

SOUTH AFRICA / JUDGMENT

Van Der Watt v Schoeman and Others (3393/2022) [2023] ZAECQBHC 61; 2024 (1) SA 531 (ECGq) (12 October 2023) [2023] ZAECQBHC 61

COURT
Eastern Cape High Court, Gqeberha

BEFORE
Bands

CASE / FILE NUMBER
3393/2022

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FLYNOTES:

COMPANY – Oppressive or prejudicial conduct – Deadlock – Applicability of section 163 to a director or a shareholder confronted with a deadlock with no reasonable prospect of reconciliation –

Oppression remedy – Provides locus standi to any shareholder or director – Conduct complained of is not only oppressive but is also unfairly prejudicial to applicant – Such conduct disregards interests of applicant – Reports on which open offer is allegedly premised rely upon incorrect information and are unreliable – Relief sought by applicant is competent – Companies Act 71 of 2008, s 163.

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

IN
THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE
DIVISION, GQEBERHA)
REPORTABLE
Case No.
3393/2022
In
the matter between:-

CARIN
VAN DER
WATT
Applicant
and
ADA-MARI
SCHOEMAN
First
Respondent
LEAP
OF FAITH PATENSIE (PTY) LTD
Second
Respondent
GR
FERREIRA
BOERDERY
Third
Respondent
MERWE
VAN DER
WATT
Fourth
Respondent

JUDGMENT

BANDS J:

- [1] Whilst the interpretation and applicability of section 163 of the Companies Act, 71 of 2008 (“the Act”), may, at first glance, seem apparent in view of the interpretation of its predecessor, section 252 of Act 61 of 1973 (“the old Companies Act”); to confine its ambit analogously, would be to ignore the clear wording of section 163 and the extensive remedy, which the legislature must have had in mind when enacting it.
- [2] Primarily, the applicant seeks relief in terms of section 163 of the Act, directing the first respondent to purchase the applicant’s

shares and loan account in the second respondent at a fair value;[1] alternatively, an order that the second respondent be wound-up in terms of section 81(1)(d). Ancillary thereto, the applicant seeks declaratory relief in relation to unauthorised payments made to and from the second respondent; as well as relief in terms of section 162 of the Act, declaring the first respondent to be a delinquent director. The application is opposed by the first respondent on narrow grounds, to which I return.

[3] Central to the dispute, is the applicability of section 163 of the Act to a director and/or a shareholder of a company who is confronted with a deadlock, either in the management of the company, or in

respect of voting power, with no reasonable prospect of reconciliation. Whilst the oppression remedy, under section 252 of the Old Companies Act, typically operated as a mechanism for the protection of minority shareholders against oppressive and prejudicial conduct of the majority shareholders; on a proper construction of section 163 of the Act, and for the reasons that I shall come to shortly, the remedy can be invoked by a director, qua director, and/or shareholder, qua shareholder, of a company where the management and/or voting power is divided equally between them.

[4] The salient portions of section 163 of the Act read 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) ...
- (c) ...
- (d) ...
- (e) an order directing an issue or exchange of shares;
- (f) an order-
- (i) ...

(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...”
- [5] Accordingly, the section provides a shareholder or a director with a remedy against any oppressive or unfairly prejudicial acts or omissions of a company or related person, that unfairly disregards the interests of a party.
- [6] The remedy, on a plain reading of section 163, contextually, is far wider than its predecessor, section 252 of the Old Companies Act, which provided that:

“(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.”

- [7] The extensive nature of the remedy for which section 163 provides is underscored by the inclusion of the element of unfair disregard of the applicant’s interests.[2] In *Utopia Vakansie-Oorde Bpk v Du Plessis*,[3] the concept of interests, although with reference to section 62quat(4) of the 1926 Companies Act, was stated to be much wider than the concept of ‘rights’. Accordingly, the Supreme Court of Appeal in *Grancy Property v Manala*,[4] in endorsing its earlier decision in *Utopia*, concluded that there is much to be said for the proposition that section 163 of the Act must be construed in a manner that will advance the remedy that it provides rather than limiting it.
- [8] There is nothing in the wording of the section itself which suggests that the remedy is available only to the conduct of a shareholder or director who is vested with the power to override a minority vote and there exists no reason for attributing a narrow meaning thereto. Technically, section 163 of the Act provides locus standi to any shareholder or director.[5] In *Benjamin v Elysium Investments & Another*[6] the court found, albeit with reference to section 111 bis of the 1926 Companies Act:

“the circumstances in which oppression may arise being so infinitely various... it is impossible to define them with precision.”

I am consequently unable to accept the argument that sec. 111 bis cannot be invoked by a member of a company who shares the voting control equally with another.”

[9] Accordingly, whilst the oppression remedy typically operates as a mechanism for the protection of minority shareholders, there exists no reason why, in an appropriate case, given the particular facts of a matter, it is not available to a shareholder who can cast precisely half the votes in a general meeting of a company, such that the voting power is equally divided between an applicant and a respondent. The distinguishing feature between a deadlock

situation and one involving majority shareholders is that a majority or a controlling shareholder will not generally be granted relief under section 163 of the Act on the basis that he or she has the power to exercise his or her voting power to eliminate the oppression and/or the prejudice of which he or she complains. The difference between the aforesaid situation and the present is manifest.

[10] It has been suggested[7] that it is not clear how a deadlock per se can satisfy the requirements of subsections (1)(a) to (c) of section 163. This approach loses sight of the inclusion of the words ‘related person’ in the sub-sections under discussion. In terms of section 1 of the Act, ‘related’, when used in respect of two persons, means persons who are connected to one another in any manner contemplated in section 2(1)(a) to (c).

[11] In terms of section 2(1)(b) of the Act, 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).

[12] Section 2(2) of the Act reads as follows:

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)."

[13] Accordingly, on a proper reading of section 2(1)(b) of the Act, read together with section 2(2)(d) thereof, an individual is related to a juristic person if the individual directly or indirectly controls the juristic person where the 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 section 2(2)(a), (b), or (c). Whilst a finding in this regard is dependent upon the facts of each matter, a deadlock situation can clearly be catered for within the ambit of the above sections. For the purposes of this judgment, I find that the facts fit squarely within the purview

of section 163 of the Act.

[14] I now turn to the facts of the present matter.

[15] The applicant and the first respondent, doctors, are the only directors and registered shareholders of the second respondent. The share capital of the second respondent has at all times comprised of 200 shares, allotted to the applicant and the first respondent equally. The second respondent is a domestic company analogous to a partnership, commonly referred to as a quasi-partnership (or owner-managed) company. Implicit in the business arrangement between the applicant and the first respondent was that they, as the shareholders and directors of the second respondent, would participate in the management of the second respondent's affairs.

[16] The second respondent's principal asset is a commercial property situated at 994 Fred Ferreira Street, Patensie ("the immovable property"), from which the medical practice, Gamtoos Vallei Doktors, operated ("the practice"). The applicant and the first respondent, together with Alexander James Barbour ("Barbour"), were the directors and equal shareholders of the practice. The immovable property was purchased in November 2016 for a purchase consideration of R1,650,000.00, subject to a suspensive condition that the second respondent be granted a loan in the amount of R1,500,000.00 on or before 21 January 2017. A deposit of R165,000.00 was funded by way of equal loans in the amount of R85,065.00.00 made by the applicant and the first respondent to the second respondent. The remainder of the purchase price was secured by way of a loan obtained by the third respondent from FNB, [8] for which the applicant and her husband stood surety. The third respondent, in turn, loaned the necessary capital to the second respondent. The immovable property was registered in the name of the second respondent on 15 August 2017, whereafter the practice took up occupation during February 2018 following extensive renovations to the immovable property.

- [17] The practice, which occupied the major portion of the immovable property, paid rental in the amount of R20,000.00 per month to the second respondent. The following further tenants took up occupation, paying the following further rentals (exclusive of VAT):
- (i) Tolbos, R1,500.00 per month; (ii) Scheyisa Powerlines, R5,500.00 per month; (iii) Bay Physio, R2,500.00 per month; and (iv) Tania Venter Hair Salon, R2,850.00 per month. In addition, the respective lessees were responsible for the payment of their pro rata utility charges.
- [18] The second respondent's major liabilities, according to its annual financial statement for the financial year ending February 2019, consists of loans from the applicant in the amount of R986,477.00 and from the first respondent in the amount of R856,192.00, both of which are unsecured, and a secured loan from the third respondent in the amount of R2,135,160.00.
- [19] According to the applicant, the relationship between her and the first respondent became strained during the middle of 2020, at which stage she realised that they would need to go their separate ways. She obtained a ballpark valuation of the second respondent during January 2021, whereafter she informed the first respondent and Barbour, during March 2021, that she intended on selling her shares in the practice. Following a meeting held on 8 April 2021, it was agreed that the first respondent and Barbour would purchase the applicant's equity for a purchase consideration of R250,000.00, payable by the first respondent and Barbour in equal proportions of R125,000.00, in twelve equal monthly instalments from 1 May 2021. It was further agreed that the applicant would cease being a shareholder of the practice with retrospective effect from 31 March
2021. The agreement was recorded in a written agreement of sale of shares.
- [20] As at 31 March 2021, the tenants of the immovable property and the rentals (exclusive of VAT) paid by them, in addition to their responsibility in respect of their utility charges, were as follows: (i) the practice, R20,000.00; (ii) Tomsett, R1,500.00; (iii) Physiotherapists, R2,700.00; (iv) coffee shop, R0;[9] and (v) PSG, R5,500.00.
- [21] Notwithstanding the applicant's resignation as a shareholder of the practice, she remained a shareholder and director of the second respondent.
- [22] Apparent from the applicant's papers is that shortly after leaving the practice on 9 April 2021, the first respondent started to exclude the applicant from the management of the second respondent, treating it as her personal fiefdom. The applicant's founding papers describe in detail the circumstances in which such accusations are made and her continued attempts to convene a directors' meeting to discuss various pressing issues, which attempts were ignored by the first respondent.
- [23] Whilst I do not propose to discuss the details of the applicant's complaints at great length, the exclusion of the applicant by the first respondent, in the effective participation in the management of the second respondent, is glaringly apparent. The first respondent has acted unilaterally, and has, on the whole, treated the second respondent and its principal asset as

her own. She has concluded and continues to conclude transactions on behalf of the second respondent without being authorised to do so. Significantly, the first respondent, in her answering affidavit, elected not to traverse the specific allegations made by the applicant in this regard, nor did she attempt to justify such accusations other than to contend that:

“8. There has been a long history between the Applicant and me regarding the running of the Second Respondent. During March 2021 the Applicant approached myself and stated that she could no longer be involved in the day-to-day running of the Second Respondent, due to family responsibilities.

9. It was then decided between myself and the Applicant that she takes a year sabbatical leave from the running of the Second Respondent and that I would be responsible for the running of the Second Respondent. The Applicant never returned and failed to resume with her responsibilities in the running of the Second Respondent and I've since been running the business myself.”
- [24] Not only are the aforesaid allegations expressly denied by the applicant, but they fly in the face of the objective, common cause facts before court.
- [25] Without belabouring the point, the applicant and the first respondent held a directors meeting on 8 April 2021, this being a month after the applicant allegedly approached the first respondent contending that she could no longer attend to the day-to-day running of the second respondent. Moreover, the applicant in numerous correspondence addressed to the first respondent during the alleged sabbatical period, implored upon the first respondent that the directors are required to act jointly. She continuously called for directors' meetings to be held to no avail. At no stage did the first respondent cite the applicant's alleged sabbatical in any of the correspondence that was exchanged preceding the application.
- [26] There can be no doubt that the applicant has established conduct in the nature contemplated in section 163 of the Act.[10] Put differently, I am satisfied that the conduct complained of is not only oppressive but that it is also unfairly prejudicial to the applicant. At the very least, such conduct disregards the interests of the applicant.
- [27] On either party's version, by 31 July 2022, the relationship between the applicant and the first respondent had broken down completely. On 2 August 2022, the applicant's attorneys of record addressed correspondence to the first respondent, indicating inter alia, that the first respondent was responsible for the demise of the trust relationship between the applicant and the first respondent and that her conduct, in relation to the applicant, constitutes oppressive and unfairly prejudicial conduct, citing various examples such as: (i) receipt of the first respondent of cash payments by certain tenants, which are not paid into the bank account of the second respondent; (ii) numerous unlawful transactions made by first respondent; and (iii) the denial of the applicant to participate in the management of the second respondent. Ultimately, the applicant, through her attorneys of record, demanded that the first respondent purchase her shares and loan account in the second respondent at a reasonable market related value. To this end, it was proposed that an independent valuer be appointed to determine the value of the applicant's shares and loan account.

- [28] On 15 August 2022, the first respondent, through her attorneys of record advised inter alia that insofar as the unlawful or unauthorised transactions are concerned, such payments are not payments made to the first respondent but are instead payments that the first respondent made to the second respondent, which is managed by her. Apart from the fact that the first respondent was not authorised to make loans to the second respondent by way of a directors' resolution, implicit in the first respondent's response is that she acknowledges that she usurped the management of the second respondent in circumstances where she was never authorised to do so by the board of directors. The first respondent suggested that the applicant obtain her own valuation and that the parties mediate the dispute.
- [29] Further correspondence was exchanged between the legal representatives for the applicant and the first respondent, from which it is apparent that as of 13 September 2022, the applicant was advised that the first respondent had no interest in purchasing the applicant's equity in the second respondent and that an independent valuer be appointed to determine the value thereof. Presumably, the first respondent at that stage had in mind that a third party purchase the applicant's equity, if he or she is interested, bearing in mind the valuation thereof.
- [30] The parties, despite various communications being exchanged between them during the period of 13 September 2022 and 18 October 2022, were unable to resolve the dispute. The application was thereafter launched during November 2022.
- [31] Whilst the first respondent denies the applicability of section 163 of the Act on the basis that the applicant is not an oppressed minority, she contends that there is no other way to resolve the current impasse other than to proceed with the buy-out by herself of the applicant's shares, citing that the liquidation of the second respondent would be far more prejudicial to the parties.
- [32] Accordingly, under cover of a letter, dated 12 December 2022, the first respondent delivered an open offer to the applicant, in the amount of R500,000.00 together with ancillary performance, which offer was premised on two valuation reports obtained by the first respondent. The first respondent, relying on *Bayly and others v Knowles*[11] as authority, argued that a fair offer destroys the entire basis of prejudicial conduct, as the offer cures any prejudice.
- [33] On this basis, the first respondents answering affidavit records as follows:
- "28. In view of the case law to be relied upon on my behalf, not only is the background by enlarge (sic) irrelevant, but also the alleged prejudicial conduct. For present purposes, I do not necessarily agree with the factual contentions by the Applicant, in respect of both the background and the prejudicial conduct. For present purposes, I'll concede that the offer is made, due to the fact that the cooperation between the Applicant and myself had (sic) become impossible and that this Honourable Court for those reasons can assume that it is premised on prejudicial conduct."*

- [34] The first respondent further contends that the further allegations made by the applicant regarding the various other remedies under the Act are not viable in the face of the open offer and seeks that the application be dismissed with costs and that the open offer, which she contends to be “very generous and more than reasonable”, be made an order of court.
- [35] Whilst it was argued on behalf of the first respondent that the present matter was on all fours with *Bayly and others v Knowles*, such proposition is misguided.
- [36] In *Bayly*, there existed no cogent reason for Knowles’ rejection of Bayly’s offer. Both in correspondence and under oath, Knowles confined himself to the assertion that the offer was “unacceptable” to him, without tendering an explanation for his refusal to take it up. The court found that his attitude, as manifested in the counter-proposal and in the argument before court, was simply a refusal to dispose of his shares to Bayly, leaving him in control of the company. The court found that in the face of the positive assertion by Bayly that his offer was more than fair to Knowles, which Knowles failed to take issue with, it was not open to Knowles to contend otherwise.
- [37] The position in *Bayly* is irreconcilable with the facts of the present matter. I say this for the simple reason that the applicant pertinently takes issue with the reasonableness of the open offer on the basis that the reports upon which it is allegedly premised, rely upon incorrect information; are unscientific; flawed; and are unreliable. Detailed reasons for such assertions are traversed by the applicant, in her replying affidavit, over some 30 paragraphs. Having given due consideration thereto, read in conjunction with the reports, I am in agreement with the applicant. Accordingly, I cannot accede to the first respondent’s request to make the open offer an order of court.
- [38] This then brings me to the question of the nature of the relief sought by the applicant. The list of orders that a court may make under section 163(3) is non-exhaustive and open-ended. Where a court grants relief to an applicant by way of a direction that his shares are to be purchased, the court has an unfettered discretion as to the method of fixing the price of the shares, which should be a fair price therefor, and which should be determined objectively as to the date at which such price is to be fixed. Implicit therein is that a court is empowered to direct that such price be determined by an objective third person, such as an independent valuer. The relief sought by the applicant herein is competent and there exists no reason why an order in terms of the draft order 2, barring the relief in respect of section 162 of the Act,[12] should not be made an order of court. The costs of the application, including the reserved costs of 14 February 2023 are to follow the result.
- [39] Accordingly, the following order is issued:
1. The first respondent be and is hereby directed to purchase the applicant's shares and loan account in the second respondent at a fair value to be determined in terms of paragraphs 2 to 9.

2. That the applicant and the first respondent (“the parties”) are directed to endeavour to agree upon the appointment of a practising chartered accountant of not less than 15 years standing who shall not be the auditor of any of them, nor have been previously professionally engaged in any capacity by any of them, to undertake the valuation of the shares and loan accounts in accordance with the directions in paragraphs 2 to 9, and to determine the purchase consideration payable for the shares and loan account of the applicant. In the event of the parties being unable to so agree within 10 days of the date of this order the valuation and determination shall be undertaken by a Gqeberha based practising chartered accountant of not less than 15 years standing, to be nominated by the president or chairman of the Gqeberha Regional Association of the South African institute of Chartered Accountants.
3. The valuer is to make the determination in respect of the fair value of the shares and loan account within a period of 30 days from the date of this order and shall deliver to all parties a written notice indicating the fair value of the shares and loan account of the applicant in the second respondent.
4. The costs of the valuer are to be borne by the second respondent.
5. In determining the aforesaid fair value, the valuer shall act as an expert and not an arbitrator, and:
 - 5.1 the fair value of the shares and loan account shall be determined with regard to the financial condition of the second respondent as at the date that this application was issued, being the value at which the shares and loan account would have exchanged between a willing buyer and willing seller, neither being under compulsion, each having full knowledge of the relevant facts and with equity to both;
 - 5.2 the valuer shall have due regard to any order that this Honourable Court makes in terms of paragraph 17 below;
 - 5.3 the price of the shares shall be determined pro rata the total issued share capital of the second respondent (having due regard to any order that this Honourable Court makes in terms of paragraph 17 below), that is without any discount for the shares representing the minority or majority holding and without any discount on account of any contractual restrictions that might have been agreed upon between the shareholders, or provided for in the memorandum of incorporation on the disposal of the shares other than as between existing shareholders;
 - 5.4 any costs borne by the second respondent in respect of this application shall be excluded from the valuer’s determination, and the purchase price is accordingly to be determined as if such costs had not been borne by it.

6. Each of the parties to this application shall fully and timeously cooperate with the valuer and furnish all information, appropriately vouched, and all documentation required by him or her to undertake the valuation and determination, failing which the valuer is authorised to make application through the chamber book to a judge for such further directions and relief as may be appropriate
7. the valuer shall have the following further powers:
 - 7.1 the right to conduct all investigations necessary and, in particular, to obtain from the parties or any third party or entity all information and documentation considered by the valuer reasonably necessary for the valuers determination;
 - 7.2 the right to obtain information regarding the financial affairs from any bank, financial institution or other entity where monies may have been invested or to which/whom monies may be owed by any of the entities relevant to the determination;
 - 7.3 the right to obtain and call for balance sheets or income statements in respect of any entity or business relevant to the determination;
 - 7.4 the right to inspect books of account in respect of any company or entity, including but not limited to bank statements, paychecks, deposit books and personal statement of affairs and liabilities which the valuer considers relevant for the determination;
 - 7.5 the right to make physical inspection of assets and take inventories;
 - 7.6 the right to question any person or party and obtain explanations deemed necessary for the purpose of making the determination;
 - 7.7 to do anything or to take any such steps as may reasonably be considered by the valuer to be relevant to the valuer's determination, including the appointment of an expert valuer to value the assets (including the commercial property of the second respondent situated at 994 Fred Ferreira St. Patensie ("the immovable property");
 - 7.8 to be entitled to apply to this court for any further direction that the valuer shall or may consider necessary in order to perform his determination; and
 - 7.9 to take into account any matter which the valuer considers relevant to determining what the valuer considers to be a fair value as at the date of the issuing of this application.
8. The applicant as well as the first respondent shall be entitled to forward any documents or representations to the valuer and shall be entitled to copies of any documents or representations made available by the other party and in respect of which the other party is entitled to comment to the valuer.
9. The determination of the valuer shall be final and binding on the parties.
10. Payment of the fair value of the shares and loan account so determined shall be made within one month of such determination being made.

11. Upon a full discharge by the party acquiring the shares and loan account, the applicant shall transfer her shares to the transferee shareholder (the first applicant) or the company, as the case may be.
12. The first and second respondents are directed to take all reasonable steps to procure the release of the applicant from any liability which she may have under any guarantee which may have been given by her for the second respondent's obligations and that, until such release is procured, each of the first and second respondents shall be jointly and severally liable to indemnify the applicant against such liability.
13. The first respondent is directed to cede the Momentum policy, number 3[...]8, that she took out on the life of the applicant, to the applicant.
14. The applicant is directed to cede the Momentum policy, number 3[...]1, that she took out on the life of the first respondent, to the first respondent.
15. The first, second and third respondents are directed to take all reasonable steps to procure the release of the applicant from any liability which she may have under any guarantee which may have been given by her for the third respondent's obligations (including the suretyship that she signed in favour of the First Rand Bank limited and her cession in securitatem debiti of her Sanlam policy, number 589[...], and Investec policy, number 149[...]) and that, until such release is procured, each of the first, second and third respondents shall be jointly and severally liable to indemnify the applicant against such liability.
16. The first, second and third respondents are directed to take all reasonable steps to procure the release of the fourth respondent from any liability which he may have under any guarantee which may have been given by him for the third respondents obligations (including the cancellation of the bond in favour of First Rand Bank over the property of the fourth respondent situated at 27 Dombeya Street, Wavecrest, Jeffreys Bay; Erf 5[...], Jeffreys Bay) and that until such release is procured, each of the first, second and third respondents shall be jointly and severally liable to indemnify the fourth respondent against such liability.
17. The loans that the applicant unilaterally made to the second respondent and the payments that she unilaterally made out of the bank account of the second respondent, as reflected in the spreadsheet annexed to the founding affidavit marked "CW30", be and are hereby declared unauthorised and void, and the chartered accountant appointed as the valuer, in his determination of the fair market value of the applicant's shares in the second respondent, must ignore all the loans that the first respondent made to the second respondent and all the payments made by the second respondent for the benefit of the first respondent, Dr Ada-Mari Schoeman Inc or any other person or entity related to the first respondent and, insofar as any other transactions referred to in "CW30" are concerned, take into account that these transactions are void and unenforceable and attribute, where necessary, market related values of these transactions. That will include the rent that Schoeman Inc. pays.

18. The first respondent is to pay the costs of this application, including the reserved costs of 14 February 2023.

I BANDS

JUDGE OF THE HIGH COURT

Date heard:

25 May 2023

Date of judgment: 12 October 2023

For the applicant: Adv T. Zietsman

Instructed by:

Schoeman Oosthuizen Inc.

167 Cape Road

Mill Park

Gqeberha

For the 1st respondent: Adv P Jooste

Instructed by:

Nel Mentz Steyn Ellis Inc

Quinton van der Berg Attorneys Inc.

132 Cape Road

[1] Such value to be determined by a practicing chartered accountant of not less than 15 years in the manner set out in the notice of motion.

[2] FHI Cassim Contemporary Company Law 2 ed (2012) at 770-1.

[3] 1974

(3) SA 148 (A) at 170H-171D.

[4] 2015

(3) SA 313 at 324 A.

[5] FHI Cassim Contemporary Company Law 2 ed (2012) at 683.

[6] 1960

(3) SA 467 (ECD) at 476H and 477A – B.

[7] In Henochsberg on the Companies Act, 71 of 2008.

- [8] In the amount of R2,500,000.00 to cover the remainder of the purchase price in the amount of R1,500,000.00 and to fund extensive renovations to the immovable property.
- [9] The coffee shop was not charged rental as the applicant and the first respondent sought to assist the owner and were of the view that it would attract customers and patients.
- [10] Grancy Property Ltd v Manala 2015
- (3) SA 313 (SCA) Louw and Others v Nel 2011 (2) SA 172 (SCA).
- [10] Grancy Property Ltd v Manala 2015
- (3) SA 313 (SCA)
- Louw and Others v Nel 2011 (2) SA 172 (SCA).
- [11] [201] 3 All SA 374 (SCA).
- [12] On the facts before court, I am not satisfied that a case has been made out for the relief sought in respect of section 162 of the Act.

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ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECQBHC/2023/61.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/van-der-watt-v-schoeman-and-others-unknown-topic-aecqbhc-2023>

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