

SOUTH AFRICA / JUDGMENT

Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others (GSJ) [2012] ZAGPJHC 233; [2013] 1 All SA 603 (GSJ); 2013 (2) SA 331 (GSJ) (16 November 2012)

[2012] ZAGPJHC 233

COURT

South Gauteng High Court, Johannesburg

BEFORE

D S S Moshidi

CASE / FILE NUMBER

2012/00994

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REPORTABLE

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 2012/00994

DATE:16/11/2012

In the matter between:

PEEL, JOSEPH EDWARD (JNR).....First Applicant

PEEL, JOSEPH EDWARD (SNR).....Second Applicant

PANDELA, BONISIWE DUDUZILE.....Third Applicant

QUARI, GILLIAN.....Fourth Applicant

and

HAMON J&C ENGINEERING (PTY) LTD.....First Respondent

HAMON SOUTH AFRICA (PTY) LTD.....Second Respondent

HAMON & CIE (INTERNATIONAL SA).....Third Respondent

DELVAUX, PHILIPPE..... Fourth Respondent

CHAUKE, SHIRLEY.....Fifth Respondent

VAN DER BOORN, JO..... Sixth Respondent

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] This is a novel matter in that it requires the determination of the issue whether the relief sought by the applicants correctly and properly falls within the ambit of the provisions of sec 163 of the Companies Act No. 71 of 2008. The application is also unique in that the basis thereof is not about what traditionally would occur in a company in which the applicants are involved as shareholders or directors.

[2] In the notice of motion the applicants seek relief in the following terms:

“1. Directing that the second respondent transfer its shares held in the first respondent to the applicants or their nominee with effect from 31 December 2011;

That the second applicant, alternatively the applicants, further alternatively anyone or more of the applicants, pay to the second

respondent the sum of R7 000 000.00 less the wasted expenditure in the sum of R2 465 394.86 within seven days of the granting of this order;

In the alternative to paragraph 2 above:

That the second applicant, alternatively the applicants, further alternatively, anyone or more of the applicants, pay to the second

respondent the sum of R7 000 000.00 less the wasted expenditure to be determined by the Court by way of trial action;

That the applicants deliver their declaration in regard to such action within 20 days of the granting of this order;

That the rules regarding trial actions further apply to the conduct of the matter;

That all licence agreements between the first respondent and the second and the third respondents be declared cancelled;

That the shareholders’ agreement between the applicants and the first and the second respondents be declared cancelled;

The applicants are ordered to forthwith take the necessary steps to change the name of the first respondent from Hamon J&C Engineering (Pty) Ltd to J&C Engineering (Pty) Ltd;

The second respondent is ordered to ensure that all directors appointed to it to the board of the first respondent resign, and in

the absence of them doing so within seven days, the applicants are authorised to take such steps as may be necessary in the offices of the Companies and Intellectual Property Commission to reflect such directors as having been removed;

That the second and the third respondents pay the costs of this application, jointly and severally, the one paying the other to be absolved.”

An amendment has been effected by the applicants to correct paras 2 and 3.1 of the notice of motion by deleting the word “applicant” and substituting it with the words the “second respondent”.

THE PARTIES

- [3] The first applicant is a director and shareholder of the first respondent. The second applicant, the father of the first applicant, is a retired businessman and a former shareholder of the first respondent. The third and the fourth applicants are a director and also shareholders, respectively, of the first respondent.
- [4] The first respondent is Hamon J&C Engineering (Pty) Ltd (hereinafter “Hamon J&C”), a company duly incorporated, having its registered office at Bedfordview, Johannesburg. The second respondent is Hamon South Africa (Pty) Ltd (hereinafter “Hamon SA”), a company duly incorporated with its registered address at Corner Rigger Road and Kelvin Street, Spartan. The third respondent is Hamon & Cie (International SA) (hereinafter “Hamon & Cie”), a company duly incorporated and registered in Belgium. The third respondent has consented to the jurisdiction of this Court. The fourth, fifth and the sixth respondents are directors of the first respondent.
- [5] On the papers, a reference to “the Hamon respondents” is a reference to the second and the third respondents, namely Hamon SA and Hamon & Cie respectively, whilst a reference to “the joint venture company” or “JV company” is a reference to Hamon J&C.
- [6] In terms of the provisions of sec 3(1)(a) of the Companies Act 71 of 2008 (“the new Companies Act”), Hamon J&C is a subsidiary of Hamon SA; Hamon SA is a subsidiary of Hamon & Cie; and Hamon J&C is thus also a subsidiary of Hamon & Cie. By virtue of the provisions of sec 2 of the Companies Act the respondents are all related persons. All of the above are common cause.

THE BRIEF NATURE OF RELIEF SOUGHT

- [7] In the founding papers, and relying on sec 163 of the new Companies Act, the applicants in the main contended that an act or omission of Hamon SA and/or Hamon & Cie has had a result that is oppressive and unfairly prejudicial to; or that unfairly disregards the interests of, the applicants and/or the business of Hamon J&C and/or Hamon SA, is being or has been carried out or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicants and/or the powers of a/the director/s or prescribed officer of Hamon SA, and/or Hamon & Cie, are being or have been exercised in a

manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicants.

BRIEF BACKGROUND

[8] Some background is indispensable. The papers are rather bulky and infested with a long history of numerous correspondence exchanged between the parties. In summarised form, it was common cause that:

During or about 2009 the applicants, in particular the first and the second applicants, representing the applicants and J&C

Engineering CC (which later became, for the purposes of the under-mentioned transaction, J&C (Proprietary) Limited (“J&C”), commenced negotiations with Hamon SA. The latter was represented by Francis Lambilliotte (“Lambilliotte”), the chairman of Hamon SA’s board of directors, and the fourth respondent, the president of the business unit environmental manager of Hamon & Cie.

The negotiations were aimed at exploring how Hamon SA and J&C could form a joint venture company or otherwise work together to the mutual benefit of both parties.

At the time J&C, which was still registered as a close corporation, was active in the business of air pollution control

(“APC”), in particular electrostatic precipitators (“ESP’s”). It had remained largely a family-owned business, which was started by the second applicant and his wife. The first applicant, his sister, and the fourth applicant and her husband, were all employed by and worked daily in the business of J&C.

On the other hand, Hamon SA, at the time was active in APC activities and other business activities including cooling systems.

The activities undertaken by Hamon & Cie and the other companies in its group included in addition to APC and ESP’s,

fabric filters, gas scrubbers etc. on a worldwide basis. Hamon SA was a subsidiary of the multinational company, Hamon & Cie, which was much more larger than J&C and conducted business around the world through its group companies.

Over the years, and in compliance with the South African Black Economic Empowerment legislation (“the Broad-Based Black Economic Empowerment Act No 53 of 2003”), J&C had offered one of its highly rated employees, i.e. the third applicant, an opportunity to take up a member’s interest. She performed the task of purchasing and the Hamon Resources function in J&C. She was paid a member’s distribution like all other members of J&C.

The main purpose of the applicants’ desire to enter into the joint venture was the belief that by J&C aligning itself with Hamon SA, it would benefit J&C and its members in the long run as the business would be afforded the opportunity to increase significantly in size and derive the

benefits of substantial management, administrative, financial, marketing and budgeting expertise. On the applicants' version, Hamon SA particularly represented that they anticipated substantial workflow for the new JV company arising out of, amongst others, the good name of Hamon.

[9] As a result of the protracted and various negotiations, the parties, during October 2010, concluded a Sale and Transfer Agreement, and a Shareholders' Agreement. The main basis and objective of the transaction was summarised in the recital in clause 2 of the Sale and Transfer Agreement in the following terms:

"2.1 Hamon SA is engaged in the business of air pollution control activities with the use of electrostatic precipitators, precipitators, fabric filters and gas scrubbers.

J&C is likewise engaged in the business of air pollution control activities.

Hamon SA and J&C wish to combine their respective resources, abilities, skills, know-how and intellectual property for the

purposes of jointly conducting the business of air pollution control activities in RSA for their mutual benefit, and for this

purpose propose incorporating a limited company (the 'JV Company').

To achieve their objective, the following transactions are to be implemented and the following documents signed:

2.4.1 The incorporation of the JV Company, whose name will be Hamon J&C Engineering (Proprietary) Limited (or such other name

as may be agreed by the parties or approved by the Registrar of Companies in RSA);

The conversion of J&C from a close corporation to a limited liability company in accordance with the Companies Act;

The transfer by Peel Snr and Peel Jnr of the issued shares in J&C to the JV Company in exchange for 14 000 (fourteen thousand) ordinary shares in the JV Company;

The purchase by Hamon SA of 7 000 (seven thousand) ordinary shares in the JV Company issued and allotted to Peel Snr;

The distribution of J&C of the J&C Business to the JV Company by way of the declaration of a dividend in specie in terms

of section 42 of the Income Tax Act 1962 as amended with the result that the J&C Business will be owned by the JV Company

prior to the deregistration of J&C;

The conclusion of the shareholders agreement between Hamon SA, Peel Jnr and such other parties as may be agreed by the parties

regulating their association as shareholders in the JV Company in accordance with the draft shareholders agreement hereto annexed marked 'B';

The conclusion of employment contracts between the JV Company and Peel Jnr, Martin Quari, Gillian Quari, Rene Peel and other employees of J&C as agreed by the parties on the terms set forth in the draft employment contracts hereto marked 'C1'

to 'C5';

The conclusion of a licence agreement and a service agreement between Hamon & Cie SA (an/or one of its subsidiaries or

affiliated companies) and the JV Company in accordance with the draft service agreement and licence agreement hereto marked 'D' and 'E';

The conclusion of a sale and rental agreement between the JV Company and Clandale Properties (Proprietary) Limited relating to

the property presently occupied by J&C in accordance with the draft hereto annexed marked 'F';

It is recorded by the parties that the intention of this Agreement is that following the closing date (and the repurchase by

the JV Company of 100 of its own shares initially owned by Hamon SA) the issued shares in the JV Company will be held as follows:

Peel Jnr (and/or other members of the Peel Family as defined in clause 5.4 below) and Bonisiwe Duduzile Pandela ('Pandela')

– 7 000 (seven thousand) ordinary shares (40% of the total issued shares);

Hamon SA – 10 500 (ten thousand five hundred) ordinary shares (60% of the ordinary shares);

2.6 It is further recorded that the ordinary shares in the JV Company are to be issued at a nominal value of R1 each."

[10] For what will become relevant later herein, the Sale and Transfer Agreement and the Shareholders Agreement made provision for the resolution of any disputes by way of arbitration.

[11] The applicants contended that neither the Sale and Transfer Agreement nor the Shareholders Agreement catered for the present

impasse which has arisen between the parties. The respondents contended to the contrary. Both parties, however, agreed that there

were indeed extensive negotiations between them leading to the conclusion of the Agreements. It was not in dispute that in addition

to the negotiations, the conclusion of the Agreements was preceded by a Memorandum Of Understanding (“MOU”) which was ultimately signed during November 2009. The MOU was incorporated by reference.

[12] The effective date of the Sale and Transfer Agreement was 1 October 2010. In short, and which was not in dispute, the essence of the transaction had the following consequence. The existing J&C business was transferred to the first respondent. Hamon SA sold the Hamon assets to the JV Company for a consideration of 3 500 ordinary shares. The Hamon assets were defined to be the right to use the Hamon trade name and the trade marks associated therewith, together with all business connections in and outside South Africa. The second applicant transferred to the JV Company the applicants’ respective shares in J&C.

[13] In consideration for the transfer by the first and the second applicants and of their respective shares to the JV Company who would, based on the agreed value of the shares, issue and allot 7 000 ordinary shares to the first and the second applicants. It was agreed that the value of the J&C shares to be transferred would be based on the J&C Enterprise value having been agreed upon by the parties as amounting to R14 million. The purchase price payable by Hamon SA to the second applicant was R7 million.

[14] In terms of the Shareholders’ Agreement, Hamon SA, the first applicant, the third applicant and the fourth applicant agreed that their relationship as shareholders in the JV Company was to be governed by the provisions of the Shareholders’ Agreement. The JV Company’s sole business would be that of air pollution control with the use of electrostatic precipitators in South Africa.

[15] The shareholding in the JV Company was recorded as being (after the sale of 7 000 shares by the second applicant to Hamon SA) as follows:

Hamon SA – 10 500 ordinary shares constituting 60% of the total issued ordinary share capital of the JV Company;

The first, third and fourth applicants – 7 000 ordinary shares constituting 40% of the total issued ordinary shares capital

of the JV Company;

The Board comprised of four directors, one of whom was the third applicant or another black person as determined by the

shareholders, one of whom would be appointed by the first applicant and the fourth applicant, as long as they jointly held at least 20% of the capital of the JV Company. It is noteworthy that the remaining directors were appointed or were to be appointed by Hamon SA. One of the directors appointed by Hamon SA would act as Chairman of the Board and would have a second or casting vote in the event of an equality of votes. The management of the JV Company had to vest in the Board. A quorum for the meetings of the Board was four directors.

In addition, Hamon SA had the right to appoint the Chief Executive Officer and the Financial Manager of the Joint Venture Company.

The approval of the annual budget and business plan of the JV Company could not be taken or implemented by the JV Company unless agreed to by the shareholders holding at least 75% of the issued shares of the JV Company.

In the end, J&C was converted from a close corporation to a company, the first and the second applicants transferred their

shares in J&C to Hamon J&C; Hamon SA transferred the Hamon assets to Hamon J&C; the second applicant sold his shares in Hamon J&C to Hamon SA; and Hamon SA paid the sum of R7 million to the second applicant on 22 October 2010. The business of J&C continued to run as it had before except that it was now operating under the Hamon J&C name.

However, over time, and gradually, the papers show that the relationship between the applicants and the Hamon respondents soured. It deteriorated to such an extent that both parties now seek to part ways. The only issue appears to be on what basis such secession should be effected, including which parties should effect payment of certain wasted expenditure and in what proportion. The main reason why the applicants wish to end the relationship is in fact the subject-matter of the instant application, as discussed immediately below.

THE BLACK ECONOMIC EMPOWERMENT (“BEE ISSUE”)

[16] This application in terms of sec 163 of the new Companies Act is largely based on the alleged conduct of the Hamon respondents and their directors and prescribed officer prior to the conclusion of the Sale and Transfer Agreement and the Shareholders’ Agreement, and which conduct was discovered subsequently. The alleged conduct relates primarily to an attempt by the Hamon respondents to improve the Black Economic status of Hamon SA (“the BEE issue”). The applicants’ attitude is that the conduct is of such a serious nature that it jeopardises continuation of any business with Hamon. The applicants feel that they simply cannot be associated with the Hamon respondents anymore.

[17] On the papers, the occurrence of the BEE issue itself, was substantially common cause. It was therefore unnecessary to discuss the event at length, save for the areas of disagreement. In July 2009 two ladies were employed by Hamon SA, namely Ms Bongiwe November (“November”) as a cleaning lady, and Ms Daphne Mangwana (“Mangwana”) as a driver and messenger. On 29 July 2010, Hamon & Cie (International SA), in a written agreement (headed “Agreement for Sale of Shares in Hamon (South Africa) (Pty) Ltd”) sold 13% of the

shares in Hamon SA to November, and a further 13% to Mangwana. Attached to the founding papers were a copy of the agreement of sale of shares in Hamon SA between Hamon & Cie and Mangwana, as well as correspondence from Hamon & Cie confirming the sale of the shares to November and Mangwana.

[18] The two lots of shares in percentages of 13% totalled 26%, which on the version of the applicants, was significant because this is the amount of shares generally required for the ownership element of the BEE score card in order to optimise the points allowed for purposes of BEE.

[19] In advancing their case that the sale of the Shares Agreement to November and Mangwana was a sham, not genuine transactions, the applicants relied on several grounds, including that:

The shares were sold for R1 in exchange for 1 089 288 ordinary shares in Hamon SA;

In clause 10 of the Sale of Shares Agreement, Hamon & Cie, reserved to itself “an option to repurchase the shares at any time, on simple request”;

The purchase consideration for the shares in terms of the exercise of such option would be computed pro rata of the net asset value in proportion to the number of shares held by each of the lady purchasers. However, given that the net asset value of Hamon SA at the time of the sale was negative, it was quite clear that Hamon & Cie was reserving to itself an option to reclaim the shares without transferring any value;

It very rarely occurs that shares are bought and sold in an arms’ length transaction at net asset value, let alone for the sum of R1;

Mangwana stated that she and November were not given an opportunity to read the Sale Agreements before they were signed. They also saw a document (Mangwana did not what document exactly) contained on a letterhead of Hamon and Mr Richard Carew (“Carew”), the managing director of Hamon SA, took the document back after its signature;

Mangwana further stated that her sale of Shares Agreement was already signed on behalf of Hamon & Cie and two witnesses as well as by two witnesses who were unknown to her next to the space where she had to sign;

Carew told Mangwana and November that they must go out and tell everyone that they are now “major” shareholders of Hamon SA. Carew advised Mangwana and November that they will receive a shareholder’s allowance of R115,00 per week from the week during which the agreements were signed;

There was no shareholders’ agreement concluded. There was no indication that there were attorneys involved in drawing the agreement;

It was highly improbable that a multi-national company would sell 26% of its shares on such basis were this a genuine transaction;

Mangwana also confirmed that her position in Hamon SA subsequent to the sale did not change at all. She was not treated as a shareholder or as someone who was now to participate in the decision-making of the business of Hamon SA. She was paid the

shareholders' allowance, which is of itself and unusual payment;

Mangwana said that she was aware that a "big deal" between Hamon SA and Eskom Holdings Ltd ("Eskom") was pending and that same was awarded to the company shortly after 29 July 2010;

Shortly thereafter two overseas directors from Hamon & Cie, i.e. the fourth respondent and Clause Brinkmann ("Brinkmann"), came to visit the South African office and advised all the staff during a meeting that the company was "now with BEE" doing well and that it almost had to close down, but was now able to pay debt where it was due;

More significantly, less than six months after concluding the Sale of Shares Agreement, on 7 January 2011, the same shares were simply taken back by Hamon & Cie, without discussion with the two lady purchasers, and were transferred, in the words of Carew, because a "proper lady" had been found. In this regard, reference was made to Ms Shirley Chauke, the fifth respondent who is the deponent to the answering papers.

[20] The papers contained bulky correspondence exchanged between the parties covering various issues, including the BEE issue. The latter was eventually reported to the Department of Trade and Industry ("the DTI") by Mangwana, on 19 January 2011. She made a declaration under oath, which was annexure "FA36" to the founding papers. Her version as set out therein, reflected that the sale of shares to her was clearly a case of fronting in order to improve Hamon SA's BEE status and was not a genuine BEE transaction. The upshot is that the DTI is currently investigating the matter.

[21] The applicants contended that in the South African business environment committing a fraud relating to Broad-Based Black Economic Empowerment ("B-BBEE") and thereby abusing the most vulnerable members of our community in circumstances described above, is seen in a very serious light. The nature of the work that Hamon J&C engaged in often came from Organs of State or public entities such as work from Eskom relating to air pollution solutions for power stations.

[22] Further that even non-governmental organs took into account a contractor's BEE status for purposes of their procurement

points in respect of their own BEE score cards. If the applicants and their business, which they are now conducting through the JV Company under the Hamon name, were to be tainted by these serious allegations it has a potential of destroying their business prospects going forward, and that the applicants have been or are exposed to a serious business risk. The applicants cannot see their way clear to continue working with or being associated with the Hamon respondents in a business relationship that was clearly broken down irretrievably as a result of the mistrust that has arisen.

[23] In terms of the provisions of sec 163 of the new Companies Act, the primary relief sought by the applicants is to sever ties so that Hamon J&C is no longer a subsidiary of Hamon SA and Hamon &

Cie, or otherwise associated with the Hamon respondents. In this regard, the applicants seek an order directing an exchange of shares between the second applicant and Hamon SA as envisaged in sec 163(2)(e); and/or directing the restoration of Hamon SA by the applicant of a part, alternatively, the whole of the consideration that Hamon SA paid for the shares, with conditions as envisaged in sec 163(2)(g); and/or varying or setting aside the sale of shares transaction between Hamon SA, the second applicant and Hamon J&C and compensating Hamon J&C and/or the second applicant, or any other of the applicants as envisaged in sec 163(2)(h); and that Hamon SA pay compensation to the second applicant and/or Hamon J&C, as envisaged in section 163(2)(j).

THE HAMON RESPONDENTS' CONTENTIONS

[24] I deal with the Hamon respondents' contentions. The answering affidavit was deposed to by the fifth respondent, a director of the second respondent, and on behalf of the second to the sixth respondents.

[25] In essence, the respondents raised four issues in opposition to the relief sought, including that the second applicant lacked locus standi on the basis that he was neither a shareholder nor director of any of the respondent companies, in particular, the first respondent.

[26] The issue raised about the locus standi of the second applicant is capable of resolution with relative ease. In the replying papers, the applicants had accepted that reference to "the applicants" should be read as a reference to the first, third and fourth applicants only where reference is made to the shareholders and directors of Hamon J&C. It was accepted that the second applicant is not a director or shareholder of Hamon J&C. The applicants have also pointed out that there was a typographical error in the notice of motion in that paragraphs 2.2. and 3.1 of the notice of motion referred to the second applicant paying to the "applicant" the money paid by the second respondent for the shares in Hamon J&C. It should have been a reference to the "second respondent" and an amendment was later sought to make the appropriate correction. In any event, it seems to me that whether or not the second applicant was joined as an applicant or respondent was irrelevant since the other remaining applicants, i.e. the first, third and fourth applicants all have locus standi to seek the relief which was not disputed. In any event, the second applicant has abided by the decision of this Court. Further, in any event, it is arguable that the second applicant, who sold to the second respondent, his shares in the first respondent, may have an interest in the repayment of the purchase price in terms of a wider interpretation of sec 163 of the new Companies Act.

THE DETERMINATION OF THE BEE ISSUE

- [28] In the view I take in the matter, it is appropriate and convenient to deal first with the BEE issue. The respondents denied that the second and the third respondents had acted fraudulently in relation to the Black Economic Empowerment and that they were indifferent to the most vulnerable members of the community.
- [29] However, the respondents admitted that the two Agreements of the Sale of Shares with the two ladies, i.e. November and Mangwana were concluded during July 2010 and were terminated during December 2010. This was two months after the Sale and Transfer Agreement was concluded in regard to the formation of the JV Company. The respondents further contended that nowhere in the founding papers had the applicants demonstrated that the agreements with November and Mangwana oppressed or unfairly prejudiced or unfairly disregarded the interests of the applicants; or resulted in the business of the second and the third respondents having been or being conducted or concluded in a manner which is or has been oppressive or unfairly prejudicial to the applicants or has unfairly disregarded or is disregarding the interests of the applicants. The respondents further contended that the applicants have not shown that the conclusion of the Sale of Shares Agreement with November and Mangwana involved the powers of one or more directors or prescribed officers of the second or third respondents being, or having been, exercised in a manner that is or was oppressive or unfairly prejudicial to, or which unfairly disregarded the interests of, the applicants.
- [30] In the view of the respondents, the other issues raised by the applicants are matters which principally relate to the management of the first respondent. These matters included the value which was placed on the Hamon assets for the purposes of the Sale and Transfer Agreement, and the Matla Project carried out by the second respondent. Further that the main emphasis of the applicants' complaint was on the BEE issue in respect of which the applicants had not demonstrated any basis for relief under sec 163 of the new Companies Act. Many other issues now appearing in the founding affidavit were not mentioned in the correspondence between the parties.
- [31] The respondents contended that at the time, the third respondent was genuinely of the view that transferring 26% of the issued shares in the second respondent was in compliance with BEE requirements in South Africa. The third respondent had sought to empower members of the staff of the second respondent. However, following advice received by the second and the third respondents, that what had been done in fact did not constitute proper BEE empowerment as contemplated and intended in the laws relating to BEE, the third respondent repurchased the shares from November and Mangwana. The third respondent believed that what it had done was in proper compliance with the laws relating to Black Economic Empowerment. Neither the second nor the third respondents gained any commercial or economic advantage as a result of concluding the agreements. Neither the second nor the third respondent nor any of the applicants suffered any prejudice as a result of the agreements concluded with November and Mangwana.

[32] The respondents consequently denied that Hamon's conduct introduced an unacceptably high business risk for the applicants. However, the respondents admitted that the issue of the agreements with November and Mangwana have been reported to the DTI. The agreements were not cases of "fronting". The real complaint of the applicants is that they now believe they have done a poor commercial deal by contracting with the second and the third respondents, and have not attained what they bargained for. The applicants are now attempting to terminate a deal for no valid

reasons.

[33] The respondents denied that they had threatened to fire Mangwana if she did not depose to an affidavit to ensure that the

charges laid with the DTI are withdrawn. In this regard, Mangwana in her affidavit, Annexure "FA36" to the founding papers, had stated, inter alia, that:

"... Early in November 2011, I was called in by the director of Hamon South Africa (Pty) Ltd ... Shirley asked me what 'we'

were going to do about the 'BEE fronting' case. She told me that the company wanted to fire me and she was the only person protecting me. I asked her what wanted [sic] from me. She told me that I had to go to the Department of Trade and Industry ('DTI') as well as the police station to depose of an affidavit in order for the case to be withdrawn against the company by the DTI. ... I did not go to the police station and I did not depose of an affidavit as I do not wish to withdraw the case or the investigation against the company."

The respondents had dismissed these allegations as untrue. The disciplinary hearing against Mangwana has nothing to do with the BEE issue according to the respondents.

[34] The respondents contended further that the JV Company had been very profitable for the applicants which explained their desire to now wish to exit the relationship. The first respondent had used the Hamon trade mark and the Hamon trade name outside South Africa to, inter alia, procure a lucrative Zimbabwean contract which was done with the full support of the second and the third respondents. The respondents admitted that attempts to negotiate a mutually acceptable exit relationship have not been successful. The respondents contended that the business of the first respondent cannot stand still whilst the applicants engaged in litigation to claim relief to which they are not entitled.

THE REPLYING AFFIDAVIT

[35] In the replying papers, and briefly stated, the applicants denied that there were disputes of fact; that the present problems between the parties can be resolved by arbitration; and that they are not entitled to relief in terms of sec 163 of the new Companies Act. >

- [36] The applicants attached a copy of the appendix to the Matla Refurbishment Projects tender document which they argued would have formed part of the agreement between Hamon SA and Eskom. The requirements set out in the said appendix were incorporated in the tender that was awarded by Eskom to the second respondent. The appendix sets out in some detail the requirements that had to be met by the successful tenderer, i.e. Hamon SA, in respect of BEE.
- [37] The appendix document made it clear that the evaluation by Eskom was an ongoing evaluation which gave the successful tenderer an opportunity to achieve the BEE targets within 24 months of the contract. To the extent that the respondents contended that because the Matla power project was concluded in 2008 already, it was irrelevant and did not give rise to the transaction with November and Mangwana, the applicants submitted to the contrary. The deponent to the answering affidavit, i.e. the fifth respondent, was admittedly not involved with Hamon SA at the time. The applicants therefore argued that the only inference to be drawn was that the transaction was concluded with November and Mangwana in order to cure the difficulty that the second respondent had in meeting the BEE requirements. Without the transaction with November and Mangwana, it was clear that Hamon SA had not complied with what was required of it in terms of the contract awarded to it for the Matla Refurbishment Project.
- [38] The above, according to the applicants, was borne out by the following. While the evaluation and negotiations with Eskom were ongoing, the Hamon respondents and their directors did not make any disclosure to the applicants. In an e-mail correspondence the first applicant had with Brinkmann of the Hamon respondents on 15 December 2010, the applicants had summarised various important aspects of the business of Hamon J&C. In his response of the same date, Brinkmann made the following statement, presumably in respect of the fifth respondent:

“We are moving forward to get a black lady as a shareholder of Hamon SA ...”

At that stage too, no disclosure was made that Hamon SA already had, it seems until 15 December 2010, two black lady shareholders in November and Mangwana.

- [39] In addition, the applicants argued in the replying affidavit that the respondents failed to take the Court into their confidence and disclose when exactly they received the advice that the structure with November and Mangwana was not compliant with BEE requirements. From the correspondence between the parties, it must have been some time before 15 December 2010. The non-disclosure, so the applicants contended, had no regard at all for the applicants' interests. The applicants having transferred their shares and company J&C Engineering into the Joint Venture Company, i.e. Hamon J&C in order to have the benefit of Hamon's alleged good name, should have been advised of all these matters since they were material.

[40] It was in the end the applicants' contention on the BEE issue, that when the facts subsequently came to light, the response of Hamon SA was that the issue was unimportant, and that it was a waste of time to deal therewith. This attitude was epitomised in the various correspondence between the parties. In the view of applicants, even if the charges relating to the BEE issue were dropped, or for some reason not pursued by the DTI, or prosecuting authority, whether as a result of pressure applied by Hamon SA on Mangwana to withdrawn them, the applicants are simply not prepared to be associated with the Hamon name anymore. The respondents, of course, denied that they ever suggested that the BEE issue was not a serious matter. They also denied that Mangwana was threatened in any manner whatsoever. The applicants rejected as incorrect the suggestion that because the BEE issue occurred in the past, it was not relevant.

THE PROVISIONS OF SECTION 163 OF THE NEW COMPANIES ACT

“(1) A shareholder or a director of a company may apply to a court for relief if –

any act or omission of the company, or a related person, has had a result that it oppressive or unfairly prejudicial to, or that

unfairly disregards the interest of, the applicant;

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

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 -

an order restraining the conduct complained of;

an order appointing a liquidator, if the company appears to be insolvent;

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) apply;

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 shareholders' agreement;

an order directing an issue or exchange of shares;

an order –

appointing directors in place of or in addition to all or any of the directors then in office; or

declaring any person delinquent or under probation, as contemplated in section 162;

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 paid the equivalent value, with or without conditions;

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;

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;

an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;

an order directing rectification of the registers or other records of a company; or

an order for the trial of any issue as determined by the court.”

Subsection 3 provides that:

“If an order made under this section directs the amendment of the company’s Memorandum of Incorporation –

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.”

[42] In the context of the present matter, sec 2 of the new Companies Act is of crucial importance and relevance. It provides as follows:

“(1) For all purposes of this Act –

an individual is related to another individual if they –

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

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

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

a juristic person is related to another juristic person if –

either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection

(2);

either is a subsidiary of the other; or

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 -

in the case of a juristic person that is a company –

that juristic person is a subsidiary of that first person, as determined in accordance with section (3)(1)(a); or

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 employment or election of, directors of that company who control a majority of the votes at a meeting of the board; ...”

THE PROVISIONS OF SECTION 252 OF THE OLD COMPANIES ACT

[43] In resolving the issue as to the correct construction and interpretation to be placed to the provisions of sec 163 of the new Companies Act, reference to case law in which sec 252 of the old Companies Act was interpreted is rather instructive. For the sake completeness, sec 252 of the latter Act provided as follows:

“(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may, subject to the provisions of subsection (2), make an application to the Court for an order under this section.

(2) Where the act complained of relates to -

any alteration of the memorandum of the company under section 55 or 56;

any reduction of the capital of the company under section 83;

any variation of rights in respect of shares of a company under section 102; or

a conversion of a private company into a public company or of a public company into a private company under section 22, ...

- (3) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

[44] In *Donaldson Investments v Anglo-Transvaal Collieries* 1984 (4) SA 204 (T), a full bench decision, the appellant applied under sec 252 of the old Companies Act for an order, inter alia, that the first respondent purchase the preferent shares held by the appellants. In dismissing the appeal, the Court observed that it appeared that sec 252 of the Act extended the ambit of the remedy of aggrieved shareholders, and that the Court preferred the construction to the words as will advance the remedy rather than limit it. At p 210A of the judgment, the Court said:

"The onus is on the appellants to prove the factum probandum of s 252(2) on a balance of probabilities as in any civil litigation.

Section 252(3), by the use of the words 'considers it just and equitable' seems to apply a degree of discretion to be judicially exercised 'to bring to an end the matters complained of'. This must be based on the foundation of the requirements of s 252(2)."

See also *Scottish Co-operative Wholesale Society Ltd v Meyer and Another* [1958] 3 All ER 66 at 88E-G, especially at 89F, where the Court said:

"It is, no doubt, true that an order of this kind gives the oppressed shareholders what is, in effect, money compensation for the

injury done to them; but I see no objection to this. The section gives a large discretion to the court, and it is well exercised in making an oppressor make compensation to those who have suffered at his hands."

In *Bayly and Others v Knowles* [2010] 3 All SA 374 (SCA), the Court held that any exercise of a discretion under sec 252(3), the Court is bound to consider, not only the interests of the warring shareholders, but also those of shareholders who have stood apart and the best interests of the company itself.

[45] As to the criteria expected by the Courts in what an applicant seeking relief under sec 252 of the old Companies Act must establish, the Court in *Louw and Others v Nel* 2011 (2) SA 172 (SCA), at para [23] said:

“The combined effect of ss (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.”

THE FACTS OF THE PRESENT MATTER AND SECTION 163

[46] The facts and circumstances of the present matter are admittedly slightly different to cases brought under sec 252 of the old Companies Act, although the legal principles discussed above largely remain a relevant consideration. It is therefore necessary, in my view, to closely analyse and interpret the remedy provided by sec 163 of the new Companies Act. This remedy must be interpreted having in mind, not only the contents of the preamble to the new Companies Act namely to, inter alia, “provide appropriate legal redress for investors and third parties with respect to companies”, but also the definition of “related and inter-related persons, and control”, as contained in sec 2 of the new Companies Act, as set out earlier in the judgment. The applicants’ main contention, if recalled, is that they were unaware of the BEE issue. It was never disclosed to them by the Hamon respondents. When they did become aware of its existence later, they took it up with the respondents. The respondents played down its effect and consequences even though a serious matter. It had the potential of affecting the applicants’ business in Hamon J&C and posed serious business risks for the future. The BEE issue occurred, not in Hamon J&C but in Hamon SA. As a consequence, the applicants desperately wish to sever all ties with Hamon.

SOME LEGAL PRINCIPLES IN INTERPRETING SECTION 163

[47] In Henochsberg on The Companies Act 71 of 2008, at p 567, under the discussion of sec 163, the following is said:

“A number of circumstances could give rise to the remedy under this section becoming available. The first is where an 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 (s 163(1)(a)). The phrase ‘has had a result’ indicates that the act must be completed. It is also the result, and not the act, that must be oppressive or unfairly prejudicial. Secondly, where the business of the company or a related person is carried on in a manner that is

oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant (s 163(1)(b)), or, thirdly, where the powers of a director or prescribed officer (see reg 38 sv 'prescribed officer') of the company, or a person related to the company are exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant (s 163(1)(b)). See s 2 for the definition of a person 'related' to the company, which can include a subsidiary and/or holding company of the company."

GUIDANCE FROM SOME FOREIGN JURISDICTIONS

[48] A proper construction and interpretation of sec 163 cannot be achieved lightly without reference to similar authorities in foreign jurisdictions. Section 232 of the Australian Corporations Act No 50 of 2001 provides as follows:

"The Court may make an order under section 233 if –

the conduct of a company's affairs; or

an actual or proposed act or omission by or on behalf of a company; or

a resolution, or a proposed resolution, of members or a class of members of a company;

is either:

contrary to the interests of the members as a whole; or

(e) *oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that company or in any other capacity. For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by*

operation of law is taken to be a member of the company."

Sections 233 and 234 of that Act provide for the type of orders which a court can make, and who can apply for such order, respectively.

[49] In Australia it was held that the words "oppressive to", "unfairly prejudicial to" and "unfairly discriminatory to", should be seen as a "composite whole and the individual elements mentioned in the section should be considered merely as different aspects of the essential criterion, namely, commercial unfairness". See *Morgan v 45 Flers Avenue (Pty) Ltd* [1986] 10 ACLR 692; 5 ACLC 222, 233 per Young J.

[50] On the other hand, the Canadian approach seems to confer a wider discretion on the Courts. Sections 241(1) and (2) of the Canada Business Corporations Act, RSC 1985cC-44; "the CBCA", provide as follows:

"241.(1) A complainant may apply to a court for an order under this section.

(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

any act or omission of the corporation or any of its affiliates effects a result,

the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director

or officer, the court may make an order to rectify the matters complained of.”

Section 241(3) of the same Act allows the Court even wider powers in granting relief, including, “an order compensating an aggrieved person”, and “an order requiring the trial of any issue”.

There are several similarities between sec 241(3) of the CBCA and sec 163(2) of the new Companies Act. Henochsberg (opcit) refers to Stephanie Ben-Ishai and Poonam Puri-2004 Queens Law Journal 79; 88-89; in 820099 Ontario Inc v Harold E Ballard Ltd [1991] 3 BLR (2nd ed) at 185-186 where the concept is explained as follows:

“Shareholder interest would appear to be intertwined with shareholder expectations. It does not appear that the shareholder expectations which are to be considered are those that a shareholder has as his own individual ‘wish list’. It must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders.”

(See O’Neill and Another v Phillips and Others [1999] UKHL 24; [1999] 2 All ER 961 (HL); McMillan v Pott (Case 11125/08) (WCC) and Gower v Davis 692 in respect of “legitimate expectations”).

[51] In a thesis by Natasha Adoley Abbey of the University of Western Ontario, titled, “An Insightful Study of the Oppression Remedy Under South African and Canadian Corporate Law”, at pp 116 and 123 said the following:

“The second Part of the oppression remedy relates to the court’s discretion or judicial powers. There are a few similarities between section 241(3) of the CBCA and section 163(2) of the 2008 SA Companies Act as to the court’s power to provide a remedy. However, the list provided is not exhaustive. The wide discretion was noted in the case of 82009 Ontario Inc. v Harold E Ballot Ltd. “Section 247(3) [now s 248(3)] gives the court tremendous latitude. Subject to being concerned about interfering as little as possible, a judge should be able to use his [or her] ingenuity to effect the remedy most suitable to the situation.” With this tremendous latitude, the South African Courts have an opportunity to change to face of the South African Corporate Law

forever, through the proper use of their powers. The responsibility they also have is to ensure that the cases that are applied are carefully considered. Section 5(2) of the 2008 SA Companies Act says:

‘[t]o the extent appropriate, a court interpreting or applying this Act may consider foreign company law.’

Not only are the South African Courts given a wide discretion under the section 163 oppression remedy, they are also statutorily

empowered to consider foreign company to the extent they are appropriate. There are 17 different remedies available, but also

note that in both the South African Statute and the CBCA, this list of remedies is non-exhaustive. Of the 17 remedies, South Africa and Canada share nine. “

At page 123 of the same thesis the following is said:

“This chapter provided a detailed comparison of both oppression remedies under section 163 of the 2008 SA Companies Act and section 241 of the CBCA, within the following categories, standing under the oppression remedy, the scope of the conduct, standard of corporate conduct, whose interests are being protected and what interests are being protected in the context of the reasonable expectations of shareholders as well as the judicial powers. The key aspect of the Canadian oppression remedy is its growth from the Ebrahimi case to a wide remedy that seeks to enforce reasonable expectations of shareholders. The enforcement of the reasonable expectations is only possible where there is a clear statute. A statute that provides for the clear legal rights of the individuals in a corporation is required. Although South Africa has only recently adopted the 2008 SA Companies Act, further amendments to the South African company law are needed in order to take full advantage of this wide remedy.”

[52] With the above in mind, I revert to the present matter. A careful consideration of the interpretation given by our courts to the provisions of sec 252 of the old Companies Act and the provisions in sec 163 of the new Companies Act, and as argued by counsel for the applicants, correctly in my view, shows a continuing intention by the legislature to broaden relief in these provisions, rather than to limit them.

[53] That this intention is carried out forward into the new Companies Act is apparent from a number of factors including:

The introduction of a new ground, namely conduct “that unfairly disregards the interests of, the applicant” indicating a far wider basis upon which relief may be sought – in other words, the conduct now need not be limited to oppressive conduct or conduct which is “unfairly prejudicial, unjust or inequitable”;

The relief is now granted not only to shareholders but also to directors;

The relief granted is not only in relation to the conduct of the company or its affairs as was the case in respect of sec 252 of the old Companies Act, but also as a result of:

53.3.1 any act or omission of the company or a related person;

the business of the company or a related person;

the powers of a director or prescribed officer of the company, or a person related to the company;

53.4 Extensive examples of the kinds of orders that may be granted, even including the following orders:

53.4.1 An order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder

paid for the shares, or paid the equivalent value, with or without conditions;

53.4.2 An order declaring 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;

An order directing rectification of the registers or other records of a company; or

53.4.4 An order for the trial of any issue as determined by the Court.

[54] Prior to applying the above considerations and legal principles to the facts of the instant matter, I need to deal briefly with the provisions of the Black Economic Empowerment legislation. Section 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003 (“the BBEEA”) defines “broad-based economic empowerment” as

“means the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include, but are not limited to –

increasing the number of black people that manage, own and control enterprises and productive assets;

facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;

human resource and skills development;

achieving equitable representation in all occupational categories and levels in the workforce;

preferential procurement; and

investment in enterprises that are owned or managed by black people.”

It is common knowledge that the Minister of Trade and Industry has since published for comment the Broad-Based Black Economic Empowerment Amendment Bill 2011 (“the Bill”), which is generally aimed at enforcing compliance with the BBEEA. The preamble to the Bill reads as follows:

“To amend the Broad-Based Black Economic Empowerment Act, No 23 of 2003 (the Act) in order to promote compliance with the Act by Organs of State and Public Entities and to strengthen the evaluation and monitoring of compliance with the Act; to provide for the

regulation of verification agencies Independent Regulatory Board of auditors; to establish the B-BBEE Commission to deal with compliance

of B-BBEE; to clarify the interpretation of the Act and to provide for the offences and penalties.”

[55] Based on the above, it is clear that in the present matter, the Joint Venture Company, as described in the Sale and Transfer

Agreement, intended that J&C Engineering should benefit from the use of the “Hamon” name as well as its alleged goodwill. The applicants argued, correctly so in my view, that the fact that the second and the third respondents engaged in an inappropriate BEE exercise, and that they did and have not sought to take appropriate measures to remedy their conduct, is oppressive. The transaction with November and Mangwana and not disclosing such to the applicants, ineluctably means that the conduct of the Hamon respondents was and is unfairly prejudicial to the applicants, and unfairly disregards or disregarded their interests. The applicants were and are exposed to serious business risks especially if the DTI eventually finds that the whole BEE issue was a sham. Criminal prosecution is not excluded at this stage. A business risk is defined in Business Dictionary.com as follows:

“The probability of loss inherent in organisations operations and environment (such as competition and adverse economic conditions) that may impair its ability to provide returns on investment. Business risks plus the financial risk arising from the use of debt (borrowed capital and/or trade credit) equal to corporate risk.”

[56] The definitions of “related and inter-related persons and control” in sec 2 of the new Companies Act, quoted above, make it clear that both the second and the third respondents are persons that are “related” to the first respondent, i.e. Hamon J&C. In my view, the words used in sec 2 must be interpreted according to their ordinary meaning. See *Bato-Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC), at para [89]. In addition, in terms of the Shareholders’ Agreement, the second respondent holds the majority shares, namely 60%, in the JV Company and has the right and power to appoint directors. One of the directors appointed by the second respondent is or was to be the Chairman of the Board and has a second or casting vote in the event of an equality of votes. The importance is that it is also the conduct of the related persons and their directors, which in this instance includes the Hamon respondents and their directors, which is relevant to a determination in this matter. In a more recent judgment of *Kudumane Investments Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ), Satchwell J had the occasion to deal with the provisions of sec 163(1) of the new Companies Act. At paras [49] and [50] of the judgment respectively, the learned judge said:

“Section 163(1) of the Act provides that a shareholder of a company may apply to court for relief if any act or omission of a person related to the company has had the result that is oppressive or unfairly prejudicial to or unfairly disregards the interests of

the applicant. Section 2 of the Act spells out that a juristic person is ‘related’ to another juristic person if either

of them directly or indirectly controls the other. Control of a juristic person is found where the ‘related’ person has the right to appoint directors who control a majority of the votes at a meeting of the board.”

[57] The applicants had made it more than plain in the founding papers, particularly in para 15, that the relief sought is based on all the subsections of sec 163 of the new Companies Act, the respondents’ contentions to the contrary are without merit. Although there were other issues on which the complaint was based, it appeared common cause that the main issue is the BEE issue. The applicants view this issue in a very serious light. The same apply to the authorities and government institutions. The business of Hamon J&C relies heavily on organs of State and public entities as well as other large non-governmental companies who are concerned about a service provider’s BEE status, for business. A company’s BEE status, which is required to be credible, is vital for such purposes, and to ensure ongoing business.

[58] In addition, the Hamon respondents do not dispute that the sale of shares transaction with November and Mangwana did not constitute proper BEE empowerment as contemplated and intended in the laws relating to BEE, as quoted above. The respondents themselves do not suggest that they benefited from what was, on their own admission, an improper BEE exercise. In paragraph 9.3 of the answering affidavit, the fifth respondent simply stated that:

“The third respondent was genuinely of the view that transferring 26% issued shares in the second respondent was in compliance with BEE requirements in South Africa and that the sale to November and Mangwane was in order.”

This clearly was not a genuine transaction as the advice later sought by the Hamon respondents proved otherwise.

[59] From the above, it is more than plain that the applicants, as directors and shareholders, except the second applicant, are plainly being prejudiced. Their interests are being unfairly disregarded by the Hamon respondents. On entering into the JV Company, the applicants had reasonable expectations of profiting financially, at least, from the association of the Hamon name. The fact that the BEE issue is not being resolved makes the conduct oppressive towards the applicants. In Contemporary Company Law, 1st ed, 2011, the learned authors at 684 state:

“The concept of a related person, as defined in s 2 of the Act, includes a holding company and subsidiary relationship, as well as direct or indirect ‘control’ of another company or its business (or the direct or indirect ‘control’) of each of them or the business of each of them or the business of each of them by a third person. The extension of locus standi to include shareholders (and directors) of related persons constitute a distinct improvement on the 1973 Act. It takes account of pertinent judicial discussions and the issues that arose from time to time of whether an applicant could complain of the conduct of the affairs of a parent company ... Section 163 now makes it clear that in appropriate cases, and provided that the other elements of the oppression remedy are satisfied, they may indeed do so.”

Indeed, an insightful formulation of the vast difference between the remedy provided by sec 252 of the old Companies Act and now sec 163 of the new Companies Act is set out in table form in The Comparative Guide to the old and new Companies Act, 1st edition, 2011, at pp 387-388 by Richard Jooste.

[60] It appears to me that a proper construction to the words, “related and inter-related persons and control”, as set out in sec 2, will always play an important role in considering relief sought in terms of sec 163. For example sec 75(1) of the new Companies Act may be helpful. In relation to a “director’s personal financial interests”, it provides:

“(1) In this section –

‘director’ includes –

an alternative director;

a prescribed officer; and

a person who is a member of a committee of the board of a company, irrespective of whether the person is also a member of the company’s board; and

(b) ‘related person’, when used in reference to a director, has a meaning set out in section 1, but also includes a second company of which the director, or a close corporation of which the director or a related person is a member.”

It is also interesting to note that sec 1 of the Co-operative Banks Act No 40 of 2007 defines a “related person” as:

“(i) a person or member who is directly or indirectly controlled by the same person or member; and

(ii) a person or member who is so interconnected with another person or member that should one of them experience financial difficulties, one or all of them would be likely to experience a lack of liquidity.”

From all of the above, it is clear that in the present matter, although the BEE issue complaint occurred in Hamon SA, however by

virtue of its involvement in the Hamon J&C, Hamon SA can safely be qualified as a “related person”. Hamon SA control and materially influence Hamon J&C. This is so even though there is no expanded definition of “inter-related”. The present definition, however, suggests that a wider interpretation was intended by the Act.

[61] In regard to the legitimate expectations of the applicants in the present matter, see *Re A Company* (No 00709 of 1992) *O’Neill and Another v Phillips and Others* [1999] UKHL 24; [1999] 2 All ER 961 at 970d-f. The Hamon respondents have also contended that the conduct complained of is something that occurred in the past, and

therefore irrelevant to the applicants. This contention is clearly contrary to the express provisions of sec 163(1) which covers both past and future conduct. Section 163(1)(a) refers clearly to any act or omission of a company that “has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicants”. Section 163(1)(b) refers to the business of the company or related person as being or “has been carried on, or conducted in a manner that is ...”. Section 163(1)(c) refers to the powers of a director or prescribed officer of the company or a person related to the company as being or “have been exercised”. It is therefore clear that past conduct, even if the conduct is not being persisted with, can still have the results envisaged. Such conduct, as argued by counsel for the applicants, can still be grounds for relief in terms of sec 163 of the new Companies Act. It would seem that the fact that the transaction with November and Mangwana occurred in July 2010, prior to the formation of the Joint Venture Company, effective from 1 October 2010, does not make the events any less serious. The suggestion that because the conduct occurred in the past and is therefore not relevant, is without merit.

THE RESPONDENTS’ ARGUMENT ON THE BEE ISSUE

[62]

62.1 In their heads of argument, the Hamon respondents argued that the results of the BEE issue are entirely speculative on the part of the applicants. Further that the conduct complained of by the applicants has not resulted in any oppression, unfair prejudice or disregard of the applicants’ interests. The respondents also argued that the very most that the applicants can say is that “if the applicants and their business, which they are now conducting through the JV Company under the Hamon name, were to be tainted by these allegations, it has a prospect of destroying their business going forward”. I have already found that as a result of the conduct complained of, the applicants have been or are exposed to serious risks. There can hardly be a question of speculation under circumstances where the BEE issue is under investigation by the DTI.

The Hamon respondents’ reliance on *Aspek Pipe Co Ltd v Mouerberger* 1968 (1) SA 517 (C) for the proposition that sec 163(1) is simply not designed to deal with the present sort of dispute, is misplaced. I conclude on the aspect of the applicability of sec 163 that the applicants’ complaint indeed squarely falls within the provisions of the section.

DISPUTES OF FACT OR NOT

[63]

63.1 I deal briefly with Hamon respondents’ contention that there are disputes of fact on the papers. The main issue in this matter is the BEE issue. As determined above, the respondents have conceded in their answering affidavit that the transaction with November and Mangwana did not comply with the requirements of BEE. The respondents have indicated unequivocally that they are willing to part company with the applicants if the original price paid to the second applicants for the shares is returned. The applicants desperately want to sever all business relations with the Hamon respondents. There is therefore no dispute that the parties ought to

part company with the consequence that the Joint Venture would cease to exist. This is contrary to the view of the Hamon respondents that pending agreement on the amount to be paid, business must continue as usual.

There, is however, one challenge facing the Court. That is the question whether there should be a deduction for the wasted

expenditure from the original purchase price of the shares, or not. The wasted expenditure is contained in annexure “FA15”

to the founding papers, titled “Hamon J&C Engineering (Pty) Ltd – Integration and Hamon ‘Joint Venture’” costs. These are the cost and expenses allegedly incurred by the applicants in order to transfer the business to Hamon J&C, as well as to implement the changes that Hamon SA required. All these had to do with the implementation of the Joint Venture.

There is no agreement between the parties on how exactly the wasted expenditure issue should be dealt with. In the answering

affidavit, the Hamon respondents contended, inter alia, that annexure “FA15” was unclear and would need to be explained by way of evidence. I agree. I am indeed unable to resolve this aspect of the matter in these proceedings. In my view, the solution would be to invoke the provisions of sec 163(2)(l) by referring the quantum of this issue for trial. Other than the wasted expenditure issue, there are no other irresolvable

disputes of fact preventing the granting of the relief sought.

THE RESPONDENTS’ ARGUMENT ON ARBITRATION

[64] Finally, I deal with the Hamon respondents’ contention that the applicants have not exhausted the provisions of the Shareholders’ Agreement relating to arbitration. As mentioned earlier in this judgment, clause 22 of the Shareholders’ Agreement, contained an arbitration provision. In this regard clause 22.1 provides that:

“Any disputes arising from or in connection with this Agreement, should be finally resolved in accordance with the rules of the Arbitration Foundation of Southern Africa (‘AFSA’) by an arbitrator or arbitrators approved by AFSA. There shall be no right of appeal as provided for in article 22 of the aforesaid rules.”

SOME APPLICABLE LEGAL PRINCIPLES ON ARBITRATION

[65] In my view, there are several obstacles in the respondents’ contention having regard to the particular circumstances of the matter. First, some applicable legal principles. The Courts would generally give effect to arbitration provisions in agreements. However, it has been held on occasions that an arbitration clause does not necessarily oust the jurisdiction of the Courts. See *Universiteit van Stellenbosch v J A Louw* 1983 (4) SA 321 (A) at 333G-H; *Nick’s Fishmonger Holdings (Pty) Ltd v De Sousa* 2003 (2) SA 278 (SECLD) at 282A; and *LAWSA* 2nd ed, Vol 1, para 548.

[66] As regards the onus, it is settled law that a party wishing to invoke an arbitration clause must allege and prove the underlying jurisdictional facts

required in order to rely on the clause. See *Goodwin Stable Trust v Duohex (Pty) Ltd* 1998 (4) SA 606 (C) at 615. One of the requirements is that a party wishing to rely on an arbitration clause must show that such clause is applicable to the dispute between the parties. In *PCL Consulting (Pty) Ltd v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at para [8], Cloete JA said:

“In the present proceedings, the defendant has simply pointed out that the lease agreement has an arbitration clause in wide terms. That is not sufficient. The defendant was obliged to go further and set the terms of the dispute ...”

The whole exercise is one of interpreting the agreement.

THE APPLICATION OF LEGAL PRINCIPLES TO THE ARBITRATION ISSUE

[67] Applying the above principles to the facts of the present matter, it is plain that from the nature of the dispute between the parties that it is not a dispute that arises from or in connection with the Shareholders' Agreement. The Hamon respondents have failed to suggest either the basis or the specific clause/s in the Shareholders' Agreement on which they rely for their contentions. The respondents rather rely on the general statement contained in para 6.3 of the answering affidavit that:

“The dispute which is the subject-matter of this application is a dispute ‘arising from or in connection with’ the shareholders’ agreement being concerning the relationship between the applicants and the second respondent in the first respondent and ...”

The relationship that exists does not arise out of the Shareholders' Agreement, nor is it in connection therewith, but simply since the parties are shareholders in accordance with the Sale and Transfer Agreement. In my view, on this ground alone, the contention of the Hamon respondents ought to be rejected.

[68] However, if I am incorrect in the above determination, I believe that the arbitration defence should also not succeed on the following grounds. The present application is brought under the provisions of sec 163 of the new Companies Act. The entity that is supposed to conduct the arbitration process, namely AFSA, clearly does not have the powers to grant the relief as envisaged in sec 163 of the new Companies Act, only a Court does. Section 166 of the new Companies Act provides for alternative dispute resolution, including arbitration, by certain accredited entities. Section 166(3) defines the term “accredited entity”. AFSA is not such an accredited entity. For this reason too, the arbitration defence must fail.

[69] There is yet another important reason why this defence cannot succeed. In the allegations relating to the BEE issue, the applicants have, in a way, imputed fraudulent conduct on the part of the Hamon respondents. It is on its own, a serious allegation that cannot properly be ventilated by arbitration proceedings, in my view. In *Rawstorne and Another v Hodgen and Another* 2002(3) SA 433 (W) at para [25], RA Solomon JA said:

“In the present matter it is the applicants who have been accused of fraudulent conduct and it is they who object to the arbitration. I am mindful that there should be compelling reasons for refusing to hold a party to his contract to have a dispute resolved by arbitration. It seems to me, however, that where fraud of the kind alleged in the present matter is imputed, it would be wrong not to allow the party accused thereof the opportunity of having so grave a personal imputation adjudicated upon in open Court.”

The applicants’ objection to arbitration was upheld. See also *Scriven Bros v Rhodesian Hides and Produce Co Ltd and Others* 1943 (A) 393 at 402. In *The Law of Arbitration South African and International Arbitration*, Peter Ramsden, at 400, the learned author states:

“Accordingly under MAL, courts have either granted a stay on arbitrable issues and not stayed issues which are not a claim under the contract (e.g. fraud claims) and therefore not subject to arbitration.”

MAL refers to the Model Law on International Commercial Arbitration. From the above, it is not appropriate to refer the present matter to arbitration. In addition, in the various correspondence exchanged between the parties, the Hamon respondents at no stage suggested a referral to arbitration either in terms of the Shareholders’ Agreement or otherwise. In this regard, for example, annexure “FA32” to the papers, being a letter from attorneys Werksmans dated 19 October 2011, in fact suggested the contrary. For all the above reasons, the arbitration defence must also fail.

CONCLUSION

[70] For all the foregoing reasons, I conclude that the applicants have succeeded to prove on a balance of probabilities that they are entitled to the relief as contained in the order below. There is no reason why the costs should not follow the result.

ORDER

[71] In the result the following order is made:

1. An order is granted in terms of prayers 1 and 4 to 8 of the notice of motion dated 12 January 2012.
2. In terms of sec 163(2)(l) of the new Companies Act, the relief claimed in prayers 2 and 3, as amended (the payment of the shares and wasted expenditure) are hereby referred to trial.
3. In regard to the issues contained in order 2 above, the notice of motion and the founding affidavit shall stand as simple summons and the answering affidavit as appearance to defend.
4. The applicants shall deliver their declaration in regard to such action within 20 days of the granting of this order.
5. Thereafter the normal provisions of the rules of trial actions shall apply.

D S S MOSHIDI

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

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DATE OF HEARING: 8 JUNE 2012

DATE OF JUDGMENT: 16 NOVEMBER 2012

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Prepared on 12 October 2026 · Esheria