
SOUTH AFRICA / JUDGMENT

Westerhuis v Whittaker and Others (4145/2017) [2018] ZAWCHC 76 (26 April 2018) [2018] ZAWCHC 76

COURT

Western Cape High Court, Cape Town

BEFORE

Kusevitsky

CASE / FILE NUMBER

4145/2017

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NO 4145/2017

ANDREA WESTERHUIS

Applicant

vs

KATHLEEN WHITTAKER

First Respondent

SIMONE WHITTAKER

Second Respondent

WILLIAM STREET PROPERTY

INVESTMENTS (PTY) LTD)

Third Respondent

THE COMPANIES AND INTELLECTUAL

PROPERTY COMMISSION

Fourth Respondent

JUDGMENT

HANDED DOWN 26 APRIL 2018

KUSEVITSKY AJ:

Introduction

1. The First and Second Respondents (whom I shall refer to as the Respondents or alternatively, the Whittakers) are two directors of the Third Respondent, William Street Property Investments (Pty) Ltd (“the Company”). The First Respondent holds 75% of the issued securities in the Company and the Applicant the remaining 25%. The Company owns an immovable property, which is let to commercial tenants, and conducts no other business. The Whittakers are in control of the Company.
2. In the Founding Affidavit, the Applicant alleges that the Respondents have been taking unauthorised remuneration in their capacity as directors of the Company, and that they have been running personal expenses through the books of the Company without authorisation. It is alleged that in doing so, that the Whittakers have acted unlawfully in the gross abuse of their position as directors, that they have intentionally or by gross negligence inflicted harm upon the Company within the meaning of Section 162 of the Companies Act 71 of 2008 (“the Companies Act”) and the business is being carried on in a manner (or had a result) that is oppressive or unfairly prejudicial to the Applicant

as a minority shareholder within the meaning of Section 163 of the Companies Act.

4. The Applicant’s case is that the conduct was in fact not authorised and that such conduct is accordingly unlawful.
5. The Applicant contends further that it is essential that the Company be placed under the stewardship of at least one completely independent director. The Applicant accordingly seeks orders declaring the Whittakers to be delinquent directors, alternatively placing them under probation and removing them and appointing the Applicant and an additional independent director in their stead in terms of Section 163(2) (f) of the Companies Act.
6. During argument, counsel for Applicant abandoned its relief claimed in terms of prayers 3, i.e. a request for all financial information and documents relating to the Third Respondent and prayer 5, an order

seeking the Respondents purchase the Applicant’s shares in the company.

The

facts

7. According to the Whittakers, the company is a small family concern which was set up in 1971 by the late Liam Whittaker, the father of First Respondent, to carry on business as a commercial letting enterprise. The company acquired immovable property known as Erf 17394 Cape Town at Paarden Eiland and situated at 62 Marine Drive, Paarden Eiland upon which a factory was built. Liam Whittaker, until his death, was the sole shareholder of the Company. On his death, these devolved in equal shares to his wife Grace Whittaker ("Grace") and the Third Respondent, the LF Whittaker Trust ("the LFN Trust").

According to the Whittakers, the company was set up for two primary objectives, the first, to provide Grace, First Respondent's late mother, with employment and a source of income and secondly, to provide an asset, in the form of the shares, to devolve upon Liam Whittaker's heirs. The company holds as its sole asset, this commercial property which is let to various tenants, and is operated as a letting enterprise.

8. Grace was the sole director from 1971 until her death in 2014. According to the Whittakers, she was also the sole employee and was the only person who received remuneration from the company. In her latter years, Grace was unable to do all of the required work herself, and was later assisted by her daughter and granddaughter, First and Second Respondent respectively, both of whom ostensibly assisted in managing the company's rental enterprise and did so gratuitously to ensure that Grace could continue receiving

her income.

9. A few months before Grace's death, First Respondent was appointed as her co-director because of concerns regarding the former's health. Grace remained both a director and the sole employee of the company until her death. After her death, First Respondent took over her role as the executive director and sole employee of the company and as such attended to all of the functions required to run its business, for which she continued to receive the same remuneration as Grace.
10. Following Grace's death in September 2014, Second Respondent was appointed as a non-executive co-director of the company. According to them, she has never received any payment from the company. In 2014, First Respondent inherited 50% of the shares in the company from Grace's estate, and a further 25% of the shares from the LFN Trust. At the same time Applicant, the niece of First Respondent, and a grandchild of Liam Whittaker, inherited 25% of the shares from the LFN Trust.

The

Issues

11. According to the Applicant, the Whittakers have been running personal expenses through the books of the Company and they have been taking unauthorised remuneration in their capacity as directors of the Company. In her founding affidavit, the Applicant states that

from the income statement of the company, it appears that “employee costs” are reflected for the period 2015 and 2016 as R 157 000.00 and R150 000.00 respectively. According to her, the company has no employees. Ostensibly, to correct this position, the Whittakers then gave notice on 30 September 2016 to call a shareholders meeting with the intention of passing a special resolution which included:

“1 – The ratification of the Director emoluments taken for the year ended the 29 February 2016

2 – The establishment of the 2017 financial year emoluments to be received.”

12. At this meeting, which was held on 31 October 2016, the Applicant’s representative contended, upon advice from counsel, that the use of the words “previous” and “paid”, payments were in contravention of section 66(8) and (9) of the Companies Act and were not capable of being ratified. Section 66 (9) provides as follows:

“(9) Remuneration contemplated in subsection (8) may be paid only in

accordance with a special resolution approved by the shareholders within the previous two years.”

As a result of this dispute, the shareholders meeting was postponed.

13. Thereafter, on 1 November 2016, the Whittaker’s through the Company, gave notice of a further

shareholders meeting which was to be held on 1 December 2016, for the purpose of passing special resolutions for the approval of directors emoluments which were to be taken for the financial years ending 28 February 2017 and 28 February 2018. I am not told whether this meeting in fact took place.

14. On the 20 January 2017, the Applicant received further communication from the representatives of Third Respondent. In it, they contended, having taken advice from a recently retired Dean of Accounting and the co-author of the Commentary on the Companies Act, Professor Geoff Everingham, that First Respondent was entitled to take the amounts as reflected in the financial statements and would, in future, be entitled to such payments. The letter containing the advice inter alia provided as follows:

“This means that non-executive services where the Director fulfils a non-executive function will require a special resolution in terms of subsection 9. Where the Director performs an executive function and earns remuneration for the services rendered to the Company a special resolution is not required.

...

In the case of executive Directors, their services as a Director must be distinguished from (sic) their services as an employee of the Company. Shareholder approval is not required in the latter instance.

Simone Whittaker has to date received no remuneration whatsoever from the Company. Kathy Whittaker has been paid a salary of R 10,000 per month for services and work performed to and for the Company. This salary was set by the Shareholders of the Company more than 10 years ago and was condoned by Standard Bank Trust which prior to the death of Grace Whittaker was a 50% Shareholder in the Company.”

15. According to Applicant, this version is contrived, as not only does it conflict with their previous position (which was the acceptance that they were not entitled to receive remuneration without a special resolution – which was denied by the Respondents), but the proposition was not sustainable in law. This is because the Whittakers, in doing so, would had to have acted through its directors by negotiating contracts with themselves in their personal capacities, and not only was this not permitted under the Companies Act, but it also constituted a breach of their fiduciary duties.
16. The Applicant placed its reliance on section 75(5) of the Companies Act for this proposition. In terms of this provision, if a director of a company has a personal financial interest in respect of a matter

to be considered at a meeting of the board, then the director is required to disclose the interest, its general nature and any

material information relating to the interest, together with any observations or pertinent insights, and thereafter, to leave the

meeting immediately after making the aforesaid disclosure. In terms of section 75 (5), the said director must not take part in the consideration of the matter and may not vote on the matter. It therefore followed, according to Applicant, that neither of the Whittakers could have voted on a resolution to conclude employment contracts with themselves, and to the extent that they had purported to do so, they would have acted in contravention of the Companies Act and the employment contracts are void and unenforceable as a result.

17. The First Respondent contends that after her mother’s death, she was not only the sole director, but had assumed her executive role as the sole employee of the company. She did so on the same basis as her mother. This includes receiving the same employee remuneration which Grace had received, but she would also be reimbursed for her motor vehicle and other expenses, such as her computer used in for company business. Second Respondent was appointed as her non-executive co-director in November 2014 and assists First Respondent in the running of the business. First Respondent contends that she uses her home as the company office, visits the premises on one or two occasions per week, and utilises her laptop and other home office equipment to undertake the various tasks on behalf of the company.

Evaluation

18. Section 66 of the Companies Act, inter alia provides that the business and affairs of a company must be managed by or under the direction of its board of directors, which has the authority to exercise all of the powers and perform all of the functions of the company, except to the extent that the Act or the company's Memorandum of Incorporation (MOI) provides otherwise. The board of the company must comprise in the case of a private company or a personal liability company, at least one director in addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of the Act or its MOI.
19. A company's MOI may also specifically authorize one or more named persons to appoint and remove one or more directors, provide for one or more persons to be ex officio directors of the company and may also provide for the appointment or election of one or more persons as alternate directors of the company. More importantly, in terms of section 66(8) of the Companies Act, except to the extent that the MOI of a company provides otherwise, the company may pay remuneration to its directors for their service as directors, subject to subsection (9), which provides that this remuneration may be paid only in accordance with a special resolution

approved by the shareholders within the previous two years.

20. It is common cause that a company's MOI is its founding instrument through which the business of the company obtains its powers and authority to perform and exercise its functions. A company's MOI may also contain restrictions as to the powers and functions of a director and inter alia, the manner and extent to which a company remunerates its directors.
21. In casu, the MOI or any other written instrument^[1] directing how the Company is to be managed, is conspicuously absent. I therefore have to approach this matter in terms of the new

Companies Act, 71 of 2008.

22. Section 76 of the Companies Act addresses the standard of conduct expected from directors and extends it beyond the common law duty of directors by compelling them to act honestly, in good faith and in a manner they reasonably believe to be in the best interests of, and for the benefit of, their companies. Section 76(3) of the Companies Act states that a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director in good faith and for a proper purpose, in the best interests of the company and with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as carried out by that director, and having the general knowledge, skill and experience of that director.
23. Such reasonable behavior will differ from case to case and will be considered having regard to the peculiar circumstances of the issues facing a particular director. As in all cases involving negligence, the test is essentially an objective one, in that it postulates the

standard of conduct of the notionally reasonable director. Specifically, in section 77(9) of the Companies Act, a court may relieve a director from any liability if a court considers it just if it appears that the director, having regard to all of the circumstances of the case, including those connected with the appointment of the director, it would be fair to excuse the director. [2]

24. In her answering affidavit, First Respondent stated that after her mother's death, she ran the company in exactly the same way as her mother had done. Against this backdrop, it is evident that we are dealing with a small family enterprise, initially created with the intention of benefiting its family members. It has long been accepted that in these types of companies, compliance with formalities usually take a back seat and typically, strict compliance with formalities are often relaxed precisely because of the relative closeness of the participants. In casu, the manner in which Whitakers operated was no different. It is not disputed that Grace received remuneration from the Third Respondent. According to the Respondents, this remuneration was within the knowledge of all of the shareholders, including Standard Trust who was the other shareholder along with Grace. Furthermore, given the purpose for which the company was established, it was not disputed that the company was purposefully created to ensure an income stream via the only asset in the company. I was told that throughout the company's existence, at least 75% shareholders knew and approved of the executive director's employment and remuneration. After Liam Whittacker's death, Grace held 50% of the shares and the remaining 50% were in the LFN Trust controlled by Standard Trust. After Grace's death, First Respondent holds 75% of the requisite shares required for a special resolution.
25. There is nothing before me that suggested that prior to First Respondent's obtaining her shareholding in the company, that resolutions were taken which entitled Grace, as shareholder, to her remuneration. But this is not a question that I have to dwell on for, in the absence of the MOI, I have to accept the Respondents' version that the income received, at least insofar as it related to Grace, was as contemplated by the founder of the Company.
26. Furthermore, it is also self-evident that First Respondent, and before her, Grace was the employee of the Company. There is no dispute that the premises is occupied by tenants. According to the financial statements of the company which was attached to the Applicant's founding affidavit, it reflected the company to be operating as a rental enterprise and generating a rental income of R 400 00.00 per annum. The only dispute in this regard involves the Applicant's complaint that the functions performed by her are vastly overstated. In my view,, whether or not one or three invoices require to be sent out to a tenant per month, or whether the premises need to be checked on once or three times per month, does not detract

from the fact that the company requires someone to fulfill the administrative duties and functions of a landlord and management

agent, and that someone is charged to administer those functions on behalf of the company. I have to accept that First Respondent

administers this function. Against that backdrop, one must accept further that First Respondent carries out this function in a position as an employee of the Company notwithstanding the fact that she is also a shareholder. Put differently, the mere fact that she is a shareholder does not preclude her from being an employee of the company as well. Counsel for Respondents relied on Henochsberg[3] who expressed the position as follows:

“...usually an executive director is appointed as director and also as employee, he holds two positions in two different capacities. This dual capacity is important in company law and in labour law.... As an employee he will also have the duties of an employee in addition to that of director ... He could receive remuneration as a director and as an employee or in one of either capacities.

27. Similarly, a director can also be an employee in addition to holding the independent office of director.[4] I am therefore of the view that the remuneration provided to the First Respondent is not unauthorised. With regard to Second Respondent, no evidence was adduced at all to support a claim that she was receiving any remuneration from the Company. Accordingly, the claim that she has received unauthorized remuneration is unfounded.

Delinquent directors

28. The other basis upon which the Applicant contends that the Whittakers' conduct have brought them within the realms of having being declared delinquent directors, is the claim that they are running personal expenses through the books of the Company without authorisation. It is this behaviour that is inflicting harm on the Company and accordingly, they are acting in a manner that is oppressive or unfairly prejudicial to the interests of the Applicant in her capacity as a minority shareholder.

The

legal framework

29. Section 162(5)(c) of the Companies Act reads as follows:

“(5) A court must make an order declaring a person to be a delinquent director if the person –

(c) While a director -

(i) grossly abused the position of director;

(ii) took personal advantage of information or an opportunity, contrary to Section 76(2)(a);

(iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to Section 76(2)(a);

(iv) acted in a manner –

(aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the directors functions within, and duties to, the company; or

(bb) contemplated in Section 77(3)(a), (b) or (c);

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30. To the extent relevant, section 163 provides that a shareholder or a director of a company may apply to 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 interest of, the applicant; or

(c) the power of a director or prescribed officer of a 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.’

31. A court is also empowered in terms of section 163 to make any interim or final order including:

‘(a) an order restraining the conduct complained of; ...

(e) an order directing an issue or exchange of shares; ...

(i) an order requiring the company ... to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine.’

32. In *Geffen and Others v Dominquez and Others*[5], Davis J stated the following in relation to an enquiry in terms of section 163:

“[23] In *Grancy Property Limited v Manala* 2015

(3) SA 313 (SCA), Petse JA, on behalf of a unanimous court, noted that the substantial body of case law dealing with s 252 of the Companies Act 61 of 1973 which was repealed by the 2008 Companies Act, is, in material respects, equivalent to s 163 of the Companies Act. Thus there is a benefit to be derived from considering the previous jurisprudence as to what constitutes oppressive or unfairly

prejudicial conduct. Unfortunately, this judgment did not lay down its own test but it is fair to say that it relied upon and thus

confirmed a number of decisions, in which the court had engaged previously with what constitutes oppressive or unfairly prejudicial

conduct. What emerges therefrom, is that an applicant for relief under the section cannot simply make a number of vague and generalised allegations but has to establish:

1. The particular act or omission that has been committed, or that the affairs of the company have been conducted in the manner so alleged.
 2. Such act or omission or conduct of the company's affairs is unfairly prejudicial, unjust or inequitable to the applicant or some part of the members of the company.
 3. The nature of the relief that must be granted to bring to an end the matters of which there is a complaint; and
 4. It is just and equitable that the relief be so granted."
33. The court also held that the judgment in Grancy Property Ltd, supra also made it clear that the conduct of the majority shareholders had to be evaluated in the light of a fundamental principle of company law, namely by becoming a shareholder, the latter undertakes to be bound by the decisions of the majority shareholder/s. It therefore follows that not all acts which prejudicially affect a minority shareholder or which disregard his or her interests will entitle a minority group to the relief set out in the section.[6]
34. In argument, counsel for Applicant, Mr Cutler referred to Gihwala and Others v Grancy Property Ltd and Others 2017 (2) SA 337 (SCA) where the court ruled that the delinquency order against two directors was entirely justified, finding that their conduct fell

within the scope of section 162(5)(c) of the Act where they had excluded Grancy from the benefits of an investment which it had

substantially financed, whilst the two directors, Mr Gihwala and Mr Manala, took the benefits for themselves and for their own personal enrichment.

35. Mr Cutler relied on the following paragraph as the test to be applied for delinquency:

"[139] These actions caused harm to SMI. It was in my view wilful misconduct on the part of Mr Gihwala and Mr Manala because it was entirely intentional and with knowledge of the obligations owed to Grancy under the investment agreement. But at the very least it was gross negligence akin to recklessness. It involved a breach of trust in relation to their performance of their duties as directors. It was entirely inexcusable and ongoing as evidenced by their endeavors to avoid complying with their obligation to provide a proper accounting to Grancy in regard to its investment. A declaration of delinquency was entirely justified. (my emphasis)"

36. It is trite that a court has to decide, firstly, if an applicant is entitled to relief in terms of section 163 and if so, which factors need to be considered in making the decision. A court is also tasked to adjudicate on the alleged breach of the directors' duties in terms of section 75. The First Respondent alleges that, as she is the Company's only employee, she performs all of its business functions and that these require the use of her own motor vehicle, laptop ,telephone and fax and utilizing part of her home as an office for the Company. The second complaint by Applicant relates to alleged unauthorised loans. In this regard, the only

allegation that is made on this aspect in the founding affidavit is as follows:

“The February 2016 financials also disclose unauthorised loans to the First Respondent and the Whittaker Family. Trust. These unauthorised

loans need to be investigated.”

37. According to the Respondents, both of the loans are reflected in the Company’s audited financial statements. The first loan in the amount of R 154 043.00 and marked “K Whittaker” is unsecured, and was made to Grace prior to her death and was assigned to First Respondent as her heir. It was therefore not a loan for which either of the Respondents were responsible. The second loan, according to the Whittakers, is an unsecured loan of R 424 496.00 made to the Third Respondent, which bears interest at prime plus 2% and has no set terms of repayment. According to them, neither of Respondents derive any personal benefit from the loan, which is to the Trust, of which the Applicant is a beneficiary. There is therefore no evidence that the Company is in any way prejudiced by the loan, from which it derives its interest.

38. The collective circumstances described in section 162(5(c)) are categorized as ‘substantive abuses of office’[7]. What this requires, according to the Respondents, are actions by directors, evaluated objectively, which fall far short of the

standard of the reasonable director. They argue that none of the complaints complained about could be criticized as grossly negligent,

wilful, fraudulent or a gross abuse of office. I tend to agree. In fact, throughout the answering affidavit, First Respondent reports

that this is how they have always done things and on this basis, alone, there can be no finding that the conduct complained of can be construed as wilful or fraudulent.

39. It is trite that an applicant must make out his or her case in the founding papers. In *Bayat v Hansa* 1955 (3) SA 547 (N) at 553 held the following:

‘An applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it in his affidavits filed with the notice of motion whether he is moving ex parte or on notice to the respondent and is not permitted to supplement in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his answering affidavit) still less to make a new case in his replying affidavits.’

40. Furthermore, given that these are motion proceedings and that quite clearly, there exists disputes of fact, I have to consider this matter in light of the accepted principles as enunciated in *Plascon-Evans*[8]. I was also confronted with an application to strike out by the Respondents on the basis that Applicant sought to supplement her

rather sparse founding affidavit in Reply. It is trite that it is impermissible to make out new grounds for an application of this

nature in a replying affidavit[9] and accordingly I do not deem it necessary to deal with the striking out application. These questions therefore have to be answered on the basis of the founding affidavit and the answering affidavit.[10]

41. According to the Respondents, the Applicant has not only failed to demonstrate cognizable facts evidencing ‘gross misconduct’, ‘gross negligence’, a ‘fraud’ upon her a shareholder, or an abuse of trust on the part of the Respondents, but she has also failed to produce sufficient evidence

to support a claim that the Respondents have inflicted any harm on the company.

42. There is clearly a loss of trust and a breakdown of the relationship between the shareholders in this small domestic company. Courts have previously come to the assistance of shareholders who find themselves in this position by winding up a company on just and equitable grounds where the relationship between the partners have become untenable. However, I make no pronouncements in this regard. In this application, however, based on the conspectus of the evidence before me, I am constrained to find that the Applicant has not made out a case for a finding of conduct amounting to delinquent behaviour within the meaning of sections 162 and 163 of the Companies Act.

43. I was also called upon to make a finding in terms of section 162 (7)(iii) of the Companies Act. This provision provides that:

(7) A court may make an order placing a person under probation, if-

(a) while serving as a director, the person-

(i) ...

(ii) ...;

(iii) acted in, or supported a decision of the company to act in, a manner contemplated in section 163 (1)”

44. Mr Cutler argued that a finding in terms of section 162 was not a sine qua non for a finding in terms of section 163. Thus if they have not made out a case in finding the directors delinquent, then the alternative relief is putting the Respondents on probation in terms of section 162(b). According to Respondents, no cognizable facts which meet the requirements of section 162(8)(a), which are pre-requisites for a probationary order, have been met. I agree. Since I have found that there is no basis for the relief in a finding that the Respondents conduct were oppressive or unfairly prejudicial

to the Applicant, similarly there is no factual or legal grounds proffered which would entitle the Applicant relief in terms of

Section 163(2)(f)(i). In my view, the Applicant has not made a case out for a finding in terms of section 162.

45. Lastly, in relation to the relief claimed in Prayer 4 for payment of money as repayment or compensation, I am of the view that even had I found the Respondents conduct to have been oppressive and prejudicial to the Applicant, this claim would not have been competent in this application as this court would not have been in a position to identify or determine what amounts should be repaid, in what would clearly have been an illiquid claim.

Conclusion

46. In summary, I am unable to find that Applicant has made out a case for declaring that First and Second Respondents are delinquent or that their conduct has been oppressive or unfairly prejudicial or disregarded the interests of the Third Respondent or the Applicant in a commercial sense.

Order:

In the circumstances, I issue the following order:

1. The application is dismissed with costs.

KUSEVITSKY AJ

- [1] Since this company was created in 1971, it would have had as its founding documents, a Memorandum of Association and Articles of Association in terms of the old Companies Act but the new Companies Act 71 of 2008 allowed companies to file a notice of amendment of its current founding documents to bring it in line with the new Act by 30 April

2013

- [2] Subsection 9(b)

- [3] Henochsberg On the Companies Act 71 of 2008, Vol.1 at p76(1)

- [4] Amazwi Power Products (Pty) Ltd v Turnbull JA (2008) 29 ILJ 2554 (LAC): 14/07 20 June 2008 at para 12

- [5] (4501/2014)

- [2017] ZAWCHC 118 (17 October 2017) at para 23

- [6] Ibid para 24

- [7] Grancy Property Ltd v Manala [2013] 3 ALL SA 111 (SCA) at para206

- [8] Plascon-Evan Plaints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623(A)

- [9] Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635-636

- [10] Geffen supra at para 41

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Prepared on 10 October 2026 · Esheria