THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 613/2017

In the matter between:

TECHNOLOGY CORPORATE MANAGEMENT (PTY) LTD	**FIRST APPLICANT**
ANDREA CORNELLI	**SECOND APPLICANT**
ANTONIO JOSE GARRIDO DA SILVA	**THIRD APPLICANT**
IQBAL HASSIM NO	**FOURTH APPLICANT**
BARRY KALMIN NO	**FIFTH APPLICANT**

and

LUIS MANUEL RITO VAZ DE SOUSA	**FIRST RESPONDENT**
JOSE MANUEL GARCIA DIEZ	**SECOND RESPONDENT**
SHARON ANN OBEREM	**INTERVENING APPLICANT**

Neutral citation: *Technology Corporate Management (Pty) Ltd and Others v De Sousa and Another* (Case No 613/2017) [2024] ZASCA 29 (26 March 2024)

Coram: WALLIS, MBHA, VAN DER MERWE, PLASKET and DLODLO AJJA

Heard: 30 and 31 October 2023

Delivered: 26 March 2024

Summary: Companies Act 61 of 1973 – s 252 – claim that manner in which the business of the company has been conducted was unfairly prejudicial, inequitable or unjust to plaintiffs – requirements for proof of unfair prejudice – whether company a small domestic company of the nature of a partnership – growth of company and introduction of a new major shareholder – effect of shareholders agreement on management of company – whether previous relationship between original shareholders continuing to exist – whether expectations based on previous relationship continuing to exist

Dismissal of major shareholder as employee – whether unfair exclusion from company – effect of binding award by CCMA that dismissal neither procedurally nor substantively unfair – rule in *Hollington v Hewthorn* to be confined to decisions in criminal cases – test for admissibility of CCMA award whether relevant – prima facie proof that dismissal not unfair – onus on plaintiff to demonstrate that notwithstanding award dismissal unfairly prejudicial to him.

Shareholder no longer employed in company – locked in because unable to dispose of shares as provided in shareholders' agreement – whether unfair prejudice if no offer made to acquire their shares – no obligation to make such an offer unless exclusion or other prior conduct caused unfair prejudice – no right of unilateral exit from the company at the cost of the company or the remaining shareholders – where no obligation to negotiate to acquire shares failure to do so not unfair.

Loss of trust and confidence by minority shareholders in management by majority – unfair prejudice if occasioned by lack of probity on part of the majority – necessary to show conduct that is dishonest or falls short of the standard of fair dealing required of majority in managing the affairs of the company – unfair prejudice not established by evidence that if managed differently company would have been more profitable.

Shareholder dispute – majority shareholders securing that the company's funds are expended in defending the action – in principle improper if company has no material interest in the outcome of the litigation – where substantive relief is sought against company it is not a nominal defendant – does not mean that company's resources should be used to defend the interests of the majority shareholders – company should only engage on matters having a direct impact on its own interests – remedy for improper use of company's resources to fund litigation on behalf of shareholders an interdict and order that majority refund amounts disbursed in their interests – does not entitle minority shareholders to compel the company to expend its funds in payment of the minority's costs.

Fair offer – considerations.

Buy-out – before ordering company to purchase minority's shares court must consider impact on the company – form of order.

Fair trial – what constitutes – effect of a one-sided approach to issues - interruptions during cross-examination and restricting the time to be spent on cross-examination – need for civility in exchanges between judge and counsel.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Boruchowitz J, as court of first instance) reported *sub nom*: *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others* 2017 (5) SA 577 (GJ).

It is ordered that:

1 The application by the intervening applicant for conditional leave to intervene is dismissed and the intervening applicant is ordered to pay the costs of opposition by the first and second respondents in the main application, such costs to include the costs of one counsel.

2 The application for leave to appeal is upheld with costs, such costs to include the costs of the application for leave to appeal before the high court and the costs of two counsel.

3 The appeal is upheld with costs, including the costs of two counsel and the judgment of the High Court is altered to read as follows:

(a) The plaintiffs' claim is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

(b) The costs of the adjournment on 2 October 2012 including the costs consequent upon the employment of two counsel are to be costs in the cause in the action.

(c) The plaintiffs are ordered jointly and severally, the one paying the other to be absolved, to pay the costs of the application to amend the particulars of claim dated 9 December 2013 and the costs of the application in terms of Rule 35(3) dated 4 December 2015, such costs to include those consequent upon the employment of two counsel.

(d) Each party is to bear his or its costs of the application in terms of s 163 of the Companies Act 71 of 2008 and in respect of the recusal application by the first applicant.

JUDGMENT

Wallis AJA (Mbha, Van der Merwe, Plasket and Dlodlo AJJA concurring)

[1] The central issue in this application for leave to appeal is whether the high court's order, under s 252 of the Companies Act 61 of 1973 (the Act), that the First Applicant, Technology Corporate Management (Pty) Ltd (TCM), purchase the shares in TCM owned by the First Respondent, Mr Luis de Sousa, and the Second Respondent, Mr Jose Diez, should be upheld or set aside. The applicants other than TCM are the remaining shareholders of TCM, namely Mr Andrea Cornelli, Mr Antonio (Tony) da Silva and the Iqbal Hassim Family Trust (the Trust) represented by its trustees, the fourth and fifth applicants. The Trust was the vehicle through which Mr Iqbal Hassim acquired shares in TCM.

[2] This judgment is regrettably lengthy, as was the trial before Boruchowitz J. To simplify reading I will refer to Mr de Sousa and Mr Diez jointly as the plaintiffs and to them individually as Luis and Jose, as was done at the trial. The present applicants will be referred to collectively as the defendants in relation to the proceedings in the high court and as the appellants in relation to the proceedings in this court. Individually, Messrs Cornelli, da Silva and Hassim will be referred to as Andrea, Tony and Iqbal. Three other individuals who feature in the

narrative, Mr Wayne Impey, the Chief Financial Officer (CFO) of TCM and Messrs Frank and Fabio Cornelli, who were responsible for the operations of what is referred to as the Supplies Division of TCM, will be referred to as Wayne, Frank and Fabio. No disrespect is intended by the use of their given names without conventional honorifics. Conventional usage is adopted in relation to other individuals.

[3] In view of the range of issues that arise in this appeal and must be dealt with in the judgment it is convenient to preface it with an index. The issues are dealt with as follows:

Introduction

[4] In the early 1980s, while they were training as customer engineers on the installation and repair of IBM computers, two young men, Luis and Andrea became good friends. They were good at their work, with Luis becoming a technical specialist and Andrea, who had a more commercial bent and was good with customers, becoming an operations specialist. In 1987, after IBM withdrew from South Africa, leaving their employer, ISM, as the sole agent for IBM products in South Africa, Andrea and Luis decided to set up in opposition to ISM providing computer repair services to IBM users. An accountant they approached for advice said that they should establish a company through which to operate the business. They did so and in due course that company became TCM. Although the initial plan had been for their line manager at ISM to join them, he withdrew at a late stage and TCM was incorporated with each of them owning 50% of the issued shares and each contributing their different skills to the venture.

[5] TCM was successful and expanded rapidly. Within a month or two of its establishment, Jose, also an IBM trained technician, was employed to work with Luis, and about two years later Tony, also formerly of IBM, was employed to work in sales with Andrea. Both Jose and Tony were promised shares in TCM, although the extent of the stakes they would receive was indeterminate and the promise was only given effect in 2004. Within a few years of its founding TCM had, through the acquisition of stakes in existing local businesses, established branches in Durban, Cape Town, East London (later moved to Port Elizabeth, as it was then known,

now Gqeberha) and Bloemfontein. Under pressure from customers to extend the range of its services it also acquired 50% shareholdings in two existing companies providing software and network services. An increase in the number of employees accompanied the expansion and in 1990 an informal Board of Directors was constituted comprising Andrea as chair, Luis and representatives of the related companies as the remaining members. In truth this was merely a committee created to co-ordinate activities of the various companies involved in some way with TCM.[1]

[6] One of the 'directors' was Andrea's brother, Frank. He did not work for TCM, but had his own company, Sternco (Pty) Ltd, which imported heavy duty machinery for large industrial corporations such as Iscor and was sharing TCM's premises on an unexplained basis. He was Sternco's representative on this board of directors. He became involved in TCM's business because TCM needed to obtain items of IBM equipment and IBM spares from overseas. IBM disinvested from this country, along with other large multi-national corporations, as part of a campaign to place pressure on the apartheid regime. It appointed ISM as its sole South African representative. TCM could not source the equipment and spares it needed from either ISM, with which it was in competition, or directly from IBM. Apparently, Jose was able to identify and contact potential overseas suppliers, but TCM had no expertise in the process of collecting these items, arranging for their carriage by air or sea to South Africa, arranging insurance, freight and customs clearance and making payment through the international banking system. It turned to Sternco to undertake this work as an adjunct to the latter's existing business. After Sternco was liquidated in about 1995, Frank and another

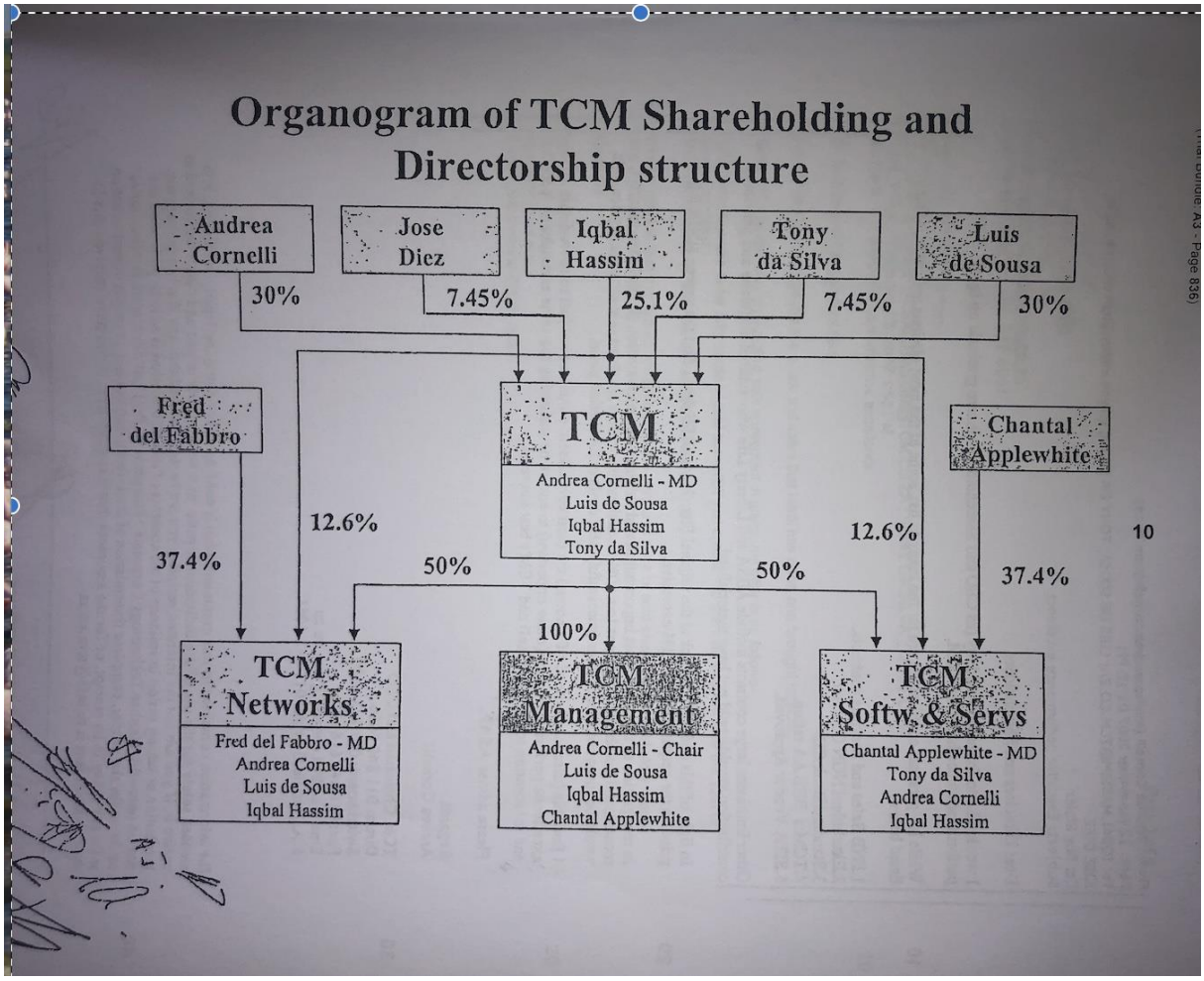
[1] This is reflected in the fact that the minutes of the first meeting of the committee record that service on the committee was voluntary.

brother, Fabio, continued to attend to the importation of equipment and spares for TCM, as well as continuing Sternco's other business. This was done through the Supplies Division. It will be necessary to revert to the basis upon which this operated later in this judgment. For the present it suffices to introduce Frank and Fabio and the origin of their involvement with TCM.

[7] TCM's business was successful and it expanded the scope of its operations. In addition to the branches it established service centres in 37 places in South Africa to enable it to respond rapidly to customer requests. This was important as major clients included a bank and a healthcare business whose activities extended beyond the major cities. According to its Annual Financial Statements (AFS), TCM earned annual revenues of R165 million in the 2002 financial year. In the following year that increased to R227 million. Andrea and Luis were the sole directors and their directors' emoluments for those years, apart from any other benefits they may have enjoyed by way of salary, bonuses, allowances and the like, amounted to around R2.6 million, which they shared equally. Their roles within the company were reasonably well-defined. Andrea was effectively the chief executive and Luis headed up the technical side and the accounting. Jose was in charge of logistics and supplies and Tony's role was in sales and marketing. These four were the key figures, although the staff complement had increased to several hundred.

[8] In 2003, TCM lost a tender for a substantial contract with Standard Bank because it lacked an acceptable BEE profile. Andrea believed that, unless this was remedied, the future of the business was threatened and set about looking for a suitable person to introduce to the company to

enhance its BEE profile to a suitable level. He identified Iqbal as being able to fill that role. Iqbal had a lengthy career with IBM and was at the time working for IBM in a senior position in Dubai. On 15 March 2004, heads of agreement were signed between Andrea, Luis, Tony, Jose, Iqbal and TCM, as well as the software and networks associated companies and the two outside shareholders, each of whom held a 50% share in those companies. The heads of agreement provided for the then existing shareholders of TCM, being Andrea and Luis (40% each) and Tony and Jose (10% each) to sell a total of 25.1% of the issued share capital in TCM to Iqbal. This would dilute Andrea and Luis's stakes to 30% each and those of Tony and Jose to 7.45% each. In addition Iqbal was to acquire a 12.6% stake in the network and software companies at the expense of the two outside shareholders. Iqbal took up his position in TCM on 1 April 2004, after the signature of the heads of agreement, but before the conclusion of the formal sale and shareholders agreements that it contemplated. The sale of shares agreements was only concluded on 29 June 2005. Attached to the sale of shares agreement was the following organogram showing the corporate structure after implementing the transaction.



[9] The advent of Iqbal marked a distinct change in the internal dynamics of TCM and the commencement of the deterioration in the relationship between Luis and Andrea. In his founding affidavit in earlier application proceedings seeking similar relief in terms of s 252 of the Act ('the s 252 application'), Luis said that from approximately 2007 the relationship between the members of TCM began to deteriorate. In evidence he tied this to certain events in November 2007. However, there were undoubtedly earlier signs of problems and particularly of a rift between Luis and Andrea. The earliest occurred in relation to two addenda to the sale of shares agreement in September 2005. Both dealt with the computation of the price. On 19 September 2005, Wayne, who

had previously been TCM's auditor and had been appointed as CFO and a director in 2004, brought them to Luis for signature. The two were related, because the one dealt with the computation of the purchase price in terms of the formula in the agreement and the other explained that the price had been computed on the basis of the division known as the TCM Supplies Division reflecting a nil value. Luis signed the first without demur. The second one he refused to sign, although Jose signed both. The treatment of the Supplies Division was one of the grounds upon which Luis and Jose claimed that they had suffered unfair prejudice. As foreshadowed in paragraph 6 it will be dealt with later.

[10] Another sign of problems was that, in the emails that were the principal means of communication among the executives, Luis increasingly questioned or challenged Andrea and the exchanges became personal and aggressive suggesting a breakdown in the relationship between the two men. An early exchange in January 2006 captures the tone of these communications. It started with Andrea receiving an email from IBM advising that there had been excellent feedback from the IBM compliance team regarding their performance on fourteen of TCM's most profitable deals, resulting in a perfect IBM audit. The following morning he circulated the email to Luis, Iqbal and Tony with the suggestion that a staff member, Justine Impey, and her spouse, be awarded a company-paid overseas trip in appreciation of her contribution to the audit and asking for their approval or disapproval. Fourteen minutes after sending the email he received the terse response from Luis 'Disagree.' Not surprisingly he replied, asking: 'Please provide brief motivation on why you disagree?' The response was:[2]

'I have been over this before and I don't think that I have to do it again.

[2] This and other emails are reproduced in this judgment as sent.

I guess this is a sort of democracy and majority wins. In a game there are always winners and losers. Fortunately for you have hand picked the other players and therefore we will never be playing on a level field. You sold it to me and I bought it. I'll just have to live with it.'

[11] The original email distributing good news raised a simple issue that one would have thought could be resolved by way of a five minute conversation between individuals who had known one another and worked together amicably for years. Given the rather unpleasant tone of Luis's response, it is no surprise that Andrea's reply was equally sarcastic and reflected some frustration with Luis. It read:

'I respect your views and decisions.

Its my (democratic) view that you are lacking in understanding of who/what contributes real value at TCM.

You references to I "sold you" I 'hand picked" I created "unlevel playing field" is incorrect, disrespectful and indicative of your continual (democratic) lack of confidence and trust in my intentions and methods.

I've tried and will continue to better your understanding and confidence, all within reason and respect. I urge you be as respectful, co-operative and if possible less (pre) judgmental."

The email ended with an invitation to discuss the issue or any other issue 'in restoring your confidence and satisfaction in myself and/or TCM'. The contrast between the tone of this exchange and an earlier exchange of emails between the two men in 2002 was stark. Clearly something was going wrong well before the events of November 2007.

[12] The most cursory reading of the documents, the evidence and the record of the proceedings referred to below in the Commission for Conciliation, Mediation and Arbitration (the CCMA), reveals that there was growing tension between Luis and Andrea. In November 2007 matters came to a head and Luis's disgruntlement turned into action. He

consulted attorneys and in May 2008, at their suggestion, approached Mr John Geel, an accountant with KPMG, to undertake a valuation of his shares. In his affidavit in the s 252 application he said that he did this because his and Jose's positions were becoming untenable and that it would be in the best interests of all if they extricated themselves from the relationship. The terms of engagement of Mr Geel said that his task was 'to assist Luis with an indicative value of the TCM Group to assist with possible future negotiations with prospective shareholders and/or investors'. As there was no question of any such negotiations occurring, the only purpose of the valuation was to be used in Luis's efforts to extricate himself from the company by having the company, or the other shareholders, buy his shares. By then he and Jose, although the latter seems to have played a fairly passive role, had resolved to exit the company and were setting about achieving that aim.[3] The relationship between him and Jose on the one hand and Andrea on the other, and Luis's relationship with Iqbal, deteriorated. The record suggests that Andrea and the other directors were aware that Luis was engaged in consultations with legal and commercial advisers with a view to leaving the company.

[13] On 19 February 2009 a meeting was convened with Andrea at the instance of Luis and his advisers, Mr Geel and Mr Buchler, his attorney. Mr Geel testified that the purpose of the meeting was to put a proposal that would have involved the purchase of Luis's and Jose's shares in TCM. Initially it appeared that the parties would make progress because, Luis and Jose wished to sell and Andrea made it clear that he was desirous of seeing them exit the company. He said he would be more than

[3] His evidence during the CCMA hearing was that it was only in August that he seriously started considering exiting the business, but this seems unlikely. In his founding affidavit in the s 252 application he said that when he approached KPMG it was with a view to the on-sale of his shares.

happy to assist in a process over the next three months to make that happen 'in good faith'. He put forward three criteria as indications of what he regarded as good faith. They were that Luis and Jose would reduce their involvement in the day-to-day operations of the company, take a reduction in salary and relinquish their executive directorships. There was then a caucus between the plaintiffs and their advisers. According to Mr Geel, on their return the response was that the conditions were unacceptable to Luis and Jose and:[4]

'… at that point the meeting became acrimonious and I say acrimonious, was hostile, swearing, bad language in the meeting and Andrea said that was it, he got up, he stormed out, he left the meeting, gone.

The meeting then adjourned.

[14] The following day, Luis was suspended from his employment and presented with three disciplinary charges. An independent chair was appointed to deal with the disciplinary enquiry, which culminated in Luis being dismissed from his employ with TCM with effect from 31 March 2009. Luis appealed unsuccessfully to an independent appeal tribunal and, after that failed, he approached the CCMA. On 30 October 2010, after an eleven day hearing, the CCMA held that his dismissal was both substantively and procedurally fair and dismissed his claim based on unfair dismissal. He did not review that decision before the Labour Court. Instead he decided, in conjunction with his legal advisers, to concentrate his efforts on the s 252 application. That application had been launched on 28 September 2009 in parallel to the CCMA proceedings.[5] In it he sought an order that either TCM, or Andrea, Tony and the Trust, purchase his and Jose's shares in TCM for a price of R160 million or an amount to

[4] It was put to Mr Geel that the initial reaction was that this was a fair proposal, but that the problem arose when Mr Buchler said that if Andrea didn't get on with it quickly Luis would return to work. While Mr Geel did not dispute this I prefer not to make a factual finding on whether that occurred.

[5] Case number 09/41464.

be determined. Jose was still employed when those proceedings commenced and was never dismissed, but resigned from his employment with TCM on 2 April 2013.

[15] The present action was instituted on 14 December 2010 before the s 252 application could be heard. It sought substantially the same relief on substantially the same grounds.[6] After a trial lasting for 80 days that gave rise to the record of 17 438 pages now before us, Boruchowitz J upheld the plaintiffs' claims and ordered TCM to purchase their shares at a value to be determined after consideration of a valuation of the shares by a referee. The judgment runs to 156 pages and 362 paragraphs. An application by the five applicants for leave to appeal was dismissed on 24 May 2017 and Andrea, Tony and the Trust were ordered to pay the costs on an attorney and client scale, including the costs of two counsel. On 7 September 2017 this court (Navsa ADP and Swain JA) referred their application for leave to appeal for oral argument in terms of s 17(2)(*d*) of the Superior Courts Act 10 of 2013, subject to the usual order that a full record be filed and that the parties be prepared, if called upon to do so, to argue the merits of the appeal. Given the size of the record and the scope of the appeal this Bench was specially constituted to hear the appeal before the commencement of the fourth term. We are indebted to counsel for their helpful submissions and their co-operation in enabling the appeal to be fully argued in the time available.

[6] The action was launched before the Companies Act 71 of 2008 came into force on 1 May 2011 and was preserved by the provisions of Item 10(1) of Schedule 5 to the 2008 Act.

The litigation history

[16] I echo the words of Ponnan JA in *Louw v Nel*[7] that this is a case that is by no means easy for an appellate court to deal with satisfactorily. That is not only because of the voluminous record and the confused presentation of the case and the defence, but also because time did not stand still while the litigation wended its way through the courts. The high court's judgment contained an explanation of the history of the litigation. This contained very serious findings of bad faith against Andrea and stinging criticism of the conduct of the case by leading counsel for the defendants. These underpinned the making of punitive orders for costs against the defendants and necessitate a traverse of that history. Summons was issued on 14 December 2010. It was amended in 2012 to include reference to events after the issue of the summons. The trial was set down for hearing on 2 October 2012, but was adjourned because it could not be completed in the allocated time. The defendants, other than TCM, were ordered to pay those costs on the attorney and client scale, including the costs of two counsel and qualifying fees for an expert witness Professor Wainer. That order was made despite the fact that the defendants had wanted to proceed with the trial on the available dates, but objected to Professor Wainer giving evidence, because no expert notice had been delivered in respect of his evidence, nor had he attended any meeting of experts as required by the Gauteng Practice Manual. The order is challenged in this appeal.

[17] On 9 December 2013, shortly before the trial was due to recommence, having been set down for four weeks from 27 January 2014, the plaintiffs served a notice of intention to amend the particulars of claim to introduce additional financial material up to 2013 and the

[7] *Louw and others v Nel* [2010] ZASCA 161; 2011 (2) SA 172 (SCA) para 1.

facts surrounding Jose's resignation in 2013, together with an allegation amounting to a claim that he was constructively dismissed. The application to amend was opposed and then withdrawn on 16 January 2014, without a tender for costs. Leading counsel for the plaintiffs told the judge that they did not intend to adduce evidence outside the scope of the pleaded issues and that the evidence foreshadowed in the notice would be led 'for corroborative and evidential' reasons. The nature of these was not explained. He said in regard to the 2013 financial material that 'we're not complaining about 2013, we're not extending the period of complaint'.

[18] In reality the evidence raised entirely new substantive issues that were not pleaded. Over the objections of the defendants' counsel, Jose dealt with his treatment leading up to his resignation in 2013. The judge understood him to be claiming constructive dismissal and the heads of argument in this court contended that he was constructively dismissed. Professor Wainer dealt at length with the proper accounting treatment of maintenance spare parts. This was not referred to in the pleaded claim and only arose as a result of the revised expert report by Mr Geel produced in anticipation of the amendments to incorporate the 2013 material. In his earlier reports there was no reference to maintenance spare parts as a separate item. The defendants other than TCM were ordered to pay the costs of the plaintiffs' application to amend on the attorney and client scale, including the costs of two counsel, even though the application was witdrawn. That order is also challenged in this appeal.

[19] When the trial commenced in January 2014 the respondents' leading counsel delivered his opening address during the first two days and the applicants then applied for a separation of issues in terms of Rule

33(4). That consumed six days of hearing followed by a week's adjournment during which the judge prepared a written judgment.[8] The hearing of evidence commenced on 14 February 2014 with Mr Geel. A consolidated summary of his evidence had been delivered incorporating material up to 2013. Defendants' counsel objected to the plaintiffs leading evidence in regard to events falling outside the times specified in the pleadings, being the matters raised in the withdrawn notice of amendment and derived from the consolidated report of Mr Geel. The objection was overruled and Mr Geel gave evidence for four days. The trial was then adjourned at the defendants' request and cost.

[20] On 3 December 2014, during the adjournment, the defendants made an offer to purchase the plaintiffs' shares for a price of R46 995 000 in the case of Luis and R7 097 000 in respect of Jose, supported by a valuation from TCM's auditors, Grant Thornton. The offer was open for acceptance by either or both of Luis and Jose until 17 December 2014. On 5 December 2014 the plaintiffs' attorneys wrote to the defendants' attorney saying that the offer would be regarded as part of a genuine attempt at trying to resolve the matter, but that the deadline could not be met. The response was to extend it to 19 January 2015. The record contains no other response from the plaintiffs until a letter dated 12 February 2015, noting that the offer had lapsed, but indicating a willingness to engage in settlement negotiations. The defendants' attorneys asked for a meeting, but nothing came of that.

[21] The hearing resumed on 5 May 2015. Notwithstanding that at the end of the previous hearing counsel had said that he had no further

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[8] *De Sousa and Another v Technology Corporate Management (Pty) Ltd* 2016 (6) SA 528 (GJ) (*De Sousa (1)*).

questions for Mr Geel, further evidence in chief was led from him dealing with facts about the performance of the company in 2014. These were derived from a fresh summary of Mr Geel's evidence and a summary of Professor Wainer's evidence. Leading counsel for the defendants noted an objection to this evidence being led but, given the previous ruling on the introduction of the 2013 evidence, merely so as to have it on record and without any expectation that the objection would be upheld.[9] Mr Geel's evidence in chief continued for a further day and a half. Thereafter his cross-examination commenced. It endured for eighteen days, with a good deal of time being lost due to interlocutory matters and discussions between counsel and the judge, primarily over the direction and duration of the cross-examination. Eventually on 1 June 2015, the judge directed that by midday the following day Mr Geel was to be 'out of the witness box'. When midday came the following day there was a further debate about the duration of the cross-examination, but ultimately it concluded on 2 June 2015, subject to the reservation of a single issue.

[22] Luis's evidence was led on four days thereafter. On 9 June 2015 the judge informed the parties that he had discussed the course of the case with the Judge President in the light of its length and the fact that he was due to retire from active service as a judge at the end of July 2016. An arrangement had been made for it to be set down for the whole of the first term of 2016. The Judge President had directed that:

'Whether or not the matter is finalised at the end of the first term of 2016 the parties shall not be permitted to set down or enrol the matter for further hearing in this court. Judgment shall be delivered on the basis of the evidence which at that stage has been adduced. … The parties are directed to take all necessary steps in order to finalise the matter by not later than the last day of the first term of 2016.'

[9] Inexplicably, but typically for this trial, it took 14 pages of the record to note a simple objection.

After this direction had been given Luis's evidence continued for a further three days and the proceedings were then adjourned on 11 June 2015 to 25 January 2016.

[23] The trial resumed on that date, but the following five days were taken up with matters arising from an application by Luis under s 163 of the 2008 Act, aimed at compelling TCM to pay his costs of the litigation. TCM (but not the other defendants) opposed the s 163 application and, in the opposing affidavit, sought Boruchowitz J's recusal from hearing that application, but not the trial. The grounds advanced were that in making the two earlier costs orders against the defendants other than TCM, he had expressed the view that TCM was an innocent and purely nominal party in the s 252 litigation and described the other four defendants as 'wrongdoers'.[10]

[24] In December 2015 TCM had declared a dividend, but withheld Luis's share because his by then divorced wife, Mrs Sharon de Sousa (now Mrs Oberem, the intervening applicant), claimed that one half of it be paid to her because a division of the joint estate formed part of the divorce order. TCM issued an interpleader summons and paid the money into its attorney's trust account. This prompted Luis to add a further claim to his s 163 claim. This was to be paid the full amount of the dividend declared in December. When the trial resumed, a week was spent dealing with these matters including two days on the recusal application. On the morning that the parties were going to argue the s 163 application, an agreement was reached between Luis and Mrs Oberem, who had now applied to intervene in the trial, that the dividend could be paid and each

[10] The view is echoed in his judgment and will be the subject of consideration at a later stage of this judgment.

would receive a portion of it. This resulted in the s 163 application not proceeding and the costs of the recusal application and the s 163 application were reserved. At the end of the trial the defendants, other than TCM, were ordered to pay the costs of both applications on the attorney and client scale, including the costs of two counsel. That order is also challenged in this appeal, in part on the grounds that only TCM was a party to those applications and not the other defendants. Andrea deposed to an affidavit confirming certain facts and specifically recorded that he otherwise abided the decision of the court on the merits. The other defendants did not oppose the application.

[25] When the matter resumed on 3 February 2016, Luis's cross-examination started. It continued for nine days until 11 February 2016, when the judge made an order that:

'Your cross-examination will cease tomorrow afternoon at 4 o'clock. You're afforded another day to cross-examine Luis.'

The cross-examination ended the following day, although not without a protest being registered over its foreshortening. Luis was re-examined the following day and Jose then gave evidence. His evidence in chief took about a day and he was then cross-examined for about two days in all. When that was finished, plaintiffs' counsel applied for, and after argument was granted, leave to recall Luis on certain stock sheets referred to in the cross-examination of Jose. That took the balance of that day and some of the following day.

[26] On 22 February 2016 Mr Geel's cross-examination was resumed. He was re-examined on 24 February and then further cross-examined on 25 February 2016. Once he had completed his evidence Professor Wainer gave evidence and was cross-examined over three days before the

plaintiffs' evidence was concluded on 1 March 2016. The following day the defendants' case was closed without calling any witnesses. Subsequently the parties addressed oral argument over five days and the judgment was delivered on 31 March 2017. Effectively the judge upheld every allegation made by the plaintiffs. His primary finding was that this was a small domestic company of the nature of a partnership and that the plaintiffs had been excluded from participation in its management in a manner that was unfairly prejudicial to them. In addition he held that there had been a failure to negotiate in good faith to enable the plaintiffs to exit the company and this failure on its own constituted further unfairly prejudicial conduct. He dealt with each of the other allegations in the particulars of claim and upheld all of them. His view was that these showed a lack of probity by Andrea in the conduct of the affairs of TCM that underlay the breakdown in relations between him and Luis and constituted a further ground of unfairly prejudicial conduct.

[27] In order to determine the appeals against certain costs orders as well as the fair trial issue it will be necessary to look in greater detail at some of the reasons for the protracted nature of the proceedings. An enormous amount of time was taken up by debates over interlocutory issues and procedural matters. At the outset, six days were devoted to arguing the application to separate the issues and the rest of the second week was spent in the preparation of a written judgment. Five days were spent over the s 163 application, the recusal and the related disputes. Time was repeatedly wasted over lengthy debates between the judge and counsel for the defendants, such as one that occurred on 23 February 2016. Mr Geel was about to be recalled to deal with one outstanding issue from his cross-examination and virtually a whole day was spent in debating whether he could deal in re-examination with some work he had

done since his previous period in the witness box. The debate stretched over 118 pages of the record and took two-thirds of the day, while the re-examination took 143 pages and the further cross-examination it engendered 109 pages. That was a particularly flagrant example, but there were many others in the record. Throughout the trial the evidence was interspersed with regular exchanges between counsel and counsel, and the judge and counsel. These started with interruptions that became arguments and then wandered all over the terrain of the case without any apparent purpose. Time was taken up with repeated judicial warnings that the proceedings were becoming unduly protracted. The protests these engendered from leading counsel for the defendants – not counsel who appeared before us – further protracted the trial. None of this served to facilitate the smooth running of the case.

Preliminary issues

[28] The first issue is whether leave to appeal should be granted. If granted, the applicants raised two points *in limine* that it contended were dipositive of the appeal. The first was that the high court's order did not include an order in terms of s 252(3) of the Act for the reduction of the share capital of the company in consequence of the order that the company buy the respondents' shares. That was not a point *in limine*, but a possible flaw in the order granted by the high court and could only be properly considered at the end of the appeal. The second was that Mrs Oberem, should have been joined in the action after she divorced Luis on 26 October 2015. She had applied for leave to intervene in the trial, but her application had been dismissed and leave to appeal refused. Her further application to this court for leave to appeal was dealt with simultaneously with the application for leave to appeal in the present case. Orders referring each of them for oral argument were granted in

similar terms on the same day, 7 September 2017. When Mrs Oberem's application was heard a consent order was made in circumstances dealt with below. Nevertheless, on 20 October 2023, an application was delivered on her behalf for leave to intervene in this appeal if leave to appeal were to be granted. The second point *in limine* and the application to intervene in this appeal are intertwined and it is convenient to deal with them together.

Leave to appeal

[29] This case raised a number of points in regard to the proper approach to s 252 of the Act. While that section has now been repealed by the Companies Act 71 of 2008 (the 2008 Act), decisions on the earlier provision will be of assistance in relation to cases arising under s 163(1) of the new Act,[11] which substantially re-enacts it.[12] In addition the applicants have reasonable prospects of success if granted leave to appeal on the merits. Together those factors mean that leave to appeal must be granted.

[30] One further matter must be mentioned. The applicants raised a contention that they were denied a fair trial. Mr Green SC, who appeared before us on behalf of the applicants, but was not involved in the trial, raised the relevant points in appropriately moderate language by reference to passages in the record. For his part, Mr Subel SC, who appeared for the respondents at the trial and before us, said that 'It was a thoroughly unpleasant trial.' The record reveals some disconcerting

[11] *Grancy Property Ltd v Manala and Others* [2013] ZASCA 57; 2015 (3) SA 313 (SCA) paras 22-32; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) paras 54-56. In the latter case at para 54 Rogers J doubted whether the new section provided a much wider scope for judicial intervention than its predecessor.

[12] *Freedom Stationery (Pty) Ltd and others v Hassam and Others* [2018] ZASCA 170; 2019 (4) SA 459 (SCA) para 26; *Parry v Dunn-Blatch and others* [2024] ZASCA 19, para 20.

exchanges between counsel and between leading counsel for the defendants and the judge. An application was made for the judge's recusal in relation to an interlocutory application. The judgment is in parts couched in immoderate language when expressing displeasure with the manner in which the applicants' defence to the claim was conducted. In refusing leave to appeal the judge recognised the serious nature of the allegations made in relation to his conduct during the trial, but characterised them as 'nothing less than an abusive, derogatory, *ad hominem* attack on a presiding judge'. Regrettably, this conveyed that the judge was overly sensitive to the allegations and regarded them as a personal affront.[13]

[31] It is unfortunate that in the interests of justice the judge did not grant leave to appeal, so that an appeal court could express a view on the matters he described in these terms. He cited the following paragraph from the judgment of the Constitutional Court in *Bernert v ABSA Bank*:[14]

'Apart from this the applicant has made serious allegations against judges of the Supreme Court of Appeal. These allegations concern the proper administration of justice. They strike at the very core of the judicial function, namely, to administer justice to all, impartially and without fear, favour or prejudice. Compliance with this requirement is fundamental to the judicial process and the proper administration of justice. This is so because it engenders public confidence in the judicial process, and public confidence in the judicial process is necessary for the preservation and maintenance of the rule of law. Bias in the judiciary undermines that confidence.'

[32] That is an important statement of principle, but the judge should have followed the guidance given in the following paragraph, which he did not quote, in regard to the desirability of such allegations being

[13] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 14G-J.
[14] *Bernert v Absa Bank Limited* 2011 (3) SA 92 (CC) para 21.

considered by a court that could investigate whether there was any substance in them. That paragraph reads:[15]

'These are important constitutional issues that go beyond the interests of the parties to the dispute, for an independent and impartial judiciary is crucial to our constitutional democracy. It is, therefore, in the public interest that these issues be resolved. As these allegations are made against the Supreme Court of Appeal, there is no court that can investigate these issues other than this court. This court, as the ultimate guardian of the Constitution, has the duty to express the applicable law, in to enhance certainty among judicial officers, litigants and legal representatives, and, thereby, to contribute to public confidence in the administration of justice.'

In *Bernert* the Constitutional Court granted leave to appeal for those reasons without referring to the prospects of success, because the nature of the issues raised meant that it was in the interests of justice to do so. For the same reason leave to appeal should have been granted in this case in that this court could consider the complaint and address it to the extent necessary. Accordingly, leave to appeal will be granted.

Joinder and the application to intervene

[33] The circumstances in which Mrs Oberem applied to intervene in this appeal were set out earlier. The application was dealt with at the outset of the hearing and dismissed on the basis that reasons and appropriate costs orders would be given in this judgment. These are the reasons and they also dispose of the second point *in limine*.

[34] For reasons that do not concern us it was thought preferable for Mrs Oberem's application for leave to appeal to be heard before the application in the present case. It came before this court on 27 May 2019. Mrs Oberem and Luis, together with Jose and TCM, arrived at a

[15] Ibid, para 22

settlement that was embodied in a consent order. The relevant provisions of that order read as follows:

'1 A Liquidator is appointed for the determination of the liabilities and assets of the former joint estate, of the Applicant [Mrs de Sousa] and the 1st Respondent [Luis]. In so far as is necessary the appointed liquidator is authorised to discharge all liabilities, liquidate and distribute all of the assets of the joint estate including the 30% shareholding in the 3rd Respondent currently registered in the name of the 3rd Respondent …

2 …

3 Subject to and once all the liabilities of the joint estate have been discharged, the extent of which shall be determined by the liquidator, the Applicant shall be entitled to be registered as a member of the 3rd Respondent as to 15% of its issued share capital, or such portion thereof as may remain thereafter after the discharge of the liabilities as aforesaid.

4 The 1st Respondent shall remain registered as to 30% of the share capital of the 3rd Respondent, until such time as the rights of the Applicant and the 1st Respondent in relation to such shares are finalised.

5 – 10 …

11 Nothing in this order shall affect the costs involved in the trial action under case 50723/2010 or in the appeal pending before the SCA. It is specifically recorded that the Applicant [Mrs Oberem] makes no admission as to any liability of the joint estate and of herself with regard to any costs relating to the trial action and/or any further proceedings relating thereto.'

[35] Mrs Oberem explained in her affidavit in support of the present application for leave to intervene that she had been advised that should leave to appeal be granted this court's order established her direct legal interest in the present appeal. She believed that there was a conflict between that order and the high court's order in the trial and that in view of the order in her appeal 'it is no longer possible for this Honourable Court to uphold the judgment of Mr Justice Boruchowitz in respect of the

main matter to the extent of my 15%, or to reverse or vary that order insofar as it may pertain to my 15%'.

[36] It was by no means clear what was sought to be achieved by the intervention if leave to appeal were to be granted to the Applicants and the appeal proceeded on its merits. If leave were refused, the high court's order would remain in place unamended and would encompass what Mrs Oberem referred to as 'my 15%'. If leave was granted, either the appeal would succeed, in which event the high court's order would be set aside, or it would fail, in which event it would remain in place unamended. Either way the aim of protecting her 15% would not be achieved, at least not by way of some adaptation or amendment of the high court's order.

[37] A more fundamental difficulty lay with the submission that the effect of the earlier order was to give Mrs Oberem a direct legal interest in the subject matter of the suit. In *SA Riding for the Disabled Association*[16] the Constitutional Court said:

'It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the sought.'

[38] Did the earlier order give Mrs Oberem a direct and substantial interest in the subject matter of this case? She clearly had no interest in whether the treatment of her former husband had been unfairly prejudicial, unjust or inequitable to him in his capacity as a 30%

[16] *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others* 2017 (5) SA 1(CC) para 9.

shareholder of TCM, or whether the company's affairs were being conducted in a manner that was unfairly prejudicial, unjust or inequitable to him or some part of the members of the company. Her claim was dependent upon half of the shares registered in her husband's name being hers ('my 15%). She contended that this 15% shareholding 'no longer forms part of the order' of the high court and 'this needs to be recognised at the commencement of the hearing of the appeal'.

[39] Unfortunately that was the same misconception that had underpinned her application to intervene at the trial,[17] save that it was now thought to have been fortified by the consent order. Once the divorce order was granted Mrs Oberem acquired a right to a division of the joint estate, because it was property jointly owned by Luis and herself. In the ordinary run of cases this is done by agreement between the parties but, if they cannot agree, the court will either order a division, or appoint a liquidator to effect a division,[18] or possibly both. The liquidator proceeds under the *actio communi dividendo*.[19] All that is required is an equality of division in the end result, not a division of every asset, although where an asset is easily divisible the liquidator will ordinarily allocate it in equal shares to the former spouses. It is always open to them to agree that any particular asset be divided between them in this way once the liquidation process arrives at the stage where assets can be distributed. That is what occurred as a result of the settlement and the consent order granted by this court. The parties accepted that, once the liquidator's work was done, the 30% shareholding, or some part of it,

[17] This judgment does not appear to have been reported, but see *De Sousa v Technology Corporate Management (Pty) Ltd and Others; De Sousa v De Sousa and Another* [2018] ZAGPHC 445 paras 37-45 (*De Sousa* (2)).
[18] *Gillingham v Gillingham* 1904 TS 609 and *Revill v Revill* 1969 (1) SA 325 (C).
[19] *Robson v Theron* 1978 (1) SA 841 (A) at 854G-855H; *Morar NO v Akoo* [2011] ZASCA 130; 2011 (6) SA 311 (SCA) para 12.

would still exist and could be divided equally between Luis and Mrs Oberem. To that end the consent order made provision for the company and the other shareholders to consent to this arrangement. It made no mention of the present proceedings or what would occur in respect of these shares if the high court's order or the appeal against it was upheld. The parties knew that would be decided in this application. Prior to the liquidation of the joint estate, the order did not entitle Mrs Oberem to advance claims in respect of any portion of the 30% shareholding registered in Luis's name. Nor did it give her a direct and substantial interest in the outcome of these proceedings. The 30% shareholding was to remain registered in Luis's name until the position in relation to those shares was finalised. Until that occurred her interest in the shares themselves was no more than a *spes*. It is inconceivable that, without any express reference to it, the consent order altered the high court's order in this case in the material respect suggested by Mrs Oberem.

[40] In the result the application to intervene was misconceived and Mrs Oberem lacked any direct and substantial interest in the litigation entitling her to be joined in the appeal if the application for leave were to be granted. As to costs, only the respondents sought an order for costs. In our view they were entitled to their costs, but only on the basis of one counsel and not on the basis of the costs being awarded on an attorney and client scale. That forms part of the order set out above.

The pleaded case

[41] In pleading the case, even though their situations were markedly different, no distinction was drawn between the position and complaints

of Luis and those of Jose, save for a single paragraph dealing with the latter being sent to Namibia. Their cases overlap at some points but diverge at others. It is best therefore to separate the two.

Luis's case

[42] The particulars of claim adopted a scattergun approach without clearly identifying the course of conduct of the company's affairs of which complaint was made. Allegations were pleaded in the broadest possible terms with little particularity, such as the complaints about Luis being 'criticised, belittled, humiliated and persecuted', and descended to the trivial with an allegation that Andrea 'unfairly and unjustly reduced the office and parking space available to' Luis with a view to showing 'public contempt' for him and 'denigrating his status as a founder member' of the company. The friendship relationship on which the business had been established had plainly broken down, accompanied by a good deal of bitterness. The broad allegation was that Luis was entitled to the same standing and status in TCM as Andrea and the latter had set about a campaign to deprive him of that status and drive him out of the company.

[43] The extent to which the pleadings threw everything but the kitchen sink at Andrea is reflected in the reliance placed upon two events that, as a result of Luis's opposition, did not occur. The first was a proposed amendment to the sale of shares agreement to reduce the price payable by Iqbal for the Trust's shares. The second was a proposed loan to Iqbal to assist him to pay for the shares. Luis suggested that this might involve a contravention of s 38 of the Act. He refused to agree to the amendment and, irrespective of its lawfulness, the idea of a loan was dropped. The two paragraphs of the particulars of claim dealing with these matters

commenced with the meaningless statements that Andrea 'purported to compel the plaintiffs to conclude an amending agreement' and 'purported to procure that' a contravention of s 38 would occur. Not only were they meaningless, but it is incomprehensible on what basis events that did not occur because of Luis's opposition could constitute conduct by Andrea of the affairs of TCM in a manner that was unfairly prejudicial to Luis.

[44] Of more substance were allegations falling broadly into four categories. The most substantial related to Luis's personal situation and encompassed his dismissal as an employee, his resulting exclusion from executive involvement in the day-to-day running of the business and the determination of bonuses and benefits in a manner that was said to be prejudicial to him and benefitted other executives and employees in return for their support of Andrea. It was alleged that Andrea had an ulterior motive of 'humiliating, denigrating, and punishing' the plaintiffs for not acceding to his demands. The second category related to allegedly favourable treatment of Iqbal directed at assisting him to pay for his shares by concluding retention agreements, making payments under those agreements and paying him enhanced bonuses and other benefits. The third category involved the accounting treatment of the Supplies Division, the alleged undervaluation of inventory and criticisms of the failure to control the operating expenses of the business, thereby diminishing the benefits flowing to shareholders and the value of the business. The fourth and last category related to the alleged failure in 2008 and 2009 to negotiate in good faith with Luis in order to enable him to dispose of his shares at fair value. Linked to that was a failure to furnish information and documents that would have enabled him to arrive at a fair value for his and Jose's shares.

[45] I have endeavoured to place these disparate items in an appropriate order, although there was no discernible common thread binding them together. On that basis Luis's case was the following:

(a) he had a legitimate expectation to daily involvement and engagement in the operations of the first defendant as a director and shareholder;

(b) more particularly he had a legitimate expectation to recognition and remuneration as (i) a founder member of TCM; (ii) a quasi-partner in the affairs of the business, which was a domestic company akin to a partnership; (iii) a participant in and contributor to the business of TCM of equal standing to Andrea; and to (iv) the due respect and regard of his fellow directors, shareholders and employees;

(c) since approximately 2007 these benefits had been denied to him;

(d) between 2007 and 2009 as a result of his unwillingness to agree to certain changes in the sale agreement under which Iqbal had acquired the shareholding in the company he placed in the Trust, he had been abused and treated in a demeaning manner; had his resignation as a director demanded; and had his bonuses reduced both in order to humiliate him and to use the funds to assist the Trust to pay for the shares and buy the personal loyalty of other recipients of bonuses;

(e) Andrea procured the conclusion of retention agreements with Iqbal that were a sham and benefited Iqbal and the Trust at the expense of the other shareholders;

(f) the disciplinary charges brought against him were spurious and in procuring them Andrea was driven by the ulterior motive of excluding him from the business;

(g) the disciplinary hearing was conducted in a manner that was unfair to him;

(h) during 2008 and 2009 Andrea refused to engage in *bona fide* discussions or negotiations aimed at permitting Luis to dispose of his shares either to the other shareholders or to a third party at a fair value and refused to permit him the proper access to documents and information to which he was entitled as a shareholder and director, thereby preventing him from arriving at a fair assessment of the value of his shares and complying with the provisions of the shareholders' agreement in regard to the disposal of his shares;

(i) in three respects, Andrea engaged in conduct in regard to the finances of TCM that operated to the detriment of other shareholders, namely that he:

(1) caused the business of the Supplies Division of TCM to be transferred at no value to another company, TCM Printing Solutions (Pty) Ltd, owned by the Trust as to 25.1% and his brothers Frank and Fabio as to the balance in equal shares of 37.45% each; alternatively procured that the business of the Supplies Division was conducted and accounted for as if it were an entity separate from TCM, with all income and profits accruing for the benefit of the Trust and Frank and Fabio; and

(2) during the period 2008 and 2009 Andrea procured an under-valuation of the inventory of TCM of approximately R11.2 million for the purpose of reducing the value of the Luis's shares; and

(3) from 2007 Andrea has conducted the business of TCM in a manner such that the operating profit had been drastically reduced; the operating expenses had almost doubled and, although the gross profit of the business climbed from R153 878 415 in 2008 to R228 746 081 in 2012, a failure to control the expenses of the business, resulted in the benefits available for distribution as dividends not accruing as they should and the growth and well-being of TCM not being properly ensured and protected;

(j) Andrea had authorised and procured that the funds of TCM be used to conduct the defence of the application proceedings referred to earlier in para 9 of this judgment;

(k) In the result the relationship of trust and respect between Luis and Jose on the one hand and their co-shareholders on the other had broken down so that it was impossible for them to co-operate meaningfully as shareholders, directors and employees and jointly to conduct the business of TCM and best advance its objectives.

Jose's case

[46] Jose's claims in regard to unfair prejudice could not be the same as those of Luis. TCM was established by Andrea and Luis. Jose and Tony had joined it as junior employees with an offer of an indeterminate number of shares. They had carried on as employees without that offer being fulfilled until shortly before it became necessary to sell shares to Iqbal as part of the BEE deal. At times Luis described them as directors, although they were not formally appointed as such until 2004. However, they appear from an early stage to have worked with Andrea and Luis as part of an informal executive committee for the business. They discussed major decisions, but the final decisions were taken by Andrea and Luis. On that basis it was alleged that Jose had a legitimate expectation of daily involvement in the operations of TCM and recognition of his status as a shareholder and director of the company. He did not claim to have been a 'quasi-partner' as Luis did, nor did he claim to have the other expectations described above in para 45 (b) above.

[47] The allegations in the particulars of claim that were specific to Jose were that:

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

16.1 marginalised, sterilised, humiliated and denigrated the status of the second plaintiff;

16.2 rusticated him to the first defendant's Namibian office without discussion and without his consent;

16.3 threatened to dismiss the second plaintiff should he not resign as a director of the first defendant;

16.4 deprived the second plaintiff of his erstwhile duties and status without proper cause;

16.5 generally conducted himself towards the second plaintiff with the ulterior motive of forcing the second plaintiff to leave the employ of the first defendant and to give up his directorship thereof and/or his shareholding therein.'

It is unclear whether 'the present time' referred to in the preamble was 2010 when the summons was issued, or 2012 when the particulars of claim were amended, but on the facts alleged it does not appear to matter. In paragraph 17 it was alleged that the second defendant had conducted himself and the business of TCM in a manner calculated to deny and frustrate the plaintiffs' legitimate expectation of their daily involvement and engagement in the operations of TCM and the recognition of their status as shareholders and directors.

[48] There was an overlap with Luis's allegations in regard to the endeavour to reduce the price payable by Iqbal. Jose also objected to the retention payments to Iqbal and he adopted the allegations summarised in paragraphs 45 (i) to (k) arising from Mr Geel's analysis of the financial position of the company. Like Luis he alleged that there were no bona fide negotiations over their possible departure from the company and the disposal of their shares. Nor was any reasonable offer made to purchase the shares.

The relief sought

[49] An order under s 252 is directed at remedying the unfair prejudice that has been suffered. The unfair prejudice on which the plaintiffs relied was the following.

(a) Their primary case was that by virtue of the nature of TCM's business they both had a legitimate expectation to daily involvement and engagement in the business, as well as recognition of their status as shareholders and directors. In Luis's case he claimed to be entitled in addition to recognition as an equal participant and contributor to Andrea. Both claimed to have been denied these rights from 2007 to 2010, when the summons was issued. They said that their prejudice was compounded by their being locked-in, causing an inability to dispose of their shares and realise their value. They sought a 'buyout' order that either TCM, or alternatively Andrea, Tony and the Trust, should purchase their shares and take transfer of them against payment of the sum of R160 million, or such other amount as the court might determine. They tendered against payment in full to resign as directors and sign all documents necessary to transfer the shares to whoever purchased them.

(b) The secondary case was that, even if they had no such legitimate expectations, Luis's dismissal and the treatment Jose received before his resignation on 27 March 2013, were prejudicial to their position as shareholders and resulted in their exclusion from the daily involvement and engagement in the business and the recognition as shareholders and directors that they would otherwise have enjoyed. Like their primary case, the prejudice was compounded by their being locked-in.

(c) The third source of unfair prejudice was simply that they were locked in and, in and of itself, this constituted unfair prejudice to them as shareholders.

(d) Their final ground of unfair prejudice was that they had lost faith and confidence in the management of the business by Andrea and the other directors as a result of the latter conducting the affairs of the business in a manner lacking in probity, so that it was no longer possible for Luis and Jose to co-operate meaningfully with them in the conduct of the company's business. They did not allege dishonesty or a general lack of probity in conducting the affairs of the company, but a lack of probity in relation to conduct directly affecting them. They attributed this to an intention to force them out of the company and compel them to sell their shares at less than their true worth. This unfair prejudice was closely linked to their being locked-in.

[50] Luis and Jose alleged in para 21 of the particulars of claim that the fair value of their shares was R160 million, alternatively an amount to be determined by the court. Mr Geel had determined that figure. Prior to the commencement of the hearing in 2014, the parties agreed that the issues to be decided would be as set out in the particulars of claim 'save for paragraph 21 thereof, read together with paragraph 15 of the plea ("the remaining issues") which relates to the quantum of the claim'. The precise effect of that separation of issues, like much else in the case, gave rise to an argument before us arising from the fact that the judgment ed TCM, rather than the other shareholders, to purchase the shares on the basis of a valuation to be done. That will be dealt with later in the judgment.

The evidence

Luis and Andrea

[51] It is a persistent judicial complaint that cases brought by minority shareholders claiming to have been unfairly prejudiced by the manner in which the affairs of the company have been conducted, come to resemble matrimonial suits and disputes over the dissolutions of partnership. The parties take the opportunity to unearth every grievance and canvas every disagreement, however minor, that might conceivably have led to the breakdown in their relationship. They pore over every actual or perceived fault or slight and blame one another for everything that went wrong.[20] They frequently attribute to the other party improper motives directed at causing them harm. That occurred in the present case. Luis said that Andrea engaged in 'a concerted and orchestrated plot to remove me from the business'. He accused Andrea and Iqbal of acting in concert in an attempt 'to completely alienate me from the business'. According to him Andrea was acting *mala fide* and was motivated by ulterior motive and malice. Why he would have done this to an old friend and business partner was never explained. In his mind the incident that triggered the breakdown in the relationship occurred in November 2007 when Andrea asked for and received, over his strenuous opposition, an increase in his remuneration that meant that for the first time he earned more than Luis. He viewed this as a fundamental breach of an informal agreement they had concluded in about 1987 that they would always be on the same footing as far as remuneration and status was concerned.

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[20] Hoffmann J in *Re a Company (No 004377 of 1986)* [1987] BCLC 94 at 101 drew the analogy with matrimonial proceedings and remarked that: 'Voluminous affidavit evidence is served which tracks the breakdown of a business relationship commenced in hope and expectation of profitable collaboration. Each party blames the other but often it is impossible, even after lengthy cross-examination, to say more than the petitioner says in this case, namely that there was a clear conflict in personalities and management style.'

[52] The rupture in regard to Andrea's remuneration was followed two weeks later by Andrea attempting to persuade his fellow shareholders to reduce the price payable by Iqbal for the shares. Luis refused to accept that this was a genuine attempt to assist someone who had brought considerable benefits to the business, but needed assistance in meeting his obligations to pay the purchase price of the shares he had purchased. Instead he treated it as symptomatic of Andrea trying to secure the support of the other directors and senior executives to exclude him from the business. The final straw, after which the relationship between the two men came to resemble a form of internecine guerrilla warfare, was a dispute at the end of November and the beginning of December over Andrea's attempt to sever the relationship between TCM and its Supplies Division by creating a new company in which the only shareholders would be his brothers Frank and Fabio with Iqbal as a BEE shareholder. This appears to have confirmed Luis's belief that Andrea was actively working to bring about a situation where he was isolated as a director and would be excluded from the company. His resentment over what he perceived to be a humiliating downgrade in status was obvious and the source of many of the problems between the two of them.

[53] Luis attributed every disagreement between himself and Andrea from 2007 to a conspiracy to remove him from the company arising from ulterior motives and malice on the part of Andrea. Everyone who agreed with Andrea over the issues giving rise to disputes was tarred with the same brush of being part of a conspiracy, or having had their co-operation bought with generous bonuses and the like. Hard evidence of such conspiracies and ulterior motives was lacking. The company was thriving and growing to the benefit of all. Between 2004 and 2008 its value increased fourfold according to Luis' evidence before the CCMA.

Between 2008 and 2012, the date of the amended particulars of claim, its sales increased from R318 million to nearly R775 million. Its gross profit increased from R96 million to nearly R229 million. Its headcount grew from 396 to 534. Between June 2008 and July 2012 it paid out dividends of R81 million to its five shareholders, at a stage when dividends were not subject to income tax in the hands of the recipient. Insofar as relevant, that trend continued in the years after 2012. It is obvious that the business was thriving under Andrea's leadership, notwithstanding Luis's resistance. Prior to 2005 the company had not declared dividends. The new policy was adopted in the light of clause 4.3 of the sale of shares agreement, which provided that all dividends received by Iqbal would be used to discharge the purchase price of the shares. Luis was a major beneficiary of the new policy of paying substantial dividends.

[54] Beyond their increasingly divergent perspectives on their roles and relative positions in the company, no obvious reason emerged for the deterioration of the relationship between the two former friends. Every indication was that before 2004 and the introduction of Iqbal as a BEE shareholder the business was run very informally with Andrea in the CEO role taking responsibility for overall management and building up the company together with sales and marketing, and Luis in charge of the technical side of the business, logistics, procurement, inventory, some accounting record-keeping and administration. There was no evidence of there being any need to resolve issues, as each man took responsibility for his own area of work. Any problems were minor and resolved through informal meetings. After 2004, and especially after the conclusion of the shareholders agreement in 2005, Andrea took his role as CEO very seriously. He saw the loss of the Standard Bank contract and the need to address BEE issues as a wake-up call that the company needed to change

and he set about addressing this. He identified Iqbal as the person who could address the BEE issue and make a contribution to the company and he appears to have conducted the negotiations with him with little input from anyone else. Luis did not ask for Iqbal's CV or interview him.

[55] Luis repeatedly suggested that Andrea had persuaded him to go along with the BEE transaction and the shareholders agreement on the basis that nothing would change. This is difficult to believe and is contradicted by the existence and terms of the shareholders agreement. The very act of drawing up a shareholders agreement proclaimed that things would change and what had been an informal way of doing business would become more formal. Email exchanges and Luis's evidence conveyed that he thought that Andrea had become over-infatuated with his role as CEO, wanted his own way in everything and resented any attempt to stand in his path. In other words he had grown too big for his boots. The shift in perceptions was well illustrated by the emails exchanged between them in November 2007 over Andrea's suggestion that there be an adjustment to his own remuneration package.

[56] The exchange started with an email from Andrea to the directors saying that he had long thought that his package as CEO and Chairman was not consistent with his role and the performance of the company and suggesting an adjustment. Luis responded that afternoon saying that he could not approve of the recommendation and that he would send a note to the shareholders only. The note was in an email sent at the same time in which he said that directors' increases, especially an increase for the CEO, should be approved only by the shareholders, He said that TCM's

net profits after tax were lower than the previous year although turnover was up by 20% and gross profit by 22%. He added:

'4 On paper I believe that My Shareholding is worth less today than it was a year ago. Again I speak from what I can recall.

5 As a CEO he has not achieved the number one goal. That is to create fair value in the Shares held by Shareholders.'

Luis added that one cannot compare the package of the CEO of a private company, especially if the CEO is a major shareholder, with that of a public company, as the risks were different. However, he said he respected Andrea's ability as a businessman and his ability to maximise profits and most aspects of his vision for the group. Accordingly he said he would accept an increase of 5% to bring his total increase for the year up to approximately 18%.

[57] The tone of the email, the criticism directed at him and the grudging offer of an insignificant increase, angered Andrea. He responded as follows:

'Hi Luis,

I find your views mostly irrelevant and emotional. Your personal (non appreciative) views are very evident and consistent with your general conduct and behaviour.

For the record this is not an "increase" its an "adjustment" long overdue (many years ago), often recommended by other shareholder/directors, yet always opposed by you, maybe thinking and acting as a joint CEO? I remind you, you are not a Joint CEO or a 50/50 partner in a small business (as once was, a long time ago). Accepting, acknowledging this may resolve the continual non-productive baggage you keep raising.

I need not (further) justify the and my CEO role, responsibility, value, performance or shareholder returns over the last 20 year … most evident in the last 3 years.'

Andrea went on to say that the directors represented the shareholders and were accordingly able to contribute and vote on the matter he had raised. He claimed that the amount of the adjustment was not material to him as

he was not seeking wealth through his salary, presumably in contrast to seeking wealth from his shareholding. He said he was willing to embrace any CEO better suited to the job than he and suggested that Luis nominate one. The issue carried on over the next couple of days with the exchanges becoming increasingly sarcastic on both sides. It included further criticism by Luis of the company's performance and Andrea's response that he had addressed these issues 'enough".

[58] The one point of substance that emerged from these exchanges was that Luis was hoping for the company to list on the JSE to enable the shareholders to realise the true potential of their shares. Andrea recognised that Luis was looking for an 'exit strategy/plan' and asked that there should be no more JSE meetings. He suggested that Luis should see whether he could get an offer for the company without its key people and told him that he was 'a fine one judging the CEO performance'. An article about earnings for CEO's and executive directors was attached, and he added sarcastically:

Now ask yourself how come **"you"** earn the same as the CEO … maybe its because you have the same size office?'

In the final email in this exchange he referred to Luis's 'ghost consultant', which showed an awareness that Luis was seeking advice outside the company.

[59] Luis described the other members of the board of directors (Tony, Iqbal, Wayne and Ms Bhula) as lackeys of Andrea ('his coterie'), whose support and votes at board meetings and on round robin resolutions had been bought by the grant of bonuses and other financial benefits. An example of his ascribing impropriety to Andrea and others, and his reluctance to take anything at face value, appears from his approach to

the incident described in paragraph 10 above. He annexed the emails referred to there to his founding affidavit in the s 252 application. Consistent with his general practice of always attributing ulterior – usually dishonest – motives to people, he said in his affidavit:

'Obviously, Cornelli's intention to reward Justine in this way was part of his usual strategy, namely, to reward people, and members of their family, thus to ensure their compliance and loyalty. Certainly this proposal could not be explained on any other basis.'

Andrea's answering affidavit explained the nature of the IBM audit and its potential downside for TCM and refuted the suggestion that he was trying to curry favour with Wayne by favourable treatment of his sister-in-law. Luis made no endeavour in reply to deal with the importance of the audit or to explain why he thought that the work was part of Ms Impey's ordinary duties, but redoubled his attack on Andrea by adding that he was close friends of Ms Impey and her husband and:

'…was even then in the habit of distributing largesse to reinforce his support base in the company.'

It is unclear how this supposed favouritism was compatible with the fact that in the following year Ms Impey's bonus was reduced substantially, unlike those of other senior employees, and only resumed an upward trajectory the following year.

[60] As had been the case when he gave evidence before the CCMA, Luis reluctantly accepted under cross-examination at the trial, that he could point to no fact to justify the accusations he made against the directors, other than that the individuals whom he targeted in this fashion supported proposals emanating from Andrea. He accused his colleagues of blatant dishonesty in regard to an internal survey undertaken in 2008 concerning support services for customer sales and services and persisted in the accusation until the trial. There was no foundation for this

accusation. On this and every other point he was unwilling to concede that he might have been at fault in any way, or a contributor to the deterioration in his relationship with Andrea and his fellow directors.

[61] In regard to his dismissal Luis said:

'The whole conflict, orchestrated by [Andrea] culminating in my dismissal on charges which were patently trumped-up, had nothing to do with my conduct as an employee but were designed to punish and persecute me as a shareholder, and, ultimately, to compel me to dispose of my shares at a value far below the true value of my shares.'

This was the pattern throughout the case. Luis was obsessed by the idea that Andrea was conspiring with the other directors to get rid of him and seeking to harm him financially by compelling him to dispose of his shares at less than their true value. He saw a conspiracy in almost everything that was done in the company. When cross-examined about the provisions of the shareholders agreement all he could say was that the apparent and obvious meaning of its provisions 'was not what he was told'. The record contains many examples of Luis's unwavering belief that Andrea had for no identifiable reason misled him as to the effect of the shareholders agreement and engaged in a process of manipulating events so as to isolate and exclude him, with a view to compelling him to dispose of his shares at far less than their true worth. It was never apparent why Andrea would have set about such a course.

[62] The defendants' plea did not give a reason for the obvious breakdown in shareholder relations, or make any specific allegations against either Luis or Jose's conduct. It is plain from the documents in the record and the cross-examination directed to Luis at both the CCMA and the trial, that Andrea and the other directors regarded him as being obstructive and uncooperative in the workplace and having failed to adapt

to the needs of a business that had grown beyond all recognition. The issues emerged from the details of the charges in his disciplinary enquiry. The first was a technical one of disobeying an instruction from Andrea and there is no need to go into it. The second was that he had caused an irretrievable breakdown in trust and in the working relationship with his fellow employees, directors and shareholders, arising from accusations of dishonesty made against the CEO and fellow executives as well as insinuations of corporate governance irregularities and potentially criminal breaches of the Companies Act. He had demanded major amendments to the shareholders agreement, such as that he be joint CEO with Andrea, in order to change the manner in which the company was being run and secure greater authority and status for himself.[21] The charge said that this had caused a breakdown in relationships, which he had refused to try and repair. This was causing disharmony and tension in the company and he had become incompatible with his fellow directors. The last charge complained of his work performance and his failure to assist his colleagues and heed the advice and instructions of the CEO. The long and the short of this was that his fellow directors laid responsibility for the breakdown in relationships squarely at Luis's door.

[63] The documents included in the record do not cover the entire period after Iqbal joined the company or even the entire period after the conclusion of the shareholders agreement. But the conclusion is irresistible that the problems that gave rise to this litigation followed upon the changes that came about when Iqbal joined the company and flared up over three issues in November 2007. Within six months of the latter date Luis was looking for a way to leave the company he had co-founded

[21] He said that it was to reflect the agreed position between him and Andrea that they were of equal status and were always joint CEO's. Not even Jose supported that view of matters.

twenty-one years earlier. In 2008 he started openly to question the accuracy of the audited financial statements, but Mr Geel's description in his report of the circumstances in which he was employed suggest that the problems had been brewing for a while. The commercial driving force behind Iqbal joining TCM as a shareholder, director and employee was the loss of the contract with Standard Bank and Andrea's decision that the BEE issue needed to be addressed urgently. While Luis said that he supported the proposal that Iqbal become involved and regarded him as having been an immense success, it is not clear that he truly welcomed it. When issues arose over whether Iqbal would be able to adhere to the payment provisions in the agreement, he was not co-operative in addressing the problem. He said that he thought that Iqbal's arrival would not affect him or his relationship with Andrea, but plainly no-one else shared that view, not even Jose. His unwillingness to accept this was a theme to which he repeatedly returned and it lies at the heart of his exclusion case.

[64] There is nothing in the record to suggest that Andrea tried to address this problem in a sympathetic manner, although some emails said that he had on many occasions tried to discuss the problems with Luis and get him to understand that his fears were misplaced. Several of his emails to Luis said that particular issues had repeatedly been explained to him and there was no point in further discussion. Andrea recognised that the introduction of Iqbal and the conclusion of the shareholders agreement signalled a more formal structure to the company's operations. There were now three major shareholders and Wayne, its former auditor, had been introduced as the CFO and a director. His own position as CEO took on greater importance, while that of Luis declined in relative

importance, becoming a service provider to the sales function. Decisions were now taken after consultations that included Iqbal and Wayne. That Andrea appreciated this is clear, but either Luis did not, or if he did, was deeply resentful of it. Under cross-examination he constantly harked back to the past and the way things had been before the conclusion of the shareholders agreement. His constant queries directed at proposals or decisions advanced by Andrea appear to have been attempts to push back against the changes and reassert his former standing in the company. Those efforts became most apparent in the proposals he put forward in May 2008 to be appointed joint CEO with Andrea. His own description of these was that 'this is going back okay to the way things used to run before the BEE agreement came along'.

[65] The deterioration in the relationship between the two men is apparent from the tone of their correspondence. There are numerous examples in the record. Both were parties to uncivil exchanges. It is pointless to speculate whether the relationship would have broken down had it not been necessary for Iqbal to become a shareholder and be involved in the business. It is equally pointless to speculate whether it would have achieved the success it has without his involvement, or whether, as Andrea feared, it would not have survived. The fact of the matter is that Iqbal became involved with the agreement of both Luis and Andrea and proved a great success. His joining the company flowed from the conduct of TCM's affairs, but the existing shareholders agreed to it and it was not in any way unfair or prejudicial to their position as shareholders. The schism that arose was an indirect and unintended consequence of his advent. The inevitable changes that it brought about were welcomed and adopted by Andrea and resisted by Luis because of

their impact on his role and status. That resistance in turn generated frustration and anger on the part of Andrea and the breakdown in the relationship followed.

Jose

[66] Jose's situation was significantly different from that of Luis. Jose was not dismissed, nor were disciplinary charges brought against him. His pleaded complaint was that he, like Luis, was sidelined and humiliated as a result of a restructuring of his role and an allocation of most of his previous responsibilities to Tony. On 31 March 2009 he wrote to Andrea declining an offer of voluntary retrenchment made on 17 March 2009 and accepting the altered description of his responsibilities, in the following terms:

'In these circumstances, I confirm that I will continue in my new Executive Director role and enclose a signed acceptance of my Job Description to confirm the aforementioned.'

Essentially this left him with no defined duties beyond ad hoc executive projects assigned to him by Andrea. He said that he felt obliged to accept the position even though it left him in a position where he was no longer an executive with people reporting to him, but at the beck and call of Andrea.

[67] Shortly thereafter he was seconded on short notice to Namibia to establish a branch office there. It was made apparent to him that, if he did not accept this position, he was likely to be retrenched. The logistics of the move were a problem and impractical for him because of the need to get a visa in order to work in Namibia and because of his home and family commitments. He thought he could have done the job equally well from the Johannesburg office with occasional visits to Namibia, but at the

end of the day would apply for a work visa every six months that permitted him to stay in the country. While the logistical and personal problems occasioned by the move were considerable, he accepted the role and over the next three years made a success of it.[22] His evidence in chief in this regard was as follows:

'MR SLON: … [W]hat was your attitude to this response, to this suggestion?

JOSE: The suggestion was perfect. There's no problem at all in my, from my side. I actually welcomed it. I thought it was a good idea and me taking over and handling it was perfect.

MR SLON: Yes.

JOSE: I knew the field. I knew the logistics. Basically I would know exactly how to take it on and how to get it going.'

His further comments were that 'I was quite happy doing that' and:

'MR SLON: And how – what was the – how did it go, personally? How did you feel about doing the work and going up to Namibia and being involved in the company?

JOSE: I was excited about it.

MR SLON: Yes.

JOSE: I thought it was a good idea.'

[68] Jose also said that in accepting the position in Namibia he had been faced with Hobson's choice. Either he went to Namibia, or he would have been retrenched and become a non-executive director with significant consequences for him when he was nearing the age of sixty. However, his evidence that the reorganisation that deprived him of his executive duties was an attempt by Andrea to force him to leave the employ of TCM and give up his directorship was unconvincing in view of the positive way in which he embraced it. His resignation on 2 April 2013, two and a half years after the commencement of this action and

[22] In his evidence he said he was there for nearly three years until April 2013, but that was nearly four years after he was instructed to take the position.

three and a half years after the commencement of the prior application for s 252 relief, was triggered by a row with Andrea over a stock count and the disposal of out of date spares. Andrea criticised Jose for not completing the task allotted to him, while Jose maintained that he had exactly performed what he was told to do and the problem lay with Tony not making it clear which stock he wanted scrapped. It seems probable that Jose was perceived by Andrea and generally within the company as an ally of Luis's, but he was not driven out and remained an employee until his resignation.

General

[69] The picture that emerges is one that can easily occur when a small company grows beyond its original roots and becomes a large organisation requiring clearer structures and lines of authority with less scope for the relaxed manner of doing things that characterised its early days. Andrea and the majority of directors saw the company as having changed from a small domestic company into a major business that needed to be run differently from the way it had been run in the past. Wayne's appointment to a role that had not previously existed, but one that exists in every major company, was indicative of that. Taking cognizance of BEE realities and bringing in Iqbal with his great experience in the industry, likewise showed that the company had moved to a new level. Luis did not readily accept these changes and his attitude towards Iqbal was at best ambivalent and possibly hostile.[23] He was particularly sensitive to its impact on his status within the company. He was unwilling to accept Andrea's authority as CEO, but hankered after the days when, as he perceived it, they had run everything jointly. In his

[23] He described him as a 'latecomer' who was 'adding a Black face to the business'. He said that he was 'not unique in South Africa. There would have been other people that could fulfil that role.' However, when invited to identify someone he was unable to do so.

evidence he attributed everything that had happened to a conspiracy or a plan to humiliate or persecute him. The result was that he hurled accusations of dishonesty and improper motives at everyone who supported Andrea. Everyone else was always wrong and he was right. This extended to the people who presided over the various disciplinary proceedings and even the judge who dismissed the s 252 application. There could be no doubting his sense of grievance. It needed to be, but was not, taken into account when considering the extent to which it coloured his evidence and its reliability.

[70] I share the view expressed in *Kremer*[24] that in cases of this type 'it is usually a waste of time to investigate who caused the breakdown' and the present case well-illustrates that point. Whether it would have been any easier if counsel for the appellants had not closed their case without calling any witnesses, is impossible to say. One suspects that it would have further muddied the waters.

[71] In my view a careful reading of the transcript of the trial and the documentary evidence reveals nothing more than that Andrea's and Luis's paths diverged as the company grew and succeeded beyond even their wildest dreams. They had carried on for 17 years with Andrea as the CEO and Luis running the information technology side of the operations and the accounts. For a number of years they had enjoyed the same benefits and major decisions were taken jointly, but there is no evidence of what was regarded as a major decision until the time came to address the BEE problem in 2003 and 2004. Luis's evidence at the CCMA was that Andrea was always responsible for the 'managing part' of the

[24] *In Re a Company (No 006834 of 1988) ex parte Kremer* [1989] BCLC 365 (Ch D) at 366.

company, but that they regarded themselves as equal and joint runners of the company.[25] Andrea always consulted him when he thought it appropriate and vice versa.

[72] Luis said that he was happy with the decision to introduce Iqbal and thought they would simply carry on as before with five people instead of four. That is difficult to accept from a successful businessman, but if correct it was remarkably naïve of him. Iqbal did not share the same background as Luis and Andrea in building the business from scratch. That background was likewise shared by Jose and Tony. He had no baggage arising from long-standing personal relationships. He was entering into a business transaction with successful businessmen. He came from a lengthy career in a large multi-national, which would have operated in a hierarchical way with a clear allocation of roles and responsibilities. He was to acquire a 25.1% stake in the business in terms of formal agreements prepared by legal advisers. There was no reason for him to think that the business would not be run in accordance with those agreements. The shareholders agreement opened the way for disagreements about the direction of the business to be resolved by majority vote. The heads of agreement were followed by the execution of a formal shareholders agreement. This replaced the prior more informal way of doing things evidenced by the promises of equity to Jose and Tony not having been carried out and them being regarded as directors although not appointed as such. All of this signalled that there was to be a significant change in the way in which TCM was run. Luis did not like this and constantly looked back to the pre-2004 situation and tried to assert that his position was no different from what it had been then.

[25] He said it was 50.50.

[73] By contrast, it is plain that Andrea was less concerned with the past than the future. He was very conscious of his leadership role and responsibilities as CEO of a company with a turnover of hundreds of millions of Rand, major clients, a national footprint and a large and growing workforce. The ongoing growth in the company did not suggest that the business was being mismanaged. He was certainly forceful in making proposals and seeking to implement them. He ultimately lost his temper over Luis's attempt to act as if he were joint CEO. From the stage when it became clear that Luis was planning to extricate himself from the business, it was equally clear that Andrea would have been happy for him to go. To make matters worse just as Luis did not trust him, he did not trust Luis. That underpinned his suggestions that Luis and Jose should resign as executive directors, but remain non-executives at reduced remuneration. But there is nothing to indicate that he was not genuinely trying to do his best for the company and its shareholders, or was plotting to use nefarious means to rid himself of the burden of dealing with Luis.

[74] Against that background, where Luis and Jose wanted to exit the company and Andrea wanted them to leave, one would have thought that it would have been possible to reach an accommodation that enabled that to take place. However, the problem appears to have been that the parties were far too far apart on the value of the shares held by Luis and Jose. Andrea had indicated a figure of R37 million, but their Luis and Jose's view in the light of Mr Geel's assessment was that a proper figure was between R130 and R160 million. That was a gap that in the prevailing atmosphere of mutual distrust could not be bridged. All that this court can do therefore is determine whether the high court was correct in its findings in regard to the treatment alleged by Luis and Jose; whether that treatment, to the extent it occurred, was unfairly prejudicial, unjust or

inequitable to them in their capacity as shareholders; and, if so, whether the appropriate remedy was an order that TCM purchase their shares. But first in order to provide context to the factual enquiry it is necessary to consider what s 252 requires of an applicant seeking relief under its provisions.

Section 252

General

[75] The relationship between a company and its members, as well as the members *inter se* is contractual and based primarily on the memorandum of incorporation (formerly the memorandum and articles of association). In *Sammel v President Brand Gold Mining Co Ltd*, Trollip JA said:[26]

'By becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder (cf. secs. 16 and 24). That principle of the supremacy of the majority is essential to the proper functioning of companies.'

The company in that case, was a public company listed on the Johannesburg Stock Exchange with a large body of shareholders, whilst TCM is a private unlisted company, with only five shareholders, but the principle holds good for all companies.[27] On any disputed issue the views of the majority will ordinarily prevail.

[76] This remains the ordinary rule, but legislation governing companies in South Africa, following both the lead and in many respects

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[26] *Sammel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 678.
[27] *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 (HL) at 500. For examples see *Garden Province Investments (Pty) Ltd and Others v Aleph (Pty) Ltd and Others* 1979 (2) SA 525 (D) at 533H-534G; *Louw and others v Nel* op cit, fn 7, para 22.

the language of similar English legislation, has long recognised that in certain circumstances, even if the majority shareholders act strictly in accordance with the contractual terms governing the shareholder relationship, they may have exercised their powers in a way that was oppressive or unfairly prejudicial to minority shareholders. To that end the courts have been vested with statutory powers to override the majority's exercise of its contractual powers in order to remedy such oppression or unfair prejudice. At the time the present disputes arose the applicable provision was s 252 of the Act, which in relevant part read as follows:

'**252. Member's remedy in case of oppressive or unfairly prejudicial conduct.**—(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may, subject to the provisions of subsection (2), make an application to the Court for an order under this section.

(2) …

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

This was the provision invoked by Luis and Jose. Speaking for this court Ponnan JA said of it that:[28]

'The combined effect of ss (1) and (3) is to empower the court to make such order as it thinks fit for the giving of relief, if it is satisfied that the affairs of the company are

[28] *Louw v Nel*, ibid, para 7.

being conducted in a manner that is unfairly prejudicial to the interests of a dissident minority.'

[77] Although the heading referred to 'oppression' that was a hangover from its predecessor.[29] Section 252 referred to conduct that is 'unfairly prejudicial, unjust or inequitable'. While 'unfairly prejudicial', 'unjust' and 'inequitable' are notionally separate they may overlap. For convenience and to avoid unnecessary repetition, I will refer to all three generally as 'unfair prejudice' or 'unfairly prejudicial' as the sense requires. The section could be invoked in two situations. The first was where the complaint was that a particular act or omission of the company was unfairly prejudicial to the member or group of members. The second was where the affairs of the company were being conducted in a manner unfairly prejudicial to that member or to some part of the members of the company. The latter was the basis for the present claim. While there was potentially an overlap between the two, there was a clear difference in principle, between cases where the complaint arose from the actions of the company and those where it was the manner in which the affairs of the company were being conducted that was alleged to be unfairly prejudicial. The one focussed on the company's actions, while the other focussed on the manner in which the affairs of the company were being conducted and the actions of those responsible for that conduct.[30] These would usually be the directors and the majority shareholders.

[78] Unfairly prejudicial conduct by the company could arise from matters such as changes in the articles of association to enable the

[29] Section 163 of the 2008 Act refers to 'oppressive or unfairly prejudicial conduct' or conduct that 'unfairly disregards the interests' of a shareholder or director.
[30] The distinction was drawn by David Richards J (as he then was) in *Re Coroin Ltd (No 2)*, [2013] 2 BCLC para 626.

majority shareholder to dispose of their shares;[31] amending the articles of association to confer additional rights on a developer;[32] changes to the voting rights attached to certain shares or the issue of additional shares in such a way as to result in a shareholder's voting rights being diluted[33] or to enable the majority to acquire the minority's shares; a merger with, or takeover by, another business; the disposal of the company's business or a major asset of that business;[34] or even the winding-up of the company.[35] Any of those could be structured so as to prejudice the interests of minority shareholders unfairly. Their common feature was that they were actions by the company itself, albeit driven by the majority shareholders.

[79] A claim of the second type under s 252 required proof of the manner in which the affairs of the company were being conducted that was unfairly prejudicial to the member, or part of the members, of the company. The language of the section postulated generally an ongoing course of conduct, although it is unnecessary to decide whether it had to be continuing when the proceedings were launched or when relief was given.[36] The cases held that a court should not construe the notion of conducting the affairs of the company unduly narrowly, because 'the affairs of a company can be conducted oppressively by the directors doing nothing when they ought to do something – just as they can be conducted oppressively when they do something injurious to its interests

[31] *Greenhalgh v Arderne Cinemas Ltd (No 2)* [1950] 2 All ER 1120 (CA).
[32] *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and others* 2017 (5) SA 9 (CC).
[33] *In re Sam Weller Ltd* [1990] 1 Ch D 682 at 689G-H; *Re Coroin Ltd* op cit, fn 30. para 555.
[34] *Garden Province Investments (Pty) Ltd and Others v Aleph (Pty) Ltd and Others*, op cit, fn 27.
[35] *Bader and Another v Weston and Another* 1967 (1) SA 134 (C) at 146F-H.
[36] See in this regard the discussion of the expression 'are being conducted' in the English and Australian counterpart to s 252 in *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 paras 126-132.

when they ought not to do it'.[37] Proof was required of an identifiable and discernible course of conduct of the company's affairs that was unfairly prejudicial to the member or part of the members.[38] It was permissible to rely upon outwardly unrelated incidents, provided they were linked in a way that identified the course of conduct of which complaint was made. In the absence of such a link between the events relied on and the conduct of the company's affairs the requisites for relief under s 252 would not be satisfied. [39] Without such a link 'the acts of the members themselves are not acts of the company, nor are they part of the conduct of the affairs of the company'.[40]

[80] The concept of the affairs of a company being conducted in an unfairly prejudicial manner is concerned with the effect of the conduct, not the motives of those responsible for it, although motive is not always irrelevant because it may affect whether the outcomes are unfair.[41] The enquiry is whether objectively speaking the conduct complained of was unfairly prejudicial to the shareholder or part of the shareholders. A successful invocation of s 252 does not require proof of a lack of bona fides on the part of the directors or management of the company or an intention to cause prejudice. The persons responsible for the conduct may be motivated solely by what they regard as (and may well be) the best interests of the company. Sight must not be lost of the importance of the

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[37] Per Lord Denning in *Scottish Co-operative v Meyer and Another* [1953] 3 All ER 66 (HL) at 88, quoted in *Livanos v Swartzberg and others* 1962 (4) SA 395 (W) at 398 C-D. The latter case involved the respondent preparing to set up a business in opposition to the company in anticipation of leaving the existing company.

[38] *Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Another* 1968 (1 (SA 517 (C) at 529B-D.

[39] *Graham v Every* [2015] 1 BCLC 41 (CA) paras 37-38. The actions may be those of a shareholder but they must involve matters that involve the affairs of the company. If they are merely issues between the shareholders in their capacity as such they do not fall within the section. See also on the same point *Loveridge and others v Loveridge* [2020] EWCA Civ 1104, para 55 and *Primekings Holdings Ltd and Others v King and Others* [2021] EWCA Civ 1943, para 61.

[40] Per Harman J in *Re Unisoft Group Limited (No 3)* [1994] 1 BCLC 609 at 610-611.

[41] *Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Collieries Ltd and Others* 1983 (3) SA 96 (A) at 111F-H; *Parry v Dunn-Blatch and others*, op cit, fn 12, para 39.

word ‘unfairly’. The remedy is only available if the member is unfairly prejudiced.[42] The mere fact that a course of action by the company operates to the prejudice of a member does not suffice to entitle them to a remedy under s 252. The unfairness and the prejudice must affect the shareholder as a shareholder. Unfair prejudice to the shareholder as an employee does not fall within the section unless it has an impact on their position or interests as a shareholder. Save in extremely unusual circumstances the prejudice will be commercial prejudice.[43] While the claimant does not have to come to court with ‘clean hands’, in the sense that they must have been faultless in the breakdown of the relationship, if their own conduct is the primary or major cause of the problems that have arisen that is relevant to whether the conduct to which they have been subjected was unfair.

[81] ‘Unfairly prejudicial’ is an expression that is not susceptible of close definition. In 1967 Corbett J drew attention[44] to the paucity of material on the meaning of the expression ‘unfair prejudice’ in the predecessor to s 252 and the situation has only improved slightly since then, notwithstanding that there are now many cases in the law reports both here and overseas on the application of s 252 or similar provisions in other jurisdictions. The reason is that each case depends on its own peculiar facts, although over time some recognised categories of instances of unfairly prejudicial conduct have been identified. The breadth of the powers vested in the court is not an invitation for courts to intervene in

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[42] *Garden Province Investments (Pty) Ltd v Aleph (Pty) Ltd*, op cit, fn 27 at 531C-G. In this case it was said that unfairness was used in the sense of unreasonable on the basis of the Afrikaans text.
[43] *Re Unisoft Group Limited No 3)* op cit, fn 40, at 611 f-i
[44] *Bader and Another v Weston and Another*, op cit, fn 35, at 145C-D dealing with s 111 (*bis*) 2 of the Companies Act 46 of 1926.

the affairs of a company at the instance of a disgruntled member. In a passage cited by this court in *Louw v Nel*,[45] Buckley LJ said:

'The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted …'[46]

Dissatisfaction and disagreement with, or disapproval of, the conduct of the business, does not of itself mean that the member has suffered unfair prejudice. The fact that there are irreconcilable differences between shareholders may in some circumstances justify an order for winding-up the company, but it is not, without more, unfair prejudice.[47] Something more is required. The question is, how much more?

[82] There is a tension between the principle of majority rule in *Sammel v President Brand Gold Mining Co Ltd* and the power given to courts by s 252 to intervene in the company's affairs on equitable grounds and in doing so override, or at least provide a remedy for, conduct that is entirely in accordance with the memorandum of association of the company and any collateral agreements. In that situation the principle of majority rule gives way, because the powers of the majority have been exercised in a way that is unfairly prejudicial to the minority. The same tension arose under the provisions of s 459 of the 1985 Companies Act in the United Kingdom, which was the corresponding provision in that jurisdiction until its replacement by s 994 of the 2006 Companies Act.[48] It provided for a court to grant relief where the company's affairs were being or had been conducted in a manner which was unfairly prejudicial

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[45] Op cit, fn 6, para 24

[46] *Re Five Minute Car Wash Service Ltd* [1966] 1 All ER 242 (CA) at 246-7.

[47] *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97 para 89 citing *Mcmillan v Toledo Enterprises International Pty Ltd* [1995] FCA 1664 para 58.

[48] Section 994 allows a shareholder to apply to court where 'the affairs of the company are being, or have been, conducted in a manner that is unfairly prejudicial to the interests of members generally of some part of its members, in their capacity as such (including the petitioning member); or an actual or proposed act or omission of the company is or would be prejudicial.'

to the interests of its members generally or some part of its members. This was the subject of the leading speech of Lord Hoffmann in *O'Neill v Phillips*.[49] The following passage[50] provides helpful guidance on the approach to resolving the tensions inherent in s 252:

'… Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history … that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles …

Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. In the case of s 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders.[51] Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman *societas*, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.

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

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[49] *Re a company (No 00709 of 1992) O'Neill and another v Phillips and others* [1999] 2 All ER 961 (HL). The significance of the judgment is noted by Robert Goddard 'Taming the unfair prejudice remedy: Sections 459-461 of the Companies Act (1985) in the House of Lords' (1999) 58 *Cambridge Law Journal* 487.

[50] Ibid, 966f to 967d.

[51] Shareholders' agreements are dealt with below in para 93.

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

[83] It has been suggested by one commentator that the approach of Lord Hoffmann unduly narrowed the scope of the unfair prejudice jurisdiction and that the approach of courts in Canada, Australia and New Zealand is to be preferred.[52] I have considered the various cases from those jurisdictions cited by the author and others cited by South African writers,[53] but refrain from citing and analysing them because I think the criticism is based on a misconstruction of *O'Neill v Phillips*. There appears to be little practical difference in the approach in different jurisdictions. The author suggested that *O'Neill v Phillips* 'effectively limits "unfairness" in terms of the remedy to breaches of legally enforceable agreements', apparently basing this on the fact that the trial court had said, and Lord Hoffmann accepted, that negotiations to increase Mr O'Neill's stake in the company to 50% had stalled and Mr Phillips had resumed the reins of management because the company ran into difficulties. But the point of the decision was that the trial judge had found that because Mr Phillips had made no promise or undertaking to increase Mr O'Neill's shareholding or allow him to continue as the manager of the business, Mr O'Neill could not have had any realistic

[52] Matthew Berkahn 'Unfair Prejudice: Who has it right, economically speaking?' [2008] 1 *JIALawTA* 55 (The full title of the journal is Journal of the Australasian Law Teachers Association.). The author cites other academic writing in fn 43 at p 60 in support of his view. A more favourable view was expressed by Jason W Neyers 'Is there and Oppression Remedy Showstopper: *O'Neill v Phillips*' (2000) 33 *Can Bus L J* 447.

[53] M S Blackman et al, Commentary on the Companies Act, (Juta, 2002, Loose-leaf in three volumes). has a wide selection of references to cases in the United Kingdom, Australia and Canada as well as references to the South Africa cases.

expectation that either of those events would occur.[54] Accordingly there was no unfairness in not carrying out a promise that he had not made. Lord Hoffmann recognised that 'there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers'. That was inconsistent with saying that unfairness resided only in breaches of legally enforceable agreements. Any doubt should be put to rest by the following passage from his speech:[55]

'In a quasi-partnership company, they will usually be found in the understandings between the members at the time they entered into association. But there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. *Nor is it necessary that such promises should be independently enforceable as a matter of contract.* A promise may be binding as a matter of justice and equity although for one reason or another (for example, because in favour of a third party) it would not be enforceable in law.' (Emphasis added.)

[84] Identifying every circumstance in which equitable considerations will make it unfair for the majority to rely on their strict legal powers is an impossible task as Lord Wilberforce recognised when dealing with the just and equitable ground for winding up a company in *Ebrahimi v Westbourne Galleries Ltd*.[56] He said:

'The words ["just and equitable"] are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is

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[54] At 971 Lord Hoffmann said: '… there is no basis, consistent with established principles of equity, for a court to hold that Mr Phillips was behaving unfairly in withdrawing from the negotiation. This would not be restraining the exercise of legal rights. It would be imposing upon Mr Phillips an obligation to which he never agreed. Where, as here, parties enter into negotiations with a view to a transfer of shares on professional advice and subject to a condition that they are not to be bound until a formal document has been executed, I do not think it is possible to say that an obligation has arisen in fairness or equity at an earlier stage.'

[55] Ibid 969.

[56] *Ebrahimi v Westbourne Galleries Ltd*, op cit, fn 27. The case concerned a petition to wind-up a company on the grounds that it would be just and equitable to do so. The passages quoted in the text have previously been cited with approval by this court. See *Apco Africa (Pty) Ltd v Apco Worldwide Incorporated* [2008] ZASCA 64; 2008 (5) SA 615 (SCA) para 17; *Cook v Morrison and Another* [2019] ZASCA 8; 2019 (5) SA 51 (SCA) para 20. The principle has been applied on a number of occasions in the high court.

room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act 1948 and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence—this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company—so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.'

His Lordship pointed out that it is confusing to refer to such companies as 'quasi-partnerships' or 'in substance partnerships' especially as one must always be alert to the fact that:

'[T]the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company

not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.'

[85] Two situations that commonly form the basis for claims by a minority shareholder of unfair prejudice were identified. The first is where there was an agreement or understanding that all or some of the shareholders would participate in the conduct of the business, whether as directors or employees or both, where the unfair prejudice lies in their being prevented from doing so. These can conveniently be described as exclusion cases. The second is where, in the absence of such an agreement or understanding, the conduct of the majority shareholder, especially where it involves a lack of probity on their part, brings about a loss of trust and mutual confidence, but the disaffected shareholder is unable to address that by disposing of their interest in the company. The result is that they are effectively locked in and unable to realise the value of their investment.

[86] These two situations frequently overlap. Both are in play in this case. Luis says that he was excluded from the company, initially by being sidelined in his role as a director and employee and subsequently as a result of his dismissal. In addition he says that he is unable to realise the value of his shareholding and is therefore locked in to the company. His primary case was based on the cumulative effect of both. His secondary case was that, even if he had not established his exclusion claim, his 'locked in' claim on its own sufficed to entitle him to relief. Jose's case on exclusion is less clear, although he complained that his role was reduced and his responsibilities given to others, particularly Tony. He was not excluded as a director and remained in employment until he

resigned on 2 April 2013, after the commencement of this litigation. His 'locked in' claim appeared to be the same as that of Luis.

Exclusion cases

[87] Exclusion cases overwhelmingly arise in smaller companies[57] where the shareholders enter into the venture on the basis of an informal or tacit understanding or arrangement that each will contribute something by way of capital or labour and each will play a role in the running of the company, usually as a director, but sometimes as an employee, whether alone or in addition to being a director. This applies particularly to companies constituted on the basis of family, friendship or complementary business skills, where, albeit unspoken, the parties have an understanding of the manner in which the business will be conducted and their respective roles in it. Later, when differences and disputes arise and cannot be resolved, unfair prejudice may be occasioned to the minority shareholder if they are excluded by the majority shareholder from the position that enabled them to play a role in the running of the company. The aggrieved shareholder then complains that their exclusion was inconsistent with the basis upon which they became a shareholder. Exclusion can occur in various ways. The minority shareholder may be sidelined in the ongoing decision-making process of running the business, while remaining a director and employee. Alternatively, they may be removed as a director under the provisions of the relevant legislation or

[57] Rehana Cassim 'A Critical Analysis on the Use of the Oppression Remedy by Directors Removed from Office by the Board of Directors under the Companies Act 71 of 2008' (2019) 40 *Obiter* 154 at 159-161. The court in *Latimer Holdings Latimer Holdings Ltd v SEA Holdings New Zealand Ltd* [2004] NZCA 226; [2005] 2 NZLR 328, para 78, based on a survey in Australia, held that this was the common situation giving rise to an exclusion claim. *Re Phoneer Ltd* [2002] 2 BCLC 241 raised the converse situation of a breach of an undertaking to remain working in the business for five years given to induce the other shareholder to make further loans to the company and agree to an adjustment of shareholdings. The breach was held to give rise to unfair prejudice under s 459 of the Companies Act (1985). Not all are small companies and they may involve substantial businesses. See, for example, *Re Coroin Ltd (No 2)*, op cit, fn 30.

dismissed from employment, or both. One way or another the effect is to prevent them from continuing to fulfil the role initially anticipated and accepted when they became a shareholder.

[88] Exclusion is usually the result of a breakdown in the relationship between the shareholders.[58] The reasons for relational breakdown are many and varied. Sometimes the business develops and the shareholders disagree on its future direction. Sometimes the introduction of a new shareholder alters the dynamics between the existing shareholders. Disagreements may arise over the distribution or retention of profits, remuneration of shareholders, the payment of bonuses or dividends. If the business goes through a lean period the managing shareholders may be accused of negligent or incompetent management. The examples can be multiplied, but the end result can be that one or more of the shareholders may feel that they have been excluded. In turn this may lead the disgruntled shareholder to seek avenues to leave the company, while realising the value of their interest in it.

[89] The remedy under s 252 is not restricted to cases where the company was formed on the basis of a personal relationship or understanding between the shareholders in regard to the manner in which they will conduct themselves in exercising their rights as shareholders. However, the cases, both here and elsewhere, suggest that it is most usually in that type of case that resort is had to s 252 or its equivalent. These were for a time referred to in England as 'legitimate expectation'

[58] See M I Iqbal, 'The effectiveness of shareholder dispute resolution by private companies under UK companies legislation: an evaluation' (November 2008), doctoral thesis submitted to Nottingham Trent University by M I Iqbal available at https://irep.ntu.ac.uk/id/eprint/306/1/194154_Iqbal.pdf, Chapter 3 (hereafter M I Iqbal).

cases,[59] but Lord Hoffmann, the initiator of the expression, said that this borrowing from public law may be misleading.[60] Since the decision in *O'Neill v Phillips* the concept of 'legitimate expectations' has been abandoned in the UK (but not apparently elsewhere) in favour of 'equitable considerations', which is regarded as being more certain and a bar to judicial findings based on individual concepts of fairness rather than some objective standard.[61] However, Luis pleaded his case on the basis of a legitimate expectation, so in dealing with it I will continue to use the expression, subject to the *caveats* in the following paragraph.

[90] I share Lord Hoffmann's reservations about the use of the term 'legitimate expectations'. The criticism of the expression by the New South Wales Court of Appeal seems justified. It expresses a conclusion regarding the character of the expectation, rather than adding anything to that notion, and it can distract from the central question of whether there has been unfairly prejudicial conduct.[62] Like the latter court, I do not accept its replacement by 'equitable considerations'.[63] Unlike England, we do not have a separate system of equity, where equity is the means whereby courts can avoid the consequences of strict legal rights in accordance with principles developed over many years. Our law is developed on the basis of equitable principles generally, especially those embodied in the Constitution and the Bill of Rights, but unlike England it does not afford the courts a power to avoid legal obligations on the basis of equity. In the result equity in our law does not bear the same meaning

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[59] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others*, op cit, fn 11, paras 62-63.
[60] *O'Neill v Phillips*, op cit, fn 49, at 970 in section 6 of the opinion. This view was endorsed in *Re Coroin Ltd*, op cit, fn 30 paras 635-636.
[61] M I Iqbal, op cit, fn 58 at 186.
[62] *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd*, op cit, fn 47, para 62 (per Spigelman CJ) and paras 649-650 (per Fitzgerald JA). See also *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104, paras 166-171.
[63] *Tomanovic v Global Mortgage Equity Corporation Pty Ltd*, ibid, paras 177-179.

as it does in England.[64] The legitimate expectations doctrine has a definite role in our public law and importing it into the field of company law is not necessarily apt. It is preferable, as Rogers J did in *Visser Sitrus*,[65] to speak of cases where there is proof of an informal arrangement or understanding between the contesting shareholders as to the manner in which they will exercise their rights as shareholders and the roles they will play in the company's business operations. This can be entirely informal and is unlikely to rise to the level of a contract, but it is shared by the majority and minority shareholders.

[91] The exclusion cases to which we were referred and that I have encountered in my own research were almost invariably based on allegations that an arrangement or understanding existed among the shareholders that the minority shareholder would be entitled to participate in the management of the business at an operational level. This created expectations on the part of the minority and imposed restraints upon the majority's exercise of their contractual rights. If such an arrangement or understanding was established, then excluding the minority shareholder from that participation, whether by removing them from the board of directors, downgrading their role in the company in some other way, or dismissing them from employment, could possibly constitute unfair prejudice to them. The existence of such an arrangement or understanding of that nature is usually inferred from the nature of the relationship between the shareholders, for example, their being close relatives or good friends, and their conduct in managing the affairs of the company, for example, the division of responsibilities, the manner of decision-making or an equality of treatment. The scope of any arrangement or

[64] A similar point is made about Canada in Neyers, op cit, fn 52
[65] *Visser Sitrus*, op cit, fn 11, para 62.

understanding is limited only by statutory and regulatory constraints and may arise in respect of many situations.

[92] Two further points need to be made before turning to discuss the situation of a minority shareholder being locked in and unable to realise their investment in the company. The first is that informal arrangements or understandings of the type being discussed do not necessarily operate in perpetuity. As the company develops and grows such arrangements or understandings will frequently be adapted to changing circumstances or abandoned altogether. The business may expand, or its nature may change. If it is successful, other shareholders may be brought in. Funding agreements may need to be concluded on terms that preclude the implementation of the original agreement or understanding. If the company becomes sufficiently large and successful a listing on a public stock exchange may be sought. The evidence shows that this was thought of as a possibility in 2006 and Luis raised it in a proposal he put to the board of directors in May 2008. Accordingly, when a claim of exclusion is based on an arrangement or understanding, the court must not only examine whether at the inception of the company there was such an arrangement or understanding, but also whether it was still operative when difficulties arose. If the parties by their actions have abandoned it then the disaffected shareholder can no longer rely on it.

[93] The second point is that, apart from the memorandum of incorporation of a company, shareholders have always been entitled to further regulate their relationships by way of a shareholders agreement. Such agreements were valid and binding under the Act[66] and are

[66] *Gihwala and Others v Grancy Property Ltd and Others* [2016] ZASCA 35; 2017 (2) SA 337 (SCA) para 54.

specifically provided for and rendered enforceable under s 15(7) of the 2008 Act. They typify the kind of collateral agreement referred to by Lord Hoffmann.[67] Shareholders agreements are entered into where investors wish to regulate their relationship *inter se* when the investment is to be made through the medium of a company. They are a recognised means of protecting the rights of minority shareholders and dealing with the consequences of a breakdown in relationships between shareholders.[68] Their advantage is that they specify the rights of the parties *inter se;* they may be flexible; they can only be altered with the consent of all the parties; they can restrict the power of the majority to ride roughshod over the views of the minority by imposing minimum requirements to pass certain resolutions; they can make provision for the participation of the shareholders as directors or employees and provide for exit mechanisms if for any reason any shareholders wish to exit the company.[69]

[94] Where the parties have, with the assistance of legal and possibly commercial advisers, carefully negotiated the terms of a shareholders agreement spelling out their rights and obligations in particular situations, it is ordinarily not unfair to conduct the affairs of the company in conformity with those instruments. The notion of fairness is not indefinite, but is informed by the underlying values of reasonableness and justice that play a creative, informative and controlling role in our law of contract. The Constitutional Court in *Beadica* held that those values do not empower courts to refuse to enforce contractual terms on the basis of their subjective view of whether to do so would be unfair, unconscionable

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[67] See para 82, supra.
[68] See M I Iqbal, op cit, fn 58, Chapter 4 The thesis is partly based on interviews with barristers in the UK specialising in this area of company law and they appear to be virtually unanimous that such agreements are a protective device for minority shareholders. The use of such agreements is widespread in other jurisdictions. See M I Iqbal, p 79, fn 35.
[69] This is a very brief summary of matters discussed in greater detail by Dr Iqbal, ibid.

or unduly harsh.[70] Where the parties have expressly addressed and provided for particular situations that may arise in the future, courts should be wary of holding that the implementation of what was agreed is unfairly prejudicial to a minority shareholder and, by overriding the agreement, confer rights on the minority shareholder that they agreed not to have. Such a finding would come perilously close to ignoring the principle laid down in *Beadica* that courts do not have the power to refuse to enforce contracts on the basis of the individual judge's perceptions of fairness. It would also override the long-accepted principle that the courts do not exist to make contracts for the parties. It is one thing for the courts to remedy unfair prejudice by overriding an otherwise lawful exercise of rights by a majority shareholder. It is something entirely different for them to confer rights on minority shareholders that are greater than, or differ from, the rights for which they have bargained and impose burdens on the majority that it did not undertake to bear.

Locked-in cases

[95] The possibility of the minority shareholder being locked in and unable to realise their investment may, as will be seen, aggravate the unfairness of an exclusion that is itself unfairly prejudicial. But the shareholder may find themselves locked in even where there is no exclusion from participation in the affairs of the company, or where that exclusion was not unfair. The minority may wish to exit the company because they have lost trust and confidence in the majority and the direction of the company. They may also wish to do so for reasons of their own that impute no failing to the majority. In either event they may

[70] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC) paras 79 and 80. In view of the fact that our law does not recognise a system of equity such as that in England it is preferable to refer to the foundational values of our Constitution and the manner in which those principles are to be found in our law of contract than to the 'established equitable rules' to which Lord Hoffmann referred in *O'Neill v Phillips*.

find themself unable to realise their investment unless the arrangements for this in terms of the articles of association, or any shareholders agreement, facilitate an exit, or an exit arrangement can be negotiated without undue difficulty. It is not enough merely to show that the relationship between the parties has irretrievably broken down,[71] but nonetheless claimants try to build upon such breakdown and their inability to exit the company to show that it has resulted in unfair prejudice to them. When they do so it is always necessary to bear in mind that:[72]

'The provisions of the section were enacted to protect members from unfairly prejudicial, unjust or inequitable conduct; not to enable a 'locked-in' minority shareholder to require the company to buy him out at a price which he considers adequately reflects the value of the underlying assets referable to his shareholding.'

[96] Whether the mere inability to exit the company because of the terms of the memorandum of incorporation or a shareholders agreement is in and of itself unfairly prejudicial to the minority shareholder was considered in *O'Neill v Phillips.* The relationship between Mr O'Neill and Mr Phillips had broken down so that trust and confidence between the two had been lost. It was submitted that it was irrelevant whether this was due to anything unfair done by Mr Phillips, because, even if he was not at fault in causing the breakdown, it would be unfair to leave Mr O'Neill locked into the company as a minority shareholder. This would prevent him from realising his investment in the company because of provisions in the articles of association that effectively governed and limited his power to dispose of his shares. The contention was that either

[71] *Grace v Biagioli and Others* [2005] EWCA Civ 1222 para 61, sub-para 6; *Tomanovic v Global Mortgage Equity Corporation Pty Ltd*, op cit, fn 62, para 199.
[72] Blackman, op cit, fn 53, p 9-37 (RS2).

Mr Phillips or the company should raise the capital to pay Mr O'Neill a fair price for his shares. It was rejected in the following terms:[73]

'Mr Hollington's submission comes to saying that, in a "quasi-partnership" company, one partner ought to be entitled at will to require the other partner or partners to buy his shares at a fair value. All he need do is to declare that trust and confidence has broken down. … [I]t is submitted that fairness requires that Mr Phillips or the company ought to raise the necessary liquid capital to pay Mr O'Neill a fair price for his shares.

I do not think that there is any support in the authorities for such a stark right of unilateral withdrawal. There are cases, such as *Re a company* (*No 006834 of 1988*), *ex p Kremer* [1989] BCLC 365, in which it has been said that if a breakdown in relations has caused the majority to remove a shareholder from participation in the management, it is usually a waste of time to try to investigate who caused the breakdown. Such breakdowns often occur (as in this case) without either side having done anything seriously wrong or unfair. It is not fair to the excluded member, who will usually have lost his employment, to keep his assets locked in the company. But that does not mean that a member who has not been dismissed or excluded can demand that his shares be purchased simply because he feels that he has lost trust and confidence in the others. I rather doubt whether even in partnership law a dissolution would be granted on this ground in a case in which it was still possible under the articles for the business of the partnership to be continued.'[74]

[97] I think this was correct. The mere fact that a minority shareholder wishes to exit the company and claims to have lost trust in and respect for the majority shareholders does not on its own mean that they have suffered unfair prejudice within the ambit of s 252 (or its equivalent). It does not become unfair prejudice merely because the member seeking to depart is 'locked in' by their inability to dispose of their shares. It will

[73] *O'Neill v Phillips*, op cit, fn 49 at 972e-j. The principle was endorsed in *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC) paras 5-6.

[74] The model rules for private companies in the Companies Act 2006 do not contain a default rule providing for a dissentient minority shareholder to exit the company despite that having been recommended by the Law Commission. The reasons are discussed by M I Iqbal, op cit, fn 57, para 4.6.3.1, pp 103-105.

almost always be prejudicial for the withdrawing minority shareholder to be unable to realise their investment.[75] However, prejudice alone, and even a loss of trust in the majority, is not necessarily unfair. After all the minority shareholder agreed to become a shareholder on the basis that they could not freely dispose of their shares in the company. One of the risks of conducting a business with others in a small private company is that leaving the business and disposing of one's interest in it may be difficult or practically impossible. Small private companies in South Africa have always been required to have provisions in their articles of association restricting the transferability of shares. This is still the case under s 8(2)(*b*)(ii)(bb) of the 2008 Act. Often these take the form of provisions requiring the departing member to find a purchaser for their shares and, having done so, then to offer the shares to their fellow members on the same terms. Similar provisions are frequently encountered in shareholders agreements. The difficulty is always to find an outside purchaser for the shares. If no such purchaser can be found and the remaining shareholders do not wish to acquire the shares of the departing member the latter is 'locked in' to the company with no involvement in its day-to-day operations and no means of realising the value of their shareholding.

[98] Treating that as automatically unfair would rewrite the provisions in the memorandum of incorporation, or any shareholders agreement dealing with a member's disposal of their shares, and replace them with an obligation on the remaining members to acquire them provided only that the departing shareholder declared their loss of trust in the majority. There is no reason why, in the absence of some form of misconduct by

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[75] *Lucy v Lomas* [2002] NSWSC 448, para 43; *Tomanovic v Global Mortgage Equity Corporation Pty Ltd*, op cit fn 62, para 202.

the majority, a loss of faith in them should advantage the minority shareholder. Such an advantage would be at the cost of the majority, who had not acted unfairly but would nonetheless have to raise the capital to purchase the minority's shares. Nor is there is any reason why the disaffected minority, should be in a better situation than shareholders seeking to leave for other reasons, such as relocation elsewhere in the country, or emigration, or advancing years, who would not be entitled to claim that the remaining shareholders acquire their shares. That would amount to discrimination among the shareholders. The estate of a disaffected shareholder would likewise be in a worse situation than the disaffected shareholder was when still alive.

[99] If claiming that one had lost faith in the majority were the key to unlocking a right to demand that the company or the majority acquire the minority's shareholding, it would effectively confer a right to exit the company at will at the expense of the remaining shareholders. A court should not allow a claim of unfair prejudice to be used to rewrite the terms on which the parties agreed to conduct the affairs of the company.[76] As Lord Hoffmann said:

'a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted.'

The same reasoning applies with even greater force in the situation postulated by Luis in his evidence, that where a shareholder and director is also an employee and is dismissed from employment for serious misconduct, the other shareholders must purchase their shares or, if they

[76] While not adopting the decision in other respects Hammond J in *Latimer Holdings* op cit, fn, 57, para 95 said that on this point the House of Lords 'must be right' that there should not be a right to exit at will.

do not wish to do so, must retain the member in employment despite such serious misconduct.

[100] The problem of minority shareholders finding themselves locked in and unable to dispose of their shares has received legislative attention. Under s 164 of the 2008 Act provision is made for a dissenting shareholder in certain circumstances, hedged about with qualifications, to give notice to the company requiring the company to acquire their shares at fair value. However, the availability of that remedy is limited to amendments to the memorandum of incorporation affecting rights attaching to shares, the sale of the whole or greater part of the assets or undertaking, an amalgamation or merger and proposals for a scheme of arrangement. It does not give rise to a general unilateral right of withdrawal at the instance of a minority or dissentient shareholder. And there are sound business reasons why that should be so. To permit a shareholder to withdraw and compel either the remaining shareholders, or the company, to purchase their shares might imperil the future of the company and prejudice its creditors. Its shareholders would be prejudiced by being forced to dispose of assets or borrow money in order to pay the price fixed for the shares of the departing shareholder. It might even lead to the winding-up of the company or the sequestration of the other shareholders. Allowing that to happen to a functioning and otherwise solvent business is not in the public interest.

[101] The basic principle underlying provisions such as s 252 was well-expressed by Young J, in *Fexuto v Bosnjak Holdings*,[77] when he said:

'Because it is easily overlooked, it is necessary to repeat that a plaintiff must actually prove oppression before obtaining relief. Oppression is not normally established

[77] *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688 SC (NSW) at 740.

merely by showing that the majority are in control of the company, that the applicant is consistently outvoted nor because the majority have made some decisions which were questionable from a business point of view or have later turned out to be disastrous.…[C]are must be taken to ensure that the traditional role of directors and shareholders to manage and control their own companies was not invaded without due cause.'

Under s 252 in the absence of any unfair prejudice flowing from other matters, the fact that a member finds themself locked in to their shareholding and unable to realise their investment in the company does not sustain a case that the affairs of the company are being conducted in a manner that is unfairly prejudicial, unjust or inequitable to them. Identifying the circumstances where that might in conjunction with other factors have given rise to a claim for relief under s 252, or might give rise to a claim under s 163 of the 2008 Act, is not a question that needs to be addressed in this case.

Offers to purchase

[102] In *O'Neill v Phillips*, Lord Hoffmann held that, in exclusion cases in particular, whether the majority offer to acquire the shares of the excluded party may be highly relevant. The trial court and the House of Lords held that Mr O'Neill failed to prove that he had been unfairly treated. In the result Mr Phillips successfully defended the unfair prejudice claim. However, Mr Phillips contended that, in any event, he had made an offer to purchase Mr O'Neill's shares at a fair valuation and this was all the relief to which Mr O'Neill was entitled. Accordingly it was submitted that the claim should fail. The point did not need to be decided, but was discussed because of its practical importance.

[103] The relevant passage reads as follows:[78]

'In the present case, Mr Phillips fought the petition to the end and your Lordships have decided that he was justified in doing so. But I think that parties ought to be encouraged, where at all possible, to avoid the expense of money and spirit inevitably involved in such litigation by making an offer to purchase at an early stage. This was a somewhat unusual case in that Mr Phillips, despite his revised views about Mr O'Neill's competence, was willing to go on working with him. This is a position which the majority shareholder is entitled to take, even if only because he may consider it less unattractive than having to raise the capital to buy out the minority. *Usually, however, the majority shareholder will want to put an end to the association. In such a case, it will almost always be unfair for the minority shareholder to be excluded without an offer to buy his shares or make some other fair arrangement.* The Law Commission … has recommended that in a private company limited by shares in which substantially all the members are directors, there should be a statutory presumption that the removal of a shareholder as a director, or from substantially all his functions as a director, is unfairly prejudicial conduct.[79] This does not seem to me very different in practice from the present law. *But the unfairness does not lie in the exclusion alone but in exclusion without a reasonable offer. If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out.*'(Emphasis added.)

[104] It must be borne in mind that O'Neill, the minority shareholder, had not been excluded in the sense in which that expression is used in cases of this type. He did not have any expectation of receiving either 50% of the shares or a salary based on 50% of the profits. Accordingly, denying him those benefits did not unfairly prejudice him. The point Lord Hoffmann was making was that it would almost always be unfair not to make a fair offer to acquire the shares of an excluded shareholder, where

[78] *O'Neill v Phillips*, op cit, fn 49, at 974-975.
[79] No such presumption was enacted in the English Companies Act 2006 although there is a presumption that the removal of the company's auditor in certain circumstances will be presumed to be unfairly prejudicial to some part of the company's members. See s 994 (1A).

they were denied benefits which they expected to receive. Similarly the dictum from *Kremer*[80] quoted in para 46 of the high court's judgment must be understood in its proper context. That was a case where there was no dispute between the parties that one of them would have to purchase the shares of the other in the light of a breakdown of confidence between them. The unusual feature was that the minority shareholder sought an order that they acquire the majority's shares, while the majority, which had offered to buy the minority's shares at a fair price, sought an order to that effect. The remark that it would be unfair to require the minority shareholder to maintain their investment in the company where they had fallen out with the majority was made in that unusual context. Where the minority shareholder's claim to buy-out the majority had failed, to refuse it any relief at all and thereby oblige it to maintain its investment in the company, would indeed have been unfair. *Kremer* is not authority for the proposition that whenever the minority has fallen out with the majority they will be unfairly prejudiced unless the majority offers to purchase their shares at a fair price.

[105] With respect, the high court in the present case misconstrued what Lord Hoffmann said. In para 44 of the high court's judgment,[81] the following appears:

'A form of unfair prejudice which is of particular relevance in the instant case arises where a minority shareholder who has a right or legitimate expectation to participate in the management of the company is excluded from so doing by the majority without a reasonable offer or arrangement being made to enable the excluded shareholder to dispose of his shares. *The prejudicial inequity or unfairness lies not in the legally justifiable exclusion of the affected member from the company's management, but in the effect of the exclusion on such member if a reasonable basis is not offered for a*

[80] *Kremer*, op cit, fn 24.
[81] *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others* 2017 (5) SA 577 (GJ) para 44.

withdrawal of his or her capital.[82] It was emphasised in *O'Neill* above … that 'it will almost always be unfair for a minority shareholder to be excluded without an offer to buy his shares or to make some other fair arrangement.' (Emphasis added.)

In saying that the high court relied on *McMillan NO v Pott*:[83]

'[39] In my judgment the respondents' attitude in failing, within a reasonable time of McMillan's exclusion from the management of the company, to afford the trust the opportunity to remove its capital, constitutes an act or omission by the company that, in the circumstances described, is unfairly prejudicial, unjust or inequitable to the trust within the meaning of s 252(1) of the Companies Act.

[40] *A basis to claim relief in terms of s 252 inured in the circumstances, even if it is accepted that McMillan had been wholly or in part to blame for his removal from the board and dismissal from employment. The prejudicial unfairness or inequity lies not in the legally justifiable exclusion of the affected member from the company's management, but in the effect of the exclusion on any such member … if a reasonable basis is not offered in the circumstances for a withdrawal by the member of his or her capital*. The issue of fault should, in general, not negate the right of a so-called quasi-partner member to relief under s 252, when such member has been excluded by the other members from the direct participation in the management of the company, contemplated when the member's investment in the company was made.'(Emphasis added)'

[106] Both those statements indicate that in an exclusion case the prejudice may flow *solely* from the failure to make a fair offer to acquire the minority's shares. In other words, even if the exclusion is not unfairly prejudicial to the claimant, the failure of the majority thereafter to make a fair offer to acquire the minority's shares is unfairly prejudicial. That is particularly clear from the emphasised passage in *McMillan NO v Pott*, where the judge said that even if McMillan had been entirely at fault and

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[82] This sentence was quoted in *Armitage NO v Valencia Holdings 13 (Pty) Ltd and Others* [2023] ZASCA 157, para 22 in support of the proposition that the test for unfair prejudice is an objective one, which is clearly correct. The judgment did not analyse the relevant portions of *O'Neill v Phillips* or refer to *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA), which is discussed in para 109. It cannot be taken to have endorsed, even *obiter*, the judgment that is under appeal before us.

[83] *McMillan NO v Pott and Others* 2011(1) SA 511 (WCC) paras 39 and 40.

this had led to his removal from the business that did not matter. The unfairness or inequity would lie in no reasonable basis being offered for the removal of his capital. The conduct leading to the exclusion would not 'negate the right to relief under s 252'. But, if his dismissal was entirely his fault, the dismissal was not unfairly prejudicial to Mr McMillan. In the absence of some other ground of unfair prejudice it did not give rise to a claim for relief under s 252.

[107] Lord Hoffmann did not say that whenever a shareholder is excluded, however justifiably, they will be unfairly prejudiced if a reasonable offer to purchase their shares is not forthcoming. That would ignore the requirement that the shareholder must have suffered unfair prejudice in order to be entitled to relief. Absent any unfairly prejudicial conduct towards the shareholder, they enjoy no right to relief, however much they may be prejudiced by their inability to remove their capital. Any other approach would mean that a shareholder dismissed for the grossest form of misconduct, such as theft or taking a bribe or sexual harassment of subordinates, could claim to be unfairly prejudiced by the absence of an offer to purchase their shares. An offer according to Lord Hoffmann 'is only material to the outcome of the trial if the court considers that the petitioner is otherwise entitled to succeed'.[84] He also did not say that, irrespective of the circumstances, a minority shareholder who had been excluded would be unfairly prejudiced, unless a reasonable offer had been made to acquire their shares. Instead he identified two situations where a reasonable offer is relevant.

[84] *O'Neill v Phillips*, op cit, fn 49 at 974e-f. He said that logically it can only go to the question of costs.

[108] The first is where the matter proceeds to trial. In such a case a fair offer not accepted will be relevant to costs if the disaffected shareholder is successful in showing an entitlement to relief, but the relief obtained is no better than that offered. The second situation, and the one that has given rise to misunderstanding, arises from the statement:

'But the unfairness does not lie in the exclusion alone but in exclusion without a reasonable offer. If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out.'

Lord Hoffmann was dealing solely with exclusion cases, where the exclusion itself was unfairly prejudicial to the excluded shareholder.[85] In that situation a reasonable offer made at the outset would cure any unfairness flowing from the exclusion and the respondent could have the petition struck out.[86] He did not say that the absence of a reasonable offer on its own, where the exclusion was not unfair, would be unfair. Had that been what he meant, Mr Phillips would have lost and Mr O'Neill would have won, because Mr Phillips had not made a reasonable offer to acquire Mr O'Neill's shares.[87] He rejected the submission that it was unfair for the minority to be 'locked in' and unable to dispose of its shares because, if upheld, it would amount to conferring a right to unilateral withdrawal and impose on either the company or the remaining shareholders an

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[85] *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* op cit, fn 61, para 237.

[86] The striking out procedure in the UK under CPR 3.4(2) provides that:

'The court may strike out a statement of claim if it appears to the court:-

(a) that the statement of claim discloses no reasonable grounds for bringing or defending the proceedings;
(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;
(c) that there has been a failure to comply with a rule, practice direction or court .'

These were not the rules in force in 1999 when the judgment in *O'Neill v Phillips* was delivered and it appears that the power to strike out a claim may be wider than our procedure by way of an exception in South Africa. Neyers, op cit, fn 52 points out that it is unclear whether Lord Hoffmann meant that an unfairly prejudicial exclusion ceased to be unfair if a fair offer was made, which suggests that if the majority are prepared to make a fair offer, they can always get rid of the disaffected shareholder even by unfair means, or that making the offer forestalls the buyout remedy where that is what is sought. If it is the latter, it is unclear why that justifies the striking out of the claim.

[87] It was unreasonable because it did not include an offer in respect of the costs incurred before the offer was made.

obligation to buy the minority's shares to which they had never consented. The absence of a reasonable offer may aggravate the unfairness of an exclusion, but an exclusion that is not in and of itself unfair is not rendered unfair by the absence of a reasonable offer to buy the excluded shareholder's shares.

[109] In *Bayly v Knowles*[88] this court applied *O'Neill v Phillips* in that way. The high court had held that the offer made by Bayly 'was far below the true value of the shares'. In fact, the respondent, Knowles, had not disputed an allegation that the offer was more than fair to him, or set out any facts explaining his failure to accept it, save that he did not want to sell his shares to Bayly, but wanted to acquire Bayly's shares for himself. In the result the appeal was upheld and the buy-out order set aside. Heher JA said:[89]

'The failure to accept Bayly's offer has important consequences for Knowles. In English law the making of a reasonable offer for the shares of an oppressed minority is enough to counter reliance by the complainer on s 459 of the Companies Act (the equivalent of s 252). Pursuit of the complaint in the face of such an offer is evidence of abuse of the process sufficient to strike out such reliance *in limine.* The principle of encouraging affected parties to use the procedures provided in the articles (or in a shareholders' agreement) to avoid 'the expense of money and spirit' is laudable. In the context of s 252 the failure of a minority shareholder to accept a reasonable offer for his shares and leave the company in the hands of the majority is, at least, strong evidence of a willingness to endure treatment which is prima facie inequitable despite the choice of a viable alternative. If that is so it would not ordinarily behove him to continue to complain about oppression.'

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[88] *Bayly and Others v Knowles*, op cit fn 82, paras 19-24. In *Re Fortuna Dev Corporation: Tempo Group Ltd v Wynner Group Ltd and Another* 2010 (2) CILR 85, the Court of Appeal of the Cayman Islands upheld an order striking out a petition for the winding-up of the company on just and equitable grounds where there had been a reasonable offer at a price determined by an agreed procedure to purchase the shares of the dissentient shareholder.

[89] *Bayly and Others v Knowles*, ibid, para 24.

Heher JA rightly referred to the need to make a reasonable offer for the shares of 'an oppressed minority'. He did not say that the failure to make an offer rendered the minority oppressed.

Loss of trust due to an absence of probity

[110] Although this did not appear in the forefront of the argument by counsel for the plaintiffs, there are references in the judgment of the high court to the affairs of the company being mismanaged and that there had been a lack of probity in the conduct of its affairs.[90] The judge said that it:

'is unduly prejudicial to them as they remain passive shareholders in the company which appears to be mismanaged by the majority with whom they have fallen out. It cannot reasonably be expected of the plaintiffs who have lost their employment to keep their assets locked in TCM.

The following is a glaring example of a lack of probity in which TCM's affairs have been conducted.'

He then referred to the various aspects in which Mr Geel had been critical of the accounts of TCM.

[111] *Fexuto v Bosnjak Holdings*,[91] illustrates that where there is a loss of faith, trust and confidence in the majority shareholders occasioned by a lack of probity on their part, that may constitute unfair prejudice and justify the grant of an order that the shares of the disaffected minority be acquired by the company or the majority. The plaintiff in *Fexuto* complained that the majority appropriated for themselves two business opportunities that they were under a fiduciary obligation to develop through the company. The court ordered an accounting to the company for the benefits acquired by the majority, after which it said that the disaffected minority shareholder would be entitled to a buy-out .

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[90] Judgment paras 332 and 333.

[91] *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd*, op cit, fn 47, at 740.

[112] A large part of the trial was devoted to Mr Geel's criticisms of the accounting methods of TCM. The judge accepted his evidence and found that the true value of TCM was not reflected in its AFS for 2008 to 2012; that the financial results had been manipulated since 2008; that inventory had been deliberately understated; and, that work-in-progress and maintenance spares had not been properly accounted for. The court held that this had probably been done deliberately in order to suppress share values should TCM or the defendants be compelled to purchase the plaintiffs' shares. It was also critical of the manner in which the Supplies Division had been treated. The judge clearly did not regard Andrea's conduct as reflecting the standard of fair dealing to be expected in the treatment of a minority shareholder by the majority. Given those findings it will be necessary to consider in due course whether a case of unfairly prejudicial conduct was established on this further basis, notwithstanding that it did not stand in the forefront of the argument presented to us.

Conclusion on s 252

[113] An applicant for relief under s 252 cannot simply make a number of vague and generalised allegations of unfairness, but has to establish:[92]

'1. The particular act or omission that has been committed, or that the affairs of the company have been conducted in the manner so alleged.

2. Such act or omission or conduct of the company's affairs is unfairly prejudicial, unjust or inequitable to the applicant or some part of the members of the company.

3. The nature of the relief that must be granted to bring to an end the matters of which there is a complaint;[93] and

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[92] *Louw and Others v Nel*, op cit, fn 7, para 23; *Geffen and others v Martin and Others* [2018] 1 All SA 21 (WCC) para 23.

[93] The appropriate remedy is not limited to reversing the conduct of which complaint is made. It must 'put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholder of the company' per Oliver LJ in *In re Bird Precision Bellows Ltd* [1985] BCLC

4. It is just and equitable that the relief be so granted.'

Whether the affairs of the company were conducted in a manner unfairly prejudicial to the minority requires an objective assessment of the overall conduct. While it aids the analysis to consider the alleged conduct within a framework of instances that have been held to constitute unfairly prejudicial conduct in other cases, it is not an exercise in categorisation. Determining whether the company's affairs can be pigeonholed in one or more categories recognised in other decisions is not necessarily decisive. All the proven facts must be assessed within the legal framework of the applicable corporate structure. That consists of the memorandum of incorporation and any collateral agreements between the shareholders identifying their rights and obligations as members of the company. A shareholders agreement is the archetype of such a collateral agreement. A useful test is whether the exercise of the power or rights in question involves the breach of an arrangement or understanding between the parties, even if not contractually binding, and whether it would be unfair to allow that situation to continue.

[114] It is not sufficient for a claimant to show that the relationship between the parties has broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence no longer exist. The loss of trust or confidence in the majority must flow from the affairs of the company being conducted in a manner that is unfairly prejudicial to the minority. Unfair exclusion from the management of the company to the detriment of the minority's position as a shareholder is the quotidian example of situations falling within the section. The unfair prejudice may be overcome by an offer to purchase the minority's shares at a fair price.

493; [1986] Ch 658. Cited with approval in *Ming Siu Hung and others v J F Ming Inc and Another* [2021] UKPC 1 para 15.

Conversely, a failure to make such an offer where there is no prior unfair exclusion and no other unfair prejudice, is not in and of itself unfair prejudice. Unless the minority have suffered unfair prejudice there is no obligation on the company or the majority shareholders to negotiate their exit other than in terms of the memorandum of incorporation or any applicable shareholders agreement and it is not unfair prejudice if they refuse to do otherwise. The exercise by the company or the other shareholders of the powers and rights conferred by the articles cannot ordinarily be regarded as unfair, especially where those powers are used to protect the company from conduct by the minority that is detrimental to the well-being of the company.[94]

Luis's claim of legitimate expectation and exclusion

Background

[115] Luis's primary contention was that this is an exclusion case based on his legitimate expectation as a director and shareholder to daily involvement and engagement in the operations of TCM. He claimed to have a legitimate expectation to recognition and remuneration as (i) a founder member of TCM; (ii) a quasi-partner in the affairs of the business, which was a domestic company akin to a partnership; (iii) a participant in and contributor to the business of TCM of equal standing to Andrea; and to (iv) the due respect and regard of his fellow directors, shareholders and employees. His complaint was that in breach of this expectation and understanding, since approximately 2007 and especially after his suspension and dismissal in 2009, he had been excluded from engaging in the operations of TCM. This was the first and primary source of alleged unfair prejudice.

[94] This summary owes much to the analysis in *Grace v Biagioli and Others*, op cit, fn 71, paras 61-63.

[116] It was common cause that TCM was founded by two men having close ties of friendship and complementary skills that enabled them to make a success of the business. There is no doubt that they went into business together on the basis of mutual trust. From the outset the business operated on a basis of joint decision-making and equality. The advent of Jose and Tony did not change that. Their role was subordinate to that of the two founders. Although Jose and Tony were referred to as directors, it does not appear that they were formally appointed as such until 2003 or 2004. They are not reflected as directors in the AFS until the year ended 29 February 2004. In any event it is clear that they could be overruled by Andrea and Luis. For so long as those two continued on the path of joint decision-making their grip on the company's affairs was absolute.

[117] Luis testified that at a very early stage, soon after Jose joined the company, he and Andrea had a discussion in the garage one afternoon about the need for a formal salary structure so that they could be paid instead of relying on their savings from their employment with ISM. He said that they agreed that:

'… so long as TCM existed we will be, we would have equal shares in the running of the company. Okay, we'll draw, you know, the same salaries, have equal say in the management even though we approached it from different angles. Okay, it would be like a, you know, like running a home, like running a family. Okay, both parties have something to say in it.'

This 'garage agreement' was consistent with TCM originally being the type of small domestic company that typically features in exclusion cases, where shareholders are also working employees and the parties anticipate that it will continue on that basis.

[118] While that was undisputed, the key question was whether that close relationship continued in place after 2004 and justified Luis's continued expectations of his role. TCM had become a company with a turnover running into the hundreds of millions of Rand, a national presence and a staff complement of several hundred. Its ownership structure and management had altered with the introduction as shareholders of Iqbal, and to a lesser extent Tony and Jose. Initially that occurred in terms of heads of agreement signed on 15 March 2004. It was formalised in the sale of shares agreement and the shareholders' agreement executed on 29 June 2005. Two obvious questions arose from this. Could the business any longer be described as a 'quasi-partnership', or was the basis of the relationship between the shareholders now to be found in the shareholders agreement? Did Luis's position as a co-founder of the business continue to justify his being entitled to the same standing and authority in the company as Andrea, who was now formally the Chairman of the company and its CEO?

[119] Luis attempted to show that the advent of Iqbal and the conclusion of the shareholders agreement left matters unchanged so far as his role in the company was concerned. The running of the company would remain in his and Andrea's hands and would continue as before. But his evidence suggested that things indeed changed. He said that when Iqbal joined the business:

'It was not what we had agreed on, on moving forward. It was not what the shareholders agreement was meant to be. None of those things. Everything started turning upside down and Andrea, backed by Iqbal, started changing things in such a way that he just wanted to push me out of the company. That's what he wanted to do.'

He accepted under cross-examination that the garage agreement was not carried over into the shareholders agreement. However, he clung to the view of the relationship between himself and Andrea expressed in his description of the disciplinary proceedings instituted against him as a dispute 'between the founders of the company, the two top people in the company'.

[120] The differences between Luis and Andrea flared up in November 2007 with Andrea's suggestion that he receive a backdated adjustment to his remuneration package, resulting in him and Luis being differently remunerated for the first time. The resultant exchanges between them have been described earlier and illustrate the central importance of Luis's claim that he had a legitimate expectation of being entitled to manage TCM on a day-to-day basis as an equal partner with Andrea and that this was left undisturbed by the sale of shares to Iqbal and the conclusion of the shareholders agreement. The High Court's finding was as follows:

'[128] That De Sousa had a right, or at the very least a legitimate expectation, to participate in the management of the business of TCM can admit of no doubt. TCM may properly be described as a quasi-partnership company. Although technically and legally governed by the strictures of company law, in fact and in reality, the relationship amongst the shareholders was more akin to a partnership in which each held 50% of the shares … Since its establishment TCM functioned and was administered under the direct control of its two founding members who participated equally in its management. De Sousa testified that a pact was made between him and Cornelli that for as long as TCM existed they would be equal partners in the business, would earn the same benefits and would have an equal say in its affairs. It was always intended that all shareholders be employed by the company. I also accept that, despite the introduction of Diez, [Da Silva][95] and Hassim as minority shareholders, TCM retained its identity as a domestic company in the nature of a partnership primarily between De Sousa and Cornelli.'

[95] The judgment inadvertently refers to De Sousa and not Da Silva.

[121] The learned judge did not explain the basis for the conclusions in the last two sentences of this passage[96] and counsel's heads of argument simply asserted that even after Iqbal's acquisition of his 25.1% shareholding:

'… the company nonetheless retained its original identity of a domestic company in the nature of a partnership, primarily between De Sousa and Cornelli …'

Neither the judgment nor the respondents' heads of argument engaged in any analysis of the provisions of the heads of agreement, the sale agreement or the shareholders agreement, although they were central to the defence to the claim. The plea alleged that the relationship between the shareholders was governed by a written shareholders agreement. Luis's allegations of a legitimate expectation and the existence of a quasi-partnership of equals between him and Andrea were denied. In a request for particulars for trial the defendants asked whether it was admitted that the shareholders agreement 'is the document that governs the relationship between the shareholders themselves'. The answer was that at the time of its conclusion it was intended to govern the relationship between the shareholders. Whether it in fact did so lay at the heart of the defence to Luis's claim. The first issue to be addressed is whether the judge's findings in the final two sentences quoted in the previous paragraph were correct. The initial relationship between Luis and Andrea will be considered followed by the conclusion of the heads of agreement, the sale agreement and the shareholders agreement. The judgment will then consider the parties' contentions and the high court's conclusion as quoted above and set out the findings on the exclusion issue.

[96] He referred to it again in para 133, but only in the context of the provisions relating to the disposal of shares by a shareholder.

The relationship between Luis and Andrea

[122] One cannot fault the learned judge's conclusion that at its inception in 1987 TCM was a classic example of a small domestic company operating on a basis of trust and mutual respect between the founders, Luis and Andrea. They held equal stakes in the company, applied their differing skills to promoting the growth of the company and reaped the benefits of doing so as it grew and achieved success. Luis said with justifiable pride that they started out in competition with IBM and by the early part of the present century had become IBM's agent in South Africa. Clearly their relationship gave rise to a mutual understanding that they would work together to manage the company and its affairs on a basis of equality. However, with growth and the company's expansion came change. The central issue at the trial was whether those changes in ownership and in the nature and extent of its operations brought an end to the understanding that had lasted while building up the company and replaced that understanding with formal agreements. As Young J put it in *Fexuto*:[97]

'…the legitimate expectation does not last forever. It will be lost, if it is no longer practicable for the right to the expectation to continue.'

Young J's view that the mere expansion of a company indicates that an earlier arrangement or understanding fell away may not necessarily be correct,[98] but changes in the nature of the company and its business may indicate that the earlier informal understanding of how the business should be conducted has ceased to be feasible so that it falls away. A significant factor in bringing that about may be the advent of new shareholders who become involved in the business on a different basis.

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[97] *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd*, op cit, fn 77, at 704, lines 44-45.
[98] It was held on appeal not to be supported by the facts. *Fexuto Pty Limited v Bosnjak Holdings Pty Ltd*, op cit, fn 47.

[123] The existence of an arrangement or understanding in cases of this type is usually inferred from the conduct of the parties. By and large small domestic companies do not regulate the relationship among shareholders as formally as larger businesses involving experienced business people. Initial arrangements and understandings may be displaced by events. Lord Templeman expressed it broadly in saying that the arrangements or understanding would apply unless for some good reason a change in management and control became necessary.[99] The appellants' case was that this is what happened when Iqbal joined the company in 2004. He did so, with the support of Luis, Jose, Tony and Andrea because it was imperative to address the BEE issue. In order to assess the impact of his arrival on the management of the operations of TCM it is necessary to look at the contracts under which that came about.

The heads of agreement

[124] The heads of agreement were executed on 15 March 2004. Either prior to, or contemporaneously with, the conclusion of the heads of agreement, effect was given to the long-outstanding undertaking to give Jose and Tony equity in the company. The contract under which that was done was omitted from the record. The heads of agreement provided for the transactions described above in paragraph 8. Iqbal was to pay for the shares he was purchasing over 36 months. The price was payable out of dividends and bonuses, would bear interest and be secured by a pledge. The number of shares sold to Iqbal was sufficient to give TCM the BEE rating it wanted. In addition it ensured that no decision requiring a special resolution could be passed without Iqbal's agreement.[100]

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[99] *Tay Bok Choon v Tahnasan Sdn Bvd* [1987] UKPC 2

[100] Counsel provided us with a list of twenty provisions of the Act that required a special resolution ranging from changing the type of company; changing its name; altering the Memorandum of Association; increasing share capital; converting or cancelling shares; issuing shares; approving share

[125] Clause 8 of the heads of agreement provided that:

'A detailed shareholders agreement and sale agreement shall be entered into between all parties regulating their rights as shareholders and setting out the terms of the sale embodied herein.'

It went on to identify the matters that were to be regulated by the shareholders agreement. Clause 9 provided that, if Iqbal were to leave the company or resign as an employee, he would be obliged to offer his shares back to the original sellers at the same purchase price. He was, however, to be entitled to dispose of a maximum of 70% of his shares to BEE third parties on similar terms as deemed necessary by the majority of the shareholders or in accordance with any BEE Charter applicable to the industry or simply for empowerment purposes.[101] Under clause 10 the other shareholders were to have options in their favour to acquire Iqbal's shares on the same terms and conditions in the event of his resignation or death.

[126] Clause 12 recorded that Iqbal was to be appointed an executive director and that his functions and duties would be embodied in employment agreements[102] and his package would be structured on mutually acceptable terms. Andrea, Luis and Tony were to remain as directors, but Jose was to resign.[103] Under clause 13 detailed employment agreements were to be entered into with Jose and Tony regarding their

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option plans; making loans to directors or managers; or voluntarily winding-up the company. The 0.1% portion of Iqbal's shareholding afforded him powerful protection.

[101] There is a corresponding provision in clause 11.1 of the shareholders agreement.

[102] The heads of agreement say that these are attached but the parties have omitted them from the record.

[103] This was effectively reversed under the shareholders agreement because Luis nominated him as a director.

functions, duties and package in TCM.[104] Lastly in relation to TCM clause 14 provided that:

'The shareholders agreements must deal with the resignation of directors and employees of Tony and Jose as well as Andrea and Luis and the death of the parties. The parties must meet to discuss all these aspects.'

[127] Thereafter the heads of agreement dealt with TCM Networks (Pty) Ltd and TCM Software and Services (Pty) Ltd in which TCM held a 50% share, with the other 50% being held respectively by Mr del Fabbro and Ms Applewhite, who were both parties, together with those companies, to the heads of agreement. In regard to TCM Networks, Mr del Fabbro was to sell 12.6% of the shares to Iqbal on the same terms and conditions *mutatis mutandis* as the TCM sale. A shareholders agreement was to be entered into under which Mr del Fabbro, Andrea and Luis were to be directors of TCM Networks. The arrangements in regard to TCM Software were similar in that Ms Applewhite was to sell 12.6% of the shares to Iqbal on the same terms and conditions *mutatis mutandis* as the TCM sale. A separate shareholders' agreement was to be entered into under which Ms Applewhite, Iqbal, Andrea and Tony were to be directors of TCM Software. Finally the heads of agreement provided that the management company, TCM Management (Pty) Ltd, was to be restructured and the directors would be Andrea, Luis, Ms Applewhite and Iqbal.

[128] The heads of agreement constituted a detailed contract prepared by TCM's attorney. It provided a roadmap for the future structure of the shareholding of TCM and the management of its business operations. It contemplated the conclusion of further detailed agreements that would

[104] We do not know whether such agreements were concluded, but if they were they have been omitted from the record.

deal with the shareholdings of the individuals; the identity of the directors of the different companies; the need for employment agreements in respect of Iqbal, Tony and Jose; what was to happen if Iqbal left the company or resigned as an employee; and the resignation as either directors or employees of any of Andrea, Luis, Tony and Jose, as well as the possibility of their deaths. On this basis Iqbal started working for TCM at the beginning of the 2005 financial year in early March 2004.

The sale and shareholders agreements

[129] TCM adopted new articles of association by resolution dated 28 February 2005 and these were registered om 5 July 2005. Articles 14 to 16 dealt with the circumstances in which a member could dispose of their shares. They imposed an initial obligation to offer the shares to the other existing members and made any transfer subject to the consent of the board of directors. Under article 61 the business of the company was to be managed by the directors. Article 67 provided that a director may hold any office or place of profit under the company other than that of auditor 'for such period and on such terms as to remuneration and otherwise as the directors might determine'.

[130] The sale and shareholders agreements were signed on 29 June 2005 over a year after the heads of agreement. The sale agreement provided for the sale of shares to Iqbal in accordance with the provisions of the heads of agreement. The price was more clearly defined in para 3.1 as being 'an amount equal to the net asset value of the company as at the effective date together with a price earnings multiple of 5.7 based on the after-tax profits of the company as at the effective date and as reflected in the effective date accounts multiplied by 25,1%'. The parties fixed the price

at R26 646 260.53 on the basis of this formula. Payment was to be effected by way of a deposit of R500 000 and the balance was payable within 36 months of the date of signature of the agreement. Contrary to the heads of agreement the balance was to be free of interest. Clause 18 provided that if Iqbal died before full payment had been made the sellers would not be entitled to compel his estate to pay the balance of the purchase price, but should retain the percentage of shares already paid for and sell and transfer the balance to the sellers at the price outstanding at the time.

[131] The shareholders agreement was typical of such agreements. In clause 3 it recorded the holdings of the five shareholders and in clause 3.6 provided that:

'The shareholders wish to regulate their relationship as shareholders in the company on the terms and conditions contained herein.'

That was consistent with the stated purpose in clause 8 of the heads of agreement that the shareholders agreement should be entered into by all parties 'regulating their rights as shareholders'. It sought in clause 4 to give priority to the agreement over the articles of association.

[132] Clause 5 dealt with directors. The relevant provisions read:

'Notwithstanding anything to the contrary contained in the articles of association of the company, the **shareholders** shall take all steps, do all things and vote in favour of all resolutions necessary to procure that:

5.1.1 **Andrea** and **Luis** shall as long as they hold at least 30% (thirty per centum) each of the company's total issue share capital be entitled to appoint 2 (two) directors to the **board** and to remove and replace such appointed directors;

5.1.2 The remaining **shareholders** being **Tony, Jose** and **Iqbal** shall as long as they hold at least 15% (fifteen per centum) each of the company's total issued share capital

be entitled to appoint one director each to the **board** and to remove and replace such appointed directors;

5.1.3 no person (including any shareholder of the company from time to time) shall have any claim against any party hereto pursuant to his or her removal as director in terms of this agreement and/or in terms of the **Act**, it being recorded that nothing in this agreement is intended to entrench the appointment as director of any specific individual(s);

5.1.4 resolutions of the **board** shall, save as otherwise provided herein, be passed by a majority vote of the **board** on the basis that each director shall have one vote;

5.1.5 in the event of an equality of votes as regards any resolution proposed to be passed by the **board**, the chairman of the **board** shall have a casting vote (it being recorded that the present chairman of the **board** shall be **Andrea**) who shall however be subject to re-election and re-appointment at the annual general meeting;

5.1.6 s quorum for meetings of the **board** shall be comprised of any three directors, provided that both **Luis** and **Andrea** shall be present at all such meetings;

5.1.7 if there is no quorum at any meeting ("the original meeting") **of the** board, the original meeting shall be adjourned to the same time and same day two weeks later than the date originally set ("the adjourned meeting") on the basis that written notice of the date and time of such adjourned meeting shall forthwith after the adjournment of the original meeting be given by the company to all the directors of the company. Any director(s) present at an adjourned meeting shall constitute a quorum.'

The remaining provisions of clause 5 dealt with the right to appoint alternate directors; the place where board meetings were to be held; contact details of directors; remote participation in board meetings and round robin resolutions.

[133] Clause 5 recognised Luis in two ways. First it entitled him to appoint two directors for so long as he held at least 30% of the shares in TCM. Andrea was likewise entitled to appoint two directors to the board. Second it provided that a meeting of directors would not initially be quorate unless both he and Andrea were present. However, the impact of those two provisions was diluted by clauses 5.1.3 and 5.1.7. The former

made it clear that nothing in the agreement entrenched either Luis or Andrea, or anyone else for that matter, as a director. The necessary implication was that, notwithstanding their agreed entitlement to appoint directors, and the undoubted anticipation that they would be directors, any of Luis, Andrea or Iqbal could be removed as members of the board by following the statutory procedures laid down in the Act.[105] Clause 5.1.6 protected Andrea and Luis by rendering a board meeting at which one of them was not present non-quorate. However, the scope of the protection was limited because at an adjourned meeting the meeting would be quorate if any director was present.

[134] Clause 5.1.5 provided for Andrea's initial appointment as chair of the board, with a casting vote in the case of an equality of votes, but it expressly provided that he could be removed at an annual general meeting. Provision was made in clause 9.1 for the appointment of a managing director to undertake the day-to-day management and administration of the business. Although Andrea is sometimes referred to in documents as the CEO, it is not clear that the board ever formally appointed him to that role. However, it was plainly the manner in which he functioned. Jose accepted that since 1990 Andrea had been the CEO and that he had not held this position jointly with Luis, who was responsible for the technical service and accounting side of the business.

[135] Although all of the shareholders were employees of TCM at the time of its conclusion, the shareholders agreement did not refer directly to that employment. Following upon the provision in clause 14 of the heads of agreement that it should deal with the resignation or death of the

[105] The provisions of s 71(1) of the 2008 Act preclude the entrenchment of directors by way of shareholders agreements, which reinforces the. provisions of clause 5.1.3.

shareholders, including both Luis and Andrea, clause 10 entitled 'Deemed Offers', provided that:

'Should any of the **shareholders**:-

10.1.1 die or suffer any incapacity for any reason whatever (it being agreed that a continuous period of 90 (ninety) days during which such shareholder is unable to perform his usual management functions in respect of the **company** shall represent incapacity for the purpose of this 10.1.1;

10.1.2 be sequestrated whether provisionally or finally; or

10.1.3 surrender his estate whether provisionally or finally; or

10.1.4 leave the employ of the **compan**y for any reason whatsoever,

Then such party ("the offeror") shall be deemed on the day immediately preceding the occurrence of such event to have offered ("the offer") all of the offeror's **shares** ("the sale shares") and an equivalent percentage proportion of the offeror's claim by way of loan account ("the sale claims" against the **company** on the exact basis set out in clause 13 as applies to each shareholder referred to therein.'

In the case of Luis, Andrea and Tony clause 13.14 provided for them to offer to sell their shares to the remaining shareholders. The procedure in clauses 13.15 to 13.17 was, broadly speaking, that they should find an external third party purchaser, offer the shares to the remaining shareholders at the price and on the terms offered by the potential purchaser and either sell the shares to the remaining shareholders at the price offered by the third party, or sell them to the third party. The effect of the provisions of clauses 13.16 and 13.17 appears to be that if the remaining shareholders accepted the offer in part that would not permit the exiting shareholder to sell the balance to the third party. In order to dispose of the balance of the shares they would have to repeat the process.

[136] Other provisions of the shareholders agreement dealt with Iqbal's shares, the sale of shares by the other shareholders and the admission of new shareholders. Clause 17 covered the dividend policy and clause 21

imposed restraints on the shareholders in relation to the disclosure of confidential information and competition with TCM. These restraints applied only during the shareholder's employment with the company. Finally, clause 27 provided that the agreement was the sole record of the parties' agreement in relation to its subject matter, namely, the relationship between the shareholders. It also provided that no party would be bound by any representation, warranty, promise or the like not recorded in the agreement. That was fatal to Luis's complaint that he had been misled.

Discussion

[137] A claim under s 252 based on the member's exclusion from the company requires the identification of the acts giving rise to the exclusion. Most reported cases seem to arise from the member's removal as a director, but in this case that did not occur. Whilst Andrea suggested on several occasions that Luis should resign as an executive director and made that a condition for continuing with the discussions about acquiring his and Jose's shares on 18 February 2009, he was not removed from the Board and continued to attend board meetings after the present litigation commenced. Luis also remained a shareholder with the ordinary rights of a shareholder to participate in the affairs of the company and receive dividends. Based upon the way things had operated from the inception of the business, he claimed a legitimate expectation to daily involvement and engagement in the operations of the business and to be recognised and remunerated as a participant of equal standing to Andrea, who was the chairman and effectively chief executive of TCM. Was this justified?

[138] In order to satisfy that expectation Luis needed to be an executive director of TCM employed as such and remunerated on the same basis as

Andrea. He did not have that right under either the articles of association or the shareholders agreement. The trial court held that there was such a right because this was a quasi-partnership company, administered under the direct control of Luis and Andrea, who participated equally in its management on the basis that it was always intended that all shareholders would be employed by the company. The foundation for this was the garage agreement that even Luis accepted was not carried over into the shareholders agreement. Nonetheless, the judge held that even after the introduction of Tony, Jose and the Trust as shareholders and the conclusion of the shareholders agreement the company retained its identity as a domestic company in the nature of a partnership between Luis and Andrea.

[139] With respect to the trial judge I cannot accept either of those conclusions. Whatever the precise position before the conclusion of the heads of agreement and up to the conclusion of the sale and shareholders agreements, once those agreements had been concluded the shareholders had put their relationships *inter se* on a very different footing, namely one regulated by the shareholders agreement. This was the main purpose of the heads of agreement, which said:

'A detailed shareholders agreement and sale agreement shall be entered into between all parties regulating their rights as shareholders and setting out the terms of the sale embodied herein.'

Clause 3 of the shareholders agreement confirmed that the parties' purpose in concluding the agreement was to regulate their relationship as shareholders on the terms and conditions set out in that agreement. Those terms were spelled out explicitly in clause 5. It made no mention of any special arrangement or understanding between Luis and Andrea. It attached no qualifications to each shareholder's power to exercise the

voting rights attaching to their shareholding and it dealt with the possibility of their ceasing to be employed by the company. I am unable to see how those detailed arrangements could be overlain by a guarantee of employment and an unspoken partnership between Luis and Andrea requiring that each be afforded equal status and equal participation in the control and management of the company's business. That would be destructive of the entire purpose of concluding the shareholders agreement and would impermissibly contradict its terms.

[140] Dealing first with the finding that it was intended that all shareholders would be employed by the company, it was correct that they were all employees at the time the heads of agreement and the shareholders agreement were concluded and it was assumed that they would continue to be employed. But their employment was neither indefinite nor guaranteed, because clause 10(1) of the shareholders agreement contemplated that a shareholder could become incapacitated from performing their executive functions or cease to be employed. Luis agreed that this included dismissal from employment and his counsel did not suggest otherwise. Accordingly the intention that all shareholders would be employed was subject to a significant qualification that applied to Luis as much as to the other shareholders, namely that they continued to be able to discharge their functions as an executive director and that there were no proper employment-related reasons for terminating their employment.

[141] Continued employment was a pre-requisite to Luis's ability to be involved in the day-to-day running and management of the company. The express recognition that any of the shareholders could be dismissed was inconsistent with an arrangement or understanding that Andrea and Luis

would always be employed and engaged jointly in the management of the business. Any shareholder could leave the company for other reasons and compete with TCM. The deemed offer and the accompanying risk of being locked in to a minority shareholding in the company were the only protection offered by the shareholders agreement against any shareholder seeking to leave for whatever reason or conducting themselves in a way that would justify the termination of their employment.

[142] In regard to the second finding that the company retained its identity as a domestic company of the nature of a partnership, under cross-examination, both in the CCMA hearing and in his evidence in this case, Luis reluctantly accepted that the shareholders agreement had brought about significant changes to the relationships between him and Andrea. The agreement recorded that Andrea would be the chair and, whether or not he was formally elected to that position, he was *de facto* the managing director or CEO. The day-to-day management and administration of the company was accordingly to be undertaken by him. The extent to which he consulted his fellow shareholders or directors over any matter was within his discretion. There was no obligation on him to do so. Significant decisions by shareholders about the company's affairs would require the agreement of at least two of the three major shareholders. This meant that neither he nor Andrea had a right of veto and either could be outvoted. That simple reality disposed of the claim by Luis to continued joint control on a day-to day basis with Andrea.

[143] A further insurmountable stumbling block in the path of the high court's conclusion that this was a domestic company of the nature of a partnership between Luis and Andrea, was that there was no evidence that Iqbal was informed of, much less accepted and agreed to, such an

arrangement or understanding between Luis and Andrea. Proving its existence was precluded by clause 27 of the shareholders agreement. Disclosure of the existence of such an arrangement would have materially affected Iqbal's involvement in TCM. After negotiations lasting over a year and the conclusion of the shareholders agreement it is impossible to conceive that he would have agreed that contrary to its terms the company would continue to be administered under the direct day-to-day control of Luis and Andrea to his exclusion. Anything he wanted to do would depend on his being able to secure the agreement of both of the original shareholders. In the context of a public company Vinelott J said:[106]

'Outside investors were entitled to assume that the whole of the constitution was contained in the articles, read, of course, together with the Companies Acts. There is in those circumstances no room for any legitimate expectation founded on some agreement or arrangement made between the directors and kept up their sleeves and not disclosed to those placing the shares with the public.'

Iqbal was an outside investor in TCM and was entitled to assume that the whole of the arrangements between the shareholders was contained in the shareholders agreement negotiated and executed for that purpose. Accordingly, there could no longer be a 'quasi-partnership' arrangement between Luis and Andrea, as contended for in this litigation.

[144] The sale of shares and introduction of Iqbal, together with the conclusion of the shareholders agreement, fundamentally changed how the company was to be run. Luis knew this as illustrated by his subsequent attempt to vary the shareholders agreement. The proposal for amendments to the sale of shares agreement that he put before the board of directors in May 2008 included the following:

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[106] *Re Blue Arrow plc* [1987] BCLC 585.

'Luis, his nominee or successor-in-title will get Joint CEO Status with all privileges, salary and car allowance backdated to 1st Nov 2007 as well as Immediate Log-on and equal transaction access to Andrea on ALL TCM current & future accounts on Internet Banking.'

This was a fairly transparent endeavour to restore the claimed position prior to the advent of Iqbal and the conclusion of the shareholders agreement.

[145] Accompanying that proposal was a proposal for numerous changes to the shareholders agreement to limit the directors' powers unless there was agreement by shareholders holding 80% of the entire issued share capital of the company. If adopted the effect would be to shift control of the company on all major decisions and many smaller day-to-day matters from the directors to the shareholders. Any decision on those matters would require the support of all three principal shareholders. It would have given Luis veto power in respect of those thirty-three matters[107] and enabled him to block any management decision with which he disagreed. Under cross-examination he was evasive about this, but the conclusion was indisputable. The proposals related *inter alia* to undertaking new business activities; the repurchase or buy back by the company of its own shares; transfer of any of its shares to any person other than the company itself; incurring long-term debts or any other material borrowing; the conclusion of any contract that 'could negatively affect the rights of any shareholder'; the passage of special resolutions; the approval of any budget and an annual business plan; the establishment or implementation of or any changes in the company's financial policy (including but not

[107] In *Fexuto*, op cit, fn 47, para 56 it was said of such a power that: 'The inability to make decisions by reason of the existence of a veto is a very significant burden for any active commercial organisation to bear. It could adversely affect all its commercial and financial relationships. It is not a burden which should be inferred in the absence of any foundation in the formal documents or in oral communication which creates such an impediment to the capacity of the group to grow and develop.'

limited to payments to shareholders) or accounting policies 'which might adversely affect one of the shareholders'; the conclusion or implementation of any transaction with any shareholder or officer or director of the company or any relative of those individuals; the appointment, dismissal or determination and or increase in the remuneration and bonuses of directors or the managerial level of employees; the adoption or amendment of employment benefits for employee; the grant of share options or the creation of any employee share scheme with the inclusion of a profit sharing arrangement; and the conclusion of financial or suspensive sale contracts or other contracts binding the company to on-going financial commitments over and above those for which provision had been made in the current budget or business plan of the company.

[146] Leaving aside the distinct possibility that these proposals were directed at forcing the hand of his co-shareholders into purchasing his shares, their obvious purpose of reversing the provisions of the shareholders agreement evidenced a clear recognition that the old order had changed in 2004. The former relationship and understanding in relation to the running of the business of TCM ended in 2004 and 2005 and a new arrangement was put in place by the conclusion of those two agreements.

[147] There are some similarities with the Australian case of *Fexuto,*[108] which involved a family business that was built from scratch into the largest business of its type in Australia. After the father and patriarch died, the eldest son contended for an understanding among the members of the family, that they would all participate in the management of the

[108] Op cit, fn 47.

business on the basis of a 'consensus style management', alternatively to his entitlement to be an executive director engaged in the day-to-day management of the business. In regard to the existence of this understanding Spigelman CJ said that:[109]

'It is of some significance in the present case that the Appellant was not able to point to any document, nor give any evidence of any conversation, by which the `understanding' for which it contended was created. There was no evidence of any communication constituting any such understanding, or on the basis of which any express understanding could be inferred. The case, in this respect, was entirely a circumstantial one. The right to participate was to be established by a process of inference.'

In that case the business was structured through a holding company, three subsidiaries and three family trusts. This distributed the shares among the three sons and their families equally with their mother holding a key share until her death, with its distribution thereafter preserving the equality of interest among the three sons. In rejecting the claim based on an understanding or informal agreement Spigelman CJ said:

'The structure was devised with considerable care and attention to detail.'[110]

Similarly the structure created in terms of the shareholders agreement in this case was devised with considerable care and attention to detail. Iqbal had a 25.1% shareholding, the extra 0.1% coming at the expense of Tony and Jose. That served both BEE purposes and meant that special resolutions could not be passed without his support. The shareholders agreement made detailed provision for the structure of the board of directors of the company and similarly detailed provision for what was to happen if one of the parties to the agreement ceased to be an employee of the company. If, as Luis claimed, matters were to remain unaltered there was no point in creating that carefully designed structure.

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[109] Ibid, para 32.
[110] Ibid, para 39.

Conclusion on legitimate expectation

[148] The high court's conclusion that Luis retained a legitimate expectation to daily involvement in the company as a person of equal standing to Andrea after Iqbal joined the company was not justified by the evidence. The court erred in not analysing the agreements governing Iqbal's introduction to the company or giving any consideration or weight to their provisions or what occurred once Iqbal started working at TCM. It may not have brought immediate or obvious changes in Luis's day-to-day situation, because he remained an executive director and employee for some five years after that. Whether he truly thought that he would always have daily involvement in the company as a person of equal standing to Andrea, or whether he merely believed that this was his entitlement as a co-founder of the company, is immaterial. Whatever he thought it was on a vague and ill-formed basis. But, for any expectation he entertained to be reasonable or legitimate, he needed to be able to point to an understanding or agreement involving all the shareholders. He made no attempt to do so. In view of the changes that came about in 2004 and 2005 his continued reliance on the historic situation did not suffice.

[149] The evidence and particularly the documents placed before us suggest that the affairs of TCM were conducted with a fair degree of informality. In *Fexuto,*[111] Spigelman CJ aptly described this kind of situation in saying the following:

'Management practices in a corporation develop for many reasons. They are subject to the exigencies of what falls for determination and to the personalities involved. The fact that a particular person exercises certain management rights, or has a de facto authority to carry on or to prevent certain actions, is as consistent with an inference

[111] Op cit, fn 46, paras 59 and 61.

that this is merely the result of an ad hoc procedure, as it is with an inference that it is a manifestation of an underlying `understanding' to this effect.

…

One cannot infer the right to have a status quo continue merely from the fact that it is the status quo. Something more is needed in order to establish a right or expectation that it would continue. That will usually take the form of an agreement or understanding between parties or an expectation induced by the conduct of the business.'

[150] Luis's evidence and the documents did not reflect, much less establish, the continued existence of such an agreement or understanding after 2004. Accordingly, the high court's finding that after 2004 and 2005 Luis had a legitimate expectation that he would continue to be involved in the daily operations of the company and would be recognised and remunerated as of equal standing with Andrea cannot stand. In my judgment all Luis was entitled to was the position and standing afforded to him under the articles of association and the shareholders agreement. He had a legitimate expectation that he would be entitled to exercise the rights ordinarily attaching to his ownership of a 30% shareholding, as well as the further right, whilst he held that shareholding, to appoint two directors and through them to exercise the powers and functions of a director. For so long as he remained in employment with TCM, I accept that such employment would be in a senior executive position. However, given the provisions of clause 5.1.3 of the shareholders agreement stipulating that his right to be a director was not entrenched, he did not have a legitimate expectation that the company would appoint him as an executive director. Nor did he have a right to expect that it would retain him in employment if there were proper grounds for his dismissal. Those conclusions serve to dispose of his claim insofar as it was based on the existence of the claimed legitimate expectation.

Luis's dismissal

[151] That conclusion does not dispose entirely of Luis's claim to have been excluded from his role at the company. There remained a second source of unfair prejudice alleged on the pleadings, but not developed as such in either the heads of argument or the oral argument. It was that, even if he had no such legitimate expectation, he was employed as an executive director and his unfair dismissal would not only deprive him of that employment and role in the company, but also trigger the deemed offer for his shares. This case on unfair prejudice was based on the contention that he had been unfairly dismissed. This excluded him from his role in the company, because his active engagement in managing the operations of the company ceased after his suspension on 19 February 2009 and his dismissal with effect from 31 March 2009. The evidence, both oral and documentary, suggests that he and Andrea clashed over most substantial and some petty issues. Andrea appears to have had a policy of circulating e-mails to the other directors asking for their agreement to policy decisions that he advocated. The record is replete with responses by Luis questioning or opposing outright those suggestions; demanding information and explanations; querying whether the decisions should be taken without a formal meeting; and frequently countering with his own contrary proposals. After his dismissal nothing prevented him from continuing with this and he did so. However his suspension and subsequent dismissal deprived him of the ability to participate in the day-to-day operations of TCM and perform his managerial function. That was the basis for his second claim to have been excluded. The right to dismiss any employee, including a director, was not disputed, so this claim pertinently raised the fairness of his dismissal

[152] Luis alleged that the charges against him were spurious and the conduct of his disciplinary hearing was unfair. He claimed that Andrea was acting with an ulterior motive to rid the business of his daily engagement and involvement in its affairs and to deprive the business of his contribution. The response in the plea was that he had been lawfully and fairly dismissed after a disciplinary procedure the fairness of which, from both a substantive and a procedural perspective, had been upheld by the CCMA and not challenged by him.

[153] Despite the fact that Luis's exclusion flowed from his dismissal, and its alleged unfairness was said to be unfairly prejudicial to him in his capacity as a shareholder, the judgment did not address the fairness of his dismissal. The reason emerged from paragraph 106 of the judgment where the judge said:

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

For the reasons already dealt with in paragraphs 103 to 107 of this judgment that view was incorrect. Being subjected to unfair prejudice was an essential pre-requisite, before any question of an offer to purchase arose. The contrary view of the high court in this case and the conclusion to the same effect in *McMillan NO v Pott* were wrong in law and must be overruled.

[154] The judge further explained that in his view the findings of the CCMA commissioner were irrelevant because of the rule in *Hollington v Hewthorn*.[112] In para 129 he added:

'As a matter of law, it is irrelevant whether or not Cornelli or the board of directors of TCM was justified in dismissing De Sousa from his employment. What matters is that he has been excluded from management …'

In the result the judgment did not deal with the allegations of unfair dismissal, or whether the dismissal was unfairly prejudicial to Luis in his capacity as a shareholder. In the course of the trial counsel for the plaintiffs had taken the same approach and their heads of argument in this court did not address the issue of dismissal.[113] That approach was incorrect because Luis's exclusion flowed directly from his dismissal and the defendants contended that his exclusion was not unfair because his dismissal was fair. If he had no expectation of continued employment and engagement in the day to day running of the business, but his dismissal was grounded on an ulterior motive to rid the business of his involvement, lacking fair reasons relating to his conduct or performance, that would be unfair.[114] It would impact directly, and to his prejudice, on his rights as a shareholder because it would give rise to a deemed offer under clause 10 of the shareholders agreement, with the prospect of being locked-in. It was therefore essential to address the fairness of his dismissal.

[155] Once the fairness of Luis's dismissal was in issue, the effect of the decisions on that issue by the various disciplinary bodies and particularly the CCMA had to be considered. Luis pleaded that his dismissal was both procedurally and substantively unfair. The internal disciplinary enquiry

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[112] *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 (CA); [1943] 2 All ER 35 (CA).
[113] Their practice note said that it was unnecessary to read the record of the evidence before the CCMA.
[114] As alleged in para 13.5.4 of the Particulars of Claim.

held that his conduct justified his dismissal. The appeal confirmed that decision. After an eleven day trial, where the onus of proving the fairness of the dismissal rested on TCM[115] it was held to have discharged that onus. The CCMA commissioner concluded that the dismissal was procedurally and substantively fair. Did the entire issue have to be revisited and decided afresh? Was the judge correct in saying that the finding of the CCMA commissioner was irrelevant?

The Labour Relations Act 66 of 1995 and s 252 of the Act

[156] The Labour Relations Act 66 of 1995 (the LRA) is one of the statutes passed to give effect to the right to fair labour practices in s 23(1) of the Constitution and the related labour rights in that section. Central to these rights is every worker's right not to be unfairly dismissed, embodied in s 185(1) of the LRA. Where disputes arise over either the procedural of the substantive fairness of a dismissal, the LRA provides for the dispute in most instances to be referred to the CCMA under s 191(1)(*a*)(ii) of the LRA, unless it is claimed that the dismissal was one that could be referred directly to the Labour Court under s 191(5)(*b*) of the LRA.

[157] An arbitration award by a CCMA commissioner is capable of being challenged on various grounds under s 145 of the LRA. If it is not challenged then in terms of s 143(1) of the LRA it is final and binding and may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued. It is unnecessary to explore the intricacies of reviews of CCMA arbitration awards as Luis elected not to challenge the commissioner's award in the present case. It is accordingly final and binding on him. Under s 157(1) of the LRA the Labour Court's

[115] Section 192(2) of the LRA.

jurisdiction in relation to reviews of CCMA arbitration awards is exclusive of the jurisdiction of any other court. In the result there was a statutorily binding determination that Luis's dismissal by TCM was not unfair both procedurally and substantively.

[158] The particulars of claim alleged that the manner in which Luis's original disciplinary hearing was conducted was unfair to him. No particulars were given, but it is apparent, from the decision of the chair of the hearing, as well as the documents in the record and Luis's evidence, that his complaint was that he had sought to be legally represented at the hearing and this was refused. On the substantive issues Luis advanced three complaints. The first was that the charges related to alleged conduct which had occurred substantially earlier – some six months or more – than the time the charges were levelled against him. The second attacked the charges broadly by saying that they did not merit investigation, scrutiny or dismissal, without giving specifics. That went to the seriousness of the charges. Thirdly he alleged that the charges had been brought with the ulterior motive of ridding the business of him, terminating his daily engagement and involvement in TCM's affairs and preventing him from making his contribution to those affairs.

[159] These allegations raised issues of both procedural and substantive unfairness in relation to his dismissal. They were made in support of the claim that he had been subjected to unfair prejudice as a shareholder in the conduct of the affairs of the company. Insofar as labour law was concerned those questions had been asked and answered against Luis in the only forum having jurisdiction to address them. That raised the conundrum of whether it was open to him to raise them again in a different context and for a different purpose. If he could, it created the

possibility of the high court reaching conclusions contrary to those of the CCMA on the very same questions. Take for example the procedural issue of legal representation at the initial disciplinary hearing. The chair held that it was not appropriate to permit him to have legal representation. If the high court took a different view, then the allegation that the disciplinary hearing was unfair would be established. If the high court held that the charges against him related to trivial matters and were brought with an ulterior motive with a view to getting rid of him, his dismissal was substantively unfair. If the high court accepted that the charges were established, but that dismissal was an excessive sanction, the dismissal would likewise be substantively unfair. On each and every issue it was notionally possible for the high court to arrive at the opposite answer to the CCMA in respect of issues that under our labour law fall within the exclusive jurisdiction of the CCMA and potentially the Labour Court and Labour Appeal Court. That would be a most unsatisfactory situation.

[160] There is no reason in principle why an applicant for relief under s 252 should not rely on the unfairness of their dismissal from employment as constituting their exclusion from the company. Ordinarily that will be in cases where there is a legitimate expectation of employment as an adjunct to the shareholding. For example, an employee whose principal source of income from their involvement in the company comes from their salary or the ability to earn commission will probably be able to demonstrate that they enjoy a legitimate expectation of continued employment. However, it is conceivable that, even without such an expectation, their dismissal may give rise to unfair prejudice in their capacity as a shareholder, for example, where it triggers an obligation to dispose of their shares at an artificially low price. Where

unfair dismissal is relied on in support of a s 252 claim and the fairness of the dismissal has been the subject of adjudication by the bodies established for that purpose, what is the impact of their decisions upon the s 252 enquiry? The high court's approach was that it was irrelevant. For the reasons that follow, I disagree.

***The rule in Hollington v Hewthorn*[116]**

[161] The high court relied on this decision in saying that the decision of the CCMA commissioner was irrelevant. I do not think it was correct to do so. The rule in *Hollington v Hewthorn* is described as follows in LAWSA, the opening sentence being the relevant portion for present purposes:[117]

'Evidence that a party has been convicted of a criminal offence is not evidence, not even *prima facie* evidence, in a subsequent contested civil suit; it is the irrelevant opinion of another court. In uncontested civil proceedings the fact of the conviction constitutes *prima facie* proof. The finding of a court in civil proceedings is inadmissible in subsequent criminal proceedings and a conviction is not evidence in subsequent criminal proceedings against someone else.'

The judgment has always been controversial[118] and in its country of origin and elsewhere has been abolished or varied by statute. It is part of our law of evidence by virtue of the provisions of s 42 of the Civil Proceedings and Evidence Act 25 of 1965, but it has only been invoked to a limited extent. It does not apply in relation to disciplinary proceedings against legal practitioners where a conviction is accepted as constituting evidence of the commission of the crime unless rebutted by the legal

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[116] *Hollington v F Hewthorn & Co Ltd* , op cit, fn 115.

[117] Lawsa, Vol 18 (3 ed, 2015) para 141; It was stated in this form in *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and others* [2015] ZASCA 210; 2016 (3) SA 143 (SCA) para 12.

[118] *C/f S v Khanyapa* 1979 (1) SA 824 (A) at 840C-841A, where Rumpff CJ expressed relief that the rule was inapplicable and referred to criticism of it. That judgment was overruled in *Attorney-General Northern Cape v Brühns* 1985 (3) SA 688 (A), but without addressing the qualms expressed in regard to *Hollington v Hewthorn*.

practitioner.[119] In a case involving piercing of the corporate veil it was held that despite the rule the plaintiff could rely upon the existence of a judgment debt against A in order to pursue claims against B and C to recover that debt.[120] In a forfeiture case, the Constitutional Court invoked it to refuse to admit the record of a criminal trial where the accused was acquitted, because such evidence was 'superfluous'.[121] The controversy over it is reflected in leading textbooks and academic writing although not all comment is unfavourable.[122]

[162] Although the rule is expressed as precluding reliance on a conviction in a criminal case to prove a fact in a civil case, there are some judicial statements indicating that it may extend to preventing reliance on a judgment in one civil case as evidence to prove facts in a subsequent civil case involving different parties.[123] However, in those cases, unlike the present one, that was not a pertinent issue and the statements were at most *obiter dicta*. Only in *Graham v Park Mews Body Corporate*,[124] was the rule deliberately extended to include subsequent litigation between the same parties. The court said the following:

'I am of the view that such rule is applicable in the present matter, even though the previous proceedings were not a criminal trial, but arbitration proceedings. There seems to be a general rule that findings of another tribunal cannot be used to prove a

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[119] *Hassim (also known as Essack) v Incorporated Law Society of Natal* 1977 (2) SA 757 (A).
[120] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at 806C-H.
[121] *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) para 42
[122] C W H Schmidt and H Rademeyer *The Law of Evidence* (Looseleaf, 2003, Lexis Nexus) para 21.1.3; Thulisile Brenda Njoko 'The admissibility of criminal findings in civil matters: Re-evaluating the *Hollington* judgment' 2021 *De Jure Law Journal* 160.
[123] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others*, op cit, fn 123; *Shepherd v Mossel Bay Liquor Licensing Board* 1954 (3) SA 852 (C) at 860H-861C; *Birkett v Accident Fund and Another* 1964 (1) SA 561 (T) at 566H-567B; *Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund and others* 2007 (1) SA 142 (N) para 11; *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Ltd; National Director of Public Prosecutions and Another v Mulaudzi* [2017] ZASCA 88; 2017 (6) SA 90 (SCA) para 40. Schmidt and Rademeyer, ibid, para 21.3.5 regard it as illogical not to extend the rule in this way.
[124] *Graham v Park Mews Body Corporate* 2012 (1) SA 355 (WCC) paras 59-65.

fact in a subsequent tribunal. I also see no logical reason why the application of this rule cannot be extended to the findings, orders and awards of other tribunals, so as to exclude the opinion of triers of fact in these proceedings in civil or criminal matters.'

The judge sought support for this extension in the following passage from *Land Securities plc v Westminister City Council*:[125]

'In principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties.'

[163] With respect that overlooked the reference to 'different parties' in *Land Securities*. That case concerned an attempt in a rent review arbitration to introduce an arbitrator's award in a separate rent review involving entirely different parties as evidence of comparable rentals. A careful reading of the judgment shows that the reason for the exclusion of the award was that it was not evidence of a valuation by a skilled valuator – which would have been admissible as expert evidence and subject to cross-examination – but the opinion of the arbitrator based on the evidence placed before him. All that the arbitrator could say was that on that evidence, the correctness of which could not be tested, he had formed the opinion reflected in the award. In addition, admitting the evidence would involve a collateral enquiry into the correctness of the arbitration award, which was not the purpose of the rent review. *Graham v Park Mews Body Corporate* dealt with an application for the appointment of an administrator to the respondent body corporate. It had been preceded by an arbitration between the applicant and the body corporate over certain repairs and the resultant award had been made an order of court. The applicant sought to make use of the findings by the arbitrator to support the case that the administration of the body corporate should be taken out

[125] *Land Securities plc v Westminster City Council* [1993] 4 All ER 124 at 127.

of the hands of the body corporate and vested in an administrator. That was a wholly different situation from the one in the *Land Securities* case.

[164] *Graham v Park Mews Body Corporate* was considered in *Institute for Accountability in Southern Africa v The Public Protector*.[126] There a claim for declaratory relief was based upon adverse findings made by the Constitutional Court and the Gauteng Division of the High Court in regard to the then Public Protector's conduct in the discharge of her duties. It was submitted on behalf of the Public Protector that these findings were inadmissible in terms of the rule in *Hollington v Hewthorn*, as being merely the opinions of various other courts in regard to her conduct. The contention was rejected. The judge pointed out that the findings in question were not made in criminal proceedings, but in reviews of the Public Protector's conduct, and they were all final andno longer subject to appeal. He held that given the criticism addressed to the rule it should be strictly confined to the circumstances to which it clearly applied, namely the use of findings in a criminal case to prove facts in a civil case. As regards the argument that the rule excluded the findings with which he was concerned, because they were irrelevant opinions, the learned judge held that the findings by judges in review proceedings cannot be equated to the opinions of ordinary individuals. One can well understand the reluctance of a judge to hold that findings by our highest court and the full court of the division in which he was sitting were merely irrelevant opinions that could be disregarded.

[165] In my view that criticism of *Graham v Park Mews Body Corporate* was well-founded. The rule in *Hollington v Hewthorn* should not be

[126] *Institute for Accountability in Southern Africa v The Public Protector and others* 2020 (5) SA 179 (GP). The views expressed in this judgment have found support in *Maqubela and Another v The Master and Others* 2022 (6) SA 408 (GJ) paras 47-50.

extended beyond the circumstances to which it expressly applied. In other instances where it is sought to use findings in a previous case to prove facts in a subsequent case, the test for admissibility should be relevance and the court must pay careful attention to the weight to be attached to the evidence thus tendered. It should be excluded if, like the *Land Securities* case, it diverts the case into a collateral enquiry.

Discussion

[166] Applying those principles to the present case, the rule in *Hollington v Hewthorn* was inapplicable because the CCMA award was not made in criminal proceedings. It was a labour arbitration to decide whether Luis's dismissal was either procedurally or substantively unfair. The onus of proof rested on TCM and the decision by the commissioner that it was not unfair in either respect was final and binding on both TCM and Luis. The s 252 proceedings involved the same parties and the allegation was that Luis's dismissal was both procedurally and substantively unfair. The onus rested on Luis to prove that. While the s 252 action required him to show that the dismissal was unfairly prejudicial to him in his capacity as a shareholder, and he was not seeking conventional labour law remedies such as reinstatement or compensation, the issue of the unfairness of his dismissal was the same in both proceedings and there was a legally binding decision that it was not unfair. On any view the CCMA award was not irrelevant to the s 252 issue that Luis had raised and did not raise collateral issues. Accordingly the judge erred in treating it as such.

[167] In fairness to the judge there are passages in the record that suggest that counsel for TCM may have been under a misapprehension as to the scope of the rule in *Hollington v Hewthorn*. Leading counsel mentioned the case and was plainly concerned that without some

admission it would be necessary for him to call all eleven witnesses who had testified at the CCMA enquiry to show that the dismissal was fair, as the rule might prevent him from relying upon the CCMA award. That concern resulted in the defendants' attorney proposing to the plaintiffs' attorney that the record of the evidence before the CCMA should be accepted as evidence in the trial, a proposal that if accepted would have resolved one of the key issues in regard to the conduct of the trial. The plaintiffs did not explain why they did not agree to this proposal and the judge disallowed cross-examination of Luis directed at ascertaining why this was unacceptable.[127] That disallowance was based on Luis not having been the author of the correspondence between the attorneys. That was not a good reason for preventing counsel from cross-examining Luis on their contents.[128]

[168] On the issue of the relevance of the CCMA award the status of such an award was dealt with above. The grounds upon which Luis contended that his dismissal was unfair for the purposes of this action overlapped to a considerable extent with the grounds of unfairness canvassed in the CCMA. The record of the CCMA proceedings was before the high court, as were the reasoned findings of the initial disciplinary hearing, the appeal and the CCMA commissioner. Luis was cross-examined to a limited extent[129] on his basis for claiming that the result of the disciplinary procedures was unjustified. The high court was in a position to reach its own conclusions on whether there were grounds for doubting the finding of the commissioner and it could do so in the light of the reasons advanced by Luis for not accepting that conclusion.

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[127] In argument counsel merely said that 'Of course' they could not agree to that proposal.
[128] *Van Tonder v Kilian NO* 1992 (1) SA 67 (T) at 72F-73J; *Absa I-Direct Ltd v Lazarus NO and Another* [2017] ZAKSDHC 14; 2017 JDR 0572 (KZD) para 6.
[129] Cross-examination was restricted by certain time constraints imposed by the judge.

But it did not do so, even though the fairness of the dismissal was of central importance in the exclusion case advanced by Luis. That was an erroneous approach.

[169] It is helpful to consider the grounds Luis put forward for not accepting the CCMA award. His only complaint in regard to the disciplinary hearing was that he was refused legal representation. As a result, and acting on the advice of his attorneys, he withdrew after handing in a document with the submissions prepared by his attorneys. He refused to give evidence or be cross-examined. He attended the appeal hearing and handed in submissions, but again was refused legal representation. The record in the CCMA reflects that his complaint, about being refused legal representation, was not pursued before the commissioner. Luis could not recall what other complaint he had about the appeal, save that he would not concede that the chair was independent. As regards the proceedings before the CCMA his complaint was that because of some confusion over the date for the hearing new counsel was briefed and only had two days to prepare before the hearing commenced. As a result he said that 'due to lack of preparation we weren't allowed to present our case fully'. This complaint was not borne out by an examination of the record of the CCMA proceedings. Whatever initial problems may have been experienced by counsel, and none were raised or appear from the record, the hearing proceeded on 18 March 2010 for five days and counsel cross-examined TCM's witnesses, including Wayne and Iqbal, by reference to a detailed trial bundle. There is no indication from the transcripts that exist[130] of his being hampered in doing this. The hearing was then adjourned from March to July when Andrea gave evidence and was cross-examined. Luis gave his evidence

[130] That in respect of Iqbal is incompletely transcribed.

over two days in July and was cross examined for a further two days in September. Throughout there was no indication that counsel was insufficiently prepared or that Luis was deprived of the opportunity to present his case in full.

[170] The CCMA was the only tribunal having jurisdiction in South African law to determine whether Luis had been unfairly dismissed from his employment. Its binding decision that he had not was plainly relevant to the same issue when raised in the s 252 proceedings. At the very least it raised a prima facie case for him to rebut that his dismissal had not been unfair. That was particularly so in view of the fact that he had invoked the jurisdiction of the CCMA to contest the fairness of his dismissal. Proof that his dismissal was unfair was a necessary precursor to his contention that as a result he had suffered unfair prejudice in his capacity as a shareholder. In my view the situation was closely analogous to that which applies in disciplinary proceedings involving advocates and attorneys, where the legal practitioner in question has been convicted of a crime by a competent court. That is taken as prima facie evidence that they committed the crime, but they are entitled to challenge the conviction and show on the record of the trial that they should not have been convicted. They are entitled to produce evidence other than that at their criminal trial to show that they were not guilty of the offence of which they had been convicted.

[171] I can see no reason why that approach should not be adopted in relation to a CCMA arbitration. Luis was represented by counsel on the instructions of the firm of attorneys who had advised and represented him since the end of 2007 and which represented him in the trial of this action. He was in a position in this trial to contend on the record that the

CCMA commissioner had erred. He made no attempt to do so. Nor did he make any attempt to adduce evidence to show that the commissioner erred. In some respects, such as his contention that his counsel had insufficient time to prepare for the hearing before the CCMA, his case was not borne out either by the dates on which the hearing took place, the cross-examination of TCM's witnesses or the detailed basis upon which his own evidence was led. In short, he presented no evidence and advanced no plausible reason for suggesting that the CCMA commissioner's assessment that his dismissal was fair was flawed in any respect.

Conclusion on dismissal

[172] In the circumstances, the onus resting upon Luis of showing that his dismissal was unfair, either procedurally or substantively, was not discharged. It followed that while his dismissal may have prejudiced him, he was not unfairly prejudiced in his capacity as a shareholder by it. Insofar as his exclusion case rested on his dismissal as an employee apart from the legitimate expectation that he claimed he had to continued employment and status that case must fail. For those reasons, his primary case based on his exclusion should have failed.

Absence of genuine negotiations and a fair offer

[173] Luis and Jose's third source of alleged unfair prejudice was that they were, as counsel put it, 'locked in' and unable to dispose of their shares in the company. Counsel submitted that there is prima facie unfair prejudice where a shareholder is locked in. He submitted that the lock-in was a vital part of the case and urged us to look at the justice of the situation because it involved people's lives. There was a need for what he termed a commercial divorce. He argued that the shareholders agreement

itself was not the problem, it simply did not go far enough. The problem was that in this situation the minority shareholders were unable to extricate themselves and realise the value of their shares and this needed to be remedied.

[174] There were two elements to the complaint concerning the failure to negotiate. The first was that Andrea had refused to engage in bona fide discussions or negotiations with the aim of permitting the plaintiffs to dispose of their shares, either to TCM, the remaining shareholders or a third party. The second was that Andrea had prevented Luis and Jose from having proper access to the financial documentation of TCM in order to arrive at a fair assessment of the value of their shares. It was contended that in order for them to comply with the requirements of clause 13 of the shareholders agreement it was first necessary for them to determine a fair value for their shares, based on adequate and accurate information. Only then could they market the shares and find a third party purchaser, which was a necessary precursor to them offering the shares to their co-shareholders on the terms they had been able to obtain in the open market. This involved considering whether, and if so to what extent, there was an obligation to provide that information and engage in negotiations with a view to enabling Luis and Jose to exit the company and dispose of their shares.

[175] In regard to negotiations, although counsel submitted that the problem did not lie with the shareholders agreement, in my view that is precisely where it lay from the perspective of Luis and Jose. Luis admitted this when saying that:

‘In hindsight, what the agreement says and what it should have said is actually quite different.’

In his affidavit in the s 252 application he had been more explicit saying that he had been advised that:

'there are several glaring deficiencies and impracticalities in the agreement one of which has left me in an untenable position.'

His problem lay with the effect of clause 10, read with clause 13, of the shareholders agreement. Clause 10 dealt with various situations that would hinder a shareholder from performing their functions or place them under a disability. One of those was a shareholder leaving the employ of the company for any reason whatsoever. It provided that if they did so they were deemed to have offered their shares to the remaining shareholders on the terms set out in clause 13. That clause dealt generally with a shareholder wishing to dispose of their shares. It set out in considerable detail how any such disposal was to take place. There were separate provisions relating to Tony and Iqbal. If one of the other three shareholders wished to dispose of their shares, or some of them, they had to offer them to their co-shareholders at a price at which the disposing shareholder wanted to sell the shares to an identified third party. Thereafter there would either be a sale to the co-shareholders, or some of them, or to the third party. Any sale to a third party required the consent of the board of directors. The shareholders agreement did not impose an obligation on the remaining shareholders to engage in negotiations with the departing shareholder to acquire their shares.

[176] Provisions restricting the disposal and transferability of shares may operate to the prejudice of a minority shareholder wishing to exit the company, by making it difficult for them to leave or creating a locked in situation. However, the basis upon which that situation was said to be unfairly prejudicial was never explained. These were the terms the parties had freely agreed. A claim that implementing them was unfair could only

be an attack on the fairness of the terms themselves. That amounted to nothing more nor less than saying that the shareholders agreement was unfair. Counsel rightly disavowed any such argument. It is not the court's function under s 252 to pronounce upon the fairness of agreements freely entered into by persons of sound mind and contractual capacity. The argument that a mere loss of faith, confidence or trust in management constitutes unfair prejudice, unless arrangements are made to purchase the disaffected shareholder's shares, amounts to claiming a unilateral right to withdraw from the company and would impose an obligation on the company or the remaining shareholders to find the money to enable this to happen. That is a compulsory purchase without agreement or wrongdoing in the form of unfairly prejudicial conduct. It is one thing to grant a remedy where the exercise of rights by the majority shareholders has caused unfair prejudice to the minority. It is something entirely different to confer upon a shareholder a right additional to those to which they have agreed in a shareholders agreement and at the same time burden the other shareholders with obligations they were not asked to undertake and never accepted.

[177] In the present case Luis's dismissal and Jose's resignation triggered the deemed offer provisions in clause 10 of the shareholders agreement. The structure of clause 13 was that an offer would be put to the remaining shareholders in due course, but that was not for the purposes of negotiation. Its terms would be fixed by the terms of an offer the departing shareholders had obtained from a third party. They could either accept or reject those terms. Any negotiations outside those terms were entirely voluntary. There was no obligation on the remaining shareholders to negotiate outside the terms of the agreement to acquire their shares at a fair price. The plaintiffs were entitled to secure a third party offer to

purchase their shares, which they would then submit to the remaining shareholders under clauses 13.14 to 13.17. It is difficult to see how a failure to negotiate when one is under no obligation to do so can cause unfair prejudice to another shareholder. The request from the disaffected shareholder that the remaining shareholders should negotiate a basis for their departure was a request to depart from what the parties agreed in the shareholders agreement. The refusal to agree to that cannot on its own amount to unfair prejudice to the disaffected shareholder.[131] Although not obliged to do so, Andrea had indicated a willingness to negotiate a basis for Luis and Jose to depart, but they were not prepared to accept his terms for doing so. In those circumstances he withdrew, but because the process was entirely voluntary on his part it could not give rise to unfair prejudice in the absence of his having given any other undertakings.

[178] The plaintiffs' heads of argument drew attention to a what they described as 'Cornelli's obnoxious and obstructive behaviour' at the meeting on 18 February 2009. They suggested that the litigation 'was necessitated to a significant degree' by Andrea's conduct. The submission, like a number of others, was long on adjectives and short on substance. Andrea had been asked to attend a meeting where the plaintiffs would propose that they exit the company and either TCM or the remaining shareholders would purchase their shares. Andrea's attitude, formed against the background of Luis's conduct since 2004, was straightforward. The plaintiffs wanted to leave the company and cease to

[131] This is not a case such as *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* op cit, fn 61, the facts of which appear to be unique. The parties held various businesses in a loose partnership and agreed to separate those interests. Various heads of agreement were concluded to give effect to the separation and as part of the process Mr Tomanovic resigned his directorships and forewent his salary replacing it with what were described as loans against the ultimate purchase price of his interest. The negotiations broke down and the other shareholder demanded repayment of the loans while refusing to restore Mr Tomanovic's position as director and the payments made to him. That was held to be unfairly prejudicial to him.

be directors at all. As a sign of their good faith he wanted the two of them to stand down as executive directors immediately and accept a reduced remuneration. In return he would assist in finding a purchaser for their shares. In that way he would not be negotiating 'with a gun to his head'.

[179] That was a legitimate, if hard-nosed, negotiating position. The potential prejudice to the plaintiffs was limited because their goal in any event was to cease to be executive directors or to work for TCM. The judgment said that they could not have been expected to agree to him alone finding an interested third party to buy their shares. Why ever not? Like any other mandate they could have stipulated for a time period within which he was to do that and he had the advantage over anyone else of knowing the company intimately. Letting him find a purchaser meant there was little risk of problems arising with the requirement that a third party purchaser would require the approval of the board of directors to acquire the shares. Imposing this requirement also had its risks for Andrea and the company because, if the subsequent search for a purchaser was unsuccessful, he would be faced with the need to reinstate and possibly compensate the plaintiffs. If he refused, a claim that they had been unfairly prejudiced by giving up their executive directorships would inevitably follow.[132] The approach taken by Andrea at the meeting may have been a hard line approach, but that was to be expected against the background of events and is not in any way unusual in commercial negotiations. Mr Geel accepted that his walking out was a form of negotiation.

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[132] See *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* op cit, fn 61, where the failure to reach agreement on the terms of an agreed division of the business was held to have been unfairly prejudicial where the claimant had in good faith resigned his directorships and after the breakdown in negotiations the other party refused to reinstate him.

[180] In the heads of argument Andrea and the other shareholders were criticised for ‘insisting on strict obedience to the terms of the agreement’. There was, so the submission went, nothing to stop them from negotiating in good faith outside of the special provisions of the shareholders agreement. That is correct, but they were not obliged to do so and it was not unfair for them to ask that their agreement be honoured. Any different approach is nothing more than an endeavour to create an obligation to negotiate on terms for the disaffected shareholder to depart, even though the shareholders agreement imposed no such obligation. If upheld it would impale the appellants upon the horns of a dilemma. If they negotiated outside the items of the agreement, a failure to offer to purchase the plaintiffs’ shares at a price acceptable to them could be attributed to negotiating in bad faith. If they refused to negotiate outside the agreement their refusal could be characterised as acting in bad faith. Either way the outcome would create grounds for contending that there was unfair prejudice in the conduct of the company’s affairs. Upholding the argument would give the disaffected shareholder a unilateral right of withdrawal. The remaining shareholders would always be obliged to negotiate terms for the minority to depart and they would do so in the face of the threat that otherwise a court would impose terms upon them. But that is the very situation the shareholders agreement was designed to avoid, not only in relation to Luis and Jose, but in respect of all five shareholders.

[181] The plaintiffs’ additional complaint was that they were obstructed in obtaining the financial information they needed in order to formulate a proposal that could be taken to potential purchasers for their consideration. The argument on unfair prejudice was that under clause 10 of the shareholders agreement once a deemed offer was triggered,

whatever the cause of that might be, the affected shareholder was entitled to whatever information they wished in order to be able to take their shares to potential buyers and solicit offers. This appears to have been treated as axiomatic, but I have difficulty in finding a legal basis for it. If such a right existed it must have been subject to some constraints. A shareholder would possess the audited accounts and that would be the ordinary starting point in valuing the company's shares. It seems to me that disclosure of confidential information such as management accounts would require restrictions to ensure that their confidentiality would not be breached. That would be important, as buying the shares might only be of interest to someone in the same industry, or even a current competitor, as was apparent from Mr Geel's evidence about whom he would approach as a possible purchaser of the shares.

[182] In demanding this information Luis said that he was entitled to it in his capacity as both a shareholder and as a director. Insofar as the former was concerned reliance was placed upon clause 12 of the shareholders agreement. Clause 12.1 imposed upon the parties an obligation to procure that the company kept 'proper and up to date accounting, financial and other records' in relation to its business and affairs and to produce its accounts according to accounting policies agreed by the board from time to time, which accounts were to be available for inspection at all reasonable times and upon giving reasonable notice to all shareholders. In amplification of that, management accounts consisting of a balance sheet, profit and loss account and cashflow statement, together with a written management report, were to be produced monthly within twenty-five business days of the end of each month. Audited AFS were to be produced with six months of the company's financial year end. In addition there was an obligation 'as soon as practicable' to provide

shareholders with such other information as to the financial affairs and business of the company as the shareholder might reasonably request from time to time, including to explain any variations between budgeted and actual figures of the company for any period.

[183] It does not appear to me that this clause was directed at enabling a shareholder to place otherwise confidential information before a third party adviser with a view to assessing what price the shareholder could hope to obtain for their shares. On its face its purpose was to provide shareholders with information that would enable them *qua* shareholder to keep track of their interest in the company and assess how it was doing. Luis demanded information for the purpose of placing it before Mr Geel and his team so that they could undertake a valuation of his and Jose's shares. Increasingly, as time passed, the purpose of the information was to support a case that the accounts were inaccurate. I am not satisfied, without having had any detailed argument on this, that he was entitled to do so. Both the frequency and the extent of the information demanded seemed to exceed the reasonable information that this clause was designed to provide to the shareholders in for them to know what was happening in the company. Clause 12.2.2.3 suggests that the purpose of seeking other information was to investigate discrepancies between budgeted and actual figures and similar matters.

[184] The plaintiffs' heads of argument claimed that 'all information should have been candidly made available' but failed to address which information was information to which the plaintiffs were entitled or how that should be identified. On any basis the right to information was subject to a reasonableness limitation. However, the approach was that

anything Luis asked for he was entitled to receive.[133] That was a startlingly wide and in my view obviously incorrect, claim. It is illustrated by the list of items contained in an email he addressed to Andrea on 10 July 2008, which asked for the following in electronic format for all TCM companies, divisions and subsidiaries including four property owning companies:

'1) Draft Financials for 2008 incl. a List of items still to be finalised.

2) Daily balances of ALL bank accounts until 10/072008 (Daily Balances.xls spreadsheet)

3) Updated Management Accounts till end of May.

4) Updated Cash Flow Statements till the end of May

5) Combined (JBA 7 TCMSERVE) Age Analysis Report as of 29/02/2008 – Technology Corporate Management only

6) Copy of actual Bank Statements 01/05/08 to 30/06/08 – Stand 226 only

7) Balances on Shareholders Loan Accounts as of 30/06/2008

8) Copy of Leases for Midrand, Melrose Arch, Cape Town and Bedfordview

9) Budgets from 2009 Financial Year – Still Outstanding from previous request.

Not surprisingly Andrea replied pointing out that Wayne had many tasks such as finalising AFS and budgets and that the requests would be looked at once he had time. A letter addressed to the plaintiffs' attorneys on 7 October 2008 by TCM's attorney complained of TCM being continually inundated with requests addressed to Andrea and Wayne for information. Those demands for information occurred during the period when Mr Geel was working on his first valuation, which was dated November 2008, and it seems probable that their purpose was to assist him in that task. The letter pointed out that TCM did not have to comply with unreasonable requests, nor was there any obligation on Andrea and Wayne to provide explanations in writing.

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[133] In evidence he said: 'As far as I understand directors regardless of whether executive or not they're entitled to all the information or all company related information, whatever they want.' He appeared to be oblivious to the obvious limitation that the information sought must be for the purpose of his discharging his duties as a director.

[185] The heads of argument also dealt with a letter written by TCM's attorney to Mr Geel after the abortive meeting saying that it appeared during the course of the meeting that he had been furnished with TCM's confidential information to which he was not entitled without the consent of TCM's board of directors. No doubt that was due to the contents of Mr Geel's presentation. The information was specified as consisting of balance sheets, draft financial statements, management accounts, budgets, bank statements and other documentation. Clearly it referred to information furnished by Luis to Mr Geel for the purpose of the work Luis had employed Mr Geel to undertake for his own personal purposes. That is conceded in the heads of argument where it is said to have been to enable the plaintiffs to stipulate a price for the sale of their shares 'or, later, to prepare their case'. In other words the requests were being used for the purpose of obtaining early discovery. They were not directed at any purpose under the shareholders agreement, nor had the information been sought for any purpose arising from Luis discharging his duties as a director of the company. There was nothing untoward in the company's attorney writing to a third party who had been placed in possession of confidential information of the company asking for its return and warning that if it was further disclosed there would be consequences. In the commercial world information of that type may be disclosed for purposes of a due diligence or similar exercise, but it is almost invariably done in terms of a non-disclosure agreement to safeguard the confidentiality of the information.

[186] While the plaintiffs failed to show that there were relevant documents to which they were entitled and which they were denied, if they were denied information to which they were entitled they had been

given a specific remedy to deal with this. That remedy lay under clause 12.2.3, but it was not invoked. There is also a difficulty with the claim that it was impossible for the plaintiffs to take a proposal to the market without the information that was allegedly withheld. It was not supported by any evidence of an attempt to identify suitable potential purchasers, or to test the waters in regard to price on the basis of the audited accounts that were freely available to the plaintiffs and their advisers. Unless that was done and it could be shown that the absence of particular data had proved a stumbling block in attracting potential purchasers, this was pure speculation. Lastly there was no evidence of the prejudice actually suffered as a result of the lack of information. Mr Geel produced lengthy and detailed reports setting a value on the shares of the company which formed the basis of their claims in both the s 252 application and in the present action. He does not appear to have experienced any difficulty in doing so and although he updated the reports several times over the years of the trial, during which more and more documents were disclosed in consequence of applications in terms of Rule 35(3), his valuation of R160 million never changed.

[187] There was accordingly no substance in the contention that the plaintiffs were unfairly prejudiced by being denied access to TCM's documents. There was also no basis for any adverse findings against Andrea for his reluctance to disclose documents that he did not think Luis was entitled to, or in his wishing to protect the confidentiality of the company's documents.

[188] For those reasons the plaintiffs argument based upon the failure to make a fair offer to purchase the shares, the alleged failure to negotiate and the failure or refusal to produce documents, could not succeed. It

follows that the secondary argument on behalf of Luis and Jose had to fail. That left as the only possible basis for the claim a breakdown of the relationships among the shareholders and a loss of trust and confidence in the leadership of Andrea, accompanied by a lack of probity on his part in the management of the company's affairs. Although this was not separately argued nor clearly held to exist in the judgment, the high court made findings on each of the plaintiffs' other complaints and the plaintiffs submitted that these findings were unimpeachable, although the submission was not developed in oral argument. It is accordingly necessary to consider whether the plaintiffs were entitled to relief in respect of those issues.

Loss of trust and confidence due to a lack of probity

[189] The fourth alleged source of unfair prejudice was that Andrea and the other directors had shown a lack of probity in their conduct of the affairs of the company and this, combined with the lock-in, amounted to unfair prejudice. This argument was common to Luis and Jose. It was not fully developed in the heads of argument, nor was it clearly set out in the high court's judgment, although findings were made on various matters underlying the argument. Whether a proper factual foundation was laid for this must be determined. The starting point must be those matters pleaded in the particulars of claim that bear upon the issue. There are three. The first was the treatment of the Supplies Division. The second was a journal entry that was said to be an improper write-off of stock in an amount of R11.2 million in 2008. The third was an allegation that Andrea had conducted the business from 2007 to 2012 in a manner that caused the operating profit and EBITDA to be reduced; the operating expenses to increase substantially and the gross profit to climb by about 50%. This was ascribed to Andrea intentionally, alternatively recklessly,

failing to contain and/or reduce the operating expenses in proper proportion to its gross profit, in order that benefits might accrue to shareholders by way of dividends and the growth and well-being of the company and its ultimate profitability to shareholders would be ensured and protected.

[190] On these three bases Luis accused Andrea and the other directors of conduct that would reveal a lack of probity. But he accepted under cross-examination that his accusations were not based on any facts known to him. In fact much of it was based on the analysis and opinions of Mr Geel. The high court made favourable findings concerning Mr Geel's merits as a witness, accepted his evidence and reports about each of these three issues. The appellants vigorously attacked those findings relying on the judgment of this court in *NPC*.[134] Surprisingly, the plaintiffs' heads of argument did not deal with the attack or seek to rebut it. The members of the court were told with few exceptions that we did not need to read the documents in the record referring to financial matters unless specifically referred to.

[191] It is unnecessary to endorse all the appellants' criticisms of Mr Geel as a witness. However, those criticisms had merit. The following features of Mr Geel's testimony should have given rise to caution, if not disquiet, in weighing his merits as a witness.

(a) The terms of his engagement provided that he would not seek to establish the reliability of the information received from Luis and Jose and that he assumed no responsibility for the accuracy, reliability of completeness of that information. He did not

[134] *PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd and Others* [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) paras 96-114 (*NPC*)

investigate anything in the face of plausible and detailed explanations in affidavits that he had read;

(b) He regarded Luis as his client and said that his responsibility was to Luis, although he later tried to say that he understood his obligations to the court as an expert witness;

(c) After he had changed from being a commercial adviser on a possible sale of shares to an expert witness in an unfair prejudice case, his fee arrangement with Luis remained on a contingency basis under which he was to be rewarded depending on the amount for which Luis's shares would ultimately be sold. That gave him an incentive to be partisan in his evidence. If a buy-out was made at his valuation of R160 million his fee would be of the order of R5 million;

(d) To a considerable extent, insofar as the claim was based upon his evidence, it was being advanced on his advice and according to his analysis of the financial records of TCM. For example he accepted that, until he raised it, Luis had no idea of what EBITDA was. He accepted that the arguments in that regard were devised by him. In that situation there was a serious risk that he was seeking to justify himself. A fair reading of the record showed that this is what he did;

(e) Neither his reports, nor his evidence in chief, disclosed any of these matters reflecting on his independence and impartiality as a witness whose duties were owed to the court and not to his client ;

(f) A careful and fair-minded reading of his evidence showed that he was reluctant to make obvious concessions in answer to counsel's questions; that he often gave lengthy and argumentative answers to simple and direct questions; that he was consciously trying to

> foresee the direction of cross-examination and forestall it; and on some issues he was obviously evasive.

All in all, Mr Geel was not wholly independent, nor balanced and impartial in his evidence. He quite explicitly adopted the approach of Luis, his client, that if there was anything that appeared odd or unusual to him, or about which he was unclear, that should be attributed to some improper or malign purpose on the part of Andrea and his fellow directors. That was not a proper approach for an expert witness to adopt. It also meant that his evidence should have been approached with a far higher degree of scepticism than it received.

[192] Before examining the various instances of conduct that allegedly demonstrated a lack of probity, it is necessary to make one other preliminary comment about the approach to the evidence. The judgment and the heads of argument in this court emphasised and placed much store on the fact that the appellants closed their case without calling evidence. However, whether that justified an adverse inference being drawn, either generally or on a specific issue, depended on 'the particular circumstances of the litigation'.[135]

[193] The closure of the appellants' case did not mean that the court had to accept Luis's allegations uncritically and at face value. They had to be weighed in the light of the documentary evidence and the general probabilities. The fact that on many issues Luis was contradicted by Jose should have been dealt with, but the judgment did not mention those contradictions. The general probabilities required that particularly careful consideration be given to the impact of Luis's clear sense of grievance about his treatment. Throughout, this had manifested itself in allegations

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[135] *Titus v Shield Insurance Co Ltd* 1980 (3) SA 119 (AD) at 133E.

of conspiracies and dishonesty against his co-directors and senior executives in the company, although he could not point to a single fact to suggest that any of the individuals concerned had acted in any way dishonestly or failed to address matters independently and on the basis of their genuine belief as to what was best for the company. Before upholding his view that there was a conspiracy to get rid of him, some consideration needed to be given to whether his complaints in regard to the accounts and his accusations against Andrea and the other directors were a product of his obsession that there was a conspiracy against him. The other consideration was whether it was likely that the individuals concerned being willing to behave dishonestly in to be in Andrea's good books.

[194] Andrea drove the process on behalf of TCM, so it is his conduct that warrants the closest examination. In regard to the complaints about the management of the business and the suggestion that deliberate attempts were made to diminish the profits and reduce the value of the company, consideration needed to be given to why he or any of the other shareholders and directors would have done this when it would have been to their own financial detriment. Furthermore, whatever the merits of Mr Geel's criticisms about the conduct of the auditors and the manner of presentation of the AFS, the business was clearly doing well. Whether it could have done better was wholly irrelevant. The allegation was that Andrea had set out to harm it and thereby to cause harm to Luis, by deflating the profits and the value of the shares, even though on both aspects he would have suffered the same harm as Luis. That would truly

be a case of shooting himself in the foot.[136] There is no indication in the judgment that full account was taken of these problems. It proceeded simply on the basis that because the defendants closed their case without calling witnesses all of Luis's complaints were undisputed. The protracted cross-examination of the witnesses and the concessions extracted from them, usually reluctantly, demonstrated that this was far from being the case.

The Supplies Division

[195] The issue in this regard was a factual one. Was the Supplies Division fully part and parcel of TCM, as were other divisions of the company, or was it effectively a separate entity run by Frank and Fabio (and later Iqbal as well) for their own benefit, whilst operating under the TCM umbrella? The plaintiffs claimed that it should be included on the basis that its trading activities were for the benefit of TCM and including it would add about R10 million to the value of TCM as well as contributing to its overall profitability. In treating it as separate, and trying to move it to a standalone company owned by Frank, Fabio and Iqbal, they argued that the true value of the TCM was diminished and that Andrea did this in to reduce the price payable for the plaintiffs' shares. As that issue only arose after 2007 the implication was that it was a new development at that time when the problems between Luis and Andrea became more intense. In response, the defendants pleaded that the Supplies Division was created in 1995 for the purpose of ensuring continuity of TCM's supply chain and to assist Frank by warehousing the former business of Sternco within TCM, while it would still be conducted for Frank's personal risk and benefit. It was alleged that to the knowledge

[136] The origin of the expression is the trench warfare in World War I where shooting oneself in the foot was resorted to in order to avoid further service. In other words it referred to deliberate self-harm, which is what Andrea was accused of.

of the plaintiffs it had always been operated as if it were a separate entity and all profits generated by it accrued to Frank and Fabio. From a legal and accounting perspective its treatment in the books and records of TCM might have posed some difficulties. However, no-one suggested that as between the shareholders of TCM, if the arrangements in respect of the Supplies Division were as the defendants described them, they could not, or should not, be given effect.

[196] Much of the relevant material was common cause. The origins of the Supplies Division lay in Sternco (Pty) Ltd, a business importing heavy industrial equipment run by Frank. From the early days of TCM's operations it also arranged for the importation of spare parts and other items on behalf of TCM. Both Luis and Jose gave evidence about this, but neither had a clear picture of precisely what Sternco was doing on behalf of TCM. Luis described them as freight agents. Asked to explain how TCM dealt with the issue when Sternco went into liquidation, he said:

'At the time that Sternco went into liquidation, there aren't many suppliers overseas that one can just shut the door on this one and move on to the next. You know this is very specialised equipment and there is a handful, really a handful of suppliers in all the countries right around … and *it was very important for us to keep that supply line open and keep a good relationship with the provider, with the supplier of parts*. In essence the supplier viewed us as the customer and Sternco was just the freight agent. You know the relationship was between TCM and the provider of the spare parts. *So if we were to default on any payments the supplier would be reluctant to actually provide us with any more parts.*' (Emphasis added.)

At that time TCM was not an IBM agent and were competing with IBM for this business. That was why it was important to keep the supply lines open.

[197] The evidence went on:

'COURT: What did TCM then decide to do as far as this was concerned?

LUIS: Well, TCM had to honour those payments for equipment –

COURT: When you talk of payments, payments by Sternco to the suppliers?

LUIS: I don't –

COURT: What are you actually talking about?

LUIS: I don't know exactly if the payment was done from, you know because there is a freight agent in the middle.

COURT: But they are acting as you say as freight agents?

LUIS: Yes, but from –

COURT: But your suppliers TCM is paying for those suppliers, is it not?

LUIS: I am not sure exactly how that works. I know with the import duties certain things have been cleared. Sometimes you have to pay the freight agent and the freight agent pays the supplier.

COURT: Alright.

LUIS: So you know I'm not too clear when it comes to how that whole operation fits together.'

He confirmed that TCM honoured the obligations of Sternco and paid the suppliers, thereby becoming a creditor of Sternco.

[198] This showed that Sternco was more than a freight agent, because they were incurring the liability to the suppliers to pay for the goods. The description is rather more that of a purchasing agent on behalf of TCM, which seemed to accord with the evidence of Jose, who said:

'In the very early days Sternco had been doing imports of equipment. Therefore they had the knowledge of how to transfer funds overseas. They had the knowledge and they had the contact for shipping agents. So they knew how to do things in that respect. We had never done that before. We had no idea what a shipping agent was, what a clearing agent was. How do you pay an invoice in South Africa, originating in the US and the UK? We had no idea of those. And since they did have the knowledge in the very early days they supplied us with that service. So I would source a part overseas and I would hand all the paperwork over to Sternco. They would arrange the

transfer of funds to that company. … They would arrange for Skyline to collect the goods. Skyline in turn had their own people doing the clearing of the goods. In other words paying the duties and import duties and so on, and at the end of the day they would give us a bill that included all that. So it was the price of the goods, the shipping, the clearing everything. It was very convenient.. We didn't know how to do it. They did.'

[199] Comparing these two accounts, it is clear that Jose had a firmer grasp of the relationship between TCM and Sternco. He sourced the spares and parts that had to be imported and he dealt with Sternco in that regard. TCM was paying a fee to Sternco for this service and that would be included in the bill at the end of it all. His explanation also made it clear why TCM was concerned at Sternco going into liquidation and was willing to discharge its debts. It posed an existential threat to its own business.

[200] Jose was unclear about the basis for Frank returning to the business after a brief hiatus. He said that he came back to carry on doing the imports for TCM. At the same time he carried on with Sternco's business of importing heavy industrial machinery. He was still doing that business when Jose gave evidence in 2016. Jose understood that the Supplies Division was part of TCM and that Frank was paid a salary. The basis upon which this occurred does not appear to have been discussed with him. Luis's evidence was that, after the liquidation of Sternco, Andrea mentioned to him that they were going to employ Frank 'in order to keep the freight portion of the company or the importing of the spares going'. He said that he expressed concern as to how the company was going to carry that overhead and Andrea said that Frank would 'bring in the industrial part of the Sternco division or Sternco, the company to help cover his overheads'. He was going to be an employee in receipt of a

salary and other benefits and on that basis Luis agreed that he would come into TCM and manage the imports.

[201] The arrangement in regard to the industrial equipment obviously puzzled counsel who was leading Luis and he sought to clarify matters by way of a series of leading questions. This only served to create greater confusion as appears from the following passages in the evidence:

'MR SLON: And you mentioned that he would retain the industrial, his other or Sternco's erstwhile involvement in the importation of other goods, the Iscor … goods and various other goods that were involved in the earlier dispensation.

LUIS: Well, the import of the goods really came into TCM, like I said to help subsidise Frank Cornelli's overheads, you know overheads in the company because there wasn't enough goods being freighted into the country to have him as a sole freight agent or a specialist in freight. It would have been a lot cheaper just to go to another freight agent outside the company, so he brought in the industrial part of the business to help subsidise his overheads in the TCM, the company.

MR SLON: So the effect of all this was that Mr Frank Cornelli became an employee of the company.

LUIS: That's correct. Okay, that was the basis of the agreement that I reached with Mr Andrea Cornelli, that Frank Cornelli was going to be employed, would get the same benefits. He was always going to be paid monthly salaries and that's really what the bases were.

MR SLON: Yes, and he would then do your imports as he had done before under Sternco and he would do his own business, industrial goods in order to fund, in order to supplement his income to make it economical for him?

LUIS: That's correct.

Mr SLON: It would still have nothing to do with TCM?

LUIS: That's correct.

MR SLON: The industrial part.

LUIS: Well, he was going to be employed, so that's, you know the work flow as far as spare parts or computers happened, okay.

[MR SLON]:[137] And Jose was still going to be, is still the …

LUIS: Jose Diez … would place the orders as he normally did and Frank would manage the freight of the goods and run the industrial on the, you know, to subsidise his –

COURT: You say subsidise?

LUIS: Yes.

COURT: What do you mean by that?

LUIS: … There wasn't enough imports of computer equipment, of computer goods to cover his cost to the company. Okay, so that's how the industrials landed up in TCM, okay, because TCM, okay, never had anything to do, okay, with industrial parts. Okay we're a computer company. So he brought in, okay, and the profits generated for that helped cover his cost to company as an employee.

MR SLON: Did he have any obligation to TCM in regard to fees or costs that TCM would be either expressly or tacitly incurring by virtue of this arrangement? Was there any payback by him?

LUIS: Nothing. Not as far as I know.

MR SLON: And as I understand your version this became, the supplies division, this so-called supplies division is what grew out of this arrangement with Andrea?

LUIS: Yes. That's correct. Okay, that's what the supplies division was. It was always a division. Okay, it was never going to be – it was owned by TCM.

COURT: The profits derived from the sale of machinery, to whom would they accrue, industrial machinery?

LUIS: Well, it belonged to the company to help cover his overheads.

COURT: It belonged you say to –

LUIS: It belonged to TCM. Okay, it was invoiced by TCM, okay. You know, TCM invoiced it for [inaudible] on a TCM statement to its customers. It was the business of TCM.'

[202] This lengthy and convoluted explanation failed to address any of the key points raised in the defendants' plea. It was not disputed that the Supplies Division operated under the TCM umbrella, but that was not the

[137] There is a gap in the record immediately before this passage and it appears that the name of counsel was omitted because the following passage is a response from Luis.

point of the defence, which was that it was located there to assist Frank, whose existing separate business importing heavy industrial machinery had been liquidated. If that business could be resuscitated and generate profits, why would income accruing from it be used to cover overheads incurred by a computer business that could source the modest services they received from Sternco from other freight agents? From TCM's perspective, why would they wish to enter into the business of importing heavy machinery, when they were a highly successful computer business? The two businesses had no connection and combining them produced no synergies. From Frank's perspective, why would he hand over to TCM a business that he could run successfully and in which TCM had no interest? The suggested arrangement made very little sense and the explanation given unravelled under cross-examination.

[203] Cross-examination of Jose and Luis revealed that:

(a) the Supplies Division worked in a separate section of the TCM premises;

(b) the Supplies Division continued to import heavy industrial machinery, but no-one in TCM had anything to do with it and there is not a single reference to it in any of the documents in the record other than specific documents such as cheques and invoice reconciliations used to calculate what was due to the Supplies Division from TCM;

(c) while TCM banked with Standard Bank, the Supplies Division banked with Mercantile Bank;

(d) Frank and Fabio had signing powers on that bank account and were the only non-directors of TCM to have signing powers on bank accounts in the company's name;

(e) the bank account had an overdraft facility which was secured by the pledge of a deposit account that TCM maintained with Mercantile Bank for the sole purpose of providing that security;

(f) the bank account ran an overdraft even though TCM had ample funds of its own to discharge the overdraft and thereby avoid the incurrence of interest;

(g) on occasions the Supplies Division borrowed amounts from TCM which were then repaid by deduction from amounts received from debtors;

(h) the Supplies Division had its own employees;

(i) the Supplies Division had its own debtors and creditors;

(j) payments made to TCM in respect of accounts rendered to debtors by the Supplies Division were reconciled separately and paid over to the Supplies Division by way of cheques drawn on TCM's bank account and deposited in the Mercantile Bank account;

(k) administrative expenses incurred and paid by TCM Management (Pty) Ltd, the management company for the group, on behalf of subsidiary companies were recouped by charging a management fee. The Supplies Division was charged a management fee in the same way as subsidiaries;

(l) TCM Management paid the salaries of all employees in the group, including subsidiaries, but in the case of the Supplies Division, it recovered the amount of the salaries paid from the division;

(m) the salaries of Frank and Fabio, as with other employees of the Supplies Division, were fixed by them without reference to TCM management;

(n) there were sales from the Supplies Division to TCM and *vice versa;*

(o) no management accounts were provided to the directors of TCM in respect of the Supplies Division until after the issue of summons in this case;

(p) the Supplies Division operated entirely independently of TCM.

These arrangements were completely different from those of other divisions, which had no employees of their own, no separate bank accounts or bank facilities and no separate debtors and creditors. Putting all these facts together it is plain that the Supplies Division operated as if it were an entity separate from TCM.

[204] The Supplies Division continued Sternco's main business of importing heavy industrial machinery. Jose confirmed that this line of business had nothing to do with TCM. Nobody at TCM had any involvement in it and no-one was interested in who the suppliers were, what was being imported into South Africa or why. Frank simply continued with Sternco's business through the Supplies Division. The trial court appears to have accepted this because it said:

'The importation of Sternco's industrial or mining goods would be retained by Frank Cornelli and the benefits thereof would accrue to TCM in to subsidise the overheads which Frank Cornelli's employment now presented to TCM.'

With respect it is unclear what the court had in mind with this statement. The idea that Frank was going to retain the business of importing industrial or mining goods, but the profits would accrue to TCM to cover TCM's overheads made no sense. In what sense would he 'retain' the business when the profits would accrue to TCM? What was he retaining? If he was retaining the business presumably he would be liable for any losses, something that would have been in the forefront of everyone's minds in the light of Sternco's liquidation. Why would he agree to such an arrangement?

[205] Jose confirmed that the idea was to save what could be saved of the Sternco business in order to help Frank and that he would run the business of Sternco in the Supplies Division. This served the dual purpose of assisting Frank and not disrupting TCM's importation of parts and equipment because Frank was familiar with that business. In other words it was an arrangement that suited both parties. The proceeds of importing heavy machinery were not subsidising TCM's expenses in respect of Frank's overheads to TCM. The revenues generated by the Supplies Division, whether generated from importing heavy machinery or dealing with TCM's importation of spares and stock, were being used to pay its expenses, including Frank's salary. When challenged to identify any time when profits from the Supplies Division accrued to TCM, Luis's only suggestion was that the overdraft with Mercantile Bank had been reduced. But that did not involve any transfer of profits to TCM.

[206] Luis's suggestion that matters in regard to the bank account at Mercantile Bank were arranged so that TCM could monitor closely the financial viability of the business was not plausible. It would have been far easier and less costly, including avoiding the payment of interest on an overdraft and releasing the investment pledged as security for the overdraft, to operate the financial affairs of the Supplies Division in the same way as the other divisions of TCM through its bank account with Standard Bank. There would then have been no need to separate the Supplies Divisions receipts every month and pay them into the Mercantile Bank account. It is difficult to conceive of a clumsier and less effective method of monitoring the financial viability of the Supplies Division and no evidence was adduced to show that this was what was being done. Of course, if the losses and liabilities of the Supplies Division, as well as its

profits and assets, accrued to Frank and Fabio such monitoring would have been largely unnecessary.

[207] One would have expected the argument on behalf of the plaintiffs in this court to address the way in which the Supplies Division operated and provide a plausible explanation for arranging its affairs in this fashion, but it was not addressed at all. It ignored the allegations in the plea as well as the detailed concessions about those operations by both Luis and Jose. The heads of argument suggested that the defendants relied solely on alleged contradictions between Luis and Jose and a challenge to the judge's construction of the addendum to the sale of shares agreement dealing with the Supplies Division. As to the first the submission was that Andrea was available to be called as a witness, but was not called. The suggestion appeared to be that all the concessions on factual issues about the operation of the Supplies Division should be disregarded, because Andrea had not testified and said that the concessions were correctly made. That is both a novel submission and plainly wrong. Once counsel had put to Luis and Jose how the Supplies Division operated, and they had confirmed that the propositions being put to them were correct, there was no need to call Andrea to give evidence about those matters. Where there were differences between the evidence of Luis and Jose, and on the facts set out in paragraph 203 I do not think there were, Jose's evidence could not be rejected. He was a good witness who on these issues made concessions more readily than Luis and seemed not to be affected by any particular hostility towards Andrea. Unlike Luis he regularly voted in favour of accepting the annual audited accounts and in favour of Andrea continuing in his role as chairman of the company as well as supporting his remuneration package He also signed the addendum and voted to place the Supplies Division in a separate company with Frank, Fabio and

Iqbal as its shareholders. His only concern was it continuing to use the TCM name.

[208] It is no part of this case for us to decide on the precise legal effect of the arrangements in regard to the Supplies Division, or whether and, if so, how it should have been dealt with and disclosed in TCM's accounts. The fact that the trading operations of the Supplies Division were being conducted under the TCM name with accounts being rendered and made payable to TCM through its Standard Bank account might have resulted in any claims arising from those operations being pursued against TCM. Luis may have been technically correct in saying that in its current form it was part of the business of TCM, but it added nothing in terms of either profits or losses to the AFS, so the effect was neutral. However, that is not the issue confronting us. We are concerned with whether Luis and Jose have been unfairly prejudiced by this arrangement of its affairs. In answering that question their awareness of the arrangement and acquiescence in it was the important issue. If they were aware of and acquiesced in it they cannot claim to have been unfairly prejudiced by it.[138]

[209] Mr Geel's evidence in regard to the change in presentation of the annual accounts in 2009 to show a separate balance sheet for the Supplies Division was addressed to the wrong issue. The only express mention of the Supplies Division in the accounts for the previous years was a note that first appeared in the 2004 accounts under contingent liabilities that 'The company's call account is pledged to the value of R2 800 000'. In

[138] Blackman, op cit, fn 52, p 9-41 to 9-42: 'An applicant 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.' The principle flows from *Irvin and Johnson Ltd v Oelofse Fisheries Ltd; Oelofse v Irvin and Johnson and Another* 1954 (1) SA 231 (E) at 243A-B and was recently affirmed in this court in *Parry v Dunn-Blatch and others*, op cit, fn 12, para 48.

2005 this note was expanded to say that the pledge was ‘as security for the Supplies Division’s current account with Mercantile Bank’. Thereafter the note remained the same until it was dealt with separately in 2009, where it was said that the management of the Supplies Division share in 100% of the profits of the division. The note did not suggest that this was a new arrangement. Apart from this note, the accounts prior to 2009 do not indicate how the affairs of the Supplies Division were dealt with. If the arrangement for which the defendants contended were not correct and only contrived in 2008 and 2009, that could have been exposed quite readily by looking at the books and accounts for the Supplies Division, but those were not asked for, nor produced. The inference is that the Supplies Division indeed operated as if it were an entirely separate entity from TCM. It was irrelevant in those circumstances whether its trading operations were included in TCM’s overall accounts or omitted, as long as they neither increased nor decreased the trading profits shown in the accounts. Mr Geel considered this question and his conclusion was that in each year that he reviewed any profits before tax of the Supplies Division were distributed to Frank, Fabio and Iqbal so that the profits of TCM were unaffected by it and the value of the Supplies Division to TCM was nil.

[210] Luis was well aware of how the Supplies Division was being conducted. He said that he signed 95% of the cheques for the division. These reflected the transactions described earlier. In regard to the employment of the Frank and Fabio there was a revealing exchange in November 2002 about grading of employees for the purpose of the December bonus. Mr Sarkis asked Andrea how he should deal with the rating of directors and apparently furnished a list of names. The response was that all directors should be given a two rating and then Andrea

suggested ratings for four individuals including both Frank and Fabio at a two rating. This email was copied to Luis, Tony, Jose and Frank. Luis's reply had a detailed comment about Frank, but said that he did not know exactly what duties Fabio performed and therefore could not comment. Andrea's response to Luis was:

'As for Supplies … the rating is irrelevant as they have self-jurisdiction on their ratings, salary and bonuses. Our help (at month end) is due to the strict cash management we require to protect our investment at Mercantile.'

Luis did not question this statement. An independent jurisdiction over ratings, salaries and bonuses was wholly consistent with the Supplies Division operating as an independent entity outside the control of TCM. The latter's only concern was to protect its investment with Mercantile Bank that had been pledged to secure the overdraft of the Supplies Division.

[211] Two other facts bear upon this issue. The first is that all the financial statements in the record commencing with the 2002 year up until 2008 showed that Frank and Fabio had made substantial long term, interest-free, unsecured loans to TCM. In 2002 these were R891 711 (Frank) and R581 597 (Fabio). These loans substantially exceeded those of Andrea and Luis. They had been reduced by 2008 to R425 104 and R358 698 respectively. Neither Luis nor Jose could explain them. Employees do not ordinarily lend money to their employers, but people with an interest in a business do. Mr Geel explained that they arose as a result of the practice at the end of each financial year of granting bonuses to the two of them in order to eliminate from TCM's accounts any profits earned by the Supplies Division. The bonuses were either partially paid out, or not paid out at all, depending on the cash position of the Supplies Division. In other words the distribution of the bonuses and their

retention as loans, effectively to the Supplies Division, was entirely consistent with the defendants' explanation of the arrangements with the Supplies Division.

[212] The second factor is the addendum to the sale of shares agreement referred to in paragraph 7 that Luis refused to sign, but Jose signed. That accompanied the addendum showing how the price of the shares purchased by Iqbal had been computed and contained the following two paragraphs:

'3 Iqbal further agrees that he is aware that the division known as the TCM Supplies Division has reflected a nil net asset value in computing the purchase price.

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

The addendum was prepared by the defendants' attorney and signed by Andrea, Tony, Jose and Iqbal. Jose said in evidence that he signed it because he though it right at the time. Paragraphs 3 and 4 contained statements of fact, not expressions of opinion. The judgement noted this evidence, but said that paragraph 4 was ambivalent (I think this should read ambiguous) and that the clause was capable of meaning that the business properly belonged to TCM, but the financial benefits would accrue to Frank and Fabio. I can detect no ambiguity that would limit it to the financial benefits. It said that the profits, losses, assets and liabilities would accrue for the benefit of Frank and Fabio. The liabilities and the losses cannot be ignored. Those were also for Frank and Fabio's account. Mr Geel had made the same error in saying that Frank and Fabio did not take risk. Collectively the profits, losses, assets and liabilities encompassed the whole of the business of the Supplies Division. That was why paragraph 3 of the addendum said that nothing had been included in the purchase price payable by Iqbal in respect of the Supplies

Division. Jose said he signed the addendum as an accurate reflection of the factual position. Luis did not explain at the time why he would not sign it, nor did he send an email or in any other way query the correctness of the statements in the addendum. When Andrea sought board approval for housing the business of the Supplies Division in a separate company at a board meeting on 9 September 2008 Jose voted in favour of the resolution explaining that his only concern was the continued use of the TCM name because if things went wrong it could redound to the detriment of the group.

[213] If the addendum was factually incorrect, it would have created a situation where the signatories had signed a formal document intended to have binding legal effect knowing that its contents were false. It is improbable that Jose and Tony would have been happy to sign it without protest. Iqbal would have taken it at its face value, because he was recorded at the board meeting on 9 September 2008 as saying that he had always understood the Supplies Division to be a 'Frank and Fabio company'. He indicated that he was happy for them to have a BEE partner other than himself. There is no reason to think that the addendum was drafted to lend support to a description of the situation of the Supplies Division that the signatories knew to be incorrect. On the contrary the probabilities point in favour of it being a correct record of the position. All the directors other than Luis, including Wayne and Ms Bhula, confirmed the position at the 9 September 2008 board meeting.

[214] The issue in relation to the Supplies Division was not whether it was owned by and a division of TCM. Nor was it whether the arrangement was properly reflected in the accounts of TCM. The issue

was whether Luis and Jose had been unfairly prejudiced by the implementation of the arrangements between TCM and Frank and Fabio which had been in place since 1995. The arrangements meant that the Supplies Division operated *de facto* for the benefit of Frank and Fabio. Luis and Jose knew that from the beginning and acquiesced in it. Luis's claim to have been unfairly prejudiced by the arrangement was without merit and his endeavour to obtain a financial benefit from that business appears opportunistic. There was nothing secret about the arrangement and it was discussed and implemented entirely openly. The arrangement did not demonstrate a lack of probity on the part of Andrea. The high court erred in concentrating on the question of ownership of the Supplies Division and ignoring the arrangements under which all concerned had agreed that it would operate. There was nothing dishonest about them and they did not support the proposition that Andrea showed a lack of probity in dealing with the Supplies Division.

[215] For the sake of completeness I should deal briefly with two other points. The first is that Mr Geel devoted part of his report to the Supplies Division. He had no personal knowledge of the basis upon which the Supplies Division had been established or the arrangements made in that regard. In the circumstances his report and his evidence on this was irrelevant. It is significant that everything he said about it was directed at establishing a value for Luis and Jose's shares. This was a feature of his evidence. Including the Supplies Division added R10 million to his valuation of the business. The other point is that, after Luis's refusal to sign the addendum to the Sale of Shares agreement, Andrea tried to separate the Supplies Division by moving it into a separate company in which the shareholders would be Frank, Fabio and Iqbal. While an off-the-shelf company was acquired for that purpose no such transfer ever

took place because of the dispute over the situation of the Supplies Division. It was alleged in the particulars of claim that a transfer had occurred and the plaintiffs' heads of argument in this court said that there was a transfer. This was incorrect. Although the company was formed prior to the transfer being approved by the board of TCM, that was because it was acquired as an 'off the shelf' company from someone who provided that service. The complaint about the formation of the company arose from an incorrect reading of the company's founding documents. In the result there was no merit in the claims about the Supplies Division and the manner in which it was operating. Luis and Jose were not subjected to any unfair prejudice thereby.

The R11.2 million write-off

[216] The first issue pleaded in regard to financial matters was that Andrea procured an undervaluation of the inventory of TCM of a value of approximately R11.2 million. Mr Geel identified this as an issue. He explained that when undertaking the valuation he used the management accounts with which he was furnished, but agreed to wait to update the report in the light of the audited AFS. However, these differed materially from the management accounts:

'as a result of a number of "period 13" or audit adjustments, with the principal adjustment relating to a stock write-off of R11.2 million.'

He noted that Luis and Jose disagreed with the adjustments and were strongly of the view that rather than writing off or making provision for inventory obsolescence there was a need to write up the inventory values because of saleable inventory stored in separate locations not being included in the inventory count. The only other reference in his report to this 'inventory write-off of R11.2 million' noted that it had the effect of

reducing finished goods from the management balance of R18.3 million to the R7 million in the AFS.

[217] In his founding affidavit in the s 252 application Luis referred to the fact that in the 2008 AFS the auditors had made a number of adjustments, 'with the principal adjustment relating to inventory write-downs and write-offs in an amount of R11.2 million'. He said that this did not make sense and confirmed what he had said to Mr Geel, namely that there needed to be a stock write-up due to saleable stock. He said that all stock on hand was usable, had intrinsic value and a net realisable value that exceeded its cost.

[218] In dealing with this adjustment Mr Geel said:

'I said the major discrepancy that made no sense at all was the significant adjustment that was being provided for or raised in the draft audited financial statements and that was in the area of inventory where there was a significant decrease in the value that was being shown as inventory in these draft financial statements, in comparison with what we had seen in the draft management accounts. I say material and I will go there I'm sure in due course. It was to the extent of an adjustment of some R11.2 million, and that is very material in the financial statements of TCM.'

He added that there were some other adjustments, but the principal one was in the inventory area. The judge clarified that he was talking about the inventory adjustment in the AFS. Mr Geel confirmed this and said that there had been a material difference on the EBITDA number 'and it all arose [due] to, principally arose [due] to [an] R11.2 million adjustment to inventory'. For him this was important because the adjustment of this inventory would have had the effect of increasing his opening figure for EBITDA. He explained that the adjustment was made by a single journal entry of a globular figure of R11.2 million. This effected the adjustment between the management accounts and the audited accounts of R11.2

million. In his view, given the nature of the business this was impossible. The write-off could only have applied to inventory, as TCM's historic practice in regard to maintenance spare parts was to write them off as expenses when purchased and not capitalise them.

[219] In the course of the trial while Mr Geel was under cross-examination the judge ordered the expert witnesses to meet and minute their agreements and disagreements concerning this journal entry. The minute of this meeting reflects the following:

'8 Geel accepts and understands that the journal entry on page 810 removes the closing balances at 28 February 2007 financial year (i.e. the opening inventory balances at 1 March 2007 for the 2008 financial year) for the relevant accounts and this was understood and is confirmed … This journal is not disputed.

9 Geel's concerns are of a different nature namely that when comparing the balance of each component and location of inventory as at 28 February 2007 per location, there is no explanation for the significant reduction of these balances.

…

11 Whilst Geel understands the R11.2 million journal as … being the reversal of the opening balances, the material difference in the components and locations of the inventory as noted above and not followed up by the auditors are his real concerns. Geel realises … that the R11.2 million arises from opening balances of inventory, which required reversal. This is correctly reversed.'

The minute goes on to refer to an explanation Wayne gave to Mr Geel concerning a change in the system for recording inventory that occurred during the 2008 financial year and continues:

'13 Geel remains concerned that there is no evidence of physical stock count of the take on inventory balances into the perpetual system. Impey indicated that this is correct but that [certain documents in the Trial Bundle} do not deal with any inventory counts. Any adjustment was made at year end, namely 28 February 2008.

14 Geel remains concerned about the conduct of the auditors and evidence (or lack thereof) in verifying the physical inventory at year end 28 February 2008.

15 Impey is concerned that the inventory balances at 28 February 2007 may not be reliable due to the lack of reliability of the [replaced] system, which was under the control of De Sousa.'

[220] Everything Mr Geel had said prior to this point conveyed that his criticism of the audited accounts was based on the auditors making the disputed journal entry of R11.2 million. His evidence had been that this was a straightforward write-off or write-down of stock values. There was no justification for it. The concession that it was nothing of the sort, but an entry that needed to be made in order to reverse and thereby remove the closing balances from the previous year, undermined all of his evidence. He tried to shift the focus to his perception of the absence of evidence of a physical stock count to determine the inventory balances for take-on into the new system, saying that he remained concerned about the conduct of the auditors and the lack of evidence of a verification of the physical inventory. He concluded that they had only attended at the Midrand branch. But a concern about the quality of an auditor's work was irrelevant to the pleaded claim that Andrea had procured an undervaluation of inventory for the ulterior purpose of reducing the value of the plaintiffs' shares, which is the claim in the particulars of claim. In any event he ignored the fact that Luis said that the auditors had attended stock counts at all five main branches with one Van Schalkwyk, then the national logistics manager, who reported directly to Jose as the logistics director.

[221] With respect, the manner in which the judgment dealt with this issue was unsatisfactory. In the first place the judge persisted in referring

to the journal entry as a stock write-off,[139] when it was nothing more than a standard adjustment to remove the closing balances from the previous year's accounts. He then said that Mr Geel's evidence of 'the stock write-off' called for an answer from the defendants. As Mr Geel conceded that the journal entry was not a stock write-off, it is hard to see what evidence the court had in mind. The problem was compounded by the judge citing a statement by counsel that Andrea would testify that there was no understatement of inventory and that the journal entry was 'an accounting adjustment'. This was precisely the concession made by Mr Geel. Nonetheless the judge went on to say that Andrea should have entered the witness box to explain the reasons for the non-existent stock write-off and added that it was reasonable to suppose that he would not have been able credibly to explain the reasons for it. The fact of the matter is that the R11.2 million journal entry was not a stock write-off and the endeavour by Mr Geel to divert attention away from the fact that he had wrongly taken an innocuous accounting entry as evidencing unexplained impropriety, should have been rejected. In the result, there was no merit in this ground for alleging that Luis and Jose were subjected to unfair prejudice.

Inventory, maintenance spare parts and EBITDA

[222] These three issues took up a considerable part of the trial via the evidence of Mr Geel and added considerably to the bulk of the documents in the record. They should not have done so because they were not pleaded and were not germane to any issue that was properly raised in the pleadings. The only pleaded issue was that Andrea intentionally or recklessly failed to control operating expenses to the detriment of the

[139] This section of the judgment is headed 'R11.2 MILLION STOCK WRITE-OFF' and is described as a stock write-off thereafter in paras 242-244, 247 and 251 to 254 of the judgment.

company's ability to pay dividends and its long-term well-being. A comparison of Mr Geel's consolidated report and the withdrawn notice of amendment shows that the latter was based on the former. The notice of amendment sought to extend the period under consideration to include 2013. The extension related to the value of inventory on hand and maintenance spare parts as well as alleging that with effect from the financial year 28 February 2013 these had incorrectly been brought into account as an asset under the category 'property, plant and equipment' and depreciated. It sought to update the EBITDA allegations to include 2013. This was novel and came from the 2013 changes to Mr Geel's report. The discussion of maintenance spare parts came in its entirety from Mr Geel's 2013 report, albeit that this source was not identified as such in the consolidated report.

[223] Despite the withdrawal of the application to amend, the plaintiffs went ahead and led the evidence of Mr Geel on all the matters covered by the proposed amendment. The end result was that virtually all of his evidence and the bulk of the documents relating to it dealt with issues not raised in the pleadings and in consequence were inadmissible. An objection to the evidence on inventory, maintenance spare parts and EBITDA being led was rejected when the trial recommenced at the beginning of 2014. When it resumed in 2015 the court permitted the financial evidence to be further extended to include the 2014 year. It became the heart of the case and in going beyond the pleadings forced the defendants to engage with numerous collateral issues that had no relevance to the pleaded case. This should not have happened. The plaintiffs should have been confined to the pleaded issues.

[224] This is not mere pedantry or formalism. I am well aware that pleadings exist for the benefit of the court and that in certain circumstances the conduct of the parties may be such as to broaden the scope of the dispute and the issues to be dealt with in the trial. But I am also mindful of the remarks of Harman J in *Unisoft*[140] quoted in the high court's judgment that:

'Petitions under s 459 have become notorious to the judges of this court – and I think also to the Bar – for their length, their unpredictability of management, and the enormous and appalling costs which are incurred upon them by reason of the volume of documents likely to be produced. … In the circumstances it behoves the court, in my view, to be extremely careful to ensure that oppression is not caused to parties, respondents to such petitions, or indeed, petitioners upon such petitions, by allowing the parties to trawl through facts which have given rise to grievances but which are not relevant conduct within the very wide words of the section.'

The particulars of claim underwent a substantial amendment in 2012 shortly before the first date for hearing. The attempt to amend them again before the hearing resumed was abandoned. In those circumstances the court should have been alert to any attempt to expand the issues by the back door route of claiming that it was 'corroborative and evidential', which was the justification put forward by counsel for the plaintiffs. What it was said to corroborate was never clear and the court treated it as if the issues had been broadened.

[225] As far as this appeal is concerned there is no reason not to hold the plaintiffs to their counsel's disavowal of any intention to broaden the scope of the case beyond the pleaded issues and the period they covered. They alleged that:

(a) Andrea conducted the business of TCM from 2007 to 2012 during which period EBITDA before dividends received declined;

[140] *Re Unisoft Group* Ltd, op cit, fn 40, p 611f-i.

operating expenses increased substantially; and gross profit increased by about fifty percent. Specific amounts were given in respect of the 2007 and 2012 years based on the approved AFS for those years.

(b) Andrea had, during the same period, either intentionally or recklessly failed to contain or reduce operating expenses to a proper proportion of gross profit, such that the benefits might accrue to the shareholders, particularly the plaintiffs, by way of dividends and the growth, well-being and ultimate profitability to shareholders, particularly the plaintiffs, were properly ensured and protected.

The issues arising from these allegations were extremely narrow. The figures referred to in (a) were admitted, so that there was no issue in that regard. No impropriety on the part of Andrea and the board was said to arise on the basis of the figures on their own. The sting of the complaint was that, but for Andrea's intentional or reckless failure to contain or reduce operating expenses to a proper proportion of gross profit, greater benefits would have accrued to shareholders and the long term growth, well-being and ultimate profitability of TCM to shareholders and the plaintiffs in particular would have been ensured and protected.

[226] Paragraph 260 of the judgment correctly identified this as the issue, but then went on to say that there had been a reduction of the dividends paid to shareholders and this had negatively impacted on the value of TCM shares. TCM commenced paying dividends in the 2005 tax year, when it paid a dividend of R8 million. That was the year in which Iqbal joined the company. No dividend was paid in the 2006 tax year, but dividends of R10 million each were paid in the 2007 and 2008 tax years. In each of 2009 and 2010 it paid two dividends totalling R15 million and

in 2011 a single dividend of R15 million. In 2012 the single dividend rose to R16 million. The judgment said that dividends had been reduced, but that was factually incorrect for those years and incorrect for all the years for which information was available. In 2013 two dividends totalling R16 million were paid. In each of 2013, 2014 and 2015 two dividends totalling R18 million were declared and paid. A first dividend of R6 million had been paid for the 2016 tax year. These payments showed that Mr Geel's gloomy prognostication that if matters continued the prospect of receiving a dividend might disappear entirely was unfounded, as was the same view expressed by Luis in his founding affidavit in the s 252 application.

[227] The period from 2006 to 2012 was a period of consistent growth of the company in regard to both revenue and gross profit. The plaintiffs relied on Mr Geel's evidence to contend that all was not as it seemed and that by intentionally or recklessly failing to control expenses Andrea reduced the benefits to which shareholders were entitled and damaged the growth, well-being and ultimate profitability of the company. This was a difficult case to establish given the obvious profitability and growth of TCM during this period. It was not enough for the plaintiffs to show that Andrea might have done a better job of running the company, or could possibly have improved its performance had he adopted different policies. That was irrelevant and would not constitute unfair prejudice. In any event Mr Geel's evidence did not remotely justify that allegation or indeed seek to do so. He rather grudgingly conceded under cross-examination that, notwithstanding his dire predictions, TCM was not failing. His attitude was that:

'The contention is if things were to continue, and I'm talking now that EBITDA percentage and decline as it had then there's trouble, but currently it's liquid. It's cash

positive. It's got a quick ratio. It's got a current ratio all that are positive and the debtors collection days are positive.'

He accepted that it was a good solid company that had weathered the storm of the recession. It did not have attorneys chasing debtors. It had good customers, good products from good suppliers and a reliable income stream. The notion that Andrea was not keeping a close eye on costs was based solely on the comparison with the comparative companies that are dealt with below in paragraph 232. At the end it was no more than uninformed guesswork on his part.

[228] Mr Geel sought to justify the claim that Andrea was damaging the company in two ways. First he sought to suggest that inventory and maintenance spare parts, which latter first came up in his 2013 report, had been understated in TCM's AFS. In the combined 2013 report, after referring to the R11.2 million stock write-off, Mr Geel said that consideration of the 2008 audited accounts led him to conclude that the inventory figures were unrealistic and probably materially understated. Luis told him that the inventory adjustments did not reflect reality, but needed to be increased and that this was 'a deliberate ploy by the CEO to understate the results and thereby the ultimate value of TCM'. Mr Geel undertook an analysis of the inventory figures in the audited accounts. He concluded, on the basis of a couple of cryptic entries written by an unknown audit clerk in the audit notes for 2008 and his own views on how the company would operate, that it was improbable that the figures in the audited accounts were correct. His original valuation of the TCM group in 2008 on the basis of the management accounts was R348 million, but he adjusted it to R430 million on an inventory value of R33.9 million provided by Luis without any supporting information.

[229] This approach was illustrative of the significant flaws of Mr Geel as a witness and his evidence generally. He had no knowledge of how the business operations of TCM were conducted and did not accept Wayne's explanations or take up his offers to assist him.[141] He was contractually bound to rely on what Luis told him and his conditions of contract excluded any obligation to investigate the accuracy of that information. This resulted in him relying on the undocumented and unsupported say-so of a witness with a manifest grievance. He ignored Jose's view that the stock records were unreliable, even though they were under Luis's and Jose's control. He criticised the auditors without checking his concerns with them. He said that stock counts had not occurred or not been attended by the auditors, when Jose said they had occurred and the auditors were present. He queried the exclusion of inventory of R33.8 million in the face of an explanation by the auditors that this had been sold to FNB, invoiced and set aside. He accepted Luis's word that there was somewhere a secret warehouse with a significant inventory of unidentified stock. The evidence showed that this was a storeroom referred to as either 'Andrea and Justines's store' or the 'magpie store' that everyone knew about.

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[141] Andrea and Wayne explained at a meeting the 2013 change in the way maintenance spare parts were accounted for, namely that in 2012 TCM had acquired some large maintenance contracts, called BTR ('below the router') contracts, where they would have to stock and supply the spare parts to perform their maintenance obligations, whereas previously they had contracts with the OEMs ('original equipment manufacturers') under which they paid a quarterly premium to the OEM's in return for which the OEM's would supply the maintenance spare parts they needed on very short notice so that it was unnecessary to maintain high levels of stock. Mr Geel dismissed this explanation without further investigation because:
'This explanation completely contradicts de Sousa's, Diez's and our understanding of TCM's business operations as well as contradicts with the details of maintenance spare balances held from 2007 to 2013 as per the Spares Valuation Reports discussed below.'

[230] Although not pleaded, the topic of maintenance spare parts[142] loomed large at the trial having emerged in the 2013 consolidated summary. Mr Geel and Professor Wainer said that the method of accounting for these adopted in 2013 was incorrect and ignored the relevant provisions of the International Financial Reporting Standards. This was irrelevant because it had no impact on the period from 2008 to 2012 to which the plaintiffs had, through counsel, expressly confined their complaints. At that time and for more than twenty years prior to 2013 the company's practice had been to write the cost of spare parts off as an expense on acquisition. Mr Geel knew this and Luis and Jose did not suggest that they were unaware of that being the practice. It was therefore not prejudicial to their interests as shareholders because there is no unfair prejudice where the shareholders were fully aware of, and did not object to, the practice in question.[143]

[231] Mr Geel's EBITDA analysis was the basis for his suggesting that TCM was poorly managed and that costs were not being properly controlled. His reasoning in his first summary was that the decline in EBITDA, despite an increase in revenue, was due to significant increases in staff costs, management fees and other operating expenses since 2008 and this 'indicated a degree of inefficient management of the operating expenses'. There was no evidence of Andrea intentionally or recklessly failing to control the expenses. Mr Geel expressed the view that 'TCM is significantly worse off than it was in 2008', but that was obviously not the case, nor had TCM suffered 'value erosion and destruction'.

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[142] Maintenance spare parts were spare parts kept in store to enable TCM to undertake maintenance obligations in terms of maintenance agreements with clients, while inventory are parts and machines kept as stock for sale.

[143] Blackman, op cit, fn 52, 9-41 (RS 3) sv 'Applicant cannot complain of conduct to which he acquiesced or in which he participated.' See the cases in fn 138 ante.

[232] Mr Geel based this evidence on his comparison of TCM's performance with that of three JSE listed technology companies that he referred to as CoCos (Comparative Companies). His conclusion was that TCM's performance was 'contrary to the performance of the other CoCos over this same period where they have shown growth'. The appropriateness of these comparisons was challenged because Mr Geel knew nothing about the businesses of the three companies (or TCM) and selectively extracted information from their published accounts to show TCM in a bad light. None of them were competitors of TCM, two were investment holding companies and two derived the bulk of their revenue from outside South Africa, so they were not truly comparable. The criticisms were forcefully and persuasively advanced in the appellants' heads of argument and the plaintiffs' counsel wisely made no endeavour to defend the comparison, or the arguments advanced by Mr Geel in reliance on them.

[233] The basic flaw in Mr Geel's testimony was that he was unable to escape from the fetters of his original mandate of placing a value on TCM because Luis wanted to exit the company and realise the value of his shares. His original report in November 2008 had been drafted with that in mind and it is apparent from reading the reports tendered as expert summaries that his true purpose was to highlight matters that in his view would increase the value of Luis's and Jose's shareholding as a starting point in a negotiation for their shares to be purchased by the company or the other shareholders. There was nothing wrong with his trying to do that when he was looking to help them sell their shares. There was everything wrong in his continuing with that approach once he became an expert witness in the trial. In a revealing comment in evidence in chief he said:

'In the view of Professor Harvey Wainer and myself, the extent of the profits recorded in the financial statement directly affects the valuation of the shares.'

His evidence and the documents shows that this mindset never changed and it explains much of the superfluous material in Mr Geel's reports and his evidence. The plaintiffs were seeking to have their co-shareholders purchase their shares and wished to maximise the price. Influenced by the fact that he was acting on a contingency fee basis, Mr Geel had a similar interest.

Conclusion

[234] No matter how widely Mr Geel cast his net it did not support the three grounds pleaded in support of a contention that Andrea and his co-directors had acted with a lack of probity in regard to these matters. Accordingly, the fourth alleged source of unfair prejudice also fails.

Favourable treatment of Iqbal

[235] The pleadings identified three issues in regard to Iqbal as supporting a claim of unfair prejudice in relation to Andrea's treatment of him. The first was the endeavour to amend the sale of shares agreement with a view to reducing the purchase price he was to pay for his shares and to give him an extension of time within which to pay it. There was no merit in this point as the proposed amendment was blocked by Luis. The second was the conclusion of the retention agreements. The third was the payment of bonuses. These two can be dealt with fairly briefly.

The retention agreements

[236] There were nine of these executed at approximately six monthly intervals from 1 October 2008 until 18 July 2012. Each of them provided for payment to Iqbal at three monthly intervals of an amount of R625 000

styled as a Cash Retention Payment. The first of them was executed by the company after Iqbal had made arrangements and paid Luis and Jose for their shares. The retention agreements provided that if Iqbal left the company's employment during the retention period he would be obliged to repay the retention amount for that period. The particulars of claim described these agreements as a sham which unduly favoured the Trust or Iqbal at the expense of Luis and Jose and the other shareholders.

[237] It is unclear what the plaintiffs meant by saying that the retention agreements were a sham. The judge found that they were simulated transactions, but in what sense is unclear. He said that they were not retention agreements and their true commercial purpose was to assist Iqbal in paying for the shares. That may have been the motive for concluding the agreements, but it did not make them simulated transactions. As explained in *Roshcon*[144] a simulated agreement is a disguised transaction where the parties do not intend it to have effect according to its apparent tenor, that is, the effect which its terms convey. It requires not only a dishonest intention, but also the existence of a different and unexpressed agreement or tacit understanding between the parties that is the 'real' agreement.

[238] What is singularly lacking in this case is any indication of what the 'real' agreements, as opposed to the 'simulated' retention agreements, were. The retention agreements were clear that Iqbal would be paid the amounts specified in return for maintaining his current level of contribution as assessed by Andrea and still being in the employ of the company until three months after the expiry of each period and not have

[144] *Roshcon (Pty) Ltd v Anchor Body Builders CC and Others* [2014] ZASCA 40; 2014 (4) SA 319 (SCA) and the authorities cited there especially *Zandberg v Van Zul* 1910 AD 302 at 309 and *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 at 395-6. .

given notice to terminate that employment, or having had his employment terminated for cause, before that date. If he died the day after receiving a payment his estate would have to repay it. The motive for entering into the agreements may well have been to assist him in paying for the remaining shares he had purchased from Andrea and Tony,[145] but that did not make the agreements other than they appeared to be on the face of it. The fact that someone is employed out of motives of benevolence, or paid more than their services are worth, does not mean that the contract is not one of employment. There was nothing simulated about the retention contracts which were concluded openly and on straightforward terms.

[239] The retention agreements were only concluded after discussion at a board meeting on 9 September 2008. Both Luis and Jose were at the meeting and Iqbal withdrew while the subject was discussed. The reasons for concluding the agreements appear from the minutes of that meeting. The key elements were managing key contracts and for BEE purposes. At the meeting although Luis raised some concerns about the terms of the draft agreements tabled by Andrea, the clauses he raised did not appear in the final agreements. He said that he was happy with the amounts suggested. Jose said that in principle he agreed with it. However Luis voted against the motion and Jose and Iqbal abstained. It passed with the support of the remaining directors.

[240] The judgment said that there was obviously no need to enter into any retention agreement in order to guard against the loss of Iqbal's services. It did so on the basis that there was no evidence that he wished to leave and because he was generously remunerated. It ignored the discussion at the board meeting on 9 September 2008, where genuine

[145] Before any of the retention agreements were concluded Iqbal had paid Luis and Jose for their shares.

concerns were raised about the prospect of losing Iqbal and the impact that would have on the business. Neither Luis not Jose said that these fears were misplaced or that restraint agreements were a sham. Tony raised the question of his age, then nearly seventy, and the need to keep him working. When those contemporaneous discussions are considered, the conclusion that there was no basis for the restraints was not justified.

Bonuses

[241] The pleaded complaint was that Andrea drastically reduced the bonuses to which Luis and Jose were ordinarily entitled with a view to humiliating them and benefitting others in to win their loyalty. The evidence showed that each year a bonus pool was established to cover all bonuses and bonuses were then awarded on the basis of an assessment of performance. In the result annual bonuses fluctuated on the basis of the amount of the bonus pool and the assessment of the individuals concerned of whom there were a number. It is correct that in one or two years Luis and Jose received no or smaller bonuses than others, but beyond their saying that this was victimisation there was no factual basis upon which the court could judge whether the amount of the bonuses had been fairly determined. It was not established that their treatment in regard to bonuses was unfairly prejudicial to them.

TCM's payment of litigation costs

[242] The last pleaded ground of unfairly prejudicial conduct was that Andrea had procured that the funds of TCM were used for the purpose of discharging the legal costs incurred by the defendants in the s 252 application proceedings that were dismissed. This was said to be to the financial detriment of TCM. It was based upon what in the United

Kingdom is referred to as the legal costs principle, described as follows in *Crossmore Electrical*:[146]

'The company is a nominal party to the [unfair prejudice petition], but in substance the dispute is between the two shareholders. It is a general principle of company law that the company's money should not be expended on disputes between the shareholders: see *Pickering v Stevenson* (1872) L.R.14 Eq 322.'

We were not referred to any South African authority on the point but it is endorsed by the authors of Blackman:[147]

'It is a general principle of company law that the company's money should not be expended on disputes between shareholders. The general rule is that the company has no business whatever to be involved in such an application, on the principle that the company's moneys should not be expended on disputes between shareholders and in particular its moneys ought not to be used to defend the majority shareholders in what is essentially a dispute between them and other shareholders. The use of the company's funds by the majority in defending the application is a misuse of the company's funds, confers a distinct financial advantage on the majority, and prejudices and discriminates against the applicant; it is both unfair and infringes the basic principle that the powers and funds of a company may be used only for the purposes of the company.' (Footnotes omitted.)

[243] The principle is well-established in England and in many such petitions in that jurisdiction the company is not even joined to the proceedings. In the absence of an undertaking to be personally responsible for the legal costs the majority shareholders may be restrained by an injunction from causing the company to incur expenditure on legal or professional services for the purposes of the petition or any other aspect of the dispute,[148] including a counterclaim by the company at the

[146] *Re Crossmore Electrical and Civil Engineering Ltd* [1989] BCLC 137 (Ch D) at 138.
[147] Blackman, op cit, fn 52, 9-54 (RS 2).
[148] *Gott v Hauge* [2020] EWHC 1473 para 53.

instance of the majority shareholders. The following summary of the application of the principle in *Koza*[149] is apposite. It reads:

'It is clear from these judgments that, whatever the procedural context in which the issue arises, the court is concerned to identify the true substance of the proceedings and that which constitutes the real contest. If the real contest is between parties other than the company itself, it will be a misfeasance for the company's directors to cause its funds to be expended on the legal costs of that contest. That does not of course mean to say that there may not be some legal expenditure which it is proper for the company itself to incur in the context of a shareholders' dispute. The incurring of legal costs in relation to the company's obligation as a party to give disclosure is one such example. There will be others, but they are limited to those aspects of the dispute in respect of which the company has its own independent interest to protect.'

[244] In general the principle is a sound one and unless the company will be affected by the relief sought in an unfair prejudice case it will probably be unnecessary for it to be joined. If the implementation of any order made will require the company's co-operation, or the company is directly affected, for example, where a buy-out is sought against the company itself, it must be joined. However, that does not mean that the company should enter the lists or bear the costs of defending the unfair prejudice claim. That will remain a dispute between the shareholders in which it is not and should not be a contestant. It may incur and pay costs on certain matters where its own interests are at stake, for example over matters of disclosure or whether the terms of the relief being sought are appropriate.

[245] Matters become complicated where the joinder of the company is pursuant to a claim for substantive relief against it. That was the case in

[149] *Koza Ltd v Koza Altin Işletmeleri AS* [2021] EWHC 786 (CH) para 66.

the s 252 application and is the case here. In that situation, the assumption made in the high court that the company is purely a nominal defendant and should not be incurring any costs in defending the action is unduly facile. That assumption was reflected in the findings on the merits in this action and the various costs orders made by the high court. An order that the company buy back shares will affect it because compliance may place an undue strain on its resources to the actual or potential detriment of its creditors. It may even threaten the viability of the company. Although it might have no interest in whether the minority shareholder has been subjected to unfair prejudice, it would be directly affected by an order to purchase their shares. How the company should respond in that situation will depend on the facts of the particular case. Prima facie it should not bear all the costs of defending the s 252 claim, but it is entitled to resist the relief claimed against it. Where the allegations by the disaffected shareholder impinge on the company directly, for example, where it is contended that its accounts are not a true reflection of its business or that it is engaged in fraudulent trading, there may be a need for it to defend its business reputation. If left unchallenged, such allegations might have potentially disastrous consequences for the business, leading to its bankers withdrawing support or its suppliers refusing it credit.

[246] Deciding on the proper approach for the company to adopt introduces the possibility of a conflict between the personal interests of the majority shareholders and the interests of the company. One cannot resolve these potential complexities by adopting an *a fortiori* rule that in all instances it is improper for the company against which relief is sought to resist that claim on its merits and incur costs in doing so. I do not agree with the English case cited in paragraph 314 of the High Court's judgment that there is a 'heavy onus' on the company to justify such

expenditure. That is judicial hyperbole. The simpler approach is to ask whether on the evidence the company's funds were properly expended in its own interests.

[247] The complaint in the pleaded case was that TCM paid the costs of opposing the s 252 application.[150] That application was dismissed on the basis that once the answering affidavit was delivered it was apparent that there was an irresoluble dispute of fact on the papers. The court ordered each party to bear its own costs up to the date of filing of that affidavit and ordered Luis and Jose to pay the costs thereafter. The costs to which the complaint related were therefore those incurred by TCM up to and including the filing of that affidavit and the attorney and client component of the costs after that date. We were not informed as to the amounts involved but, even if it is assumed that procuring that the company pay these costs was unfairly prejudicial to Luis and Jose, the remedy would not be a buy-out order. The obvious order, if the majority shareholders improperly arranged for the company to expend its funds defending a claim brought against them by an aggrieved minority shareholder, would be one that compelled the majority to reimburse the company for the funds improperly expended, not an order that TCM purchase the shares of Luis and Jose for a consideration of R160 million or such other amount as the court might determine as the fair value of their shares.

[150] The judgment dealt with the matter as if the complaint extended to the costs of the present action, but that was not the pleaded case. If the company paying the costs of defending the action were to be considered the court needed to take into account that Luis and Jose did not bring proceedings to prevent it from doing so and that the s 163 application was directed not at stopping this but at procuring that TCM pay their legal costs as well.

Jose's claim

[248] Insofar as Jose's claim ran in parallel to and was based on the same grounds as that of Luis there is no need to say anything further. It was distinct in that prior to 2004 his status as a shareholder was no more than a *spes* and he was not a director at all. He may have had an expectation of being made a shareholder but that expectation was satisfied when he and Tony received 10% stakes from Luis and Andrea at around the time of the BEE deal with Iqbal. From 2004 onwards he could hardly lay claim to having an expectation of being a director, because his appointment to that role was dependent on Luis nominating him for that position. As to his expectations of participation in the day to day management of the business that was dependent on his continued employment and subject to the qualification of there being no legitimate grounds for the termination of that employment.

[249] Given those limited expectations the difficulty facing Jose was that he was still working for TCM in 2009, when the s 252 application was brought; in 2010 when the present action was commenced; and even in 2012 when this action first came to trial. He had not been excluded from the company as an employee and remained an executive director, who actively participated in board meetings. The treatment of which he complained in his evidence was treatment that affected him as an employee, but not as a shareholder. Whether it would have given rise to a claim before the appropriate labour tribunals is neither here nor there. It did not give rise to him suffering any unfair prejudice in his capacity as a shareholder. That is no doubt why the attempt was made in 2013 to expand the scope of the case in order to include within it the circumstances leading up to the termination of his employment. But the

application for an amendment was withdrawn and counsel for Jose nailed his colours to the mast of the period specified in the pleadings, that is, the period up until 2012. As with virtually all of his objections, counsel's objection to Jose giving evidence about the circumstances leading up to his dismissal was rejected, but it should have been upheld.

[250] For those reasons Jose's case had to stand or fall with the case advanced on behalf of Luis based on issues other than Luis's exclusion from employment and participation in the day to day management and operations of the business.

Conclusion on unfair prejudice

[251] The plaintiffs' case that the affairs of the company had been conducted, principally by Andrea, in a manner that was unfairly prejudicial, unjust or inequitable to them was not established. Section 252 does not confer a right to exit a company on the grounds of a breakdown in the relationship between or among the shareholders, or to demand that the remaining shareholders make a reasonable offer to acquire the shares of the disaffected shareholder. Accordingly, the failure to negotiate terms to enable Luis and Jose to exit and realise the value of their shares was not unfair prejudice, as it was not coupled with prior unfair prejudice that they had suffered on some other basis. TCM ceased to be a small domestic company managed by its founders in a manner akin to a partnership. It became a very large company that for essential business reasons changed its shareholding structure in 2004 and regulated that structure in a formal fashion through the terms of the sale of shares agreement and, in particular, the shareholders agreement. As a consequence of those changes, to which both Luis and Jose were parties, they did not have a legitimate expectation of continued employment and

status. As that formed the basis for their main argument that they had suffered unfair prejudice by being excluded from participation in the day to day management of the operations of the company their main argument had to fail. Luis did not show that his dismissal was unfair and gave rise to unfair prejudice in his capacity as a shareholder. That disposed of the second basis for the claim. The claim based on a refusal to negotiate terms for their withdrawal in the absence of other unfair prejudice was legally unsound. Lastly the claim that Andrea conducted the affairs of the company or treated the plaintiffs in a manner that showed a lack of probity and constituted unfair prejudice to them in their capacity as shareholders was not established on the facts.

[252] Mindful of the risks in classifying a s 252 claim into categories and dealing with those categories as discrete claims, instead of treating the claim as a single claim consisting of different elements and arising from a number of separate events, I have considered whether there is any basis for taking the events that have been proved and viewing them collectively to see whether they show that the plaintiffs suffered unfair prejudice. There are two reasons why that must result in a negative answer. The first is that it was for the plaintiffs to identify the course of conduct which was unfairly prejudicial to them and they have not done so. Their case consisted of an unconnected series of events on which they have tried to project a deliberate pattern of behaviour by Andrea designed to force them out of the company. Whether those events were taken individually or collectively they did not establish that. The second reason is that this is not how they presented their case. That rested firmly on the proposition that this was a small domestic company of the nature of a partnership between Luis and Andrea giving rise to Luis having certain legitimate expectations concerning his role in TCM. Once that foundation was not

established, the remaining elements of unfair dismissal and failure to make an offer or enter into reasonable negotiations to enable their exit fell away.

[253] The appeal must accordingly succeed on its merits. The high court's order must be set aside and appropriate orders made in relation to the costs of the action. However, before dealing with those it is necessary to say something about the order granted by the high court and then to deal with the fair trial issue.

The high court's order

[254] The high court ordered TCM to purchase the shares of the plaintiffs and to take transfer of them at a purchase consideration to be determined by a referee 'of the nature of and akin to' a referee appointed in terms of s19*bis* of the Supreme Court Act 59 of 1959.[151] It gave directions as to the basis upon which the referee was to determine the value of the plaintiffs' shares. It then dealt with the costs of the action and the reserved costs of the s 163 application and the associated application for recusal; the wasted costs of the postponement of the trial on 2 October 2012; and the costs relating to the withdrawn application for leave to appeal and the application in terms of rule 35(3) brought on 4 December 2015. The appeal's success means that the order must be set aside, but the following comments are made for the guidance of courts seized with matters of this kind in the future.

[255] Before making a buy-out order against TCM the high court needed to consider whether any unfair prejudice suffered by the plaintiffs had

[151] The reference to the 1959 Act was presumably dictated by s 52 of the Superior Courts Act 10 of 2013.

been resolved by the two offers TCM made to purchase Luis and Jose's shares and, if not, whether it was in a position to determine the appropriateness, of making such an order against TCM. Both needed to be considered against the background that it had been agreed and ordered that the issue of the value of the plaintiffs' shares would be separated from the remaining issues in the case.

[256] Under the heading: 'Where the prejudice lies' the judgment held that the defendants had not made a fair or proper offer to purchase Luis and Jose's shares. Two offers were made in the course of the litigation. The first was one of approximately R54 million on 3 December 2014, accompanied by a valuation from Grant Thornton, the company's auditors. The second was made on 17 February 2016, accompanied by a further valuation from the same firm, of R50 094 000 for Luis's shares and R11 037 000 for Jose's shares. The judge said the first offer was suggestive of an absence of bona fides by Andrea and that he found it hard to accept that the second offer was a genuine, valid and bona fide offer. On that basis he concluded that Andrea and the other shareholders failed or refused to engage in *bona fide* discussions or negotiations with the aim of permitting Luis and Jose to dispose of their shares at a fair value.

[257] As the value of the shares was by agreement not before him, the judge was in no position to assess whether either offer was a fair offer in regard to amount and payment. Insofar as curing unfair prejudice was concerned that was the primary question. As both offers were substantial and supported by valuations from the auditors,[152] whether they were fair offers could only be decided once the value of the shares had been

[152] Not the auditors whose work attracted criticism from Mr Geel.

assessed. The plaintiffs' attorneys said that the first offer was a genuine offer, but no reasons were given for allowing it to lapse. Nor was Grant Thornton's valuation criticised. It appears to have been prepared on a similar basis to those of Mr Geel and his team from KPMG. The second offer came at a very late stage of the proceedings on 17 February 2016, giving a short period for acceptance, which the judge said was inadequate. He therefore concluded that it was not a genuine and bona fide offer. It is a novel proposition that, because an offer is made at a late stage of proceedings, it is not to be regarded as genuine and bona fide. Had it been accepted it would not have been so characterised. Also the judge refused to receive the valuation on which the offer was based so could not assess whether it was genuine.

[258] Insofar as the appropriateness of making a buy-out order against TCM was concerned the high court needed to consider the impact of such an order on the company, but it was not in a position to do so because by agreement it had not received any evidence in regard to the value of the shares. It was accordingly not possible to determine whether the company was in a position to pay the indeterminate amount that was to be determined by the referee. If payment of that amount would seriously damage TCM's finances or its commercial viability, there was no mechanism for addressing and revisiting that question. The horse of TCM's obligation to purchase the shares would already have bolted and as the referee was appointed as an expert not an arbitrator the scope of any challenge to the determination was limited.[153]

[153] The judge referred to his majority judgment in *Perdikis v Jamieson* 2002 (6) SA 356 (W) para 5. This reference was unaffected by the Supreme Court of Appeal overruling the majority judgment on the point in issue in that case in *Tamilram v Trustee, Lukamber Trust and Another* [2021] ZASCA 173; 2022 (2) SA 436 (SCA) para 15.

[259] This had implications going beyond the shareholder dispute. The purpose of a buy-out order is not to bring the company to its knees. It is to remedy the unfair prejudice by enabling the disaffected shareholders to leave and realise their investment. The remedy is a broad equitable one. Considering its impact on the company, its employees, creditors and customers was essential in determining what should be made. While Mrs Oberem might not have had a direct and substantial interest in the outcome of the case, she had a more general interest in whether all of Luis's shares were sold or whether half were preserved to be transferred to her as part of the liquidation of the joint estate. Over a thousand employees were interested in the future of their jobs. A number of extremely large nationwide businesses were dependent upon TCM's maintenance services. There is also the concerning factor that the order fixed the date of valuation as the date of the judgment, that is, 31 March 2017. That was eight years after Luis had been dismissed and four years since Jose had resigned. The figures we have, which do not take the picture up to the date of judgment, show that this was a period of substantial growth of the company. The court needed to consider whether the plaintiffs were entitled to benefit from any increase in the value of the shares during the period when they had no involvement in the operations of the company. It could not do that in the light of the fact that the valuation of the shares and the date upon which such valuation was to be made were not before the court. Had it been appropriate for it to make an order, and the respondents had pursued their claim for a buy-out order against TCM, the court should have confined its order to declaratory relief in regard to its finding that there had been unfairly prejudicial conduct in terms of s 252.

Fair trial issues

[260] At the outset, counsel for the applicants raised various issues relating to the fairness of the trial. He indicated, however, that the applicants preferred the case to be decided on the merits, because, if the fair trial points succeeded, that would result in a remittal to the court below for the trial to commence anew – a prospect that no one relished. The fair trial points concerned some unfortunate interchanges between the judge and leading counsel for the defendants; interventions in, and the imposition of deadlines on, the cross-examination of witnesses; and restrictions on both the subject-matter of evidence[154] and cross-examination.

[261] The fairness of a trial is distinct from any question of bias although the two may overlap. No issue of bias was raised in this case. The difference between the two is that whether a trial was fair is a matter of objective judicial assessment, while possible bias is assessed through the eyes of the notional fair-minded and informed observer. A trial is unfair where judicial conduct disrupts the presentation of the case on one side or otherwise prevents the court from properly appraising the case on its merits. That is what is said to have occurred in this case.

[262] A preliminary question facing us was whether we were obliged, irrespective of our view of the merits, to determine the fair trial issues. The Supreme Court in the United Kingdom addressed the question in

[154] A key issue was Luis's allegation that he was unfairly dismissed. He was reluctant to permit cross-examination arising from the record of evidence in the CCMA hearing. When counsel told him that, if the fairness of the dismissal remained in issue, he would need to call all eleven witnesses who had given evidence in those proceedings unless it could be agreed that the record of that evidence should stand as evidence in the trial, the judge responded without argument that he would not permit that to happen.

Serrafin v Malkiewicz,[155] where the unfairness was directed at the claimant, a litigant in person. Lord Wilson said;

'What should flow from a conclusion that a trial was unfair? In logic, the order has to be for a complete retrial. As Denning LJ said in the *Jones*[156] case …

> "No cause is lost until the judge has found it so, and he cannot find it without a fair trial, nor can we affirm it.'

Lord Reed observed during the hearing that a judgment which results from an unfair trial is written in water.'

[263] This is the converse situation, where the allegation of unfairness is made by the defendants and the plaintiffs assert that the trial was fair. In that situation I think that the court is not bound to make a final determination of the question, and it may tailor its response to the unfairness to suit the circumstances. In *Hamman v Moolman* this court held that it could deal with the case on the information before it, but affording the factual findings of the judge less weight than would normally be given to the findings of a trial judge and a similar approach has been taken in some other cases.[157] In this case we were firmly of the view after the hearing that the appeal had to succeed on its merits. The plaintiffs said that the trial was fair, so there can be no prejudice to them in deciding the case on its merits.

[264] It is desirable nonetheless to make a limited number of observations for the guidance of judges who have to deal with long and

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[155] *Serrafin v Malkiewicz and others* [2020] UKSC 23 para 49.

[156] *Jones v National Coal Board* [1957] 2 All ER 155 (CA). This has been cited with approval in a number of decisions of this court, eg *S v Cele* 1965 (1) SA 82 (A); *Hamman v Moolman* 1968 (4) SA 340 (A); *S v Rall* 1982 (1) SA 828 (A) and the Constitutional Court, albeit in a slightly different context viz *S v Basson* 2007 (3) SA 582 (CC) para 33.

[157] In that case the alleged unfairness was directed at the defendant. The court overturned the judgment in favour of the plaintiff and dismissed the claim. In *Solomon and Another NNO v De Waal* 1972 (1) SA 575 (A) the judge's interventions were hostile to the plaintiff's case. The court found that as demeanour of the witnesses was not a key aspect of their credibility, the case could be decided and the appeal upheld on the written record. I have reservations whether it would now be accepted that the court could on its reading of the record uphold the trial court's judgment as occurred in *Rondalia Versekeringskorporasie van SA Bpk v Lira* 1971 (2) SA 586 (A).

complex matters such as this. In more leisurely times courts, while not acting as 'silent umpires' to use Lord Denning's expression, were more inclined to leave the conduct of the case to counsel and to limit interventions to elucidating evidence, making procedural rulings and rulings on admissibility, and preventing long-winded and unnecessary evidence in chief or abusive or repetitive cross-examination. With courts under far greater pressure than in the past, a more active case management role is expected of the judge. The Constitutional Court in *S v Basson*[158] approved the following statement by Harms JA in this court, that:[159]

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

[265] In a trial of the length of this one, with copious documents and a good deal of technical evidence on financial matters, the task of the judge is an onerous one. A balancing act is required because 'there is a thin dividing line between managing a trial and getting involved in the fray'.[160] It is inevitable that on occasions the participants, including the judge, will show signs of stress and impatience, but greater restraint in expressing their feelings is required of judges. The stresses imposed upon the judge when the emotions of the parties run high as they did in this case are particularly great. At one stage the judge described it as a war and counsel for the plaintiffs said that it was a most unpleasant trial. The

[158] *S v Basson*, op cit, fn 156, para 33.
[159] *Take and Save Trading CC and Others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) para 3.
[160] Ibid, para 4.

task of the judge in that situation is onerous and unenviable. I emphasise two matters. Judicial tolerance of the technique of cross-examination adopted by the cross-examiner is essential. Some cross-examiners are pithy, quick and to the point, focussing on the relevant and ignoring the dross. They are few and far between. Many cross-examinations are long and tedious and much of the content may seem to the judge of little relevance. But extreme patience is called for and intervention is only warranted where it is necessary to elucidate a point, or where it is clear that the questions are irrelevant or repetitious.[161] Where the intervention takes place at a late stage and involves the imposition of time constraints, the greatest caution is called for, in order to ensure that the cross-examiner may complete their task and cover the appropriate material required for a proper discharge of their duty towards their client.[162]

[266] The second point is the need to be particularly careful to avoid giving the impression of favouring a particular view of the qualities of a witness, or the relevance or merits of an issue, and allowing this to influence the approach to the conduct of the case. It is inevitable that judges form prima facie views, sometimes strong prima facie views, about issues in a case. Nonetheless, they must be careful not to allow those views to affect the conduct of the trial in a way that unfairly prevents the one party from fully presenting their case. Whether their prima facie views are correct can only be determined when every relevant witness has testified in full and the judge has heard the arguments on both side. The danger is that, when prima facie views are given effect during the running of the trial, they may affect the one party's ability to present its case fully. That is when unfairness occurs even when it is unintended.

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[161] *S v Cele* 1965 (1) SA 82 (A).
[162] C/f *SAP SE v Systems Applications Consultants (Pty) Ltd and Another* [2024] ZASCA 26 paras 23-29.

For that reason it is often wise to reserve decisions having final effect, such as costs orders, until the end of the trial.

[267] Only a few comments are necessary on the issues giving rise to the fair trial complaint. The first is that the reported judgment ascribes the delays in the case to a deliberate endeavour to delay the proceedings, the fault being laid at the door of leading counsel and Andrea. In fairness to both of them, while they were by no means blameless in relation to the protracted and diffuse course that the trial took, laying all the blame on them was unjustified. The expansion of the issues; uncooperative witnesses; repeated inconclusive judicial interventions and the debates that followed; the s163 application; and Mrs Oberem's participation; all contributed substantially to the pedestrian progress of the case. None of the protagonists was free from responsibility for the delays that beset the trial.

[268] The primary complaint related to the judge's decision to curtail the cross-examination of both Mr Geel and Luis. In the case of Luis that precluded counsel from asking questions on matters that were undoubtedly pertinent to the decision in the case. Prima facie that was an irregularity in accordance with the principle expressed in the following terms by Schreiner JA:[163]

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

There is no doubting the judge's right to curtail cross-examination where it is repetitive, irrelevant or an attack on the witness's credibility on

[163] *Distillers Korporasie (SA) Bpk v Kotze* 1956 (1) SA 357 (A) at 361H.

collateral issues, but it is a power to be exercised with great caution. As this court stressed in *Cele*,[164] in view of the important role that cross-examination plays in our system of evidence, any decision by a judge to curb its exercise, by disallowing questions or restricting the time allowed for that purpose, must be approached with patience and discernment. An important consideration will be whether similar constraints were placed upon counsel for the other party so as to avoid the impression of disparate treatment of the two sides of the case, and the stage that has been reached in the cross-examination when the restriction is imposed.

[269] As regards the unfortunate exchanges between the judge and leading counsel it would have been better had they not occurred. We fully understand the frustration that the trial judge must have felt in this case in the light of his perception that it was being dragged out and unduly delayed and the obdurate approach adopted by counsel to every aspect of the case. Nonetheless exchanges between the judge and counsel may have an impact on the lay litigants and judges must be alert to avoid any impression that their personal feelings about counsel and the manner in which counsel is conducting the trial are influencing their ability to consider and weigh the issues in a dispassionate and impartial way. I endorse the sentiment expressed by Ploos van Amstel J that:[165]

'It is important that presiding officers treat legal representatives who appear before them with courtesy and respect. This is part of the right of access to courts which is guaranteed in our Constitution. A litigant who sees his legal representative being treated with disrespect by a presiding officer may well feel that he is not getting a fair hearing or form the perception that the presiding officer is not as impartial as she should be. This has the potential to erode the confidence of the public in our courts. There are very few problems in court that cannot be dealt with firmly but politely.'

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[164] *S v Cele*, *op cit*, fn 161, at 91B-G.
[165] *Absa I-Direct Ltd v Lazarus NO and Another*, op cit, fn 244 para 9.

[270] Despite any deficiencies there may have been in the conduct of the trial it is nonetheless possible for us to reach a clear conclusion and determine the appeal on the merits, as requested by the appellants' counsel, without making a finding on the fair trial issue. That seems to us desirable. The parties would prefer a decision on the merits and given the passage of time it is in the interests of justice that this dispute be brought to a conclusion without the expenditure of further judicial resources upon it. I accordingly refrain from saying anything further on the issue.

Costs

[271] The costs of the appeal and the trial must follow the result. They should include the costs of two counsel. There are however separate appeals in relation to certain costs orders made by the trial court in the course of the proceedings. In each case the second to fifth appellants were ordered to pay costs jointly and severally, the one paying the others to be absolved, on the scale as between attorney and client. I will deal with each in turn. Fortunately I can be brief because the judgment dealt with two of these orders in a single paragraph containing no reasons and the third order was mentioned in one brief paragraph. All three orders were clearly founded on the judge's view that the defendants' approach to the litigation had been obstructive and that there was no merit in their opposition to the claim. As that has been held to be mistaken the costs orders must be revisited.

[272] The first related to the adjournment of the trial in October 2012 when it was first set down. The case had been set down for ten days and the parties said that they were unable to give the Deputy Judge President an assurance that it would be finished in that time. He accordingly refused to allocate a judge to hear the matter as it would become part-

heard. An attempt by the defendants to have a judge allocated to deal with an argument that the delay was occasioned by the failure to deliver a summary in respect of the evidence of Professor Wainer was rebuffed by the Deputy Judge President. Where costs are incurred and wasted in that situation the trial court does not ordinarily waste further judicial time investigating in granular detail the causes of, or responsibility for, the adjournment. The parties had underestimated the time taken to complete the trial and given the length of time it in fact took the Deputy Judge President was clearly justified in refusing to allow it to commence. The wasted costs occasioned by the adjournment should be costs in the cause.

[273] The second set of costs were those attendant upon the application to amend the particulars of claim dated 9 December 2013 and the Rule 35(3) notice dated 4 December 2015. The application for amendment was withdrawn and the Rule 35(3) notice was not pursued. I can see no justification for requiring the defendants to pay these costs. The plaintiffs should be ordered to pay them jointly and severally, the one paying the other to be absolved, including the costs of two counsel.

[274] The third set of costs related to the s 163 application brought by Luis and ultimately not pursued further, notwithstanding defendants' counsel expressing concern on various occasions that it would be resuscitated. That application led to the defendants seeking the judge's recusal from hearing that application, but not the trial itself. Recusal was apparently argued extensively[166] over two days. We did not receive detailed argument on the merits of either application. Having read both, each had their strengths and weaknesses.

[166] The record of the argument was not included in the record on appeal, but reference to the portion of the transcript excluded from the record shows that it ran to nearly 200 pages over two days of argument leaving aside the procedural issues that were debated before the argument.

[275] On the s 163 application this judgment has already held that the judge was correct in his conclusion that the company was obliged to pay the dividend to Luis and not to Mrs Oberem. Whether TCM was wrong to withhold payment and issue an interpleader notice was, as the judge said, an interesting question. It became an academic question when Luis and Mrs Oberem settled the issue and I see no good reason to revive it. Whether success on that question would have translated into success in the s 163 application was another matter altogether. The judgment says that the launch of the application was both necessary and reasonable and the relief sought therein justified. I have doubts in regard to the first two propositions and considerable reservations about the court's power to grant the relief sought. The glaring problem confronting the application was that it was brought under the equivalent of s 252 in the 2008 Act, seeking an order that TCM pay Luis and Jose's costs of the litigation. Part of the plaintiffs' case in this action was that it was improper for the company to expend its funds on a dispute among the shareholders. That is a general principle that is endorsed in this judgment, but then the old adage that what is sauce for the goose is sauce for the gander comes to mind. If it was wrong for the defendants to cause the company to expend its funds in a dispute with the minority shareholders, I fail to see on what basis it was proper to ask the court to compound the impropriety by making the company pay the minority shareholders' costs as well. The remedy was to stop the majority from abusing their position by way of an interdict, joined with an order to repay TCM any costs that should not have been paid from its resources.

[276] Insofar as the recusal application was concerned the judge had made two orders for costs against Andrea, Tony and the Trust, but not TCM. In each instance he rejected submissions that he should reserve the costs as it was inappropriate for him to determine whether TCM was purely a nominal defendant at that stage. This judgment holds that he was incorrect in the view that TCM was a nominal defendant in the light of the substantial relief sought against TCM. The point of the recusal application was that he was being asked in the s163 application to rule that, because TCM was a nominal defendant, it had improperly been funding the other defendants' defence to the s 252 application and this action. Because of the strong views he had already expressed on the 'nominal defendant' point, it was submitted that he should recuse himself. Luis had deposed to an affidavit in which he said that those strong views were a reason why it was particularly appropriate for him to deal with the s 163 application. Against that background it cannot be said that a careful lawyer could not reasonably have advised the defendants to bring the recusal application. But that does not mean that it would have succeeded. If as contended the judge had effectively pre-empted the decision in respect of one of the grounds of unfair prejudice, there may have been merit in the judge's response that an application for recusal would need to encompass the trial as well as the s 163 application.

[277] Accordingly, the outcome of these two applications was neither clear nor inevitable. These were interlocutory issues raised in the middle of a lengthy trial. In the absence of full argument it seems undesirable to determine either issue definitively in these proceedings. The order of the trial court cannot stand because of the misdirections on which it was based. The fair order to be made at this stage is that each party should bear their or its own costs in relation to both applications.

The order

[278] In the result it is ordered that:

1 The application by the intervening applicant for conditional leave to intervene is dismissed and the intervening applicant is ordered to pay the costs of opposition by the first and second respondents in the main application, such costs to include the costs of one counsel.

2 The application for leave to appeal is upheld with costs, such costs to include the costs of the application for leave to appeal before the high court and the costs of two counsel.

3 The appeal is upheld with costs, including the costs of two counsel and the judgment of the High Court is altered to read as follows:

(a) The plaintiffs' claim is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

(b) The costs of the adjournment on 2 October 2012 including the costs consequent upon the employment of two counsel are to be costs in the cause in the action.

(c) The plaintiffs are ordered jointly and severally, the one paying the other to be absolved, to pay the costs of the application to amend the particulars of claim dated 9 December 2013 and the costs of the application in terms of Rule 35(3) dated 4 December 2015, such costs to include those consequent upon the employment of two counsel.

(d) Each party is to bear his or its costs of the application in terms of s 163 of the Companies Act 71 of 2008 and in respect of the recusal application by the first applicant.

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M J D WALLIS

ACTING JUDGE OF APPEAL

Appearances

For applicants:	Ian Green SC (with him P Cirone)
Instructed by:	Roy Stoler Attorneys, Sandton;
	Honey Attorneys, Bloemfontein
For respondents:	A Subel SC (with him B M Slon)
Instructed by:	Amanda Martin Attorneys, Sandton;
	Matsepes Inc, Bloemfontein.
For intervening party:	K J van Huyssteen (Attorney);
	Fluxmans Inc,
	Sandton.