



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 921/2017

In the matter between:

**FREEDOM STATIONERY (PTY) LIMITED
APPLICANT**

FIRST

OYSTER PLASTICS (PTY) LIMITED

SECOND APPLICANT

SA FILE MANUFACTURERS (PTY) LIMITED

THIRD APPLICANT

**MOSS RIDGE PROPERTIES (PTY) LIMITED
APPLICANT**

FOURTH

SHAUKAT ALLI MOOSA

**(in his capacity as a trustee of the Shaukat
Alli Moosa Family Trust, IT 5931/1982)
APPLICANT**

FIFTH

GOOLAM HOUSEN MOOSA

**(in his capacity as a trustee of the Shaukat
Alli Moosa Family Trust, IT 5931/1982)
APPLICANT**

SIXTH

SALIM MAHOMED MOOSA

**(in his capacity as a trustee of the Shaukat
Alli Moosa Family Trust, IT 5931/1982)
APPLICANT**

SEVENTH

SHAUKAT ALLI MOOSA

(in his capacity as a trustee of the Goolam
Hoosen Moosa Family Trust, IT 5928/1982)
APPLICANT

EIGHTH**GOOLAM HOOSEN MOOSA**

(in his capacity as a trustee of the Goolam
Hoosen Moosa Family Trust, IT 5928/1982)
APPLICANT

NINTH**SALIM MAHOMED MOOSA**

(in his capacity as a trustee of the Goolam
Hoosen Moosa Family Trust, IT 5928/1982)
APPLICANT

TENTH**SHAUKAT ALLI MOOSA**

(in his capacity as a trustee of the Salim
Mahomed Moosa Family Trust, IT 5926/1982)
APPLICANT

ELEVENTH**GOOLAM HOOSEN MOOSA**

(in his capacity as a trustee of the Salim
Mahomed Moosa Family Trust, IT 5926/1982)
APPLICANT

TWELFTH**SALIM MAHOMED MOOSA**

(in his capacity as a trustee of the Salim
Mahomed Moosa Family Trust, IT 5926/1982)
APPLICANT

THIRTEENTH**CASSIM RASHID MOOSA**

(in his capacity as a trustee of the Cassim
Rashid Moosa Family Trust, IT 5935/1982)
APPLICANT

FOURTEENTH**IMRAAN CASSIM RASHID MOOSA**

(in his capacity as a trustee of the Cassim
Rashid Moosa Family Trust, IT 5935/1982)
APPLICANT

FIFTEENTH

MAHOMED IRSHAD MOOSA

(in his capacity as a trustee of the Cassim
Rashid Moosa Family Trust, IT 5935/1982)
APPLICANT

SIXTEENTH

AKBAR ALLI MOOSA

(in his capacity as a trustee of the Akbar
Alli Moosa Family Trust, IT 5934/1982)
APPLICANT

SEVENTEENTH

MAHOMED ZUBEIR MOOSA

(in his capacity as a trustee of the Akbar
Alli Moosa Family Trust, IT 5934/1982)
APPLICANT

EIGHTEENTH

AHMED SHOAIB MOOSA

(in his capacity as a trustee of the Akbar
Alli Moosa Family Trust, IT 5934/1982)
APPLICANT

NINETEENTH

HAMIDA BANU MOOSA

(in her capacity as a trustee of the Akbar
Alli Moosa Family Trust, IT 5934/1982)
APPLICANT

TWENTIETH

ABDUL RAZAK DAWOOD MOOSA

(in his capacity as a trustee of the Akbar
Alli Moosa Family Trust, IT 5934/1982)
APPLICANT

TWENTY FIRST

ASHRAFF YOUSOUF DAWOORD MOOSA

(in his capacity as trustee of the Akbar
Alli Moosa Family Trust, IT 5934/1982)
APPLICANT

TWENTY SECOND

SULEMAN HASSAM

(in his capacity as a trustee of the Akbar

**Alli Moosa Family Trust, IT 5934/1982)
APPLICANT**

TWENTY THIRD

SULEMAN HASSAM

**(in his capacity as a trustee of the Suleman
Hassam Family Trust, IT 5930/1982)
APPLICANT**

TWENTY FOURTH

AKBAR ALLI MOOSA

**(in his capacity as a trustee of the Suleman
Hassam Family Trust, IT 5930/1982)
APPLICANT**

TWENTY FIFTH

ABDUL RAZAK DAWOOD MOOSA

**(in his capacity as a trustee of the Suleman
Hassam Family Trust, IT 5930/1982)
APPLICANT**

TWENTY SIXTH

OBEAD MOOSA

**(in his capacity as a trustee of the Suleman
Hassam Family Trust, IT 5930/1982)
APPLICANT**

TWENTY SEVENTH

ZUBEDA MOOSA

**(in her capacity as a trustee of the Suleman
Hassam Family Trust, IT 5930/1982)
APPLICANT**

TWENTY EIGHTH

IQBAL EBRAHIM HASSAM

**(in his capacity as a trustee of the Iqbal
Ebrahim Hassam Family Trust, IT 1401/1997)
APPLICANT**

TWENTY NINTH

ABDUL RAZAK DAWOOD MOOSA

**(in his capacity as a trustee of the Iqbal
Ebrahim Hassam Family Trust, IT 1401/1997)
APPLICANT**

THIRTIETH

**THE TRUSTEES OF THE ABDOOL CARRIM
SACOR FAMILY TRUST
APPLICANT**

THIRTY FIRST

**SHAUKAT ALLI MOOSA
APPLICANT**

THIRTY SECOND

**ABDOOL CARRIM SACOR
APPLICANT**

THIRTY THIRD

and

MAHOMED ZUKERIA HASSAM

(in his capacity as a trustee of the

**Mahomed Zukeria Hassam Trust, IT 592/1982)
RESPONDENT**

FIRST

ALTAF HASSAM

(in his capacity as a trustee of the

**Mahomed Zukeria Hassam Trust, IT 592/1982)
RESPONDENT**

SECOND

NADIM HASSAM

(in his capacity as a trustee of the

**Mahomed Zukeria Hassam Trust, IT 592/1982)
RESPONDENT**

THIRD

Neutral citation: *Freedom Stationery & others v Hassam & others* (921/2017) [2018]
ZASCA 170 (30 November 2018)

Coram: Ponnan, Tshiqi, Van der Merwe and Schippers JJA and Carelse AJA

Heard: 6 November 2018

Delivered: 30 November 2018

Summary: Practice – judgments and orders – uniform rule 42(1)(a) – order to which a party is procedurally entitled not erroneously made in the absence of an affected

party – a party that reconciles itself with a reasonable prospect that relief may be granted not entitled to rescission under rule 42(1)(a).

Company law – wide powers of a court under s 252 of the Companies Act 61 of 1973 – court not limited to relief formulated by applicant.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Bezuidenhout J sitting as court of first instance):

It is ordered that:

1 The application in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 succeeds;

- 2 The refusal of leave to appeal by this court is set aside and replaced with an order granting the applicants' leave to appeal to this court;
- 3 The appeal is upheld with costs, including the costs of the applications for leave to appeal;
- 4 The order of the court a quo is set aside and replaced with an order dismissing the action with costs.

JUDGMENT

Van der Merwe JA (Ponnan, Tshiqi and Schippers JJA and Carelse AJA concurring)

[1] This is an application for the reconsideration of an application for leave to appeal brought in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013. Maya P referred the application for oral argument in terms of s 17(2)(d) of the Superior Courts Act and also directed the parties to address the court on the merits if called upon to do so. The matter came before this court in the following manner. In an action instituted by the respondents against the applicants and others, the court a quo (Bezuidenhout J in the KwaZulu-Natal Local Division, Durban) on 23 March 2017 set aside an order of that division made earlier by Swain J on 8 December 2011. The applicants applied to the court a quo for leave to appeal against its order. The court a quo dismissed the application. The applicants then approached this court for leave to appeal in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013, but two judges of this court refused leave to appeal. The determinative question before us is whether the respondents were entitled to rescission of the order of Swain J. The question must be answered against the following background.

Background

[2] The matter concerns the shareholding in four companies. They are Freedom Stationery (Pty) Ltd (Freedom Stationery), Oyster Plastics (Pty) Ltd (Oyster Plastics), SA File Manufacturers (Pty) Ltd (SA File) and Moss Ridge Properties (Pty) Ltd (Moss Ridge). As its name suggests, Freedom Stationery is engaged in the business of

manufacturing and supplying stationery. Oyster Plastics mainly manufactures plastic products. The principal business of SA File is the manufacturing of files. Moss Ridge owns industrial and commercial properties. I refer to these four companies collectively as the Freedom Group. At all relevant times hereto, the directors of all four companies in the Freedom Group were Mr Abdool Sacoor and Mr Shaukat Alli Moosa.

[3] Prior to the events that I shall describe shortly, the shares in each of the companies in the Freedom Group were held as set out below. Six family trusts each held 8 per cent of the shares. They were:

- (a) The Shaukat Alli Moosa Family Trust (the S A Moosa Trust);
- (b) the Goolam Hoosen Moosa Family Trust (the G H Moosa Trust);
- (c) the Salim Mahomed Moosa Family Trust (the S M Moosa Trust);
- (d) the Suleman Hassam Family Trust (the S Hassam Trust);
- (e) the Iqbal Ebrahim Hassam Family Trust (the I E Hassam Trust); and
- (f) the Akbar Alli Moosa Family Trust (the A A Moosa Trust).

[4] A further five family trusts each held 6,4 per cent of the shares in the Freedom Group. They were:

- (a) The Abdul Kader Moosa Family Trust (the A K Moosa Trust);
- (b) the Cassim Rashid Moosa Family Trust (the C R Moosa Trust);
- (c) the Dr Aziz Ahmed Moosa Family Trust (the Dr A A Moosa Trust);
- (d) the Sikander Amod Hassam Family Trust (the S A Hassam Trust); and
- (e) the Mahomed Zukeria Hassam Family Trust (the M Z Hassam Trust).

The trustees of these 11 trusts are all close relatives of each other.

[5] Four individual members of the Akoo family (the Akoo's) each held 1,25 per cent of these shares. The remaining 15 per cent of the shares were held by the Abdool Carrim Sacoor Family Trust (the A C Sacoor Trust).

[6] The present applicants are: the four companies in the Freedom Group; the six trusts referred to in para 3 above; the trustees of the C R Moosa Trust; the trustees of the A C Sacoor Trust; and Mr Sacoor and Mr Shaukat Moosa in their personal capacities as directors of the companies. The trustees of the M Z Hassam Trust are the respondents herein. At all relevant times they were Mr Mahomed Zukeria (MZ)

Hassam and his two sons. For reasons that shall become apparent, the A K Moosa Trust, the Dr A A Moosa Trust and the S A Hassam Trust are not parties to these proceedings.

[7] The Articles of Association of each of the companies in the Freedom Group provides that, if a member of the company desires to sell any of his shares in the company, such member shall give written notice of his intention to sell to the directors of the company and state the price that he requires for the shares. The directors shall within one month of the date of receipt of the written notice, advise every other member of the company of the contents thereof and each member shall be entitled to acquire the shares so offered within one month after the date of receipt of such advice. If the members of the company are unable to agree upon the selling price of the shares, the auditor of the company may be requested to determine the true and fair value thereof and the members shall accept that value as the selling price of the shares. Only if none of the members of the company offers to purchase the shares as aforesaid, may the member offer the shares or the remaining portion of the shares for sale to any other person.

[8] The Freedom Group was a successful concern and over a number of years its shareholders received handsome dividends. During 2010, however, some of the shareholders of the Freedom Group became discontented. They believed that the directors of the Freedom Group, with the backing of the majority shareholders, conducted its affairs in an oppressive and unfairly prejudicial manner, within the meaning of s 252 of the Companies Act 61 of 1973 (the Act). They consequently launched an application under s 252 of the Act (the section 252 application). These shareholders were the Akoo's, the trustees of the S A Hassam Trust and the trustees of the A K Moosa Trust (the section 252 applicants). As I have set out, the section 252 applicants held 17,8 per cent of the shares in the Freedom Group.

[9] In prayers 1 to 5 of their notice of motion, the section 252 applicants sought orders: declaring that the affairs of Freedom Stationery were being conducted in a manner unfairly prejudicial, unjust or inequitable to the applicants; that Mr Shaukat Moosa and Mr Sacoor be removed as directors; that Mr Shaukat Moosa and Mr Sacoor be interdicted from occupying the position of a director of Freedom Stationery

for a period of three years from date of the order; that two independent directors be appointed; and that the shareholders be directed to appoint a director to serve on the board together with the two independent directors. Two further prayers of the notice of motion read as follows:

'6. Alternatively to paragraphs 2 to 5 above, ordering the majority shareholders to purchase the shares and loan accounts of the Applicants at a purchase consideration to be determined by an independent firm of Auditors to be elected by the Applicants.

7. Alternatively to para 6 above by the senior partner or senior director of the auditing or corporate services division Deloittes or KPMG or Ernst and Young.'

[10] Freedom Stationery, all of its other shareholders and Mr Shaukat Moosa and Mr Sacoor were cited as respondents in the section 252 application. Oyster Plastics, SA File and Moss Ridge were not cited as respondents and no relief was claimed against them in the notice of motion.

[11] The section 252 application was duly served. Mr M Z Hassam did not read the papers but arranged for it to be delivered to his attorney, Mr Iqbal Ganie. After taking advice from Mr Ganie, the trustees of the M Z Hassam Trust resolved not to oppose the application. It should be mentioned that the section 252 applicants included the family trusts of two of Mr M Z Hassam's brothers. The Dr A A Moosa Trust, the family trust of another brother of Mr M Z Hassam, was the only other shareholder that did not oppose the section 252 application. The section 252 application was opposed by Mr Shaukat Moosa, acting also for Mr Sacoor and the remaining 69,4 per cent shareholders.

[12] In circumstances that I shall return to, Swain J issued an order in the section 252 application on 8 December 2011 (the section 252 order). In a nutshell, the section 252 order provided that the trustees of six of the respondent trusts purchase the shares and loan accounts of the section 252 applicants in the Freedom Group, at a price to be determined by a chartered accountant appointed by the chairperson of the South African Institute of Chartered Accountants.

[13] The section 252 order was fully given effect to. The 17,8 per cent shares of the section 252 applicants in the Freedom Group were valued at R51,3 million, as follows:

Freedom Stationery R44,32 million; Oyster Plastics R1,27 million; SA File R2,17 million; and Moss Ridge R3,54 million. In terms of resolutions dated 9 November 2012 these shares and loan accounts were transferred to: the S A Moosa Trust (3 per cent); the G H Moosa Trust (3 per cent); the S M Moosa Trust (3 per cent); the S Hassam Trust (3 per cent); the A A Moosa Trust (3 per cent) and the C R Moosa Trust (2,8 per cent). For convenience, I refer to these trusts as the purchasing respondents. The two other trusts that opposed the section 252 application, namely the I E Hassam Trust and the A C Sacoor Trust, were eventually not interested in purchasing the shares.

[14] However, on 27 March 2013, and despite their deliberate decision not to oppose the section 252 application, the trustees of the M Z Hassam Trust instituted an action aimed at overturning the section 252 order and reversing its implementation. They alleged that the section 252 applicants and the purchasing respondents had concluded a sale of shares agreement in breach of the rights of the M Z Hassam Trust contained in the Articles of Association of the companies in the Freedom Group; that the agreement was therefore invalid and of no force and effect; and that the parties to that sale of shares agreement 'wrongfully and unlawfully procured the granting' of the section 252 order.

[15] Based essentially only on these allegations, they claimed an order setting aside the section 252 order. They also claimed ancillary relief consisting of an order declaring 'the agreement in respect of the sale of shares referred to in the order . . . as invalid and of no force or effect'; that the purchasing respondents deliver an account of all the dividends which they had received in respect of the shares purchased in terms of the sale of shares agreement; and that the Freedom Group take whatever steps may be necessary to rectify their respective share registers to give effect to the order. The action was defended by the present applicants and the matter went to trial. Mr M Z Hassam and Mr Iqbal Ganie testified for the respondents. The applicants called Mr Shaukat Moosa and his brother, Mr Salim Moosa, as witnesses. At the conclusion of the trial, the court a quo granted all the orders claimed in the action, with costs.

Rescission of court orders generally

[16] As a general rule, a court has no power to set aside or alter its own final order, as opposed to an interim or interlocutory order. The reasons for this age-old rule are twofold. First, once a court has pronounced a final judgment, it becomes *functus officio* and its authority over the subject matter has ceased. The second reason is the principle of finality of litigation expressed in the maxim *interest rei publicae ut sit finis litium*; it is in the public interest that litigation be brought to finality. See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (AD) at 306F-G and 309A; *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) paras 22 and 29; *Zondi v MEC, Traditional and Local Government Affairs, and others* 2006 (3) SA 1 para 28.

[17] There are exceptions to this general rule. The requirements for relief under these exceptions depend on whether the judgment was given on the merits of the dispute between the parties after evidence had been led or whether the order was made in default of appearance of the party that seeks to have it rescinded. In respect of the first category the test is stringent. Such judgment can only be set aside on the ground of fraud or, in exceptional circumstances, on the grounds of *justus error* or the discovery of new documents. See *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163 at 168 and *De Wet & others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1040E-1041B. A default judgment, on the other hand, may be set aside in terms of Uniform Rule 31(2)(b), rule 42 or the common law. Only rule 42(1)(a) or the common law rules in respect of rescission of a default judgment could possibly be applicable to the section 252 order.

[18] Rule 42(1)(a) provides:

‘(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;’

As Streicher JA explained in *Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) paras 25-27, the phrase ‘erroneously granted’ relates to the procedure followed to obtain the judgment in the absence of another party and not the existence of a defence to the claim. See also *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) paras 6 and

9. Thus, a judgment to which a party was procedurally entitled, cannot be said to have been erroneously granted in the absence of another party.

[19] It follows from what I have said that the invalidity of an antecedent sale of shares agreement could not, by itself, entitle the M Z Hassam Trust to rescission of the section 252 order. It had to bring its case within the requirements of rule 42(1)(a) or the aforesaid common law rules. The alleged invalidity of an agreement has no bearing on rule 42(1)(a) and could only satisfy the second common law requirement. Yet, the M Z Hassam trust relied only on the invalidity of the alleged sale of shares agreement for the setting aside of the section 252 order. The particulars of claim in the action made no reference to the requirements of rule 42(1)(a) or the common law rules relating to rescission of default judgment. It follows that the particulars of claim did not disclose a cause of action. As the M Z Hassam Trust in any event did not present a reasonable and acceptable explanation for its default in evidence, it did not make a case for the setting aside of the section 252 order. This should have been the end of the matter.

[20] Despite all of this, the court a quo not only set aside the section 252 order in terms of rule 42(1)(a) but also declared the sale of shares agreement to be invalid. This it did without consideration of the evidence and without making any finding of credibility. In these circumstances I propose to deal firstly with whether an antecedent sale of shares agreement was in fact entered into and secondly with the approach of the court a quo in respect of rule 42(1)(a).

Sale of shares agreement?

[21] The affidavits in the section 252 application demonstrated that the relationship of trust and goodwill between the section 252 applicants and the directors of the Freedom Group had dissipated. The majority of the shareholders of the Freedom Group, however, supported the directors. Mr Shaukat Moosa was firmly of the view that the only viable solution was to take up the offer in the section 252 application to purchase the shares in Freedom Stationery. He insisted, however, that the section 252 applicants should sell their shares in the Freedom Group. This was accepted by the section 252 applicants. In the result, Mr Shaukat Moosa arranged that all the other shareholders be contacted to ascertain which of them would be interested in

purchasing these shares. As I shall set out later in more detail, the M Z Hassam Trust declined to participate in the collective effort to purchase the shares within the context of the section 252 application.

[22] Having agreed in principle that the shares of the section 252 applicants in the Freedom Group would be purchased by the other shareholders so interested, negotiations ensued between these parties. Whilst the section 252 application was pending, each side produced a draft consent order aimed at settling the application. Neither side, however, was prepared to accommodate the other's proposal. As a result no agreement was reached and the section 252 application was enrolled for hearing on 8 December 2011. What happened on that date, appears from the clear and uncontroverted evidence of Mr Shaukat Moosa. He said that after counsel for both sides attended on Swain J in chambers prior to the hearing, the parties were informed that Swain J had directed them to attempt to agree the terms of a consent order and had indicated that in the absence of such agreement he would rule on the matter. The matter stood down and the legal representatives of the section 252 applicants prepared a new draft consent order. The parties then considered this draft consent order. Mr Shaukat Moosa testified that the new draft consent order was also not agreed to. He said that when his objections to a number of provisions thereof were conveyed to the section 252 applicants, they shook their heads and said 'no ways, no ways'. This caused him to comment that the parties were wasting their time and that the matter should be argued. Thus, no binding agreement had been reached by the time that Swain J entered the court room.

[23] In court, Swain J enquired whether the parties had been able to reach agreement. Counsel responded that they had not. Swain J asked whether a consent order had been drafted and upon affirmation hereof, the consent order drafted earlier that morning, was handed up. Swain J proceeded to work through the draft consent order, inviting submissions from counsel on both sides on the matters that the parties had been unable to agree on. The court accordingly heard argument and made rulings on a number of issues. These rulings included: that the costs of the valuer are to be borne in equal shares by the section 252 applicants and the purchasing respondents and that the valuer is not afforded the power to summon persons to appear before him to provide information or evidence nor to inspect personal

statements of affairs or liabilities. Swain J effected these and other amendments to the draft consent order in manuscript and proceeded to make the amended document an order of court. In the circumstances it is of no moment that the section 252 order continued to be headed 'Consent Order' and still bore a resemblance to an agreement. For these reasons as well, the M Z Hassam Trust did not prove the agreement that they alleged and there was thus no basis for a declaration of invalidity.

Section 252 order erroneously granted?

[24] It remains to deal with the court a quo's approach in respect of rule 42(1)(a). It reasoned that the section 252 order differed materially from the relief claimed in the section 252 application in two respects, namely that the section 252 order provided for the sale of the shares and loan accounts in Oyster Plastics, SA File and Moss Ridge and for the purchase thereof only by the purchasing respondents. Therefore, so the court a quo reasoned, the section 252 order had erroneously been made in the absence of the M Z Hassam Trust.

[25] As I have said, when an affected party invokes rule 42(1)(a), the question is whether the party that obtained the order was procedurally entitled thereto. If so, the order could not be said to have been erroneously granted in the absence of the affected party. An applicant or plaintiff would be procedurally entitled to an order when all affected parties were adequately notified of the relief that may be granted in their absence. The relief need not necessarily be expressly stated. In my view it suffices that the relief granted can be anticipated in the light of the nature of the proceedings, the relevant disputed issues and the facts of the matter. In this regard it would be useful to enquire whether the relief could have been granted without amendment of the process in question. If so, the failure of an affected litigant to take steps to protect his interests by joining the fray, ought to count against him. I agree with what Didcott J said in *Ex parte Mason* 1981 (4) SA 648 (D) at 651C-D, namely:

'The creditor who is not a character from some fairy tale protects his interests by keeping in touch with the application's progress and, once his opposition to it is serious, by joining the fray. On the advertised date he appears or is represented in Court, to discover for himself whether the proceedings will be abandoned. If he has held back his affidavits in the meantime, he will have no difficulty in defending his caution and, should the case continue, in persuading the Court to allow him the opportunity to file them after the security is furnished.'

In circumstances such as these, a party who did not oppose or participate in the proceedings, would not be entitled to relief under rule 42(1)(a). This is not only logical and fair, but accords with the fundamental principle of finality of litigation.

[26] Section 252 was repealed by the Companies Act 71 of 2008 (the new Act). Section 252 was substantially re-enacted in s 163 of the new Act. Despite its repeal, s 252 remained applicable to the respondents' action by reason of the provisions of Item 10 of Schedule 5 to the new Act. Section 252(1) of the Act provides that a member of a company who complains of oppressive or unfairly prejudicial conduct, may make an application to the court for an order under s 252. Section 252(3) provides:

‘(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 members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.’

[27] Once it appears to a court that there was oppressive or unfairly prejudicial conduct within the meaning of s 252(1), s 252(3) provides a court with very wide powers to make an order that it considers just and equitable in the circumstances. It may make such order as it deems fit for bringing an end to the matters complained of. The court is not limited to the kind of order specifically mentioned in s 252(3). The words ‘or otherwise’ should not be construed *eiusdem generis* to those preceding it. See *Bader & another v Weston & another* 1967 (1) SA 134 (C) at 147F-G (dealing with the identically worded s 111*bis* of the Companies Act 46 of 1926); *Louw v Nel* [2010] ZASCA 161; 2011 (2) SA 172 (SCA) paras 21 and 23; *Off-Beat Holiday Club & another v Sanbonani Holiday Spa Share Block Ltd & others* [2017] ZACC 15; 2017 (5) SA 9 (CC) paras 27 and 28. This wide discretion empowers a court, for instance, to oblige even a minority shareholder to purchase the shares of a majority shareholder (*Bayly v Knowles* [2010] ZASCA 18; 2010 (4) SA 548 (SCA) para 27), or to grant relief against an oppressor who is not a direct shareholder of the company concerned (*Bader* at 148A-C). Section 252 has to be given a construction that will advance the

remedy rather than limit it. This statement in *Donaldson Investments (Pty) Ltd & others v Anglo-Transvaal Collieries Ltd – SA Mutual Life Assurance Society & another intervening* 1979 (3) SA 713 (W) at 719F has expressly been approved in *Off-Beat* para 27.

[28] In line herewith, an argument that the powers of a court under s 252 are restricted to orders relating to the pursuance of the objects contained in a company's memorandum of incorporation was rightly rejected by Jones J in *Gatenby v Gatenby & others* 1996 (3) SA 118 (E). For these reasons, counsel for the MZ Hassam Trust correctly conceded that in principle a court may order a purchase of shares under s 252(3) without compliance with the Articles of Association of a company. In the light hereof, I agree with what was said in Blackman et al, *Commentary on the Companies Act*, vol 2, p 9-6 and 9-46, namely that although an applicant under s 252 ought to state in clear terms the general nature of the relief sought, the court's discretion is not limited by such formulation. See also *Breetveldt & others v Van Zyl & others* 1972 (1) SA 304 (T) at 315C-E; *Heckmair v Beton en Sandstein Industrieë (Pty) Ltd & andere* (1) 1980 1 SA 350 (SWA) at 353A-B. The nature of the section 252 application manifested the reasonable prospect that, without amendment thereof, an order may be made obliging only those shareholders that participated in the application to purchase the shares of the section 252 applicants.

[29] It appears from the evidence that the affairs of Freedom Stationery, Oyster Plastics, SA File and Moss Ridge were closely interrelated. The latter three companies were acquired or incorporated with funds emanating from Freedom Stationery and without any financial contribution by the shareholders. Oyster Plastics and SA File were described as the 'manufacturing arms' of Freedom Stationery and Moss Ridge owned the properties in which the other three companies did business. The shareholders and directors of these companies were exactly the same. General meetings of the Freedom Group took place at the same time. Although Oyster Plastics, SA File and Moss Ridge were not cited in the section 252 application, it was stated in the founding affidavit that their affairs were closely intertwined with that of Freedom Stationery and that the conduct complained of, also related to these three companies. It therefore came as no surprise that Mr Ganie testified that had these three companies been cited in the section 252 application '... it most probably would

have made no difference' to his advice to the M Z Hassam Trust. In these circumstances, it is clear that the trustees of the M Z Hassam Trust must have at least realised or ought to have realised that an order in terms of the section 252 application might relate to the purchase of shares in the Freedom Group as well.

[30] But this is not the end of the matter. Mr Salim Moosa testified that his brother, Mr Shaukat Moosa, requested him to contact all the shareholders of the Freedom Group to ascertain whether they would be interested in purchasing the shares of the section 252 applicants in the Freedom Group. Mr Salim Moosa said that he telephoned Mr M Z Hassam for this purpose. He said that this took place around May 2011. He told Mr Hassam that the Freedom Group shares would be coming up for sale and asked whether the M Z Hassam Trust would be interested to take up its allocation. Mr Salim Moosa testified that Mr Hassam responded in an abrupt manner and said that the shares held by the trusts of his brothers Mr A H Moosa and Mr S A Hassam belonged to their family and that no one else could buy them. Mr Salim Moosa said that he told Mr Hassam to go ahead and do so and that that was the end of the conversation.

[31] In his evidence Mr M Z Hassam confirmed the approach by Mr Salim Moosa and that his response was essentially as related by Mr Salim Moosa. The only material difference in the evidence of these witnesses in this regard was that Mr M Z Hassam said that reference had only been made to Freedom Stationery shares. It is clear, however, that this conversation took place well after Mr Shaukat Moosa had deposed to his answering affidavit in the section 252 application, where he expressed the firm view of the majority shareholders that the shares in the Freedom Group should be purchased. The probabilities are therefore overwhelming that Mr Salim Moosa referred to the shares of the Freedom Group, as he had been instructed to do. Even though Mr M Z Hassam expressed entitlement to purchase the shares of his brothers' trusts, the M Z Hassam Trust did nothing about it. It could hardly have expected the court to order it to purchase the shares in its absence.

[32] For these reasons I find that when the trustees of the M Z Hassam Trust took the considered decision not to participate in the section 252 application, they reconciled themselves with the reasonable prospect that the court could in the

exercise of its wide discretion under s 252 order that the shares in the Freedom Group be purchased by the purchasing respondents. In the result the section 252 order was not erroneously made in their absence.

[33] It follows that the order of this court refusing the application for leave to appeal, should be set aside, that leave to appeal should be granted and that the appeal should be upheld.

[34] It is ordered that:

- 1 The application in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 succeeds;
- 2 The refusal of leave to appeal by this court is set aside and replaced with an order granting the applicants' leave to appeal to this court;
- 3 The appeal is upheld with costs, including the costs of the applications for leave to appeal;
- 4 The order of the court a quo is set aside and replaced with an order dismissing the action with costs.

C H G van der Merwe
Judge of Appeal

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