



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
_____	_____
DATE	SIGNATURE

CASE NUMBER: 88160/19

DATE: 24 March 2022

BEN COETZEE BESTER

First Applicant

(Identity number: [...])

(In his personal capacity and in his capacity as trustee
for the time being of the Bester Roodeplaat 44 Trust)

MARTINUS MURRAY BESTER N.O.

Second Applicant

(Identity number: [...])

(In his capacity as trustee for the time being
of the Bester Roodeplaat 44 Trust)

JOHANNES BAREND BESTER N.O.

Third Applicant

(Identity number: [...])

(In his capacity as trustee for the time being
of the Bester Roodeplaat 44 Trust)

RIAAN BESTER N.O.

Fourth Applicant

(Identity number: [...])

(In his capacity as trustee for the time being
of the Bester Roodeplaat 44 Trust)

BEN COETZEE BESTER N.O.

Fifth Applicant

(Identity number: [...])

(In his capacity as trustee for the time being
of the Bester Roodeplaat 44 Trust)

LEBRA DEVELOPMENT (PTY) LTD

First Respondent

(Registration number: 2003/006588/07)

HENDRIK CHRISTOFFEL BOTHA

Second Respondent

(Identity number: [...])

(In his personal capacity and in his capacity as trustee
for the time being of the Canaan Family Trust)

LISBETH JOHANNA LOUISA BOTHA

Third Respondent

(Identity number: [...])

(In her personal capacity and in his capacity as trustee
for the time being of the Canaan Family Trust)

GERHARDUS PETRUS VAN DER WESTHUIZEN

Fourth Respondent

(Identity number: [...])

MAGDALENA JULYA GEYSER

Fifth Respondent

(Identity number: [...])

JUDGMENT

KOOVERJIE J

- [1] This is an application in terms of section 163 of the Companies Act ('the 2008 Act'). The application was instituted by the first applicant in his position as director and second to the fifth applicants being the trustees of the Bester Roodeplaat Trust 44 ("the Trust") representing the shareholders.
- [2] In terms of prayer 1 of the notice of motion, the first applicant, in his capacity as director of the first applicant, Lebra Development, requested certain information to be made available to him; and
- [3] those prayers set out in prayer 2 of the notice of motion, where the first to fifth applicants sought for an order that a forensic audit be conducted in respect of Lebra Development and that the Bester Roodeplaat 44 Trust's minority shareholding be bought out at fair value, (as determined by an independent chartered accountant).
- [4] For the purposes of this application the main role players are the first applicant, Mr Bester, who was at all relevant times the nominated director of the Trust. The Trust was a minority shareholder in the first respondent ("Lebra"). The second and third respondents, Mr Botha and Mrs Botha, managed the affairs of Lebra.
- [5] The core issue for determination is whether a case has been made by the director and the shareholders of the Bester Roodeplaat Trust in terms of Section 163 of the Companies Act (2008).

CONDONATION

- [6] Both parties sought condonation. The respondents were late in the filing of their answering papers and the applicants with their replying affidavit. Neither party opposed the late responses and each party had proffered explanations for their respective non-timeous filing of their affidavits. Both parties have further indicated that there was no

prejudice to them. I am satisfied with the explanations proffered and find that good cause is shown. Condonation is granted in respect of both affidavits.

THE APPLICATION

[7] Section 163(1) stipulates:

“(1) A shareholder or a director of a company may apply to a court for relief if—

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
or

(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant”.

[8] Furthermore, Section 163(2) stipulates:

“(2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit ...”

[9] Within this context and on the facts I am required to determine whether the conduct of the respondents (as set out in the founding affidavit) is oppressive or unfairly prejudicial and/or unfairly disregarded the interests of the applicants.

[10] The applicants identified the following acts of conduct, as being oppressive and/or unfairly prejudicial to them:

- (i) Mr Bester, in his capacity as director of Lebra, was denied access to financial and other pertinent management information pertaining to Lebra;
- (ii) the second and third respondents utilised the funds from Lebra in order to cover their personal expenses;
- (iii) upon the first applicant requesting information in respect of the finances of Lebra Development and refusing to sign the financial statements of this entity, Mr Bester, as nominated director of the minority shareholder (the Trust), was threatened to be removed as director without any valid reasons;
- (iv) the applicants were excluded from decision-making in respect of Lebra. For instance, Mr Botha made decisions in respect of Lebra without any authorising resolutions and/or notice to Mr Bester. This included the decision to put in place the memorandum of incorporation ("MOI") without making the prior MOI available;
- (v) Lebra Development provided financial assistance to the second and third respondents without complying with section 45 of the Companies Act); and
- (vi) after this application was issued and served on the respondents but not finalised as yet, the respondents proceeded to remove Mr Bester as a director.

BACKGROUND

[11] Lebra was registered on 24 March 2003, and held interests in the development of commercial and residential real estate. It was managed by the second and third respondents since its incorporation.

[12] In 2006, the Bester Roodeplaat Trust (represented by the applicants) purchased its 10% shareholding in Lebra for an amount of R200,000.00.

[13] Subsequently, the first applicant was appointed as a director in Lebra on 1 June 2007.

[14] The issued share capital in Lebra is as follows:

(i) the second respondent – 51%

(ii) the Canaan Family Trust (represented by the second and third respondents) – 39%; and

(iii) the Bester Roodeplaat 44 Trust – 10%.

[15] On 1 November 2010, a resolution was adopted by Lebra's board of directors ("the 2010 Resolution") where the second respondent was authorised to enter into 'agreements' and to sign 'any contract' on behalf of Lebra. Since the adoption of the 2010 resolution, the second applicant entered into various agreements, and signed multiple contracts for and on behalf of Lebra, without any objection by the first applicant.

[16] It appears that the discord between Mr Bester and Mr Botha started around 2018. It was when Mr Botha was in the process of entering certain high risk agreements with a prospective purchaser in respect of certain property held by Lebra (property in the estate of Roodeplaat Eco Estate), the so called Invicta agreements.

[17] Mr Bester argued that Mr Botha failed to provide copies of these proposed agreements when he requested them. He was only furnished therewith after they were signed. Mr Bester further alleged that Mr Botha had no authority to sign such agreements. It was shortly thereafter that Mr Bester began requesting all financial and management information in respect of Lebra Development.

[18] According to the respondents, the relationship became strained when the applicants became persistent in the sale of their minority shareholding.

APPLICANTS' CASE

[19] It is the applicants' case that the conduct of the respondents was prejudicial to the interests of the applicants in that:

- (i) the value of the company was diminished by unauthorised financial assistance and company funds being used for personal expenses; and
- (ii) rights and interests of the applicants were unilaterally removed/diminished by virtue of the MOI, and the removal of Mr Bester as director.

[20] The applicants submitted that the minority shareholders' consent was not obtained in respect of the financial assistance given to the second and third respondents as well as the allocation of R68 million received by Lebra regarding the sale of plot 181, Derdepoort. In particular, the failure to provide proper accounting for the allocation of these funds prejudiced the financial interest of the minority shareholder.

[21] The first applicant's case is premised on the basis that the conduct of specifically the second and third respondents justified the relief sought, in terms of section 163 on either or more of the following grounds, namely that their conduct:

- (i) was oppressive or unfairly prejudicial to or disregarded the applicants' interest in terms of section 163(1)(a) of the 2008 Act;

- (ii) caused the business of Lebra to be carried on or conducted in a manner which is oppressive or unfairly prejudicial or unfairly disregarded the interest of the applicant as envisaged in terms of section 163(1)(b); or
- (iii) caused the powers of the directors of Lebra being or having been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregarded the interest of, the applicants as envisaged in terms of section 163(1)(c) of the 2008 Act.

[22] The particular allegations as set out in the founding papers are as follows:

“23.1 The directors of the first respondent refuse to provide me (in my capacity as director of the first respondent) with pertinent financial and other information in respect of the first respondent (notwithstanding the fact that the third respondent has admitted that funds of the first respondent are being used for personal expenses of the second and third respondents);

23.2 The second and third respondents (in their capacity as shareholders/representatives of the Canaan Family Trust) are attempting, in bad faith, to remove me as a director of the first respondent in order to prevent me from taking steps in order to address the apparent mismanagement and financial irregularities in the first respondent;

23.3 The second and third respondents (in their capacity as directors of the first respondent) have effectively excluded me (and by extension the Roodeplaat Trust) from any participation in respect of the first respondent in that the business of the first respondent is carried on by the second and third respondents without notice to me and/or without obtaining proper board resolutions; and

23.4 The first respondent has provided, and continues to provide, financial assistance to the second and third respondents which is in contravention of sections 45 of the Companies Act.”

Consequently, it was submitted that it was just and equitable that the Trust's shareholding be bought at a fair value.

RESPONDENTS' CASE

- [23] In their papers the respondents allege that no case has been made for relief in terms of section 163. Lebra's financial statements were duly reviewed by its appointed accountants (Logista) since the inception of Lebra.
- [24] The annual financial statements for the year ending 31 March 2017 of Lebra were signed by all of the directors at the time, inclusive of the first applicant. The aforesaid statements were duly compiled and reviewed by Logista. The aforesaid report records that the financial position of Lebra was correctly recorded in all material respects therein.
- [25] On 21 June 2018, a directors' meeting was held between all three directors, inclusive of the first applicant, in terms whereof various matters were discussed, including the third-party agreement concluded on 21 June 2018.
- [26] The aforesaid third-party agreement was concluded by Lebra, duly represented by the second respondent and Roodepark Homeowners Association ("the Roodepark HOA") on 21 June 2018. A resolution was adopted by the Roodeplaat HOA, giving Mr Botha the authority to conclude agreements on behalf of Lebra.

[27] On 6 August 2018, subsequent to the aforesaid meeting, Mr Bester presented a proposal (purportedly on behalf of the Trust) to sell its 10% shareholding in Lebra to the respondents.

[28] The respondents were not in favour of the first applicant's aforesaid proposal in that the proposed valuation of the applicant's shareholding was inflated, coupled with the fact that it included potential future profits which had not at the time yet realised. It was this disagreement that eventually gave rise to the conflict between the parties and eventually this application.

[29] The respondents alleged that thereafter the applicant made unreasonable demands for financial information and questioned the second and third respondents' ability to act in the best interests of Lebra.

[30] It was pointed out that the application was launched not due to oppression, but was rather an attempt to force the sale of the shares of the Trust. In argument, the respondents set out to demonstrate why the applicant's case lacked merit and that no case for section 163 relief was made. In particular, explanation proffered were as follows:

- (i) the withholding financial information in respect of Lebra; and the exclusion of Mr Bester in participating in Lebra's business related to his position as director and not to the shareholders. The issue concerning offering financial assistance to Mr and Mrs Botha (second and third respondents) affected the shareholders;
- (ii) there is no evidence before this court that would illustrate that there was an agreement and/or understanding or an intention between the shareholders of Lebra that the Trust would be entitled to participate in the management affairs of Lebra;

- (iii) further since Mr Bester was removed on 25 November 2019 as director by the majority of the shareholders of Lebra, he no longer had *locus standi* to pursue this application. Mr Bester would only be entitled to information and participate in the management and affairs of the company if he was a director. Consequently, the relief sought in his capacity as director is legally impermissible;
- (iv) on the issue of the loan advancements of Lebra, the respondents pointed out that it was made with the consent of all the directors and shareholders. When loans were effected, Mr Bester was still a director of Lebra and had sight of the 2017 annual financial statements wherein the loans were recorded. At that stage Mr Bester did not object thereto, even if such loans contravened Section 45 of the Companies Act, a case that such conduct was oppressive or unfairly prejudicial has not been made;
- (v) Lebra never amended its constitutional documents. Prior to 22 August 2018 no MOI was in existence. The current MOI was lawfully adopted as a new document;
- (vi) on the issue of forensic audit sought, the respondents argued that the applicants have failed to:
 - (a) provide any evidence that there was financial mismanagement and that a forensic audit is warranted;
 - (b) provide any facts to evidence that Lebra's financial statements cannot or should not be relied upon;
 - (c) explain why a forensic audit, as opposed to an ordinary audit, should be conducted;
 - (d) explain why, given that Lebra's financial statements had been reviewed annually and signed off by Mr Bester, Lebra's financial affairs should still be audited;

- (e) explain why, given that Mr Bester had signed the 2017 annual financial statements, any transactions prior thereto should be subjected to a forensic audit. Furthermore, no explanation is provided as to why the audit has to commence from the 2007 financial year. It is accepted therefore that companies are only required to keep certain information for a certain period of time. As this issue was not addressed in the founding affidavit, it is impossible to determine for what years an audit would still be possible;
- (f) explain why Lebra, who had already paid to have its financial statements reviewed, should be held liable for the very significant costs that will be incurred by a forensic audit.

ANALYSIS

[31] ***Grancy Property Ltd v Manala and Others***¹, is the leading authority wherein the concept “oppressive conduct” was defined in the context of section 163 of the Act. It was stated:

“[22] To determine the meaning of the concept of ‘oppressive’ in s 163 it is apposite to refer to Aspek Pipe Co (Pty) Ltd v Mauerberger 1968 (1) SA 517 (C) which held (at 525H-526E):

‘I turn next to a consideration of what is meant by conduct which is “oppressive”, as that word is used in sec. 111 bis or sec. 210 of the English Act. Many definitions of the word in the context of the section have been laid down in decisions both of our Courts and in England and Scotland and as I feel that a proper appreciation of what was intended by the Legislature in affording relief to shareholders who complain that the affairs of a company are being conducted in a manner “oppressive” to them is basic to the issue

¹ *Grancy Property Ltd v Manala and Others* 2015 (3) SA 313 (SCA).

which presently lies for decision by me, it is necessary to attempt to extract from such definitions a formulation of such intention. “Oppressive” conduct has been defined as “unjust or harsh or tyrannical” . . . or “burdensome, harsh and wrongful” . . . or which “involves at least an element of lack of probity or fair dealing” . . . or “a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely” . . . It will be readily appreciated that these various definitions represent widely divergent concepts of “oppressive” conduct. Conduct which is “tyrannical” is obviously notionally completely different from conduct which is “a violation of the conditions of fair play”. (My emphasis)

[32] “Oppressive conduct” also means burdensome, harsh or wrongful, failure to adhere to the company affairs or to “fair play” on which every shareholder is entitled to rely. ***Marshall & Marshall (Pty) Ltd and Others (1954) 35A 571 (N) at 580.***

[33] A lack of probity means conduct that demonstrates lack of good faith and fair dealing, to the prejudice of some members. A more recent decision of the Supreme Court of Appeal – ***Geffen and Others v Dominquez-Martin and Others [2018] 1 ALL SA 21 (WCC) at par 23*** – upheld the ***Grancy Property*** approach but went on to set out the requirements that have to be met for a section 163 relief. It is clear that relief under section 163 cannot simply be based on vague and generalised allegations. It is necessary to establish:

- (i) the particular act or omission has been committed, or that the affairs of the company are being conducted in the manner alleged;
- (ii) such an act or omission or conduct of the company’s affairs is unfairly prejudicial, unjust or inequitable to the applicants or to some members of the company;

- (iii) the nature of the relief which must be granted to bring an end to the matters of which such is a complaint.

Ultimately, the applicants have to rely on clear evidence in order to invoke the provisions of Section 163 of the Act².

[34] I am mindful that this court is not required to resolve every factual dispute. The core issue for determination is “whether there is a lack of probity and unfair dealing in the affairs of the company which has given rise to the breakdown in the confidence and trust among the shareholders; whether the majority voting power has been abused or unfairly used to the prejudice of the minority shareholders and whether the plaintiffs have been treated by the company in a manner that is unfairly prejudicial, unjust and inequitable”³.
(My emphasis)

[35] The applicants have submitted that it is just and equitable for the relief to be granted. It was argued that its request for information was justified and that its minority shareholding be bought out at fair value. It was emphasized that the applicants only seek a “fair value” for their shares. With the recent developments aimed at excluding the minority shareholder, the disposal of the shares would be the most viable option.

[36] It was argued that although Mr Botha was given authority to enter into agreements on behalf of Lebra by virtue of the 2010 resolution, such resolution did not authorise Mr Botha to enter into agreements without at least disclosing the terms of those agreements to the rest of the directors, more specifically, with regard to the “Invicta Agreements” where Lebra was requested to comment on the said agreements. I have noted Annexure “**BCB4.1**”, which constitutes an email dated 6 August 2018, wherein Mr

² Harilal v Rajman and Others 2017 (2) ALL SA 188 K2D at par 84

³ De Sousa and Another v Technology Corporate Management (Property) Limited and Others 2017(5) SA 577 GJ par 67

Bester addressed his concerns regarding the Invicta contracts, albeit after the agreements were signed.

[37] In fact, I have noted that the respondents' have conceded that the Trust was entitled to have access to the records in terms of section 25 of the Companies Act (**Annexure "BCB5"**). The respondents argued that Mr Bester had sight of the bank statements as well as other information for at least the 2017 and 2018 years before he was removed as a director.

[38] Having considered the papers before me and submissions made by counsel, I am of the view that the conduct of the respondents was unfair and was not in the best interests of the shareholders of the Trust. The exclusion of the minority shareholders in respect of the decision making processes was prejudicial.

[39] No doubt the applicants found themselves in an unenviable situation. They were not only excluded in the decision making of Lebra but have been unable to reach an agreement on the sale of their 10% shareholding.

[40] I must emphasize the relief sought in this application refers to a settlement based on fair value. The reasons for rejecting the proposed offer was that the valuation of the Trust's shareholding was inflated and potential profits taken into account by the applicants had not been realised at the time. It may be so, but the shareholders have not been privy to such figures. The shareholders are surely entitled to such information.

[41] On their own version the respondents conceded that the shareholders are entitled to access to the records in terms of Section 26 of the Companies Act (**Annexure "BCB5"**).

[42] It has also not been disputed that certain personal expenses of the second and third respondents were paid by Lebra. The respondents had confirmed same in their correspondence by stating: *"Daar is ook enkele gering items wat wel nie deel van die*

besigheid is nie en teen Henk se leningsrekening toegedeel is en soos gewoonlik in die finansiële state reflekteer word” (paragraph 81 of the founding affidavit).

[43] The circumstances may also be, as the respondents contended, that there was no mismanagement and/or financial irregularities in Lebra. Irrespective, in my view, the applicants are entitled to financial information from the 2018 financial year. The concerns raised were not farfetched. It was not disputed that the loans were made to both the second and third respondents in amounts of R1,936,546 and R1,560,844 respectively. Mr Bester had in fact requested the resolutions authorizing such loans and same were never furnished. The evidence further reflects that he refused to sign the 2018 financial statements as he was never furnished with the source documents.

[44] Mr Bester had in fact, before the shareholder’s meeting of 26 August 2019, addressed his concerns, and motivated why he sought the financial information and set out a director’s fiduciary responsibility regarding the financial affairs of Lebra. I find it necessary to reiterate same:

“9. Tydens jou en my genoemde gesprek het ek egter gesê dat my eerste verantwoordelikheid is teenoor Lebra binne die direkteurspligte van die maatskappy en om die detail inligting te kry en die finansiële prosesse ten volle te prober verstaan. Daarvoor moet ek toegang hê en kry tot die spesifieke inligting wat nodig is vir die bestuur van die maatskappy, die risikos en alle aspekte van die finansies daarvan. Ek sal dus graag begin om hierdie inligting, wat ek reeds in detail van Henk en Liz per epos op 3 Junie 2019 aangevra het, te kry en deeglik ondersoek alvorens ek met verantwoordelikheid die finansiële state mag en kan aanvaar.

10. Die afwyking van my fokus op die versoek van inligting ten opsigte van Lebra se finansies was om geleentheid te gee vir die onderneming wat in punt 8 van hierdie

skrywe bespreek is. Ten spyte daarvan en op grond van my detail versoeke gedurende die afgelope aantal maande wil ek versoek dat hierdie versoek tot inligting asseblief dringend hanteer word sodat ek toegang het tot die betrokke inligting en state voor die AGM van 28 Augustus 2019. Ek moet dus al die inligting kry en in detail ondersoek. Daarna moet die inligting bespreek word en alle vrae tot my tevredenheid beantwoord word. Die motivering daarvoor is onder andere; (i) die beperkte en gebrekkige toegang wat ek, onder streng voorwaardes, tot dusver tot Lebra se finansiële bestuurinligting en spesifiek die bankstate gehad het; (ii) die gevolge van die verklarings en verantwoordelikhede wat ek (en elkeen van ons) as direkteur moet aanvaar (punt 4 van hierdie skrywe) vir Lebra se ongeouditeerde state, (iii) die spesifieke wyse waarop groot bedrae kontantbetalings sonder deursigtige besluite of volledige inligting in en uit Lebra se bankrekeninge geskuif word en (iv) die skriftelike opmerkings wat kan beteken dat die maatskappy se bankrekening soms vir persoonlike transaksies gebruik word, en (v) die opmerking dat dit nie sinvol is vir al die direksielede om (projek) bestuursvergaderings by te woon nie.

11. Soos ek reeds vantevore per epos aangedui het, sal ek graag so spoedig moontlik toegang tot al die bankstate soos wat ek reeds in die verlede maar spesifiek per epos op 3 June 2019 gelys het, wil kry. Die enkele bankstate wat ek op 24 Julie 2019 kon bestudeer het gelei tot 'n hele aantal kritiese vrae en finansiële- en bestuursbekkernisse wat ek met jou gedeel het. Henk en Liz se epos van 24 Julie 2019 dui aan dat: Daar is ook enkele geringe items wat wel nie deel van die besigheid is nie en teen Henk se leningsrekening toegedeel is en soos gewoonlik in die finansiële state gereflekteer word. Ek sal my graag wil vergewis van die detail van hierdie opmerking en so spoedig moontlik 'n lys met al die betrokke items en bedrae op die bankstate wat ek aangevra het, wil ontvang – dus ook vir die boekjaar van die state wat nou bedoel is om voor Lebra se 2019 AGM te dien.

Daar is dan verder ook ander kritiese vrae wat dalk eerder deur professionele persone geformuleer sal moet word wat waarskynlik sal kan verwys na 'related parties', riglyne vir die vergoeding van lede van die direksie, bestuur en beleid oor direkteure se leningsrekeninge en resolusies vir al die betrokke besluite asook die sake wat ek vantevore met Henk en Liz in die sogenaamde 'critical notes' bespreek het."

[45] It is not disputed that shortly thereafter the respondents took steps to remove Mr Bester as a director. At the shareholders' meeting of 28 August 2019 he was handed the notice for his removal and was effectively removed as director on 25 November 2019. The reasons proffered for his removal were that:

- (i) his continued presence as a director did not benefit Lebra; and
- (ii) he has not made any tangible contribution towards the growth and profitability of Lebra in terms of securing contract revenue through new projects or through sales of existing inventory; and
- (iii) two additional directors had to be appointed.

[46] On the respondent's version, Mr Bester was not acting in the best interest of Lebra. His only interest was to sell the 10% shareholding of the Trust. In my view, it is clear that Mr Bester was becoming difficult to work with, and becoming the "problem child". He had to be removed as director.

[47] In opposing his removal, he made it known that:

"28. In email correspondence dated 6 August 2018, 8 January 2019, 4 April 2019, 3 June 2019 and 24 July 2019, I addressed my concerns to the CEO and the CFO in respect of the following matters, namely:

- 28.1 *the legal matters in which Lebra is involved;*
- 28.2 *my lack of access to the company bank statements resulting in lack of cash flow related responsibilities;*
- 28.3 *historic- and current positions, responsibilities, cash flow and risks of Lebra in relation to HC Botha, LJL Botha, the USA authorities and the South African Reserve Bank as well as the same relationship between Lebra and Gloval Trade House, both prior to and after 2008;*
- 28.4 *the processes and results related to the closing of Lebra Construction CC;*
- 28.5 *the CEO and CFO's timeously or failure to properly respond to my emails;*
- 28.6 *my lack of access to the bank statements of Lebra for the past year and the same since 1 January 2015;*
- 28.7 *the CEO and CFO's failure to record properly the minutes of meetings;*
- 28.8 *the lack of efficient communication (i.e. the CEO and CFO's insistence on using Drop Box despite the fact that manner of communication was utterly ineffective);*
- 28.9 *the position of private investors in the Roodepark Eco Estate, specifically as regard:*
- 28.9.1 *their position in holding second bonds on the Roodepark Ece Estate properties;*
- 28.9.2 *the availability of agreed number of allocated stands in the Roodepark Eco Estate; and*
- 28.9.3 *the calculations of costs and profit share of the private investors in the Roodepark Eco Estate project.*

- 28.10 *the value of Lebra Development (PTY) Ltd shares;*
- 28.11 *the deregistration of a motor vehicle that was registered in the name of Coetzee Bester and again repossessed by Lebra;*
- 28.12 *the inadequate response to my emails requesting the CEO's attention and possible involvement in my focus and work on addressing the future shortage of electricity on Roodepark Eco Estate;*
- 28.13 *information related to 'related parties' of Lebra;*
- 28.14 *requests for information by Reichmans capital / Investec regarding a remediation process on an undeclared R700 000-00 loan in the name of Lebra by the CEO and the CFO;*
- 28.15 *perspectives on the non-response by the CEO on requests for detailed information regarding the possible sale of Lebra shares to a consortium;*
- 28.16 *detailed analysis of the risks involved in the undisclosed detail of the Invicta contract to purchase Roodepark Eco Estate Phase 3A and 3B; and*
- 28.17 *the responsibilities and approval processes of remuneration for Lebra role players..."*

[48] From the various correspondence forming part of the papers, I have also noted Mr Bester remained persistent in concluding the sale of the Trust shares and simultaneously insisted on having detailed insight into the financial affairs of Lebra. It cannot be gainsaid however that as a director and as a shareholder, he was entitled to such information.

[49] It appears that until the "Invicta agreement" debacle, Mr Bester never questioned Mr Botha's capabilities to manage Lebra and sign agreements on its behalf.

[50] On his own version Mr Botha alleged that he has always acted in the best interest of Lebra. This was never disputed by Mr Bester before. In my view, going forward, Mr Botha should have, as part of his ongoing fiduciary undertakings, furnished Mr Bester with the relevant information he sought.

[51] I have further noted that when the Invictus agreements were requested prior to the signing thereof, no valid explanation was proffered as to why Mr Bester was only furnished with the signed agreement two days later. As a director, Mr Bester was entitled thereto even if Mr Botha was delegated to enter into agreements on behalf of Lebra by virtue of the 2010 resolution.

[52] Further I am mindful that the prejudice suffered must be unfair⁴. The test for fairness is objective and the court is required to have regard to the conduct complained as a whole in order to determine if the effect is unfairly prejudicial.

[53] It was alleged that by virtue of the MOI, as a minority shareholder, the Trust is entitled to participate in the affairs of Lebra. However, from the minutes of the meeting, I noted that *“if minority shareholding were critical to us as majority shareholding in terms of decision making (not covered in the MOI) we would have had the requirements for a shareholders’ agreement, which we do not.”*

[54] This demonstrates clearly that the minority shareholder being excluded from the decision making process. Consequently, the result of the respondents’ conduct had a prejudicial effect on the minority shareholders⁵. Such conduct constitutes an encroachment on their interests and rights in Lebra. It is practice that the right of a shareholder to manage the affairs of a company is usually denied from the articles of association or shareholders’ agreement. It is not in dispute that no such agreement was

⁴ Visser Citrus (Pty) Ltd v Goedeheop Citrus (Pty) Ltd and Others 2014 (5) 179 WOC, par 55

⁵ Count Gothard SA Pilati v Witfontein Game Farm Pty Ltd [2013] All SA 190 GP

in place. Lebra was conducted in a manner that is unfairly prejudicial to the interests of the minority⁶.

[55] The relief sought in terms of section 163 is therefore justified. The fact remains that there is still a minority shareholder which has a financial interest in Lebra by virtue of its shareholding. It remains a 10% shareholder and it is entitled to Lebra's financial information and management.

[56] At this juncture it is appropriate to refer to the De Sousa matter at paragraph 48. I reiterate the fully extract therefrom:

"I gave as an example the standard case in which shareholders have entered into association upon the understanding that will also participate in the management of the company. In such a case, it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him the opportunity to remove his capital upon reasonable terms. The aggrieved member could be said to have had a "legitimate expectation" that he would be able to participate in the management or withdraw from the company." (My emphasis)

In this instance, the shareholders requested the buyout of their shares.

[57] This then brings us to the question of what the equitable remedy would be. This court is equipped with a wide discretion to propose just and equitable relief that would bring an end to the matters complained of.

[58] It would be to the benefit of both parties that they terminate their relationship with each other. There is no doubt that the relationship is irretrievable and has become

⁶ Louw v Nel 2011 (2) SA 172 SCA at 23

unworkable. The just and equitable solution would be for the respondents to buy out of the Trust's share of 10% at fair value in Lebra.

[59] However, the shareholders would require an insight into the financial affairs of Lebra for the 2018, 2019 and 2020 financial year period. The fair value would have to be determined through an accurate and justifiable valuation of the shares. Such value can only be attained after a forensic audit is undertaken with an audit opinion expressed. In this manner one would ensure that the applicant's valuation of its 10% is not inflated and that by this time the potential profits may have been realised.

COSTS

[60] On the issue of costs, the applicants have specifically sought a punitive costs order. From my findings, the applicants are substantially successful and should be awarded with costs in its favour. I am however not inclined to grant a punitive costs order. In particular, the applicants have not been successful in the reinstatement of Mr Bester as a director. His reinstatement is not appropriate and further not necessary if consideration is given to what the applicants seek from this dispute.

[61] Furthermore, this court has not been satisfied that a case has been made for the purchase of the applicants' shares as yet. The order granted by me has made provision for an equitable resolution between the parties.

[62] I have, however, noted that the applicants had as a last resort approached this court for relief particularly due to information and documents not being furnished and the fact that it could not proceed with the disposal of the Trust's shares.

[63] I am further mindful of the fact that Mr Bester was removed as a director whilst Mr Bester was a party to these proceedings and which proceedings had not been finalized.

[64] The respondents now come before court proffering an argument that Mr Bester is not entitled to any of the documents since he no longer holds directorship in Lebra. This, in my view, was a disingenuous move and constituted *mala fide* conduct on the part of the respondents.

[65] In the premises I make the following order:

1. The applicants are to approach the South African Institute of Accountants ("SAICA") to nominate and appoint an independent chartered accountant ("*chartered accountant*") with a minimum of 10 years' experience, to conduct a forensic audit of the first respondent's financial position for the financial year ending 2018 to the financial year ending 2020, in general and specifically pertaining to:
 - 1.1 the allocation of the amount of R68,000,000.00 received by the first respondent in respect of the sale of Plot 181, Derdepoort;
 - 1.2 the authorisation of loans to directors and shareholders of the first respondent;
 - 1.3 the utilisation of funds and assets of the first respondent for the personal expenses of the second and third respondents.
2. The forensic audit shall be concluded within 6 months from date of this order and be furnished to all parties herein within 10 days from date of completion of the audit report.

3. The applicants on behalf of the Bester Roodeplaat 44 Trust are entitled to have insight to the source documents furnished to the appointed chartered accountant by the respondents, if necessary.
4. The aforesaid appointed chartered accountant shall, after the finalisation of the forensic audit, determine the fair value of the authorised and issued share capital of the first respondent to date of this order. Such valuation shall be finalised within 1 month after the conclusion of the forensic audit by the appointed chartered accountant.
5. The relief sought in prayers 2.3 and 2.4 (“the purchase of the shareholding”) of the notice of motion is postponed *sine die*.
6. The first respondent is to bear the costs of the forensic audits.
7. The applicants are granted leave to approach this court, on duly supplemented papers, subsequent to the receipt of the documents, audit report, and the fair valuation for the relief sought for the purchase of the shareholding of the Bester Roodeplaat Trust 44.
8. The respondents shall file an affidavit in response to the supplemented issues within 20 court days from date of delivery of the supplementary affidavits, if any.
9. Thereafter, the applicants may file their affidavit(s) in reply to the respondents’ affidavit within 10 (ten) court days from receipt of the respondents’ affidavit(s).
10. The second to third respondents are ordered to pay the cost of this application which includes the costs of two junior counsel.

H KOOVERJIE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants: Adv D Keet, Adv van Dyk

Instructed by: Van Dyk Steenkamp Attorneys INC
C/O Jacobson & Levy Inc

Counsel for the Respondents: Adv L Kotze, Adv J Myburgh

Instructed by: Roodt and Co Attorneys

Date heard: 24 February 2022

Date of Judgment: 24 March 2022