REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2022-972

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

.....
SIGNATURE **DATE** 14 March 2024

In the matter between:

JONATHAN RICHMAN	Applicant
and	
FRM PROPERTY INVESTMENTS (PTY) LTD	First Respondent
MARIO FIORINO N.O.	Second Respondent
DONATELLA MARIA CARLA FIORINO N.O.	Third Respondent
MALCOM CLAUDE SHEPPARD N.O.	Fourth Respondent
PIERINA MARANGONI N.O.	Fifth Respondent
GIOVANNI MARANGONI N.O.	Sixth Respondent
MARISA SABATO N.O.	Seventh Respondent

JUDGMENT

STAIS AJ:

This judgment is handed down electronically by circulating it to the parties' representatives by email and by uploading on CaseLines.

[1] This matter concerns the questions of whether it would be just and equitable to wind up a solvent company in terms of section 79(1)(b) read with section 81(1)(c)(ii) and (d)(iii) of the Companies Act, 2008 ("Act"), and if not, whether there was oppressive or prejudicial conduct that requires appropriate relief in terms of section 163 of the Act.

[2] The parties were agreed that the following issues require determination: (a) Whether it is just and equitable to place the first respondent ("Company") under winding up? In this regard I am to determine whether the Company is a small domestic company in the nature of a quasi-partnership and whether the relationship between the shareholders has broken down irretrievably? (b) In the event I am disinclined for whatever reason to place the Company under winding-up, whether a liquidator or receiver should be appointed to sell either the Company as a going concern ("Business") or sell its immovable property ("Property"), and distribute the proceeds of such sale with due regard to the shareholders' respective loan accounts? (c) Whether I have the power to appoint a liquidator, alternatively receiver, to sell either the Business or the Property? (d) Whether appointing either a liquidator or receiver amounts to nothing more than placing the Company under winding up? It was common cause that the relief at (a) was sought in terms of section 79 and the relief at (b), (c) and (d) was sought in terms of section 163 of the Act.

[3] Before turning to a consideration of the issues, I make two preliminary comments. The first is that the applicant seeks final relief. I am therefore enjoined to apply the well-established Plascon-Evans rule and only grant relief if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order. (*Plascon-Evans Paints Lt v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)) These would include the contents of the supplementary affidavits filed by the parties, which were admitted by agreement. The second is that, despite the formulation of the issues by the parties and in the event that I am disinclined to liquidate the Company, I am authorised by section 163(1) of the Act to make any interim or final order I consider fit. In the result, argument before me was directed at whether I should grant an order winding up the Company on the 'just and

equitable' basis alternatively, what order, if any, would be appropriate in terms of section 163(1) of the Act.

Main Relief: Winding up

[4] A solvent company may be wound up in terms of section 79(1)(b) by court order on the grounds that it is just and equitable to do so, on application of a creditor or shareholder as is contemplated in respectively section 81(1)(c)(ii) and (d)(iii) of the Act. It is common cause that the applicant has *locus standi* to bring the application for the relief sought.

[5] It is trite law that the power to grant a winding up order is discretionary irrespective of the grounds on which the applicant relies for the proposed winding up, and in considering those grounds and reasons, previous decisions are to be approached as merely laying down guidelines as to the proper considerations to be applied. (*F & C Building Construction Co (Pty) Ltd v Macsheil Investments (Pty) Ltd* 1959 (3) SA 841 (D) at 844; *Re JD Swain Ltd* [1965] 2 All ER 761 (CA) at 762; *SAA Distributors (Pty) Ltd v Sport en Spel (Edms) Bpk* 1973 (3) SA 371 (C) at 373)

[6] It is now well-established in our law, on the authority of *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 (CA) and *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492, that a small 'domestic' company or a company akin to a partnership (so-called 'quasi-partnership') may be liquidated on the basis of the 'just and equitable' principle due to a complete breakdown in the special personal relationship that ought to exist between directors and/or shareholders of such a company. (*Moosa NO v Mavjee Bhawan (Pty) Ltd & Anor* 1967 (3) SA 131 (T) at 136H-138H; *APCO Africa (Pty) Ltd & Anor v APCO Worldwide Inc* 2008 (5) SA 615 (SCA) at [16]-[30])

Nature of the Company

[7] Although there was confusion on the papers regarding the shareholding in the Company (an aspect to which I shall return), it was common cause before me that the applicant and his sister each hold one-sixth of the Company's issued

shares, which they inherited form their late father ("Mr Richman"). I pause to mention that the application is supported by the applicant's sister, Mary Anne Richman, who is not cited as a party, but who has as much interest in the Company and outcome of these proceedings as the applicant does. Pre-litigation correspondence by the applicant's attorneys of record inform that they acted on behalf of both siblings, and she has filed an affidavit supportive of the application. I shall therefore consider them as joint shareholders of one-third of the Company's issued shares and when referring to 'the applicant', context may indicate that I refer to both the applicant and his sister.

[8] The other shareholders are the Fiorino Trust, represented by the second, third and fourth respondents and the Marangoni Trust, represented by the sixth and seventh respondents. Each of the Trusts holds a third of the shares. The Company has two directors, Mr Fiorino and the late Mr Marangoni's daughter, the seventh respondent ("Ms Sabato").

[9] The applicant pinned its colours to the 'just and equitable' mast, specifically relying on the Company being a small domestic company in the nature of a quasi-partnership of which the relationship of reasonableness, honesty, trust, good faith and confidence between the respective shareholders has broken down irretrievably. It is only in the event I find that the Company is in the nature of a partnership, that it would be necessary to consider whether there is a lack of confidence in the directors' conduct and management of the Business or whether there is a complete breakdown in the relationship between the applicant and the other shareholders, in both instances such as would justify a final winding up order. I turn then to consider whether the Company is a domestic company founded on the analogy of partnership.

[10] The applicant contends that the founding purpose of the Company was based on an "*understanding*" between the founding shareholders (which he identifies as Messrs Richman, Fiorino and Marangoni), who were "*equal shareholders and 'partners*'" in the Business and arranged their affairs by consulting with one another in an equal and fair manner; that they understood and agreed that their loan accounts were always equal or equalised (in the sum of R2.1 million) bearing interest at an equal rate of interest; and that it was "*always*

understood and agreed" or "*a term of the underlying oral or tacit agreement*" between the founding shareholders that each shareholder would be represented on the Company's board of directors. The undisputed facts testify to the fact that the applicant, when he launched the application, may not have fully appreciated his involvement at inception of the Company. Mr Fiorino did not depose to the answering affidavit, and I am mindful that Messrs Richman and Marangoni cannot speak from beyond the grave. I am, however, assisted in my pursuit of the appropriate relief by the fact that many material facts were either not seriously disputed or became common cause by the time the matter was argued before me.

[11] The Company, which was incorporated on 3 August 1994 with an issued share capital of 120 shares, was acquired from the initial sole shareholder (unrelated to any of the parties). At the time, Messrs Richman, Fiorino and Marangoni had been business partners for many years as directors and shareholders of two furniture manufacturing companies that merged that year. The business of the merged companies operated from the Property and continued to do so after the manufacturing business was sold during 1994. The Property was not sold and was transferred to the Company. Company minutes of the inaugural shareholders' meeting reveal that Messrs Richman, Fiorino and Marangoni were appointed as directors and that they were the shareholders together with the applicant. The agreed common cause facts therefore incorrectly record that the applicant received his shares from his late father. There is uncertainty whether the applicant attended the inaugural meeting because he does not recall the meeting which took place after he had already emigrated to the USA and Mr Richman signed the minutes of the meeting on his behalf. In my view that would not detract from, but rather underscore, the inference that Messrs Fiorino, Marangoni and Richman intended to allocate a third of the shares to each of their respective families. Whilst Messrs Fiorino and Marangoni chose to have their shares (40 shares each) held by the respective Trusts, Mr Richman and the applicant elected to hold their shares (20 shares each) in their personal capacities. The Company was capitalised by shareholders' loans of R2 million from each of the Trusts and R2 million jointly from Mr Richman and the applicant. Even after Mr

Richman had emigrated to the United States of America ("USA") in 1996/1997 (the date being uncertain), Messrs Fiorino and Marangoni ensured that Mr Richman received payment of interest on his shareholder's loan (*i.e.*, the account held jointly with the applicant). Despite Mr Richman's death in 2001 and his children's lack of involvement with the Company, monthly interest payments continued to be made into designated bank accounts.

[12] The directors recently 'corrected' the shareholding by issuing further shares to ensure that the applicant and his sister each now own 40 shares and the Trusts 80 shares each, again dividing the issued share capital equally between the three families – Mr Fiorino conceding that the respondents "*accept that the applicant is correct*" as to the division of the issued share capital of the Company. The applicant's and his sister's loan accounts are now also reflected separately in the Company's books and attempts were recently made to equalise the interest payments on the loan accounts, because, as Mr Fiorino put it, "this *would accord with the original position*" as the applicant maintains. In the result, the Company structure reflects what I believe the three patriarchs intended by ensuring that the shareholding in the Company is held equally by, and treatment of the seed capital is managed evenly in the interests of, their respective families.

[13] In all the circumstances, I am persuaded that the Company is a small private company that was set up as a quasi-partnership. (*Marshall v Marshall (Pty) Ltd & Others* 1954 (3) SA 571 (N)**;** *Knipe & Others v Kameelhoek (Pty) Ltd & Anor* 2014 (1) SA 52 (FB))

Breakdown in the relationships

[14] It is well-established that I am to be guided by two distinct principles in exercising my discretion to wind up the Company. I may grant a winding up order if there is a justifiable lack of confidence in the conduct and management of the company's affairs founded on the directors' conduct in regard to the company's business. I may also do so in instances (sometimes called the deadlock principle, but which does not require actual deadlock) that are strictly confined to those small domestic companies in which, because of

some express, tacit or implied arrangement, there exists between the shareholders a particular personal relationship of confidence and trust in regard to the company's affairs similar to that existing between partners, and if by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the shareholders destroy that relationship, the other shareholders are entitled to claim that it is just and equitable that the company should be wound up. (*APCO Africa (Pty) Ltd & Anor v APCO Worldwide Inc* 2008 (5) SA 615 (SCA) at [18] and [19])

[15] Mr Smit (who appeared for the applicant, together with Mr De Oliveira) urged me to find that the relationship between the Company's shareholders (and specifically between the applicant and Mr Fiorino) has broken down irretrievably and further, because the applicant and his sister were treated unfairly and with disdain, they have developed a justifiable lack of confidence in the directors' management of the Company's affairs. A necessary corollary to this question, should I find that a breakdown exists in the relationship between the shareholders or between the Richman siblings and the directors, is whether that situation necessarily justifies a winding up order. An analysis of the relevant facts is therefore required.

[16] The applicant raises several 'core issues': (a) Despite the agreement that the loan accounts would be equalised and attract interest at equal interest rates, Mr Fiorino has unilaterally and disproportionately drawn down on his loan account and received interest at rates disproportionate to the other shareholders; (b) despite the applicant's "*keen interest*" in the management of the Company, the representatives of the Trusts have unreasonably voted against his appointment as a director and "*always vote with one another against*" him; (c) the other shareholders refuse to participate in the drafting of a shareholders' agreement "*and simply refuse to sign it*"; (d) Mr Fiorino failed to disclose to the applicant or in the Company's financial statements that he was operating a business from the Property without paying rent to the Company and subsequently paying too little (compared to market rental and that paid by other tenants); (e) Mr Fiorino did not fully disclose that he was paying himself a fee for attending to repairs and maintenance of the Property and was using Company funds to pay for his personal and business-related

expenses. The applicant was aware that these issues may give rise to factual disputes but ventured that any disputes would not be genuine and *bona fide*.

[17] The applicant's complaints must be considered in context.

[18] The applicant and his sister emigrated to the United States of America ("USA") in 1986, *i.e.*, long before the Company was incorporated and the Property acquired. It is common cause that the applicant and his sister have never been involved in the operational running of the Business. Save for a single enquiry mid-2016 regarding interest on the loan accounts, the applicant does not appear to have had any interest in the Company until March 2017, when he attended at the Property and had an altercation with Mr Fiorino (a matter to which I shall return). The founding affidavit attests to the fact that the applicant was not even aware that he had also been a shareholder since the Company was acquired, because he was under the impression that he and his sister had inherited their father's shares. Although the applicant's complaints regarding the management of the Company hark back to 2013, it was only in the latter half of 2018 that he requested the Company's memorandum of incorporation, certain financial statements and the Trust's letters of authority, and sought to be appointed to the board of directors.

[19] Mr Richman emigrated to the USA in 1996/1997, *i.e.*, soon after the Company was incorporated and the Property acquired, by which time according to the respondents, the relationship between Mr Richman and his fellow shareholders had soured. The respondents' version that Mr Richman did not involve himself in the affairs of the Company at all, was met by a bare denial that does not bear scrutiny. Although Mr Richman passed away in 2001, the applicant only sought to inform the Company of his passing in 2005. The news was conveyed by letter to the fourth respondent that had been posted to an address vacated several years earlier. The letter requested a meeting and for Mr Richman's shares be transferred to the applicant. The applicant does not provide an explanation for this extraordinary delay in notifying the Company of his father's passing. The situation is compounded by the fact that news of Mr Richman's death only reached the respondents in 2009, and during the intervening years the applicant made no attempt to find out whether the

shares had been transferred as he requested in 2005, nor did he enquire why the meeting that he had requested, had not been arranged. The only reasonable inference that I am able to draw from these facts is that the applicant was unaware of his father's involvement (if any) with the Company or of the applicant's general lack of interest in the Company, or both. Significantly though, the fact that the respondents had no knowledge of Mr Richman's death from 2001 to 2009, corroborates the respondents' version that Mr Richman's whereabouts was not known to the Company, and he was not missed, because he did not involve himself in the Business after he emigrated to the USA.

[20] Save for a single enquiry in 2016 and the altercation between the applicant and Mr Fiorino in 2017, there is no mention in the affidavits that the applicant had at any time prior to late-2018 expressed any concerns about the management or affairs of the Company or that he had any specific queries or complaints regarding the conduct of the directors. There is no mention of his participation in general meetings. His disinterest in the Company was so complete that he delayed four years before unsuccessfully attempting to inform the respondents that Mr Richman has passed away. It appears that he only now found out that his letter in 2005 had not been received, when he was so informed through the respondents' answering affidavit. He was also not aware that the board, then comprised of Mr Fiorino and Mss Sabato and Rocco, had on 2 April 2014 authorised the statutory-required filing of a new memorandum of incorporation. Despite knowing that the Richman shareholding was no longer represented on the board after Mr Richman's death, the applicant did not until 2019 seek representation on the board. Nothing is said about the appointment, conduct or tenure of Ms Rocco, who resigned from the board in 2017. It is fair to say that the applicant and his sister had for more than twenty years accepted their exclusion from the control and management of the Company.

[21] One can hardly speak of a 'special relationship' between the Richman siblings and the other shareholders in such circumstances. It is further doubtful that any business relationship remained between Mr Richman and Messrs Fiorino

and Marangoni after Mr Richman emigrated. Clearly, much had changed since the Company was set up.

[22] The applicant's objections in regard to the control and management of the Company are directed principally at the conduct of Mr Fiorino and are based largely on correspondence exchanged between the applicant's and respondents' respective attorneys. It is therefore surprising that the applicant waited until his replying affidavit before revealing that he had an expressive altercation with Mr Fiorino in March 2017. Details of this incident and of the contents of the applicant's subsequent electronic mail of 17 March 2017 to the fourth respondent, were not alluded to in the founding affidavit. The electronic mail refers to two meetings some three weeks earlier. The first was a meeting with the fourth respondent, whereat the applicant had discussed his proposal that insisted on changes to the management of the Company. These included the shareholders concluding a shareholders' agreement; equalising the loan accounts and interest at 12% to accrue on the balances; appointing a professional management company to manage the Property; appointing a new board which would exclude Mr Fiorino; and Mr Fiorino relinquishing all control of the Company, including being a signatory on the bank account. These terms were conveyed as being not negotiable, brooked no discussion and, if not accepted, would result in the applicant filing a suit against the directors. The second was a meeting later the same day between the applicant and Mr Fiorino that lasted only a few minutes before Mr Fiorino "*flew into a rage*" at the applicant's proposal, causing the applicant to depart in fear of his personal safety. Bearing in mind the applicant's disinterest in the affairs of the Company at the time and the absence of any information of preceding events that may have triggered such a drastic proposal, the tone of the electronic mail strikes me as rather arrogant. This does not excuse Mr Fiorino's conduct, but it does provide some context for his anger. It is understandable that the parties thereafter turned to their attorneys to take care of further communications.

[23] Details of the meeting and electronic mail of March 2017 were provided in response to the respondents' denial that the relationship between the applicant and Mr Fiorino had failed. There is no mention of a subsequent face-

to-face meeting between the applicant and Mr Fiorino, and the next exchange of correspondence only occurred in September 2018, well before the applicant launched this application in April 2022.

[24] Mr Vivian SC (who appeared for the respondents, together with Mr Van Staden) reminded me that I should not lightly interfere in the internal affairs of the Company. (*Du Plessis v Bonnox (Pty) Ltd & Anor* [2019] ZAGPPHC 515 (18 April 2019)), overturned on appeal only in respect of the alternative relief that was granted in terms of section 163 of the Act – *cf Gent & Anor v Du Plessis* (1029/2019) [2020] ZASCA 184 (24 December 2020)) The so-called principle of 'majority rule', essential to the proper functioning of a company, recognises that it is a natural consequence of the applicant having become a shareholder, that he undertook to be bound by the lawful decisions of the majority, even where they adversely affect his own rights as shareholder. (*Sammel v President Brand Mining Co Ltd* 1969 (3) SA 629 (A); *Mbete v United Manganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA))

[25] The last exchange of correspondence relied on by the applicant in his founding affidavit, is a letter of 20 September 2021 from the respondents' attorney which the applicant describes as indicative of Mr Fiorino's "*derisive"* responses to his requests for information and clarification. I may say that I do not find the attorney's letter, which contained a request for clarification to a preceding enquiry by the applicant, to be contemptuous or irreverent. The founding affidavit refers to no contact or exchanges of correspondence thereafter, before the applicant embarked on this application.

[26] Whilst the patriarchs may have set up the Company as a quasi-partnership, it has not been managed as such for almost a generational cycle. The facts do not support Mr Smit's argument that the 'special relationship' that existed between the patriarchs in the late 1990's transcended time and international boundaries. I am not informed of any personal relationships between the applicant (and his sister) and their uncle Mr Fiorino or cousins. What is clear, is that there was never a business relationship of any kind between the Richman siblings and the other shareholders; certainly not of the kind required to justify a winding up order.

[27] Section 66 of the Act provides that the Company is managed by or under the direction of the board, which has the authority to exercise all the powers and perform any of the functions of the Company (except to the extent that the Act or the memorandum of incorporation provide otherwise). The structure and governance of the Company is set out in a memorandum of incorporation that conforms with the Act and which has not been the subject of legal challenge. It does not provide for shareholders to have board representation, precludes the appointment of alternate directors and contains a generic reference to a shareholders' agreement being binding on the Company. It has not been suggested that the terms are substantially different to the substituted articles of association under the old Companies Act, 1973. It is common cause that the shareholders never concluded a shareholders' agreement and consequently there is no lawful reason why the shareholders should have agreed to the applicant's insistence that they conclude one. His complaint of not being appointed to the board also has no legal foundation. He expresses irritation, despite decades of disinterest in the Business, at the other shareholders' conduct in this regard but when he and his sister were invited to put their names forward at the annual general meeting held on 20 January 2023, they refused to do so. Viewed separately, or together with any other reasons, these do not justify the winding up of the Company.

[28] The financial-related complaints require closer scrutiny and therein lies the rub. During the course of the present litigation, the balances on all the loan accounts were restated from 2018 and reflect significant payments by the Company to the accounts of the Marangoni Trust and Richman siblings, as well as payments by Mr Fiorino to the Company to settle what the restatement revealed to be the Fiorino Trust's debit loan account. The fact as to equalisation of the shareholders' loan accounts and (possibly) the method of calculating interest, remain in dispute. It is also a question whether the Fiorino Trust's debit loan account was correctly restated, because of the historical treatment and restatement of medical aid payments. Another persistent dispute turns on whether Mr Fiorino's personal business paid reduced rentals to the Company. Mr Fiorino's denial of this accusation does not pass muster when regard is had to the factual analysis put up by the applicant in reply. It is

surprising that the applicant's detailed allegations in regard to these rentals did not draw a thorough response from Mr Fiorino when he chose to address *inter alia* the issues of the respective shareholdings and loan accounts, and his personal expenses, in a supplementary affidavit. I therefore cannot agree with Mr Vivian that I am compelled to accept the respondents' version on this issue. The amounts involved are not disclosed and I am unable from the facts at hand and absent expert evidence, to make an informed decision on this dispute. These disputes cannot be resolved on the papers before me and such corrections as may be required to any specific loan account, may require further related corrections to one or more of the other loan accounts. There exists also a minor dispute on the question whether certain of Mr Fiorino's personal expenses were paid by the Company, but this appears to have been largely resolved in the restated loan account of the Fiorino Trust.

[29] The 2023 annual general meeting, held on 20 January 2023, was attended by the shareholders' appointed proxies. It was resolved by majority vote to approve the 2022 annual financial statements and to re-appoint the Company's auditors, and by unanimous vote that the applicant and his sister would nominate three independent auditors, one of whom would be appointed by the Trusts, to review the 2023 annual financial statements. Further developments in this regard do not appear from the papers.

[30] Mr Fiorino and the fourth respondent should timeously and properly have considered the concerns raised in the applicant's (attorney's) correspondence and revisited the Company's financial statements. Had they done so, the fourth respondent may not have required counsel to advise him of certain errors in the financials, and he would not have resorted to blaming an unidentified clerk in the auditors' employ. It is apparent from Mr Fiorino's supplementary affidavit that the fourth respondent, who deposed to the answering affidavit in Mr Fiorino's absence from the country, was not aware of the shareholders' agreed arrangements regarding the shareholdings and treatment of the loan accounts. Despite Mr Fiorino confirming the contents of the answering affidavit, the inescapable inference is that he did not properly peruse the contents thereof. Had he done so before it was deposed to by the fourth respondent, it would not have been necessary for him to file a

supplementary affidavit to correct the fourth respondent's misinterpretation of the original agreement pertaining to the various shareholdings and interest payments. Judging from the contents of Mr Fiorino's supplementary affidavit and had the applicant not long before hardened his resolve to wind up the Company, the matter should not have reached the steps of court or should have been resolved before the answering affidavit was filed. It appears to me that such disputes as remain between the parties relate to the loan accounts and can be resolved by an appropriate order in terms of section 163(2) of the Act.

[31] There are other reasons also that motivate my reluctance to wind up the Company.

[32] The Property is a large warehouse in the Cleveland industrial area, leased to various tenants. The Company is solvent and profitable. It has no major creditors (save for the shareholders' loan accounts) and is able to pay its debts. The Business continues to provide for the shareholders. There is no suggestion that the Company is unable to function or that it is in a state of malaise and unable to carry on at a profit. (See *APCO supra* at [28])

[33] I can appreciate the applicant's apprehension due to the disregard with which his complaints were treated, but the recent substantial corrections of the applicant's principal concerns around the shareholding and loan account issues pursuant to Mr Fiorino's concessions, belated as they may be, have largely resolved the lack of probity of which the applicant complains. It shows also that the applicant may have been wrong to refuse to participate in an agreed mediation by an independent professional person. There is good reason why the Uniform Rules of Court make it mandatory for parties to consider mediation at the inception of litigation and before embarking on potentially more costly and risky litigation proceedings.

[34] I have a very wide discretion whether to wind up the Company, which is to be judiciously exercised with due regard to justice and equity of the competing interests of all concerned. (*Moosa NO v Mavjee Bhawan (Pty) Ltd and Anor* 1967 (3) SA 131 (T) at 136G-H)

[35] Mr Vivian SC cautioned that the recent equalising payments on the loan accounts may be set aside by a liquidator as improper dispositions, which would harshly prejudice the Richman siblings and the Marangoni Trust. However, the Company is solvent and able to pay its debts, with the result that section 340(1) of the Act, as read with the relevant provisions of the Insolvency Act, 1936, and section 341(2) of the Act, do not find application. If I am wrong, then Mr Vivian's argument would certainly provide further support for my aversion to a winding up order.

[36] Section 347(2) of the 1973 Act instructs a court when considering a winding up application by members of the company, to satisfy itself that there is not some other remedy available to them and that they are acting reasonably in seeking to wind up the company instead of pursuing the other remedy. I appreciate that the application was not brought under the 1973 Act, but it is of particular relevance that the Act, in a comparable way, emphasises the rescue of companies and charges me to balance the rights and obligations of the shareholders and directors, and encourages efficient and responsible management of the Company. (section 7(i) and (j) of the Act)

[37] In all events, a winding up order will destroy a perfectly viable company and, in the circumstances of this matter, would not be just and equitable. I agree with Mr Vivian that a winding up order would kill the proverbial goose that lays the golden egg.

[38] I am restrained for the same reasons that prevent me from granting a winding up order, from granting the alternative relief to sell the Business or the Property, both of which would have consequences not unlike a winding up order.

Relief in terms of section 163

[39] Neither the notice of motion nor the agreed issues for determination refer specifically to relief in terms of section 163 of the Act, though the founding affidavit contains the bare contention that the applicant satisfied the requirements of sub-section (1) thereof.

[40] Mr Smit provided three reasons in response to my enquiry why the applicant did not seek appropriate limited relief to protect his interests under section 163(2) of the Act. First, he suggested that hindsight comes too late (by which I understood him to mean recognition of the reality of the situation); second, it took time before the applicant was vindicated; and third, relief under section 163(2) would probably have been premature. Each response implies that relief in terms of section 163(2) of the Act may now be apposite and I therefore afforded the applicant the opportunity during argument to formulate the relief (if any) that could be granted.

[41] I was informed that the applicant insists on relief on the full terms of a proposal put to the respondents shortly after the answering affidavit was filed ("Proposal"). It bears mentioning that the applicant had withdrawn the Proposal soon after it was put to the respondents in mid-2022. The Proposal, consisting of three distinct phases, was made on a 'without prejudice' basis (but disclosed by the applicant in his replying affidavit) and with the *caveat* that any proposed resolution of the matter is not negotiable and entirely dependent on the sale of the Business or Property and distribution of the proceeds, all of which is to be overseen by independent third parties. This amounts to nothing other than the alternative relief sought by the applicant. If I am obligated to accept the complete Proposal as formulated in the letter, it would be as good as winding up the Company and I have given my reasons for not doing so. However, Mr Vivian echoed Mr Smit's argument on alternative relief, that I have a wide discretion to grant equitable relief in terms of section 163(2) of the Act. This is an invitation fraught with complications.

[42] The applicant has satisfied the requirements of section 163(1) of the Act. (See *Gent and Another v Du Plessis supra*). His lack of confidence in the management of the Company and his resentment at not being a director or of the shareholders not agreeing to conclude a shareholders' agreement, do not fall within the purview of section 163(1). But I need look no further than the persistent refusal of the board to properly consider (and belatedly concede) the applicant's complaints, or the prejudicial manner in which the Business was carried on by the board, Mr Fiorino and the fourth respondent in regard to the applicant's loan account or the treatment of Mr Fiorino's rental payments,

to find unfairly prejudicial conduct or at the very least, conduct that unfairly disregards the interests of the applicant in terms of any of the three sub-sections of section 163(1)(b) of the Act.

[43] Section 163(2) affords me the discretion to make any interim or final order I consider to be fair and equitable to remedy the prejudice which the applicant has suffered. But that is not the end of the matter. It is well-established that an applicant should formulate the relief that is sought.

[44] This cautionary note was first sounded in *Moosa v Mavjee Bahwan supra* at 152F-G where it was held that an applicant for relief under section 111*bis* of the Companies Act, 1926 (an earlier predecessor of section 163(2) of the Act) must specify the particular relief he wants when he makes a substantive application under this section.

[45] The *dictum* was applied in *Breetveldt & Others v Van Zyl & Others* 1972 (1) SA 304 (T) at 315A-B the court found that "*the application gives no indication of the nature of the order which could or should be made under sec. 111 bis (2) for regulating the conduct of the companies' affairs in the future, or for the purchase of the shares of any members of the companies by other members of the companies, or by the companies themselves, or otherwise. It would be impossible, on the meagre material provided, to arrive at any reasonable solution or fair determination under sec. 111 bis (2). In these circumstances, it cannot be expected that the Court should speculate on what might be a just solution.*"

[46] In *Lourenco & Others v Ferela (Pty) Ltd & Others (No 1)* 1998 (3) SA 281 (T) at 295F-H the applicants had not yet formulated any relief under section 252 of the Companies Act, 1973 (the predecessor to section 163) and the court held that "*it is not sufficient to make a number of general allegations in respect of a particular company. The applicant must establish … the nature of the relief which must be granted to bring an end to the matters complained of…*"

[47] In *Louw & Others v Nel* 2011 (2) SA 172 (SCA) at [32] the applicant had with "*Every amendment cast the net wider*" and had *inter alia* failed to identify the

parties that should be encompassed by the order and on what basis. In those circumstances the court held, with reference to *Breetveldt supra* and *Lourenco supra*, that "*an applicant should formulate the relief that is sought.*"

[48] In *Knipe supra* the applicants did not apply for relief in terms of section 163, but in considering the relevance of the section the court (at 64H-I) approved of the dictum in *Louw supra*.

[49] It is apparent from a proper consideration of the relevant case law that the warning that an applicant is to formulate the appropriate relief in terms of section 163(2), was expressed in circumstances were there was no detailed relief proposed or where the proposed relief did not measure up to the evidence. This is not the case *in casu*.

[50] Further considerations that I must bear in mind when considering the terms of an appropriate order, is that I am not a slave to the applicant's proposed relief. Whilst I am afforded some freedom to carve out an appropriate order (Freedom Stationary (Pty) Ltd & Others v Hassam & Others 2019 (4) SA 459 (SCA)), I should be careful to not interfere in the internal affairs of the Company. (*Du Plessis v Bonnox supra* at [24.1]).

[51] Back then to the applicant's Proposal, which was made subject to the *caveat* I referred to above. I do not propose to repeat the Proposal in all its detail. Suffice it to say that the proposed sale of the Business or Property and distribution of the proceeds between shareholders by an independent attorney, was made subject to unanimous agreement on the identity of the appointed agent and on the terms of any offer at a reserve price of R13½ million, failing which the parties were obliged to accept the outcome of a sale on public auction without reserve; all of which would be at the cost of the Company. Shorn of the terms that were to regulate the proposed sale, the Proposal provides for recalculated financial statements and the immediate end to the inclusion of Mr Fiorino's personal expenses in his loan account. But the letter containing the Proposal is dated and the affidavits reveal that there remain other issues that must be resolved, some of which appear to have been largely attended to already, *i.e.*, it is common cause that another

recalculation of the loan accounts may be required, and that the annual financial statements must be restated to allow for the recalculation and for certain errors that were identified, but for which the amounts were undetermined.

[52] I do not intend to provide for the sale of the Business or Property. There is sufficient information before me that will allow me to fashion an order based on common ground; at least common to the issues that remain. I do not intend by my order to create or amend existing company documents or policy, or to affect changes to the control or management of the Company. Rather, I intend to initiate a process as envisaged in section 163(2)(j) of the Act, which should ensure an expeditious resolution of the matter. (See *De Sousa & Anor v Technology Corporate Management (Pty) Ltd & Others* 2017 (5) SA 577 (GJ) at [359]-[360]

[53] The matter must be resolved, and no purpose will be served referring the disputes to evidence, which no party has requested.

Costs

[54] I have given much consideration to the question of costs. It may with some justification be argued that some portions of the costs should be borne by the auditors (for their admitted errors to which they were alerted by respondents' counsel) or by individual shareholders (for reasons that should be apparent from the reasons for my order). But I did not hear argument on specific individual costs orders and the applicant's Proposal envisaged that the costs of the sale processes (including the costs and commissions of any appointed agents) were to be borne by the Company. The applicant was justified in approaching the court for relief. Significant time and costs were wasted by the trustees' obduracy to properly consider the applicant's complaints. The applicant was vindicated by the significant concessions that were made only in Mr Fiorino's supplementary affidavit that renounced significant defences that were raised in the answering affidavit. There is no reason why costs should not follow the result, save that I would not mulct the Company in the costs of the parties' litigation.

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

1. HBL Barnett Chown ("HBL") shall restate the annual financial statements for the 2015 – 2022 financial years, and also for the 2023 financial year if already audited, and shall provide the restated annual financial statements to the directors and shareholders of the Company by 30 April 2024.

2. In attending to paragraph 1 above and to the extent that the annual financial statements do not so provide, HBL shall take the following into account ("Instructions"):

    2.1. Medical aid contributions paid by the Company shall be written back and allocated to the relevant loan accounts.

    2.2. A reasonable amount for rentals that were payable to the Company by Mr Fiorino's private business, Italian Craft, shall be determined with reference to the rental paid by a tenant for a comparable area in the Property over the period.

    2.3. The restatement shall ignore personal expenses of Mr Fiorino over the period 2015-2021 that were debited to the Fiorino Trust's loan account in the sum of R142,302.23, but shall take into account all subsequent personal expenses of Mr Fiorino that were paid by the Company.

    2.4. The shareholders' loan accounts shall be recalculated and equalised, and for this purpose the separate loan accounts of the applicant and his sister shall be considered as a combined sum, to be halved.

    2.5. Parity in respect of the loan accounts shall be the sum of R1,200,000.00 for each of Fiorino Trust's and Marangoni Trust's loan accounts and R600,000.00 for each of the separate loan accounts of the applicant and his sister.

3. The directors shall convene a general meeting ("General Meeting") within 30 days of receiving the restated annual financial statements from HBL, at which meeting the shareholders shall attend, in good faith, to the following matters:

    3.1. They shall appoint an auditor to replace HBL as auditor for the Company ("Auditor"). If they cannot agree on the appointment, then the applicant shall within 3 days of the General Meeting nominate three names and the directors shall have 2 days thereafter to accept one of the nominees, who shall be the Auditor.

    3.2. They shall attempt to agree the restated annual financial statements and in the event they are unable to do so, they shall attempt to

resolve any disputes that may arise from the restated annual financial statements (“Disputes”).

4. In the event the shareholders are unable to resolve the Disputes, they shall so inform the Auditor, who shall forthwith appoint a registered chartered accountant with no less than 10 years’ experience to review the restated annual financial statements with due regard to the Instructions and Disputes (“Review”).

   4.1. In attending to the Review, the appointed auditor shall not act as an arbitrator, but shall act as an expert referee (“Referee”) and shall determine his own procedure, which shall include the receipt of representations from any of the parties consisting of such documents or written statements as may be relevant to facilitate the Review.

   4.2. The Referee shall furnish a report containing his findings and recommendations to the Auditor, directors and shareholders within 21 days of his appointment.

   4.3. The Referee’s findings and recommendations shall be final and binding on the parties and on the Auditor.

5. Any payments in terms of the agreed restated annual financial statements, alternatively, as may be found by the Referee, to be due to the Company shall be paid in full within 30 days of the General Meeting, alternatively, receipt of the Referee’s report, as may be applicable.

6. Any payments in terms of the agreed restated annual financial statements, alternatively, as may be found by the Referee, to be due by the Company to any party, shall be paid in full within 30 days of the General Meeting, alternatively, receipt of the Referee’s report, as may be applicable.

7. The Auditor shall be responsible for auditing the 2023 (if not yet audited) and 2024 financial statements of the Company with due regard to the agreed restated annual financial statements, alternatively to the findings and recommendations in the Referee’s report.

8. The costs of retaining HBL and the Referee to give effect to this order, shall be paid by the Company.

9. The applicant’s costs of suit, including the costs of two counsel, shall be paid by the second, third, fourth, fifth, sixth and seventh respondents jointly and severally, the one paying the other to be absolved.

_____

P STAIS
Acting Judge of the High Court
Johannesburg

APPEARANCES:

Applicant:	Adv J Smit and M de Oliveira
Instructed by:	KWA Attorneys
Respondents:	Adv SC Vivian SC and MPE van Staden
Instructed by:	Giuseppe Fizotti Attorney
Date of hearing:	10 November 2023
Date of judgment:	14 March 2024