IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE SIGNATURE

Case Number: 16803A/2011

In the matter between:

COUNT GOTTHARD S.A. PILATI	Applicant
and	
WITFONTEIN GAME FARM [PTY] LTD	First Respondent
DR GUNTHER SCHLOSSER	Second Respondent
BERTHOLD VON SETHE	Third Respondent
THE SOUTH AFRICAN REVENUE SERVICE	Fourth Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fifth Respondent

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JUDGMENT

POTTERILL J

1 The Applicant in the notice of motion applied for the following relief:

1.1 *"Setting aside the transaction and agreement in terms of which the First Respondent purchased portions 2 and 3 of the farm Witfontein 154 KQ ['the property'] by ordering the transfer of the property to the Applicant. The third respondent is to pay the costs of the transfer alternatively the Applicant, first respondent and third respondent jointly and severally;*

1.2 *That the shareholding of the Applicant be transferred to the third respondent alternatively to the first respondent and that the purchase price for such shares be reimbursed to the Applicant;*

1.3 *That the loan account of the Applicant in the first respondent be rectified to reflect the purchase price of the property paid by the Applicant as well as the transfer costs and improvements to the property paid for by the Applicant in the amount of R5 305 300-00;"*

1.4 Alternatively the Applicant must be compensated in the amount of R5 305-00 being the value of the property plus all non-capital expenditure incurred by the respondent on the property in return for the transfer of the Applicant's shareholding in the first respondent to the third respondent.

1.5 In the further alternative an order directing rectification of the share register of the first respondent to reflect an equal shareholding of 50% shareholding each between the Applicant and the third respondent. The loan account must be rectified to reflect the amount of R5 305 300.00 and the Applicant must be appointed as a director. To affect this court must order the first respondent to amend its memorandum of incorporation or to create an unanimous shareholder agreement and to direct an issue or exchange of shares.

1.6 Alternatively Witfontein Game Farm [Pty] Ltd must be wound up as it would be just and equitable to do so.

2 In the Applicant's heads of argument the Applicant now seeks relief only in terms of prayers 1, 2 and 3 of the amended notice of motion on the "undisputed evidence". The relief sought in prayers 1, 2 and 3 read as follows:

"*1 Setting aside the transaction and agreement in terms of which the First Respondent purchased Portion 2 and 3 of the farm Witfontein 154KQ [hereinafter referred to as "the Property"] by ordering the transfer to the Applicant of such property by the First Respondent, and that the Applicant's loan account in the first Respondent be written off;*

2. That the Applicant shall pay the costs of the transfer of the property;

3. That the shareholding of the Applicant in the First Respondent be transferred to the Third Respondent;"

The Applicant contended that the third respondent raised factual issues rendering the adjudication of the other prayers impossible [par 2 of the heads] and it was submitted that these factual disputes must in the event that the application is not granted on the "undisputed facts", be referred to trial in terms of section 163(2)(1) of Act 71 of 2008 ['the Companies Act"].

3 In the supplementary heads, handed up in court, in paragraph 4.9 counsel on behalf of the Applicant concluded as follows:

"Because of the factual disputes which are arisen, particularly with regard to the content of the oral agreement concluded in 2003 and the circumstances surrounding the conclusion of that agreement, the Applicant accepts that he cannot rely on his averments in this regard in order to obtain relief on the papers."

4 The above relief is sought in terms of section 163 of the Companies Act of which the salient portions on which the Applicant relied reads as follows:

"(1) A shareholder or director of a company may apply to a Court for relief if-

(a) Any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of, the Applicant…

(c) The powers of a director… of the company, or 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-

……

(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;"

………

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

5 For ease of reference I will refer to the first respondent as "Witfontein", the second respondent as" Schlosser" and the third respondent as "Von Sethe".

Only Von Sethe is opposing the application. Witfontein is not opposing because it was advised not to utilize company money for shareholder disputes. Schlosser abides by the decision of the court, but did file a comprehensive affidavit.

6 I find it necessary to next set out the versions of the Applicant and von Sethe before returning to the common cause facts pertaining to the shareholding in Witfontein and the management of the portions. The Applicant wanted to purchase property in South Africa. Von Sethe told him that as the Applicant was a foreigner without permanent residence it would be problematic for the Applicant to purchase property in South Africa. At that stage Von Sethe had bought property ["portion 1"] in South Africa. The Applicant attempted to buy the property [portions 2 and 3] adjacent to the property that Von Sethe operated on. To facilitate the purchase he was told by von Sethe that as a foreigner the best way to purchase property in South Africa was through a company and Witfontein was ideal for this purpose. He therefore concluded an oral agreement with von Sethe and Schlosser. This entailed that the Applicant would buy the neighbouring property through Witfontein and he would acquire 49% of the shareholding of Witfontein. A shelf company, Witfontein, was utilized for this purpose. The parties expressly agreed that after Schlosser retired, Schlosser's shareholding would be transferred to the Applicant at no cost. Schlosser represented to him that he was an attorney acting on behalf of the Applicant; this would render the Applicant and von Sethe to be equal shareholders. Prior to this agreement and the purchasing of portions 2 and 3 von Sethe told the Applicant that the Applicant could "leave" Witfontein at any given time and take portions 2 and 3 with him or sell same on the open market for his own benefit. Contrary to such agreement von Sethe now owns 51% [fifty one percent] of the shares in Witfontein and

the Applicant only 49% [forty nine percent] of the shares. In reply in par 22.7 the Applicant stated that *"in fact [he] believed that he was buying the farm and thereafter bringing it into the First respondent, not that I was only buying shares in the first respondent and that this money would be used by the First Respondent to purchase the farm."*

The requisite shareholders' meetings were never held until the Applicant complained about the lack thereof, and then such were held at a time and place which was not convenient to him because the Applicant spent a major portion of his time in Europe. The Applicant's investments in Witfontein were not shown in Witfontein's balance sheets, notwithstanding requests, and very poor excuses were presented as explanations. The fact that every party paid all their own bills, taxes and salaries resulted in the financial picture of Witfontein being totally skewed in favour of von Sethe. The fact that Witfontein did not have a bank account clearly showed that the factual position was that the two farms were managed totally separately. Von Sethe refused to allow the Applicant to separate from Witfontein and to transfer the properties to the Applicant in any form. None of the amounts spent by the Applicant to improve the value of the property was reflected against the loan account in the books of Witfontein and no *quid pro quo* was given to him for this investment except for the share premiums which had no growth. In reply he for the first time stated that he did submit records of expenditure relating to portions 2 and 3 as well as invoices that where in lieu of loan accounts but it was never reflected in the financial statements. [PR7 dated 7 December 2005]. In contrast the loan account of von Sethe grew for no apparent reason. He effected improvements of R3, 2 million by building a luxurious lodge on Portion 3 and by effecting general repairs and improvements to Portion 2 and 3 of the property. In reply he for the first time attached photographs reflecting the averred luxury lodge. Von Sethe misled him because as a prudent business man he would not have paid in excess of R2 million to buy a share in a company that at that stage was only worth a fraction of such amount; at the very least he would have done so for 50% shares in the company. He did in reply concede that he himself was a lawyer but knew nothing of the South African law. In reply he also denied that Schlosser was an admitted attorney in Germany. He only in 2008 realized that von Sethe was not going to honour the oral agreement and that is why he only then raised it for the first time. The result hereof is that the relationship between the parties had completely broken down and they could not continue to work together as shareholders. In reply he denied that he no longer was interested to have property in South Africa. Schlosser remained the only director and he acted exclusively on behalf of von Sethe. Schlosser represented to the Applicant that he had the capacity to represent the Applicant as attorney and therefore had a duty to protect the Applicant's interests. The e-mails/letters of his former attorney dated 21 February 2008 [CP7] and 15 April 2009[CP9] were attempts to settle the divorcing of the Applicant from Witfontein and portions 2 and 3, but it failed. This also demonstrated the irreconcilable differences between the parties.

7 Von Sethe and Schlosser denied that Schlosser was a party to the concluded oral agreement. Von Sethe also denied that the Applicant would receive1% shares as Schlosser only had one share. They also both denied that the one share of Schlosser with Schlosser's retirement would be transferred to the Applicant at no cost. The one share was already transferred to von Sethe in May 1989 long before the Applicant was involved in Witfontein. Von Sethe set out that the Applicant did not hold a substantial loan account in Witfontein with the year 2010 reflecting an amount of R22 310 00. Von Sethe explained that his loan account did in fact fluctuate upwards because he annually provided Schlosser with a loan account certificate which reflected his expenses incurred for Witfontein. The loan account of the Applicant can not be rectified because it was never alleged that it was incorrect prior to the issue of this application. The averred amount of R3 million as improvements was never substantiated or proven. The Applicant did receive the financial statements of Witfontein wherein the loan accounts where reflected; in fact he thanked Schlosser therefor. Von Sethe averred that there was no oppressive conduct on his part. The real reason why the Applicant brought this application was because he wanted to terminate his involvement in Witfontein because of the political and socio-economic climate in South Africa.

8 Schlosser confirmed that he only held one share and not 1% share. He confirmed that the single share was transferred against payment on 10 May 1989. He took strong exception to the averment that he colluded with von Sethe pertaining to the one share and submitted that the facts disproved this averred collusion. He confirmed that he was the only director of Witfontein. Witfontein was specifically incorporated to purchase portion 1. The main aim of the company was a game farm for trophy hunting on a commercial basis. However in reality the Applicant and von Sethe separate from each other on an *ad hoc* basis organised hunting trips. He denied that the Applicant held a substantial loan account in Witfontein. He did every year send out the draft loan account certificates to which the Applicant did not respond. Expenses like electricity, water etc. resulted in an increase in the loan account whereas having hunting parties on the Applicant's portions would reduce a loan account. He denied that the financial statements were skewed in favour of von Sethe. The averments of how it was skewed were so vague that he could not comment on it. He never consented to any improvements and there is no proof that the value of portions 2 and 3 has increased. He never visited the farm. He denied that Witfontein was a shelf company. He floated it against payment when he was still a consultant with Webber Wentzel and Bouwens Inc. He submitted that he managed Witfontein *bona fide* and in its best interests. He acted in the best interests of Witfontein, the Applicant and von Sethe and never acted exclusively in the interest of von Sethe. He in fact proposed the shareholders agreement. The Applicant did receive a *quod pro quo* for his investment in that he received 49% shares. The first time the Applicant complained about a shareholders meeting was in 2009. He denied that the relationship between him and the Applicant had broken down because on 12 January 2012 the Applicant accepted that Schlosser remain the director of Witfontein. It is his responsibility to manage Witfontein and not the shareholders working together. It was his duty to run the daily affairs of Witfontein. In the articles the management of the company vests in the board of directors. He denied that he ever acted as the Applicant's attorney. He did

not know of any instance where von Sethe used his majority shareholding to outvote the Applicant and the Applicant was not prejudiced in any manner.

9 Allen Paterson the qualified auditor of Witfontein also filed an affidavit. He had no interest in the litigation and deposed to the affidavit solely as an independent and objective witness. He attached all the documents pertaining to Witfontein that he had in his possession. The annexures revealed that Witfontein was registered and incorporated on 25 April 1989. The main business was the operation of a game farm for trophy hunting on a commercial basis. On the date of incorporation one share was issued and allotted to Schlosser and on 10 May 1989 99 999 shares were issued and allotted to von Sethe against a paid purchase price of R349 996,50. On the same day Schlosser transferred his one share to von Sethe. This is reflected in the minutes of the first director's meeting. Witfontein had prior to this bought portion 1 and it was registered in Witfontein's name on 24 July 1989.

On 30 July 1994, 30 July 1996, 28 July 1997, 2 September 1998, 27 July 1999 and 31 May 2000 annual general meetings were held. These were not formal annual meetings and von Sethe agreed to and resolved thereto in writing. Although there are no minutes for the years 2001 and 2002 there was nothing to indicate that the same did not happen as in the previous years. There were no formal annual general meetings between and including 2004-2007. The financial statements for those years were prepared and audited and approved by Schlosser. Schlosser prepared a loan certificate for the two shareholders but only von Sethe certified these certificates.

On 19 February 2004 Witfontein purchased portion 2 and 3. " *Prior to the registration of property 2 into the First Respondent's name, it appears that the Applicant deposited the sum of R2 100 000,00 into an Absa Bank account for the credit of Inter-Disciplinary Services CC (account no. 4055144267). The conveyancing attorneys were Trollip, Cowling & Janeke Inc who advised that* *the purchase price of property 2 of R1870 000,00 and that the transfer costs would amount to R203 473,00. The total costs for the transaction would consequently amount to R2 073 473,00'*[Par 4.16].

On a meeting of shareholders and directors held on 12 May 2005 an additional ordinary 100 00 shares were issued and allotted to the Applicant as 98 000 shares and to von Sethe 2000 shares. Consequently von Sethe held 102 000 of the issued share capital and the Applicant held 98 000 shares resulting in the 51%-49% split.

He confirmed Schlosser's version about the annual general meeting to be held on 16 October 2009. The notice convening this meeting was sent to von Sethe and the Applicant on 10 July 2009. The Applicant did not attend the meeting and because there was no quorum the meeting was adjourned to 31 October 2009. At this meeting there was a quorum because Schlosser held a proxy for von Sethe and the meeting was duly constituted. The Applicant phoned an employee of Schlosser indicating that he required the minutes of this meeting because he was not aware of this meeting. For the meeting of 2 November 2010 the Applicant informed the same employee of Schlosser that he could not attend this meeting at he wanted to drive form the airport to the farm before nightfall. The meeting was rescheduled for 4 November 2010. On the 4th of November 2010 von Sethe signed a proxy nominating the chairman of the meeting to be his proxy. As just Schlosser was present the meeting was adjourned to 30 November 2010. On this date the Applicant was present as well as Schlosser as proxy for von Sethe.

On 12 January 2012 an annual general meeting was held. In attendance was Schlosser, Chris Leistner (an attorney and proxy of the Applicant), von Sethe and his son-in-law as an invitee and Paterson himself. The usual resolutions were passed. Although this notice of motion was by then issued, upon the filing of a notice of intention to oppose, the Applicant's attorney would keep the matter in abeyance for settlement negotiations. Various settlement proposals were discussed but the matter could not be resolved.

10 It would be prudent to next set out as background the common cause chronological facts. These facts remained relevant in deciding all the issues before me even though the Applicant requested that the issues on these facts be referred to oral evidence.

10.1 On 16 February 1989 Witfontein purchased a property from the Groblers. [This property will for ease of reference as referred to above be known as" portion 1".]

10.2 Schlosser, an attorney of Germany practising in South Africa as a business consultant on request of Von Sethe floated Witfontein Game Farm on 25 April 1989. On the date of incorporation Schlosser as nominee took up one[1] share.

10.3 In that same year Schlosser's one[1] share was transferred to von Sethe as well as a 99 999 shares that were issued and allotted to von Sethe at a purchase price of R349 996.50. At date 10 May 1989 von Sethe was the 100% shareholder of Witfontein. Schlosser was the only director of Witfontein. The company records reflected all the aforesaid. Witfontein was a game farm with the main object of hunting or experiencing the typical safari of South Africa. The idea was to operate a hunting trophy farm but as Portion1,[2 and 3 later referred to] are landlocked this dream did not materialize.

10.4 Portion 1 was registered into Witfontein's name on 24 July 1989.

10.5 The Applicant during 1999 visited South Africa by invitation of von Sethe. The Applicant expressed interest in buying property in South Africa. Von Sethe only managed to buy the neighbouring farm, hereinafter referred to as “Portions 2 and 3” in 2003. The transaction culminated in that Witfontein purchased portions 2 and 3 and the Applicant acquired an allotment of 49% shareholding in Witfontein with von Sethe holding 51%.

10.6 The oral agreement between the Applicant and von Sethe was that the Applicant would manage Portions 2 and 3 on his own and pay all expenses pertaining thereto and von Sethe would pay all expenses for Portion 1 and manage it on his own.

10.7 On 16 July 2004 Schlosser wrote a letter to the Applicant with the relevant portion being the following: *“As previously discussed over the phone it will now become necessary for you to acquire an interest in Witfontein Game Farm(Pty) Ltd by the issue of new shares in such proportion as may be agreed between yourself and Mr von Sethe.*” Schlosser also suggested that the Applicant and von Sethe formalise their shareholding relationship with a shareholders agreement.

10.8 On 12 May 2005 at a meeting of directors and shareholders new shares were issued and allotted; 98,000 to the Applicant and 2000 shares to von Sethe.

10.9 In a fax dated 21 July 2005 Schlosser informed the Applicant that the shareholding in the company was now 51% for von Sethe and 49% for the Applicant.

10.10 In an e-mail form the Applicant in response to the fax dated 21 July 2012 he replied as follows:

> *"Thank you for your fax from 21 July, 2005 and I advise you, to share the operation expenses in proportion to the shareholding (Von Sethe 51%;PIlati 49%)"*

10.11 On 22 November 2006 Schlosser forwarded to the Applicant a draft shareholders agreement. In this draft clause 2.3 sets out the shareholding as 51% for von Sethe and 49% for the Applicant.

10.12 In an e-mail dated 18 January 2008 the Applicant informed Schlosser that he wanted to sell portions 2 and 3. He specified the reasons for this as follows:

> *"Since my purchase of the farm the situation in the region changed significantly because of*
>
> *- the formation of a nature reserve on the farm*
>
> *- an extensive building development on the neighbouring farm – about 900 metres away from my houses*
>
> *- a land tax (most probably with the right of the authorities to enter) is lurking"*[p259]

He also set out that the political climate in South Africa had changed unfavourably. He gave Schlosser two scenarios, one if he and Von Sethe both intended to sell their properties what should transpire, or one setting out what should transpire if only he wanted to sell the property. He *inter alia* refers to him selling his shares of 49%.

10.13 On the 16th of May 2008 the Applicant wrote a long letter to von Sethe [PR3] with *inter alia* the following content:

> *"3. It is correct that I have informed Heinz regarding my thoughts, to possibly take over your business shares, or in due time look for a new partner who maybe could take over shares in the company. We would have an interested party, but this would depend very much on the specific conditions which are still unknown.…*
>
> *4. I have written to Dr Schlosser and wait for his statement regarding the 1% share in the company that he used to have, but in my opinion no longer has after your acquisition of shares."*

10.14 On 26 March 2009 von Sethe wrote a letter to the Applicant with the following relevant portion:

> *"In January 2008 you informed me that you want to withdraw your investment from South Africa because you did not trust the political situation. On 12/11/2008 you told me that you no longer want to sell but that you want to get out of the farm company as a partner, and on 19/11/2008 we agreed mutually to sell the whole company, that means portion 1, 2 and 3. As you remember, I am emotionally very attached to this farm and it was not easy for me to decide for the first time to give up the farm and sell it, as I nevertheless confirmed with you on 19/11/2008. The political situation of the country did not change, the future president will be Zuma, which means that the*

country will be led into a unknown future, which may be unpleasant for foreign farmers in 2 to 3 years. That is why I still want to sell the farm company and I think that we should offer the portions of the farm on the market as soon as possible."

10.15 The Applicant did effect improvements to portions 2 and 3.

11 On the above versions of the Applicant and the respondent, as well as the common cause facts, the Applicant in the supplementary heads submitted that the Applicant would not be entitled to the relief claimed and that on these facts the matter must referred to oral evidence. On behalf of the respondent it was argued that the Applicant knew that there would be disputes of fact and changed tack as the matter went along and that the application should be dismissed. The Applicant did however submit that there are not disputes of fact relating to the management of Witfontein and that on these facts the relief sought in the amended notice must be granted. The respondent argued that they are so trivial that the application must be dismissed with attorney and client costs. I find it practical to first decide the issues on which the Applicant submitted it should be successful in the relief claimed. It was however necessary to first set out the above facts as background in understanding the facts now relied on for the relief claimed.

12.1 The Applicant averred that contrary to section 163(1)(a) of the Act von Sethe had conducted himself in a manner that unfairly disregarded the interests of Applicant. This conduct firstly flowed from the fact that the since the incorporation of the company Schlosser was the only director and von Sethe was the majority share-holder. It was argued that from these facts it was obvious that Schlosser held office as the only director at the behest of von Sethe. The fact relied on for this general proposition is that von Sethe wrote a letter to a neighbour on a company letterhead without consulting with the Applicant. The nature of the letter was to complain about the neighbour, Mr Mac Gillevray, locking the gate that gave von Sethe access to and from a public road to the portions. The letter set out who the director is, who the two shareholders were and also their percentage shareholding and where they reside when on the portions. The letter is dated 22 November 2009 and also explained that the relations between the shareholders are “critical.”

Von Sethe replied that this letter indicated that he signed the letter as the majority shareholder of Witfontein. He in his capacity as a shareholder had in terms of the oral agreement a right to attempt to ensure and protect a right of way over the farm of the said MacGillivray. Von Sethe also set out that the letter was in a friendly and gentlemanly tone and was no proof of an altercation between him and the neighbours. Von Sethe’s unilateral conduct must be seen against the background that he and the Applicant would manage each portion on its own. However he acted in the best interest of Witfontein because the value of any farm would be negatively affected if that farm is “blokland” without any right of access to a public road. The Applicant himself also wrote a letter to this neighbour without informing von Sethe. In this letter the Applicant informed the neighbour that he did not know of any legal action to be taken against the neighbour and he did not support such action.

12.2 The further complaint of the Applicant was that he was not advised or consulted with regard to the taking of legal action by the company and he did not support such action.

Von Sethe simply persisted that he need not consult with the Applicant before taking the action because this action, if to be taken is at board level. No basis was set out by the Applicant why he as a shareholder should have been consulted before the board took a decision to institute legal action.

12.3 The Applicant is also relying on the fact that von Sethe did not properly maintain the fire breaks on Portion 1, thus exposing the company and indirectly the Applicant to damages’ claims. Von Sethe admitted that a fire did break out on Witfontein but not due to negligence pertaining to fire-breaks.

The fire-breaks on portion 1 were constructed and maintained in a way that he regarded as effective. The Applicant contended that the fire spread because Von Sethe did not maintain the fire breaks on his portion of the farm and that was the reason why the fire spread. This contention of his he averred was confirmed in a letter from Mokolo dated 27 October 2010. The relevant portion of this letter reads as follows:

> "*When we arrived there the fire was burning on 2 sides of the gate on Witfontein side and we immediately started to fight it. ..Because of the extremely strong wind that was blowing during this day the fire jumped to Mokolos side and was quickly brought under control thanks to Mokolos staff.*
>
> *We learned that David, Mr von Sethes(sic) gardener burned dry leaves and branches at midday and left them unattended. This fire started to spread and as he is the only person on the farm he was unable to bring the fire under control by himself quickly because of the very strong wind blowing. We were informed by David that* <u>*there is no fire fighting equipment available on Witfontein Game Farm.*</u>
>
> *Mokolos staff and Mr Heinz Billy did the necessary after fire checks during the following night and early morning. "*

Von Sethe stated that he need not have consulted about the firebreaks on Portion 1 just as the Applicant did not consult with him about the firebreaks on portions 2 and 3. The Applicant persisted that this stance reflected von Sethe's attitude that he did not consult his co-shareholder regarding activities on company property that could prejudicially affect the company and the co-shareholder.

12.4 The Applicant also relied on the conduct of von Sethe in negotiating rental with the Mokolo River Nature Reserve. He complained that he received no benefit from it and was not consulted about it and Von Sethe unilaterally decided not to accept the offer. Von Sethe replied that there was no negotiation process, he was asked to consider an offer and he did not accept the offer. The offer only related to the portion that he managed for his own expenses and income. If he did decide to accept the offer the board would have had to approve it.

The Applicant contended that all the above illustrated von Sethe's entitlement to manage Witfontein but the Applicant was denied this right and these actions amount to text book oppression of a minority shareholder.

12.5 The Applicant set out that von Sethe invited Heinz Billy [hereinafter referred to as "Billy"] in 2002 to the farm where the Applicant met him. In 2004 the Applicant invited him to meet him in Austria in 2004. In Austria he "*agreed with Billy on behalf of the First respondent and in terms with the agreement with the Second and Third respondents, that he could stay at the old farm house on Portions 2 and 3 of the property to supervise the construction work of the new farm houses"* [par 42.4].

In October 2004 "*I gave Billy a lifelong right of residence on Witfontein Portions 2 and 3 as my employee in accordance with the agreement with the Third Respondent."* [par 42.6.5]. Von Sethe and Schlosser contacted the Department of Home Affairs and informed them that Wifontein did not employ Billy and therefor his work permit is invalid. This despite the fact that the agreement was throughout that each of the shareholders could employ their own staff. This was also contrary to the information supplied on an application for a hunting license submitted by Schlosser for Witfontein wherein it was stated that Billy was to be appointed as the person that will exercise the powers, functions and duties on behalf of the owners of the farms. The Applicant contended that Schlosser and von Sethe vexatiously and with a probable view to exclude Billy from the farm and thereby take over complete control of his portions of the farms. In supplying false information to Home Affairs they were having Billy deported. This was a further attempt to disenfranchise the Applicant from the management of Witfontein which is a "*direct arch with the original agreement between the parties"* [par 46].

Billy in his confirmatory affidavit stated that he was an employee and friend of the Applicant and confirmed what the Applicant stated pertaining to him.

Von Sethe admitted that Schlosser did sign the application for a hunting license in 2006. A natural person had to take responsibility for the license and it was done by Billy on an *ad hoc* basis. Von Sethe however strongly denied that Billy ever was an employee of Witfontein or was duly authorized to represent Witfontein. On 18 June 2009 Billy applied to renew a hunting license wherein he indicated that he was the owner of the farm and applied in the name of Witfontein. These false allegations could have serious consequences when future applications for hunting licenses are to be made. Von Sethe took the matter up with the immigration officials by providing them with affidavits. They did this to protect Witfontein and not to take over control of the farm or to act vexatiously. Billy is employed by the Applicant and not by Witfontein. In reply the Applicant denied that Billy gave false information because as he was employed by the Applicant he was therefor *de facto* employed by Witfontein.

12.6 The Applicant is also relying on the above incidents as evidence that von Sethe was locked in various disputes with the neighbours. Good relations with the neighbours "*is very important for the value of the First Respondent's property as well as for the vision that we had for the First Respondent, to keep proper relations with its neighbours, some of whom are serious players in the game preservation business in the area. Clearly the Third Respondent does not have the same vision for the First respondent as I do* "[par 41.9].

13.1 The incidents as set out in paragraph 12 above are relied upon by the Applicant for the relief as set out in the amended notice of motion as constituting acts or omissions unfairly disregarding the interests of the Applicant.

13.2 The bad relations with the neighbours and the omission to maintain proper firebreaks were affecting the Applicant's interests in that the value of the property was being affected. His interests were also affected in that he and the respondents don't have the same vision for the property.

13.3 The other affected interest was his interest in the management of his property and the property of Witfontein. The Applicant relied on the fact that since the incorporation of Witfontein Schlosser was the only director of the company and von Sethe the majority shareholder thus Schlosser held office as director on behest of von Sethe. Von Sethe acted as if he was authorised to act on behalf of Witfontein by writing letters to third parties and making decisions about an offer and the taking of legal action unilaterally. Although it is common cause that those decisions could only be taken at board level in reality Schlosser would not have taken those decisions. Schlosser was only a smokescreen because for 23 years he only did the administrative work and he did not manage Witfontein for the purpose it was established. Von Sethe dogmatically applied the principle of the majority ruled thereby disregarding the interests of the minority. The Applicant was never consulted or requested to give some input. It is correct that shareholders of a company are not involved in the management of the company but practically von Sethe was whereas the Applicant was completely excluded. It was thus argued on behalf of the Applicant that von Sethe was conducting himself in a manner that unfairly disregarded the interests of the Applicant.

13.4 The interests of the Applicant were prejudiced when Schlosser and von Sethe reported Billy to the immigration officials. They were acting *mala fide* with the intent to exclude/evict Billy from the farm and taking over the portions of the farm of the Applicant.

14.1 On behalf of von Sethe it was argued that the facts relied on are so trivial that they effectively constitute *de minimus curat lex* and could never constitute grounds for the relief sought in terms of Section 163(1)(a) of the Act.

14.2 Each party was responsible for their own firebreaks on their respective portions of the property. There were no facts set out how the averred failure to maintain the firebreaks unfairly prejudiced the Applicant. There was no need to consult with the Applicant pertaining to the firebreaks in terms of the common cause agreement. There was no evidence how this complaint impacted on him as a shareholder.

14.3 The unilateral conduct of writing a letter on a company letterhead did not unfairly disregard the interests of the Applicant. He was writing a letter on behalf of himself in that he was affected in his beneficial use of Portion 1. This was in line with the common cause fact that each party would have the beneficial use, management and expenses of their respective portions and they need not consult with each other. It was argued that in any event he acted in good faith because it was to the benefit of all the parties to ensure that the farm is not "blokland". He never in this letter gave the impression that he was acting on behalf of Witfontein. There are no facts to set out as to how this conduct impacted negatively on the Applicant.

14.4 The complaint that he had no say in the affairs of Witfontein and that the majority ruled is incorrect. There was not a single fact put forward where a majority decision was taken and the Applicant was outvoted. In general shareholders do not have a say in the day to day running of the company with the director fulfilling this function. The shareholders themselves had drawn a line between the management of the company, i.e Schlosser and the management of the portions of the farm by each shareholder.

14.5 The reporting of Billy to the deportation authorities did not unfairly prejudice the Applicant. Billy was still on the farm. It was untrue that Schlosser and von Sethe under oath lied to the authorities; in fact they told the truth that Billy was not the owner or employed by Witfontein. The Applicant in reply admitted that Billy was not employed by Witfontein. Their conduct was in response to Billy untruthfully stating that he was employed by Witfontein. Von Sethe did not have an opportunity to react to the replying statement that the correct authority to have reported it to was the Limpopo Environmental Department and not the Immigration Department. It was argued that once again there were no facts to explain how this conduct complained of unfairly disregarded the interests of the Applicant.

15.1 "Interests" is not defined in the Act. In the interpretation and application of this Act effect must be given to the purposes as set out in section 7 of the Act [s5(1)].

Section 7 identifies the following as the purposes of the Act relevant to this dispute:

"*(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;*

(i) balance the rights and obligations of shareholders and directors within companies;

(j) encourage the efficient and responsible management of companies"

In terms of Section 5(2) a Court interpreting or applying the Act may consider foreign company law where appropriate.

Section 158 of the Act reads that a court when determining a matter before it must when making an order in terms of this Act:

"*(a)* *...must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act; and*

(b)(i) *…must promote the spirit, purpose and objects of this Act; and*

(ii) *if any provision of this Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights."*

15.2 The Applicant argued that in view hereof section 163 must be interpreted widely. I was referred to Cassim Contemporary Company Law (2011) p692:" *In all likelihood a judicial construction will be given (one hopes) to extend rather than to limit the remedy (following the approach under the previous regime)."*

I was referred to the Canadian decision of **Stech v Davies** (1987)53 Alta LR (2d) 373 at 379 where the Court interpreted the meaning of "unfairly disregards" as *"to unjustly and without cause…pay no attention to, or ignore or treat as of no importance the interests of"* an Applicant.

This section is wider than section 252 of the old Act, Act 61 of 1973, because the complaint can also be against acts or omissions of a related person. The phrase." *or that unfairly disregards the interest of, the Applicant"…*set out a sufficient new jurisdictional requirement versus acts of omissions being oppressive or unfairly prejudicial. The Applicant supported the view of Cassim supra:

"*Section 163(1) does not necessarily require that the 'conduct' be unlawful in the sense that it infringes any legal rights of the Applicant [p680]…..The oppression remedy operates typically as a mechanism for the protection of minority shareholders [p683]…The unfair disregard of the 'interests' of the Applicant did not previously form part of the oppression remedy. Its explicit inclusion under the new Act arguably indicates that even where the conduct complained of does not affect any rights of the Applicant as derived, for instance, from the Act or the company's memorandum of incorporation, the Applicant will still have locus standi if the interests are affected…'Interest are wider than 'rights… and may include equitable consideration* [page685].

15.3 The Applicant submitted that the reliance in argument on behalf of von Sethe on **Louw v Nel** 2011(2) SA 172 (SCA) as authority on oppression of minority shareholders [in terms of the old Act] and the concept of fairness in a corporate context is dangerous in view of the wording of section 163 and the approach to the interpretation and application of the new Act. The court in the Louw-matter supra did not attempt to interpret and apply the old Act in a manner which promoted compliance with the Bill of Rights as provided for in the Constitution in the application of the Company Law. Human dignity of a minority shareholder is enshrined in Section 10 of the Constitution and part and parcel of the *pacta sunt servanda* principle.

15.4 The reliance by counsel for von Sethe on Australian authority is also misplaced because the Australian Act does not contain a provision which refers to the disregarding of the interests of an Applicant and the Australian Courts are not enjoined to apply constitutionally entrenched rights in interpreting its company's legislation. The interpretation adopted in Australia that the various concepts used in this Section are to be viewed as a composite whole is not in line with South African law pertaining to the interpretation of statutory law; that if possible effect is given to each word or phrase in order to avoid tautology [**NST Ferrochrome (Pty)Ltd v CIR** 2000(3) SA 1040 (SCA)1047]

15.5 It was concluded that on the facts set out the interests of the Applicant is unfairly disregarded. A court can fashion an appropriate remedy which is tailor-made for the circumstances. It was argued that in view of the fact that the Applicant paid the purchase price and financed the improvements for portion 1 and 2 and the portions were managed separately from portion 1 the practical way is to grant the prayers in the amended notice of motion. It was argued that this was the most practical way to protect the Applicant’s interests and end the acrimony between the shareholders.

16.1 On behalf of von Sethe it was argued that for the Applicant to make out a cause of action based on s163(1)(a) the Applicant had to establish three components:

(i) any act or omission, i.e. conduct;

(ii) which had a result; a consequence

(iii) that consequence had a particular effect; *in casu* unfairly disregarded the interests of the Applicant.

16.2 The interests unfairly disregarded must be interests operating in the corporate world in the Applicant’s capacity as a shareholder. It was argued that it is very difficult to give a separate and distinct meaning to “oppressive”, “unfairly prejudicial” and “unfairly disregards” in such a manner that they don’t overlap. It was thus argued that the Australian approach of viewing the concepts as a composite whole and the individual elements should be considered as different aspects of commercial fairness.

16.3 Corporate fairness is not requiring lawfulness to override unfairness of consequences, but is recognition of corporate context and its basic democratic principle of majority rule as a particular concept of fairness.

16.4 The Applicant did not show any result of interests being unfairly disregarded. The incidents now relied on are isolated and even if viewed holistically are *de minimus.*

16.5 The Applicant's complaint that he had no say in the company affairs is reliant on incidents were von Sethe acted pertaining to his portion in terms of their oral agreement. The general complaint in the founding affidavit of the Applicant that he had no say in the affairs of the company was responded to by von Sethe in general that shareholders do not have a say in the run of the affairs of the company and can not be interpreted as an exclusion of the Applicant in the running of Witfontein. The Applicant did not deny Schlosser's averment that "*I know of no instance at which the Third Respondent outvoted the Applicant by allegedly using his majority shareholding as the resolutions passed throughout were those which had gone before"* [par 31].

16.6 The Applicant set out no facts as to what the consequences of these averred incidents were and how it impacted on the interests of the Applicant.

It was thus argued that the Applicant's application must be dismissed with costs on an attorney and client scale.

17.1 Section 252 of the old Act read as follows:

"(1) *Any member of a company who complains that any particular act or omission of a company in unfairly prejudicial, unjust or*

> *inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may subject to the provisions of subsection (2), make an application to the Court for an order under this section."*

For ease of reference I again quote section 163(1)(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…"*

17.2 An act or omission that "*unfairly disregarded the interests*" of the Applicant is a new phrase in this act. The Applicant thus argued that the application of this section is wider as the section in the old Act and would encompass the incidents relied on and specifically that the respondents were acting in a manner which did not enable the Applicant to enjoy fair participation in the affairs of the company.

In general and in company law the concept "interests" would be a wider concept than "affairs of the company" [s252(a)]. Cassim's submission that "interests" would be wider than" rights" is also correct in as far as "rights" are applicable pertaining to this section. The section does not state that the interests of the Applicant being unfairly disregarded should be interests affected in any particular capacity.

17.3 On behalf of von Sethe it was argued that no matter how wide interests are to be interpreted it must be placed in context of the regulatory Act and its operation in the corporate world. The Applicant's interests *in casu* must in the context of s 163 be in his capacity as a shareholder which it is not.

17.4 I would think that the concept interests could include interests not flowing from the memorandum of incorporation of the company, but from an understanding or agreement between the parties. Interests "*arise[s] out of fundamental understanding between the shareholders, which formed the basis of their association but was not in contractual form.*" [**Saul D Harrison & Sons Plc, Re** [1995] 1 B.C.L.C at 19- English Court of Appeal]. The acts complained of need thus not necessarily flow from the Articles of Association or by example from a majority vote, but for instance from a breach of trust or acrimony between the parties flowing from the fundamental understanding between the shareholders. Canadian Courts interpret the phrases similar to those in s163 on a general fairness standard based on the reasonable expectations of the Applicant and not only strict legal rights.

17.5 The test however is whether the acts or omissions that unfairly prejudiced the Applicant's interests resulted in affecting the Applicant in his capacity as a shareholder. The precise question is whether the harm which the Applicant has suffered is something he or she is entitled to be protected from.

17.6 The interests the Applicant is relying on could, dependent on the merits thereof, qualify as interests, but must result in unfair prejudice to him in his capacity as a shareholder. The result of the act or omission must be unfairly prejudicial and not the act. Hennochsberg on the Companies Act, 71 of 2008, Vol 1, p568 is in agreement with counsel for von Sethe that s163's phrase " *'has had a result' indicates that the act must be completed, that must be oppressive or unfairly prejudicial. It is also the result, and not the act, that must be oppressive or unfairly prejudicial."* I agree that it is thus the effect of the challenged conduct which is critical.

17.7 In the matter at hand the Applicant would be entitled to relief in terms of s163 if he can prove the following:

(1) any act or omission on the part of von Sethe and Schlosser;

(2) which had a result or consequence;

(3) which was oppressive, unfairly prejudicial or unfairly disregarded the interests of the Applicant.

The undisputed facts the Applicant were relying on for the application to succeed was found on specifically the phrase "unfairly disregarding the interest of the Applicant."

17.8 The Applicant argued that in view of the new concept of "unfairly disregarding the interests" of an Applicant the legislature did not intend that the three concepts in (3) above be interpreted as a composite whole. In any event such interpretation is in conflict with the South African rule of statutory interpretation where effect should be given to each phrase in order to avoid tautology. The Applicant relied specifically on the phrase that the respondents conducted themselves in a manner that "unfairly disregarded the interests" of the Applicant.

17.9 On behalf of von Sethe it was argued that it is impossible to define each concept without them overlapping. Counsel also relied on Australian law wherein it was found that the concepts must be interpreted as a composite whole as merely being different aspects of the essential criterion i.e. commercial fairness. Section 163 as now formulated closely resembles the s241 of the Canadian Business Corporations Act, RSC 1885, CC-44. Section 163 also resembles 232 of the Australian Corporations act 2001(Cth). Applying s5(2) of the Act a Court can thus take cognisance of Canadian and Australian Company law in applying and interpreting section 163 and the third respondent's reliance on Australian case law is not misplaced.

17.10 I was urged by counsel on behalf of the Applicant to consider case law on Section 252 with great caution due to the difference in wording and also the approach to be adopted in terms of the new Act. It is correct that the new Act expressly in section 7 has as one of its purposes to promote compliance in Company law with the Bill of Rights. The Applicant thus argued that the new phrase, “interests”, coupled with this explicit purpose and application of the Act rendered reliance on case law pertaining to s252 of the old Act to be done with great caution.

17.11 The submission that the courts would not in company law prior to the new Act have promoted compliance with the Bill of Rights is incorrect because in terms of section 39(2) of the Constitution a court **must** when interpreting any legislation promote the spirit, purport and objects of the Bill of Rights. **Louw v Nel** (supra) was decided by the Supreme Court of Appeal in 2011 and the third respondent thus can instructively rely on this matter keeping in mind that it centred on section 252.

17.12 In the Louw-matter supra the purpose of section 252 was expressed as follows:

> *”[t]he combined effect of subsections (1) and (3) is to empower the court to make such order as it thinks fit for the giving of relief, if it is satisfied that the affairs of the company are being conducted in a manner that is* ***unfairly prejudicial to the interests*** *of a dissenting minority”[p23]*[my emphasis].

Although section 163 may be wider than s252 this quote is equally applicable to the purpose of section 163. This is so because in this quote “interests being unfairly prejudiced” features pertinently as the expressed purpose in ironically the words of s163 and not of s252. As the Applicant is relying specifically thereon I do not find it necessary to decide whether all the phrases must be read as a composite whole, but I do find that interests unfairly prejudiced must result in commercial unfairness affecting the Applicant in such capacity.

18.1 It was argued that the interests pertaining to the fire-breaks and von Sethe's acrimony with the neighbours were affecting the Applicant's interests in that the value of the property was being affected. His interests were also affected in that he and the respondents did not have the same vision for the property.

This argument is to be rejected. There was a fire but not in one of the letters from the neighbours do they state that it was due to negligence with the fire-breaks. The neighbours averring negligence pertaining to the lack of a firebreak or proper maintenance of one could have been expected in lieu of the statement in [CP30] that they in 1998 advised von Sethe to establish a firebreak on his side of the farm. However the neighbours gave as the reason for the fire starting that a fire was left unattended and the fire spread due to the extreme strong winds. The criticism was that the neighbours had to fight the fire as there was no manpower or fire-fighting equipment on the portion of the farm of von Sethe.

Furthermore there are no facts setting out that the averred acrimony with the neighbours could and have resulted in affecting the value of the property; in fact one neighbour offered to rent some of the property. In terms of the common cause understanding between the parties that each party would maintain at their own cost the fire breaks on each portion there can be no foundation for the submission that the Applicant needed to be consulted and informed pertaining to the firebreaks. There are no facts set out how this interest was unfairly prejudiced.

18.2 The parties had the same vision for the farm, but the property is "blokland" and this prevented their ideal of a trophy hunting game farm realising. Von Sethe did break a lock to a gate, but the relevant neighbour did not complain that he was not entitled to access but was very concerned and upset that he left the gate unlocked with big five roaming the property. Access though the neighbouring property was utilized since the property was bought and even before that. The Applicant had access to a public road whereas portion 1 did not have access. Von Sethe securing access to portion 1 did not result in any unfair prejudice to the interests of the Applicant as the owner and manager of portions 2 and 3 or as shareholder. There is no evidence of how the value of the property or Witfontein was affected. These interests simply did not result in commercial unfair prejudice to the Applicant's shareholding or even his share in the property.

18.3 The fact that information was given to the deportation authorities about Billy once again has not resulted in any unfair prejudice. It is common cause that Billy was not employed by Witfontein and incorrectly declared so on a further application for a fire arm. It was not argued that this incorrect statement should not have ben corrected but that it should have been done at another authority and not the deportation authority. Even if there was an element of malice on von Sethe and Schlosser's behalf in reporting it to the deportation authorities the result of the act or omission must be unfairly prejudicial and not the act. Billy is still on the farm and the Applicant is in control of his portions of the farm. This incident did not result in prejudicial unfairness to the Applicant. The averment that the respondents' intention was in so doing to evict Billy and take over the Applicant's portion of the farm is a quantum leap with no substance. There was not a single fact to sustain an eviction and takeover of portions 2 and 3 by the respondents.

19.1 The high water mark of the Applicant's interest relied on is that he had no say in the affairs of the company whereas von Sethe did. When Schlosser acted as Director of Witfontein he only acted on behalf of von Sethe. The affected interests were originally set out as a complaint of disenfranchisement of the Applicant in the management of the company. It was later conceded that the shareholders do not manage a company, but the director. The affected interests where then moulded to the active involvement of von Sethe in Witfontein unfairly prejudicing the Applicant.

19.2 The argument that Schlosser only acted on behalf of von Sethe is rejected. The only fact relied on for this submission is that von Sethe was the majority shareholder and therefor Schlosser effectively only acted for von Sethe. This may be the *de facto* situation but this averment is insufficient to sustain unfair prejudice to the interests of the Applicant because there is not a single further fact setting out conduct or a result of such conduct before court. There simply is no cause of action i.t.o. s163 based on this argument.

19.3 It was argued that von Sethe was conducting himself as if he was authorized to act on behalf of the company. This was because he wrote a letter on a letterhead of Witfontein to the neighbours pertaining to access of the property. He also was not consulted before von Sethe threatened to institute legal action pertaining to access to the property. Von Sethe also had discussions with a third party regarding a rental offer; he did not consult with the Applicant or take it to the Board.

19.4 The running of Witfontein and the shareholding therein can not be seen in isolation. The agreement between the parties that each party would run and maintain their own portions of the property in Witfontein had a role to play. There was thus by agreement a difference pertaining to the management of the company and the management of the portions.

Von Sethe’s involvement was all relevant to his portion of the property in keeping with the understanding between the parties. If von Sethe accepted the rental offer on his portion the Board would have to approve it. If he was denied access to his portion he in terms of the understanding had the right to address it. The Board had to sanction any legal action and not a shareholder. If legal action was to be taken by Witfontein on behalf of the shareholder whose access was being denied him then it again centred round the management of von Sethe's portion of the property. These acts, not individually, not holistically, resulted in any unfairness to the Applicant. The Applicant has not suffered any harm or prejudice flowing from one of these incidents. In terms of the agreement between them he could not have expectations to be consulted pertaining to von Sethe's portion.

19.5 In keeping with the objective to construct "unfairly prejudicial" wide and not to equate it with "oppressive" the Applicant did not show that the respondents acted with a result unfairly prejudicial to the Applicant. The Applicant could not show that the value of his shareholding or his portions of the property was diminished. I can not find that these incidents complained of infringed upon his entrenched rights in the Bill of Rights, not his right to information neither his dignity. Mere dissatisfaction with or disapproval of the conduct of the respondents did not render their acts unfairly prejudicial to the Applicant. There was no unreasonable or unethical conduct rendering the acts or omissions unfair.

Even in constructing unfairness very widely using as guide all the factors set out in the following; ".*.fairness is a matter of balancing the interests of all involved in the light of the history and structure of the company and in terms of the policies underlying the section and the Act, the duties of the directors, the rights and duties of a majority shareholder in relation to a minority shareholder, and the agreements or understanding outside the articles which may give rise to legitimate expectations in the conduct and interest of the stakeholders." [*–Blackman MS,Jooste RD and Everingham GK; **Commentary on the Companies Act (2002) (2)** p9-26] I can not find that the acts or omissions of the respondents resulted in unfairly prejudicing the interests of the Applicant.

20 Accordingly the application on these facts is dismissed.

21.1 The Applicant argued that due to the factual dispute on the papers pertaining to the other affected interests relied on for relief the matter must be referred to trial in terms of section 163(2)(l) of the Act.

21.2 The respondent argued that the Applicant in fact abandoned his cause of action as set out in the founding affidavit and then "hoisted his petard" to the answering affidavit of the Third Respondent and that the court should in following **Administrator, Transvaal v Theletsane** 1991(2) SA 192 (A) 196H-I reject the grasping at straws of the Applicant and dismiss the application. The Applicant changed tack from his entitlement to become a shareholder and co-director of the company to incidents that were *de minimus*. The Applicant should have foreseen a factual dispute pertaining to his shareholding and role in the company and should have not proceeded by way of application.

21.3 The Applicant argued in reply that the legislature intended that an Applicant applying for relief in terms of Sect 163(1) of the Act must institute motion proceedings [*"may apply*"]. Therefor an Applicant could not be penalised in that an Applicant should have anticipated conflicts of fact which could only be resolved by referral to oral evidence. This is so because section 163(2)(l) authorises a court to grant "*an order for the trial of any issue as determined by the court.*" The Applicant persisted that the undisputed facts relied on where in the founding affidavit and the Applicant is seeking the same relief. The third respondent's reliance on the Theletsane-matter was misplaced because it could not be argued that no trace of a case was set out in the Applicant's affidavit. The answering affidavit did not deal equivocally with any facts and there was no prejudice to the third respondent. The matter at hand was a matter that could be distinguished from the Theletsane-matter as it was in the matters of **South Pensinsula Municipality v Evans & Others** 2001(1) SA 272 (C) at 291 B-E, **Sokhela v MEC for Agriculture (KZN)** 2010(5) 574 (KZN) at 601 G-602C and **Sea Front for ALL v MEC, Environmental Planning** 2011(3) SA 55 (WCC) at 68 I-69 A.

21.4 The Applicant was at the hearing of the matter asking for relief on facts that on no reading of the founding affidavit was the main or primary facts. The relief and its many alternatives sought were also amended extensively. I need not address the facts and relief sought in terms of a quasi-partnership because the Applicant did not proceed on this basis. The alternative relief sought for compensation to be paid to the Applicant was no longer pursued. The alternative relief no longer pursued was that of a complete restructuring of the contractual and corporate relationship between the Applicant and the third respondent. The rectification of the loan account is also not pursued. The original outcome sought by the Applicant was that he would in his own name hold the two properties as well as the R2.1 million that he originally paid and effectively that the equivalent book value of the two properties was to be reflected in the rectified loan account and written off. All of this was to be done on the respondents' costs.

There is thus substance in the argument that upon receiving the opposing affidavit the Applicant changed his stance on what factual basis he is relying for immediate relief and in fact the original unreasonable relief sought was amended.

The facts relied on for relief as set out in paragraphs 17.4-17.7 supra were however set out in the founding affidavit. The main relief i.e. the setting aside of the transaction and agreement in terms of which Witfontein purchased Portions 2 and 3, ordering the transfer to the Applicant of such property by the First Respondent, and that the Applicant's loan account in the first Respondent be written off was also sought in the original notice of motion. Although I agree that they changed tack as to on what facts they were relying in their affidavit substantiated by the affidavit of the third respondent I can not find that the Applicant's case in fact was argued only on the respondent's affidavits for relief as was done in the Theletsane-matter supra. The facts relied on now may be incidental but they were in the founding affidavit.

22.1 The question remains whether the averred factual dispute must be referred to oral evidence in terms of s163(2)(l). On behalf of von Sethe it was argued that referring the matter to trial will serve no purpose. The reason for this is that the main jurisdictional fact of the Applicant was that he was to receive Schlosser's 1% shareholding in Witfontein when Schlosser retired rendering him equal shareholding. This fact was destroyed by the objective evidence as set out by the affidavits and annexures of von Sethe. This argument was also fuelled by the argument in par 19 supra, i.e. the Applicant had to change tack to pull the application through because he could no longer rely on this fact.

22.2 The fact that s163 authorises a court to refer any issue to trial does not negate the principle that it will only refer a matter if there is indeed a *bona fide* factual dispute. Where final relief is sought on application an Applicant will only be successful if the undisputed facts together with the facts contained in the respondents affidavit affords him the relief applied for; **Plascon Evans Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634E-635C and **Wightman t/a JW Construction v Headfour (Pty) Ltd And Another** 2008 (3) SA 371(SCA)

22.3 The Applicant is very vague in his affidavit pertaining to the oral agreement that was concluded on which his original cause of action was wholly reliant. He initially stated that the agreement was concluded between himself, Schlosser and von Sethe. In reply he conceded that Schlosser was not a party to the oral agreement. He stated that he was misled by von Sethe informing him that as a foreigner he would struggle to buy property and that he should use the company as a vehicle. On his own version he however as far back as 1999 offered to buy the neighbouring property in his own name; he did not aver that he then attempted to buy the property through the company. He also did not disclose when the oral agreement was concluded but it would seem that it was only concluded before the Applicant bought the property in 2003. The respondent's version must be accepted that Witfontein was not a shelf company used as vehicle to purchase portion 1 ;i.e. Witfontein was specifically incorporated to purchase portion 1. The Applicant contradicted his own version that von Sethe informed him that as " *a foreigner without permanent residency would find it very difficult to buy property he had to do it through the company".* [p9 par 10]

On p588 par 22.7 he stated as follows:

> *"I in fact believed that I was buying the farm and thereafter bringing it into Witfontein."*

This contradicts his own version that as a foreigner he would not be able to buy property in his own name. In a letter from his own attorney the reason why it was suggested to buy it through the company is set out as:

> *"The proposal is made to him instead of buying the game farm in his own name he should also buy it through the company of the fist friend, his neighbour.*
>
> *(f) He is made to understand that to buy, the game farm on his own name would be much more costly and it would be much more to his benefit to buy his farm also through the company of the neighbour."*

The fact that this letter was written after the transaction was concluded does not render it irrelevant; it just gave another reason as to why the transaction was structured the why it was. The version that he was misled that he could only buy the property through the company is contradicted on his own version and is on the papers untenable.

22.4 The crux of the Applicant's application is that he would only have bought the property if he was a 50% shareholder and he expected to become that in terms of the oral agreement. In the founding affidavit he set out that they initially agreed that he would buy the neighbouring property and would acquire 49% of the shareholding of the company. "*The express agreement was that when the Third Respondent retired, his 1% [one percent] shareholding would be transferred to me free of charge after which the Third respondent and I would be equal shareholders of the First Respondent"*[p9 par11]. The court is never enlightened as to why there is reference to "the initial agreement" featured because there is no mention of a further agreement. The reference to the third respondent is obviously wrong and is in fact a reference to Schlosser. Only in the replying affidavit did the Applicant clarify the oral agreement as that he would become a 50% shareholder when Schlosser *"retired as a director or shareholder*' [par 22.9 of the replying affidavit]. The argument on behalf of von Sethe that the agreement was set out so vaguely that it should be rejected has merit. This is so because the generalised facts set out by Applicant were contradicted with the respondent's facts setting out chapter and verse rendering the Applicant's version untenable. What would happen if Schlosser never retired, would the Applicant then never become a 50% shareholder? What if he retired as a shareholder but not as a director or visa versa? What would happen if Schlosser died and it fell within his estate? If he was adamant that he would only have given ownership of the property on condition that he become a 50% shareholder one would assume that the oral agreement would have been concluded with Schlosser as the shareholder who had to transfer his shares, which the Applicant conceded it was not. The Applicant, an experienced businessman and lawyer, would not have concluded such a vague agreement, even with old acquaintances. The *lacuna* in his affidavit with the undisputed facts the respondents put up in defence render his version palpably implausible.

22.5 The objective facts show that Schlosser never had 1% shareholding, but only 1 share. It could thus never have been the understanding that the transfer of the 1 share would result in the Applicant having 50% shareholding in the company. Even if the Applicant was misinformed the companies records cleared showed this and yet the Applicant for 5 years took no steps to protest or request rectification of the records. His reply that he did not act when he noticed this situation in correspondence was because he "*considered at that time that this was a mere cost division between the Third Respondent and I, as the Second Respondent was still acting as director"* [par 47.2 of replying affidavit]. In an e-mail from the Applicant to Schlosser dated 26 July 2005 the Applicant advised Schlosser "*to share the operation expenses in proportion to the shareholding (Von Sethe 51%;Pilati 49%)."* The costs thus clearly relate to the shareholding in the company.

22.6 Furthermore on one of his versions the shareholding would be 49% until Schlosser retired as shareholder or director. Schlosser obviously was not a shareholder anymore but "*was still acting as a director*" [par 47.2] The question then is on what basis the Applicant claimed 1% shareholding if Schlosser was still acting as a director, which he still is, that rendered on his version a fair splitting of costs in 49%-51%.

22.7 The Applicant did not when, on Schlosser's initiative, he is sent the shareholders agreement take the opportunity to set the matter straight. The Applicant averred he did makes notes on the agreement but did not disclose to the court what notes he made on the agreement and is completely silent on the fact that this agreement in 2006 still reflected the shareholding as 49% for him and 51% for von Sethe.

22.8 In the Applicant's replying affidavit he proffered another reason why he never would have consented to a minority shareholding:

> *"I would not readily have agreed to take a minority shareholding if I had not been brought under the false impression that I could not originally*

take an equal or majority shareholding in a South African company" [par 28 of the replying affidavit]

This is now a further and new representation in the **replying** affidavit denying the respondents an opportunity to respond thereto. This averment contradicted his own version that he willingly took up a minority shareholding with a promise to become an equal shareholder. The Applicant's version is untenable.

22.9 I can not find that there is a *bona fide* dispute or that this issue must be referred to trial.

23.1 All the secondary issues raised relate to the averred oral agreement and his minority shareholding. His further complaints were that his loan account in the books of Witfontein did not reflect the debt due for the improvement of the property nor his investment in buying the properties. He was unfairly prejudiced that no proper shareholders meeting were held and when arranged it was held at a place and time inconvenient for him. He did not receive a return on his investment in the company and he did not have equal management rights in the company. All of this led to acrimony between the parties and the court must step in.

23.2 There was no acrimony between the parties from 2003-2008. The first time the Applicant raised any alleged unfair prejudice in writing was in April 2009. This was after he on 18 January 2008 sent an e-mail to Schlosser with the tenure that he wanted to realise his investment in Witfontein and take his money out of South Africa. The e-mail is silent about any entitlement to his other 1% shareholding and what would happen to that. The acrimony only commenced when the Applicant wanted to separate himself from the properties and Witfontein. The acrimony did not result from any act or omission by the company that unfairly prejudiced the Applicant in his capacity as a shareholder or in his capacity as the manager of portions 2 and 3.

23.3 For many years there was no complaint about shareholders meetings. In the founding affidavit the averment was simply that the meetings were not held until he complained. On the one hand there is the complaint that no meetings were held but on the other hand he avers that it was difficult for him to attend them because he was often not in South Africa. Paterson in his affidavit set out that there were informal meetings held and Schlosser confirmed that not once was there a majority decision that affected the Applicant in any way, let alone unfairly. The Applicant could not show a result that unfairly prejudiced his interests flowing from these informal meetings or meetings not held.

23.4 It is common cause that the Applicant did not sign a loan account certificate. In the application he did not set out a single figure as to what his loan account should be. For many years he did not once complain about the audited reports. Only in reply did he refer to one letter dated 7 December 2005 wherein he stated the following:

> ”*I invested locally-taxed money into the house of the farm-invoices and copies enclosed- and also machinery and equipment (e.g. a4x4) for the farm. I am going to ask Mr von Sethe if he agrees that we put this in the balance sheet and will tell you about it”* [PR7].

He did not set out what von Sethe’s reaction was to his request to put it in the balance sheet, or that von Sethe unreasonably refused to do so, or that he approached Schlosser and that he refused to entertain the figures. Once again the Applicant was confronted with a new fact in reply. The court is not informed what action the Applicant took from the date of this letter to secure the amounts reflected in the loan account or balance sheets and how this was unfairly refused. This is another grasping at straws.

24 The Applicant did not on the facts set out a cause of action for relief in terms of s163 nor that in terms of s163(2)(l) the matter must be referred to trial.

25.1 There is now acrimony between the Applicant and von Sethe and the question is whether the court must attempt to order fair relief separating the parties. In terms of section 163(2) the Court has wide powers and the Court is at large to fashion an appropriate remedy. The purpose of section 163 is however set out supra as " *[t]he combined effect of subsections (1) and (3) is to empower the court to make such order as it thinks fit for the giving of relief,* ***if it is satisfied that the affairs of the company are being conducted in a manner that is unfairly prejudicial to the interests of a dissenting minority"****[p23]*[my emphasis].

15.2 I am not satisfied that the affairs of the company were conducted in a manner that was unfairly prejudicial to the interests of the Applicant. In the Louw-matter supra in paragraph [23] the following was found:

> "*Thus, the court's jurisdiction to make an order does not arise until the specified statutory criteria have been satisfied."*

25.3 Accordingly I can make no order because the criteria were not satisfied.

26.1 On behalf of von Sethe a punitive cost order was prayed for. It was argued that the Applicant did not disclose material facts to the court and did not play open cards with the court. The Applicant made untruthful and misleading statements and had to change tack demonstrating the vexatious and reckless nature of the application.

26.2 The Applicant argued that this application was novel in that no case law has been reported on section 163 and some lee-way must be allowed.

26.3 The application was certainly novel, in more than one way, but special circumstances must exist before a court grants a punitive cost order. The Applicant did change tack and did in the founding affidavit set out bald and vague facts. However the specified criteria of section 163 were open to debate, i.e. whether a result must flow from the conduct and how the criteria were to be interpreted. Dependant on the interpretation the Applicant may have been successful. Under these circumstances I am inclined not to grant a punitive cost order.

27 I accordingly make the following order:

27.1 The application is dismissed with costs, costs to include the costs of two counsel to the extent that two counsel were employed.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 168803A/2011

HEARD ON: 13 November 2012

FOR THE APPLICANT: ADV. J.P. VORSTER SC
ADV. J.R. MINNAAR

INSTRUCTED BY: Leistner Attorneys

FOR THE THIRD RESPONDENT: ADV. M.M. OOSTUIZEN SC

INSTRUCTED BY: MP van Staden Attorneys

DATE OF JUDGMENT: 1 February 2013