IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: PORT ELIZABETH

CASE NO: 14/11

Heard on: 17/06/11

Delivered on: 11/08/11

In the matter between:

ROBERT GRIFFITHS — Applicant

and

CLIMATIC AIR CONDITIONING &

REFRIGERATION CC

Registration No. CK1986/002088/23 — First Respondent

and

ANCHOR ENGINEERING CC

Registration No. 1986/004500/23 — Second Respondent

and

CLIFIN INVESTMENTS (PTY) LTD

Registration No. 1994/008500/07 — Third Respondent and

AINSLELY OWEN PUGHE-PARRY Fourth Respondent

and

GERALD JACK FRIEDMAN, AINSLEY OWEN PUGHE-PARRY and CLEMENT CHARLES ROBERT MORRIS in their capacities as Trustees for the time being of THE AINSLEY PUGHE-PARRY TRUST Registration No. TM6106 Fifth Respondent

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JUDGMENT

NHLANGULELA J:

[1] The applicant has brought this application in terms of s 36, s 49 and s 68 of the Close Corporations Act, Act No. 69 of 1984 (the Act); and s 252 of the Companies Act, Act No. 61 of 1973 (the Companies Act). The applicant seeks, in the first part, an order that the membership and shareholding of the applicant in the first, second and third respondents be terminated and that the applicant's members interest and loan accounts in those respondents be transferred to the fourth, alternatively, the fifth respondent, against payment

of certain sums to the applicant. In the second part, the applicant seeks an order that the first, second and third respondents be placed under provisional liquidation in the hands of this Court. The relief is sought in the second part only in the event that the relief in the first part is not granted.

[2] The applicable legislation in this case are s 36 and s 49 of the Act and s 252 of the Companies Act. I quote hereinunder the relevant provisions of the pieces of the legislation aforementioned.

Section 36 of the Act reads:

> "**Cessation of membership by order of Court**
>
> (1) On application by any member of a corporation a Court may on any of the following grounds order that any member shall cease to be a member of the corporation:
>
> a) Subject to the provisions of the association agreement (if any), that the member is permanently incapable, because of unsound mind or any other reason, of performing his or her part in the carrying on of the business of the corporation;
>
> b) that the member has been guilty of such

conduct as taking into account the nature of the corporation's business, is likely to have a prejudicial effect on the carrying on of the business;

c) that the member so conducts himself or herself in matters relating to the corporation's business that it is not reasonably practicable for the other member or members to carry on the business of the corporation with him or her; or

d) that circumstances have arisen which render it just and equitable that such member should cease to be a member of the corporation:

Provided that such application to a Court on any ground mentioned in paragraph (a) or (d) may also be made by a member in respect of whom the order shall apply.

(2) A Court granting an order in terms of subsection (1) may make such further orders as it deems fit in regard to–

a) the acquisition of the member's interest concerned by the corporation or by members other than the member concerned; or

b) the amounts (if any) to be paid in respect of the member's interest concerned or the claims against the corporation of that member, the manner and times of such payments and the persons to whom they shall be made; or

c) any other matter regarding the cessation of membership which the Court deems fit."

Section 49 of the Act reads:

"**Unfairly prejudicial conduct**

(1) Any member of a corporation who alleges that any particular act or omission of the corporation or of one or more other members is unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, or that the affairs of the corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, may make an application to a Court for an order under this section.

(2) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable as contemplated in subsection (1), or that the corporation's affairs are being

conducted as so contemplated, and if the Court considers it just and equitable, the Court may with a view to settling the dispute make such order as it thinks fit, whether for regulating the future conduct of the affairs of the corporation or for the purchase of the interest of any member of the corporation by other members thereof or by the corporation.

3) …

4) …

5) …"

Section 252 of the Companies Act reads:

"**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 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 mattes 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) …

5) …"

[3] The nature and purpose of s 36 and 49 of the Act can best be appreciated by referring to judgment of Nepgen J in *De Franca v Exhaust Pro. CC (De Franca Intervening)* 1997 (3) SA 878 (SECLD) at 893C–H, where the learned Judge stated as follows:

"Section 49 deals with the situation where conduct (an act or an omission) of the close corporation or of one or more of its members, or where the manner in which the affairs of the close corporation are being conducted, is unfairly prejudicial, unjust or inequitable to a member of the close corporation. When this occurs such member may make application to the Court for an order that will have the effect of 'settling the dispute' (s 252 of Act 61 of 1973 provides for an order having the effect of 'bringing to an end the matters complained of'). As to what an applicant must establish, see *Gatenby's* case (*supra* 124B-G). The Court has a wide discretion with regard to the order that it decides to make to bring about the required result (*cf Gatenby* case *supra* at 122F-123J). Such order can, however, only be made 'if the Court considers it just and equitable' to do so.

Section 36 of the Act also deals with an application to Court by a member of a close corporation, but such member is not required to establish conduct of the nature referred to above when discussing s 49 of the Act, namely conduct affecting him. It is the carrying on of the business of the close corporation that must

> be affected, either by the existence of circumstances envisaged by ss (1)(a) or by conduct as described in ss (1)(b) and (1)(c). Subsection (1)(d), however, gives wide and virtually unlimited scope for the application of s 36 of the Act, the only limitation being the 'just and equitable' requirement. The order that a Court can make in terms of s 36(1) of the Act is circumscribed, namely an order that a member shall cease to be a member of the close corporation. Once a Court decides that an order for such cessation of membership should be made, it has a discretion to make further orders as referred to in s 36(2) of the Act. While a Court could, applying the provisions of s 49 of the Act, make an order compelling one member to purchase the interest of another, which would have the effect of such member's membership in the close corporation ceasing, that which would have to be established before this is done is quite different to what would have to be established under s 36 of the Act."

[4] The Honourable Mr Justice Meskin in *Henochsberg on the Close Corporations Act*, Vol. 3 paras. 36.1 and 49.1 confirms that a member who makes the application envisaged by s 36 and s 49 of the Act bears the *onus*

of proving that he is entitled to the relief which he seeks and it is incumbent upon him to place before the court necessary evidence to enable the court to decide that it would be appropriate for it to grant the order sought. In this regard the learned author also refers to the case of *Kanakia v Ritzshelf 1004 t/a Passage to India* 2003 (2) SA 39 (D) at 48. The applicant bears the same *onus* to persuade the court to make any further order envisaged by s 36(2). See: *Geaney v Portion 117 Kalkheuwel Properties CC and Others* 1998 (1) SA 622 (T) at 631H–632A.

[5] In terms of s 36(1)(a) the applicant should adduce evidence to prove that the fourth respondent is permanently incapable, for whatever reason, of performing his part in the carrying on of the business of the first, second and third respondents. Under s 36(1)(b) the evidence must prove that the conduct of the fourth respondent in relation to the business of the first, second and third respondents is likely to have a prejudicial effect on the carrying on of the business of the entities and, in terms of s 36(1)(c), that the conduct is such that it is not reasonably practicable for the applicant to carry on the business of the corporations with the fourth respondent. Under s 36(1)(d), which is couched in the terms which are wider than those employed in s 36(1)(b) and (c), the evidence should prove the presence of circumstances, other than the conduct of the fourth respondent and with

reference to the carrying on of the business or any matter relating thereto or otherwise, which render it just and equitable that the applicant should cease to be a member of the first, second and third respondents. See *Henochsberg, supra,* para. 36.6.

[6] As already indicated in the case of *De Franca, supra,* in terms of s 49(1) of the Act the applicant must adduce evidence which proves that the conduct of the fourth respondent is unfairly prejudicial, unjust or inequitable to him. This feature distinguishes a relief under s 49 from s 36 of the Act. Other than that feature, the two reliefs compliment each other, hence a need for the applicant to rely on both sections. A relief under s 49 advances rather than limit the rights of a member of a corporation to take part in the running of the business of a corporation and when he/she wishes to terminate membership due to oppressive conduct by a co-member to do so without unnecessary inhibition. The commonalities between the two relief are described in *Henochsberg, supra,* para. 49.1 as follows:

> "Circumstances which may justify the Court's intervention under this section also may justify the Court's intervention under s 36. Thus, it is difficult to conceive that the existence of conduct unfairly prejudicial, unjust or inequitable to a member (A), within the meaning of subs (1), would not also

inevitably qualify as the existence of circumstances rendering it just and equitable, within the meaning of s 36(1)(d), that A should cease to be a member if A were to prefer this. An application under s 36(1)(d) of course may be made also by A himself (see the proviso to s 36(1)). It may be observed that under s 36(2) the Court *inter alia* may make an order for the acquisition of A's interest by the corporation or by other members (cf s 49(2)). Conversely, under s 36 (1)(d) read with s 36(2) the Court may order that the interest of a member responsible for the said conduct is to be acquired by A. The jurisdiction under s 49 is, however, wider than that under s 36 since the Court can make any order, other than one envisaged by s 36(2), regulating the future conduct of the affairs of the corporation, ie on the basis of there being no alteration to its membership (eg by appropriately permanently interdicting the member or members responsible for the said conduct)."

[7] I find the passage in the case of *Gatenby v Gatenby and Others* 1996 (3) SA 118 (ECD) at 124B–G which is referred to in the case of *De Franca,* to be significant and relevant to the decision of this application. The said passage reads:

"It is necessary to consider what he must establish to succeed. *Garden Province Investment and Other v Aleph (Pty) Ltd and Others (supra* at 531C *et seq)* holds that in order to succeed in invoking the provisions of s 252 of the Companies Act a minority shareholder must establish

'not only that a particular act or omission of a company results in a state of affairs which is unfairly prejudicial, unjust or inequitable to him but that the particular act or omission itself was one which was unfair or unjust or inequitable. Similarly, looking at the second part of the section, where the complaint relates to the manner of conduct of the business, it is the manner which the affairs have been conducted as well as the result of the conduct of the business in that manner in which must be shown to be unfairly prejudicial, unjust and inequitable. In the Afrikaans version the word "unfairly" is translated as "onredelike" and in point of fact it was the Afrikaans version of the Act which was signed. The word "unfairly ", therefore, whether it qualifies only the word "prejudicial" or whether it qualifies the words "prejudicial, unjust or inequitable" means therefore "unfairly", in the sense of "unreasonably", and it seems to me that the use of the word "unfairly" in this sense in the section fortifies my belief that the section relates both to the manner and nature of the conduct as well as to the results or effect of that conduct. When one looks at the second part of the section it is stated explicitly that the manner in which the affairs of the company are being conducted must be shown to be unfairly prejudicial, unjust or inequitable. This conclusion seems to me also to be consistent with what has been said on a number of occasions with regard to the predecessor of this section, namely the previous s 111*bis.* Thus in the case of *Livanos v Swartzberg and Others* 1962 (4) SA 395 (W) Cillie J said at 399:

> "In any event it is not the motive for the conduct that the Court must look at *but the conduct itself and the effect* which it has on the other members of the company."

(My italics) (See also *Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others* 1968 (1) SA 517 (C) at 529.)'

Section 49 places a similar *onus* upon a member of a close corporation who considers that he is being unfairly prejudiced."

[8] For the view which I take of this matter as a whole, the alternative relief sought by the applicant to liquidate the first, second and third respondents in terms of s 68 of the Act, seems to me to be inappropriate. I will give reasons for my view later on in this judgment.

[9] I now proceed to deal with the facts of this case to see if there is evidence adduced to support the granting of the relief sought in part 1 of the notice of motion.

[10] Robert Griffiths, is an adult male businessman who resides at 31 King Edward Street, Newton Park, Port Elizabeth. He is the applicant is this matter. Ainsley Owen Pughe-Parry is an adult male businessman who resides at 19 Brighton Drive, Summerstrand, Port Elizabeth. He is the fourth respondent in this matter. I will hereinafter refer to both the applicant and fourth respondent as Griffiths and Pughe-Parry, purely for the sake of convenience.

[11] Griffiths and Pughe-Parry became acquainted to each other during 1984. At the time Pughe-Parry was operating a business under the name and style of Climatic Air Conditioning & Refrigeration, a close corporation which is duly registered and incorporated in terms of the Act with its registered address at Rosebank, 30 Bird Street, Port Elizabeth (hereinafter referred to as Climatic). Climatic conducts the business in the supply and

installation of air conditioning and refrigeration systems. In essence, Climatic would sub-contract to a building company during the course of constructing a commercial or industrial development for the installation of the air conditioning system to the new structure. Climatic is cited as the third respondent in this matter. Pughe-Parry was the sole member of the corporation.

[12] On invitation by Pughe-Parry, Griffiths joined Climatic as an employee, serving as a sales representative.

[13] During the year 1987, Pughe-Parry offered to sell to Griffiths 20% membership interest in Climatic at R87 000,00. The offer was accepted and the price was duly paid by Griffiths, thus changing his status of an employee to that of a "co-owner" of the business. To regulate their relationship as the members of Climatic, the parties concluded a written association agreement. Pursuant thereto, Griffiths, aged 31 years at the time, put his heart and soul into the business. He worked hard. He helped build up a substantial new client base and expanded and maintained the existing client base. Griffiths was primarily responsible for the sales and marketing; designing of air

conditioning, refrigeration, and tender calculations. Project management also formed a large part of his duties and responsibilities. Pughe-Parry was responsible for managing the day to day affairs of Climatic.

[14] As the business of Climatic grew in leaps and bounds; so did the financial strength and business appetite of Griffiths and Pughe-Parry. During the year 2001, Griffiths and Pughe-Parry acquired the second respondent, Anchor Engineering Close Corporation (Anchor), at a price of approximately R100 000,00. The parties became members of Anchor with membership interest at the ratio of 20%–80% respectively. The business of Anchor was the manufacture of ducting and sheet metal products which became a strategic fit with Climatic's business. No association agreement was concluded by the parties in Anchor.

[15] Further, in 2003, Griffiths and Pughe-Parry decided to activate a dormant company, Clifin Investments (Pty) Ltd (Clifin), to establish a business of supply of air conditioning control systems, maintainance and repair services to customers of Climatic. Clifin is cited as the third respondent in this matter. While Pughe-Parry took 80% shares in Clifin,

Griffiths contentend himself with the remaining 20% shares. They later transferred 20% and 5% shares respectively in favour of one Mr Duane John Schmidt, the erstwhile employee of Climatic.

[16] I interpose to say something about the fifth respondent. It is described as the Ainsley Pughe-Parry Trust, which is duly registered under No. TM6106 in terms of the Trust Property Control Act, Act No. 57 of 1988. Pughe-Parry is a trustee of the Trust together with Mr Gerald Jack Friedman and Mr Clement Charles Morris. It is common cause that the Trust is the alter ego of Pughe-Parry, the sole beneficiary thereof.

[17] Throughout the years of successful operations Climatic, Anchor and Clifin grew into substantial businesses. During the year 2007, Climatic had grown into a business with a turnover of approximately eighteen million rand per annum and assets with a market value which was estimated between eight million rand to nine million rand. It had acquired approximately 35 vehicles, plant equipment, tools and stock. Anchor has a turnover of approximately one million rand six hundred thousand rand per annum. The assets consist of modern state of the art sheet metal

manufacturing equipment. Clifin grew into a company with a turnover of two million five hundred thousand rand per annum. The assets consist of vehicles, tools, equipment and stock.

[18] Notwithstanding Griffiths' interest in the entities, Griffiths was dominated by Pughe-Parry, who simply decreed all operating and management decisions without consultation with Griffiths. This state of affairs, exacerbated by many other reasons which will be outlined shortly, culminated in a rift between the parties which led Griffiths to opt out of the entities and leave Pughe-Parry to carry on with the business. On 17 November 2006 Griffiths informed Pughe-Parry in writing of his decision to resign from all three entities. This letter was in compliance with the association agreement.

[19] The reasons for Griffiths to leaving the entities are not seriously disputed by Pughe-Parry. A good business relationship of 23 years which existed between the parties had declined over a period of time to a point where the trust and respect between the parties was lost completely. Griffiths states that despite his protestations and objections, Pughe-Parry

committed the bulk of Climatics resources to a large building contractor, which is commonly known as WBHO. This contractor was engaged in huge projects extending to Paarl, Mossel Bay, George, Vereeniging and Port Elizabeth. The stake given by WBHO to Climatic constituted 60% of turnover in WBHO. Further, at the same time Climatic was caused by Pughe-Parry to accept all of VWSA's paint shop projects. Such huge commitment effectively stripped the entities from their ability to service its remaining loyal client base. The entities became unable to satisfy their existing clients, resulting in a decline in customer satisfaction and orders. Griffiths was left to pacify the disgruntled customers with little resources or support from Pughe-Parry. When the entities could not deliver in accordance with the programme of works, Pughe-Parry over extended the entities to WBHO and VWSA resulting in shoddy and poor workmanship and substantial retentions and funds owed to the entities, being offset to repair and rectify poor quality workmanship. Pughe-Parry disregarded the involvement of Griffiths in the operations of the businesses and insisted on treating him like an employee. Pughe-Parry failed to call meetings for the entities, did not consult with Griffiths meaningfully in relation to decisions made by the entities or contracts entered into by the entities, and conducted the affairs of the entities in a way where financial or other information became virtually unavailable. It became almost impossible for Griffiths to establish or monitor his investments in the entities, the financial position of the entities or the entities' exposure to risk.

[20] Pughe-Parry's version is that from 1994 onwards Griffiths started misusing drugs, was arrested, jailed and convicted for drug related crimes. Griffiths misused the internet facilities of Climatic and at the sight of clients and staff members, wrongfully visiting ponographic websites. Griffiths had to be referred to a rehabilitation centre at cost to Climatic. He alleges that the condition of Griffiths had degenerated to such an extent that he was unable to make any sensible decisions regarding anything to do with the entities. This necessitated "bottle feeding" Griffiths most of the time.

[21] Pughe-Parry blames Griffiths for dishonesty in that, whilst still being a member in the entities, in the year 2007 he and one Mr Daniel De Jager formed Siyalungisa Manufacturing (Pty), an engineering company manufacturing sheet metal ventilation and air-conditioning. Siyalungisa offered a service, design, manufacture and supply of sheet metal ducting to the air-conditioning and ventilation industry contractors in Port Elizabeth and the Eastern Cape. Siyalungisa was formed and had been operated in direct competition with Climatic, doing so in contravention of a restraint of trade clause in the association agreement.

[22] Griffiths denies all the blame which is leveled against him by Pughe-Parry, contending that the alleged issues of dishonesty are partly untrue, exaggerated and, in any event, irrelevant to the core matters of business operations. Griffiths further contends that he was ill treated and disrespected by Pughe-Parry over a long period of time.

[23] It is clear from the above facts that the trust and respect between the parties has dissipated, the relationship between the parties is dysfunctional and their partnership relationship in the entities has disintegrated. The concession has been made by Pughe-Parry that any further co-operation between him and Griffiths is impossible. It comes as no surprise that Griffiths left the operations of the entities into the hands of Pughe-Parry. The management and operations of the entities became a one man show. Griffiths had been sidelined and reduced to an employee, albeit without any say. A deadlock situation has been reached between the two members. An attempt by Griffiths to terminate his membership and get paid for his investments in the entities is a further indication that both the personal and business relationship between the parties has irretrievably broken down with no prospect of reconciliation in sight.

[24] The question now to be asked, and answered, is whether Griffiths has made a case against the respondents in terms of s 36, s 49 and s 68 of the Act and s 252 of the Companies Act. If the question is answered in the affirmative, the next question is whether the relief sought should be granted as prayed in the notice of motion.

[25] It was submitted by *Miss Mey*, counsel for the respondents, that Griffiths has not made out a case for a relief sought because of the existence of material dispute of facts relating to, not only why and how Griffiths left the employ of the entities and decided to terminate his membership, but also the manner in which the entities were run with regard to settlement discussions and Griffith's breach of restraint of trade. I do not agree with this submission because the material facts stated by Griffiths regarding why and how a rift, developed between the parties, which culminated in a deadlock, has been admitted by Pughe-Parry.

[26] The dispute around the issue of restraint of trade is not material in my view because it was not the main reason for the break-down of business

relationship between the parties, but it was the result of such break-down. It is also significant to note that a claim based on such alleged breach cannot even be taken into account in the evaluation of membership interest since no counter-claim was made for it and it has, in any event, become prescribed. In the circumstances there would be no need for Griffiths to apply for hearing of oral evidence on the issue of restraint of trade.

[27] I will not deal with the legal objection that the issues in this application are pending determination by a Court in the summons proceedings because such action was withdrawn.

[28] *Miss Mey* submitted further that the relief sought cannot be granted because Griffiths has failed to prove that Pughe-Parry and the Trust are able to make payment for the transfer of membership interest of Griffiths to them. She also submitted that Griffiths has failed to prove the value of his membership interest and loan accounts which should be paid to him. Further, it was submitted that it would not be just and equitable for the Court to terminate Griffiths' membership in the entities or to order transfer of membership interest where Griffiths would be left with a contingent liability

towards creditors in favour of whom he had signed sureties.

[29] *Mr Huisamen SC,* who appeared on behalf of Griffiths, submitted that sufficient evidence has been placed before Court to prove that Griffiths is entitled to the relief sought.

[30] In my view the facts of this case prove that the conduct of Pughe-Parry in relation to the business of the entities constitute the grounds which are stated in s 36(1)(b), (c) and (d) of the Act. The domineering attitude that Pughe-Parry displayed towards Griffiths, the exclusion of Griffiths from the decision making which is necessary for the smooth and all inclusive carrying on of the business, his reluctance to convene business meetings and failure to prepare financial statements do not augur well for the success of the entities. The departure of Griffiths in 2006 has shown that it was not reasonably practicable for him to carry on the business of the entities with Pughe-Parry. In these circumstances it would be just and equitable that Griffiths ceases to be a member of the entities. It appears that the establishment of Siyalungisa was caused by the anomalous situation in which Griffiths found himself. The fact that Pughe-Parry himself does not

wish to work with Griffiths anymore may very well be a circumstance that supports the relief sought by Griffiths to terminate his membership in the entities.

[31] The conduct of which complaint is made by Griffiths in terms of s 36 is the same conduct that affects Griffiths in his personal capacity as envisaged in s 49 (1) of the Act. See *Henochsberg*, para. 49.1. Therefore, Griffiths has proved by credible evidence, which is set out in his affidavits, that he is entitled to a relief in terms of s 49 of the Act and s 252 (1) of the Companies Act because he is a victim of oppressive conduct of Pughe-Parry. It has been proved that not only is the conduct of Pughe-Parry unfairly prejudicial, unjust or inequitable to Griffiths, but also that his conduct is itself unfair, or unjust or inequitable within the description of unfair conduct as mentioned by Jones J in the case of *Gatenby, supra,* at 125G–H with reference to the case of *Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Collieries Ltd: SA Mutual Life Assurance Society And Another Intervening* 1979 (3) SA 713 (W) at 722E–G where it was stated:

> "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 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."

[32] The remedy sought by Griffiths in terms of s 36 and s 49 of the Act and s 252 of the Companies Act, has origin in the common law solutions to deadlocks between partners arising from the joint ownership of property and collective oppression arising from shareholders, see: *Heckmair v Beton and Sandstein Industreë (Pty) Ltd en Andere* (1) 1980 (1) SA 350 (SWA) at 353A. To this Jones J states in *Gatenby, supra,* at 123E that there is a common feature in the legislation relating to companies, close corporation and common law, in acknowledgement of the underlying equitable principle that no co-owner, no partner, no shareholder and no member is normally

obliged to remain as a co-owner, partner, shareholder or member against his will in circumstances where this is unfair or oppressive to him. Based on this statement, I am of the view that the provisions of s 36(2) and 49(2) of the Act and s 252 (2) of the Companies Act constitute an appropriate remedy for Griffiths in Climatic, Anchor and Clifin. I am satisfied that an order terminating Griffith's membership in the entities is appropriate; and that his membership interest, shareholding and loan accounts should be transferred to Pughe-Parry against payment of a fair price.

[33] The verbal agreement reached between Griffiths and Pugh-Parry in November 2006 that Pughe-Parry would purchase the equity of Griffiths in the entities, does not permit an argument that Pughe-Parry cannot raise funds to pay. Such an agreement was later undermined by Pughe-Parry who suddenly raised a defence that due to breach of restraint of trade by Griffiths, he was no longer bound to purchase Griffiths' equity at a fair value.

[34] Griffiths has made an effort to valuate his equity in the entities so that he may be paid and leave the entities as already agreed. Faced with the hostility and refusal by Pughe-Parry to comply with a request for financial statements, in 2006 Griffiths took steps to hire one Mr Michael Howcroft, (Howcroft), the chartered accountant, to calculate and give value to his

membership interest and loan accounts. After making necessary calculations, on 03 December 2008, Howcroft came up with a value of R2 103 296,00, which was disputed by Pughe-Parry's auditors, Mazars Moores Rowland (Mazars). In March 2009, Mazars responded that an amount of between R900 000,00 to R1 050 000,00 was appropriate. This figure was later on lowered to R707 000,00. The problem between the auditors lay in the disputed method of calculation. In an attempt to address the problems, Howcroft came up with an offer in the sum of R1 465 000,00, which was rejected by Pughe-Parry. Pursuant to a valuation meeting which was held on 29 April 2009, Howcroft delivered a compromise offer in the sum of R1 100 000,00, which was rejected by Pughe-Parry contending that he was prepared to pay only R800 000,00. The counter offer was not based on any accounting method. However, on 14 August 2009, the parties agreed to settle the dispute at R1,1m less certain expenses in the sum of R178 883,00. After a settlement agreement was drafted and signed by Griffiths, Pughe-Parry refused to sign it. He repudiated the agreement, instead, albeit with a measure of ambivalence as he stated that he needed more time to collect funds and would settle the matter provided that a dispute about breach of restraint of trade was going to be addressed simultaneously with the claims of Griffiths. Yet again, on 26 March 2010 he stated that he was arranging finances to pay Griffiths. Frustrated by Pughe-Parry's dilatoriness in the settlement of his claims, Griffiths resolved to approach this Court for a relief sought.

[35] On the foregoing, I am not persuaded that Pughe-Parry is unable to pay for the membership interest and loan accounts of Griffiths. I can find no reason in the papers to support the submission that Griffiths equity cannot be purchased because Pughe-Parry has no money to do so. What I see in Pughe-Parry is an unwillingness to pay, an attitude which is consistent with his statement made on affidavit that any further co-operation with Griffiths is impossible to him.

[36] It was submitted further on behalf of Pughe-Parry that the relief sought may not be granted because Griffiths is a co-surety with Pughe-Parry for certain liabilities of the entities for which he has not been released by the creditors. Pughe-Parry refuses to indemnify Griffiths in respect of such liabilities. In this regard the case of *Kanakia, supra,* at 54C was referred to. It must be said that the facts in *Kanakia* are distinguishable from the facts of this case. There, the applicant, a member sought relief in terms of s 36(2) and s 49(2) of the Act, failed to place evidence before the Court that he was

able to indemnify a co-member, whom the applicant wanted to be removed from the corporation against transfer of joint liabilities towards the creditors of the corporation if the co-member is not released from suretyship in the future. There was evidence that the applicant had made certain undertakings which he did not honour. As a result, the court held that it was not just and equitable for the membership interest of the co-member to be transferred to the applicant and to leave the co-member with a contingent liability towards creditors in favour of whom he had signed suretyship.

[37] In this case, Griffiths has proved with credible evidence that the entities are financially sound and, *ex hypothesi*, Pughe-Parry, as a majority holder, has financial means to indemnify him. The fact that Griffiths is not a controlling member and shareholder and that he left the entire entities, which are still up and running, under the control of Pughe-Parry in November 2006, reinforces my belief that it would be just and equitable to order transfer of the membership interest subject to indemnification of Griffiths against liabilities of creditors. I have also not received evidence that any of the creditors, who have not been revealed to the Court, has not been paid by the entities. In the circumstances, it would be absurd for this Court to deny a remedy to Griffiths in a situation where compelling evidence exists for it to be granted merely on the basis that Griffiths has bound

himself to creditors.

[38] For a decision that I have already made that a case has been made out for relief in terms of s 36 and s 49 of the Act and s 252 of the Companies Act, no purpose would be served in entering into discussions on s 68 of the Act. Suffice it to be said that liquidating the entities would not be desirable as no basis exists for the Court to make such an order. The *dictum* by Nepgen J in *De Franca, supra,* serves as a guideline. The learned Judge said the following at 896E:

> "In fact, it is my view that it is highly probable that by enacting s 36 of the Act one of the purposes of the Legislature was to create a mechanism whereby the inevitability of winding-up can be avoided where a 'deadlock' situation exists between members. Even if that was not the specific intention of the Legislature, s 36 of the Act clearly has such result."

[39] A determination of a fair value of interest and loan account of Griffiths has not been a simple matter for the parties. In the light of the disagreements that have endured from the year 2006 to date, it cannot be a

simple matter for the Court either. The fact of the matter is that each party has displayed sceptism and mistrust towards the other's audit report. Both Howcroft and Mazars have compiled reports. These experts have themselves been entangled in disputes regarding the appropriateness of accounting methods and formulas as applied by each. To the debate that ensued on the issue, *Miss Mey* contended that the valuation placed on Griffiths' members' interest and loan accounts is outdated and unacceptable, as financial information utilized was collected two years before the application was brought. With reference to the relief sought that the Court should order payment of R1 632 000,00, *Miss Mey*, relying on the case of *Smyth and Another v Mew 2*010 (6) SA 537 (SCA) at 543E, submitted that not enough financial information was placed before the Court in support of that value to enable the Court to exercise its discretion in favour of Griffiths. I would not agree with *Miss Mey* that the information utilized is outdated; neither would I agree that the financial information was inadequate. It seems to me that the audit reports of the respective parties need to be verified and reconciled to the extent that the parties do not agree on accounting methods and formulas to be applied in the calculation of Griffiths' membership interest and loan account in the entities. Thus, referring the matter to an independent chartered accountant is an appropriate step to be taken.

[40] The resolution of a dispute concerning the insurance policies of Griffiths and Pughe-Parry need not detain the Court. There is no real dispute here. Insurance policies taken by the one member on the life of the other are regulated in terms of the association agreement which was concluded by the parties in Climatic. There is merit in the relief sought that the insurance policies be dealt with in terms of paragraphs 11 and 13 of the association agreement dated 24 September 1987, by each member ceding a policy on the life of the other. Pughe-Parry will not be prejudiced as his interest in the entities is larger as compared to that of Griffiths.

[41] Although the applicant failed to support the relief sought for the liquidation of the entities he has, nevertheless, achieved substantial success in the application. He is therefore entitled to the costs, which should be paid by all the respondents except the fifth respondent.

[42] In the result the following order shall issue:

1. That the membership of the applicant in the first,

second and third respondents be and is hereby ordered to cease with immediate effect.

2. **That the fourth respondent be and is hereby directed to acquire the applicant's membership interest in and loan claims against the first, second and third respondents for an amount/price to be determined within thirty (30) days from the date of this order by an expert practicing as a Chartered Accountant of at least 10 (ten) years experience appointed by the Chairman of the Port Elizabeth Region Association of Chartered Accountants.**

3. **That the price shall bear interest at the prescribed legal rate from 7 November 2006 to date of payment, which is to be calculated monthly in arrears and compounded; and such accrued interest is to be paid:**

   (a) without deduction or set-off within 30 (thirty) days of the date of its determination.

(b) into the Trust Account of the applicant's attorneys of record.

4. That the fourth respondent and the applicant be and are hereby directed to cede to each other all and any insurance policies effected on the lives of each other in pursuance of paragraph 11 of the Association Agreement entered into between the parties in relation to the first respondent on 24 September 1987.

5. That the first and fourth respondents be and are hereby directed to take whatever steps might be necessary to secure the release of the applicant from all or any sureties signed by the applicant on behalf of the first respondent in pursuance of paragraph 8 of the Association Agreement forthwith and, failing any such release, to indemnify the applicant against all or any claims which may be made against the applicant by any creditor of the first respondent on the strength of any such surety.

6. **That the fourth respondent be and is hereby ordered and directed, both in his personal capacity as well as in his representative capacity on behalf of the first, second and third respondents, to take all such steps and sign all such documents, as are necessary to give effect to the oder, alternatively and in the event of the fourth respondent failing to take steps required within 7 (seven) days of granting this oder, the Sheriff be authorized and directed to take all such steps and sign all such documents, on all the respondents' behalf, to give effect to the order.**

7. **That the relief sought in part B of the notice of motion be and is hereby refused.**

8. **That the first, second, third and fourth respondents pay the applicant's taxed party and party costs, such liability to be jointly and severally, the one respondent to pay the other respondents to be absolved from liability; and**

such costs to include costs incurred in the determination of the prices of the applicant's membership interest, shares and loan accounts.

Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Counsel for the applicants	:	Adv. J.D. Huisamen SC
Instructed by	:	Joubert, Galpin & Searle Inc
		PORT ELIZABETH
Counsel for the respondents	:	Adv. C.K. Mey
Instructed by	:	Laubscher Attorneys
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