



Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 21770/2009

In the matter between:

INDIMA FARMING (PTY) LTD

Applicant

And

STAWELKLIP ESTATES (PTY) LTD

1st Respondent

(Registration No.2000/018540/07)

The trustee for the time being of

2nd Respondent

THE HOCHLAND TRUST (IT260/95)

HOCHLAND WERKERS KOMMITTEE

3rd Respondent

DESMOND GERHARD GOLIATH

4th Respondent

MARTIN BENJAMIN

5th Respondent

JOCOLENE MBALULA

6th Respondent

NETO MBALULA

7th Respondent

PIETER DIETRICH	8 th Respondent
TRACEY GROOTBOOM	9 th Respondent
MARIA DIETRICH	10 th Respondent
MICHAEL ENGELBRECHT	11 th Respondent
VERNON BASSET	12 th Respondent

JUDGMENT DELIVERED: 19 AUGUST 2010

BINNS-WARD, J:

[1] The applicant has applied for relief under two heads. The first head is for an order appointing 'an interim manager' as 'representative of the applicant' to manage the farm owned by the respondent jointly with Hugo Schreiber ('Schreiber'), 'who acts as the present manager and representative of the second respondent'. The second head is for an order directing the second respondent and Schreiber to provide one Stefan Schutte 'with all such financial documentation and information requested by Schutte in regard to and in connection with the financial affairs of the farm, including access to

the first respondent's computer and all other records of first respondent'.¹

[2] In order to contextualise the aforementioned relief an introduction of the *dramatis personae* and a description of some of the background events is necessary. The applicant company is a 50% shareholder in the first respondent company. The business of the first respondent is the ownership and operation of a fruit farm in the Piketberg region of the Western Cape. The owner of the other 50% holding in the first respondent is the second respondent. The second respondent is a trust in which the relevant proprietary affairs of Schreiber are effectively invested. The second respondent had previously been the registered owner of the farm. It sold the farm in 2004 in terms of a transaction which resulted in the farm being held by the first respondent company with the shareholding just described. Two relevant incidents of that transaction were the conclusion of a shareholders' agreement between the applicant and the second respondent and of a management agreement between the first respondent and Schreiber. In terms of the latter agreement,

¹ The words within inverted commas are quoted directly from the notice of motion.

Schreiber was appointed to manage the farming business of the first respondent company.

[3] The management agreement was concluded for a five year period, which was to be automatically renewed for a further five year period unless the shareholders decided, by a vote supported by 'at least 75% of [the company's] shareholders', to terminate the agreement. It is thus apparent that, unless the character of the initial shareholding of the respondent, or the control of the second respondent were to change, Schreiber's position as the manager of the first respondent's farming business was contractually entrenched.

[4] It also needs to be mentioned in this regard that Schreiber, whose father had originally acquired the farm during the 1980's, had been in charge of the management of the farming operations there since the early 1990's. It is common cause that Schreiber's role was considered by all concerned in the 2004 transaction to be 'pivotal' to the enterprise to be conducted through the vehicle of the first respondent company. This much is clearly reflected in certain of the provisions of the shareholders' agreement. Clause 11.1 of the shareholders' agreement recorded 'that Hugo Schreiber is a pivotal

figure in the management of the Company's business as well as [the second respondent trust] as shareholder of the company. As such it is recorded that both shareholders require an exit mechanism in the event of the death or permanent disability of the said Hugo Schreiber.' The shareholders' agreement also contained provisions that determined that the two shareholders would have equal representation at board level and that no meeting of the directors would be quorate if not attended by at least one of the appointees of each of the two shareholders. The second respondent's appointees to the four member board of directors were Schreiber and his wife. Schreiber was therefore, by virtue of the contemporaneous operation of the management agreement, for all intents and purposes the managing director of the first respondent company.

[5] The measure of latitude afforded Schreiber in his role as *de facto* managing director was a wide one. That much is apparent from the provisions of the management contract, which expressed Schreiber's duties and the terms of his remuneration and benefits in such loose language as to afford him, subject to such limited constraints as the directors might have sought to place on the construction of the relevant provisions, a broad discretion in their

determination and implementation. Schreiber's duties under the contract were defined in the following manner:

- 5.1 Schreiber will manage the business diligently in accordance with the norms and standards that would be expected of a reasonable farming manager of a farm of this type.
- 5.2 The parties annex hereto a business plan which is intended to regulate the future conduct of the company's business.
- 5.3 Schreiber will be required to manage the business materially in accordance with this business plan and with any revised business plan presented by the Company from time to time.

The latitude arising from the broad provisions of clause 5.1, quoted, above, was underscored in the manner the contract was implemented; because no business plan, as referred to in sub-clauses 5.2 and 5.3, was ever attached to the executed deed of contract, or presented in the ensuing five years before the falling out which occurred between the shareholders in or about 2009 and gave rise to the current proceedings and the other litigation to which I shall refer presently.

[6] Apart from the loosely defined constraints provided in terms of clause 5.1 of the management agreement, the only limitations on Schreiber's management authority was that arising from clause 5.1 of the shareholders' agreement which reserved to the directors the

management of the day to day activities of the company and the exercise of 'all such powers as are granted to them in terms of the common law, the [Companies] Act and the articles of association'. In that regard too, the powers in fact reposed in Schreiber, with the apparent acquiescence of all concerned, were emphasised by the absence of any intervention or direction from the board. The board of directors actually never met, notwithstanding the provision in the shareholders' agreement that it should meet every six months.

[7] For reasons about which it is best that I say as little as possible in the circumstances, the applicant determined, late in 2009, to apply for the winding up of the first respondent company. The resultant court proceedings are still pending and currently set down for hearing in this court two and a half month's hence. The essential basis of the allegations founding that application is that it would be just and equitable for the company to be dissolved because of a deadlock in the sense generally understood in that context. In its replying papers in those proceedings, as not infrequently happens in cases of that nature, the relief sought by the applicant was broadened to include a prayer for alternative relief by way of a buy-out order in terms of s 252 of the Companies Act, No. 61 of 1973. The winding up proceedings

are opposed by the second respondent. The employees of the first respondent have also obtained leave to intervene as respondents in the application. The respondents in the pending proceedings, which had been set down for hearing at the end of May, some two and a half months ago, required the opportunity to deal with the alternative relief belatedly introduced. That resulted in a postponement of those proceedings for hearing in November 2010.

[8] The current application was launched on the day that the winding up application had been due to be heard at the end of May. The first head of relief as described in paragraph [1], above, was formulated in the expectation that the winding up / s 252 application would be postponed *sine die*. The appointment of the co-manager was sought pending the eventual hearing of the to be postponed winding up application. In the context of subsequent developments, which included an order by the Deputy Judge President setting a timetable for the exchange of papers in and hearing of the current application, the application before me falls to be understood as being for the appointment of an interim manager pending the hearing of what I shall for convenience call 'the main application' in November.

[9] The relief sought under the first head of the current application is unusual and no precedent for it was cited by the applicant's counsel. It was initially labelled as an 'interim interdict application', but that appellation was later amended and it was contended that in seeking it the applicant was actually availing of s 252 of the Companies Act. Indeed, I think that it is only under that statutory provision that a basis for the relief might arguably resort. One is thus confronted with what is, in my experience, the novel situation of an application for interim relief in terms of s 252 of the Companies Act pending the determination in different proceedings of a different form of final relief under s 252 of the Companies Act. If it were competent to afford the relief on that basis - something I am prepared, without so holding, to assume in the applicant's favour - the context of the case would suggest that the treatment of the application should be governed by the well-established principles applicable to interim interdict applications. Indeed, counsel on both sides appeared to accept this proposition when I put it to them during argument.

[10] The right that the applicant seeks to protect by means of the first head of relief is to have the first respondent company managed in accordance with the prescripts of the shareholders' and

management agreements. More particularly, it wants a co-manager to be appointed to shadow, or supervise the activity of the appointed manager, Schreiber (the wording of paragraph 1 of the notice of motion expresses the intended role of the interim manager more extensively and invasively than I have done, but I am adopting the watered down description of the co-manager's intended authority advanced by the applicant's counsel in argument). Of course it is not ordinarily open to shareholders to intervene in the management of a company in the manner that the applicant seeks to do in this matter. That is another reason which no doubt explains why it is sought to reason it as being founded on the exceptional remedies afforded in terms of s 252. The consequence, however, is that the applicant has to bring its complaint within the ambit of s 252(1) if it is to get even its toe in the door.

[11] Section 252 (1) provides:

- (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 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.

[12] The complaints or apprehensions upon which the application is founded do not concern the acts or omissions of the first respondent, but those of Schreiber, *qua* manager. And the alleged effects of Schreiber's management directly affect the company rather than the applicant in its capacity as a member. Another aspect weighing against the application considered as one in terms of s 252 is that the relief ordinarily sought in terms of the provision is directed to bring to an end that which has happened or is occurring rather than to address apprehended, but undefined, future prejudice. Problems that have occurred in the past can, however, afford a basis for an order in terms of the section directed at regulating the future conduct of the company's affairs (see s 252(3) of the Companies Act). With those considerations of principle in mind, I turn to examine the factual basis for the relief sought under the first head in the founding affidavit in the current application.

[13] The grounds advanced in the founding papers in support of an interim order regulating the future conduct of the first respondent's affairs are the following

1. Schreiber had recently purchased a Toyota Land Cruiser. It was suspected that the expenditure that was incurred may have been debited to the first respondent's account. If so, it had not been included in the budget and had been made without prior authorisation of the board, or any knowledge whatsoever by the applicant.
2. Schreiber had purchased new tyres for the vehicle. This purchase was connected to the needs of a private trip to be undertaken by Schreiber to Mozambique. These expenses had also not been provided for in the first respondent's budget.
3. Schreiber had booked a trip to Mozambique for himself and his family, the cost of which may have been charged to the first respondent, but had not been budgeted for.
4. Schreiber had been on overseas trips to the Netherlands and China with his family 'also probably funded by the company and which expenditures were also not included in the budget, or were made without any prior

authorisation from the board of the company or even knowledge of the applicant'.

5. Schreiber 'had incurred a debt on behalf of the company in respect of pesticide in the amount of approximately R3 million which was unpaid and in respect of which the creditor was agitating for payment....The possibility of this particular creditor resorting to legal proceedings to recover this debt and the consequent detriment that any such legal proceedings would be (sic) to the company is a genuine cause for concern'.

Apart from these identified concerns, it was admitted by the applicant that Schreiber was managing the farming operations in an efficient and productive manner. The applicant was concerned however about the prospect of unauthorised expenditure being incurred by Schreiber for his own benefit or for unauthorised purposes because of the pending litigation in the main application.

[14] The applicant's counsel submitted that these examples of alleged past conduct by Schreiber in respect of the conduct of the

company's affairs provided sufficient basis for the court to intervene to regulate the future conduct of the company's affairs in the manner sought in terms of paragraph 1 of the notice of motion by way of the appointment of a co-manager.

[15] Assuming, without so finding, that the applicant's counsel's submission might find any basis in principle - notwithstanding the problems I consider that the applicant has bringing itself within the qualifying criteria for relief in terms of s 252(1) – it becomes evident, when consideration is given to the respondents' responses to the aforementioned allegations, that the bases for apprehension of harm by the applicant are shown to be very thin.

1. The Toyota was not paid for by the first respondent. The first respondent's funds were appropriated to pay for the deposit on the vehicle, but the expenditure was debited to the second respondent's loan account in the company, which stood in credit in the amount of several million rand, many millions of which were at the time immediately payable by the first respondent to the second respondent.

2. The tyres for the Toyota had not been paid for by the first respondent, but by the second respondent.
3. The incurrence of any expenses by the first respondent in respect of a trip to Mozambique by Schreiber and his family was denied.
4. Schreiber explained that his personal expenses on business trips to the Netherlands and China were incurred in the furtherance of the first respondent's business. He acknowledged that any expenses incurred in respect of any accompanying members of his family were for his own account.
5. The dispute in relation to the pesticide issue was related to crop damage that had occurred as a consequence of the use of the pesticide. The parties involved, including the supplier-creditor referred to by the applicant, had reached a mutually agreed settlement in terms of which the supplier had accepted a materially reduced sum in payment.

[16] Confronted with these somewhat deflating answers, the applicant in reply averred:

‘While it may well be that the expenditures referred to in these paragraphs, upon investigation, are expenses which properly relate to the business of the First Respondent, still it is clear from the terms of the shareholders’ agreement, particularly clause 5.2.27 thereof that in regard thereto “no decision...shall be taken or implemented unless shareholders holding not less than 51% of the issued shareholding of the company vote in favour thereof”. No such vote has taken place in regard to these expenditures. It does not avail Schreiber to debit his loan account with expenditures on First Respondent’s behalf in the first place....’

[17] The applicant’s reply rings distinctly hollow in the context of the evident lack of any concern by the applicant about the non-compliance with the shareholders’ agreement over several years in respect of the running of the company. It is evident that the applicant during that period had been content to leave the management of the company entirely to Schreiber and that it had not exercised the rights afforded to it by virtue of its joint control of the board of directors to exercise supervision and direction over Schreiber’s executive functions. Moreover, there is no explanation as to why the grounds of complaint described in paragraph [13], above, were not addressed through the offices of the board of directors before an approach by the applicant to court for extraordinary relief. In my view it is only

after demonstrating that the applicant's concerns could not be addressed in the exercise of the powers of the appropriate organs of the company's government that an approach to court in terms of s 252 would arguably be warranted. Many of the issues could have been clarified upon simple enquiry. Others could have been addressed simply by the directors serving on the board as the applicant's appointees exercising their rights of access to the company's accounts. There was no availment of these mechanisms. In any event it does not seem to me that any of the complaints relied upon by the applicant affected it in its capacity as a member (cf. *Ben-Tovim v Ben-Tovim* 2001 (3) SA 1074 (C) at 1093). They are rather matters that might have affected the first respondent company, and, if they did, are matters that should have been addressed by its board of directors. If the complaints had been established, and the board of directors had failed to address the issue arising appropriately, applicant might have come closer to establishing that the affairs of the company were being conducted in a manner unfairly prejudicial, unjust or inequitable to it.

[18] In my judgment therefore, the applicant has failed to bring itself within the ambit of s 252(1) of the Companies Act. Even were I to be

wrong in so concluding, I am not persuaded that the applicant has established sufficiently cogent grounds for its apprehension that it is prejudiced by the conduct of the company's affairs to the extent that a material intervention in the management of the company is warranted pending the determination of the main application. It seems to me that it is within the power of the applicant using its vote as a shareholder and its rights under the shareholders' agreement to appoint directors to represent its interests in the company to achieve, in the ordinary course, the degree of insight into and supervision over the management of the company by Schreiber that it seeks instead to obtain by the extraordinary measure of the appointment of a co-manager by the court. The notion implicit in the argument by the applicant's counsel that in the current circumstances it would be unrealistic to expect effective action by the board of directors is conjectural. The directors representing the second respondent's interests have every reason to have the first respondent's best interests at heart in the discharge of their functions. Apart from the fact that the first respondent's best interests coincide with those of Schreiber and the second respondent, an obstructive or objectively indefensible conduct of the company's affairs at this stage would only

heighten the likelihood of a winding up order or an order directing the sale of the second respondent's interest to the applicant in the main application; neither of which results would be desired by Schreiber or the second respondent.

[19] Reverting to the analogous requirements of interim interdictory relief, I have not been persuaded that the applicant in that sense has established a *prima facie* right, even though open to doubt. Even if the establishment of a *prima facie* right had been satisfied, I would not be persuaded that the applicant had established a reasonable or well grounded apprehension of irreparable harm, or the absence of an alternative remedy.

[20] Recognising the tenuousness of the established bases of complaint, the applicant's counsel sought to persuade me that the issue was not what had already happened, but a concern as to what might happen in the future pending the final determination of the main application. In advancing that argument counsel was, perhaps unconsciously, reversing his characterisation of the relief as having been sought in terms of s 252 of the Companies Act and reverting to the position of an applicant for interim interdictory relief in the

conventional sense. The argument was untenable. Section 252 is premised on addressing the prejudicial conduct of a company's affairs that has already occurred. It thereby affords an affected member an extraordinary remedy by way of an exception from the consequences deriving from the common law position exemplified by the decision in *Foss v Harbottle* (1843) 67 ER 189. An interim interdict in the conventional sense is afforded to prevent apprehended future harm. But where, outside the ambit of s 252 of the Companies Act, is a member's legal standing to seek relief interfering in the conduct of a company's management in circumstances where the apprehended harm is properly a matter to be addressed by the company and not by its members acting in their individual capacity?

[21] There were other difficulties in the way of granting the applicant the relief it sought under the first head. I do not think it necessary to discuss them all. The most obvious is that the application does not put up any identified person as the proposed co-manager and it does not nearly adequately define precisely how the co-management functions are to be discharged. The applicant's counsel contended that these were details that might be addressed if the court were

persuaded in principle that some form of co-management regime should be instituted. He conceded that these further aspects would require a further hearing, presumably on the exchange of yet further papers (the papers in the current matter run to in excess of 630 pages and those in the main application to in excess of 800 pages). Having regard to the context of the matter seen as a whole, and in particular that there is only a short period before the main application is due to be heard, I would not in any event have been inclined to exercise my discretion in favour of embarking upon such a course on the basis of the conjectural basis established for an apprehension of material prejudice to the applicant in the interim.

[22] In the circumstances the application for the first head of relief cannot be upheld.

[23] The second head of relief may be shortly disposed of. It seemed to me to have been wholly misconceived. By virtue of its representation on the board of directors, the applicant is able through either of its two appointees to obtain access to the first respondent's financial records whenever such access is reasonably required. For the purposes of such examination the director or directors concerned

are entitled to be assisted by a professional accountant such as Mr Schutte. This follows from the provisions of s 284 of the Companies Act and the interpretation given thereto in the reported cases. Should the company or any of its directors or officers be complicit in frustrating the provisions of s 284 of the Companies Act, the appropriate remedy would be for the frustrated director to seek urgent interdictory relief. The directors or officers responsible for the company's non-compliance would also lay themselves open to criminal prosecution.

[24] There is no basis in law of which I am aware, or to which the applicant's counsel could direct my attention, which gives a shareholder the right to appoint, or to have the court appoint on its behalf, an accountant to examine the company's books (cf. (*Clutchco (Pty) Ltd v Davis* [2005] 2 All SA 225 (SCA) at para.14).

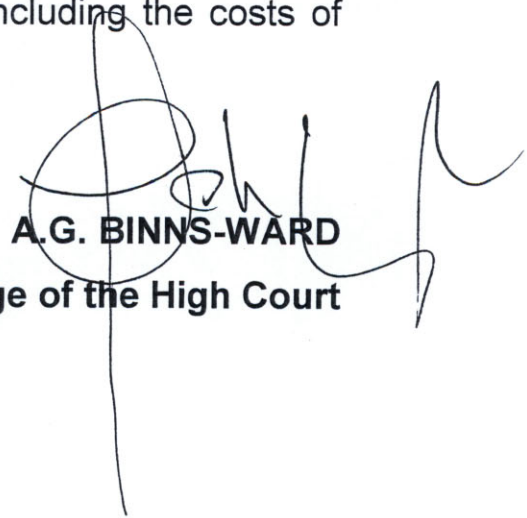
[25] The application for relief under the second head must therefore also fail.

[26] The Hochland Workers Komitee and a number of employees of the first respondent were admitted as intervening parties in the

application in terms of the aforementioned order made by the Deputy Judge President. The intervening parties made common cause with the second respondent in opposing the application. I am somewhat at a loss to understand why the applicant consented to such an order because the basis of the legal standing of the intervening parties on the matter in issue in the current application is by no means apparent to me. It may be that the applicant decided that the exigencies of obtaining a hearing on an urgent basis rendered it impracticable to contest the intervention of the intervening parties having regard to the delays that such a course would probably occasion. Whatever the reason, it seems to me that once it allowed the intervention the applicant thereby exposed itself to paying the costs of the intervening parties in the event of the application for interim relief not succeeding.

[27] In the result the following order is made:

The application is dismissed with costs, including the costs of two counsel where such were employed.



A.G. BINNS-WARD
Judge of the High Court

IN DIE HOË HOF VAN SUID-AFRIKA
(WES-KAAP HOË HOF, KAAPSTAD)

SAAKNOMMER

SS105/08

5 **DATUM**

7 JUNIE 2010

DIE STAAT

teen

1. **JOHN PIETERSEN**

10 2. **EBRAHIM SALIE**

V O N N I S

15 **RILEY, WnR:**

By vonnisoplegging is die soeke na 'n gepaste straf nie altyd maklik nie, want daar is soveel faktore wat 'n rol speel wat nie altyd definieerbaar is nie. Daarom is dit so belangrik dat die vonnisoplegger by die strewe na 'n gebalanseerde vonnis 'n straf moet oplê wat gepas is vir die oortreder en die misdaad wat hy of sy gepleeg het. Dit moet ook billik of regverdig wees in die oë van die gemeenskap en daar moet ook 'n mate van genade wees, afhangende van die omstandighede.

5 'n Vonnis moet altyd gebaseer wees op 'n gebalanseerde oorweging van die drie elemente, naamlik die aard en die erns van die misdryf, die belange van die gemeenskap en die persoonlike omstandighede van die oortreder. Die gemeenskap verwag dat ernstige misdaad gestraf sal word, maar verwag ook tewens dat strafversagtende omstandighede in ag geneem moet word en dat die beskuldigdes se besondere posisie deeglike oorweging verdien.

10

Die misdrywe waaraan die beskuldigdes skuldig gevind is, ressorteer onder Deel I van Bylae 2 van die Strafwysigingswet, 105 van 1997, wat voorsiening maak in artikel 51 vir 'n minimum vonnis vir sekere misdrywe. Op die moord aanklag maak die Wet voorsiening vir die oplegging van lewenslange gevangenisstraf en ten opsigte van die roof met verswarende omstandighede aanklagte, maak die bepalings van die Wet voorsiening dat 'n hof 'n eerste oortreder tot 'n tydperk van 15 jaar gevangenisstraf kan vonnis.

20

Volgens die Wet mag 'n hof slegs afwyk van die voorgeskrewe vonnisse tensy daar wesenlike en dwingende omstandighede bestaan wat 'n afwyking van die voorgeskrewe vonnisse regverdig. Volgens S v Malgas 2001(1) SASV 469 (HHA) moet daar nie ligtelik afgewyk word van die voorgeskrewe /im /...

minimum vonnis bepalings nie.

Die vonnisse in Wet 105 van 1997 voorgeskryf, beoog ook
veral afskrikking en kan derhalwe seker ook as “exemplary
5 sentences” beskou word. Die diskresionêre bevoegdheid word
egter verleen om 'n mindere vonnis op te lê. Dit behoort wel
gedoen te word wanneer die minimum vonnis in die besondere
omstandighede so wesenlik sal verskil van 'n billike straf, dat
dit tot 'n skokkende onreg teenoor die veroordeelde sou lei.
10 Hoewel dit duidelik is dat die Wetgewer by die voorgeskrewe
minimum vonnisse wou toon in welke ernstige lig sekere
misdrywe deur die Howe bejeën moet word, kon dit nooit die
bedoeling van die Wetgewer gewees het dat die oplegging van
sodanige vonnis in elk geval moet geskied nieteenstaande die
15 feit dat dit tot 'n skokkende onreg teenoor die veroordeelde sou
lei. Sien in die verband S v DODO 2001(1) SASV 307 (OK) en
die sake daarin aangehaal.

“Dit is egter belangrik om in ag te neem dat indien die Hof ten
20 tye van vonnisoplegging en na oorweging van die
omstandighede van die betrokke geval, tevrede is dat die
voorgeskrewe vonnis onregverdig en buite verhouding is tot
die misdaad, die beskuldigde en die belange van die
gemeenskap en die oplegging van so 'n vonnis wat 'n onreg aan
25 die beskuldigde sal doen, is die Hof geregtig om 'n mindere
/im /...

vonnis op te lê". (Vertaling met verwysing na paragraaf [25] in die Malgas-saak.) Sien ook in die verband die saak van S v Vilikazi 2009(1) SASV 552 (HHA) op 560f.

- 5 Me Allie het sterk namens die Staat aangevoer dat as gevolg van die bydraes van beskuldigdes 1 en 2 tot die pleeg van die misdrywe; dat die Hof hulle 'n swaardere vonnis moes oplê as wat Beck opgelê is in die pleit- en vonnisooreenkoms wat hy met die Staat aangegaan het. Sy het betoog dat die feit dat
- 10 Beck, onder andere, uit die staanspoor sy samewerking aan die polisie gegee het, 'n konfessieverklaring aan die polisie gemaak het, die pleit- en vonnisooreenkoms aangegaan het en ook ooreengekom het om namens die Staat teen die beskuldigdes te getuig, hom onderskei van beskuldigdes 1 en
- 15 2.

Die feit dat beskuldigdes 1 en 2 onskuldig gepleit het in die saak, kan nie teen hulle gehou word nie.

- 20 Die misdrywe waaraan die beskuldigdes skuldig bevind is, is uiters ernstig. Moord is die mees ernstigste misdaad wat gepleeg kan word. Dit is onnodig dat die Hof na die statistiek verwys waaroor die ondersoekbeampte getuig het. Die feit van die saak is, dat ons almal weet dat die pleeg van die
- 25 misdade waaraan die beskuldigdes skuldig bevind is,
- /im
- /...

onverpoos voortgaan nieteenstaande die oplê van swaar vonnisse deur die howe.

Die oorledene was 'n eenvoudige hardwerkende familieman wat
5 'n kleinerige besigheid, Brent's Electrical, genoem na sy seun,
geopereer het. Hy is in die laatmiddag oorval deur Beck en
beskuldigde 1 in sy besigheidspersoneel. Hy het Beck duidelik
vertrou. Beck was tot onlangs voor die oorledene se dood
werksaam by die oorledene. Volgens die aanvaarde getuienis
10 het hy beloof om Beck weer aan te neem in sy diens indien die
werk weer sou toeneem. Hy is op 'n uiters brutale wyse deur
Beck en beskuldigde 1 wie met 'n gemeenskaplike oogmerk
saam met beskuldigde 2 opgetree het, aangerand deurdat hy
aanvanklik geskop en geslaan is en later met 'n ysterstaaf
15 geslaan is asook met 'n mes of 'n soortgelyke voorwerp gesteek
is. Die oorledene is ook erg verwurg.

Volgens die getuienis wat die Hof aangehoor het en aanvaar
het, was die oorledene magteloos nadat hy onder bedwang
20 gebring is deur Beck en beskuldigde 1. Hy is vasgemaak en
hy kon geen weerstand bied nie. Sy mond is toegeplak met
kleefband om te verhoed dat hy skree.

Die oorledene se dood het katastrofiese en erg benadelende
25 gevolge vir sy familie gehad. Hy was die broodwinner. Hy het
/im /...

twee kinders gehad. Daar is getuienis aangebied dat sy jong dogter nou verslaaf is aan dwelms. Ek is nie oortuig dat die dwelmverslaafheid noodwendig verband hou met die moord op die oorledene nie en wil nie spekuleer daaroor nie. Wat egter
5 duidelik is, is dat die hele familie, insluitende die oorledene se seun en vrou, emosioneel geknak is as gevolg van die misdade.

Na die moord het mev Selfe 'n beroerte aanval beleef en ly sy
10 nou aan depressie. Die besigheid, Brent's Electrical, moes toemaak. Niemand kon klaarblyklik die besigheid bedryf soos die oorledene dit gedoen het nie. Die min bates, onder andere twee voertuie, moes verkoop word. Die familie se finansiële posisie is heel duidelik erg geaffekteer. Mev Selfe
15 word binnekort ook afbetaal by die plek waar sy werk. Die seun het gelukkig nog werk.

Wat heel duidelik is, is dat die oorledene se dood erge trauma aan sy familie veroorsaak het op verskillende vlakke. Wat
20 natuurlik die ergste uit die hele besigheid en die dood van die oorledene is, is dat op die oog af, hy gedood is vir kraggereedskap wat vir die meeste, volgens die getuienis voor die Hof, vir omtrent R850 verkoop is en dat dit blyk dat gedeeltes van die geld grootliks op dwelms vermors is.

25

Die Hof is maar te goed bekend daarvan dat dwelm misbruik en die gepaardgaande euwels wat daarmee saamgaan, 'n massiewe probleem geword het in die Hof se jurisdiksie, veral in die breë Wes-Kaap. 'n Groot persentasie van ernstige misdaad is direk te wyte aan die behoefte van gebruikers om 5 geld te bekom vir hulle dwelm aankope.

Die moord op die oorledene was totaal ongevraagd en uiters brutaal. Daar was beplan om die oorledene te beroof en hom 10 na die roof, die enigste getuie tot die roof eenvoudig te vermoor.

Die erns van die misdade en die manier hoe dit gepleeg is, is juis van die redes waarom die misdrywe ressorteer onder die 15 misdade wat tot gevolg het dat minimum vonnisse opgelê moet word en dit is dat, eerstens, beskuldigdes se optrede beplan was en met voorbedagte rade gepleeg is.

Tweedens, die oorledene was 'n persoon wie belangrike 20 getuienis sou kon aflê ten opsigte van die roofoanklagte.

Derdens, die moord op die oorledene is gepleeg gedurende die uitvoering van die misdaad, dit wil sê die roof met verswarende omstandighede.

Vierdens, die misdaad is ook gepleeg deur 'n groep persone tydens 'n gesamentlike, opsetlike optrede en/of met 'n gemeenskaplike doel.

5 Ek is terdeë daarvan bewus dat die howe nooit die indruk mag skep dat die mens se lewe goedkoop is in die oë van die reg nie. Sien in die verband S v Mqwati 1985(4) SA 22 (T) op 25J. Maar 'n vonnisoplegger se taak is nie om 'n vonnis op te lê wat die gemeenskap se belang of 'n sekere groep se mening
10 tevrede te stel nie, maar om die gemeenskaps belang te dien. In Mhlakaza & Another v S 1997(2) All SA 185 (A) het die Appèlhof, soos dit toe bekend was, wat vonnis betref die volgende beslis:

15 “The object of sentencing is not to satisfy the public opinion but to serve the public interest. A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the Court’s duty to impose fearlessly and
20 appropriate and fair sentence even if the sentence does not satisfy the public. The Court cannot allow itself to be diverted from its duty to act as an independent arbiter for making choices on the basis that they will find favour in the public.”

25

Die gemeenskap verwag egter dat ernstige misdade behoorlik gestraf sal word, maar terselfdertyd word daar ook tewens verwag dat strafversagende omstandighede in ag geneem word en dat die beskuldigdes se besondere posisie deeglik
5 oorweging verdien. Derhalwe is 'n vonnisoplegger se taak nie om wraak te neem en die beskuldigde te offer op die altaar van vergelding nie, maar om op 'n billike, redelike regverdige wyse en sonder vrees 'n vonnis te oorweeg, wat voldoen aan die vereistes van die geordende gemeenskap sonder om die
10 belange daarvan oor te beklemtoon.

Na my mening is daar tereg betoog dat die Hof kan bevind dat daar wesenlike en dwingende omstandighede teenwoordig is, wat 'n afwyking van die voorgeskrewe minimum vonnisse ten
15 opsigte van beskuldigde 1 en 2 regverdig.

Beskuldigde 1 is 27 jaar oud. Hy kom van 'n goeie stabiele familie. Sy ouers is al jare getroud. Ek was beïndruk deur sy pa. Hy is 'n eenvoudige, hardwerkende man wat sy hele lewe
20 lank swaar gewerk het om sy gesin 'n beskeie drieslaapkamerhuis te verskaf en binne sy vermoë 'n goeie lewe vir hulle te probeer gee.

Ek aanvaar dat hy totaal geskok was toe hy uitvind oor
25 beskuldigde se betrokkenheid by die moord. Volgens hom, is

hy en sy familie gelowiges. Hulle woon die Apostoliese kerkdienste gereeld by. Sy familie ken nie misdaad nie. Beskuldigde 1 se optrede ken hulle nie. Dit is nie hoe hulle lewe nie.

5

Beskuldigde 1 het nie sy ouers probleme gegee nie. Ek sal aanvaar dat beskuldigde 1 St.8 op skool gehaal het en skool verlaat het om die familie te help werk. Ek aanvaar verder dat hy ten tye van sy arres as 'n ongekwalifiseerde skrynwerker 10 gewerk het. Sy salaris blyk op die stadium omtrent R600 per week te gewees het.

Beskuldigde 1 het een kind van vyf jaar oud. Ek aanvaar dat toe hy gewerk het, dat hy die kind onderhou het. Hy het ook 15 tot en met huidiglik kontak met die kind gehad. Die beskuldigdes erken dat hy sedert die ouderdom van 22, 23 jaar oud dwelms gebruik en sê dat dit met eksperimentasie begin het toe hy met 'n vriend begin rook het.

20 Wat die misdaad self betref en sy betrokkenheid, hou beskuldigde 1 vol dat hy slegs betrokke was by die roof op die oorledene. Hy ontken dat hy die oorledene gesteek het met 'n mes en/of met 'n ysterstaaf geslaan het. Hy het getuig dat as hy geweet het dat die oorledene gedood sou word, dan het hy 25 nie saamgegaan nie. Hy het toegegee dat die misdaad

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self "tik" en gebruik hy dit dan ook volgens die getuienis met Beck en beskuldigde 1 en andere.

Sy vrou dra om een of ander rede nie kennis van die sy van sy
5 lewe nie. Volgens die getuienis het hy die idee van die roof
geïnisieer en met die voorstel vorendag gekom. Hy is die een
wat dit verder gevoer het toe hy Beck weer daaroor uitvra en
oortuig. Hy is die een wat die vervoer verskaf het en hy is die
een wat, volgens die getuienis, wag gehou het buite. Alhoewel
10 hy nie fisies bygedra het tot die roof en die moord nie, maak
dit egter nie sy bydrae tot die misdade minder ernstig nie. Sy
rol moet egter in perspektief gesien word in ag genome sy
bydrae.

15 Beskuldigde 2 was heel emosioneel toe hy getuig het ter
versagting van vonnis en het verskoning gevra vir die dood van
die oorledene. Advokaat Allie het aangevoer dat die Hof wat
vonnis betref selfs wat beskuldigde 2 betref, gedagtig moes
wees aan die beginsel dat in gevalle soos die onderhawige,
20 dat wat beskuldigde 1 en Beck fisies aan die oorledene gedoen
het, ook toegedig moet word aan beskuldigde 2 in die lig van
die gemeenskaplike oogmerk wat hulle almal gehad het by die
pleeg van die misdrywe.

25 Ek neem kennis van haar betoë in die verband.

Beskuldigde 2 het verder getuig dat as hy nie gery het, sou dit nooit gebeur het nie. Hy het egter volgehou dat as hy geweet het wat Beck in sy "mind", soos hy dit gestel het, gehad het, hy
5 nooit sou gery het nie.

Nieteenstaande me Allie se sterk betoog dat beskuldigdes 1 en 2 swaarder vonnisse opgelê moet word dan Beck, is ek nie daarvan oortuig nie. Op die feite en die omstandighede van
10 die saak is ek van mening dat beskuldigdes 1 en 2 se morele blaamwaardigheid ten opsigte van die pleeg van die misdrywe minder as dié van Beck beskou moet word en gevolglik is ek van mening dat die vonnis wat hulle opgelê moet word, minder behoort te wees as die vonnisse wat Beck opgelê was.

15

Ek het egter besluit om beskuldigde 1 en 2 in die omstandighede van die saak op 'n soortgelyke wyse te hanteer wat vonnis betref en het ek gevolglik dan nou ook besluit om hulle dieselfde vonnis op te lê.

20

Soos reeds gemeld, moet ernstige misdade swaar gestraf word. Die enigste straf wat die Hof in die saak kan oplê is inderdaad langtermyn gevangenisstraf. Daar word egter nie met die straf beoog om beskuldigdes totaal af te kraak met die
25 vonnisse nie.

In ag genome al die faktore wat 'n gepaste vonnis daarstel en die regspraak in dié verband, is die Hof van mening dat die volgende 'n billike en regverdigde straf is in die omstandighede
5 van die saak:

Op aanklag 1, moord, word die beskuldigdes elk gevonniss tot AGTIEN (18) JAAR GEVANGENISSTRAF.

10 Op aanklag 2, roof met verswarende omstandighede, word die beskuldigdes elk gevonniss tot TIEN (10) JAAR GEVANGENISSTRAF.

Ingevolge die bepalings van artikel 280 van die Strafproseswet
15 word gelas dat die vonnis op aanklagte 2, dit wil sê die aanklagte van roof met verswarende omstandighede, samelopend uitgedien word met die vonnis opgelê op aanklagte 1. Die effektiewe vonnis is dus agtien (18) jaar gevangenisstraf ten opsigte van elk van die beskuldigdes.

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Beide beskuldigdes word onbevoeg verklaar om 'n vuurwapenlisensie te besit.

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RILEY, WnR

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