

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
Date: 23rd February 2022 Signature: _____	

CASE NO: A5043/2020

DATE: 23 FEBRUARY 2022

In the matter between:

VALENCIA HOLDINGS 13 (PTY) LIMITED

GREEN, SHAUN MICHAEL

SMITH, MARK DOUGLAS

HOY, RONALD JAMES

STANBRIDGE, DEREK NORMAN

RODITIS, ALEXANDER ELIAS

and

ARMITAGE, MICHELLE NO

First Appellant

Second Appellant

Third Appellant

Fourth Appellant

Fifth Appellant

Sixth Appellant

Respondent

Coram: Fisher J, Adams J et Malindi J

Heard: 8 November 2021 – The 'virtual hearing' of the Full Court Appeal was conducted as a videoconference on *Microsoft Teams*.

Delivered: 23 February 2022 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being

uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 23 February 2022.

Summary: Company law – Companies Act 71 of 2008, s 163 – oppressive conduct and conduct that is unfairly prejudicial to shareholder – proceedings against company and its directors – action for relief by shareholder against directors of, and fellow shareholders in company – arising from loans advanced to shareholders in terms of agreement between all shareholders –
Section 162 of the Companies Act – declaring directors as delinquent – the principles discussed –

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg (Matojane J sitting as Court of first instance):

- (1) The appellants' appeal against paragraphs 1.1, 1.2, 1.3, 1.4 and 1.6 of the order of the court *a quo* is upheld, with costs, including the costs of the application for leave to appeal and the costs consequent upon the employment of two Counsel, one being a Senior Counsel.
- (2) The respondent's cross-appeal is dismissed with costs, including the costs of the application for leave to appeal and the costs consequent upon the employment of two Counsel, one being a Senior Counsel.
- (3) The above paragraphs 1.1, 1.2, 1.3, 1.4 and 1.6 of the order of the court *a quo* are set aside and in its place is substituted the following: -
 - '(a) The plaintiff's claims are dismissed, with costs'.

JUDGMENT

Adams J (Fisher J et Malindi J concurring):

[1] As a general rule, a shareholder in a company contracts and undertakes to be bound by the decisions of the majority of shareholders, even where such decisions adversely affect his own rights as a shareholder, provided those decisions on the affairs of the company are lawful. In that regard, an act of the company that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of a shareholder, is outlawed. Similarly, the powers of a director of a company cannot and should not be exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a shareholder.

[2] These are the principles in issue in this appeal. In particular, we are required to decide whether conduct on the part of the first appellant¹ ('Valencia') through its directors, the second to fifth appellants², and the sixth appellant³, in granting interest-free loans to the second to fifth respondents, amounted to such unlawful conduct.

[3] In the court *a quo*, the respondent⁴, who acts herein in her capacity as executrix in the estate of her late husband, Mr Alan Armitage ('the deceased'), contended that such conduct indeed amounted to an oppressive act, which, in any event, unfairly prejudiced her and disregarded her interest as a shareholder. The court *a quo* (per Matojane J) agreed with the respondent and granted judgment separately against the second to fourth appellants in her favour for compensation by the second to fifth appellants in several amounts, totalling R6 768 900, which equates to the total proceeds of a life assurance policy taken out in favour of these appellants on the life of the deceased.

¹ The first defendant in the court *a quo*.

² The second, third, fourth and fifth defendants in the court *a quo*.

³ The sixth defendant in the court *a quo*.

⁴ The plaintiff in the court *a quo*.

[4] In sum, the court *a quo* held that Valencia and its remaining four directors, the second to fifth appellants, unfairly discriminated against the respondent as she was not treated equally like other shareholders. Equity and fairness, so the court *a quo* concluded, demand that the second to fifth respondents pay compensation to the respondent in the total sum of R6 768 900, against which the respondent should deliver in negotiable form the appropriate percentage of her share in Valencia.

[5] The court *a quo*, however, dismissed the respondent's claim for an order declaring the second to sixth appellants, delinquent directors.

[6] The appellants appeal against the judgment and the order of the court *a quo* in terms of which the second to fifth appellants were separately ordered to make payment to the respondent of amounts totalling R6 768 900. The respondent cross-appeals against the court *a quo*'s refusal to declare the second to sixth appellants as delinquent directors. Both the appeal and the cross-appeal are with the leave of the court *a quo*.

[7] The questions to be answered in the appeal and the cross appeal are the following: (1) Is the respondent entitled to the relief granted in her favour against the first to fifth appellants? And (2) Should the court *a quo* have declared the said appellants as delinquent directors or placed them on probation?

[8] These issues are to be decided against the factual backdrop as set out in the paragraphs which follow. The facts which are material to the issues to be decided in this appeal are, in my view, by and large common cause if regard is had to the pleadings in the court *a quo* and the evidence led on behalf of the parties. In that regard, the parties relied only on expert evidence in support of their respective cases. The opinions of the expert witnesses naturally relied and were premised on documentary evidence, which, more often than not, was not contested by the other side.

[9] The deceased, who passed away on 12 December 2013, was a shareholder in and a director of Valencia until the date of his death. Seventy-five percent of the shares in Valencia was owned by the parties in this litigation as follows: the second appellant ('Mr Green') – 7.5%; the third respondent

(‘Mr Smith’) – 27.33%; the fourth respondent (‘Mr Hoy’) – 27.33%; the fifth respondent (‘Mr Stanbridge’) – 5.33%; and the deceased – 7.5%. The remaining 25% shares in Valencia are held by Justice Khumalo, Pamela Promise Mallela and Sisi Dlamini, who were not involved in the dispute between the parties and who played no role in this litigation.

[10] On the 30 September 2011 all of the shareholders in Valencia concluded a written shareholders’ agreement, which regulates their relationship as shareholders of the said company. The directors of Valencia are Mr Smith, Mr Hoy and Mr Stanbridge, and, as already indicated, the deceased was also a director up to and until the date of this death on 12 December 2013. Up to 20 July 2018, Mr Green was also a director, whereas Justice Khumalo, Pamela Promise Mallela and Sisi Dlamini occupied positions as directors until 23 March 2016.

[11] Valencia had two wholly owned subsidiaries, namely MDS International Skills (Pty) Ltd (‘MDS Skills’) and MDS NDT Consultants (Pty) Ltd (‘MDS Consultants’). The second to sixth appellants are all directors of both these subsidiaries, as was the deceased until the date of his death on 12 December 2013.

[12] The second to fifth appellants and the deceased, as shareholders of Valencia, took out and contributed to a life indemnity insurance policy on each other’s lives. On the death of the deceased, the life indemnity insurance policy paid out the amount of R6 768 900, which was distributed in proportion to their shareholding to Messrs Green, Smith, Hoy and Stanbridge, as the beneficiaries of the policy.

[13] In the court *a quo*, the respondent in her action essentially sought an order compelling Messrs Green, Smith, Hoy and Stanbridge to buy the 7,5% shareholding of the deceased in Valencia for the full amount of the indemnity insurance policy pay-out, that being R6 768 900, together with interest on this amount from the date on which the proceeds of the policy were paid out.

[14] The court *a quo* rejected the respondent’s claim for the said sum based on an alleged oral agreement concluded during 2012 between the second to fifth appellants and the deceased. The court found that there was no evidence in

support of the alleged oral agreement, the existence of which, so the court *a quo* found, was belied by the non-variation clause in the shareholders' agreement, which contained no such provision on which the respondent could base a claim for payment of the proceeds of the life assurance policy.

[15] What the shareholders' agreement did provide was that the proceeds from the insurance pay-out would be used by the surviving shareholders to purchase the shares of the deceased and that the purchase and sale of the shares would be governed by the relevant clauses (clause 19) in the agreement, which included provisions relating to the valuation of the shares. The claim by the respondent based on the express provisions of the shareholders' agreement was also rejected by Matojane J, as, according to him, the respondent did not make out a case for the relief if regard is had to the express provisions of the agreement. The simple point, as held by the court *a quo*, is that the disposal of the shares of the deceased was regulated by and should have occurred in accordance with the provisions of the shareholders' agreement, which required that the shares in Valencia were to be sold to the remaining shareholders at fair value to be determined by the auditors in accordance with further provisions in the shareholders' agreement. The procedures prescribed by the shareholders' agreement were not followed, which meant that the respondent could not rely on the said agreement for the relief sought. Accordingly, the respondent's claim based on the written shareholders' agreement was refused by the court *a quo*.

[16] We need not concern ourselves with these findings by the court *a quo*, as the respondent does not appeal these rulings.

[17] The respondent was however successful with her claim advanced on the basis of the provisions of section 163 of the Companies Act, Act 71 of 2008 ('the Companies Act'), premised on oppressive and/or prejudicial conduct on the part of Valencia through Messrs Green, Smith, Hoy and Stanbridge. The case of the respondent was that an appropriate order to make good the alleged oppressive and/or prejudicial conduct inflicted on the deceased was that Messrs Green, Smith, Hoy and Stanbridge be ordered to pay to the deceased estate the amount of R6 768 900, together with interest thereon.

[18] The Court *a quo* agreed with the respondent and, in terms of s 163(2)(j) of the Companies Act, ordered the second to fifth appellants to purchase the shares of the deceased in Valencia for the amount of R6 768 900, together with interest thereon.

[19] It was the respondent's case that the following conduct on the part of Valencia and its directors constitutes conduct that is oppressive, unfairly prejudicial and that disregards the interests of the deceased. Firstly, so the respondent alleged, Valencia and Messrs Green, Smith, Hoy and Stanbridge granted, maintained and increased interest free loans to themselves from the financial year ended 29 February 2013 to 29 February 2016, which loans, so the respondent contends, were improper and in contravention of s 45(3)(a) and (b) of the Companies Act. Secondly, so the respondent contended, during the time that the loans were granted to Messrs Green, Smith, Hoy and Stanbridge, no interest-free loans were granted to the respondent, and, to add insult to the injury, Valencia was at the same time servicing a loan from Investec Bank, which as and at 28 February 2014, was standing at R3 319 709.43. Lastly, it was alleged by the respondent that the loans were advanced and maintained notwithstanding that Valencia had been advised that the loans were improper and contrary to the provisions of the Companies Act.

[20] The case of the respondent was therefore that the foregoing conduct complained of collectively constituted the oppressive and/or unfairly prejudicial conduct as envisaged in section 163(1) of the Companies Act, Act 71 of 2008 ('the Companies Act'). It was accordingly necessary for the respondent to prove all of the conduct complained of, which she did by reference to common cause facts. In that regard, it was not disputed by the appellants that interest-free loans were granted to the second to fifth appellants over the period from 29 February 2012 to 28 February 2016.

[21] Additionally, the evidence also showed that the deceased himself enjoyed the benefits of interest free loans from 2012 all the way up to 2016. The balance on his loan account at the end of each financial year was as follows: 2012 – R222 680; 2013 – (Cr R594 245); 2014 – R990 221; 2015 – R1 025 293;

2016 – R1 025 293; and 2017 – R Nil. Comparing these figures to the loan accounts of the other shareholders, produce the following results in relation to their loan indebtedness as at 29 February 2016: Mr Smith – R12 221 635; Mr Hoy – R13 047 970; and Stanbridge – R2 239 989.

[22] The main gripe of the respondent is that since the 2013 financial year, there has been exponential increases in the loan accounts of the second to fifth appellants, whilst she, as a shareholder, received no such benefits. The increases were as follows: Mr Smith's loan had increased to R12 221 685, having been R5 833 876 in February 2013, R8 918 780 in February 2014 and R11 622 555 in February 2015; Mr Hoy's loan account had increased to R13 047 970, having been R5 666 667 in February 2013, R8 622 838 in February 2014 and R14 275 979 in February 2015; and Mr Stanbridge's loan had increased to R2 239 989, having been R1 507 026 in February 2013, R2 120 366 in February 2014 and R2 166 824 in February 2015.

[23] It may be apposite at this juncture to point out that the respondent's starting point is the 2013 financial year ending February 2013. This, in my view, is a wrong approach. The starting point should in fact be the 2014 financial year, ending February 2014, because during the most part of that financial year the deceased was still a member of Valencia and was still enjoying the benefits of his own shareholder's loan. This approach makes a big difference to the perceived prejudice to the respondent in that the amounts advanced to the appellants during the 2015 and 2016 financial years are substantially less than the amounts complained of by the respondent.

[24] This approach renders the following results relating to the extent of the increases in the loan accounts of the appellants subsequent to the death of the deceased. During 2015, Mr Smith's loan account increased by R2 703 775 and by R599 080 during 2016; Mr Hoy's loan account increased by R5 653 144 during 2015 and decreased by R1 228 009 during 2016; During 2015, Mr Stanbridge's loan account increased by R46 458 and by R73 165 during 2016; Mr Green's account increased by R1 218 215 during 2015 and remained the same during

2016, therefore no increase; The loan account of the deceased had increased by R35 072 during 2015 and remained the same during 2016.

[25] Therefore, the total amount of the loans advanced to the appellants during the 2015 financial year was the sum of R7 220 231 and R964 571 during the 2016 financial year.

[26] The deceased passed away on 13 December 2013, and therefore, so the appellants contend, he could no longer borrow monies from Valencia. The point about the respondent's case is, as held by the court *a quo*, that by granting interest-free loans to the second to fifth appellant after the death of the deceased, instead of declaring dividends, Valencia unfairly benefitted the second to fifth appellants to the prejudice of the respondent. The appellants' retort is to the effect that, during his lifetime, the deceased did not complain about the granting of interest-free loans to the shareholders. In fact, so it is alleged by the appellants, he participated in the scheme and he himself had a loan account which had a debit balance up to the 2016 financial year.

[27] Section 163 of the Companies Act provides as follows:

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

- (1) A shareholder or a director of a company may apply to a court for relief if –
 - (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
 - (b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or
 - (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.
- (2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including-
 - (a) an order restraining the conduct complained of;
 - (b) an order appointing a liquidator, if the company appears to be insolvent;

- (c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131 (4) (a) apply;
 - (d) an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;
 - (e) an order directing an issue or exchange of shares;
 - (f) an order - (i) appointing directors in place of or in addition to all or any of the directors then in office; or (ii) declaring any person delinquent or under probation, as contemplated in section 162;
 - (g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;
 - (h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;
 - (i) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;
 - (j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;
 - (k) an order directing rectification of the registers or other records of a company; or
 - (l) an order for the trial of any issue as determined by the court.
- (3)'.

[28] In *Grancy Property Ltd v Manala and Others*⁵, the SCA held that, in determining whether the conduct complained of is oppressive, unfairly prejudicial or unfairly disregards interests, it is not the motive for the conduct complained of that the court must look at but the conduct itself and the effect which it has on the other members of the company. In that matter, Petse JA also referred, with

⁵ *Grancy Property Ltd v Manala and Others* 2015 (3) SA 313 (SCA).

approval, to the following extract from F H I Cassim: *Contemporary Company Law, 2nd Edition* (2012) at pg 771-2:

‘Despite the wide ambit of s 163, it must be borne in mind that the conduct of the majority shareholders must be evaluated in light of the fundamental corporate law principle that, by becoming a shareholder, one undertakes to be bound by the decisions of the majority shareholders ... Thus not all acts which prejudicially affect shareholders or directors, or which disregard their interests, will entitle them to relief – it must be shown that the conduct is not only prejudicial or disregarding but also that it is unfairly so.’

[29] Thus, so the SCA held, it is not enough for an applicant to show that the conduct of which he complains is ‘oppressive’ or ‘prejudicial’ to him or that it ‘disregards his interests’. The applicant must demonstrate that the ‘oppression’, ‘prejudice’ or ‘disregard’ has occurred ‘unfairly’. Importantly, as contended by the appellants, a minority shareholder cannot complain of conduct that was carried out with his acquiescence or agreement, and still less of something done with his co-operation or collaboration. Moreover, a complaining shareholder is not allowed to engage section 163 as a surrogate for the enforcement of contractual rights.

[30] This then brings me to the questions whether in this case the respondent has established conduct of the nature contemplated in s 163 of the Companies Act and whether she was entitled to the relief that she was granted by the court *a quo*. As I have already indicated, the sum total of the allegations made by the respondent against the appellants is that during the 2014, 2015 and 2016 financial years they advanced to themselves additional personal loans from Valencia, without affording to her the same benefits as a shareholder. It bears emphasising that during most of the 2014 financial year, the deceased himself was still a shareholder in Valencia and he also enjoyed the benefits of an interest-free loan from Valencia, the balance of which stood as at February 2014 at R990 221. The loans complained of were in addition to sums standing to the credit of their loan accounts at the end of the 2014 financial year, which were as follows: As and at the end of February 2016 the balances on the loan accounts of all of the shareholders were as follows: Mr Smith – R12 221 635; Mr Hoy – R13 047 970; Stanbridge – R2 239 989; and the deceased – R990 2221.

[31] Applying the above principles to the facts *in casu*, I am not satisfied that the court *a quo* was correct in holding that the respondent made out a case for the relief she sought in her action. The totality of the allegations made by the respondent cannot, to my mind, translate into conduct which can be said to be oppressive or unfairly prejudicial to her or unfairly disregarded her interest as a shareholder. The point is simply that the conduct complained of cannot possibly be said to be unfair conduct contemplated in s 163 if the deceased had agreed to same. It is inconceivable that the grant and maintenance of interest-free shareholders' loans, which the deceased had consented to and participated in, could constitute conduct which can be described as oppressive, unfairly prejudicial or unfairly disregarded the interests of the deceased.

[32] In that regard, I find myself in agreement with the following *ratio decidendi* in *Irvin and Johnson Ltd v Oelofse Fisheries Ltd; Oelofse v Irvin and Johnson Ltd and Another*⁶:

'But it is idle to contend that the conduct complained of amounted to oppression. Oppression is something done against a person's will and in his despite. It is not something done with his acquiescence or consent, and still less something done with his co-operation. He chose voluntarily to risk the position in which he finds himself. Accordingly, petitioner fails to establish any 'oppression' and cannot invoke sec 111*bis*.'

[33] In short, as submitted by Mr Subel, who appeared together with Ms Cirone, for the appellants, the respondent cannot complain of oppression in respect of conduct that the deceased consented to, participated in and acquiesced in. This conduct cannot be alleged to be 'oppressive', 'unfairly prejudicial' or 'unfairly disregarding' the respondent's interests. Moreover, the deceased concluded a shareholders' agreement with his co-shareholders in terms of which he specifically agreed to the manner in which he would be obliged to dispose of his shareholding in Valencia. The respondent is therefore not entitled to conveniently use an oppression remedy for the ulterior purpose of avoiding compliance with the terms of the shareholders' agreement.

⁶ *Irvin and Johnson Ltd v Oelofse Fisheries Ltd; Oelofse v Irvin and Johnson Ltd and Another* 1954 (1) SA 231 (E).

[34] Moreover, the deceased, who is a 7.5% shareholder in Valencia, cannot and should not be allowed to enforce a contractual arrangement between the shareholders in terms of which the proceeds of a life assurance policy were to be used to buy back his shares, in circumstances where such a contractual arrangement was found not applicable on the proven facts. In other words, the relief available to a shareholder in terms of s 163 is not an alternative cause of action to a claim based in contract.

[35] I am therefore of the view that the court *a quo* erred in finding that the respondent had established the allegations that the appellants conducted themselves in a manner which was oppressive or unfairly prejudicial to the respondent or that unfairly disregarded her interest.

[36] The appeal should therefore succeed.

The Cross-Appeal

[37] In the particulars of claim the respondent sought an order that Green, Smith, Hoy, Stanbridge and Roditis be declared delinquent directors, alternatively, that they be placed under probation.

[38] This claim by the respondent to have the second to sixth appellants declared delinquent directors, was based by and large on the same grounds on which she based her claim for payment of the amount of R6 768 900, notably the fact that, instead of declaring dividends regularly, the appellants generously extended to themselves personal loans with regular monotony.

[39] Additionally, so it was contended by the respondent, these appellants failed to prepare on an annual basis Annual Financial Statements (AFS's) for Valencia for the years ended 28 February 2015 to 28 February 2018. Also, they did not ensure that the AFS's were timeously reviewed by an auditor, approved by the board of directors and approved by the shareholders.

[40] As rightly contended by the appellants, as regards this complaint, no evidence was led by the respondent and this complaint can and should be dismissed summarily.

[41] As regards the complaint that these appellants caused Valencia to advance to them interest free loans when the respondent received no such benefit and at a time when Valencia was insolvent, the appellants reiterated their contention that the respondent did in fact have the benefit on an interest free shareholder's loan account. This, so the appellants allege, was conceded by the respondent. Moreover, so it was submitted by Mr Subel, no evidence was led on the alleged insolvency of Valencia. I find myself in agreement with these contentions. The respondent's expert witness specifically distanced himself from any reliance on the alleged insolvency of Valencia.

[42] There was also a complaint that the appellants misrepresented to interested parties that a dividend had been declared and paid during the 2015 financial year, when no such dividend had been paid. The dividend had in fact been declared on 1 April 2016 and reflected in the February 2015 AFS of Valencia. The AFS were authorised for issue by the directors on 1 June 2016 and in circumstances where the AFS recorded the dividend declared. These AFS were not approved by Valencia's external accounting reviewer. This dividend recordal was then changed in a later version of the 2015 AFS that then recorded the dividend as an event occurring after the reporting period. The appellants' expert witness, Prof Wainer, explained that this was a common accounting error and that the error had no effect on the integrity of the financial statements. This explanation is a very plausible explanation and, as contended by the appellants, cannot possibly be a ground to having them declared delinquent directors.

[43] The further complaints were that the appellants, with knowledge that the 28 February 2015 AFS had material errors therein, obstructed the auditor from providing information to the respondent, which it had expressly and deliberately undertaken to furnish, and that they caused Valencia to oppose legal proceedings at a substantial cost. As rightly contended by the appellants, there was no evidence led in support of these complaints. The only evidence advanced was in relation to legal fees incurred by MDS Skills. The fact of the matter is that no legal fees were paid by Valencia. Koski was also forced to concede in cross-examination that there was no auditing or accounting provision that required Valencia's attorneys to bill Valencia for the legal work that it did on its behalf.

[44] Lastly, the respondent complained that the second to sixth respondents contravened section 45 of the Companies Act in relation to Valencia and the subsidiary companies.

[45] Section 45 of the Companies Act provides that

‘45 Loans or other financial assistance to directors

- (1) In this section, 'financial assistance'
 - (a) includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation; but
 - (b)
- (2) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide direct or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject to subsections (3) and (4).
- (3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless
 - (a) the particular provision of financial assistance is
 - (i) pursuant to an employee share scheme that satisfies the requirements of section 97; or
 - (ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and
 - (b) the board is satisfied that
 - (i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and
 - (ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.
- (4)
- (5) If the board of a company adopts a resolution to do anything contemplated in subsection (2), the company must provide written notice of that resolution to all

shareholders, unless every shareholder is also a director of the company, and to any trade union representing its employees

- (a) within 10 business days after the board adopts the resolution, if the total value of all loans, debts, obligations or assistance contemplated in that resolution, together with any previous such resolution during the financial year, exceeds one-tenth of 1% of the company's net worth at the time of the resolution; or
 - (b) within 30 business days after the end of the financial year, in any other case.
- (6) A resolution by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with
- (a) this section; or
 - (b) a prohibition, condition or requirement contemplated in subsection (4).
- (7) If a resolution or agreement is void in terms of subsection (6) a director of the company is liable to the extent set out in section 77 (3) (e) (v) if the director
- (a) was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 74; and
 - (b) failed to vote against the resolution or agreement, despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in subsection (4).'

[46] The loans complained of were shareholders' loans. The purpose of section 45 is to protect the shareholders. This was held by the SCA, with reference to the predecessor to s 45, that being s 226 of the Old Companies Act, in *Neugarten and Others v Standard Bank of South Africa Ltd*⁷. In that matter, the SCA agreed with the High Court's view that the clear purpose of s 226 'is to prevent directors or managers of a company acting in their own interests and against the interests of shareholders by burdening the company with obligations which are not for its benefit but are for the benefit of another company and/or for the benefit of its directors and/or managers'.

[47] The appellants' short answer to the respondent's complaint relating to s 45, was that the said section does not apply to shareholders' loans. In any

⁷ *Neugarten and Others v Standard Bank of South Africa Ltd* 1989 (1) SA 797 (A).

event, so the argument on behalf of the appellants went, if the shareholders' conduct contravened section 45, then it was conduct that the deceased participated and was complicit in. As was conceded by the respondent's expert witness, Koski, Valencia had been granting its shareholders loans from its inception. I agree with this contention.

[48] The point is that, in my view, there is nothing untoward about interest-free shareholders' loans. In Valencia all the shareholders, including the deceased, agreed to manage the business of Valencia in this manner and they agreed that they would have interest-free shareholders' loans which would be set off by dividends.

[49] For all of these reasons, I am of the view that the court *a quo* was correct in its finding that the respondent had not made out a case to have the second to sixth appellants declared delinquent. The cross-appeal therefore stands to be dismissed.

Conclusion

[50] In sum, I am of the view that the conduct complained of by the respondent in relation to the appellants are not the type of conduct which entitled the respondent to an order in terms of s 163 of the Companies Act. Similarly, the respondent has not, in my view, made out a case for a delinquency declaration.

[51] The court *a quo* was therefore not correct in granting judgment against the second to fifth appellants. It was however correct in dismissing the claim to have the appellants declared delinquent directors.

[52] Consequently, the appeal must succeed and the cross-appeal should fail.

Costs of Appeal

[53] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*⁸.

⁸ *Myers v Abramson*, 1951(3) SA 438 (C) at 455

[54] I can think of no reason to deviate from the general rule.

[55] The respondent should therefore pay the costs of the appeal of the appellants. And the respondent should also pay the appellants' costs of the cross-appeal

Order

[56] In the result, the following order is made: -

- (1) The appellants' appeal against paragraphs 1.1, 1.2, 1.3, 1.4 and 1.6 of the order of the court *a quo* is upheld, with costs, including the costs of the application for leave to appeal and the costs consequent upon the employment of two Counsel, one being a Senior Counsel.
- (2) The respondent's cross-appeal is dismissed with costs, including the costs of the application for leave to appeal and the costs consequent upon the employment of two Counsel, one being a Senior Counsel.
- (3) The above paragraphs 1.1, 1.2, 1.3, 1.4 and 1.6 of the order of the court *a quo* are set aside and in its place is substituted the following: -
 - (a) The plaintiff's claims are dismissed, with costs'.



L. R. ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	8 th November 2021 – in a ‘virtual hearing’ during a videoconference on <i>Microsoft Teams</i> .
JUDGMENT DATE:	23 rd February 2022 – judgment handed down electronically
FOR THE FIRST, SECOND, THIRD, FOURTH, FIFTH AND SIXTH APPELLANTS:	Adv Arnold Subel SC, together with Adv Paolo Cirone.
INSTRUCTED BY:	Knowles Hussain Lindsay Inc, Sandton
FOR THE RESPONDENT:	Advocate Adrian Botha SC, with Advocate A D Theart
INSTRUCTED BY:	Brian Kahn Incorporated, Johannesburg