



**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

Case nos. 817/17; 818/17
4602/17; 4603/17

In the matters between:

ANDRE CHRISTIAN BRESLER

Applicant

and

XIGO (PTY) LTD

First Respondent

RICHARD CLIVE POPL

Second Respondent

ANDREW DAVID BAHLMAN

Third Respondent

GAVIN SCOTT

Fourth Respondent

ANDRE CHRISTIAN BRESLER

Applicant

and

QUICKBERRY (PTY) LTD
Respondent

First

RICHARD CLIVE POPL

Second Respondent

RICHARD BRIAN GRANTHAM
Respondent

Third

GAVIN SCOTT
Respondent

Fourth

GAVIN SCOTT

Applicant

and

QUICKBERRY (PTY) LTD
Respondent

First

RICHARD CLIVE POPL

Second Respondent

RICHARD BRIAN GRANTHAM
Respondent

Third

ANDRE CHRISTIAN BRESLER
Respondent

Fourth

GAVIN SCOTT

Applicant

and

XIGO (PTY) LTD
Respondent

First

RICHARD CLIVE POPL

Second Respondent

ANDREW DAVID BAHLMAN

Third Respondent

ANDRE CHRISTIAN BRESLER
Respondent

Fourth

JUDGMENT DELIVERED ON 12 OCTOBER 2018

SHER, J:

1. I have before me four related applications which by agreement between the parties were consolidated and heard together. They concern a number of

shareholders and directors of two sister companies Xigo (Pty) Ltd and Quickberry (Pty) Ltd, which offer brokerage services in company mergers and acquisitions. Xigo concentrates on transactions where the value of the share capital or turnover is in excess of R 50 million and it largely operates on international markets, whilst Quickberry operates primarily in the local markets where the values concerned are less.

2. In two of the applications, which were launched¹ on 19 January 2017 by Bresler (who was at the time the financial director of Xigo), orders were sought winding up both companies on the grounds that it was just and equitable as the relationship of trust and confidence between the shareholders had allegedly broken down irretrievably.
3. Save for Scott, the applications were opposed by Bresler's co-directors and shareholders. Although they agreed that they were 'deadlocked' and their relationship had been irrevocably damaged² they contended that it would be inappropriate and commercially undesirable to wind up the entities as they were viable and commercially solvent companies which were trading at a profit. Consequently, on 10 February they in turn launched counter-applications in each matter in which they sought orders in terms of s 163(1) and (2) of the Companies Act³ whereby second and third respondents ie Pople and Bahlman in the Xigo application and Pople and Grantham in the Quickberry application, would be authorised to acquire Bresler's 29.9% and 20% shareholding in these companies respectively at values to be determined by 2 independent chartered accountants and auditors.⁴
4. Although a large part of the founding affidavits which were filed by Bresler in both applications detailed various attempts by the parties (from June 2016 already) to arrive at a parting of the ways on the basis that the respondents were to acquire

¹ Under case nos. 817/17 and 818/17.

² As will be apparent from what is set out below the respondents allege that Bresler was to blame for this state of affairs.

³ No. 71 of 2008.

⁴ Who were to be chosen by agreement between the parties, or failing such agreement as appointed by the SA Institute of Chartered Accountants.

Bresler's shareholdings at values which were to be determined independently, and Bresler expressed his frustration at what he perceived to be continued intransigence on the part of the respondents, the offer which was put forward by them in February 2017 by way of their counter-applications was not acceptable to him as far as its formulation was concerned, and he filed opposing affidavits in respect of both.⁵

5. Although he was in agreement that the respondents should acquire his shareholding in both companies he contended that their proposal as to the manner in which his shareholdings should be valued was 'vague' and 'lacking in substance' inasmuch as it did not set out any details in regard to the effective date for the proposed acquisition thereof, the method which was to be adopted by the valuers, the information on which they were to base their valuation, how any disputes would be dealt with and how the acquisitions would be financed. He also said he did not trust that the respondents would follow a fair procedure and he referred in this regard to correspondence in which he said they had made it clear that they wished to acquire his shareholding at minimal values. He said there was no need to obtain independent valuations as the respondents had prepared a draft share sale agreement in June 2016 in terms of which Bahlman was to acquire the second tranche of an additional 10% of the total issued share capital in Xigo from him, Scott and Pople in equal proportions (ie 3.33% from each of them). Based on these discussions his shareholding in Xigo at the time was valued at R 7.5 million. Although in October 2016 the company's auditor Lanfear had subsequently valued his shareholding in Xigo at R 9.25 million he had nonetheless indicated in November 2016 that he was prepared to accept the June value. However, he had also asked Grant Thornton, an independent firm of chartered accountants, to prepare a report as to the appropriate methodology for arriving at a valuation of the equity in both companies and duly annexed a copy thereof,⁶ which was dated 27 February 2017. It is common cause that the authors of the report recommended that a valuation be performed on a so-called

⁵ Between 28 February and 1 March 2017.

⁶ Annexure 'ACB 86' to his answering affidavit in the counter-application.

discounted cash flow basis ie on the basis of the net present value of the likely future income which was to be derived by the companies over a certain period of time, capitalized and discounted.

6. The respondents seemingly did not engage Bresler in regard to his proposed valuation method and between 6 and 19 April 2017 gave notice that they intended to withdraw their counter-applications in both matters. On 19 April they also filed a notice of withdrawal of their opposition to the winding up of Xigo.
7. On 3 May 2017 Bresler obtained a provisional order for its winding up which was made final on 15 June 2017. For reasons which are not apparent from the papers he did not proceed to move for an order winding up Quickberry. However, a month later, on 14 July 2017, he gave notice that he intended to amend the notice of motion in both matters, by introducing an alternative order in similar terms to that sought by the respondents ie one whereby second and third respondents in each application were to be directed to acquire his shareholdings in terms of s 163(2) of the Act. To this end he sought to rely on the report which he had obtained from Grant Thornton, in which the proposed methodology for arriving at a valuation of the members shareholdings had been set out.
8. That then by way of introduction as far as the two winding up applications by Bresler are concerned. In the two remaining applications⁷ which were launched on 10 March 2017, Scott who similarly holds a 29.9% and 20% shareholding in each of the two companies and who also was a director in both, also sought an order in terms of s 163(1) and (2) of the Act, directing the selfsame respondents to acquire his shareholdings in both entities at a value to be determined by two independent chartered accountants, as per the proposed methodology set out in the report by Grant Thornton. And in the alternative, he too sought an order winding up the companies.
9. The respondents did not file opposing papers in regard to the principal relief which was sought in the applications which were brought by Scott. On 13 June

⁷ Under case nos. 4603/17 and 4602/17.

2017 Scott filed supplementary founding affidavits in which he pointed out that although he sought an order based on the Grant Thornton report, inasmuch as it was silent as to the date at which his shareholdings were to be valued he asked that the court should direct that it was to precede the date when he was suspended as a director ie 20 December 2016. To this end he proposed 30 November 2016 as this was the last month-end date, prior to his suspension, in which financial statements were available.

10. Following this, Bresler too sought to propose in later affidavits which he filed that the applicable date for the valuation of his shareholdings should be fixed at a date prior to the launch of his winding-up applications, and he also suggested that 30 November would be appropriate.
11. The respondents in turn dispute that a date prior to the commencement of proceedings by Bresler in January 2017 would be fair or appropriate, for either the Bresler or the Scott applications. They aver that inasmuch as Bresler deliberately chose to institute winding up proceedings and to prosecute these to the end in Xigo notwithstanding their 'longstanding' offer to purchase his shares, and given that he pressed on and obtained not only a provisional order but also a final order even after they had again made an offer to purchase his shares by way of their counter-application, which he had spurned, he should not be allowed to benefit from his actions at their expense. They said that as a result of Xigo being placed in liquidation it had suffered severe reputational damage and had lost all value to the point where it was now commercially insolvent and its shares were worthless. They alleged that the destruction in value had already been wrought when the provisional order was granted and as a result they had decided that there was little point in resisting the winding up any further, or in proceeding with their counter-application in terms of s 163. They averred that Quickberry had suffered a contagious similar reduction in value following the demise of Xigo.
12. They further contended that in any event, at least insofar as Xigo was concerned it was no longer legally permissible for the relief which Bresler now sought in

terms of s 163 to be granted. In this regard they contended that the court became *functus officio* once the final order of winding up had been granted. They submitted further that by deliberately electing to proceed with an order for the winding up of both entities Bresler had waived any rights which he might have had to claim relief in terms of s 163, in the alternative.

13. As far as Scott was concerned they claimed that inasmuch as he had associated himself with the winding up applications which Bresler had launched by also seeking orders in this regard in his applications, he too should not be allowed to obtain a date for the valuation of his shareholdings at any time before the launch of his proceedings in March 2017. They pointed out that in his applications he had only sought orders in terms of s 163 without any reference to a date for the valuations of his shareholdings and without motivating initially why valuations should be made on any date prior to the grant of an order in this regard. They contended that inasmuch as he only sought to propose valuations based on an earlier date by way of supplementary papers which he filed on 13 June 2017, some 2 days before Bresler took a final order for the winding up of Xigo, by which time there was no longer any value in its share capital or that of Quickberry, it would be unfair and inappropriate to set the date for the valuation of Scott's shareholding in Xigo or Quickberry at any time prior to the grant of an order in terms of s 163, or at the very earliest as at the date when the final winding up order for Xigo was made.
14. That then by way of a general introduction. What I am required to determine therefore is whether the applicant parties have made out a case for relief in terms of s 163 of the Act and if so, what date to fix for a valuation of their shareholdings in both companies, and whether or not, as far as Bresler is concerned an order in terms of s 163 is competent in relation to his shareholding in Xigo.
15. It is common cause that in relation to the first question which requires an answer I am required to arrive at a determination which is fair to both sides⁸ having due regard for the circumstances which gave rise to any order which might eventuate

⁸ *Louw v Nel* 2011 (2) SA 172 (SCA) at para [31].

in terms of the aforesaid provision. In the context of the applications which are before me whereby orders are sought in terms of s 163(2)(e) of the Act directing certain shareholders to acquire the shareholdings of others the applicants must show either 1) that any act or omission of the companies or any 'related' person has had a result which is 'oppressive or unfairly prejudicial' to them or which 'unfairly disregarded their interests'⁹ or 2) that the business of the companies or the powers of any of the directors were conducted or exercised in a manner which was 'oppressive or unfairly prejudicial' to them or which 'unfairly disregarded their interests'.¹⁰ In order to determine whether such acts, omissions or conduct took place I will of necessity have to have regard for the long and troubled history of the relationship between the parties and how it soured and ultimately broke down, and will have to try, where possible, to attempt to attribute blame and 'oppressiveness' or unfair conduct, if any, to those responsible.

16. There are a number of aspects which make this exercise a difficult one. In the first place, as will already be apparent from the brief remarks which were made by way of introduction, both sides blame one another for the break-down in their relationships and there are a number of factual disputes as to who was responsible for what, and the papers are rambling and vituperative in their scope with much posturing and manoeuvring apparent on all sides. In addition, the parties did not stick to the long-established and accepted rule that, unless special circumstances warrant it, only 3 sets of affidavits are to be filed. The papers in the applications are unnecessarily prolix and repetitive, encompassing many thousands of pages. In like fashion when it came to argument the parties also did not restrict themselves to one bite at the cherry, and numerous sets of heads of argument were filed. Oral argument itself also was fragmented, unnecessarily lengthy and repetitive, at least insofar as second and third respondents are concerned. An initial attempt during June-July last year to argue only Scott's applications was halted and postponed in order to allow the four applications to be heard together with a view to avoiding the possibility of contrary decisions by

⁹ S 163(1)(a).

¹⁰ Ss 163(1)(b) and (c).

different courts. This was accompanied by further sets of affidavits being filed followed in quick succession by further heads of argument.

17. It is extremely disheartening that notwithstanding that all the parties were in agreement that the relationship between them had long broken down irretrievably and their commercial marriage was at an end, and notwithstanding that they were basically all in agreement that there should be a share buy-out of the applicants' shareholdings (save in respect of Bresler's shareholding in Xigo), and notwithstanding the court's repeated entreaties that they should consequently attempt to resolve their differences extra-judicially, the war raged on regardless, a year after the winding up of Xigo and long after the *dramatis personae* were clearly engaged in other ventures.

The factual background

18. In their voluminous affidavits the parties made frequent reference to emails which were exchanged between them during the sorry history of the decline in their relationships. As is to be expected, by and large these references were chosen or quoted from selectively and with a view to furthering a particular point of view. In Bresler's case this was with a view to bolstering the assertion, central to his application to wind up the two corporate entities, that relationships between the shareholders and directors had completely degenerated to the point where the administration and operation of these entities had become dysfunctional and it was accordingly just and equitable that they be wound up. In the case of Scott this was with a view to illustrating how unfairly he had been treated in order to bolster his claim that there had been oppressive conduct within the meaning of s 163 of the Act, which would justify making an order that the other shareholders were to buy him out.
19. In order to obtain as accurate and 'neutral' a reflection of what transpired as is possible I have attempted, in what is set out below, to refer to the actual contents of the emails which were exchanged without such an inadvertent bias, by relying on the actual language which was used rather than the spin which the parties sought to place on it. I have also attempted to set out a single chronological

history with reference to all the parties in order to set out a holistic picture of events instead of a separate account in respect of each of the applicants, as foreshadowed in their individual applications.

20. Xigo was formed by Scott, Bresler and Pople. At the time Scott had his own consultancy in the field of mergers and acquisitions after being exposed thereto whilst in the employ of various audit firms, and he and Bresler thought there was an opportunity for them to work together in this area. Bresler identified a UK company BCMS Corporate Ltd ('BCMS') which was active in the same field on an international level and they recognized that there was an opportunity to start a similar venture in South Africa, in alliance with it. Pople was known to Bresler as a potential investor and he agreed to join forces with them. Initially he was in charge of sales and managed the relationship with BCMS and Scott performed the role of Deal Leader which involved him facilitating transactions between potential sellers and buyers. Bresler was employed as the company's financial director. With the expansion of the business Bahlman was employed as a second Deal Leader and later as the MD, after Pople indicated he wanted to emigrate to Mauritius, at which point Pople was Chairman of the Board. After a while they realised there was an opportunity for another entity to be established in order to deal with smaller, local transactions where the client turnover was between R 10-50 million or less, which led to the formation of Quickberry. Although Xigo and Quickberry were 2 separate corporate entities they were effectively run and operated together by a largely common group of shareholders and directors. Bresler, Scott and Pople were directors of both companies and each held a 29.9% shareholding in Xigo. Bresler and Scott each held a 20% shareholding in Quickberry. The remaining 10% shareholding in Xigo and 40% in Quickberry was held by Bahlman and one Rick Grantham, respectively.
21. Although Scott was a major fee earner for both businesses, quite early on there was some dissonance in regard to the direction he and Bresler were taking the businesses. In September 2015 Bahlman and Pople indicated that they did not consider him to fit in as part of the executive team and they suggested that it

would perhaps be better if he exited the businesses. In the latter part of 2015 Pople suggested to Scott that since his focus should be on doing deals it would not be necessary for him to be involved in meetings of Exco which at that stage consisted of the other shareholder directors. Although Scott was not happy with this proposal and was told that all major decisions would still be taken by all the directors he began to notice that he was being slowly side-lined and excluded from the decision-making processes. Directors' meetings became mere formalities where resolutions which had previously been taken by Exco were signed off, without debate and without Scott being involved with the policy or strategic decision-making behind such decisions.

22. On 9 May 2016 Scott informed Bahlman, then the managing director of Xigo, that he felt 'lost and isolated' as he was not part of Exco. He also thought the relationship between Xigo and BCMS was very tenuous, which he attributed to Bresler's involvement which he saw as 'destructive'. He said he was concerned with the 'schizophrenia' in the business when Bresler was present and there was a significant 'fear factor' (sic) amongst staff who were concerned for their jobs, as Bresler seemed to be very proud of the fact that he regularly fired employees.
23. On 3 June 2016 Pople (then Chairman of Xigo), informed Bahlman and fellow director Pudney that Scott and Bresler needed to be formally reprimanded. He said Bresler was allowing his abrasive manner to undermine the company's best interests and their business relationship with BCMS and he felt this issue needed to be formally addressed, as the MD of BCMS had requested that Bresler no longer deal with their staff. Bahlman was of the view that they needed to weigh up what was best for the business before determining how to 'drop the hammer' on Bresler ie sanctioning him.
24. On 26 July Bahlman informed Pople that he and Pudney would be meeting with Bresler the following week at which time they would insist that he move into the sales side of the business and thereby avoid any operational risk in their relationship with BCMS.

25. Bresler did not take kindly to this request. On 3 August he sent Pople an email in which he said that he had enough of the unpleasantness and had reached the point where he did not want to work with people who did not want to work with him. As far as he was concerned BCMS was at fault and should take bold steps to demonstrate that it wished to continue working with him by removing one of the staff members with whom he was having difficulties, and holding a disciplinary enquiry in respect of another. In the alternative Xigo should consider moving on as a company and forming a working relationship with other international companies who might not have an African footprint, but with whom they could easily partner. In his view the third option was that he 'moved' on and the board continued to take the business forward 'without the noise' his involvement generated for them.
26. On 4 August Bahlman informed Pople and Pudney that the business appeared to have outgrown Bresler 'in all aspects'. As they were committed to BCMS in the short-term and it was not prepared to move forward with them if Bresler remained operationally involved, he queried whether a solution would not be for them to set up their own research and data business which Bresler would run as a separate entity. Xigo would then contract it for sales data, lead generation and locally focused research data. Following this, on 12 August Pople met with Bresler and offered him a non-executive position in Xigo. This too did not sit well with him.
27. On 5 August Bahlman issued a written warning to Scott in which it was recorded that he had failed to discharge his duties in regard to a proposed deal. In this regard it was contended that he had not properly attended to closing the underlying transaction which resulted in the client bypassing them and concluding a transaction with another entity whilst its mandate with Xigo was still in place, which resulted in Xigo having to embark on litigation in order to enforce its rights in relation to the payment of commission.
28. Scott objected to the written warning and contended that he had not been afforded an opportunity to offer his explanation of events. According to him the

incident was not his fault and was simply a case of the client deliberately circumventing Xigo.

29. On 18 August Bahlman and Pudney set up a meeting with Scott in which they indicated that there was still dissatisfaction with his performance since their prior discussion in September 2015 and they informed him that his co-shareholders and directors would like him to leave by the end of the year ie December 2016. Although he did not agree that he was not performing as required Scott said he would think about their request and would revert. He said that given that his colleagues clearly wanted to take the business forward without him he was in principle not averse to exiting provided that he received fair value for his shareholding and was given a fair chance to pursue other opportunities.
30. Further to discussions which Bahlman had with BCMS early in September 2016 it was agreed that Bresler would be removed from the operational side of their inter-company dealings. On 13 September Bahlman told Bresler and Pudney that they needed to 'drop the hammer' on Scott as he had allegedly delayed in closing a deal for over a year, as a result of which it had been cancelled.
31. On 29 September Pudney wrote to his fellow directors regarding Scott's possible exit pursuant to discussions they had held between themselves in this regard, in his absence. He pointed out that in terms of clause 8.6 of the shareholders agreement upon his termination as an employee (for whatever reason) Scott would be deemed to have offered his shares to the remaining shareholders on the terms and conditions set out in clause 8. These provisions provided that two independent auditors had to determine the fair value of his shareholding and an offer for it would then lie open for acceptance by the remaining shareholders for a period of 12 months. If after 12 months none of the remaining shareholders had elected to accept his offer Scott would have 30 days within which to sell his shareholding to an outside third party at a price equivalent to or better than the fair value price which had been put on it by the auditors. Pudney was of the view that before he continued 'pressurising' Scott into resigning the remaining shareholders should seek to arrive at an agreement amongst themselves as to

the likely value of Scott's shareholding and whether they were still prepared to acquire it at that price, and should also consider how they would raise the necessary funds in order to do so.

32. Pople responded that based on certain valuations which he had obtained in March that year he would be willing to take up a share of Scott's shareholdings, and they should not let Scott sell or dispose of them to an outsider. Bresler felt that they had to be fair, regardless of the history involved, and needed to adopt an honest view on fair value and then try and negotiate a disposal without 'ripping the business apart'. He said that he had been advised that a 'back to back sweetheart deal' (from Scott to Pople) was 'dangerous' as it was not 'legal' and if they proceeded down that path they could be seen as trying to compromise a minority shareholder. He warned that although none of them wanted to overpay for Scott's shares the risk of 'going too low' was something that they should be careful of.
33. In reply to this Pople said that values for Scott's shareholdings would be determined independently and not on the basis of the valuation that had been done for him earlier in the year. He was of the view that immediately upon Scott's exit from the companies' employ they should 'pull the share sale trigger' and use the next 12 months in order to fund the acquisition of his shares. He was of the view that it might be possible to negotiate staggered payments with Scott.
34. On 4 October Bahlman expressed the view that Scott had been a problem ever since he had been in the business, and had proven to be a 'risk and a liability' despite the success fees he had recently generated, and according to him his exit was long overdue.
35. Grantham (the MD of Quickberry) responded that they should get Scott out of his shareholding sooner rather than later and 'at the lowest price possible'. He agreed that the first step towards this process was to obtain an auditors' valuation. He said that as per Bresler's numbers they were probably looking at a base valuation of Xigo as a company with a previous profit before tax of R 3.5 mil

and a current profit of R 7 mil for the year, with future profits forecast to be around R 10 million.

36. Pursuant to the aforesaid exchange on 5 October Pudney addressed an email to Scott in which he reminded him of their discussions on 18 August where they had talked about him resigning as an employee of Xigo, and the consequent sale of his shares in terms of the shareholders' agreement. Given their proposed 'completion' date of 15 December 2016 he asked for a meeting to be held the following week with a view to discussing Scott's exit on an amicable basis without having to resort to a 'destructive legal process'.
37. On 16 October 2016 Pople noted that having reflected on Scott's contribution over the last 6 years he agreed with Bahlman that he should be paid 'as little as possible' for his shares. In order to put pressure on Scott and the valuation of his shareholding he suggested that they call for shareholder loans in order to support Xigo during November, regardless of the current discussions they were having with BCMS.
38. On 18 October Bahlman informed Pople and Pudney that Xigo was facing yet another cash flow 'crunch' which would result in directors not being able to take a salary for a few months and would delay them getting rid of Scott, as they were not in a financial position to bring someone in to replace him. He said that although he had indicated he was in the business for the long haul the 'history' with Scott and Bresler had reached a point where it was just too much for him to handle.
39. In his response Pople said that he had considered calling upon shareholders to provide a loan to the company in order to assist it with its cash flow problems, and as Bahlman was financially strapped they could lend him his share thereof. He also thought that Scott 'needed to go' and that they shouldn't 'hold back on this' if at all possible. In addition, he considered that Bresler was being substantially overpaid for his current role in the business and his remuneration needed to be brought back in line with the market. He suggested that they could perhaps cancel his bonus if his salary could not be 'touched', and hopefully this

would be enough to get him to 'leave'. He thought a forced sale of his shares was dependent on whether they could alter his appointment as an executive director, to a non-executive one.

40. On 27 October Bahlman reported to Pople and Pudney that Bresler had told him he was concerned that he was 'in the same boat' as Scott, as there were 'things happening behind the scenes' which could result in his exit. Bahlman reiterated that in his opinion Bresler 'had to go' as the 'opportunity cost' of keeping him on was too great and had set the business back a year. He was of the view that they should exclude Bresler from discussions in relation to a number of issues which needed to be addressed including the company's structure, their long-term relationship with BCMS and their long-term business plan.
41. Between 27 October and 1 November Grantham interviewed a candidate from Deloitte who they thought could possibly be employed as a deal leader in place of Scott, and in order to put 'further pressure' on him Grantham and Pople proposed that they should wait until the end of November before declaring a dividend in Quickberry as this would 'tie in better' with the 'plan' they had for him. As it turned out a dividend was declared somewhat sooner, largely at the insistence of Bresler.
42. In his founding affidavit Scott pointed out that at the time he was effectively being pressurised from two sides by his co-shareholders and directors. By not releasing a dividend in Quickberry whilst at the same time expecting him to make a shareholder loan to Xigo they were restricting his cash flow with the aim of placing him under pressure to sell his shares at a discount. At the time they were also planning to hold separate meetings on 8 and 9 November at which they would strategize on how to 'exit' him and Bresler from the two companies.
43. Subsequent to the aforesaid meetings Pudney (acting on behalf of the other shareholders) had two lengthy telephonic discussions with Bresler. During the first of these, which took place on 8 November, they considered a number of issues including renegotiating Xigo's contract with BCMS, which Bresler threatened to veto. He said he felt that his rights as a shareholder and director

were not being respected as the others were not prepared to buy him out for value, and if this were allowed to continue it could end up with him winding up the company. Pudney suggested that this could be avoided by having a proper valuation of his shareholding done and then buying him out at that value. He asked why, notwithstanding their proposal not to pay out a dividend in Quickberry, Bresler had 'forced' one to be declared. Bresler said he had done so because Pople had wanted to 'starve' Scott out of his share thereof and at the same time 'force' him to put money in on the 'other side' ie into Xigo.

44. During further discussions which Bresler and Pudney had on 11 November they explored the question of what would constitute fair value for Bresler's shareholding in Xigo. Bresler indicated that the number which he had in his head was R 11.8 mil, because after tax that would leave him with an amount of R 10 mil net, but at a stage he also seemed to suggest that he would possibly consider accepting an offer at R 9 mil. As such he didn't think it was necessary for a formal valuation to be carried out. This was in contrast to the position he apparently adopted the previous day, when he confirmed in an email exchange with Pudney that a formal valuation of his shareholdings in both companies would be made by two independent auditors. In the same email he said that he had objected to some of the decisions they had taken in their efforts to 'suppress' Scott's rights, over which he had been accused of being 'soft', decisions which he felt exposed them to risk.
45. On 11 November Pople informed BCMS that they were proceeding to remove Bresler and Scott from the business and there was a possible opportunity for BCMS to acquire a 25-30% stake in Xigo.
46. Following his discussions with Bresler, on 14 November Pudney sent out an email to the other directors and shareholders (including Grantham) in which he set out what he considered to be a range of possible options which they had 'on the way forward'. These included acquiring Bresler's shareholding for R 9 mil as Bresler had proposed. He was of the view that if they did this it would inevitably impact on the value which was to be placed on Scott's shareholding and would

effectively mean that their combined 60% shareholding in Xigo was worth in the order of between R 14 and R 15 mil, which was too high. As alternative options he suggested that either Pople or Bresler could resign as non-executive director and employee of Xigo respectively in which event the provisions of cl 8.6 of the shareholders' agreement would equally be triggered, or Bahlman could take up a further 10% shareholding which was available to him in Xigo (thereby diluting Bresler's shareholding) or he could resign from Xigo and establish a new corporate entity, or Xigo could be liquidated. Finally, if all other options failed he suggested that they could remove Bresler from Exco which would 'certainly make his life uncomfortable', and this could be 'coupled' with removing the financial/accounting functions from him and reducing his salary commensurately in line with his revised job description.

47. In his response, Bahlman agreed that Bresler and Scott needed to be 'exited' as soon as possible. He was of the view that they could no longer afford the 'misalignment' as Bresler's veto was blocking them from finalising strategy and business plans with BCMS and they were unable to trade effectively because of a 'dysfunctional executive with damaged relationships' at director and shareholder level, but he expressed doubt as to whether some of the options suggested by Pudney would work. He felt that attempting to 'performance manage' Bresler out of the business either by shutting down the Cape Town office or by reducing his remuneration would not succeed, as he was quite capable of commuting to Johannesburg and achieving sales targets that would make 'working him out of the business potentially difficult'. In addition, he was concerned that by 'playing with remuneration' and company 'structure' Bresler could make out a case for constructive dismissal. He was also concerned that Bresler and Scott could combine forces and utilise their joint 60% shareholding to put them 'on the back foot', or Bresler could block Scott's exit or 'provide evidence that would stack up' against them should Scott sue for unfair dismissal. He suggested that they should make an offer for Bresler and Scott's shares, non-acceptance of which would result in an 'automatic trigger mechanism' detrimental

to the value of Xigo, which would leave Scott and Bresler 'carrying an empty can'.

48. In his response Pople set out a series of steps which should be taken. In the first place they needed to 'get rid' of Scott as soon as possible by obtaining an independent valuation of his shareholding and persuading BCMS to subscribe for it in full, failing which he would be prepared to take up the balance. Thereafter Bahlman should take up his 10% option in Xigo, thereby diluting Bresler's shareholding below 30%. In the meantime they would put up with Bresler in their employ but would close the Cape Town office and retrench all Cape Town staff, who would have to reapply for sales and marketing positions in Johannesburg. Simultaneously, Bresler's package and responsibilities would be adjusted 'as severely as possible without labour recourse' (sic) with discussions commencing in this regard in January 2017 so that he would 'get the picture early on' (sic). Any 'slip in sales' would be taken up with him in writing in order to put 'performance pressure' on him. Pople also agreed with the suggestion that they should take away the financial function from Bresler. In his opinion even if Bresler continued to earn the same it would 'hurt him' if they cut him off from the company's finances and he wouldn't want to stay on for 'long' thereafter. After Bresler had left via 'retrenchment or pressure or performance' (sic) they could then deal with his shareholding in the same manner as they were proposing for Scott's. Pople concluded his email by asking Pudney (as an attorney) what the 'dangers' were with this 'plan' as he was concerned that Bresler could team up with Scott and with their combined majority shareholding they could call a board meeting and take control, before they could get Scott's shares 'off him'.
49. On 15 November Pople further commented that Bresler wouldn't want to stay on indefinitely if he was no longer on Exco, his remuneration had been 'minimised' and he had no future in a company which didn't want him, whilst having to commute to Johannesburg, and he was confident that under those circumstances Bresler would eventually resign. In the meantime, they could 'force' Scott to sell his shares and he also believed they had enough to dismiss

him, although Bresler could perhaps provide email evidence which would prove a constructive dismissal. If Bresler did so they would have to 'play hardball' with him and get him to realise that his behaviour could cause the company to collapse and leave him with nothing, and he needed to 'understand' that keeping the company to himself and Scott was not an option which was open to him.

50. At about this time Pople, Bahlman and Pudney considered recruiting someone to take over from Bresler with effect from January 2017 and they had discussions in regard to the possible remuneration that they would need to pay her, based on what she was earning.
51. On 16 November Pudney reported that he had obtained legal advice that if they sought to remove the financial and accounting function from Bresler they would be acting in conflict with clause 7.14 of the shareholders agreement which required the consent of more than 70% of the shareholders in order to amend, vary or substitute any of the directors' service agreements or fees. In response Bahlman said they were 'treading on dangerous ground'.
52. Later that same day Bahlman forwarded calculations he had done in support of a business case for closing the Cape Town office, and the savings which would be achieved after retrenchments and rehiring of certain staff for sales and marketing positions in Johannesburg. Pursuant to this Pudney formally advised Bresler that they would no longer be entering into a proposed lease which they were considering with ACSA, for premises in Cape Town.
53. On 18 November Cliffe Dekker Hofmeyr attorneys addressed a letter to the shareholders and directors of both entities on behalf of Bresler (with the support of Scott) in which it was pointed out that although it had been agreed, subsequent to the meeting which was held on 8 November, that the other shareholders would revert with an offer for the possible acquisition of their interests in the 2 companies, such an offer was not yet forthcoming. The letter warned against shareholders who were minded to go about their separate commercial ways in a manner destructive of the underlying value of the companies and their own shareholdings, and cautioned against the temptation of

making use of provisions of the shareholders' agreement in order to 'engineer' the exit of Bresler and Scott on forced terms. The letter also 'respectfully' cautioned against shareholders making use of their managerial prerogatives at board level, to secure stronger bargaining positions with a view to procuring Bresler and Scott's exit under the deemed offer provisions of the shareholders agreement. It proposed that a 'better' way to achieve a non-destructive and non-litigious outcome was for the parties to sit down and attempt to reach agreement on a plan for a commercially sensible and amicable parting of the ways as soon as possible. To this end, an invitation was extended to the other shareholders and their legal representatives to facilitate a process of engagement. In the meantime, it was suggested that whilst negotiations were underway there should be no change to any of the directors' conditions of employment in order to preserve value and avoid allegations of bad faith, which would undermine a negotiated outcome.

54. To this open invitation Pudney only responded on behalf of the other shareholders and directors on 29 November, after a further email prompt from Bresler's attorneys. His response can at best be described as dismissive. He said the letter from Cliffe Dekker was both 'unexpected' and 'unfortunate' because whereas every effort had been made to have 'open' discussions with Bresler and Scott, the letter from Cliffe Dekker had now changed the 'position'(sic). He said that whilst it was noted that Bresler was interested in selling his shares there was no urgency on the part of the shareholders and directors he was representing, and they were of the view that no purpose would be served in having any discussions in this regard.
55. On the same day Pudney circulated a number of proposed 'round-robin' resolutions to members of Exco for their approval and signature. In the preamble thereto it was recorded that Xigo and BCMS were considering extending their contractual relationship, which was due to terminate in June 2017. As such, BCMS had invited Bahlman to visit them for a period of 5 days (commencing on 28 November) with a view to mending the fractured relationship between their

companies (following the decision by BCMS that its staff would not interact with Bresler as a result of what it perceived to be 'continued verbal abuse and destructive behaviour' towards them) and in order for Bahlman to make a presentation to BCMS on possible opportunities in southern Africa which they could jointly explore. It was further recorded in the preamble that Bresler had unilaterally decided not to approve the costs of Bahlman's trip to BCMS and had deducted such costs from his salary for the month of November, without prior approval and authority of Exco. Consequently, it was proposed that Bahlman's visit to BCMS should be formally approved and the reasonable costs thereof should be borne by Xigo, and Bahlman should be reimbursed for such costs as had already been incurred by him. Further to this it was proposed that Exco should condemn Bresler's actions in making unauthorised deductions from Bahlman's salary.

56. Thirdly, it was proposed that Exco should in the exercise of its managerial prerogative divest Bresler of his responsibility for Xigo's financial and accounting functions with immediate effect, and Grantham should take these over in the short-term. Lastly, it was proposed that Xigo should reverse its decision to enter into a lease agreement with ACSA for the rental of premises in Cape Town and should close its Cape Town office and retrench the CT staff.
57. On 30 November Bresler queried the proposed resolutions by Exco. He said that insofar as he had the existing authority to approve expenditure in Xigo, resolutions by Exco which purported to override this 'had no standing'. He averred that as differing motivations for Bahlman's visit to BCMS had been put forward he needed clarity as to how the visit would benefit Xigo. Consequently, he asked to be provided with a copy of the agenda for the meetings which were to be held, as well as of the business plans and presentations which were (to be) made, and details of the persons who would be attending. On 2 December he followed this up with a further communication in which he stated that Exco resolutions had never been part of Xigo's standard business practices.

58. On 16 December Bahlman forwarded him a copy of the draft business plan which had been approved by Exco on 9 November together with a copy of the presentation that he had made to BCMA, and reminded him that he needed to decide whether he was going to sign the Exco resolutions or not. In the meantime, he was asked to give immediate effect to the last two resolutions which had already been approved by the majority of Exco members and in this regard to liaise with Grantham in regard to handing over the accounting functions and records.
59. A further copy of the Exco resolutions which had been signed by the other members was forwarded to Bresler on 12 December by Pudney, together with a copy of the 'timetable' for Bahlman's visit to BCMS, and he was again requested to advise whether he intended to sign the resolutions or not. This prompted Bresler to respond that he would consider them on his return from leave the following week, but in the interim he wanted a copy of the YE (presumably the 'year-end') presentation which had been made to BCMS as well as (another copy of) the business plan and Bahlman's 'visit report'. He followed this up with a further request for sundry information from Bahlman which he (again) said he needed so that it might 'clarify' (sic) what benefits the visit had for Xigo.
60. What then followed between the parties over the following two weeks or so is an exchange of emails of which the tone was increasingly frosty and hostile, on all sides, and in which Bresler continued to adopt what might fairly be described as an obdurate approach. He took the position that the purported resolutions were impermissible as they amounted to an attempt to circumvent the entrenched provisions in the shareholders agreement and informed Bahlman that he could not implement strategic business plans which did not have the approval of all the shareholders. Pudney then sent him a series of angry emails in which he accused Bresler of misquoting him in his exchanges with other members and warning that if he continued in this vein he would take legal action against him, and he attempted to explain how resolutions such as those proposed did not fall foul of the shareholders agreement and had regularly been taken by Exco since

March 2016. Pudney also accused him of mischievously misconstruing what they had discussed in relation to the costs of Bahlman's visit to BCMS in order to create discord between himself and the others. In response Bresler said that he did not believe debating the issues via correspondence was constructive as it was causing Pudney's tone to become 'increasingly aggressive' and his email had become 'populated' with much 'professional legal terminology', and he suggested that they should meet at his attorneys' offices early in January to review the correspondence. He warned that if they were to try and implement the proposed resolutions in the meantime his 'rights' remained 'reserved'.

61. Shortly before 10 a.m on 20 December Scott sent out an email to the directors and shareholders in both entities, in which he called for board and shareholder meetings be held on 7 February 2017 in order to deal with a 'multiplicity' of issues details of which would be set out by him in due course. In his founding affidavit he said that he took this step as a result of the refusal by his co-shareholders to engage in negotiations with him.
62. In the email he alleged, somewhat cryptically, that many decisions were being taken without the requisite 'authorities'(sic) and it was time for governance to be 'entrenched', and he requested that the parties apply their minds to what needed to be considered in order that an agenda could be prepared by the third week of January 2017. He also asked them to consider whether a 'Texas auction' could not be an option, if they were unable to arrive at consensus on certain matters which were to be discussed. It is common cause that what he was referring to in this regard was a situation where, in the absence of agreed values for their shareholdings, offeror members would engage in a process whereby they would bid to buy other member's shareholdings at a certain value or price, failing acceptance of which the offeree members could in turn buy the offeror's shareholdings at the selfsame price or value, in proportion to their shareholdings.
63. Approximately 30 mins after Scott's email went out Bahlman sent an email to Pople and Pudney in which he informed them that he had obtained legal advice that they could 'unfortunately' not dismiss Scott without a disciplinary hearing, but

he would be suspending him 'with immediate effect'. He said that although he had received contradictory legal advice on this 'the key' was that their process was 'bulletproof' and they would still get Scott 'out of the business' that day. He copied them in on a notice of suspension and a notice of a disciplinary hearing (with enclosed charge-sheet) which he had prepared and suggested that Pudney should chair the hearing, which was scheduled for 18 January 2017. Scott's averment that the disciplinary process against him was launched directly as a result of his call for board and shareholder meetings stands uncontroverted.

64. At 12h00 the same day Bahlman called Scott to a meeting at their offices in Illovo, which Scott assumed was in order to review his current work portfolio. Scott prepared minutes of this meeting later that same day.
65. From these it appears that after an initial discussion of their personal and family health issues, their children and their holiday plans Scott reported back on the status of a number of deals that were underway. Almost an hour after the meeting had commenced Bahlman then asked him what plans he had for the business and what he felt about previous discussions between himself and Pudney in relation to his exiting the company. He replied that he found it difficult being in an environment where he was not wanted, but he enjoyed what he was doing. He said he was happy to have a fair discussion about a parting of the ways and that is why he had sent out the notice earlier that day calling for a meeting of shareholders and directors in February. Bahlman responded by saying there were a number of issues that he was concerned about and a disciplinary hearing should 'probably' take place, and he believed he had to put Scott 'on ice' until the hearing was held. When Scott asked what he meant by this he informed him that he was being suspended with immediate effect pending a disciplinary hearing which was to be held on 18 January. He said he was concerned about how Scott had handled certain deals and they were lucky not to have incurred any liability arising from them. He then handed him the aforesaid notice of suspension and notice of the disciplinary hearing with the charge-sheet enclosed therein.

66. The notice of suspension informed him that he had been suspended on (full) pay with immediate effect as a result of his 'actions as highlighted' (sic) in the charge-sheet and alleged that this was not the first time that he had not acted in the best interests of the company, as had previously been pointed out in the written warning which was issued to him on 5 August. He was further informed that his access to company email accounts and all company information, systems, processes, staff and customers had been terminated and he was to hand in his access cards and keys.
67. The notice of the disciplinary hearing set out 5 charges which ranged from alleged gross insubordination and gross negligence (alternatively gross dereliction of duty) to gross dishonesty. In substantiation of these offences it was alleged that 1) he had breached company policies by instructing a business analyst (one Barford) in September 2016 to consult with one of the company's clients in Durban for the purpose of preparing a financial package for prospective buyers 2) when questioned by Bahlman as to why he appointed the analyst he had maintained that there had been a misunderstanding by the analyst as to what he had been asked to do 3) he had failed to take timely and active steps to maintain and protect the company's reputation as a result of which a client had registered their dissatisfaction and sought to claim a refund 4) a number of business risks had eventuated due to inactivity and lack of communication on his part in regard to certain projects he was managing 5) he had taken a 'significant' amount of time off from work during 2016 without the necessary leave being granted therefor and 6) he had failed or refused to provide Bahlman with certain correspondence or documentation which had been requested from him.
68. On the very same day that Scott sent out a request for board and shareholder meetings to be held in February 2017, Pople sent out a counter notice that a directors meeting would be held on 10 January. According to the accompanying draft resolution which was to be proposed at that meeting, all Exco resolutions which had been taken previously were to be ratified and it was to be resolved that Xigo would in future be managed by Exco, instead of its Board.

69. Given that Scott had already requested meetings for 7 February (at which the proposed resolutions could also be tabled) Bresler requested an explanation for the urgency of the meeting Pople had called. He pointed out that he would still be on leave on 10 January and said he believed that it would be prudent for them to wait until he had obtained legal opinion on the validity of the proposed resolutions (which according to him were at odds with the entrenched provisions in the shareholders agreement), before they proceeded to take a vote on them. He pointed out that they were in the 'throes of a buy and sell discussion' of their respective shareholdings as a result of a dispute. He asked that, in the event that they were nonetheless minded to push ahead with the meeting and to table the resolutions regardless, they should advise him whether they would be 'rescuing' (sic) ie recusing themselves from voting on the extension of the BCMS contract given the apparent conflict of interest.
70. On 23 December Scott pointed out that he had requested that the board and shareholder meetings be held in February as he was also going to be on leave until mid-January. In relation to the resolutions which were being proposed he too sought further information. He asked for a copy of the initial resolution which had been taken at the outset, approving the formation of Exco and setting out its powers and authority, and enquired on what basis certain of its members had exercised executive authority while serving on it, even though one of them (Pople) was a non-executive director of Xigo, and another (Grantham) was not even a director of Xigo. He said that in his view the creation of Exco was contrary to provisions of the shareholders agreement.
71. On Xmas eve Bresler noted that he had informed Pople of his objections to the meeting which was proposed for 10 January and the proposed resolutions which were to be tabled and had formally requested a postponement which had been refused. He asked Pople to circulate the minutes of the earlier meeting which they had held on 9 November at which the proposed resolutions had been discussed. He pointed out that neither he nor Scott or another director Deon

Wolfaardt, had been invited to attend the meeting and they had not had the benefit of being present when the proposed resolutions had been considered.

72. On 26 December Pople informed Scott that he had no 'ulterior' motive in calling the meeting for 10 January. He said the reason why he had chosen that date was simply because he would be in Johannesburg at the time and wanted to be present. He said it was 'coincidence' that his notice calling for the meeting had gone out on the same day that Scott had been suspended, and that he found it 'inconceivable' that Scott did not know that since March 2016 management of the company had been effected by Exco, which consisted of the 'majority' of the directors. He alleged that s 72 of the Companies Act read with article 6.8 of the memorandum of incorporation made provision for the establishment of committees as the shareholders' agreement was silent on this aspect. In his view the shareholders agreement was thus of 'no consequence'.
73. On 26 December Scott addressed a lengthy and important email to Pople in which he raised a number of legal issues pertaining to the legality and validity of Exco and of the numerous decisions which had been taken by it. He pointed out that in terms of clause 6.6 of the shareholders agreement the board was the entity empowered to manage the company, and its day-to-day management was to be undertaken by the managing director who was appointed by the board. As he understood it s72 merely provided that the board of a company may delegate some of the authority and functions which reside in it to a committee, but the provision could not be construed to allow a board to delegate its entire power and authority to manage a company to a committee. In his view that would amount to an abdication of authority as opposed to a delegation of part thereof. He pointed out that when he had been requested not to attend board meetings it was on the understanding that Exco would not act in place of the board and would not usurp any of the responsibilities of any shareholder or director. He again queried on what basis Grantham, who was not a director of Xigo, was a member of Exco. He also asked to be provided with information as to the proposed terms and ambit of the partnership agreement they envisaged entering into with BCMS and said that

without being properly informed in this regard it was not possible for shareholders or directors to properly consider the proposed resolution pertaining to BCMS.

74. Bresler, in turn, again reiterated that both the Companies Act and the shareholders agreement would be breached should the resolutions proposed be adopted. He too contested Pople's interpretation of s 72 which he said was intended to deal with the establishment of committees such as audit and ethics committees, but did not authorise the entire management of the company to be taken over by a committee instead of by its board of directors. He said he also felt it was important to place on record that Pople's attempts to steer the company in favour of an extension of their contract with BCMS to the exclusion of others, and to exit Scott on disciplinary grounds, would undermine the 'buy and sell' negotiations they were currently engaged in, as well as any efforts to find a third party who might acquire his and Scott's shares. He accordingly again proposed that the resolutions which were to be proposed be deferred until they had received legal advice as to their validity. The following day he sent a further communication to Pople informing him that in his view they were 'treading on dangerous ground' as the entire process seemed to be a bid to take advantage of a majority board position in order to compromise the entrenched rights of shareholders.
75. Notwithstanding the numerous objections and queries which were raised by Scott and Bresler, on the morning of 28 December Pople resolutely informed all the parties that the board meeting would be going ahead on 10 January and the proposed resolutions would be tabled and voted upon.
76. On 30 December Bresler suggested to Pople (somewhat cheekily) that he use the January meeting to ask Bahlman to step aside as MD and let him get back into the position, as had apparently happened in 2013, and when Pople curtly rejected his suggestion he responded that although they had a 'good run' he agreed that it was 'time to part ways' and to this end he was happy to sell his shares or to buy out Pople's, if that was what he preferred.

77. On 7 January the respondents (excluding Scott and Bresler) held meetings with representatives of BCMS and two days later Pople, Grantham and Bahlman held a report-back meeting with Xigo and Quickberry staff (once again excluding Scott and Bresler).
78. On 10 January the meeting of the board of Xigo took a number of resolutions based 'on at least a single majority'(sic). In the first place the meeting resolved (per Pudney, Pople and Bahlman) that all previous resolutions taken by Exco on the basis of a simple majority were to be ratified and approved. Secondly, it was resolved that the company should enter into negotiations with BCMS in regard to a renewal of their partnership agreement. Finally, it was resolved that management of the company would be 'vested' in Exco during 2017, purportedly in terms of s 72 of the Companies Act.
79. Two days after these resolutions were passed Bahlman reminded Bresler that he had not yet given effect to the earlier resolutions which had been adopted by Exco in relation to reimbursing the expenses he had incurred in his visit to BCMS in November 2016, and in relation to his handover of the financial and accounting records to Grantham, and he was reminded that a failure to comply with these resolutions would constitute an act of gross insubordination, which would be dealt with 'appropriately'.
80. Scott's disciplinary hearing was held before Grantham as Chairperson on 18 January, at which time he was apparently found guilty on all the charges which were preferred against him, even though each of them had both a main as well as an alternative count, and even though no formal finding to this effect can be found, either in the notes of the proceedings or in the Chairperson's notes on 'assessment'. Although a more detailed evaluation as to the significance thereof in the broader context of the matter as a whole is set out below, it is necessary at this juncture to make some brief comments on the form and content of the proceedings.
81. According to the notes of the proceedings the only witnesses who were called were Barford and a staff member Alex Crellin. For the rest it appears that the

principal 'outline' of the company's case against Scott, such as it was, was provided by Bahlman who also acted as the so-called initiator of the charges.

82. It is very apparent that much of what was said by Bahlman during the proceedings constituted little more than thirdhand hearsay and his own subjective contention of what he alleged was client dissatisfaction with Scott.
83. As far as Barford is concerned, he simply 'testified' that Scott had asked him to oversee the 'compiling' (sic) of a client's accounts, which were in a mess, in order that they could obtain the necessary proof and substantiation of certain expenses, for the purposes of a presentation which was to be made to prospective parties. It appears that he and Crellin complained to Bahlman about having to do this, as they believed it was not a good use of Barford's time. Crellin felt that the process of 'collecting and filing slips' was essentially the work of an auditor and not an analyst. How this evidence justified a finding on the relevant charges viz that by giving the instruction which he did to Barford (as ill-advised and as cost-inefficient as it might have been) Scott breached company policy (charge 1) or somehow misled Bahlman as to what he had asked Barford to do (charge 2) is not evident at all from the Chairperson's notes of the evidence or his assessment of the proceedings.
84. In addition, it appears that over and above the few charges which were listed in the charge-sheet Bahlman proceeded to go much further by providing a 'generic representation' (sic) in regard to a number of issues which he alleged had come to light in discussions with clients, even though Scott was not charged in respect of these infractions. As the name of the alleged clients he referred to was redacted in the notes it is not possible to properly evaluate whether or not the various statements made by Bahlman throughout the course of the proceedings correlated in any way with the charges which were preferred against Scott, but even a cursory comparison thereof shows that what was presented went far beyond what was alleged in the charge-sheet. And curiously, after each and every utterance pertaining to these alleged clients was made by Bahlman, Grantham simply recorded that Scott 'provided no evidence to the contrary', as if

the hearing was run in a piecemeal charge-by-charge fashion and there was some sort of onus on Scott, even though what had been presented by Bahlman was little more than his own personal, subjective interpretation as to what he had allegedly heard from third parties who were not called to confirm such allegations before the disciplinary hearing. As such these utterances hardly constituted 'evidence' which Scott could have been expected to refute. In fact, all that they served to do was to graphically illustrate why hearsay evidence is generally unreliable and for this reason is ordinarily of little value, even if it is properly admitted. It is common cause from the numerous emails referred to above that Bahlman had an axe to grind with Scott, and it would accordingly have been very easy and convenient for him to make sweeping and unsubstantiated allegations of client dissatisfaction, when in fact this was not the case, or was grossly exaggerated. As Scott pointed out in his affidavit, none of the alleged complaints or issues which clients had with him were even mentioned in the portfolio review meetings which were held with him on 17 August and 22 September 2016, and I was similarly unable to find anything of substance in this regard in the minutes of the portfolio review meeting which was held with him by Bahlman on 20 December 2016, just before he was suspended. The generally poor quality of what was put forward by Bahlman in lieu of hard substantiation of the allegations in the charge-sheet is encapsulated in the 'general statement' (sic) that he made that a number of 'clients were relatively unhappy with Scott or at best unfazed' (sic) by the change from him to another deal leader.

85. In his single-page assessment of the proceedings the Chairperson rightly pointed out that although Bahlman had declared that for each of the charges there was 'some form of evidence' in most instances he did not provide anything over and above the allegations which were set out in the charge-sheet. As far as charges 1 and 2 were concerned the Chairperson pointed out that what the witnesses testified to 'did not exactly match' the allegations contained in the charges. As far as charge 4 was concerned, once again, the Chair pointed out that Bahlman 'did not provide detailed evidence' regarding the charge and had simply stated that Scott had taken 'extensive' time off from work without informing other staff, and it

is notable that not only were no attendance records provided or even referred to, but not even an indication of the alleged dates when Scott had been absent without leave was provided. However, notwithstanding these material defects in relation to both the weight and quality of the evidentiary material which was put before him the Chair was of the view that because Scott had produced 'little to no counter evidence' (sic) and had not cross-examined the witnesses or the 'evidence' (sic) he had 'little choice' but to accept Bahlman's statements and to 'agree' with the charges as stated, and to recommend a sanction of dismissal. In the circumstances it does not take a lawyer with even a modicum of knowledge of labour law to appreciate that the findings and conclusions of the Chairperson were wholly inadequate and materially and fundamentally defective, and the hearing as a whole was a travesty.

86. As was pointed out in the introduction, the day after Scott's disciplinary hearing was held Bresler launched proceedings for the winding up of both companies.
87. Between 2 and 9 February Bahlman carried out a retrenchment exercise in respect of the Cape Town office staff complement, and on 9-10 February the respondents filed their answering affidavits in the winding up applications, together with their counter-applications for orders in terms of s 163.
88. On 17 February Pople gave notice of a meeting of directors of Xigo which was to be held on 8 March, at which it was to be proposed that Bresler be suspended with immediate effect pending a disciplinary enquiry 'into whether or not the company should terminate his employment' (it will be noted there wasn't even a cursory attempt to state that the suspension or the disciplinary hearing was being effected on the grounds of any alleged misconduct), and removing his authority to act as a signatory and guarantor on the company's bank accounts. In addition, it was to be proposed that the company launch 1) an application in terms of the Companies Act declaring Bresler to be a delinquent director and 2) investigations in regard to and (if appropriate) actions for damages incurred by the company arising out of the winding up application and/or for 'invasion of privacy' (sic) and/or 3) the launch of criminal charges against Bresler including charges of

fraud (allegedly for directing mandates away from the company (sic)) and/or charges for allegedly violating the Communications Related Information Act 70 of 2002.

89. Once again no attempt was made to even suggest on what basis such investigations, applications and/or actions were to be brought and the respondents' answering affidavits are completely silent as far as the basis for the proposed resolutions authorising these steps are concerned. One is left to speculate that the proposed investigations and/or actions concerning the alleged 'loss of privacy' and violation of Act 70 of 2002 had to do with the trove of compromising emails which Bresler had managed to lay his hands on, and which he annexed liberally to his affidavits in support of the winding up applications. On what basis the company had a right in law to sue for breach of privacy, which traditionally is a personal right, was also not dealt with at all.
90. On 3 March 2017 Bresler launched an urgent application¹¹ in which he sought an order interdicting the taking of the proposed resolutions pertaining to his suspension. On 7 March an order was made¹² by agreement between the parties suspending the implementation of any resolution in this regard pending the outcome of Bresler's application in relation to Xigo.¹³ Two days later, on 9 March Scott issued his applications for relief in terms of s 163. As at that date he was still in limbo following his suspension almost 3 months earlier. On 31 March Bahlman and Pudney resigned as directors of Xigo.

The law

91. The central question which I am required to determine in relation to the statutory provisions on which the applicants seek to rely¹⁴ is whether the business of the companies or the powers of any of their directors were conducted or exercised in a manner which was 'oppressive or unfairly prejudicial' to them or which 'unfairly disregarded' their interests. As was pointed out by the Supreme Court of Appeal

¹¹ Under case no. 4046/17.

¹² Per Desai J.

¹³ Under case no 817/17.

¹⁴ Ss 163(1)(b) and (c.).

in *Grancy*¹⁵ much of the jurisprudence in regard to these terms is derived from the interpretations that were afforded to them in relation to predecessor legislation, being s 252 of the 1973 Companies Act¹⁶ and s 111*bis* of the Companies Act of 1926.¹⁷

92. S 111*bis* provided that where a member of a company complained that its affairs were being conducted in an oppressive manner and the underlying facts justified a winding up on the grounds that it was just and equitable, but this would unfairly prejudice that member (or other members), the court could, by way of an alternative and 'with a view to bringing to an end the matters complained of' make such order as it saw fit to remedy the situation, including an order that the shares of a member be purchased.
93. In seeking to interpret this provision in *Aspek Pipe*¹⁸ Tebbutt AJ (as he then was) set out¹⁹ a useful survey of the meaning which had been afforded to conduct which was defined as 'oppressive', in various decisions in the UK and in our courts. He pointed out that it ranged from conduct which was 'unjust or harsh or tyrannical'²⁰ to that which was merely 'burdensome, harsh and wrongful'²¹ or which involved a lack of probity or a failure to adhere to the 'standards of fair dealing'²² in regard to a company's affairs or the 'conditions of fair play' on which every shareholder is entitled to rely.²³ He held that such conduct was present where shareholders (who in *casu* were in the majority) used their greater voting power unfairly in order to 'prejudice' another, or acted in a manner which did not allow that shareholder 'to enjoy a fair participation' in the affairs of the company.²⁴

¹⁵ *Grancy Property Ltd v Manala & Ors* 2015 (3) SA 313 (SCA) at para [23].

¹⁶ Act 51 of 1973.

¹⁷ Which in turn was modelled on s 210 of the English Companies Act 1948.

¹⁸ *Aspek Pipe Co (Pty) Ltd & Ano v Mauerberger & Ors* 1968 (1) SA 517 (C).

¹⁹ *Id* at 525J-526E.

²⁰ *Marshall v Marshall (Pty) Ltd and Ors* 1954 (3) SA 571 (N) at p580, which as Tebbutt AJ explained (at 526C-E) in its ordinary grammatical meaning refers to conduct which is "severely oppressive or despotically harsh or cruel".

²¹ *Scottish Co-operative Society v Meyer* (1958) 3 All ER 66 (HL) at p71.

²² *Id* at p 86.

²³ *Elder v Elder and Watson Ltd* 1952 SC 49 at p60.

²⁴ *Aspek* n 18 at pa 527 H-J.

94. S 252 of the 1973 Act did away with the requirement that the remedy serve only as an alternative to a winding up order and it was thus no longer dependent on the underlying requirements for it, and its ambit was extended beyond oppressive conduct²⁵ to any conduct or omission which was 'unfairly prejudicial, unjust or inequitable' to the member of a company. However, inasmuch as the court was still empowered to exercise its powers to grant appropriate relief 'with a view to bringing to an end the matters complained of'²⁶ it was nonetheless still generally seen as the first alternative to a winding up order, inasmuch as such an order was understood to put an end to a company's commercial existence. In *Irvin & Johnson Ltd v Oelofse Fisheries*²⁷ it was assumed that because of this limitation it would not be a remedy which would be available once a company had been finally wound up.
95. But, in *Scottish Co-operative*²⁸ the House of Lords held²⁹ with reference to a similarly worded provision in English law that although the words of the section suggested that the legislature had in mind some remedy whereby the company might continue to operate, instead of being wound up, it would be wrong to infer therefrom that the remedy was limited to situations where the company was still in active business:
- 'The object of the remedy is to bring "to an end the matters complained of", that is the oppression, and this can be done even though the business of the company has been brought to a standstill. If a remedy is available when the oppression is so moderate that it only inflicts wounds on the company, whilst leaving it active, so also it should be available when the oppression is so great as to put the company out of action altogether.'
96. In endorsing this dictum in *Louw*³⁰ the Supreme Court of Appeal accepted, without deciding so, that the grant of a winding up order was in itself no bar to an

²⁵ Which, although set out in the heading of the section, was not referred to in the body thereof.

²⁶ S 252 (3).

²⁷ *Irvin & Johnson Ltd v Oelofse Fisheries; Oelofse Fisheries v Irvin & Johnson Ltd* 1954 (1) SA 231 (E).

²⁸ Note 21 at p89.

²⁹ Per Denning J.

³⁰ Note 8 at para [20].

order for relief against oppressive conduct being granted in terms of s 252. I will return to this aspect in due course.

97. With the enactment of s 163 of the 2008 Companies Act protection against such conduct was extended to directors as well as shareholders³¹ and relief was made available not only in circumstances where a company had acted in an oppressive or unfairly prejudicial manner, but also where a 'related person' had done so, or where the powers of a director or 'prescribed officer' had been exercised in such a manner, or as a result of which a shareholder or director's 'interests' had been 'unfairly disregarded'. In addition, liability has been extended to encompass not only acts of commission, but also to circumstances where a company or any such person has failed ie omitted to act, as a result of which the consequences referred to have occurred. In the circumstances it is clear that the legislature's intention was to widen the scope of the remedy. In *Aspek Pipe* ³² the court held that a liberal construction should be adopted when interpreting the statutory provisions which provide for the remedy against such conduct.³³
98. Before turning to consider whether any of the shareholders or directors acted in a manner which falls within the purview of s 163, some final remarks as to the law on the subject need to be made. In the first place, I am mindful of the well-established principle of the supremacy of the majority, which is fundamental to our company law and the proper running of companies. According to this principle, by becoming a shareholder in a company a person undertakes to subject himself to and to be bound by the rule of the prescribed majority of shareholders, provided their decisions are in accordance with the law, even

³¹ Similar provisions in Canada have gone further by making the remedy available not only to members and directors but also to officers of a company or 'security holders', creditors and even in some instances members of the public (cf s 215 of the Saskatchewan Non-Corporations Act RSS 1978, s 450 of the Quebec Business Corporations Act, s 243(2) of the Yukon Business Corporations Act RSY 1986, s 227 of the Business Corporations Act of British Columbia SBC 2002 and ss 238 and 241 of the Canada Business Corporations Act RSC 1985). In Australia the remedy is available to shareholders and directors (s 232 of the Corporations Act 2001 (Cth) whilst in the UK it may apparently still be confined to shareholders (*vide* s 994 of the Companies Act 2006).

³² Note 18 at p 527D-F.

³³ Similarly, in *Grancy* n 15 at para [26] the SCA confirmed that s 163 should be construed in a manner which will advance the remedy it offers, rather than to limit it.

though the majority's decisions may adversely affect his rights as a shareholder.³⁴

99. Secondly, one must be mindful of the fact that it is the board of a company which is empowered to manage its affairs and to direct the operation of its business from day to day, and not its shareholders, and it is well-established that neither mere dissatisfaction with the way the board manages a company nor loss of confidence in it or some of its directors *per se* entitles a shareholder to interfere in terms of s 163, under the guise of seeking protection.³⁵ Neither does disharmony or deadlock between directors or opposing sets of shareholders, unless such lack of confidence, disharmony or deadlock arises as a result of oppressive conduct, or conduct which is unfairly prejudicial to, or which unfairly disregards the interests of, a shareholder or director.³⁶ A court should thus also be careful when evaluating the conduct which is complained about, not to substitute its own 'business judgment' for that of the functionaries entrusted with that power in terms of the company's constitution.³⁷
100. Finally, it may be pointed out that neither the pursuit of personal profit nor of any pecuniary advantage on the part of an oppressor need be shown in order to successfully rely on the provision in question,³⁸ which requires an objective and not a subjective determination. In the circumstances the underlying motive for the conduct in question is not necessarily relevant to a consideration of whether or not relief should be granted, unless it goes to show a lack of probity or unfair dealing, or a pattern of conduct. As was explained in *Aspek*³⁹ primarily the 'result rather than the motive is the material thing and it is not the motive for the conduct but the conduct itself to which the Court must look and the effect which it has' (sic) on the member (or director).

³⁴ *Sammel & Ors v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 678G-H; *Louw* n 8 at para [22].

³⁵ *Louw* n 8 at para [24].

³⁶ *Aspek* n 18 at 527B-C.

³⁷ *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & Ors* 2014 (5) SA 179 (WCC) at para [64].

³⁸ *Id.*

³⁹ *Id* at 529D-E. Conduct may thus be considered to be oppressive even though it is ascribable 'simply to the controlling shareholder's overwhelming desire for power and control and not with a view to his own advantage in a pecuniary sense' *R v Harmer Ltd* (1958) 3 All ER 689 at p704.

The law applied

101. In my view, if one steps back and considers the history of the deterioration in the relationship between the applicants and their co-shareholders and directors as outlined above it was characterised by egregious oppressive conduct to the applicants, which was both unfairly prejudicial to them and unfairly disregarded their interests as shareholders and directors.
102. In arriving at this conclusion I make full allowance for the fact that the applicants' co-shareholders and directors may well have had cause for dissatisfaction in regard to the way in which both of them conducted themselves in relation to the businesses of the two companies, and that they may well have been a major cause of the breakdown in interpersonal relationships in what were essentially small 'domestic' entities, run almost as quasi-partnerships. Bresler, in particular, was the subject of a fairly vituperative attack by his colleagues. He was variously described in the answering affidavits as abrasive, ascerbic, antagonistic, aggressive, confrontational, condescending and lacking managerial and negotiation skills.
103. Although he strenuously denied being the fly in the ointment as far as BCMS was concerned and sought to blame the fracture in the relationship between it and Xigo on the incompetence of its own staff, there are objective indications in the correspondence that was exchanged between the two companies, particularly that emanating from BCMS, that it was indeed his obnoxious behaviour which caused ructions in their inter-company dealings. This is borne out by the fact that a number of BCMS' staff refused point-blank to have any dealings with Xigo, if he was involved. In blaming him for the deterioration in their relationships the respondents pointed out that because he had set his face against BCMS he tried to frustrate their attempts at repairing the damage he had caused and was opposed to their decision to extend their dealings with BCMS by renewing their contractual relationship. In the exercise of his authority as financial director he spitefully refused to allow Bahlman's travel expenses to visit BCMS to be paid from the company's coffers, and kept on obtusely asking them to motivate why

the company should pay for such expenses, when they were clearly incurred in the interests of the company's business.

104. At the end of December 2016 he caused Pople to be removed as an approved and authorised signatory on Quickberry's bank account and in January 2017 he allegedly breached company confidences by informing staff of the Cape Town offices of Xigo that they were going to be retrenched. After he had launched his winding up applications, which had a negative and depressing effect on both businesses, he allegedly set about informing staff members that there was a danger that they would not be paid what was due to them, causing anxiety and a drop in morale. He was accused of deliberately refusing to agree to salary increases or the payment of bonuses and creating a 'toxic' working atmosphere at Quickberry which resulted in the loss of key personnel. Whilst the litigation was ongoing he allegedly took up employment with a competitor, Benchmark International M&A Advisors, and a number of Xigo's staff left to join him.
105. In addition, the respondents claimed that he was 'the architect' (sic) of Scott's demise and abused him, as he could not tolerate him. There is however little if any evidence of this in the voluminous correspondence between the shareholders and directors and, if anything, it appears that on more than one occasion Bresler in fact attempted to stand up for Scott. He repeatedly cautioned them from riding roughshod over Scott's right to be paid out the fair value of his shareholding.
106. As far as Scott is concerned the respondents' complaints were more muted. They appear to have become frustrated by what they perceived to be a lackadaisical and slapdash approach to his responsibilities and duties as deal leader. It appears as if he let a number of deals fester away instead of closing them expeditiously, thereby exposing the companies to potential loss, and there clearly was some dissatisfaction in regard to the standard and quality of service he was rendering to clients.
107. But that said, all in all, although the respondents claimed to be the ones who were the victims of oppressive and unfair conduct on the part of Scott and

Bresler, within the meaning afforded to those terms as set out in the cases I have referred to above, in my view this was not established at all and any shortcomings in regard to their failures, and the negative behaviour they were accused of, was ascribable either to their managerial or personal deficiencies or to their frustrations at, and reactions to, what was being done to them by the respondents.

108. It is evident that (motivated no doubt by their frustrations with the applicants) Pople, Bahlman, Pudney and Grantham effectively decided to take matters into their own hands and set about taking control of the two entities in order that they could get rid of both Bresler and Scott, who they considered were no longer a fit for what they had in mind as far as the direction and future of the businesses were concerned. Initially it appears they only envisaged getting rid of Scott, but as the relationship with Bresler also progressively worsened they decided that he too had to go.
109. The difficulty which they had was that Bresler and Scott together held a combined 60% majority shareholding in Xigo and a 40% shareholding in Quickberry. Fortunately, the shareholders agreements provided⁴⁰ that if either of them was to leave the employ of the companies (except to take up a position as non-executive directors), they would thereby trigger the sale of their equity, with effect from the day preceding the date of their 'departure'. However, divestment of the shareholding was not immediate and the shareholders agreement also provided for a lengthy and cumbersome process in terms of which the shares would be deemed to have been offered for sale at fair value (as determined by two independent auditors), which offer would lie open for acceptance by any of the other shareholders for a period of 12 months. If at the expiry of such a period the offer had not been accepted the departing shareholder would then be at liberty to offer his shareholding to a third party. The respondents astutely realized that in a situation where either Scott or Bresler was forced to leave they would have the upper hand, as far as their respective bargaining positions were

⁴⁰ In clause 8.6.

concerned, as they could drag out the process of acquiring their shares for a full year before electing to accept or reject their deemed offers, and amongst themselves they spoke about using this period of time to put pressure on the applicants to sell their shareholdings for a reduced value.

110. The plan which they adopted to give effect to their aims was to build up a case of sorts against Scott (presumably because he had been a source of irritation for longer and was an easier and softer target), which they could use as grounds to fire him by way of a disciplinary hearing, thereby triggering the sale of his shareholding, part of which they envisaged could be taken up by BCMS and the remainder of which Pople was interested in acquiring. Although they claimed they wanted to pay Scott fair value for his shareholding this is belied by a number of statements they made in which they clearly said they wanted to pay as little as possible for his shareholding, and the strategy they adopted of deliberately putting him under financial pressure, by calling for him to contribute towards a shareholder loan for Xigo, whilst at the same time withholding the declaration of a dividend in Quickberry. The idea clearly was that faced with a disciplinary hearing and a subsequent dismissal, whilst at the same time being placed under financial pressure, he would be motivated to offer his shares to them at a heavily discounted price.
111. The next step was to 'performance manage' Bresler out of Xigo, by making his working conditions intolerable. To this end, they proposed closing down the Cape Town office where he was based, thereby compelling him to commute to and from their principal place of business in Johannesburg whilst at the same time taking away his control of the purse strings, by removing his financial functions from him, even though he was still the financial director. They thought that this combination of inconvenience and humiliation would do the trick, and forced to work under such circumstances it would not be long before he too decided to leave. Bresler was excluded from all decision-making in relation to the closure of the Cape Town office, including the costings pertaining thereto (which once again

one would have expected he would have been involved with as financial director), and was simply informed of it when it was a *fait accompli*.

112. Scott was marginalized and excluded from participating in the affairs of the companies from early in 2016, when it was decided by Bahlman, Pople, Pudney and Grantham (with Bresler initially acquiescing) that management of both entities would effectively no longer be carried out by their boards, but by fiat of a single executive committee which was established for this purpose. In my view, in doing so those involved acted contrary not only to the memorandums and the shareholders agreements of both companies, but also contrary to well-established principles of company law and provisions of the Companies Act, notably s 72 thereof, which although it allows for a committee to be set up to perform certain functions as may be delegated to it by the board, does not allow for complete executive control by the board to be subverted and rule by committee to be put in place, instead.
113. In banding together as a group of shareholders and directors who were likeminded in their objectives, the lines became blurred. In this regard for example Pople, who was the Chair of the Xigo board, assumed executive authority on Exco, as did Grantham who was the MD of Quickberry but not a director of Xigo. Nonetheless, both of them made executive decisions in respect of a number of matters involving both companies. At the end, not only Scott but Bresler too was excluded from active participation in Exco and the decisions it took.
114. Not only were both applicants excluded from their right to participate in the affairs and the running of both companies, but despite clear attempts on their part to try and start an active process of engagement in relation to a valuation of the equity in both entities and their share thereof they were stonewalled by the respondents. Bresler in particular was very active in trying to get the respondents to put forward an acceptable offer for his shareholding, but nothing was forthcoming (notwithstanding his indication to Pudney already in November 2016 as to what he was looking at in terms of a figure), because the respondents

clearly thought they would play the long game with a view no doubt to also getting him to sell at a discount.

115. It is well established law that excluding a shareholder from participation in the affairs of a company of which he is a member ⁴¹ whilst at the same time preventing him from extricating his shareholding for fair value, or not engaging him with a view to a reasonable offer for his shareholding,⁴² is oppressive and unfairly prejudicial conduct.
116. I am mindful that the disciplinary process to which Scott was subjected was directed, supposedly, at his alleged failure to perform satisfactorily as an employee and in this regard the circumstances giving rise to his dismissal would ordinarily not be relevant as to whether or not he was oppressed or prejudiced unfairly as a shareholder, or director.⁴³ However, it has been pointed out in a number of Canadian cases that where the interests of an employee are closely intertwined with his interests as a shareholder and his dismissal is part of a 'larger' pattern of conduct designed to exclude him from participation in the company, it is clearly permissible and indeed necessary to have regard thereto.⁴⁴
117. Given that the strategy which was adopted by the respondents included bringing Scott before a disciplinary hearing and then firing him as part of a broader pattern of conduct designed to force him out of the company, not only as an employee but also as a shareholder, the circumstances pertaining to the hearing are clearly relevant to a consideration of whether or not they formed part of the oppressive conduct which was directed at him. In *Barnard*⁴⁵ this court held⁴⁶ that procedural unfairness and irregularities in relation to the convening of a shareholders' meeting in order to remove the applicant as a director, as well as in relation to a

⁴¹ *Barnard v Carl Greaves Brokers (Pty) Ltd & Ors* 2008 (3) SA 663 (C.) at para [45]; *O'Neill & Ano v Phillips & Ors* [1999] 2 All ER 961.

⁴² *De Sousa v Technology Corporate Management (Pty) Ltd & Ors* [2017] 3 All SA 47 (GJ).

⁴³ *Meskin Henochsberg on the Companies Act Vol 1* (Issue 14) at 574(9) referring to *Nanef v Con-Crete Holding Ltd* [1993] OJ No 1756 at 71 (QL) (Gen Div).

⁴⁴ *Leon & Armstrong The Relevance of the Oppression Remedy as a Control on Corporate Governance in Canada* 27 *Advoc.Q.* 402 (2003) at p429-433; *Nanef* n43.

⁴⁵ Note 41 at para [45].

⁴⁶ Per Binns-Ward J.

disciplinary hearing which was subsequently convened and which led to his dismissal, could be considered in substantiation of his allegation that the affairs of the company were being conducted in a manner which was unfairly prejudicial, unjust or inequitable to him.

118. As I pointed out above, Scott's hearing itself was substantially flawed and materially defective, on a number of grounds. Not only was the 'evidence' insufficient to sustain a finding on the charges, but the presiding officer also misdirected himself in numerous respects, not least in regard to how he handled the question of onus and his evaluation of the 'evidence'. Even Scott's prior suspension was patently defective in that he was never given any opportunity, contrary to the fundamental tenets of the *audi alteram partem* principle, to provide reasons for why he should not be suspended, before he was informed thereof. Bresler's intended suspension would also have fallen foul of this principle, had he not interdicted it from being put into operation. I may add that even were sufficient, reliable evidence to have been properly put before the hearing, it is doubtful whether or not it could reasonably have led to a sanction of dismissal. In this regard it is a well-established principle of labour law that where an employee is guilty of not performing according to the level or requirements of a particular job, not because of any misconduct on his part but rather because of an inadequacy, the 'sanction' which is to be imposed is to be a corrective and graduated one, designed to help him raise himself to the level or standard required. Dismissal would ordinarily only be permissible once, and if, he had thereafter failed to rehabilitate himself and his subsequent performance had again not come up to scratch.
119. In the result, and for the reasons I have referred to, in my view it is clear that both Bresler and Scott have made out a case for the relief which they sought. They were both the victims of the abuse of the power and control which the respondents wielded over the two entities.

The appropriate remedies

- i) The functus officio point:

120. Although I accept, on the strength of the decision in *Louw*, that the liquidation of Xigo does not *per se* necessarily constitute a bar to an order that Scott or Bresler's shareholdings should be bought out by their co-shareholders, the difficulty which presents itself is that an order in these terms is being sought by Bresler by way of a claim for alternative relief, pursuant to an amendment to the notice of motion in the Xigo application which was effected in July 2017, after the grant of the principal relief which was sought.
121. In my view this is both conceptually and legally unsound. In the first place, it seems to me, as a matter of logic, that if an applicant brings an application in which he or she asks only for certain (principal) relief, in this case a winding up order, without any alternative claim being attached thereto, and then succeeds in getting it, that is the end of the matter and they have nothing left against which they can later put in an alternative claim. One can surely only ask for alternative relief if there is still some principal relief or claim outstanding, if that has gone because it has been awarded or settled, on what basis can one later seek to put in an alternative thereto?
122. In the second place, to allow such an alternative at this stage would violate the *functus officio* doctrine, which it has been said, is one of the essential mechanisms by which the law seeks to give expression to the principle of finality.⁴⁷
123. It is well established in our law ⁴⁸ that once a court has duly pronounced a judgment or order which is final in effect, it has no authority to alter, supplement or correct it, save in respect of accessory or consequential matters that flow from it ie such as orders for costs or interest, or the correction of typographical,⁴⁹ arithmetical or other errors, or orders by way of clarification necessary to give proper effect to its 'true' intention. The reason for this is that upon making its

⁴⁷ *Retail Motor Industry v Minister of Water* 2014 (3) SA 251 (SCA) at para [23] quoting from Pretorius 'The Origins of the Functus Officio Doctrine' (2005) 122 SALJ 832. In *Firestone South Africa (Pt) Ltd v Genticuro A.G* 1977 (4) SA 298 (AD) at 309A Trolip JA held that public policy requires that the principle of finality in litigation should generally be preserved rather than eroded.

⁴⁸ *Firestone* n 45 at 306F-G; *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at pp176, 187.

⁴⁹ Sometimes referred to as a 'clerical' error.

pronouncement the court has exhausted its powers: its jurisdiction having been fully and finally exercised, its authority over the subject-matter has ceased.⁵⁰ In my view once this court granted a final winding up order for Xigo at the instance of Bresler on 15 June 2017 it was *functus* as far as his application was concerned and it cannot now entertain the application for alternative relief which has been brought by him in relation to Xigo. As far as the remaining applications by him and Scott are concerned there is no such impediment.

ii) The terms of a buy-out order:

124. Fortunately, this is not a matter where the court needs to decide between competing claims for orders that shareholders should buy one another out, as second and third respondents withdrew their counter-applications in this regard. The parties are in fact agreed that if there is to be an order directing a buy-out, it should be one directing second and third respondents to acquire the applicants' shareholdings. That brings me to the question of what the appropriate terms of any order which might issue for the purchase of shares should be. In matters such as these the remedy proposed should, as far as is practically possible, effect an expeditious, straightforward and inexpensive termination of the relationship between the parties, in a manner which will avoid the potential for further disputes⁵¹ and it must be fair to both sides,⁵² and the court is required to consider not only the interests of 'warring' shareholders, but also those of any shareholders who may have stood apart from the fray, as well as the best interests of the companies concerned.⁵³

125. Inasmuch as s 163(2) provides that the court may make any interim or final order it considers 'fit' it has been held that these are words of wide import which reflect that a court has a wide and unfettered discretion⁵⁴ to make such order as it

⁵⁰ *Firestone* n 45 at 426G.

⁵¹ *Bayly v Knowles* 2010 (4) SA 548 (SCA).

⁵² *Louw* n 8.

⁵³ *Bayly* n 51 at para [25].

⁵⁴ *Id* at para [27]; *Bader v Weston* 1967(1) SA 134 (C.) at 147; *Louw* n 8 at para [21]; *Meskin* n 43 at 574(10).

considers to be fair and equitable in the case before it, in order to 'put right and cure' the unfair prejudice which the oppressed shareholder may have suffered.

126. What has to be determined by the court is what would constitute a fair price⁵⁵ for the applicants' shareholdings, which must of necessity depend on the circumstances before me, as set out above. It has been held, as a general principle, that a fair price should represent the value the shareholdings would have had 'if there had been no unfair treatment'.⁵⁶ In arriving at such a determination, it is not necessary that I conduct a valuation exercise of the kind which would ordinarily be performed by an accountant or auditor, in accordance with the accepted methodology which such professionals commonly make use of. In this regard Grant Thornton explained in their report that there are 3 recognized methods of valuing equity in a corporate entity viz an income-based valuation (which quantifies the capitalized net present value of the future income stream ie cash flow which would accrue to the entity, which is then discounted at a rate appropriate for the risks associated with such income stream), a market-based valuation (which seeks to determine the fair market value of the entity concerned in terms of certain earnings or revenue multiples), and a net asset valuation (which uses the current value of a company's tangible net assets as the key determinant of fair market value). As I indicated previously, Grant Thornton were of the view that the income-based ie discounted cash flow valuation method was the appropriate one to adopt in the case of the two entities in this matter.
127. The parties have agreed that if I were minded to make a buy-out order it can be left to an independent, registered and practising chartered accountant to make such a valuation, in accordance with such accepted valuation methodology as is set out in the Grant Thornton report, and in accordance with a directive which I issued in this regard they have favoured me with proposed draft orders which set out terms of reference for the exercise which must be carried out by such valuer.

⁵⁵ *Scottish* n 21 at p89.

⁵⁶ *De Sousa* n 42 at para [36]; *Scottish* n 21 at p89. A similar approach has been adopted in Australia vide *Sanford v Sanford Courier Service Pty Ltd* (1986) 10 ACLC 549.

In most material respects the parties were *ad idem* as to what those terms of reference should be.

128. What has not been agreed upon between the parties, and has not been set in the Grant Thornton report is the relevant date at which fair value should be pegged by the appointed valuer. Grant Thornton point out that the determination of the date in valuation matters is usually driven by the reason for which the valuation is to be performed.
129. In a number of English and Australian cases the date which has been set for the valuation of shares which are to be acquired, in terms of an order of the kind in issue in this matter, has ranged from the date when the application was launched⁵⁷ to the date the order was made,⁵⁸ or a subsequent date pursuant to such an order,⁵⁹ the date of the last available balance sheet⁶⁰ or even the date when the unfair conduct occurred,⁶¹ or a convenient date immediately before it.⁶² From a review of the case law it appears that the most commonly stipulated valuation dates are when the application for relief was launched or when an order was made.
130. As was pointed out in the introduction, the respondents contend that it would not be fair to order them to acquire the applicants' shareholdings for a price or value which is determined as at 30 November 2016, which is the date suggested by the applicants (being the last available date according to Scott, at the time when he was dismissed, when a balance sheet or set of financial statements are available), as this would result in them having to pay millions of rands for shares

⁵⁷ *Scottish n 21*; *Re London School of Electronics Ltd* (1985) 1 BCC 99394; *Re a Company (No. 002612 of 1984)* (1986) 2 BCC 99453; *Re Bread Ltd*; *The Queensland Co-operative Milling Association v Hutchinson* [1977] Qd R 44; *Re Dalkeith Investments Pty Ltd* (1984) 9 ACLR 247; *Sanford n 56*; *Reid v Bagot Well Pastoral Company Pty Ltd* (1992) 9 ACSR 129; *Joint v Stephens* (2008) 26 ACLC 1.

⁵⁸ *Re a Company (No 005134 of 1986) ex parte Harries*; *Richards v Lundy* [2000] 1 BCLC 376; *Re Regional Airports Ltd* [1999] 2 BCLC 959; *Roberts v Walter Developments Pty Ltd* (1997) 15 ACLC 882; *Mopeke Pty Ltd v Airport Fine Foods Pty Ltd* (2007) 61 ACSR 254.

⁵⁹ *Re a Company* (1983) 1 BCC 98. This was a matter where the applicant had unreasonably rejected previous fair offers which had been made.

⁶⁰ *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* (2003) 47 ACSR 514.

⁶¹ *Re O.C Transport Services Ltd* (1984) 1 BCC 99.

⁶² *Dynasty Pty Ltd v Coombs* (1995) 13 ACLC 1290.

in companies which, as a result of Xigo having been consigned to the 'abattoirs of the insolvency court' by Bresler, are now practically worthless. In essence the respondents submit that inasmuch as Bresler chose to go for winding up applications in respect of both entities, he was the cause of the destruction in their value and the author of his own misfortune and he should consequently not be allowed to profit at the respondents' expense. The applicants on the other hand contend that it would be manifestly unfair not to order the respondents to buy them out at that date, as this would do nothing more than to give effect to the general rule that they should be bought out at a value which their shares would have had in the ordinary course, but for the oppressive conduct to which they were subjected. Scott, in particular points out that he was unfairly dismissed on 20 December 2016, and he was not directly involved in the internecine warfare which Bresler and the respondents engaged in, and launched his own, separate applications for buy-out orders in terms of s 163 on 9 February the following year, and only sought winding up orders in the alternative, and not as the principal relief.

131. The respondents further contend that what the applicants are in effect seeking to do is to obtain what amounts to compensatory orders in lieu of damages via the back door, under the guise of orders in terms of s 163, and this is not permissible. They point out that such orders are provided for in terms of s 163(2)(j) of the Act. In *Scottish* Lord Denning opined⁶³ that an order in terms of the then equivalent section in English law directing an oppressor to acquire the shares of an 'injured' shareholder for a fair price was in effect an order for 'money compensation' for the injury which had been done to the oppressed shareholder. This view was endorsed in a number of subsequent English and Australian decisions.⁶⁴ That the nature of the remedy is recognized to be a compensatory one is further borne out by the fact that contrary to what would be ordinarily be the case in an ordinary commercial exchange of shares, it is generally accepted

⁶³ Note 21 at p 89.

⁶⁴ *Re a Company No 002612 of 1984* (1986) 2 BCLC 99 at p495; *Rankine v Rankine* (1995) 124 FLR 340; *Smith Martis Cork & Rajan Pty Ltd & Ors v Benjamin Corporation Pty Ltd* (2004) 207 ALR 136 at pars [71]-[72] *Vadori v AAV Plumbing* [2010] NSWSC.

that when valuing minority shareholdings pursuant to an order in terms of s 163 no discount is to be applied for the fact that these may be minority shareholdings.⁶⁵ The reason for this is because if a discount were to be applied it would allow the oppressors to acquire the shareholding of the oppressed at a price which would reflect the effect of their oppressive conduct, thereby perversely providing them with an incentive to oppress.⁶⁶

132. Despite various requests during 2016 that the respondents should engage Bresler and Scott in an attempt to resolve their disputes by non-litigious means, they were rebuffed on a number of occasions. It is worth reiterating that, although it was agreed pursuant to the meeting which was held between Bresler and Pudney on 8 November that the other shareholders would revert with an offer for the possible acquisition of the applicants' interests in the 2 companies, or at least Bresler's, no such offer was ever forthcoming. On 18 November Bresler's attorneys formally and sensibly requested, on behalf of both him and Scott, that an attempt be made to reach agreement on a commercially sensible and amicable parting of the ways in a manner which would not be destructive of the underlying value of the companies and the individual shareholdings. The respondents rejected this proposal on 29 November with the proverbial measure of contempt as they were of the view that no purpose would be served in having any discussions in this regard and according to them there was no urgency. In my view the respondents' refusal to engage the applicants in what was clearly a sensible proposal, at a time when on their own version the relationships between the shareholders and directors was severely dysfunctional and the businesses were suffering as a result thereof, was wholly irresponsible and the respondents are largely to blame for what followed.
133. Having previously warned that if they did not engage him he would have little option but to wind up the companies, Bresler was almost obliged to make good

⁶⁵ *O'Neill* n 41 at p11; *De Sousa* n 42 at para [36]; *McMillan NO v Pott* 2011 (1) SA 511 (WCC) at 541A-E.

⁶⁶ Sirianos 'Problems of Share Valuation under Section 260 of the Corporations Law' (1995) 13 *Company and Securities Law Journal* 88, as cited by Brockett 'The Valuation of Minority Shareholdings in an Oppression Context- A Contemporary Review' (2012) 24.2 *Bond Law Review* at p 122.

on his threats. My sense of it is that he thought that an application for winding up would jolt the respondents into action and force them to the negotiating table. I do not believe that he seriously envisaged that he would have to actually take an order in this regard, as he must have realized that by doing so he would, in a manner of speaking, kill the geese which were laying the golden eggs. It might, with the benefit of foresight, have been more sensible if, instead of launching winding up proceedings Bresler had brought applications in terms of s 163 instead, with winding up orders being sought in the alternative. But the question is whether or not he can be blamed for adopting the course of action which he did, and only seeking s 163 orders much later.

134. I accept that, as a general principle, in matters such as these an order for the winding up of a company should be sought as a last resort because of the consequences attendant thereto, which result in the company no longer being able to continue in active business and effectively coming to an end. Although it was held in *Louw*⁶⁷ that the liquidation of a company is not necessarily a bar to a subsequent application for an order in terms of s 163 directing a share buy-out, in that matter the applicant had sought such an order from the outset, by way of an alternative to an order for winding up, and by the time the matter was heard the company had already been put under at the instance of a creditor, and therefore the *functus officio* principle was not applicable. This is not the case in this matter, where an application in terms of s 163 was not sought in Xigo, as an alternative, until after the principal relief had been granted.
135. In my view, disaffected shareholders should be encouraged to first make application for relief in terms of s 163, if it is appropriate, before they resort to applications for winding up, rather than after. Not only will this allow for a possible settlement between opposing shareholders in a manner which will allow for the company to continue in business, but it will also not destroy the underlying value of the equity in the company. It will encourage applicants to reflect very carefully on the effect a possible winding up order will have on the value of their own

⁶⁷ Note 8.

shareholdings, before they rush to court for such an order. If s 163 orders are granted too readily in post wind-up situations, it will allow impetuous litigants to avoid this responsibility, and then seek to gain an unfair advantage over their co-shareholders by asking for an order that they be bought out at pre-liquidation values at their expense, thereby saving themselves from the calamity they brought upon everyone.

136. As it turned out, the respondents must have realized that they needed to engage Bresler on a possible buy-out, or else he would go ahead, because on 10 February they themselves launched counter-applications for relief in terms of s 163. Bresler responded to these counter applications by advising in his replying/opposing affidavits of 28 February that he was not averse to his shares being bought out, provided this was done in an orderly manner. To this end he presented the report of Grant Thornton.
137. Shortly thereafter, on 9 March, Scott launched his own s 163 applications in which he proposed making use of the selfsame methodology proposed in the report by Grant Thornton. Shortly after 24 March all of the applications were postponed for hearing on 6 June.
138. Inasmuch as the respondents did not file opposing papers in Scott's applications I think Bresler is correct when he says that at that stage of the proceedings all the parties must have been of the view that in preference to winding up the companies his and Scott's shareholdings should be acquired by the remaining shareholders, and all that really remained in dispute was a determination of how the shares should be valued and acquired. One would have thought that in the light of these circumstances the respondents would have reached out to the applicants and would have attempted to resolve the matters before they went any further. However, this was not to be and between 6 and 19 April they instead withdrew their counter-applications, not only in Xigo but also in Quickberry. As far as the record goes there is no concrete indication that any real attempt was made in the period between 24 March and 19 April to put forward any hard offers and one must assume that even then the respondents were not of the view that

there was any urgency in the matter. And as a result, on the papers it appears that Bresler was still of a mind to proceed with the applications for orders winding up both companies, and was also determined to have things his way. Thereafter it appears Xigo was wound up by agreement on 3 May 2017. Bresler did not however press for the winding up of Quickberry.

139. In the answering affidavit which the respondents filed on 5 June 2017⁶⁸ it was averred that subsequent to the filing of Bresler's replying affidavit in Quickberry on 28 February, the businesses in Xigo and Quickberry started to 'unravel' and the viability of a buy-out was becoming 'slim'. According to Grantham, Bahlman and Pople no longer held the view that a buy-out in Xigo was 'preferable at that stage'.
140. Somewhat curiously, notwithstanding this statement, as far as Scott's applications were concerned Grantham said that although a notice of intention to oppose was filed they subsequently decided that it was appropriate that they should acquire Scott's shares in Quickberry and attempts were made to communicate with his attorneys in order to structure an appropriate mechanism for this, by 6 June 2017 when the matter was to be heard. However, Grantham said that in April 2017, having discussed the matter with their legal representatives they concluded that there was no longer any purpose in continuing with their opposition to Bresler's application for the winding up of Xigo, which had by then suffered substantial prejudice as a result of the winding up application and certain conduct on the part of Bresler. He said that as Bresler had not elected to seek relief in terms of s 163 in relation to Quickberry, and since his proposed terms in relation to the valuation of his shareholding in Quickberry were not acceptable to them, the respondents, decided to withdraw their counter application against him in Quickberry. They alleged that Bresler made himself guilty of inappropriate behaviour in respect of Quickberry in that he made potential clients aware of the winding up application and as a result they were reluctant to sign up any new deals. It was alleged that he had also started

⁶⁸ in response in response to the supplementary affidavit filed by Bresler on 30 May.

intimating to staff that they would not be paid their salaries for March and the atmosphere in the offices became toxic. The respondents claim that Bresler reduced staff working hours by half as well as the salaries and Quickberry had to be relocated to avoid employees becoming increasingly demoralised. Despite this a number of staff members resigned. They also claimed that Bresler and Bahlman had started new businesses in direct competition with Quickberry. They averred that Bresler's real motive in seeking the winding up of the 2 entities was to eradicate competition in respect of his own businesses. As a result of these facts and circumstances the respondents were of the view that the liquidation of Quickberry might well be an appropriate remedy, as they doubted whether it would survive for longer than another 2-3 months. However, notwithstanding these assertions Quickberry was never placed into liquidation at the instance of any of the parties, or any creditors, and as at date hereof it is still in existence. This must of necessity place a large question mark behind the respondents' *bona fides*. My sense of it is that the respondents were as bloody-minded about not arriving at a compromise with Bresler and Scott, as they accuse them of being. In the case of Scott in particular, I can see no reason why the counter-applications needed to be withdrawn. There was no defence raised to his allegations of oppressive conduct, and from the outset he had indicated that he sought a buy-out order in terms of s163. Why did the respondents not engage him in this regard, immediately after he filed his application, or at the very latest, by the time they filed their own counter-application thereto, in February?

141. In my view Scott had nothing to do with the applications for winding up which Bresler launched and it would be grossly unfair to seek to blame him for any depreciation in value which occurred after the launch of such applications, or to seek to peg the valuation of his shares to a date connected with the events in this regard. He was subjected to egregiously oppressive and unfairly prejudicial conduct, to which the respondents have never even pretended to have a defence. Their failure to file any answering papers in regard to either of his applications speaks volumes.

142. I have taken account of Scott's explanations for why he has suggested that the date for the valuation of his shares should be set as the end of November 2016. I can see no reason why financial statements will not be able to be drawn for the end of December 2016, being the month in which he was 'dismissed'. Traditionally the end of many entities' financial year is February, which will usually provide a more accurate and up to date picture of the companies' financial state and the value of their equity, for a valuer and (had all things been equal) from the papers before me it does not appear as if Scott or the respondents would have been prejudiced or advantaged were the date when he launched his applications, to be set as the date for the determination of the value of his shareholdings, instead of the end of November 2016, if that were considered appropriate. However, having duly considered the circumstances set out above, which gave rise to the deterioration in the parties' relationship and the oppressive conduct to which Scott was subjected in the course thereof, and the applications which followed thereafter, in my view as far as Scott is concerned the fair and appropriate date at which his shareholdings should be valued, should not be the date when he launched his applications ie 10 March 2017 but should accordingly be 31 December 2016.
143. As far as Bresler is concerned, in my view given that he initially chose to go by way of winding up applications instead of an application for a buy-out in terms of s 163 it would already, for this reason, not be appropriate to put him in the same camp as Scott as far as the date for a valuation of his shareholding is concerned. In addition, in my view there was a failure also on his part, and not only on the part of the respondents, to engage meaningfully. The differences which there were between him and the respondents were not insurmountable and had they wanted to resolve the matter it would, with a bit of effort, have been easy enough to do. In this regard I point to the fact that the parties were able to arrive at a largely agreed draft order containing their proposed terms of reference for a valuation. Initially the respondents were to blame for the impasse, but he too must bear a share of the responsibility for the events which followed. Even if one accepts that he acted impulsively by launching applications for the winding up of

both companies because of the pressure he was under at the time and simply because he wished to use these as a forceful negotiating tool, he had time to reflect and to put in an alternative claim when the respondents launched their counter-application on 10 February, or by the time when he filed his replying/answering affidavits at the end of February, in which he essentially agreed that an order in terms of s 163 should issue for a buy-out of his shares, albeit on different terms to those they proposed. He chose not to do so even after he realized that there were differences between the valuation methods proposed by the respondents and his own, and even after Scott had launched his own such applications to which the respondents had effectively conceded, and even after the respondents then unexpectedly withdrew their counter-applications in April. I do not believe that the respondents succeeded in proving that by failing to make application for an alternative order before his notice of amendment was filed on 14 July 2017, he had waived his rights to do so. He could always have later issued a separate application for such relief and I do not believe that his conduct is necessarily inconsistent with such an intention. Waiver of rights is not something that is easily presumed, unless there is very clear evidence to this effect. In my view Bresler simply did not see the need to make such an application, until after he had obtained a final order of liquidation in Xigo, and he had despite this still not managed to arm wrestle the respondents into making him an offer.

144. On the other hand, the respondents should not, in my view, be allowed to get away with their abject refusal to do the right thing, given the way in which they had treated him. Whilst it is so that 'technically' Bresler only formally put them on notice in July 2017 that he was seeking to claim for an order in terms of s 163, I agree with his contention that in the light of the stance which he adopted in his replying/answering affidavits of 28 February it must have been clear to the respondents that, as in the case of Scott, he too was still suggesting that there be a buy-out, and by the end of March the respondents were clearly of a similar view, because they had filed their own counter-applications for such relief in terms of s 163 on 10 February. One would have thought that in such

circumstances sense would have prevailed, and they would have pressed for a settlement with both him and Scott, in this regard. Instead, they decided to withdraw their counter-applications. By doing so, they knowingly decided to subject themselves and the companies to a liquidation order, and to the risk that the value of the underlying shareholdings would be negatively affected. In my view, in the light of these circumstances, and having regard similarly for the deterioration in the parties' relationship and the oppressive conduct to which Bresler was subjected the fair and appropriate date for the valuation of his shareholding in Quickberry should accordingly be 31 March 2017.

145. They are two remaining aspects which need to be dealt with. Firstly, insofar as the costs of the winding up of Xigo are concerned Bresler contended that these should be borne by second and third respondents given that they had opposed the application. The respondents on the other hand contend that, inasmuch as their opposition was directed at trying to save a solvent and viable commercial entity from being placed into liquidation, they were justified in opposing the matter. Having considered the circumstances I am of the view that the order which is ordinarily granted in such matters ie that the costs should be costs in the winding up is the appropriate order that should be made. Lastly, I note that although the costs of the urgent application for an order interdicting the respondents from implementing certain resolutions in terms of which they were to suspend and discipline Bresler were reserved for determination together with the applications which are before me, however, neither of the parties have addressed me in this regard. I accordingly propose making an order which will give them an opportunity, in the event that they are unable to resolve the matter, to make further written submissions in this regard.

The Orders

146. In the result I make the following orders:

146.1 In the application under case number 817/17:

(a) The application for relief in terms of s163 (2)(e) of the Companies Act no.71 of 2008, is dismissed with costs, such costs to include the costs of two counsel where so employed.

(b) The costs of the application for the winding up of the first respondent shall be costs in the winding up.

146.2 In the application under case number 818/17

(a) Second and third respondents are directed to purchase, in proportion to their shareholding, the shares of the applicant in the first respondent in accordance with the terms set out in annexure 'A' hereto.

(b) The date at which the valuer shall determine the purchase price and value of the applicant's shares in the first respondent shall be 31 March 2017.

(c) Second and third respondents shall be liable for the costs of the application jointly and severally, such costs to include the costs of two counsel where so employed.

146.3 In the application under case number 4602/17

(a) Second and third respondents are directed to purchase, in proportion to their shareholding, the shares of the applicant in the first respondent in accordance with the terms set out in annexure 'A' hereto.

(b) The date at which the valuer shall determine the purchase price and value of the applicant's shares in the first respondent shall be 31 December 2016.

(c) Second and third respondents shall be liable for the costs of the application jointly and severally, such costs to include the costs of two counsel where so employed.

146.4 In the application under case number 4603/17

(a) Second and third respondents are directed to purchase, in proportion to their shareholding, the shares of the applicant in the first respondent in accordance with the terms set out in annexure 'A' hereto.

(b) The date at which the valuer shall determine the purchase price and value of the applicant's shares in the first respondent shall be 31 December 2016.

(c) Second and third respondents shall be liable for the costs of the application jointly and severally, such costs to include the costs of two counsel where so employed.

146.5 In the application under case number 4046/17

In the event that the parties are unable to arrive at an agreement in respect of the costs of the application, they shall be entitled to make written submissions in regard thereto within 15 days from date of this order.

SHER J

Attendances:

For the applicant in the matters under case nos. 817/17 and 818/17:

Mr A Smalberger SC

Instructed by: Cliffe Dekker Hofmeyr, Cape Town

For the applicant in the matters under case nos. 4602/17 and 4603/17:

Mr A Subel SC

Instructed by: Fluxmans Attorneys, Rosebank

For the respondents: Mr C Eloff SC

Instructed by: Fairbridges Wertheim Becker, Cape Town

ANNEXURE 'A'

1. The 2nd and 3rd respondents ("the respondents") are directed to purchase, in proportion to their shareholding, the shares of the applicant in the 1st respondent

and to take transfer thereof against payment to the applicant of a purchase price ("the purchase price") in an amount to be determined in the manner set out below.

2. The purchase price for the applicant's shares is to be determined by a registered and practising chartered accountant in South Africa of not less than 15 years standing ("the valuer") whose identity is to be agreed upon in writing between the applicant on the one hand and the respondents on the other, within 10 days of the grant of this order and, failing such agreement, an accountant of such standing to be nominated by the Chairperson for the time being of the Public Accountants and Auditors Board.
3. The valuer is to determine the purchase price and value of the applicant's shares in the 1st respondent at the applicable date which is set out in the order which is prefixed hereto, and in the following manner:
 - 3.1 in accordance with the valuation methodology set out in "ACB 86" annexed to the replying affidavit in case number 817/2017;
 - 3.2 no allowance is to be made for the fact that the applicant holds a minority shareholding and there should be no discount for that fact;
 - 3.3 the valuer is required to meet with and to receive representations from each of the parties and their financial representatives in carrying out his/her functions;
 - 3.4 in valuing the applicant's shares in the 1st respondent the valuer shall have the further power to make such adjustments as the valuer may consider fair to arrive at what, in the valuer's professional expert opinion, would constitute a "fair price" for the applicant's shares to be acquired by the respondents as set out in paragraph 1 above;
 - 3.5 the applicant and the respondents shall co-operate fully with the valuer for the purposes of the valuer carrying out such valuation and determination and shall provide all and any documents in their possession or under their

- control as may be called for, or required by, the valuer and shall subject themselves to any interview that the valuer may require and answer any questions posed to them, whether orally and/or in writing, by such valuer;
- 3.6 the valuer shall act as an expert in making such determination and not as an arbitrator and the valuer's valuation and determination shall be final and binding absent manifest error;
- 3.7 the valuer is granted the power to instruct his own legal representatives for the purposes of approaching this court for any direction or power necessary to carry out his/her functions in terms of this order;
- 3.8 within one week of any party making written submissions to the valuer, any party/parties may deliver any comments to those submissions;
- 3.9 the valuer will make a preliminary valuation in accordance with the principles set out above within 6 weeks of his appointment (or such longer period as this court may on application direct) and will circulate such preliminary valuation to the applicant and the respondents immediately upon it being finalised;
- 3.10 the applicant and the respondents will make any such written submissions as they may wish to make in respect of the preliminary valuation, in writing, within one week of receipt of the preliminary valuation;
- 3.11 the valuer, after considering any written submissions received, will make a final valuation and determination of the purchase price within 2 weeks of publishing his preliminary valuation;
- 3.12 the costs of the valuation shall be borne by the respondents jointly and severally.
4. The respondents are to make payment of the purchase price, in proportion to their respective shareholdings in the 1st respondent, within 30 days of the date referred to in paragraph 3.11.

