

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/58016

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

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B.C. WANLESS
2023

3 February

In the matter between:

DA EDERY N.O.

Applicant

and

BRANDS 2 AFRICA PROPRIETARY LIMITED
Respondent

First

CR CLEMENCE
Respondent

Second

**THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

Third Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 3 February 2023.

JUDGMENT

WANLESS AJ

Introduction

[1] In this application one DEBRA ANN EDERY, an adult female (*“the Applicant”*) seeks certain relief in terms of section 163 of the *Companies Act 71 of 2008* (*“the Act”*). The Applicant does so in her capacity as a shareholder in the company BRANDS 2 AFRICA (PTY) LIMITED which is the First Respondent in the application (*“the Company”*).

[2] The relief sought by the Applicant and as set out in the Applicant’s Notice of Motion, reads as follows:

“1. *That the applicant’s non-compliance with the rules of court concerning forms, service and time periods otherwise applicable be condoned, that such rules be dispensed with and that this application be heard and adjudicated upon as an urgent application in terms of uniform rule 6(12).*

2. *That:*

2.1 *Jacob Ederly, or such other person nominated by the applicant from time to time (**“the Nominated Director”**) and another person as nominated by the South African Institute of Chartered Accountants (**“the Independent Director”**), be appointed as directors of the first respondent (**“the Company”**);*

2.2 *The Company shall pay the reasonable fees of the Nominated Director and the Independent Director as well as reimburse them in respect of all costs reasonably incurred by them in pursuance of their appointment; and*

2.3 *The appointment of the Nominated Director and the Independent Director to the board of the Company shall be:*

2.3.1 *with effect from an order granted in terms of this application; and*

2.3.2 *pending, and endure until the finalisation of an action which is to be instituted by the applicant, for final relief, within 10 days from the date of an order being granted.*

3. *That the second respondent be ordered to pay the costs of this application.*

4. *Such further and/or alternative relief as may be required.*¹

[3] One CRAIG CLEMENCE, an adult male ("*Craig*") is the Second Respondent. Craig is a shareholder of the Company and presently the sole director thereof. The Third Respondent is the COMPANIES AND INTELLECTUAL PROPERTY COMMISSION against whom the applicant seeks no relief in the application. Both the Company and Craig oppose the application and the relief sought by the Applicant.

Background

[4] In the opinion of this Court the relevant history for present purposes and to provide pertinent background in respect of this matter, is as follows:-

- 4.1 at all material times the Applicant was married to one PIERRE ALBERT EDERY, an adult male ("*Pierre*");
- 4.2 Craig was appointed a director of the Company on or about the 12th of June 2013;
- 4.3 on or about the 1st of August 2014, Pierre was employed by the Company on a permanent basis (prior to this date the Company utilised his services on an *ad hoc* basis);
- 4.4 on or about the 1st of September 2014, Pierre became a 10% shareholder in the Company when shares in that amount were given to him by Craig for no consideration;
- 4.5 Pierre was appointed a director of the Company on or about the 1st of March 2015;
- 4.6 during or about April 2020, Craig and Pierre made an offer to Wild Rose Capital Holdings (Pty) Ltd ("*Wild Rose*") which was the majority shareholder in the Company to purchase the shares owned by Wild Rose and this offer was accepted;
- 4.7 during or about May 2020, Pierre was diagnosed with bladder cancer;
- 4.8 on or about the 4th of May 2020, Wild Rose exited the Company and the shareholding in the Company was then held on the basis that Craig had a 53% shareholding and Pierre had a 47% shareholding;

¹ *Emphasis added.*

- 4.9 during or about the period August 2020 to July 2021, Pierre underwent various surgeries and chemotherapy sessions in respect of his bladder cancer;
- 4.10 on the 23rd of July 2021 Pierre passed away;
- 4.11 the Applicant was appointed as executrix of Pierre's deceased estate on or about the 27th of August 2021;
- 4.12 on or about the 14th of December 2021 the Applicant instituted an urgent application in this Court for the relief as set out in the Applicant's Notice of Motion referred to above;
- 4.13 on the 8th of February 2022, when the matter was to be heard by this Court on the urgent roll, it was removed therefrom with costs reserved.

[5] All of the foregoing facts are either common cause between the parties or are not seriously disputed by them. Of course, as will become evident later in this judgment, there are a number of other matters which have taken place in respect of which the Applicant and Craig have presented to this Court their own very different versions. These will be dealt with at appropriate stages later in this judgment.

The Applicant's case

[6] The Applicant's case and the argument presented before this Court on behalf of the Applicant as to why this Court should grant the Applicant the relief that she seeks in terms of section 163 of the Act, can be broadly summarised as follows. At the heart of the matter, so the Applicant contends, is a minority shareholder in the Company (the Applicant as the executrix of Pierre's deceased estate is presently a 47% shareholder) who wants to sell those shares at a fair and reasonable price but is being prevented from pursuing such a buy-out as a consequence of the unfairly prejudicial and oppressive conduct of Craig (the majority shareholder). Thus, says the Applicant, she is entitled to the relief sought in terms of section 163 of the Act which will enable her to obtain the necessary information to value the shares and sell them.

Craig's case

[7] Craig's opposition to the relief sought by the Applicant is based, broadly speaking, upon two grounds. In the first instance, it was submitted that, having regard to the *real* purpose of the litigation in this matter, namely the expressed intention of the Applicant to ensure that there is a "commercial divorce" and that she sell the shares in the Company for a reasonable price, it is incorrect to attempt to utilise subsection 163(2)(f)(i) of the Act and request this Court to appoint additional directors to the Company in order to do so. More particularly, it was submitted on behalf of Craig that

it is impermissible for the Applicant to attempt to use the provisions of this subsection to gain control of the Company as a “stepping stone” towards the *real* relief sought, namely the obtaining of information from the Company to assist in the sale of those shares. In this regard, it was submitted that the Applicant has other remedies, including other relief in terms of section 163 of the Act, at her disposal to utilise should she be correct in her assertions that the Company and/or Craig are guilty of the oppressive or unfair conduct as set out in subsections 163(1)(a);(b) or (c) of the Act and/or are not co-operating in her efforts to value and sell the 47% shares she now owns in the Company. Secondly, it was submitted that even if the Applicant was entitled to seek the relief she had sought in terms of section 163 of the Act (which was denied), she had in any event failed to prove that she had satisfied the requirements of that section of the Act to enable this Court to grant the said relief.

The law

[8] Section 163 of the Act reads 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) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or
 - (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.
- (2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including-
 - (a) an order restraining the conduct complained of;
 - (b) an order appointing a liquidator, if the company appears to be insolvent;
 - (c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter

6, if the court is satisfied that the circumstances set out in section 131 (4) (a) apply;

- (d) an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;
 - (e) an order directing an issue or exchange of shares;
 - (f) an order-
 - (i) appointing directors in place of or in addition to all or any of the directors then in office; or
 - (ii) declaring any person delinquent or under probation, as contemplated in section 162;
 - (g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;
 - (h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;
 - (i) an order requiring the company, within a time specified by the court, 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;
 - (j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;
 - (k) an order directing rectification of the registers or other records of a company; or
 - (l) an order for the trial of any issue as determined by the court.
- (3) If an order made under this section directs the amendment of the company's Memorandum of Incorporation-
- (a) the directors must promptly file a notice of amendment to give effect to that order, in accordance with section 16 (4); and

- (b) no further amendment altering, limiting or negating the effect of the court order may be made to the Memorandum of Incorporation, until a court orders otherwise.

(4)²

The election of this Court to set out all of the provisions of section 163 of the Act in this judgment and not just the provision upon which the Applicant relies, particularly in respect of the relief that the Applicant seeks (*subsection 163 (2)(f)(i) refers*) is intentional. It has not been done simply to burden this judgment unnecessarily. As can be seen therefrom (and as will be dealt with at the applicable stage in this judgment) the potential remedies available to an Applicant who has satisfied the requirements of subsections 163(1)(a);(b) or (c), are numerous and wide-ranging in nature.³

- [9] A summary of the applicable legal principles in this matter is set out hereunder. In so doing, this Court shall attempt to set out clearly the manner in which our courts have interpreted and applied the meaning of the words “*conduct that is oppressive, or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant*” when called upon to interpret and apply the provisions of subsections 163(1)(a);(b) and (c) of the Act in various commercial situations.
- [10] The jurisprudence developed in terms of section 252 of the Companies Act 61 of 1973 (“*the old Act*”) which was the equivalent of section 163 of the Act, can also be considered when determining what constitutes “*oppressive or unfairly prejudicial conduct*”.⁴ As is clear from the section, subsections (1) to (3) thereof afford shareholders and directors the right to approach the Court for relief from oppressive or prejudicial conduct (“*unfairly prejudicial*”).⁵
- [11] In the opinion of this Court (and as glaringly obvious as this may be) it is imperative to note that there is a clear distinction between subsections (1) and (2) of section 163 of the Act. Subsection (1) sets out the oppressive or prejudicial conduct in respect of which an applicant can approach a court for relief and subsection (2) sets out the powers of the court in the event of the court deciding to come to the assistance of an applicant by granting some form of relief. What is essential to note, however, is the important qualification contained in subsection (1) by the use of the

² *Emphasis added.*

³ *Subsections 163(2)(a) to (l) inclusive of the Act.*

⁴ *Henochsberg on the Companies Act (“Henochsberg”), commentary on section 163 of the Act; Grancy Property Limited v Manala and Others 2015 (3) SA 313 (SCA) at paragraph 22; Count Gothard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others [2013] 2 All SA 190 (GNP) paragraph 17.12; Peel Hamon J&C Engineering (Pty) Ltd [2013] 1 All SA 603 (GSJ) at paragraph 43; Omar v Inhouse Venue Technical Management (Pty) Limited and Others 2015 (3) SA 146 (WCC) at paragraph 4; De Villiers v Kapela Holdings (Pty) Limited and Others (42781/2015) [2016] ZAGPJHC 278 (14 October 2016) at paragraph 75.*

⁵ *Henochsberg, commentary on section 163 of the Act (hereafter referred to as “Henochsberg”).*

legislator of the single word “*if*” at the end of the first sentence in subsection (1) and directly preceding subsections (a); (b) and (c). In light thereof, it is clear that:-

- (i) the oppressive or prejudicial conduct of which the applicant complains must fall within the meaning of the provisions of subsection (1);
- (ii) the onus of proving that the oppressive or prejudicial conduct of which the applicant complains falls within the meaning of the provisions of subsection (1) is, as a general proposition, incumbent upon the applicant;
- (iii) it is also incumbent upon the applicant to prove that the respondent has, as a fact, carried out the oppressive or prejudicial conduct; and
- (iv) in the event of the applicant failing to discharge the onus incumbent upon the applicant of proving that the conduct complained of falls within subsection (1) and that the respondent has actually carried out such conduct, then the applicant has not passed the “first hurdle” (so to speak) and subsection (2) does not come into operation.

[12] However, even in the event of the applicant in an application in terms of section 163 of the Act successfully discharging the said onus, this does not bring an end to the matter. This is because, in terms of subsection (2), a court considering an application in terms of section 163 “*may*” make any interim or final order it considers fit, including the orders as set out in subsections (a) to (l) inclusive thereof. In the premises, the court has a discretion, to be exercised judicially, whether or not to grant the applicant relief and, if so, the nature of that relief.

[13] The interpretation and application of section 163 of the Act has received considerable judicial attention by our courts over the years. “*Oppressive*” conduct has been held to be, *inter alia*, “*unjust or harsh or tyrannical*” or “*burdensome, harsh, wrongful*” or which “*involves at least an element of lack of probity or fair dealing*” or “*a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely*”. As can be seen from the foregoing, these definitions represent widely divergent concepts of “*oppressive*” conduct.⁶ Another definition of “*oppressive*” conduct is that conduct of this nature denotes conduct that is “*burdensome, harsh and wrongful*” and that such conduct would include lack of probity or good faith and fair dealing in the affairs of a company to the prejudice of some portion of its members.⁷

⁶ *Aspek Pipe Co (Pty) Ltd v Mauerberger 1968 (1) SA 517 (C) at 525H-526E.*

⁷ *Scottish Co-operative Wholesale Society Ltd v Meyer [1959] A 324 HL at 342.*

[14] As to the nature of and the manner in which the conduct must be applied to qualify as being “oppressive” within the meaning of the section, this was clearly set out in the matter of *Garden Province Investment v Aleph (Pty) Ltd*⁸ where it was held:

‘It seems to me that a minority shareholder seeking to invoke the provisions of s 252(1) of the Companies Act must establish not only that a particular act or omission of a company results in a state of affairs which is unfairly prejudicial, unjust or inequitable to him, but that the particular act or omission itself was one which was unfair or unjust or inequitable. Similarly, looking at the second part of the section, where the complaint relates to the manner of conduct of the business, it is the manner in which the affairs have been conducted as well as the result of the conduct of the business in that manner which must be shown to be unfairly prejudicial, unjust or inequitable. In the Afrikaans version the word

“unfairly” is translated as “onredelike” and in point of fact it was the Afrikaans version of the Act which was signed. The word “unfairly”, therefore, whether it qualifies only the word “prejudicial” or whether it qualifies the words “prejudicial, unjust or inequitable” means therefore “unfairly” in the sense of “unreasonably”, and it seems to me that the use of the word “unfairly” in this sense in the section fortifies my belief that the section relates both to the manner and nature of the conduct as well as to the results or effect of that conduct. When one looks at the second part of the section it is stated explicitly that the manner in which the affairs of the company are being conducted must be shown to be unfairly prejudicial, unjust or inequitable.”⁹

[15] Probably the *locus classicus* in dealing with what constitutes “oppressive or unfairly prejudicial conduct” in the context of section 163 of the Act, is the matter of *Grancy Property Ltd v Manala and Others*.¹⁰ In *Grancy*, the Supreme Court of Appeal (“SCA”)¹¹ referred to its earlier decision in the matter of *Louw v Nel*¹² where it had held¹³ the following:

“The combined effect of ss (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 a 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

⁸ 1979 (2) SA 525 (D) at 531.

⁹ *Emphasis added.*

¹⁰ 2015 (3) SA 313 (SCA).

¹¹ At paragraph [25].

¹² 2011 (2) SA 172 (SCA).

¹³ At paragraph [23].

unfair, the conduct of the minority may nevertheless affect the relief that a court thinks fit to grant under ss 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.' (Citations omitted)¹⁴

[16] It was further held in *Grancy* that:

[26] According to Prof FHI Cassim *et al* the extensive nature of the remedy for which s 163 provides is underscored by the inclusion of the element of unfair disregard of the applicant's interests. I agree with this view for it derives support from a judgment of this court in *Utopia Vakansie-Oorde Bpk v Du Plessis* 1974 (3) SA 148 (A) at 170H – 171D where it was stated that the concept of 'interests' (in the context of s 62 *quat* (4) of the 1926 Companies Act) is much wider than the concept of 'rights'. Accordingly there is much to be said for the proposition that s 163 must be construed in a manner that will advance the remedy that it provides rather than limit it.

[27] 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 motive for 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 (see eg *Livanos v Swartzberg and Others* 1962 (4) SA 395 (W) at 399).¹⁵

[17] With regard to, *inter alia*, the manner in which a court should determine whether or not an applicant has shown that he or she is entitled to the relief sought in terms of section 163 of the Act, Van Der Linde J, in the matter of *De Villiers v Kapela Holdings (Pty) Ltd and Others*¹⁶ held the following:¹⁷

¹⁴ Emphasis added.

¹⁵ *Emphasis added.*

¹⁶ (42781/2015) [2016] ZAGPJHC 278 (14 October 2016).

¹⁷ At paragraphs [28] to [32].

- [28] The applicant need only establish a *prima facie* right, although open to doubt. She must show that on her version, together with the allegations of the respondents that she cannot dispute, she should obtain relief at the trial. If, having regard to the respondents' contrary version and the inherent probabilities serious doubt is then cast on the applicant's case, the applicant cannot succeed.
- [29] This well-trying approach was significantly qualified by a full bench of this court in *Ferreira v Levin, NO and Others*; *Vryenhoek and Others v Powell, NO and Others*. *Ferreira*, which received the imprimatur of the Constitutional Court, materially lowered the bar set by *Gool*. The latter required that on the asserted case the applicant "should" obtain final relief at trial; the former requires only "a" prospect of success, albeit "weak."
- [30] The correct perspective, however, of these ostensibly dichotomous positions is, in my view, captured by Holmes, J (then) in *Olympic Passenger Service (Pty) Ltd v Ramlagan*, approved by Holmes, JA in *Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another*, in turn followed by *Ferreira*, and approved by the Constitutional Court:

"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted."

[31] The concept is then that "a *prima facie* right, though open to some doubt" conveys that the strength of the right is allowed to fluctuate from strong to weak: if it is strong, the other requirements for an interim interdict may be weak; if it is weak, the other requirements for an interim interdict may be strong.

[32] The perspective of the meaning of "a *prima facie* right, although open to some doubt", as collected by Ferreira from Erikson Motors and Olympic Passenger Service and approved by the Constitutional Court, seems to me to render, in the context of the strength of the *prima facie* right, future reliance on Webster and Gool otiose; they remain pertinent, of course, in the context of factual disputes on the affidavits. The remedy remains "an extraordinary remedy within the discretion of the Court," as Erikson Motors underscored, but that is a description apt for the entire discretion-exercising process, not only the first element of it.¹⁸

[18] In *Grancy* the SCA cited with approval the important point made by Professor FHI Cassim¹⁹ as follows:²⁰

*"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 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 disregarding but also that it is unfairly so."*²¹

[19] Further, more than 50 years ago, the erstwhile Appellate Division, in the matter of *Sammel and Others v President Brand Gold Mining Co Limited*²² stated:

"First, some general principles that are relevant. By becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder (cf. secs. 16 and 24). That

¹⁸ *Emphasis added.*

¹⁹ Prof FHI Cassim et al in *Contemporary Company Law, 2nd Edition* (2012) at pages 771-772

²⁰ At paragraph [32].

²¹ *Emphasis is that of the SCA.*

²² 1969 (3) SA 629 (AD).

*principle of the supremacy of the majority is essential to the proper functioning of companies.*²³

[20] As held by Rogers J in the matter of *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others*²⁴:

*“What is important to emphasise, however, is that it is not enough for an applicant to show that the conduct of which he complains is ‘prejudicial’ to him or that it ‘disregards’ his interests. The applicant must show that the prejudice or disregard has occurred ‘unfairly’. ‘Oppression’ likewise connotes an element at least of unfairness if not something worse”.*²⁵

[21] The matter of *Lourenco and Others v Ferela (Pty) Ltd and Others*²⁶ sets out some important principles which are particularly pertinent to the present matter. Firstly, when dealing with what it is necessary for an applicant to show in order to establish a cause of action under section 252 of the old Act the Court held²⁷ that:

“It is clear that to establish a cause of action in terms of s 252 of the Companies Act it is not sufficient to make a number of general allegations. In respect of a particular company the applicant must establish the following:

- (1) an act or omission by the company itself, which is unfairly prejudicial, unjust or inequitable to the applicant or to some part of the members of the company or that the affairs of the company are being managed in a manner unfairly prejudicial, unjust or inequitable to the applicant or some part of the members of the company;
- (2) the nature of the relief which must be granted to bring an end to the matters complained of; and
- (3) that it is just and equitable that such relief be granted.”²⁸

What conduct does the Applicant complain of to entitle her to the relief sought?

[22] The conduct relied upon by the Applicant in her affidavits placed before this Court and dealt with by her Counsel in argument, are the following:

²³ At 678H, cited with approval in, for example, *Garden Province Investment and others v Aleph (Pty) Limited 1979 (2) SA 525 (D)* at 534B/C, which in turn was cited more recently in *Modisane and Another v Prime Portfolio Investment SA (Pty) Limited [2015] ZAGPJHC 265 (12 November 2015)*.

²⁴ 2014 (5) SA 179 (WCC).

²⁵ At paragraph 55.

²⁶ 1998 (3) SA 281 (TPD).

²⁷ At 295F-G.

²⁸ *Emphasis added*.

- 22.1 Craig's refusal to recognise and implement a written agreement that the Applicant contends was entered into between Pierre and Craig during or about May 2020;
- 22.2 Craig's secret and unlawful appointment of his wife as a director of the Company;
- 22.3 Craig's offer to purchase Pierre's shares from the deceased estate at a value that the Applicant contends is a fraction of the actual value of those shares;
- 22.4 Craig's refusal to grant to the Applicant access to the Company's financial information to enable her to undertake a valuation of Pierre's shares;
- 22.5 Craig's insistence with compliance with the Company's Memorandum of Incorporation ("MOI") and the Act in circumstances where the Applicant contends the parties did not previously have regard thereto;
- 22.6 Craig's objection to the appointment of the deceased estate's nominee as a director as being contrary to the affairs of the Company being carried out in the nature of a quasi-partnership as before.

Whether the relief sought is interim or final, together with the issues of onus and the resolution of disputes of fact in motion proceedings when dealing with an application in terms of section 163 of the Act

[23] It will be necessary to consider each of the grounds relied upon by the Applicant in this application and as set out above. When doing so, both parties have submitted to this Court that when deciding this matter, this Court must apply the well-established principles in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd*²⁹ to determine whether or not the Applicant is entitled to the relief sought on motion proceedings. In this regard, it was submitted, on behalf of the Company and Craig, that the relief sought by the Applicant, although framed as interim relief, was in fact final relief in nature and should be regarded as such. This was so, it was submitted, because in the event of this Court granting to the Applicant the relief sought, namely the appointment of two directors to the Company, this issue would not be revisited either by this Court or by the Court hearing the action to be instituted by the Applicant which would form part of any order granted by this Court.³⁰ In the opinion of this Court, it would appear clear that the relief sought is indeed interim relief both in form and in nature. As a matter of form, it is interim since, as is clear from the wording of the Notice of Motion, not only is a clear distinction drawn between the relief sought as

²⁹ 1984 (3) SA 623 (A) at 634E-G.

³⁰ *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2018 (6) SA 440 (SCA) at paragraph 47; *Andalusite Resources (Pty) Ltd v Investec Bank Limited and Another* 2000 (1) SA 140 (GJ) at paragraph 22.

interim relief and the final relief by way of the action to be instituted by the Applicant but the appointment of the two directors to the Company commences from the date of any order granted by this Court and comes to an end upon the finalisation of the action. In the premises, the relief is clearly interim in nature and there is no need for any provision in any order to have the appointments reconsidered or set aside. Even if this was not the case, this Court is certain that the Company or Craig, as parties to such an action, would be quite entitled to raise such an issue on the pleadings in the action should there be any doubt in respect thereof and seek an appropriate order from the court determining the action as to the continued appointment of any directors of the Company as a result of an order of this Court.

[24] That said, it is further the opinion of this Court that it is ultimately unnecessary to decide whether the relief sought by the Applicant is interim or final relief. This is because, in the first instance, as set out above, the parties are in agreement that the principles as enunciated in *Plascon-Evans* should apply in the present matter. Whether the parties are, strictly speaking, correct in this regard (the principles in *Plascon-Evans* deal with final and not interim relief) is also not, in the opinion of this Court, an obstacle to this Court determining whether or not the Applicant has proven that she is, on motion proceedings, entitled to the particular relief she seeks in terms of section 163 of the Act. Whilst *Plascon-Evans* remains authoritative in the present matter as to how this Court should deal with a dispute of fact in motion proceedings the ultimate manner in which this Court determines whether or not the Applicant has discharged the onus incumbent upon her to prove that she is entitled to the relief in terms of section 163 of the Act, will be in line with the authorities already cited in this judgment. In doing so, this Court will, at all times, be fully aware of the fact that the nature of the relief sought in any particular matter (such as, for example, an interim interdict in *De Villiers v Kapela Holdings (Pty) Limited and Others*) in terms of section 163 of the Act may, to one extent or another, have an effect on the manner in which a court will examine the evidence before it when determining the success or failure of an applicant. At the end of the day, this Court will adopt an approach in line with the established principles of our law pertaining to both motion proceedings and applications in terms of section 163 of the Act.

Craig's refusal to recognise and implement a written agreement that the Applicant contends was concluded between Pierre and Craig during or about May 2020

[25] With regard to this complaint by the Applicant, there is a clear factual dispute on the application papers. The Applicant contends that the written agreement that provides, *inter alia*, for a shareholder holding more than 45% of the shares in the Company to nominate one person for appointment as a director and provides for equal voting rights between Pierre and Craig ("*the agreement*") was signed by Pierre on 5 May 2020 and then by Craig on 27 May 2020. In the answering affidavit, Craig, under oath, disputes the authenticity of his signature and denies signing the agreement. He

further states that he believes that the signature purporting to be his is a forgery. The explanation provided by Craig in the answering affidavit is that although Pierre did present him with the document for signature during or about May 2020 and that Pierre was attempting to pressurise him to sign the said document, he refused to do so. Craig further states, under oath, that the first time he saw the agreement purportedly signed by both himself and Pierre, was when a copy thereof was provided to his attorneys by the Applicant's attorneys on the 6th of September 2021.

[26] It was submitted by Adv Gilbert, who appeared on behalf of the Company and Craig, that this factual dispute, particularly as it relates to Craig's version, cannot be rejected as far-fetched or fanciful. In this regard, he puts forward a number of reasons in support of this submission. In the first instance, he makes the point that the Applicant, as executrix of the deceased estate, has no personal knowledge pertaining to Craig's signature on the agreement. Indeed, it must be noted that she never claims to have any such personal knowledge. In the premises, it was submitted that the Applicant's averments pertaining thereto and as contained in the founding affidavit, constitute hearsay evidence.

[27] At this stage of the judgment, it is apposite for this Court to make mention of the fact that there appears, in the application papers, to be indications of no less than two interlocutory applications between the parties. On or about the 26th of January 2022 the Company and Craig issued a Notice that they would make application, at the hearing of this matter, for the striking out of certain paragraphs of the Applicant's founding affidavit. There are no other documents or affidavits relating to this Notice. Then, on or about the 17th of March 2022, the Applicant issued a Notice of Motion, together with a founding affidavit, in terms of which the Applicant sought that, at the hearing of this matter, the very same paragraphs in the founding affidavit that the Company and Craig sought to have struck out as hearsay, be admitted into evidence in terms of section 3 of the *Law of Evidence Amendment Act 45 of 1988* ("the Evidence Act"). No further documents or affidavits appear to have been filed in respect of this interlocutory application. When the matter was argued before this Court, no mention was made (to the very best of this Court's recollection) to either interlocutory application or to the fact that it would be necessary for this Court to decide whether or not the evidence tendered by the Applicant and contained in the paragraphs of the founding affidavit referred to above, constituted hearsay evidence. Most importantly, this Court was never asked to decide whether such evidence should be excluded on the basis of it being hearsay or whether it should be admitted in terms of section 3 of the Evidence Act. In light of the decision that this Court has reached in this matter, it is the opinion of this Court that it is unnecessary to make a finding as to the admissibility of that evidence as proffered by the Applicant in the founding affidavit.

[28] It was further submitted that the Applicant's own version, even if accepted, is inherently contradictory. In this regard, it is the Applicant's version that one COHEN

(“Cohen”), at that time Pierre’s attorney, was requested by Pierre, on the 6th of May 2020, to draft an agreement reflecting that Pierre and Craig would have equal voting rights and that Cohen, having done so, then sent a draft thereof to Pierre on the 12th of May 2020. It was pointed out by Adv Gilbert that the foregoing is supported by emails which form part of the application papers. In light of the foregoing, it was impossible for Pierre to have signed the agreement on 5 May 2020, as averred by the Applicant. This, submits Counsel, seriously calls into doubt the Applicant’s entire version of events and facts as placed before this Court by way of her affidavits. Further and in this regard, it must be noted that when this discrepancy was pertinently raised in the answering affidavit it was not addressed by the Applicant in reply other than to state “...the discrepancy between the dates of 5 May 2020 and 12 May 2020 have no material bearing on this application, or the status of the agreement.”³¹

[29] Against this version as provided by the Applicant, it was submitted that the version of Craig is far more probable and thus cannot be rejected as being far-fetched or fanciful. In this regard, it is common cause between the parties that the sale of 51% of the shares of the Company by Wild Rose to Pierre and Craig took place on 4 May 2020. In terms of that agreement Craig would own 53% and Pierre would own 47% of the shares in the Company. It was submitted that if it had been the intention to have equal voting rights, then the sales agreement with Wild Rose would simply have reflected an equal shareholding in the Company. It did not and there was a deliberate split of 53% to 47% which, it was submitted, negates the contentions of the Applicant and reflects a deliberate intention for there not to be equal voting rights (which obviously supports Craig’s version).

[30] Moreover, it was the Applicant’s version that she was told by Pierre that despite the disproportionate shareholding reflected in the sale agreement with Wild Rose, Pierre and Craig had nonetheless agreed to have an equal say in the running of the Company and equal voting rights in respect thereof. This however is not borne out by the documentary evidence. The email sent by Pierre to Cohen on the 6th of May 2020 wherein he requests Cohen to draft an agreement reflecting such equality does not show that he and Craig had reached agreement in respect thereof. Rather, it was submitted on behalf of the Company and Craig that the wording and tone of that email clearly illustrate that no such agreement had been reached and that it was Pierre’s “wish” that it had been so. It was submitted by Adv Gilbert that if there had indeed been a preceding agreement reached between Pierre and Craig prior to the 6th of May 2020 the email would have read very differently. It would simply have stated that agreement had been reached and that Pierre now wished to have that agreement reduced to writing.

³¹ Subparagraph 33.5 of the replying affidavit.

- [31] Further and in regard to the two emails exchanged between Pierre and Cohen, as dealt with above, it is important to note that Craig was not copied into either email by Pierre or by Cohen. It was submitted on behalf of the Company and Craig that if indeed an agreement had been reached between Pierre and Craig, as alleged by the Applicant, then Craig would have been part of the email trail since he would have been a willing party to an agreement which was in the process of being reduced to writing.
- [32] A considerable amount of the Applicant's case with regard to the agreement as to equal voting rights depends upon this Court accepting the email trail between Pierre, Craig and representatives of the Company's bankers during the period 21 to 26 August 2020. On this issue, Adv Gilbert makes the important point that Craig has explained, under oath, that he simply did not notice, in the long exchange of emails between Pierre and the aforesaid representatives of the Bank, where he was copied into certain emails, that Pierre had represented to the Bank that there were equal voting rights between the two of them. Craig further points out in the answering affidavit that none of the documents furnished to the Bank and which are attachments to the chain of emails reflecting the alleged equal voting rights were actually signed by him or that he was even requested to sign them. The actual page reflecting the alleged equal voting rights is signed by Pierre only and then emailed by Pierre directly to the Bank. It is noted by this Court that the Applicant failed to attach any confirmatory affidavits from the representatives of the Bank who were involved in the said email trail or affidavits from them possibly explaining whether or not there were any discussions which took place with either Pierre or Craig outside of the emails which may have assisted this Court in deciding the matter.
- [33] To Craig's credit, he obtained the expert evidence and a report from a handwriting expert which he provided to the Applicant's attorneys prior to the Applicant filing her replying affidavit. This expert was unable to provide an opinion as to whether the disputed signature on the agreement was Craig's or not. Adv Gilbert made the submission that the very fact that this report is inconclusive, is indicative of the genuine dispute of fact which exists between the parties on this particular issue.
- [34] Having regard to the foregoing, it was submitted on behalf of the Company and Craig that, in the context of conduct which the Applicant contends falls within the ambit of section 163, Craig's conduct in refusing to recognise the agreement which he disputes that he signed, cannot constitute unfairly prejudicial conduct.

Craig secretly and unlawfully appointed his wife as a director of the Company.

- [35] The explanation for the foregoing is, once again, to be found in the answering affidavit. Here Craig states that he appointed his wife as the second director of the company, three days before Pierre died, at the request of the Company's Bank, who preferred there to be two directors in case anything happened to Craig as the sole

director which could leave the Company “rudderless”. It must be noted that no confirmatory affidavit from a representative of the Bank is attached to the answering affidavit.

[36] Craig goes on to explain that once he had taken legal advice, his wife offered to and then did resign as a director of the Company on the 12th of November 2021. Reference is made in the answering affidavit that prior thereto, on the 15th of October 2021, Craig’s attorneys addressed a letter to the Applicant’s attorneys wherein it was recorded that Craig’s wife would resign and that a second director could be appointed as envisaged by the provisions of section 68 of the Act. It was also stated in the answering affidavit that the appointment of his wife was never intended to be a secret and that a simple company search would have shown that she had been appointed as a director of the Company.

[37] In the premises, it was submitted that there is no merit to this complaint which was rectified. It was further submitted that Craig had made it clear that he was happy to convene a shareholders’ meeting where a second director could be elected.

Craig’s offer to purchase Pierre’s shares from the deceased estate at a value that the Applicant contends is a fraction of the actual value of those shares

[38] Adv Gilbert submitted that there is no obligation upon Craig to buy the shares owned by the deceased estate, especially at a value which the Applicant has unilaterally ascribed to those shares. It was further submitted that the Applicant’s dissatisfaction at the value offered by Craig for the minority shareholding can be addressed as part of what was described as the “usual” buy-out order pursuant to which Craig could be compelled to purchase the shares owned by the deceased estate at a market related value and as determined by an independent third party valuer.³² This is assuming of course that the Applicant can make out a case for that relief in the action to be instituted, as catered for in the order sought in the present matter and dealt with by the Applicant in her affidavits.

[39] It should be noted that the conduct complained of by the Applicant under this heading is closely linked to the complaint that Craig has refused to grant her access to the financial information of the Company to enable her to undertake a valuation of Pierre’s shares. On behalf of the Company and Craig, it was submitted that Craig’s offer to purchase the shares in the Company owned by the deceased estate at a value considered by the Applicant to be too low, cannot constitute unfairly prejudicial conduct within the meaning of section 163 of the Act.

Craig’s refusal to grant to the Applicant access to the Company’s financial information to enable her to undertake a valuation of Pierre’s shares.

³² *Knipe v Kameelhoek (Pty) Ltd 2014 (1) SA 52 (FB)*.

[40] In response to this complaint, it was submitted on behalf of the Company and Craig that there is no general principle in our corporate law that a company or the majority shareholder is required to make information available to a minority shareholder to enable the minority shareholding to be valued.³³ Further, it was submitted by Adv Gilbert that, in the present matter, no case had been made out by the Applicant for such access to information merely on the basis that the Applicant seeks such information to enable the value of the deceased estate's minority shareholding to be determined and particularly where the necessary provision can be made for such information to be furnished as part of the usual-form buy-out order.

[41] With regard to the foregoing, it was pointed out by Counsel that our courts have recognised that they have an unfettered discretion as to the method of fixing the price of such shares, which should be a fair price determined objectively and provided that an applicant formulates the appropriate relief to enable such a discretion to be exercised.³⁴ This informs the usual form order that is typically granted in a buy-out, which provides for a determination of a fair price of the relevant shareholding by way of a particular methodology, usually at the instance of an independent third-party valuer who has access to all the necessary financial information.

[42] In support of his argument, Adv Gilbert relied on the matter of *Geffen and Others v Martin and Others*³⁵ where it was held, *inter alia*, that:

"...with regard to the question of access to bank accounts, no basis was suggested as to why a shareholder had an entitlement to a daily viewing of the company's bank accounts."³⁶

Following thereon, it was further submitted that the Applicant had accepted that she had been provided with and had access to the financial statements of the Company for the 2020 and 2021 financial years. These financial statements were provided to the Applicant by Craig's attorneys on the 7th of September 2021. The attention of this Court was drawn by Adv Gilbert to the fact that the said financial statements had been signed off by the Company's auditor.

[43] Arising from the foregoing, it was further submitted that the failure of the Applicant in the present matter to adduce evidence, such as by way of an expert accountant, challenging the veracity of the financial statements for purposes of at least making a preliminary determination of the value of the minority shareholding, militates against the relief she seeks being just and equitable.³⁷ Without setting out a basis in her

³³ *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA).

³⁴ *Knipe* at paragraph 33.

³⁵ [2018] 1 All SA 21 (WCC).

³⁶ *At* paragraph 69.

³⁷ *Geffen* at paragraph 66.

founding affidavit, submits Adv Gilbert, as to why these annual financial statements cannot be relied upon, the Applicant cannot complain that she has been provided with insufficient information so as to entitle her to any further information, let alone the invasive relief sought in the Notice of Motion which goes well beyond access to information.

[44] Finally, it was submitted that, in any event, should the Applicant's *true* complaint be that she needs access to information, then the relief sought should have been crafted to obtain such information rather than the invasive appointment of no less than two extra directors to the Company's board of directors which is directly contrary to the majoritarian principle.

Craig's insistence with compliance with the Company's Memorandum of Incorporation ("MOI") and the Act in circumstances where the Applicant contends the parties did not previously have regard thereto

[45] At the outset, it was submitted on behalf of the Company and Craig that Craig's insistence upon compliance with the MOI cannot in and of itself constitute unfairly prejudicial conduct.

[46] In support thereof, it was also submitted that there was nothing unfair in Craig adopting the position that once his relationship with Pierre ended upon Pierre's death, he was not bound to appoint Pierre's widow or his widow's nominee as a director who would then simply slot into where Pierre once was. Also, it was submitted that to the extent that the Company's MOI and the provisions of the Act support Craig as the majority shareholder in adopting that position, he cannot be faulted.

Craig's objection to the appointment of the deceased estate's nominee as a director as being contrary to the affairs of the Company being carried out in the nature of a quasi-partnership as before.

[47] In the first instance, it is pointed out by Adv Gilbert that on the application papers before this Court the Company and Craig dispute the averments made by the Applicant that the Company is/was a quasi-partnership or conducted its business on that basis whilst Pierre was alive. As set out in the answering affidavit, Craig explains that (as is common cause in this matter) Pierre was not part of the Company at inception; only joined the Company during 2014 and then only as a very small shareholder, holding 10% of the shares in the Company which were given to him by Craig for no consideration.

[48] Counsel for the Company and for Craig takes the argument further and submits that, even if it is assumed (in the Applicant's favour) that the company was in the nature of a quasi-partnership the conduct complained of, namely the failure of Craig to accept

a new “partner”, cannot constitute unfairly prejudicial conduct. This must be so, it is submitted, because:

48.1 it is so that the exclusion by a majority shareholder of the participation of a minority shareholder in the affairs of a company that is in effect a quasi-partnership may, where the excluded shareholder had a legitimate expectation to participate in those affairs, found relief under section 163.³⁸ However, it was submitted, on the facts of the present matter, that Craig did not unfairly exclude Pierre from participation in the affairs of the Company. Rather, it was Pierre’s death and preceding illness that gave rise to his exclusion and not any identified conduct of Craig; and

48.2 once a partner dies that is the end of the partnership³⁹ and the executrix of the deceased partner’s estate cannot simply appoint someone to slot in as the new partner.

[49] In the premises, it was submitted on behalf of the Company and Craig that the Applicant’s attempt to found unfairly prejudicial conduct based upon a quasi-partnership where the partnership has ceased to exist upon the death of the alleged quasi-partner, is fundamentally flawed.

Has the Applicant overcome the “first hurdle” in the application by proving unfair prejudicial conduct on behalf of Craig and thereby satisfying the requirements of subsections 163(1) (a);(b) or (c) of the Act ?

[50] In order to answer this question, it is necessary to consider the grounds relied upon by the Applicant and decide whether, on the evidence placed before this Court and the facts as averred by the Applicant on motion proceedings, which are either accepted or not genuinely disputed by the Company and Craig, the Applicant has discharged the onus incumbent upon her to prove that Craig is guilty of unfairly prejudicial conduct towards her within the meaning of same in terms of section 163 of the Act.

[51] Those grounds relied upon by the Applicant in this matter have already been dealt with in some detail in this judgment. Suffice it to say, this Court accepts the majority (if not all) of the submissions made by Counsel for the Company and Craig in respect of these grounds, qualified by a few observations of this Court, as dealt with hereunder.

³⁸ *Barnard v Carl Greaves Brokers (Pty) Ltd and others 2008 (3) SA 663 (C), para 45 and 46 citing the well-known speech of Lord Hoffman in O'Neill and Another v Phillips and Others [1999] 2 All ER 961 (HL). See also, more recently in this Division, De Sousa and another v Technology Corporate Management (Pty) Ltd and others 2017 (5) SA (GJ), para 128 and 332.*

³⁹ *J Henning Perspectives on the Law of Partnership (2014) Juta at p 166: “Since a partnership is constituted intuitu personae, in other words the delectus personarum is regarded as one of the main considerations on which an agreement of partnership rests, any change in membership destroys the identity of the firm. If a partner retires or dies, or a new partner is admitted, this brings about a dissolution of the existing partnership at common law.”*

- [52] The first observation which this Court wishes to make, pertains to the complaint that Craig has failed to recognise and implement the agreement. Whilst this Court agrees with the submissions made on behalf of the Respondent that, *inter alia*, the Applicant's version that she was told by Pierre that despite the disproportionate shareholding reflected in the sale agreement with Wild Rose, Pierre and Craig had nonetheless agreed to have an equal say in the running of the Company and equal voting rights in respect thereof is not borne out by the documentary evidence,⁴⁰ it would be remiss of this Court if it were not to be noted that what cannot be disputed is the existence of other documentary evidence. This other documentary evidence consists of the emails leading up to the agreement coming into existence; the agreement itself and the emails between the parties during the period 21 to 26 August 2020. In the opinion of this Court, these documents could *possibly* show an increasing mistrust on behalf of Pierre towards Craig and the manner in which Pierre possibly conceived that Craig was conducting the affairs of the Company. Of course, these fears would only have been heightened by the fact that Pierre was terminally ill and wished to do everything he possibly could to secure the future of his family, including the Applicant (which also provides a *possible* explanation as to why Pierre may have told the Applicant that Craig had agreed to equal voting rights). The fact that things may have already started to sour between Pierre and Craig and that Pierre was concerned therewith, is also supported by the assertions in the answering affidavit made by Craig to the effect that Pierre had presented the agreement to him during May but he had refused to sign it.
- [53] The difficulty with these facts when considering whether the Applicant has discharged the onus incumbent upon her, is that (a) this Court did not understand it to be the Applicant's case that the agreement was somehow being "created" by Pierre to protect his minority shareholding in the Company (rather, it was always the Applicant's case that Pierre and Craig had actually agreed to equal voting rights) and (b) it ultimately takes the dispute of fact pertaining to the issue of whether or not Craig did, as a fact, enter into the agreement with Pierre, no further. It is nevertheless important to note that this Court has considered these facts in this judgment.
- [54] A further observation made by this Court is that, as noted earlier in this judgment, Craig had appointed his wife as a director of the company prior to Pierre's death. On Craig's version, this was at the request and suggestion of the Company's Bank (the appointment of another director). No independent evidence was placed before this Court in support thereof. However, despite the foregoing and any possible inferences that may be drawn therefrom that even shortly before Pierre's death, Craig may have been taking steps to ensure that his control of the Company was not somehow usurped, it cannot be said that Craig's conduct in this regard constitutes unfairly prejudicial conduct towards the Applicant.

⁴⁰ Paragraph [30] *ibid*.

- [55] The final observation which this Court wishes to make is that from the information placed before it during the course of this application, it would appear, *prima facie*, that the price offered by Craig to purchase the shares of the deceased estate is far lower than that which the said shares may ultimately be valued at. This was not seriously challenged by Craig in the answering affidavit. However, once again, this does not satisfy the requirement of the Act in proving that Craig's conduct was unfairly prejudicial towards a minority shareholder. This must be so, for all of the reasons as dealt with earlier in this judgment and as set out hereunder. Whilst the attempts by Craig to purchase the shares of Pierre's deceased estate at a value which appears to be far less than what those shares are really worth may perhaps be regarded as questionable if judged on a purely moralistic standard, they fall well short of constituting conduct which could be classified as being unfairly prejudicial towards the Applicant as envisaged in terms of section 163 of the Act.
- [56] Having considered all of the grounds relied upon by the Applicant in support of her application in terms of subsection 163(1) of the Act, it is the finding of this Court that the Applicant has failed to prove, on a balance of probabilities, that either the Company or, in particular, Craig, has carried out any conduct which is unfairly prejudicial towards the Applicant. This is so since the conduct complained of is not unfairly prejudicial within the meaning of the provisions of subsections 163(1)(a);(b) or (c) of the Act. It is certainly not oppressive. The foregoing is applicable in respect of the conduct complained of by the Applicant which is accepted by the Respondent and in light of which there is no material dispute of fact. In those instances where there *are* material disputes of fact (in respect of whether the agreement was entered into by Craig and whether Craig accepted that he and Pierre had equal voting rights despite the fact that Pierre was a minority shareholder, this being allegedly evidenced by the email correspondence between Pierre, Craig and representatives of the Company's Bankers) this Court holds that these disputes are genuine and *bona fide* disputes of fact⁴¹ and that the versions put forward by Craig are not so far-fetched and fanciful to be rejected by this Court on the affidavits before it. In the premises, where such disputes of fact exist, this Court must accept the versions put forward by Craig.
- [57] In light of the findings by this Court, it is not necessary for this Court to decide whether or not the contents of the Applicant's founding affidavit, contained in certain paragraphs thereof and as referred to earlier in this judgment, constitute hearsay evidence and should be struck out, or should be entered into evidence, in the interests of justice, in terms of section 3 of the Evidence Act. Whether the averments of the Applicant constitute hearsay evidence or not, they are insufficient to assist the Applicant in discharging the onus incumbent upon her.

⁴¹ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T); Khumalo v Director-General Co-operation and Development 1991 (1) SA 158 (AD) at 167G.*

[58] Ultimately, the failure of the Applicant in this application is as a result of an incorrect understanding and misinterpretation of the statutory requirements of section 163 of the Act. This is so, particularly when applied to the facts of this case. None of the grounds complained of by the Applicant could remotely provide a basis for this Court to grant relief to the Applicant, as a minority shareholder, in terms of section 163 of the Act. Moreover, the failure of the Applicant to succeed in this application must also rest on her inability to properly recognise and appreciate the corporate law principle of majoritarian control.⁴² The Applicant has failed to discharge the onus incumbent upon her to prove that any conduct by the Company or Craig can be said to be unfairly prejudicial towards the Applicant whether one considers the relief sought by the Applicant in this application to be interim or final in nature. In coming to this decision this Court is guided and assisted by the principles as enunciated in, *inter alia*, *De Villiers*, *Grancy*, *Sammel* and *Lourenco*.

[59] In the premises, this application should be dismissed. Moreover, even in the event of this Court being incorrect and the Applicant having succeeded in proving that Craig had carried out conduct which is oppressive or unfairly prejudicial or unfairly disregards the interests of the Applicant, the Applicant would still not have been successful in this application, for the reasons more clearly set out hereunder.

In the event of this Court being incorrect in holding that the Applicant has failed to prove unfairly prejudicial conduct on behalf of the Company or Craig, did the Applicant show that the relief she seeks is appropriate to bring an end to the matters complained of and that it would have been just and equitable for this Court to grant that relief ?

[60] A number of important facts in the present matter need to be noted in considering whether the Applicant had demonstrated that she was entitled to the relief sought if she had crossed the “first hurdle” and had proved that this Court could, in the exercise of its discretion, grant the Applicant relief in terms of subsection 163(2) of the Act. These facts are:

58.1 the nature of the relief sought;

58.2 the reasons why the Applicant sought the particular relief that she did.

The nature of the relief sought

[61] The applicant seeks the appointment of two further directors to the Company (in addition to Craig who is presently the sole director), one being Jacob Edery, or such person nominated from time to time by the Applicant (*“referred to by the Applicant as*

⁴² *Lourenco*; *Grancy*.

the Nominated Director”) and the other being a person nominated by the South African Institute of Chartered Accountants (*referred to by the Applicant as the Independent Director*”). This relief is presumably fashioned on the relief provided for in subsection 163(2)(f)(i) of the Act. The said subsection has been set out earlier in this judgment. Nevertheless, it deserves repeating herein. It provides:

“Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including an order appointing directors in place of or in addition to all or any of the directors then in office.”⁴³

- [62] Whilst subsection 163(2) of the Act determines that the Court *may* make *any* (interim or final) order *“it considers fit”* and continues to provide some examples of the powers that the Court may exercise, the Court’s powers are not limited to those as set out in subsections (a) to (l).⁴⁴ The discretion of the Court to grant appropriate relief where it is warranted, has been recognised to be fairly wide.
- [63] However, in the present matter before this Court, it is imperative to note that in seeking the relief that the Applicant has sought, no reliance was placed by the Applicant at any stage in the proceedings to either seek alternative relief from this Court or to alter the relief sought in any manner or form. In addition thereto, it was never suggested by the Applicant, either in the application papers before this Court or during the course of argument by Counsel acting on behalf of the Applicant, that this Court should, or could, grant to the Applicant relief in any other form should this Court have deemed that the relief sought by the Applicant was not appropriate.

The reasons why the Applicant sought the relief that she did.

- [64] It was stated by the Applicant, in the founding affidavit, that having regard to the present circumstances, it is impossible for herself (as the present minority shareholder in the Company) and Craig (as the majority shareholder in the Company) to continue as co-shareholders in the Company. In the premises, on the Applicant’s own version the Applicant contends that there should be what is often referred to as a “commercial divorce”. This is further clear from the entire tenor of the application; the complaints levied against Craig and the relief it is stated would have been sought in the action to be instituted had the Applicant been successful in this application.
- [65] Having regard to the foregoing, it would appear to this Court to be fairly obvious that the relief that the Applicant *should* have sought was that Craig, as the majority shareholder, buy-out the deceased estate as the minority shareholder. Whilst not specifically mentioned as a power in subsection 163(2), it is a form of relief which our

⁴³ *Emphasis added.*

⁴⁴ *Grancy at paragraph 29; Henochsberg.*

courts have frequently granted.⁴⁵ Reference has already been made in this judgment to the manner in which buy-out orders may be made by the courts to effect commercial divorces, including safeguards to ensure fairness to all parties in the giving of effect thereto.

[66] In addition to the foregoing, it would appear to this Court that, in light of the Applicant's complaints and the fact that it was incumbent upon the Applicant to seek appropriate relief that would bring an end to the matters complained of, there were yet still other subsections contained in subsection (2) which may have been of greater assistance to the Applicant in this matter.

[67] Subsection 163(2)(e) provides for "*an order directing an issue or exchange of shares*". This subsection has been seen as an alternative to the Court ordering a buy-out of shares but still directing an exchange of shares for cash and in the appropriate case money compensation for oppressed shareholders.⁴⁶ A further subsection which appears to this Court to be particularly on point, especially having regard to the Applicant's complaints of not having been provided with sufficient information to carry out a valuation of the Applicant's shares, is subsection 163(2)(i) of the Act. This subsection allows the Court to make an order "*requiring the company, within a time specified by the court, 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*".⁴⁷ It was common cause that financial statements were provided to the Applicant. If the Applicant contended that the information contained therein was insufficient for the purposes of valuing the Applicant's shares then it would appear to this Court that it would have seemed fairly obvious that appropriate relief should have been sought in a form of accounting put forward in the application papers which would have put an end to the Applicant's complaints. This form of relief, if granted, would also have put an end to the necessity of (presumably) the Applicant having to institute the action as contemplated in the Applicant's Notice of Motion.

[68] However, as is clear from both the Applicant's Notice of Motion and the Applicant's affidavits, the Applicant, despite averring that the purpose of the application is a "stepping stone" to obtaining the necessary information to value the shares of the deceased estate and that it will be necessary for the Applicant and Craig to obtain a "commercial divorce", does not seek a forced buy-out by Craig of the deceased estate's minority shareholding (with appropriate ancillary relief). Rather, the Applicant seeks what Adv Gilbert has described as the "invasive" relief of the appointment of

⁴⁵ *Omar v Inhouse Venue Technical Management (Pty Limited and Others 2015 (3) SA 146 (WCC) at paragraph 50; Freedom Stationery (Pty) Limited and Others v Hassam and Others 2019 (4) SA 459 (SCA) at paragraph 28; Gatenby v Gatenby and Others 1996 (3) SA 118 (E); Henochsberg.*

⁴⁶ *Muller v Lilly Valley (Pty) Limited [2012] 1 All SA 187 (GSJ) paragraphs 40 and 41; Gushman NO and Another v Traut NO and Others [2013] JOL 30862 (FB) at paragraph 29; Scottish Co-operative Wholesale Society Ltd v Meyer 1959 AC 324 (HL) at paragraph 89; Henochsberg.*

⁴⁷ *Emphasis added.*

two directors to the Company which could effectively deprive Craig of control of the Company (despite the fact that he would remain the majority shareholder in the Company which, once again, would be in conflict with the majoritarian principle).

- [69] It was at this stage of the argument that the question was posed, quite rightly so, by Counsel for the Company and Craig, as to why the Applicant had sought the relief in the form that she did, when more circumscribed relief could have achieved the purpose of access to information or why any relief at all was necessary as a precursor to seeking the usual-form buy-out order. In this regard. It was submitted by Adv Gilbert that the Applicant had a second objective in seeking the invasive relief that she did and which would have had the effect of depriving Craig of control of the Company. That objective, he submits, is to attempt to use the relief sought in terms of section 163 of the Act *in terrorum* (as an “*instrument of oppression*”) against Craig as the majority shareholder to force him to acquire the deceased estate’s shares at a greater value than warranted.
- [70] Adv Gilbert then proceeded to draw the attention of this Court to numerous examples of the Applicant’s conduct during the history of this matter which he submits supports his submissions that the institution of this application in terms of section 163 of the Act was nothing more than an instrument of oppression. This Court is acutely aware of the cautionary note issued by the Supreme Court of Appeal in *Grancy*⁴⁸ where it was accepted that whilst the Court has a very wide jurisdiction and discretion in applications of this nature the Court must however be carefully controlled in order to prevent the section of the Act from itself being used as a means of oppression. In addition thereto, this Court is also alive to the well-established principles (as also relied upon by Adv Gilbert during the course of argument) in corporate law that an aggrieved shareholder should, in general, attempt to resolve any internal disputes by way of internal domestic remedies before approaching the Court for equitable relief.
- [71] In light of the decisions reached by this Court in respect of both the fact that the Applicant has failed to discharge the onus incumbent upon her to show that the conduct of either the Company or Craig satisfies the requirements of subsection 163(1) of the Act and the decision in respect of the relief sought by the Applicant in terms of subsection 163(2) of the Act, this Court deems that it is unnecessary for it to attempt to unravel possible reasons for the Applicant’s election to request the relief in the form that she did. This decision is fortified by the fact that the Company and Craig do not seek an order for punitive costs against the Applicant in this matter.
- [72] Had the Applicant proved, on a balance of probabilities, that the Company or Craig had been guilty of conduct which was unfairly prejudicial and oppressive towards Pierre’s deceased estate as a minority shareholder in the Company in terms of subsection 163(1) of the Act it is nevertheless clear that this Court would not, in the

⁴⁸ At paragraph 32.

exercise of its discretion, have granted the Applicant the relief sought being the appointment of the Nominated Director and the Independent Director. This is simply because the relief that an applicant seeks must be appropriate to bring an end to the matters complained of and it would be just and equitable to grant that relief.⁴⁹

[73] As is clear from that set out above the Applicant, despite having had the opportunity to do so and for reasons only known to herself, chose relief that was entirely inappropriate; did not necessarily put an end to the conduct complained of; was merely a step in the procedure to the final relief ultimately sought by the Applicant and would certainly not have been just and equitable. With regard to the last factor, it would not have been just and equitable, on the facts before this Court, to grant the relief sought, thereby effectively depriving the major shareholder of control of the Company which, on the present information before this Court, is not in any financial danger but in fact appears to be doing rather well. In this regard, no case was made out by the Applicant that the Applicant was suffering any financial prejudice as a result of the Company's affairs being mishandled or neglected in any manner whatsoever by Craig. Once again, as with the difficulties faced by the Applicant in failing to discharge the onus in respect of subsection 163(1) of the Act, it is the opinion of this Court that the Applicant, in approaching the relief sought in terms of subsection 163(2) of the Act, has failed to truly appreciate the corporate principle of majoritarian control.

[74] In the premises, this Court holds that even had the Applicant overcome the "first hurdle" in this application, the Applicant would nevertheless have been unsuccessful in this application in failing to demonstrate that this Court should exercise its discretion in her favour and grant her the relief as sought. Under the circumstances, even in the event of this Court being incorrect in dismissing the application in the first instance the application was doomed to fail.

Costs

[75] It is trite that costs fall within the discretion of the Court. Moreover, it is trite that unless unusual circumstances exist, costs normally follow the result. No such circumstances have been brought to the attention of this Court. In the premises, there is no reason why the order for costs should not follow the normal course and the Applicant be ordered to pay the costs of the application.

[76] The Company and Craig have asked that this Court also make an order that the Applicant pay the costs incurred when the matter was removed from the Urgent Roll, those costs having been reserved. In light of the fact that these costs were incurred in the course of the litigation; the application would have been set down on the

⁴⁹ *Louw at paragraph 23; Lourenco.*

Urgent Roll by the Applicant before being removed; the fact that this Court cannot find any grounds of urgency on the application papers before it and that there was no real opposition to paying these costs from the Applicant in the event of the application being dismissed, this Court is of the opinion that these costs should also be paid by the Applicant.

Order

[77] In the premises, this Court makes the following order:

1. The Application is dismissed;
2. The Applicant is to pay the costs of the application, such costs to include the costs occasioned by the removal of the application from the urgent roll on the 8th of February 2022.

B.C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 17 October 2022
Judgment: 3 February 2023

Appearances:

For Applicant: A Subel SC (with P Lourens)
Instructed by: Werksmans Attorneys

For First and Second Respondents: BM Gilbert
Instructed by: Peter Le Mottée Attorneys