REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 18493/2021

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

22 MARCH 2022 **……………………..**
………………………...
Date **ML TWALA**

In the matter between:

SILVANA IDA BARBAGLIA APPLICANT

And

MICHAEL ANTINIO VINCENZO BARBAGLIA FIRST RESPONDENT

PABAR (PROPRIETARY) LIMITED SECOND RESPONDENT

CHARL EDWARD ANDERSON N.O. THIRD RESPONDENT

GREGORY MASSIMO BARBAGLIA FOURTH RESPONDENT

LEONARD PULE N.O.
(In his capacity as the Master of the High Court, Johannesburg as defined by the Administration of the Estate Act, 66 of 1965) FIFTH RESPONDENT

Case No: 21928/2021

SILVANA IDA BARBAGLIA APPLICANT

And

MICHAEL ANTINIO VINCENZO BARBAGLIA FIRST RESPONDENT

PABAR (PROPRIETARY) LIMITED SECOND RESPONDENT

CHARL EDWARD ANDERSON N.O. THIRD RESPONDENT

GREGORY MASSIMO BARBAGLIA FOURTH RESPONDENT

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be the 22nd of March 2022

TWALA J

[1] The disputes in the Barbaglia family which arose after the death of Mr Barbaglia who died on the 10th of December 2020, the husband of the applicant to whom she was married in community of property. Such disputes have led to the applicant launching three applications before this Court against the same respondents save for the Master of the High Court. I propose to deal with the two applications under the above case numbers together in this judgment since the facts and the relief sought therein are closely and or inter-related. The case against the Master has already been dealt with separately.

[2] In the application under case number 21928/2021, the applicant seeks an order that the first respondent, alternatively the second respondent, represented by the first respondent, be directed to restore the status quo ante which existed prior to the alteration of the share register of the second

respondent on or about the 17th of February 2021 by restoring the applicant's name to the second respondent's share register as the holder of two shares (1%) and the name of Vincenzo Barbaglia as the holder of 168 shares (84%) in the second respondent. Furthermore, the applicant seeks an order for costs against the first respondent.

[3] In the application under case number 18493/2021, the applicant seeks the following order:

3.1 That, in accordance with the provisions of section 163(2)(f)(i) of the Companies Act, 71 of 2008 ("the Companies Act"), the applicant, and or the fourth respondent ("Gregory"), be appointed as directors of the second respondent ("Pabar"), together with an independent director, in place of the current sole director of Pabar, the first respondent ("Michael"), alternatively, that the applicant, and or Gregory, together with an independent director be appointed as directors of Pabar in addition to Michael ('the section 163 relief").

3.2 That the section 163 relief remains in force from the date of the granting of the order set out in 3.1 above to the date on which the joint estate of the applicant and her late husband, Vincenzo Barbaglia ("Mr Barbaglia"), ("the joint estate") is finally wound up, or the date on which Pabar is sold or disposed of, by way of a sale of 100% of the shares in Pabar, or the sale of its business, or final winding up, or the date on which the applicant ceases to be a shareholder in Pabar, whichever occurs first.

3.3 That Pabar be compelled to furnish the applicant with copies of the following documents on a monthly basis, and for so long as the applicant remains a shareholder in Pabar, namely:

a. Pabar's general ledger;

b. Pabar’s bank statements;

c. Pabar’s payment breakdowns;

d. Pabar’s turnover reports;

e. Pabar’s income statements;

f. Pabar’s cash flow projections;

g. Pabar’s management accounts.

3.4 That the disposal, alienation, or encumbrance of any of Pabar’s assets, as appear on its balance sheet, other than in the ordinary course of business, is prohibited from the date of the granting of the order sought in prayer 3.2 above to the date on which the joint estate is finally wound up, or the date on which Pabar is sold or disposed of, by way of a sale of 100% of the shares in Pabar or the sale of its business, or final winding up, or the date on which the applicant ceases to be a shareholder in Pabar, whichever occurs first.

3.5 That Michael is prohibited from using Pabar’s resources to pay for his personal legal fees from the date of the grant of the order sought in this prayer 3.4, to the date on which the joint estate is finally wound up, or the date on which Pabar is sold or disposed of, by way of a sale of 100% of the shares in Pabar, or the sale of its business, or final winding up, or the date on which the applicant ceases to be a shareholder in Pabar, whichever occurs first.

3.6 That Michael is required to: (i) provide a reconciliation of the personal legal fees paid by Pabar on his behalf from the date of Mr Barbaglia’s death, being 10 December 2020, to date; and (ii) repay to Pabar the personal legal fees paid by Pabar on his behalf from the date of Mr Barbaglia’s death to date, and within thirty (30) calendar days from the granting of this order.

3.7 That the first respondent is to pay the costs of this application, save in the event that any other respondent opposes the relief sought in this

application, in which event that the costs of this application are to be paid by the first respondent and any such opposing respondent, or respondents, in equal proportions.

[4] The applicant is the widow of the late Vincenzo Barbaglia ("the deceased") who died on the 10th of December 2020, and to whom she was married in community of property for more than 64 years.

[5] The first respondent is Michael Antonio Vincenzo Barbaglia, an adult businessman who is the oldest of the two sons born of the marriage between the applicant and the deceased. He is currently the sole director and shareholder in the second respondent.

[6] The second respondent is Pabar (Proprietary) Limited, with registration number: 1967/011760/07, a limited liability private company duly incorporated in accordance with the company laws of the Republic of South Africa, and with its registered address situated at 7 Fransen Street, Chamdor, Krugersdorp, Gauteng ("Pabar").

[7] The third respondent is Charl Edward Andersen N.O an adult male businessman who is cited in his official capacity as the current appointed executor of the estate of the deceased, and with his place of employment at 7 Fransen Street, Chamdor, Krugersdorp.

[8] The fourth respondent is Gregory Massimo Barbaglia an adult male businessman who is the second son born of the marriage between the applicant and the deceased residing at Sunset Towers, Short Road, Morningside.

[9] The fifth respondent is Leonard Pule N.O in his capacity as the Assistant Master of the High Court, Johannesburg, ("the Master"), situated at 66 Marshall Street Johannesburg.

[10] It is only the first and second respondents who filed their opposition to both these applications. There is no relief sought against the further respondents and they are not participating in these proceedings except for the third respondent having filed a notice to abide with the decision of this Court. I propose to refer to the parties as the applicant and to the first and second respondents as respondents in this judgment. Where necessary, I will refer to the other respondents by name as indicated above.

[11] The genesis of these cases is that the applicant is the widow of the Late Mr Vincenzo Barbaglia, *("the deceased")*, whom she married by proxy in Omegna, Italy on the 9th of May 1957. At the time of their marriage, the deceased was domiciled in South Africa and accordingly their marriage was in community of property. The marriage between the applicant and the deceased was blessed with two sons who are the first and fourth respondents in these proceedings.

[12] It is undisputed that the deceased during his life time established Pabar as the main family business which was regarded as the treasury in the family, financing the establishment of other business interests in the family. At the time of his death, the deceased and the applicant were the registered shareholders of Pabar holding eighty-five percent (85%) of the shares in Pabar. The remaining fifteen (15) percent of shares in Pabar were held by the first respondent who it is alleged to have acquired the shares as a donation in 2012. The first respondent has been working with the deceased in Pabar for more than four decades. Pabar is a valuable asset in the joint estate of the

deceased and the applicant being valued at R44 million in a joint estate with a total value of more than R80 million.

[13] During the years preceding July 2014 the deceased and the applicant would revise their joint will every year and Mr Banchetti, their long standing attorney would assist them with the drafting and or to effect the amendments of the will, if any. In July 2014 the deceased was diagnosed with mild dementia which diagnosis was changed in 2016 to that of severe dementia. On the 26th of September 2019 Advocate Grace Goedhart SC was appointed Curatrix ad Litem for the deceased and on the 9th of October 2019 Advocate Jenifer Cane SC was appointed Curatrix Bonis to the deceased. On the 19th of October 2019 the appointment of the curatrix bonis was extended to the joint estate of the applicant and the deceased.

[14] The deceased died on the 10th of December 2020 and this resulted in the termination of the curatorship of the joint estate. On the 14th of December 2020 the curatrix bonis addressed a letter to the attorneys for the applicant, Bove Attorneys Incorporated (Ms Bove), enclosing copies of five Wills of the deceased which she had in her possession. During the period as the curatix bonis of the joint estate, Advocate Cane SC advised the family that she did not intend on relying on documents signed after July 2014 since the deceased was diagnosed with dementia as she regards them to be invalid. The applicant and the deceased were the only two directors of Pabar.

[15] The first and fourth respondents were working in Pabar with the first respondent being more on the operational side and the fourth respondent managing the finances and other administrative work of Pabar. At all times the family business was run on a tripartite relationship/partnership between the applicant and the deceased as a unit and the first and fourth respondents

as two individuals. The applicant resigned as a director of Pabar when the curator bonis took charge of the joint estate and appointed the first respondent and Mr Frank Pellegrini, an independent director, as directors in Pabar on the 31st of March 2020. The curatrix bonis directed that the directors of Pabar and Pabar should at all times furnish the fourth respondent with the financial information of Pabar so that he can have full insight into Pabar's financial position and wellbeing and to give him access to the premises of Pabar on a daily basis during working hours.

[16] Before the appointment of the curatrix bonis, both the first and fourth respondents earned salaries from Pabar. With time as the family business empire diversified, the fourth respondent attended to the other businesses of the family but continued his involvement in the financial affairs and administration and attended at the premises of Pabar. This happened until Mr Pellegrini resigned as director on the 13th of January 2021 after the death of the deceased. The first respondent did not resign as director of Pabar when the curatorship of the estate terminated at the death of the deceased. During her tenure Advocate Cane SC commissioned a valuation report on Pabar which report was compiled by the firm Strydoms Incorporated. The report found that the first respondent has expended a sum of more R7 million to fund his personal legal fees from the coffers of Pabar.

[17] On the 15th of January 2021 the applicant was appointed by the Master of the High Court as the Executrix in the estate of the deceased. On the 25th of January 2021 the attorneys for the applicant addressed a letter to the attorneys of the first and fourth respondents informing them of her appointment as executrix in the estate of the deceased. However, without her knowledge or consent, on the 17th of February 2021 the first respondent unilaterally caused the share register of Pabar to be altered by removing the

applicant and the deceased as the shareholders and made himself a hundred percent (100%) shareholder in Pabar. It only came to the attention of the applicant on the 14th of April 2021 that the share register of Pabar has been altered when the first respondent filed its answering affidavit in opposition to an application brought against him by the fourth respondent under case number 16659/2021.

[18] In the letter of the 25th January 2021 addressed to the attorneys of the first and fourth respondent by the applicant's attorneys, it was further stated that the first respondent's funding of his personal legal fees through Pabar should cease immediately. On the 22nd of March 2021 the first respondent deprived and refused to give access to the fourth respondent into Pabar's premises and financial documents. Furthermore, he caused Pabar to cease paying the fourth respondent's monthly salary. He refused and caused Pabar, against the arrangement of the curatrix bonis, not to pay the legal fees of the applicant. He paid an amount from Pabar's account in the sum R400 000 as security for costs in an action wherein Pabar is not a party. He increased the overdraft facility of Pabar to over R11 million without consulting the applicant who has signed personal sureties on behalf of Pabar. It is this conduct of the first respondent that necessitated to launching of these proceedings.

[19] It is trite that in order for the applicant to succeed with an application of the mandament van spolie, it must allege and prove that it was in peaceful and undisturbed possession of the property and that it was deprived of such possession unlawfully. Furthermore, it is trite that the primary purpose of spoliation is to prevent self-help – thus preventing people from taking the law into their own hands. The cause for possession or that it is wrongful or illegal is irrelevant, as that would go to the merits of the dispute.

[20] In *Ngqukumba v Minister of Safety and Security and Others (CCT 87/13) [2014]- ZACC 14; 2014 (7) BCLR 788 (CC); 2014 (5) SA 112 (CC); 2014 (2) SACR 325 (CC) (15 May 2014)* the Constitutional Court stated the following:

> *"Paragraph 10: the essence of the mandament van spolie is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim 'spoliatus ante omnia restituendus est' (the despoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process."*

[21] The respondents contended that the applicant and the estate of the deceased were not in possession of the shares as at the 17th of February 2021. The applicant and the deceased signed an agreement on the 3rd December 2015 wherein they transferred their shares into the name of the first respondent. The applicant and the deceased, so it is contended, signed the share certificates on the 3rd of December 2015 transferring their shares into the name of the first respondent. By signing the share certificate, the applicant expressly consented to the transfer of the shares. What happened on the 17th of February 2021 was in fact an update of the share register of Pabar which the respondents are required to do in terms of the provisions of the Companies Act, 71 of 2008. The names of the applicant and the deceased were still on the share register on the 17th February 2021, but they were not

in possession of the shares since they transferred them on the 3rd of December 2015 already.

[22] It is on record that the applicant was surprised to learn that the first respondent is a hundred percent shareholder of Pabar because she has never relinquished her one percent share in Pabar. She has never consented to her share or that of the deceased being transferred nor did she sell or donated her share to anyone in Pabar. She denies that she signed the documents the first respondent is relying upon. She admits having been presented with these documents at her home some time back to sign same but she refused and did not sign them. She is surprised that some signature that looks like hers appears on the document. The reasons she did not sign these documents was because it purported to hand over everything in Pabar to the first respondent whereas it has been their wish and agreement with the deceased that their entire estate should devolve upon their two sons in equal shares when they are both dead.

[23] Given that on the 31st of July 2020 the first respondent, through its attorneys of record, addressed a letter to the curatrix bonis advising that it does not intend on relying on the agreements of 2015 and or 2016, it is telling that he would six months later and after the death of his father, without any notice or consultation with his mother and brother who are part of the tripartite relationship/partnership as far as Pabar is concerned, in a clandestine fashion alter the share register of Pabar. The first respondent through his attorneys stated in the letter that the agreements of 2015 were not given effect to as a consequence of the request by applicant. Moreover, he was aware of the ongoing dispute with regard to, not only these documents, but also the manner in which he alleges to have acquired the fifteen percent (15%) shareholding in Pabar in 2012.

[24] I do not agree with the first respondent's reliance on the share certificate that is alleged to have been signed in 2015 whereas the agreement is alleged to have been signed in 2016 due to an error that occurred on the 2015 agreement regarding the number of shares of the applicant and the deceased. The share certificate is a product of the agreement and not the other way round. At first there must be an offer and acceptance for the agreement to come into force and thereafter the share certificates may be signed in order to transfer the shares into the name of the transferee. Now, in this instance, the first respondent even acknowledges that the applicant refused to sign the documents and that he only discovered later when the documents were given to him by the applicant's domestic worker, Ms Zhou, that they have been signed by the applicant.

[25] The further difficulty which the first respondent has is the manner in which it received the documents and the date upon which he received them from Ms Zhou in relation to the date upon which he altered the share register. According to his testimony, he received a note from Ms Zhou with the documents which note stated that Ms Zhou received the documents for safe-keeping from the deceased and that she was giving him these documents but by the time he receives them, she will be out of the country and will be in her home in Zimbabwe. However, it is undisputed that Ms Zhou was working for applicant and that she only left for her home country on the 5th of April 2021 whereas the first respondent altered the share register on 17th of February 2021. It is my respectful view therefore that he could not have relied on the documents he received from Ms Zhou to alter the share register of Pabar.

[26] In *Tigon Ltd v Bestyet Investment (Pty) Ltd 2001 (4) SA 634 (N)* the Court stated the following:

> *"It seems to me that a distinction (not always recognised) may be drawn between the share itself, which is an incorporeal moveable entity, and bundle of personal rights to which it gives rise. The argument that we are here dealing with purely personal rights to which the protection of the mandament van spolie does not extend is, therefore, not correct. The incorporeals, consisting of the shares, are, by statute, movable property and possession is exercised by the holder negotiating, pledging, bequeathing or otherwise dealing in the shares. The holder also exercises possession by being registered in the register of members and thereby being able to vote and receive dividends. Mr Brett's submission that the removal of a shareholder's name from the register leaves the rights of such holder intact and unaffected cannot be correct. The holder has been denied all the benefits of registration as a member. Tigon went a step further, however, and cancelled or expunged the very issue of the shares, effectively depriving the holder of all rights of beneficial use."*

[27] Furthermore, there is no merit in the contention that the applicant by signing the share certificate expressly consented to the transfer of her share in Pabar. It should be recalled that the applicant has categorically denied putting her signature on those documents and contended further that, because she is married in community of property with the deceased, the deceased could not have transferred his shares without her consent. She would not have agreed to the transfer of the shares because it has always been their (the deceased and herself) intention and agreement that both their sons should inherit from their estate in equal shares. Even if, for a moment, I was to accept that she signed the share certificate as contended by the respondents, she signed a

share certificate in relation to her only share in Pabar and not on the share certificate in respect of the shares of the deceased. However, in terms of the Matrimonial Property Act the deceased still needed her written consent to cede his shares to the first respondent in Pabar.

[28] Section 15 of the Matrimonial Property Act, 88 of 1984 provides as follows:

> *"15. Powers of spouses*
>
> *(1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.*
>
> *(2) Such a spouse shall not without the written consent of the other spouse –*
>
> *(a)……………..*
>
> *(b)………………*
>
> *(c) Alienate, cede or pledge any shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or any similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate;*
>
> *(d)…………………………*
>
> *(3) A spouse shall not without the consent of the other spouse –*
>
> *(a)…………………*
>
> *(b)………………….*
>
> *(c) Donate to another person any asset of the joint estate or alienate such as asset without value, excluding an asset of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate, and which is not*

> *contrary to the provisions of subsection (2) or paragraph (a) of this subsection.”*

[29] Worse still for the first respondent is that paragraph 4 of the purported agreement of the sale of shares provide that the applicant and the deceased are selling their combined eighty-five percent (85%) ordinary shares of R1 each to the first respondent for a total sum of R29 750 000. Paragraph 5 of the agreement provides for the first respondent to pay the R29 million purchase price with monthly instalments of R250 000 over a period of sixty months or until the death of the longest living between the applicant and the deceased. Although the first respondent places so much reliance on these agreements, he has failed to demonstrate that he has performed and discharged his obligations in terms of these agreements and made a payment to the applicant and the deceased in the sum of R29 750 000 or any part thereof.

[30] I am fortified in the applicant’s consistency in denying that she signed these documents or that she disputes that the signature appended on these documents is hers. Paragraphs 6 and 7 of the agreements state that both the deceased and the applicant indicated and undertook in their own free will, without any pressure or duress on the part of any party and after having taken independent legal advice, to bequeath to Michael (the first respondent) the amounts due to them at their respective dates of death. The applicant is on record that her wish and agreement with the deceased was that everything in Pabar would devolve upon their two sons in equal shares, being the first and fourth respondents. This is the apparent theme that runs through the three joint wills of the deceased and the applicant as they always updated or amended the joint will every other year.

[31] The respondents contended further that the share register was altered in terms of the law as is provided for in section 51 of the Companies Act. This argument is misplaced and the respondents misconstrue the purpose of the section. I agree that in terms of section 51 of the Act, a company must enter in its securities register every transfer of any certificated securities and such certificate is proof that the named security holder owns the securities, in the absence of evidence to the contrary. However, this section cannot be said to empower the first respondent to take the law into its own hands and alter the share register without a proper recourse to legal process.

[32] In *George Municipality v Vena 1989 (2) SA 263 (A)* which case was quoted with approval by the Constitutional Court in the Ngqukumba case quoted above, the Appellate Division then held the following:"

> *"That any Act purporting to alter the fundamental principle of our "law that a person should not be disturbed in his possession of property without recourse to legal process would have to be narrowly construed in view of the fundamental importance of that principle of law."*

[33] It is quite astonishing that the first respondent would question and challenge the marital regime of the marriage of his parents which was even concluded before he was born. It is however, on record that the first and fourth respondents, as the children of the deceased and because of their tripartite relationship in the family business, were served with the papers when the applicant brought an application to appoint a curator ad litem and a curator bonis to the person of the deceased. Both the first and fourth respondents did not oppose the application including the application extending the curator bonis' powers to administer the joint estate of the deceased and the

applicant. The court found that the matrimonial regime of the applicant and the deceased was that of a marriage in community of property. I therefore agree with the applicant that this point has been adjudicated upon and need not be considered in these proceedings.

[34] Because of the marriage in community of property between the deceased and the applicant as was confirmed by a court order on the 19th of October 2019, the applicant would still be entitled to her half-share in the estate of the deceased even if the will of the 26th of September 2017 was to be accepted as the last will of the deceased upon which the first respondent places reliance for his conduct. It follows therefore inescapably that the applicant is the owner of half the shares which were registered in the name of the deceased together with her one percent shareholding prior to being despoiled by the first respondent on the 17th of February 2021. The contention therefore that she has a one percent share-holding and can be disposed of by being paid R220 000 is meritless and misplaced.

[35] I hold the view therefore that the applicant has discharged the onus placed upon her in that she has demonstrated and proved that she and the estate of the deceased were in possession of the shares of Pabar until they were despoiled by the first respondent on the 17th of February 2021. I am of the respectful view therefore that the inescapable conclusion is that the applicant is entitled to the relief that she seeks in terms of the notice of motion.

[36] It is on record that this matter served before the Urgent Court on the 11th of May 2021 when it was struck from the roll for lack of urgency and the issue of costs was reserved for determination in this hearing. Although the case was struck off the roll on the 11th of May 2021, it was not an issue that there were no merits in the matter. The applicant has now been found to be

successful in its case against the first and second respondents on the same papers as they served in the urgent Court. It is my respectful view therefore that there is nothing in this case that suggests a deviation from the normal rule that the costs should follow the results.

[37] In the circumstances, I make the following order:

1. The first respondent alternatively, the second respondent represented by the first respondent, is directed to restore the status quo ante which existed prior to the alteration of the share register of the second respondent on or about the 17th of February 2021 by restoring the applicant's name to the second respondent's share register as the holder of two shares (1%) and the name of Vincenzo Barbaglia as the holder of 168 shares (84%), in the second respondent;
2. The first respondent is ordered to pay the applicant's costs of the application and the costs of the 11th of May 2021 including the costs of two counsel.

[38] I now turn to deal with the application under case number 18493/21 which is brought in terms of section 163 of the Companies Act which provides as follows:

> *"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) ………………………*

> *(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.*

[39] The first respondent contended that the applicant does not have locus standi to bring this application against him for she is neither a director nor shareholder in the second respondent. I am unable to agree with the first respondent in this regard. The applicant has demonstrated in the spoliation application under case number: 21928/21 that she was a holder of one percent (1%) of the shares in Pabar and that she was despoiled by the first respondent on the 17th of February 2021. Furthermore, the applicant demonstrated that she was married in community of property to the deceased who was the owner of eighty-five percent (85%) of the shares in Pabar before his death, and therefore she is entitled to her half-share in the estate of the deceased including his shares in Pabar. Based on the findings of this Court in case number 21298/2021 and its order directing the first respondent to restore the applicant's name and that of the deceased in the second respondent's share register, the applicant has the necessary locu standi to bring this action.

[40] The applicant contended that the first respondent has been undermining her shareholding for some time now. He firstly started by claiming that he is a fifteen percent (15%) shareholder in Pabar which he obtained in 2012. He gives two different versions as to how he obtained the fifteen percent shares in Pabar – that he bought the shares from the deceased and when he failed to produce proof of how he purchased them – he then claimed that it was donated to him by the deceased. The applicant vehemently denies knowledge

of the donation and avers that, as she was married in community of property to the deceased, she did not consent to the donation.

[41] In the second instance, the first respondent challenges the marital regime of the applicant and the deceased and avers that their marriage is out of community of property as they were married in terms of the laws of Italy which provided for marriages concluded before 1975 to be out of community of property. This contention of the first respondent has been resolved by the Court order of the 19th of October 2019 when the applicant's marriage was declared to be in community of property. This issue is therefore settled and need not be determined by this Court. The first respondent was cited in those proceedings and never filed his opposition nor has he made any attempt to appeal the decision of the 19th of October 2019.

[42] In the third instance, the first respondent place reliance on the contested will of the deceased dated the 26th of September 2017 in which will the deceased bequeathed the whole of Pabar to the first respondent. The applicant has launched an action contesting the validity of the will for the applicant and the deceased has for years concluded a joint will which they amended almost every year. But the thread that flowed from these joint wills was that their two sons will inherit their joint estate in equal shares. Moreover, the will of the 26th September 2017 was concluded by the deceased alone and during the period when he was suffering from severe dementia. The first respondent only produced this will after the death of the deceased and to the curator bonis. However, he did not discuss or inform the applicant and or the fourth respondent about this will.

[43] It is further contended by the applicant that the first respondent, although he worked for Pabar for more than four decades, he was never a director or de

facto director as he avers. He was only appointed a director by the curatrix bonis on the 31st of March 2020, and to avoid him having absolute control of Pabar and using it as his fiefdom, Mr Frank Pellegrini, an independent director, was appointed as a non-executive director. The curatrix bonis' instructions were that Pabar should pay the legal fees of the applicant and that the first respondent should account for the more than R7 million he has expended for his personal legal fees from the coffers of Pabar. Furthermore, that the directors should give the fourth respondent access to the premises and to the books of account of Pabar. However, the first respondent has resisted and refused to do this since the departure of Mr Pellegrini.

[44] The applicant further complained that the first respondent has continued to use the resources of Pabar to pay his personal legal expenses and has been running Pabar, as if he is the sole shareholder, for his own benefit. He did not resign as director of Pabar when the curatorship of the estate terminated at the death of the deceased. As a sole director, so it is contended, in March 2021 the first respondent's attorneys sent a letter to the fourth respondent advising him that his access to Pabar's premises and to its financial information is terminated. Furthermore, the letter informed the fourth respondent that his salary as well from Pabar, which he has been receiving for years for the work he has been doing for Pabar and other businesses of the family, was terminated. This brought the way in which Pabar has been run for years to an end.

[45] As a consequence of the first respondent's conduct, so the argument went, the applicant's rights as a shareholder have been completely ignored and as things stand she has no insight or control as to how Pabar is run. In a short space of time the rights of the applicant as a shareholder have been usurped by the first respondent with the assistance of the third respondent who is the

executor nominated by the contested will of the deceased dated the 26th of September 2017. The first respondent continues to abuse the resources of Pabar and has paid a sum of R400 000 out of its coffers being security for costs in a matter involving one of the businesses he partnered with the fourth respondent of which Pabar has no interest and now Pabar is experiencing financial strain.

[46] The applicant complained further that the curatrix bonis instructed the third respondent to reflect his personal expenses and legal fees in the business loan account, but there is no detail of the loan account since it is not populated in the books of Pabar. Since Pabar is experiencing financial strain, the first respondent had to borrow money from one of the family businesses to pay the staff salaries of Pabar. The first respondent has, so it was contended, deliberately prevented payment of the legal fees for the applicant to prevent her from obtaining legal advice about the goings on in Pabar. Furthermore, the first and third respondents brought an application against the applicant to prevent her from making enquiries about the overseas properties which belong to her joint estate with the deceased.

[47] It is now well established that the court has the power and wide latitude in the exercise of its discretion to make an order which it deems fit if it is satisfied that the affairs of the company are being conducted in a manner which is oppressive or abusive and unfairly prejudicial to the interests of applicant who is a shareholder or director or a related person of the company. For the applicant to succeed in the relief she seeks, she must establish that the conduct complained of has been committed, that the conduct of the director or the affairs of the company are conducted in a manner that is unfair, prejudicial, unjust and inequitable to her interests and

that it is just and equitable to bring an end to such conduct by granting her the relief sought.

[48] Section 163(2) of the Companies Act provides as follows:

> *(2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including –*
>
> *a) An order restraining the conduct complained of;*
> *b) …………………………*
>
> *f) an order –*
>
> > *(i) appointing directors in place of or in addition to all or any of the directors then in office; or*
> >
> > *(ii) ……………..*

[49] In *Louw v Nel 2011 (2) SA 172 (SCA)* the Supreme Court of Appeal dealt with the provisions of the then section 252 which is the equivalent of the present section163 and stated the following:

> *"The combined effect of subsections (1) and (3) is to empower the court to make such order as it thinks fit for the giving of relief, if it is satisfied that the affairs of the company are being conducted in a manner that is unfairly prejudicial to the interests of the dissident minority. The conduct of the minority may thus become material in at least the following two obvious ways. First, it may render the conduct of the majority, even though prejudicial to the minority, not unfair. Second, even though the conduct of the majority may be both*

> *prejudicial and unfair, the conduct of the minority may nevertheless affect the relief that a court thinks fit to grant under subsection 3. An applicant for relief under s 252 cannot content himself or herself with a number of vague and rather general allegations, but must establish the following: that the particular act or omission has been committed, or that the affairs of the company are being conducted in the manner alleged and that such act or omission or conduct of the company's affairs is unfairly prejudicial, unjust or inequitable to him or some part of the members of the company; the nature of the relief that must be granted to bring to an end the matters complained of; and that it is just and equitable that such relief be granted. Thus, the court's jurisdiction to make an order does not arise until the specified statutory criteria have been satisfied."*

[50] In *Grancy Property Limited v Manala (665/12) [2013] ZASCA 57 (10 May 2013)* in which the case of Nel above was quoted with approval, the Supreme Court of appeal stated the following:

> *"In concluding on this particular aspect of the case it bears mention that in determining whether the conduct complained of is oppressive, unfairly prejudicial or unfairly disregards the interests of Grancy, it is not the conduct complained of that the court must look at but the conduct itself and the effect which it has on the other members of the company."*

[51] I do not agree with the contentions of the first respondent that Pabar, as a treasury which paid everything for the family businesses and Noble Land, had an interest in the winding up of Noble Land. Pabar was not cited as a

party in the proceedings of Noble Land and therefore had no interest in the proceedings. However, if Pabar has an interest in Noble Land – hence it paid the legal fees, it is for the first respondent to give details as to how much of the R7 million was expended on legal fees on behalf of Pabar in the Noble Land action and he has failed to do so. Furthermore, the curatrix bonis instructed the first respondent to give details of legal fees paid by Pabar in its books of account, but it is on record that nothing has been populated in the loan account with regard to the legal fees paid on behalf of the first respondent by Pabar. The applicant does not know, even now, as to how much the first respondent has expended over and above the R7 million for legal fees for he is continuously involved in litigation against the applicant and the fourth respondent.

[52] The first respondent contended that the applicant was never involved in the running of the business of Pabar although she has been a director all these years. It was contended further that, as an elderly person, there is no need for her to be furnished with the books of account and financials of Pabar. Furthermore, that she is only a one percent shareholder and should not interfere with the running of Pabar otherwise the first respondent could pay her out the value of her share in Pabar which is about R220 000 as per the valuation done in December 2020.

[53] The first respondent, so it was argued, paid the legal fees during the tenure of the curatrix bonis with its consent and the R400 000 paid as security for costs in the Noble Land case was made before Mr Pellegrini resigned. Although Pabar is not cited as a party in the case of Noble Land, Pabar has an interest in Noble Land for, as a treasury of the family, it funded the

acquisition of Noble Land. The curatrix bonis confirmed that the applicant should approach Pabar to pay for its legal fees but that it should be recorded in the loan account of the applicant so that it is paid back to Pabar. At the moment, so the argument went, the applicant's monthly expenses in the sum of R186 314.83 are paid by Pabar and she is entitled to this amount because she is the widow of the deceased.

[54] Much as Pabar is a private company with limited liability and is owned and run by the family who operate on the bases of consensus or agreeing with each other rather than on strict principles of company law, it is not open to one director of the company to conduct himself or the business of the company in an unfair and prejudicial manner to the interests of the other shareholders. It is of no consequence how many shares the minority shareholder holds in the company, her interests deserve to be protected and taken into consideration at all times. It seems to me that the first respondent ignores and disregards the fact that the applicant by her marriage in community of property to the decease, is entitled to a half-share of the estate of the deceased and therefore has a significant shareholding in Pabar.

[55] The age of a shareholder is of no relevance when it comes to her rights if they are affected by the conduct of the director or are disregarded in the manner in which the business of the company is conducted. It should be recalled that the curatrix bonis appointed Mr Pellegini, an independent person, as a director of Pabar to reign in the first respondent in the conduct of the affairs of Pabar. The directors were at the time directed to allow the fourth respondent access to the financial records of Pabar and to its premises. Since the first respondent has been the sole director after the resignation of

Mr Pellegrini he has flatly refused to give the fourth respondent access to any thing in Pabar. The conduct of the first respondent in this regard, by extension deprives the applicant access to information about the business of Pabar which she shared with the fourth respondent.

[56] The first respondent does not concern itself with the issue that the applicant has signed personal surety on behalf of Pabar. He does not make issue about increasing the overdraft facility of Pabar to more than R11 million. He is not interested in the exposure of the applicant to that extent and continues to shut her out of the business of Pabar as he avers that she has never sat her foot at Pabar even when the deceased was still alive. It is on record that the fourth respondent has been working for Pabar and was concentrating on the management of its finances. Since the first respondent became the sole director after the resignation of Mr Pellegrini, he has used Pabar as his fiefdom and has shut out both the applicant and the fourth respondent. He has refused to convene a shareholders meeting or to discuss the affairs of Pabar with the applicant and or the fourth respondent.

[57] It is my considered view therefore that that the conduct of the first respondent is manifestly oppressive, unfairly prejudicial and disregards the interests of the applicant as a shareholder of the second respondent. It therefore ineluctably follows that the applicant has established a case that, it is just and equitable to grant her the relief sought in terms of section 163 of the Act.

[58] Although the first respondent should also have resigned as director of Pabar when the curatrix bonis' term of office came to an end, however he

continued on the basis that he has been made an heir to inherit everything in Pabar in terms of the will of the 26th of September 2017. I do not understand the applicant to be having serious issues with the first respondent remaining a director and she does not persist that she or the fourth respondent be appointed as directors of Pabar. Furthermore, the first respondent has not shown any discomfort about the independent persons suggested for appointment as the co-directors in Pabar to look after and protect the interests not only of the applicant but that of Pabar as well. It is therefore my respectful view that there is no reason for the first respondent to bother if his conduct or the manner in which the business of Pabar is conducted is not unfairly prejudicial and unjust and inequitable to the interests of the applicant and Pabar.

[59] This matter was initially enrolled in the Urgent Court, however the court struck it off the roll for lack of urgency and the issue of costs was reserved for determination in this Court. The first respondent contended that it was entitled to the costs of the 28th of April 2021 for it was brought to court on urgent basis and had to prepare and file its papers under extreme circumstances and the matter did not proceed.

[60] I understand that the matter did not proceed in the Urgent Court on the 28th of April 2021 but that does not mean there was no merit in the matter. I have now found in favour of the applicant and I am not persuaded that I should deviate from the general rule that costs follow the result. I am of the respectful view that the circumstances of this matter dictate that the applicant should get her costs for bringing this application. The applicant is faced with a terrible situation with her eldest who is full of vigour in his attempt to take over or denude a major asset in her joint estate with her husband of its value for his personal benefit. The applicant and the deceased built the wealth for

their children and wanted them to share equally, but greed has creeped in and the first respondent wants everything for himself.

[61] In the circumstances, I make the following order:

1. The first respondent is declared to have exercised his duties as a director of the second respondent in a manner which is oppressive, unfairly prejudicial to, and which unfairly disregards the interests of the applicant and shareholder in the second respondent;

2. Pursuant to the order in 1 above:

   2.1 The first respondent is prohibited from the date of this order, and in accordance with the provisions of section 163(2)(a) of the Act, from using the second respondent's funds, assets, or resources, whether in his capacity as a purported shareholder or director of the second respondent, to pay any legal fees for which he is personally liable and/or which are rendered, directly or indirectly, for his personal benefit;

   2.2 Mr Sean Hirschowitz, failing which Mr Carlos Pedregal, failing which Mr Eric Moss, is appointed as a director of the second respondent until such time as the estate of the late Mr Vincenzo Barbaglia (the deceased) is finally wound up or the second respondent's business, or the majority of its shares, are sold, whichever occurs soonest;

   2.3 The second respondent is directed to furnish the applicant with copies of the following documents on a monthly basis for so long as the applicant remains a shareholder in the second respondent:

      2.3.1 Pabar's general ledger;

2.3.2 the bank statements for all bank accounts held by Pabar;

2.3.3 a schedule of payments made by Pabar in each month;

2.3.4 Pabar's turnover reports;

2.3.5 Pabar's income statements;

2.3.6 Pabar's cash flow projections; and

2.3.7 Pabar's management accounts.

2.4 Other than in the ordinary course of business, any disposal, alienation, or- encumbrance of any of Pabar's assets, as appear on its balance sheet, is prohibited from the date of this order to the date on which, whichever occurs earliest:

(i) The deceased's estate is finally wound up;

(ii) Pabar is sold or disposed of, by way of a sale of 100% of shares in Pabar, or the sale of its business; or

(iii) Pabar is finally wound up; or

(iv) the date on which the applicant ceases to be a shareholder in Pabar.

2.5 The first respondent is required to: (i) provide a reconciliation of the personal legal fees paid by Pabar on his behalf from the date of Mr Barbaglia's death, being 10 December 2020, to date; and (ii) repay to Pabar the personal legal fees paid by Pabar on his behalf from the date of Mr Barbaglia's death to date, and within thirty (30) calendar days from the granting of this order.

3. The first respondent is to pay the costs of this application and the costs of the 28th of April 2021 including the costs of two counsel

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: 23rd and 24th February 2022

Date of Judgment: 22nd March 2022

For the Applicant: Advocate AE Franklin SC
Advocate FR McAdam

Instructed by: Bove Attorneys Incorporated
Tel: 011 485 0424
vickyb@boveattorneys.co.za

For the First and Second Respondent: Advocate J Peter SC
Advocate C Dittberner

Instructed by: Werkmans Attorneys
Tel: 011 535 8000
ivonwildenrath@werkmans.com

For the Third Respondent: Lawtons Africa
Tel: 011 775 6373
Arnold.shapiro@lawtonsafrica.com
charland@pabar.co.za

For the Fifth Respondent: Bowmans Attorneys
Tel: 011 669 9555
Tim.gordon-grant@bowmans.com