**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATLA DIVISION, PIETERMARITZBURG**

**CASE NUMBER 999/2022P**

**In the matter between:**

**BUSINESS PARTNERS LIMITED** **APPLICANT**

**And**

**AFRICAN DUNE INVESTMENTS 275 (PTY) LTD** **FIRST RESPONDENT**

**NAKESH SINGH** **SECOND RESPONDENT**

**JUDGMENT**

**BEZUIDENHOUT J:**

[1] This matter was originally brought as an urgent application and after it was ruled that it was not urgent it was struck off the roll and the matter was then set down on the opposed roll for hearing. Applicant is no longer seeking a rule *nisi* but a final order.

[2] Applicant in the notice of motion is seeking the following order.

"1.1 In terms of section 163(2)(f)(i) of the Companies Act 2008 Angus Findlay is appointed as director of First Respondent.

1.2 That in terms of Rule 6.1 of the shareholders agreement concluded between Applicant and Respondents dated 20 May 2010 as amended, Kevin Govender is declared appointed as a managing director of First Respondent.

1.3 Decisions of the First Respondent by its resultant board of directors are to be decided as to one rate per director.

1.4 The director appointed in 1.1 above may not be removed as director save by a unanimous vote of the shareholders of First Respondent, being the Applicant and the Second Respondent, or by order of court, provided that the directorship of the directors referred to in paragraphs 1.1 and 1.2 hereof will cease is upon the successful sale of the Applicant's share in the first Respondent, to the second Respondent.

1.5 The director appointed in terms of 1.1 above is to be paid reasonable remuneration, which, in the event of a dispute regarding the quantum, shall be determined by the Legal Practice Council.

1.6 That Second Respondent be directed to pay the costs of this application including the costs consequent upon the employment of senior counsel."

[3] After Mr. Stokes SC commenced his argument Mr. Potgieter SC, appearing on behalf of Respondents, placed on record that Respondents were no longer opposing

the relief sought in paragraph 1.2 of paragraph 2 above namely that Kevin Govender be appointed as the managing director of First Respondent. This relief was therefore settled

[4] It was disputed that Govender be appointed as the managing director until this concession was made on behalf of Respondents. It was submitted by Mr. Stokes SC that Applicant has a legal right as a shareholder as it was a 38 % shareholder of First Respondent. In terms of clause 6.1 at page 55 of the indexed papers it was provided in the shareholders agreement that shareholders can nominate a director for appointment. Respondents answering affidavit refers to a simulated agreement in part and this is set out in paragraph 54 on page 221. Respondents contend in paragraph 135 at page 239 of the papers that First Respondent will, until the disputes are resolved, keep Applicant appraised of what is transpiring and Applicant is protected by the Companies Act as it is a registered shareholder with voting rights even though it may be contended that it is a simulated transaction. Respondents contended that Second Respondent is entitled to have the shareholding of Applicant transferred to him.

[5] An independent director is needed and that Applicant as shareholder has made out a case for such an appointment. It was submitted there has been contraventions by Respondents as there is a tenant which is not paying rent and that Respondents have actively excluded Applicant. Applicant was therefore entitled to appoint a director in terms of section 163 of the Companies Act. The company was manipulated by Second

Respondent to the exclusion of the other director. Second Respondent is afraid that a third director will break the stalemate between them. There is a stalemate coming as Applicant contends that it is owed money. Second Respondent contends that it has paid its debt and its objection to have Findlay appointed as a director is an attempt by Applicant to take control. The appointment of Findlay will assist to stop someone seizing control.

[6] It was submitted that the judgment in Grancy Limited v Manala & Others 2015 (3) SA 313 (SCA) allows in terms of section 163 of the Companies Act for the appointment of a director. Section 163 underscores the requirement that a shareholders interest that is impaired may follow that course. The orders sought are as was granted in Grancy. Section 163 allows the court to make an order it deems fit.

[7] In the counterapplication Respondents are seeking a debatement which it was submitted is devoid of any legal basis. It cannot show the existence of a fiduciary relationship or a contractual entitlement to debatement or the existence of a statutory obligation by Applicant to deliver a debatement of account. In addition to the debatement of account it seeks a declarator or that clauses 2 and 5.5 to 5.12 of the shareholders agreement concluded on 3 June 2010 are void and of no force and affect between the parties. There is a pending action challenging these clauses in the articles of association and to have them declared void. These are issues which will be decided at the action. It is therefore submitted that Applicant is entitled to the relief sought in the

notice of motion and that the counterapplication should be dismissed with costs such costs to include the costs of senior counsel.

[8] It was submitted on behalf of Respondents that the appointment of Findlay would be oppressive conduct. Applicant did not make out a case for such relief and there is no need for such an order. The further relief which is sought in paragraphs 1.3, 1.4 and 1.5 is an attempt to make a minority shareholder equal to the majority shareholder. This matter is distinguishable from that of Grancy. The directors each have a vote. Applicant has not demonstrated oppressive or unfairly prejudicial conduct on the part of Second Respondent. It is not entitled to the appointment of Findlay. The only allegation by Applicant in this regard is in paragraph 31 of its founding affidavit where it suggests that a company linked to Second Respondent is occupying premises in breach of section 75(3) of the Companies Act. It was submitted that this ignores the argument of a simulated transaction. There is therefore no case for such relief. It was submitted that there are no allegations to support the further relief in the notice of motion. Frist Respondent was given authority from the outset to lease the premises to Second Respondent or his nominee. The relief sought is contrary to the terms of the shareholders agreement which Applicant seeks to enforce.

[9] In respect of the counterapplication Applicant's complaint is to deny the entitlement to a debatement which First Respondent is entitled to. Applicant and Second Respondent are shareholders in First Respondent that should be supporting the

success of First Respondent. This supports Respondents argument of a simulated transaction. The declaratory relief in the counterapplication is based on the facts as set out in the answering affidavit. The conflict between the articles association and shareholders agreement necessitates the declaring of clauses 5.5 to 5.12 of the shareholders agreement void as they are in conflict with the articles of association. The directors each already have a vote at any meeting. First Respondent is disputing that there is any money owing to the bond holder. Applicant wants to take away the right of the company to dispute the said amount. The shareholders agreement is not in dispute and the relief sought is not an amendment as in section 163. There is an action pending where the issues regarding to the articles of associations and shareholders agreement will be decided.

[10] Applicant already has most of the powers which it is now seeking. Applicant is a minority shareholder and it is not the purpose of section 163 that it can stop the process. The relief in paragraph 1.4 goes against the shareholders agreement and there is nothing to amend it. The relief in paragraph 1.5 also requires an amendment to the shareholders agreement. No facts have been provided that brings the application within the ambit of section 163. For nineteen years the minority shareholder has not sought any relief. Applicant allowed Second Respondent to run the company until he disputed the amount owing to Applicant as the bond holder. Applicant therefore has a conflict of interest. There is nothing oppressive and an action has been instituted and if the relief is granted now the action will not continue. The relief Applicant seeks is not necessary. The setting aside of certain clauses of the shareholders agreement will be

dealt with in a trial. The matter is distinguishable from Grancy and the conduct is not oppressive neither unfairly prejudicial. The application should be refused with costs and the debatement should be granted.

[11] In reply it was submitted that Applicant has accounted. The relief sought is more than a statement from inception. An independent director can address the issue whether there is money owing or not. If the shareholders agreement is not consistent section 163 is there for that purpose. In terms of Grancy a wide range of orders can be made. Section 163 allows the relief under 3 categories and an order should therefore be granted. In the order sought a paragraph 1.4(a) should be inserted that the director appointed in terms of paragraph 1.1 will not have any vote in respect of any pending action on issues related thereto.

[12] The issues remaining are therefore those in paragraph 1.1, 1.3, 1.4, 1.5 and 1.6 of the notice of motion and the debatement of account in terms of the counterapplication.

[13] Section 163 of the Companies Act 71 of 2008 sets out relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of a company.

> "(1) A shareholder or a director of a company may apply to court for relief if:

(a) any act or omission of a company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interest of the applicant.

(b) the business of the company, or a related person is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant, or

(c) the powers of the director or prescribed officer of the company, or a person related to the company, are been or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant.

(2) Upon considering an application in terms of subsection (1) the court may make an interim order or final order that it considers fit including:

(a) -

(b) -

(c) -

(d) an order to regulate the company's affairs, the by directing the company to amend its Memorandum of its corporation or to create or amend a unanimous shareholder agreement.

(e) -

(f) an order

(i) appointing directors in place of or in addition to all or any of the directors then in office or;

(ii) declaring any person delinquent, or under probation, as contemplated in section 162."

[14] It was submitted on behalf of Applicant that in the present case what was found in paragraph 15 of Grancy was applicable where it held as follows:

> "The sole purpose of that application as Mr. Hodes, who appeared together with Mr. MacNally for the appellant, contended in argument before us, was to arrest the continuation of the oppressive and unfairly prejudicial conduct that unfairly disregard the interest of Grancy as a minority shareholder in SMI perpetrated by Manala and Gihwala. This would be achieved by the court itself appointing directors either in place of or in addition to those directors in office to ensure that SMI was not exposed to further risks."

In paragraph 26 it was held:

> "Accordingly, there is much to be said for the proposition that section 163 must be construed in the manner that will advance the remedy that it provides rather than limit it."

It continues in paragraph 27:

> "In concluding on this particular aspect of the case it bears mention that in determining whether the conduct complained of is oppressive, unfairly prejudicial

> or unfairly disregards the interests of Grancy it is not the motive for the conduct complained of that the court must look at but the conduct itself and the effect which it has on the other members of the company."

In the case of Grancy the court after considering the matter appointed two independent directors. The order which was granted is similar to that which is being sought by Applicant in the present matter.

[15] It was submitted on behalf of Respondent that the facts of the present matter is different to that in Grancy and that the decision in Grancy accordingly does not apply. It was submitted that the decision in Gent and Another v Du Plessis [2020] ZASCA 184 is the more recent decision in this regard. In paragraph 2 of Gent it was held that:

> "An applicant is only entitled to relief under section 163(1) upon satisfying the criteria set out therein. And only then is a court empowered to grant appropriate relief in terms of section 163(2) of the Act, upon the proper exercise of its discretion."

From this decision it is apparent that it has to be shown that the conduct complained of was oppressive or unfairly prejudicial, or that Applicant's interests have been unfairly disregarded. It was further held that the exercise of a majority shareholding voting rights does not amount to oppression.

[16] In both Grancy and Gent there were indeed severe misconduct on the part of the other directors or shareholders and accordingly it resulted in the orders which were granted. No misconduct of that sort has been committed in the present case. This will be dealt with later.

[17] Before a court can exercise its discretion to make an order in terms of section 163(2) it has to be satisfied that there was indeed a contravention as set out in section 163(1). There must therefore have been oppressive or unfairly prejudicial conduct that unfairly disregards the interest of Applicant. The business of the company must be carried on or conducted in a manner that is oppressive or unfairly prejudicial or that unfairly disregards the interest of Applicant. Or the powers of the director or a person related to the company are being exercised in a manner that is oppressive or unfairly prejudicial and disregards the interests of Applicant.

[18] In Henochsberg on the Companies Act 71 2008 relating to section 163 at 574(8) it states:

> "Only conduct which adversely effects the rights or interests or is detrimental to the financial interest of a shareholder is relevant and therefore the prejudice must be commercial and not merely emotional . . . A disregard of the rights of a member, as such, without any financial consequences may amount to prejudice falling within the section."

> "Where the acts complained of have no adverse financial consequence, it may be more difficult to establish relevant prejudice. Mere dissatisfaction with or disapproval of the conduct of a majority shareholder does not render the acts unfairly prejudicial. The conduct must be unreasonable or unethical and interests unfairly prejudiced must result in commercial unfairness affecting the applicant in capacity as dissenting minority."

It further states at 574(11):

> "It is not sufficient to establish that the manner in which the company's affairs are being conducted is unfairly prejudicial, unjust or inequitable. It must also be established that the result of the conduct of the affairs in that manner is oppressive or unfairly prejudicial to or unfairly disregards the interests of the applicant. It is therefore the effect of the challenged conduct which is critical."

It continues at 574(12):

> "The conduct of the majority shareholders should, however, always be judged in the light also of the principles that by becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder."

[19] At this stage Applicant is a 38 % shareholder in First Respondent and Second Respondent holds 62 %. At a meeting held Applicant required details of the tenancy of

the property owned by First Respondent. It is contended that First and Second Respondent refused to provide this information but advised that a company called Zyosync Pty (Ltd) was in occupation but was not paying rental. The sole director of this company is Second Respondent. It is contended that Applicant should be informed whether rental is being received or not.

[20] Applicant contends that Respondents conduct is unfair and prejudicial to Applicant and that Applicant is prevented from invoking its right to sell the shares back to Second Respondent and to receive the agreed payment. Second Respondent carries on the business of First Respondent in contravention of section 75(3) of the Companies Act. Applicant contends that the appointment of Govender as a director will lead to an impasse between the two directors. Applicant wishes Findlay to be appointed as a director as this will allow for a majority decision one way or the other. It would thus prevent an impasse.

[21] It is contended by Second Respondent that there is no indication in the application papers that the business of First Respondent is being jeopardised. Second Respondent has been conducting the business since 2010 and there has never been any queries about him doing so. No shareholders meeting was held in the last 11 years nor was there any suggestion of any steps as envisaged in section 60 of the Act. Applicant never participated in ordinary or special shareholders resolutions as envisaged in section 65 and Second Respondent ran the business as envisaged in

section 66 of the Act. There is no reason for Second Respondent to jeopardise the position of First Respondent as he is the majority shareholder thereof.

[22] It is contended that the main objection by Applicant is that Second Respondent has permitted an offence in terms of section 75(3) of the Act by allowing an associated entity to occupy the premises that forms the subject matter of dispute without payment of rental. It is submitted that this is ill conceived or misplaced. It is apparent from annexure “A” to the founding affidavit that First Respondent had a lease agreement for a period of 5 years with Erwing 542 CC commencing on 1 May 2010 and Applicant was aware that Second Respondent had an interest in the said close corporation. There was no objection by Applicant to this. Applicant took steps and instituted litigation in terms of the loan agreement against First Respondent knowing that Applicant is a shareholder of the company that it was litigating against and Applicant as shareholder never raised any concern on this issue neither called a general meeting. It is contended that a special power of attorney which is attached to the founding affidavit and especially clause 1 thereof Applicant is appointed by First Respondent to be its lawful and sole exclusive agent and could dispose of the said property. The bond was settled in August 2021 and Zyosync continued to make payment of rentals to ensure that the instalments to Applicant under the bond were paid.

[23] There is a dispute between the parties as to whether there is still an amount owed by First Respondent to Applicant or whether the bond has been paid up.

Respondents therefore require a debatement of account. It was held in Absa Bank Ppk v Janse van Rensburg 2002 (3) SA 701 (HHA) at paragraph 15 that for a party to succeed with a request for a debatement it must prove:

(a) the existence of a fiduciary relationship between the parties or

(b) a contractual agreement to do so or

(c) the existence of a statutory duty obliging the debatement of account. It held further at paragraph 16 that there was no reason why a party should be legally obliged to help determine the extent of a claim against it.

[24] Respondents contend that Applicant and Second Respondent are both shareholders and Applicant is also a shareholder and bond holder. As it is also a bond holder it must provide a debatement of account. Applicant contends that a third director can establish if there is an amount owing. This appears to me to be unnecessary. Why would he be able if the other directors cannot obtain it? Applicant is a credit provider. Does the fat that it is also a shareholder effect whether it should provide a debatement of account or not. If a shareholder contends that the company owes it money in respect of a bond which is disputed why should such shareholder/bondholder not set out how it was determined. The relationship between the parties in this matter is unique as Applicant is a shareholder and also a bond holder. All that is required is a calculation of what is owed and what has been paid. Applicant stands in a position of confidence and good faith towards First Respondent. It therefore has a fiduciary duty. Whether a fiduciary relationship is established will depend on the circumstances of each case.

See Phillips v Fieldstone Africa (Pty) Ltd and Another 2004 (3) Sa 465 (SCA) at 477 to 479. In my view there is such a duty due to Applicant's unique position. Applicant must therefore provide Respondents with a debatement of account.

[25] I am not satisfied that Applicant has made out a case for the appointment of a third director. The conduct of Respondents are not oppressive or prejudicial to Applicant. If a stalemate does arise it can be addressed at that stage. An independent third director cannot be appointed merely because there may be a stalemate.

[26] The relief in paragraph 1.4 of the notice of motion is contrary to the shareholders agreement and the relief in paragraph 1.5 is already catered for in the shareholders agreement.

[27] Both Applicant and Respondents have been partly successful. It would therefore appear to me that no order as to costs be made.

The following order is made.

1. An order is granted in terms of paragraph 1.2 of the Notice of Motion.
2. An order is granted in terms of paragraph (a) of the counterapplication at page 202.

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**BEZUIDENHOUT J.**

**JUDGMENT RESERVED ON:** **10 AUGUST 2022**

**JUDGMENT HANDED DOWN:** **7 NOVEMBER 2022**

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