REPORTABLE **CASE NOS: 1461/2009**
1200/2010

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

In the matter between :

CORNELIS JOHANNES ANDRIES FERREIRA Applicant

and

THE EXECUTORS OF ESTATE LATE
LOUIS McEWAN HALSE NO First Respondent

ROBERT FRIEDRICH HAVEMANN Second Respondent

JOHANNES JOCHEMIS LLOYD Third Respondent

PAUL STEPHANUS ROBBERTSE Fourth Respondent

YUSUF CASSIM Fifth Respondent

JOHANNES VAN DER MERWE BOOYSEN Sixth Respondent

SIX-A PROPERTY INVESTMENTS
(PROPRIETARY) LIMITED
(REGISTRATION NO 1983/011979/07) Seventh Respondent

JUDGMENT

Delivered on 25 June 2010

MOTALA AJ

INTRODUCTION

[1] The Applicant is a minority shareholder in Six-A Property Investments (Pty) Ltd

("the Seventh Respondent"). The issued share capital of the Seventh Respondent comprises six hundred shares, one hundred of which are held by the Applicant while the remaining five hundred are collectively held in the names of the First to Sixth Respondents.

[2] On 12 August 2009 the Applicant instituted motion proceedings in terms of section 252 of the Companies Act, No 61 of 1973 ("the Act"). The relief sought by him was for an order in terms of section 252(3) compelling the First to Sixth Respondents to purchase the Applicant's interest "comprising his shareholding (including the right to occupy Portion 3 of the ground floor premises of the immovable property owned by the Seventh Respondent and situate at Media House, 47 Kings Road, Pinetown, KwaZulu-Natal), together with his loan account and contribution account in the Seventh Respondent" for a price to be agreed upon between the parties *alternatively*, and failing such agreement, for a price to be determined by an arbitrator. The Applicant further sought an order for the appointment of an arbitrator having the powers and duties conducive to a proper determination of the value of the Applicant's interest in the Seventh Respondent. Lest his claim for relief under the provisions of section 252 of the Act for the acquisition of his shares in the Seventh Respondent not be upheld, the Applicant sought leave to approach this Court on the same papers, supplemented in so far as may be necessary, for an order winding-up the Seventh Respondent.

[3] The winding-up application foreshadowed above was indeed instituted by the Applicant on 2 February 2010. The latter application came before Wallis J on 2 March 2010 on which occasion an order was granted consolidating that application with the prior application under section 252 of the Act and adjourning both applications as consolidated for determination on the opposed motion roll on 28 April 2010. It was in these circumstances that the applications came before me.

[4] At the commencement of the hearing before me counsel for the Applicant, namely Mr H. A. de Beer SC, indicated that the only relief being sought by the Applicant was an order for the winding-up of the Seventh Respondent. He expressly disavowed any reliance on the Applicant's claim for relief in terms of section 252(3) of the Act compelling the acquisition of his shareholding and related interest in the Seventh Respondent by the First to Sixth Respondents. Mr de Beer emphasised, however, that in abandoning such claim for relief the Applicant in no way intended to distance himself from the case made and contentions advanced by him in the section 252 application; on the contrary, such remained an indispensable component of his claim for relief for the winding-up of the Seventh Respondent.

[5] On resumption of the hearing following the long adjournment that was taken immediately upon conclusion of his argument, Mr de Beer retracted his earlier

disavowal and abandonment of the Applicant's claim for relief under the section 252 application. He indicated that the Applicant indeed persisted with such claim *albeit in the alternative* to his claim for the winding-up of the Respondent in the event of *that* application not succeeding. Mr Lingenfelder, who appeared on behalf of the First to Fifth Respondents (I pause to mention in parenthesis that neither application was opposed by the Sixth Respondent and that the Seventh Respondent, while signifying its intention to oppose both applications, did not deliver any answering affidavits in furtherance of its opposition) did not raise any objection to the Applicant's change of stance. It was in these circumstances that I granted the Applicant leave to re-instate his claim for relief under section 252 of the Act in the alternative to the claim for winding-up. I could in any event not conceive of any prejudice being caused to the Respondents by my accession to the Applicant's request for such re-instatement.

[6] There is yet a further aspect of the matter that merits mention at the present juncture. It is this. I raised with counsel for the Applicant *in initio* whether his client required me to determine the application merely on the papers. I indicated to counsel that the papers, in my view, disclosed certain factual disputes that may require investigation and determination by way of *viva voce* evidence as a necessary precursor to a proper decision of the application, especially having regard to the considerations of justice, fairness and equity having a bearing on the exercise of my discretion in relation both the main and

alternative claims. Counsel for the Applicant indicated that the Applicant elected to have the matter determined on the papers alone. In accordance with the test enunciated in ***Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (A) at pp 634 E – 635 B, the application falls in the result to be determined on the strength of the facts as stated by the Respondents, together with the admitted facts in the Applicant's affidavits.

RELEVANT BACKGROUND

[7] It would be convenient at this juncture to set out the relevant facts and circumstances constituting the factual matrix in which the current dispute falls to be considered.

[8] On 1 October 1981 the Applicant entered into a partnership ("the first partnership") of attorneys, notaries and conveyancers with Louis McEwan Halse, the Second Respondent, the Third Respondent, one Lester Schoeman and Thomas Ian Askew. All of the partners were attorneys of this Court. The object of the first partnership was the conduct of practice as attorneys, notaries and conveyancers. The first partnership practised in Durban under the name of "Halse Havemann and Partners" and in Pinetown initially under the name "Halse Havemann and Lloyd (Incorporating C. J. A. Ferreira)" and subsequently by the name of "Halse Havemann Lloyd and Ferreira".

[9] During the year 1983 the Applicant and his aforementioned co-partners resolved to form a company in which each would hold an equal shareholding. Such resolution culminated in the formation of the Seventh Respondent on 31 October 1983 with a share capital of R600 divided into six hundred ordinary par value shares of R1 each. The Applicant and his aforesaid co-partners were each issued one hundred shares in the Seventh Respondent. The main object of the Seventh Respondent as defined in terms of the object clause set out in its memorandum of association was "to invest in, and develop property of all kinds". The Seventh Respondent proceeded to acquire the immovable property described as Lot 1875 Pinetown Township, in extent 1588 square metres, bearing the physical address 47 Kings Road, Pinetown ("the property") for the purchase price of R170 000.

[10] The Seventh Respondent intended developing the property, which comprised a vacant stand, by way of the erection thereon of an office block.

[11] It soon became apparent that the shareholders of the Seventh Respondent (ie the Applicant and his co-partners) were unable to fund the entire cost of the proposed development. In order to generate portion of the required development funding the shareholders invited the participation of two individuals who were involved at the time in the building industry, namely Messrs Frank and

Richard Verbaan. The participation of the said individuals was secured in terms of an agreement concluded in writing on 28 May 1984 between the Applicant and his co-shareholders, of the one part, and Frank and Richard Verbaan, of the other part. In terms of such agreement, which the Applicant loosely describes as "The Shareholders' Agreement", the Verbaans acquired one half of the shareholding in the Seventh Respondent for the sum of R102 000. The agreement further provided for the employment of a company controlled by the Verbaans, namely Verbaan Construction (Pty) Ltd, for the purpose of constructing the buildings and completing the development envisaged on the property. The agreement provided, yet further, for the conversion in due course of the Seventh Respondent to a share block company with the intention of operating a share block scheme of the nature contemplated in the Share Blocks Control Act, No. 59 of 1980. The agreement envisaged that the scheme would comprise four share blocks to be equally divided between the Verbaans of the one part and the Applicant and his co-partners of the other part. It envisaged that the latter, as holders of share block numbers 1 and 3, would be entitled to the right of occupation of the ground floor of the proposed development and one half of the undercover parking bays and that the Verbaans, as holders of share block numbers 2 and 4, would be entitled to the right of occupation of the first floor of the proposed development and one half of the undercover parking bays.

[12] It merits mention at this juncture that the envisaged conversion to a share block company never materialised, nor was a share block scheme ever operated in relation to the property.

[13] Pursuant to the aforesaid agreement the Seventh Respondent during the year 1985 obtained a development loan from the Trust Bank of Africa Limited against the security of a first mortgage bond over the property. Verbaan Construction (Pty) Ltd constructed the envisaged office block upon the property in accordance with building plans conducive to the conversion thereof in due course to a sectional title development scheme of the nature contemplated in the then extant Sectional Titles Act 66 of 1971. Upon completion of the development, the first partnership and Verbaan Construction (Pty) Ltd took occupation of the ground floor and first floor respectively of the office block, which became known as Media House, with effect from 1st November 1985. Agreements of lease with 1st November 1985 as commencement date were concluded in December 1985 between the Seventh Respondent and the first partnership in respect of the ground floor and the Seventh Respondent and Verbaan Construction (Pty) Ltd in respect of the first floor. The first partnership duly paid the rentals specified in the agreement of lease relating to the ground floor premises for the period November 1985 to 20th February 1986. Louis McEwan Halse terminated his association with the first partnership by resigning as partner on 28th February 1986. Such *ipso jure* brought about the dissolution

of the first partnership.

[14] A sequel to the dissolution of the first partnership was the formation on 1st March 1986 of a new partnership of attorneys, notaries and conveyancers ("the second partnership") comprising the Applicant, the Second Respondent, the Third Respondent, the Fourth Respondent, Lester Schoeman, Thomas Ian Askew and one D. Grindlay. The second partnership assumed the rights and obligations of the first partnership under the agreement of lease relating to the ground floor premises with effect from 1st March 1986 until 28th February 1988.

[15] The second partnership dissolved on 29th February 1988 simultaneously with the Applicant's resignation as partner. On 1st of March 1988 the Applicant proceeded to take occupation of a portion of the ground floor of the property (since described as Suite 3, Media House) together with two undercover and two open parking bays and part of a storeroom.

[16] The Applicant took up occupation of such portion of the ground floor of the property pursuant to his stance and contention that he was entitled to do so in the exercise of a right of occupation and of reasonable use and enjoyment of the property in proportion to his shareholding. He invoked in support of such stance and contention the object for which the property was developed. He maintained that his liability to the Seventh Respondent *qua* one-sixth

shareholder was limited to payment of one sixth of the latter's expenses.

[17] The Applicant refused to enter into any lease agreement regulating his rights and obligations in relation to that portion of the property occupied by him. He unwaveringly persisted in his stance that his rights as a shareholder included the right to occupy that portion of the property without the payment of any rental or other occupational consideration therefor. The Applicant's continued occupation of the property since March 1988 on the basis contended for by him has, not surprisingly, been a serious bone of contention between himself and his co-shareholders.

[18] Thomas Ian Askew ceased to be a shareholder in the Seventh Respondent by no later than the year 1989. His shares were in fact transferred to Louis McEwan Halse and the Second and Third Respondents. Lester Schoeman too disposed of his shares in the Seventh Respondent to one P.S. Smit who in turn disposed of such shares to the Booysen Family Trust.

[19] Various meetings of the shareholders of the Seventh Respondent were held between February 1999 and March 2004 and several resolutions were passed in the course of such meetings. The *impasse* between the Applicant and his co-shareholders in relation to the question of the Applicant's continued occupation of portion of the property *without* a lease and *without* payment of

a market-related consideration was the dominant feature on the agenda of almost each and every one of such meetings. That very *impasse* also featured prominently as the subject matter of ongoing correspondence exchanged between them.

[20] There were two further contentious developments that merit mention at this juncture:

(a) firstly, during or about 1998 the Seventh Respondent, acting through the instrumentality of its directors at the time, made payment of the sum of R 20 000,00 to each of Halse Havemann and Lloyd and Verbaan Construction (Pty) Ltd to defray the costs incurred by them in respect of the replacement or renewal of light fittings (alleged to be in a poor or defective state) within the respective premises occupied by them. The Seventh Respondent, through its directors at the time, caused such expenditure to be treated in its books of account as being of a capital nature and proceeded to debit the amount thereof *pro rata* against the loan accounts of all its shareholders. The Applicant disapproved of, and raised his disquiet over, such expenditure. He proceeded during the limited tenure of his subsequent directorship to cause such loan account debits to be reversed by passing credit by way of the journalisation thereto of

levies received from the said occupiers. This was consistent with the Applicant's stance that the expenditure in relation to the light fittings was a matter properly for the account of the relevant occupiers. The First to Fifth Respondents maintain that there was nothing sinister or otherwise improper about the Seventh Respondent's original treatment of the cost of replacement of the light fittings as capital expenditure. Such, according to them, properly fell to be borne by the Seventh Respondent as owner and developer of the property;

(b) secondly, the Seventh Respondent, acting through the very same directors, with effect from about the middle of the year 1999 (following the advent of the body corporate of the sectional title development scheme established upon the property) imposed levies on all tenants in occupation of the unit/s owned by the Seventh Respondent to help improve the cash flow necessary for the conduct of its operations, including the payment of levies to the body corporate. The Applicant refused to pay such levies on the ground of his contention that he was not a tenant and hence not liable to do so. It is common cause that *but* for the Applicant the remaining occupiers made payment of such additional levies to the Seventh Respondent.

[21] The Applicant's stance and attitude bearing on his occupation of portion of the

property (ie. Suite 3, Media House and the store room and parking bays referred to earlier herein) were clearly enunciated in a document that he prepared in response to a notice convening a general meeting of the Seventh Respondent for 22nd February 2000. Copies of the said document (which appears as annexure "CF9" at pages 63 to 65 of the papers in case no. 11461/2009) were handed out by the Applicant to shareholders in attendance at the adjourned meeting on 28th March 2000 (the adjournment having become necessary on the ground that there remained unfinished business on the occasion of the meeting of 22nd February 2000). The Applicant pointedly deals in such document with his response to the agenda items relating to his continued occupation of the property and the suggested need for him to conclude a lease agreement of defined duration at a market related rental in the following terms:

> "I have been in occupation of the premises known as Suite 3 Media House since 1 March 1988. My contention is that such occupation is in the first instance based on co-ownership of Sections 1 and 3 and common property of the land and buildings on ERF 1875 Pinetown by virtue of my shareholding in the company, and not on tenancy or lease or otherwise.
>
> I have not appropriated Suite 3 as mine, nor do I allege that the area

thereof is exactly one sixth of that of the ground floor. My liability to the company, whether I occupy the premises or not, is one-sixth of the expenses … after deduction of one–sixth of the genuine rental income. I am prepared to pay such one sixth and nothing more.

The company does not have the power to override the Shareholders Agreement of 17 May 1984. It cannot force a lease agreement onto me, and it cannot determine rentals. It can also not evict me.

Regarding co-ownership the position is as follows:

The members of the original Group of Six, although they were in partnership as attorneys, bought the land in co-ownership, and not in partnership. For practical and commercial reasons, the company was formed and structured to be the juridical owner of the land and future improvements. The Shareholder's Agreement of 1984 confirms the primary and secondary stages of ownership."

[22] The reference in the foregoing extract to the Shareholder's Agreement is in fact a reference to the written agreement referred to earlier in this judgement that was concluded on 17th May 1984 between all of the original members of the Seventh Respondent (who were also partners in the first partnership) collectively as one party and the Verbaans as the other party, with the Seventh Respondent

being a further party on account of its manifest interest therein. As alluded to earlier, the purpose of such agreement was to regulate the sale by the Applicant and his co-shareholders of one half of their collective shareholding in the Seventh Respondent to the Verbaans on the basis of the contemplated conversion of the Seventh Respondent to a shareblock development company. The further purpose of the agreement was to deal with the development of the property by way of the construction thereon of an office block and the appointment of Verbaan Construction (Pty) Ltd as building contractor.

[23] It suffices to mention for present purposes that the meeting of 28 March 2000 failed to resolve the *impasse*. The meeting ended acrimoniously with four of the Applicant's five co-shareholders walking out.

[24] On 22nd January 2004 the Applicant received a letter form his co-shareholder, the now deceased Louis McEwan Halse, in *inter alia* the following terms:

> "There is no point in reverting to the past wrangles and unpleasantries which held up the 1999 and following financial statements for ages – solved by mainly allowing you "on board" to adjust your objections to your satisfaction. As far as I am concerned, the only aspect in the current financial statement is to adjust your indebtedness to the Company for unpaid "rentals", "levies" or monies owing by you – whatever name you

wish to place on it – together with appropriate interest thereon.

I, for one, am determined at the meeting duly called for on Monday, 26th January 2004 … to get the present dispute settled once and for all by allocating specific portions of space areas to individuals fairly and equivalent to our respective shareholdings; to secure same by leases at rentals covering the Company costs, exterior maintenance and bond repayments; based on proper plans by a surveyor or architect; and compliance with any Body Corporate requirements so as to enjoy sectionalisation, etc in the future if required.

Nobody can have any more then they are entitled to and all will have to meet their obligations by sub–letting if necessary or desired, or personal occupation in your particular case.

I do not intend the meeting… to be one of confrontation, but rather a genuine and final get–together of sensible parties to separate our respective interests in our mutual investment in such a way as to obviate any future differences – and get out of one another's hair!"

[25] It is unclear whether or not any meeting of the members of the Seventh Respondent in fact occurred on 26th January 2004 and, if so, what the outcome

was. What is clear, however, is that the lingering *impasse* between the Applicant and his co – shareholders remained unresolved.

[26] The next development of consequence was a meeting of all of the members of the Seventh Respondent held in the boardroom of the KwaZulu – Natal Law Society Library on 30th March 2004. Such meeting concluded with consensus being reached in the terms reflected in the minutes appearing as annexure "CF15" at pages 82 to 85 of the record in case number 11461/2009. It is necessary for purposes of this judgement to record what I consider to be the salient resolutions passed at such meeting:

"1. That CJA Ferreira (a reference to the Applicant) continue to occupy the portion of the premises on the ground floor of Media House currently occupied by him without paying any consideration therefor other than the monthly expenditure referred to in 3 below without deduction or demand as determined by the company auditors from time to time.

2. That the Group A shareholders (a reference to the Applicant's co-shareholders) are entitled to occupy the balance of the ground floor of Media House on the same basis as CJA Ferreira as set forth in resolution 1 above *mutatis mutandis* .

3. That the shareholders of the company pay the expenses of the company according to their respective shareholdings.

4. That the shareholders are entitled to sub–let their respective portions of the ground floor of Media House, should they wish to do so, to any other person or entity and the company hereby consents to such sub–letting."

[27] Notwithstanding the agreement reflected in the foregoing resolutions, it is common cause that the Applicant with effect from the date thereof made no payment whatsoever towards the expenses of the company, whether in proportion to his shareholding or at all. This even though the Applicant proceeded to sub–let that portion of the property previously occupied by him to a tenant from whom the Applicant has derived and continues to derive a rental income. The Applicant has sought to justify his non–payment on the ground that the auditors of the company did not make a determination of the expenses of the company and his *pro rata* liability to contribute as required by the agreement of 30th March 2004.

[28] It is in fact common cause that the Applicant's cessation of all payments to the Seventh Respondent in fact occurred a whole year prior to the meeting of 30th March 2004. On 18th March 2003 the Applicant addressed a letter to the Seventh Respondent (a copy of which appears at page 114 of the papers in case no.

11461/2009) in which he advised that "owing to both work inflow and liquidity problems" he was "unable for the present and foreseeable future to pay "rent", for lack of a better word, to the Company". The correct position, therefore, is that the Applicant ceased making any payments to the Seventh Respondent, or to contribute towards its expenses, by no later than 18 March 2003.

[29] On 4th October 2004 the Seventh Respondent passed a resolution pursuant to the provisions of section 220 of the Act removing the Applicant as a director. The requisite special notice of the intention to pass such resolution, together with the invitation to make written representations prior to the meeting and to make oral representatives at the meeting in relation thereto, was given to the Applicant on 3rd September 2004.

[30] On 2nd June 2005 the Seventh Respondent, acting through its director Louis McEwan Halse, despoiled the Applicant of his possession and occupation of Suite 3 Media House by causing the locks of the front doors affording access thereto to be changed. Such conduct on the part of the Seventh Respondent was no doubt borne out of the deep frustration occasioned by the Applicant's persistent failure to make any payment or contribution towards the expenses of the Seventh Respondent notwithstanding the aforesaid agreement reached on 30th March 2004 and his continued occupation of portion of the property. The foregoing considerations did not, however, justify the conduct of the Seventh

Respondent in illicitly depriving the Applicant of his possession of the property and barring his access thereto. The Applicant in order to redress the said state of affairs sought and obtained an order from this Court in proceedings under case number 7871/2005 restoring his possession of the relevant portion of the property.

HAS THE APPLICANT ESTABLISHED A CASE FOR THE WINDING UP OF THE SEVENTH RESPONDENT IN TERMS OF SECTION 344 (h) OF THE COMPANIES ACT 61 OF 1973 ?

[31] It is against the aforesaid background that the Applicant's primary claim for the winding up of the Seventh Respondent falls to be considered. The Applicant premises such claim on section 344 (h) of the Act, which empowers a Court to wind up a company if "it appears to the Court that it is just and equitable that the company should be wound up".

[32] It is well established that section 344 (h), unlike the preceding subparagraphs of section 344 "postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding-up (*per* Trollip J [as he then was] in **Moosa N.O. v Mavjee Bhawan (Pty) Limited 1967 (3) SA 131 (T) at 136**; **Erasmus v Pentamed Investments (Pty) Ltd 1982 (1) SA 178 (W) at 181** ; **Tjospomie Boerdery (Pty) Limited v Drakensberg Botteliers (Pty)**

Limited 1989 (4) SA 31 (T), **especially at pp.42-43; Apco Africa (Pty) Ltd v Apco Worldwide Inc. 2008 (5) SA 615 (SCA) at 621**). In **Tjospomie** *(ibid)* Stegmann J concluded, with reference to the judgment of **Innes CJ** in **Hull v Turfmines Limited 1906 TS 69 at 75,** that whether or not the conclusion of law is to be derived is not, and never could be, a matter for the exercise of a discretion in its true sense. Difficult though justice and equity are to define, they have to be seen as setting an objective standard that will be the same in every court in the land. He proceeded to hold, correctly in my view, that it is only once the relevant jurisdictional fact envisaged by section 344 (h) has been found to be present (i.e. the relevant conclusion of law has been drawn) that the section thereupon vests the court with a power to grant or withhold a winding-up order. It is this power that is to be properly described as "discretionary".

[33] It is well established, moreover, that the expression 'just and equitable" is not to be interpreted so as to only include matters *ejusdem generis* the other grounds specified in section 344 (**Loch v John Blackwood Limited [1924] AC 783 (PC); Emphy v Pacer Properties (Pty) Ltd 1979 (3) 363 (D) at 365**; **Erasmus** case ***supra* at 181**. It confers upon the court a wide discretionary power which must be exercised judicially taking into account all relevant circumstances (**Moosa No** case, ***supra***, **at 136**; **Emphy** case, ***supra*, at 369**). No general rule can be laid done as to the nature of the circumstances that have to be borne in mind in considering whether a case comes within the

expression (**Davis and Co Ltd v Brunswick (Australia) Ltd [1936] 1 All ER 299 (PC) at 309**). The considerations of justice and equity are those between the competing interests of all concerned (**Moosa** case ***supra*** **at 136**).

[34] It must be remembered, however, that the just and equitable ground is not some kind of "catch all" ground. It is rather a special ground on which certain features of the way in which a company is being run or conducted can be questioned to the point of requesting the Court to wind it up. As was pointed out by Coetzee J (as he then was) in **Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W)**, whilst not intended to constitute any kind of *numerus clausus* and subject to recognising the right of the Courts to devise further categories from time to time, there were broadly five categories into which cases decided both in England and South Africa for winding up on this special ground have fallen, ie. "disappearance of the company's *substratum"*, "illegality of the objects of the company and fraud committed in connection therewith", "deadlock", "grounds analogous to those for the dissolution of partnerships" and "oppression".

[35] It is necessary for purposes of the present matter to briefly dwell on the "deadlock" principle justifying the winding up of a company on the just and equitable ground. This principle, derived from **In re Yenidje Tobacco Company Limited [1916] 2 Ch 426 (CA)** is founded on the analogy of

partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. If by conduct which is either wrongful, or otherwise not in accordance with the arrangement existing between them, one or more of the members destroys that relationship, the other member or members will be entitled to claim that it is just and equitable that the company should be wound up (**Moosa** *supra*, at 137 ; **Emphy** *supra* at 366H – 367B; **Apco Africa** *supra* at 625). Actual deadlock is not however necessary for the dissolution of a partnership. All that is necessary is to satisfy a court that it is impossible for the partners to place that confidence in each other which each has a right to expect and that such impossibility *has not been caused by the person seeking to take advantage of it* (my emphasis).

[36] With regard to the disappearance of a company's substratum justifying its winding up on the just and equitable ground, what is required is that the realisation of the company's object (or all its objects, if it has more than one), *determined by reference to its memorandum* (my emphasis), has become objectively impossible (**Taylor v Welkom Theatres (Pty) Ltd 1954 (3) SA 339 (O) at 350** and cases there cited; **Witwatersrand Deep Ltd v Union Mining Finance and Investment Ltd 1924 WLD 35 at 48; Re Kitson &**

Co Ltd 1946 [1] All ER 435 (CA) at 438) . Whether or not the company's *substratum* has disappeared is a question to be determined independently of the wishes or intentions of the members or the directors (*ibid* at 439).

[37] A final principle relevant to the question of winding up on the just and equitable ground merits mention. It is this. An applicant relying on this ground must come to Court with clean hands, ie. he must not himself have been wrongfully responsible for, or have connived at bringing about, the state of affairs which he asserts results in its being just and equitable to wind up the company (**Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 (HL) at 374; [1972] 2 All ER 492 at 507**; **Emphy** case *supra* at 368; **Wackrill v Sandton International Removals (Pty) Ltd 1984 (1) SA 282 (W) at 292**).

[38] The Applicant seeks to have the Seventh Respondent wound up on the just and equitable ground on a twofold basis. Firstly, he contends that a deadlock has developed between himself and his co-shareholders in relation to the vexed question of the Applicant's gratuitous occupation of portion of the property, in particular Suite 3 Media House together with a store room and certain parking bays. As is apparent from what has gone before, it is the Applicant's contention that he is entitled to possess and occupy that portion of the property of the Seventh Respondent on the basis of what he describes as right of "co-ownership *pro rata* to my shareholding". The Respondents, on the other hand, contend

that the Applicant has no right of occupation on the basis of any co-ownership of the property. The property, they maintain, vests solely and exclusively in the Seventh Respondent *qua* owner and that any right to possession and occupation of any portion of the same is dependent upon the lawful derivation thereof from the Seventh Respondent, which required a lease agreement being concluded with the Applicant against the consideration of a market related rental. It is clear that the foregoing *impasse* between the parties has been the fundamental cause of the breakdown of the personal relationship of confidence and trust between them. It has brought about a situation were the Applicant and his co-shareholders are no longer able to act reasonably and honestly towards one another and with friendly co-operation in running the affairs of the Seventh Respondent. It is clear moreover that such dissension between the parties has engendered a deep seated antipathy between them and was the very consideration that prompted the Applicant's removal as a director of the Seventh Respondent in the circumstances described above.

[39] I shall accept for purposes of this judgment that the "deadlock" principle can indeed be applied in the present matter. My acceptance of the foregoing proposition should, however, not be equated with my having made any positive finding in that regard. There is force in the contention that the partnership relationship created by the first partnership, which was confined to the conduct of the practice of attorneys, conveyancers and notaries in partnership, did not

extend to the subsequent acquisition of the property through the vehicle of the Seventh Respondent. The formation of the Seventh Respondent and the latter's subsequent acquisition and development of the property could not indisputably be said to have been in necessary furtherance of the business of the first partnership. The fact that portion of the office block erected upon the property (ie. Media House) housed the practice of the first partnership for a time could not be said to have altered the picture in any material respect. Notwithstanding the aforegoing, I accept that the Seventh Respondent constitutes a "domestic" company in which there is required to exist between the members thereof in regard to its affairs a particular personal relationship of confidence and trust characterised by reasonableness and honesty towards one another and a spirit of friendly co-operation between them. The destruction of that relationship would entitle the Applicant to claim that it is just and equitable that the Seventh Respondent should be wound up *provided that* such was not attributable to the wrongful conduct of the Applicant himself. This is because of the well established principle that an applicant cannot rely on a collapse of the relationship wrongly caused by himself (see the **Ebrahimi , Emphy** and **Wackrill** cases *supra*).

[40] The destruction of the relationship between the Applicant and his co-shareholders has not resulted in literal deadlock in relation to the affairs of the Seventh Respondent. The Applicant is not a director of the Seventh Respondent.

He is moreover a minority shareholder holding not more that one sixth of the overall voting power for all shareholders in general meeting. This is not a case where one is dealing with two rivalling factions holding equal voting powers. The absence of literal deadlock does, however, not in itself preclude the grant of a winding up order on the just and equitable ground provided of course that such is justified in the light of the other considerations canvassed above.

[41] I proceed to examine the alleged right of possession and occupation of portion of the Seventh Respondent's property for which the Applicant has consistently contended and which he continues to assert. The Applicant essentially contends that he is entitled to occupation of that part of the property currently in his possession on the basis of co-ownership *pro rata* to his one sixth shareholding in the Seventh Respondent. He avers that such right finds support in the written partnership agreement concluded between the members of the first partnership in November 1985, the written agreement concluded in May 1984 between the Applicant and his co-shareholders in the Seventh Respondent at the time, the Verbaans and Seventh Respondent (referred to by the Applicant as "the shareholders agreement") and the agreement concluded on 30th March 2004 as reflected in the minutes of the meeting of shareholders described above.

[42] There is, in my judgment, no substance whatsoever in the Applicant's contention. The agreements invoked by the Applicant manifestly do not bear out

the same. Clause 22 of the partnership agreement (appearing at page 43 of the papers in case number 11461/2009) on which the Applicant has sought to rely provides merely that the shares held in the Seventh Respondent by any of the partners of the first partnership would remain vested in them notwithstanding the dissolution of the first partnership, and further regulated the right of disposition of such shares. The right contended for by the Applicant finds no support in such clause. I find the Applicant's invocation thereof perplexing to say the least.

[43] I have already canvassed the nature, purpose and effect of the agreement concluded during May 1984 between the Applicant, his co-shareholders and the Verbaans. The right of possession and occupation contended for by the Applicant does not find support in such agreement on any reasonable interpretation thereof. The agreement contemplated the conversion of the Seventh Respondent to a share block development company, comprising four share blocks, on the basis of the allocation of two share blocks to the Verbaans, with the concomitant right of exclusive use and occupation of the first floor of the office development and one half of the undercover parking bays, and the allocation of the remaining two share blocks to the first partnership with the concomitant right of exclusive use and enjoyment by the latter of the ground floor of the development and the remaining one half of the undercover parking bays. As alluded to earlier, the share block conversion contemplated in such

agreement never materialised with the result that neither the Verbaans nor the first partnership became vested with the proposed rights of use and enjoyment that would respectively have accrued to them had the share block scheme indeed been established. It was for this reason that agreements of lease were concluded between the Seventh Respondent, *qua* owner, and each of the first partnership and Verbaan Construction (Pty) Ltd, *qua* tenants, in respect of the ground floor and first floor respectively of the building on the property upon completion of its construction.

[44] I now deal with the agreement reflected in the minutes of the meeting of the shareholders of the Seventh Respondent on 30th March 2004. As I have already alluded to, that agreement *at best for the Applicant* conferred upon him the right to remain in occupation of the portion of the property then occupied by him without paying any consideration therefor other than payment of his *pro rata* share of the expenses of the Seventh Respondent in proportion to his shareholding. The agreement also empowered the Applicant to sub–let that portion of the property occupied by him should he be inclined to do so.

[45] I am unable to fathom the basis of the Applicant's reliance on that agreement as lending support for, or giving credence to, his contention that he is entitled to occupation of that portion of the property on the basis of co-ownership *pro rata* to his shareholding. The high water mark of the agreement reflected in the

minutes of the meeting of 30th March 2004 was to allow the Applicant and his co-shareholders occupation of portions of the property subject to their reciprocal obligation to make payment of the expenses of the Seventh Respondent in proportion to their respective shareholdings. It is in any event not without significance that the Applicant, despite remaining in occupation of portion of the property and later proceeding to sub-let the same for reward, made no payments whatsoever toward the expenses of the Seventh Respondent, whether in proportion to his shareholding or at all. I find the explanation advanced by the Applicant to justify or otherwise excuse his non-payment (ie. that he was awaiting determination by the company's auditors of the company's expenses and the measure of his *pro rata* liability to contribute thereto) to be disingenuous. The Applicant was indeed contributing towards the expenses of the company until March 2003 when he unilaterally suspended his contributions citing workflow and liquidity problems. I would at the very least have expected the Applicant immediately after conclusion of the shareholders' meeting of 30th March 2004 to resume payment of the monthly amounts he had been contributing towards the expenses of the Seventh Respondent until about March 2003. The Applicant's averment that the determination by the auditors of the Seventh Respondent of the precise amount of the expenditure of the Seventh Respondent and the extent of his liability to contribute thereto were necessary pre – conditions to the commencement of his liability does not bear scrutiny. Paragraph 1 of the minutes of the meeting of 30th March 2004, as amended in

manuscript, contemplated no more than review and determination by the auditors of the expenses of the company *from time to time* in the future (my emphasis). The Applicant's contention that that clause meant that the obligation to make payment towards the expenses of the company was to remain in total abeyance until the auditors had determined afresh the expenditure of the company, and his resultant contribution thereto, is bereft of substance. If the Applicant was indeed sincere about his commitment to fulfilling his obligation to pay his *pro rata* share of the expenses of the Seventh Respondent but was prevented from doing so for lack of determination thereof by the auditors, why, it may legitimately be asked, did he not take any steps to seek and obtain such determination? The most plausible and compelling inference to be drawn, in my judgment, is that the Applicant was less than *bona fide* about honouring his financial obligations to the Seventh Respondent. I find the conduct of the Applicant in remaining in possession and control of portion of the Seventh Respondent's property, in making no payments whatsoever to the Seventh Respondent since about March 2003 and in persisting on non - payment even after he sub-let the same and derived an income therefrom to be reprehensible and deserving of strong censure. One can in this context readily understand the destruction of the working relationship between the Applicant and the Respondents and the intense acrimony between them.

[46] I am in agreement with counsel for the Respondents (at least the First to Fifth

Respondents) that the Applicant's contention that his shareholding in the Seventh Respondent rendered him co-owner of portion of the property in proportion to his shareholding demonstrates a serious lack of appreciation on his part of the distinction between the juristic nature of a partnership and a registered company. The ownership of the assets of a company, including any immovable property registered in its name, vests solely and exclusively in the company. Its shareholders have no proportional right of ownership in and to the same. Such principle finds clear exposition in the seminal judgment of the then appellate division in **Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530 at PP.550-551**:

> " … I come to inquire whether the transaction complained of is a contravention of the statues. In other words, whether ownership by Dadoo Ltd is in substance ownership by its Asiatic shareholders. Clearly in law it is not. A registered company is a legal persona distinct from the members who compose it… That result flows from the separate legal existence with which such corporations are by statute endowed, and the principle has been accepted in our practice. Nor is the position affected by the circumstance that a controlling interest in the concern may be held by a single member. This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property vested in the

company is not, and cannot be, regarded as vested in all or any of its members."

[47] In my view, the fact that the Applicant is an attorney of this Court renders the proposition that he contends for all the more startling.

[48] It is, in all the circumstances, the finding of this Court that the collapse of the relationship between the Applicant and his co-shareholders is attributable to the Applicant's own wrongful conduct consisting primarily of his arrantly untenable stance that his shareholding in the Seventh Respondent entitled him to rights of possession, use and occupation of portion of the property akin to his being co-owner thereof. As I have already demonstrated in my discussion above, the evidential material before me manifestly does not support the Applicant's contention on any basis. The effect of my finding is to non-suit the Applicant in his bid to wind up the Seventh Respondent on the ground that the "deadlock" principle renders it just and equitable to do so.

[49] Something needs to be said about the further basis on which the Applicant seeks a winding up order, ie. that the winding up of the Seventh Respondent is also indicated by the disappearance of its substratum. As I have already alluded to earlier in this judgment, the disappearance of a company's substratum falls to be determined by reference to its memorandum. The specific question for

determination is whether the realisation of the Seventh Respondent's object *as described in its memorandum* has become objectively impossible (**Taylor, Kitson & Witwatersrand Deep** cases *supra*). The memorandum of the Seventh Respondent (appearing at pages 18 to 20 of the record in case number 1200/2010) defines its object as "investment in, and development of property of all kinds". While it is indisputable that the development of the property by way of the erection of an office block thereon was motivated by the consideration of providing housing for the practice of the first partnership, such was manifestly not its defined object. The object of investing and developing property of all kinds has not been rendered impossible by the dissolution of the first partnership. In any event, the first partnership dissolved with the retirement or resignation therefrom of the individual Louis McEwan Halse on 28 February 1986. Notwithstanding that, the Seventh Respondent continued thereafter to conduct business in pursuance of its defined object. In particular, it proceeded as sectional title developer with the establishment of a sectional title scheme upon the property and to cause sectional transfers of units in the scheme to be registered during or about June 1999.The suggestion, therefore, that the Seventh Respondent's substratum has disappeared is in my judgment devoid of substance.

[50] Further to the aforegoing, there is no suggestion before me that the Seventh Respondent is anything but a commercially solvent company. Despite the

financial difficulties that have from time to time beset the Seventh Respondent, attributable at least in part to its financial discord with the Applicant, the Seventh Respondent would appear to be a commercially viable entity. The evidence before me is that it has fully discharged its indebtedness to the mortgagee in favour of whom it encumbered the property under the mortgage loan agreement concluded to fund development of the property. It must be remembered that it is not considered to be just and equitable to wind up a commercially solvent company at the instance of a member merely because such member is in the minority **(Wiseman v ACE Table (Pty) Ltd 1991 (4) SA 171 (W) at 181 – 182:** see also **Kanakia v Ritshelf 1004 CC t/a Passage to India 2003 (2) SA 39 (D))**

[51] In all the circumstances, I am not satisfied that it would be "just and equitable" within the meaning of that expression in terms of section 344 (h) of the Act for the Seventh Respondent to be wound up. In my judgment the Applicant's bid to wind up the Seventh Respondent on that ground falls to be refused.

THE CLAIM FOR ALTERNATIVE RELIEF IN TERMS OF SECTION 252 OF THE COMPANIES ACT

[52] Section 252 of the Act provides insofar as is relevant:

"(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may, subject to the provisions of sub section (2), make an application to the Court for an order under this section.

2) ……

……

…..

3) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any member of the company by other members thereof or by the company and, in the event of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise".

[53] An applicant seeking relied under the section bears the onus to establish:

(a) an act or omission by the company itself which is unfairly prejudicial to

the applicant or certain of its members, or that its affairs are being managed in such a manner;

(b) the nature of the relief sought to remedy the matters complained of; and

(c) that it is just and equitable that such relief be granted.

(**Lourenco v Ferela (Pty) Ltd (No. 1) 1998 (3) SA 281 (T) at 295 F-H; Ben–Tovin v Ben-Tovin 2001 (3) SA 1074 (C) at 1093; Carlisle v Atcorp Holdings Ltd 2003 CLR 261 (W)** and the authorities there cited)

[54] It is not sufficient, however, to establish merely that a particular act or omission of a company results in a state of affairs which is unfairly prejudicial, unjust or inequitable to the applicant seeking relief; what must be established in addition is that the particular act or omission was *itself* one which was unfair or unjust or inequitable; it must moreover be established that the *result* of the conduct of the affairs in that manner is unfairly prejudicial, unjust or inequitable (**Garden Province Investment v Aleph (Pty) Ltd 1979 (2) SA 525 (D) at 531**). It

is also necessary in every case to establish that it is just and equitable that relief should be granted. This requirement is apparent from the use in section 252 (3) of the Act of the words "and if the Court considers it just and equitable" in relation to the discretionary power of the court to make such order as it deems fit with a view to bringing to an end the matters complained of. In **Donaldson Investments (Pty) Ltd v Anglo – Transvaal Collieries Ltd 1979 (3) SA 713 (W) at 719** Preiss J commented on this requirement as follows :

> "it seems to me that this is perfectly logical; for instance, an act which is unjustly prejudicial may be subsequently rectified or balanced by subsequent conduct, or else it may fall within the provision of the *de minimis* principle".

[55] The Applicant's counsel in both his written heads of argument and in oral argument before me relied on the following acts or omissions as constituting conduct that is unfairly prejudicial, unjust or inequitable or as demonstrating the Applicant's contention that the affairs of the Seventh Respondent are being conducted in a manner unfairly prejudicial, unjust or inequitable to him:

i) the failure of the Seventh Respondent to implement the agreement of 30th March 2004 as reflected in the minutes of the meeting referred to above. The Applicant's specific complaint is that the Seventh Respondent

failed to instruct its auditors to determine its expenses and to apportion the same among its shareholders on a *pro rata* basis in accordance with their respective shareholdings;

ii) the alleged failure of the Seventh Respondent to finalise outstanding financial statements and tax returns and the failure of its directors to hold directors' meetings;

iii) the failure of the Seventh Respondent to hold annual general meetings in compliance with the time periods prescribed in terms of section 179 (1) (v) of the Act;

iv) the claim by the firm of attorneys Halse Havemann & Lloyd, which occupied portion of the ground floor of the property, of the sum R 19 3000,00 as an input tax for value added tax purposes on "rentals" paid. The Applicant disputes that any rentals were payable by such firm under any valid lease agreement with the Seventh Respondent so as to entitle it to claim the vat portion thereof as an input tax;

v) the illicit conduct of the Seventh Respondent, through its director Halse, in unlawfully depriving the Applicant on 2nd June 2005 of his undisturbed possession and occupation of the portion of the property possessed and

controlled by him since March 1988. As indicated earlier, the Applicant was restored to possession shortly thereafter by order of this Court in proceedings for a *mandament van spolie*;

vi) the Applicant's unhappiness with the manner in which various expenses of the Seventh Respondent were treated for accounting purposes. He cites in particular the payments made by the Seventh Respondent in respect of light fittings replaced within the premises of Halse Havemann & Lloyd and Verbaan Construction (Pty) Ltd and the debiting of shareholders' loan accounts for that purpose, as well as the unauthorised debiting of shareholders' loan accounts with the amounts of levies raised by the Seventh Respondent;

vii) the incessant bickering and the deep-seated acrimony between the Applicant and his co-shareholders in consequence of the "deadlock" over the question of the Applicant's continued possession and enjoyment of portion of the property without payment of any rentals or other occupational consideration. This aspect has already been fully canvassed earlier in this judgment.

[56] Before I proceed to consider whether the Applicant has established the requirements for relief in terms of section 252, in particular whether he has

proven unfairly prejudicial, unjust or inequitable conduct on the part of the Seventh Respondent or his co-shareholders, a prior question that merits consideration is whether my finding that it is *not* just and equitable within the meaning of section 344 (h) of the Act to wind up the Seventh Respondent is in itself also decisive of the question of whether it is just and equitable to make an order under section 252? While it is well established that facts which may justify winding up on the just and equitable ground may also justify the grant of relief in terms of section 252 (**Hart v Pinetown Drive-in Cinema (Pty) Ltd 1972 (1) SA 464 (D) at 467; Leon Van Rooyen 1988 *Tydskrif vir die Suid -Afrikaanse Reg* 268 at 283**), the corollary proposition, ie. that conduct will not be unfair unless it would also justify a winding up order, is a *non sequitur* . In **O'Neill and another v Phillips and others [1999] UKHL24; [1999] 1 WLR 1092; [1999] 2 All ER 961 (HL)** Lord Hoffmann, at part 5 of his speech, drew a useful illustration of the operation of the parallelism between the concept of justice and equity in a winding up application of the sort contemplated by section 344 (h) of the Act and unfairness in the context of section 252 when he stated that the parallel "does not mean that conduct will not be unfair unless it would have justified an order to wind up the company… The parallel is not in the conduct which the court will treat as justifying a particular remedy but in the principles upon which it decides that the conduct is unjust, inequitable or unfair." I agree, with respect, that while there is indeed a parallelism between the requirements of section 344 (h) and section 252 of the

Act, my finding that it is *not* just and equitable to wind up the Seventh Respondent does not automatically dispose of the claim for relief under section 252.

[57] I now proceed to examine the individual grounds upon which the Applicant places reliance in his bid for relief in terms of section 252 of the Act. I deal firstly with the deadlock and acrimony between the Applicant and his co-shareholders. I can but only reiterate my finding that such unhappy state of affairs is directly attributable to the Applicant's indefensible stance that he is entitled to use and occupation of portion of the property on the basis of a right of co-ownership proportionate to his shareholding in the Seventh Respondent. For the reasons set out above, such stance is in my view wholly untenable. The Applicant's further conduct in making no payments whatsoever to the Seventh Respondent, or towards its expenses, since about March 2003 and moreso after the agreement of 30th March 2004, while continuing to enjoy use and occupation of portion of the property and even deriving an income therefrom through sub-letting, reflects a disturbing disregard for the financial interests and welfare of the Seventh Respondent. The severe polarisation in the relationship between the Applicant and his co-shareholders is hardly surprising in such context. The destruction of the relationship between the Applicant and the Respondent was manifestly the product of the Applicant's own wrongful conduct. It cannot in my view be said to have been occasioned by any oppressive or otherwise unfairly

prejudicial, unjust or inequitable conduct on the part of the Seventh Respondent or any of its other shareholders.

[58] I have also given careful consideration to each of the other grounds for relief enumerated above. I find no merit in any of such grounds. They do not in my judgment begin to disclose conduct, whether actively or by omission, by the Seventh Respondent or any of the Applicant's co-shareholders sufficient to meet the requirements of section 252. As alluded to earlier, the Applicant was not only required to establish conduct resulting in a state of affairs unfairly prejudicial, unjust or inequitable to *him*, but also that the particular act or omission that he complains of was *itself* one which was unfair or unjust or inequitable (**Garden Province** case ***supra*** at 531).

[59] I pause to deal specifically with the conduct of the Seventh Respondent in the year 2005 in despoiling the Applicant of his peaceful and undisturbed possession of portion of the property. While such conduct was no doubt unjust and inequitable, its prejudicial effect was removed by the Applicant's immediate restoration to possession in terms of an order of this Court in proceedings for a *mandament van spolie*. It is in my view also of some moment that the spoliation that the Applicant complains of occurred some five years ago and that the Applicant has, save for the limited period of time that it endured, otherwise enjoyed undisturbed and uninterrupted possession of portion of the property

since March 1988. As indicated above, such possession was wholly gratuitous and without the payment of any consideration whatsoever with effect from about March 2003. The effect of all of the aforegoing cannot and does not now render it just and equitable, in my judgment, to afford the Applicant relief on the basis of that complaint.

[60] It is in any event common cause on the papers that the Respondents (or at least some of them) were and remain interested in acquiring the Applicant's interest in the Seventh Respondent. *Appropos* the foregoing, the Third Respondent makes the following statement - in the answering affidavit (at paragraphs 22 and 23) which significantly stands undisputed by the Applicant in his replying affidavit-:

> "I would … have preferred to resolve the matter amicably and I endeavoured to do so before this affidavit was deposed to. However, the Applicant claims an interest in the Seventh Respondent which is unique and far exceeds that of a normal shareholder in a company which is his shares, and if he has one, any credit amount in his loan account. The additional components of his claimed interest are set out in paragraph 13 (c) to (e) of his (founding) affidavit. Quite plainly there is no prospect of any purchaser of his interest giving value for those components…. I am confident that the Applicant will find a purchaser for his interest the

moment he abandons his out of the ordinary views and draws a clear distinction between himself as shareholder and the Seventh Respondent as a separate entity…"

[61] The interest asserted by the Applicant in the Seventh Respondent, as is apparent from the founding papers, is not confined to his shareholding comprising one hundred fully paid up ordinary shares and the credit balance of his loan account, but is also alleged to extend to:

i) the right to repayment of contributions made by him towards the expenses and liabilities of the Seventh Respondent from its inception in an amount of R 533 285,00; and

ii) what he describes as "the exclusive but unregistered right of use and occupation of certain office and storage space and parking bays… consisting of 2 under-cover parking bays, 2 open parking bays, 10 square metres, being one half, of the floor area of storage space in Section 1 and approximately 147 square metres of office space and kitchen and ablution facilities in Section 3".

[62] The Applicant's claim of right to the exclusive use and occupation of portions of the property is, as I have already found, bereft of substance. His ordinary shareholding in the Seventh Respondent does not endow him with any such

right as a matter of law, nor has the Applicant established the existence of such right on any other basis. The basis of the Applicant's claim to repayment of the cumulative amounts paid by him towards the expenses of the Seventh Respondent from its inception is also unclear. This especially when the Applicant himself avers in his replying affidavit that shareholders of the Seventh Respondent were obliged to contribute *pro rata* towards payment of its expenses if its rental income, it being an investment company, proved insufficient to defray the same. I am also at a loss to understand why the Applicant contends that any claim he may have for repayment of monetary contributions made by him constitutes an integral component of the value of his *shareholding* in the Seventh Respondent.

[63] I must, with respect, agree with the Respondents in their assertion that "the Applicant claims an interest in the Seventh Respondent which is unique and far exceeds that of a normal shareholder in a company". In my judgment, the Applicant's misguided belief that his shareholding carries with it the right of exclusive use and occupation of certain portions of the property is the fundamental obstacle in the path of the successful disposition of his shares to one or more Respondents for a consideration reflective of their real value. I am satisfied that Applicant's inability to obtain a buyer for his shares from among his co-shareholders is indeed attributable to his unique and legally unsustainable views of the value of his rights as shareholder.

[64] In English law the making of a reasonable offer for the shares of an oppressed minority is enough to counter reliance by the complainer on section 459 of the English Companies Act (the equivalent of our section 252). Pursuit of the complaint in the face of such an offer is evidence of abuse of the process sufficient to strike out such reliance *in limine*. In **Bayly v Knowles (174/09) [2010] ZACSA 18 (18 March 2010) HEHER JA** made the following observation at paragraph [24]: "In the context of section 252 the failure of a minority shareholder to accept a reasonable offer for his shares and leave the company in the hands of the majority is, at the very least, strong evidence of a willingness to endure treatment which is *prima facie* inequitable despite the choice of a viable alternative. If that is so it would not ordinarily behove him to continue to complain about oppression". There can be no doubt *in casu* that the making of a reasonable offer for the acquisition of the Applicant's shares would indeed be forthcoming from one or more of the Respondents if the Applicant were to move away from his untenable demands and unrealistic expectations as to the value of his interests in the Seventh Respondent.

[65] In sum, the Applicant is in my judgement not entitled relief in terms of section 252 of the Act. Not only has the Applicant not established conduct unfairly prejudicial, unjust or inequitable to him, I also do not consider it just and equitable on a conspectus of all the facts to exercise my discretion in his favour.

ORDER

[66] In the result, I make the following order in respect of each of the applications (ie. case numbers 11461/2009 and 1200/2010) consolidated for purposes of the hearing before me:

The application is dismissed with costs.

Date of hearing :	30 APRIL 2010
Date of judgment :	MAY 2010
Counsel for Applicant :	MR. H. A. DE BEER SC
Instructed by :	LOUIS M. PODIELSKI, DURBAN
Counsel for first, second, third, fourth, fifth Respondents :	MR. E. LINGENFELDER
Instructed by :	HALSE, HAVEMANN & LLOYD, PINETOWN