REPUBLIC OF SOUTH AFRICA

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

CASE NO: 12058/2018

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

7/9/2018
DATE

SIGNATURE

In the matter between:

KEWCO PROPRIETARY LIMITED	First Applicant
GREGORY DAVID SENIOR	Second Applicant
LEWIS GOLDEN N.O.	Third Applicant
ANDREA SENIOR N.O.	Fourth Applicant

and

SECOND CHAPTER INVESTMENTS PROPRIETARY LIMITED	First Respondent
LODESTONE BRANDS PROPRIETARY LIMITED	Second Respondent
MAYFAIR HOLDINGS PROPRIETARY LIMITED	Third Respondent
MAYFAIR SPECULATORS PROPRIETARY LIMITED	Fourth Respondent
THE STANDARD BANK OF SOUTH AFRICA LIMITED	Fifth Respondent

JOHAN VAN ZYL Sixth Respondent

MARK RUSSELL Seventh Respondent

KUGIN MUTU Eighth Respondent

KATE CRAWFORD Ninth Respondent

SUMMARY

Company Law – Interim and/or final relief – majority shareholders proposing to engage in sale of shares process in terms of adopted company Memorandum of Incorporation – minority shareholders seeking to interdict sale process based on allegations of oppressive, and unfairly prejudice to, and which disregards the interests or the applicants (minority of shareholders), and as contemplated by section 163(1)(a) of the Companies Act 71 of 2008 ("*the 2008 Companies Act*"). Requirements of Interim Interdict not proved – and prospects of success under section 163 of the 2008 Companies Act not reasonable – or probable – majority shareholders acting in best interests of both opposing respondents and interests of company and all its shareholders – application refused.

JUDGMENT

MOSHIDI, J:

INTRODUCTION

[1] In this special motion proceedings, the applicants seek certain interim relief ("*Part A*"), pending the outcome of the final relief ("*Part* B") in due

course. The circumstances under which the present relief is sought touch on, and are based on allegations of facts, or omissions of a company or related person, which has/had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of minority shareholders such, as the applicants. This, as envisaged in section 163 of the Companies Act No 71 of 2008 ("*the 2008 Companies Act*"), read with the provisions of section 252(1) of its predecessor, namely Act No 61 of 1973, where applicable, ("*the 1973 Companies Act*").

SEMI-URGENT RELIEF

[2] The matter before me on semi-urgent basis for certain reasons advanced. In the notice of motion dated 26 April 2018, Part A is framed, *inter alia*, in the following terms:

> "*Pending the final determination of Part B, interdicting the First, Second, Third, Fourth and Fifth Respondents from taking any steps, alternatively further steps, to implement or progress the competitive sales process contemplated in terms of Second Respondent's Memorandum of Incorporation (the competitive sales process); alternatively, conclude any agreement of sale with any bidder pursuant to the competitive sales process, alternatively implement any agreement concluded with any bidder pursuant to the competitive sales process ...*"[1]

[1] See paragraph 2 of Notice of Motion (Part A).

OPPOSING RESPONDENTS

[3] The application is opposed by the first, second, third and fourth respondents only.[2] The grounds of opposition are dealt with later below.

[4] This matter is by far not one of the run-of-the-mill ones, both in regard to the facts and the law. For these reasons, some background layout is necessary.

THE PARTIES

[5] In essence, the *dramatiis personae* in the litigation are, the applicants on the one hand, and Lodestone Brands Proprietary Limited ("*the second respondent*"), on the other hand. The latter is an incorporated company founded in or about 2009. It is a multi-category fast moving consumer goods business operating through three divisions, namely Confectionary (Mister Sweet); Beverages (Dynamic Brands); and Personal and Baby Care (National Pride).

[6] Presently, the second respondent's shareholding is as follows: Second Chapter Investments Proprietary Limited ("*SCI*") or ("*the first respondent*"), holds 74% of the total issued share capital of the second respondent; Mayfair Holdings (Pty) Ltd ("*the third respondent*"), holds 78.37% of the total issued shares of the first respondent, as well as directly holding 10.77% of the total

[2] The Consolidated Index to application, Vol 5, p 413.

issued shares of the second respondent. On the other hand, the applicants are minority shareholders in the second respondent holding, collectively 19,84% of the issued share capital.

THE ADOPTION OF THE MEMORANDUM OF INCORPORATION

[7] It is not in dispute that, the second respondent's shareholders adopted the Memorandum of Incorporation ("*MOI*") on or about 22 April 2014 with effect from 13 June 2014. This was pursuant to the MOI being lodged with the Companies and Intellectual Property Commission. It was also on the basis of the second respondent's Framework Agreement ("*the Framework Agreement*") entered into between the second respondent and, *inter alia*, and quite interestingly, with the first applicant; the second applicant, Dynamic Brands (Pty) Ltd; Mister Sweet (Pty) Ltd; and the first respondent. The effective date of the Framework Agreement was from 2 June 2014.[3]

CLAUSE 16 OF THE MOI

[8] The MOI contains several pertinent clauses. However, one of the most crucial and relevant clauses is clause 16. The applicants' case is based almost exclusively on this clause, for the allegations of oppressive, unfairly and/or conduct that disregards their interests. The clause provides, *inter alia*, as follows: "*Company Sale*" means the *bona fide* arm's length sale (or other transfer for value), whether through a single transaction or a series of

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[3] See, clause 1.1.24, FA 3 p 155.

transactions, of 100% (one hundred per cent) of the issued shares or of all or substantially all of the assets utilised in the business; "*Competitive Sale Process*" means a competitive tender sales process carried out by the Relevant Investment Bank on behalf of the Board to facilitate a company sale by inviting bids on an invitation only or public advertisement basis from bidders wishing to be the acquirers under a Company Sale. Standard Chartered Private Equity ("*SCPE*"), or any number of shareholders holding, in aggregate 50.1% (fifty point one per cent) of all shares and claims (either being an "*initiating shareholder*"), may, at any time after 30 September 2017, serve a written notice ("*a sale notice*") on the company and the other shareholders requiring the Board to conduct a Competitive Sale Process. If the company receives a Sale Notice, the Board shall – appoint a Relevant Investment Bank to conduct the competitive sale process on behalf, and under the instructions, of the Board; procure that the CEO and the executive management of the company shall co-operate with the Relevant Investment Bank in connection with the competitive sale process to give it full and unrestricted access to the premises, accounting books and records and personnel of the company; and endeavour to ensure that the Relevant Investment Bank solicit one or more binding bids within a period of no more than 90 (ninety) days from its appointment. Each shareholder shall be deemed to have waived its rights under 3.4 in so far as they relate to any offer for shares and claims constituted by a binding bid and shall give, all such support, including its support for any exemption from the relevant provisions of the Act and the Takeover Regulations promulgated under the Act, as may be required to implement a company sale. The Board shall submit each binding bid, together with the Relevant Investment Bank's recommendations in respect thereof as well as the Board's own recommendation as to whether to accept or reject such binding bid, to the initiating shareholder. If the initiating shareholder notifies the Board in writing within no more than 15 (fifteen) business days from receiving the binding bids pursuant to 16.5 that it has elected – to accept the offer constituted by a binding bid, it and all other shareholders shall be deemed to have accepted the offer constituted by such binding bid and the company and the shareholders shall proceed to implement such binding bid on the basis that, if all necessary regulatory approvals required for the implementation thereof shall not have been obtained within 180 (one hundred and eighty) days from the date on which acceptance of such binding bid was communicated to the third party acquirer, it shall be deemed to have lapsed and the acceptance thereof shall likewise be deemed to have lapsed …"[4]

THE BASIS OF THE APPLICANTS' COMPLAINT

[9] What triggered the applicants' complaint relates to certain events which occurred in early December 2017. On 6 December 2017, Steinhoff International Holdings NV ("*Steinhoff*") announced that certain accounting irregularities had come to light, and that Markus Jooste ("*Jooste*"), the Chief Executive Officer of Steinhoff, had resigned.[5] Between 5 and 7 December 2017, the shares in Steinhoff lost a considerable amount of value, falling from R46,25 to R10,00 per share.

[4] See FA – FA1 – para 16.6.1, p 129.
[5] See FA – paragraphs 41 to 43 – p 21, Vol 1.

[10] At a scheduled Board meeting and dinner of the second respondent on 13 to 14 December 2017, it was raised that, given the difficulties with Steinhoff, and the risks for the second respondent arising from the third respondent's association with it, and Jooste, it would be in the interests of the second respondent to sever complete ties with the third respondent. I must mention that the dinner was also attended by the first applicant's Chief Executive Officer and majority shareholder in the first applicant, and Gregory David Senior ("*Senior*"), Chief Executive Officer of the second respondent's Confectionary Division and the second applicant. The Board of the second respondent also formed a sub-committee ("*the sub-committee*") to investigate and deal with the separation contemplated in the interests of the body of shareholders. The sub-committee was comprised of Beckert; Bruyns and Seymour.

[11] At the Board meeting of 14 December 2017, and following the appointment of the sub-committee, and the decision to separate from the third respondent, the second applicant raised the possibility of a management buy-out and also indicated that a sale of shares by the second respondent and a trade buyer should not be contemplated. However, the other directors did not share this view. One of them was Van Zyl who opined that no party should be excluded from the envisaged process. It was not agreed or resolved that the sub-committee should investigate any particular method of sale or class of potential purchaser. As a consequence, the fifth respondent, "*Standard Bank*", was appointed in order to advise the sub-committee in regard to the

disposal of shares process, and to conduct a valuation to inform the second respondent and its body of shareholders, irrespective of the manner in which the separation was to be achieved. Indeed, the applicants have not only questioned rather strongly the appointment of Standard Bank, but also its involvement in the process of separation. The sub-committee nevertheless met with Standard Bank on 20 December 2017 to discuss options for the separation of the third respondent and the second respondent.[6] Indeed, the respondents have refuted strongly, these views as unfounded, as did Standard Bank.

[12] On the papers, and although for divergent reasons, and following the above developments, there ensued a period of some uncertainty since the third respondent tried to resolve the difficulties with the Mayfair Lenders, and various sections of the second respondent's shareholders engaged in protecting their own interests in the process of the sale of the direct and indirect third respondent's stakes in the second respondent. This included the investigation of a possible management buy-out by a management consortium consisting of Bruyns and Seymour (representatives of SCI P1 – the minority shareholders in the first respondent.[7]

[13] What followed next, was a significant development. The applicants, in a letter to the first, third and fourth respondents, raised various concerns and objections to a potential sale of shares in the second respondent.[8] On 28 February 2018, the first respondent invoked the provisions of clause 16 of the

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[6] See FA, para 97, p 44 and AA para 61, p 342.
[7] See AA, para 62, p 342.
[8] See FA – FA6, pp 238 to 240.

MOI. This was by letter sent to the second respondent and the other shareholders in the second respondent, and aimed at procuring a competitive sales process ("*the sale notice*").[9]

[14] It is apparent that the 28 February 2018 was exceedingly eventful. Willem Adriaan du Plessis ("*Du Plessis*"), was appointed director of the second respondent.[10] On the same day, Attorney Johan Roodt of Roodt Incorporated ("*Roodt*"), on behalf of the respondents, replied to the applicants' attorneys, Du Plessis Van der Merwe Incorporated ("*Van der Merwe*"). This was in response to the applicants' concerns. Roodt indicated that, given the scheme of arrangement to be entered by the second respondent, it was not in dispute that the developments would trigger a deemed offer under clause 10.2 of the second respondent's MOI in respect of the third respondent's direct 10.77% shareholding in the second respondent. He also conveyed that going through a deemed offer process in respect of 10.77% of the shares in the second respondent when the clause 16 (MOI) process was imminent would be futile, since all the shares in the second respondent would have to be sold under such a process.[11]

[15] During March 2018, there was extensive interaction between the opposing parties, culminating in the launch of the present proceedings. During such interaction, the applicants were constantly invited to take part in the process and the intended competitive bidding process as bidders; however, the applicants demanded strongly that the sale notice be withdrawn, alleging

[9] See FA, FA20 and AA para 98.
[10] See FA13 and AA para 99.
[11] See FA15, p 280.

that it was oppressive procedure, and that the appointment of Du Plessis was also oppressive conduct, as well as a variety other complaints.[12] The respondents naturally, denied that the exercise of rights under clause 16 of the MOI was prejudicial or oppressive in any way since the first respondent was simply exercising a contractual right that was available to it. At the same time, the opposing respondents also conveyed that, there were concerns that the first and second applicants were not acting in the best interests of the second respondents by acting in a manner as to advantage them and the shareholders they represented rather than in the best interests of the second respondent.[13]

[16] On 15 March 2018 the second respondent convened a Board meeting, and in order to act on the first respondent's notice triggering the clause 16 process by appointing the "*Relevant Investment Bank*" to run the competitive sales process. Present at this meeting were, Beckert, Bruyns, Russell, the first applicant, the second applicant, Du Plessis, Seymour, Van Zyl and Du Toit Potgieter. At this meeting, the applicants present expressed the view that, since the first applicant was appointed by a shareholder and the second applicant as a shareholder, they were conflicted in respect of the resolution appointing Standard Bank as the Relevant Investment Bank. The respondents disputed this alleged conflict of interests on both factual and legal basis, and for several reasons.[14] Standard Bank's proposal to be appointed as the Relevant Investment Bank under clause 16 of the MOI, was circulated to the board before the meeting. The resolutions were adopted by all 7 of the

[12] See FA15, pp 282 to 285.
[13] See FA17, pp 287 to 291.
[14] See AA p 356-358, paragraphs 109 to 110.3.

directors in attendance, that is, every director save for the first and second applicants, and in terms of which Standard Bank was appointed as the Relevant Investment Bank. As stated above, the applicants disputed the appointment. The respondents also alleged in the answering papers that Du Plessis at the board meeting, once more, encouraged the management shareholders to participate in the disposal process, and to submit an offer in terms of the process, and that he also advised that it was not in the best interests of the second respondent or the management shareholding to pick a particular potential buyer or funder upfront. The present applicant was launched on 23 March 2018. There were subsequently two meetings of the second respondent's board, the outcomes of which do not seriously impact on the decision to be made in these proceedings.

THE BASIS OF THE INTERIM RELIEF

[17] As stated before, and in essence, the interim relief sought by the applicants under Part A is based on certain complaints, and alleged impropriety on the part of the respondents. The main complaint is that the respondents seek to pursue a competitive sales process in terms of clause 16.2 of the MOI of the second respondent. They contended that the competitive sales process will have the effect that they will dispose of their own shares in the second respondent, and also those of the applicants, as minority shareholders thereof, by way of a bidding process designed by the fifth respondent, Standard Bank. In addition, the applicants contended that, the proposed sales process is presently unknown to them in that they had not

been informed about it, and denied sufficient information relating thereto. On this basis, the applicants contended that the sales process, if carried out, will result in the applicants being compelled to dispose of their shares in the second respondent, and that the process may very well not enable the applicants to participate in an open and transparent bidding process. Furthermore, that the process is likely to cause harm to the second respondent itself. Essentially, the applicants seek what they term, protection against the pending and future conduct of the first, third, fourth and fifth respondents. They contended that such alleged conduct will be oppressive and unfairly prejudicial to, and that will disregard the interests of the applicants, as contemplated by section 163(1)(a) of the Companies Act, 2008, as amended. Stated differently, the interim relief now sought is of the nature of an order to maintain the *status quo* so as to protect the applicants from alleged oppressive and unfair treatment pending the final determination of the applicants' entitlement to relief against the respondents' conduct.

THE RESPONDENTS' OPPOSITION

[18] The participating respondents opposed the application strenuously. The main grounds of the opposition are that: firstly, the envisaged sales process will be to the benefit, and will serve the best interests, of all the second respondent's shareholders, as well as the second respondent itself; and secondly, that the competitive sales process is a contractual right afforded to the majority shareholders, and that it is not susceptible to an attack in terms of section 163 of the Companies Act 2008.

HAVE THE APPLICANTS MADE OUT A CASE

[19] I now turn to the crucial question, which is whether the applicants have succeeded, on a balance of probabilities, to make out a case for the interim relief claimed presently, and based on all the circumstances of this case, including the plainly divergent allegations on the papers. However, I must hasten to mention that in closing argument, the respondents contended rather viciously that, in substance and in effect, the relief now sought is not interim in nature, but is final and must therefore be determined by this Court against the test for final relief. In these circumstances, I am compelled to examine both types of relief.

THE REQUIREMENTS FOR INTERIM RELIEF

[20] The requirements for interim relief and/or final relief in interdicts are by now well-known and settled in law. In regard to interim relief, as in the present case, the following is the position: the applicant must establish a *prima facie* right, though open to some doubt; an infringement of such right by the respondent; or a well-grounded apprehension of an infringement of such right; a well-grounded apprehension of irreparable harm to the applicant if the interim interdict should not be granted and applicant should ultimately succeed in establishing its right finally; the absence of any other satisfactory

remedy; and that the balance of convenience favours the granting of an interim interdict.[15]

THE *ONUS* OF PROOF

[21] It is also trite that, the *onus* of proving a *prima facie* right rests on the applicant.[16] See also *Simon NO v Air Operations of Europe AB and Others.*[17]

[22] In *Beecham Group Ltd v B-M Group (Pty) Ltd*[18] and in regard to interim interdicts, the Court said:

> *"I consider that both the question of the applicant's prospects of success in the action and the question whether he would be adequately compensated by an award of damages at the trial are factors which should be taken into account as part of a general discretion to be exercised by the Court in considering whether to grant or refuse a temporary interdict. Those two elements should not be considered separately or in isolation, but as part of the discretionary function of the Court which includes a consideration of the balance of convenience and the respective prejudice which would be suffered by each party as a result of the grant or refusal of a temporary interdict. As to the question of damages, as far back as 1938 Schreiner J, in Transvaal Property and Investment Co Ltd and Reinhold and Company v SA Township Mining and Finance Corporation Ltd and the 1938 T.P.D. 512 said at p 521, that:*
>
> > *'The question of discretion is bound up with the question whether the rights of the party complaining can be protected by any other ordinary remedy.'"*

[15] See *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 384 (W) at 383A-G; *Knox D'Arcy Ltd and Others v Jamieson and Others* 1995 (2) SA 579 (W), at 580B-C and at 590B-D; *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (SCA) at 398I-399B; *Setlogelo* 1914 (D) 221 at 227; *Erickson Motors (Welkom).*
[16] See *Godbold v Thomson* 1970 (1) SA 61 (D); *Molteno Brothers and Others v SA Railways and Others* 1936 (A) 321 at 333; *Johannesburg Municipality v African Reality Trust Ltd* 1927 (A) 163 at 177.
[17] See 1999 (1) SA 217 (SCA) at 228F-I.
[18] See [1977] 1 All SA 267 (T) page 271.

That statement was made with reference to an application for a permanent interdict; but that is true also of an application for a temporary interdict was aptly stated by Holmes J, in *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D). The headnote of that case accurately sums up his decision upon the general principles to be applied in applications for temporary interdicts, as follows:

> *"In those intermediate cases of applications for interim interdicts* (sic) *the applicant's prospects of ultimate success may range all the way from strong to weak. The Court, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, may grant an interdict – it has a discretion to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour him."*

(See also for now, *Cape Tax Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd* 1968 (2) SA 528 (C).)[19]

THE ESSENCE OF APPLICANTS' COMPLAINT

[23] To restate: the applicants, who are minority shareholders in the second respondent, now seek to prevent the majority shareholders from exercising their right under clause 16 of the second respondent's MOI to sell their shares in the second respondent through a competitive sale process. For this, the applicants rely on the right not to be subjected to oppressive or unfairly prejudicial conduct as contemplated in section 163 of the Companies

[19] At 529G-H.

Act 2008. In brief, the applicants contended that: a competitive sales process will increase the reputational risk for the second respondent and its shareholders, as Standard Bank will in all likelihood, in conducting the sales process, solicit bidders from the open market; that the first respondent is required to sell a substantial portion of its shares at certain minimum values, including those of the applicants, before December 2018; that the competitive sales process, which will not be in the interests of the second respondent and its shareholders, is destructive of the applicants' rights, interests and expectations in terms of clauses 3.4 and 10.1 of the MOI. In fact, in closing argument, rather heavy weather was made in regard to the applicants' legitimate expectations allegedly created by the respondents, and based on certain case law. Significantly, the applicants, despite their contentions, conceded that the competitive sales process is a mechanism indeed found in clause 16 of the MOI. Indeed, there are other contentions advanced, which are replete in the founding papers, as well as in the heads of argument.

<u>NO CASE FOR INTERIM RELIEF</u>

[24] I have had due regard to all the contentions, and arguments. It is my considered judgment that, having regard to all the legal principles summarised above, the applicants have not succeeded in making out a case for the interim relief now sought. The reasons, for this conclusion, apart from being palpable, become more apparent immediately below. The applicants have plainly not established a clear right, even open to doubt, as required by the enunciated legal principles. The applicants' reliance on the right entrenched

in section 163 of the Companies Act 2008, in my view, remains dubious and highly questionable for now. The prospects of the applicants succeeding in proving this right under Claim B of the notice of motion should the present interim be granted, remain bleak. I do not have to traverse in full the merits of Claim B for present purposes. However, section 163 of the Companies Act 2008, which is the successor of section 252 of the 1973 Companies Act, provides as follows:

> ***"163. Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company***
>
> *(1) A shareholder or a director of a company may apply to a court for relief it – (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;*
>
> *(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or*
>
> *(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.*
>
> *(2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including –*
>
> *(a) an order restraining the conduct complained of;*
>
> *(b) an order appointing a liquidator, if the company appears to be insolvent;*
>
> *(c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131(4)(a) apply;*
>
> *(d) an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;*

(e) an order directing an issue or exchange of shares;

(f) an order –

(i) appointing directors in place of or in addition to all or any of the directors then in office; or

(ii) declaring any person delinquent or under probation, as contemplated in section 162;

(g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;

(h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;

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

(j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;

(k) an order directing rectification of the registers or other records of a company; or

(l) an order for the trial of any issue as determined by the court.

(3) If an order made under this section directs the amendment of the company's Memorandum of Incorporation –

(a) the directors must promptly file a notice of amendment to give effect to that order, in accordance with section 16(4); and

(b) no further amendment altering, limiting or negating the effect of the court order may be made to the Memorandum of Incorporation, until a court orders otherwise."

Both the relevant provisions of the Companies Act 1973 and the Companies Act 2008, have been the subject matters of numerous legal writings and case law. For present purposes, and for the sake of brevity, in *De Sousa and Another v Technology Corporate Management (Pty) Ltd*[20] the court said:

> *"Although s 252 should be given a beneficial construction, our courts will be slow to interfere in the management of companies. In judging the conduct of the majority, regard must be had to the principle that by becoming a shareholder in a company a person undertakes by his conduct to be bound by the decisions of the majority of shareholders if those decisions are arrived at in accordance with the law, even where they adversely affect his rights as a shareholder or prejudice his interests (Sammel and Others v. President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 678H; Garden Province above N4 at 533-535; Aspek Pipe above [38] at 528; and Donaldson above [39] at 720A-B). The loss of confidence in the manner in which the company's affairs are conducted or resentment at being outvoted or mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well founded, will not of itself constitute prejudice, injustice or inequality within the meaning of the section (Garden Province above N4 at 535C; Re Five Minute Car Wash Ltd [1966] 1 All ER 242 (Ch) at 246-247; Re Postgate and Denby (Agencies) Ltd above [47]; Carlisle v. Adcorp Holdings Ltd 2000 CLR 261 (W) at 264; Re Elgindata above [39] ..."*

[25] From the above, it is doubtful whether the appellants' claim to the right entrenched in section 163 of the Companies Act 2008 has been established. Neither is it a right that can accrue spontaneously. The same applies to the applicants' pre-emptive rights under clause 3.4 of the MOI, in terms of which they claim would allow them to retain their shares in the second respondent. The applicants' initial contention that the continued presence of clause 16 in the MOI was "*an oversight and an administrative error*" has no merit at all.

[20] See 2017 (5) SA 577 (GJ) paras 49-51.

[26] In our law, it is by now accepted that a company is an association of persons for an economic purpose. A member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. The powers of the directors of a company under the Articles of Association, and sometimes in collateral agreements between shareholders, are powers to be exercised for the benefit of the company (in this case the second respondent) as a whole, and should not be exercised for some illegitimate, ulterior or inadequate purpose. Shareholders' interests are closely interwoven with shareholder expectations. The shareholder expectations which are to be considered are not those that a shareholder has as his own individual wish list. For these propositions and legal principles, see, *The Wilds Homeowners Association v Van Eeden.*[21]

[27] It is by now accepted and settled in our law that, subject to certain patent prejudicial and unfairness and oppressive conduct, as envisaged in the repealed section 252(1) of the Companies Act 1973, as well as section 163 of the Companies Act 2008, and as argued by the opposing respondents, a person who becomes a shareholder in a company (like in the second respondent in this case), undertakes to be bound by the decisions of the prescribed majority even if they adversely affect his rights as a shareholder. In addition, ordinarily, minority shareholders are subjected to the wishes of the

[21] JDR 0743 (GNP) para 105); *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 321 (GSJ) paras 49 and 50; *De Villiers and Kopela Holdings (Pty) Ltd* 2015 JDR 1942 (GSJ) para 65; *MacMillan NO v Pott and Others* 2011 (1) SA 511 (WCC); and the respondents' heads of argument paras 51 to 57.

majority. See in this regard, *Sammel and Others v President Brand Gold Mining Co Ltd*[22] where the following was said:

> *"First, some general principles that are relevant. By becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder. (Cf. Secs 16 and 24). That principle of the supremacy of the majority is essential to the proper functioning of companies. Thus, in Levin v Felt and Tweeds Ltd 1951 (2) SA 401 (AD), it was contended (p 411H) that the rights of the ordinary shareholders were being altered by the construction of capital of the company, because when they invested money in it, they relied on the fact that the capital of the company was as it then was, and that any deduction of capital therefore adversely affected their rights."*

See also *Garden Province Investment and Others v Aleph (Pty) Ltd and Others.*[23] Based on the above, it begs the question; on what basis have the applicants now proved a legal right entitling them to the interim relief presently sought? They, are seasoned business people, they have consciously and freely, consented to the retention of clause 16 of the second respondent's MOI.[24] The contentions of the applicants that, the relevant part of clasue 16 of the MOI should have been removed, but the omission was, "*due to what can only be described as an oversight and an administrative error at the time*", are clearly without any merit. These are fabricated after thoughts. The Supreme Court of Appeal, in *Bayly v Knowles,*[25] which concerned an order made in favour of the respondent under section 252(3) of the Companies Act 1973 directing and regulating the disposal of shares in a small proprietary company, also affirmed that it does not avail a minority shareholder to whom a

[22] See 1969 (3) SA 629 (A), at 678G-H.
[23] 1979 (2) SA 525 (D).
[24] See FA p 20, paras 36 to 39.
[25] 2010 (4) SA 548 (SCA) at para 24.

reasonable offer to purchase his shares has been made to obtain relief under section 163 of the Companies Act 2008.

THE BEST INTERESTS OF SHAREHOLDERS

[28] In the present matter, I have, despite diligent search in the opposing contentions, not found any legal justification to intervene, in favour of the applicants, in the affairs of the second respondent at this stage. There is plainly no evidence to prove that the first respondent or the second respondent are acting *mala fide* in the sales process, and not to the benefit and best interests of the second respondent and all its shareholders. On the contrary, it rather appears to me, and quite attractively too, that the applicants are seeking to protect, not an interest in fair treatment, but an interest in them alone achieving the lowest price possible for the acquisition of the other shareholders' shares in the second respondent, as correctly submitted by the respondents. There is also no credible evidence that the competitive sales process complained about, will result in any oppressive or unfairly prejudicial conduct deserving of protection presently. In the same vein, the applicants failed to prove that the appointment of Standard Bank, as the Relevant Investment Bank, as alluded above, as well as Standard Bank's conducting of a valuation of the second respondent, showed any unfairly prejudicial conduct. These processes are perfectly allowed by clause 16 of the second respondent's MOI. The applicants have, based on all of the above, failed to establish or prove the existence of a clear or *prima facie* right for the interim relief sought. If there is no right present, it follows that the interdict cannot be

granted. See, for example, *Plettenberg Bay Entertainment (Pty) Ltd v Minister Van Wet en Orde en 'n Ander.*[26] In my view, for all the above reasons only, the instant application for interim relief must be refused, since all the legal requirements for an interdict, have to be met.[27]

THE BALANCE OF CONVENIENCE

[29] If however, I am incorrect in my above determination, I am nevertheless bound to consider the other requirements of obtaining interim relief. I commence with the requirement of the balance of convenience. At the outset, in *Harnischefeger Corporation and Another v Appleton and Another,*[28] it was held as follows:

> *"In deciding whether or not to grant an application for an interdict pendente lite, the Court has to consider the balance of fairness (Afrikaans: billikheidsbalans), that phrase being more descriptive and accurate than 'balance of convenience' as something more fundamental than mere convenience is balanced. In striking the balance, the prospects of being successful (in the main action) are in the scale together with the prospect of each party suffering harm as a result of the Court either interfering or, alternatively, not granting interim relief, the seriousness and irreparability of the harm, the difficulties of proving the extent of any harm, and the risk of not recovering the amount (of damages) caused by the harm."*

[30] In *CB Prest SCE;*[29] the learned author, after reviewing the requirements of an interdict, states:

[26] 1993 (2) SA 396 (C).
[27] See *CB Prest infra.*
[28] 1993 (4) SA 479.
[29] The Law of and Practice of Interdicts, 1993 at p 73.

> *"A consideration of the balance of convenience is often the decisive factor in an application for an interim interdict. In Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another Holmes JA found that the applicant's claim for vindication had but fragile qualifications for classification as 'prima facie established, though open to some doubt' and proceeded to say that, "as to the balance of convenience, the extent to which it may possibly favour Eriksen's not make up for the weakness of their claim. Even where all of the requirements for a temporary interdict appear to be present, it remains a discretionary remedy and the exercise of the discretion ordinarily turns on a balance of convenience."*

Based on the above principles, it is plain that the applicants have similarly not shown that the balance of convenience overwhelmingly favours the interim relief sought, as correctly argued by the respondents. In the event the applicants presently succeeding, it is implicit that the clause 16 (MOI) process, or any similar process, cannot be followed by the majority shareholders pending finalisation of the relief claimed in Part B of the notice of motion, which can only occur at some unknown period in the future; it will equally imply that the intended sale process will not happen timeously in order for the third and fourth respondents to comply with their obligations under the Scheme of Arrangement ("*the Scheme of Arrangement*") entered by them. To recall the Scheme of Arrangement[30] was entered into in terms of section 155 of the 2008 Companies Act, between the third respondent and its creditors. The Scheme of Arrangement has a termination date of 31 December 2018. It requires the disposal of certain specified assets by 30 November 2018. Briefly stated, and cumulatively, these factors constitute, not only the urgency in finalizing the matter, and the probable prejudice to the respondents, but also added reasons to decline the instant relief. In any event, the first respondent has a contractual right to call for a competitive sales process in terms of the

[30] See RA1.1 p 1132.

MOI. In addition, both the third respondent, in a way, and the first respondent, have a right, as the majority shareholders in the second respondent to take decisions in regard to their shares and shareholding. Furthermore, and for this reason, the third respondent is equipped with the right to secure the best possible price and value for its direct and indirect shareholding. In the event of the refusal of the present relief, it is probable that the applicants' shares may be bought at a competitive price. Alternatively, the applicants may buy the shares in the second respondent which are not held by them at a competitive price. There is therefore no conceivable, potential, or probable harm that may befall the applicants should the instant relief be declined. Furthermore, assuming in favour of the applicants, that the pending Part B of their relief is granted, it is more than plain and indeed trite by now that the court possesses wide discretionary powers in terms of section 163 of the 2008 Companies Act to remedy any harm they may suffer.

ALTERNATIVE REMEDY

[31] I must conclude on this aspect by dealing with the final requirement of granting interim relief. This is the issue of alternative relief. In the founding papers, the applicants alleged, *inter alia*, that:

> "*There is no alternative remedy available to the applicants ... the applicants have taken all steps possible to request that SCI (the first respondent) prevents this competitive sales process, but it has not adhered, or engaged in such requests. Furthermore submit that there is no alternative remedy which would protect the interests of the applicants, other than referred to above.*"[31]

[31] See FA paragraphs 136.5 to 136 page 60.

The respondents contended otherwise, for a variety of credible reasons.

[32] At the risk of over-reliance, in *Prest supra*[32] the learned states:

> "*The final requirement for the grant of an interlocutory interdict, like that of the final interdict, is the absence of another adequate remedy to the applicant, and the respective requirements are similar ... one cannot escape the fact that the interlocutory remedy is extraordinary and discretionary. Any attempt to minimize this essential character of the remedy is destined to failure. At the same time it is always the task of the court when faced with this or any other type of remedy, to ensure that justice is done.*"

APPLICATION OF PRINCIPLES

[33] A careful application of the above principles to the facts of this matter, shows that: the applicants indeed have alternative relief available to them should the instant relief not be granted; their interests are capable of being addressed elsewhere; as stated above, in the event of applicants succeeding under Part B of the notice of motion in terms of section 163 of the 2008 Companies Act, the court is clothed with wide discretionary powers to remedy any harm; the applicants have in fact been invited repeatedly to be part of the competitive bidding process envisaged under clause 16 of the MOI. More specifically, if the applicants, as minority shareholders, decline to be bought out, they have open to them an arrangement to bid in their own right to acquire all the shares in the second respondent. Furthermore, not only do the applicants have open the option of claiming damages later if they prove any

[32] Cf pages 77 and 78.

harm, but clause 18(3) of MOI provides for a dispute resolution arising between the parties in the following terms:

> *"Save to the extent to the contrary provided for in this Memorandum of Incorporation, any dispute arising out of or in connection with this Memorandum of Incorporation or the subject matter of this Memorandum of Incorporation including, without limitation, any dispute concerning –*
>
> *18.3.1 the existence of this Memorandum of Incorporation apart from this is 18;*
>
> *18.3.2 the interpretation and effect of this Memorandum of Incorporation;*
>
> *18.3.3 the respective rights or obligations of each party, under this Memorandum of Incorporation;*
>
> *18.3.4 the rectification of this Memorandum of Incorporation;*
>
> *18.3.5 any breach, termination or cancellation of this Memorandum of Incorporation or any matter arising out of such breach, termination or cancellation;*
>
> *18.3.6 damages in contract, in delict, compensation for unjust enrichment; or*
>
> *18.3.7 any other claim whether or not the rest of this Memorandum of Incorporation apart from this 18 is invalid and enforceable,*
>
> *shall be decided by arbitration as set out in this 18."*[33]

[34] It is not in dispute on the papers that the applicants have declined, for good or bad reasons, to be engaged in the arbitration/dispute mechanism proceedings, which is still available to them.[34] In the replying papers, the applicants contended in essence that the court retained an inherent jurisdiction and an arbitrator is not empowered to grant relief in terms of

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[33] See FA1, pages 131 to 132.

[34] See *Carlisle v Adcorp Holdings Ltd* 2000 CLR 260 (W) at 274-275.

section 163 of the 2008 Companies Act, which is referred to the court; and that "*an arbitration process in terms of the MOI would interfere with a sale in terms of the competitive sales process no less, if no more, than the court process*".[35] However, for present purposes, I need not make a definitive finding on these disputed contentions regarding the alternative dispute mechanism, save to observe that such alternative mechanism is still available, was available to the applicants prior to the institution of the present proceedings. I also need not make a definite finding on the issue whether or not the applicants' present relief in fact amounts to a final interdict, as contended for by the respondents, although all indications point that way, *prima facie*. The fact of the matter remains that, on the papers before me, as presently presented, and considered cumulatively, the applicants have not succeeded in making out a case for the interim relief claimed. For this reason too, the application must be refused. The costs, which is a discretionary matter, should follow the result, which should include the costs occasioned by the employment of two counsel.

ORDER

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

1. The application for the relief sought in Part A of the notice of motion of this application is dismissed with costs.

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[35] See RA paragraphs 72-74.

2. The costs shall include the costs occasioned by the employment of two counsel.

D S S MOSHIDI
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the applicants Assisted by	C Eloff SC B M Gilbert
Instructed by	Du Plessis Van der Merwe Inc
Counsel for the respondents Assisted by	L Harris SC P Ngcongo
Instructed by	Roodt Inc
Date of hearing	8 June 2018
Date of judgment	7 September 2018