



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **16514/2023**

In the matter between:

**THE TRUSTEES FOR THE TIME BEING OF  
THE KROMRIVIER TRUST**

Applicant

and

**THE TRUSTEES FOR THE TIME BEING OF  
THE HARTWIG FAMILY TRUST**

First Respondent

**CEDERBERG PARK (PTY) LTD**

Second Respondent

**GEMINI MOON TRADING 536 (PTY) LTD**

Third Respondent

**ERNST HARTWIG**

Fourth Respondent

**Coram:** Justice J Cloete

**Heard:** 10 and 14 October 2024, supplementary notes delivered on 18 October 2024

**Delivered electronically:** 29 January 2025

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**JUDGMENT**

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## **CLOETE J:**

### **Introduction**

- [1] This is an application for various grounds of relief, all based on the Companies Act.<sup>1</sup> The sections applicable to the determination of this matter are s 31, s 61 and s 163. Properly construed, the applicant's case is underpinned by the protection provided to a shareholder (or director) of a company against oppressive or prejudicial conduct, resulting from any act or omission of the company (or a related person) as described in s 163. The application is opposed by the first and fourth respondents. Without disrespect, and for convenience only, I will refer to the two main protagonists by their first names, as the parties did in the papers.
- [2] In its amended form (provided by agreement as a draft order after the conclusion of argument) the applicant asks for the following relief, namely: (a) the second and third respondents ("the companies") be directed to provide the applicant with copies of all financial statements filed with the CIPC,<sup>2</sup> alternatively drafts thereof if not yet filed, for the period 2017 to date in terms of s 31(1)(b); (b) the appointment of an independent director (being a chartered accountant with more than 10 years experience) to the board of each company, and who shall, in addition to his or her ordinary powers as director, be mandated to investigate (as set out hereunder) their financial affairs, and thereafter produce a report with recommendations to the rest of each board and shareholders in terms of s 163(2)(f)(i); and (c) declaring that Mr Philip Nieuwoudt ("Pip") was invalidly removed as a director of each company in light of s 61(1), coupled with attendant and/or consequential relief, including rectification of the share registers of these companies to reflect equal shareholding by the applicant and first respondent.
- [3] The envisaged investigation by the independent director to be appointed is to include but not be limited to the following:

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<sup>1</sup> No 71 of 2008.

<sup>2</sup> Companies and Intellectual Property Commission.

3.1 Whether an audit is required in relation to either or both of the companies; and

3.2 The financing and financial arrangements made in relation to the development of Cederberg Park, Kromrivier, which shall include all resolutions passed by the companies, all loan agreements entered into by them, compliance or lack thereof with s 75 of the Companies Act, the relationship between the companies and the first and fourth respondents and their related entities, and net asset valuations of the companies, but *'noting that this order shall have no effect on parties other than the respondents in this matter'*.

[4] The first and fourth respondents oppose this application on three main grounds. The first is that it has been brought with ulterior motives, and not to obtain the remedy provided for in s 163; to reinstate Pip as a director of the companies will merely recreate the deadlock which existed before his removal as director, and in any event no case has been made out for the appointment of an independent director, let alone the envisaged investigation. Second, the applicant must fail on the application of the Plascon-Evans rule. Third, and in any event, the applicant knew, or ought to have known, that there would be serious disputes of fact incapable of resolution on affidavit.

[5] The papers are replete with factual disputes in relation to the lengthy and wide-ranging averments contained in the applicant's founding papers. I will accordingly endeavour to deal only with the evidence directly relevant to the relief sought, firstly with reference to the relatively few undisputed facts, and secondly with reference to the primary disputed ones.

[6] To this it must be added that although the initial notice of motion contained an alternative prayer for a limited referral to oral evidence in the event of the court being unable to determine the issue pertaining to rectification of the share registers, this was abandoned by the applicant, it having been submitted on his behalf in heads of argument that *'there is no dispute of fact*

*in this regard, the Hartwigs do not allege any positive facts to cast doubt on the [applicant's] trustees' version of events and, in fact, appear to admit the invalidity'.*

### **Undisputed facts**

[7] During 2008 the Nieuwoudt family, represented by Pip, entered into discussions with the Hartwig family, represented by the fourth respondent, Mr Ernst Hartwig ("Ernst"), to develop the farm Kromrivier, and in particular the existing rudimentary tourism facilities thereon, into a quality eco-tourism destination. At the time, Kromrivier had been in the Nieuwoudt family for generations and was registered in the name of APC Nieuwoudt & Seun (Edms) Bpk ("APC").

[8] Thereafter, on or about 11 September 2008, APC represented by Pip, and Ernst in both his personal capacity and as 'trustee' of a company to be formed ("Newco") concluded a written agreement with regard to the proposed development. It is not a model of clarity but the relevant terms for present purposes were as follows:

8.1 Kromrivier would be developed in phases, each with its own objectives and target dates;

8.2 The development would be subject to: (a) the required applications for land use approval being successful; (b) Ernst having the sole and exclusive discretion as to the financial viability of the project from time to time; and (c): provided that (a) and (b) were met, Ernst in his capacity as representative of Newco would have the irrevocable option to purchase the property (together with certain livestock and equipment) against payment of a purchase price of R10 million (incl. VAT) until 15 December 2009, whereafter the purchase price would increase in accordance with inflation until transfer of the property into the name of Newco;

- 8.3 The target dates were: (a) applications for land use approval by 15 December 2009; (b) financial viability study by 15 December 2009; (c) exercise of the option to purchase by 15 December 2009; (d) formation of Newco by 28 February 2010; (e) transfer of the property to Newco pursuant to the exercise of the option by 30 June 2010; (f) construction and upgrading of a maximum of 25 chalets for purposes of sale on a “fractional title” basis, upgrading of the manor house and development of other infrastructure by 30 June 2012; and (g) conclusion of the first sale agreement in respect of the chalets by 30 June 2011 (possibly this was meant to be 30 June 2012 but nothing turns on it);
- 8.4 Ernst and/or Newco would finance the project until 15 December 2009, subject to: (a) each party making a capital injection of R500 000 into Newco once the property was transferred into its name; and (b) each party making a cash loan to Newco of R5 million on terms to be agreed;
- 8.5 Provided that all suspensive conditions were fulfilled by the target dates, each party would hold 50% of the shares in Newco and each would nominate one director to Newco’s board; Newco would be responsible for all other financing of the project as well as its marketing, and would appoint Ernst as project manager and co-ordinator; and Newco would give APC the first option to appoint a manager of the property; and
- 8.6 The terms of the agreement would be the sole memorial thereof and could only be amended if reduced to writing and signed by the parties (the non-variation clause).

[9] On 21 January 2010 the third respondent, Gemini Moon Trading 536 (Pty) Ltd (“Gemini Moon”, the Newco) was established. On 12 March 2010 it purchased Kromrivier in terms of a written deed of sale from APC for R10 million (incl. VAT). Gemini Moon paid R5 million with the balance of R5 million owing on

loan account by it. Gemini Moon serves as the property owning company, and at some stage the second respondent, Cederberg Tourist Park (Pty) Ltd (“Cederberg Park”) was established as the operating company of the tourism business. Ultimately the 50% shareholders of Gemini Moon were the applicant (Pip’s family trust) and the first respondent (Ernst’s family trust). Cederberg Park is the wholly owned subsidiary of Gemini Moon. Pip and Ernst were the only two directors of both companies until Pip’s removal which I deal with later.

[10] The property was developed but this took far longer, and cost far more, than expected. At a point the relationship between the Nieuwoudt and Hartwig families soured, and matters came to a head during the latter part of 2022, resulting in this application being launched on 26 September 2023. Pip’s complaints are summarised in the founding affidavit as follows:

‘19. *As the court will note from the contents of this affidavit, the Trust [i.e. the applicant] as minority shareholder has clearly been subject to oppressive and unfairly prejudicial conduct at the hands of Ernst, the Hartwig Trust and the Companies (through Ernst’s directorship and the Hartwig Trust’s majority shareholding). There has been a concerted effort by the Hartwig Trust, Ernst and the management of the Companies to make our family’s lives difficult for at least the last year and given that the applicant in this matter is our family trust and we are the trustees and beneficiaries thereof, the actions taken against various family members is certainly oppressive and unfairly prejudicial to our interests. This, when coupled with an almost complete lack of required information about the financial affairs of the Companies and our exclusion from key decision making and the offer to buy the remainder of our shares for R2 million (which is less than our shareholder loan account) is, I submit, clear evidence of conduct which entitles us to protection under section 163 of the Companies Act, 2008 (“the Companies Act”).’*

[my emphasis]

- [11] In early 2011, Pip's (separate) farming business operated on another farm, Hantamsdrif, was experiencing cash flow problems, and he asked Ernst to loan him money to tide him over. Ernst did not agree to a loan but proposed that Pip's trust (the applicant) should rather sell some of its shares in the companies to the first respondent. Pip accepted. The net result was that Pip's trust transferred 48 of its shares in Cederberg Park, and 12 of its shares in Gemini Moon, to the first respondent. The circumstances surrounding the transaction and the sum paid by the first respondent for the shares are dealt with later in this judgment under the section dealing with the disputed facts.
- [12] During 2022, Pip shot dead two baboons which he considered to be '*problematic*' animals at the tourist park. They are a protected species and when Ernst discovered this he was outraged. A meeting took place between Ernst, Pip and Pip's wife, Rinda, on 21 June 2022 at which this issue, amongst others, was raised by Ernst, who called for a follow-up meeting on 21 July 2022 which Pip decided he would not attend. On 15 July 2022, Ernst made an offer on behalf of the first respondent to acquire the balance of the shares held by Pip's trust for R2 million, and that as one of the conditions of the share purchase Pip resign as director of both companies. Pip refused. On 17 August 2022, Ernst addressed an email to Pip asking him to resign as director of both Cederberg Park and Gemini Moon as a result of the baboon incident, which Pip refused to do. On 11 October 2022, Ernst sent a further email to Pip attaching notices, purportedly from the boards of both companies, of a shareholders meeting to be held on 26 October 2022 for resolutions to remove Pip as director.
- [13] The two grounds contained in the notices were: (a) gross insubordination for failing to comply with instructions from Ernst and to follow '*the management structures*' of each company when making decisions; and (b) gross negligence as a result of the baboon incident. Pip did not attend the shareholders meeting. On 11 November 2022, Pip was informed by Ernst that he had been removed as a director of both companies.

- [14] Pip's wife, Rinda, who had worked in various capacities at the tourist park, had her employment terminated by Cederberg Park's general manager, Mr Duane Miller, on 30 September 2022 with effect from the end of October 2022. She took this issue to the CCMA and the dispute was settled on 23 March 2023, in terms of which Cederberg Park, amongst other matters, re-employed her in a different capacity (as "wine representative") with effect from 2 May 2023.

### **Primary disputes of fact**

- [15] The first pertains to the nature of the business relationship. Pip alleges that Ernst proposed they *'partner together to upgrade our tourist park'* because Ernst had money whereas the Nieuwoudts had Kromrivier but no funding or access to capital required to upgrade the tourist park. They discussed that it would establish a legacy for the future generations of their respective families; and it was *'understood'* that the Nieuwoudts would manage the day-to-day operations on the farm, with the Hartwigs handling *'the financial side of things as Ernst was considered to be a businessman after managing the Cape Gate development in Cape Town'*. Accordingly *'the central reason and idea'* behind entering into a business relationship with Ernst was to partner together to improve Kromrivier to the mutual benefit of both families.
- [16] Ernst denies this to be the case. He maintains it was never discussed (nor even intended) that the purpose of the project would be to establish a legacy for the future generations of their respective families. It was a fundamental aspect of the agreement that ownership of Kromrivier would change hands, and the farm would be sold to a corporate entity. Put simply, Pip knew that his family would no longer own Kromrivier. He also knew there was no certainty as to whether, and if so, when and in what capacity, any member of Pip's family would be employed (and only employed) by the corporate entity which would eventually conduct business on Kromrivier (i.e. Cederberg Park). This, Ernst contends, is borne out by a letter dated 8 February 2010 from Pip's own attorney (Mr Albertus Erasmus who is also one of the trustees of the applicant along with Pip and his wife, Rinda) in which it was confirmed that



consideration would be given to the appointment of Pip's wife as park manager, and possibly Pip and/or one Dewald as farm manager(s) on a contract basis.

[17] According to Ernst, from his perspective he certainly intended to create a legacy, by means of the successful completion of the project and establishment of an eco-tourism destination, in a nature reserve. But this would be a legacy for the inhabitants of the greater Cederberg area, and future generations in general. The paramount consideration, from both their perspectives, was to create '*an exceptional tourism destination in the unique Cederberg area*'. At the time it was a sound business decision and would have been a good investment.

[18] It is also Ernst's version (not denied by Pip in reply) that Pip's decision to enter into their business relationship was driven mainly by financial considerations. He knew that a project of this nature should eventually over time yield a good return on investment. At that stage Pip had already sold off other portions of his family land. The initial net proceeds of the sale of Kromrivier to Gemini Moon, i.e. R5 million in Pip's pocket, coupled with the potential of future employment for some of his family members, was very attractive. Both men knew, and understood from the outset, that Gemini Moon would be established and registered as a vehicle for the project; Gemini Moon would be the developer entity undertaking and executing the project; and that whoever might in future become involved in the venture would do so as employee or representative of the relevant corporate entity (i.e. Gemini Moon or Cederberg Park). It was therefore not a case of the two families entering into a business relationship, with them assuming certain roles or being assigned certain main functions. Pip is therefore incorrect to contend that the relationship between the Nieuwoudt and Hartwig families in relation to the development of Kromrivier was a *quasi*-partnership.

[19] Ernst also points out that in the founding affidavit, Pip failed to disclose that he (Ernst) had vast experience and knowledge as an architect as well as a property developer, particularly in the context of the design and construction

of the infrastructure and buildings of the intended tourism facilities on Kromrivier; and that Ernst was never paid for his substantial efforts and contribution towards the development and ongoing operations of the businesses. These allegations were also not disputed by Pip in the replying affidavit. According to Ernst, certainty in respect of an equal partnership only existed in relation to one aspect, namely the shareholding of the new company that would be incorporated as a vehicle for the development (i.e. Gemini Moon). Any involvement by any member of the Nieuwoudt family in the tourism business would be strictly on the basis of an employee of that entity (i.e. Cederberg Park).

- [20] The second main area of dispute relates to Pip's complaint about the length of time and increased costs to complete the project, in respect of which he maintains he was kept in the dark by Ernst, including key decision-making. Ernst emphatically denies this to be the case. According to him, Pip knew full well, at all relevant times, what had caused major delays and how much money had been spent on the project.
- [21] This included Pip knowing that before the project could commence approval had to be obtained for the building plans, as well as environmental authorisation from the relevant government department which was only granted on 25 November 2010. He also knew it was only thereafter that the installation of basic services (roads, water and sewerage) could commence, which took a year; this was followed by the upgrading and restoration of the existing buildings such as the farmstead, whereafter construction of the new buildings could commence, with the first (the visitors' centre) only being completed in 2016.
- [22] Ernst also alleges that although Pip spent most of his time on Hantamsdrif, he regularly visited Kromrivier. Ernst also discussed the various stages of the development with Pip. That Pip was excluded from key decision-making is, according to Ernst, a downright falsehood. He always involved Pip in the important decisions which had to be taken in the course of the project until its completion in 2019, and thereafter, and Pip was regularly present at site

visits. In support of his version Ernst annexed a number of supporting documents and correspondence spanning the period 2010 to 2021, including minutes of meetings at which Pip was present.

[23] Ernst also maintains that in addition, Pip's purported ignorance that the development costs would far exceed the initial capital contribution is a lie. Already in August 2008, and to Pip's knowledge, they obtained a report from a quantity surveyor who costed the development based on the site development plan, and calculated that the total building costs would amount to approximately R60 million. In this regard it is noted that in terms of clause 7.4 of the 2008 agreement, it was specifically provided that Newco (later Gemini Moon) would be responsible for procuring external finance for the project, which accords with Ernst's version. Pip also alleges that except for the financial information received by his attorney (and co-trustee) on 21 June 2022, all that Ernst had provided to him since 2016 were: (a) the draft annual financial statements for Gemini Moon, which Pip signed off in 2016; and (b) the draft financial statements for 2022. What Pip did not disclose is that: (a) he had signed off all the previous financial statements of Gemini Moon before 2016; and (b) he only signed the 2016 financial statements in 2018, at a time when he knew the project had not yet been completed and that further, substantial costs needed to be incurred in order to do so. Careful perusal of Pip's replying affidavit demonstrates that he failed to engage squarely with any of these material allegations.

[24] The third main area of dispute pertains to the 2011 share sale agreement. According to Pip, that agreement pertained only to Gemini Moon, and the agreed purchase price was R700 000 paid in two tranches of R350 000 each on 2 February 2011 and 8 March 2011. He only remembers signing '*a short document*' on the bonnet of Ernst's vehicle. He was never given a copy of this document, and nor was he provided with updated share certificates or registers until 2022. He maintained he could not even recall the exact number of shares in Gemini Moon that the applicant sold to the first respondent.

[25] Pip's version is further that at the time he did not understand trust law nor the requirement of obtaining the approval of his co-trustees for any decisions he made. This he only came to learn in 2019 when he wished to sell more of the applicant's shares to the first respondent, and was advised by Ernst's son that he needed to obtain the written approval of his co-trustees. It is noted that, on his own version, Pip came to realise this some 3 years before he and Ernst fell out in 2022. He did nothing about it until then. His excuse is that this was *'for various reasons, including the fact that our family's relationship with the Hartwig family had not yet collapsed and at the time I wished to keep our relationship on good terms'*. He also blames Ernst for not informing him of what was required of him, despite his own attorney being one of the applicant's co-trustees. It is noted that the excuse proffered by Pip is contained in the very same affidavit in which he alleges the delays and increased costs of the project were exacerbated by alleged nepotism on Ernst's part as well as *'years of incoherent and poor project management'*. It is difficult to fathom how both can be correct.

[26] It is Ernst's version that in 2011, Pip requested a loan of R1 million, not R700 000, and that it was thereafter agreed the applicant would sell some of its shares in both Gemini Moon and Cederberg Park to the first respondent for R1 million. He and Pip discussed what would constitute a fair market value for the shares. Based on the initial capital contribution of R10 million, and 120 shares in each company, they agreed that 12 shares in each would represent such a value. Due to an earlier administrative error in the company register of Cederberg Park, which was picked up by its auditors due to the 2011 share sale, its share register had to be rectified, hence the transfer of 48 shares (i.e. 60 less 12) in Cederberg Park and 12 in Gemini Moon to the first respondent. In his replying affidavit Pip again failed to deal squarely with Ernst's allegations.

[27] Ernst also annexed documentation reflecting how the 2011 sale transaction was implemented, including: (a) a resolution signed by both himself and Pip on behalf of Gemini Moon for the transfer of 12 shares from the applicant to the first respondent dated 21 January 2011; (b) the securities transfer form

(Form CM42) in respect of the transfer of these shares, signed by Pip; and (c) two share certificates issued by Cederberg Park and Gemini Moon to the applicant in respect of these share transfers, again signed by both Ernst and Pip and also dated 21 January 2011.

[28] Ernst annexed copies of the relevant bank statements of the first respondent, reflecting that payment of the purchase price of R1 million occurred by means of four electronic fund transfers, as follows: (a) R350 000 on 1 February 2011; (b) R350 000 on 8 March 2011; (c) R200 000 on 1 April 2011; and (d) R100 000 also on 1 April 2011. The first two payments were made to APC Nieuwoudt & Seun at Pip's instruction. The last two payments were made to Gemini Moon and credited to the loan account of APC. This occurred by agreement between Ernst and Pip as is evidenced by the company's annual financial statements for that period which were also signed by Pip.

[29] According to Ernst, a second share transaction was concluded in June 2012, when Pip again approached him for a loan of R1 million. He declined this request since he was concerned about the prospect of repayment. Instead they concluded a further agreement of sale in respect of the shares held by the applicant in the companies. Given the increased scope of the works since the previous share transactions and the fact that the first respondent alone financed the development and assumed all of the risks associated therewith, they agreed that 18 shares (instead of 12) in each company would represent a fair market value for a purchase price of R1 million. Pip and Ernst therefore entered into a further agreement of sale on behalf of their respective family trusts, in terms of which the first respondent purchased from the applicant a further 18 shares held by it in each of the companies for that total sum. The transactions were implemented by means of similar resolutions, securities transfer forms and the issue of share certificates, all of which were signed by Pip as well. Payment of the purchase price occurred by means of two electronic fund transfers of R550 000 and R450 000, both on 1 July 2012. Again, Ernst annexed a copy of the first respondent's bank statement reflecting these payments. Again, Pip did not deal squarely with any of these allegations in his replying affidavit, and, on close scrutiny, appears to have

retreated to the position that he sold them without the consent of his co-trustees.

**Application of the Plascon-Evans rule to the s 163 portion of the relief sought**

[30] On a conspectus of Pip's affidavit evidence his complaint of oppressive conduct is underpinned mainly by the above material factual disputes. He can only succeed if the allegations of the first and fourth respondents, taken together with those he admits, justify the granting of his s 163 relief, unless the version of these respondents is so far-fetched and untenable that it falls to be rejected on the papers as they stand.

[31] Although I am mindful that both Pip's co-trustees deposed to confirmatory affidavits that they had no knowledge of the only share sale transactions which Pip disclosed in his founding papers, and Rinda also deposed to such an affidavit in support of Pip's averments in reply, it is concerning that neither took the court into their confidence about how this was reasonably possible, particularly given that there must have been financial records kept for the applicant which would have reflected these transactions, given that it was a trading trust due to its involvement in the business of both Gemini Moon and Cederberg Park. It is also perturbing that Rinda confirmed under oath Pip's version in his founding affidavit that he specifically discussed with her his wish to sell shares in Gemini Moon in 2019, but she was not in favour of this and he decided not to pursue it. She was accordingly aware of his intentions in her capacity as one of his co-trustees. In my view all of this should have been properly explained in the founding affidavit for this court to be persuaded that the share sale transactions were not authorised and therefore they are invalid; but in any event, this has nothing to do with any alleged oppressive conduct on the part of Ernst.

[32] On only the primary materially disputed facts (leaving aside the plethora of allegations about how Ernst apparently treated members of Pip's family), and applying the Plascon-Evans rule, I am persuaded that the relief sought in terms of s 163 cannot be granted. However, even if I am wrong in this regard,

there is a further reason why it should be dismissed. It is clear that when Pip launched this application he must have foreseen the existence of material disputes of fact not capable of resolution in motion proceedings. If for some inexplicable reason he was not, he could have been under no illusion that this was the case once the answering affidavit was filed. It was Pip's election not to seek a referral to trial or for oral evidence on specified issues, even at that stage, and he must bear the consequences. It follows that all the relief he seeks pertaining to s 163 must be dismissed. This includes the appointment of an independent director, the envisaged investigation, and rectification of the share registers of both Cederberg Park and Gemini Moon. I now turn to deal with the remaining issues.

**Whether Gemini Moon and Cederberg Park must provide the applicant with copies of their annual financial statements**

[33] In terms of s 31(1)(b) of the Companies Act, a person who holds or has a beneficial interest in any securities issued by a company is entitled '*on demand to receive without charge one copy of any financial statements of the company required by this Act*'. It is not in dispute that the applicant is a shareholder in Gemini Moon and that Cederberg Park is Gemini Moon's wholly owned subsidiary. It is also common cause that demand was made by the applicant in terms of s 31(1)(b) on 10 May 2023, and the demand has not yet been complied with. In addition neither Gemini Moon nor Cederberg Park opposed the granting of this relief.

[34] It was submitted on behalf of the first and fourth respondents that this relief is inextricably linked to that under s 163 and for a collateral purpose, namely to exert pressure on the first and fourth respondents in relation thereto. However it is not for the first and fourth respondents to put up a defence which neither Gemini Moon nor Cederberg Park have raised, and the provisions of the subsection are peremptory. During argument I raised with counsel for the applicant my concern that the statements sought may not yet be in existence, and he suggested a compromise that in those instances where they are not, ones in draft form would suffice.

[35] I will grant this relief with the qualification that it will pertain only to drafts already in existence, since I do not understand s 31(1)(b) to impose an obligation on a company to create such a statement when it does not yet exist. It remains open to the applicant to avail itself in due course of the mandatory provision in s 30(1) of the Companies Act, namely the obligation imposed on a company to prepare financial statements annually within six months of the end of each financial year.

**Whether Pip was invalidly removed as a director of Gemini Moon and Cederberg Park**

[36] As previously stated on 11 October 2022, Ernst despatched two notices to Pip, purportedly on behalf of the boards of both Gemini Moon and Cederberg Park, of a shareholders meeting to be held on 26 October 2022 for the purpose of passing a resolution in terms of s 71(1) of the Companies Act for Pip's removal as director.

[37] Section 61(1) of that Act provides that the board of a company, or any other person specified in its memorandum of incorporation or rules, may call a shareholders meeting at any time. It is common cause that there is no provision in the memoranda of association permitting only Ernst or the first respondent (or indeed anyone else) to call such a meeting. It is also, of course, common cause that at the time the only other board member was Pip, and Ernst admits that Pip in his capacity as a member of both boards did not consent to the calling of either shareholders meeting.

[38] According to Ernst, given the deadlock between Pip and himself at that stage, no purpose would have been served by attempting to obtain Pip's consent. In other words, both companies lacked an effective board of directors. He submitted that, given this state of affairs, the first respondent as majority shareholder enjoyed the inherent power to exercise those of the boards concerned. In the alternative Ernst seeks, by way of a conditional counter-



application, an order in terms of s 61(12) of the Companies Act to commence the process for Pip's removal afresh.

[39] In *Heatherview*<sup>3</sup> it was held that:

*[20] In the general notes to section 61 in Henochsberg on the Companies Act 71 of 2008, volume 1 published by LEXIS-NEXIS it is stated in relation to section 61(1) that:*

*"General meetings are ordinarily convened by the directors, and a majority shareholder cannot usurp this power."*

*[21] In Commentary on the Companies Act of 2008, JL Yeats et al, Vol. 1, Juta, at 2-1231 [Original Service, 2018] the learned authors state:*

*"If a company fails to convene a meeting for any reason other than those contemplated in s 61(11) . . . the Act gives a shareholder the power to apply to the court for an order requiring the company to convene a meeting . . . ."*

*[22] It seems therefore that whilst shareholders or members may in terms of section 61(3) request the board to convene a meeting, it is the board that must in fact do so and where the shareholders or members convene the meeting themselves, it is unlawful. Their remedy, where the directors refuse or fail to convene a meeting on request in terms of s61(3) lies in subsection (12) i.e. to approach a court.'*

[Section 61(11) does not apply in the present case].

[40] The applicant opposes the counter-application, while at the same time relying on the self-same passage in *Heatherview* as authority for its contention that

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<sup>3</sup> *Heatherview Estate Extension 24 Home Owners Association (NPC) v Mahlatse Trading Enterprise CC and 101 Others* [2019] JOL 44922 (GP).

the shareholders meetings were not lawfully convened which resulted in Pip's removal as director. I agree with the last submission, but by the same token, the applicant cannot have it both ways. In my view the s 61(12) remedy is not only available to the first respondent, it also presents a sensible and practical solution. There is more than enough on the papers before me to demonstrate that the relationship between Pip and Ernst has effectively irretrievably broken down, and the deadlock between them will not likely be resolved.

- [41] The only other option would be for one of them to apply for the liquidation of both companies on the basis that it is just and equitable in the circumstances. However this is not something that either has suggested. Although neither Ernst nor Pip have proposed any conditions for the court's consideration in respect of the shareholders meeting to be convened (as envisaged in s 61(12)), it is my view that the terms I shall include in the order that follows are the best I can do in the circumstances. Given the conclusion I have reached, it would be premature to grant the applicant the relief sought pursuant to his '*reinstatement*' as director (for convenience, this is contained in paragraph 9 in the initial notice of motion and carried over into the amended relief at paragraph 7).

### **Costs**

- [42] The applicant has obtained very limited relief. The papers run to 628 pages, excluding heads of argument, and the matter ultimately had to be argued over two days. In addition, regrettably, both the applicant's papers and heads of argument filed on its behalf contained numerous unwarranted *ad hominem* attacks on Ernst which he had to deal with. In the circumstances it is my view that the applicant should be liable for 90% of the costs of the first and fourth respondents. These respondents sought costs on the attorney and client scale, but I shall instead order party and party costs on Scale C.

- [43] **The following order is made:**

- 1. The second and third respondents (“the companies”) are directed, within 60 calendar days from date of this order, to provide the applicant with copies of:**
  - 1.1 The annual financial statements of each of the companies filed with the Companies and Intellectual Property Commission (“CIPC”) from 2017 to the end of each’s last financial year; and**
  - 1.2 To the extent that annual financial statements have not been finalised and filed with the CIPC during the above period, then the draft annual financial statements to the extent they have been prepared, for those years;**
- 2. The remainder of the relief sought by the applicant in its notice of motion as amended in terms of the draft order provided after the conclusion of oral argument is dismissed;**
- 3. The first respondent, in its capacity as majority shareholder of the third respondent (the second respondent being the third respondent’s wholly owned subsidiary) shall cause shareholders meetings to be convened in respect of the second and third respondents, in terms of section 61(12) of the Companies Act 71 of 2008, within 60 calendar days from date of this order and subject to the following terms:**
  - 3.1 Each of the shareholder representatives, namely Mr Philip Nieuwoudt and Mr Ernst Hartwig, shall be entitled to have a legal representative of their choice present who shall not participate in the business of the meeting but shall be permitted to furnish advice to the representative at whose request he/she attends;**
  - 3.2 The first respondent shall ensure that the proceedings are recorded by an independent third party and that a written**

transcript of the meeting is provided to each shareholder representative within 7 calendar days thereafter; and

4. The applicant shall pay 90% of the party and party costs of the first and fourth respondents in respect of both the main application and the conditional counter-application on Scale C, and including the fees of one senior counsel.

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**J I CLOETE**

For applicant: Adv C. Fehr

Instructed by: Oosthuizen & Co. (Mr J. Rutgers)

For first and fourth respondents: Adv P. Vivier SC

Instructed by: Potgieter Joubert Inc. (Ms A. Joubert)

For second and third respondents: no opposition and no appearance