



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Not Reportable**

Case no: 638/2022

In the matter between:

**MICHELLE ARMITAGE NO**

**APPELLANT**

and

**VALENCIA HOLDINGS 13 (PTY) LTD**

**FIRST RESPONDENT**

**SHAUN MICHAEL GREEN**

**SECOND RESPONDENT**

**MARK DOUGLAS SMITH**

**THIRD RESPONDENT**

**RONALD JAMES HOY**

**FOURTH RESPONDENT**

**DEREK NORMAN STANBRIDGE**

**FIFTH RESPONDENT**

**Neutral citation:** *Armitage NO v Valencia Holdings 13 (Pty) Ltd and Others*  
(638/2022) [2023] ZASCA 157 (23 November 2023)

**Coram:** DAMBUZA, MEYER and GOOSEN JJA, KATHREE-  
SETILOANE and SIWENDU AJJA

**Heard:** 26 September 2023

**Delivered:** 23 November 2023

**Summary:** Company law — action by executor of deceased shareholder's estate — s 163 of the Companies Act 71 of 2008 (the Act) — oppressive or unfairly prejudicial conduct — whether interest free shareholder loans as an advance on future dividends constituted oppressive or unfairly prejudicial conduct — deceased shareholder consenting to the loans — claim for payment of indemnity insurance proceeds — buy and sell — indemnity insurance proceeds not equal to value of shares — share buy-out procedure binding on the executor — oppressive or unfairly prejudicial conduct not established — award of compensation under s 163(2)(j) not competent.

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**ORDER**

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**On appeal from:** Gauteng Division of the High Court, Johannesburg (Adams J with Fisher and Malindi JJ concurring, sitting as a court of appeal):

The appeal is dismissed with costs, which shall include the costs of two counsel.

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**JUDGMENT**

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**Siwendu AJA (Dambuza, Meyer, Goosen JJA, and Kathree- Setiloane AJA concurring):**

[1] This appeal is based on the oppressive or unfairly prejudicial conduct remedy in s 163(1) of the Companies Act 71 of 2008 (the Act). Its genesis flows from interest free loans granted by the first respondent, Valencia Holdings 13 Limited (Pty) Ltd (Valencia) to its shareholders, as an advance on future dividends. The full court of the Gauteng Division of the High Court, Johannesburg (the full court) found the loans were not oppressive or unfairly prejudicial, and set aside a compensation order granted to the appellant in terms of s 163(2)(j) of the Act. The appeal is with the special leave of this Court.

[2] Mrs Michelle Armitage NO (the appellant) instituted an action against the respondents in the Gauteng Division of the High Court, Johannesburg (the high court) in her capacity as the executrix of the estate of her late husband, Mr Alan Armitage (the deceased). She claimed payment of R6 768 900, being the proceeds of a life insurance policy paid to the respondents. She alleged amongst

the numerous grounds for the action, that the respondents engaged in oppressive and prejudicial conduct envisaged in s 163 of the Act.

[3] The deceased, who died on 12 December 2013, was a minority shareholder in the first respondent, Valencia Holdings 13 (Pty) Ltd (Valencia). The second to fifth respondents were co-shareholders in Valencia together with the deceased. At the time of his death, the shares in Valencia were held in the following proportions: (a) 7.5% of the shares were allotted to the deceased and the second respondent, Mr Shaun Michael Green respectively; (b) The third respondent, Mr Mark Douglas Smith and the fourth Mr Hoy each held 27.33% of the shares; and (c) the fifth respondent Mr Derek Norman Stanbridge held 5.33% of the shares. The remainder of the shares were held by Black Economic Empowerment (BEE) shareholders. They played no role in the litigation.

[4] Valencia is a non-trading holding company. It has two wholly owned operating subsidiaries, MDS International Skills (Pty) Ltd and MDS NDT Consultants (Pty) Ltd. Over and above their respective shareholding, the deceased and the respondents were joint directors of Valencia and its wholly owned subsidiaries, making Valencia a closely held group.

[5] In terms of Clause 15.1 of the shareholders' agreement, the shareholders agreed that the value in Valencia lay in their collective skills and expertise. They decided to take out and maintain a 'buy and sell' indemnity insurance on each other's lives in the event of the death or disability of one of them. The insurance policy was issued in May 2012. They jointly determined the premium payable with their insurance broker, based on an estimated value of Valencia's shares, and adjusted the insurance premium by 3.5% annually.

[6] From 29 February 2012 to 29 February 2016, the deceased and the second to fifth respondents (respondents) devised a mechanism to fund their

personal financial needs by way of ‘interest free shareholder loans’ (the loans). They styled the loans as ‘advance payments on future dividends’. The scheme operated in this manner. When one of the shareholders required funds for personal expenses, these would be sourced from one of Valencia’s subsidiaries. Since Valencia did not possess a bank account, payments would then be made by the subsidiary to the shareholder or to a third party on behalf of the requesting shareholder.

[7] At each financial year end, the subsidiary from which the funds were drawn, would record the amounts advanced against the name of the requesting shareholder, and furnish a single journal entry of all the shareholder loans advanced to Valencia. The amounts paid on behalf of each shareholder would be recorded against that shareholder’s loan account as an ‘interest free shareholder loan’. As and when Valencia declared a dividend, it would first amortise the loans against the dividend due to the relevant shareholder. To the extent that a balance stood in credit after settling the loan, it would be paid to that shareholder.

[8] The insurance policy taken out on the life of the deceased was paid out to the surviving shareholders in an aggregate sum of R6 768 900. In April 2014, the respondents tabled an offer to the appellant to acquire the deceased’s shares. Negotiations faltered and the respondents withdrew the offer. A deluge of litigation on several aspects of the affairs of Valencia, including a contested application for disclosure of company information, followed. The upshot is that three years after the death of the deceased, in March 2017, following the institution of the action in January 2017, the respondents made another offer ‘with prejudice’ to purchase the deceased’s shares for R6 768 900. They offered to pay the purchase price over 60 months with interest at the rate of 10.25% from the date of the signature of the settlement agreement.

[9] The appellant declined the offer, and alleged that the respondents enjoyed a substantial benefit by way of ‘huge interest free loans made by Valencia’ to her exclusion. She made a counter-offer asserting that: ‘The simple, fair and appropriate resolution to that is that the amount of R 6 768 900.00 should attract interest from the date of the receipt of the proceeds at the appropriate interest rate which we suggest to you would be the prime overdraft rate over the period . . .’. The counter offer was not accepted.

### **Section 163 (1) proceedings**

[10] In the trial proceedings, the appellant alleged in Claim 1 that there was an oral agreement between the respondents and the deceased that the proceeds of the insurance policy would be paid to the survivor or executor of the estate of the first dying shareholder. In the alternative, she claimed that the death of the deceased was a ‘trigger event’ in terms of the shareholders’ agreement. The respondents were required to pay the appellant the proceeds of the insurance policy, for the proportionate portion of the shares of the deceased but failed to do so.

[11] In Claim 2, which she pleaded in the alternative to Claim 1, the appellant alleged that the respondents acted in concert and engaged in ‘oppressive and/or unfairly prejudicial’ conduct (the conduct) under s 163(1) and (2) of the Act in disregard of her interests. She attacked the advance of the loans to the respondents on the grounds that they were prohibited financial assistance to the directors, made in breach of ss 45(3)(a) and (b) of the Act.<sup>1</sup> She alleged that the

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<sup>1</sup> Section 45(3) of the Companies Act 71 of 2008 provides:

‘Despite any provision of a company’s Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless—

(a) the particular provision of financial assistance is—

(i) pursuant to an employee share scheme that satisfies the requirements of section 97; or

(ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and

loans were not sanctioned by a special resolution of shareholders as required by s 45(3)(a)(ii) of the Act. Furthermore, when Valencia granted the loans, it had a debt of R3 319 709 with Investec Bank, which attracted debt servicing interest. She furthermore alleged that, Valencia failed to satisfy the solvency and liquidity test. She also alleged that the respondents acted in concert and increased the loans to themselves ‘notwithstanding that the company had been advised that such loans were improper and/or contrary to provisions of the Act.’

[12] Her second complaint about the oppressive or unfairly prejudicial conduct, also pleaded in the alternative, was that she had been excluded from participating in the loan scheme and should have been afforded a similar benefit. The respondents wrongfully withheld company information. She maintained that a payment of the proceeds of the insurance policy was an ‘equitable’ means to avoid a dispute about the purchase price of the shares, expenses and legal costs associated therewith.

[13] Lastly, the appellant sought an order declaring the second to fifth respondents, delinquent directors and placing them under probation in terms of s 162 of the Act (delinquency claim). She claimed the respondents grossly abused their position as directors. They had intentionally or through gross negligence, inflicted harm on the company and/or acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in the performance of their functions as directors. It is not necessary to deal with those allegations since they are no longer relevant to the appeal.

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(b) the board is satisfied that—

- (i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and
- (ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.’

[14] Although the high court dismissed the appellant's claims based on: (a) the oral agreement; (b) the breach of s 45 of the Act; and (c) the delinquency claim, it found that there was unfair and oppressive conduct. The high court ordered the respondents to pay a sum of R6 768 900 in terms of s 163(2)(j) of the Act, in proportion to the proceeds received when they realised the insurance. It reasoned that the appellant had been unfairly excluded from shareholder benefits and that: '[a]part from not benefiting from the proper distribution of the profits of the company, [the appellant] was also prejudiced by the non-payment of the interest on [the] loans. This constitutes a violation of the conditions of fair play on which every shareholder is entitled to rely on'.

[15] The respondents challenged the high court's findings and the compensatory order, on appeal to the full court. The appellant was granted leave to cross-appeal against the refusal to declare the respondents delinquent directors.

[16] The full court reversed the decision of the high court and found that the conduct complained of did not entitle the appellant to relief in terms s 163 of the Act. It also dismissed her reliance on s 45 and reasoned that: '. . . the deceased concluded a shareholders' agreement with his co-shareholders in terms of which he specifically agreed to the manner in which he would be obliged to dispose of his shareholding in Valencia. It held that the appellant was not entitled to conveniently use an oppression remedy for the ulterior purpose of avoiding compliance with the terms of the shareholders' agreement'. The full court further dismissed the cross-appeal to declare the respondents, delinquent directors. Dissatisfied with the outcome, the appellant turned to this Court.

### **In this Court**



[17] The appeal has crystallised to the dismissal of the oppressive or prejudicial conduct claim under s 163(1) of the Act and is restricted to the orders setting aside the compensation award made in terms of s 163(2)(j) of the Act. The appellant did not challenge the dismissal of her cross-appeal.

[18] At the heart of the appeal, is whether the oppressive or unfairly prejudicial conduct has been established. The submission on behalf of the appellant centred on the loans and their characterisation as advance dividends. The argument was that since the appellant ‘was to be considered a shareholder, the effect of not paying her such advance dividends was clearly prejudicial and unfairly disregarded her interests’. Given that the loans were shareholder loans, then she was treated differently from the other shareholders without reason, so it was argued.

[19] The respondents argued on the other hand that the appellant failed to prove the above allegations. The respondents submitted first, that the deceased consented to the loans. Secondly, after his death, his estate, enjoyed the benefit of the loans until 2017. Thirdly, the appellant failed to follow the procedure stipulated in the Memorandum of Association (MoA) dealing with the disposal of the deceased’s shares. Lastly, the respondents contended that the appellant impermissibly contrived the relief in terms of s163 to secure the payment of the insurance policy proceeds.

### *The law*

[20] The relevant provisions of s 163(1) and (2) of the Act read:

‘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

...

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

...

(j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation.’

[21] The provision expands the relief beyond a shareholder and permits a director to apply personally for a remedy against the company. It mitigates one of the general rules of company law: when a person becomes a shareholder of a company, that person undertakes to be bound by majority decisions even if the decision affects their rights as a shareholder.<sup>2</sup> As this Court stated in *Grancy Property Limited v Manala*<sup>3</sup> (*Grancy*), s 163 is in some respects the equivalent to s 252(1) of the Companies Act 61 of 1973<sup>4</sup> (the old Companies Act). The substantial body of case law dealing with s 252 of the old Companies Act, repealed by the current Act, applies to the assessment of oppressive or unfairly prejudicial conduct.

[22] It is notable that the language employed in the provision differs from that of the old Companies Act. The court in *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others*<sup>5</sup> (*Visser*) observed that although the new provision may not directly alter the character of the regulated conduct, the inclusion of the

<sup>2</sup> *Sammel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 678G-H.

<sup>3</sup> *Grancy Property Ltd v Manala and Others* [2013] ZASCA 57; [2013] 3 All SA 111 (SCA); 2015 (3) SA 313 (SCA).

<sup>4</sup> Section 252(1) provided that: ‘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 some part of the members of the company, may, subject to the provisions of subsection (2), make an application to the Court for an order under this section’.

<sup>5</sup> *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014(5) SA 179 (WCC) at paras 54 to 55.

word ‘oppressive’ in the text connotes conduct of ‘a more egregious kind.’ I agree with the remarks made in *Visser* that it would be difficult to find that conduct is ‘oppressive’ without such conduct being ‘unfairly prejudicial’ Nevertheless, the test is an objective one, and as held by the court in *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others*,<sup>6</sup> ‘The prejudicial inequity or unfairness lies not in the *legally justifiable exclusion* of the affected member from the company's management, but in the effect of the exclusion on such member if a reasonable basis is not offered for a withdrawal of his or her capital.’

[23] This Court in *Louw and Others v Nel*<sup>7</sup> (*Louw*) sets out the criteria for granting relief as follows:

‘An applicant for relief under s 252 cannot content himself or herself with a number of vague and rather general allegations, but must establish the following: that *the particular act or omission has been committed*, or that the affairs of the company are being conducted in the manner alleged, and that such act or omission or conduct of the company's affairs *is unfairly prejudicial, unjust or inequitable* to him or some part of the members of the company; the nature of the relief that must be granted to bring to an end the matters complained of; and that it is just and equitable that such relief be granted. Thus, the court's jurisdiction to make an order does not arise until the specified statutory criteria have been satisfied.’ (Own emphasis.)

### *Is the conduct complained of oppressive or prejudicial?*

[24] The respondents maintained that the deceased's participation and consent to the loan scheme vitiates the appellant's claim. Their position is reinforced by the principle in *Irvin and Johnson Ltd v Oelofse Fisheries Ltd*<sup>8</sup> (*Irvin and Johnson*) where the court held that:

‘Oppression is something done against a person's will and in his despite. It is not something done with his acquiescence or consent, and still less something done with his co-operation.’

<sup>6</sup> *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others* [2017] ZAGPJHC 109; [2017] 3 All SA 47 (GJ); 2017 (5) SA 577 (GJ) para 44.

<sup>7</sup> *Louw and Others v Nel* [2010] ZASCA 161; 2011 (2) SA 172 (SCA); [2011] 2 All SA 495 (SCA) para 23.

<sup>8</sup> *Irvin and Johnson Ltd v Oelofse Fisheries Ltd* 1954 (1) SA 231 (E) at 243B-C.

[25] In this case the consent is borne out by the annual financial statements for the financial year ending February 2013 signed by the deceased, reflecting a credit loan account of approximately R600 000 in his favour. Mr Koski, called as an expert by the appellant to testify at the trial, confirmed that the deceased had the benefit of the shareholder loan account. Payments were made to third parties for his personal expenses on his behalf.

[26] The appellant sought to disavow that the deceased's consent to the loans scheme bound her. She submitted instead that, as executrix, her position is analogous to that of the executor in *Van den Bergh v Coetzee*<sup>9</sup> (*Van den Bergh*). The question in *Van den Bergh*, was whether knowledge of certain latent defects by the deceased in respect of a sale of a property could be imputed to the executor. The court found that there was no legal basis to do so and held that:

‘. . . the executor does not step into the shoes of the deceased on his death; he does not succeed to the person of the deceased. He is simply required to administer and distribute his estate under the provisions of the Administration of Estate Act 66 of 1965. In my view, there is no justifiable legal basis to connect the executor with the acts of the deceased. The executor's position is regulated by the Act’.

[27] In the present matter, the rights and dominium in the shares remained vested in the deceased estate.<sup>10</sup> The appellant's role was to administer the deceased estate in accordance with the deceased's last will and testament. The provisions of the Memorandum of Association (MoA) read with the shareholders' agreements bound the appellant in relation to the management of the deceased's assets in Valencia. I deal with the effect of the shareholders agreement below.

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<sup>9</sup> *Van den Bergh v Coetzee* 2001 (4) SA 93 (T) at 95H-I.

<sup>10</sup> See s 3 of the Estate Duty Act 45 of 1955; also *Gaffoor NO and Another v Vangates Investments (Pty) Ltd and Others* [2012] ZASCA 52; 2012 (4) SA 281 (SCA); [2012] 2 All SA 499 (SCA) para 33.

[28] In answer to the evidence pointing to the deceased's consent, counsel for the appellant submitted that we should consider the benefit derived from the loans over time. After the deceased died, the appellant could not participate in the loan scheme. She was not treated equally with the other shareholders, so it was argued. Therefore, the Court should order the payment of the proceeds realised by the respondents from the 'buy and sell' insurance policy in exchange for the shares. It was intimated that an independent valuation of the shares in Valencia would be difficult. To bolster the argument for the payment of the proceeds, counsel sought to persuade us that under s 163(2) of the Act, this Court can exercise a similar discretion to that articulated in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*<sup>11</sup> (*Oakdene*) and grant an order it considers appropriate.

[29] First, the submission misconstrues the 'buy and sell' provisions which bind the appellant. It was submitted their effect is that the shareholders would 'use the proceeds' to buy the deceased's shares. It was argued that shareholders determined the value and contemplated that the premium paid for the 'buy and sell' insurance policy 'would match' the value of the shares in Valencia. The relevant part, of the shareholders' agreement states:

'15 BUY-SELL

...

15.3 The death or disablement (as determined by the rules applicable to such disablement insurance) of a shareholder or the person who holds a controlling interest in a shareholder shall be deemed to constitute a 'trigger event' as contemplated in clause 14, in which event the other shareholders agree to use the proceeds of such indemnity insurance to purchase the shares and claims proportionately or as may otherwise be agreed between them, held by the deceased or disabled shareholder or the person who holds the controlling interest in a shareholder.

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<sup>11</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] ZASCA 68; 2013 (4) SA 539 (SCA); [2013] 3 All SA 303 (SCA) paras 18-21.

15.4 To avoid doubt the provisions of clause 19 will apply when valuing the shares and claims for the purposes of this clause 15.

15.5 Accordingly, the shareholders agree that if there is any shortfall between the proceeds of the indemnity insurance and the fair value of the shares and claims, if any, such shortfall or difference will be deemed waived and the fair market value of the shares of the offering shareholder will be the value determined under the buy-sell insurance agreements to be concluded by the shareholders after signature of this agreement, provided that if such buy-sell insurance has not been taken out, prior to an offer being received (or deemed to be received) by an offeree then the fair value of the shares will be determined in accordance with clause 19.

...

#### 19 DETERMINATION OF FAIR VALUE

The fair value of the shares will be determined annually by the auditors of the company ('the valuer') at its cost. Such fair value as determined will be recorded in the notes of the auditor's (valuer's) financial report presented to the directors and will represent the total sum to be insured in accordance with, and as contemplated by the provisions of clause 15 collectively representing each of the legacy shareholder's amount insured proportionate to his shareholding. For any purpose under this agreement, such fair value shall be determined in accordance with the following provisions.'

[30] The difficulty with the appellant's submission is that she did not dispute that the premium paid for the 'buy and sell' insurance was based on an estimated value of the shares, agreed to between the shareholders and the insurance broker. The phrase 'to use the proceeds' does not mean 'pay the proceeds' as suggested. The argument isolates the phrase from the rest of the provisions in a manner that is inconsistent with the overall terms of the shareholders' agreement. It, thus, yields an unbusiness - like result.<sup>12</sup>

[31] When clause 15.3 is read with clause 15.5, it is clear that the shareholders anticipated that there could be a shortfall between the estimated value fixed for

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<sup>12</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

determining the premium, on the one hand, and the actual value of the shares, on the other. They had agreed on a contractual means to bear that risk. Whether or not there was a shortfall, and its extent could only be determined after the independent valuation envisaged under clause 19. Since that has not occurred, there is no basis to determine the compensation amount claimed. The submission is not sustainable. It entails the reinstatement of the award made by the high court, in disregard of the prevailing agreements.

[32] Second, the assertion that there was unequal treatment does not assist the appellant. The loan account ledger, presented at the trial reflects movements in the shareholders' loan accounts. It shows that Valencia maintained the deceased's loan account beyond his death. The evidence of Mr Koski supports the contentions by the respondents. He confirmed that the deceased's estate had the benefit of an interest free loan until 2017. From 2013 to 2017, Valencia declared dividends of R35 million and amortised the deceased's loan account and those of other shareholders, as was the agreed practice.

[33] Mr Koski conceded that the deceased's loan account was adjusted after Valencia declared a dividend in 2016. The evidence also showed that three of the four remaining shareholders received loans during 2014 to 2015. Only two of the shareholders received new loans during the period 2015 to 2016. And only one shareholder took out a new loan during 2016 to 2017. Ultimately, after the deceased's loan account was settled, the nett movement on the loan accounts of other shareholders decreased rather than increased between 2017 and 2018. There is no evidence of a diminution of benefits to the estate after the deceased died.

[34] The argument that a court has a discretion to grant relief under s 163(2) in the circumstances of this case cannot be sustained. Here too, as in *Oakdene*, the

court's discretion is 'bound up' by the jurisdictional requirements in s 163(1)(a) for an act or omission that is oppressive or unfairly prejudicial. Objectively, the appellant's allegations do not withstand the scrutiny required for relief under s 163. That there are difficulties with the valuation of the shares compounded by the effluxion of time, is not a basis to grant the relief sought. The Court in *Louw* makes it plain that the conduct of the minority seeking relief is not immune to scrutiny.<sup>13</sup>

[35] The respondents made numerous tenders to purchase the shares at fair market value, and later, for a sum close to the amount awarded to the appellant by the high court. She, however, elected to embark on lengthy litigation to force the sale of the shares on terms not contemplated by the shareholders in Valencia's constitution documents. As correctly contended by the respondents, the refusal of the tender counters the appellant's reliance on the oppression remedy.<sup>14</sup> That would be more so in the present case, where the refusal of the tender was based on incorrect factual grounds.

[36] Confronted with the above challenges, the appellant revived her complaint that the loans breached s 45 of the Act. She submitted that there could not have been unanimous consent about their grant once the deceased died. The shareholders and directors were no longer the same. Her position as an executor of the estate meant that she could not create a debt in Valencia.

[37] Section 45 is designed to protect shareholders against self-serving directors who breach their fiduciary duties. On the facts of the present matter, it is doubtful that a cure for the breach of s 45 lies in the oppression or unfair prejudicial remedy. In any event, the s 45 complaint was not amongst the

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<sup>13</sup> Fn 7 supra.

<sup>14</sup> *Bayly and Others v Knowles* [2010] ZASCA 18; 2010 (4) SA 548 (SCA); [2010] 3 All SA 374 (SCA) para 24.



grounds for appeal before the full court. The appellant did not cross-appeal its dismissal by the high court. It is unnecessary to decide it in this appeal.

[38] In conclusion, the requirements for relief under s 163 were not established. In the result, I make the following order:

The appeal is dismissed with costs, which shall include the costs of two counsel.

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N T Y SIWENDU  
ACTING JUDGE OF APPEAL

#### Appearances

For the appellant:	A C Botha SC
Instructed by:	Brian Kahn Inc Attorneys, Randburg Claude Reid, Bloemfontein
For the respondents:	A Subel SC and P Cirone
Instructed by:	Knowles Husain Lindsay Inc, Sandton McIntyre Van der Post, Bloemfontein