



IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2010/50723

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>31-3-2017</u>	
DATE	SIGNATURE

In the matter between -

DE SOUSA, LUIS MANUEL RITO VAS

1ST PLAINTIFF

DIEZ, JOSE MANUEL GARCIA

2ND PLAINTIFF

and

**TECHNOLOGY CORPORATE MANAGEMENT
(PROPRIETARY) LIMITED**

1ST DEFENDANT

CORNELLI, ANDREA

2ND DEFENDANT

DA SILVA, TONY

3RD DEFENDANT

HASSIM, IQBAL

4TH DEFENDANT

CASTELLUM TRUST LIMITED

5TH DEFENDANT

JUDGMENT

BORUCHOWITZ J:

[1] This is an action brought at the instance of two minority shareholders for relief in terms of s 252 of the Companies Act, No 61 of 1973, as amended (the Act).

[2] The plaintiffs, acting jointly, seek relief in the first instance against the first defendant, Technology Corporate Management (Pty) Limited (TCM), and in the alternative, against the second, third and fifth defendants. TCM is a nominal defendant as, in substance, the dispute is between the shareholders.

[3] TCM was incorporated in 1987. It is engaged in the sales, supply and maintenance of computer systems, and is a distributor of computer hardware, software and related products, and performs value added services. It has several subsidiaries and is the holder of shares in the following companies: TCM Management (Pty) Limited; TCM Software & Services (Pty) Limited; TCM Networks (Pty) Limited; E-Business Infrastructure Solutions (Pty) Limited; Stand 226 Erand (Pty) Limited; Cape Gannet Properties (Pty) Limited; TCM Small Systems (Pty) Limited and Lechabile Holdings (Pty) Limited.

[4] The current proportional shareholding of TCM is as follows:

- 4.1 The first plaintiff (De Sousa): 30%;
- 4.2 The second plaintiff (Diez): 7.45%;
- 4.3 The second defendant (Cornelli): 30%;
- 4.4 The third defendant (Da Silva): 7.45%;
- 4.5 The Hassim Family Trust (controlled by the fourth defendant, Iqbal Hassim (Hassim): 25.1%.

[5] Each of the shareholders (and Hassim on behalf of the Iqbal Hassim Family Trust (the Trust)) is a director of TCM. Its current board of directors consists of five shareholders and two non-shareholders. The two non-shareholders are Mr Wayne Impey, TCM's Chief Financial Officer, and Ms Ayesha Bhula. Cornelli is the chief executive officer of TCM.

BACKGROUND

[6] To properly contextualise the dispute it is necessary that I refer to certain material facts relating to the incorporation of TCM and the history of the relationship between De Sousa and Cornelli. These are either common cause or incapable of dispute, particularly as the defendants closed their case without adducing evidence.

[7] In mid-1980 De Sousa commenced employment at IBM as a trainee customer engineer in field services. Cornelli was employed in the same capacity by IBM at more or less the same time and they became friends. In 1980 until 1987, they worked closely together as part of the same team. De Sousa became a technical specialist, while Cornelli became an operations specialist.

[8] Their friendship grew in leaps and bounds and they decided to go into business together. The business was initially named "TCM Small Systems" and later, in about August 1987, a company was incorporated by the name of TCM Small Systems (Pty) Limited, which later changed its name to TCM. Each of

De Sousa and Cornelli held 50% of the shares therein, and they were the only directors and employees. At the outset the business of the company consisted of the recycling and adapting of down-graded computer parts and the resale thereof. De Sousa managed the technical side of the business and, later, the business accounting systems, whereas Cornelli dealt with the management of the company and the sales portion of the business. The company benefited greatly from their complementary and synergistic skills.

[9] TCM was in substance a partnership in corporate form. The affairs of TCM were always conducted by means of mutual discussion and consensus of the principal shareholders. As founding members, they held equal status within the company and contributed substantially to the running of the business. Although De Sousa and Cornelli had different areas of expertise, they were equals in every way; they earned equal salaries; had identical offices and commanded the same measure of respect from all employees and from each other. De Sousa testified that at all times their understanding was that both he and Cornelli had the right to participate in the running of the company.

[10] Diez joined TCM in October 1987, when he became a director and employee in field operations, stores and logistics. Da Silva, who also became a director, joined the company in April 1989 and was employed in sales and field work. On 30 March 2004, Hassim was brought into TCM as a Black Empowerment Partner and was appointed as an executive director of TCM with the title of Corporate Sales

Director. During June 2005, the Hassim Family Trust, which was controlled by him, was made a shareholder of TCM.

[11] A formal shareholders' agreement regulating the relationship between the shareholders, was only entered into for the first time on 29 June 2005, some eighteen years after TCM's incorporation.

[12] Simultaneously with the conclusion of the shareholders' agreement, a sale of shares agreement was entered into between Hassim and the remaining shareholders of TCM, in terms of which Hassim purchased 25.1% of the issued share capital of TCM from the remaining shareholders. In terms of that agreement it was provided that the purchase price was to be determined in accordance with a formula, and paid by the Hassim by means of an initial deposit of R1.5 million, with the balance thereof within thirty-six months from the date of signature of the agreement. The purchase price was subsequently determined to be an amount of R26 646 260.53.

[13] The plaintiffs contend that although the composition of the equity in TCM changed after Hassim acquired a 25.1% stake therein, TCM nonetheless still retained its original identity of a domestic company in the nature of a partnership primarily between De Sousa and Cornelli, in whose day-to-day business all

shareholders were entitled to be engaged. This is an issue with which I will deal later in the judgment.

[14] For some reason, Hassim could not afford to pay the purchase consideration in respect of the shares acquired by him. Attempts were then made by Cornelli to assist Hassim to pay for the shares. These attempts gave rise to fundamental disputes between the plaintiffs and Cornelli.

[15] Initially, Cornelli, who is the chairman and chief executive officer of TCM, sought to persuade the shareholders to reduce the purchase price of Hassim's shares by 20% and insisted that they amend the shareholders' agreement, but plaintiffs resisted Cornelli's compulsion to conclude the amending agreement. In a further endeavour to assist Hassim, it is alleged that Cornelli purported to procure, in contravention of s 38 of the Act, that TCM finance a loan to the Trust and/or Hassim to enable them to discharge the purchase consideration in respect of the shares acquired by him. This too was resisted by De Sousa. Cornelli then procured that a number of retention agreements be concluded between TCM and Hassim. The plaintiffs contend that these agreements unduly favoured the Trust and/or Hassim's financial position at the expense of TCM and the other shareholders. Generous bonuses were also given to Hassim.

[16] The plaintiffs assert that because of their resistance to the attempts made to assist Hassim to pay for his shares, Cornelli repeatedly criticised, belittled, humiliated and persecuted them in the presence of other directors, shareholders and employees. By way of example, Cornelli reduced the office and parking space available to De Sousa with the aim of showing public contempt for him.

[17] The remuneration package payable to Cornelli and other shareholders was also a source of animosity between De Sousa and Cornelli. It is common cause that until October 2007 De Sousa received exactly the same remuneration as Cornelli by way of salary, bonuses and other perks. On 6 November 2007, Cornelli proposed that he be paid a monthly salary of R125 000 and a R16 500 car allowance. De Sousa objected to this, whereafter the bonuses payable to him were drastically reduced. In contrast, substantial bonuses directors' emoluments and other benefits were paid to Cornelli, Da Silva and Hassim.

[18] The relationship between De Sousa, Diez and Cornelli worsened to the point that on 10 May 2008, De Sousa and Diez received emails from Cornelli recommending that they hand in their "*voluntary resignations as executive directors and remain on the board as non-executive directors*". A notice of formal suspension of De Sousa from the employment of TCM was delivered on 19 February 2009.

[19] In March 2009, TCM preferred disciplinary charges against De Sousa of gross insubordination and undermining the authority of Cornelli, causing an irretrievable breakdown in trust and in the working relationship with TCM, his fellow-employees,

directors and shareholders; he was also accused of having poor work performance. These charges led to the formal dismissal of De Sousa as an employee of TCM. De Sousa contends that Cornelli acted with an ulterior motive in pursuing these charges; that the charges were groundless and did not merit investigation or his dismissal. An appeal by him against the findings of the disciplinary tribunal was dismissed.

[20] In about June 2009, De Sousa referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging that he had been unfairly dismissed. On 30 October 2010 the Senior Commissioner before whom the arbitration was conducted issued an award in which he determined that the first plaintiff had not been unfairly dismissed.

[21] On 3 April 2009, De Sousa received confirmation that he had been dismissed from the employ of TCM. Following his dismissal, De Sousa was excluded from the day-to-day management of the affairs of TCM and has received no salary or other financial benefits other than dividends. He has been denied the usual freedoms and his access to the company and its records has been severely curtailed. He has, however, been permitted to attend board meetings and is effectively a non-executive director.

[22] On 1 April 2009, Cornelli addressed correspondence to Diez wherein he stated that a "*non-voluntary retrenchment*" might be an option for him. On 17 March 2009, Cornelli sent correspondence to Diez recommending his "voluntary resignation". On 30 April 2009, Cornelli addressed further correspondence to Diez

indicating that he would be subject to "forced retrenchment". Diez was thereafter deployed to manage TCM's Namibia Branch. On 2 April 2013, Diez resigned as an employee of TCM with effect from 29 April 2013 and since that date has not received his salary and other entitlements other than dividends. Like De Sousa, he has only been permitted to attend board meetings.

THE ISSUES

[23] The relief sought in the particulars of claim is the following.

- "(a) That the first defendant, *alternatively*, the second and third defendants and the Trust, each in proportion to his or its existing shareholding in the first defendant -
 - (i) purchase the shares of the plaintiffs; and
 - (ii) take transfer thereof against payment to the plaintiffs of a purchase consideration in the amount of R160 million (or such other amount as this Court may determine as the fair value of the plaintiffs' shares); in the case that the second and third defendants and the Trust are the purchasers, each in proportion to his or its aforesaid shareholding, and in accordance with the provisions schedule annexed hereto marked "X".
- (b) That the plaintiffs shall, within five days after the payment to them in full of the purchase consideration referred to above, in writing notify the first defendant of their resignation as directors of the first defendant.

- (c) That the parties shall take all steps, do all things and sign all documents which are necessary to give effect to the provisions of prayers (a) and (b) hereof as expeditiously as possible, failing which the Sheriff of this Court is hereby authorized and directed to take such steps, do such things and/or sign such documents on behalf of the party or parties to do so for such purpose.
- (d) That the Plaintiffs be granted further or alternative relief, particularly, but not only, that, if needs be, a referee be appointed in terms of section 19bis of the Supreme Court Act No 59 of 1959 in order to determine the value of the plaintiffs' shares in the first defendant".

[24] There are principally two issues that fall to be decided. Whether the plaintiffs are entitled to relief under s 252 of the Act and, if so, what the appropriate consideration is that should be paid for the plaintiffs' shares.

[25] Broadly stated, the plaintiffs' case is that Cornelli, the second defendant, acting alone, alternatively supported by the third and fourth defendants, has conducted himself in the manner set out in paragraphs 12 to 18 of the particulars of claim and thereby brought about a state of affairs which is unfairly prejudicial and inequitable to the plaintiffs. Accordingly, the plaintiffs contend that it would be just and equitable for their shares in TCM to be purchased by TCM, alternatively the second and third defendants, and the Trust, each in proportion to his or its existing shareholding in TCM.

[26] To facilitate a proper understanding of the issues, it is necessary to set out the allegations made in paragraphs 12 to 18 of the particulars of claim:

“12.1 During or about the period November 2007 to September 2008:

12.1.1 the second defendant caused to be registered a company by the name of TCM Printing Solutions (Pty) Ltd (TCM Printing Solutions), whose issued share capital was owned by each of the fourth defendant as to 25.1% thereof, and Frank and Fabio Cornelli, the brothers of the second defendant, each as to 37.45% thereof;

12.1.2 the second defendant wrongfully and intentionally caused the business of the first defendant conducted by means of its Supplies Division to be given over to TCM Printing Solutions at no value;

12.1.3 *Alternatively to paragraph 12.1.2 hereof*

the second defendant procured that the business of the first defendant's Supplies Division be conducted and accounted for as if it were a separate and distinct entity from the first defendant, and caused all income and profits arising therefrom to accrue solely to the fourth defendant (*alternatively*, the Trust) and Frank and Fabio Cornelli.

12.1A In the event that the facts set out in paragraph 32.2.1 are proven, and in accordance with the foregoing, the business of

the first defendant's Supplies Division has from at least September 2008 been conducted and accounted for, and is to date conducted and accounted for, in the foregoing manner.

12.2 The value of the business comprising the Supplies Division of the second defendant was at the relevant time approximately R10 million.

12.3 The second defendant accordingly wrongfully caused and continues to date to cause loss to the first defendant of its business conducted under its Supplies Division and the value thereof, thereby in turn also jeopardising the value of the plaintiffs' shares in the second defendant.

13. During or about the period November 2007 to April 2009:

13.1 the second defendant purported to compel the plaintiffs to conclude an amending agreement in terms of which they would receive a reduced purchase consideration (to an extent of 20%) under the terms of the original agreement which had been concluded amongst the plaintiffs and the second and third defendants, on the one hand, and the fourth defendant, on the other, in terms of which the Trust acquired its 25.1% shareholding in the first defendant;

13.2 as a result of the plaintiffs' resisting the second defendant's compulsion as aforesaid, the second defendant:

13.2.1 repeatedly criticised, belittled, humiliated and persecuted the plaintiffs in the presence of the directors and shareholders, and certain employees, thereof;

13.2.2 demanded their resignation as directors of the first defendant;

13.2.3 unfairly and unjustly reduced the office and parking space available to the first plaintiff with the aim of showing public contempt for the first plaintiff, of reducing his reducing his contribution to the first defendant and of denigrating his status as a founder member thereof and as a participant therein of equal status to the first defendant;

13.3 the second defendant purported to procure that:

13.3.1 in contravention of the provisions of section 38 of the Companies Act No 63 of 1971 ("the Act"), the first defendant would finance a loan to the Trust and/or the fourth defendant; and or

13.3.2 the first defendant would make a donation or disposition to the Trust and/or the fourth defendant,

to enable it or him to discharge the purchase consideration in respect of the acquisition of its shares in the first defendant and which unduly favoured the Trust's and/or the fourth defendant's financial position at the expense of the first defendant and the other shareholders thereof;

13.4 the second defendant procured that a "retention" agreement (which was a sham) be concluded between the first defendant and the fourth defendant which unduly favoured the Trust's and/or the fourth defendant's financial position at the expense of the first defendant and the other shareholders thereof;

13.5 the second defendant procured that disciplinary charges be preferred against the first plaintiff, persisted in pursuing a disciplinary hearing

against him and in dismissing him upon his being found “guilty” thereof, in circumstances where:

13.5.1 such charges related to the alleged conduct of the first plaintiff which occurred at a substantially earlier time;

13.5.2 the alleged conduct of the first plaintiff with which the charges were concerned did not merit investigation, scrutiny or dismissal;

13.5.3 the manner in which the disciplinary hearing was conducted was unfair to the first plaintiff;

13.5.4 the second defendant acted with an ulterior motive in pursuing the charges against, and dismissing, the first plaintiff, namely for the purpose of ridding the business of the first plaintiff of the daily engagement and involvement of the first plaintiff in its affairs and of his contribution thereto;

13.6 the second defendant drastically reduced the bonuses to which the plaintiffs were ordinarily entitled with the ulterior motive of humiliating, denigrating and punishing the plaintiffs for refusing to accede to his demands, while substantially increasing the bonuses and benefits (including director’s emoluments) ordinarily paid out to other employees and/or directors of the company, including himself, for the purposes, *inter alia*, of:

13.6.1 assisting the Trust, through the fourth defendant, to pay for the shares acquired by it from the other shareholders a set out above;

13.6.2 enhancing and assuring the loyalty of the other recipients of the bonuses to him personally, such recipients including the members of the second defendant's family and of the families of the other directors and/or shareholders generally, and of those who were employed by the first defendant specifically at the second defendant's behest;

13.7 the aforesaid conduct had the result that the resources and patrimony of the first defendant were unduly depleted at the behest of the second defendant for the purposes aforesaid.

14. During or about the period 2008 to 2009:

14.1 the second defendant refused to engage in *bona fide* discussions or negotiations with the aim of permitting the plaintiffs to dispose of their shares (whether to the other shareholders, a third party or to the company itself) at fair value and without resort to litigation and other conflict;

14.2 the second defendant refused to permit the plaintiffs free and proper access (to which, both as directors and shareholders, they were entitled) to financial documentation of and pertaining to the first defendant, and impeded and frustrated such access as they managed to procure, such that they were prevented from arriving at a fair assessment of the value of their shares in the first defendant and were accordingly unable to comply adequately or at all with the provisions of the shareholders' agreement governing the disposal of their shares.

15. During or about the period 2008 and 2009:

15.1 the second defendant procured in the audited financial statements of the first defendant an undervaluation of the inventory of the first defendant of a value of approximately R11.2 million;

15.2 such undervaluation did not reflect the true financial position of the first respondent;

15.3 the true value of the first respondent was thereby reflected as having been substantially reduced to its prejudice, and, furthermore, such undervaluation was procured by the second defendant for the ulterior purpose of reducing the value of the plaintiffs' shares therein.

15A

15A.1 From 2007 to date the second defendant has conducted, and continues to conduct, the business of the first defendant in a manner such that:

15A.1.1 the operating profit available to the shareholders of the first defendant after all its expenses have been discharged has been, and continues to be, drastically reduced such that the EBITDA (before dividends received) of the first defendant was R36 803 694 at end of the financial year of 2008 and R20 369 999 at the end of the financial year of 2012; and

15A.1.2 the operating expenses of the first defendant, and especially management fees, staff costs and director's emoluments, have almost doubled since the end of the financial year of 2008 when they amounted to R118 250 255, whereas at the end of the financial year of 2012 they amounted to R216 763 106; while

15A.1.3 the gross profit generated by the first defendant has climbed from R153 878 415 at the end of the financial year of 2008 to R228 746 081 at the end of the financial year of 2012.

15A.2 The second defendant has intentionally, *alternatively*, recklessly, failed, and continues intentionally, *alternatively*, recklessly, to fail, to contain and/or reduce the total operating expenses of the first defendant in proper proportion to its gross profit, such that:

15A.2.1 the benefits thereof may accrue to the shareholders, and to the plaintiffs in particular, by way of dividends;

15A.2.2 the growth and well-being of the first defendant and its ultimate profitability to shareholders, and to the plaintiffs in particular, are properly ensured and protected.

16. During the period of approximately September 2008 to the present time, the second defendant has:

- 16.1 marginalised, sterilized, humiliated and denigrated the status of the second plaintiff;
 - 16.2 rusticated him to the first defendant's Namibia office without discussion and without his consent;
 - 16.3 threatened to dismiss the second plaintiff should he not resign as a director of the first defendant;
 - 16.4 deprived the second plaintiff of his erstwhile duties and status without proper cause;
 - 16.5 generally conducted himself toward the second plaintiff with the ulterior motive of forcing the second plaintiff to leave the employ of the first defendant and give up his directorship thereof and/or his shareholding therein.
17. Since approximately 2007 to date, the second defendant has conducted himself and the business of the first defendant in a manner calculated to deny and frustrate the plaintiffs' legitimate expectations:
- 17.1 to their daily involvement and engagement in the operations of the first defendant;
 - 17.2 to the recognition of their status as shareholders and directors of the first defendant;
 - 17.3 in the case of the first plaintiff, to recognition and remuneration appropriate to his status as:

17.3.1 a founder member of the first defendant;

17.3.2 a quasi partner in the affairs of the first defendant whose business was at all material times conducted as a domestic company in a manner akin to that of a partnership;

17.3.3 a participant in and contributor to the business of the first defendant of equal standing to the second defendant;

17.3 to the due respect and regard of their fellow directors, shareholders and employees of the first defendant.

18. The second defendant has authorised and procured the use of funds belonging to the first defendant for purposes of discharging the legal costs incurred in the defence of himself, the third defendant and the Trust and/or the fourth defendant, in application proceedings launched by the plaintiffs, as applicants, against the defendants, as respondents, out of this Court under Case No 09/41464, to the financial detriment of, and without value to, the first defendant."

[27] In paragraphs 19 to 22 the following important allegations are made.

"19. As a result of the conduct of the second defendant as set out in paragraphs 12 to 18 hereof, the relationships of trust and respect between the plaintiffs, on the one hand, and the second and third defendants and the Trust, on the other hand, have broken down to such a degree that it is no

longer possible for them to co-operate meaningfully as shareholders, directors and/or employees of the first defendant and jointly to conduct its business and best advance its objectives.

20. Within the meaning of section 252(1) of the Act, the second defendant, therein acting alone, *alternatively*, therein supported by the third and fourth defendants, has, by conducting himself in the manner set out in paragraphs 12 to 18 hereof, caused and brought about a state of affairs such that the affairs of the first defendant have been and continue to be conducted in a manner unfairly prejudicial, unjust and/or inequitable to the plaintiffs as members of the first defendant.
21. The fair value of the plaintiffs' shares in the first defendant is, to the best of the knowledge and belief of the plaintiffs, R160 million; *alternatively*, such fair value falls to be determined by this Court.
22. It is just and equitable in all the circumstances that this Court make the orders set out in prayers (a) to (e) hereinbelow."

[28] In their plea, the defendants deny most of the allegations made by the plaintiffs. In particular, they deny the allegations made in paragraph 12 of the particulars of claim, in respect of the Supplies Division. I will deal later in the judgment with the opposing contentions of the parties in regard to the Supplies Division.

[29] In relation to the allegations made in paragraph 13.4 of the particulars of claim, the defendants admit that TCM and Hassim concluded six retention agreements but deny that they were "a sham" and unduly favoured Hassim and/or the Trust's

financial position at the expense of TCM and the remaining shareholders.

[30] They also aver that De Sousa was guilty of gross insubordination and undermining the authority of Cornelli, causing an irretrievable breakdown in trust in the working relationship with TCM, his fellow employees, directors and shareholders. These allegations formed the subject-matter of a disciplinary hearing pursuant whereto De Sousa was found guilty and dismissed from the employ of TCM. In the replication, De Sousa denies these allegations.

[31] Prior to the trial, it was agreed and ordered under Rule 33(4) that the allegations made in paragraph 21 of the particulars of claim, read with paragraph 15 of the plea, stand over for later adjudication. These allegations relate to the determination of value of the plaintiffs' shares.

RELEVANT LEGAL PRINCIPLES

[32] Section s 252 of the Act¹ provides, in relevant part, as follows:

“252. Member’s remedy in case of oppressive or unfairly prejudicial conduct

- (1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of

¹ The remedy for oppressive or prejudicial conduct under the 2008 Companies Act is contained in s 163.

the members of the company, may, subject to the provisions of subsection (2) make an application to the Court for an order under this section.

(2) ...

(3) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

(4) ..."

[33] The section and its counterpart in other jurisdictions has been subjected to considerable analysis and interpretation. The position in English law is particularly instructive as the oppression remedy provided in terms similar to s 252 of the Act.²

² The predecessor of the current English oppression remedy, s 459(1) of the English Companies Act, 1985, read as follows:

"A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

Section 459(1) of the Companies Act, 1985 (as amended by the Companies Act, 1989) now provides as follows:

"A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members

[34] Section 252 provides a member,³ or part of the members of a company, with the means of obtaining relief from unfairly prejudicial, unjust or inequitable acts or omissions of the company or conduct of its affairs. The emphasis is upon the unfairness of the conduct complained of. A member seeking relief must show that the conduct is “*unfairly prejudicial, unjust or inequitable*” to that member or to some part of the members. The conduct must not only be prejudicial, but unfairly so.⁴ Fairness is thus the criterion by which a court must decide whether it has jurisdiction to grant relief.

[35] The test of unfair prejudice is an objective one. Our courts have generally followed what is referred to as the “*reasonable bystander test*”. This was articulated by Nourse J in *R A Noble & Sons (Clothing) Limited* [1983] BCLC 273 at 290-291.

“The test of unfairness must, I think, be an objective, not subjective, one. In other words, it is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test ... is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner’s interests.”

(including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.”

³ Section 103(2) of the Act, provides that a member is a person “...who agrees to become a member of a company and whose name is entered into its register of members ...”. The right to be on the register is independent of ownership of the shares (see *Davis v Buffelsfontein Gold Mining Co Limited & another* 1967 (4) SA 631 (W) at 633D-F).

⁴ “unfairness” has been held to mean ‘unreasonable’ (see *Garden Province Investment v Aleph (Pty) Limited* 1979 (SA) SA 525 (D) at 531).

[36] Fairness is an elastic concept. What is fair or unfair will depend upon the context in which it is being used. In *O'Neill In Re a company (No 00709 of 1992)* *O'Neill and another v Phillips and others* [1999] 2 All ER 961 at 966H-967E), Lord Hoffmann put it thus:

“Although fairness is a notion which can be applied to all kinds of activities, its content will depend on the context in which it is being used. Conduct which is perfectly fair between competing businessmen will not be fair between members of the family. In some sports it may require, at best, observance of the rules, in others (‘it’s not cricket’) it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.

In the case of s 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, the company has developed seamlessly from the law of partnership, which was treated by equity, like the Roman *societas*, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it was considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.

The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that

there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith”

[37] What is evident from the above-quoted passage in *O'Neill* is that the notion of unfairness transcends the strict legal rights of the shareholders; there may be cases where it would be unfair for the majority to exercise or take advantage of their legal rights or powers under the Articles of Association or agreements between the them.

[38] The Court's jurisdiction to make an order does not arise until the statutory criteria have been satisfied. The plaintiff (or applicant) bears the onus of satisfying the Court that the particular act or omission has been committed, or that the affairs of the company are being conducted in the manner he alleges; and that such act or omission or conduct of the company's affairs is unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company (*Bader & another v Weston and another* 1967 (1) SA 134 (C) at 139F-G); *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA 517 (C) at 525; *Louw v Nel* 2011 (2) SA 172 (SCA) para [23]; see also Blackman *et al*, *Commentary on the Companies Act* (Vol 2) p 9-44).

[39] The following has been recognised as unfairly prejudicial conduct entitling a shareholder to relief: Where there is an unfair abuse of power and an impairment in

the probity with which the company's affairs are being conducted; where the majority voting power has been abused or unfairly used to the prejudice of shareholders; and where the majority shareholders use their greater voting power in a manner which does not enable the minority to enjoy a fair participation in the affairs of the company (*Elder v Elder & Watson Limited* (1952) SC 49 at 55 and 60; *Aspek Pipe* at 528D-H; *Donaldson Investments (Pty) Ltd and others v Anglo-Transvaal Colliers Limited: SA Mutual Life Assurance Society and another intervening* 1979 (3) SA 713 (W); *Elgindata Limited* [1991] BCLC 959 at 984 and 1004).

[40] Lack of probity or fair dealing was described by Lord Cooper in *Elder v Elder & Watson Ltd* (at p 55), as -

“a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely”.

[41] In *Aspek Pipe* (at 528E-H), Tebbutt AJ highlighted the distinction between the remedy of winding-up and the relief afforded by s 111*bis* of Act 46 of 1926 (the predecessor of s 252) in these terms:

“... Lack of confidence or harmony, as I have said, may justify the granting of the former; [a winding-up order] only lack of confidence or harmony rested upon lack of probity or on unfair dealing or conduct will justify the latter [relief in terms of s 111*bis*]. Secondly, it is necessary to establish such lack of probity or fair dealing or ‘violation of the conditions of fair play’. It is essential

not to confuse the rights which the majority shareholders undoubtedly have to manage the affairs of the company and to determine its policy with lack of probity and unfair dealing in the affairs of the company. Anyone who becomes a minority shareholder in a company does so with the obvious knowledge that where his point of view conflicts with that of the majority, the latter's will is likely to prevail. He invests his money in a company on that premise and cannot be heard to complain if the affairs of the company are not conducted as he desires. He is, however, entitled to complain if the majority voting power is being abused or unfairly used to his prejudice as a shareholder. The circumstances must warrant an inference that

‘there has been, at least, an unfair abuse of powers and impairment of confidence in the probity with which the company's affairs are being conducted as distinguished from mere resentment on the part of the minority at being outvoted on some issue of domestic policy’(See *Re Harmer, supra* at pp 699, 706)⁵

(My comments in parenthesis)

[42] And, in *Donaldson*, Preiss stated (at 722E-G):

“It seems to me that the new wording of s 252 means, at least, what was set out in some of the cases dealing with the old s 111*bis*, where the requirement was placed at the less stringent level. In my view, the applicants must establish a lack of probity or fair dealing, or a visible departure from the standards of fair dealing, or a violation of the conditions of fair play on which every shareholder is entitled to rely. Couched in another form; I agree that the applicants must establish that the majority shareholders are using their greater voting power in a manner which does not enable the minority to enjoy a fair participation in the affairs of a company. The emphasis is upon the unfairness of the conduct

⁵ *Re H.R. Harmer Limited*, (1958) 3 All ER 689 at pp 699, 706).

complained of. It must be conduct which departs from the accepted standards of fair play, or which amounts to an unfair discrimination against the minority.”

[43] Conduct which adversely affects or is detrimental to the financial interests of a member is justiciable under the section. Thus relief may be claimed where it can be shown that the value of a member’s shareholding in a company has been seriously diminished or jeopardised by reason of unfair, unjust or inequitable conduct on the part of those who have control of the company. In *Re Elgindata* (at 984) Warner J observed:

“[a] petitioner under the section will generally succeed ‘if he can show’ ... that the value of his shareholding in the company has been seriously diminished or at least seriously jeopardised by reason of a course of conduct on the part of those persons who have had de facto control of the company, which has been unfair [to him].’

Warner J continued at 1004g:

“... By its very nature the misapplication of a company’s assets by those in control of its affairs for their own benefit or for the benefit of their family and friends, is unfairly prejudicial to the interests of minority shareholders.”

[44] A form of unfair prejudice which is of particular relevance in the instant case arises where a minority shareholder who has a right or legitimate expectation to participate in the management of the company is excluded from so doing by the majority without a reasonable offer or arrangement being made to enable the

excluded shareholder to dispose of his shares. The prejudicial inequity or unfairness lies not in the legally justifiable exclusion of the affected member from the company's management, but in the effect of the exclusion on such member if a reasonable basis is not offered for a withdrawal of his or her capital.⁶ It was emphasized in *O'Neill* (at 974-975) that "*it will almost always be unfair for a minority shareholder to be excluded without an offer to buy his shares or to make some other fair arrangement*".

[45] In *O'Neill* (at 972g-h), Lord Hoffmann also referred to an earlier judgment which he had delivered in the Chancery Division, *Re a Company* (No 0668 34 of 1988), *ex p Kremer* [1989] BCLC 365 (ChD) at 36, in which the following was stated:

"... if a breakdown in relations has caused the majority to remove a shareholder from participation in the management, it is usually a waste of time to try to investigate who caused the breakdown. Such breakdowns often occur (as in this case) without either side having done anything seriously wrong or unfair. It is not fair to the excluded member, who will usually have lost his employment, to keep his assets locked in the company. ..."

[46] The following dictum in *Kremer* was referred to with approval in *Bayly v Knowles* 2010 (4) SA 438 (SCA) para [23]:

"... This is an ordinary case of breakdown of confidence between the parties. In such circumstances, fairness requires that the minority shareholder should not

⁶ See *McMillan NO v Pott & others* 2011 (1) SA 511 (WC) para [40].

have to maintain his investment in a company managed by the majority with whom he has fallen out. But the unfairness disappears if the minority shareholder is offered a fair price for his shares. In such a case, s 459 was not intended to enable the Court to preside over a protracted and expensive contest of virtue between the shareholders and award the company to the winner.”

[47] The right of a shareholder to manage the affairs of a company is usually derived from the articles of association or agreements between the shareholders, but the relationship between a company’s members may give rise to a legitimate expectation to participate in the company’s management. This usually occurs in the case of a small domestic company or what is termed a ‘quasi-partnership’ company (see *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W) at 182A-E; *Ebrahimi v Westourne Galleries Limited* [1973] AC 360; *Re Postgate & Denby (Agencies) Limited* [1987] BCLC 8 at 14a-f; *Re Elgindata supra* at 985; and the Australian decision in *Fexuto (Pty) Limited v Bosnjak Holdings (Pty) Limited* (1998) 28 ACSR 688 SC (NSW)).

[48] The following statement in *O’Neill* (at 970D-F) is relevant to the question of legitimate expectations of a shareholder.

“In *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 19, I used the term ‘legitimate expectation’, borrowed from public law, as a label for the ‘correlative right’ to which a relationship between company members may give rise in a case when, on equitable principles, it would be regarded as unfair for a majority to exercise a power conferred upon them by the articles to the prejudice of another member. I gave as an example the standard case in which

shareholders have entered into association upon the understanding that each of them who has ventured his capital will also participate in the management of the company. In such a case, it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him the opportunity to remove his capital upon reasonable terms. The aggrieved member could be said to have had a 'legitimate expectation' that he would be able to participate in the management or withdraw from the company."

[49] Although s 252 should be given a beneficial construction, our courts will be slow to interfere in the management of companies. In judging the conduct of the majority, regard must be had to the principle that by becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the majority of shareholders if those decisions are arrived at in accordance with the law, even where they adversely affect his rights as a shareholder or prejudice his interests (*Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (AD) at 678; *Garden Province supra* at 533-535; *Apek Pipe* at 528, and *Donaldson* at 720).

[50] The loss of confidence in the manner in which the company's affairs are conducted or resentment at being outvoted or mere dissatisfaction with or disapproval of the conduct of the companies affairs, whether on grounds relating to policy or to efficiency, however well-founded, will not of themselves constitute prejudice, injustice or inequity within the meaning of the section (*Garden Province supra* at 535; *Re Five Minute Car Wash Service Ltd* (1966) 1 All ER 242 (Ch) at

246-247; *Re Postgate & Denby (Agencies) Ltd* (1987) BCLC 8 (Ch); *Carlisle v Adcorp Holdings Limited* 2000 CLR 261 (W) at 264; *Re Elgindata supra*).

[51] Where there is disagreement about whether a particular managerial decision is commercially sound, not only will the courts not intervene, but there can also be no unfairness to the applicant where, or simply because, those in control of the company's affairs take a different view from his on the matter. Even a commercially unreasonable approach to the making of profits will not justify intervention in the absence of any suggestion of wilful mismanagement or of any impropriety in the conduct of the company's affairs.

[52] The fact that a shareholder may be to blame for the unsatisfactory relationship between the shareholders is not a reason to deny him relief under s 252. It is not a requirement of the section that a party seeking relief come to court with "*clean hands*". In general, the issue of fault does not negate the right to relief under s 252 (*In re London School of Electronics Limited* [1986] Ch 211 at 221-222 and *Grace v Biagioli and others* [2006] BCC 85 at para 77) and *McMillan v Pott* paras [40] and [41]). But such conduct may be material in a number of ways. First, it may render the conduct of the majority, even if it is prejudicial, not to be considered unfair. Second, it may affect the relief which the court may seem fit to grant (see *In re London School of Electronics Limited* 222A-C).

[53] In applying s 252, it is important to bear in mind that the section only comes into operation when a shareholder is affected in his capacity as a member by the company's actions. The acts of individual members are not necessarily acts of the company. It is a question of fact in each case whether the conduct of a member is part of the conduct of the affairs of the company (see *Astec (BSR) plc* (1998) 2 BCLC 556 at 585A-I). The requirement of prejudice means that the conduct must be shown to have caused the member harm in a commercial and not in a merely emotional sense (see *Re Unisoft Group Limited (No 3)* (1994) 1 BCLC 609).

[54] During his final address senior counsel for the defendants revisited several arguments that had been raised and rejected in the abortive application to separate a question of law in the form of an exception. One such submission was that conduct that causes prejudice to all members of the company or impacts upon the company and only indirectly or derivatively on the members, is not justiciable under the section. It would be a work of supererogation to repeat my reasons for rejecting that submission as these are fully set out in *De Sousa v Technology Corporate Management* 2016 (6) SA 518 (GLD) paras [36] to [45].

[55] To determine whether conduct is unfairly prejudicial the Court is not required to consider each complaint in isolation. What matters is the cumulative effect of the complaints (see *De Sousa* paras [29] to [35] and cases there cited). The test for determining whether conduct is unfair or not requires a balancing all the interests involved in the light of the history and structure of the company and in terms of the

policies underlying s 252 and the Act; the duties of directors; the rights and duties of a majority shareholder in relation to a minority shareholder, and the agreements or understanding outside the articles which may give rise to legitimate expectations (see Blackman *et al*, “*Commentary on the Companies Act*” (Vol 2) at at 9-26 and cases there cited). The effect of the challenged conduct is the real issue, and depending on the circumstances of each case, the motive for the conduct may also be relevant (*Aspek Pipe* at 529D; *Donaldson Investments (Pty) Ltd and others v Anglo-Transvaal Collieries Limited and others* 1983 (3) SA 96 (A) at 111g (per Galgut AJA).

[56] Subsection 252(3) confers a wide discretion on the Court to do what is considered fair and equitable in all the circumstances of the case, to put right and cure the unfair prejudice which a shareholder has suffered (*Bader and another v Weston & another* 1967 (1) SA 134 at 147; *Louw v Nel* 2011 (2) SA 172 (SCA) para [21]). As to the nature of the discretion, see Blackman *supra* at 9-45 to 9-50; “*Henocheberg on the Companies Act*”, ‘Chapter IX Remedies of Members’: *Relief from Oppression* at 484 to 484(2)). Subsection 252(3) of the Act provides that if it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable to a member or some part of the members or that the company’s affairs have been conducted in such manner, -

“... the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company’s affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a

purchase by the company, for the reduction accordingly of the company's capital, or otherwise.”

[57] During argument senior counsel for the defendants fastened onto the wording of the following phrase used in the subsection: “... *the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, ...*”. Based thereon, he submitted that for purposes of an action in terms of s 252 it is necessary that the state of affairs complained of be “on-going”. With respect, this contention misses the point - even if a particular aspect of conduct is discontinued, the prejudicial effect of such conduct may continue. This is particularly evident in the present case where the plaintiffs have been excluded from participating in the conduct of TCM's business in circumstances where it is alleged that its affairs have been conducted inappropriately. The fact that TCM may have discontinued the conduct complained of does not detract from the fact that the environment is one in which the plaintiffs are required to remain as passive shareholders notwithstanding that the conduct has occurred. This state of affairs is unfairly prejudicial to them.

[58] In determining the nature of the relief to be granted, the Court must consider what order is appropriate at the time of the hearing and not what would have been appropriate at the date of the presentation of the application or institution of action (see *Blackman et al*, 9-46 and the reference therein to *Re Hailey Group Ltd* [1993] BCLC 459 at 473).

PROTRACTED NATURE OF THE LITIGATION

[59] Before embarking on an analysis of the evidence, it is necessary to say something about the manner in which the trial was conducted. This will place in proper context the reasons why certain procedural rulings were made in order to curtail the duration of the trial. What I will say also has a bearing on the reasons advanced by the defendants for the closure of their case without adducing evidence.

[60] The litigation has a long tortuous history. It began as a motion matter on 14 May 2010, when the plaintiffs sought substantially the same relief as is sought in the present action. the Court (Claassen J) dismissed the application with costs on 11 May 2011. Paradoxically, the 252 application was resisted by the defendants on the ground that there were disputes of fact that could only properly be decided at a trial. Yet, when the present action was instituted, and after the plaintiffs had given evidence for many days, the defendants chose to close their case without adducing evidence.

[61] Summons was issued on 14 December 2010. The trial commenced before me on 27 January 2014 and was only concluded on 1 April 2016. Some seventy-five days were taken up in the hearing of evidence, and a further five days in legal argument. A veritable mass of documentation was presented to the Court; the record is some ten thousand pages in length and the exhibits, core bundles and heads of argument run into thousands of pages.

[62] Given the magnitude and complexity of the evidential material laid before me, it is not practicable to deal with every material item of evidence and every point raised in argument. Accordingly, I will only deal in this judgment with those matters that I consider to be material.

[63] The following cautionary remarks of Harman J in *Re Unisoft Group Limited* (No 3) [1994] 1 BCLC 556 at 611*f-i* are particularly apposite:

“ Petitions under s 459 have become notorious to the judges of this court – and I think also to the Bar – for their length, their unpredictability of management, and the enormous and appalling costs which are incurred upon them particularly by reason of the volume of documents liable to be produced. By way of example on this petition there are before me upwards of thirty lever-arch files of documents. In those circumstances it befits the court, in my view, to be extremely careful to ensure that oppression is not caused to parties, respondents to such petitions or, indeed, petitioners upon such petitions, by allowing the parties to trawl through facts which have given rise to grievances but which are not relevant conduct within even the very wide words of the section.

The section requires there to have been conduct of ‘the company’s’ affairs, or an act or omission by ‘the company’, so one has to look and see that the activity complained of is an activity in the course of conduct of the company’s affairs or is by the company, so that the petitioner can show that the affairs have been conducted in a manner prejudicial to the interests of the members. The requirement of prejudice means that the conduct must be shown to have done the members harm and I believe harm in a commercial sense, not in a merely emotional sense. The further requirement that the prejudice is ‘unfair’ is a more uncertain but necessary thing to show, but before the fairness or unfairness of

the conduct or act is considered, ‘prejudice’ – that is harm or damage – must be shown. Those requirements set out the basic rules that the court must in my view be careful to insist upon to restrain this procedure from breaking all reasonable bounds.”

[64] A period of four weeks was initially allocated for the hearing of the matter. But that period was taken up by, among other things, an abortive application brought by the defendants in terms of Rule 33(4) to separate a question of law in the nature of an exception. The judgment dismissing that application is reported as *De Sousa and another v Technology Corporate Management (Pty) Limited and others* 2016 (6) SA 528 (GJ)).

[65] The record is bristling with objections, primarily taken by counsel for the defendants. There were unwarranted interlocutory applications. Three pertinent examples are the abortive application in terms of Rule 33(4); an application brought by the defendants to exclude evidence said to be beyond the scope of the pleadings, and an unsubstantiated and groundless application for my recusal.

[66] The cross-examination of the plaintiffs’ witnesses was unduly lengthy and often traversed minutiae instead of focusing on the facts and broad legal issues that are dispositive of the case. A pertinent example is the cross-examination of Mr Geel, the chartered accountant and auditor called by the plaintiffs. His evidence-in-chief took approximately four days but he was cross-examined by defendants’ counsel for seventeen days. Much time was taken up in dealing with details such as the unreliability of the values contained in stock summary and spares valuation reports and the documentation preceding them, matters which in the result have

little bearing on the outcome of the case. Very little by way of a contrary version was put to Geel. The same may be said of Diez, who was also extensively cross-examined on the accuracy of values contained in documentation pertaining to maintenance and other forms of inventory.

[67] In proceedings for relief in terms of s 252 of the Act, or its successor, s 163 of the Companies Act, 71 of 2008, it is not required of the Court to resolve every factual dispute. The real and overriding question for determination is whether there is a lack of probity and unfair dealing in the affairs of the company which has given rise to a breakdown in the confidence and trust among the shareholders; whether the majority voting power has been abused or unfairly used to the prejudice of the minority shareholders, and whether the plaintiffs have been treated by the company in a manner that is unfairly prejudicial, unjust or inequitable.

[68] The number of objections taken by the defendants unnecessarily prolonged the duration of the trial; it is reasonable to infer that the defendants' approach was calculated to delay and frustrate the plaintiffs' substantive and procedural rights.

[69] The following conduct affords clear evidence of the defendants' intention to deprive the plaintiffs of the financial wherewithal to pursue the present claim. Clause 17.2 of the shareholders' agreement obliges the board of directors of TCM to pay a dividend, within thirty days after signature of the company's annual financial statements, equal to a percentage of the company's net after tax profits earned during the preceding financial year. According to the evidence it was TCM's practice to decide upon the amount and date of payment of a dividend between July

and September of each year when the audited annual financial statements of TCM were approved. For reasons best known to Cornelli and the board of directors, the financial statements for 2015 were only approved on 11 November 2015, but no mention was made of a dividend. Eventually, a dividend was declared at a board meeting held on 14 December 2015, but De Sousa's dividend - amounting to approximately R4 million – was withheld from him. Instead of paying it to De Sousa the dividend was paid into TCM's attorneys' trust account. TCM's attorney then invoked interpleader proceedings alleging that there was a competing claim for the dividend from De Sousa's former wife, Sharon De Sousa (Sharon).

[70] The withholding of the dividend placed the plaintiffs in an intolerable position as they were funding the litigation from their own pockets. De Sousa has assisted Diez in paying for his legal costs. Cornelli would have known that the only financial benefits received by the plaintiffs from TCM were their dividends and that the withholding of the dividend would place undue financial pressure on De Sousa.

[71] It is common cause that the legal costs incurred by the second to fifth defendants have been and are presently being charged to TCM. The plaintiffs were accordingly driven to launch an application in terms of s 163 of the Companies Act, 71 of 2008, to compel payment of the dividend and for an order that their legal costs would also be paid by TCM. De Sousa's wife purported to intervene in these proceedings. Prior to 26 October 2015, De Sousa was married to Sharon in community of property; he was the registered shareholder, and she, the beneficial owner of an indivisible half of such shares. Whatever rights Sharon may have to the shares is of no concern to TCM, which was obliged to pay the declared dividend

to De Sousa, the registered member. After hearing argument, I ordered that the dividend be paid forthwith to De Sousa. This obviated the need for the plaintiffs to proceed with the s 163 application. The time taken up in dealing with the s 163 application had the effect of further lengthening the duration of the trial.

[72] TCM had no legal right to withhold payment of the dividend from De Sousa. Unless a company's articles provide otherwise, dividends are payable to the persons who are registered in its register of members (see *Henochsberg on the Companies Act*, 71 of 2008, 24; Blackman, *Commentary on the Companies Act*, Vol 1, 5-152). The full dividend should have been paid to De Sousa, as he is the registered holder of the shares. As a matter of law, a company recognises only its registered shareholders, that is, those whose names are entered in its register of members. The company is not concerned with the principal whose name does not appear on the register, usually described as the "*beneficial owner*" (*Sammel* at 666D; *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co Ltd* 1976 (1) SA 441 (A) at 453A-B, and *Standard Bank of South Africa Limited v Ocean Commodities Inc* 1983 (1) SA 276 (A), 289B).

[73] The legal position in regard to the payment of dividends is described by Lindley LJ in *Société Générale de Paris v Tramways Union Company Limited* (1884) 14 QBD 424 (at 451-452) as follows:

"If a shareholder in a company governed by the Companies Act ... does not transfer his shares, but agrees to transfer them or to hold them upon trust for another, either absolutely or by way of security, there can be no doubt as to the validity of the agreement, nor as to the effect of it as between the parties to it.

As between them the agreement or trust can be enforced; but as regards the company the shareholder on the register remains a shareholder still. He is the person to exercise the rights of a shareholder, for example, to vote as such, to receive dividends as such, and to transfer the shares The person having the beneficial interest in the shares has, as against the company, no right to them; he has, as against the company, no right to have them registered in his own name."

[74] In *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Limited* 1976 (1) SA 441 (A) (at 453), the then Appellate Division expressed the position in relation to nominee and beneficial shareholders as follows:

"The principal, whose name does not appear on the register, is usually described as the 'beneficial owner'. This is not, juristically speaking, wholly accurate; but it is a convenient and well-understood label. Ownership of shares does not depend upon registration. On the other hand, the company recognises only its registered shareholders."

See also *Standard Bank of South Africa Limited v Ocean Commodities Inc* 1983 (1) 276 (A) at 289.

[75] It is settled law that upon declaration of a dividend the sum due becomes a debt due from the company to the registered shareholder (*Blackman et al, Commentary on the Companies Act* (Vol 1, 5-149). I consider the delay in declaring the dividend and the payment thereof into TCM's attorneys' trust account as a stratagem employed by Cornelli to deprive the plaintiffs of the means to properly

pursue the present litigation. The launch of the interpleader proceedings by TCM's attorney was legally unjustified. It goes without saying that the withholding of the dividend in the circumstances described unduly prejudiced De Sousa in his capacity as a shareholder.

INTERVENTION APPLICATION

[76] A most disturbing feature is the fact that on the eve of the delivery of this judgment proceedings were launched by Sharon and defendants which were calculated to derail the delivery of the judgment. On 22 February 2017, some eleven months after I had reserved judgment (and more than two years after the commencement of the present action), Sharon, who was formerly married to De Sousa in community of property, launched an application to intervene as a sixth defendant for purposes of filing a plea and counterclaim. The intervention application was brought on the basis that upon the divorce from De Sousa on 26 October 2015, she became the owner of 15% of the shares in TCM, alternatively, a separate and free co-owner with De Sousa of 30% of the shares registered in his name. She asserted in her proposed counterclaim that because the joint estate is still to be divided, she is entitled to retain "*her portion*" of the shareholding and to have a 15% shareholding in TCM registered in her name; furthermore, that her interests would be prejudicially affected if the relief sought in the present action were granted.

[77] On 8 March 2017, the defendants opportunistically applied for leave to amend their plea so as to allege that this Court lacks jurisdiction to make an order that any

of the defendants purchase shares owned by Sharon either solely or in c-ownership with De Sousa. The alleged basis for this new-found plea is that the defendants cannot be ordered to buy shares from a person who refuses to sell them.

[78] The argument that Sharon had a legal entitlement to have 15% of the shares registered in her name is specious. The effect of the grant of the order of divorce was to bring an end to the community of property that previously existed between Sharon and De Sousa and to require an equal division of the joint estate after payment of liabilities (see *Meyer v Thompson NO 1971 (3) SA 376 (D)* at 377F). Absent an agreement to the contrary, Sharon did not, upon the divorce, acquire any right to the shares themselves or any portion thereof. She could not claim any asset of the joint estate *in specie* or in an undivided form, and was merely entitled to a share of the net proceeds of the joint estate after the realisation of liabilities.

[79] The fact that Sharon is presently a separate and free co-owner with De Sousa of 30% of the shares in TCM does not entitle her to be registered as a member in the register of members. The right to be on the register is independent of ownership of the shares (see *Davis v Buffelsfontein Gold Mining Co Ltd and another* 1967 (4) SA 61 (W) at 633C-F and the reference therein to the case of *Jeffery v Pollak & Freemantle* 1938 AD 1 at 18; also see Hahlo, "South African Company Law through the Cases" (6 ed) at 175).

[80] For these reasons I held that Sharon did not have a direct or substantial legal interest that would justify her intervention in the present action.

[81] It is as well to also bear in mind that s 252(3) endows this Court with the discretion to make “*such order as it thinks fit ... with a view to bringing to an end the matters complained of*”. The wide nature of the discretion would permit the Court, where appropriate, to make an order for the disposal of shares, contrary to the wishes of the owner or beneficial owner thereof.

[82] I dismissed the intervention application and the defendants’ proposed amendment as they were, in my view, devoid of any merit. Should the Court have been inclined to grant the orders sought, this would have had serious and far-reaching consequences. The plaintiffs would have suffered grave prejudice, such, that cannot be catered for by an appropriate costs order. This Court would have been required to re-open the case and give consideration to a whole range of factual disputes concerning the joint estate of De Sousa and Sharon, all of which are irrelevant to the relief sought in the present action. In proceedings under s 252, the Court is not concerned with the personal disputes between husband and wife. Had the trial been reopened, the Court would have to consider afresh what relief other than the disposal of the plaintiffs’ shares would be appropriate. This would have opened up new avenues of enquiry requiring further evidence to be led.

[83] Nowhere in the application for intervention did Sharon seek to explain, or credibly explain, the reasons why her application was brought on the eve of the delivery of this judgment. It is considered to be an abuse of process where there is an inordinate, unexplained or inexcusable delay causing prejudice (see *Mahommed Cassimjee v The Minister of Finance* 2014 (3) SA 198 (SCA) paras [10] to [12] and cases there cited). The excessive unexplained lateness of the application

warranted the conclusion that it was brought with the ulterior purpose of derailing this judgment. The launch of the application to intervene and to amend the defendants' plea was in my view a well-orchestrated stratagem with clearly defined ulterior motives; Sharon and Cornelli had together conspired to derail the imminent judgment in the trial and to deprive De Sousa of the capacity to enforce his rights. This conduct constituted an abuse of the process of court. For that reason I ordered that the costs of the applications be paid by Sharon and the defendants on a punitive scale.

[84] A most disturbing fact that emerged in the intervening application is that TCM had again deliberately withheld payment of the 2016 dividend to which De Sousa was entitled. Instead, the dividend was again paid into the trust account of TCM's attorney, who instituted an interpleader proceeding. An urgent application by De Sousa to compel payment of the dividend was struck off the Roll by Windell J on 14 February 2017 on the grounds that it lacked urgency, and that application is to be determined on the opposed roll of this Court in August 2017. For the reasons stated, TCM had no legal right to withhold payment of the dividend from De Sousa.

[85] The launch of the abortive urgent application served to further increase the legal costs that De Sousa has had to bear.

[86] The time spent in having to adjudicate upon the intervention application and application inconvenienced me greatly. The papers in these applications, including a copy of the record, are voluminous; they run to approximately 1 000 pages.

Given the timing of the launch of these applications, I am convinced that the true purpose was to derail my judgment and delay the finalisation of the trial.

[87] Yet a further indication that the defendants' conduct was calculated to delay and frustrate the plaintiffs' rights arises from the following. Meetings were held between the experts: Geel, Professor Wainer and Greyling. Professor Wainer testified that Greyling had been in agreement with him on certain matters but that this had been countermanded and Greyling had been instructed that he was not at liberty to agree those issues with Wainer. Wainer was not challenged on this aspect. It is a matter of concern that there was interference in this manner with the defendants' ostensibly independent expert witnesses. Also see, in this regard, the minutes of a meeting of accounting experts dated 14 May 2015, Exhibit G para 5; and Exhibit P paragraph 2.22.

THE TIMETABLE

[88] On countless occasions, I warned the parties that a time limit had to be imposed and that the trial could not proceed indefinitely. I emphasized that it was not in the public interest for litigants to monopolise a judge for many months, especially in a busy division such as the Gauteng High Court, and that the public purse could not reasonably be expected to bear the expense of a long trial.

[89] At some stage, the Judge President of this Division indicated that finality had to be reached and that the matter had to be concluded by the end of the first term of 2016 (3 April 2016). A meeting was held in my Chambers at which a date for the

continuation of the trial was to be decided upon. At the meeting I informed the parties' legal representatives that because I was to retire at the end of July 2106, an assurance had to be given that at least the evidence would be completed by the end of the first term of 2016. As far as I was concerned such undertaking was given, but this was later disputed by the defendants' counsel. In the light of this, I again contacted the Judge President, who instructed me to record that whether or not the matter was finalised at the end of the first term of 2016, the parties would not be permitted to enrol the matter for further hearing.

[90] In an endeavour to ensure a fair apportionment of the remaining time available for the hearing of the matter, I urged the parties to agree upon a timetable. The defendants refused to do so. Because of their refusal to cooperate, I accepted the timetable that had been proposed by plaintiffs' counsel (Exhibit U).

[91] After De Sousa had been cross-examined for some eight days, defendants' senior counsel pointed out that there were a number of topics that he still wished to cover in cross-examination. I informed him that he would have to complete his cross-examination within a further day. He was also invited to at least put the defendants' versions in relation to the outstanding topics to De Sousa, but he refused to do so.

[92] The foregoing is, I believe, a fair summary of the reasons why the litigation between the parties has been unduly protracted.

PREJUDICE ALLEGEDLY SUFFERED BY THE DEFENDANTS

[93] Counsel for the defendants submitted that the evidence of De Sousa should be excluded because his cross-examination was terminated prematurely by the Court. Relying on a dictum of Wepener JA in *S v Khumalo* 2012 JDR 1401 para [14], it was argued that the defendants' right to a fair trial guaranteed by the Constitution had been infringed.

[94] The right to fully and effectively cross-examine a witness is undoubtedly a fundamental procedural right and the failure to allow cross-examination is inconsistent with the right to a fair trial. But, vital as the right may be, it is not an absolute right. Whether a curtailment of cross-examination has resulted in the negation of the right to a fair trial depends upon the circumstances of each case, and much depends on whether the curtailment has resulted in prejudice.

[95] In *Distillers Korporasie SA Beperk v Kotze* 1956 (1) SA 357 (A) at 361H) Schreiner JA, writing for the Court, said:

"The disallowance of proper questions sought to be put to a witness by cross-examining counsel is an irregularity which entitles the party presented by the cross-examiner to relief from a Higher Court, unless that Court is satisfied that the irregularity did not prejudice him"

[96] The instances where a court is permitted to limit cross-examination are well documented (see “*Cross-examination in South African Law*”, Dr JP Pretorius, pp 253 to 255; “*Principles of Evidence*”, PJ Schwikkard and SE Van Der Merwe (4 ed) pp 394 to 399, and “*The South African Law of Evidence* (2 ed) – DT Zeffertt and AP Paizes pp 909 to 912).

[97] Cross-examination may be limited when it is protracted and irrelevant, only adding to the cost of litigation and a waste of public time (see *Mechanical and General Inventions Company Limited and Lehwiss* [1935] AC 346 at 360). In *R v Melozani* 1952 (3) SA 639 (A) at 641, Van den Heever JA, writing for the Court, stated:

“It is the duty of a presiding Judge to control proceedings in his Court and to prevent a waste of public time and treasure. It is a duty, however, which should be discharged with circumspection in the interests of the administration of justice. ...”

[98] In *Universal City Studios Inc and others v Network Video (Pty) Limited* 1986 (2) SA 734A at 754G, Corbett JA stated:

“There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interest of the proper administration of justice”

[99] In 1964, the Van Winsen Committee of Inquiry into the Uniform Court Rules and Costs, alluded to the problem involving protracted cross-examination in this way:

"Repetitious and unnecessary cross-examination and an over-elaboration of argument serve in many cases to increase costs. Not rules, but the firm intervention of the presiding judges is the remedy in such cases. While it is not the function of the judge unduly to curb cross-examination or argument, it certainly is his right and duty to put a term to unwarranted examination and argument. A more frequent resort by judges to this right would certainly assist in keeping down the level of costs."

[100] Similar views were expressed by Harms JA in *Take and Save Trading CC v Standard Bank of South Africa Limited* 2004 (4) SA 1 (SCA) at 4F-G:

"... Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources. ..."

[101] In my view, the defendants have not suffered any real or legally cognizable prejudice as a result of the curtailment of the period allowed for the cross-examination of De Sousa. The only limitation placed on cross-examination was its duration. The defendants were not prevented from cross-examining De Sousa or any other witness and no limitation was placed on the lines of cross-examination or the topics which the defendants were required to cover. Unfortunately, during cross-examination of the plaintiffs' witnesses much time was taken up with matters

that, at the end of the day, are not dispositive of the case. The defendants chose not to confine themselves to the time-limits imposed by the timetable.

[102]In argument defendants' senior counsel suggested that I had repeatedly stressed that an inflexible line would be taken in relation to Exhibit U and that "*the defendants would be given no leeway*". This is not correct. What I in fact stipulated was that the timetable would be rigidly applied "*unless justice required a departure therefrom*". It is not without relevance that in terms of Exhibit U, the period allocated for the cross-examination of De Sousa was five days but in fact he was cross-examined by defendants' counsel for nine days.

[103]The defendants closed their case on 1 March 2016. The closure was unheralded and came as a surprise to both the plaintiffs and the Court. At that stage, there was still approximately a month available for the hearing of evidence. This period could usefully have been employed to call Cornelli, who is principally implicated in the matter, to give evidence. Other witnesses could also have been called by the defendants.

[104]Before closing the defendants' case, counsel for the defendants handed in Exhibit Z, entitled "*Topics still to be covered by defendants*". In many of the topics referred to in Exhibit Z are, in my view, not material or germane to the broad issues that are required to be decided; and those that are could easily have been dealt with during the time allocated for cross-examination of the plaintiffs' witnesses.

[105]The following is to be observed if one examines Exhibit Z. It was not necessary for the Court to determine the precise values of the maintenance spares inventory (Item 3); what mattered is the manner in which maintenance spares were accounted for by TCM. It is common cause that TCM held a significant amount of maintenance spares inventory from 2008 to 2013. These items were treated as an expense by TCM and only properly brought into account as inventory in the financial statements for the year ended 2013. Why this was done is peculiarly within the knowledge of Cornelli and the board of directors of TCM. Only they and their accounting expert, Mr Greyling, who it was thought would be called in evidence, could explain why maintenance spares for the period 2008 to 2013 were expensed and not treated as inventory. It was also not necessary for the Court to determine the precise values of inventory on hand, or whether the spares valuation reports and stock summary reports were accurate.

[106]The proceedings before the CCMA (Item 6) are not material to the outcome of the case. It is common cause that De Sousa was dismissed from his employment after a disciplinary hearing. Even if it were proven that there were grounds for De Sousa's dismissal, he would still be entitled to claim the relief sought and to dispose of his shares in TCM at a fair value.

[107]At some stage during the trial, defendants' counsel indicated that he intended

to call the eleven witnesses who had apparently given evidence at the CCMA hearing. I indicated that that I would not permit these witnesses to be called as this would unduly prolong the trial. In my view, the evidence of these witnesses could have had no material impact on the plaintiffs' right or entitlement of the relief sought. Whether the witnesses were believed by the Commissioner at the CCMA hearing, is irrelevant and the findings and opinions of the Commissioner are not binding on this Court (see *Hollington v F Hewthorn and Co Limited* [1943] KB 487 (CA)).

[108] De Sousa's pie charts evidence (Item 9) does not advance either party's case. Nor is the evidence pertaining to the 'Secret Warehouse' (Item 1) dispositive of the case.

[109] The plaintiffs' complaint relating to the denial of their legitimate expectations (Item 12) is indeed a vital aspect which should have been given priority by defendants' counsel when cross-examining De Sousa. So, too, is the question of the office space and parking space complaint (Item 11); the complaint relating to Hassim and the retention agreements (Item 10). These matters could and should have been dealt with during the period allocated for De Sousa's cross-examination. Why these were not dealt with during his cross-examination is not clear.

[110] The EBITDA question (Item 7) was fully dealt with in the cross-examination of

Geel. In any event, the following matters relating to the EBITDA question are peculiarly within the knowledge of Cornelli and TCM's board of directors: The accounting treatment in respect of maintenance spares during the period 2008 to 2013; the reasons for the R11.2 million write-off of inventory in 2008; the payment of bonuses and increased salaries (Item 5) to Hassim, and the dividend policy adopted by TCM. Cornelli ought to have explained these matters and why the EBITDA values were reduced during the period subsequent to 2008.

[111] Only the defendants could explain why TCM funds were used to pay for the costs of the s 252 motion matter (Item 2) and why TCM, which is a neutral party and essentially a nominal defendant, should have to pay the costs incurred by the second to fourth defendants in resisting the present action.

[112] Litigants have a Constitutional right to a fair trial; it is fairness, and not length, that is guaranteed. Given the unduly protracted nature of the trial as a result of the circumstances described, there was every justification for the Court to impose a time limit for the hearing of evidence and cross-examination. For these reasons I am satisfied that the defendants have not suffered any real or undue prejudice as a result of the curtailment of the time permitted for cross-examination. Their fair trial rights have not been negated.

[113] For these reasons I decline to exclude the evidence of De Sousa. His evidence stands uncontradicted.

CLOSURE OF THE DEFENDANTS' CASE

[114] The principal submission advanced on behalf of the defendants is that there was no obligation upon them to testify as the plaintiffs failed to make out a *prima facie* case.

[115] In civil cases, a party's failure to give gainsaying evidence under oath or affirmation may have an adverse effect on his case; however, the effect of such failure would depend upon all the circumstances of the case. In *Brandt v Minister of Justice and another* 1959 (4) SA 712 (A), Ogilvie Thompson J said the following at 712:

“... Now, where a witness, who is available and able to elucidate the facts, is not called by a party such failure ‘leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him’ (per Watermeyer C.J., in *Elgin Fireclays Ltd. v Webb* 1947 (4) SA 744 (A) at p 750). *Ex hypothesi*, such adverse inference only arises if the witness in question is able to elucidate the facts or may, from the circumstances, be presumed to be so able. ...”

[116] In *Titus v Shield Insurance Co Ltd*, 1980 (3) SA 119 (A), Miller JA at 133E said:

“It is clearly not an invariable rule that an adverse inference be drawn; in the final result the decision must depend in large measure upon ‘the particular circumstances of the litigation’ in which the question arises. And one of the circumstances that must be taken into account and give due weight, is the strength or weakness of the case which faces a party who refrains from calling the witness.”

[117] Similarly, in *Tshishonga v Minister of Justice and Constitutional Development and Another*, Pillay J said:

“The failure of a party to call a witness is excusable in certain circumstances, such as when the opposition fails to make out a *prima facie* case. But an adverse inference must be drawn if a party fails to testify or produce evidence of a witness who is available and able to elucidate the facts, as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him, or even damage his case.”

[118] Cornelli, who is principally implicated in this action, was present throughout the hearing and there has been no suggestion that he was not available to be called as a witness. Nor is there any suggestion that Mr Greyling, the defendants’ accounting expert, or Frank and Fabio Cornelli, who are also implicated in the matter, were unavailable to give evidence. Mr Impey, the financial director of TCM, also sat in Court for virtually the entire duration of the proceedings. It is reasonable

to suppose that each of these witnesses would have been able to give evidence in relation to the facts in dispute.

[119] That Cornelli was able to elucidate the facts is evident from the following facts: He deposed to the answering affidavit in the 252 application, in which he dealt extensively with the complaints levelled against the defendants in the present action. As is required when deposing to affidavits, Cornelli stated that the facts contained in the affidavit were within his own knowledge.

[120] In defendants' counsels' written "*submissions on application to separate issues and opening address*", it was stated that Cornelli would or probably would give evidence in relation to a number of matters. In paragraph 62 it was stated that Cornelli will testify as to what happened at numerous board meetings and general meetings. And, in paragraph 64, it was stated that as far as dividends are concerned, Cornelli "*will give evidence*" that over the period 28 February 2005 to 30 November 2013, TCM declared dividends every year totalling R123 million. In paragraph 75, it was said that "*Cornelli will testify that the disaffection of the plaintiffs commenced with the advent of Hassim*". It was further indicated in paragraphs 76, 77, 78, 79, 81 and 84, that Cornelli would give evidence relating to the failure by Standard Bank to renew its contract with TCM; the need to seek out a person who would satisfy BEE criteria; the decision to sell shares to Hassim and the reasons why retention agreements were entered into.

[121] Of particular significance is the statement made in paragraph 86 of the defendants' counsels' written submissions, where the following is stated:

"Cornelli will testify to the truth of the plea concerning the Supplies Division complaint. He will also adduce evidence of accounting between TCM, on the one hand, and the Supplies Division, on the other. He will produce cheques drawn on TCM in favour of the Supplies Division and he will testify to both De Souza and Diez' knowledge and participation therein."

[122] In paragraph 90, it was stated that "*Cornelli will testify*" that there was no understatement of inventory as alleged in paragraph 15 of the particulars of claim. It was also stated that he did not conduct himself in the manner alleged in paragraphs 16 and 17 of the particulars of claim.

[123] And, in paragraphs 90, 92, 95, 96 and 97 of the written submissions, it is stated that Cornelli will testify in regard to the following matters: His attempts to persuade his fellow shareholders to reduce the purchase price of the shares that each had sold to Hassim; and that none of the shareholders of TCM has been offered the shares of either plaintiff in terms of the provisions of the shareholders' agreement; that there was no under-statement of inventory as alleged in paragraph 15 of the particulars of claim and that he did not conduct himself towards the plaintiffs in the manner alleged in paragraphs 16 and 17 of the particulars of claim.

[124] In cross-examination versions were put to the plaintiffs' witnesses that Cornelli would testify along the lines set out in the defendants' written submissions. This

gave rise to the reasonable expectation that the defendants would give countervailing evidence.

[125] In *ZT Mtembu v The Safety and Security Sectorial Bargaining Council and others*, a judgment of the Labour Court (Case No JR2870/10 – para [39]) it was held (per Snider AJ) that no reliance can be placed on versions put to witnesses in respect of which no evidence is subsequently given.

[126] Whether the defendants were justified in failing to adduce evidence and whether an adverse inference ought to be drawn is a matter with which I will deal later in the judgment.

WHERE THE UNFAIR PREJUDICE LIES

[127] On a proper conspectus of the allegations made in the particulars of claim, the unfair prejudice or inequity relied on falls within the following three categories: First, that the affairs of TCM have been conducted in a manner that is detrimental to the plaintiffs' financial interests. Cornelli and those who control its affairs under his direction have embarked on a course of conduct that has negatively impacted on the value of the plaintiffs' shares and reduced the dividends and other financial benefits payable to them. This is the import and effect of the allegations made in paragraphs 12, 13.6, 15 and 15A of the particulars of claim. Second, that there is a

lack of probity or unfair dealing in the manner in which the affairs of TCM have been conducted which has given rise to a breakdown of confidence and trust. Third, that the majority, under the direction of Cornelli, have excluded the plaintiffs from participating in the management of TCM's business without affording them an opportunity to dispose of their shares at fair value or upon reasonable terms.

[128] That De Sousa had a right or, at the very least a legitimate expectation, to participate in the management of the business of TCM can admit of no doubt. TCM may properly be described as a quasi-partnership company. Although technically and legally governed by the strictures of company law, in fact and in reality, the relationship amongst the shareholders was more akin to a partnership in which each held 50% of the shares (see *Emphy and another v Pacer Properties (Pty) Ltd* 1979 (3) SA 364 (DCLD) at 365-367 and cases there cited). Since its establishment TCM functioned and was administered under the direct control of its two founding members who participated equally in its management. De Sousa testified that a pact was made between him and Cornelli that for as long as TCM existed they would be equal partners in the business, would earn the same benefits and would have an equal say in its affairs. It was always intended that all shareholders be employed by the company. I also accept that despite the introduction of Diez, De Sousa and Hassim as minority shareholders, TCM retained its identity as a domestic company in the nature of a partnership primarily between De Sousa and Cornelli.

[129] As a matter of law, it is irrelevant whether or not Cornelli or the board of directors of TCM were justified in dismissing De Sousa from his employment. What matters is that he has been excluded from management and has allegedly not been able to properly dispose of his shares at a fair value. It is alleged in paragraph 14 of the particulars of claim that Cornelli has refused to engage in *bona fide* discussions or negotiations with the aim of permitting the plaintiffs to dispose of their shares either to TCM, the remaining shareholders or a third party. They further allege that Cornelli has prevented them from having proper access to the financial documentation of TCM, which is necessary to enable the plaintiffs to arrive at a fair assessment of the value of their shares.

[130] As was highlighted in *O'Neill* (at 970*d-f* and 975), the unfairness lies not in De Sousa's exclusion from participating in the management of TCM, but his exclusion coupled with an alleged inability to dispose of his shares at a fair value. Fairness requires that De Sousa should not have to maintain his investment in TCM which is managed by the majority with whom he has fallen out. The same considerations apply to Diez. Such unfairness would disappear if De Sousa and Diez were offered a fair price for their shares.

[131] It is critical to know, therefore, whether a reasonable offer has been put by the majority for the purchase of the plaintiffs' shares or a fair arrangement has been made which would enable the plaintiffs to dispose of their shares at a fair value. The putting of such offer would alleviate any prejudice suffered by the plaintiffs. It is

also necessary to establish whether the plaintiffs have been afforded sufficient access to the financial information of TCM to enable a proper assessment of the value of the shares to be conducted.

[132]In *O'Neill* (p 975) Lord Hoffmann set out the criteria for the determination of a reasonable offer. Five factors were referred to. (1) The offer must be to purchase the shares at a fair value. This would ordinarily be a value representing an equivalent proportion of the total issued share capital, without a discount for its being a minority holding. (2) The value, if not agreed, should be determined by a competent expert. (3) The offer should have the value determined by the expert as an expert and should not provide for the full machinery of arbitration or of an expert who gives reasons. The objective should be economy and expedition. (4) The parties should have the same right of access to information about the company which bears upon the value of the shares, and both should have the right to make submissions to the expert. (5) When an offer is made after years of litigation, the offer should generally be accompanied by an offer to pay costs. In the present case, there is evidence that the plaintiffs expended substantial amounts in legal costs in furtherance of the litigation. Allowance must be made for this factor in determining a fair value for the shares.

[133]It is appropriate to at this stage refer to the shareholders' agreement concluded on 29 June 2005. The agreement regulates the manner in which the shareholders are to dispose of their shares. Subclause 10.1 provides that any

shareholder whose employment by the company is terminated for whatever reason shall be deemed to have offered his shares and loan account for sale to the remaining shareholders on the basis set out in clause 13. This clause deals with the pre-emptive rights of the shareholders. Subclauses 13.14 and 13.15 require the plaintiffs to first offer their shares for sale to the other shareholders. The offer shall is to remain open for acceptance for a period of fourteen days following the receipt thereof, and must stipulate a price at which the plaintiffs wish to sell their shares to a *bona fide* third party. Subclauses 13.17 and 13.18 provide that should the offer not be accepted, the plaintiffs shall be entitled to dispose of their shares to a third party subject to the consent of the board of TCM.

[134] Clause 12 of the shareholders agreement obliges the company to keep proper and up-to-date accounting, financial and other records in relation to its business and affairs. It also obliges the company to provide monthly management accounts and audited financial statements. Subclause 12.2.2.3 and 12.2.3 provide that a shareholder may request information as to the financial affairs and business of the company and that should the requested information not be provided, a shareholder may appoint an independent firm of accountants to produce such information or investigate the affairs of the company at the company's expense.

[135] Shareholders are not inflexibly bound to the provisions of the shareholders' agreement and it would be perfectly permissible for a *bona fide* offer to be made outside the realm of the shareholders' agreement. Nor is the Court duty-bound to

enforce the shareholders' agreement. Equitable considerations may dictate that there be a departure from the strict provisions of the shareholders' agreement (see *O'Neill* at 967C).

[136] Because De Sousa's employment was finally terminated on 3 April 2009, he is deemed or presumed, in terms of the shareholders' agreement, to have offered his shares for sale to the remaining shareholders on that date. In reality, however, he had made an offer to sell his shares prior to that date.

[137] On 4 February 2009, a letter was addressed by plaintiffs' attorneys to defendants' attorney, in which it was indicated that the plaintiffs were desirous of disposing of their shares in TCM. The defendants were invited to engage in such process. A meeting was then held at the offices of KPMG on 18 February 2009 for the purposes of discussing recommendations to enable the plaintiffs to sell their shares either to TCM, or to the remaining shareholders or an interested third party. Among the persons present were the plaintiffs, Geel, Cornelli, Impey and their respective attorneys.

[138] De Sousa and Geel testified that shortly after the meeting commenced, Cornelli made various demands. He demanded that the plaintiffs absent themselves from the workplace for at least three months during which he would attempt to find a purchaser for their shares. He also insisted that they resign as

directors and that they accept payment of 80% of their existing salaries. De Sousa was not prepared to accept these demands. As a result, Cornelli lost his temper and stormed out of the meeting.

[139]The next day, 19 February 2009, De Sousa received an email from Cornelli stating that he had been suspended from the employment of TCM, with full pay and benefits, pending the outcome of a disciplinary investigation and hearing. The reason for his suspension was his alleged insubordination, non-performance, undermining of the chief executive's authority and causing a breakdown in trust amongst fellow employees and directors. Disciplinary proceedings were thereafter instituted against De Sousa.

[140]On 24 February 2009, defendants' attorney wrote to Geel in which it was claimed that Geel was not entitled to be in possession of financial information of TCM as it was confidential. The following was stated in the letter:

“3. It became apparent during the course of the meeting that your clients have furnished you with certain confidential information in regard to TCM and its subsidiary companies. Please can you urgently forward to me full details of what financial information your clients have furnished you with in particular balance sheets, draft financial statements, management accounts, budgets, bank statements and any other documentation that is presently in your possession.

4. Please note that according to TCM and its subsidiary companies you are not entitled to be in possession of such financial information without the consent of the Boards of Directors of the relevant companies. My clients have instructed me to place on record that any financial information that you are in possession of has been received without the authority of the relevant Boards of Directors. My instructions are furthermore to request that you urgently furnish to my client a detailed list of the financial information in your possession together with an undertaking that such information will be released to any third party without the express consent of the relevant Boards of Directors and that such information will be treated in a confidential manner. My clients have further instructed me to place on record that should it transpire that any financial and confidential information is leaked to any third party or competitors which results in financial loss to my clients, my clients will hold KPMG Services (Pty) Ltd, Mr De Sousa and Mr Diez jointly and severally responsible for such loss."

[141] This was followed by a number of offers made by one or other of the parties during the period March 2009 to November 2014. The first such offer was made by the plaintiffs through a letter from their attorneys to TCM dated 13 March 2009. The offer was for the shareholders, alternatively TCM itself, to purchase the plaintiffs' shares at a price of R160 million. This offer was rejected in a letter from defendants' attorney dated 23 March 2009. In the letter of rejection it was recorded that the defendants did not agree with the valuation attributed to the shares, and that they were not prepared to purchase the shares "*for the price as indicated*".

[142] On 9 April 2009, plaintiffs' attorneys wrote to defendants' attorney requesting that the defendants indicate at what price the defendants were in fact willing to purchase the shares and to provide a proper valuation to support such offer.

[143] In response thereto, defendants' attorney wrote to plaintiffs' attorneys on 21 April 2009 in which they stated that "[Y]our clients' purported offer contained in your letter of 13 March 2009 does not comply with the provisions of clauses 13.14 and 13.15 of the shareholders' agreement. In the circumstances, such offer is invalid and is to be regarded as *pro non scripto*". The letter continues as follows: "In any event, my clients are, at this time, not interested in purchasing your clients' shares in TCM."

[144] The plaintiffs' attorney responded to the letter of 21 April 2009 in the following terms:

"... we see no reason why the offer made to your clients to purchase our client's shares should not have constituted a genuine, valid and *bona fide* offer, albeit outside the realm of the Shareholders Agreement. It is our view that it is entirely possible to offer the shares for sale in this manner, and that such offer is most certainly not '*pro non scripto*' as you describe it. ..."

[145] No further negotiations with a view to the disposal of the plaintiffs' shares took place until 9 December 2013, when Cornelli made what has been referred to in the evidence as the "*Mandela offer*". It reads:

“In the spirit of Nelson Mandela’s legacy and principles, subject to TCM board approval, I offer you 7 days to unconditionally withdraw your case, each party paying their own costs.

I will thereafter apply my mind, on how to best effect a transfer of your shares to good faith and synergy investors, on a willing buyer, willing seller basis.

This offer expires at 10am on Monday 16 December 2013.”

[146] On 3 December 2014, TCM made an offer to buy the plaintiffs’ shares for an amount of approximately R54 million. It was accompanied by a valuation demonstrating how the figures had been arrived at. The offer was required to be accepted by 17 December 2014. The plaintiffs responded that it was not possible for them to comply with the deadline imposed and that the defendants were to assume that the offer had not been accepted. The hope was also expressed that if the offer is made in good faith, negotiations should continue so that the matter could be resolved. The date for acceptance was extended until 19 January 2015, but on 12 February 2015 the plaintiffs’ attorneys advised that the defendants’ attorneys’ offer was not acceptable.

[147] On 17 February 2016, and when the trial was nearly at an end, counsel for the defendants produced a letter from defendants’ attorney embodying an offer together with a valuation drawn by a firm of accountants, Grant Thornton. In terms of the offer, which was made without any admission of liability, TCM offered to pay R50 094 000 for the shares held by De Sousa; and R11 037 000 for the shares

held by Diez. The offer was open for acceptance by the close of business on 22 February 2016. I permitted the letter to be handed in as Exhibit DD, but refused to allow the valuation to be introduced into evidence. To have allowed the introduction of the valuation would have given rise to new lines of inquiry and would have further prolonged the trial. Moreover, it appeared that the letter and valuation had not been discovered and were introduced without prior notice to the plaintiffs or the Court.

[148] For the sake of completeness it is necessary to refer to a purported offer made to all shareholders by an undisclosed third party. On 25 June 2008, Cornelli explained that the third party wished to purchase 35% of the issued shares in TCM for no more than R35 million plus interest payable in instalments over three years. That offer was rejected by the plaintiffs and presumably also by the remaining shareholders. De Sousa testified that he was not prepared to sell his shares at that price and that he assumed *"Mr Cornelli was actually the person that was looking to buy the shares and he was just taking a big chance"*. That offer is of little relevance for present purposes as it was made well before De Sousa's dismissal from his employment and that the plaintiffs could not reasonably have been expected to have accepted such offer. Subsequent offers made by the defendants have well exceeded that price.

[149] The allegations made in paragraph 14 of the particulars of plaintiffs' claim are in my view well-founded. It is readily evident that Cornelli and the remaining shareholders have refused to engage in *bona fide* discussions or negotiations with

the aim of permitting the plaintiffs to dispose of their shares at a fair value and without resort to litigation.

[150]It is clear that from the outset Cornelli had no serious intention to enter into *bona fide* negotiations with the plaintiffs. At the meeting held at the offices of KPMG on 18 February 2009 he sought to impose a number of wholly unreasonable conditions. Cornelli could not reasonably have expected the plaintiffs to resign as directors with a reduction in salary; nor could he have expected them to agree to him alone finding an interested third party to buy their shares. Because the plaintiffs did not yield to his demands, he lost his temper and stormed out of the room. The following day, he issued a notice suspending De Sousa from his employment. This, in my view, is not the conduct expected of someone who is seriously interested in engaging in negotiations.

[151]It is plain from the correspondence to which I have referred that Cornelli and the remaining shareholders had no interest in negotiating with the plaintiffs for the disposal of their shares. Following the rejection of the plaintiffs' offer made on 13 March 2009, the defendants were invited to indicate at what price they were prepared to purchase the plaintiffs' shares but they refused to do so. Instead, it was contended in the letter sent by the defendants' attorney on 21 April 2009 that the offer made on 13 March 2009 was invalid and is to be regarded as *pro non scripto*. It was emphatically stated in that letter that the defendants were, "*at that stage, not interested in purchasing the plaintiffs' shares*". The following was also stated in the

defendants' attorneys' letter: *"To the extent that your clients intend selling their shares to a third party, we direct their attention to the provisions of clauses 13.14 to 13.18 of the shareholders' agreement."*

[152] There is no merit in the contention that plaintiffs' offer made on 13 March 2009 was invalid. The grounds of alleged invalidity are not stated in defendants' attorneys' letter. But I assume that the defendants' attorney's bases his contention on the fact that the offer made by the plaintiffs on 13 March 2009 was required to be accepted within ten days and not the fourteen-day period stipulated in subclause 13.15.1 of the shareholders' agreement. This is not a ground that would render the offer invalid. The period stipulated in 13.5.1 is for the benefit of the defendants and they could have waived this requirement. Even if the defendants' attorney's construction of the shareholders' agreement is correct, equitable considerations make it unfair for the defendants to strictly rely upon the provisions of the shareholders' agreement. It was at all times open to the plaintiffs to put a *bona fide* offer for the sale of their shares outside the realm of the shareholders' agreement.

[153] In the final paragraph of defendants' attorneys' letter, it was indicated that if the plaintiffs intended to sell to a third party, they were obliged to comply with the pre-emptive provisions of the shareholders' agreement, subclauses 13.14 to 13.18. Plaintiffs' counsel submitted that this was disingenuous since the defendants knew full well that there was no reasonable means by which the plaintiffs were able to

comply with the shareholders' agreement requiring the identification of a third party purchaser and a price to be offered by that party.

[154]The plaintiffs' access to the financial information of TCM also appears to have been unduly restricted or curtailed. Geel had been instructed by the plaintiffs to conduct a valuation of their shares. De Sousa testified that among the documents that Geel wanted to look at was the general ledger. When he requested access to the ledger, he was informed that he could only view it at the offices of TCM. De Sousa was not permitted access to TCM's computer system to enable him to view the ledger and the underlying documents on his lap-top computer. In order to access these documents on TCM's system De Sousa required the log-in details which were never given to him. De Sousa did not take up the offer to view the ledger and the underlying documents at the offices of TCM as such access would have been under the control and supervision of TCM, and would have been time-consuming.

[155]The content of the following emails which passed between the parties in February 2015 are indicative of Cornelli's obstructive behaviour in affording De Sousa access to TCM's financial documentation: On 13 February 2015, De Sousa complained that his access to TCM's operating systems had always been denied. Cornelli responded thereto as follows: *"Your access to view TCM systems have never being denied. On multiple occasions, I've offered you on-site access to view our General Ledger System (to view any numbers you wish). You've always*

ignored my multiple offers. ...” On 16 February 2015, Cornelli sent an email stating the following: *“I remind you, that your general access to TCM premises and staff is only possible after you have supplied an adequate SAPS clearance certificate.”* On the same date he addressed a further email in which the following was stated:

“Access to view TCM’s GL (General Ledger) is available as offered. On site at TCM. (not remotely)

Your general access to TCM premises and staff is only possible after you provide an adequate Clearance Certificate. You are welcome to assign Jose Diez, or any other (known safe) consultant, hopefully JBA trained, to view the GL, if you unable to get an adequate SAP’s clearance certificate.”

[156] Subclause 12.2 of the shareholders’ agreement has an important bearing on the plaintiffs’ entitlement to have access to TCM’s financial information. It provides, among other things, that shareholders have a right to be furnished with the financial documentation of TCM; this includes monthly management accounts of each company in the TCM group, balance sheets, profit and loss accounts and cash-flow statements together with written management reports. Shareholders are also entitled to the audited financial statements of each company.

[157] In the letter sent by defendants’ attorney to Geel on 24 February 2009 TCM objected to Geel being in possession of TCM’s financial information. The plaintiffs were entitled to consult Geel in order to conduct a proper valuation of their shares. It stands to reason that without proper access to TCM’s financial information it

would have been virtually impossible for the plaintiffs or their accountant to make a proper assessment of the value of their shares. This compromised their ability to put a proper offer to the defendants or to negotiate with a third party for the disposal of their shares.

[158] The so-called '*Mandela offer*' which was made on 9 December 2013 is no offer at all as no price is stipulated for the purchase of the plaintiffs' shares.

[159] The plaintiffs could not reasonably have been expected to give proper consideration to the offer made on 3 December 2014. The deadline imposed for acceptance of the offer and the subsequent extensions granted were clearly inadequate. The supporting valuation had to be evaluated and the figures upon which it was based verified. This would have required the plaintiffs to have had full and proper access to TCM's financial information. As I have already mentioned, such access had been unduly restricted or curtailed. The chance of the plaintiffs being afforded proper and unfettered access to TCM's financial information, seems remote. Absent such information, the plaintiffs would not have been able to properly address the offer with their appointed expert. Why the offer was put at the onset of the festive season is a matter of concern and is suggestive of an absence of *bona fides* on the part of Cornelli.

[160] I find it hard to accept that the offer put on 17 February 2016 was a genuine, valid and *bona fide* offer. It could hardly be contended that the offer was made with the intention of bringing the litigation and conflict to an end; it was made some seven to eight years after the termination of De Sousa's employment and when the present case was at an advanced stage. When the offer was put, the plaintiffs had incurred substantial legal costs in furtherance of the litigation (approximately R28 million). There is no indication that the offer provided for the payment of the plaintiffs' costs. It was held in *O'Neil* (at 974E) that it was proper to reject an offer which did not provide for the payment costs.

[161] But most importantly, the offer was only open for acceptance until the close of business on 22 February 2016, some five days after it was made. A period of five days could hardly have afforded the plaintiffs enough time to properly consider the offer and the accompanying valuation. The plaintiffs would first have had to have been given access to the financial information of TCM in order to discuss the offer with their appointed expert, but this, as I have previously indicated, was not forthcoming.

[162] The plaintiffs have had to resort to lengthy and expensive litigation in order to compel the purchase of their shares. I was told that at the present time the plaintiffs have expended approximately R28 million in legal costs. If the defendants seriously intended to avoid litigation, a proper offer to purchase their shares at a fair value should have been put before the launch of the s 252 application and the present

action. In *O'Neill* (at 974J), Hoffmann J emphasized "... *that parties ought to be encouraged, where at all possible, to avoid the expense of money and spirit inevitably involved in such litigation by make an offer to purchase at an early stage.*"

[163]The ineluctable conclusion to be drawn from the above facts is that Cornelli and the remaining shareholders of TCM have failed or refused to engage in *bona fide* discussions or negotiations with the aim of permitting the plaintiffs to dispose of their shares at a fair value and without resort to litigation. The defendants have not made a fair or proper offer to purchase the plaintiffs' shares. This has unfairly prejudiced the plaintiffs. Accordingly, the plaintiffs have proven the allegations made in paragraph 14 of the particulars of plaintiffs' claim.

THE PLAINTIFFS' FURTHER COMPLAINTS

[164]The principal complaint is that since about 2008 Cornelli and the remaining shareholders have intentionally or recklessly conducted the affairs of TCM in such a way as to diminish or jeopardise the value of the plaintiffs' shares and to reduce the dividends and other financial benefits payable to them. The causes that underlie this complaint are threefold.

[165] First, that Cornelli has procured that the business of TCM's Supplies Division (the Supplies Division) be conducted and accounted for as if it were a separate entity from TCM, and caused all income and profits arising therefrom to accrue solely to Hassim or alternatively the Trust, and Frank and Fabio Cornelli. This has caused loss to TCM of its Supplies Division business. It has also deprived the shareholders of value by way of dividends and has eroded the value of the plaintiffs' shares.

[166] Second, the true values of TCM's assets are not properly reflected in its annual financial statements. There has been a material understatement of inventory in the annual financial statements for the years 2008 to 2012. This has occurred as a result of a failure to take account of all sales inventory; to include work-in-progress inventory on hand, and to properly account for maintenance spares inventory. There was also an unjustified and unexplained stock write-off of R11.2 million in 2008. Such undervaluation does not reflect the true financial position of TCM. The plaintiffs contend that the undervaluation was procured by Cornelli for the ulterior purpose of reducing the value of the plaintiffs' shares (see para 15 of the particulars of claim).

[167] Third, that from 2007, the business of TCM has been conducted in such a manner that its operating profit available to shareholders after all expenses have been discharged, has been drastically reduced. Cornelli has intentionally or recklessly failed to contain and/or reduce the total operating expenses of TCM so as

to ensure its ultimate profitability. The operating expenses and especially management fees, staff costs, directors' emoluments and bonuses have substantially increased. This conduct has resulted in the resources and patrimony of TCM being unduly depleted and its EBITDA reduced. I will deal later in the judgment with the question of EBITDA (see para 15A of particulars of claim).

THE SUPPLIES DIVISION

[168] The crux of the dispute concerning the Supplies Division is whether the owner or proprietor of the Supplies Division business is TCM (as contended by the plaintiffs), or Frank and Fabio Cornelli.

[169] De Sousa's evidence is that TCM acquired the business in about 1995 from Sternco (Pty) Limited (Sternco), which had been placed in liquidation. As the owner of the business TCM is entitled to all income and profits arising from its business operations. This is denied by the defendants.

[170] The defendants allege that Sternco, which was incorporated by Frank and Fabio Cornelli in about 1986, imported industrial spare parts and all of the computers and spare parts for TCM. The liquidation of Sternco placed TCM's supply chain at risk. For purposes of ensuring the continuity of its supply chain, TCM decided to assist Frank and Fabio Cornelli by "*warehousing*" the former

business of Sternco in TCM and describing it as the "TCM Supplies Division". The business would be ringfenced from the remaining business of TCM. However, the Supplies Division would be owned by Frank and Fabio Cornelli and run at their personal risk and for their personal benefit. The plaintiffs were party to this decision.

[171] It is alleged further that the Supplies Division has throughout its existence and with the knowledge and consent of the plaintiffs, operated as if it was a separate entity owned by Frank and Fabio Cornelli. It had a separate bank account and overdraft facility. All profits generated by It would accrue solely to Frank and Fabio Cornelli and, since June 2005, also to Hassim.

[172] The onus of proof that the Supplies Division belongs to TCM is on the plaintiffs. In cross-examination it was put to De Sousa that Cornelli would give evidence to support the allegations set out in the defendants' plea. In the event, however, Cornelli did not give evidence and accordingly no reliance can be placed upon the versions that had been put. The issue of the proprietorship of the Supplies Division must therefore be decided on the basis of the evidence adduced by the plaintiffs.

[173] De Sousa testified that after the liquidation of Sternco and sequestration of Frank Cornelli, Cornelli told him that TCM was going to employ Frank Cornelli in

order to preserve the relationship between TCM and Sternco regarding TCM's freight requirements. Frank Cornelli was going to be an employee who would earn a salary and obtain benefits just like every other TCM employee and he would then manage the import and freighting of TCM's goods in that capacity. The importation of Sternco's industrial or mining goods would be retained by Frank Cornelli and the benefits thereof would accrue to TCM in order to subsidise the overheads which Frank Cornelli's employment now presented to TCM. De Sousa agreed to this.

[174] Frank Cornelli was also given the task of managing the business of a subsidiary of TCM known as TCM Networks (Pty) Limited. The business of networks was to stock and sell consumables for PCs such as printer heads, print belts, tapes, ink and toner and similar such perishables consumed in the use of computers. At a later stage this company expanded its business to include the supply of small printers.

[175] De Sousa was adamant that the business formerly conducted by Sternco was not to be "warehoused" in TCM as alleged, and run autonomously by Frank and Fabio Cornelli.

[176] De Sousa also testified that on or about 19 September 2005 he was presented with a written addendum to the shareholders' agreement which had been signed by

the parties on 29 June 2005. The following was provided in clauses 3 and 4 of the addendum:

- “3. Iqbal further agrees that he is aware that the division known as TCM Supplies Division has reflected a nil net asset value in computing the purchase price of the shares.
4. All the parties are aware that the profits losses, assets and liabilities of the TCM Supplies Division accrue for the benefit of Frank Cornelli and Fabio Cornelli.”

[177] De Sousa refused to sign the addendum as he did not agree with its terms and in particular with what was stated in clause 4. But the addendum was signed by the remaining shareholders, including Diez.

[178] The addendum must be viewed in the context of the various attempts by Cornelli to assist Hassim to pay for his shares and to retain his services. On 22 November 2007, Cornelli recommended that the sale of shares agreement concluded with Hassim be amended to reduce the purchase price of his shares by 20%. De Sousa disagreed with this and put a counter-proposal that if Hassim paid the purchase price in full by 15 December 2007, he could have a 15% reduction. De Sousa's proposal was rejected out of hand by Cornelli.

[179] On 26 November 2007 Cornelli addressed an email to De Sousa in which he stated, among other things, that he was left with *"little alternate (sic), but to pursue other methods and incentives in achieving the above. I will propose a draft resolution close to YE Feb 2008 to achieve this"*.

[180] On 27 November 2007, Cornelli wrote a letter to Impey in which he instructed him to *"convert TCM Supplies from TCM Division to a separate PTY LTD company. Shares 25.1% Iqbal, 37.45 each between Frank and Fabio"*. This instruction was given by Cornelli without reference to De Sousa. De Sousa testified that when he learnt of this instruction he took objection as he considered that a valuable part of TCM's business would be made over to a company controlled by Cornelli's brothers and Hassim.

[181] There then followed a series of emails between Cornelli, Impey and De Sousa. On 29 November 2007, he asked Cornelli and Impey to explain what the purpose was of transferring the Supplies Division business to a new company. He also wanted to know why there was no direct TCM shareholding in the company. On the same day, Cornelli responded as follows: *"The business is well known and the beneficiary the same from inception ... now extended to BEE. They not the same as other TCM companies as they are different ... since inception"*. De Sousa replied on 1 December 2007 in the following terms:

“I find your reply very vague and avoiding the requested info.

I remind you that I am a 30% shareholder of TCM and even if I was only a 5 or even a 1% shareholder I deserve a proper answer and you as CEO are obliged to provide such information comprehensively on request.

Regarding the 2nd point made, perhaps you would like to explain in what way they are different from the other TCM companies other them having been only a Division and NOT a Company”

[182] On 4 December 2007, Cornelli responded to the above email as follows: *“You asking for information which is well known to you and all for the past 20 years. There is no reason to continually state the obvious. Feel free to call a meeting if you wish to discuss this further.”* On 5 December 2007, De Sousa wrote a letter to Cornelli and the remaining shareholders in which he advised them that he would like to meet.

[183] Unbeknown to De Sousa, a company known as “TCM Printing Solutions (Pty) Limited” (Printing Solutions) had already been incorporated on 13 November 2007; and that on 3 December 2007, Frank and Fabio Cornelli, as well as Hassim, were appointed directors of that company.

[184] It is common cause that the incorporation of the Supplies Division business into Printing Solutions did not eventuate. Instead, what occurred is that from

approximately September 2008 all income and profits of the Supplies Division were diverted to Printing Solutions where they have accrued for the benefit of the Cornelli brothers and Hassim.

[185] Geel provided the Court with the operating results of the Supplies Division for the years ended 28 February 2006 to 29 February 2012 which demonstrate how the income and profits of the Supplies Division were applied. The results were extracted from the management accounts for the years ended 28 February 2006 to 29 February 2008 and TCM's annual financial statements from 29 February 2008 to 29 February 2012. Using this information Geel compiled four tables - two reflecting the profits before tax of the Supplies Division (Exhibit A pp 793 and 794), and the third and fourth a breakdown of the operating expenses of the Division (Exhibit A pp 795 and 796).

[186] Based on these tables, Geel made the following observations: The bulk of the operating expenses of the division are comprised of management fees and staff costs including bonuses. All of the profits in each year have been distributed as bonuses to the shareholders of Printing Solutions; whatever profit was made by the division in a particular year was set off by a "*charge*" by way of a bonus payment to Hassim and Frank and Fabio Cornelli. The table (Exhibit A p 793) reflects that in 2008, the profit before tax was 3%. But from 2009 until 2012, the profit before tax is reflected as 0%. By distributing the profits in this way, the value to be attributed to the Supplies Division is nil, and the shareholders of TCM would have been deprived

of any value by way of dividends. This also has had the effect of eroding the value of the shares of TCM.

[187] It strikes me as odd that the business of the Supplies Division is conducted in such a way that all of its profits are diverted to Printing Solutions, leaving a profit before tax of 0%. The probabilities are that this conduct is merely a stratagem employed to assist Hassim and Frank and Fabio Cornelli. This phenomenon of 'stripping out' all of the Supplies Division profits ought to have been explained to the Court by either Cornelli, Hassim and/or the Cornelli brothers.

[188] During his cross-examination, De Sousa was referred to the following features which were said to be an indication that the Supplies Division was not part of TCM's business. Although TCM had three other divisions, the Supplies Division was treated differently from the other divisions: It had its own bank account at Mercantile Bank, whilst TCM's current account was at the Standard Bank. The signatories on the Supplies Division bank account were Frank and Fabio Cornelli. TCM had pledged funds in a separate account at Mercantile Bank as security for the Supplies Division overdraft. Separate ledgers were kept for TCM on the one hand, and the Supplies Division on the other. When TCM collected the debts belonging to the Supplies Division they separated such debtors from TCM's own debtors. The moneys collected were paid by TCM drawing a cheque which was deposited in the TCM bank account at Mercantile Bank. TCM effected sales to the Supplies Division and issued invoices to it. TCM also issued invoices on behalf of

the Supplies Division in respect of industrial equipment which had nothing to do with the TCM business. TCM, its subsidiaries and the Supplies Division paid management fees to TCM Management (Pty) Limited, a subsidiary of TCM; the other divisions did not. The Supplies Division was treated in a similar way that TCM's subsidiaries were treated.

[189]A further feature alluded to in cross-examination is that Frank and Fabio Cornelli have, since at least 2006, been loan account creditors of TCM; they are the only non-shareholders who are or have ever been loan account creditors of TCM. It is unusual for a non-shareholder to be a loan account creditor of a company.

[190]In answer to the propositions put to him, De Souza plausibly explained that the reason the Supplies Division maintained a separate bank account at Mercantile Bank was to enable the financial viability of the newly-acquired business to be monitored. The bank account was also in overdraft and it was necessary to monitor Frank Cornelli's overheads. His explanation also accords with the probabilities.

[191]De Sousa's explanation must be viewed in the context of the circumstances under which the Supplies Division business was taken over by TCM. Sternco, the previous owner of the business, had been placed under liquidation and there would have been a great deal of scepticism as to its financial viability and the ability of Frank Cornelli to profitably run such business. The bank account at Mercantile

Bank would have been the perfect vehicle to monitor and gauge the financial viability of the business.

[192]TCM provided security to Mercantile Bank in a form of pledged funds in a separate bank account in order to secure the Supplies Division overdraft. The amount pledged was substantial. The only probable reason why TCM would have pledged its own funds in order to secure the overdraft is because it was the proprietor of the business of the Supplies Division. It is also unlikely that TCM would have pledged substantial funds merely in order to assist Frank and Fabio Cornelli, in order to operate the Supplies Division.

[193]The fact that Frank and Fabio Cornelli were signatories on the Supplies Division bank account is also not necessarily an indication that they were the proprietors of the Supplies Division. According to De Sousa it was agreed that Frank, and later Fabio, were to manage the business of the Supplies Division. They would have been required to sign cheques in order to conduct such business. Nor is the fact that TCM collected the debtors of the Supplies Division and deposited the amounts collected into the TCM bank account at Mercantile Bank an indication that TCM is not the owner of the business of the Supplies Division. If one accepts De Souza's testimony that it was necessary to monitor the financial viability of the business, then it would reasonably have been expected that TCM would collect the debtors that belonged to the Supplies Division and have paid the amounts collected into the Mercantile Bank account. The probabilities are that because the bank account was in overdraft and TCM had pledged its own funds as security, TCM

would have wanted to ensure that the amounts collected were paid into the account in order to reduce the overdraft.

[194] So, too, is the fact that separate ledgers were kept for TCM on the one hand and the Supplies Division is no indication that Cornelli's brothers were the owners of the business. If the intention was to monitor the Supplies Division business it would have been important to have maintained a separate ledger from that of TCM.

[195] Because TCM effected sales to the Supplies Division and issued invoices to that Division and the fact that the Supplies Division paid management fees to TCM Management (Pty) Limited is also not necessarily indicative of the fact that its business was not owned by TCM. This is wholly consistent with De Sousa's explanation that the business was to be treated as a separate entity for purposes of monitoring its financial viability.

[196] Counsel for the defendants also pointed to the fact that TCM issued invoices on behalf of the Supplies Division in respect of industrial equipment, which equipment had nothing to do with the TCM business. Again, this does not establish Frank Cornelli's ownership of the business. De Sousa's uncontested evidence is that the importation of Sternco's industrial or mining goods was to be retained by Frank Cornelli and the benefits thereof were to accrue to TCM in order to subsidise the overheads which Frank Cornelli's employment presented to TCM.

[197] It was strenuously argued by on behalf of the defendants that the following wording of the addendum dated 19 September 2005 was indicative that Frank and Fabio Cornelli were the owners of the Supplies Division business.

- “4. All the parties are aware that the profits, losses, assets and liabilities of TCM Supplies Division accrue for the benefit of Frank Cornelli and Fabio Cornelli.”

[198] The wording of the aforesaid clause is ambivalent. There is no indication from the wording employed that Frank and Fabio Cornelli are the owners of the Supplies Division business. What is stated is that the profits, losses, assets and liabilities would “*accrue for the benefit of Frank Cornelli and Fabio Cornelli*”. The clause is certainly open to the construction that although the business properly belongs to TCM, the financial benefits of the business will accrue to Frank and Fabio Cornelli. If, indeed, Frank and Fabio Cornelli were intended to be the owners of the Supplies Division this would have been stated in clear and unambiguous terms.

[199] An examination of the annual financial statements reveals that for many years the accounting for TCM Supplies Division has been fully integrated into TCM's financial statements. It was only for the first time in 2009 that TCM purported to reflect the financial position of the Supplies Division on a separate balance sheet attached to the main TCM financials.

[200] In the notes to the annual financial statements for the year ended 28 February 2009, the following is stated:

“29. TCM Supplies division

Included in the results for the year is the TCM Supplies division, which trades as a separate division of Technology Corporate Management (Pty) Ltd, under a dedicated management structure. The financial position and results for the division are set out on page 41.

The management of the TCM Supplies division share in 100% of all profits generated by the division.”

[201] Geel rightly testified that from an accounting point of view, a reasonable third party examining the financial statements of TCM after 2009 would conclude that TCM Supplies is merely a division of TCM and that TCM is responsible in every respect for such division. The accounting and financial treatment of the Supplies Division is consistent with the plaintiffs’ version that the Supplies Division is part of and owned by TCM itself.

[202] It was foreshadowed during the defendants’ opening address and, later, in the cross-examination of De Sousa, that Cornelli would give evidence concerning the ownership of the Supplies Division. Cornelli, who is principally implicated in the matter, was available to give evidence. He was present in Court throughout the hearing and obviously has personal knowledge of the relevant facts. His failure to testify serves to strengthen De Sousa’s evidence, and in my view, an adverse inference ought to be drawn against the defendants. This is quintessentially a case where it is proper to infer that Cornelli feared that his evidence would expose facts unfavourable to him and damage the defendants’ case (see *Elgin Fireclays; Titus v Shield Insurance* and *Tshishonga v Minister of Justice & Constitutional*

Development. Also see *Absa Investment Management Services (Pty) Ltd v Crowhurst* [2006] 2 BLLR 107 (LAC)).

[203] On the basis of De Sousa's unchallenged evidence, which is corroborated by Geel, it is my finding that the Supplies Division is owned by and is part of TCM, and its value is to be taken into account in the valuation of TCM as a whole.

[204] Presently, the business of the Supplies Division is carried on solely for the benefit of Hassim and Frank and Fabio Cornelli. Hassim derives 25.1% thereof, and Frank and Fabio Cornelli 37.45% each. By permitting the business to be carried on in this way, TCM has been deprived of the income of a lucrative part of its business. This has impacted negatively on the profitability of TCM and the value of its shares. This constitutes a misapplication of TCM's assets which is unfairly prejudicial to its members and in particular to the plaintiffs.

[205] Geel testified that the Supplies Division presently has a value of approximately R15 million. Such value must be brought into account in determining the overall value of TCM for purposes of the relief sought.

/INVENTORY ...

INVENTORY

[206] I turn now to consider the question whether the true values of TCM's inventory are properly reflected in its annual financial statements for the years 2008 to 2012.

[207] In regard to this issue, the plaintiffs relied on the evidence and Professor Wainer. Geel is an experienced chartered accountant and auditor. Professor Wainer has considerable experience in regard to accounting and auditing practice. He is a member of the Auditing Standards Board established in terms of the Public Accountants and Auditors' Act, and is a past member of the Accounting Practices Committee and the Reporting Award Committee of the SA Institute of Chartered Accountants (SAICA). He is also a past member of the Accounting Issues Task Force of SAICA.

[208] Geel testified as to TCM's treatment of inventory for the year ended 29 February 2008, as well as the historical trends in TCM's inventory balances between 2008 and 2013. He sought to demonstrate that there had been an understatement of sales inventory, and that TCM had failed to properly account for maintenance spares and work-in-progress. This had impacted negatively on TCM's gross profit margins.

[209] Professor Wainer gave evidence as to the proper manner in which spare parts held by TCM for maintaining its customers' computer equipment ought to have been

accounted for. He was brought in as a witness to counter the views of the defendants' accounting expert, Mr Greyling, who it was thought would give evidence.

[210] Geel conducted a careful and meticulous analysis of TCM's financial documentation, including the auditors' working papers to which I have referred, and the annual financial statements of TCM. The full extent of his analysis appears from the summary of his analysis, "Exhibit A". Based on his observations, Geel concluded that there has been a material understatement of inventory in the annual financial statements for the years ended 2008 to 2012 which has resulted in TCM's gross profit margins being reduced. There has also been a significant increase in total operating expenses and, in particular, management fees and staff costs, including directors' emoluments and bonuses. All of this has had a negative impact on TCM's profitability and its EBITDA results.

[211] The following basic principles of accounting are relevant for present purposes. Gross profit is the difference between sales (or revenue) and the cost of sales. The cost of sales are the costs directly attributable to the generation of sales of inventory and include purchases or cost of inputs, labour, *etc.*

[212] Cost of sales is determined by subtracting the closing balance of inventory on hand at year-end from the opening inventory balance, plus inventory purchases. Expressed as a formula, it is as follows:

$$\text{Cost of sales} = \text{Opening Inventory} + \text{Purchases} - \text{Closing Inventory}.$$

If the closing inventory balance is understated this would have the result of overstating the cost of sales balance, and reducing the gross profit of the company. Thus, the amount at which inventory is included in the annual financial statements is fundamental to the reported profit. If inventory is understated, profits will, likewise, be understated. This, in turn, has a direct impact on the valuation of the business.

[213] Geel referred the Court to tables reflecting the historical trends in TCM's inventory balances subsequent to 2008 as well as the average implied days of inventory on hand (see Tables 1 and 8 (Exhibit A pp 735-737). Table 8 is a combined summary of the historical trends in inventory during the period 2006 to 2013, and also reflects the revenue of TCM (sales), cost of sales and gross profit during such period. The Court was also referred to the source documents from which the tables were compiled; these are contained in Exhibit D1.

[214] The following is to be observed from these tables. There was a marked reduction in inventory from R16.5 million in 2007, to R7.1 million in 2008. This was followed by a further decrease to R5.4 million in 2009. Inventory holdings increased during 2010 and 2011, rising to R9.7 million by 2012.

[215] Table 8 also reflects revenue or sales during the period 2006 to 2013. An analysis of that table reveals that revenue during that period showed significant growth. According to Geel TCM's total revenue growth during this period was 143%. Revenue growth had increased by 15% from 2008 to 2009; remained flat from 2009 to 2010 and increased by 7% from 2010 to 2011, and 6% from 2011 to 2012.

[216] Geel testified that it does not make sense that the value of stock reflected in the financial statements for these years should have declined from R16.5 million as at 28 February 2007 to R7 million as 28 February 2008, particularly given that revenue increased over the same period.

AVERAGE DAYS OF INVENTORY ON HAND

[217] The aforesaid tables also reveal that in 2008 there was a marked reduction in the average days of inventory on hand. Average days of inventory on hand is an indication of how many days of future sales one has on hand before being out of stock. It is a key indicator used to assess inventory movements and is calculated as follows: $\text{Average days of inventory on hand} = (\text{Closing inventory} / \text{Cost of Sales}) \times 365 \text{ days}$. In 2006 the average days of inventory on hand was 18 days and 23 days in 2007. This decreased to 6 days in 2008; it remained at 6 days during

2009 to 2012, and only rose to 10 days in 2013. In all, there was a 67% decrease from 2006 to 2012.

[218] Geel also analysed the inventory holdings reflected in the annual financial statements of two listed companies, Datatec Limited and Business Connexion Group Limited (CoCos), for the years ended 2006 to 2012. According to Geel, these companies have similar business models and operations to TCM. The inventory trends are reflected in Table 9 (Exhibit A p 744). In the case of Datatec, the average days of inventory on hand was consistently in excess of 30 days, save for 2009 and 2011, when this was reduced to 25 and 29 days respectively. In the case of Business Connexion, the average days of inventory on hand consistently exceeded 17 days, save for 2006, 2007, 2008 and 2013, when these were 8, 14, 13 and 16 respectively. These statistics are a further indication that the inventory holdings disclosed in TCM's annual financial statements are unrealistic. Cornelli should have given evidence to explain how it was possible for TCM to have operated with such low levels of inventory on hand. It seems hardly likely that TCM could have operated on 6 days of inventory on hand as depicted in Table 8.

[219] It was suggested during cross-examination that it was inappropriate to compare TCM's performance with those of Datatec and Business Connexion. Defendants' counsel pointed to a number of distinguishing features: Datatec and Business Connexion are both listed companies, whereas TCM is a private company; Datatec is an investment holding company with about 100 subsidiaries

and the same, albeit to a lesser degree, applies to Business Connexion. TCM is a single operating company; whereas Geel chose, to TCM's detriment, to compare it on its own without its subsidiaries, to the whole of the Datatec Group. Another difference is that TCM operates virtually exclusively in South Africa but Datatec has international operations. And the inventory comparisons were made without knowledge of Datatec's revenue and how this was generated. It was also suggested, with reference to the financial statements of the CoCos that they did not have similar business models and operations to TCM and that the comparisons were inappropriate.

[220] Whilst I accept that there may be some justification in the defendants' contention that it was inappropriate to use the CoCos referred to as a basis of comparison, this is not dispositive of the real question that must be decided, namely whether the inventory values disclosed in TCM's financial statements are correct. Geel's evidence concerning the CoCos may be discounted. The very obvious fact remains that on the basis of TCM's own financial statements the average implied days of inventory on hand plummeted from 23 days in 2007 to 6 days in 2008. In 2004, it was 4 days; then 7 days in 2010, and in 2011 and 2012, 6 days respectively (see Table 8, Exhibit A p 735).

[221] Given the growth of TCM's revenue during the period 2012 to 2016, it is highly unlikely that TCM would only have had an average 6 days of inventory on hand as reflected in Table 8 of Geel's expert summary. Ordinarily, one would expect that a

company that increases its activity and sales over time will increase its level of inventory holdings. It is unrealistic to accept that on average TCM only had 6 or 7 days of stock on hand before it ran out of stock. It is common cause that TCM provides repairs and maintenance services to large clients such as FNB. Service level agreements require TCM to maintain ATM machines and other computer products supplied to FNB. TCM must, as a probability, have had sufficient inventory holdings to meet the needs of FNB and other large clients.

[222]The low average days of inventory on hand is a strong indicator that the inventory balances stated in the 2006 to 2012 financial statements are probably materially understated.

[223]Geel attributes the marked decline in inventory holdings during the 2006 to 2012 financial years to principally four factors: First, the incorrect expensing through the income statement of maintenance spares on hand in February 2008, which should have been accounted for as inventory; second, the failure to bring into account work-in-progress; third, a failure to take into account the stock or inventory held at all of TCM's branches; and, fourth, an unexplained stock write-down of R11.2 million in 2008.

/MAINTENANCE SPARES ...

MAINTENANCE SPARES

[224] It is common cause that TCM purchases spares to be used in maintaining the computer facilities of its customers, from which TCM derives revenue. These will be referred to hereafter as 'spares' or 'maintenance spares'. At the end of each financial year, TCM holds spares which have not yet been utilised in the maintenance of its customers' computer facilities.

[225] Both Geel and Professor Wainer testified that in the financial statements for the years ended 2006 to 2012, TCM did not recognise maintenance spares held at financial year-end as any kind of asset, that is, neither as inventory or fixed assets. TCM's practice was to treat the spares as an expense in the income statement. This was usually done in the year that the spares were acquired and not in the year when utilised. It is also common cause that in the 2013 financial statements, maintenance spares were treated for the first time as a fixed asset (property, plant and equipment – PPE) and not as inventory.

[226] Professor Wainer testified that it was clearly wrong for TCM to have accounted for the spares stock on hand as an expense in the year acquired. These spares should have been dealt with as inventory. It was also wrong to have treated them as fixed assets (PPE). He explained that the TCM financial statements are required to be prepared in accordance with International Financial Reporting Standards

(IFRS). IFRS includes International Accounting Standard IAS2, which provides in paragraph 6 thereof as follows:

“6. Inventories are assets:

...

(c) in the form of materials of supplies to be consumed in the production process in the rendering of services”

As the maintenance spares stock are materials to be consumed in the rendering of services by TCM, they fall squarely within the definition of inventories in IAS2.

[227] I have no hesitation in accepting the opinions expressed by Professor Wainer and Geel to the effect that TCM's practice of expensing maintenance spares through the income statement, instead of treating them as inventory, was incorrect. Both De Sousa and Diez testified that maintenance spares were used in maintaining the computer facilities of TCM's clients. Accordingly, on the basis of Accounting Standard IAS 2 referred to above, these spares should have been treated as inventory.

[228] It is axiomatic that if the spares held at the financial year-end are simply treated as an expense, TCM's profits are reduced. And, conversely, if the spares held are treated as inventory, the profits of TCM would be higher. If the spares are

treated as fixed assets (PPEs), as was done in 2013, the amount thereof is not an expense, and the profit would also be higher as the spares would be depreciated over time and the expense recognised over the depreciated period.

[229] The probabilities are that TCM would have carried considerable levels of inventory in the form of maintenance spare parts during the period 2008 to 2012. It provides repairs and maintenance services to large clients such as FNB. These customers would require TCM to hold a significant amount of inventory on hand in the case of emergency repairs and maintenance on a countrywide basis. The 2013 financial statements reflect a carrying value at 28 February 2013 of maintenance spare parts in the sum of R6 696 541; this clearly demonstrates the considerable value of the maintenance spares held by TCM at any time.

[230] It was argued on behalf of the defendants that the complaint about the expensing of maintenance spares would only be relevant if it be shown that the value of the spares held by TCM was material, and that such materiality has not been demonstrated. Diez, who was the logistics director of TCM, had testified that the values attributed to maintenance spares in the spares valuation reports were inaccurate. It was submitted that as Geel had based his contention about the expensing of spares on these reports, it had not been shown that the value of spares held by TCM was material. I do not agree with this submission. As indicated above, the probabilities are that TCM would have carried considerable levels of inventory in the form of spare parts in order to provide repairs and

maintenance services to its large clients. The carrying value at 28 February 2013 of maintenance spare parts was R6 696 541.

[231] It was further argued that when TCM's business changed in 2012, with the introduction of what is termed the BTR contract, it became necessary for TCM to hold maintenance spares. It was only at this point in time that maintenance spares became material. This is why TCM, based on expert advice received from the technical department of its auditors, PKF, changed its policy of expensing and accounted for maintenance spares as PPE in 2013 and as inventory in 2014. The difficulty that I have with this argument is that it is unsupported by any evidence. The defendants should have advanced evidence to show that TCM's business had changed in 2012 with the introduction of the BTR contract and that it was no longer appropriate to expense maintenance spares.

[232] The defendants persistently contended that it was proper for the maintenance spares to be expensed. This was the stance taken by Greyling, the defendants' expert, in his expert summary and at the meetings of experts. This was also the version put by defendants' counsel to plaintiffs' witnesses. It was not surprising that Greyling, who so adamantly clung to what is clearly an untenable thesis, did not enter the witness-box to explain the stance taken by him. Why maintenance spares were treated as PPEs in 2013 and then as inventory in the 2014 financial statements should have been explained.

[233]The evidence establishes beyond doubt that TCM's failure to treat maintenance spares as inventory in the 2006 to 2012 annual financial statements has materially contributed to the understatement of the final year-end inventory balances. The practice of expensing maintenance spares through the income statement has also had the effect of suppressing TCM's profits.

WORK-IN-PROGRESS

[234]Up and until 2007, TCM reflected work-in-progress in the financial statements (see Exhibit D1 p 127, where work-in-progress is reflected as R5 977 499). However, since that year, no work-in-progress has been accounted for in the annual financial statements.

[235]Geel pointed out that the stock summary report for 2008 reflects a sum of R3 105 739 in respect of work-in-progress. This is depicted in Table 12 of Exhibit A (p 753). In his view at least R3 105 739 should have been considered and brought into the annual financial statements at 28 February 2008 as work-in-progress.

[236] Geel also expressed the opinion that it is unlikely, given that TCM provides and holds ATMs for FNB – as is evident from the auditors' working papers – that no work-in-progress exists at year-end.

[237] Why work-in-progress was not reflected in TCM's financial statements subsequent to 2007 ought to have been explained by Cornelli and/or the defendants' auditors.

STOCKTAKING

[238] Geel conducted a detailed review of the audit working papers of TCM's auditors, PKF, with regard to inventory as at 29 February 2008. He referred the Court to extracts from PKF's audit programme for physical stocktaking (Exhibit A pp 805 to 814). In particular, he referred to the following recorded comment made by one of the PKF audit team members: *"Only attended the Midrand stock count. No stock kept in Durban and Cape Town"* (see Exhibit A p 805).

[239] The statement that *"no stock is kept in Durban and Cape Town"* is clearly contradicted by PKF's own audit working papers elsewhere in their audit files. PKF's subsequent stock costing exercise identified stock in Durban and Cape

Town. In PKF's working papers regarding the stock costing and net realisable value testing reference is made to stock at Durban and Cape Town (see Exhibit A, Table 5 p 730). PKF also conducted interval sampling tests, tests for materiality and stock costing at various locations including KZN and Cape Town (see Exhibit A pp 807 and 808). Furthermore, the summary of the opening trial balance in PKF's working papers shows stock at Head Office, Midrand, Cape Town and Durban for the 2007 and 2008 financial years (see Exhibit A, Table 6 p 731).

[240] What is abundantly clear from the audit working papers of PKF is that the only stock count conducted was at TCM's Midrand branch. Stock at other locations appears not to have been counted by PKF, and not included in the final inventory balance in February 2008.

[241] Geel expressed the view that the low levels of inventory values in the 2008 to 2012 financial statements are not credible, especially given that TCM has 5 main branches, a head office in Midrand and offices in Bloemfontein, Cape Town and Durban. It further has a further 37 satellite branches country-wide, which presumably hold inventory.

/R11.2 MILLION STOCK ...

R11.2 MILLION STOCK WRITE-OFF

[242] During Geel's review of PKF's audit working papers and the management accounts of TCM, he identified an inventory write-off of R11.2 million. A journal entry had been passed which had the effect of reducing inventory from the management accounts balance of R18 328 687.05 to R7 107 353, as reflected in the 2008 financial statements. PKF's stock analytical review reflecting the composition of R18 328 687.05 is summarised in Table 6 of Exhibit A p 731. And the inventory balance of R7 107 353 is contained in the annual financial statements for the year ended 2008 (Exhibit D1 p 179).

[243] The stock write-off of R11.2 million mainly related to the work-in-progress of approximately R6 million, and the opening balances of the stock at Durban (approximately R700 000) and Cape Town (R4.5 million). The ostensible reason for the write-off is that the auditors had been told by management that the stock does not exist. This is apparent from the following note made under the schedule dealing with stock costing in the audit working papers (see Exhibit A p 811).

"The other stock accounts amounting to R11,2 million are opening balances for which there is no existing stock according to management."

[244] Geel rightly approached the stock write-off with a great deal of scepticism. There is no audit working paper evidence that PKF had investigated the explanation provided by management for the write-off. From the PKF comments on the audit

file referred to above, it appears that PKF merely relied on the representations from management that there was no existing stock. Management's assertion that there was no stock at these locations was not tested or verified, as no stock counts were performed at these locations or any other location except for the Midrand location.

[245] The statement that there was no stock at these locations is contradicted by PKF's own working papers which reflect considerable stock on hand in Cape Town and Durban (see Tables 6 and B4 of Exhibit A, pp 731 and 809). PKF's working papers show that they conduct stock costing and Net Realisable Value (NRV) testing at various locations, including Durban and Cape Town (see In B3.1 and B3.2 of Exhibit A pp 807 and 808).

[246] It is extremely improbable that TCM would not have held stock at its Durban and Cape Town branches. If, as appears from the aforementioned note in the PKF's audit working papers, someone in TCM's management had instructed them that such stock did not exist, such instruction could only have been made with the object of deliberately suppressing the value of TCM's inventory holdings.

[247] The write-off is inconsistent with TCM's accounting treatment in prior years. Geel pointed out that it does not make sense that the value of stock should have declined from approximately R16.5 million, as at 28 February 2007, to

approximately R7 million at 28 February 2008, particularly given that revenue had increased over the same period.

[248]In cross-examination it was put to Geel that at a meeting of experts held on 14 May 2015 he had conceded that the stock adjustment had been validly made. This concession is said to be contained in the following clause of the minutes of the meeting of accounting experts (Exhibit G):

“Geel accepts and understands that the journal entry on page 810 removes the closing inventory balances at 28 February 2007 financial year (i.e. opening inventory balances at 1 March 2007 for the 2008 financial year) for the relevant accounts, and this was understood and is confirmed as reflected on Exhibit A page 732 the 3rd paragraph. This journal is not disputed.”

[249]Geel responded that the adjustment on its own is correct but it is only one element of the year-end process and did not give consideration to fully reflecting closing stock as part of the year-end balances. The journal entry writing-off all of the inventory opening balances was the “*one side of the coin*”, and no final journal entry for the ‘other side of the coin’, being the reinstatement of the closing balance was made. By way of example, specifically relating to work-in-progress, Geel highlighted that at least R3.1 million should have been considered and brought into the annual financial statements at 28 February 2008, as work-in-progress, but that no such amount was reflected. The R3.1 million is reflected in the TCM summary report for 2008 as shown on Exhibit A (p 753).

[250] The defendants' counsel also sought to criticise Geel on the basis that he had relied on the stock summary and spares valuation reports which Diez had admitted were inaccurate. The inaccuracy or otherwise of these documents is irrelevant. What matters is the overwhelming evidence that there was stock on hand in Cape Town and Durban that appears not have been taken into account during the stocktaking in 2008.

[251] The defendants contend that in respect of the R11.2 million write-off there was no case for the defendants to answer. More than that – it was a vexatious waste of resources and should attract a punitive order as to costs. I do not think so. *Ex facie* TCM's management accounts and PKF'S audit working papers, there was an R11.2 million adjustment that needed to be explained, and Geel was right to raise it as an issue.

[252] Geel's evidence concerning the stock write-off called for an answer from the defendants. I have already referred to defendants' counsel's written submissions in support of the separation application to the effect that Cornelli would give evidence in order to explain the reasons for the write-off. Of particular significance is the following statement made by counsel for the defendants:

“96 Cornelli will testify that there was no understatement of inventory as alleged in paragraph 15 of the particulars of claim. It was an accounting

adjustment which satisfied the auditors who has consistently given TCM unqualified annual financial statements.”

[253] Cornelli should have entered the witness-box in order to explain the reasons for the stock write-off. His failure to do so serves to reinforce the views expressed by Geel. It is reasonable to suppose that Cornelli would not have been able to credibly explain the reasons for the write-off.

[254] As there is no discernable or probable reason for the R11.2 million write-off, the inescapable conclusion is that the write-off was unjustified and made with the deliberate intention of suppressing the inventory balance in the 2008 annual financial statement.

[255] It was argued on behalf of the defendants that Geel's opinions ought to be rejected as the facts upon which they are founded have not been proven or common cause. There is no merit in that submission. Geel's opinions are based on TCM's own financial records, namely its annual financial statements, the general ledger, the journal and stock records. These documents were generated by TCM or by the auditors on its behalf and are clearly admissible against TCM.

[256] A further argument advanced was that the defendants' auditors, PKF, should have been called in order to prove the audit working papers as these documents did

not belong to TCM, were not in its possession and were procured by means of a subpoena *duces tecum*. This contention is also without merit. Much depends upon the probative purpose for which the audit working papers were relied on. If the purpose was to prove or establish the accuracy of the working papers, then the authors of the audit working papers ought to have been called as witnesses. But Geel did not use the audit working papers and notes for such purpose. They were used to in large measure to test the observations that Geel had independently reached after analysis of TCM's annual financial statements; management accounts; general ledger, journal, stock-sheets and spares valuation reports. To the extent that certain notes purportedly made by the auditors in the working papers - such as for example the notes concerning the note concerning stock-costing contained in Exhibit A p 811 - may constitute hearsay, such hearsay is admissible in terms of s 3 of the Law of Evidence Amendment Act, 45 of 1988. I am of the opinion that having regard to the facts listed in the aforesaid section of the Act, such evidence should be admitted in the interests of justice.

[257] The defendants further argued that no reliance could be placed on Geel's evidence concerning maintenance spares as Diez had conceded that the spares valuation reports were inaccurate. There is similarly no merit in this submission. Geel did not rely on these reports in order to establish their accuracy or the truth of their contents, but rather to show that at any given time TCM was in possession of substantial quantities of maintenance spares. That TCM in fact held such spare parts is evident from the 2013 financial statements which for the first time treated them as fixed assets. The carrying value at 28 February 2013 of maintenance spare parts was R6 696 541.

[258] To sum up, therefore, if regard be had to the low average days of inventory on hand; TCM's accounting treatment in respect of maintenance spares; the failure to account for work-in-progress; the absence of proper stocktaking and the unjustified stock write-off R11.2 million, it is clear that the inventory values in the 2008 to 2012 annual financial statements have been materially understated. This has contributed to an understatement of TCM's profits and probably to a devaluation of its asset value.

[259] Given the absence of countervailing evidence from the defendants, it is reasonable to conclude that the undervaluation of inventory was deliberately made with the ulterior purpose of suppressing the true value of the plaintiffs' shares in TCM. I am fortified in this conclusion by the fact that the downward trend of the value of inventory reflected in the 2008 to 2012 financial statements commenced at about the same time that fundamental difficulties arose between De Sousa and Cornelli.

EBITDA

[260] The EBITDA complaint is to be found in paragraph 15A of the particulars of claim. In essence, what is alleged in these paragraphs is that from 2007 Cornelli has conducted and continues to conduct the business of TCM in such a manner

that that the operating profit available to shareholders after all its expenses have been discharged, has been drastically reduced. This has resulted in a reduction of the dividends paid to shareholders and has negatively impacted on the value of TCM shares.

[261] "EBITDA" is an acronym used to represent the earnings of a company before interest, tax, depreciation and amortisation. It is a measure of the profitability of an entity and is often used as a prime marker in assessing or establishing the commercial value of any business conducting activities for profit. It is also a measure of a company's operating performance.

[262] Geel explained that the EBITDA number or value can be multiplied by an EBITDA multiple to establish a value approximating 'Enterprise Value' (EV). EBITDA is considered the most appropriate benchmark to which to apply a multiple to approximate an EV. This is because EBITDA ignores the financing structure of a business and the cost thereof. It also ignores taxes and non-cash items such as depreciation and amortisation. The exclusion of these from EBITDA allows for EBITDA to be a better comparison of companies which may have different financing structures, tax positions and asset utilisation than other measures, such as earnings after tax.

[263] Geel analysed the historical trends in TCM's EBITDA for the period 2008 to 2013. The product of this analysis is reflected in Tables 10 and 16 of Exhibit A (pp 766 and 767). The information contained in these tables was derived from the operating results of TCM (the company and not the TCM Group) as reflected in its audited financial statements for the years ended 28 February 2006 to 28 February 2013.

[264] Table 10 shows that in 2008, EBITDA (before dividends) was R36 803 694, whereas in 2009 it dropped substantially to R17 762 331. It remained flat for the 2010 and 2011 years and rose minimally to R20 369 999. The EBITDA percentage for 2008 was 6%, but dropped to 3% in 2009, and declined steadily thereafter. In 2011 it was 2%, and in 2012 rose minimally to 2.6%.

[265] In 2008 the profit before tax was R42 518 019 but in 2009 dropped significantly to R25 838 548. In 2010, it rose to R34 247 164, then dropped to R27 037 149 in 2011, and dropped even further in 2012, to R22 682 811. The percentage profit before tax dropped from 7% in 2008 to 4% for 2009, 2010, 2011, and 3% in 2012.

[266] A significant feature pointed out by Geel is that despite the dramatic decrease in the profit before tax the dividends paid to shareholders increased significantly. In 2008 the dividends paid amounted to R10 000 000. For 2009, 2010 and 2011 it was R15 000 000 and in 2012 rose to R16 000 000. All of this, in my view, suggests either that the profit before tax as reflected in the annual financial

statements of TCM has been deliberately suppressed or understated. And, if not, that operating expenses have been inefficiently managed and unacceptably high dividends have been paid.

[267] Revenue, as depicted in Table 10, shows the following trends. There was a growth in revenue of 19% and 56% in 2007 and 2008 respectively, an increase by 15% from 2008 to 2009. This remained flat from 2009 to 2010, and increased by 7% from 2010 to 2011. The specific figures are the following. Revenue rose from R318 161 745 in 2006 to R379 766 587 in 2007. In 2008 it was R591 317 419. In 2009, R67 920 728. This remained approximately the same in 2010. In 2011 it rose to R728 987 538, and in 2012 to R774 566 940.

[268] Geel also conducted an analysis of the trends in the gross profit of TCM for the years 2006 to 2012. These are reflected in Table 3 (Exhibit A p 747). According to Geel TCM achieved gross profit margins of 30% and 31% in 2006 and 2007 respectively, and then 26% and 25% in the 2008 and 2009 financial years. He also testified that as a consequence of the reduction in inventory from 2007 (R16.5 million) to 2008 (R7.1 million), and a further decrease to R5.4 million in 2009, the gross profit was suppressed, as was the profitability of TCM.

[269] It is clearly evident from Tables 3 and 10 and the financial statements that underlie them that despite the substantial increase in revenue during the period 2006 to 2012, there was little change in TCM's gross profit percentages. From an accounting point of view the understatement of inventory would have increased the cost of sales, with a resultant reduction in the gross profit of TCM.

[270] Table 16 (2013) (Exhibit A p 767) is an updated schedule reflecting the operating results for TCM, as they appear from the audited financial statements for the years ended 28 February 2011 to 2013. This table shows that EBITDA (before dividends) in 2013 has grown by 113% to a value of R42.5 million. In 2012, it was R19.9 million. According to Geel, whose opinion is supported by Professor Wainer, the significant increase in EBITDA is entirely due to an increase in the total depreciation expense of approximately R20 million. This occurred as a result of the TCM's change of accounting policy in respect of maintenance spare parts to which I have previously referred.

[271] Geel attributes the increase in gross profit margin to 33% in 2013 from 30% in 2012 to the capitalisation and subsequent depreciation of maintenance spares inventory as PPE in 2013. The cost of sales therefore decreased and depreciation expenses increased in the 2013 year. The depreciation related to maintenance spares is 2% of revenue. The depreciation (expense below the gross profit line) has historically been included in cost of sales (above the line). If this had been accounted for on the same basis as it had been in the past, then the gross profit percentage for TCM would have been 30% in 2013.

[272] Geel also identified a number of categories on which there had been significant increases in total operating expenses in TCM over the financial years 2008 to 2012. Operating expenses were 20% of revenue at 2008 and increased to 28% of revenue in 2012. This was largely due to the payment of increased management fees, directors' emoluments and staff costs.

[273] Geel pointed out that until 2008 management fees grew in line with revenue but after that date these fees grew at a rate in excess of revenue growth year on year until 2011. Until 2009, staff costs and directors' emoluments as a percentage of revenue was 14% of revenue. Subsequently, these costs increased to 17%, 18% and 19% in the 2010, 2011 and 2012 financial years (Tables 10 and 16 – Exhibit A pp 766 and 767).

[274] Geel prepared an analysis of directors' emoluments and dividends paid by TCM during the financial years 2010 to 2013 (Tables 18 and 24 – Exhibit A pp 781 and 782). These tables were derived from the annual financial statements and management accounts of TCM. The tables reflect that all of the directors, except De Souza, received directors' emoluments for the 2010 to 2012 financial years. All of the directors also received commission and performance bonuses. De Sousa has only received dividends for these years.

[275] Table 18 also reflects a breakdown of the emoluments and other benefits paid to Hassim. He, like all other directors, received a salary and thirteenth cheque, as well as commission and performance bonuses. He also received what is termed a "*TCM Supplies Division split*"; in 2010, this was R980 259; in 2011, R2 886 866 and in 2012, R1 648 014. He also received retention payments during these years. In 2010, the retention payment was R2 500 000. The same amount was paid in each of 2011 and 2012.

[276] Table 24 (Exhibit A p 782) shows that emoluments paid to Hassim increased significantly during the period 2011 to 2013. Hassim's total emoluments in 2011 amounted to R8 466 571; in 2012, R7 111 245, and in 2013, R445 140. There is also a significant discrepancy between the emoluments paid to Cornelli and Hassim. In 2011, the total emoluments paid to Hassim purportedly amounted to R8 466 571, whereas Cornelli received emoluments totalling R3 506 016. The emoluments paid to Hassim were more than double those paid to Cornelli. For the ensuing year, that is, 2012, the position remained the same. But in 2013, the emoluments paid to Hassim decreased to R4 445 140.

[277] The manner in which the business of the Supplies Division has been conducted has also contributed to a reduction in TCM's EBITDA. The Supplies Division has been permitted to operate as if it was a separate entity owned by Frank and Fabio Cornelli and all profits generated by it accrue solely to them and, since June 2005, also to Hassim. All of its profits have been diverted to TCM Printing Solutions (Pty) Limited, leaving a profit before tax of nought per cent. No revenue or benefit has accrued to TCM as a result of the Supplies Division being run and accounted for as a separate entity. Substantial bonuses have been paid to the Cornelli brothers, Frank and Fabio, and Hassim, which have been expensed, thereby reducing the Supplies Division's net profit. TCM has been deprived of the profits generated by the Supplies Division and this has materially contributed to a reduction in TCM's EBITDA.

[278] Geel referred the Court to Table 30 (2013) (Annexure A p 790). This table deals with the growth in revenue and operating expenses for period 2008 to 2013.

This table shows that the increase in total operating costs has been higher than the growth in revenue in each year subsequent to 2008. This is illustrated by the negative differential between the growth in revenue and the growth in total operating costs expenses. Geel is of the view that if this continues in the future, that is, where operating costs and total staff costs are higher than the increase in revenue, the prospect of a dividend being declared will be reduced and shareholders will not be able to extract value from the business.

[279] Geel also undertook a comparison of TCM with other listed companies in what he considered to be the market in which TCM operates. These were Datatec Limited (Datatec), Datacentrix Holdings Limited (Datacentrix) and Business Connexion Group Limited (BCX).

[280] He recognised that there had been a global recession which impacted upon the IT industry, and that all the comparative companies referred to experienced a decline in revenue in the 2010 financial year. Although the industry experienced operating difficulties at around the time of the recession (March 2009), the comparative companies have subsequently recovered and are all trading at similar levels to or higher than before, thereby improving shareholder value. These companies have shown increased gross profit margins and significant increases in EBITDA. This is contrary to the performance of TCM during the same period.

[281] Whereas TCM had consistently outperformed the comparable companies pre-2008, this was no longer the case after that date and TCM now significantly lags and underperforms against the comparable companies.

[282] Geel identified substantial increases in the EBITDA of the three comparative companies which is reflected in the movement in their share prices during the period 2008 to 2012. This was a matter of concern as the comparative companies faced the same macro-economic factors and difficulties in the market. Geel observed that the trends and budgetary constraints in relation to the comparative companies are consistent with well-managed companies, but the same cannot be said for TCM in the period post-2008.

[283] During a cross-examination, counsel for the defendants sought to discredit Geel's choice of comparable companies. The following are, in essence, the criticisms levelled at Geel's choice of companies.

[284] Geel claimed that he had used Datatec, Datacentrix and BCX because, in his view, they had similar business models and operations to TCM but this was incorrect as he had no knowledge of either their business models or operation. Geel asserted that TCM and these companies have similar products, similar customer bases, similar risks and similar business cycles. But he knew nothing about any of these aspects. Each of the distinguishing facts was drawn from the annual reports of each of these companies, which are in the trial bundle.

[285] It was submitted that there were clear distinguishing features between TCM and the three companies: For example, Datatec was a public company listed on the Johannesburg Securities Exchange, whereas TCM was a private company. Datatec is an investment holding company with about a hundred subsidiaries. TCM is an operating company whereas Datatec is an investment holding company. TCM operates virtually exclusively in South Africa, whereas Datatec has international operations. 95% of Datatec's revenue was generated in the United States and Europe.

[286] Datacentrix was also distinguishable from TCM. Datacentrix is a holding company and does not trade; its revenue is zero. TCM is an operating company. Datacentrix is a mainly services company rather an inventory company.

[287] Defendants' counsel also pointed to other distinguishing features in relation to BCX and TCM but it is unnecessary for present purposes to refer to each of these features.

[288] It was submitted that Geel did not present a balanced view of the facts relating to the comparative companies and that in certain respects he had been less than candid with the Court but this was disputed. He confirmed that he does not profess to be an expert in IT companies or what expenses an IT company should

normally incur, or what sort of staff numbers an IT company should employ or what salaries they should receive or what are the correct numbers for staff costs and directors' emoluments. He also confirmed that other than by comparison with the three comparative companies he would not know what sort of inventory an IT company should carry.

[289] Whilst there may be some force in the arguments advanced by the defendants, it is unnecessary for present purposes to decide whether in fact Datatec, BCX and Datacentrix are appropriate comparative companies. A finding one way or the other does not detract from Geel's evidence concerning TCM's EBITDA. Based on TCM's own annual financial statements, management accounts and other financial documents, Geel's convincingly demonstrated that there had been an understatement of inventory with a significant increase in operating expenses of TCM during the period 2008 to 2012 which led to a significant reduction in EBITDA during that period. The comparison with the EBITDA of Datatec, Datacentrix and BC was only intended to reinforce this view.

[290] The evidence incontrovertibly shows that TCM's EBITDA decreased from R36.8 million in 2008, to an EBITDA of just R22.5 million in 2013. This dramatic reduction in EBITDA is an indication that TCM has not been run profitably; that the profits available to shareholders have decreased significantly and that shareholder value has been reduced. The low EBITDA trends will undoubtedly influence the

price that a third party would be willing to pay in order to purchase the plain/tiffs' shares in TCM.

[291] Geel's conclusion in respect of EBITDA is expressed as follows in his expert summary (Exhibit A pp 789 to 790):

“3.9.1 From the analysis and review of the results reflected in the audited AFS, although the revenue of TCM has shown an increase over the relevant period, the share of the profits available to shareholders, including De Sousa and Diez, has decreased dramatically (EBITDA has decreased from R36.8 million in 2008 to an EBITDA of just R22.5 million in 2013) by reason of the significant increase in total staff costs (including directors' emoluments), management fees since 2008 and other operating expenses, indicating a degree of inefficient management of the operating expenses of TCM. This is contrary to the performance of the other CoCos over the same period where they have shown growth.

3.9.2 As can be seen from the analysis above and as shown in Table 30 below, although the revenue of TCM has shown an increase over the period from 2008 to 2013, the increase in total operating costs has been higher than the growth in revenue in each year subsequent to 2008. This is illustrated by the negative differential between the growth in revenue and the growth in total operating expenses.

3.9.3 Should this conduct continue in the future i.e. where the operating costs (and most significantly the total staff costs and the management fees) increase at a rate substantially higher than the increase in

revenue, the prospect of even a dividend being declared will be even more remote and the shareholders will not be able to extract value from the business. Shareholder value could only be enhanced by improved management control of costs etc. to turn around the business and prevent a continued erosion of the shareholder value of TCM, as has been the case over the last five years.”

[292] Save for Geel’s reference to the CoCos in 3.9.1 above I have no hesitation in accepting his aforesaid conclusion and the opinions expressed by him. His opinions are well-reasoned and based on facts and data contained in TCM’s auditors’ working papers and TCM’s annual financial statements from 2007 through until 2014. See in this regard *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MbH* 1976 (3) SA 352 (A) at 371G. Most importantly, Geel’s evidence concerning TCM’s EBITDA was not controverted by the defendants.

[293] For these reasons it is my conclusion that TCM’s low EBITDA will have negatively impacted upon the value of the plaintiffs’ shares.

GEEL’S EVIDENCE

[294] During his cross-examination Geel was subjected to an unreasonable and unrelenting attack on his credibility and competency to give evidence as an expert. His cross-examination, which endured for some sixteen days, was detailed and searching. But, regrettably, was at times insulting and defamatory.

[295] Geel was an impressive and credible witness. His expert testimony was helpful and of immeasurable assistance to the Court. Contrary to what was argued by the defendants, his evidence in regard to the material aspects of this case cannot be criticised. When reliance was placed by him on evidence imparted to him by third parties or from documents, he made this plain and readily and fairly made concessions when they were called for. For these reasons I unhesitatingly accept his opinions and conclusions.

[296] In attempting to discredit Geel's evidence, counsel for the defendants sought to draw parallels from the criticism that the Supreme Court of Appeal had directed at the expert witness in *Pricewaterhousecoopers Inc v National Potato Co-Operative Limited* [2015] 2 All SA 403 (SCA). In *Pricewaterhouse*, Wallis JA, writing for the court, identified the following five complaints against the expert witness.

“... First, he laid no foundation for being regarded as an expert, save his qualifications as an accountant who had not been in practice for many years and had limited practical experience. Second, his opinions were based largely upon the hearsay evidence he had culled from various documents and were not founded on proven facts. Third, his evidence, fairly viewed, was nothing more than that of an advocate advancing the case of his client, the NPC. Fourth, it was not objective but was directed at justifying the conclusions he had formed. He was unwilling to defer to the experience of those with far greater expertise in the matters under consideration than he. Fifth, it must be borne in mind that he not only undertook the original investigation leading to the claim, but was intimately involved in the gathering of evidence and the pleaded formulation of the claim. ...”

[297] It was submitted that, as had occurred in *Pricewaterhouse*, Geel had laid no foundation for being regarded as an expert in auditing and accounting matters, save for his qualifications as an accountant. He had not been in practice for many years and had limited practical experience. He conceded that he had not been involved in an audit since 1994 and that he had never had responsibility for the conduct of an audit. Notwithstanding this, Geel did not hesitate to criticise TCM's auditors for the manner in which they performed their audit, and TCM for the way it accounted for its maintenance spare parts and the manner in which it ran its business.

[298] The criticisms levelled at Geel are wholly unjustified. Geel's expertise is evident from the following facts. He joined KPMG, a prominent firm of accountants, in 1988 and qualified as a chartered accountant in 1990. From 1991 to 1993 he was seconded to KPMG, London, in the audit practice where he performed audits to the point where he became a senior manager who was made a partner of KPMG in 1996 and was appointed as the managing director of the corporate finance business with effect from 1 March 2005, and of the Transactions and Restructuring Division in September 2008.

[299] Geel is primarily concerned with mergers and acquisitions and valuations activity and is involved in all of the sales processes, acquisition and disposal mandates including negotiation support, business valuations and the structuring of transactions and deal closure. He is a director in both KPMG Inc, which is the audit business, and of KPMG Services, which is the advisory side. As appears from his

Curriculum Vitae (Notices Bundle, p 224) he has been involved in the disposal of numerous businesses involving both listed and private companies. He has conducted numerous financial reviews and working capital reviews. All of this work, although not audit focused, requires him to have an in-depth understanding of financial statements and their preparation in accordance with IFRS. The evidence that he gave did not require him to be a technical auditing expert or to express highly technical auditing opinions. His evidence dealt primarily with inventory, trends and inventory subsequent to 2008 and inventory on hand. It also dealt with EBITDA between 2006 and 2013 of both TCM and listed comparable companies. None of these matters required him to express a technical audit opinion. His evidence in relation to inventory and EBITDA was based on TCM's own annual financial statements and management accounts. And the views that he expressed on the trends to which he referred are self-evident to anyone who is versed in fundamental accounting principles. Most significantly, the views that he expressed in regard to the accounting treatment of maintenance spare parts, was corroborated by Professor Wainer. His evidence was not controversial or challenged by the defendants on any credible basis.

[300] It was further submitted that Geel lacked the independence and neutrality required of an expert. Reliance in this regard was placed on two English cases, referred to with approval in *PriceWaterhouse*⁷: *The Ikarian Reefer*⁸ and *Elliot C Wightman et al v Estate of Peter N Widdrington*,⁹ both of which dealt in extensive

⁷ *Pricewaterhouse* paras 96 to 99.

⁸ *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 [QB] Con Ct] at 81-82.

⁹ *Elliot C Wightman et al v Estate of Peter N Widdrington* 2014 CanLII 341 (SCC).

detail with the duties of an expert witness. Geel's alleged lack of objectivity was premised on the following: He was the person who devised the claim; he was intimately involved in the gathering of evidence and the pleadings' formulation of the claim; he effectively became the advocate on the claim's merits and disregarded and discounted any facts inconsistent with his own theories and conclusions. He was not objective and his evidence was directed at justifying the conclusions he had formed. His opinions were expressed without any factual basis having been established by way of admissible evidence, and he gave evidence in areas where he lacked expertise.

[301] The following factors are said to impair Geel's independence as an expert. He was involved in the matter long before either the 252 application or the summons was issued; he had performed valuations during 2008 and is the author of the EBITDA claim; he was also the author of the R11.2 million adjustment or understatement complaint; he was directly involved in the pleaded formulation of the claim and in the gathering of evidence. The comparative company exercise was his idea, as was the choice of the three companies.

[302] The fact that Geel was involved in the manner alleged does not detract from the probative value of his opinions. Initially, his mandate was to act as a valuer of De Souza's interest. But later, when the litigation commenced, his mandate changed and he was required to act as a forensic expert. Geel's evidence is essentially limited to the question of the trends in TCM's inventory from 2008 to 2013, inventory on hand and maintenance spare parts; the trends in TCM's

EBITDA between 2006 and 2013, and the trends in the profitability of the Supplies Division from 2006 and 2013.

[303] The fact that he is the author of the EBITDA claim and that during the course of his analysis of TCM's financial documentation, he discovered that there was a R11.2 million adjustment or understatement, does not impair his independence as an expert. Nor does the fact that he was involved in the pleaded formulation of the claim and in gathering of the relevant evidence. It is reasonably to be expected of a forensic expert who is approached in regard to pending litigation to perform the tasks that Geel had undertaken. I am satisfied that none of the criticisms levelled by the defendants bears scrutiny or is justifiable. I am fortified in this conclusion by the fact that the defendants chose not to lead countervailing evidence in order to rebut Geel's conclusions.

[304] It was further argued that Geel had a personal financial interest in the case as he was working on a contingency fee in the litigation. The quantum of the fee payable was in part based on the value of the shares forming the subject-matter of the claim. It was submitted that *Pricewaterhouse*, properly read, makes it plain that the proposition of a contingency fee is inimical to the independence of an expert and that, accordingly, the Court should rule out any reliance on his testimony.

[305] In the context of the present case, I am satisfied that the fact that Geel acted on a contingency basis has in no way compromised his independence as an expert. Geel explained that he initially started his assignment for De Souza as a valuator but that once the litigation commenced his mandate changed. He issued a final

valuation report in November 2008. Thereafter, his engagement changed when he was requested by De Souza to assist him in relation to the present action. The engagement letters embodying the contingency fee were produced in evidence. In terms of KPMG's initial engagement Geel did not act on a contingency basis. The introduction of a contingency fee element was only introduced on or about 26 January 2009. Geel explained that at that stage he was aware that the plaintiffs had incurred substantial legal costs and expenses; they were not receiving any income and were funding the litigation from the dividend that was paid to them. If the plaintiffs were to pay KPMG's fee on a purely time basis this would place undue financial strain on the plaintiffs. He indicated that he was prepared to take some risk but at the same time be paid on an hourly basis, hence the change in mandate and the introduction of a contingency fee.

[306] Geel's reasons for introducing a contingency fee element are perfectly understandable. The evidence shows that the plaintiffs have had to incur many millions of rands in order to finance the litigation in that other than dividends they have received no income from TCM. I accept that if the value of the plaintiffs' shares were the issue to be determined in the present case, then it could reasonably have been argued that Geel had a financial interest in the outcome of the litigation. But that is not the position in the present case.

[307] Another point of criticism raised by the defendants was that Geel's mandate embodied certain material restrictions. The engagement was accepted on the basis of KPMG's general terms of business. Clause 6 of the standard terms provides:

“We shall not be under any obligation in any circumstances to update any advice, report or any product of the services, oral or written, for events occurring after the advice, report or product concerned has been issued in final form, unless specifically agreed upon by mutual consent by you and us in the body of the Engagement Letter.”

[308] In terms of clause 9 of the standard terms and conditions it was provided:

“We shall not seek to establish the reliability of information received from you or any other information source.”

The clause continues as follows:

“Accordingly we assume no responsibility representations with respect to the accuracy, reliability or completeness of any information provided to us.”

[309] In my view, the fact that the KPMG mandate embodied the abovementioned restrictions did not reduce the evidential weight to be attached to Geel's opinions. His opinions are primarily based on TCM's annual financial statements, management accounts and other financial documents. The annual financial statements were intended to represent to the outside world the true financial position of TCM during the financial years in question. It certainly was not required of Geel to test the veracity or accuracy of the information stated in the financial statements. Nor was it required of Geel to verify the accuracy of the management accounts and other financial documents produced by TCM and its board.

[310] The following factors operate to strengthen the evidence and opinions expressed by Geel. A great deal of his evidence was not controversial or challenged on any credible basis. The defendants' expert accountant, Greyling, who it was reasonably anticipated would give evidence was not called as a witness. Geel's evidence is corroborated by the testimony of Professor Wainer. His evidence was not challenged in material respects or on any serious or credible basis.

USE OF COMPANY FUNDS TO RESIST THE ACTION

[311] This complaint is set out in paragraph 18 of the particulars of claim.

[312] There is no dispute that since the date of inception of the litigation, TCM has borne all of the defendants' legal costs; this includes the costs of the 252 application and the present action. The plaintiffs assert that this is a misuse of TCM's funds.

[313] An extensive exposition of the relevant legal principles is to be found in Blackman.¹⁰ A summary of what is stated is the following. It is a general principle of company law that the company's money should not be expended on disputes between the shareholders. The use of the company's funds by the majority in defending an application or action is a misuse of such funds because it confers a

¹⁰ Blackman *et al* *Commentary on the Companies Act* (Vol 2) p 9-54-2 to 9-56).

distinct financial advantage on the majority, and prejudices and discriminates against the minority shareholders. But this is not necessarily always the case. Company funds may be used where it is necessary or expedient to protect the company's interests. Thus, expenditure of company funds may be justifiable in order to resist an order that the company buy back the shares of a member or to pay a dividend.

[314]In *Re a company (No 1126) of 1992* [1994] 2 BCLC 146 at 156), Lindsay J stated that there is a *heavy onus* on a company to satisfy the Court with evidence of the necessity or expediency to have incurred such expenditure. The majority must show that such costs were properly payable out of such company's assets. As was amusingly pointed out by Lindsay J, there is "*a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency*".

[315]The defendants' legal representatives contended that it was permissible for TCM to fund the litigation by virtue of it having been cited as the first defendant and relief being sought against it. This contention is misplaced. TCM is in effect a nominal defendant as the true disputing parties are the shareholders. TCM only defends the action by virtue of Cornelli and the remaining defendants having caused it to do so.

[316]It was also contended that TCM is not a nominal defendant as a judgment in favour of the plaintiffs would impact on TCM's balance sheet; its liquidity; creditors, and its ability to obtain credit in order to carry on its business. I do not agree. There was a heavy onus upon the defendants to have established these facts by

means of evidence but such evidence was not forthcoming. The failure of the defendants to afford an explanation leads to the conclusion that this is not a situation where it was necessary or expedient for TCM to expend money in order to protect its interests. I find, therefore, that the expenditure of such moneys constitutes a misuse of TCM's funds.

[317] The plaintiffs have expended approximately R30 million of their own funds on legal costs. In the circumstances, the use by the second to fifth defendants of TCM's funds to resist the plaintiffs' claim is in itself a ground of unfair prejudice under s 252 of the Act.

[318] Should an order for the purchase of the plaintiffs' shares be granted, in arriving at a value and a fair price for the shares, an adjustment ought to be made for the fact that TCM has borne legal costs in respect of the action and the prior 252 application.

[319] I am satisfied therefore that the plaintiffs have proven the allegations made in paragraph 18 of the particulars of claim.

THE RETENTION AGREEMENTS

[320] The plaintiffs allege in paragraph 13.4 of the particulars of claim that Cornelli procured that a retention agreement (which was a scam) was concluded between

the company and Hassim which unduly favoured Hassim's financial position at the expense of TCM and the other shareholders.

[321] It is common cause that a series of nine retention agreements were entered into between TCM and Hassim during the period 1 October 2008 to 18 July 2012. Copies of these are attached to the defendants' answer to the plaintiffs' request for further particulars dated 20 August 2012. Each agreement which is signed by Cornelli is labelled "CEO RETENTION PROGRAM", and provides that the program is to be "*in strict confidence*".

[322] In terms of each retention agreement Hassim was to receive a 'Cash Retention Payment' of R1.25 million.

[323] De Sousa contends that the retention agreements were simulated transactions in that their true purpose was not to retain Hassim's services but to assist him to pay for his shares.

[324] This Court is entitled to know whether the parties actually intended that the retention agreements should have effect between them according to their tenor. As was stated by Wessels CJ in *Kilburn v Estate Kilburn* 1931 AD 501 at 507:

"It is a well-known principle of our law that Courts of Law will not be deceived by the form of the transaction: it will rend aside the veil in which the transaction is wrapped and examine its true nature and substance. *Plus valeat quod agitur quam simulate concipitur.*"

[325] There is every indication that the retention agreements are indeed simulated transactions.

[326] The agreements must be viewed in the context of the previous unsuccessful attempts made by Cornelli to assist Hassim in order to pay for his shares all of which were resisted by De Sousa. Initially, Cornelli sought to persuade all the shareholders to reduce the purchase price of Hassim's shares by 20%; he then decided that TCM finance a loan to the Trust and/or Hassim but that was opposed by De Sousa on the basis that as the law stood at that stage such loan would have constituted a contravention of s 38 of the Act. He thereupon decided to conclude the suite of retention agreements.

[327] There was obviously no need to enter into any retention agreement in order to guard against the loss of Hassim's services. He never expressed a desire to leave TCM and was generously remunerated. He was a shareholder, executive director and employee who was remunerated by means of a substantial salary, dividends and bonuses. He also received, and continues to receive, a substantial portion of the profits generated by the Supplies Division. Geel conducted an analysis of the directors' emoluments and dividends paid by TCM for the period 2010 to 2013 (Exhibit A, Tables 18 and 24 pp 781 and 782). These tables reflect that Hassim received a salary and thirteenth cheque; a commission and performance bonus; a share of the profits of the TCM Supplies Division referred to as "*TCM Supplies Division Split*", and a retention payment. Geel testified that Hassim's income in 2011 was some R8.5 million, which is comparable to top directors' remuneration and listed companies. Without the retention payment it would come to some

R6 million. This, in my view, would have been more than sufficient to retain his services.

[328] Cornelli should have given evidence in order to explain the true reason and commercial purpose of the retention agreements. As was stated by Watermeyer CJ in *Elgin Fireclays Limited v Webb* (1947 (4) SA 744 (A) at 750), his failure to give evidence "*leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him*". In the circumstances, an adverse inference ought to be drawn against him.

[329] I accordingly find that the retention agreements are indeed simulated, and that their true commercial purpose was to assist Hassim to pay for his shares. The entering into of such agreements unduly favoured Hassim and/or the Trust's financial position at the expense of TCM and the other shareholders thereof. The entering into the so-called retention agreements constitutes further evidence of a lack of probity in the manner in which the affairs of TCM have been conducted.

CONCLUSION

[338] On a proper conspectus of the evidence it is readily evident that the affairs of TCM have been and continue to be conducted in a manner that is unfairly prejudicial, unjust and/or inequitable to the plaintiffs as members of TCM.

[331] In their treatment of the plaintiffs, Cornelli, and those acting under his supervision, have displayed what Lord Cooper in *Elder v Elder* described as –

“a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely”.

[332] De Sousa and Diez, who had a right or legitimate expectation to do so, have been excluded from participating in the management of TCM but have been unable to dispose of their shares at a fair value. Cornelli has refused to engage in *bona fide* negotiations with the aim of permitting the plaintiffs to dispose of their shares. This is unduly prejudicial to them as they remain passive shareholders in the company which appears to be mismanaged by the majority with whom they have fallen out. It cannot reasonably be expected of the plaintiffs who have lost their employment to keep their assets locked in TCM.

[333] The following is a glaring example of a lack of probity in which TCM's affairs have been conducted. The true value of TCM is not properly reflected in its annual financial statements for the period 2008 to 2012. The evidence incontrovertibly shows that there has been a manipulation of the financial results of TCM since 2008; sales inventory has been deliberately understated; work-in-progress has not been brought into account and maintenance spares have not been properly accounted for. The R11.2 million stock write-off in 2008 has not been explained. This has had the effect of suppressing TCM's gross profit and, ultimately, its net profit and EBITDA. The probabilities are that this was deliberately done in order to

suppress share values in the event that TCM or the second to fifth defendants were compelled to purchase the plaintiffs' shares.

[334] TCM's EBITDA has decreased from R36.8 million in 2008 to R20.4 million in 2012 by reason of a significant increase in staff costs, directors' emoluments, management fees, the payment of bonuses and other operating expenses. This is indicative of an inefficient management of the operating expenses of TCM. The profits available to shareholders have decreased dramatically which has negatively impacted on the level of dividends payable to the plaintiffs. Shareholder value has been eroded. The lower EBITDA trends will negatively influence the price that the remaining shareholders or a third party would be willing to pay in order to purchase the plaintiffs' shares.

[335] There has been a deliberate misapplication of TCM's assets. The business of the Supplies Division, which is owned by TCM, has been conducted and accounted for as if it were a separate entity from TCM; all its income and profits accrue solely to Hassim and the brothers of Cornelli, Frank and Fabio. This has resulted in a loss to TCM of the business and profit derived by the Supplies Division and jeopardised shareholder value. The payment by TCM of the legal costs incurred by the second to fifth defendants to resist the present action and the 252 application also constitutes a misapplication of TCM's assets. The entering into of the simulated retention agreements with Hassim constitutes a further misapplication of TCM's assets.

[336] A particularly sinister feature is that there is an unmistakable temporal coincidence between the difficulties that arose between De Sousa and Cornelli and the sudden seeming decline in the financial fortunes of TCM as reflected in its 2008 to 2012 annual financial statements. Whilst there was a global recession that impacted on the IT industry in the 2010 financial year, this does not explain the sudden drop in TCM's EBITDA percentage, from 6% in 2008 to 3% in 2009. This is all the more inexplicable given the fact that there was a significant growth in revenue from of 19% in 2007 to 56% in 2008. It is not surprising that the defendants chose not to explain the reasons for the drop in EBITDA.

[337] In the premises, the plaintiffs are entitled to relief in terms of s 252 of the Act. The jurisdictional criteria for the grant of such relief have been satisfied (see *Louw & ors v Nel supra* para [23]). There is every reason to believe that the conduct complained of will continue and that the plaintiffs will be prejudiced by that conduct unless given relief in terms of s 252(3).

COSTS

[338] This is quintessentially a case in which costs ought to be awarded against the second to fifth defendants on a punitive scale.

[339] The following factors justify such an award.

[340] The defendants' approach to the litigation has been obstructive. They have taken every opportunity to prolong the hearing and delay the finalisation of the trial.

[341] The proceedings were punctuated by groundless objections brought by the defendants. At the outset of the trial the defendants unsuccessfully applied to separate issues and raised a question of law in the nature of an exception. This application was unheralded and took the Court and the plaintiffs by surprise. Why the exception was not brought within the time parameters provided for in the Rules of Court was not explained. A failure to except timeously will normally render a party liable for such additional costs as have been caused by such failure (see *Porter v Union Government* 1919 TPD 234; *Burroughs Machines Limited v Chenille Corporation of SA (Pty) Limited* 1964 (1) SA 669 (W) at 676); also AC Cilliers, "Law of Costs" (3 ed) 3-07).

[342] After the dismissal of the application to separate / exception, an application was brought to exclude the scope of the evidence which the plaintiffs intended to lead. This, too, was dismissed. And, at a later stage, the defendants launched an abortive application for my recusal.

[343] The cross-examination of the plaintiffs' witnesses was excessively long. As previously stated, Geel was cross-examined for approximately seventeen days. Counsel for the defendants dealt with many issues that at the end of the day are not dispositive of the case. Very little by way of a contrary version was put to Geel.

[344] On 7 August 2012, the defendants delivered a notice in terms of Rule 36(9)(a) indicating that they intended to call Mr Allan Greyling to give evidence as an expert witness at the trial. In his expert summary it was stated that he would give evidence to show that maintenance spares had been properly accounted for by TCM in terms of IFRS. The plaintiffs called Professor Wainer to give evidence in rebuttal of Greyling's opinion. But that proved unnecessary as the defendants chose not to call Greyling as a witness. In the result the plaintiffs had unnecessarily incurred the cost and expense of calling Professor Wainer.

[345] The following are examples of the defendants' obstructive behaviour. When the trial was at an advanced stage, I urged the parties to agree upon a timetable in order to limit the duration of the trial but the defendants refused to do so. As a result I was compelled to impose a timetable but the defendants did not adhere thereto.

[346] After De Sousa had been cross-examined for about eight days, defendants' senior counsel pointed out that there were a number of topics that he still wished to cover in cross-examination. I informed him that he had to complete his cross-examination within a further day and invited him to at least put to De Sousa the defendants' versions in relation to these topics. But he refused to do so.

[347] One cannot ignore the wrongful conduct of withholding the dividends declared in favour of De Sousa. Cornelli and those under his control clearly contrived a situation where the dividend instead of being paid to De Sousa, was paid into the trust account of TCM's attorney, who issued interpleader proceedings. This

conduct was calculated to delay and frustrate the plaintiffs' substantive and procedural rights. Such conduct warrants an exemplary order as to costs. There was no legal basis whatever for the dividends to be withheld from De Sousa and for interpleader proceedings to have been instituted. De Sousa, as the registered member and holder of the shares in TCM, was entitled to receive the dividend (*Société Générale de Paris supra* at 424; *Henochsberg on the Companies Act*, 71 of 2008 (p 24).

[348] In order to obtain the release of the 2014 dividend to which he was entitled, De Sousa was compelled to institute an application in terms of s 163 of the Companies Act, 71 of 2008. The launch of this application was both necessary and reasonable and the relief sought therein justified. I will accordingly order that the costs of the 163 application, which were reserved, be paid by Cornelli personally and the third to fifth defendants on the scale as between attorney and client.

[349] Cornelli has refused to engage in *bona fide* discussions or negotiations with the aim of permitting the plaintiffs to dispose of their shares at a fair value and without resort to litigation. There is no reason why a proper offer was not put prior to the onset of the litigation in order to avoid the incurrence of unnecessary legal costs. This conduct was wholly unreasonable and has prejudiced the plaintiffs who have had to incur substantial legal costs in furtherance of the litigation. Approximately R30 million has been expended by the plaintiffs in legal costs.

[350] As I have already mentioned there was a recent orchestrated attempt made by Cornelli and De Sousa's wife to derail the delivery of this judgment. I have already

dealt in detail with the events surrounding the launch of the application timing to intervene and to amend.

[351] The wrongful use of TCM's funds to resist the present proceedings is also an important factor that impacts on the question of costs. It was argued by counsel for the defendants that TCM was not a nominal party to the proceedings and that it was necessary for it to employ its own funds in order to resist the plaintiffs' claim. The principal relief is against TCM and, if its defence was unsuccessful, it would be obliged to produce a sum of up to R160 million to satisfy a judgment against it. That judgment would affect its balance sheet, liquidity, creditors and its ability to obtain credit. This justified TCM's decision to defend the action and to utilise its funds to do so. I cannot accept this argument. As was stated by Lindsay J in *Re a company (No 1126) of 1992* [1994] BCLC 146 at 146), there is a "*heavy onus*" on a company to satisfy the Court with evidence of the necessity or expediency to have incurred such expenditure. The defendants failed to adduce the necessary evidence. Moreover, it should be borne in mind that TCM only defends the action by virtue of Cornelli and the remaining defendants having caused it to do so. It would be unfair to burden TCM with such costs. Any cost order should be borne by Cornelli and the third, fourth and fifth defendants jointly and severally.

[352] In *Blackman et al* (at 9-55 to 9-56), the learned authors express the position most aptly:

"In the vast majority of cases there will be no real prospect of satisfying the tests. Usually, the company is merely a nominal party to an application without

any interest in the matter, the dispute being in substance one between the shareholders. And this is invariably the case where the applicant seeks to be bought out either by other shareholders or by the company itself; thus if it is shown that directors of a company have been causing the company's money to be spent on financing the resistance to such an application, the Court should prevent such expenditure, such expenditure being a misfeasance and there is no excuse for it in law. The mere fact that the directors concerned have strong feelings about the person they would like to see in control of the company and able to appoint and remove its directors, does not entitle them at the expense of the company to take part in a dispute whether the applicant's shares should be compulsorily acquired by other shareholders or by the company."

[353] It is proper to award costs on an attorney and client scale where a party has deliberately failed to limit or curtail proceedings, or has abused the Court's process. In this regard I am mindful of the following dictum of Innes CJ in *Scheepers and Nolte v Pate* 1909 TS 353 at 356 said the following:

"I think it is the duty of a litigant to avoid any course which unduly protracts a lawsuit, or unduly increases its expense. If there is a legal defence which can be effectively raised, by way of exception or otherwise, at an early stage, he ought at that stage to raise it. If he only takes it later on it may still be effective, but the fact that it came late, and that considerable expense was unnecessarily incurred in consequence, seems to me an element which may well affect the mind of the court in apportioning the costs."

[354] The object of award of attorney and client costs was been explained by Tindall J in *Nel v Waterberg Landbouwers Ko-Operatiewe Vereeniging* 1946 (A) 597 at 607:

“The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.”

Nel's case was approved by the Constitutional Court in Swartbooi and others v Brink and others 2006 (1) SA 203 (CC) para [27]

[355] Given the manner in which the litigation has been conducted by the second to fifth defendants, the Court should, as a mark of its disapproval, direct that the second to fifth defendants bear the costs of the action jointly and severally, the one paying, the others to be absolved, on the scale as between attorney and client. Such costs should include the qualifying and attendance fees for the plaintiffs' expert witnesses, Geel and Professor Wainer, as well as the costs consequent upon the employment of two counsel.

[356] The following costs should also to be paid by the second to fifth defendants jointly and severally, the one paying, the other to be absolved, on an attorney and client basis: (a) The wasted costs occasioned by the postponement of the trial set down for hearing on 2 October 2012. These costs should include the costs occasioned by the employment of two counsel and the qualifying fees in respect of the plaintiffs' experts, Geel and Professor Wainer. (b) The costs relating to the

plaintiffs' application for leave to amend in terms of their notice of intention to amend dated 9/10 December 2013, and the costs relating to the plaintiffs' application in terms of Rule 35(3) dated 4 December 2015. These costs are also to include the costs occasioned by the employment of two counsel.

APPROPRIATE RELIEF

[357] Section 252(3) provides that the order may be "*for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members or by the company, or otherwise*". The Court has a wide discretion concerning the order it should make, subject to the overriding consideration that the order should aim at bringing to an end the matters complained of (Blackman *et al*, *Commentary on the Companies Act* 9-46 and cases there cited).

[358] Having regard to these considerations, the only practicable order that should be made is that TCM be directed to purchase the plaintiffs' shares. The shares shall be purchased by TCM at their value on the date of the order to be granted.

[359] It is necessary that a referee be appointed in order to determine the value of the plaintiffs' shares in TCM. Due to the numerous concerns raised by Geel and Professor Wainer in relation to the manner in which TCM's financial statements have been audited, it is undesirable that the referee undertaking such valuation be the company's auditors. The referee should be a registered and practising chartered accountant and auditor of not less than 15 years' standing to be

nominated by the President of the Institute of Chartered Accountants for the time being from any one of the following South African accounting and auditing practices – PriceWaterhouseCoopers, Ernst & Young and Deloitte. The referee shall act as an expert and not arbitrator (see in this regard *Perdikis v Jamieson* 2002 (6) SA 356 (W) para [5]).

[360] The appointed referee shall have the powers and duties akin to a referee appointed in terms of s 19*bis* of the now repealed Supreme Court Act, 59 of 1959.¹¹ Section 19*bis* allowed a court, with the consent of the parties, to refer the matter for determination by a referee. However, such consent is not required in the present case. This Court has a wide discretion, in terms of s 252(3), to make “*such order as it thinks fit whether for ... the purchase of the shares of any members of the company by other members thereof, or by the company ...*”. This includes the power to appoint a referee with the same powers and duties as a referee would have had in terms of s 19*bis* of the repealed Supreme Court Act.¹²

¹¹ Investigation by a referee is now regulated by s 38 of the Superior Courts Act, 10 of 2013.

¹² Section 19*bis* of the Supreme Court Act, 59 of 1959, provided as follows:

“(1) In any civil proceedings any court of a provincial or local division may, with the consent of the parties, refer –

(a) any matter which requires extensive examination of documents or scientific, technical or local investigation which in the opinion of a court cannot be conveniently conducted by it; or

(b) any matter which relates wholly or in part to accounts; or

(c) any other matter arising in such proceedings,

for enquiry and report to a referee, and the court may adopt the report of any such referee, either wholly or in part, and either with or without modifications, or may remit such report for further enquiry or report or consideration by such referee, or make such other order in regard thereto as may be necessary or desirable.

[361] The plaintiffs are entitled to be paid a fair price for their shares. As a general rule, where the aggrieved shareholder's shares are to be purchased, a fair price is the value that his shares would have had if there had been no unfair treatment (*Blackman et al* 9-50 to 9-51). The following specific provisions must, at the very minimum, be contained in the order.

- (1) The valuation of the shares shall make no allowance or deduction for the fact that the plaintiffs hold a minority shareholding and there should be no discount for that fact. The following statement of Binns-Ward AJ in paragraph 4 of the supplementary judgment in *McMillan NO v Pott* at 541A-D, properly reflects the position:

“[4] Firstly, the provision that the shares be valued without any discount for the shares representing a minority holding was consciously made to the applicant's choosing. The reason why a minority interest is frequently only saleable at a discount is explained in the report by Mr Pter Crawford, annexed to the respondents' submissions. Those considerations apply in an ordinary commercial transaction between willing buyer and willing seller. There is, however, no reason in principle why in the peculiar circumstances of a compulsory sale, pursuant to an order made in terms of s 252 of the Companies' Act, the acquiring party should be able to obtain

(2) Any such report or any part thereof which is adopted by the court, whether with or without modifications, shall have effect as if it were a finding by the court in the civil proceedings in question.

(3) Any such referee shall for the purpose of such enquiry have such powers and shall conduct the enquiry in such manner as may be prescribed by a special order of court or by rules of court.”

the excluded party's shares at a discount to the pro rated value of all the issued shares in the company. Compare the observation at part 10 of the opinion in *O'Neill v Phillips*, the 'fair value' in such circumstances –

'will ordinarily be a value representing an equivalent proportion of the total issued share capital, that is, without a discount for its being a minority holding. The Law Commission (paragraphs 3.57-62) has recommended a statutory presumption that in cases to which the presumption of unfairly prejudicial conduct applies, the fair value of the shares should be determined on a pro rata basis. This too reflects the existing practice.'"

(2) The valuation shall include the value of the TCM Supplies Division.

THE ORDER

[362] In the premises, the following order is granted.

1. The first defendant (TCM) is directed to purchase the shares of the plaintiffs in the first defendant and to take transfer thereof against payment to the plaintiffs of a purchase consideration in an amount to be determined by the referee referred to in paragraph 4 below, being the value of the plaintiffs' shares in TCM as at the date on which this order is made.
2. The plaintiffs shall, within five days after the payment to them in full of the purchase consideration referred to above, in writing notify TCM of their resignation as directors of TCM.

3. The parties shall take all steps, do all things and sign all documents which are necessary to give effect to the provisions of 1 and 2 above as expeditiously as possible, failing which the Sheriff of this Court is hereby authorised and directed to take such steps, do such things and/or sign such documents on behalf of the party or parties to do so for such purpose.
4. A referee be appointed in the nature of and akin to a referee appointed in terms of s 19*bis* of the Supreme Court Act, No 59 of 1959 (the Act) in order to determine the value of the plaintiffs' shares in TCM as at the date on which this order is made.
5. The valuation of the plaintiffs' shares to be determined by the referee shall –
 - 5.1 make no allowance or deduction for the fact that the plaintiffs hold a minority shareholding and there should be no discount for that fact;
 - 5.2 include the value of the TCM Supplies Division;
 - 5.3 be on the basis as if all payments made by TCM for legal costs (including all fee deposits) and disbursements up to date of valuation in respect of this action and the prior application under Case No 2009/41464 had not been paid or borne by TCM, and the TCM cash and expense position shall be notionally adjusted accordingly;

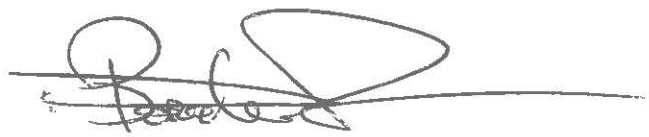
- 5.4 ignore the effect of any cost order against TCM in terms of this order;
- 5.5 take into account any adjustment considered necessary to account for the spares inventory, sales inventory, work-in-progress and other categories of inventory on hand at TCM.
6. The referee's costs are to be paid in the first instance to the referee by TCM, subject to what is set out in paragraph 13 below in relation to such costs.
7. In the absence of agreement between the parties within fourteen days from date of this order in relation to the identity of the referee, such referee is to be a registered and practising chartered accountant of not less than fifteen years' standing to be nominated by the President of the Institute of Chartered Accountants for the time being from any one of the following South African accounting and auditing practices: PriceWaterhouseCoopers, Ernst & Young and Deloittes.
8. The referee is required to meet with and receive representations from each of the parties and their financial representative/s in carrying out his/her functions.
9. It is declared that the TCM Supplies Division is owned by and is part of TCM and that its value is to be taken into account in the valuation of the plaintiffs' shares.

10. The referee shall have all powers *mutatis mutandis* contemplated in s 19bis of the Act, and shall include the power to assess what he/she considers to be a fair value for inventory in carrying out the valuation of the plaintiffs' shares in TCM.
11. In valuing the plaintiffs' shares in TCM, the referee shall have the further power to make such adjustments as the referee may consider fair to arrive at what, in the referee's professional expert opinion would constitute a "fair price" for the plaintiffs' shares to be acquired by TCM as set out in 1 above.
12. The referee's report is to serve before this Court *mutatis mutandis* as would a referee's report in terms of s 19bis of the Act. Such report is to be dealt with by this Court in accordance with s 19bis of the Act.
13. The second to fifth defendants are to pay the costs of this action jointly and severally, the one paying, the others to be absolved, including the qualifying and attendance fees for the plaintiffs' expert witnesses, Mr J Geel and Professor H E Wainer and the referee's costs. The costs to be paid by second to fifth defendants shall include the costs consequent upon the employment of two counsel and are to be taxed on the scale as between attorney and client.
14. The reserved costs in respect of the plaintiffs' application in terms of s 163 of the Companies Act, 71 of 2008, and in respect of the first defendant's counter-application for recusal are to be paid by the second to fifth defendants jointly and severally, the one paying, the others to be absolved. These costs are to

include the costs consequent upon the employment of two counsel and are to be taxed on the scale as between attorney and client.

15. The wasted costs occasioned by the postponement of the trial in this action set down for hearing on 2 October 2012 are to be paid by the second to fifth defendants jointly and severally, the one paying, the others to be absolved on the scale as between attorney and client. These costs are to include the costs consequent upon the employment of two counsel and the qualifying fees in respect of the plaintiffs' experts, Mr J Geel and Professor H E Wainer.
16. The costs relating to the plaintiffs' application for leave to amend in terms of their notice of intention to amend dated 9/10 December 2013 and the costs relating to the plaintiffs' application in terms of Rule 35(3) dated 4 December 2015 are to be paid by the second to fifth defendants jointly and severally, the one paying, the others to be absolved, on the scale as between attorney and client and are to include the costs occasioned by the employment of two counsel.

DATED at JOHANNESBURG this 31st day of MARCH 2017.



BORUCHOWITZ J
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

/DATE OF HEARING ...

DATE OF HEARING : 1 April 2016

DATE OF JUDGMENT : 31 March 2017

ON BEHALF OF
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with Adv B SLON

INSTRUCTED BY : EDWARD NATHAN SONNENBERGS INC
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ON BEHALF OF
THE DEFENDANTS : ADVOCATE J SUTTNER SC
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