**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO:** 34026/18

(1) **Reportable** **No**
(2) **Of interest to other Judges** **No**
(3) **Revised: Yes**

**Date: 13/09/2021**

**Signature**.....

In the matter between:

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| **STRATEGIC PARTNERS GROUP (PTY) LTD** | First Appellant |
| **NJILO CAPTIAL INVESTMENTS (PTY) LTD** | Second Applicant |
| **MZOLISI DILIZA** | Third Applicant |
| **DAVID MOSHAPALO** | Fourth Applicant |
| **EBRAHIM SINBANDA** | Fifth Applicant |

and

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| **THE LIQUIDATORS OF ILIMA GROUP (PTY) LTD** | First Respondent/Counter- |
| (In liquidation) | Applicant |
| **THE MAGISTRATE, KRUGERSDORP** | Second Respondent |
| **THE MASTER OF THE HIGH COURT** | Third Respondent |

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JUDGMENT

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**MAIER-FRAWLEY J:**

***Introductory background***

1. Ilima Group (Pty) Ltd (hereafter referred to as the 'company in liquidation') was compulsorily wound up by order of court. Thereafter, the Master of the High Court appointed 3 joint liquidators to wind up its affairs. Those 3 liquidators are referred to collectively as the first respondent. The company in liquidation is the owner of a 11.784% shareholding in the first applicant (hereafter referred to as 'SPG').

2. The second applicant is a shareholder, the third and fourth respondents are directors, whilst the fifth respondent is the auditor of SPG.

3. The liquidators were required in the course of winding up the affairs of the company in liquidation to value and dispose of the shareholding owned by it. They took steps to ascertain the value of the shareholding by way of seeking access to the financial affairs of SPG. The liquidators used the provisions of sections 414 and 415 of the old Companies Act (Act No. 71 of 1973) to commence proceedings before the Second Respondent and to have persons subpoenaed to attend the proceedings to provide information which the liquidators believed would be necessary to properly value the shareholding of the company in liquidation. The persons subpoenaed to attend the proceedings included *inter alia,* representatives of the first applicant and the third to fifth applicants. Not only was their evidence required but they were required to produce various categories of documents in the course of those proceedings. These persons are persons who naturally have knowledge about the affairs of SPG and who also through the production of documents could reveal information pertaining to the shareholding in question. The liquidators realized that any shareholders agreement was relevant to the valuation of the shareholding. In November 2013, they called for production

of SPG's shareholders agreement and also indicated that they required an independent valuation of the company in liquidation's shareholding in SPG (hereinafter intermittently referred to as 'the shares' or 'the shareholding'). SPG sought to make use of the shareholders agreement to achieve a forced sale of the shares and took steps under the shareholders agreement to obtain a valuation of the shareholding so that it could implement the rights it believed it held. In due course a valuation of the shares was obtained from Mazars. The liquidators disputed the valuation as well as the enforceability of the shareholders agreement as not all shareholders had signed it. Thereafter, two further valuations were procured, one by the liquidators (the Zeelie Valuation) and another by SPG (the Price Waterhouse Coopers 'PWC' valuation). These are referred to in more detail below. Suffice it to say at this juncture that the Zeelie valuation was disputed by SPG whilst the PWC valuation was disputed by the liquidators.

4. Litigation ensued between the parties and in due course the dispute concerning the validity of the shareholders agreement was resolved by findings made by the Court. In a judgment delivered on 17 August 2018, Unterhalter J found that no valid and binding shareholders agreement had been concluded between the shareholders of SPG.

5. On 8 June 2020, after the judgment of Unterhalter J had been delivered, notice was given of a Special General Meeting of the shareholders of SPG for purposes of passing a resolution to abrogate SPG's Memorandum and Articles of Association in their entirety and to replace them with a Memorandum of Incorporation ('MOI'). The terms of the MOI provided, *inter alia,* for a forced sale of the SPG shares at a value determined at a retrospective date, being the date on which a forced sale event, as defined therein, occurred.

6. The liquidators had concerns, *inter alia*, that that the proposed MOI would effectively restrict access to certain information and/or documentation of SPG and that the forced sale provisions therein imposed a restriction on the manner in which the liquidators could seek to realise the shares, moreover, without regard for the present day value thereof. The liquidators voted against the adoption of the proposed resolution. Despite their opposition, the resolution was adopted by majority vote on 30 June 2020.

7. The liquidators formed the view that the adoption of the new MOI, given the absence of a valid shareholders agreement providing for a forced sale mechanism, was a stratagem employed by the majority to achieve what they could not accomplish under the purported shareholders agreement and that its provisions providing for a forced sale of the shares at a value determined at a retrospective date was oppressive and unfairly prejudicial to the creditors of the company in liquidation.

8. The question which would naturally have arisen in the proceedings before the second respondent was whether or not the liquidators were entitled to demand production of documents with a view to valuing the shareholding, bearing in mind that the validity of the shareholders agreement, upon which SPG had relied, was vehemently in dispute. In issuing the relevant subpoenas, the second respondent would ordinarily have made a call as to the relevance and materiality of the information sought during the course of those proceedings. The papers filed in the present proceedings do not suggest otherwise.

9. If the forced sale provisions included in the new MOI were to apply, the valuation of the shareholding would be a mechanical matter, once the forced sale procedure provided therein was set in motion, and there would be room for the argument that the documents sought by the liquidators would be

irrelevant to the establishment of the value of the shares. In addition and by extension, the evidence sought to be produced already through the witnesses subpoenaed would be irrelevant.

10. If I were to find that the new MOI is oppressive or unfairly prejudicial in its effect and result apropos the company in liquidation (minority shareholder) so that the liquidators are entitled to ignore the impact of the MOI upon them, as contemplated by the provisions of the new Companies Act (Act No. 71 of 2008), then the liquidators would be entitled to proceed to interrogate witnesses and demand production of relevant documents for purposes of valuing the shareholding and in further dealing with the shares in question.

11. SPG and the other applicants' launched this application (effectually relying on the status of the MOI) in which they seek a ruling on the claims for production of documents made in terms of s 414 read with s 415 of the old Companies Act.

12. In this regard, the relief sought in the main application is for a declarator that *'the liquidators of Ilima Group (Pty) Ltd (in liquidation), a shareholder in Strategic Partners Group (Pty) Ltd, are entitled to no more documents from any of the applicants other than those documents which fit into the categories of documents described in the following statutes:- (a) sections 26 and 31 of the Companies Act, 2008, alternatively, (b) section 113 of the Companies Act of 1973'* together with an order for costs against those respondents who oppose the application. Only the First Respondent opposed the main application. Neither the first nor the second respondent participated in the proceedings.

13. The liquidators opposed the main application and also filed a counter application in which, apart from seeking the dismissal of the main

application, they seek, *inter alia,* a variety of declarators directed towards seeking rulings on the status of clause 27 of the new MOI as well as the status of the documents sought at proceedings before the second respondent and further in these proceedings.

14. For the sake of completion, the relief sought in the counter-application, includes the following:

14.1. An order that the main application be dismissed with costs, such costs to include the costs of two counsel;

14.2. A declarator that in terms of section 163(2)(h) of the Companies Act, 71 of 2008 ('the 2008 Act'), the provisions of clause 27 of the Memorandum of Incorporation of SPG, as approved at the General Meeting of shareholders of SPG on 30 June 2020, do not apply to the shareholding or sale of such shareholding held by Ilima Group (Pty) Ltd (in liquidation) ('Ilima') in SPG;

14.3. A declarator that the documents and records sought by the first respondent at insolvency enquiry proceedings held at the Krugersdorp Magistrates Court on 23 March 2018 and 15 June 2018 respectively, fall within the category of documents to which the first respondent is legally entitled to in terms of sections 414 and 415 of the old Companies Act) and are to be provided to the first respondent;

14.4. An order that the fifth applicant provide the documents, listed in annexure 'B1.3' to the Notice of Counter-Application, to the first respondent;

14.5. An order that the first to fourth applicants provide the documents, listed in annexure 'C' to the Notice of Counter-Application, to the first respondent;

14.6. An order that the first to fifth applicants pay the costs of the counter-application on an attorney and client scale, such costs to include the costs of two counsel.

***Issues for determination***

15. The legal issue arising for consideration in the main application is whether a shareholder in liquidation (represented by its liquidators) is entitled to only the limited rights of access to information and documents as are afforded to an ordinary shareholder under the provisions of the new Companies Act or whether, by virtue of the provisions of ss414 and 415 of the old Companies Act, the liquidators are entitled to wider access to information and documents for purposes of administering the insolvent estate of the shareholder in liquidation.

16. The issue for determination in the counter-application is whether or not the first respondent has established an entitlement to the declaratory relief sought, including the relief sought in terms of s163(h) of the new Companies Act, and whether the order so sought is just and equitable in the circumstances of this matter.

***Condonation***

17. The first respondent seeks condonation for the late filing of its answering affidavit in the main application. The applicants oppose the grant of condonation. The answering affidavit was filed 22 months after it was due. Whilst at first blush this appears to be an extraordinarily lengthy delay, the liquidators have given a full account for the entire period of the delay, as set

out in Annexure 'TH6'[1] to the answering affidavit, as is required by law.[2] In short, the explanation given for the delay is that the liquidators made concerted attempts throughout that period to engage with SPG and other shareholders with a view to find common ground on the dispute that had arisen between the parties in relation to the true value of the company in liquidation's shares in SPG, including the manner of realisation thereof, given the unresolved dispute concerning the validity of the shareholders agreement.

18. The first respondent filed a composite affidavit, both in answer to the founding affidavit filed in the main application and in support of its counter-application, which, according to the liquidators, was brought after exhausting every possible other avenue to objectively value the shares, as is incumbent upon them to do, given the duty owed by them to the *concursus creditorum* to dispose of the shares at a fair and current market related value, on an informed basis, by having access to all the necessary and relevant documents required and requested by them, but which have not all been provided to them.

19. In *Van Wyk,*[3] the Constitutional Court held that the standard for considering condonation is the interests of justice. Whether it is in the interests of justice

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[1] In annexure 'TH6", the liquidators provide a timeline of events which took place since the launch of the main application wherein they outline the various attempts made by them to engage with SPG 'in order to arrive at an amicable resolution of the matter, including a resolution of the disputes relating to the information and documentation that the liquidators seek from the applicants'.

[2] See: *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA), paras 11 & 15.

[3] *Van Wyk v Unitas Hospital and another* 2008 (2) SA 472 (CC) at 477 A-B. There, the court stated that factors relevant to the enquiry as to whether it is in the interests of justice to grant condonation include, but are not limited to, the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised and the prospects of success.

to grant condonation depends upon the facts and circumstances of each case. The issue of prejudice remains an essential factor in the adjudication of an application for condonation.[4] The constitutional court has given guidance on how an application for condonation ought to be approached. As pointed out by Zondo J in *Grootboom*:[5]

> "...the interests of justice must be determined with reference to all the relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

20. The main application does not appear to have been prosecuted with any perceptible vigour and it has not been demonstrated that the applicants have been prejudiced by the delay. On the contrary, the launch of the main effectively stultified any further proceeding of the insolvency inquiry that was scheduled to proceed on 18 September 2018 in the Krugersdorp Magistrate Court, a consequence which redounded to the benefit of SPG and those applicants who were subpoenaed to appear thereat. In any event, by the time the matter was heard, all the affidavits were before the court and legal argument was presented in relation to the parties' respective cases, as

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[4] See for example: *Santa Fe Sectional Title Scheme NO 61/1994 Body Corporate v Bassonia Four Zero Seven CC* 2018 (3) SA 451 (GJ) at 454F-G; *Madinda v Minister of Safety and Security, Republic of South Africa* 2008 (4) SA 312 (SCA).

[5] *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC), para 51.

put up in the full gamut of affidavits.[6] In all the circumstances, I am of the view that it is in the interests of justice to grant condonation.

***Broader Factual Matrix***

21. The applicants accuse the liquidators of abusing their statutory powers, deliberately delaying the finalisation of the liquidation process and acting with *mala fides*.[7] It is thus necessary to contextualise the controversy by providing a chronology of salient events.

22. The relevant factual background set out below is not contentious, being either undisputed or unrefuted on the papers.

23. It bears mention that as the company in liquidation holds 11.784% of the total issued shares of SPG, its interest in SPG is therefore the equivalent of 11.784% of the value of SPG.

24. It is not in dispute that SPG holds a significant shareholding in Bombela Concession Company (Pty) Limited ('BCC'). Bombela Civils Joint Venture Proprietary Limited ('BCJV'), a subsidiary of BCC, is involved in the construction of the Gautrain project. BCC has a concession agreement with the Gautrain Province relating to the Gautrain project and is involved in the operation of the Gautrain project. There had been various ongoing disputes between the Gauteng Province and BCC/BCJV and *vice versa*, some of which

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[6] I incline towards the approach adopted by Wepener J in *Pangbourne Properties v Pulse Moving* 2013 (3) SA 140 GSJ where the answering affidavit was filed out of time, as too, the replying affidavit. At par 18, the learned Judge concluded that : "*...in the matter under consideration all the papers are before me and the matter is ready to be dealt with. To uphold the argument that the replying affidavit and consequently also the answering affidavit fall to be disregarded because they were filed out of time will be too formalistic and an exercise in futility and will leave the parties to commence the same proceedings on the same facts de novo...*'
See too: *Transafrican Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278 F-G.

[7] The applicants allege in para 2.4 of the replying affidavit that the liquidators objective in opposing the main application is not to get more information on the value of the shares in question but *mala fide 'to keep the pressure up on SPG and its shareholders to pay Ilima their price for the shares, not to find out any more about value.'*

resulted in arbitration and court proceedings instituted by one or another of those parties against the other. However, by the time the present application was heard, certain of those claims had become settled between the various role-players.

25. The company in liquidation was placed under final winding-up by order of court on 28 April 2010. The liquidators have been in control of the company in liquidation since their appointment by the Master on 7 March 2011. Pursuant to their appointment, the liquidators set about investigating the affairs of the company in liquidation. On 5 November 2013, they requested to be advised of the extent of its shareholding in SPG, as well as a valuation thereof. Whilst SPG initially maintained that the extent of the company in liquidation's interest in SPG was 10%, it eventually recognized that it is in actual fact 11.784%.

26. Under cover of a letter dated 11 November 2013,[8] the liquidators called for a copy of SPG's shareholders agreement, indicating therein that they required an independent valuation of the company in liquidation's shareholding in SPG. Further, they recorded that 'with regard to the valuation of the shares, we want to be involved in this process *so that an independent verification is possible*, particularly, the mandate given to the valuators...' (own emphasis).

27. This notwithstanding, the first applicant went ahead and singularly mandated Mazars Corporate Finance (Pty) Ltd ('Mazars') to attend to the valuation of SPG shareholding.[9] On 27 May 2014, Mazars completed their

[8] See Annexure 'MD5" to the founding affidavit in the main application.

[9] As is apparent from the Mazars valuation (Annexure 'MD7' to the founding application in the main application), Mazars was appointed by the call shareholders in terms of clause 24.2 of the SPG shareholders agreement 'to arrive at a fair market value of the shares' in SPG 'for the purposes of a sale by SPG shareholders in terms of clause 24 of the shareholders agreement.' In their report, Mazars pointed out that '*It should be noted that the application of clause 24.2 would result in a lower value of SPG should SPG be valued at the date when the said shareholder committed an act of insolvency. As a result we have performed the valuation as at 31 March 2014...*'. It was further

valuation, which was furnished to the liquidators on 23 June 2014. Mazars concluded that the value of 100% of the shares in SPG was between R62 million and R74 million, as at 31 March 2014, which value was said to be 'subject to material uncertainties as discussed in more detail below.' [10]

28. In a letter addressed by the third applicant to SPG on 23 June 2014 ( a copy of which was forwarded to the liquidators) it was made clear that SPG was seeking to facilitate the sale of the company in liquidation's shares in SPG through the forced sale mechanisms provided for in clauses 24 & 25 of the SPG shareholders agreement.[11] The letter recorded, *inter alia*, that SPG would commence with the implementation of the sale of the relevant shares at a price of R5.4 million in accordance with clauses 15.2 and 15.4 of the shareholders agreement, as required in clause 25 thereof. It was specifically recorded that SPG's shares were unlisted and were subject to pre-emptive requirements in favour of other SPG shareholders, which limited the tradability thereof. In this letter, the third applicant indicated that, in the light of the various restrictions, the board of directors of SPG considered the fair market value of the company in liquidation's shares to be approximately R5.4 million, after applying a 20% discount to the value calculated by Mazars, given existing restrictions on the encumbering of the shares.[12]

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recorded therein that the valuation was based on 'management information, annual financial statements and in accordance with the shareholders agreement.'

[10] See: Mazars valuation, under the rubric: 'Conclusion'.

[11] These provisions set out the process for a forced sale of an insolvent shareholder's shares in SPG to other SPG shareholders and provide the methodology for a valuation of such shares, *inter alia*, providing for an agreed valuation or if that is not possible, a valuation by an independent merchant banker or chartered accountant appointed by written agreement between the shareholders and whose decision (save for manifest error) 'shall be final and binding' upon the parties.

[12] The value of R5.4 million was determined on the basis that the company in liquidation held only a 10% shareholding in SPG.

29. On 14 November 2014, the liquidators rejected the Mazars valuation, *inter alia*, on the basis that the shareholders agreement was not signed by all the shareholders of SPG.[13] In paragraph 13 of their letter, the liquidators made plain their stance that the company in liquidation was not legally bound to sell its shares in SPG on a forced sale basis nor were they bound by the Mazars valuation, which had purportedly been conducted in accordance with the provisions of the disputed shareholders agreement. The liquidators however indicated that they were nonetheless prepared to negotiate with SPG, its shareholders and outsiders for the sale of the company in liquidation's shares in SPG.

30. A material dispute accordingly arose between the parties in regard to the validity of the SPG shareholders agreement and concomitantly, the method of valuation, including the applicability of the forced sale process provided for in the disputed agreement for purposes of liquidating the company in

[13] See Annexure "MD9" to the applicants' founding affidavit. In their letter of 14 November 2014, the liquidators, *inter alia*, disputed that:- (i) a binding shareholders agreement was in existence; (ii) the process pertaining to the sale of the shares was to be governed by the forced sale provisions of the said shareholders agreement; and (iii) Mr Gelderblom, a director of SPG, had been properly nominated, constituted or appointed to be The company in liquidation's agent for purposes of giving effect to clause 25 in the shareholders agreement.
The basis for the dispute is more fully articulated in paragraphs 14 and 15 of the answering affidavit filed in the main application There the liquidators point out, *inter alia*, that two separate valuations in respect of the value of SPG had been procured from Mazars by SPG, one in June 2013 for purposes of acquiring the shares of one 'Manana' and one in May 2014 relating to the sale of the company in liquidation's shares. The June 2013 the valuation of SPG (relating to the Manana shares in SPG) was indicated as being between R315.2 million and R326.6 million, whereas only a year later, the valuation of SPG (relating to the company in liquidation's shares in SPG) was indicated as being between R62 million and R74 million, i.e., less than 20% of the valuation relating to the Manana shares, this, in circumstances where the net asset value of SPG, as recorded in the Statement of Financial Position of SPG for 2014, was some R550 117,693. The liquidators point out that such figure was regarded by the directors of SPG as well as the auditors of SPG to have fairly represented the value of SPG at the time, yet it differed substantially from both the valuations relating to the Monana shareholding and the company in liquidation's shareholding in SPG. To put this in proper perspective, the net asset value for June 2014 was the equivalent of 809% (more than 8 times) the average valuation by Mazars of SPG at the same date. Upon becoming aware of this, the liquidators became suspicious as to why they had been provided with such low valuations in respect of the company in liquidation's shareholding, more particularly, having regard to the R5.4 million that the third applicant had placed on the value of the shareholding for purposes of implementing a forced sale, as per his letter of 23 June 2014.

liquidation's shareholding in SPG. The dispute concerning the validity of the shareholders agreement was ultimately resolved pursuant to litigation between the parties, in the judgment of Unterhalter J, delivered on 17 August 2018, wherein he found that no valid and binding shareholders agreement had been concluded between the shareholders of SPG.[14]

31. Prior to the aforesaid resolution of the dispute by the court and in response to a second valuation conducted by Mazars, the liquidators decided to procure an independent valuation of shareholding from Mr Pieter Zeelie (Zeelie), a chartered accountant with more than 30 years' experience. In terms of his report, dated 10 March 2015 (the Zeelie valuation),[15] Zeelie arrived at a valuation of SPG of between R1.009 billion and R1.25 billion, an amount significantly higher than that determined by Mazars. Based on these figures, the value attributed to the company in liquidation's shareholding in SPG was between R119 million and R147 million. The Zeelie report further demonstrated certain blatant errors in the Mazars valuation.

32. On 4 June 2015, under cover of a letter by attorneys Hogan Lovells (the erstwhile attorneys representing the first respondent) the liquidators submitted an offer to SPG and its shareholders to purchase the company in liquidation's shareholding for an amount of R100 million, which offer was not accepted.

33. The first and third applicants, including other unnamed shareholders of SPG, considered the Zeelie valuation to be over-inflated. SPG decided to source another independent valuation, presumably as a result of the criticisms levelled by Zeelie against the Mazars valuations and in response to the Zeelie

[14] The judgment of Unterhalter J is contained in Annexure 'TH10' to the answering affidavit filed in the main application.

[15] Annexure 'TH24' to the answering affidavit in the main application (a duplication of Annexure 'MD12 to the founding affidavit).

valuation. To this end, SPG engaged PWC on 29 July 2015 to perform a further valuation of the company in liquidation's shares in SPG. The liquidators were invited to participate in the PWC valuation process and to provide their inputs therein, which they declined to do, for reasons given in the letter of Hogan Lovells, dated 17 September 2015.[16] The liquidators also declined to contribute towards the costs of the PWC valuation. This notwithstanding, SPG proceeded to mandate PWC on their own, to which end, they furnished PWC with select information regarding the valuation to be performed by PWC. Stated differently, the PWC valuation was based on information provided solely by SPG, however, as the liquidators later discovered, important issues and information having a material impact on the value of SPG, were withheld from PWC, as more fully detailed in paragraphs 17.6 to 17.11 of the first respondent's answering affidavit.[17]

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[16] Per Annexure 'MD14' to the founding affidavit filed in the main application. In this letter, the liquidators reiterated their stance, *inter alia*, that: (i) since no SPG shareholders' agreement, as signed by all shareholders of SPG, had by then been produced, it remained in dispute that a legally binding SPG shareholders agreement had been concluded; (ii) the authority of the directors of SPG to instruct PWC to determine the fair market value of the company in liquidation's shareholding in SPG was accordingly disputed; and (iii) it was further disputed that PWC was properly authorized to proceed with the valuation.

[17] This included legal processes and ongoing negotiations with the Gauteng Province relating to Gautrain aspects, which, as noted earlier, included, among others, claims by the Gauteng Province against BCJV and/or BCC and *vice versa*. It appeared to the liquidators, from a reading of the PWC factual memorandum and valuation, that PWC had not been fully apprised of SPG's involvement in the Gautrain project, as detailed in paragraph 17.6 of the answering affidavit. It also appeared from documents in their possession and various discussions held by them with some of the role-players in Gautrain that BCC had been involved in both arbitration and court proceedings with the Gauteng Province and that documentation and information relating to those proceedings, which would have increased the valuation being performed by PWC, may have been withheld by SPG from PWC, as detailed in paras 17.8.6 to 17.8.9 of the answering affidavit. Further conduct on the part of SPG in causing selected claims to be taken into account by PWC (such as a claim by the Gauteng Province against BCJV and a claim by BCJV against SPG), which claims reduced the value of SPG, without disclosing the settlement negotiations that were taking place between the relevant stakeholders or the outcome thereof, which would have impacted upon the valuation of SPG, are set out in paragraphs 17.8.10 to 17.10 of the answering affidavit. Claims by the Gauteng Province against BCC/BCJV as well as claims by BCC/BCJV against the Gautrain Province were not provided for in the PWC factual memorandum or its valuation report. This led to concerns by the liquidators that the audited financial statements of SPG did not represent the true state of affairs of SPG for reasons given in para 17.11 of the answering affidavit.

34. On 5 April 2016, PWC furnished SPG with a 'factual memorandum'[18] and its valuation.[19] According to the applicants, the PWC valuation was provided to the liquidators on 31 May 2016.[20] The effective date of the valuation was 30 April 2015. At the time, SPG faced a claim of R746 million made by BCJV against it arising from a shareholders' cash call, as more fully described in PWC's report. PWC valued SPG at R69 million, plus R746 million, on the basis that the R746 million would be added back if the BCJV claim was not successful. The approach of PWC was to deduct the maximum amount to which SPG was exposed (R746 million) with provision being made for 'a price adjustment to the amount paid to the company in liquidation for its

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[18] See Annexure 'TH25.1' to the answering affidavit in the main application. Mr Human of PWC records therein that he conducted a valuation of SPG as at 30 April 2015, based on a forced sale event that SPG indicated to him took place on 30 April 2015.

[19] See Annexure 'TH25.2' to the answering affidavit in the main application (being a duplication of annexure 'MS20' to the founding affidavit). PWC recorded therein that, based on clause 24 of the shareholders' Agreement and "*representations made to us by SPG and their representatives, we understand that a forced sale event has occurred and a determination of the forced sale price is required. The forced sale price is defined in the Shareholders' Agreement as 'the price at which a shareholder may become obliged to sell its equity to other Shareholders after a Forced Sale event has occurred...which price shall be the Fair Market Value.'* The Fair Market Value was defined in the Shareholders' Agreement as, *inter alia,* as a determination (in the absence of agreement between the Shareholders) of the value of the equity by an independent Merchant Bank or a Chartered Accountant, which, *inter alia,* shall have reference to the value of the Equity in the open market on a going concern basis as between a willing purchaser and a willing seller, with no deduction being made for it being a minority interest and which decisions by the valuator shall (save for manifest error) be final and binding on the parties. The report further records that "*...in accordance with our letter of engagement dated 29 July 2015, we have determined the fair market value of the ordinary shares of SPG held by Ilima on a non-marketable, controlling basis, on the assumption that the forced sale event took place on 30 April 2015 and with reference to the relevant provisions of the Shareholders' Agreement. According to the company* [SPG] *the valuation will be binding on the parties concerned...as we are required to assume a transaction in an open market on a going concern basis as between a willing purchaser and a willing buyer, we applied a marketability discount of 15% to derive the fair market value of the equity of SPG...*" (own emphasis)
The effective date of the valuation was 30 April 2015, which, as indicated in par 17.8.1 of the answering affidavit, the liquidators assumed was to correspond with SPG's attempted forced sale process (as outlined in the PWC report).

[20] According to the liquidators, the PWC was furnished to them only on 22 August 2016, however, nothing significant turns on this.

shareholding once the outcome for the anticipated arbitration process in connection with the BCJV claim is known'.

35. PWC accordingly valued the company in liquidation's shares at 11.784% of R69 million, being R8.1 million plus 11.784% of the R746 million, on a contingent basis.

36. The liquidators allege in the answering affidavit that as the Gautrain project is a very successful and lucrative project, SPG's shareholding in BCC is very valuable and therefore, the company in liquidation's shareholding in SPG is likewise very valuable.[21]

37. To enable them (and Zeelie) to consider and review the PWC report, the liquidators called for various documents, including PWC's working papers.

38. On 30 August 2016, discussions were held with Mr Matthew Human ('Human') of PWC who, after having been advised of the true position of SPG's involvement in the Gautrain project, acknowledged that he was not aware of such facts, which were thus not taken into account in the PWC report, and, had such facts been made known to him, it would have materially increased the value of SPG and consequently the value of the company in liquidation's shareholding in SPG.[22] Present at the meeting were: Van Den Heever (liquidator), Mr Canny ('Canny') (attorney acting for the liquidators), Zeelie, Mr Njokweni ('Njokweni') (attorney acting for SPG) and Mr Gelderblom (director of SPG).

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[21] This allegation was not dealt with by the applicants in their replying affidavit and remains unrefuted.

[22] The applicants object to the content of the discussions, more particularly, Human's acknowledgement, as being inadmissible hearsay. They have not, however, disputed that the said meeting took place at which the said discussions with Human occurred. Confirmatory affidavits by Canny and Zeelie were provided by the first respondent in support of the allegations. The report by Human is not considered for the truth of its content, rather as a basis to explain why the liquidators reacted in the way that they did upon receiving the information, i.e., in rejecting the PWC valuation.

39. On 23 November 2016, Canny informed Njokweni of media reports indicating that a settlement agreement had been concluded between the Gauteng Province and the Bombela companies, which suggested that the valuation of SPG' s shareholding in BCC/BCJV would likely have increased, with the result that the company in liquidation's shareholding in SPG would likewise also have increased. On 29 November 2016, Njokweni acknowledged the newspaper content and advised Canny that the PWC valuation was incorrect and would need to be adjusted.

40. Human had in the meantime provided parts of his working papers to Zeelie from which it became evident to the liquidators that information pertaining to the settlement of claims between the Bombela companies and the Gautrain Province had not been provided to PWC, which information had thus not been taken into account by Human in PWC's valuation of SPG.

41. Despite Njokweni's advices (referred to in para 39 above), no amended PWC valuation was forthcoming, notwithstanding several written requests being made to both Human and Njokweni on behalf of the liquidators during the period 9 January 2017 and 13 February 2018.

42. After discussions with SPG regarding the proposed PWC re-evaluation collapsed, the liquidators instructed Zeelie to update his valuation with all new information and documentation so far obtained. Zeelie advised the liquidators of certain additional information and documentation he would require for purposes of completing the updated valuation. Various written requests were made therefore in February and March 2018, all of which appear to have been ignored by SPG. It was eventually decided to hold insolvency enquiries for purposes of obtaining such additional information and documentation to enable the liquidators to determine the existing

financial state of affairs of SPG for purposes of finalising an updated valuation of the company in liquidation's shareholding in SPG.

43. It is common cause that the liquidators refused to accept the PWC valuation of SPG with its concomitant valuation of the company in liquidation's shareholding in SPG.[23] In summary, their objections thereto were, *inter alia,* that:

43.1. The PWC valuation was premised on the provisions of the shareholder's agreement, the validity of which was, to the knowledge of the management of SPG, placed in dispute by the liquidators as early as November 2014,[24] which agreement was subsequently declared not to be valid or binding by order of court dated 17 August 2018.[25] As such there was no trigger event or basis upon which the company in liquidation's shareholding wais to be valued on a forced sale basis, more particularly, as at 30 April 2015 (per the PWC valuation), and a present day valuation was required;

43.2. Since the PWC valuation was provided to the liquidators on 22 August 2016,[26] as such, the information is almost 6 years old;

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[23] The ostensible reasons therefore were more fully set out, *inter alia,* in paragraphs 17.8.6 to 17.20 of the answering affidavit.

[24] See para 29 and fn 13 above.

[25] The non-existence of the shareholders agreement would perforce have a material effect on the valuation as indicated *inter alia,* in paras 12.4; 14.2 to14.4; and 17.5 to 17.6 of the answering affidavit.

[26] See para 17.5 of the answering affidavit and annexure "TH 25.2" thereto. The valuation was published on 5 April 2016 when it was sent to the directors of SPG, per annexure 'MD 20' to the applicants' founding affidavit I am mindful that the applicants state, in para 42 of the founding affidavit, that that the PWC valuation was provided to the liquidators on 31 May 2016, but this is not borne out by annexure 'MD20', contrary to what has also been contended in para 33 read with fn 30 of the applicants' heads of argument.

43.3. Certain material information which was provided to PWC was incorrect;[27] which Human (of PWC) confirmed would have had a material impact on his valuation;[28]

43.4. From a perusal of Human's working papers it became evident to the liquidators that SPG had withheld information which was relevant for determining the proper and fair value of the shares held by the company in liquidation and which Human did not take into account, which they allege would have had a material impact on the PWC valuation;[29]

44. It is common cause on the papers that the liquidators made an offer to sell the company in liquidation's shareholding in SPG for the sum of R125 million sometime after a settlement meeting held between the parties on 14 September 2018 failed to produce agreement between the parties. Details of the offer, including the circumstances under which it was made or precisely how it was arrived at, were not disclosed in the papers. The said offer was not accepted. On 3 October 2018, Mr Njokweni (SPG's attorney) requested the liquidators to submit a revised offer relating to the proposed sale of the company in liquidation's share in SPG on the basis that the offer, which SPG believed was based largely on the purchase price that had been paid by SPG for additional shares acquired by it in BCC in December 2017, failed to take into account an alleged R293 million debt due by SPG to acquire a further 12.88% interest in BCC that was due by SPG to BCC and a 15% discount to take into account the limited marketability of the company in liquidation's shares in SPG and a further 15% discount to take into account the company in liquidation's minority shareholding in SPG.

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[27] See para 17.6 of the answering affidavit.

[28] See para 17.4 of the answering affidavit.

[29] See paras 17.14; and 17.14.1 to 17.14.2 of the answering affidavit.

45. It is further common cause that SPG has paid an aggregate total amount of R31.6 million in dividends to the liquidators since 2010, which they continue to collect on the company in liquidation's behalf.

46. As indicated earlier, on 8 June 2020, i.e., after the judgment of Unterhalter J on 17 August 2018 which determined the invalidity of the shareholders agreement, notice was given of a Special General Meeting of the shareholders of SPG for purposes of passing a resolution to abrogate SPG's Memorandum and Articles of Association, in their entirety, and to replace them with a Memorandum of Incorporation ('MOI').

47. As noted earlier, having formed a view that the provisions of the new MOI providing for a forced sale of the company in liquidation's shareholding at a value determined at a retrospective date was oppressive and unfairly prejudicial to the creditors of the company in liquidation, as envisaged in s163 of the 2008 Act, the liquidators decided to institute the counter-application in these proceedings with a 'Notice of Counter-Application' having been delivered on 7 August 2020.

48. The s 163 relief sought in the counter-application was resisted by the applicants on the basis that: (i) there has been no oppression of the company in liquidation; (ii) there exists no grounds in law or 'in the justice and equity jurisprudence' for a re-wording of the amended SPG MOI; and (iii) there is no need for a re-determination of the value (and hence price) of the shares in question, as that was already performed by PWC, which fixed a fair market value subject to adjustment and which adjustment has since been performed by Professor Wainer ('Prof Wainer') in 2021 after taking account of the settlement of the BCJV dispute in order to arrive at a figure of R59.7 million

for the company in liquidation's shares in SPG (or R47.8 million after deducting a 20% minority discount therefrom).

49. Based on Professor Wainer's report, and prior to the filing of a composite replying/answering affidavit by the applicants in these proceedings, SPG's attorneys made an offer on 10 February 2021 to the liquidators' attorneys to purchase the shares in question for R59.7 million, based on the alleged (but disputed) market value of the shares as determined by PWC at 31 March 2015,[30] which offer was not accepted by the liquidators.

50. In their (composite) replying affidavit, the applicants seek an order in terms of ss 163(1) and (2) of the 2008 Act, *inter alia*, directing sale of the company in liquidation's shares to a qualifying BBBEE party *'for the fair market value consideration thereof determined by PWC in their report dated 2016, duly adjusted by Professor Wainer in February 2021, being R47.8m...'* with the company in liquidation to pay the costs 'on the attorney client scale'.

*The Insolvency Inquiry*

51. It is perhaps apposite at this juncture to contextualize certain subpoenas that were issued in the course of a lawfully convened insolvency inquiry[31] that is currently underway in terms of ss 414 and 415 of the old Companies Act.

52. According to the liquidators, in order to enable them to perform a proper valuation of SPG for purposes of determining the value of the company in liquidation's shareholding in SPG, they decided to institute an insolvency inquiry in terms of the provisions of s414 as read with s415 of the old

[30] See annexure 'MD2" to the applicant's composite replying/answering affidavit.

[31] The legitimacy of the examination process provided for in the inquiry instituted under section 415 of the old Companies Act was not questioned or challenged by SPG or other persons who were subpoenaed to appear thereat, either in the course of the insolvency proceedings or in these proceedings, whether on the basis that it might be or was being used for improper purposes or on any other basis.

Companies Act before a magistrate (second respondent) in the Krugersdorp Magistrate Court. To this end, six subpoenas were issued against SPG officials during the period 2015[32] to April 2016 for the production of information and documents, as required at various times, for purposes of investigating the affairs and property of the company in liquidation.

53. As indicated earlier, pursuant to the meeting of 30 August 2016, certain additional documentation relating to the basis upon which the PWC valuation was determined was provided to the liquidators at their request.

54. Thereafter, during the period 6 April 2018 and 4 June 2018, five further subpoenas were issued against, *inter alia*, SPG officials and its auditors, calling on them to appear at further iterations of the insolvency inquiry on dates specified therein, *inter alia,* in order to produce the documents and information specified in the subpoenas.[33] The information and documents sought under cover of the subpoenas were ostensibly required to enable Zeelie to compile an updated current valuation of SPG and along therewith, a current valuation of the company in liquidation's shareholding in SPG.

55. At an inquiry held on 23 March 2018 at the Krugersdorp Magistrates' Court, with the second respondent presiding, which the deponent to the founding affidavit (Diliza) and another SPG official, Ms Nadine Goldblatt were subpoenaed to attend, they agreed to provide and were ordered by the second respondent to provide a vast array of documents and information listed in the subpoenas, by 13 April 2018. According to the liquidators, two files containing some, but not all of the subpoenaed documents, were

[32] The first subpoena was issued on 3 November 2015 whilst the Mazars valuation was underway. The liquidators attached same as Annexure 'TH 42' to their papers. *Inter alia*, a copy of the *signed* shareholders agreement was subpoenaed, including the securities register of SPG. To date, the complete securities register has not been provided to the liquidators.

[33] The last of the five subpoenas that were issued in this period prior to the launch of the main application, related to an inquiry that was scheduled to be held at the Krugersdorp Magistrates' Court on 15 June 2018, which was eventually postponed to 9 November 2018.

handed to Van Den Heever during the course of April 2018, albeit after the deadline, which documents were ultimately handed over to Zeelie. The persons subpoenaed were legally represented at the inquiry and would no doubt have been apprised of their legal rights in relation to the subpoenas and inquiry.

56. On 4 June 2018, subpoenas were issued, requiring the attendance of the fourth and fifth applicants and another representative of SPG's auditors, one Sicelo Vilakati, at an insolvency inquiry to be held on 15 June 2018. They too were legally represented at the inquiry. At their request, the inquiry was postponed to 3 August 2018. The various representatives undertook to hand over the subpoenaed documentation by no later than 13 July 2018 but in the event that they failed to do so, they were warned to appear at the inquiry on 3 August 2018. The third applicant also undertook to provide certain further information and documentation[34] on or before 13 July 2018. Despite the agreement to provide documents and the subsequent agreed order of the second respondent, and despite various written requests that followed thereupon,[35] the required information and documentation was not provided to the liquidators.

57. On 14 September 2018 a further iteration of the inquiry was to be held since representatives of SPG and its auditors had failed to hand over the documentation, as undertaken. On 13 September 2018, SPG's attorneys requested a without prejudice meeting for purposes of exploring a settlement of the matter. According to the liquidators, SPG's attorney advised that SPG was finding the ongoing subpoenas and in-depth probing oppressive and wished to settle the question of the appropriate value of the

[34] Per the schedule contained in annexure 'TH51' to the answering affidavit.

[35] See annexures "TH53' to 'Th56". Written requests were made on 20 August 2018; 22 August 2018; 7 September 2018 and 13 September 2018.

the company in liquidation's shares in SPG by way of negotiations. He requested that Van Den Heever withdraw any threats of imprisonment of witnesses who failed to deliver documents and to excuse them from the next hearing of the inquiry. It was agreed that the inquiry would be postponed to 9 November 2018 and that the fourth applicant and the auditors would hand over the requisite documentation.

58. As indicated earlier, the settlement meeting held on 14 September 2018 failed to bring about consensus between the parties. No further documentation was received from SPG or its auditors in compliance with the various undertakings (and as ordered by the second respondent) as outlined above. Instead, the main application was launched on 14 September 2018.

59. According to the liquidators, the inquiry scheduled for 9 November 2018 was postponed and further negotiations took place between the parties thereafter in an ongoing attempt to explore an amicable resolution to the lingering but unresolved dispute about what the fair market value of the company in liquidation's shareholding in SPG is. These attempts, *inter alia,* included the submission of an offer by the liquidators to SPG and the response received from SPG's attorneys thereto, as referred to in paragraph 44 above. More pertinently, the liquidators allege that the response itself 'demonstrates that SPG is not prepared to negotiate in good faith, raising facts which the liquidators cannot verify independently because they do not have the relevant documentation.'

***Discussion***

*Main application*

60. The applicants contend that the liquidators have unreasonably delayed the realisation of assets in the winding-up of the company in liquidation since their appointment on 7 March 2011 in conflict with their statutory duties,

amongst others, the duty provided for in s 391[36] of the 1973 Act. They also contend that the liquidators have sought to employ the provisions of ss 414 and 415 of the old Companies Act to obtain production of wide-ranging classes of documents, many of which are alleged to contain (unspecified) sensitive or confidential commercial information of SPG, for the professed purpose of valuing the shareholding in question. This, despite SPG having secured an independent valuation of the shares by PWC in 2016, and despite the liquidators allegedly having had sufficient information at their disposal to effectually place a value on the company in liquidation's shareholding, as evidenced by their ability to make an offer to SPG for the sale of the shares in stipulated amounts, first in 2015 and later in 2018. Furthermore, the applicants submit that the liquidators have adopted a valuation process that not only disregards the framework for accessing the company information prescribed in the new Companies Act but which amounts to an abuse of their statutory duties and functions. The process employed by the liquidators is alleged to be one which is designed to maximise prejudice to SPG by (i) disregarding the 'independent PWC valuation' process; (ii) imposing a partisan valuator of their choice on SPG; and (iii) using the valuation process as a springboard to 'harass SPG and its officials to submit to interrogation at insolvency enquiries and produce commercially sensitive information as if it were the very insolvent the company that is the subject of the liquidators' appointment.'

61. The applicants thus seek an order declaring that the liquidators are only entitled to further documents falling into the categories described in sections 26 and 31 of the new Companies Act. The applicants initially contended that

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[36] Section 391 reads:
"*A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the the company, movable and immovable, shall apply the same so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto.*"

a shareholder in liquidation is not entitled to bypass the statutory framework for accessing company information provided for in the new Companies Act by resorting to the provisions of sections 414 and 415 of the old Companies Act, however, by the time the replying affidavit was filed in the main application, this approach was significantly watered down, as indicated below.

62. The liquidators, on the other hand, submit that the main application has been motivated by a pending insolvency inquiry lawfully convened and conducted in terms of Sections 414 and 415 of the old Companies Act. They submit that the applicants are seeking to avoid compliance with statutory subpoenas requiring production of documents falling within the ambit of those two sections and relating to the company in liquidation and its shareholding in SPG.

63. The liquidators submit that they were entitled to employ the provisions of ss 414 and 415 of the old Companies Act to procure the production of documents and information required to enable them to investigate the affairs and property of the company in liquidation in the course of the winding-up process. They did not have at their disposal all the requisite information and documentation with which to do a proper valuation of the company in liquidation's shareholding in SPG. They allege that they have been obstructed on an ongoing and prolonged basis from gaining access to information required by them to discharge their duties in liquidating and distributing the assets of the company in liquidation, specifically, the shares held by it in SPG. As pointed out in the first respondent's heads, *'the winding-up and insolvency of the company* [the company in liquidation] *entitles, and indeed obliges its liquidators, acting in the best interests of the company's general body of creditors, to realise the shares held by the company in SPG. This cannot be undertaken without adequate information*

*being made available to the liquidators to enable the liquidators to deal with the shares in an informed and responsible manner.'*

64. The liquidators further submit that the approach adopted by the applicants 'is fundamentally and legally flawed in that they purport to focus on the position of a shareholder generally in a the company and such shareholder's rights vis-à-vis that the company under the company legislation in the ordinary course' whilst ignoring the context in which and basis upon which the documents forming the subject-matter of the subpoenas (issued within the framework of an insolvency inquiry lawfully convened) or as further sought in these proceedings, are required to be produced – not simply *qua* ordinary shareholder, but in the context of the winding-up and insolvency of the first respondent and the liquidators' duties to realise the company in liquidation's shareholding in SPG at its true and present day value for the benefit of the *concursus creditorum*.

65. The applicants' founding affidavit in the main application abounds with trenchant criticism of the process followed by the liquidators in their quest to ascertain or verify the true, fair and reasonable market value of the shares held by the company in liquidation in SPG. What is not in dispute on the papers, however, is the fact that when the liquidators took control of the insolvent the company, they did not have all the facts or knowledge about the company in liquidation's affairs at their disposal. They were entitled to utilize the mechanisms provided in 1973 Act and in the Insolvency Act [37] - which continue to apply in terms of the provisions of item 9 of Schedule 5 of the 2008 Act - as a means of obtaining information about the affairs and property of the insolvent the company both before and after the institution of the *concursus creditorum*. From a reading of the first respondent's

[37] Sections 414, 415, 416 and 417 of the old Companies Act, read with ss 64-66 of the Insolvency Act.

affidavits in these proceedings, the overall purpose for convening an insolvency inquiry was to discover information and obtain production of records which relate to the property of the company in liquidation (and its value) and which may be to the financial benefit to the company in liquidation - as it pertains to the company in liquidation's shareholding in SPG and the value thereof - for the proper winding-up of the insolvent the company.

66. In *Ferreira*[38] the Constitutional Court affirmed what was said by Hurt J in *Lynn NO*',[39] where the learned judge, in recognizing the importance of the need for full information at a comparatively early stage of the winding up, stated that '...the procedure provided by sections 417 and 418 of the Companies Act is not primarily concerned with the prosecution of offenders. The sections are aimed at assisting officers of the court in the performance of their duty to the creditors of companies in liquidation, the Master and the Court... I cannot conceive of any other procedure which would enable liquidators, effectively and efficiently, to fulfil their task.' In *Swart,*[40] Binns-Ward J *inter alia* considered an application for the setting aside of subpoenas issued in terms of s 414 of the old Companies Act. In considering the statutory mechanisms contained in ss 414 and 415, including the duties of liquidators and the objects of enquiries conducted in terms of ss 414 and 415 and ss 417 and 418 of the old Companies Act, the learned Judge concluded that '*There is no difference for relevant purposes between ss 414 and 415 and ss 417 and 418, respectively, of the* [1973] *Act*'. At para 21 of the judgment, the learned judge pointed out that '*Provision for enquiries of this nature has*

[38] *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others* 1996 1 BCLR 1 (CC), paras. 122-124.

[39] *Lynn NO and Another v. Kreuger and Others* 1995 (2) BCLR 167 (N) at 170 D - F per Hurt J.

[40] *Swart and Others v Fourie and Others* (2488/2017) [2017] ZAWCHC 58 (22 May 2017), para [21] read with fn 3.

*a long pedigree and it is mirrored in the statutory regimes of other countries to whose law comparative reference is commonly made in our the company law...'.*[41]

67. In *Ferreira,* supra, the Constitutional Court approved of what was stated, *inter alia,* in cases such as *Cloverbay*[42] where the court dealt with an examination under section 236 of the English Insolvency Act 1986 and stated that '[T]he reason for the inquisitorial jurisdiction contained in s. 236 is that a liquidator or administrator comes into the company with no previous knowledge and frequently finds that the company's records are missing or defective. The purpose of s. 236 is to enable him to get sufficient information to reconstitute the state of knowledge that the the company should possess' (own emphasis)

and

*Re Rolls Razor Ltd (No. 2),*[43] where the Appeal Court held that:

'The process under s. 268 is needed because of the difficultly in which the liquidator in an insolvent the company is necessarily placed. He usually comes as a stranger to the affairs of a the company which has sunk to its financial doom... Even those who are wholly innocent of any wrongdoing may have motives for concealing what was done. In any case, there are almost certain to be many transactions which are difficult to discover or to understand

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[41] See *Ferreira* supra at paras 115-120 and *Roering NO and Another v Mahlangu and Others* 2016 (5) SA 455 (SCA) at para 20 and note 5.

[42] *Cloverbay Ltd v. Bank of Credit and Commerce International SA* [1991] 1 All ER 894 (CA) at 900e.

In *Re Rolls Razor, Ltd_* [1968] 3 All ER 698 (ChD) at 700 it was held that the position under section 236 of the Insolvency Act 1986 is broadly the same as that under section 268 of the Companies Act. The court held that:

'*The powers conferred by s. 268 are powers directed to enabling the court to help a liquidator to discover the truth of the circumstances connected with the affairs of the company, information of trading, dealings, and so forth, in order that the liquidator may be able, as effectively as possible and, I think, with as little expense as possible ... to complete his function as liquidator, to put the affairs of the company in order and to carry out the liquidation in all its various aspects, including, of course, the getting in of any assets of the the company available in the liquidation. It is, therefore, appropriate for the liquidator, when he thinks that he may be under a duty to try to recover something from some officer or employee of a the company, or some other person who is, in some way, concerned with the the company's affairs, to be able to discover, with as little expense as possible and with as much ease as possible, the facts surrounding any such possible claim.*'

[43] *Re Rolls Razor Ltd (No. 2)_* [1969] 3 All ER 1386 at 1396 - 1397.

merely from the books and papers of the the company. Accordingly, the legislature has provided this extraordinary process so as to enable the requisite information to be obtained. The examinees are not in any ordinary sense witnesses, and the ordinary standards of procedure do not apply. There is here an extraordinary ... mode of obtaining information necessary for the proper conduct of the winding-up. The process, borrowed from the law of bankruptcy, can only be described as being sui generis'. (own emphasis)

68. In *Bernstein,*[44] the Constitutional Court was again seized of a challenge to the constitutionality of ss 417 and 418 of the old Companies Act. The judgment of Ackerman J affords a comprehensive consideration of the nature and purpose of insolvency enquiries under the old Companies Act. As pointed out in *Swart* supra, *'those observations hold equally true in respect of enquiries under ss 414-415.'* The provisions under consideration were held to be compatible with the Interim Constitution. The Constitutional Court acknowledged that, subject to effective controls against their abusive use, the far-reaching effects of the said statutory provisions were justified in the public interest and accordingly have to be borne with stoicism by those upon whom they are properly brought to bear.

69. The liquidators were well within their rights to utilise the statutory mechanisms provided in the old Companies Act in causing subpoenas to be issued by the second respondent for the production of documents relevant to the company in liquidation and its affairs for the purpose of winding-up the said company and in dealing with the shares held by it in SPG. Whilst they have been criticized for failing to utilise the provisions of s 164 of the new Companies Act to procure a court determined fair market valuation of

[44] *Bernstein and Others v Bester NO and Others* [1996] ZACC 2; 1996 (2) SA 751 (CC), 1996 (4) BCLR 449, at paras 24-25 the Constitutional Court recognized that a proportionate approach is indicated – the more obvious and important the need for investigation in the peculiar circumstances, the more rigorously the provisions can fairly and legitimately be applied.

the company in liquidation's shares, and for failing to utilise the provisions of PAIA[45] to obtain production of documents, I have not been referred to nor am I aware of any authority that obliges a liquidator to do so to the exclusion of the provisions in the old Companies Act. On the contrary, it is pointed out in the general commentary on s 164 of the new Companies Act in Henochsberg[46] that 'It should be noted that an alteration of the Memorandum of Incorporation *may also* be challenged by a member on the ground that it...unfairly disregards the interests of the shareholder in terms of s 163...'. (own emphasis) It has in any event not been established by the applicants that the relevant procedural requirements for the invocation of s164 were met. In the light of the authorities quoted above and in the view I take of the matter, the interesting arguments presented by the applicants in their heads concerning the efficacy, practicality and preferability of the provisions of s164 or PAIA need not detain me further.

70. The potential scope for an inquiry under ss 414 and 415 is 'extremely wide'.[47] As is apparent from the provisions of ss 414(2) and 415(1),[48] the only

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[45] The Promotion of Access to Information Act, 2000.

[46] Henochsberg on the Companies Act 71 of 2008, authored by Piet Delport.

[47] See *Roering NO and Another v Mahlangu and Others* 2016 (5) SA 455 (SCA) at para 21. The Supreme Court of Appeal pointed out that whilst the Constitutional Court in both *Ferreira* and *Bernstein* said that our courts must be astute to prevent enquiries in terms of ss 417 and 418 from being used as an instrument of abuse, it did not seek to expand on the meaning of that expression... What constitutes an improper forensic advantage will depend upon the circumstances of each case...the fundamental issue in determining whether there is abuse is whether the enquiry is being used for a purpose not contemplated by the Act...' (at paras 35, 36 and 37). (own emphasis)

[48] **Section 414(2)** reads, in relevant part, as follows:

" The Master of officer who is to preside or presides at any meeting of creditors, may subpoena any person-

(a) who is known or on reasonable grounds believed to be or to have been in possession of any property which belongs or belonged to the the company... or who in the opinion of the Master or such other officer may be able to give material information concerning the the company or its affairs, in respect of any time before or after the commencement

limitation upon the scope of the interrogation and so too, the seeking of documents, is that the Master or presiding officer (as the case may be) must disallow any question which is irrelevant and may disallow one which would prolong the interrogation unnecessarily.

71. In dealing with the argument that the mechanism for obtaining information and the discovery of records provided for in the old Companies Act constitutes an extraordinary mode of obtaining information, it was held in *Bernstein* that 'Inasmuch as the subject matter of the enquiry is the affairs of the company taken in the very widest sense, the examinee may be interrogated on a very wide range of matters and may be compelled to disclose any of his books or papers, however confidential or incriminating they might be. The mechanism is available, not only against the directors, officers, employees or agents of the failed the company and against those suspected of being responsible for its failure, but also against innocent third parties whose misfortune it is to know something about the trade, dealings, affairs or property of the company.' (footnotes omitted) (emphasis added)

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of the winding-up, to appear at such meeting, including any such meeting which has been adjourned, for the purpose of being interrogated; or

(b) who is known or on reasonable grounds believed to have in his possession or custody or under his control any book or document containing any such information as is referred to in paragraph (a), to produce that book or document or an extract therefrom at any such meeting or adjourned meeting.

(c) ..."

**Section 415(2)** reads, in relevant part, as follows:

" The Master or officer presiding at any meeting of creditors of a the company which is being wound-up and is unable to pay its debts, may call and administer an oath to or accept an affirmation from ...any other person...who was or might have been subpoenaed in terms of section 414(2)(a), and the Master or such officer and any liquidator of the the company ...may interrogate the...person so called...concerning all matters relating to the the company or its business or affairs in respect of any time, either before or after the commencement of the winding-up, and concerning any property belonging to the the company: Provided that the Master or such officer shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily."

72. Further, in dealing with the argument that the mechanism of sections 417 and 418 and its employment was one whereby innocent outsiders, who played no part in the management of the company or its demise, are, *inter alia,* forced to go to a place where they do not want to be; are forced to give evidence by their own oral testimony and by the production of documents; are forced to reveal confidential information that they want to keep private; are forced to produce their private books and documents that they want to keep confidential, the Constitutional Court in *Bernstein,* supra, had the following to say:

> " ..directors, officers of the company generally, auditors of the company and certain outsiders, have a duty to assist a section 417 enquiry achieve its objects. This duty has been voluntarily assumed by such persons entering into their respective relationships with the company. Section 417(2) permits interrogation concerning any matter referred to in section 417(1). The latter section refers to any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the court deems capable of giving information concerning the trade, dealings, affairs or property of the company. In effect the section permits questions to be asked in connection with property, claims or the trade, dealings, affairs or property of the company. The scope of the interrogation in terms of section 417(2) of the Act must, however, be informed by the purpose of the enquiry. In so far as the purpose is concerned with the discovery of information which may be to the financial benefit of the the company and relates to the proper winding-up of the the company, as more fully analysed above, the scope of the questioning is limited to this purpose." (own emphasis)

73. The liquidators utilized the mechanism provided in ss 414 and 415 to obtain information required to independently assess and/or verify the value of the company in liquidation's shareholding in SPG, which, as is common cause or at least not in dispute on the papers, comprises a significant asset in the insolvent estate. As the court in *Bernstein* recognised, it is the function of a liquidator or administrator to do his best for the creditors. I can see nothing improper in a liquidator seeking to obtain as much information as is

reasonably required for purposes of assessing, on an informed basis,[49] the value of an asset forming part of the insolvent estate for purposes of liquidating same for the ultimate financial benefit of the *concursus creditorum*.

74. The PWC report appears to have raised more questions than answers, precipitating a need for further interrogation of the current value of SPG and in turn, the value of the company in liquidation's shares. As circumstances evolved, the question of the applicable date of the valuation became particularly contentious in the light of the judgment of Unterhalter J, which in turn gave rise to the need to determine the *current* or present-day value of SPG and that of the company in liquidation's shareholding in SPG.

75. Significantly, by the time the applicants' filed their replying affidavit in the main application, they acknowledged that 'The [main] application does not seek to limit the liquidators to only the documents available to an ordinary shareholder, this is obvious because the liquidators have already obtained via the liquidation process considerably more documentation than an ordinary shareholder would be entitled to in the absence of litigation and associated discovery obligations..'

76. Despite the applicants' evidence that they willingly co-operated in the insolvency inquiry process by attending the adjourned hearings (albeit at

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[49] See *O'Neill v Phillips* [1999] UKHL 24, PRA 10, WHERE THE House of Lords (per Lod Hoffman) set out the manner in which an offer to purchase shares at a fair value should be calculated. There, the following was said:

" *In the first place, the offer must be to purchase the shares at a fair value. This will ordinarily be a value representing an equivalent proportion of the toal issued share capital, that is, without a discount for its being a minority holding...*

*Secondly, the value, if not agreed, should be determined by a competent expert...*

*Thirdly, the offer should be to have the value determined by the expert as an expert...the object should be economy and expedition, even if this carries the possibility of a rough edge for one side or the other (and both parties in this respect take the same risk) compared with a more elaborate procedure...*

*Fourthly, the offer should... provide for equality of arms between the parties. Both should have the same right of access to the information about the company which bears upon the value of the shares and both should have the right to make submissions to the expert...*" (own emphasis)

inconvenience to witnesses involved) and providing documentation (such that they allegedly had), as sought in terms of the various subpoenas, the first respondent's answering affidavit sets out several instances, supported by corroborating evidence, where requests made for information and documentation required by the liquidators to ascertain the current value of the company in liquidation's shareholding, both before and after the publication of the PWC report, were not met. This is aside from the fact that undertakings given by representatives of SPG and those of its auditors to provide subpoenaed documents, which were ordered by the second respondent to be produced, were on the unrefuted version of the liquidators, not all provided.

77. The liquidators have provided detailed reasons in paragraph 18 of the answering affidavit for why the documentation sought (both prior to the launch of the counter-application and thereafter) is required by them. None of those facts were engaged with or specifically addressed by the applicants in their affidavits. The allegations in the answering affidavit cast doubt on the veracity and reliability of the valuation arrived at by PWC in its report.[50] It has not been suggested by the applicants that the information that has been sought over an extended period of time by the liquidators and which is now sought in these proceedings, was or is not relevant or material for a determination of SPG's true value and concomitantly, a fair and reasonable current market value of the company in liquidation's shareholding in SPG. Rather, their case is premised on the fact that the liquidators were able to made offers of sale in respect of the company in liquidation's shareholding, first in 2015 and later in 2018, which according to the applicants, means that

[50] This raised a material dispute of fact on the papers. I cannot conclude that the first respondent's version, which laid out in detail a reasonable basis for disputing the veracity or accuracy of the PWC valuation, was palpably implausible, far-fetched or so clearly untenable, so that the court is justified in rejecting it on the papers. See *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 26; See also *Media 24 v Oxford University Press* 2017 (2) SA 1(SCA), and *Malan and Another v Law Society Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA).

the liquidators must have valued the shares – therefore, so it was contended, the liquidators have no further need for information or documentation regarding the value of the shares or the holding of a further inquiry, since the object thereof, namely, to place a value on the said shareholding, has thus fallen away.

78. The applicant's above stance however fails to account for the case put up by the liquidators in their papers concerning the need to determine the *current* value of the company in liquidation's shareholding. It also fails to account for the fact that the PWC valuation pegged the valuation date at 30 April 2015, being the date on which a forced sale event envisaged in the now defunct shareholders agreement was said to have occurred. The applicable date of valuation, however, remains a controversy between the parties, given that the applicants still rely in these proceedings on that self-same historic date on which to fix the value of the shares in these proceedings. Sans a valid shareholders agreement providing for a date of valuation linked to a forced sale event, that date is no longer relevant, that is, unless reliance is placed by the applicants on the provisions of the amended MOI. It seems to me to be fairly obvious that the applicants are effectually relying, without saying so in so many words, on the provisions of the new MOI for determining a value of the shares in question at a retrospective date, being the date on which a forced sale event was said to have occurred. And it is *that* very standpoint that informs the s163 relief that is being sought by the liquidators in the counter-application, a point to which I shall return later in the judgment.

79. The Applicants seek, 'in the context of the documents already provided, the value established by the liquidators and the entire factual matrix of the oppressive enquiry on SPG and third parties', to limit the liquidators' rights to obtain further information or documents from SPG to those that an ordinary shareholder would be entitled to in terms of the Companies Act,

having regard to 'the peculiar facts' of this matter. The applicants point out in their replying affidavit that this court is not asked to pronounce on the rights of all possible witnesses in insolvency enquiries, but to exercise its discretion to limit access to what is described in generic terms (but without specificity) as the 'sensitive and confidential' information of SPG.[51]

80. The 'peculiar facts' relied on are, *inter alia,* that:

80.1. SPG willingly obtained 'independent' valuations from Mazars and PWC;

80.2. The liquidators refused to participate in the PWC valuation process and eventually rejected the PWC valuation, allegedly 'without informing SPG of the basis for such rejection', relying instead, on their own preferred valuation obtained from Zeelie;[52]

80.3. The liquidators had sufficient information at their disposal to arrive at a value of the shares, evidenced by their ability to make two separate offers for the sale of Illima shares to SPG on two separate occasions, the first of which was made in 2015[53] for the sum of R1 million, and the second of which was made in 2018 for the sum of R 1.25 million after the liquidators had obtained two lever arch files worth of SPG documents under subpoenas issued in the ongoing ss

[51] Curiously, a significant part of the applicants' heads was devoted to an argument that seeks to persuade this court to accept the proposition that a liquidator representing an insolvent shareholder ought not to be entitled to information beyond that which the new Companies Act allows an ordinary shareholder to access from a the company. That proposition, interesting as it may be, does not pass muster in the light of the various authorities referred to above.

[52] The directors of SPG however likewise rejected Zeelie's valuation, having considered same to be 'over-inflated' without addressing the substance of the report.

[53] It is clear from the timeline sketched above that the liquidators' offer in 2015 was made after the Zeelie valuation procured by the liquidators.

414 & 415 insolvency enquiry; The liquidators therefore do not need further documents to value the shares, as they have already valued them;

80.4. SPG obtained an opinion from Prof Harvey Weiner, whose affidavit is attached to the replying affidavit as annexure 'MD1', to the effect that PWC had 'more than sufficient information for a valuation of the shares in 2015, in the form of the PWC 'factual memorandum'; As such, the applicants' contend that there is no need for the liquidators to obtain more info or documents from SPG, as *'a leading expert in the field of valuations has pronounced that quite sufficient information was available in the factual memorandum of PWC, which... the liquidators have been in possession of for a number of years.'*

81. In the light of these facts, the applicants contend that the purpose for holding an enquiry (i.e., to place a value on the company in liquidation's shareholding) has fallen away as a value has already been established by the liquidators (per Zeelie valuation), as supported by the offers that were made by the liquidators to sell the shares to SPG at specific prices, and by SPG (PWC valuation), as supported by the opinion of Prof Weiner and as duly adjusted by him.

82. The above facts must, however, be considered in the light of the broader context. Firstly, the PWC valuation obtained by SPG remains disputed by the liquidators on what appears to me to be not unreasonable or untenable grounds in the answering affidavit.[54] *Inter alia*, the liquidators dispute the value attributed to the shares by PWC is either market related, fair, reliable

[54] As earlier noted, the liquidators' reasons for refusing to accede to or participate in the PWC valuation process were also previously set out in a letter dated 17 September 2015, Annexure 'MD14" to the founding affidavit in the main application.

or accurate, given that PWC was furnished with incorrect information and was also not apprised of material information, *inter alia*, in relation to the outcome of litigation pertaining to the Gautrain project or the outcome of proceedings between BCJV and BCC, which, according to the unrefuted version of the liquidators, is likely to have had a material bearing on the valuation of the shares by PWC.

83. Moreover, the liquidators point out that *'at the end of SPG's financial year on 30 June 2020, it [SPG] had a net asset value in excess of R1.4 billion. This is a substantial net asset value and as the company in liquidation holds some 11% of the shareholding therein that shareholding is worth a lot more than what SPG is offering for those shares. This again underscores the fact the shares are not being fairly valued by SPG."* It must be remembered that the value of the shares, which the applicants contend has already been established by the liquidators as a basis to inform their offers of sale, thus allegedly obviating the need for further insolvency enquiries, was in fact rejected by the applicants, with Zeelie's valuation remaining in dispute and the ultimate appraisal of the true value of the shares remaining a point of contention between the parties. Since the Zeelie valuation was not accepted by the applicants, it stands to reason therefore that the true value of the shares was required to be interrogated by the liquidators, with the true value being established through a transparent process wherein the liquidators would be afforded the same right of access to information about the company (SPG, its subsidiaries and associated companies) which bears upon the value of the SPG group, and concomitantly, the proportionate shareholding of The company in liquidation in SPG, but which information it has been prevented from accessing, leading to the launch of the counter-application. Ultimately, the first respondent's case has consistently been that the applicants are

withholding relevant financial information which is necessary to determine the fair present day value of the shares.

84. Secondly, the applicants have not engaged with the facts put up in the answering affidavit regarding the impact and effect of the forced sale provisions in the shareholders agreement upon which all the valuations secured by SPG (including that obtained from PWC, as supported Prof Weiner) were predicated. It is quite evident from the PWC report that Human (the PWC valuator) had pegged the value of the shares in question on the date on which a forced sale event occurred, as envisaged in the forced sale provisions contained in the purported SPG shareholders agreement, which provisions the applicants have steadfastly sought to rely on and apply, the validity of which, however, formed the basis of an ongoing dispute between the parties that emerged as early as 2014, and which eventually culminated in court proceedings to determine its outcome. The dispute was finally resolved in favour of the first respondent when, in 2018, Unterhalter J held that no valid and binding shareholders agreement had ever come into existence. This carried the immediate consequence that the stance adopted by the liquidators since 2014 was vindicated and that the date on which the forced sale event under the now defunct shareholders agreement occurred, being the date on which the value of the shares was fixed in accordance with the forced sale provisions contained therein (as applied in the valuations obtained from both Mazars and PWC,) could not be invoked or relied on by the applicants, who could also not force a sale of the shares at the value they held at such historic date. Simply stated, without any forced sale mechanism regulating the valuation methodology, there was nothing preventing the liquidators from seeking to procure a sale of the shares on the open market, based on their current value at the time of any such sale, as would be the case in any commercial transaction, subject only to the pre-emptive rights of

the remaining shareholders of SPG as provided for both in the then extant articles of association of SPG and now in its subsequently amended MOI.

85. Thirdly, as demonstrated in the first respondent's papers, the valuations obtained by the parties several years ago have become outdated, given that, for obvious reasons, they fail to account for any verifiable increase (or decrease) in the value of the shares during the intervening period.

86. Fourthly, the applicants' argument loses sight of the fact that that Zeelie provided only a provisional value to the liquidators for purposes of making an offer of sale in respect of the shares in 2015.[55] The price which the liquidators were prepared to accept in terms of their respective offers was one with which they were ostensibly satisfied, based on the information available to them at the time (within the context of a liquidation) as would be the position with any sale concluded as between a willing seller and willing buyer on the open market in such circumstances. Although the first offer was closely aligned with the estimated value placed by Zeelie on the shares (on the basis of information accessed by him at the time), it must be remembered that Zeelie made it known in his report that he lacked certain information with which to value the shares more comprehensively.[56] The second offer appears to have been based merely upon an estimation of the value of the shares at the time, taking account of the price paid by SPG for its acquisition of additional shares in BCC.[57]

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[55] This is corroborated in Annexure "TH6' to the answering affidavit

[56] Although the Zeelie valuation was rejected by SPG as being 'over-inflated', no reasons were provided in the papers to ground such opinion.

[57] See Annexure 'TH58" to the answering affidavit. being a copy of the letter referred to in para 44 above, the contents of which (on the first respondent's version in para 19.35 of the answering affidavit) raised facts which the liquidators could not verify independently because they did not have the relevant documentation.

87. As I am not called upon in these proceedings to determine whether the computation of the value placed on the shares or the methodology employed by one or another valuator is reliable or correct, a determination of which would in any event be inappropriate on motion, given that material disputes that have arisen in the papers in relation to the vastly disparate valuations obtained by the respective parties, it is neither apposite nor possible to decide which of the valuations are to be preferred for purposes of resolving the prevailing impasse between the parties.

88. Fifthly, on the applicants' own version, they co-operated with the insolvency inquiry process instituted in terms of the old Companies Act by appearing on the appointed days for each of the hearings conducted before the second respondent. On each occasion, undertakings were furnished by persons subpoenaed to provide the documents or information subpoenaed and orders for the provision of the documents and information were given by the second respondent. After undertakings were furnished at the inquiry convened on 18 September 2010, the applicants, in a *volte face,* decided to renege on their undertakings. They now allege, rather audaciously in my view, that the subpoenas issued under the auspices of enquiries conducted under ss414 and 415 of the 1973 Act, amounted to 'overreach' (were unduly broad) or that the convening of further inquiries constitutes an abuse by the liquidators of their powers under the relevant statutory provisions, this, in circumstances where the applicants: (i) have not applied to set aside the subpoenas either on the basis that they were issued without proper cause or for an illegitimate purpose or because they constitute an abuse of process or that they were issued without the presiding officer (second respondent) having properly applied his mind to what the liquidators contended was reasonably required; (ii) have not sought a review the insolvency proceedings currently underway in terms of ss 414 and 415, as was

incumbent upon them to do if they wished to challenge the legitimacy thereof on the basis that the statutory mechanism in old Companies Act that caters for the production of information, was being used for improper purposes; (iii) have not complained that the presiding officer failed to exercise his discretion in the manner provided by the Act (in authorising the various subpoenas) or in ordering the agreed production of documents; (iv) have not themselves applied to court to determine the fair market value of the company in liquidation shares in question; and (v) have not seriously challenged the ambit of the provisions of ss 414 and 415 or suggested that the provisions of ss 414 and 415 of the old Companies Act are not broad enough to cover the type of information sought in the counter-application and (vi) have not seriously challenged the relevance or justifiability of the information sought in the counter-application.

89. It must be stressed that the applicants have not pertinently denied or sought to engage with the facts put up by the first respondent in the answering affidavit, more specifically, those material aspects set out in paragraph 17 of the answering affidavit which bear upon on the acceptability, veracity or reliability of the PWC valuation or indeed the facts provided in the answering affidavit to ground the liquidators' belief that the value of the shares are higher than the price offered by SPG (R47.8 million), regard being had to the audited financial statements of SPG for the year ending on 30 June 2020 (Annexure 'TH72' to the liquidators replying affidavit), including what the liquidators term as 'flaws in Wainer's conclusion', as highlighted by Zeelie in his affidavit (annexure 'TH74' to the liquidators replying affidavit). All these aspects have a bearing on the relief sought in the counter-application and in part inform the grounds of opposition to the relief sought in the main application.

90. Before turning to the s163 relief sought in the counter-application, it is necessary to deal with an argument raised on behalf of the applicants, namely, that the production of documents and information sought by the liquidators constitutes an abuse of the ss 414 and 415 process. Reliance was placed on *Thorne*[58] (and authorities there cited) for the contention that the liquidators have impermissibly sought to carry on the business of the company in liquidation without the sanction of creditors or the Master and have moreover sought to delay the realisation of the relevant shares in order to extract a 'commercial bargain' at a price dictated by them, in conflict with their duty to act reasonably and to liquidate the insolvent's assets expeditiously. By 'commercial bargain' I understand the argument to refer to an advantageous offer.

91. There are several difficulties with the above contention. Firstly, there is no admissible evidence on the papers to support the proposition that the liquidators do not have the sanction of the Master or creditors in adopting the chosen course. Any allegations to this effect remain nothing more than inadmissible speculation. Secondly, had the information sought for purposes of verifying the value of SPG (so that a verifiable value of the company in liquidation's shares could be ascertained) been provided to the liquidators

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[58] *Thorne v The Master* 1964 (3) SA 38 at p.50B to 51D. There, inter alia, the following was said: "The essence of the matter in relation to the realisation of the assets of an insolvent estate is that the trustee takes the estate as he finds it and converts it into cash which he distributes to the creditors. It is no function of his to speculate with the assets in the hopes of improving their value, whether by delaying realisation or by expending money upon them. In *Walker v Brunt, N. O.*, 17 C. T. R. 669 at p. 670, HOPLEY, J., said:

'Now it appears to me that when an insolvent surrenders an estate he surrenders it as it is at the time of his insolvency, and the creditors must make the best of it in their own interests. The liabilities of the insolvent are stated and fixed and determined upon the day of the sequestration, and are not to have subsequent additions by large sums of money, however meritorious the object may be for which they have been expended.'

Even where creditors desire a postponement of realisation, there are limits upon their rights in this regard. See *Wilkins v Pieterse*, 1937 C. P. D. 165 at p. 171, where DAVIS, J., approved the passage from Mars on *Insolvency* which appears in the 5th ed. at p. 263, reading as follows:

'Creditors do not enjoy unlimited rights with regard to such sale. Thus, the underlying principle of the law being to provide for a speedy realisation of the whole of the estate assets, though creditors can authorise a gradual realisation and thus delay the sale a reasonable time, or that the realisation shall be postponed for a short period, they cannot postpone such sale indefinitely.' "

voluntarily (or pursuant to the inquiries conducted) the realisation of the shares would no doubt have been achieved earlier rather than later. The information was not voluntarily provided. Hence the need for invoking the statutory mechanism in order to obtain such information. This is also not discounting the fact that time was taken up by the pursuit of litigation in relation to the dispute surrounding the validity of the shareholders agreement, which meant that until that dispute was finally resolved, the basis upon which the realisation of the asset could occur, remained unresolved. Thirdly, the case of *Thorne* is in any event distinguishable on its facts. That case concerned a complaint regarding the Trustee's fees. The Trustee had continued to conduct the insolvent's business without the authority of the Master or resolutions of creditors. In those circumstances, the Master exercised a discretion in reducing the tariff pertaining to the Trustee's fees.

92. In the present case, the liquidators have made out a case that they have formed a considered view, based on facts set out in the answering affidavit, supported by Zeelie's expert opinion, that the price offered by SPG for the company in liquidation's shares is below its current market value and that a better price is to be obtained. There is, after all, no requirement in law that obliges liquidators to sell an assets as quickly as possible at a price that is believed, based on cogent facts, to be considerably below its true market value. The liquidators are required to do what is best for the creditors and this would entail attempting to secure the best possible price for the shares commensurate with the true and fair market value thereof. I cannot find anything unreasonable or untoward in the conduct of the liquidators in circumstances where they consider, as in the present case, that more information is required to determine the present day value of the shares so as to enable them to sell the asset at the best possible price for the benefit

of the *concursus creditorum*, particularly since the present-day value of the company in liquidation's shareholding has not yet been determined by any valuator to date. The liquidators believe that SPG's current value has likely increased by virtue of the settlement of the Gautrain litigation, the acquisition by SPG of further shares in BCC, and, not least of all, having regard to its recent financial statements, and they thus ought to be placed in an informed position to verify same. Such an approach would serve the legitimate purpose of discovery of information which may be to the financial benefit of the company in liquidation, inuring to the ultimate financial benefit of the *concursus creditorum*, as alluded to in *Bernstein*[59] and thus cannot be said to amount to an abuse of the liquidators' statutory duties.

93. For all the reasons given, I cannot find that the applicants have established an entitlement to the relief sought in the main application.

*Section 163 relief*

94. During oral argument presented at the hearing of the matter, counsel for the applicant submitted that the relief sought by the applicants in the main application has to a large extent become subsumed by the s163 relief sought (by SPG) in the counter-application.

95. At the risk of repetition, it will be remembered that a composite affidavit was filed by the applicants, both in reply to the answering affidavit filed in the main application and in answer to the founding affidavit filed in the counter-application. In such affidavit, the applicants seek relief in terms of s163 of the new Companies Act[60] for an order which effectively authorises a forced sale

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[59] See para 72 above.

[60] The order proposed and sought by the applicants is that:
"*1. The company in liquidation is directed to sell to a qualifying BBBEE party its shares in SPG for the fair market value consideration thereof determined by PWC in their report dated August 2016, duly adjusted by Professor Wainer in February 2021, being R47.8 m (forty seven million eight hundred*

of the shares to 'a qualifying BBBEE' third party at a price commensurate with the value attributed to the shares by PWC in their report (which determined the value as at 30 April 2015)[61] and which, after adjustment by Prof Wainer in 2021 (pursuant to the settlement of the BCJV claim) increased the value of the shares from R8.1 million to R59.7 million. According to Prof Wainer, if a minority discount of 20% is applied to the adjusted amount, as he opines it should be in the absence of a shareholders agreement, then the value of the company in liquidation's shareholding in SPG would be R47.8 million. This is the price which the applicants contend for in the draft order proposed by them in their composite affidavit, being a price that they allege is commensurate with the 'fair value' of the shares, such value having been determined at a historic date in 2015.

96. As regards the relief sought by the applicants in their replying/answering affidavit, the first respondent argues, *in limine*, that 'the applicants impermissibly purport to seek new, allegedly (but not truly) ancillary relief in terms of ss163(1) and 163(2)[62] of the 2008 Act.'

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*thousand rand) payable within such time as may be agreed upon between The company in liquidation and that qualifying BBBEE party.*

*2. The company in liquidation is to pay the costs on an attorney and client scale."*

[61] It will be remembered that PWC valued SPG at R69 Million as at 30 April 2015 on the basis that an additional R746 million would be added if the BCJV claim, based on a contribution sought from SPG in the form of a cash call, was unsuccessful. This meant that The company in liquidation's shares were valued at R8.1 million plus 11.784% of R746 million, on a contingent basis by PWC. The contingency in the valuation was resolved sometime in 2020, enabling SPG to instruct Prof Wainer to make the required adjustment, which he did per his report dated 9 February 2021 (annexure "MD1' to the applicants' affidavit). The report calculates the adjusted amount as R59.7 million and applies a deduction of 20% in respect of The company in liquidation's minority shareholding, arriving at a figure of R47.8 million, ostensibly on the basis that the now defunct shareholders agreement (which allowed for the value of the shareholding to be determined - in a forced sale scenario - without any deduction being made for minority status) no longer applies.

[62] Sec 163(1) of the 2008 Act reads:

"163.(1) A shareholder or a director of a the company may apply to a court for relief if—

(a) any act or omission of the 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 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

97. The basis for s 163 relief sought by the applicants in their replying/answering affidavit is summarised in the applicants' heads of argument, as follows: '*...there is no obligation on SPG to purchase Ilima's shares. It, however, seeks closure to the practice of harassment to which it has been subject and it is voluntarily willing to make the purchase at a reasonable price using the date on which the liquidators were obliged to accept the offer as the valuation date...*' without the applicants, however, disclosing in their papers, a legitimate or justifiable basis upon which the liquidators were 'obliged' to accept the PWC valuation, given that the said valuation was disputed for the reasons advanced in the answering affidavit (and in correspondence preceding the launch of the main application), which impact upon the veracity or reliability of the PWC valuation, in circumstances where the applicants failed to make any real effort to respond to the substance of either the contents of Zeelie's report or the reasons advanced by the liquidators for rejecting the PWC report. [63]

98. Be that as it may, the first respondent objects to the applicants introducing or seeking such relief – which was not prayed for in their notice of motion or

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(c) the powers of a director or prescribed officer of the the company, or a person related to the 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."

Section 163(2) of the 2008 Act reads, in relevant part:
"(2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including—

...
(e) an order directing an issue or exchange of shares;
...
(h) an order varying or setting aside a transaction or an agreement to which the the company is a party and compensating the the company or any other party to the transaction or agreement;
..."

[63] I can in any event not find, on the evidence presented, that by convening an inquiry and the issuing of subpoenas under the provisions of the old Companies Act, the applicants were 'harrassed' into revealing sensitive and confidential the company information, leading to a '*hopson's choice*' – to either either accept the liquidators' price for the shares or else face an 'unending' insolvency inquiry for the production of more and more documents for purposes of determining or verifying the value of SPG and concomitantly the value of The company in liquidation's shares in SPG.

addressed in their founding affidavit - on the basis that it raises an entirely new case in reply. This is because the founding affidavit in the main application was concerned with the ambit of inquiries convened in terms of the provisions of the old Companies Act;[64] whether the production of documents sought thereunder was justified by the provisions of ss 414 and 415; and the restriction, if any, to be imposed on the exercise of the wide powers afforded to liquidators under the provisions of the old Companies Act to investigate the existence (including the value) of an asset during the course of the winding up an insolvent estate. This, says the first respondent, is in stark contrast to the order now sought by the applicants in their composite replying/answering affidavit for the compulsory sale of the company in liquidation's shareholding in SPG via the back door of an application brought by the first respondent, as shareholder of SPG, in terms of s 163 of the new Companies Act for just and equitable relief as a result of the recent amendment of the SPG MOI.

99. The applicants contend that since the counter-application was brought in terms of s 163(1) of the 2008 Act, the court is thus considering an application as envisaged in that section, and hence it has, by operation of s 163(2), the power to make any order it considers fit.[65] The applicants allege that a fitting

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[64] i.e, in terms of ss 414 and 415 of the old Companies Act.

[65] **Section 163(1)** reads, in relevant part:
"A shareholder or director of a the company may apply to court for relief if-
(a) any act or omission of the the company, or a related person, has had a result that is oppressvie or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
(b)...
(c)..."

**Section 162(2)** reads, in relevant part:
"Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including-
...
(e) an order directing an issue or exchange of shares;
...
(h) an order varying...an agreement to which the the company is a party

order is one whereby the company in liquidation is compelled to sell its shares to a qualifying BBBEE (third) party at the value determined by PWC in their 2016 report, as adjusted by prof Wainer in February 2021, being R47.8 million.

100. The basic thrust of the first respondent's point *in limine* is that the relief sought by applicants in their replying/answering affidavit could not be considered or granted as their notice of motion did not provide therefore and moreover, the applicants failed to move for an appropriate amendment of the notice of motion. There is established authority for this proposition,[66] subject to the exception that an order in terms other than that set out in the notice of motion but which is: (i) clearly indicated in the founding affidavit; (ii) is established by satisfactory evidence on the papers; and (iii) the basis therefor has been fully canvassed i.e., the party against whom such relief is to be granted has had the fullest opportunity of dealing with the claim for relief being pressed, may be entertained by the court [67]

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(i) an order requiring the the company, within the time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;
..."

[66] See: *Adendorffs Boerderye v Shabalala & others* (997/15) [2017] ZASCA 37 (29 March 2017) at para2 20 & 24; *Municipal Workers Retirement Fund v Kopanong Local Municipality* (A67/2019) [2019] ZAFSHC 159 (19 September 2019); *Mgoqi v City of Cape Town & another* 2006 (4) SA 355 (CPD) at paras [10] - [13

[67] See for example: *Port Nolloth Municipality v Xhalisa* 1991 (3) SA 98 (C) at 112C-E where the following was said: *""Finally, there remains the question of Municipality's right to an order in the limited form as sought by Mr Barnard on its behalf by way of the prayer for 'further and/or alternative relief'. Such a prayer can be invoked to justify or entitle a party to an order in terms other than that set out in the notice of motion (or summons or declaration) where that order is clearly indicated in the founding (and other) affidavits (or in the pleadings) and is established by satisfactory evidence on the papers (or is given), cf Trustees of the Orange River Land and Asbestos Co v King and Others 6 HCG 260 at 296-297. Relief under this prayer cannot be granted which is substantially different to that specifically claimed, unless the basis therefor has been fully canvassed, viz the party against whom such relief is to be granted has been fully apprised that relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of 'further and/or alternative relief."*

101. In *Johannesburg City Council,*[68] the Full Court had occasion to consider what 'further or alternative' relief encompasses. There it was held that:

"The applicant's counsel misconceived his position in thinking that the original notice of motion could possibly suffice. This was probably based on a mistaken view of the effect of the prayer for alternative relief. The law regarding the necessity for an appropriate amendment of the claim under such circumstances and the limits of a prayer for alternative relief, is contained in the following passage from the judgment of TINDALL JA in *Queensland Insurance Co Ltd v Banque Commerciale Africaine* 1946 AD 272 at 286:

> *'In regard to the judgment for £2 450, in my opinion, the plaintiff was not entitled to claim it on the action as framed. The action is based on the policy; the claim for £2 450 is based on the compromise arising from the acceptance of the tender in the alternative pleas. The prayer for alternative relief does not help the plaintiff over the difficulty. It is unnecessary to consider whether the practice of including such a prayer is derived from the Roman-Dutch or the English practice. In the Roman-Dutch practice according to Van Leeuwen RDL5.15.8, this prayer (the so-called clausule salutaire asking for such other relief as the Court may deem best for the plaintiff) is of such effect that every right to which the plaintiff may in any way be entitled upon the allegations in his claim, is thereby considered to be included in the prayer. See also Voet 2.13.13 and Van der Linden Jud Pract 2.3.7 vol 1 at 147. The effect of the prayer for 'such further or other relief as the nature of the case might require' in the English practice seems to be the same. See Cargill v Bower 10 ChD502 at 508, in which FRY LJ pointed out that the prayer for alternative relief is limited by the statement of fact in the declaration and by the terms of the express claim, and that a plaintiff cannot get, under the prayer for alternative relief, anything that is inconsistent with those two things...'*

In *Hirschowitz v Hirschowitz* 1965 (3) SA 407 (W) at 409 VIEYRA J applied these principles to motion proceedings. The prayer for alternative relief is to my mind, in modern practice, redundant and mere verbiage. Whatever the Court can validly be asked to order on papers as framed, can still be asked without its presence. It does not enlarge in any way 'the terms of the express claim', as pointed out by TINDALL JA (*op cit*)."

102. In my view, the order for a forced sale as sought by the applicants in their composite replying/answering affidavit, does not meet the threshold for consideration as required by the authorities quoted above. No evidence in support of a claim for a forced sale, in the terms proposed, is provided in the

[68] *Johannesburg City Council v Bruma Thirty-two (Pty) Ltd* 1984 (4) SA 87 (T) at 92G-93G

applicants' founding affidavit. But even if I were to consider such a claim on the basis proposed by the applicants, the following factors would militate against its grant: Firstly, the relief is predicated upon an acceptance of the PWC valuation even though it has been disputed on grounds that *prima facie* do not appear to me to be unreasonable or unjustifiable so that they should be summarily discounted; Secondly, it presupposes that a forced sale will necessarily resolve the current *impasse* between the parties where the very notion of a forced sale, based on an outdated valuation, remains a hotly contested issue; and thirdly, I am in any event not persuaded that the impugned order is just and equitable in the peculiar circumstances, for reasons that will become apparent later in the judgment.

103. That brings me to the relief sought by the first respondent in the counter-application, namely, a declarator that in terms of section 163(2)(h) of the Companies Act, 71 of 2008 ('the 2008 Act'), the provisions of clause 27 of the Memorandum of Incorporation of SPG, as approved at the General Meeting of shareholders of SPG on 30 June 2020, do not apply to the shareholding or sale of such shareholding held by The company in liquidation Group (Pty) Ltd (in liquidation) ('The company in liquidation') in SPG.

104. On the case put up by the liquidators, they encountered resistance by the applicants to being afforded access to financial information of SPG which is both relevant and material to arriving at an informed and responsible assessment of the present-day valuation of the company in liquidation's shareholding in SPG. The applicants resist such an outcome on the basis that the PWC valuation is correct and that the liquidators acted unreasonably in failing to accede to the applicants' views and the resultant valuation as performed by their appointed valuator.

105. As I have already found, without the amendment to SPG's MOI, and without a shareholders agreement in existence providing for a forced sale mechanism, the applicants had no right to dictate a forced sale of the shares at a forced sale price determinable on the date on which a forced sale event occurred. On the contrary, the liquidators had a right to negotiate a sale of the shares on the open market, with whomever they chose, in order to secure the best price possible, subject only to the pre-emptive rights of co-shareholders to acquire the shares on no less favourable terms. That is, after all, why the liquidators pursued the insolvency inquiries to obtain information necessary to establish the fair market value of the shares.

106. In terms of the clause 27 of the amended MOI of SPG:

> "27.1. A Shareholder shall be deemed to have committed an act of insolvency, winding up or business rescue if:
>
> 27.1.1. save for solvent re-organisation or reconstruction, it is wound up, provisionally or finally, or is placed under provisional or final judicial management; or
>
> ...
>
> 27.2. If a Shareholder commits an act of insolvency, winding up or business rescue, then:
>
> 27.2.1. Upon receipt by the Defaulting Shareholder, (or its statutory representative), of written notice from those Aggrieved Shareholders whose aggregate Equity Proportion inter se is not less than 50%, a Right to Call in respect of the Equity of the Defaulting Shareholder **shall be deemed to have arisen on the Business Day immediately preceding the date of the event giving rise to the act of insolvency**; and
>
> 27.2.2. The purchase Consideration for the Forced Sale in this clause shall be the Forced Sale Price."
>
> (emphasis added)

107. The 'forced sale price' is defined in clause 1.2.24 as:

> " the price at which a Shareholder may become obliged to sell its Equity to the other Shareholders after a Forced Sale Event has occurred as expressed in this Agreement, which

price shall mean a value determined, in the first instance by written agreement between the Shareholders or their representative, and failing such agreement being reached within 5 (five) Business Days after written request for an agreed determination being delivered by any Shareholder to the others, than by an independent Merchant Bank division of any of the largest 6 (six) commercial banks in South Africa to be appointed by agreement between the Shareholders, or failing such agreement by the Chairman of the South African Institute of Chartered Accountants:

1.2.24.1,1. which shall have reference to the value of the Equity in the open market on a going concern basis as between a willing purchaser and willing seller;

1.2.24.1.2. which shall give each party an opportunity to make written submissions to him, concerning the manner in which the Forced Sale Price should be determined;

1.2.24.1.3. which shall value the Shareholder's Loans at their face value;

1.224.1.4. whose decision (save for manifest error) shall be final and binding on the Parties; and

1.2.24.1.5. whose costs of valuation shall be borne by the selling Shareholder(s) on the one hand and the Call Shareholders on the other hand in equal shares, the liability of the Call Shareholders for their half of such costs being in proportion to their Equity Proportion Inter Se."
(emphasis added)

108. In terms of clause 1.2.25, a 'Forced Sale Event' means:

" any event provided for in this MOI pursuant to which a Shareholder may become obliged to sell its Equity to the other Shareholders, other than a voluntary sale."

109. The liquidators allege that the amendment of SPG's MOI has the unfairly prejudicial effect of: (i) depriving the liquidators of the opportunity to negotiate a sale at the present day value of the shares; (ii) limiting the pool of prospective buyers to only co-shareholders of SPG; (iii) imposing a methodology for determining the value for the purpose of a forced sale of the shares at a formulaic value; (iv) forcing consequences upon the first respondent which were not there prior to the amendment in June 2020, which amendment occurred only after the judgment of Unterhalter J in 2018, by altering pre-existing conditions that regulated the sale of the shares, resulting in the first respondent being deprived of rights which had already vested, one of which includes the right to liquidate the shares at their

current value; (vi) the amendment of the MOI is unfairly prejudicial to the first respondent (as minority shareholder), with SPG seeking to procure a suppressed value of the shares on a contrived basis through the amendment of its MOI during the process of the present ongoing litigation.

110. These allegations, which were met with a bald denial by the applicants in their answering affidavit, do not in my view give rise to a genuine material dispute of fact, warranting acceptance of the applicants' version on the application of the Plascon-Evans test in motion proceedings. As was stated in *Wightman:* [69]

> "A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

111. The introduction of clause 27 in SPG's new MOI, given the absence of a valid shareholders agreement, and any reliance thereon by SPG (and co-shareholders of the company in liquidation) by retrospective application of

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[69] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA), para 13.

its provisions, when viewed within the greater context of: (i) the history of the ongoing dispute surrounding the basis upon which the valuation of the company in liquidation's shareholding in SPG was conducted by PWC, including the method of valuation employed by it (based on the forced sale provisions of an invalid shareholders agreement) and (ii) the ongoing dispute concerning the appropriate date on which the value of the shareholding is to be determined for purposes of any sale of the shareholding; and (iii) the applicants' intransigent insistence on relying on a value determined as at April 2015, ostensibly to avoid disclosure of the true and present-day value of SPG; and (iv) the liquidators' various attempts to procure access to relevant SPG company information and documentation to enable them to determine or verify the fair current market value of the shareholding in SPG on an informed basis, which attempts have to date hereof been unsuccessful, given that undertakings furnished by representatives of SPG and its auditors to provide the information and documentation sought were later reneged upon without any proper explanation; and (v) the intransigent insistence by SPG to rely on the forced sale provisions for purposes of fixing the valuation of the shares at a historic date, without regard for any increase (or decrease) in the value of the shares during the intervening period until the eventual date of sale of the shares; and (vi) the occurrence of subsequent events which may have had a material impact on the present-day value of the shares, will result in SPG seeking to procure a sale or buy-out of the shareholding in question at a value other than their present-day worth, as has effectively been sought by the applicants in these proceedings. I am persuaded that any reliance on clause 27 of the MOI by SPG and the remaining shareholders of SPG will be unfairly prejudicial to the creditors of the company in liquidation for the reasons stated in para 109 above, as envisaged in s163 of the 2008 Act.

112. Furthermore, the amendment to the MOI will for obvious reasons, not affect shareholders equally if the provisions of the amended MOI were to apply retrospectively (in so far as clause 27 thereof purports to allow this) and in so far as SPG relies thereon. As matters stand, the only shareholder who will be affected in such event is the company in liquidation. By limiting the value of the shareholding to a historic date in 2015 (as is the case in the PWC valuation), no account is taken of any increase in the value of the shareholding as at the present date. Stated differently, limiting the value of the shares to that which pertained as at a historic date based on the occurrence of a forced sale event, will inure only to the benefit of co-shareholders to the obvious prejudice of the *concursus creditorum,* who will be deprived of the benefit of having the shares offered for sale to a willing buyer at the present-day value, subject only to the pre-emptive rights of co-shareholders.

113. The fact that the court has a wide a discretion in making any order it considers appropriate in terms of s 163, does not mean that it should grant the order as prayed for by the applicants. Section 163(1)(a) deals with unfairly prejudicial conduct or conduct which unfairly disregards the interests of a minority shareholder and relates to specific actions of the company and resolutions of the shareholders that have been passed or proposed. On an application under this section, the court may, with a view to remedying or bringing to an end the mentor's complaint, make any interim or final order it considers appropriate. As noted in the case of *Armitage N.O.*[70], 'The remedy under section 163 is aimed at balancing the interests of all persons having an interest in a the company and in doing so, the legislator has given the courts a very broad discretion, applying general standards of fairness, to decide these cases on their merits. The court has the power to do

[70] *Armitage N.O v Valencia Holdings 13 (Pty) Ltd and Others* (2315/2017), an unreported decision of matojane J, para 42.

what is considered fair and equitable in all the circumstances of the case, to put right and cure the unfair prejudice which the minority shareholder has suffered at the hands of the majority of the the company. It is empowered to make such order as it thinks fit for the granting of the relief...". In *Grancy,* [71] it was held that the section must be construed in a manner that will advance the remedy it provides, rather than limit it.

114. It is trite that a declaratory order is an order by which a dispute in terms of the existence of some legal right or entitlement is resolved. The right can be existing, prospective or contingent. [72]

115. Given the protracted history surrounding the dispute concerning the fair value of the company in liquidation's shares; the judgment of Unterhalter J that eventually decreed the shareholders agreement to be invalid, thereby vindicating the approach hitherto adopted by the liquidators; the timing of the amendment of the SPG MOI to bring into play what SPG wanted but failed to achieve through a non-existent shareholders agreement, in order to procure an alteration of pre-existing conditions that were in place prior to the amended MOI (where no forced sale provisions existed and no restrictions were imposed on the sale of the shares in question to third parties (subject to shareholders' pre-emptive rights); the likely appreciation in the value of the company in liquidation's shareholding in SPG between the date of its liquidation and the date of the ultimate realisation of its shareholding, as demonstrated in the first respondent's papers, it is my view that the majority shareholders unfairly sought to achieve a result which the court, per Unterhalter J found not to subsist. In all these circumstances, I have no doubt as to the prejudicial effect of clause 27 of the new MOI and

[71] *Grancy property ltd v manala and Others* 2015 (3) SA 313 (SCA).

[72] See: *Suid-Afrikaanse Onderlinge Brand- en Algemene Versekeringsmaatskappy Bpk v Van den Berg* 1976 (1) SA 602 (A).

have no hesitation in finding that the introduction thereof has had a result that is unfairly prejudicial to the sale of the company in liquidation's shareholding.

116. In the result, I find that the first respondent has established its entitlement to the relief sought in the terms set out in its notice of counter-application, as set out in paragraph 14 above.

***Costs***

117. It is trite that an award of costs is a matter that falls within the discretion of the Court. A punitive costs order has been said to be an extra-ordinary one which may be imposed by reason of special considerations, arising either from the peculiar circumstances or the conduct of a party during the litigation.[73]

118. In *Plastic Converters,*[74] the court cautioned that the scale of attorney and client is one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible matter. The term 'vexatious' was considered in the context of a punitive costs award in *Johannesburg City Council,*[75] where the court expressed the view that proceedings may be regarded as vexatious when a litigant puts the other side to unnecessary trouble and expense which it ought not to bear. The Constitutional Court affirmed this approach in *Public Protector v SARB,*[76] stating that a punitive costs order is appropriate 'in

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[73] See: *Nel v Davis SC NO* [2016] JDR 1339 (GP) at para 25.

[74] *Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC) at para 46.

[75] *Johannesburg City Council v Television & Electrical Distributors (pty) Ltd and Another* 1997 (1) SA 157 (A) at 177D-E.

[76] *Public Protector v SARB* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) at para 144.

circumstances where it would be unfair to expect a party to bear any of the costs occasioned by the litigation'[77] and is designed 'to mark the court's displeasure at a litigant's conduct, which includes vexatious conduct and conduct that amounts to an abuse of the process of court'.[78]

119. In this matter, I am persuaded that a punitive costs order is warranted. Without repeating what has already been stated, the fact remains that the applicants did not appear to consider it oppressive or an abuse by the liquidators of their duties when they submitted themselves at the insolvency inquiriy and furnished unconditional undertakings to supply the information or documents requested (thereby avoiding interrogation), only to later renege on such undertakings whilst generally continuing to obstruct the liquidators from discovering the true and current value of SPG, ultimately maintaining that the liquidators were not entitled to the information on indefensible grounds, thereby incurring costs which ought not to have been incurred.

120. For all the reasons given, the following order is granted:

**ORDER**

1. The main application is dismissed with costs, such costs to include the costs of two counsel.
2. The late filing of the answering affidavit in the main application is condoned.
3. The counter-application succeeds. In this regard:
    a. It is declared that in terms of section 163(2)(h) of the Companies Act, 71 of 2008 ('the 2008 Act'), the provisions of clause 27 of the

[77] *Public Protector v SARB*, para 221.

[78] *Public Protector v SARB*, para 223.

Memorandum of Incorporation of SPG, as approved at the General Meeting of shareholders of SPG on 30 June 2020, do not apply to the shareholding or sale of such shareholding held by The company in liquidation Group (Pty) Ltd (in liquidation) ('The company in liquidation') in SPG;

b. It is declared that the documents and records sought by the first respondent at 'insolvency enquiry' proceedings held at the Krugersdorp Magistrates Court on 23 March 2018 and 15 June 2018 respectively, fall within the category of documents to which the first respondent is legally entitled to in terms of sections 414 and 415 of the Companies Act, 1973, ('the 1973 Act') and are to be provided to the first respondent;

c. The fifth applicant is to provide the documents, listed in annexure 'B1.3' to the Notice of Counter-Application, to the first respondent;

d. The first to fourth applicants are to provide the documents, listed in annexure 'C' to the Notice of Counter-Application, to the first respondent;

e. The first to fifth applicants are to pay the costs of the counter-application on an attorney and client scale, such costs to include the costs of two counsel.

**A. MAIER-ERAWLEY**
**JUDGE OF THE HIGH COURT,**
**GAUTENG DIVISION, JOHANNESBURG**

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| Date of hearing: | 14 June 2021 |
| Judgment delivered | 13 September 2021 |

*This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on Caselines. The date and time for hand-down is deemed to be have been at 10h00 on 13 September 2021.*

APPEARANCES:

| | |
|---|---|
| Counsel for Applicants | Adv. L. Morrison SC, together with Adv T Scott |
| Attorneys for Applicants | Knowles Hussein Lindsay Attorneys |
| Counsel for First Respondent: | Adv A. Subel SC, together with Adv J. Hershensohn |
| Attorneys for First Respondent: | Lawtons Africa Attorneys |