THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1029/2019

In the matter between:

ANITA JULIA GENT **FIRST APPELLANT**
BONNOX (PTY) LIMITED **SECOND APPELLANT**

and

PETER DANIËL JACOBS DU PLESSIS **RESPONDENT**

Neutral citation: *Gent and Another v Du Plessis* (1029/2019) [2020] ZASCA 184 (24 December 2020)

Bench: MBHA, VAN DER MERWE and MAKGOKA JJA and WEINER and SUTHERLAND AJJA

Heard: 13 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 24 December 2020.

Summary: Civil procedure – in the absence of a cross-appeal respondent not entitled to variation of the order of the court below.
Company law – section 163 of Companies Act 71 of 2008 – where no case made out under s 163(1), court not empowered to grant relief in terms of s 163(2) – oppressive or unfairly prejudicial conduct not proved.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mavundla and Mali JJ and Botes AJ, sitting as court of appeal): judgment reported *sub nom Du Plessis v Bonnox Proprietary Limited and Another* [2019] ZAGPPHC 515

(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The order of the full court is set aside and replaced by the following order:

'The appeal is dismissed with costs.'

JUDGMENT

Mbha JA (Van der Merwe and Makgoka JJA and Weiner and Sutherland AJJA concurring)

[1] This appeal concerns a decision of the Full Court of the Gauteng Division of the High Court, Pretoria (Botes AJ, Mavundla and Mali JJ concurring) (the full court). It ordered the appellant, Anita Julia Gent (Ms Gent),[1] to sell her majority shareholding in Bonnox (Pty) Ltd (the company) to the respondent, Pieter Daniël Jacobs du Plessis (Mr du Plessis), notwithstanding its conclusion that the respondent had not shown the requirements of s 163(1) of the Companies Act 71 of 2008 (the Act).[2]

[1] Although the heading to the present appeal refers to both the first appellant (Anita Julia Gent) and the second appellant (Bonnox (Pty) Ltd), it is only Ms Gent who is appealing the order of the full court.

[2] Section 163 of the Act provides as follows:

'**Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company**

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

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests 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 a director or prescribed officer of the company, or a person related to the company, are being 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 any interim or final order it considers fit, including—

(a) an order restraining the conduct complained of;

(b) an order appointing a liquidator, if the company appears to be insolvent;

(c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131(4)*(a)* apply;

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

(e) an order directing an issue or exchange of shares;

(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;

(g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;

[2] This court granted Ms Gent special leave to appeal against the order of the full court. It, however, dismissed Mr du Plessis' application for special leave to cross-appeal against the full court's order refusing the winding-up of the company and directing Ms Gent to sell her shares to him. In this court, Mr du Plessis conceded from the outset that the full court had erred in making the buy-out order and made it clear that he did not support it. In my view, the concession was made fairly and properly. When the full court found that the grounds relied upon by Mr du Plessis did not fall within the ambit of s 163(1) of the Act, that should have been the end of the matter. Indeed, absent the statutory criteria being fulfilled, the full court did not have jurisdiction to order Ms Gent to purchase Mr du Plessis' minority shareholding. An applicant is only entitled to relief under s 163(1) upon satisfying the criteria set out therein. And only then is a court empowered to grant appropriate relief in terms of s 163(2) of the Act, upon the proper exercise of its discretion. There was no 'duty' on the full court whatsoever to craft a 'clean break' between the parties, purportedly in terms of s 163(2) of the Act.[3]

[3] Mr du Plessis' argument in this court was that the full court should have held that he had established oppressive or unfairly prejudicial conduct under s 163(1);

(h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;
(i) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;
(j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;
(k) an order directing rectification of the registers or other records of a company; or
(l) an order for the trial of any issue as determined by the court.
(3) If an order made under this section directs the amendment of the company's Memorandum of Incorporation—
(a) the directors must promptly file a notice of amendment to give effect to that order, in accordance with section 16(4); and
(b) no further amendment altering, limiting or negating the effect of the court order may be made to the Memorandum of Incorporation, until a court orders otherwise.'

[3] *Du Plessis v Bonnox Proprietary Limited and Another* [2019] ZAGPPHC 515 para 67.

and, on that basis, should have directed Ms Gent to purchase his shares in the company. A draft order was prepared and attached to the respondent's heads of argument, in which it was proposed that Ms Gent be directed to purchase the respondent's shares in the company at fair value, calculated pro rata to the total issued share capital of the company. After setting out the background of the matter, I shall first consider the impact of the refusal of leave to cross-appeal on this argument and thereafter whether the requirements of s 163(1) of the Act had been proved.

[4] The company was established by Ms Gent's father, Mr Volker Herman Schadewaldt (Mr Schadewaldt), in 1957 and in due course became a highly profitable company. Its business is the manufacturing of fencing. Mr Schadewaldt was for the better part of his life the majority shareholder of the company and also its managing director, until he retired in 2010. During 1994 Mr Schadewaldt transferred 15 shares in the company to Mr du Plessis. In 1998 he transferred the rest of his shares in the company as follows: 80 shares to Ms Gent; a further 45 shares to Mr du Plessis; and 10 shares to the company's accountant, Mr Smith. As a result of her majority shareholding, Ms Gent became the company's sole director until she resigned of her own accord on 18 January 2012. During 2012 Mr du Plessis also acquired the shares of Mr Smith. In the result, Mr du Plessis and Ms Gent became the sole shareholders in the company. Ms Gent holds 53.33 percent of the issued share capital in the company while Mr du Plessis holds the remaining 46.67 percent. Ms Gent was re-appointed as a director of the company on 18 January 2013.

[5] Mr du Plessis was employed by the company from 1986, where he started as a fitter and turner. He was promoted to general manager during 2010 and, ultimately,

was appointed as a director during 2012, when Ms Gent resigned as such. He was, however, removed as a director at a meeting of the shareholders on 6 March 2013. Mr du Plessis was subsequently suspended and, after being found guilty on four counts of gross misconduct (one of which involved dishonesty) at a disciplinary hearing, dismissed as an employee during August 2014.

[6] The charges against Mr du Plessis arose after Ms Gent's uncovering, upon her return to the company in 2013, of a number of irregularities committed by Mr du Plessis. These included that Mr du Plessis, who occupied a position of trust in the company at the time, conducted his own private business, 'Blumnet', whose business was producing a woven mesh fence similar to the one manufactured by the company, by making use of the resources of the company. In the process, Blumnet was also used by Mr du Plessis to commit a fraud against the fiscus. In this regard, Mr du Plessis engineered a simulated transaction in which an invoice, in the sum of R641 293, was issued in the books of Blumnet and addressed to the company as if to reflect an honest exchange of services for money. Significantly, Mr du Plessis admitted to this misconduct.

[7] Even more serious was when, on 5 March 2013, the day before the shareholders' meeting where a resolution for his removal as a director was to be tabled, Mr du Plessis maliciously and surreptitiously obtained an order placing the company in business rescue. This was an attempt to prevent a majority resolution to remove him as director. He abused his position of trust and manipulated two employees to bring the application for business rescue in their names. The business rescue order was subsequently set aside at the instance of Ms Gent in an urgent application on 2 April 2013, despite the application being vigorously opposed by Mr

du Plessis. In rescinding the order, the court made a punitive costs order, on the attorney and own client scale, against the employees who had brought the application. As I have said, these employees were merely Mr du Plessis' proxies. Ultimately, and as a gesture of goodwill in an attempt to reconcile with Mr du Plessis, Ms Gent paid 71 percent of these costs from her own funds. Significantly, Mr du Plessis conceded that the manner in which the application for business rescue was launched, ie without Ms Gent's knowledge, as obviously an interested party, was ill-advised and ultimately fatal to that application.

[8] On 30 June 2014, Mr du Plessis brought an application in the Gauteng Division of the High Court for an order that the company be wound up on the basis that it was just and equitable to do so, as envisaged in s 344*(h)* of the Companies Act 61 of 1973 (the old Companies Act), read together with item 9 of Schedule 5 of the Act. In the alternative, he sought an order directing Ms Gent to purchase his shareholding in the company, at a price to be determined by an independent expert. He further sought an order that certain machinery be returned to him, but this aspect was disputed and was accordingly referred to trial. However, nothing turns on this issue in the present appeal and it need not detain us further.

[9] Mr du Plessis' grounds for seeking to liquidate the company were, briefly: that it was a 'private domestic company' whose affairs had been conducted in a manner akin to that of a partnership; that his relationship with Ms Gent as co-shareholders of the company had broken down irretrievably; that Ms Gent had excluded him from the management of the company and from its board of directors; that a 'deadlock' had arisen between the shareholders of the company which was not

capable of resolution; and that Ms Gent's conduct was oppressive in nature in that it undermined his rights as the minority shareholder of the company.

[10] In pursuance of the alternative relief that Ms Gent be directed to purchase his shares in the company, Mr du Plessis sought to invoke the provisions of s 163 of the Act. He alleged that Ms Gent, in her capacity as the majority shareholder and director of the company, had acted in an unfairly prejudicial and oppressive manner towards him.

[11] The application came before Hughes J on 30 March 2016. The learned Judge held that although the company was akin to a partnership, it was a solvent domestic company whose substratum remained intact. Although the relationship between the two shareholders had broken down irretrievably, and was not capable of being resolved, the court a quo found that there was no deadlock that rendered it just and equitable to wind up the company. Applying the so-called 'clean hands' principle the court further found that, as Mr du Plessis had through his own conduct caused the breakdown in the shareholders' relationship, he was not entitled to apply for the winding up of the company on the just and equitable ground.[4]

[12] In respect of the s 163 relief, Hughes J found that Mr du Plessis had not established the requisites for that section to be invoked. The court found, in particular, that neither Mr du Plessis' alleged loss of confidence in the manner in which the company's affairs were being conducted, nor his resentment at having been outvoted, fell within the purview of s 163 of the Act. The court accordingly dismissed the winding up application with costs.

[4] *Emphy and Another v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D) at 368E-H.

[13] With the leave of this court,[5] Mr du Plessis appealed to the full court which, on 18 April 2019, dismissed his appeal against the refusal of the court a quo to order the winding up of the company. It rejected the submission that the relationship between the parties resembled a partnership between shareholders. It held that it could not be said that the company was, in substance, a partnership in the guise of a private company.

[14] The full court also upheld the court a quo's finding that Mr du Plessis had failed to prove the requisites of s 163(1) of the Act. As I have indicated, the full court nevertheless went on to grant relief in terms of s 163(2) of the Act, holding that it was duty-bound to design or craft a mechanism which would result in a 'clean break' between the parties. It justified this approach on the ground that the relationship between the parties had broken down irretrievably and that it was not in their best interests to remain 'in the same bed'.[6] The full court thus directed Mr du Plessis to purchase Ms Gent's shares at a fair and reasonable value.

[15] As mentioned above, Mr du Plessis' application for special leave to cross-appeal was refused by this court. This had a significant impact on the matter. In *Shatz Investments (Pty) Ltd v Kalovyrnas*[7] this court was confronted with the question whether, without any cross-appeal, it could correct an order of a trial court by making a prayer for interest, which that court had not granted. Trollip JA said the following:

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[5] Mr du Plessis' application for leave to appeal was dismissed by the court a quo on 27 May 2016. He thereafter applied to this court for leave to appeal in terms of s 17(2)*(b)* of the Superior Courts Act 10 of 2013, which application was granted on 13 September 2016.
[6] See *Du Plessis* (above fn 3) para 67.
[7] *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A).

'…The court a quo did not award it, possibly because it was not claimed in the pleadings. But, be that as it may, in the absence of any cross-appeal to correct the order of the court a quo to plaintiff's advantage and defendant's detriment by including an award of such interest, we cannot deal with it…'[8]

[16] This dictum reaffirmed trite principles. These are that a respondent in an appeal may support the order appealed against on any ground that properly appears from the record. In order to obtain a variation of the order, however, a respondent must cross-appeal with the necessary leave, save perhaps in exceptional circumstances where there is no prejudice to the appellant.

[17] The application of these principles to the present matter has the following consequences. In the first instance, the option to liquidate the company is no longer available. Importantly, what Mr du Plessis seeks is that instead of him buying Ms Gent's shares, which is what the full court ordered, she in fact be ordered to buy his shares. It is clear from the record that the purchase price would be in the range of R20 million to R35 million, an amount Ms Gent has clearly stated she could not afford. Such a variation will, without a doubt, be to her detriment. Therefore, Mr du Plessis was precluded from seeking an order that Ms Gent be directed to purchase his shares. And, as I have said, Mr du Plessis expressly disavowed reliance on the order that obliges him to purchase Ms Gent's shares. It follows that, for this reason alone, the appeal should succeed and the order of Hughes J should be reinstated. In any event, for the reasons that follow, Mr du Plessis did not show oppressive or unfairly prejudicial conduct on the part of Ms Gent.

[8] Ibid at 560G-H.

[18] As stated already, Mr du Plessis relied in this court on the following grounds in support for the relief he applied for as provided in s 163 of the Act:

(a) Ms Gent had excluded him from the management of the company and refused to provide him with management and financial information relating to the company;

(b) Ms Gent excluded him from any decision making within the company;

(c) Ms Gent removed him as a director of the company and replaced him with her husband and brother-in-law, and also unlawfully and unfairly dismissed him from employment with the company.

[19] The full court upheld the finding of the court a quo that Mr du Plessis had failed to demonstrate that Ms Gent's conduct towards him was oppressive or unfairly prejudicial, or that his interests had been unfairly disregarded. It found that the grounds relied upon by Mr du Plessis did not fall within the ambit of s 163(1) of the Act.

[20] In my view, this finding by the full court cannot be faulted. It is bolstered by the following objective facts:

(a) Mr du Plessis was validly removed as a director of the company at a properly constituted shareholders' meeting, and as provided in s 71 of the Act.

(b) As a shareholder, Mr du Plessis is at liberty and entitled to the management and financial information pertaining to the company as provided in s 26 of the Act.

(c) Mr du Plessis is entitled to dispose of his shares in the company in accordance with the provisions of paragraph 11*(d)* of the Company's Articles of Association.[9]

(d) Mr du Plessis was dismissed after being found guilty of misconduct in a disciplinary hearing. Clearly, the dismissal as general manager did not constitute conduct that fell within the ambit of s 163(1).

(e) In respect of the removal of Mr du Plessis as a director of the company, the starting point is that the mere exercise of majority shareholding voting rights does not amount to oppression. Counsel for Mr du Plessis fairly recognised that for the removal as director to fall under s 163(1), Mr du Plessis had to prove some agreement or understanding that he would be entitled to directorship of the company. There was no proof of such agreement or understanding. The objective facts indicated the converse. Mr du Plessis made no capital contribution that could entitle him a seat on the board of the company. Even though Mr du Plessis had received the bulk of his shares during 1998, he was only appointed a director during 2012. Ms Gent nominated him as director when she resigned as the sole director of the company. Within a year, however, Ms Gent was reappointed and proceeded to take steps to remove Mr du Plessis. Thus, he was permitted to be a director only for the period of approximately a year.

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[9] Paragraph 11*(d)* provides that a shareholder, desirous of selling his or her own shares to any person other than a member of his or her family, must:
'… first offer such shares in writing to any of the other shareholders of the company at a price to be agreed upon between the shareholder desiring to sell and the other shareholder, but failing such agreement then at the same price as may be bona fide obtained elsewhere by the shareholder proposing to sell. The price so obtainable elsewhere shall be evidenced in writing by the prospective purchaser.'

[21] Viewed in the light of the above considerations, the full court clearly misdirected itself in making the order that Ms Gent be ordered to sell her majority shareholding to Mr du Plessis. It ought simply to have dismissed Mr du Plessis' appeal. It follows, accordingly, that Ms Gent's appeal must succeed.

[22] In the circumstances the following order is made:

(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The order of the full court is set aside and substituted with the following:

'The appeal is dismissed with costs.'

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B H Mbha
Judge of Appeal

APPEARANCES

For First Appellant:	M P van der Merwe SC (with him N Komar) Instructed by: Waldick Jansen van Rensburg Inc., Centurion Symington De Kok Attorneys, Bloemfontein
For Respondent:	B H Swart SC (with him R Oosthuizen) Instructed by: Jarvis Jacobs Raubenheimer Inc., Pretoria Rossouw Attorneys, Bloemfontein