IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 18535/2021

In the matter between:

BUSINESS DOCTOR CONSORTIUM LIMITED	First Applicant
BUSINESS DOCTOR NOMINEES (PTY) LIMITED	Second Applicant
and	
OLD MUTUAL FINANCE (RF) (PTY) LIMITED	First Respondent
OLD MUTUAL CAPITAL HOLDING (PTY) LIMITED	Second Respondent
OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED	Third Respondent
OLD MUTUAL EMERGING MARKETS (PTY) LIMITED	Fourth Respondent
OLD MUTUAL GROUP HOLDINGS (SA) (PTY) LIMITED	Fifth Respondent
OLD MUTUAL LIMITED	Sixth Respondent
TSAKANI CLARENCE NETHENGWE	Seventh Respondent

Coram: Wille, J

Heard: 12th, 13th and the 14th of September 2022

Delivered: 11th of October 2022

JUDGMENT

WILLE, J:

Introduction

[1] This is an opposed application about the alleged minority oppression of the applicant shareholders because it is alleged that certain of the corporate respondents acted in a manner that is unfairly prejudicial to, or unfairly disregards, the interests of the applicants. The applicants are the minority shareholders in the first respondent, which is a company that operates in various country-wide branches of the corporate respondents. The applicants hold a twenty-five per cent shareholding stake in the first respondent.

[2] It is not the subject of any dispute that the fifth respondent and the fourth respondent own and control the second respondent. The second respondent holds a seventy-five per cent majority shareholding stake in the first respondent and does not trade. The third respondent is the major trading entity in the corporate respondents' group.

[3] The first respondent is a service provider to the third respondent which is a regulated life insurance company and these services are regulated by three discrete commercial agreements. The expression ‘group’ will be a reference to the corporate respondents together with their wholly-owned subsidiaries, as cited in this application unless otherwise indicated. Historically, the first respondent has invoiced the third respondent for its services in terms of various agreements concluded so as to govern the amounts to be levied.

[4] It is the applicants' case that they fall to be directly and severely prejudiced in the event that the first respondent under-charges the third respondent for the services that it renders to the third respondent.

[5] The applicants contend as such that there has been a material under-recovery of costs from the third respondent for nearly a decade. These under-recoveries are made up, *inter alia*, of the following: (a) a suite of invoices amounting to millions of rands which the first respondent issued to the third respondent and which amounts were not recovered and that this 'debt' was subsequently reversed by way of issuing credit notes against the invoices raised and, (b) further amounts yet to be invoiced by the first respondent to the third respondent which the first respondent allegedly refuses to pursue.

[6] The position is taken that the corporate respondents who were alerted to these under-recoveries have refused or neglected to take any steps to rectify these irregularities. Further, the first respondent has positively frustrated and refused to initiate any proceedings against the third respondent for the recovery of these not-insignificant amounts. The applicants advance that this amounts to minority oppression because the corporate respondents have acted in a manner that is unfairly prejudicial and unfairly disregards their interests.

[7] They say this because the first respondent's management and the board failed: (a) to invoice the third respondent in terms of the extant agreements; (b) to remedy the situation by investigating and recovering the full extent of the under-recoveries; (c) to ensure that the commercial agreements were lawfully enforced and, (d) to ensure that the running of prescription was interrupted. In addition, it is alleged that the second respondent undermined attempts to recover these under-recoveries and frustrated this resolution process and, voted

against the first respondent's board-proposed resolution[1], both of which resolutions sought to institute legal proceedings against the third respondent to interrupt the running of prescription. Further, the majority shareholder allegedly interfered in the reporting of the first respondent's annual financial statements.

Overview

[8] The third respondent is licensed as an insurer to conduct life insurance business and does so through the vehicles of its various divisions. The first respondent owns and operates certain retail branch networks, and these are staffed by a receptionist, a branch manager, financial consultants as well as in-house advisors to these divisions.

[9] The group also has a retail branch network that operates independently of the first respondent's branches. In this regard, the third respondent has numerous retail branches across the country which operate both in towns where there are branches of the first respondent and in towns where there are no branches of the first respondent.

[10] The in-house advisors are placed by the third respondent in the branches of the first respondent and occupy 'seats' at such branches from which the third respondent's divisions provide specific services such as the sale of the third respondent's insurance and savings policies. The first respondent's financial consultants also attend to the servicing of insurance policies outsourced to the first respondent. The first respondent renders invoices in respect of the services provided to the third respondent.

[1] This during June 2020 and again during August 2021.

[11] Most importantly, in return for making 'seats' in the first respondent's branches available and for servicing its insurance clients, the first respondent derives fees and remuneration from the third respondent. The provision of the aforesaid services to the third respondent and the remuneration payable to the first respondent by the third respondent is governed primarily by three discrete agreements.[2]

[12] The contracting parties to these commercial agreements are the first and the third respondents. The applicants are not parties to these commercial agreements. Moreover, the second respondent and the applicants entered into a 'relationship' agreement. This agreement, *inter alia*, deals with the pricing of services to the businesses of the broader group.

[13] Primarily, it is advanced that the third and the fourth respondent acted contrary to the understanding reached between the group and the applicants when the applicants agreed to become minority shareholders. The position is taken that the group has allowed services to be rendered to the broader business operations of the group contrary to the express provisions of the extant agreements.

[14] It is argued that the applicants would not have agreed to become a minority shareholder (in the first respondent), without a 'pricing protection' which was agreed to as part of a carefully negotiated compact to work as partners and grow the business of the first respondent. In short, the position is taken by the applicants is that the stance adopted by the first respondent and the third respondent is cynical. Besides, it is contended that this cynicism is exemplified by the activity which took place after the launching of this application.

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[2] The 'commercial' agreements.

[15] They say this, *inter alia*, because the first respondent has now undeniably conveyed to the second respondent that the third respondent is undoubtedly indebted to the first respondent.[3] Moreover, the first respondent criticised the second respondent for not supporting a resolution to enable the institution of legal proceedings to recover outstanding amounts and suggested to the second respondent that it reconsider its overall position to avoid legal proceedings.

[16] The applicants contend that the first respondent incorrectly priced the services that it rendered to the third respondent and that the pricing for the services rendered by the first respondent to the third respondent ought to have been in accordance with the pricing provisions agreed to in an agreement styled the 'relationship' agreement.

[17] In this regard, the applicants contend that a review of the first respondent's services rendered to the third respondent revealed that there had been a significant under-recovery by the first respondent from the third respondent in the following respects, namely: (a) general cost under-recovery and, (b) the branch insurance servicing cost under-recovery.

[18] Most importantly, it is not the applicants' case that the first respondent incorrectly priced the services that it rendered to the third respondent with reference to specific pricing provisions agreed to in the commercial agreements. The applicant's case is rather (as I understand it), that they seek refuge in and place reliance on the pricing terms in the 'relationship' agreement in order to contend that the first respondent has significantly under-recovered costs from the third respondent.

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[3] Now in the sum of at least R66 million.

[19] The various respondents adopt different approaches to the factual and legal issues in dispute. In general terms, the third respondent advances that the contracting parties to the 'relationship' agreement are the applicants, the first respondent and the second respondent. The third respondent is not a party to this 'relationship' agreement.

[20] Accordingly, they say that the contention by the applicants that the alleged under-recoveries, by the first respondent are underpinned by the commercial agreements, is misplaced because it loses sight of the following facts: (a) the commercial agreements regulate the contractual relationship between the first and third respondent in respect of which the applicants are not parties; (b) the pricing terms in respect of the services rendered by the first respondent to the third respondent are regulated by the commercial agreements entered into between the first and third respondents; (c) the first respondent invoiced the third respondent for the services rendered to the third respondent pursuant to the pricing terms as reflected in the commercial agreements and the third respondent has paid the for the services in terms of these invoices.

[21] In summary, they say that the 'relationship' agreement only regulates the contractual rights and obligations between its contracting parties. Put in another way, any pricing terms agreed to between the parties in the 'relationship' agreement do not bind the third respondent as the third respondent is not a party to this latter agreement.

[22] To the extent that the applicants say that they had an 'expectation' that the pricing terms as agreed between the contracting parties to the 'relationship' agreement would be implemented by the first respondent, this is denied and is not a matter that falls to be dealt with by the third respondent. Further, they say that in any event this issue cannot be the subject of any determination in these opposed motion proceedings.

[23] By way of elaboration, the third respondent advances that it would be fanciful for the applicants to contend that they had a legally enforceable expectation that the pricing terms as agreed between the contracting parties in the 'relationship' agreement would simply be implemented by the first respondent in its dealings with the third respondent.

[24] Besides, the respective companies in the group of companies are separate legal entities and operate as such and a separate legal entity within the group cannot impose its wishes unilaterally on any other separate legal entity within the group.

[25] In this regard, the 'relationship' agreement provides, *inter alia*, as follows:

'…*Where any term of this Agreement imposes any duty or obligation on an Associate of a Party, the relevant Party shall be obliged to procure performance by its Associate, failing which the Party in question shall be directly liable for the non-performance by its Associate*…'[4]

[26] Simply put, the argument is that no liability can attach to the third respondent nor does this clause seek to impose any liability for the non-performance by an associate of any party. On the contrary, it seeks to hold the party directly liable for the non-performance of its associate. Therefore, any alleged failure by the first respondent to negotiate terms in accordance with the 'relationship' agreement with the third respondent in respect of pricing terms for services to be rendered by the first respondent to the third respondent, can self-evidently not be attributed to the third respondent by holding it, as a non-party, liable for these alleged under-recoveries.

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[4] Clause 26.3 of the 'relationship' agreement.

Chronology

[27] The issue of the alleged under-recoveries was first raised by the applicants about four years prior to the launching of this application. This was at a time that the applicants were managing the business of the first respondent. The suggestion is made that this under-recovery issue was raised in the context of the applicants attempting to inflate the value of the first respondent for purposes of deliberating upon the exercise of their 'put' option. At a subsequent board meeting about a year later, the applicants reported that the third respondent had disputed the under-recovery issue and therefore disputed the claims made by the first respondent in this connection.

[28] Thereupon, the applicants advised that they intended to issue a letter of demand and they expected a response from the management of the first respondent. Further, the applicants mooted arbitration proceedings if the matter was not amicably resolved to their satisfaction. Ultimately, a letter of demand was delivered and this was followed by an *ad hoc* board meeting at which the board resolved to seek independent legal advice on a number of the disputed legal questions so as to guide its approach to resolving these disputed issues.

[29] Thereafter, the first respondent received legal advice to the effect that certain of these issues connected with the implications of the disputed under-recoveries was indicated to be a 'shareholder-reserved' matter. This was disputed by the applicants. Accordingly, it was decided that the shareholders should attempt to resolve the matter, failing which the applicants would pursue the arbitration it had previously indicated. In response, the applicants contended that certain provisions in the 'relationship' agreement superseded and trumped the commercial agreements concluded with the third respondent. Again, the first respondent resolved to seek legal advice on this issue. The first respondent received advice to the effect

that the 'relationship' agreement did not supersede the specific agreed terms of the discrete commercial agreements.

[30] Later on, in the same year, the applicants declared a dispute and demanded a formal referral to arbitration. The first respondent agreed to arbitral proceedings and the second respondent agreed to a limited aspect of the dispute being referred to arbitration before one of the arbitrators proposed by the applicants and who thereafter duly accepted the appointment.[5] A pre-arbitration meeting was scheduled by agreement between the parties for the beginning of the following year but, this meeting was cancelled at the instance of the applicants who effectively abandoned the arbitral proceedings.

[31] A few months passed during which legal advice was sought and received and at a subsequent board meeting held in the first quarter of the year it was recorded that the management of the first respondent was endeavouring to narrow down and quantify the issues in contention relating to the alleged under-recoveries.

[32] At the following board meeting, it was noted that there was still no communication from the applicants regarding the arbitral proceedings and that the board still awaited its report-back on the alleged under-recoveries from management. This prompted the applicants to deliver a letter[6], to the first respondent: (a) recording that the arbitration was to be postponed *sine die* and, (b) demanding that a shareholders' meeting be called for the purpose of recovering all amounts allegedly due by the third respondent under the 'relationship' agreement.[7]

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[5] Mr. L A Rose-Innes SC.
[6] On the 15th of May 2020.
[7] Clause 24 of the 'relationship' agreement.

[33] As a consequence a further board meeting was scheduled mid-year whereupon the second respondent invited the applicants to withdraw their demand for the meeting, but they refused to do so. It was at this board meeting that the second respondent voted against the resolution that the applicants had proposed.[8]

[34] The reasons advanced for this 'veto' vote were as follows; (a) that the board of the first respondent had not yet taken a final position on the matter; (b) that the second respondent had not been provided with a final analysis of the alleged under-recoveries, nor of the legal basis or alleged quantum and; (c) that the basis for and quantum of the proposed litigation remained an ever-moving target. In the absence of such information, the second respondent could not sensibly support immediate litigation by the first respondent against one of its biggest customers, the third respondent.

[35] Thereafter, the third respondent intimated to the first respondent that it might not be prepared to conclude new agreements with the first respondent in the event that the first respondent persisted with its under-recoveries claims, as then formulated. It was against this background that the board of the first respondent voted to attempt to negotiate a settlement with the third respondent in connection with the alleged past under-recoveries.

[36] One of the core issues engaged with was an assessment of the risk to the first respondent in the event that it elected to pursue a cost-recovery against the third respondent, thereby straining their beneficial business relationship going forward. Thus, it was decided not to continue until a 'cost committee' had made a formal recommendation to it.

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[8] The 'veto' vote.

[37] Most significantly, the board resolved that the first respondent invite the second respondent and the fourth respondent to require the third respondent to accede to the 'relationship' agreement, to which it was not a party. On legal advice received, the second respondent advised the first respondent that it could not be obliged to require the third respondent to accede to the 'relationship' agreement.

[38] As a consequence, the quantum of any claim for under-recoveries remained a hotly debated issue with management at odds with the applicants in this connection. So much so that the third respondent addressed a letter to the first respondent advising that it was not prepared to revisit historical invoices and also threatened to exit its financial arrangement with the first respondent. Furthermore, the third respondent refused to accede to the terms of the 'relationship' agreement and reiterated that it did not acknowledge any liability for the past-alleged under-recoveries on the basis that the first respondent harboured no prospect of succeeding in any of such claims.

[39] In response, the board of the second respondent adopted the position that they did not believe that there had been any cost under-recoveries and they requested to be provided with a detailed legal basis upon which the first respondent relied in claiming any historical cost under-recoveries.

[40] This all culminated in the first respondent seeking approval for the institution of legal proceedings and ultimately the second respondent declining to give its approval for these proceedings against the third respondent. The reasons for this refusal were the following: (a) that the second respondent had on numerous occasions requested the board to provide it with the necessary information to assess the merits of the alleged under-recoveries, the merits of the proposed legal proceedings and what the board considered to be in the best interests of the

first respondent; (b) that concerns were raised that suggested that there may not be a very strong basis for the institution of legal proceedings against the third respondent; (c) that the board had still not received a formal legal opinion on the prospects of success and, (d) that regarding the best interests of the first respondent, the risk of the third respondent terminating its agreements with the first respondent was indeed a significant and real concern.

Agreements

[41] The parties to the first agreement[9] are the first respondent on the one hand and essentially the third respondent (represented by its division) on the other hand. The agreement was concluded in 2010.[10] This agreement records the basis upon which the third respondent would pay for its 'occupancy' in the first respondent's branches. The purpose of the agreement was to express the agreed commercial terms between the parties and would evolve as concepts were developed, tested and better understood, after which further commercial terms could be agreed to between the parties.

[42] The commercial terms of this agreement have since not been amended and the commercial terms as expressed in the agreement remain of application. The commercial terms record an agreement reached in respect of the following: (a) the service desks in the offices of the first respondent; (b) the sales desks in the first respondent's branches; (c) the back-office rentals in the first respondent's branches; (d) the referral of third respondent's clients to the first respondent and, (e) the first respondents 'kiosks' in the third respondent's sales offices.

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[9] The 'RMM' agreement – the first agreement.
[10] The 22nd of January 2010.

[43] The pricing and payment terms agreed upon between the first and the third respondent for these services (provided by the first respondent), are set out in this agreement and the implementation thereof was as follows: (a) on a monthly basis the first respondent would calculate the quantum of the costs for which the third respondent would be liable in respect of the services rendered to it; (b) the first respondent would furnish the third respondent with a value-added tax invoice together with a spreadsheet detailing the services rendered; (c) the third respondent would verify the tax invoice against the spreadsheet and would either accept the quantum, alternatively engage with the first respondent in respect of the invoice and, (d) in the event of a dispute, consensus would be reached on the quantum of the services rendered and the costs associated therewith (and the tax invoice would be accepted or altered), in accordance with the then agreement reached.

[44] The third respondent duly paid the first respondent the amounts reflected on these tax invoices as issued or agreed. This occurred since the inception of the agreement. It is the third respondent's case that there are no non-current outstanding amounts owing to the first respondent in terms of this agreement.

[45] The second agreement is essentially a services agreement.[11] The parties to this agreement were the first respondent and the third respondent. The agreement was extended for (3) years beyond its effective date.[12] Pursuant to its initial expiry, this agreement was extended on (8) occasions thereafter and is still in force. The applicants are neither parties to this agreement, nor to any of the amendments thereto. The terms of this agreement, including the fees or remuneration payable for the services rendered were agreed pursuant to engagements and negotiation between its contracting parties.

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[11] It was concluded in 2015 and is the 'BSP' agreement - the 'second' agreement.
[12] The effective date was the 1st of June 2015.

[46] This agreement specifically contains the relevant pricing terms for the services rendered by the first respondent to the third respondent and the accounting thereof was to be achieved by way of monthly invoicing. In accordance with the pricing terms of this agreement, the first respondent and the second respondent implemented the agreement as follows: (a) on a monthly basis the first respondent would calculate the quantum of the costs payable by the third respondent; (b) thereafter the first respondent would furnish the third respondent with a value-added tax invoice reflecting such costs, together with a spread-sheet showing the calculation thereof; (c) the third respondent would pay the tax invoice if it was satisfied that the calculations therein were correct and, (d) in the event of a disagreement the third respondent would engage with the first respondent and consensus would be reached and the invoice would then be paid.

[47] Thus, it is advanced that the costs and charges reflected in these invoices have been paid and continue to be paid by the third respondent to the first respondent. Further, and most significantly, it is argued that the tax invoices rendered in terms of this agreement have been so rendered in accordance with the specific agreement terms and are also commensurate with the actual services supplied to the third respondent.

[48] The third agreement was also concluded between the first respondent and the third respondent.[13] This agreement also sets out and regulates the payment terms in respect of the services rendered by the first respondent to the third respondent. The pricing terms and the implementation of the agreement occurred in the following manner: (a) the first respondent calculated the quantum of the (2) monthly tax invoices referred to and thereafter rendered the relevant tax invoices, together with a spread sheet reflecting the calculations, to the third

[13] The 'PFA SLA' agreement was concluded in 2016 and was amended in 2017 – the 'third' agreement.

respondent; (b) on a quarterly basis a finance sub-division calculated the quantum of the quarterly tax invoices in respect of the distribution fee referred to and rendered the result of the calculations (with the accompanying spreadsheet reflecting the calculations), to the first respondent; (c) the monthly invoices and the accompanying spreadsheets were subject to review and engagement with the first respondent in respect of the quantum in the case of a dispute or query; (d) the quantum would either be accepted or altered, in accordance with the consensus and, (e) the tax invoice would be signed off on behalf of the third respondent and thereafter paid.

[49] In a similar fashion, these tax invoices would be subject to review by the first respondent and would either be accepted as correct or engaged with respect to the quantum. Again, once the parties reached an agreement on the quantum, the first respondent would issue the relevant tax invoice to the third respondent. Finally, the tax invoices were signed-off on behalf of the third respondent and paid. Similarly, it is advanced that since the inception of this agreement, the third respondent has paid all the tax invoices in respect of the services rendered to it by the first respondent. Further, it is contended that the charges were in accordance with the terms of this agreement and were commensurate with the services rendered by the first respondent.

[50] Another document upon which the applicants seek reliance is the ‘way-forward’ agreement. This document however does not constitute an ‘agreement’ and may rather be accurately styled as ‘without prejudice proposals’ to attempt to regulate the way forward.

[51] In addition, great reliance is placed on the ‘relationship’ agreement. It is not disputed that this agreement was intended to regulate the funding and management of an entirely

different entity.[14] It is so that certain of the respondents were a party to this agreement and others acceded to the terms thereof. The applicants seek to rely on this agreement to establish a 'quasi-partnership' or 'compact' between the applicants and the corporate respondents.

[52] This agreement on the face of it, by way of its terms, specifically excludes the partnership contended for by the applicants and it has a non-variation clause and a sole memorial clause. This agreement was between the applicants, the first respondent and the second respondent. Out of this agreement also arose the 'five-year-strategic plan' which was by its very nature, on a proper construction thereof, not an agreement but, merely a plan.

Remedy

[53] Section 163 of the Companies Act[15] provides, *inter alia*, as follows:

'*(1) A shareholder or a director of a company may apply to a 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 interests of, the applicant; or

(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is

[14] Old Mutual Transaction Services (Pty) Ltd (OMTS).
[15] The Companies Act, Act 71 of 2008.

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

[53] Our courts have since recognised that a substantial body of jurisprudence in relation to our previous company law regime,[16] is instructive in the proper interpretation and application of the core remedy advanced by the applicants. It seems to me that the starting point in any case involving an allegation of oppressive conduct is the fundamental principle that by becoming a shareholder, a person undertakes to be bound by the decisions of the majority, even where those decisions may adversely affect his or her rights or interests.[17]

[54] As a general proposition, courts will accordingly be slow to interfere in the management of companies and will be cautious to ensure that the wide discretion envisaged in terms of this new regime is carefully bridled. This must be so in order that the section itself is not used in an improper manner to bring about the very oppression which it seeks to prevent.[18]

[55] Undoubtedly, it is so that although the courts are now given a very wide discretion to grant just and equitable relief from oppressive or unfairly prejudicial conduct, there are certain jurisdictional requirements that fall to be established before a court's power to grant just and equitable relief is triggered. These requirements are: (a) that the particular act or omission has been committed, or that the affairs of the company are being conducted in the manner alleged; (b) that such act or omission or conduct of the company's affairs is unfairly prejudicial, unjust or inequitable to the shareholder or some part of the members of the

[16] Section 252 of the Companies Act, Act 61 of 1973.
[17] *De Souza and Another v Technology Corporate Management (Pty) Ltd and Others* 2017 (5) SA 577 (GJ) para 49.
[18] *Louw and Others v Nel* 2011 (2) SA 172 (SCA) para 31.

company; (c) that the nature of the relief that must be granted is to bring an end to the matters complained of and, (d) that it is just and equitable for such relief to be granted.

[56] A minority shareholder seeking to rely on this remedy is accordingly obligated to establish not only that a particular act or omission results in a situation which is unfairly prejudicial, unjust, or inequitable to it, but also that the act or omission itself was one which was unfair or unjust or inequitable.[19] Put in another way, a minority shareholder must establish that the particular acts or omissions complained of are oppressive or unfairly prejudicial. The onus falls squarely on the minority shareholder seeking to rely on this remedy.

[57] As a matter of pure logic, a high degree of specificity is therefore required. This includes the need to accurately and to precisely identify the specific entities that are alleged to have engaged in oppressive and unfairly prejudicial conduct, the precise conduct in which they are alleged to have engaged in, and the specific remedy required to remedy such conduct.[20]

[58] This threshold is an extremely onerous threshold to achieve in motion proceedings where the matter essentially falls to be decided on the respondents' version absent averments which can be rejected as far-fetched or clearly untenable. Accordingly, it must be so that it is not enough for a minority shareholder to show that such conduct is prejudicial or that it disregards its interests but, also that the prejudice or disregard has occurred unfairly. The test for unfair prejudice is objective.

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[19] *Garden Province Investment and Others v Aleph (Pty) Ltd and Others* 1979 (2) SA 525 (D) at 531.

[20] This falls to be achieved by primary facts and not by secondary facts.

[59] The enquiry is whether a reasonable bystander observing the consequences of the conduct would regard it as having a prejudicial effect. What is fair or unfair will depend on the context in which it is being used. This court's intervention at the shareholder level will only be appropriate where it can be established: (a) that the case in question pertains to a small company or quasi-partnership and, (b) that there exists some informal arrangement or understanding (or legitimate expectation) which has been breached.

[60] Ordinarily, the right of a shareholder to manage the affairs of the company is derived from its articles of association or the extant agreements between the shareholders. However, courts have, in limited circumstances, recognised that the informal relationship between the company's members may give rise to a legitimate expectation to participate in the company's management. Indeed, this is one of the applicants' core arguments.

Consideration

[61] I will deal with what I consider to be the most significant issues and arguments presented in this matter. The fact that I have failed or omitted to deal with any specific contention or position taken does not mean that I ignored it or failed to take it into consideration.

[62] Firstly, I will consider the position of the fourth to sixth respondents and the relief chartered against these respondents. It is advanced that absent is any factual basis for the applicants' allegations that the fourth to sixth respondents engaged in any conduct that could conceivably constitute a contravention of section 163 of the Companies Act. To bring these respondents under the umbrella of the provisions of section 163 of the Companies Act, the applicants seek to obscure the distinction between the respondent entities.

[63] By doing so, the applicants seek to avoid having to identify any specific relationship between themselves and the fourth to sixth respondents, and with this, any specific conduct in which the fourth to sixth respondents have allegedly engaged which disregards their interests and that this prejudice or disregard, has occurred unfairly.

[64] This must be viewed within the context of the mosaic of the primary case by the applicants against the second respondent which is directed at the conduct of its management and board, who are alleged to have failed to invoice the third respondent properly and to ensure that the prescription of these potential claims was timeously interrupted. The second respondent, as the majority shareholder in the first respondent, allegedly frustrated attempts to investigate, accurately report, and recover the under-recoveries.

[65] In advancing its remedy against the fourth respondent, the applicants reference the fourth respondent and the company it controls, namely the third respondent. By doing this the applicants attempt to euthanize the separate identity status of the corporate respondents and claim that the 'group' has allowed services to be rendered contrary to the provisions of the 'relationship' agreement.[21]

[66] The applicants seek to employ a strategy of blurring and obfuscating the distinct legal personality of the entities within the respondent 'group' of companies. In my view, these references to the 'group' give rise to several insurmountable obstacles, because: (a) the applicants elected to proceed on motion and the onus is thus squarely on the applicants not only to define the issues between the parties but also to place the essential evidence before the court and, (b) the 'group' as referenced by the applicants is not a distinct legal entity and it does not exercise the rights that the applicants seek to attribute to it.

[21] Clause 24 of the 'relationship' agreement.

[67] This must be so because the rights and obligations concerned in this matter accrue to the discrete specific corporate entities with which each of the relevant agreements was concluded. Put in another way, it seems to me that the applicants' entire case is predicated by references in vague and general terms to the 'group'. By way of elaboration, the applicants claim that the 'way-forward' agreement recorded an underlying agreement between the applicants and the 'group'. Ultimately, the applicants suggest that the 'group' derived some benefit from the delay in the first respondent's under-recovery from the third respondent.

[68] It seems to me that the applicants seek to impermissibly attribute the alleged conduct of certain entities within the 'group' to all other entities that fall within the group's financial enterprise. In my view, this approach is not supported by the facts because the entities within the group are separate and independent and fall to be legally treated as such.

[69] The principle of separate legal personality applies no less to wholly owned subsidiaries. Each company within a group has its own separate and distinct legal personality. This was recently confirmed in *Pepkor*,[22] and the following dictum was endorsed from the English decision in *Adams*[23], in the following terms:

'...Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities…'

[70] Besides, in the absence of proof of fraud or other improper conduct in the establishment or use of the company, a court will be loath to disregard the separate and distinct

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[22] *Pepkor Holdings Ltd and Others v AVJH Holdings (Pty) Ltd and Others* 2021 (5) SA 115 (SCA) paras 43 to 45.
[23] *Adams and Others v Cape Industries Plc* [1990] Ch 433 ([1991] 1 All ER 929) at 1019.

legal personalities of the companies. Further, as alluded to earlier, ignoring the separate legal personality of entities within the group is not sustainable given the factual matrix. The group's own 'governance framework' recognises the legal supremacy of a particular board's fiduciary duties over any duties owed to the group. The company secretary of the third to sixth respondents confirmed under oath that the various companies at all material times were separate corporate entities with separate boards of directors, each functioning in their best interests in accordance with their fiduciary duties. Significantly, this is not engaged with by the applicants.

[71] Even if I am wrong in this connection, upon a proper consideration of the various disputed allegations on the papers, I also find that the applicants have failed to demonstrate that the fourth to sixth respondents acted in concert with any of the other respondents in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicants. I say this because oppressive conduct thus implicitly connotes an element of unfairness, if not something worse.[24]

[72] The test for unfair prejudice is objective and the enquiry is whether a reasonable bystander observing the consequences of the conduct would regard it as having a prejudicial effect. What is fair or unfair will depend on the context in which it is being used.[25] A court may only intervene at the level of the shareholders when it has been established that the case in question pertains to a small company or quasi-partnership and that there exists some informal arrangement or understanding which has been breached.

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[24] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 at para [55].
[25] *De Souza and Another v Technology Corporate Management (Pty) Ltd and Others* 2017 (5) SA 577 (GJ) para [35].

[73] As a general proposition, the right of a shareholder to manage the affairs of the company is derived from the articles of association or agreements between its shareholders. The external jurisprudence to which I have been referred emphasises that the starting point is to enquire whether the conduct of which the shareholder complains was in accordance with the contractual and statutory structure created by the articles of association.

[74] This distinction between large and small companies and the limitation of equitable considerations based on a 'legitimate expectation' has been recognised by our courts. As a matter of logic, this must be proved as a fact by way of primary facts and not secondary facts. Thus, it would be difficult to prove a legitimate expectation in cases other than those involving small private companies.[26]

[75] The compact argument piloted by the applicants in the context of the factual matrix of this matter is difficult to discern. This is so because this argument is underpinned by, *inter alia*, seeking reliance on the agreements concluded between the parties. It is highly improbable that the quasi-partnership analogy could be applied because this case has less to do with the affairs of a small private company and more to do with large commercial enterprises that entered detailed contractual arrangements with the benefit of a buffet of commercial lawyers. Moreover, the applicants contend for this quasi-partnership relationship with the entire 'group' which is a far cry from the small quasi-partnership company to which our jurisprudence bears reference.

[76] It is so that the fourth respondent acceded to the 'relationship' agreement. This notwithstanding, the only obligations which the fourth respondent assumed were: (a) to ensure that one of its subsidiaries was fully funded and remained in a position where its assets at all

[26] *McMillan NO v Pott and Others* 2011 (1) SA 511 (WCC) paras [33] to [34].

times exceeded its liabilities; (b) to provide working capital to one of its subsidiaries; (c) to appoint the managing director to one of its subsidiaries and, (d) to indicate its support of the business of one of its subsidiaries.

[77] Accordingly, I do not agree that the accession to the 'relationship' agreement in these circumstances established a partnership involving the fourth respondent and the applicants. Only obligations were imposed on the fourth respondent and the 'relationship' agreement itself expressly recorded that the agreement provided for the regulation of a joint venture relationship and not a partnership. Thus, if there was factually no partnership between the applicants, the first respondent and the second respondent it would be difficult, if not impossible, to contend for a partnership between the applicants and the fourth respondent.

[78] Besides, the 'strategic' plan does not make things any easier for the applicants. This plan was not signed off by the fourth respondent and was born out of the 'relationship' agreement, which fell to be implemented by the applicants and the second respondent.

[79] As a final arrow in their bow, the applicants seek to demonstrate a relationship with the fourth respondent underpinned by correspondence. Reliance was specifically placed on a letter written before the conclusion of the 'way forward' agreement and sometime prior to the conclusion of the 'relationship' agreement. This accordingly does not help in the attempts to contend for the establishment of a quasi-partnership involving the fourth respondent.

[80] Again, even if I am wrong in this connection, the next enquiry is to determine if the fourth defendant breached any of its obligations involving the applicants and the group. The essence of the breach is formulated as follows: (a) the fourth respondent and the company it controls (the third respondent), acted contrary to the understanding reached between the group and the applicants when the latter agreed to become a minority shareholder and, (b) the group

has allowed services to be rendered to the broader group's business operations contrary to the express provisions of the 'relationship' agreement, which affords to the applicants a carefully negotiated and deliberate pricing protection.

[81] This is in the context of the factual circumstances which show that no obligations were imposed on the fourth respondent by the 'relationship' agreement. Further, as alluded to earlier, the 'relationship' agreement only provides that the services rendered by the first respondent to the broader 'group' shall be priced in accordance with its terms. Even on a liberal interpretation, this imposes an obligation on the first respondent to price its services in a particular way when it renders those services within the 'group'. However, this does not impose any obligation on the fourth respondent to ensure that the first respondent acts accordingly. Put in another way, the fourth respondent is in no manner responsible for the rendering by the first respondent of services to the broader group, nor is the fourth respondent alleged to have acquired services from the first respondent.

[82] Thus, it must be so that the 'relationship' agreement failed to confer any rights or impose any obligations on the third respondent and, consequentially the fourth respondent had the right to refuse to require the third respondent to accede to the terms of the 'relationship' agreement.

[83] Turning now to the position of the third respondent. It is so that the first respondent denied that the third respondent was liable for the balance of all the claims that fell to be pursued by the applicants on the basis of legal advice received. The first denial is related to some of the invoices issued which remained unpaid by the third respondent. A substantial invoiced amount was subsequently reversed due to the issuing of various credit notes. Further, the second denial related to invoices not yet issued by the first respondent, which invoices

should have been issued to the third respondent. The basis of these denials was rooted in the averment that there was no legal or factual basis for the recovery of such amounts from the third respondent.

[84] The second respondent has since conveyed its conditional support for the institution of legal proceedings by the first respondent (against the third respondent), in respect of a portion of these claims. It is argued that the second respondent (the majority shareholder), ought not to have undermined the first respondent's attempts to recover the under-recoveries by asserting its majority position.

[85] Further, the point is made that this approach by the second respondent is untenable and unacceptable to the applicants because it was and is conditional by nature. This is so because the authority to institute the legal proceedings was also subject to the rider that this authority would be granted only if it was in the best interests of the first respondent to so proceed.

[86] Developments have since taken place to the degree that the first respondent (in a further supplementary affidavit) sought to explain the steps that the first respondent has since taken to redress some of the disputed issues of the under-recoveries. In this supplementary affidavit, the following procedure is suggested, namely; (a) that the first respondent collates all of the relevant information and documentation relating to a portion of the claim and, (b) that the first respondent prepares a statement of claim particularising a portion of the charges to be used as a basis for settlement discussions between the parties.

[87] In this connection, a draft arbitration agreement and a draft statement of claim were attached to the first respondent's supplementary affidavit to facilitate this process envisaged, going forward.

[88] In response, the applicants contend that the first respondent now seeks to achieve what they have been calling on the company to do for the last half a decade and while the first respondent now seeks to recover the monies owing through an arbitration process, it remains apparent that the first respondent can no longer be trusted to invoice the third respondent correctly to recover that which is fully due. The simple point is made that the draft statement of claim is inaccurate.

[89] The relief sought by the applicants in the notice of motion is premised on an application under section 163 of the Companies Act, which provides for the court to grant relief from oppressive or prejudicial conduct to a shareholder or director of a company. It seems that this election was made by the applicants because they are minority holders of shares in the first respondent.

[90] Accordingly, it is difficult for me to discern how the applicants have established a case to the effect that the third respondent has committed any act or omission that is oppressive or unfairly prejudicial to the applicants as required by section 163 of the Companies Act. Despite this, the applicants seek extensive relief against the third respondent relying purely on the provisions of section 163 of the Companies Act.

[91] Notably, the applicants do not seek to invoke the derivative action provisions of section 165 of the Companies Act. This is so despite the manner in which their relief is formulated in their notice of motion. In addition, they do not seek to force a sale of their co-shareholders shares in the second respondent. Instead, the applicants seek far-ranging relief under the rubric of section 163 of the Companies Act. By way of illustration, the applicants, who have no cause of action against the third respondent for the payment of any monies, seek an order for the payment of monies by the third respondent to the first respondent.

[92] Moreover, the applicants also lay claim to an order that the third respondent should be deprived of its legal right to raise prescription as a defence to any claim made against it. If this latter relief was to be granted, the third respondent would be deprived of a defence it may have without first determining (on the evidence) whether or not there is any basis for doing so.

[93] Put in another way, any delay by the applicants in bringing their application (and any consequential effect on disregarding the third respondent's right to rely on prescription), falls to be euthanized. The court is asked to order the third respondent to pay money it disputes is owing to the first respondent, whether the first respondent's claim is subject to prescription, or not. All of this relief is under the umbrella of relief under section 163 of the Companies Act.

[94] The applicants seek an order declaring the first to sixth respondents (which includes the third respondent) to have acted in a manner that is oppressive or unfairly prejudicial to the applicants. It must be so that such an order may only be made against a party if the jurisdictional requirements as set out in section 163 of the Companies Act have been established against that party.

[95] In my view, the applicants have failed to adduce the necessary primary facts[27], to establish the required jurisdictional requirements against the third respondent. There exists a dearth of evidence to support a case made out that any act or omission by the third respondent has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the

[27] *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 at para [28].

interests of the applicants. Moreover, there exists no legal obligation on the third respondent to investigate and resolve the alleged under-recoveries.

[96] This is particularly so when the third respondent contends that there have been no under-recoveries in respect of the commercial agreements entered between it and the first respondent.

[97] Finally turning now to the position of the first and second respondents. In summary, the applicants seek an order to the effect: (a) that the first respondent should be directed, (in addition to the claims set out in the draft statement of claim), to advance all the claims said to be recoverable by the applicants; (b) that should prescription on any of the claims find application, same falls to be judicially disregarded by court order and, (c) that should the first respondent fail to achieve a composite settlement which includes all the alleged historic under-charges claimed, then the applicants would be entitled to the extra-ordinary relief that they seek in connection with the commercial agreements.

[98] It is common cause that within a few months, both the applicants and the second respondent will have a contractual option to exit the applicant's twenty-five per cent shareholding in the first respondent. The applicants seek, *inter alia*, that their claims for the alleged under-recoveries are recognised and that the commercial contracts are aligned to the disputed pricing principles in order to ensure that the value of the first respondent is fairly stated so that the applicants may be fairly compensated.

[99] It is argued by the applicants that the domino effect of this failure to invoice and recover the under-recoveries, has been unfairly prejudicial not only to the applicants but, also to the first respondent's staff, the majority of whom are black and female.

[100] The first respondent's staff depend on the accurate recording of all revenue given in that they share in the profits of the first respondent in terms of the first respondent's incentive schemes.

[101] It is the second respondent's case that there is no basis for any of the relief now, nor was there any basis for the relief sought against it when the applicants instituted these proceedings. They say that the developments that took place after the applicants instituted these proceedings do not amount to any concessions by the respondents to the effect that the applicants are or were entitled to the relief for which they pray.

[102] Put in another way, they contend that the prior withholding by the second respondent of its approval for litigation was *bona fide* and in the best interests of the second respondent. Moreover, they say that a derivative action remedy provides squarely for the requisite relief to a shareholder in the applicants' invidious position.[28]

[103] In addition, they contend that the 'alternative remedy' solution obliterates the argument chartered by the applicants in connection with the issue of prescription. It is advanced that the applicants could have (and should have), taken steps in terms of section 165 of the Companies Act some time ago when they threatened to do so.[29] The applicants were accordingly always possessed of an available remedy to procure the first respondent to pursue their alleged claims against the third respondent. This is in the form of the appropriate derivative action relief. The relief a court may grant in terms of section 163 of the Companies Act is primarily personal by nature because it is relief that addresses an alleged wrong to a

[28] As provided for in section 165 of the Act.
[29] From July 2020.

minority shareholder. Accordingly, it was submitted that section 163 of the Companies Act is not intended as a remedy to secure relief addressing a wrong to the company.

[104] This is because the remedy a court may grant in terms of section 163 of the Companies Act does not include an order authorising and directing a company to commence or pursue legal proceedings. Put in another way, where a wrong has been committed against the company and the company does not itself take steps to remedy the wrong, resulting in (indirect or derivative) harm to a shareholder, the shareholder's remedy lies in section 165 of the Companies Act and not in section 163 of the Companies Act.

[105] Section 165(1) of the Act provides, *inter alia*, that:

'...Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right...'

[106] The procedure to be adopted in terms of section 165 of the Companies Act requires: (a) the service of a demand on the company to commence or continue legal proceedings unless the company applies to the court to set the demand aside; (b) the appointment by the company of an independent and impartial person or committee to investigate the demand and to report to the board on, amongst other things, the facts and circumstances that may give rise to a cause of action contemplated in the demand, the probable legal costs, and whether it appears to be in the best interests of the company to pursue the such cause of action and, (c) that the company, within (60) days of receipt of the demand (or longer, with the leave of the court) either; (i) initiates the contemplated legal proceedings or, (ii) advises the person who made the demand that it will not do so.

[107] In the case where the response to the demand is unsatisfactory, the person who made the demand may apply to the court for leave to bring proceedings in the name and on behalf of the company. The court may grant leave only if it is satisfied that: (a) the applicant is acting in good faith; (b) the proposed proceedings involve the trial of a serious question of material consequence to the company and, (c) it is in the best interests of the company that the applicant be granted leave to commence the proceedings. The procedural and substantive requirements of this section must be met before the court may grant relief and this is for obvious good reason.

[108] By contrast, the remedies the court may grant in terms of section 163 of the Companies Act do not *per se* include orders authorising and directing the company to commence or pursue legal proceedings.[30] The procedural and substantive requirements of section 165 of the Companies Act are not merely formal by nature as they allow for the appropriate balance to be struck between the interests of the minority and the company.

[109] The company (and its general body of shareholders) is entitled to the bridle on litigation prescribed by the legislature in section 165 of the Companies Act before it is directed to institute action. This must be viewed against a very liberal interpretation of the provisions of section 163(2) of the Companies Act that may notionally permit an applicant to obtain an order directing the company to sue without those requirements being met. This would in effect deprive the company of any filtering process and would circumvent the clear legislative intention as envisaged in section 165 of the Companies Act.

[110] Accordingly, I hold the view that the core relief sought by the applicants in the form of an order authorising and directing the first respondent to institute proceedings to recover

[30] I do not express the opinion that this may never be ordered by a court.

payment of the various disputed series is not competent relief under section 163(2) of the of the Companies Act.

[111] At least partial support is found for my view in *Larret*[31] in the following terms:

'...Having gone to all this length to create such a vehicle for derivative actions, it seems to me that the legislature could never have contemplated that section 163 would allow, in effect, a derivative action on the part of a person in the position of the applicant…'

[112] Moreover, section 165 of the Companies Act allows a shareholder to bring matters to a head where the board or the majority shareholders decline to institute proceedings or are stalling. In addition, it permits an applicant who can demonstrate exceptional circumstances to apply straight to court thereby catapulting the requirement of a prior demand on the company or the requirement to give the company time to respond to the demand.[32]

[113] Besides, there is another reason why the provisions of section 165 of the Companies Act are relevant in connection with the availability of relief under section 163 of the Companies Act. I say this because the applicant's main complaint directed at the second respondent is that the latter's invocation of the veto right to prevent the first respondent from proceeding with claims against the third respondent was unfairly prejudicial to the applicants.

[114] However, the applicants have always had available a remedy designed to neutralise a majority's use of its controlling position to vote down the institution of proceedings and so bring the prejudice complained of to an end. This is the form of relief under section 165 of the Companies Act.

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[31] *Larret v Coega Development Corporation (Pty) Ltd and others* 2015 (6) SA 16 (ECG) at para [16].
[32] Section 165(6) of the Companies Act.

[115] Finally, turning now to the position of the first respondent. The focus of this complaint is that the first respondent initially regarded R183 million as being owing in respect of certain specified charges[33], but thereafter adopted the position that approximately only R66 million was owing.

[116] The core complaint levelled against the first respondent is that it failed to investigate, accurately report, and recover the under-recoveries from the third respondent. The first respondent's argument is that there is nothing oppressive or prejudicial to the applicants about the way in which the first respondent's board conducted itself since the issue of under-recoveries first arose. On this, I agree. I say this because the facts unequivocally demonstrate that there was a genuine commercial disagreement between the first respondent's management and the applicants about the computation of the under-recoveries and the approach to be taken against the third respondent given its central importance as a major client of the first respondent.

[117] Further, the applicants instituted arbitration proceedings which they subsequently abandoned coupled with various threats of litigation against the first respondent and its directors. This is after its own nominated director voted against recommending that the first respondent pursue certain of the alleged outstanding charges.[34] This then was the main curtain raiser to the institution of this application by the applicants.

[118] It was the first respondent's position that a cautious approach fell to be adopted. This was done by seeking an independent review and by attempting to get its shareholders to resolve matters amicably between themselves. Further, a 'cost committee' was appointed

[33] Defined as the 'Series 1' charges
[34] Defined as the 'Series 2' charges.

(with a representative of the applicants) to resolve matters. This was done with a view to maintaining their relationship with the third respondent so that possibly new favourable commercial agreements could be concluded with the third respondent going forward. The applicants place emphasis on the fact that the first respondent subsequently amended its view on certain of the charges owed by the third respondent. This they say *per se* amounted to a basis for a finding of oppressive conduct by the first respondent.

[119] On the contrary, it is advanced by the first respondent that adopting such an approach would misconstrue the value of the advice given in connection with one of the commercial agreements.[35] The advice received was to the effect that the first respondent and the third respondent were obliged to negotiate and agree on the cost increases. Simply put, the first respondent was not able to institute proceedings against the third respondent without this having first occurred. It was precisely for this reason that the draft statement of claim prepared on behalf of the first respondent included a prayer for relief compelling the parties to negotiate in good faith in respect of the alleged various cost increases.

[120] The applicants also hold the view that despite its own nominated representative voting in favour of recommending to the first respondent's board not to pursue the balance of the claims[36], the first respondent's decision not to do so remained and is oppressive. The first respondent simply argues that this species of commercial disagreement does not qualify as oppressive or unfairly prejudicial conduct. This they say is particularly so where the minority shareholder relinquished control willingly in exchange for R1,1 billion as part of a share-sale transaction. On this, I also agree.

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[35] Specifically, the BSP agreement.
[36] The 'Series 2' invoices.

[121] Another argument piloted by the applicants is to the effect that the first respondent has acted oppressively because it has failed to ensure that the underlying commercial agreements were aligned to the 'relationship' agreement.[37] The first respondent submits that there is no basis to find on the papers that the commercial agreements are inconsistent with the 'relationship' agreement and that the first respondent has acted oppressively or that it has unfairly disregarded the interests of the applicants.

[122] Again, I agree because at most for the applicants this amounts to a *bona fide* dispute in motion proceedings and the applicants have failed to discharge the onus of establishing that the first respondent acted in a manner falling under the umbrella of section 163 of the Companies Act. Besides, as far as the balance of the claim is concerned (as contended for by the applicants), the amounts claimed are based on genuinely disputed underlying legal questions in connection with these invoices.

[123] In any event, the factual position is that the first respondent's board resolved to refer these submissions made by the applicants to a 'cost committee' for investigation and reporting. The upshot of this was that it was resolved that these amounts did not fall to be pursued by the first respondent. The applicants also seek a declarator to the effect that the commercial agreements are to be struck down as unlawful for non-compliance with the 'relationship' agreement'. I am unable to unearth any factual basis in connection with the conduct of the first respondent, which could be declared to be unlawful in terms of section 163 of the Companies Act.

[37] Specifically, clause 24 of the relationship agreement.

[124] Moreover, these commercial agreements are not contrary to the pricing principles contained in the 'relationship' agreement, which indicates, *inter alia*, as follows:

'*…where an objective or independent market exists for the relevant service, pricing should as far as possible be based on an arms'-length market price…'*

'…if no objective or independent market exists for the relevant service then, unless otherwise agreed in the Strategic Plan, such services shall be charged at cost plus: (i) 20% (twenty per cent) in respect of infrastructure, workspace and related support services made available to Old Mutual in-house advisors; and (ii) 13,5% (thirteen comma five per cent) in respect of Old Mutual customer servicing…'

'…After the third anniversary of the Implementation Date, services may be priced on any other basis agreed by both shareholders in writing, as long as OMF is kept in a neutral position…'[38]

[125] In addition, the objective facts point to a difference of opinion as regards the amendments to some of these commercial agreements. In summary, the first respondent regarded the terms of the commercial agreements and the amendments thereto to be compliant with the agreed pricing principles and the best commercial terms that it could negotiate in the circumstances with the third respondent.

[126] These facts, in my view, certainly do not as a 'racing certainty' establish oppressive conduct on the part of the first respondent and there is a dearth of evidence to make a finding (on the papers as currently formulated) of 'unlawfulness' for being inconsistent with the provisions of the 'relationship' agreement.

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[38] Paragraphs 24.1.1, 24.1.2 and 24.2 of the 'relationship' agreement.

[127] I have dealt with most of the arguments on behalf of the applicants thus far but there are some remaining outstanding issues that bear further scrutiny. The test to be applied for relief for oppressive conduct is objective save that the element of *bona fides* demands a subjective determination. This means that the court is not required to consider each complaint in isolation and what matters is the cumulative effect of the complaints.

[128] The applicants advance that in assessing the conduct of the respondents in this matter, there are several issues that arise, against which this conduct should be measured. Firstly, is the issue of the assumption that shareholders are normally expected to abide by the laws relating to the governance of companies, including the power of the majority shareholders to determine matters within their own competence.

[129] This must be so as this is essential to the proper functioning of companies. However, while the 'supremacy' principle is relevant and applicable, it is not absolute. This principle of 'supremacy' was eloquently expressed by Rogers, J (as he then was), in *Visser Sitrus*[39] in the following terms:

'…a South African court should in my opinion take the principle of majority rule and the binding nature of the company's constitution as its starting point…'

[130] Secondly, in addition to the supremacy principle, there is often a shareholders' agreement, and perhaps other less formalised understandings among the shareholders, or between the shareholders and the company, that may be of relevance. Further, it is so that these legitimate understandings need not be formalised and on the proven facts, the parties' compact or bargain may be established. Thirdly, in analysing whether impugned conduct

[39] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 para [64].

would qualify as oppressive conduct at a board level (with reference to the conduct of directors on the one hand) and at a shareholder level (with reference to the conduct of shareholders on the other), the issue is whether the relevant conduct is both prejudicial and unfair.

[131] Significantly, because shareholders are not subject to the same fiduciary constraints as directors, a court might more readily intervene at the shareholder level, subject always to certain strict requirements. The applicants take the position that they have pursued their relief utilizing the correct remedy because the relief they ask for may be granted not only in respect of the conduct of the company but, also in respect of related persons.

[132] Further, the applicants advance that the bargain contended for, in this case, was not only negotiated with the second respondent, but it included other entities in the group and the facts show that those other entities failed to act in accordance with the bargain. This is the applicants' core argument. The applicants allege that they agreed to regulate their relationship with all the corporate respondents in terms of a common understanding, together with written agreements.

[133] Axiomatically, this relationship also included provisions imposed by law and the common law. This included the duty of the directors of the first respondent to act in accordance with their fiduciary duties and in the best interests of the first respondent. The applicants' entire case is based on the existence of this underlying bargain or compact. The applicants pursue their application for relief from minority oppression because they say the group and its proxies (including its directors and prescribed officers), have acted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards their interests.

[134] They say this because: (a) the first respondent failed to invoice the third respondent accurately in terms of three commercial agreements; (b) that this failure has given rise to under-recoveries; (c) that the first respondent failed, to accurately report and pursue the under-recoveries and, (d) that the first respondent failed to ensure that the three commercial agreements which underpin the under-recoveries, were updated lawfully and properly enforced, despite legal advice to do so.

[135] The issue emphasized at the hearing was that these failures have meant that historical claims have been subjected to prescription due to the effluxion of time and continue to prescribe. The alleged under-recoveries are contractual claims. As a general principle, debts arising under contract are due: (a) if specific enforcement is claimed, when, according to the terms of the relevant contract, payment ought to have been made and, (b) if damages are claimed, when a breach of the contract occurred. On the papers there exists a dispute as to whether or not certain claims by the first respondent against the third respondent have in fact prescribed in law due to the effluxion of time.

[136] In my view, this matters not as I have determined that the applicants were always possessed of the remedy under section 165 of the Companies Act. An application under this section would have long since interrupted the possible running of prescription against the third respondent. A complaint is made about the inaction of the first respondent but, this inaction (if it indeed occurred) could have been cured by the applicants by the timeous launching of an application in terms of section 165 of the Companies Act.

[137] In addition, several complaints are levelled against the conduct of the second respondent. These complaints bear further scrutiny. The harsh allegation is made that the second respondent's continued refusal to acknowledge the under-recoveries, was insincere

and purely strategic. I do not find that the position adopted by the second respondent (especially as these are motion proceedings) may in any manner be categorized as a deliberate attempt to undermine the minority protection afforded to the applicants in terms of the 'relationship' agreement to protect the third respondent. I say this also because, *inter alia,* the legal position regarding the legal basis for the claims for the under-recoveries remained and still is a hotly disputed issue with various opposing positions taken by the parties.

[138] I also need to deal with the position taken by the applicants that the second respondent's reliance on the 'reserved matters' clause is misplaced and wrong.[40] Notwithstanding anything to the contrary contained in the subject document, the first respondent shall not:

'*…engage in, agree to, perform or undertake any Reserved Matter - unless shareholders holding at least 75% of the ordinary shares in OMF shall have agreed thereto in writing in one or more written instruments signed by them or on their behalf, and the powers of the Board shall be limited accordingly…*'[41]

[139] The institution or defence of any legal action above a certain threshold amount is one such reserved matter. This litigation falls squarely above this threshold determination and accordingly the position maintained is that the second respondent has a veto power by virtue of the reserved matters clause. On the contrary, the applicants contend that properly construed this clause does not prevent the first respondent from instituting proceedings against the third respondent without the second respondent's approval. In my view, this is precisely why the applicants should have sought refuge in section 165 of the Companies Act.

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[40] In the 'Memorandum of Incorporation'.
[41] Clause 24 of the Memorandum of Incorporation – Reserved Matters.

[140] By way of elaboration, the applicants say that the reserved matters clause in the circumstances is itself in conflict with the common understanding of the parties because the first respondent stood to be remunerated in accordance with the pricing provisions that were agreed. Thus, the argument is that invocation of the reserved matters clause in these circumstances seeks to thwart these agreed principles and is accordingly, oppressive. I disagree.

[141] I say this because of my views on the alleged bargain or compact contended for on behalf of the applicants. The applicants argue for a partnership between the group and the applicants essentially in accordance with the terms of the 'way-forward' agreement and in accordance with the 'strategic' plan. The core argument is a 'context' argument about mutual understanding. As a rule, the subsequent conduct of parties can only be an interpretative tool, but not so as to contradict the terms of the contract or contracts as originally agreed between the parties.[42] I have dealt in detail in this judgment why in my view the compact or bargain argument finds no place in this case as we are dealing with a host of totally discrete juristic entities.

[142] Ultimately, I turn to the alleged misrepresentation of the financial affairs of the first respondents as contended by the applicants, allegedly by way of a material understatement of inventory in the annual financial statements of the first respondent. Further, it is advanced that the first respondent's management and their audit committee convinced the external auditors not to include the accrual of certain disputed invoices which ultimately led to a contingent asset note being included for the second year in a row.

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[42] 'Unidroit' Principles of International Commercial Contracts, 2016, Article 4.3 at page 142.

[143] The contingent asset note indicates as follows:[43]

'…There is a disagreement between the parties, which was previously disclosed in the Director's (sic) report, as to the accuracy of cost recoveries from the wider Old Mutual Group for the period 1 November 2014 to 31 December 2019. Whilst the parties have agreed there will be an amount due to the Company, the amount has not been agreed and if agreement cannot be reached, the matter will go to arbitration. As such, the contingent asset has been noted…'

[144] In summary, it is argued that certain invoices reflected in the management accounts were de-recognised as revenue when the first respondent's management issued credit notes for a large portion of the under-recoveries. Therefore, this de-recognition effectively meant that the first respondent's management held the belief that the first respondent had no prospect of recovering a large portion of the under-recoveries with a nil effect on their income statement, which severely impaired the first respondent's value.

[145] Again, this is in turn inextricably linked to the argument on prescription in terms of which it is advanced that the second respondent must have appreciated that the longer that it delayed the institution of legal proceedings, the more the claims would have been prescribed, to the benefit of its parent.

[146] If this did amount to oppressive conduct (which is disputed on the papers), the main complaint reverts inevitably back to the prescription complaint. This prescription 'debt' fell to be interrupted by a timeous launching of an application in terms of section 165 of the Companies Act.

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[43] In the first respondent's Annual Financial Statements for the 2019 financial year.

Conclusion

[147] For these reasons, I find that the group entities are not essentially part of the same financial enterprise and that the agreements referenced by the applicants do not support the argument for a compact or a bargain. Thus, the group has not in any manner failed to adhere to the common understanding with the applicants on which it ostensibly agreed to expand the first respondent's business as a minority shareholder.

[148] More particularly, in my view, there existed no unequivocal common understanding as contended for by the applicants rooted in the agreements referenced and there existed no legitimate expectation in favour of the applicants.

[149] Even if I am wrong on this score, I am unable to find on these papers (as currently formulated) that the business of the first respondent was operated in a manner contrary to those values upon which the applicant's business dealings with the first respondent were predicated and accordingly that the applicants were subjected to any minority oppression.

[150] I also hold the view that the applicants incorrectly relied on a particular species of allegedly oppressive or unfairly prejudicial conduct and the relief that the applicants could have and should have pursued (if any), given the factual matrix, was a remedy under section 165 of the Companies Act.

[151] I have not dealt to any large extent with portions of the remaining relief formulated in the notice of motion on behalf of the applicants. This is because I was advised at the end of the hearing that this relief would no longer be pursued by the applicants and would be abandoned. As far as the amendment proceedings are concerned, the applicants abandoned

their belated notice of intention to amend at the inception of the hearing and tendered the wasted costs of and incidental to these proceedings.

Order

[152] In all the circumstances, the application must fail, and the following order is granted, namely:

1. That the application is dismissed.

2. That the first and second applicant, jointly and severally, the one paying the other to be absolved shall be liable for the costs of and incidental to the application (including the costs of two counsel where so employed) on the scale as between party and party, as taxed or agreed.

3. That the first and second applicant, jointly and severally, the one paying the other to be absolved shall be liable for the costs of and incidental to the notice of intention to amend (including the costs of two counsel where so employed) on the scale as between party and party, as taxed or agreed.

E. D. WILLE
Judge of the High Court
Cape Town

COURT APPEARANCES

On behalf of the applicants appeared Advocate Gauntlett SC (KC) and with him Advocate Butler SC and, Advocate Solik.

(Instructed by Bernadt Vukic Potash and Getz Attorneys).

On behalf of the first and seventh respondents appeared Advocate Rose-Innes SC and with him Advocate Kelly.

(Instructed by Webber Wentzel Attorneys)

On behalf of the second respondent appeared Advocate Muller SC and with him Advocate Reynolds.

(Instructed by Bowman Gilfillan Attorneys)

On behalf of the third respondent appeared Advocate Sholto-Douglas SC and with him Advocate Cassim.

(Instructed by Walkers Attorneys)

On behalf of the fourth respondent, the fifth respondent and the sixth respondent appeared Advocate Marcus SC and with him Advocate Mbikiwa.

(Instructed by Bowman Gilfillan Attorneys)