REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 058430/22

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

Date: 17 November 2023 E van der Schyff

In the matter between:

FERENTILLO INVESTMENTS (PTY) LTD	FIRST APPLICANT
MORNE SCHMULIAN N.O.	SECOND APPLICANT
DEON SMITH N.O.	THIRD APPLICANT
ANELIEN SCHMULIAN N.O.	FOURTH APPLICANT

(In their capacities as trustees of the Amanah Trust)

JUANDRE GROBLER	FIFTH APPLICANT

and

MOTOMARK (PTY) LTD	FIRST RESPONDENT
RENTAL CAPITAL MANAGEMENT (PTY) LTD	SECOND RESPONDENT
RENTAL CAPITAL LOGISTICS (PTY) LTD	THIRD RESPONDENT

THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION FOURTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction and background

[1] The applicants, relying on s 163 of the Companies Act 71 of 2008, seek an amendment to the first respondent's Memorandum of Incorporation, effectively authorising the holder of a 20% shareholding in the first respondent (the Company):

i. To appoint a director on the Company's Board; and

ii. To have access to the Company's financial records.

[2] The facts of the case, as succinctly summarised in the applicants' heads of argument, are that the applicants (Ferentillo, the Amanah Trust, and Grobler) are minority shareholders in the Company. The Company operates a vehicle service business centre.

[3] Ferentillo and the Amanah trust each hold a 15% shareholding, and Grobler holds 10% of the shares in the Company. The minority shareholders invested goods and capital in the Company in return for their shareholding. Their capital investments were recorded as loans to the Company. It is common cause that the loans would attract interest and that the capital would be repaid once the Company was profitable.

[4] The second respondent (RCM) and the third respondent (RCL) each hold 30% of the shares and are the majority shareholders. Mr. PJ Janse van Rensburg (VR)

was the Company's sole director at all relevant times. VR is RCM's sole director and shareholder. His brother is RCL's sole director and shareholder.

[5] From 2018 until the parties' relationship started to deteriorate around mid-2021, the shareholders met regularly to discuss the Company's finances and business. Shareholders were provided with monthly income statements and, on occasion, balance sheets. Disagreements between the shareholders started to surface in mid-2021. These turned on a proposition that portions of the shareholders' loan accounts be converted into Preference Shares and that the remaining balance be declared as unpaid dividends, the payment of invoices from Smith's Accountants, and the interest rate payable on amounts owing on loan account.

[6] The fifth applicant (Grobler) resigned as an employee of the Company and now competes with the Company. The parties attempted to mediate their differences early in 2022. However, the applicants' attorney requested certain of the Company's financial records during July 2022. VR refused to provide the records, and the litigation ensued.

The parties' contentions

[7] The applicants did not persist with the condonation application to have their belatedly filed replying affidavit accepted. The late filing of the answering affidavit is condoned. As a result, the court only had regard to the founding and answering affidavits.

[8] The applicants aver that VR's conduct is unfairly prejudicial to them and disregards their interests. They claim that he operates behind closed doors and fails to provide them with the required information and transparency that would foster the trust that minority shareholders require. The applicants believe that their investments in the Company are at risk.

[9] On behalf of the respondents, VR denies that the Company's shareholders were provided with scant information. He avers that they were provided with the information in the records detailed in s 26(1) of the 2008 Companies Act and in addition to frequent management accounts. They were also allowed to consider and debate management accounts during monthly meetings. In addition, Smith Accounting was provided with all the Company's financial information. VR claims that the applicants' contention that the Company is mismanaged is wrong and without factual or legal basis. VR explains that he required the applicants to sign a non-disclosure agreement before granting them access to the Company's bank statements because Grobler threatened to resign and compete with the Company, something he subsequently did and Ferentillo and the Amanah Trust indicated that they would prefer to dispose of their shares in the Company. The information in the bank statements is confidential, and VR needed assurance that it would remain confidential. VR denies that he deducted Grobler's salary against his loan account. He contends that Grobler demanded a higher monthly income. An option for him was to draw a lower salary and increase his income by withdrawing an additional amount against his loan account. These withdrawals were discussed, agreed upon, and signed by Grobler. VR reiterated that Ferentillo and the Amanah Trust's shareholders' loans are repayable only when the company is profitable, solvent, and financially able to do so.

[10] When the application was heard, the applicants' counsel focused his submissions mainly on one incident. He took issue with the fact that VR indicated that he would make a loan of R300 000.00 to the Company. VR then called up a loan the Company owed him, offset the loan amount of R200 000.00 against the amount of R300 000.00, and paid the balance of R100 000.00 into the Company's bank account. The applicants submitted they were unfairly prejudiced in that their loans could only be repaid once the Company was profitable, while VR misled them by offering to make a loan of R300 000.00 and then misusing the opportunity to offset a loan payable to him.

Discussion

[11] Section 163 is one of the remedies available to minority shareholders as a mechanism for minority shareholders to protect and enforce their rights when they have reasonable grounds to believe that directors or majority shareholders have violated them.[1] Due to the application of the 'majority rule' principle in the governance of companies, minority shareholders might be subject to abuse by controlling shareholders. Section 163, the so-called 'oppression remedy,' provides for judicial involvement in exercising the majority rule by shareholders.

[12] A shareholder relying on s 163 needs to make out a case that any act or omission of the company had a result that is either 'oppressive or prejudicial' to the applicant's interests or 'unfairly disregards' it. The oppressive nature of conduct is to be determined based on its results.[2] If regard is had to case law dealing with the provisions of s 252(1) of the 1973 Companies Act, the predecessor of s 163 of the 2008 Companies Act, a minority shareholder seeking to invoke s 163 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 unfair or unjust or inequitable.[3] It is likewise not the motive for the conduct complained of that the court must have regard to, but, as stated, the conduct itself and its effect on the other shareholders.[4] The conceptualisation of shareholder oppression involves an analysis of the peculiar merits of each case.[5]

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[1] See Sibanda, A. 'Advancing the Statutory Remedy for Unfair Prejudice in South African Company Law: Perspectives from International Perspective' (2015) *S.Afr. Mercantile Law Journal* 27:3, 401-417, for a discussion.

[2] In this regard s 163 is similar to s 252 of the Companies Act, 1973. See *Porteus v Kelly* 1975 (1) SA 219 (W) 222A-D; *Investors Mutual Funds Ltd v Empisal (South Africa) Ltd* 1979 (3) SA 170 (W) 177A-D.

[3] *Garden Province Investment v Aleph (Pty) Ltd* 1979 (2) SA 525 (D) at 531.

[4] *Grancy Properties Limited v Manala* 2015 (3) SA 313 (SCA) at para [27].

[5] Sibanda, A. 'Shareholder oppression as Corporate Conduct Repugnant to Public Policy: Infusing the Concept of uBuntu in the Interpretation of Section 163 of the Companies Act 71 of 2008' (2021) 24 *PELJ* 1.

[13] Oppressive conduct can be described as conduct that is coercive and abusive.[6] In *Scottish Co-operative Wholesale Society Ltd v Meyer,*[7] oppressive conduct was considered to be 'conduct that is burdensome, harsh and wrongful, a visible departure from the standards of fair dealing and an abuse of power which results in an impairment of confidence in the probity with which the company's affairs are being conducted.'[8] In *Louw v Nel,*[9] the court held that an applicant for relief under s 252 of the 1973 Companies Act:

> '… cannot content himself or herself with several 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] The Supreme Court of Appeal, in *Grancy,*[10] referred with approval to *Aspek Pipe Co (Pty) Ltd v Mauerberger*[11] when it set out to determine the meaning of the concept of 'oppressive' in s 163:

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[6] *Ibid* 13.

[7] [1959] A 324 HL at 342 referred to with approval in *Grancy, supra,* at para [23].

[8] See, amongst others, *Livanos v Swartberg* 1962 (4) SA 395 W 398, *Marshall v Marshall (Pty) Ltd* 1954 (3) SA 571 (N) 580, *Grancy, supra* at para [23].

[9] 2011 (2) SA 172 (SCA) at para [23].

[10] *Supra,* at para [22].

[11] 1968 (1) SA 517 (C) 525H-526E.

> 'I turn next to a consideration of what is meant by conduct which is "oppressive", as that word is used in sec. 111 *bis* or sec. 210 of the English Act. Many definitions of the word in the context of the section have been laid down in decisions both of our Courts and in England and Scotland and as I feel that a proper appreciation of what was intended by the Legislature in affording relief to shareholders who complain that the affairs of a company are being conducted in a manner "oppressive" to them is basic to the issue which presently lies for decision by me, it is necessary to attempt to extract from such definitions a formulation of such intention. "Oppressive" conduct has been defined as "unjust or harsh or tyrannical" . . . or "burdensome, harsh and 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" . . . It will be readily appreciated that these various definitions represent widely divergent concepts of "oppressive" conduct. Conduct which is "tyrannical" is obviously notionally completely different from conduct which is "a violation of the conditions of fair play.'

[15] In the final instance, regard must be had to the court's view as confirmed in *Grancy* and reiterated in *Geffen and Others v Dominques-Martin and Others,*[12] that the conduct of the majority shareholder has to be evaluated in the light of the fundamental principle that by becoming a shareholder, the latter undertakes to be bound by decisions of the majority shareholders. As a result, not all acts that prejudicially affect a minority shareholder or disregard their interests will entitle a minority shareholder to the relief set out in s 163.

[12] [2018] 1 All SA 21 (WCC) at para [24].

[16] Against this backdrop, I return to the facts of this case. As far as the relief sought by the applicants is concerned, the question is whether the undisputed facts alleged by the applicants, together with the facts alleged by the respondents, which is the test to be applied as laid down by *Plascon-Evans*, entitle the applicants to the relief sought. Did the applicants establish conduct of the nature contemplated in s 163 of the Companies Act?

[17] I have already dealt with the allegations made by the applicants against VR. I fail to discern any 'injury' or prejudice caused by VR to the shareholder-applicants. VR explained satisfactorily that he had provided the applicants with the required financial information and was willing to provide them with detailed bank statements once they had signed a non-disclosure agreement. As for the other issues raised, saved for the issue dealt with below, the allegations raised by the applicants are vague and not substantiated, and I do not deal with them in greater detail.

[18] The applicants fail to indicate how they are prejudiced, and unfairly so, by VR calling up a loan that he was entitled to call up regarding the terms thereof, while they are not in a position to call up their loans before the Company makes a profit. The setoff might not have been discussed with the minority shareholders, but the company's debt decreased by R200 000.00. The terms of the respective loan agreements are different, and the applicants cannot complain about being prejudiced by the terms of the agreements they concluded.

[19] There is no indication that VR's conduct amounts to a breach of the shareholder's agreement regarding how the company is run. His conduct did not derogate any right or interest of any shareholder in their capacity as shareholders. The applicants did not make out a case that any harm or prejudice they might have suffered is something they are entitled to be protected from. It was never contended that any legitimate expectation was created that the minority shareholders would participate in the management of the Company. They knew they invested in a Company with one director. As a result, the application stands to be dismissed.

Miscellaneous

[20] After the replying affidavit and concomitant condonation application were filed, the respondents filed an application to strike out portions of the replying affidavit. As indicated, the applicants did not continue with the condonation application, and the replying affidavit did not form part of the record. I am of the view, however, that the respondents are entitled to the costs occasioned by the filing of the replying affidavit and condonation application.

Costs

[21] The general principle that costs follow success applies. No case is made out for a punitive costs order to be granted

ORDER

In the result, the following order is granted:

1. **The application is dismissed with costs, including the costs occasioned by the late filing of the replying affidavit and the striking-out application.**

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E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicant:	Adv. F Arnoldi SC
Instructed by:	Van Heerden & Krugel

For the first, second, and third respondents:	Adv. BC Stoop SC
Instructed by:	Barnard Incorporated Attorneys
Date of the hearing:	7 November 2023
Date of judgment:	17 November 2023