REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Appeal Case No: A5068/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.

……………………………… ……………………
SIGNATURE **DATE**

In the appeal between :

ROSALINE SYBIL DUNN-BLATCH First Appellant

ITRISA NPC Second Appellant

and

ALICE MARY PARRY First Respondent

TRADSA (PTY) LIMITED Second Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be ____ 2022

JUDGMENT

INGRID OPPERMAN J

INTRODUCTION

[1] The appellants appeal the whole of the judgment and order of Twala J delivered on 4 April 2019. This appeal is with the leave of the Supreme Court of Appeal ("*SCA*"). The first appellant ("*Ms Dunn-Blatch*") is a director of the second appellant, ITRISA NPC ("*ITRISA*"). ITRISA was established on 30 August 1996 and is a non-profit company having an educational objective. ITRISA is entirely reliant on the revenue it generates from services rendered and *ad hoc* sponsorships it may receive from time to time. It receives no government subsidies.

[2] ITRISA is currently registered with the Department of Higher Education and Training to offer three qualifications that are aligned to the international accreditation system of the UK registered International Association of Trade Training Organisation. ITRISA is the only provider of these qualifications in South Africa.

[3] The first respondent ("*Ms Parry*") was an employee and director of ITRISA. She resigned as an employee on 31 December 2011 and as a director of ITRISA on 30 May 2012.

[4] The second respondent ("*TRADSA*") was cited by Ms Parry as the third respondent in the court *a quo*. TRADSA is a private company and both Ms Parry and Ms Dunn-Blatch are directors of TRADSA, each holding 50% of the shareholding.

[5] In the Court *a quo*, Ms Parry sought and was granted relief in terms of the provisions of sections 163(1)(a), 163(1)(b) and 163(2)(h) of the Companies Act No. 71 of 2008, as amended ("*the Companies Act*"), which provides:

'163 **Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company**

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

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or

(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

(2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including

…….

(h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement…'

[6] The cornerstone of the judgment of the Court *a quo* is to be found in paragraph [25] which reads:

"... Section 163 empowers the court to make an order it considers fit including an order to vary or set aside a transaction or an agreement to which the company, the third respondent [TRADSA] in this case, is a party ..."

[7] The agreement to which the Court *a quo* applied the provisions of section 163(2)(h), was an agreement concluded on 10 June 2015 between Ms Dunn-Blatch

and Ms Parry. When concluding this agreement, they acted in their personal capacities and in their capacities as the sole two directors of TRADSA ("*the licence agreement*").

[8] In terms of the licence agreement, Ms Dunn-Blatch and Ms Parry agreed that they were the joint authors of the copyright works,[1] confirmed and assigned the ownership of the copyright in the copyright works to TRADSA and simultaneously confirmed the existence of the exclusive licence that ITRISA had to use the copyright works,[2] confirmed that since 2009 all the copyright works used by ITRISA has borne a notice reflecting TRADSA as the copyright owner of the copyright works pursuant to the intention at all relevant times that the ownership of the copyright in the copyright works jointly authored by Ms Parry and Ms Dunn-Blatch was to vest in TRADSA and that TRADSA in turn would licence to ITRISA the right to use the copyright works,[3] confirmed the transfer, cession and assignment of all copyright in the copyright works to TRADSA from the date each item of work was created and to the extent that the retrospective assignment may not be competent, then with effect from the date of the licence agreement,[4] and confirmed the exclusive licence granted by TRADSA to ITRISA.[5]

[9] The copyright works referred to in the licence agreement were identified[6] and essentially constitute literary works.

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1 Clause 4.1 of the licence agreement.

2 Clause 4.2 of the licence agreement.

3 Clause 5.6 of the licence agreement.

4 Clause 6 of the licence agreement.

5 Clause 7 of the licence agreement.

6 Clauses 4.1 to 4.4.5 of the licence agreement.

THE RELIEF SOUGHT BY MS PARRY IN THE COURT *A QUO*

[10] Ms Parry sought the following relief:

> "(1) That the following inferred terms of the licence agreement between the Third Respondent [TRADSA] and the Second Respondent [ITRISA] be deleted:
>
> (a) that the Second Respondent [ITRISA] does not need to account to the Third Respondent [TRADSA] for the use of the intellectual property;
>
> (b) that no consideration is payable to the Third Respondent [TRADSA] for the use of the intellectual property; and
>
> (c) that compensation for the use of the intellectual property would be payable to the Third Respondent [TRADSA] if the Second Respondent [ITRISA] were disposed of to a third party and this third party would continue to use the intellectual property.
>
> (2) That the following terms are included in the licence agreement between the Third Respondent [TRADSA] and the Second Respondent [ITRISA]
>
> (a) that the Second Respondent [ITRISA] accounts to the Third Respondent [TRADSA] for all use of the intellectual property, including all revenue derived from the use of the intellectual property whether directly or indirectly;
>
> (b) that compensation is payable by the Second Respondent [ITRISA] to the Third Respondent [TRADSA] for the use of the intellectual property by the Second Respondent [ITRISA] from a date of not less than 3 years from the date of this application and for all future use of the intellectual property as follows:
>
> (i) 15% of gross revenue accruing to the Second Respondent [ITRISA] from the use of the intellectual property in the Second Respondent's [ITRISA]:
>
> - Distance learning programme;
> - Training courses and workshops; and

- Project-based consultancy;

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

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

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

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

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

(6) That the Applicant [Ms Parry] and the First Respondent [Ms Dunn-Blatch] as equal shareholders in the Third Respondent [TRADSA], enter into an agreement regarding the payment of dividends from revenue received from the compensation paid by the Second Respondent [ITRISA];

(7) That the Third Respondent [TRADSA] is compensated for use of the intellectual property by the Second Respondent [ITRISA] from a date of not less than three years preceding the date of this application on the same terms as set out in paragraph (2) above;

(8) That the First Respondent [Ms Dunn-Blatch] and the Second Respondent [ITRISA] bear the costs of this application if opposed."

[11] The Court *a quo* granted Ms Parry all the relief, which she sought except for her request that the royalty rate be fixed at 15% and 80%. The Court *a quo* referred the question of the royalty rate that is to be paid by ITRISA to TRADSA, to trial.

[12] What is immediately apparent is that the court granted the relief sought in paragraph 2 of the notice of motion ie it effectively concluded a new licence agreement for the parties by including certain terms into the licence agreement. In our view, section 163(2)(h) only authorises the setting aside or variation of a transaction or agreement or that compensation be paid and not also the redrafting of the agreement. By virtue of the other findings we make herein, we do not deem it necessary to pronounce definitively on this issue ie the scope of the relief a court is entitled to grant in terms of section 163(2)(h).

[13] Another curious feature of the relief sought in paragraph 1 of the notice of motion is that it is totally ineffectual. This is so as there is already a licence agreement which is royalty free and which is an exclusive licence agreement between TRADSA and ITRISA.

[14] With those preliminary remarks having been made, we summarise the common cause facts hereinafter.

COMMON CAUSE FACTS (OR LARGELY UNDISPUTED)

[15] TRADSA was incorporated on 19 August 1996. ITRISA was incorporated on 30 August 1996. Ms Dunn-Blatch and Ms Parry established and formed ITRISA and TRADSA. Ms Dunn-Blatch and Ms Parry were both directors of ITRISA from 30 August 1996 to 31 May 2012 when Ms Parry resigned as an employee on 31 December 2011 and as a director on 31 May 2012.

[16] Ms Dunn-Blatch remains a director of ITRISA. Ms Dunn-Blatch and Ms Parry are both directors of TRADSA and each hold 50% of the shareholding in TRADSA.

[17] During the period 1996 to May 2012, Ms Dunn-Blatch and Ms Parry created the intellectual property, that is the educational course material (the literary works) which ITRISA used in the educational services it provides. TRADSA was established for the purpose of being the holder of the ownership of the copyright in the copyright works. When Ms Parry resigned as a director of ITRISA, which she did in order to pursue other interests, she stopped receiving a salary from ITRISA.

[18] On 10 June 2015, Ms Dunn-Blatch and Ms Parry concluded the licence agreement. The use by ITRISA of the copyright works was and is royalty-free because ITRISA could not and cannot afford to pay a royalty fee for the use of the copyright works. ITRISA does not generate profits.

[19] In Ms Dunn-Blatch's answering affidavit she invited Ms Parry to once again take up employment with ITRISA to make a contribution to the business of ITRISA and in so doing to be remunerated with a salary. This offer was not accepted.

[20] The aforegoing common cause facts reveal that Ms Dunn-Blatch and Ms Parry concluded the licence agreement some three years after Ms Parry resigned as a director of ITRISA, thus, in circumstances where she had not been receiving a salary from ITRISA for a period of three years.

AN ANALYSIS OF THE REASONS UNDERPINNING THE RELIEF GRANTED IN THE COURT *A QUO*

First Reason

[21] Ms Parry argued that because she resigned as a director of ITRISA in May 2012, she no longer received a salary from ITRISA and no longer derived a benefit from ITRISA's use of the copyright works. She expressed this as follows:

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

[22] Ms Parry bases her *locus standi* to seek relief under section 163 of the Companies Act on her position as a director and shareholder of TRADSA. Ms Parry thus had to show that the business of TRADSA is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards her interests or that any act or omission of TRADSA has had a result that is oppressive or unfairly prejudicial to or that unfairly disregards her interests.

[23] TRADSA, from its inception, never received a royalty fee from ITRISA for the use of the copyright works. Ms Parry consented, and was a party, to this royalty fee arrangement from inception. In February 2012 (after her resignation from ITRISA), she proposed that a formal agreement be concluded between TRADSA and ITRISA. In a draft licensing agreement she proposed a clause that provided that TRADSA waived the right to claim a royalty fee from ITRISA until such time as ITRISA was in

a financial position to do so. In other words, she always envisaged a licensing relationship where TRADSA was not paid a royalty.

[24] On 10 June 2015, three years after she resigned as a director of ITRISA, and three years after she stopped receiving a salary from ITRISA, Ms Parry freely and voluntarily concluded the licence agreement in which she agreed in her personal capacity to assign her joint ownership of the copyright in the copyright works to TRADSA and in her capacity as a director of TRADSA, that ITRISA could use the copyright rights royalty-free. In other words, she agreed to and concluded a royalty-free licence agreement for TRADSA.

[25] Ms Parry's case is that because she is no longer employed by ITRISA and because she no longer receives a salary from ITRISA, she is unduly prejudiced by the royalty-free licence agreement given to ITRISA. However, the royalty-free licence agreement was concluded with her consent and authority three years after she stopped receiving a salary from ITRISA.

[26] It goes without saying the fact that she no longer receives a salary from ITRISA is not attributable to TRADSA and does not constitute conduct in TRADSA. The reason she does not receive a salary from ITRISA is because she freely and voluntarily resigned as a director. The Supreme Court of Appeal in *Grancy Property Ltd v Manala and others*[7] dealt with the ambit of section 163 of the Companies Act in the following terms:

> 'Despite the wide ambit of s 163, it must be borne in mind that the conduct of the majority shareholders must be evaluated in light of the fundamental corporate law principle that, by becoming a shareholder, one undertakes to be bound by the decisions of the majority shareholders. . . . Thus not all acts which prejudicially

[7] 2015 (3) SA 313 (SCA) at [32]

> affect shareholders or directors, or which disregard their interests, will entitle them to relief – it must be shown that the conduct is not only prejudicial or disregardful but also that it is **unfairly** so.' (emphasis provided)

[27] In paragraph [26] of the same judgment it was held that the section should be construed in a manner that will advance the remedy that it provides for rather than limit it.

[28] In our view, the fact that ITRISA does not pay TRADSA a royalty fee cannot on any interpretation constitute conduct that unfairly disregards Ms Parry's interests or is unfairly prejudicial to Ms Parry as a director and shareholder of TRADSA. Ms Parry consented to, and was party to, this royalty-free arrangement from inception. Ms Parry, as a director and shareholder of TRADSA, cannot complain of conduct that was carried out with her acquiescence or agreement and still less of something done with her cooperation or collaboration.[8] In our view, the Court *a quo* erred in not considering the fact of Ms Parry's conduct of participation, consent and acquiescence sufficiently. The Court *a quo* found that there was:

> "... an agreement between the parties for the second respondent [ITRISA] to pay the applicant [Ms Parry] and the first respondent [Ms Dunn-Blatch], as part of their salaries, for the copyright which they held with the third respondent [TRADSA]."[9]

[29] This finding is incorrect. Ms Parry did not allege such an agreement between the parties. She contended that whilst she and Ms Dunn-Blatch were directors of ITRISA, they both received a salary. Ms Parry alleged that because no payments were made by ITRISA to TRADSA for use of the intellectual property, part of the salary they received from ITRISA was in lieu of the compensation which would

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8 *Irvin and Johnson Ltd v Oelofse Fisheries Ltd* 1954(1) SA 231 (E) at 243.

9 Para [26] of the judgment.

otherwise have been payable by ITRISA to TRADSA for use of the intellectual property. More importantly, however, is that as from 10 June 2015, neither Ms Parry nor Ms Dunn-Blatch owned the copyright in the copyright works. They assigned ownership of the copyright in the copyright works to TRADSA in the licence agreement. Thus, the salary that is paid to Ms Dunn-Blatch by ITRISA, since 10 June 2015, cannot on any interpretation constitute some form of compensation for the use of the copyright works.

[30] Ms Jackson, representing Ms Parry, argued that the signed affidavit dated 10 June 2015 does not include a clause relating to a royalty-free agreement and that Ms Parry never consented to a royalty-free agreement. This submission flies in the face of the inferred terms Ms Parry listed in her founding affidavit and which she sought be varied by the court. The terms include that ITRISA may utilise the intellectual property which vests in TRADSA, ITRISA need not account to TRADSA for the use and no consideration is payable to TRADSA for such use. Ms Parry in fact approached the court to 'vary' the royalty-free term – she requested that it be deleted from the licence agreement. This court accepts that the affidavit attached to the founding affidavit is not the licensing agreement but rather an affidavit dated 10 June 2015, in terms of section 26(12)(a) of the Copyright Act 98 of 1978 which was brought into existence as a result of a possible sale of ITRISA to a third party. In our view, very little turns on this as Ms Parry premised her relief on this document alleging that it confirmed the assignment of the copyright works and that of an exclusive licensing agreement.

[31] Ms Jackson drew attention to the fact that the Appellants failed to draw attention to the chain of e-mails that Ms Parry and Ms Dunn-Blatch exchanged between 5 April 2012 and 10 January 2013 in which they discussed the issue of

compensation for the copyright material and matters ancillary thereto. The line in the sand was of course drawn on 10 June 2015 when the ownership in and to the copyright was transferred to TRADSA. Ms Parry thereafter had no right to claim any royalties and Ms Dunn-Blatch, none to give.

[32] Ms Dunn-Blatch had invited Ms Parry to take up employment with ITRISA so that Ms Parry could again receive a salary. This invitation was extended in the answering affidavit. In paragraph 15 of the judgment of the Court *a quo*, the Court found that this offer by Ms Parry to return to work was "*suspicious since it is clear that the relationship between the parties has broken down irretrievably*".

[33] We find that there is no factual foundation for this conclusion. The evidence which did serve before the Court *a quo* points to a different conclusion because Ms Parry had offered to work and assist with course updates to the copyright works during November 2012. More importantly, though, Ms Parry did not in the papers before the Court respond to Ms Dunn-Blatch's offer to take up employment. There does not, therefore, appear to be any factual foundation for the Court to have concluded that the offer was suspicious or that the relationship had broken down irretrievably.

[34] We thus conclude that Ms Parry failed to establish oppressive or unfairly prejudicial conduct of the kind contemplated in section 163(1) of the Companies Act.

<u>Second Reason</u>

[35] Ms Parry contended that as a shareholder of TRADSA she is unduly prejudiced by the fact that TRADSA does not receive any compensation from ITRISA for use of

the copyright works. Her grievance is formulated as follows in her founding affidavit:[10]

> "I thus submit that as a result of the first respondent's [Ms Dunn-Blatch's] conduct in refusing to vary the inferred terms, the third respondent's [TRADSA] interests, and my interests in the third respondent [TRADSA] are being disregarded and as a result I am being prejudiced."

[36] Ms Cirone, representing Ms Dunn-Blatch, contended that Ms Parry has no *locus standi* to advance the relief she seeks on this basis. She argued that, the fact that TRADSA is not getting paid a royalty fee, insofar as it may cause harm, is a harm that would be inflicted on TRADSA and not on Ms Parry as TRADSA is the proprietor of the copyright works. The Learned Judge *a quo* dealt with this difficulty in the judgment as follows:

> "There is no merit in the argument that, if any harm is caused by the conduct of the respondents, it is only caused in relation to the third respondent [TRADSA] and not the applicant [Ms Parry]. The respondents are related persons to the third respondent [TRADSA] in that the first respondent [Ms Dunn-Blatch] is a director and shareholder and intellectual property of the third respondent [TRADSA] is the cornerstone of the business of the second respondent [ITRISA]. When the conduct of the related persons is such that it has the result that it is oppressive or unfairly prejudicial to and unfairly disregards the interests of the applicant [Ms Parry], the applicant is entitled to invoke the provisions of section 163. I hold the view that the harm caused to the third respondent [TRADSA] filters through to its directors and shareholders."[11]

[37] The fact that Ms Dunn-Blatch is a director and shareholder of TRADSA does not overcome the fact that the proper applicant in the claim in respect of a wrong alleged to be done to TRADSA is *prima facie* TRADSA.

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[10] Para 7.14.

[11] Para [13] of the judgment.

[38] Section 163 of the Companies Act should not be interpreted so as to unjustifiably circumvent the *Foss v Harbottle* doctrine and its purpose. This doctrine provides that the proper plaintiff in an action in respect of a wrong alleged to be done to a company is, *prima facie*, the company.[12]

[39] It is of course open to a shareholder to force a company to take steps to deal with any wrongful conduct on the part of the directors. If such shareholder finds herself in the position that the company will not assist her, and the wrongdoers are in control of the company and protecting themselves, she can bring a derivative action.

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

Third Reason

[41] It was contended on behalf of Ms Parry that because ITRISA is a not-for-profit company, it is not entitled to make a profit. This statement is conceptually flawed. A non-profit making concern does not have shareholders and the profits it does make, is accordingly not distributed to its shareholders but utilised by the company to pursue its objectives and pay its running costs.

[42] ITRISA NPC is however, not profitable and as presently capitalised is unlikely to ever become profitable. If ITRISA was forced to pay royalty fees to TRADSA it would result in its demise. This is not purely speculative as argued on behalf of Ms Parry as ITRISA made full disclosure of its financial position to the Court *a quo*. Copies of ITRISA's annual financial statements for the years 2010 to 2017 form part

[12] The doctrine is fully explained in *London v Department of Transport, Roads and Public Works, Norther Cape* 2019 JDR 2137 (SCA) at [31].

of the record. These annual financial statements disclose that ITRISA does not generate profits, a fact which is undisputed by Ms Parry.[13] There is accordingly no money available for it to pay a royalty fee to TRADSA.

[43] The demise of ITRISA would result in the end of a useful and valuable educational service offered to South Africans. All the students who have registered and paid course fees would be severely prejudiced. These students would lose their registration and course fees because the relief that Ms Parry seeks will ultimately result in the winding-up of ITRISA. The South African educational system would lose the only service provider that offers three qualifications that are aligned to the international accreditation system of the UK registered International Association of Trade Training Organisation. The Court *a quo* found that it would be just and equitable to elevate the interests of Ms Parry (through TRADSA) above the continued existence of ITRISA and the students who have paid their course fees. The basis for doing so was however not identified.

[44] The Court *a quo* could only grant the relief if it found that it was just and equitable to do so.[14] To grant Ms Parry her relief would result in the killing of the proverbial goose that lays the golden egg. If ITRISA shut down, nobody would benefit. Such a situation can never be considered just and equitable. We thus conclude that in the circumstances of this case, the Court ought to have concluded that it is not just and equitable to grant the relief Ms Parry sought.

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[13] Ms Parry has limited personal knowledge of the financial position of ITRISA, having resigned as a director on 31 May 2012. In any event, the *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1984(3) SA 623 (A) at 634E – 635C principle, obliges this court to accept Ms Dunn-Blatch's version on this issue.

[14] Applying the SCA dicta in *Louw & Others v Nel* 2011 (2) SA 172 (SCA) at [23]

<u>Fourth Reason</u>

[45] A period of more than six years lapsed since the co-authorship of the copyright works ceased. The copyright works have been substantially updated twice annually since 31 December 2011 by Ms Dunn-Blatch in her capacity as an employee of ITRISA. The copyright works are only useful at this point in time in their updated form.

[46] In some instances, the material has been changed, enhanced and updated by *ad hoc* contractors working for ITRISA on contracts of service. Constant ongoing changes in the international trading environment require the material to be updated in order for it to be relevant.

[47] In these circumstances, the copyright works that form the subject of the licence agreement are no longer in the same form and substance as when the agreement was concluded in 2015. Each one of the items of the work listed in the licence agreement has been updated, enhanced and modified into new substantive works in which copyright vests and in which the ownership of the copyright in the new aspects of the works belongs to ITRISA. In other words, the copyright works now used by ITRISA are not the same works that Ms Parry and Ms Dunn-Blatch co-authored and assigned to TRADSA many years ago[15].

[48] The original works, in the form they existed at the time the licence agreement was concluded have no use without the updated enhancements and modifications. The relief granted by the Court *a quo* will result in severe oppression and prejudice to ITRISA. This is so because ITRISA now has to pay a royalty fee to TRADSA for the use of copyright rights, which it is in fact not using. The consequence of the order

15 The court *a quo* ought to have accepted Ms Dunn-Blatch's version on this issue applying the *Plascon Evans* priniciple.

granted by the Court *a quo* is that ITRISA would be compelled to pay a royalty fee for something that it does not use in circumstances when the copyright in the works that it does use, actually belongs to ITRISA. In this regard, the Court *a quo* erred in making a contradictory factual finding. On the one hand, the Court found that Ms Parry and Ms Dunn-Blatch had assigned ownership of the copyright in the copyright works to TRADSA[16] and, on the other hand, the Court *a quo* found that Ms Parry and Ms Dunn-Blatch had not divested themselves of the right of ownership of the works and that ITRISA was obliged to obtain the consent of TRADSA for any updates and adaptations of its works.[17] In our view, whether or not ITRISA had to obtain TRADSA's consent to make adaptations to the copyright works, is irrelevant. The position was that changes had been made and new substantive copyright works had been created which belonged to ITRISA and at worst, because of the absence of consent, jointly by TRADSA and ITRISA in which event TRADSA should pursue the claim[18]. This fact ought to have been taken into account by the Court *a quo* and was not.

<u>Fifth Reason</u>

[49] The relief that the Court *a quo* conflicts with and breaches the provisions of section 1(3) of schedule 1 of the Companies Act which provides that a non-profit company:

> "must not, directly or indirectly, pay any portion of its income or transfer any of its assets, regardless how the income or asset was derived, to any person who is or was an incorporator of the company ..."

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16 Para [18] of the judgment.

17 Para [20] of the judgment.

18 For the reasons advanced under 'Second Reason' herein.

[50] Ms Parry was an incorporator of ITRISA. Section 1(3) of schedule 1 of the Companies Act therefore precludes her from receiving a dividend from TRADSA where the origin of the dividend is derived from a payment made by ITRISA to TRADSA. Ms Parry, through her counsel Ms Jackson, submitted that this reason was never raised by any of the parties in the Court *a quo* and accordingly could not be raised on appeal for the first time. In this regard, she referred us to the *locus classicus* on this issue being *Swissborough.*[19] Ms Jackson readily conceded and indeed drew the Court's attention very properly to the appropriate principle, being that a party could advance legal argument in support of the relief or defence claimed by it even where such arguments were not specifically mentioned in the papers, provided they arose from the facts alleged and provided there was no prejudice to the other party.[20] We hold the view that the argument arises from the facts and that the adjudication of the matter on this basis will not result in any prejudice to Ms Parry (or Ms Dunn-Blatch, ITRISA or TRADSA).

[51] Ms Jackson argued that there was no facts set out by Ms Dunn-Blatch in her answering affidavit regarding any alleged transfer of income or assets from ITRISA to Ms Parry. The point of Ms Cirone's argument is that the effect of the order granted by the Court *a quo* would be to transfer income to Ms Parry who was an incorporator of ITRISA and that is what is prohibited in terms of section 1(3) of schedule 1 of the Companies Act.

[52] Ms Jackson further argued that the exceptions provided for in the prohibition set out in section 1(3) of schedule 1 of the Companies Act have application and

[19] *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others* 1999 (2) SA 279 (T) at 323 I – 324F.

[20] *Swissborough* (supra) at 324 H – 324A.

therefore the prohibition does not have application. The first such exception is to be found in subsection (b) and provides:

> "As a payment of an amount due and payable by the company in terms of a *bona fide* agreement between the company and that person or another".

[53] Ms Jackson argued that the order granted by the Court *a quo* embodies such a "*bona fide* agreement". Ms Cirone countered, in our view correctly, that the original agreement concluded in June of 2015 did not make provision for any royalty fees to be paid. The *bona fide* agreement contended for is the one which the Court *a quo* concluded on behalf of the parties and is the one which is the subject matter of this hearing, as such, the exception cannot be found to have application. This reasoning appears to be sound.

[54] The exception in subsection (c) provides:

> "as payment in respect of any rights of that person, to the extent that such rights are administered by the company in order to advance a stated object of the company."

[55] Ms Jackson argued that the licensed rights to the intellectual property are administered by ITRISA and are used to advance the stated object of ITRISA. The intellectual property she contended forms the very cornerstone of ITRISA's business. In our view, Ms Parry has no rights that could fall within the scope of this exception. None of Ms Parry's rights are administered by ITRISA and this exception does not qualify to assist Ms Parry.

[56] The exception in subsection (d) provides:

> "in respect of any legal obligation binding on the company".

[57] Ms Jackson submitted that a legal obligation such as the payment of a royalty fee in terms of a licence agreement would be included as such an exception. But that

is the very point of this hearing. No legal obligation exists because Ms Parry voluntarily relinquished the rights.

[58] We therefore find that none of the exceptions to the application of section 1(3) of schedule 1 to the Companies Act has application and that the dismissing of the appeal would countenance the contravention of this section of the Companies Act.

[59] For all these reasons we conclude that the appeal should be upheld.

ORDER

[60] We accordingly grant the following order:

(a) The appeal is upheld with the First Respondent to pay the costs of the appeal including those ordered by the Supreme Court of Appeal to be costs in the appeal.

(b) The Order of the Court *a quo* is set aside and replaced with the following:

“The application is dismissed with costs.”

I OPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

MMP MDALANA-MAYISELA
Judge of the High Court
Gauteng Division, Johannesburg

S MEERSINGH
Acting Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the appellants: Adv P Cirone

Instructed by: DM Kisch Inc

Counsel for the respondent: Adv BM Jackson

Instructed by: Rademeyer Attorneys

Date of hearing: 11 October 2021
Date of Judgment: 8 April 2022