

SOUTH AFRICA / JUDGMENT

Parry v Dunn-Blatch and Others (394/2022) [2024] ZASCA 19 (28 February 2024) [2024] ZASCA 19

COURT

Supreme Court of Appeal

BEFORE

Molemela, Saldulker, Makgoka, Hughes, Mali

CASE / FILE NUMBER

394/2022

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FLYNOTES:

COMPANY – Oppressive or prejudicial conduct – Locus standi –
Director
and shareholder resigning from one of two companies –
Dispute over company's entitlement to receive compensation
from second company for utilisation of intellectual property –
Contended that use of copyright without compensation
was
oppressive conduct – Section 163 does not preclude director
from launching an application – Dispute of fact
whether
parties had intended that compensation be payable – Director
not establishing that impugned conduct falls within
that envisaged
in section – Companies Act 71 of 2008, s 163.
THE
SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 394/2022

In the matter between:

ALICE MARY PARRY APPLICANT and ROSALENE SYBIL DUNN-BLATCH FIRST RESPONDENT
ITRISA NPC SECOND RESPONDENT TRADSA (PTY) LTD THIRD RESPONDENT

Neutral Citation: Parry v Dunn-Blatch and Others (394/2022)

[2024] ZASCA 19 (28 February 2024)

Coram: MOLEMELA P, SALDULKER, MAKGOKA and HUGHES JJA and MALI AJA

Heard: 6 September 2023

Delivered: 28 February 2024

Summary: Company law – section 163 of the Companies Act 71 of 2008 – whether the applicant established any act or omission having a result that is oppressive or unfairly prejudicial to, or that unfairly disregards her interests.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Opperman and Mdalana-Mayisela JJ and Meersingh AJ sitting as a court of appeal):

The application for special leave to appeal is dismissed with costs.

Molemela P (Saldulker, Makgoka and Hughes JJA and Mali AJA concurring):

Introduction

[1] This litigation emanates from an acrimonious relationship between two directors and shareholders of a small private company. The applicant, who is a shareholder and director of that company, alleges that the first respondent, as a director and co-shareholder in the same company, has exercised her powers as a director in such a manner as to oppress, unfairly prejudice or disregard her interests unfairly.

Salient factual matrix

[2] In 1996, the applicant, Ms Alice Mary Parry (Parry), and the first respondent, Ms Rosalene Sybil Dunn-Blatch (Dunn-Blatch), who were friends at that stage, set up and registered two companies: a private company known as TRADSA (Pty) Ltd (TRADSA) and a non-profit company known as International Trade Institute of South Africa (ITRISA). The latter was set up for purposes of offering distance learning programmes, training courses, workshops and

project-based consultancy in the field of international trade. Parry and Dunn-Blatch were directors in ITRISA and directors with equal shareholding in TRADSA. It is common cause that TRADSA was the vehicle through which Parry and Dunn-Blatch were to hold their intellectual property rights as co-authors of the educational course materials (literary works) to be used by ITRISA. It is common cause that, pursuant to the registration of these companies, Parry and Dunn-Blatch assisted in the management of ITRISA and were thus in its employ and received salaries, and that a portion of their salaries was meant to compensate them for the intellectual property which they owned through TRADSA. Thus, ITRISA did not compensate TRADSA directly for utilizing its intellectual property.

- [3] On 31 May 2012, Parry resigned as a director of ITRISA in order to pursue other interests but remained as a director and co-shareholder of TRADSA. Correspondence exchanged between Parry and Dunn-Blatch leading to Parry's resignation reveals that there was a discussion pertaining to the conclusion of an agreement that would regulate the relationship between ITRISA and TRADSA and the former's usage of the latter's intellectual property. Although the tenor of further correspondence reveals a deterioration

in their relationship, on 10 June 2015, Parry and Dunn-Blatch deposed to an affidavit in terms of s 26(12)(a) of the Copyright Act 98 of 1978 (the license agreement) with a view to formalising the relationship between ITRISA and TRADSA in respect of the use of the intellectual property. When concluding this agreement, they acted in their personal capacities and as the sole co-directors of TRADSA.

- [4] In terms of the licence agreement, Parry and Dunn-Blatch: (a) agreed that they were the joint authors of the copyright works (clause 4.1);
- (b) confirmed and assigned their ownership of the copyright in the copyright works to TRADSA and simultaneously confirmed the existence of the exclusive licence that ITRISA had to use the copyright works (clause 4.2); [1] (c) confirmed that, since 2009, all the course material used by ITRISA had borne a notice reflecting TRADSA as the copyright owner of the copyright works pursuant to the intention, at all relevant times, that the ownership of the copyright in the copyright works was to vest in TRADSA and that TRADSA, in turn, would license to ITRISA, the right to use its course materials (clause 5.6); (d) such course material was 'periodically lodged with the Department of Education Accreditation Authority and in more recent years with the Council for Higher Education, and in the case of the aforesaid more Advanced Qualification with the Financial Advisory and Intermediary Services Act (FIAS) arm of the Financial Services Board and can be confirmed on the websites of these regulatory bodies' (clause 5.7); (e) assignment of all copyrights in the copyright works to TRADSA, from the date each item of work was created and to the extent that a retrospective assignment may not be competent then with effect from the date of the licence agreement (clause 6); and (f) confirmed the exclusive licence granted by TRADSA to ITRISA to use the copyright works (clause 7).

- [5] Due to Parry's insistence on TRADSA's entitlement to receive compensation from ITRISA for the utilisation of TRADSA's

intellectual property, a dispute arose which prompted Parry to approach the Gauteng Division of the High Court, Johannesburg (the

high court) for relief. The relief[2] sought by Parry was premised on s 163 of the Companies Act 71 of 2008 (the Companies Act).[3] In her affidavit, Parry asserted that Dunn-Blatch had, in her running of the business affairs of ITRISA, engaged in oppressive or unfairly prejudicial acts that disregarded the interests of TRADSA insofar as TRADSA was being deprived of compensation due to it by ITRISA for the latter's use of TRADSA's intellectual property. Dunn-Blatch, ITRISA and TRADSA (jointly referred to as 'the respondents') were cited as the first, second and third respondents, respectively. Only the first and second respondents opposed the application. Dunn-Blatch deposed to the answering affidavit in her personal capacity and also as the duly authorised representative of the second respondent. It bears mentioning at this stage that s 163 of the Companies Act, in essence, provides that a shareholder or a director of a company may apply to court for any form of relief if any act or omission of the company or a person related to the company has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

- [6] Parry asserted that, on a plain reading of the licence agreement, there is no mention of it being royalty-free. It is this fact that she sought be varied in one of the prayers in her notice of motion. Relying on e-mail correspondence exchanged between herself and Dunn-Blatch between 2012 and 2013, Parry stated that a royalty-free licence agreement was never contemplated by the parties.

She averred that the licence agreement was nothing more than an assignment of copyright pursuant to s 26(12)(a) or s 22(3) of the Copyright Act 98 of 1978 (the Copyright Act) and was not intended to regulate royalties. She emphasised that the fact that the licence agreement was silent on royalties did not mean that she and Dunn-Blatch had waived TRADSA's right to royalties. She averred that TRADSA had never granted ITRISA consent to update or modify its course materials and therefore, any adaptations over which ITRISA claimed to have ownership were unauthorised.

- [7] In her opposition of Parry's application, Dunn-Blatch contended that the jurisdictional requirements of s 163 had not been met which, according to her, rendered the relief sought in the Notice of Motion 'incompetent'. She raised five points in limine in this regard. First, that since Parry had freely and voluntarily concluded the licence agreement three years after she resigned as a director of ITRISA, the court should not, in the face of material disputes of facts, conclude a new agreement for the parties under the guise of s 163. Second, that any claim Parry might have had, had long prescribed because, on Parry's own version, she had known of the alleged claim from 2012 but had only launched the application six years later. Third, that 'insofar as there is any harm, it is harm inflicted on [TRADSA] and not on Parry'. She asserted that insofar as any claim might exist, such claim vested in TRADSA and not Parry. She contended that Parry, as a shareholder and director of TRADSA, did not

have the necessary locus standi to apply for the relief that she sought. Fourth, that the copyright that Parry relied on was no longer in the same form and substance as it was in 2015 when the licence agreement was concluded. She averred that the course material used by ITRISA had been substantially updated and modified by ITRISA's employees and were thus adapted into new substantive copyright works in respect of which the copyright became vested in ITRISA. Fifth, that the relief sought by Parry impermissibly required the court to impose new contractual terms on ITRISA and TRADSA.

- [8] Dunn-Blatch also contended that ITRISA's financial standing was such that the operations of the company would have to be terminated if it were to pay any royalties to TRADSA. She contended that ITRISA was fulfilling an important education purpose for the community, and if it was forced to pay royalty fees to TRADSA, that would result in its demise, and its object as a non-profit company would therefore be defeated.
- [9] The high court concluded that the impugned conduct of Dunn-Blatch, ITRISA, and TRADSA 'was manifestly oppressive and unfairly prejudicial and unfairly disregards the interests of Parry as a director and shareholder' of TRADSA. It held that Parry had established a case entitling her to the relief envisaged in s 163(2). It granted the relief she had sought but referred the question of the royalty rate to be paid by ITRISA to TRADSA, to trial. The respondents were aggrieved by that decision and were granted leave by this Court to appeal to the full court.
- [10] During oral arguments in the full court, it was contended on behalf of ITRISA that since ITRISA was a non-profit company, Parry, as its incorporator, was prohibited, by virtue of the provisions of item 1(3) of Schedule 1 of the Companies Act, from receiving a dividend from TRADSA in circumstances where the origin of the dividend is derived from a payment made by ITRISA to TRADSA. It was submitted that even though there are certain exceptions to item 1(3), Parry did not satisfy any one of them.
- [11] It was contended on behalf of Parry that the payment of compensation for the use of TRADSA's literary works would fall within the exceptions stipulated in sub-item 1(3) because first, it would be in accordance with the provisions of a bona fide licence agreement and would therefore be in fulfilment of a legal obligation. Second, because the licensed rights to the intellectual property were utilised by ITRISA for purposes of advancing its stated object, a royalty expense did not equate to payment of income or the transfer of assets of the non-profit company but rather was an expense to be accounted for before income. It was therefore submitted that this point in limine fell to be dismissed as Parry had properly brought her claim to vary the terms of the licence agreement to give effect to the true intentions of the parties within the prescripts of s 163 of the Companies Act.
- [13] Furthermore, the full court stated that the fact that Dunn-Blatch was a director and shareholder of TRADSA, did not overcome the difficulty that the proper applicant in a claim based on a wrong allegedly done to TRADSA, was prima facie TRADSA itself. The full court said:

‘Section 163 of the Companies Act should not be interpreted so as to unjustifiably circumvent the Foss v Harbottle doctrine and its purpose. This doctrine provides that the proper plaintiff in an action in respect of a wrong alleged to be done to a company is, prima facie, the company.

...

Thus, we conclude that insofar as a cause of action might exist (which we do not find), it vests in TRADSA and not in Parry and is not premised on section 163. We conclude that the Court a quo ought to have dismissed the application by virtue of Parry’s lack of locus standi.’[4]

[14] Aggrieved by the decision of the full court, Parry applied to this Court for special leave to appeal against the judgment and order of the full court. Its application was referred for oral argument as envisaged in s 17(2)(d) of the Superior Courts Act 10 of 2013 (Superior Courts Act), and the parties were cautioned to be prepared, if called upon to do so, to argue the merits of the application.

Issues

[15] Before us, the same arguments raised in the full court were reiterated on behalf of Parry and the respondents. It was further submitted on behalf of Parry that the full court had failed to consider that the licence agreement was no more than an assignment of copyright pursuant to s 22(3) of the Copyright Act and thus did not regulate the issue of royalties. It was argued that TRADSA had never given up its right to royalties and was therefore entitled to royalties from ITRISA, thus justifying an order varying the terms of the licence agreement. It was argued that these were special circumstances that warranted the granting of special leave to appeal.

[16] This being an application for special leave to appeal this Court has to determine whether, in addition to reasonable prospects of success, there are special circumstances that merit a further appeal. If that is answered in the affirmative, the principal issue is whether Parry had made out a case entitling her to relief in terms of s 163 of the Companies Act. Ancillary to that issue was whether the ownership of the copyright works still vested in TRADSA despite the adaptations and modifications made to the course material over the years.

Special leave to appeal

[17] As mentioned, Parry’s application for special leave to appeal is before us because it was referred for oral argument as envisaged in s 17(2)(d) of the Superior Courts Act. It is well-established that an applicant for special leave to appeal must show, in addition to the ordinary requirement of reasonable prospects of success, that there are special circumstances which merit a further appeal to this Court. It is also settled law that the existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave.[5] Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of

justice; or that the matter is of very great importance to the parties or to the public.[6] The determination as to whether special circumstances exist to grant special leave, is intertwined with the merits of the application such that it is not feasible to consider it discreetly.

Ownership of the copyright in terms of the licence agreement

[18] It is clear from the provisions of clause 4.2 of the licence agreement that the intellectual property in respect of which ITRISA was granted an exclusive licence, vests in TRADSA. Assignment of ownership of copyrights can only be effected in terms of s 22(3) of the Copyright Act. In terms of this provision, assignment of copyright ownership must be in writing and signed by or on behalf of the assignor; thus, the consent of the owner is required.[7] That being the case, updates to the course material cannot, by virtue of the adaptation of the material alone, assign ownership of the intellectual property to another entity. Considering the strictures of the Copyright Act regarding the assignment of copyrights, Dunn-Blatch's contention that the course material vested in ITRISA because the latter had, over the years, substantially updated such material, cannot pass muster. I, therefore, cannot agree with the full court's conclusion that the adaptations made to TRADSA's course material had the effect of vesting the copyright in ITRISA or jointly, in TRADSA and ITRISA. In my view, there were no undisputed primary facts that supported this finding. On the contrary, Parry asserted that the allegation that the intellectual property vested in ITRISA was inconsistent with the licence agreement. This was because the licence agreement expressly stated that since 2009, 'all' the course material issued by ITRISA had acknowledged TRADSA's copyright. Parry asserted that the 'amendments to the intellectual property was not extensive as Dunn-Blatch would have this court believe'.

The nature of the s 163 remedy

[19] Section 163(1) of the Companies Act provides:

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

[20] Case law on the meaning of the phrase 'unfairly prejudicial' in the context of s 252 of the Companies Act of 1973 (the 1973 Act) and the terms 'oppressive' in s 111bis of the Companies Act of 1926 (1926 Act) largely continues to apply to the s 163 remedy because of similarities

in wording. However, s 163 now includes the unfair disregard of an applicant's interests and is therefore widely couched than its predecessors. In terms of s 5(2) of the Companies Act, a South African court may take cognisance of foreign law in interpreting s 163.[8] It must also be borne in mind that the South African oppression remedy was originally based on the equivalent provisions in English

law.[9] English decisions are accordingly relevant to the interpretation of s 163.

[21] It is clear from its text that through s 163 (also known as 'the oppression remedy'), a shareholder or director of a company is specifically accorded the right, and therefore has locus standi, to challenge oppressive or prejudicial or disregarding conduct, whether by that company or of a 'related person'. [10] The s 163 remedy may be granted if a shareholder or director of a company or of a related person is oppressive or unfairly prejudicial

to the applicant or unfairly disregards his or her interests. An act of omission of a director may amount to an act or omission of the company where it is done in breach of a fiduciary duty of a company.[11]

[22] In circumstances where the applicant complains under s 163(1)(a) of an act or omission of a company or related person, the focus is on the result of the act or omission. In terms of subsec 1(b), the right to challenge the impugned conduct is accorded if oppression or unfair prejudice or unfair disregard for the applicant's

interests has occurred as a result of the manner in which the business of the company (or a related person) has been carried out.

The term 'business of the company' is undefined in the Companies Act. It is significant that, in *Scottish Co-operative v Meyer and Another* (Scottish Co-operative), [12] the English court, addressing itself to the phrase 'oppression in the conduct of the business' as envisaged in s 210 of that country's Companies Act of 1948 (which is a provision equivalent to s 163 of our Companies Act), remarked that 'oppression

under section 210 may take various forms. It suggests, to my mind, . . . a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members'.

[23] In *Livanos v Swartzberg and Others* (Livanos), [13] the court deciding an application premised on s 111bis of the 1926 Companies Act, found that in secretly forming another company which competed with the business of their company, the respondent shareholder and director was guilty of conducting the affairs of the company in a manner which was unfair and thus oppressive to the applicant shareholder and director. Given the text of the provision, the business of the company may be conducted oppressively through omission, where, for example, the directors do nothing to defend its interests when it ought to take some action.[14]

In terms of sub-sec 1(c), the right to challenge the impugned conduct is granted if the powers of a director or prescribed officer of a company, or a related person are being exercised oppressively or unfairly prejudicial to, or in unfair disregard of the interests of the aggrieved applicant.

Cassim et al opine that this ground will be particularly useful where the relevant exercise of power by a director or prescribed officer amounts to neither the 'conduct of the business of the company' nor an 'act or omission of the company or a related person'.^[15]

[24] In each of the three scenarios pertaining to sub-sec 1(a),(b) or (c) as described above, the shareholder must show that he or she has been adversely affected by the impugned conduct complained of. Thus, to succeed in obtaining relief in terms of s 163, the applicant must prove to the court that the relevant conduct complained of was oppressive, or unfairly prejudicial or unfairly disregards the applicant's interests. Reverting to the facts of this case, Parry therefore had to establish that:

- (a) any act or omission of TRADSA or 'a related person' has had a result that is oppressive or unfairly prejudicial to or that unfairly disregards her interests as the applicant; or
- (b) the business of TRADSA or a related person, is being or has been carried on or in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards her interests; or
- (c) the powers of Dunn-Blatch, as a director of TRADSA are being or have been exercised oppressively, unfairly prejudicially or in a manner that disregards her interests.

Did Parry have locus standi to invoke the s 163 remedy?

[25] As mentioned before, Dunn-Blatch claimed that Parry did not have locus standi to invoke the s 163 remedy. It was contended on the respondents' behalf that where the conduct complained of by the shareholder results in a loss in respect of which the company has a claim of its own, then that shareholder cannot rely on his or her reflective loss unless he or she is able to allege and prove that the loss he or she suffered is not a loss in respect of which the company also has a claim. Thus, the proper applicant in respect of a claim alleging that a wrong was done to TRADSA, was TRADSA itself and not Parry, so it was contended. It was argued that the fact that the relief sought was a payment to TRADSA and not Parry

also illustrated that the wrong was done to TRADSA and not to Parry. For the reasons set out in the succeeding paragraphs, I disagree with this contention.

[26] It is evident that Parry premised her application on s 163(1) in general terms and did not pigeon-hole it by categorizing the impugned act or omission under item (a), (b) or (c) of sub-sec 1. In my view, in order to succeed, she must show that the conduct of the nature envisaged in (a), (b) or (c) is not only oppressive or prejudicial or disregards her interests, but also that this occurred unfairly.^[16] The court is, in terms of s 163(2), granted a wide discretion to craft an order to appropriately address or cure any oppressive,

unfairly prejudicial or unlawfully disregarded act or omission suffered by an applicant at the hands of a respondent.[17] In my view, the very fact that a court may, in terms of s 163(2)(h), and not in the setting of a derivative action envisaged in s 165 of the Companies Act, grant an aggrieved shareholder an order varying or setting aside a transaction or an agreement to which the company is a party and compensate the company or any other party to the transaction or agreement shows the fallacy of Dunn-Blatch's contention that only TRADSA could be the proper applicant in the matter.

[27] It is clear from the papers that Parry considered ITRISA's use of TRADSA's copyright (through Dunn-Blatch) without compensation as oppressive conduct. She pointed out that Dunn-Blatch was unfairly benefitting from that arrangement, because ITRISA was paying her remuneration from income derived through the usage of TRADSA's intellectual property. She described Dunn-Blatch's entitlement to receive remuneration as 'an inequitable situation' which was prejudicial to her. She asserted that under the circumstances, it was only fair that the licence agreement be varied to include a clause entitling TRADSA to receive compensation for ITRISA's usage of TRADSA's works. She averred that by refusing to agree to vary the agreement, Dunn-Blatch was unfairly disregarding her interests as a co-shareholder, which was unfairly prejudicial to her. She asserted various measures in which the impugned conduct could be remedied in

order to achieve a fair result, which included the variation of the licence agreement to so as to include a compensation-payment clause.

[28] Delpont in his work *Henochsberg on the Companies Act*[18] postulates that acting without the knowledge and concurrence of the director in apparent conflict with the duties of that director, is oppressive and, under the circumstances also prejudicial to shareholders. Notably, Parry brought the application in a dual capacity as both a shareholder and a director of TRADSA. Similarly, she cited Dunn-Blatch in a dual capacity as a shareholder and director of TRADSA. Notably, Parry asserted that Dunn-Blatch owed a duty to TRADSA, and Dunn-Blatch's failure to act in TRADSA's

interests had resulted in its business being carried out in a manner that was prejudicial to her.

[p251 para 15.] In my view, the breach of fiduciary duty that Parry deprecated falls under oppressive and prejudicial conduct envisaged by Delpont above. It also falls within the range of oppressive and prejudicial conduct referred to in *Scottish Cooperative* and *Livanos* judgments in the preceding paragraphs.

[29] The oblique argument that Parry had no locus standi because none of the respondents fall within the definition of 'a related person' in relation to TRADSA, is a red herring and has no merit. The respondents plainly fail to take into account the effect of the conjunction 'or' before the phrase 'a related person' in s 163(1), and that an applicant can locate the impugned conduct in s 163(a), (b) or (c) against the categories of persons mentioned in that sub-section, or a related person. The reference to Dunn-Blatch is clearly not on the basis of her being a related person.

[30] It is clear that on its proper reading, s 163 does not preclude Parry from launching an application based on s 163(1), because she has made various allegations which describe conduct falling squarely within the purview of that provision. Parry would therefore be entitled to an order in terms of s 163(2) if she succeeded in establishing that the refusal of Dunn-Blatch, qua director, to vary the licence agreement amounts to conduct envisaged in s 163(a) or (b) or (c) and that such impugned conduct had an adverse effect on her interests. [19]

[31] In particular, s 163(1)(c) stipulates that an aggrieved shareholder may invoke the s 163 remedy if 'the powers of a director or prescribed officer of the company, or a person related to the company' have been exercised oppressively or unfairly prejudicially or in unfair disregard of the aggrieved shareholder's interests. I specifically refer to this subsection because it is clear from various averments made by Parry that she berates Dunn-Blatch's conduct, not only on the basis that she is a director of ITRISA, but also on the basis that she, as a director of TRADSA, owes fiduciary duties to TRADSA. She complains that Dunn-Blatch puts ITRISA's interests above those of TRADSA for her own personal benefit, thereby disregarding her (Parry's) interests. (Emphasis added.) This could not be clearer than in the following extracts from her papers. In the founding affidavit, Parry said:

'[Dunn-Blatch] was aware that upon my resignation as a director I would no longer derive a benefit from [ITRISA's] use of the intellectual property and despite my numerous attempts to reach an agreement which would rectify the prevailing situation, she refused in the capacity as a director and shareholder of [TRADSA], and through the medium of [ITRISA], to vary the inferred terms and as a result, unfairly disregards the interests of TRADSA and thus, my interests.

...

I thus submit that as a result of [Dunn-Blatch's] conduct in refusing to vary the inferred terms, [TRADSA's] interests and my interests in [TRADSA] are being disregarded and as a result I am being prejudiced. [Dunn-Blatch] is using her position as director and shareholder of TRADSA to benefit [ITRISA].'

In her replying affidavit, Parry inter alia stated the following:

'As a shareholder of [TRADSA] I derive no benefit from the use of the intellectual property by [ITRISA]. Dunn-Blatch, however, is able to receive a salary through the use of the intellectual property and therefore derives a benefit from such use. Therefore, due to the prevailing circumstances, Dunn-Blatch is in a beneficial position and is able to extract a maximum benefit from the use of the intellectual property without paying for such use, and as a consequence, this has resulted in an inequitable situation between the shareholders of [TRADSA] and is causing prejudice to me.' (Emphasis added.)

- [32] In contending that Parry lacked locus standi to invoke s 163 remedy in the high court, reliance was purportedly placed on the applicability of the *Foss v Harbottle*[20] rule. The essence of that doctrine is that any loss suffered by the company must be recovered by the company itself and not by any of its shareholders. As mentioned in *Grancy Property Ltd v Manala and Others (Grancy)*,[21] a substantial body of case law on the import of s 252 of the 1973 Act shows, in material respects, that provision (ie s
- 252) is the previous equivalent of s 163 of the Companies Act.[22] In *Standard Bank of South Africa Ltd v Neugarten and Others*,[23] (which was approved in *Neugarten and Others v Standard Bank of South Africa Ltd*),[24] the court pronounced itself in relation to s 226 of the 1973 Companies Act. It said that the purpose of that provision was ‘to prevent directors or managers of a company acting in their own interests and against the interests of the shareholders by burdening the company with obligations which are not for its benefit but are for the benefit of another company and/or for the benefit of its directors and/or managers’. The remedy under s 163 is aimed at achieving the balancing of the interests of all shareholders and directors.
- [33] In *Grancy*,[25] relying on a dictum in Lord Denning’s judgment in *Scottish Co-operative*,[26] and having concluded that s 163 was the equivalent of s 226 of the 1973 Companies Act, this Court held that s 163 must be construed in a manner that will advance the remedy it provides rather than to limit it. Such an approach is consonant with the objectives of s 7 of the Companies Act, which include balancing the rights and obligations of shareholders and directors within the company and encouraging the efficient and responsible management of companies. Denying the remedy granted by legislation to an aggrieved shareholder would obviously have a chilling effect on the Companies Act’s efforts to balance the rights and obligations of all stakeholders. Insofar as it would negate the objects of that Act, it would be wrong in law.
- [33] As stated before, Dunn-Blatch relied on the rule in *Foss v Harbottle*[27] for her contention that Parry did not have locus standi to invoke the remedy set out in s 163 of the Companies Act and submitted that such a cause of action can only be pursued by TRADSA. This contention is at odds with the available body of jurisprudence which attests that a shareholder’s remedy for oppressive conduct is nothing new. It was first introduced in our company law with the promulgation of an amendment[28] of the Companies Act 46 of 1926 in 1952, which introduced s 111bis.
- [34] Reliance on the *Foss v Harbottle* rule is misplaced, in my view. This Court has comprehensively explained the applicability of this rule in *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others (Hlumisa)*. [29] It will therefore serve no purpose to attempt to rehearse or restate that principle in this judgment. Suffice it to mention, however, that *Hlumisa* concerned a claim by shareholders of a company against its directors and auditors for damages allegedly suffered as a result of the diminution in the value of the shareholders’ shares. This Court concluded that the shareholders’ claim was essentially for reflective loss,[30] (in other words reflective only of the losses suffered by the company and

therefore recoverable by the company itself) and held that the company, rather than the shareholders, were the proper plaintiffs in respect of a claim against the directors. It is of significance that, in that judgment, this Court acknowledged that there are exceptions to the Foss v Harbottle principle. It also observed that '[i]n the present case there is no hint by the appellants of a derivative claim and no assertion of oppression by the majority of shareholders. . .'.^[31] (Emphasis added.) The Hlumisa

judgment

is clearly distinguishable.

[35] As mentioned before, this Court has already cautioned that s 163 must be interpreted in a manner that advances rather than limits the remedy.^[32] I see no reason why the Foss v Harbottle rule, which has been relaxed over the years, should serve as a bar to the invocation of the s 163 remedy. This is especially so because the remedy is available even in instances where the interests of the applicant, and not necessarily his/her rights, have been affected. Interests are wider than rights and include equitable

considerations.^[33] Under the circumstances, denying an applicant the right to invoke the remedy on the grounds of a lack of locus standi in circumstances like the present would defeat the very purpose for which the remedy has been granted. It is worth noting that, in instances where the applications were dismissed on account of the applicant having failed to establish the oppressive conduct, the courts did not consider such a failure to have a bearing on locus standi. In *Gent and Another v Du Plessis*,^[34] the remedy was denied to a shareholder not because of a lack of locus standi in terms of s 163, but on the basis that the shareholder had 'failed to show that the majority shareholder's conduct towards him was oppressive or unfairly prejudicial or that his interests had been unfairly disregarded'. It seems to me that respondents conflate the failure of Parry to prove her case with absence of locus standi.

[36] If the cause of action vested only in TRADSA, as was held by the full court, this would result in an absurd result that TRADSA would never be able to launch such an application because of the deadlock between Parry and Dunn-Blatch both as equal shareholders and co-directors. I am of the view that a restrictive approach would thwart the stated purpose of the Companies Act, namely balancing the interests of shareholders and directors and encourage the efficient and responsible management of companies as contemplated in s 7 thereof. It follows that the finding of the full court on the aspect of locus standi is erroneous and therefore cannot stand. However, for reasons that will presently become clear, this finding has no bearing on the overall outcome of this application, for an appeal lies against the substantive order made by a court and not the reasons for

judgment. I consider next whether Parry has established the oppressive or unfair or prejudicial act or omission on the part of

any of the respondents.

Has Parry, on undisputed facts, established the impugned conduct complained of?

[37] When considering an application premised on s 163, a court must satisfy itself about (a) the existence of the impugned conduct by way of a positive act or omission; and (b) that the relevant conduct was either oppressive, or unfairly prejudicial or unfairly disregards the interests of the applicant. In this matter, each shareholder holds 50% of the shares. It is notable that the predecessors of s 163 granted the oppression remedy as a mechanism for the protection of minority shareholders. However, in *Benjamin v Elysium Investments (Pty) Ltd and Another*,^[35] the court granted relief to a shareholder who shared voting control equally with another shareholder. In my view, nothing precludes this Court from coming to the assistance of an aggrieved shareholder under similar circumstances.

[38] I noted that several applications were adjudicated by the courts even in instances where the shareholders had equal shareholding, as is the case in this matter.^[36] The fact that Parry is not a minority shareholder is of no moment, in my view, because the remedy in terms of s 163(1) is available to directors and shareholders alike. A businesslike approach to the s 163 remedy demands that the remedy be available to all companies,

including quasi-partnership^[37] ones. If any provision of the Companies Act or a document in terms of that Act read in its context, can be reasonably construed to have more than one meaning, it must prefer the meaning that best promotes the spirit and purpose as set out in s 7 of the Companies Act and will best improve the realisation and enjoyment of rights established by that Act.

[39] A plethora of authorities have shown that, for applicants to be entitled to relief pursuant to an application predicated on s 163, they must point out the nature of the impugned conduct and establish that the conduct in question is oppressive or unfairly prejudicial or unfairly disregards his, her or its interests. It is not the motive for the conduct complained of that the court must look at but the conduct itself.^[38] This Court in *Louw and Others v Nel*,^[39] stated as follows in relation to the remedy set out in the provisions of s 252 of the 1973 Act, the predecessor of s 163:

‘The combined effect of subsections (1) and (3) is to empower the court to make such order as it thinks fit for the giving of relief, if it is satisfied that the affairs of the company are being conducted in a manner that is unfairly prejudicial to the interests of a dissident minority. The conduct of the minority may thus become material in at least the following two obvious ways. First, it may render the conduct of the majority, even though prejudicial to the minority, not unfair. Second, even though the conduct of the majority may be both prejudicial and unfair, the conduct of the minority may nevertheless affect the relief that a court thinks fit to grant under ss 3. An applicant for relief under s 252 cannot content himself or herself with a number of vague and rather general allegations, but must establish the following: that the particular act or omission has been committed, or that the affairs of the company are being conducted in the manner alleged, and that such act or omission or conduct of the company's affairs is unfairly prejudicial, unjust or inequitable to him or some part of the members of the company; the nature

of the relief that must be granted to bring to an end the matters complained of; and that it is just and equitable that such relief be granted. Thus, the court's jurisdiction to make an order does not arise until the specified statutory criteria have been satisfied.'

It is therefore important for the applicant to adduce clear evidence in order to merit the granting of the relief foreshadowed in s 163.

[40] In her replying affidavit, Parry complained that Dunn-Blatch was receiving a benefit in the form of a salary facilitated through the use of intellectual property belonging to TRADSA while she received no benefit at all, hence her invocation of the s 163 remedy for the licence agreement to be varied to include a clause entitling TRADSA to receive compensation for the course material used by ITRISA. Unfortunately for Parry, the licence agreement is silent on the issue of payment of any compensation for the copyright-protected material owned by TRADSA.

[41] Furthermore, there is a dispute of fact as to whether the parties had always intended that compensation be payable for the utilisation of the literary works owned by TRADSA. Parry annexed e-mail correspondence to her founding affidavit to bolster her assertion that it had always been their common intention, with Dunn-Blatch, for TRADSA to charge a royalty fee for the latter's use of its (TRADSA's) course material. Unfortunately, the emails Parry considers helpful in providing context to the common intention to include the payment of compensation for ITRISA's use of TRADSA's intellectual property do not unequivocally convey that common intention. At best, the correspondence reveals a vacillation on this aspect. For instance, in one of the e-mails authored in January 2012, Dunn-Blatch stated that 'when ITRISA is on a more sustainable footing, it will pay a licensing fee for the use of the materials to TRADSA'. In response to that e-mail, Parry seemed to agree.

[42] In her answering affidavit, Dunn-Blatch denied the existence of a common intention for the granting of a royalty-free intention. She stated:

'We agreed that the license would be a royalty free license for the simple reason that [ITRISA] does not generate sufficient funds that would enable it to pay a royalty fee.

Use of the course material by [ITRISA] has always been on the basis of a royalty free licence, in circumstances where it is evident from Annexure RB1 hereto . . . it is common cause that ITRISA has never been profitable and as presently capitalized is unlikely in the future to be [so].'

[43] Dunn-Blatch attached an email authored by Parry to her answering affidavit, dated 25 February

2012. This e-mail, inter alia, raised a concern regarding the revenue which TRADSA expected to receive from royalties and the resultant cost implications. Two draft agreements were attached to that e-mail. In the first draft agreement, ITRISA is referred to as the assignor and copyright owner and one of the clauses provides that TRADSA will pay ITRISA an amount of R75 000.00 as consideration for assignment of the rights, title and interest in the work. In the second draft, TRADSA is referred to as the licensor and copyright owner, and a

clause stipulates that TRADSA, as licensor, would waive ITRISA's obligation to pay royalties until such time as it was in a financial position to do so. None of these draft agreements were signed. In her replying affidavit, Parry admitted that the draft agreements were attached to her email but disavowed any discussion of the contents thereof.

[44] Parry asserted that both herself and Dunn-Blatch had always intended to receive royalties for the utilisation of their intellectual property but had never implemented this. Notably, in her

replying affidavit she acknowledged that 'I agreed that the licence agreement would be a royalty-free agreement while I was still employed at [ITRISA]. Since then, I have attempted to vary this inferred term as it has resulted in undue prejudice to me'.

Unfortunately for her, the e-mails exchanged do not provide any clarity on the compensation issue. They were in any event exchanged

two and a half years before the signing of the licence agreement. They attest to the increasing mistrust between Parry and Dunn-Blatch

and a general deterioration of their relationship, followed by an impasse. At one instance, Dunn-Blatch sent an e-mail stating:

'Your stance of late has made me realise that it would be extremely risky- while I am at the helm of ITRISA, to activate TRADSA. You could sell your share to some other entity with no interest in ITRISA and that could seriously jeopardise our operation.'

[45] The e-mail exchange provides no clarity on whether or not there was a common intention for a royalty fee to be payable. Therefore, it is of no assistance in providing any context relating to the utilisation of the exclusive license granted to ITRISA or the material known to those who drafted the licence agreement. What is evident is that the acrimony stretched beyond the date of signature of the licence agreement.

[46] It bears mentioning that it is always open to the parties to an agreement to change the contractual terms as they wish, if they are so inclined. Where there is a refusal by one party to do so, a court, considering an application to vary the terms of the agreement, must always tread carefully so as to ensure that it does not end up making a contract for the parties other than the one they in fact made. It is axiomatic that varying the terms of the licence agreement in the manner suggested by Parry automatically imposes certain financial obligations on ITRISA. This is a step that can only be taken if there is clear evidence justifying it.

- [47] On both Parry and Dunn-Blatch's versions, the conclusion of the licence agreement was triggered by a possible sale of the business of ITRISA to a third party. It is odd that Parry would, for three years from her resignation in 2012, complain about the non-payment of compensation for intellectual property and yet omit to see to the inclusion of this critical royalties' clause in the licence agreement; she signed the licence agreement without any objection.
- [48] In her founding affidavit, Parry admitted that she and Dunn-Blatch harboured 'an intention that [TRADSA] would be able to negotiate compensation payable to it if the business of [ITRISA was] sold to a third party'. It must be accepted that, insofar as she chose to sign the licence agreement in its current form, she acquiesced to the non-inclusion of a royalties clause. It is telling that in her founding affidavit, she conceded that it can be inferred from the agreement that no consideration is payable to TRADSA for the use of its literary works. Parry cannot now contend for the varying of the agreement that she voluntarily signed on the basis that it is oppressive or unfairly prejudicial or unfairly disregarded her interests. In this regard, the following dictum in *Irvin and Johnson Ltd v Oelofse Fisheries Ltd; Oelofse v Irvin and Johnson and Another*[40] is apposite:

'But it is idle to contend that the conduct complained of amounted to oppression. Oppression is something done against a person's

will and in his despite. It is not something done with his acquiescence or consent, and still less something done with his co-operation. He chose voluntarily to risk the position in which he finds himself.'

- [49] It is evident from the discussion in the preceding paragraphs that the court's jurisdiction to grant the relief envisaged in s 163 only arises once all specified criteria set out in that provision have been satisfied. I have already alluded to the existence of factual disputes on material issues. Such disputes are incapable of resolution on the papers and could only have been decided after oral evidence had laid bare all the circumstances under which the alleged oppression, unfair prejudice and unfair disregard of interests are based. In my view, these disputes were foreseeable, given the acrimonious e-mail exchange both before and after the conclusion of the licence agreement in 2015. These factual disputes pose an insurmountable hurdle for the granting of an order on the papers.
- [50] The upshot is that Parry had failed to establish that the business of TRADSA is being or was carried on, or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregarded her interests, or, that any act or omission of TRADSA, has had a result that is oppressive or unfairly prejudicial, or disregards her interest, or that Dunn-Blatch exercised her powers as a director of TRADSA in a manner that unfairly disregards her interests as is required by s 163(1) of the Companies Act. Put differently, Parry had not established that the impugned conduct falls within that envisaged

in s 163(1)(a), (b), or (c). The full court, accordingly, correctly upheld the appeal.

[51] Given this finding, the granting of relief envisaged in s 163(2) of the Companies Act does not arise. It is therefore unnecessary to deal with the argument regarding the prescription point, the appropriateness of the order varying the terms of the licence agreement or whether the payment of royalties would flout the provisions of item 1(3) of Schedule 1 of the Companies Act. It follows that there is no reason for this Court to tamper with the full court's order which replaced the order of the high court with an order dismissing the appeal with costs. In my opinion, apart from the fact that there are no prospects of success, there are no special circumstances that warrant the hearing of a further appeal. Therefore, the application for special leave to appeal must fail. As regards costs, there is no reason to deviate from the general rule that costs follow the result.

[52] In the result, the following order is granted:

M B MOLEMELA

JUDGE OF APPEAL

Appearances:

For applicant:

R Willis (with B Jackson)

Instructed by:

Rademeyer Attorneys, Johannesburg

Honey Attorneys, Bloemfontein

For first and second respondents: P M Cirone

Instructed by:

Kisch IP, Johannesburg

Phatshoane Henney Attorneys, Bloemfontein.

[1] Clause 4.2 reads: 'confirm, pursuant to the provisions of Section 22(3) of the Copyright Act 98 of 1978, and hereby reduce to writing the assignment by each of us of the copyright in the works referred to in 4.1 above to Tradsa,

with effect from the date on which we respectively created them; and likewise confirm further the exclusive licence granted by Tradsa to ITRISA to use such works for purposes of the distance learning and other training programmes ITRISA has offered since 1996, and to enable ITRISA to obtain accreditation of such learning programmes by the relevant regulatory authorities.'

[1] Clause 4.2 reads:

‘confirm, pursuant to the provisions of Section 22(3) of the Copyright Act 98 of 1978, and hereby reduce to writing the assignment by each of us of the copyright in the works referred to in 4.1 above to Tradsa,

with effect from the date on which we respectively created them; and likewise confirm further the exclusive licence granted by Tradsa to ITRISA to use such works for purposes of the distance learning and other training programmes ITRISA has offered since 1996, and to enable ITRISA to obtain accreditation of such learning programmes by the relevant regulatory authorities.’

[2] In the high court, the following relief was sought: ‘(1) That the following inferred terms of the licence agreement between [TRADSA] and [ITRISA] be deleted:

- (a) that [ITRISA] does not need to account to [TRADSA] for the use of the intellectual property;
- (b) that no consideration is payable to [TRADSA] for the use of the intellectual property; and
- (c) that compensation for the use of the intellectual property would be payable to [TRADSA] if [ITRISA] were disposed of to a third party and this third party would continue to use the intellectual property.

(2) That the following terms are included in the licence agreement between [TRADSA] and [ITRISA]:

- (a) that [ITRISA] accounts to [TRADSA] for all use of the intellectual property, including all revenue derived from the use of the intellectual property whether directly or indirectly;
- (b) that compensation is payable by [ITRISA] to [TRADSA] for the use of the intellectual property by [ITRISA] from a date of not less than 3 years from the date of this application and for all future use of the intellectual property as follows: (i) 15% of gross revenue accruing to [ITRISA] from the use of the intellectual property in [ITRISA’s]: · Distance learning programme; · Training courses and workshops; and · Project-based consultancy. (ii) 80% of gross revenue accruing to [ITRISA] from the use of the intellectual property in: · Sub-licence agreements with third parties, which generate royalty payments or other revenue to

[ITRISA]; · Manuals, examination papers and other materials, which are sold to or via third parties in hard copy or electronic format, and do not form part of the sub-licence agreement.

(3) That a record system is established to ascertain the gross revenues as categories in (2)(b), and that the revenue amounts are verified by an independent auditor;

(4) That if [ITRISA] is disposed of to a third party, the licence agreement for the continued use of the intellectual property will be renegotiated between [ITRISA] [TRADSA] and the third party;

(5) That [ITRISA] obtains [TRADSA’s] prior written consent before sub-licensing the intellectual property to any third parties or selling manuals, examination papers and other materials which allow the use of the intellectual property by any third party;

- (6) That [Ms Parry] and [Ms Dunn-Blatch] as equal shareholders in [TRADSA], enter into an agreement regarding the payment of dividends from revenue received from the compensation paid by [ITRISA];
- (7) That [TRADSA] is compensated for use of the intellectual property by [ITRISA] from a date of not less than three years preceding the date of this application on the same terms as set out in paragraph (2) above;
- (8) That [Ms Dunn-Blatch] and [ITRISA] bear the costs of this application if opposed. . .’

[2] In the high court, the following relief was sought:

‘(1) That the following inferred terms of the licence agreement between [TRADSA] and [ITRISA] be deleted:

- (a) that [ITRISA] does not need to account to [TRADSA] for the use of the intellectual property;
- (b) that no consideration is payable to [TRADSA] for the use of the intellectual property; and
- (c) that compensation for the use of the intellectual property would be payable to [TRADSA] if [ITRISA] were disposed of to a third party and this third party would continue to use the intellectual property.

(2) That the following terms are included in the licence agreement between [TRADSA] and [ITRISA]:

- (a) that [ITRISA] accounts to [TRADSA] for all use of the intellectual property, including all revenue derived from the use of the intellectual property whether directly or indirectly;
- (b) that compensation is payable by [ITRISA] to [TRADSA] for the use of the intellectual property by [ITRISA] from a date of not less than 3 years from the date of this application and for all future use of the intellectual property as follows:
 - (i) 15% of gross revenue accruing to [ITRISA] from the use of the intellectual property in [ITRISA’s]:

- Distance learning programme;
- Training courses and workshops; and
- Project-based consultancy.

(ii) 80% of gross revenue accruing to [ITRISA] from the use of the intellectual property in:

- Sub-licence agreements with third parties, which generate royalty payments or other revenue to [ITRISA];
- Manuals, examination papers and other materials, which are sold to or via third parties in hard copy or electronic format, and do not form part of the sub-licence agreement.

- (3) That a record system is established to ascertain the gross revenues as categories in (2)(b), and that the revenue amounts are verified by an independent auditor;
 - (4) That if [ITRISA] is disposed of to a third party, the licence agreement for the continued use of the intellectual property will be renegotiated between [ITRISA] [TRADSA] and the third party;
 - (5) That [ITRISA] obtains [TRADSA's] prior written consent before sub-licensing the intellectual property to any third parties or selling manuals, examination papers and other materials which allow the use of the intellectual property by any third party;
 - (6) That [Ms Parry] and [Ms Dunn-Blatch] as equal shareholders in [TRADSA], enter into an agreement regarding the payment of dividends from revenue received from the compensation paid by [ITRISA];
 - (7) That [TRADSA] is compensated for use of the intellectual property by [ITRISA] from a date of not less than three years preceding the date of this application on the same terms as set out in paragraph (2) above;
 - (8) That [Ms Dunn-Blatch] and [ITRISA] bear the costs of this application if opposed. . . '
- [3] Section 163 of the Companies Act 71 of 2008 (the Companies Act), under the heading 'Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company', provides 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 oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.
 - (2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including— (a) an order restraining the conduct complained of; (b) an order appointing a liquidator, if the company appears to be insolvent; (c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131 (4)(a) apply; (d) an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement; (e) an order directing an issue or exchange of shares; (f) an order— (i) appointing directors in place of or in addition to all or any of the directors then in office; or (ii) declaring any person delinquent or under probation, as contemplated in section 162; (g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;

(h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement; (i) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine; (j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation; (k) an order directing rectification of the registers or other records of a company; or (l) an order for the trial of any issue as determined by the court.

- (3) If an order made under this section directs the amendment of the company's Memorandum of Incorporation— (a) the directors must promptly file a notice of amendment to give effect to that order, in accordance with section 16(4); and (b) no further amendment altering, limiting or negating the effect of the court order may be made to the Memorandum of Incorporation, until a court orders otherwise.

(4)'

- [3] Section 163 of the Companies Act 71 of 2008 (the Companies Act), under the heading 'Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company', provides 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 oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.
- (2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including—
- (a) an order restraining the conduct complained of;
 - (b) an order appointing a liquidator, if the company appears to be insolvent;
 - (c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131 (4)(a) apply;
 - (d) an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;

- (e) an order directing an issue or exchange of shares;
- (f) an order—
- (i) appointing directors in place of or in addition to all or any of the directors then in office; or
- (ii) declaring any person delinquent or under probation, as contemplated in section 162;
- (g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;
- (h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;
- (i) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;
- (j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;
- (k) an order directing rectification of the registers or other records of a company; or
- (l) an order for the trial of any issue as determined by the court.
- (3) If an order made under this section directs the amendment of the company's Memorandum of Incorporation—
 - (a) the directors must promptly file a notice of amendment to give effect to that order, in accordance with section 16(4); and
 - (b) no further amendment altering, limiting or negating the effect of the court order may be made to the Memorandum of Incorporation, until a court orders otherwise.
- (4)'
- [4] Paragraph 38 and 40 of the full court's judgment.
- [5] *Cook v Morrison and Another* [2019] ZASCA 8 (SCA); [2019] 3 All SA 673 (SCA).
- [6] *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986
- (2) SA 555 (A) at 564H–565E; see also *Director of Public Prosecutions: Gauteng Division, Pretoria v Moabi* [2017] ZASCA 85; 2017 (2) SACR 384 (SCA) para 21.
- [7] Section 22(3) of the Copyright Act 98 of 1978 provides as follows: 'No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sublicense, the exclusive sublicensor, as the case may be.'

[7] Section 22(3) of the Copyright Act 98 of 1978 provides as follows:

‘No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sublicense, the exclusive sublicensor, as the case may be.’

[8] Section 5(2) of the Companies Act provides that: ‘5. General interpretation of Act

(1) . . .

(2) To the extent appropriate, a court interpreting or applying this Act may consider foreign company law.

(3) . . .’

[8] Section 5(2) of the Companies Act provides that:

‘5. General interpretation of Act

(1) . . .

(2) To the extent appropriate, a court interpreting or applying this Act may consider foreign company law.

(3) . . .’

[9] The s 163 remedy also closely resembles s 241 of the Canada Business Corporations Act, RSC 1985 c. C-44 thus, resort may be had to Canadian case law relating to that provision.

[10] In terms of s 2 of the Companies Act, a related person is ‘2. Related and inter-related persons, and control

(1) For all purposes of this Act- (a) an individual is related to another individual if they- (i) are married, or live together in a relationship similar to a marriage; or (ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity; (b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2); and (c) a juristic person is related to another juristic person if- (i) either of them directly or indirectly controls the other, or the business of the other, as determined in

accordance with subsection (2); (ii) either is a subsidiary of the other; or (iii) a person directly or indirectly controls each of them, or the business of each of them, as determined

in accordance with subsection (2).

(2) For the purpose of subsection (1), a person controls a juristic person, or its business, if- (a) in the case of a juristic person that is a company-

- (i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3(1)(a); or (ii) that first person together with any related or inter-related person, is-
 - (aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or (bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board; (b) in the case of a juristic person that is a close corporation, that first person owns the majority of the members' interest, or controls directly, or has the right to control, the majority of members' votes in the close corporation; (c) in the case of a juristic person that is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust;

or (d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a),

- (b) or (c). . .'

[10] In terms of s 2 of the Companies Act, a related person is

'2. Related and inter-related persons, and control

(1) For all purposes of this Act-

(a) an individual is related to another individual if they-

(i) are married, or live together in a relationship similar to a marriage; or

(ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity;

(b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2); and

(c) a juristic person is related to another juristic person if-

(i) either of them directly or indirectly controls the other, or the business of the other, as determined in

accordance with subsection (2);

(ii) either is a subsidiary of the other; or

(iii) a person directly or indirectly controls each of them, or the business of each of them, as determined

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(2) For the purpose of subsection (1), a person controls a juristic person, or its business, if-

- (a) in the case of a juristic person that is a company-
 - (i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3(1)(a); or
 - (ii) that first person together with any related or inter-related person, is-
 - (aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or
 - (bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;
- (b) in the case of a juristic person that is a close corporation, that first person owns the majority of the members' interest, or controls directly, or has the right to control, the majority of members' votes in the close corporation;
- (c) in the case of a juristic person that is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust;

or

- (d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a),
- (b) or (c). . .'

[11] F H I Cassim et al Contemporary Company Law 3 ed (2023 reprint) (Contemporary Company Law) at 1028; *Stewarts (Brixton) Ltd* [1985] BCLC 4 at 8; *Civils 2000 Holdings (Pty) Ltd v Black Empowerment Partner Civils 2000 (Pty) Ltd* [2011] ZAWCHC 6; [2011] 3 All SA 215 (WCC).

[12] *Scottish Co-operative v Meyer and Another* 1958

(3) A.E.R. 66 (*Scottish Co-operative*) at 71; *Benjamin v Elysium Investments and Another* 1960

(3) SA 467 (E) at 476; *Livanos v Swartzberg and Others* 1962

(4) SA 395 (*Livanos*) at 398; *Grancy Property Ltd v Manala and Others* [2013] ZASCA 57; [2013] 3 All SA 111 (SCA); 2015 (3) SA 313 (SCA) (*Grancy*) para 22; *Strategic Partners Group (Pty) Ltd and Others v The Liquidators of Ilima Group (Pty) Ltd (in liquidation) and Others* [2023] ZASCA 27; [2023] 2 All SA 658 (SCA) para 26.

[13] *Livanos* at 399; see also *Scottish Co-operative* at 71.

[14] *Scottish Co-operative* at 367.

[15] *Contemporary Company Law* at 1030.

- [16] Grancy para 32.
- [17] *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Share Block Ltd and Others* [2017] ZACC 15; 2017 (7) BCLR 916 (CC); 2017 (5) SA 9 (CC) para 28.
- [18] *P Delpont Henochsberg on the Companies Act 71 of 2008 Vol 2 Issue 30* (2023) at 574(24) – 574(25).
- [19] In passing, it can be note that the interpretation of ‘interests of members’ under the oppression remedy granted in terms of the English Companies Act of 2006 encompasses not only interests derived from membership, although they must be reasonably connected to such. See *Gamlestaden Fastigheter AB v Baltic Partnership Ltd v Baltic Partners Ltd*
- [2007] UKPC 26, [2007] Bus LR 1521.
- [20] *Foss v Harbottle* [1843] EngR 478; (1843) 67 ER 189; (1843) 2 Hare 461. This case was the genesis of the rule against claims for reflective loss and is referred to in subsequent cases, such as *Prudential Assurance Co Ltd v Newman Industries Ltd (No*
- 2) [1982] 1 Ch 204; [1982] 1 All ER 354 (HL), in terms of which the principle was refined, exceptions were developed and the rule was also relaxed as against the development of the law in general. See *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* [2020] ZASCA 83; [2020] 3 All SA 650 (SCA); 2020 (5) SA 419 (SCA) (Hlumisa) fn 30.
- [21] *Grancy Property Ltd v Manala* [2013] ZASCA 57; [2013] 3 All SA 111 (SCA); 2015 (3) SA 313 (SCA) (Grancy).
- [22] *Ibid* para 22.
- [23] *Standard Bank of South Africa Ltd v Neugarten and Others* 1988
- (1) SA 652 (W) at 658F-G.
- [24] *Neugarten and Others v Standard Bank of South Africa Ltd* 1989
- (1) SA 797 (A) at 802A-C.
- [25] Grancy para 26.
- [26] *Scottish Co-operative*.
- [27] Hlumisa para 34.
- [28] See s 90 of the Companies Amendment Act of 1926.
- [29] Hlumisa para 34.
- [30] *Ibid* para 38.
- [31] *Ibid*.
- [32] Grancy para 26.

[33] Contemporary Company Law at 1024.

[34] Gent and Another v Du Plessis [2020] ZASCA 184 para 10, 17-20.

[35] Benjamin v Elysium Investments (Pty) Ltd and Another 1960

(3) SA 467 (E); see also Livanos op cit fn 9.

[36] See Livanos ibid, where the court found, on the basis of undisputed facts, that the applicant had showed oppressive conduct on the part of the respondent.

[37] According to Contemporary Company Law at 1025: 'A quasi-partnership company (or owner-managed company) usually involves a small private company that is formed on the basis of an agreement, an understanding or an intention that the shareholders will generally all be directors and participate in the management of the company, for instance, because the return on investment is to take the form of directors remuneration rather than dividends on shares'.

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[38] See, for example, Livanos at 399H; Garden Province Investment v Aleph (Pty) Ltd 1979 (2) SA 525 (D) at 531; Grancy para 27.

[39] Louw and Others v Nel [2010] ZASCA 161; 2011 (2) SA 172 (SCA); [2011] 2 All SA 495 (SCA) para 23.

[40] Irvin and Johnson Ltd v Oelofse Fisheries Ltd; Oelofse v Irvin and Johnson and Another 1954

(1) SA 231 (E) at 243A-B.

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