] *Gatenby* n 4 at 124E-F.
[18] 1962 (4) SA 395 (W) at 399H.
[19] 1979 (3) SA 713 (W) at 722E-G.
[20] Emphasis added.
[21] *Henochsberg* n 5 at 484 and the authorities there cited.

[59] An applicant who seeks relief in terms of section 49 bears the onus of proving that he is entitled to the relief which he or she seeks, and it is incumbent upon him or her to place before the Court the necessary evidence to enable the Court to decide that it would be appropriate for it to grant the order sought.

[60] Where an applicant seeks an order that the member's interest be acquired at fair value, it is required to disclose the financial position of the close corporation and the manner in which such fair value is to be arrived at, to enable the court to exercise its discretion in terms of section 49(2) or then the application must fail.[22]

[61] In *Feni*[23] Plasket J further observed that:

'As with s 36, a member of a close corporation who seeks relief in terms of section 49 bears the onus of establishing that the court should exercise its discretion in favour of ordering the disposal of a respondent's interest in the close corporation and as to the terms and conditions of that disposition, and, I would add, any other ancillary relief that may be claimed.'

[62] In her founding affidavit the applicant concedes that she has not adduced the necessary evidence as to fair value. The applicant relies on her alleged inability to gain access to financial information, in particular, lease agreements and rental invoices, to justify her failure to do so.

[63] In *Feni,* the Court excused the applicant's failure to adduce necessary evidence as to fair value as 'that evidence is not before me precisely because of the oppressive conduct on the part of the first respondent, that entitles the applicant to relief. To dismiss her application for want of evidence as to the value of the first respondent's interest – information that is not available to her because of his hijacking of the management and the business of Westondale Farming – would defeat the purpose of s 49.'[24]

[64] On 16 May 2016 at 06h59, before the founding affidavit was deposed to and prior to the present application being issued, the applicant was provided with, *inter alia*, a proposed

[22] *Feni* n 4 paras 28 and 33.
[23] *Feni* n 4 para 27.
[24] *Feni* n 4 para 33 (underlining supplied).

resolution for debate, which was subsequently passed, which addressed the manner of receiving and obtaining access to documents. On the facts set out hereinabove the applicant had possession of financial information (including, lease agreements and rental invoices) and had consistent access to such information. There is, accordingly, no justification for the applicant's failure to provide necessary evidence as to the value of the applicant's interest in the fourth respondent.

[64] I am bound to accept the version of the respondents, which clearly shows that the exceptional facts, which were present in the *Feni* case, are not present in this application. By all accounts, it would appear that the applicant was granted full and unfettered access to the financial records and documentation of Swan Lodge. The applicant's complaint regarding the failure by the respondents to grant her access thereto appears to be somewhat contrived to make out a case of exclusion or unfairly prejudicial conduct, which is not supported by even the common cause facts, nor the contemporaneous correspondence exchanged between the applicant and the respondents.

Is the bank account issue a basis upon which the applicant is entitled to section 49 relief?

[65] I now turn to deal with the applicant's complaint regarding the conduct of Swan Lodge's banking account. It is common cause that, as a signatory on the partnership accounts of Swan Lodge, the applicant at all times had access to the bank statements for those accounts. An account was opened in the name of Swan Lodge CC only in December 2014.

[66] As a nominated signatory on Swan Lodge's bank account, the applicant had a right to obtain copies of the bank statements (and account information), once she provided FNB with the requisite information required in terms of the relevant provisions of FICA, and submitted a specimen signature. Despite being repeatedly requested to do so, the applicant failed to submit a specimen signature to FNB.

[67] In October 2014, with the full knowledge of the applicant, the majority of the members of the fourth respondent duly passed resolutions to open a new bank account, and to transfer its funds from the partnership accounts, held by the applicant and third respondent, to the new account. In November 2014, the applicant impermissibly used a blank cheque that

the third respondent, as her co-signatory had signed for an unrelated purpose, in order to transfer R280, 000.00 of Swan Lodge's funds to a money market account held by the applicant and the third respondent. Because this partnership account required their joint authorisation, the third respondent was unable, without the applicant's consent, to make the funds available to pay Swan Lodge's expenses. The respondents averred that in so doing the applicant knowingly acted in direct contravention of resolutions passed by Swan Lodge in October 2014, and thereby subjected the corporation to significant financial and reputational risk. As a consequence the mortgage bond repayment was returned as unpaid.

[68] It appears that the partnership account, which was at threat of being frozen (due to the applicant ignoring requests in terms of FICA), was being used by the applicant as leverage to bargain for payment of a significant sum to the applicant, contrary to the interests of the Swan Lodge. A number of months after the funds were effectively frozen, the applicant said that she would only agree to transfer the funds in the partnership account, then R400, 000.00, 'on condition that R150, 000.00 be paid from the R400, 000.00 in part settlement of her loan account.'

[69] Without deciding whether it is indeed so, the applicant's conduct in leveraging her authority as signatory to obtain repayment of her loan account, contrary to the interests of Swan Lodge, may have constituted a breach of her fiduciary duties to the corporation.

[70] It appears that the applicant was not prevented from becoming a signatory on the new FNB account, but chose not to do so. In the circumstances there is no indication that the so-called bank account issue amounts to unfairly prejudicial or inequitable conduct as envisaged in terms of section 49.

The applicant's credibility

[71] A further ground for relief relied upon by the applicant in her founding affidavit related to a letter from which she says that it is 'clear to [her] that the fourth respondent's status as a separate entity was being abused because of the fact that the content' of the letter 'is false'. The applicant stated that she had no knowledge to whom the letter was given and that she 'came across' it during her preparation in the instant matter. It became apparent, from the allegations in the respondents' answering affidavit (supported by documentation),

that it was in fact the applicant who authored and circulated the letter. In reply the applicant did a *volte-face*, recalling, with surprising precision, the very documents which she claimed to know nothing about.

[72] A further unwarranted criticism was levelled against the respondents by the applicant for not 'dealing with' the salary to be paid to the fourth respondent. In answer, Reece confirms that it was the applicant who gave him the salary instruction. The applicant failed to deal with Reece's response in reply.

[73] The applicant either ignores these anomalies in her replying affidavit, or fails to adequately explain why the true position was misstated in her founding papers. To my mind this raises serious concerns regarding the applicant's credibility. It is of course not necessary to decide whether to reject her evidence on this basis, as the Court is only required to make a finding on the facts alleged by the respondents, together with the undisputed facts alleged by the applicant, unless the respondents' version is so implausible as to be rejected outright, which is not the case in this application.

Was the applicant marginalised or excluded?

[73] The applicant contended that in running the business of Swan Lodge, 'discussions between the respondents take place as if they were in one camp and [the applicant] in another'. This is not borne out by the minutes of the meetings, from which it is apparent that not only did the applicant fully participate, when she chose to do so, in the running of the business and in decision-making, but that there were several issues where the members were split or where the applicant formed part of the majority.

[74] One email from the applicant, in particular, gives cause for concern that the application was brought with an ulterior purpose. In the email, sent to the first respondent but addressed to the applicant's attorney, she stated as follows:

'Morning Danie So excited…I think kea is nipping straws. We are the ones to make demands now..I don't think pierre from kea knows he sent the email to me as it was addressed to Guthrie. I really want Dad's house but they are not getting away this easily…'[25]

[75] The applicant argues that the failure by the respondents' to give her a quarter share of the monthly rental received from the renting out of the residential property is because the first respondent adopted a 'vindictive attitude' towards her. This is not borne out by the correspondence emanating from the applicant, in terms of which she proposed how these funds were dealt with, which the other members accepted and which arrangement has been in place ever since.

Application to strike out and the VAT issue

[76] On 11 November 2016 the respondents delivered an application to strike out certain paragraphs of, and annexures to, the applicant's replying affidavit, on the basis that these paragraphs and annexures contain a new matter.

[77] The new matter related to allegations by the applicant concerning VAT, and the fact that the respondents had allegedly failed to take heed of the applicant's concern regarding the failure to register Swan Lodge as a VAT vendor, notwithstanding the fact that it had exceeded the threshold turnover of R1 million per annum.

[78] The applicant did not raise the VAT issue in her founding affidavit, save for, as alleged by the respondents 'relying on an obscure comment on the third page of one of the 58 comments referred to in her founding affidavit to justify doing so.' The respondents argued that if not struck out, this new matter is prejudicial because, absent an explanation or answer by the respondents, it creates the 'incorrect (unfair) impression that Swan Lodge was required to register for VAT in 2014, that the applicant raised 'the alarm about the issue' in October 2014, and that the respondents ignored her.

[79] It appears from the affidavit filed in support of the application to strike out, that the advice given to Swan Lodge, and to the third respondent, by two duly qualified professionals,

[25] Underlining added.

one of which was Reece, was that the taxable supplies did not exceed the threshold of R1 million. The taxable supplies at that time were, so the respondents say, below the threshold because the letting and hiring of the flats, a significant source of Swan Lodge's turnover, constituted an exempt supply in terms of section 12(c) of the Value Added Tax Act No. 89 of 1991. Acting on the advice received at the time, Swan Lodge did not register for VAT.

[80] The respondents have, in practical terms, effectively been afforded an opportunity to answer these allegations, and have done so in the abovementioned affidavit. In any event, I am of the view that a failure to register for VAT in the circumstances described does not constitute unfairly prejudicial conduct, nor has evidence been led by the applicant to show that the omission had an unfairly prejudicial result, as envisaged in section 49.

[81] It is therefore not necessary to deal in any detail with the striking out application, particularly given the view I take of this matter and the fact that it will in any event have no impact on the order which I intend to make.

CONCLUSION

[82] For all the reasons set out above, it is my view that the applicant has failed to discharge the onus imposed on her in terms of section 49. There is no clear evidence that the applicant has been excluded from the management of the business, nor that she has been marginalised as a result of the conduct of the respondents. I can also see no evidence that the respondents have used their greater voting powers for nefarious purposes, or in order to unfairly prejudice the applicant.

[83] It is clear that the applicant has lost confidence and trust in her siblings as her co-members in the corporation, however this, unfortunately, does not vest her with a right to withdraw as a member from Swan Lodge, or to invoke the protection provided for in terms of the provisions contained in section 49. To my mind the respondents have not acted in such a manner which prevented the applicant from enjoying a fair participation in the affairs of the corporation, and the applicant has failed to make out a case for the relief sought.

[84] In the circumstances, I make the following order:

The application is dismissed with costs, save for the costs of the chamber book application brought by the applicant, which shall be borne by the first, second and third respondents, jointly and severally, the one paying the others to be absolved.

HOLDERNESS, AJ
ACTING JUDGE OF
THE HIGH COURT

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Date(s) of Hearing:	28 November 2016 and 14 December 2016
Judgment delivered on:	14 March 2017