

SOUTH AFRICA / JUDGMENT

Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others (15854/2013) [2014] ZAWCHC 95; 2014 (5) SA 179 (WCC) (19 June 2014)

[2014] ZAWCHC 95

COURT

Western Cape High Court, Cape Town

BEFORE

Rogers

CASE / FILE NUMBER

15854/2013

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

Case

No: 15854/2013

DATE:

19 JUNE 2014

In the matter

between:

VISSER SITRUS

(PTY)

LTD.....APPLICANT

And

GOEDE HOOP SITRUS

(PTY)

LTD.....FIRST

RESPONDENT

MOUTON

SITRUS.....SECOND

RESPONDENT

COMPANIES AND

INTELLECTUAL

PROPERTY

COMMISSION

(CIPC).....THIRD

RESPONDENT

Coram: ROGERS J

Heard: 28 MAY

2014
Delivered: 19
JUNE 2014

JUDGMENT

ROGERS J:

Introduction

- [1] This application concerns the refusal by the board of the first respondent (“GHS”) to approve a transfer by the applicant (“VC”) to the second respondent (“MC”) of the shares held by VC in GHS. VC seeks to compel GHS to register the transfer by way of relief in terms of s 163 of the Companies Act 71 of 2008. VC also seeks an order that the clause in GHS’ Memorandum of Incorporation (“MOI”) restricting the transferability of its shares be amended.
- [2] VC seeks final relief on motion. The facts must thus be adjudicated in accordance with the Plascon-Evans rule. Mr A Ferreira appeared for VC and Mr J Newdigate SC for GHS.
- [3] Although MC was cited as the second respondent and presumably wishes the transfer of shares to be approved, it has played no part in the proceedings. It did not file affidavits in support of VC’s case or in response to the allegations made by GHS in support of the board’s decision to refuse approval for the transfer.

The facts

Goede Hoop Sitrus

- [4] Some years ago (the MOI indicates with effect from 1 March 2000) GHS was converted from a cooperative to a public company. By way of a special resolution passed by shareholders on 16 November 2012 it was converted to a private company. GHS’ primary functions are to receive citrus from producers and to grade, store, pack, market, sell and deliver the fruit on an agency basis. Producers may elect to acquire all or only some of GHS’ services.
- [5] In terms of the MOI, GHS’s shareholders have preference in the conclusion of contracts for the supply by GHS of packing and marketing services. If GHS has sufficient capacity after shareholders have made their elections, GHS may provide its services to other producers. At the present time GHS has no contracts with producers who are not also shareholders. Not all shareholders, however, pack and market their citrus through GHS. There are 88 shareholders of whom 66 pack and market their fruit through GHS.

- [6] A producer may elect to contract with GHS on a short-term basis (a one-year cycle) or a long-term basis (a three-year cycle). There are currently 42 producers who have elected to contract on a long-term basis. According to GHS' board, the business strategy and vision of the company and the majority of its shareholders are that there should be long-term contracts and that producers should acquire the full range of services, because this facilitates planning, capital investment and the appointment and retention of qualified staff.
- [7] GHS' MOI from the outset contained restrictions on the transferability of its shares, even as a public company. However, the events in the present case concern the position after it became a private company. Clauses 6.1.7.1 and 6.1.7.3 read as follows:
- '6.1.7.1 No shareholder may transfer the registered or beneficial ownership of any Ordinary Shares in the Company to any other party without first –
- 6.1.7.1.1 complying with the requirements for transfer as set out in the Act and in this MOI; and
- 6.1.7.1.2 obtaining the approval of the board for such transfer.
- 6.1.7.2
- 6.1.7.3 The board may, at any time, decline to register any transfer of Ordinary Shares in the securities register of the Company without giving any reason therefore and the directors shall be deemed to have so declined until they have resolved to register the transfer.
- [8] As will appear, MC's shareholding in GHS will, if the disputed transfer is registered, increase above 10%. The following provisions of the MOI in regard to this threshold may be noted. In terms of clause 9.3 the right of shareholders to requisition a meeting, as set out in s 61(3) of the Act, may be exercised by the holders of at least 10% of the voting rights. In terms of clause 9.7.1 the quorum for a shareholders' meeting to begin or for a matter to be considered is 10% in substitution of the 25% set out in s 64(1) of the Act.
- [9] A shareholder in GHS has one vote for every ordinary share up to a maximum of 4 million shares (clause 6.1.1.2.2 of the MOI). Thereafter there is only one vote for every 1 million shares in excess of 4 million shares (0,0001% per share). GHS currently has 31 249 515 issued shares. MC holds 2 653 811 (8,5%), which will increase by 1 066 571 to 3 720 382 (11,9%) if the disputed transfer is registered. MC's voting interest will thus increase in the same proportion (from 8,5% to 11,9%). If MC were in future to acquire further shares taking its total to 4 million, its voting interest would increase to 12,8%. Share acquisitions above 4 million would add very little to the number of MC's votes though every share acquired by MC in excess of 4 million would remove a full vote from the hands of other shareholders. So if, for example, MC were eventually to hold 10 million shares, it would have only six more votes (4 000 006 in total) but its voting interest would increase from 12,8% to 15,8% because there would now be only 21 249 515 shares in the hands of other shareholders. (These percentages assume that there will be no other shareholder with a holding in excess of 4 million shares. Theoretically, if there was one shareholder with 27 249 514 shares and one other shareholder with 4 million shares, the voting interest conferred by the 4 million shares would be a

fraction under 50%.)

Mouton Citrus

[10] MC, the proposed transferee, has held shares in GHS for some years (probably from the date of conversion to a company). As at 2008 MC held 778 875 of GHS' 24 249 515 issued shares (3,2%). During 2008 MC acquired a further 675 815 shares from seven sellers, increasing its tally to 1 454 690 (6%). In 2009 it acquired a further 518 713 shares from three sellers and in May 2011 a further 680 408 shares from another three sellers, bringing its total shareholding to 2 653 811 (10,9%).

[11] At an unspecified date after May 2011 the number of GHS' issued shares increased to 31 249 515, which had the effect of diluting MC's holding to 8,5%. (This may have been in the context of the BEE transaction mentioned in the papers.) If MC were to obtain transfer from VC of the latter's 1 066 571 shares, MC's total shareholding would increase to 3 720 382 (11,9%).

[12] GHS' board approved the various transfers to MC mentioned above (ie up to and including May 2011). However, the minute of the GHS board meeting of 24 May 2011 indicated some disquiet in relation to the transaction of May 2011 which took MC from 6% to 10,9%. The minute approving the transfer recorded the following (I provide my own translation from the Afrikaans):

'The above transactions [ie MC's acquisition of a further 680 408 shares from three sellers] will result in MC holding an interest of 10,9% in GHS which will make it the largest single shareholder after the GHC Empowerment Trust. The second largest producer [the empowerment trust was not a producer] holds about 5,4% of the shares. After an in-depth discussion, the directors were unanimously of the opinion that there was growing unease among producers over the influence of MC within GHS, taking into account MC's strategy of doing its own marketing and doing contract packing on a short-term basis. GHS' strategy of long-term discretionary packing does not suit MC and impedes its own growth strategy by way of purchasing farms and leasing land, because the land of producers is also bound to the long-term agreements with GHS. The board is of the opinion that a further increase of MC's interest [ie in GHS] is going to discourage some producers in the future from concluding long-term discretionary contracts with GHS.

The board has the power in terms of the MOI to refuse approval for transfers without giving reasons, but strategically it is not the right time to refuse the transfers. MC has still committed its total volume to GHS for packing in the 2011 season.'

[13] After the approval of the above transfer but prior to the transaction between VC and MC, the latter attempted to purchase a further 41 250 shares from the John van Wyk Family Trust. On 14 November 2011 GHS's board resolved to refuse the transfer without furnishing reasons.

[14] In early 2012 MC, in its negotiations with GHS, insisted that it would only conclude a short-term contract and that it required terms which differed from the standard terms on which GHS contracted. MC's attitude and its implications for GHS were considered at a GHS board meeting on 26 February 2012. The minute reflects the following (again my translation):

'Pursuant to discussions with producers, it is clear that the vision, growth strategy and demands of MC put GHS at risk in regard to the retention and maintenance of service levels to GHS' other shareholders and producers. The latter producers are concerned in particular about the availability of capacity in the future and the maintenance of service levels. Other packers undertake little or no contract packing for producers where they do not have control over or a say in the marketing of the fruit, primarily because of the impact on service levels and the risk of bad debt. In particular, the short-term nature of the delivery contracts which MC wants increases the risk.

If MC should withdraw, GHS will need to adapt to the reduced volumes so that it can still render a market-related packing service to the remaining producers, which is indeed possible.'

[15] Following this meeting, GHS' managing director, Mr G van Eeden, had further negotiations with MC but found himself unable to meet the latter's requirements. He reported back to the board on 16 April 2012. The minutes of the meeting record a unanimous decision by the directors. This was to the following effect: [i] GHS' first choice was to conclude a standard long-term packing contract with MC but with certain special terms which offered some concessions to MC in return for guaranteed minimum volumes. [ii] GHS would not do contract packing for other producers through the agency of MC. MC was to respect GHS' agreements with other producers. (I understand this part of the minute to mean that MC should not extend the benefits of its special terms to other citrus producers by taking their fruit as an agent and delivering it to GHS for packing.) [iii] The amendments which MC was demanding in respect of GHS' MOI and board were not negotiable. (What these demands were does not appear.) [iv] Share transfer instructions received from MC would be considered upon the conclusion of a long-term contract.

[16] GHS' management was given a mandate to negotiate further with MC along these lines. However, Van Eeden could not achieve an outcome which complied in all respects with the board's requirements. At a board meeting on 22 May 2012 the directors approved the terms of a short-term contract with MC for the 2012 season. It was recorded that MC had committed itself to a strategic process with a view to establishing a workable long-term relationship with GHS. This required both parties to appoint representatives for the discussions. The board mandated Messrs le Roux and Jacobs as its representatives. In the ensuing discussions, it became apparent to those gentlemen that MC had a vision for unbundling GHS and establishing a separate packing company. The state of play was considered at a further GHS board meeting on 18 September 2012, where a mandate for further discussions was given. However, by October 2012 it became apparent to GHS' representatives that the two companies would be unable to come to terms on the long-term relationship, though according to a board minute of 13 November 2012 MC had committed

to packing its fruit with GHS in the 2013 season.

- [17] MC is the largest single source of citrus deliveries received by GHS for packing. Over the period 2008-2013 MC's deliveries to GHS comprised an annual average of 29,5% of GHS' total fruit received. The figure was 39% for the most recent year, 2013. However, and from inception in 2000, MC has chosen largely to do its own marketing. Furthermore, according to GHS' deponent it came to the board's knowledge during 2011 that MC was not delivering all its produce to GHS; on the contrary, MC was giving preference to entities who were in competition with GHS.

Visser Citrus

- [18] The controllers of VC are Mr and Mrs Visser. For some years Mr Visser, a citrus producer, had an indirect shareholding in GHS through a 50% shareholding in a company called Hexrivier (Pty) Ltd ('Hexrivier'). During December 2010 Hexrivier was unbundled, as a result of which 1 066 571 GHS shares previously held by Hexrivier were transferred to VC. After the dilution already mentioned, this constituted a 3,4% shareholding in GHS.
- [19] On 20 April 2011 GHS' board approved the transfer of the 1 066 571 shares to VC. The minute reflects that VC requested the board to hold over the registration pending further instructions. The reason for this does not appear from the papers. In the event, though, the instruction to effect the registration was given and implemented in May 2013.
- [20] VC previously used the packing and marketing services of GHS. However, and as from the 2011 season, VC has had no business dealings with GHS. In November 2012 VC decided, in view of the cessation of its dealings with GHS, to dispose of its shares. VC also wanted to raise funds for planting new varieties of citrus. In February 2013 the Vissers approached MC. A verbal agreement was struck for the sale of shares at one rand per share. MC's controller, Mr Johan Mouton, stipulated, as a condition, that GHS' board should approve the registration of transfer of the shares. He informed the Vissers that the board had on prior occasions refused to approve transfers without giving reasons and he feared the same would happen on this occasion.
- [21] VC alleged in its founding affidavit that, at the time the deal was struck, GHS' shares 'appeared to be trading' at between R1,34 and R4,00 per share, the latter being the price at which GHS' shares were sold as part of a BEE transaction. VC says that it took the view that the market price for the shares was between R1,00 and R1,34.
- [22] During April and May 2013 Mrs Visser attempt to sound out GHS' financial director, Mr Venter, who referred her to Van Eeden. There is a factual dispute as to precisely what was said during the meeting with Van Eeden. It is common cause, though, that he told Mrs Visser that the decision lay with the board and that VC should prepare a written motivation in support of the transfer. It is also common cause that Mrs Visser enquired whether GHS would buy back VC's shares. According to Mrs Visser, Van Eeden refused, saying that the company had a policy against share buy-backs and did not wish to set a precedent. Van

Eeden denied that this had been his response; he averred that he told Mrs Visser that in all likelihood the company would not buy back the shares because it was not in the interests of the company to do so.

[23] Mr Visser met later during May 2013 with GHS' non-executive chairman, Mr Cobus de Witt, and apprised him of the fact that VC would be submitting a written motivation. De Witt confirmed that the matter would be placed on the agenda for the board meeting scheduled to be held on 28 May 2013.

[24] On 26 May 2013 VC emailed its written motivation to Van Eeden. In the letter the Vissers dealt with various matters which had been raised in the preceding discussions or which they thought might be an obstacle to approval of the transfer. These points were the following:

[a] VC had offered to sell the shares to GHS but Messrs van Eeden and Venter had indicated that the company did not wish to buy back the shares.

[b] Although transfers of shares were subject to board approval, the directors had not in the past had problems with approving transfers among producers, as had been confirmed by the recent registration of the transfer of shares from Hexrivier to VC.

[c] GHS' concern that MC was in direct competition with GHS was unfounded. Rather, it was the seller, VC, which was a direct competitor, because VC was now packing its own produce whereas MC was one of GHS' most loyal supporters. MC expected no more than a professional packing service at competitive tariffs. MC would not erect its own substantial packing facilities for so long as it could have its fruit successfully packed by a single service provider. MC's willingness to buy the shares was rather an indication that it viewed GHS' successful continuation in business as being in MC's strategic interests.

[d] The concern that MC's enhanced voting rights would be a threat to GHS was incorrect in the light of the cap on voting rights contained in the MOI.

[e] The 'extra' voting rights which arose upon the unbundling of Hexrivier would disappear with the exit of VC. (I do not understand this point and it was not elaborated upon in argument.)

[25] Having dealt with these concerns, the Vissers gave their reasons for wanting to transfer VC's shares. They did so under a heading (my translation), 'Conflicting vision for the future of GHS.' Under this heading they said the following (again my translation):

'For some time the decisions of GHS' board have been contrary to those of VC's vision for the company. For that reason we have often voted against such decisions. The decisions were, however, carried out because they procured majority support and VC is a minority shareholder.

If two parties' priorities differ so drastically, it is better for them to part ways, because it is impossible simultaneously to act to the benefit of both. At the same time, it is the fundamental right of any minority shareholder, regardless of what is contained in the company's MOI, to be protected. Because our priorities differ from those of GHS, it is to our disadvantage to remain as a shareholder of GHS. If VC is permitted to deal in its shares, its right will be protected and both parties will be able to strive for their own goals without any prejudice.'

- [26] This motivation was considered by GHS' board on 28 May 2013. The minutes noted that the Vissers' account of discussions with the directors was inaccurate. The minutes record, further, that after discussion it was decided to reject the application as it was not in the company's interests. The minutes do not set out the reasons for this conclusion. Van Eeden stated in the answering papers that there had been an in-depth debate. The transfer had been rejected because of the concerns already reflected in earlier minutes of the board. He averred, further, that the board was informed at the meeting by one of the directors that he had learnt of MC's intention to apply for the rezoning of a part of its farm for purposes of erecting a packing shed in direct competition with GHS. The concern was that existing long-term producers would not renew their contracts if MC was allowed to obtain a greater interest in the company and that this would be catastrophic for GHS.
- [27] On 30 May 2013 GHS notified VC of the refusal. Reasons were not provided. During June and July 2013 the Vissers had numerous communications with Van Eeden in which they pressed for reasons and for the criteria by which transfer applications were assessed. Van Eeden expressed understanding for their disappointment but said the board was entitled to refuse an application without giving reasons. The guiding criterion was the best interests of the company, which was the test applied by the board in relation to VC's request. Beyond this Van Eeden was not prepared to go.
- [28] On 24 July 2013 the verbal sale agreement between VC and MC was reduced to writing, apparently on legal advice. Clause 2 stated that it was a suspensive condition that GHS' board should approve the transaction. It was recorded that GHS would be approached for approval as soon as possible after execution of the agreement.
- [29] On the same day VC's attorneys wrote to GHS, attaching a copy of the sale agreement and requesting the company to register the transfer within seven days. With reference to the earlier motivation and refusal, the attorneys expressed the view that 'any refusal on the part of [GHS' board] to register the transfer of our client's ordinary shares in the securities register of the company, without any rational or cogent reason therefore, constitutes oppressive and unfairly prejudicial conduct towards our client'. GHS was referred to s 163(1) (a) of the Companies Act. The attorneys recorded their instructions to launch an application for relief if the transfer application was not approved. The right to claim damages was also reserved.
- [30] GHS did not respond to this letter. Van Eeden said in the answering papers that it was unnecessary to do so, given the earlier decision.

The application

- [31] The present application was launched on 26 September 2013. GHS filed its answering papers on 7 November 2013. Van Eeden stated in the affidavit that GHS had received legal advice that it was not obliged to provide reasons but had chosen now to do so. He proceeded to give them.
- [32] In VC's replying papers, filed on 19 December 2013, Mrs Visser traversed the reasons offered by GHS. In support of VC's case that it was suffering prejudice, she made the allegation that MC was the only willing buyer so that VC was being prevented from selling its shares. (This allegation had not been made in the founding papers or in the motivation to the board. No facts were alleged in support of it.)
- [33] Because VC had not been given GHS' reasons when it launched its application, it was inevitable that it could only traverse those reasons in its replying papers. Had the reasons been given earlier, VC would have been required to make its criticisms in the founding papers. Given this course of events, GHS took the view that it was entitled to respond to the criticisms of its reasons by way of a supplementary answering affidavit, which it filed on 24 February 2014. It sought condonation for the late filing. In the supplementary answering affidavit Van Eeden pointed out that Mrs Visser's assertion in the replying affidavit that MC was the only willing buyer was a new one and that it was unsupported by corroborative evidence.
- [34] On 7 March 2014 and by agreement the application was enrolled for hearing on 28 May 2014.
- [35] On 27 May 2014, the day before the hearing, VC delivered a supplementary replying affidavit in response to the supplementary answering affidavit. In amplification of the assertion that MC was the only willing buyer, Mrs Visser said that Van Eeden knew that 'for many months' prior to launching the application, and also thereafter, VC had tried to sell the shares to no avail. She expressed surprise at the 'technical stance' adopted by him in that regard. Mrs Visser said that she had recently 'again' tried to find purchasers by way of an email to all known shareholders, a copy of which she annexed. She said she only received a response from three members, who enquired that if she knew of a purchaser she should let them know (ie they also wished to sell their shares).

The supplementary affidavits

- [36] Mr Ferreira's position was that VC did not object to GHS' supplementary answering affidavit provided that VC's supplementary replying affidavit was allowed in. Mr Newdigate submitted that the supplementary answering affidavit should be received while the supplementary replying affidavit should not.
- [37] I think that in principle the filing of an additional set of papers – supplementary answering and supplementary replying papers – was justified, given that GHS only provided reasons in its answering papers. No time limit is specified in the rules for the filing of a supplementary set of papers. If one takes the time periods specified for the usual set of papers as a guide,

GHS should have filed its supplementary answering papers somewhat sooner. However, they were filed more than three months before the agreed date of hearing, which was more than sufficient to allow time for the supplementary replying papers. I thus rule that the supplementary answering affidavits should be received as part of the record.

[38] The supplementary replying papers stand on a different footing, because they were filed more than three months after the supplementary

answering papers and only one day before the hearing. The supplementary replying papers deal with two matters, namely the assertion that MC was and is the only willing buyer of the shares; and the alleged market value of the shares as being between R1,00 and R1,34. I do not think that evidence on the second of these questions will take the matter any further. As to the first, I consider that GHS would be prejudiced by the very late receipt of the evidence. There is a personal attack made on Van Eeden to which he has not had the opportunity of reply. This material should have been contained in the founding papers (it was not dependent on the reasons furnished by the board in their answering papers) or, by the latest, in the initial replying papers. Had this been done, GHS could have dealt with the material in its answering or supplementary answering papers.

[39] I also think the evidence is of dubious relevance, because Mrs Visser does not say that, prior to applying to the board for approval on 26 May 2013, VC had unsuccessfully attempted to sell its shares to other members or that the directors as a body knew that this was so. VC's motivation to the board did not include the assertion that MC was the only willing buyer. The act of the directors which is in issue in this case is the decision of 28 May 2013.

[40] For these reasons, I refuse to condone the late filing of the supplementary replying papers.

Clause 6.1.7.1 of the MOI

[41] In VC's amended notice of motion filed on 19 November 2013 (to which there was no objection), the relief sought by VC in relation to the MOI was that GHS be directed to remove the existing clause 6.1.7.3 (the terms of which I have quoted previously) and to replace it with the following:

'6.1.7.3 The board may decline to register any transfer of the Ordinary Shares in the securities register of the Company if the transfer of such Ordinary Shares does not comply with the provisions of this Memorandum of Incorporation or the Act.'

[42] An amended clause in this form would effectively deny the board a discretion in regard to the transfer of shares. The function of the board would be relegated to determining technical compliance with the MOI and the Act. The amended clause makes no reference to the giving of reasons, no doubt because the amended clause would not provide scope for the board to exercise a value judgment of the kind which could be the subject of reasons.

- [43] In written and oral argument Mr Ferreira did not make submissions in support of such a wide attack. He seems to have accepted that the directors were entitled to refuse to approve a transfer if they thought such refusal to be in the best interests of the company. His submissions were directed, rather, at the proposition that in the modern era it is objectionable for a company's board to be entitled to refuse a transfer without giving reasons. The proposed amendment would thus be one which required the board to give reasons for a refusal.
- [44] The essence of clauses 6.1.7.1 and 6.1.7.3, namely that GHS' board has a discretion whether or not to approve a registration of transfer and does not have to provide reasons for refusal, is a common restriction on transfer of shares in the articles of private companies. Company legislation in South Africa, in keeping with Commonwealth corporate legislation, has always required a private company's articles of association to restrict the transfer of the company's shares. This requirement has been retained in s 8(2)(b)(ii) of the new Companies Act. Although the form and extent of the restriction is a matter for the founding shareholders, a restriction of the kind contained in GHS' MOI is, as I have said, a common one. Indeed, it was the standard restriction contained in clause 11 of the Table B articles in Schedule 1 of the Companies Act 26 of 1973 (and cf *Smuts v Booysens*; *Markplaas (Edms) Bpk & 'n Ander v Booysens* 2001
- (4) SA 15 (SCA) para 15). The new Companies Act does not contain a table of standard clauses for an MOI though it does specify certain matters which must be dealt with. The Act does not prohibit a restriction of the kind which was widespread immediately prior to the coming into force of the new legislation.
- [45] As I have said, the restriction is also typical in private companies established in other Commonwealth jurisdictions. The validity of such a clause has never, to my knowledge, been challenged, and counsel informed me that they had found no authority to that effect. Of course, it has always been held that a board's discretion must be exercised in what the directors bona fide consider to be the best interests of the company, not for an improper or collateral purpose. This need not be expressly stated in the clause. Indeed, I do not think it ever is; it is simply inherent in the nature of a fiduciary power.
- [46] Mr Ferreira submitted that the cases which have cited and followed the leading decision in *Re Smith & Fawcett Ltd* [1942] 1 All ER 542 (CA), where Lord Greene MR described the nature of the standard power to refuse to approve a transfer of shares, have generally been older cases, out of step with modern notions. That is incorrect. Among the more recent cases which have dealt with the standard power and confirmed its nature are (in England) *Village Cay Marina Ltd v Acland & Others* [1998] UKPC 11 (BVI) and *Mactra Properties Ltd v Morshead Mansions Ltd & Others* [2008] EWHC 2843 (Ch) para 7; (in Ireland) *Banfi Ltd v Moran & Others* [2006] IEHC 257; (and in Australia) *Smolaret & Another v Liwszyc & Others* [2006] WASCA 50 paras 67-68. (In England, s 771(1)(b) of the 2006 Companies Act introduced, with effect from 1 October 2007, an obligation on directors to furnish reasons for refusing a

transfer of shares. Our Act does not include such a provision.)

- [47] There is no general duty on a person holding a fiduciary position to give reasons for his actions to those to whom their duties are owed. The duty of a fiduciary to render an account is a duty to disclose what he has done in the course of his administration, not why he has done it.
- [48] I do not see anything repugnant about a clause in an MOI stating that the board does not need to give reasons for its decision on a request to register a share transfer. Many powers are typically entrusted by the MOI to the directors. The administration of corporations would become unwieldy if directors were bound on request to provide reasons for their decisions. In relation specifically to share transfers, there might be sound business reasons not to provide reasons. To do so might jeopardise the company's business relations with third parties. The directors might be reluctant publicly to state reservations they have concerning the character of the proposed transferee. The giving of reasons might require the company to disclose matters of strategy.
- [49] Mr Ferreira invoked, by way of 'analogy', the provisions of the Promotion of Administrative Justice Act 3 of 2000. I do not see how VC can derive any assistance from the constitutional principles of just administrative action. Those principles apply to public bodies exercising public power under legislation. They do not apply to the administration of private companies.
- [50] I thus reject the contention that clause 6.1.7.3 is bad in principle. Whether GHS' directors in the present case exercised their discretionary power in what they bona fide considered to be the best interests of the company is a different matter. If they failed to do so, the appropriate remedy would be directed at that specific outcome and not an amendment of the MOI.

The contentious share transfer

The law

- [51] Section 163(1) entitles a shareholder or a director of a company to apply for relief under the section if any of the following prerequisites are met:
- '(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.'

[52] Some of the submissions made by counsel on the s 163 claim related to the question whether GHS' directors breached their fiduciary duties in refusing to register the transfer. In the discussion which follows, I thus consider, among other issues, the inter-relationship between s 163 and breach of duty by directors.

[53] The antecedent of s 163 was s 252 of the 1973 Act. In some respects the new provision is wider. Under the old provision only a member could petition for relief; now a director may also do so. The old provision was directed at a particular act or omission of the company or the manner in which the affairs of the company were being conducted; the new provision includes acts or omissions of a related person or the

manner in which the business of a related person is being conducted. The new provision also expressly includes the manner in which the powers of a director or prescribed officer are being or have been exercised. However, in most if not all cases the exercise by a director or prescribed officer of a corporate power will also be an act of the company. To that extent, paragraph (c) may not add much to paragraphs (a) and (b).

[54] The old Act referred to conduct that was 'unfairly prejudicial, unjust or inequitable'. The new Act refers to conduct which is 'oppressive or unfairly prejudicial to, or that unfairly disregards the interests of' the applicant. I doubt whether this materially alters the character of the conduct which was held to fall within the scope of s 252 of the old Act. The test focuses on the effect of the conduct complained of. Section 252 did not use the word 'oppressive' except in its heading. That expression, which now appears in paragraph (a) of s 163(1), appears to cover conduct of a more egregious kind than conduct which is 'unfairly prejudicial to' or that 'unfairly disregards the interests of' the applicant. In *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA 517 (C) Tebbutt AJ (as he then was) said that the word 'oppressive', as then used in the comparable provision in the English Companies Act, had been defined as 'unjust or harsh or tyrannical' or 'burdensome, harsh and wrongful' or which involves 'at least an element of lack of probity or fair dealing' or 'a visible departure from the standards of fair dealing' (at 525H-526E; see also *Grancy Property Ltd v Manala & Others* [2013] 3 All SA 111 (SCA) paras 22-23). I find it difficult to conceive of cases where the conduct complained of would be found to be 'oppressive' or as 'unfairly disregarding the interests of' the applicant without at the same time being 'unfairly prejudicial to' the applicant. In Australia a similar collection of phrases has been said to constitute 'different aspects of the essential criterion, namely commercial unfairness' (*Morgan v 45 Flers Avenue Pty Ltd* [1986] 5 ACLC 222 at 223). So on this specific aspect I express my respectful disagreement with the observation of Moshidi J in para 53.1 in *Peel & Others v J & C Hamon Engineering (Pty) Ltd & Others* 2013 (2) SA 331 (GSJ) to the effect that the phrase 'unfairly disregards the interests of' the applicant indicates 'a far wider basis upon which relief may be sought'. The old s 252 remedy, in keeping with equivalent provisions in Commonwealth jurisdictions, was not confined to the enforcement of 'rights' but covered 'interests' as well.

- [55] What is important to emphasise, however, is that it is not enough for an applicant to show that the conduct of which he complains is 'prejudicial' to him or that it 'disregards' his interests. The applicant must show that the prejudice or disregard has occurred 'unfairly'. 'Oppression' likewise connotes an element at least of unfairness if not something worse.
- [56] Where the impugned conduct is unlawful, and the conduct has a consequence that is prejudicial to the applicant, the prejudice to or disregard of the interests of the applicant is likely to be, perhaps invariably will be, 'unfair' within the meaning of s 163. That section, like its forerunner, is thus available as a remedy for unlawful corporate conduct. There might be other remedies but s 163(2) provides the court with a wide array of equitable options, some of which would not otherwise be available.
- [57] Matters become more difficult where the conduct complained of is lawful, ie within the powers of the relevant organ of the company (the general meeting or the board as the case may be) or within the power of the relevant official. Such cases potentially bring the invocation of the unfair-prejudice remedy into conflict with other principles of company law, such as majority rule and that the constitutional documents of the company are the compact between shareholders and the company by which they are all bound.
- [58] The exercise of corporate powers are often subject to express or implied qualifications. In the case of directors, for example, it has always been the position under our law that they occupy a fiduciary position and must thus exercise any power conferred on them in what they bona fide consider to be the best interests of the company, for the purpose for which the power was conferred, and within any limits which may be imposed for the exercise of the power. There are other duties flowing from the fiduciary character of the office and there is, besides, a duty to act with care, skill and diligence. With the coming into force of the 2008 Companies Act, the duties of directors have been codified at a fairly high level by s 76.
- [59] If the directors exercise a power conferred on them by the company's constitution (now styled the Memorandum of Incorporation), and in so doing meet the standard imposed by s 76, they act lawfully. Can a shareholder who is prejudiced by the decision then complain that the decision is 'unfairly' prejudicial to him? Mr Newdigate was inclined to concede that in theory this was possible but submitted that the circumstances must be rare in which board action could be regarded as producing 'unfair' prejudice where the directors have exercised their powers in good faith, for a proper purpose, in the best interests of the company and so forth.
- [60] There is an illuminating discussion by the learned authors of Gower & Davies Principles of Modern Company Law 9th Ed on the evolution of the statutory and judicial position in England (paras 20.5 – 20.25 at pp 721-734). Originally (from 1948 to 1980) the relevant legislative remedy (s 210 of the 1948 Companies Act) was aimed at 'oppression'. They were judicial pronouncements suggesting that oppression was characterised by an element of illegality (see *Scottish Co-Operative Wholesale Society Ltd v Meyer & Another* [1958] 3 All ER

66 (HL) at 71E-F: ‘burdensome, harsh and wrongful’; see also *Re Saul D Harrison* [1995] 1 BCLC 14 (CA) at 17 per Hoffmann LJ and at 28-29 per Neill LJ). Based on the principle of majority rule and the binding nature of the company’s

constitutional documents, the remedy for oppression was generally not available to address decisions taken by the general meeting or the board within their respective powers. With the introduction of an unfair-prejudice remedy in s 75 of the 1980 Companies Act (succeeded by s 459 of the 1985 Act and s 994 of the 2006 Act), it was plainly acknowledged that the remedy could extend beyond unlawful conduct, ie ‘independent illegality’ no longer needed to be proved. The new remedy ‘cuts across the distinction between acts which do or do not infringe the rights attached to the shares by the constitution of the company’ (*Re A Company* (No 8699 of 1985)

[1986] BCLC 382 (Ch) at 387 per Hoffmann J as he then was).

[61] On the other hand, the English courts have been anxious to ensure that the remedy should not, as Lord Hoffmann (as he had by then become) said, be used as ‘a licence to do whatever the individual judge happens to think fair’ and that well-established principles should not be abandoned ‘in favour of some wholly indefinite notion of fairness’ (*O’Neill v Phillips*

[1999] UKHL 24; [1999] 2 All ER 961 (HL) at 966g-h and 968a-b)). The principles of majority rule and the binding nature of the company’s constitution remain applicable. As Hoffmann LJ said in *Saul D Harrison* supra, ‘keeping promises and honouring agreements is probably the most important element of commercial fairness’ (at 18) The English courts have thus been cautious in extending the remedy beyond cases of illegality.

[62] The learned authors of *Gower & Davies* say that the only clear category which has emerged in England of unfair conduct which is not also illegal (though the jurisdiction is not in law limited to this category) is the case of ‘legitimate expectation’ or ‘equitable consideration’ arising from an informal arrangement or understanding among shareholders not contained in the company’s constitution (*O’Neill* at 967b-968a and 969b-970c; see also *Saul D Harrison* supra 19-20 per Hoffmann LJ and point 10 at 31 per Neill LJ; *Re Guidezone Ltd* [2000] 2 BCLC 321 para 175; for a detailed Australian discussion, see *Fexuto Pty Ltd v Bosnjack Holdings Pty Ltd & Others* [2001] NSWCA 97 paras 322-324 and 409-423). This might be an arrangement or understanding regarding participation in management or concerning dividend policy or remuneration. The arrangement or understanding must be proved as a fact. This makes it difficult to establish a legitimate expectation in cases other than those involving small private companies. The starting point remains the company’s articles of association. In the absence of ‘something more’, there is no legitimate expectation that the general meeting and the board will not exercise whatever powers they are given by the articles of association (*Re Saul D Harrison* supra at 19).

- [63] Similarly, in Canada it has been said that the shareholder expectations that are to be considered in an unfair-prejudice claim are not those ‘that a shareholder has as his own individual “wish list”’; the expectations are those ‘which could be said to have been (or ought to have been considered as) part of the compact of the shareholders’ (820099 Ontario Inc v Harold E Ballard Ltd [1991] 3 BLR (2d) 113 at 85-186).
- [64] It is not necessary in this case to attempt to state with precision the parameters for judicial intervention under s 163. However, and as in England, a South African court should in my opinion take the principle of majority rule and the binding nature of the company’s constitution as its starting point. In *Sammel & Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) Trollip JA said that the ‘principle of the supremacy of the majority is essential to the proper functioning of companies’ (at 678H; see also *Louw & Others v Nel* 2011 (2) SA 172 (SCA) 185 para 22; *Grancy Property Ltd* supra para 32). Where matters are left by the constitution to the judgment of the general meeting or the directors, and the shareholders or directors as the case may be have exercised the power within the parameters of any express or implied limitations, a court should be wary of substituting its own business judgment for that of the persons entrusted with that decision by the corporate constitution.
- [65] Framing the proposition specifically with reference to board decisions, the circumstances of a case would, I think, have to be exceptional before one could find that a board decision, taken in accordance with the standard set by s 76, has caused a shareholder prejudice which can properly be described as ‘unfair’ within the meaning of s 163.
- [66] I can see that the court might more readily intervene in the case of conduct of shareholders because they are not subject to the same fiduciary constraints as directors, and minority shareholders thus do not have the same safeguards. (Despite scattered statements in case law to the effect that shareholders must vote in what they bona fide consider to be the best interests of the company, shareholders may generally consult their own interests. They are not subject to the fiduciary duties of directors. See *Gower & Davies* op cit paras 19-9 – 19.10 at pp 691-692; *Henochsberg on the Companies Act 71 of 2008* p 169 and cases there cited.) Furthermore, it is at the level of shareholders that one finds the informal arrangements or understandings the breach of which has typically been regarded as ‘unfair’ though not unlawful (even though the shareholders in question might, in the respects complained of, have acted through their control of the board). This was the quasi-partnership setting of cases such as *Louw v Nel* supra and *Bayly & Others v Knowles* 2010 (4) SA 548 (SCA), though in both cases the unfair-prejudice claims failed, and in *McMillan NO v Pott & Others* 2011 (1) SA 511 (WCC), where the claim succeeded. Indeed, this is the standard setting for unfair-prejudice cases. In *Grancy Property Ltd* supra, where a s 163 claim succeeded, the company was a small special-purpose vehicle. The majority shareholders had refused, at the instance of a minority shareholder, to allow independent directors to be appointed in the face of abuse of power and the pursuing of self-interest by the majority’s former board nominees.

- [67] The leading English cases were likewise decided in relation to small quasi-partnership companies: see, eg *Scottish Co-Operative Wholesale Society Ltd v Meyer & Another* [1958] 3 All ER 66 (HL) (a violation of the duty of the utmost good faith between the constituent members of the company: at 84 in fine per Lord Keith); *O'Neill supra* (though there the claim failed, because the petitioner did not establish an informal agreement contrary to which Mr Phillips supposedly acted); see also *Ebrahimi v Westbourne Galleries Ltd & Others* [1972] 2 All ER 492 (HL) (regarding the supplementary expectations and interests that may arise in relation to quasi-partnership companies in the context of liquidation on just and equitable grounds). The reported judgments reflect a dearth of successful claims in respect of lawful shareholder decisions of widely-held companies, and I was not referred to any case in which a decision taken by independent directors in accordance with their fiduciary duties gave rise to unfair-prejudice relief
- [68] I do not rule out the possibility that such cases might notionally exist. In *Catalano & Others v Managing Australia Destinations Pty Ltd & Others (No 2)* [2013] FCA 672 Flick J referred, in his general introductory remarks on the law, to two earlier cases as authority for the proposition that even a decision made by directors in what they bona fide considered to be the best interests of the company and for a purpose within the power might be found to be oppressive. *Catalano* itself did not turn on this proposition; it was a standard quasi-partnership case of oppression by one group of shareholders against another.
- [69] One of the two cases mentioned by Flick J was the decision of the High Court of Australia in *Wayde & Another v New South Wales Rugby League Ltd*
- [1985] HCA 68; (1985) 180 CLR 453. There the claim was directed at an honest decision by the board. The claim failed. The articles of the respondent company permitted its board to determine how many teams should be permitted to compete in a rugby competition each year. The company's board determined that for the 1985 season there would be 12 teams. A company called *West*s, which was a member of the respondent and owned a team not included in the 12, complained of oppression. Flick J in *Catalano* referred to the judgment of Brennan J in *Wayde*. Although Brennan J concurred in the result, the main judgment was by Mason ACJ and three others. The court observed that the power to determine the number of teams to compete inherently involved prejudice to any team excluded; the existence of such prejudice was insufficient to invoke the remedy. In dismissing the claim, the majority said the following (para 16):
- 'Given the special expertise and experience of the Board, the bona fide and proper exercise of the power in pursuit of the purpose for which it was conferred and the caution which a Court must exercise in determining an application under s.320 of the Code in order to avoid an unwarranted assumption of the responsibility for management of the company, the appellants faced a difficult task in seeking to prove that the decisions in question were unfairly prejudicial to *West*s and therefore not in the overall interests of the members as a whole. It has not been shown that those decisions of the Board were such that no Board acting reasonably could have made them. The effect of those decisions on *West*s was harsh indeed. It has not, however, been shown that they

were oppressive or unfairly prejudicial or discriminatory or that their effect was such as to warrant the conclusion that the

affairs of the League were or are being conducted in a manner that was or is oppressive or unfairly prejudicial.’

[70] Brennan J, after making the general observations referred to by Flick J in *Catalano*, expressed his concurring conclusion thus (para 7):

‘The question here is whether the resolutions which were manifestly prejudicial to and discriminatory against Wests, were also unfair - that is, so unfair that reasonable directors who considered the disability the decision placed on Wests would not have thought it fair to impose it. The decision by the League's directors to reduce the number of competitors to 12 and to exclude Wests was in fact taken with full knowledge of the disability that that decision would place on Wests. But the directors also knew that the larger competition was burdensome to, and perhaps dangerous for, players and that a shorter season was conducive to better organization of the Premiership Competition. The directors had to make a difficult decision in which it was necessary to draw upon the skills, knowledge and understanding of experienced administrators of the game of rugby league. The Court, in determining whether the decision was unfair, is bound to have regard to the fact that the decision was admittedly made by experienced administrators to further the interests of the game. There is nothing to suggest unfairness save the inevitable prejudice to and discrimination against Wests, but that is insufficient by itself to show that reasonable directors with the special qualities possessed by experienced administrators would have decided that it was unfair to exercise their power in the way the League's directors did.’

[71] The other case mentioned by Flick J was *Cassegrain & Co Pty Ltd v Cassegrain*

[2011] NSWSC 1156. That was not an oppression case but a derivative action, and the director whose conduct was impugned was found to have acted fraudulently and in breach of his fiduciary duties. The observation that a director's decision, taken bona fide in the best interests of the company, might nevertheless be oppressive was made with reference to a question of *res judicata* arising from earlier proceedings.

Did GHS' directors comply with their fiduciary duties?

[72] We are concerned in this case with a matter entrusted by the MOI to the board of directors. The duties of the directors in exercising that power are codified in s 76. The power must be exercised

‘(a) in good faith and for a proper purpose;

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person -

(i) carrying out the same functions in relation to the company as those carried out by the directors; and

(ii) having the general knowledge, skill and experience of that director’.

[73] Section 76(4)(a) sets out circumstances in which the obligations imposed by paragraphs (b) and (c) of s 76(3) will be satisfied by a director. The director will have satisfied those obligations if:

‘(i) the director has taken reasonably diligent steps to become informed about the matter;

(ii) either –

(aa) the director has no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or

(bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and

(iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company;...’

[74] Section 76(4) makes clear that the duty imposed by s 76(3)(b) to act in the best interests of the company is not an objective one, in the sense of entitling a court, if a board decision is challenged, to determine what is objectively speaking in the best interests of the company. What is required is that the directors, having taken reasonably diligent steps to become informed, should subjectively have believed that their decision was in the best interests of the company and this belief must have had ‘a rational basis’. The subjective test accords with the conventional approach to directors’ duties, which (in relation to share transfers) was stated thus by Lord Greene MR in *Re Smith & Fawcett Ltd* supra:

‘The principles to be applied in cases where the articles of association of a company confer a discretion on directors with regard to the acceptance of transfers of shares are, for present purposes, free from doubt. They must exercise their discretion bona fide in what they consider – not what a court may consider – to be in the interests of the company, and not for any collateral purpose. They must have regard to those considerations, and those considerations only, which the articles upon their true construction permit them to take into consideration. In construing the relevant provisions in the articles, it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases. When it is said, as it has been said more than once, that regard must be had to this last consideration, it means, I apprehend, nothing more than this: that the shareholder has such a prima facie right, and that right is not to be cut down by unc

ertain language or doubtful implications. The right, if it is to be cut down, must be cut down with satisfactory clarity. It certainly does not mean that articles, if appropriately framed, cannot be allowed to cut down the right of transfer to any extent which the articles on the true construction permit...

There is nothing, in my opinion, in principle or in authority to make it impossible to draft such a wide and comprehensive power to directors to refuse to transfer as to enable them to take into account any matter which they conceive to be in the interests of the company... [T]he question, therefore, is simply whether, on the true construction of the particular article, the directors are limited by anything except their bona fide view as to the interests of the company. In the present case the article is drafted in the widest possible terms, and I decline to read into that clear language any limitation other than a limitation which is implicit by law, that a fiduciary power of this kind must be exercised bona fide in the interests of the company. Subject to that qualification, an article in this form appears to me to give the directors what it says, namely, an absolute and uncontrolled discretion.'

This statement of the law has been frequently cited with approval (see inter alia *Charles Forte Investments Ltd v Amanda* [1964] 2 All ER 240 (CA) at 945G-946H; *Village Cay Marina* supra para 12; *Mactra Properties Ltd v Morstead Mansion Ltd* [2008] EWHC 2843 (Ch); [2009] 1 BCLC 179 para 7 *Richter NO v Riverside Estates (Pty) Ltd* 1946 OPD 209 at 226-227; see also *Estate Milne v Donohoe Investments (Pty) Ltd & Others* 1967

(2) SA 359 (A) at 370F-G.)

[75] Section 76 requires the bona fide assessment of the directors to have a rational underpinning. This requirement has been articulated less frequently in the conventional statement of directors' duties but is not necessarily an innovation. For example, in *Mactra Properties* supra the court upheld the board's refusal to register a transfer because the board had adopted a 'rational approach'. In *Charterbridge Corporation Ltd v Lloyds Bank Ltd & Another* [1969] 2 All ER 1185 (Ch) the court enquired whether a reasonable person could have believed that the act was one performed in the interests of the company (at 1194E-F). A rationality test is also inherent in the following formulation of the duty by Isaacs J in an early leading

Australian case, *The Manning River Cooperative Dairy Co Ltd v Shoesmith & Another* [1915] HCA 32; [1915] 19 CLR 714 (HC) at 723:

'It is no answer to an exercise of discretion under such a power, to say that the ground on which they [the directors] have proceeded is outside any express prohibition in the articles. As I have pointed out, discretion is not wanted for that. But if, outside any express provision, the directors as business men, and with a faithful desire to protect the interests of the Company, determine under such a power, upon some ground on which fair-minded men in such a situation might reasonably consider registration detrimental to the interests of the Company, that a particular transfer should not be registered, their decision cannot be questioned or overruled in a Court of law. Shareholders who have agreed to abide by the honest discretion of directors for the common welfare, cannot ask a Judge to overrule it.'

On the other hand, the learned authors of Palmer's Company Law say that the 'no reasonable director' test is merely an aid in answering the ultimate factual question, which is whether the directors were acting in what they bona fide believed to be the best interests of the company (para 8.2609).

[76] The rationality criterion as aid down in s 76 is an objective one but its threshold is quite different from, and more easily met than, a determination as to whether the decision was objectively in the best interests of the company. In the context of the legality principle applicable to the exercise of public power, Chaskalson P said the following in *Pharmaceutical Manufacturers Association of SA & Another: In re Ex parte President of the Republic of South Africa & Others* [2000] ZACC 1; 2000

(2) SA 674 (CC) (para 90):

'... The setting of this standard [rationality] does not mean that the Courts can or should substitute their own opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision. ...'

[77] Again in the context of the exercise of public power, the requirement of rationality has been held to concern the relationship between the decision and purpose for which the power was given. Was the decision or the means employed rationally related to the purpose for which the power was given? (See, for example, *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa & Others* [2013] ZACC 13; 2013 (7) BCLR 762 (CC) paras 49-50; *Minister of Defence and Military Veterans v Motau & Others*

[2014] ZACC 18 para 69.)

[78] These principles relating to rationality in the exercise of public power can, I think, be applied with appropriate modifications to the rationality requirement for the proper exercise by directors of their powers.

[79] In the present case VC does not allege an absence of good faith on the part of GHS' directors (cf s 76(3)(a)).

[80] As to proper purpose (s 76(3)(a)), the test is objective, in the sense that, once one has ascertained the actual purpose for which the power was exercised, one must determine whether the actual purpose falls within the purpose for which the power was conferred, the latter being a matter of interpretation of the empowering provision in the context of the instrument as a whole. In the context of decisions by directors, there will often be, in my view, a close relationship between the requirement that the power should be exercised for a proper purpose and the requirement that the directors should act in what they consider to

be the best interests of the company. Put differently, the overarching purpose for which directors must exercise their powers is the purpose of promoting the best interests of the company.

- [81] The power to refuse to register a transfer of shares must thus be exercised in what the directors consider to be the best interests of the company. More specifically, the clause conferring the power has in mind that there may be circumstances in which a company's best interests would be served by not having the proposed transferee as the holder of the shares in question. The board might consider that it would be preferable, in the best interests of the company, that the proposed transferee should not become a shareholder at all or that he should not acquire a greater stake than he already has. The exercise of the power will often, by its very nature, result in prejudice to the parties to the proposed transfer (at least one of whom – the transferor – would be an existing shareholder).
- [82] In the present case, GHS' directors were bona fide of the opinion that the best interests of the company would be served by not allowing MC to increase its shareholding from 2 653 811 (8,5%) to 3 720 382 (11,9%). The unease at MC's growing influence was articulated in the minutes of 24 May 2011 and 26 February 2012. Those concerns were fortified when the board was informed, on 28 May 2013, that MC intended to apply for the rezoning of a part of its farm for purposes of erecting a packing shed in direct competition with GHS. At bottom, the directors considered that MC had a vision and ambitions which were adverse to GHS' interests and that existing long-term producers might not renew their contracts if MC were allowed to obtain a greater interest in GHS.
- [83] It was not suggested that these were not the actual reasons for which GHS' board refused the request to transfer. No ulterior motive was alleged or suggests itself. In particular, there is no suggestion that one or more of the directors was abusing the power for personal advantage.
- [84] In my view, the actual purpose for which GHS' board exercised the power to refuse the proposed transfer fell within one of the intended purposes of the empowering provision, namely to enable the board to prevent a person from acquiring an increased shareholding in the company where the obtaining of the increased shareholding was regarded as being contrary to the best interests of the company.
- [85] VC alleged that the board exercised the power for an improper purpose because the directors were using the power as leverage to force MC to conclude a long-term contract, even though the MOI permitted short-term contracts. Even if that had been the board's purpose, I am not convinced that it would have been an improper one. Although the MOI makes it lawful for GHS to conclude short-term contracts, the directors might nevertheless consider that the company's best interests would be served by encouraging long-term contracts. Be that as it may, I do not think that the complaint is factually correct. There is no doubt that GHS' board was made uneasy by MC's refusal to conclude long-term contracts and to accept the full bouquet of GHS' services but by the time of the impugned decision of 28 May 2013 negotiations with MC had failed. I do not think the board was under any

illusions that a refusal of the transfer would cause MC to change its mind. It would be more accurate to say that MC's refusal, in the negotiations over the period 2011 and 2012, to conclude a long-term contract fortified the board in its view that MC's vision and ambition for GHS differed from the board's.

[86] VC has not alleged that the directors failed to take reasonably diligent steps to inform themselves of the facts relevant to their decision. Put differently, it is not VC's case that, although the board could in principle have acted for the purpose it did, the board did not have sufficient information properly to make the decision. MC had been a shareholder of the company for some years. It is clear that the executive management of GHS had extensive negotiations and dealings with MC in the months and years preceding the relevant board meeting on 28 May 2013, of which the full board was kept informed. I have no reason to doubt that, as business people, they had sufficient information to make a proper assessment.

[87] In regard to s 76, this leaves the question whether the directors' genuine belief that their decision was in the best interests of the company

was a belief which had a rational basis. As to the facts regarding the vision and ambitions of MC, there has been no response, in these proceedings, from MC regarding the GHS board's concerns. MC has not stated that it does not harbour the ambitions and vision which have caused disquiet to GHS' directors. As I have said, it is not been shown that the directors lacked adequate information to form a view in that regard.

[88] Mr Ferreira submitted that MC would not be seeking to get a larger interest in GHS if its intentions were to harm GHS. However, that submission would be true of every case of a proposed transfer of shares, yet clearly the empowering clause contemplates that there may be cases where it would be proper to refuse consent. There are several answers to Mr Ferreira's submission. The first is that views may differ as to what is in the best interests of the company. In the respects relevant to this case, GHS' MOI entrusts the judgment on that question to the board, not to MC. The latter might genuinely think that it has a better way forward for GHS than the course which GHS' board is charting but that does not mean that GHS' board is acting irrationally by preferring its view to that of MC.

[89] Secondly, it is fallacious to assume that a proposed transferee always acquires shares with a view to advancing what he regards as the best interests of the target company. The transferee may have other business interests which would be enhanced if the affairs of the target company were curtailed or conducted differently. Such an outcome might be advantageous to himself but not to the other shareholders.

[90] Mr Ferreira submitted that the proposed transfer would in any event not give MC any greater influence in the affairs of GHS than it already has. It is particularly in relation to this contention that one must bear in mind that the court should not substitute its own business judgment for that of the directors. We are concerned with the threshold requirement of rationality. The obtaining of an increased shareholding in the present case would be

accompanied by an increase in MC's voting interest from 8,5% to 11,9%. If all shareholders were to attend every meeting, MC's increased voting interest would fall well short of enabling it to carry the day on an ordinary resolution or to defeat a special resolution. But general meetings of shareholders are not always well attended. GHS has 88 shareholders. MC's prospects of obtaining decisive influence in alliance with others will be enhanced. Furthermore, and as mentioned previously, the breaching of the 10% threshold has some significance because MC will be entitled to requisition general meetings and its shareholding will constitute a quorum. Since an ordinary resolution can be carried if supported by the holders of more than 50% of the voting rights exercised on the resolution (clause 9.10.1 of the MOI read with s 65(7) of the Act), MC might well have decisive influence at a poorly attended meeting.

- [91] The history of the matter shows that MC has set about increasing its holding in GHS. MC held only 3,2% in 2008 but increased its shareholding to 10,9% by May 2011 (in the process, entering into purchase transactions with 13 sellers). Its shareholding having been diluted to 8,5%, MC now seeks to acquire additional shares which will boost its holding to 11,9%. GHS' board believes that MC is seeking greater influence in the company. MC has not denied this. It would have been an easy matter for MC to file an affidavit stating that it wishes to acquire the shares simply for the financial benefits they will confer (whether by growth in value or dividends or both).
- [92] Apart from any actual influence which the increased shareholding might confer, the approval of the acquisition could send a message to other shareholders that GHS' board welcomes an increased influence in its affairs by MC. My impression from the board minutes of 24 May 2011 and 26 February 2012 and from the reasons offered by GHS in its affidavits is that the board is genuinely concerned about the signal that an approval of the transfer might send to other producers.
- [93] Mr Ferreira pointed out that the board had approved earlier transfers to MC. That is so, but the more recent transfers occasioned disquiet and the board refused on 14 November 2011 to approve a transfer by the John van Wyk Family Trust to MC. The fact that earlier transfers had been permitted (though, at least in the case of the last approval in May 2011, with misgivings) tends to support the bona fides of the board. GHS' directors evidently hoped that they could negotiate an accord with MC. When this failed, the board decided to draw a line in the sand. They acted on this view on 14 November 2011 (in the case of the John van Wyk Family Trust) and again on 28 May 2013 (in VC's case). If the directors could rationally have refused to register a single transfer by which MC's initial holding of 3,2% increased to 11,9% (as I think they could), I do not believe it can be said to be irrational for the directors to refuse to approve a transfer from 8,5% to 11,9%, since otherwise a shareholder might by increments

achieve what he could not do in a single transaction.

[94] VC said, when it wrote to the board seeking approval of the transfer, that if two parties' priorities differ drastically, it is better for them to part ways, 'because it is impossible simultaneously to act to the benefit of both'. VC itself thus did not appear to regard as irrational the notion that GHS would rather not have a shareholder with a vision conflicting with that of the board and the majority of shareholders.

[95] I thus conclude that the board, in refusing to approve the transfer, met the standards set by s 76 of the Act and that their refusal was a lawful one.

Unfairness?

[96] This leaves the question whether the refusal was nevertheless 'unfairly' prejudicial to VC. I have explained why I consider that a court should be wary of making such a finding where directors have complied with their fiduciary duties. If there could be exceptional cases where, despite such compliance, a board decision might be found to be 'unfairly' prejudicial to a particular shareholder, this is not such a case. No informal arrangement or understanding was established in terms whereof a shareholder would invariably be permitted to transfer its shares to another shareholder. As a fact, GHS' board refused an earlier transfer to MC. There was no legitimate expectation that the directors would not exercise the power so plainly conferred on them by the MOI, provided of course they exercised that power in accordance with the usual fiduciary constraints. Counsel were unable to refer me to any case, here or abroad, of a shareholder obtaining relief under an oppression or unfair-prejudice remedy in circumstances where the directors had exercised their power to refuse a transfer in accordance with their fiduciary duties.

[97] VC did not, in its motivation to the board, say that it had tried to sell the shares to other shareholders but been unable to find another buyer. VC also did not make such an allegation in the founding papers. A bald statement to that effect was contained in the replying affidavit and an attempt was made to corroborate it in the late papers which I have declined to receive. I express no firm opinion on whether the outcome of the case on the unfairness issue would have been different if the board had refused the transfer in the face of evidence from VC that MC was the only person willing to buy VC's shares at a reasonable price. That circumstance would increase one's natural sympathy for VC's position, and for all I know GHS' board will as a fact take a more sympathetic view if those are the facts. On the other hand, if the board in its honest and rational opinion considers that GHS' best interests will be served by not allowing MC to increase its influence in the company, it is not self-evident why a decision to that effect should be regarded as 'unfairly' prejudicing the applicant merely because nobody else (including the other 86 shareholders in the company) wants to buy the shares.

Conclusions

[98] I make the following order: The application is dismissed with costs.

ROGERS J

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Prepared on 13 October 2026 · Esheria