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

**CASE NO: 19076/2024
REPORTABLE**

In the matter between:

TOERIEN DE WIT N.O.

FIRST APPLICANT

PHILLIP RALL N.O.

SECOND APPLICANT

(in their capacities as trustees for the time being
of the Elbert de Wit Familie Trust]

and

JAKOBUS GERT SMIT

FIRST RESPONDENT

MARYKE SMIT

SECOND RESPONDENT

GASVOORSIENERS BOLAND (EDMS) BPK

THIRD RESPONDENT

JACOBUS GERT SMIT N.O.

FOURTH RESPONDENT

MARYKE SMIT N.O.

FIFTH RESPONDENT

ETIENNE BOSHOF N.O.

SIXTH RESPONDENT

[Fourth to Sixth Respondents cited in their capacities as the trustees for the time being of the Maryke Smit Family Trust]

LENETTE JANSE DE WIT N.O.

SEVENTH RESPONDENT

(in her capacity as trustee for the time being of the Elbert de Wit Familie Trust]

WORCESTER GAS (PTY) LTD

EIGHTH RESPONDENT

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

NINTH RESPONDENT

Coram: **MOOSA AJ**

Heard: 12, 26 JUNE 2025

Delivered: 15 AUGUST 2025 (delivered electronically to the parties)

Summary: Company law – section 163 of Companies Act 71 of 2008 – dividend declaration and distribution to shareholder unfairly disregarding interests of co-equal shareholder – loans to related party unfairly prejudicial conduct – jurisdictional facts of section 163(1)(c) present – final relief granted under s 163(2)(f), (h) and (j) – section 163(2)(h) remedy applies to valid and voidable agreements – s 163(2) couched flexibly and open to equitable relief not expressly catered for - agreements approved or entered into in breach of prescripts in section 75(3) or (5) is voidable, unless it is valid under s 75(7)(a) or (b).

ORDER

Having heard Counsel for the Applicants and the Respondents, it is ordered that:

1. The Applicant's application succeeds with costs.
2. Consequent on the order in 1 above, final relief is granted pursuant to the provisions of section 163(2) of the Companies Act 71 of 2008 as follows:

- 2.1 In accordance with s 163(2)(f), the Second Respondent is replaced as a director of the Third Respondent by the appointment of Toerien de Wit in her stead; but if Toerien de Wit is for any reason unable or unwilling to be appointed as director, then such other person nominated in writing by resolution of the trustees for the time being of the Elbert de Wit Familie Trust is forthwith appointed as director in place of the Second Respondent;
- 2.2 In accordance with s 163(2)(h), every loan agreement concluded between the Third Respondent and the trustees of the Maryke Smit Family Trust (MSF Trust) and every loan advance giving rise to its indebtedness to the Third Respondent in the sum of R8 954 024,41 (Eight Million Nine Hundred and Fifty-Four Thousand Twenty Four Rands and Forty One Cents) is set aside. The trustees for the time being of the MSF Trust is directed to compensate the Third Respondent by payment to it of R8 954 024,41 with interest at the prescribed legal rate computed from the date of this order until the date of final payment, both days included, which monies shall be paid in full by no later than 31 August 2026; and
- 2.3 In accordance with s 163(2)(j), by no later than 30 September 2025, the First Respondent shall compensate the trustees for the time being of the Elbert de Wit Familie Trust by payment of R500 000,00 (Five Hundred Thousand Rand) with interest at the prescribed legal rate computed from the date of this order until the date of final payment, both days included.
3. At the Third Respondent's costs, the Ninth Respondent shall forthwith deregister the Second Respondent as director of the Third Respondent and shall register the replacement director forthwith pursuant to the provisions of 2.1 above.
4. The counter-application is dismissed with costs.
5. Costs in the main application and counter-application is awarded to Applicants against the First, Second, Fourth, Fifth, and Sixth Respondents, including cost for two counsels (senior counsel's fees are allowed on scale C; his junior on scale B), such liability to be joint and several, the one paying the other to be absolved.

Moosa AJ**Introduction**

[1] This judgment is longer than usual. It deals with two contested applications. They raise an array of corporate disputes and key questions of company law requiring detailed analysis and discussion. In the main application (the main application), relief is sought under s 163(2) of the Companies Act 71 of 2008 (the Companies Act). In the counter-application (the counter-application), an order is sought to stay the main application, pending the outcome of an action launched in case no. 2025-014536 by, inter alia, the trustees for the time being of the Maryke Smit Family Trust (the MSF Trust) against, inter alia, the trustees for the time being of the Elbert de Wit Familie Trust, a South African trust with registration no. I[...] (the EWF Trust).

Relief sought

[2] The Applicants' counsel, Mr van Eeden SC, informed me that his clients no longer seek certain relief particularised in their Notice of Motion (the NoM), namely: first, an order under s 162 of the Companies Act declaring the First and the Second Respondents to be delinquent directors, or placing them under probation (prayer 1.6); secondly, an order that the First and the Second Respondents, as current directors of the Third Respondent, provide Applicants with copies of the company's securities register and its Annual Financial Statements (AFS) for the 2022 to 2024 financial years (prayer 1.9). These documents form part of the First Respondent's answering papers.

[3] Pursuant to s 163(1)(c) read with (2)(a), (f), and (h) of the Companies Act, the Applicants seek: (i) an order setting aside dividend payments by the Third Respondent to the First Respondent in the sum of R500 000,00 (Five Hundred Thousand Rand) and R1 000 000,00 (One Million Rand) during the 2018/2019 and 2020/2021 financial years respectively (prayer 1.1); (ii) an order directing the First Respondent to repay the aggregate dividends of R1 500 000,00 (One Million Five

Hundred Thousand Rand) plus mora interest computed from the date of payment to date of final repayment (prayers 1.2 and 1.3); (iii) an order setting aside a loan in the sum of R4 000 620,00 (Four Million Six Hundred and Twenty Rand) advanced by the Third Respondent to the MSF Trust during the 2019/2020 financial year (prayer 1.4); (iv) an order directing the MSF Trust to repay the balance owing on the loan with mora interest calculated from the date of payment to date of final repayment (prayer 1.5); (v) an order removing the First and the Second Respondents as directors of the Third Respondent (prayer 1.7); (vi) an order that, within five business days of this Court's order, the First Applicant and a nominee of the First Respondent (in his capacity as 50% shareholder of the Third Respondent) be appointed as replacement directors in the Third Respondent (prayer 1.8); (vii) an order that the First and the Second Respondents, as well as the MSF Trust, are restrained from revealing, disclosing, or in any way utilising the Third Respondent's know-how, trade names, marks, signage, pricing, marketing material, and confidential information, and that they are interdicted from being associated and/or concerned with, interested in and/or engaged in operating any business, company, close corporation, or other association under the name and style of the Eighth Respondent (prayer 1.11). In addition, the Applicants seek an order obliging the First and the Second Respondents to furnish particulars of any interest which they, or the Third Respondent, hold in the Eighth Respondent (prayer 1.10).

[4] At paragraph 108 of the answering affidavit deposed by the First Respondent, a director of the Third Respondent and trustee of the MSF Trust, it is admitted that the actual outstanding balance owing on loans advanced by the Third Respondent to the MSF Trust is R8 954 024,41. By virtue of this admission, Mr van Eeden SC argued that the Applicants are entitled to an order setting aside all the loan agreements and the loan advances made to the MSF Trust in the aggregate sum of R8 954 024,41 (not the lesser sum pleaded by the Applicants). This relief, in any of its forms, is vigorously opposed. I return to this aspect later in my judgment.

[5] Mr Manca SC, in his capacity as counsel for the First, Second, Fourth, Fifth, and Sixth Respondents, recorded that his clients persist in seeking an order staying the main application *pendente lite* (i.e., pending the outcome of case no. 2025-014536, including any appeals). The relief sought in that action is, in the main, as

follows: (i) an order directing that, as from March 2017, the EWF Trust was obliged to effect transfer to the First Respondent of 16,6% of its 50% shareholding in the Third Respondent, being Gasvoorsieners Boland (Edms) Bpk (Gasvoorsieners); (ii) an order directing that, as from March 2019, the EWF Trust was obliged to effect transfer to the Second Respondent (or her nominee, being the MSF Trust) of the balance of its 50% shareholding in Gasvoorsieners, being 33,4%; and (iii) an order directing that all necessary steps be taken to effect these share transfers.

Issues for adjudication

[6] The parties are in disagreement regarding a combination legal issues as well as factual matters. The first issue requiring adjudication is whether the counter-application ought to succeed. If yes, then the order to stay the main application should be granted. In such event, the issues in the main application need not be decided. On the other hand, if the counter-application is found to lack merit, then the question arising is whether the Applicants discharged their onus of proving the factum probandum as envisaged by s 163(1)(c) of the Companies Act. If yes, then the next issue to be determined is what relief, if any, should be granted under s 163(2). Finally, liability for costs is in issue.

[7] To adjudicate the disputed issues, it is necessary to first outline the salient features that gave rise to the applications. Naturally, there is a degree of overlap. The relevant facts are outlined under the next heading. They are distilled from the court papers and are, largely, common cause (or not seriously disputed).

Background facts

[8] The main protagonists in both applications are family by blood or through marriage. The First Applicant and the Second Respondent are siblings. Their mother is the Seventh Respondent. The First and the Second Respondents are married to each other. The individuals mentioned are members of the De Wit family whose patriarch is the late Elbert de Wit Snr (de Wit snr). He was an entrepreneur who operated a successful business in and around the Boland area from at least 1973 until his death on 26 February 2019. Shortly before his death, de Wit snr's business

and other commercial interests had an estimated value of no less than R100 000 000,00 (One Hundred Million Rand).

[9] In his businesses, de Wit snr surrounded himself with family. For e.g., in 2003, he appointed the First Respondent, his son-in-law, as a co-director of Gasvoorsieners, which was established in 1973. From 2003 until his passing, de Wit snr and the First Respondent constituted the board of directors for Gasvoorsieners. In 2004, de Wit snr, acting for the EWF Trust that owned all Gasvoorsieners issued shares, negotiated the sale of 50% shareholding in Gasvoorsieners to the First Respondent. Since 2004, First Respondent and de Wit snr were both family and business partners, although the latter was granted authority to exercise control. In 2014, de Wit snr appointed the First Applicant, his son, to manage the group of companies in which de Wit snr held shares through the EWF Trust, a pivotal asset-holding entity in his substantial portfolio.

[10] From about 2014, de Wit snr suffered ill-health. His health gradually deteriorated over time. Therefore, from January 2017 until his death in February 2019, he undertook an estate planning and asset distribution process. Attached to the First Respondent's answering affidavit in the main application is various correspondence, namely, AA3E; AA4E; AA5E; AA6E; AA7E; AA8E; AA9E; AA10E. They evidence the lengthy and complex process involved (such as, formal meetings and informal communications between de Wit snr, his wife, children, attorney, and others in his inner-circle). All this was geared towards corporate restructuring and asset transfers.

[11] At the time of de Wit snr's death, the discussions and the process were ongoing. On the facts before me, no final decisions were taken. Therefore, after his death, discussions continued among his wife, children, and other family members. Annexure AA12 attached to the First Respondent's answering papers in the main application is proof of this fact. It is the minutes of a meeting held on 4 August 2019.

[12] As a result, at all material times, no formal asset distribution agreements were concluded, and no transfer of assets from any trust or other entity in de Wit snr's asset organogram as detailed in AA2 annexed to the answering papers took place.

Therefore, the Register of Securities Certificate in AA26 affirms that, at all material times for purposes of the main application, the EWF Trust held ownership of 50% of the issued shares in Gasvoorsieners.

[13] The court papers in the main application include Gasvoorsieners' AFS for six (6) financial years: 2018/2019; 2019/2020; 2020/2021; 2021/2022; 2022/2023; and 2023/2024. Although some of them lack signatures from the directors and auditors, Mr van Eeden SC and Mr Manca SC conceded that their contents are not in dispute. Indeed, both parties relied on the unsigned AFS to advance some of their submissions.

[14] The directors' report forming part of Gasvoorsieners' AFS for the 2018/2019 financial year is dated 10 December 2019. The First Respondent signed it while serving as the sole director of the company. His signature was appended more than four years before the main application was launched on 30 August 2024. In other words, he signed it well in advance of the disputes arising in the pleadings.

[15] The director's report confirms that a dividend of R500 000,00 'is verklaar gedurende die jaar'. It is common cause that this dividend solely benefitted the First Respondent as shareholder. The EWF Trust did not benefit at all, even though it was a registered shareholder of Gasvoorsieners at all material times during the financial year concerned. The 2018/2019 AFS do not record that any change in shareholding occurred in the financial year concerned. Therefore, the Applicants aver that the dividend declaration and its payment to the First Respondent constitutes the exercise of directorship power in a manner that is 'oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant' (s 163(1)(c)). On this basis, they seek a setting aside of the dividend declaration and distribution as 'a transaction' contemplated by s 163(2)(h) of the Companies Act. They also seek compensatory repayment as a form of equitable relief.

[16] The auditor's report enclosed with the 2018/2019 AFS is signed on 11 December 2019 by Wuanita Moore, a director at the auditing firm Boshoff & Moore Inc. Her report records that, after an independent audit, she is unaware of any discrepancies between the financial records of Gasvoorsieners in its 2018/2019 AFS

and any information appearing in the director's report; nor is she aware of any material misrepresentation of a fact contained in the First Respondent's director's report.

[17] Since the contents of the 2018/2019 AFS as a whole are undisputed, the facts recorded in the aforementioned reports (and the financial statements to which they relate) are undisputed. Therefore, the following facts are common cause: (a) that the dividend declaration of R500 000,00 occurred during the 2018/2019 financial year (not thereafter); and (b) that the declared dividend created a tax liability of R100 000,00.

[18] In December 2019, the Second Respondent was appointed by her husband, the First Respondent, as his co-director in Gasvoorsieners. That occurred without any consultation with the trustees of the EWF Trust.¹ This is because 'Maryke and I held (and still hold) the view that a distribution [of shares] had taken place and that the Trust's consent was not required' (para 191 of the First Respondent's answer).

[19] Although the Second Respondent's appointment as director did not occur with prior consent of the EWF Trust, its trustees were aware of this appointment. Indeed, the First Applicant, acting for the EWF Trust, engaged with her both in writing and during meetings in her capacity qua director. This appears, for instance, from letters addressed to the First and the Second Respondents dated 23 November 2021 (see FA10) regarding contentious decisions taken by them as directors of Gasvoorsieners.

[20] Therefore, by their conduct, the trustees of the EWF Trust consented, albeit tacitly, to the Second Respondent's appointment and registration as director on the directors' board of Gasvoorsieners. This fact probably explains why the Applicants do not seek the setting aside of the Second Respondent's appointment and registration as director. As recorded earlier in paragraph [3], the Applicants merely seek an order replacing the Second Respondent as director pursuant to s 163(2)(f)(i) of the Companies Act (if the jurisdictional facts required by s 163(1)(c) are satisfied).

¹ **Record:** page 257 (para 190).

[21] During the 2020/2021 AFS, it is noted that a dividend amounting to R1 000 000,00 (One Million Rand) was declared and disbursed from Gasvoorsieners' profits to the First Respondent. Its declaration and payment were authorised by the First and Second Respondents as Gasvoorsieners' co-directors. It was also authorised by the First Respondent as shareholder. For the same reasons recorded in paragraph [18] above, the EWF Trust's trustees were not consulted regarding the dividend declaration, nor shared in it. The Applicants aver that this dividend declaration and distribution is directorship power exercised in a way which had an effect that is 'oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant' (s 163(1)(c)). On this basis, they seek an order setting aside the dividend declaration and distribution as 'a transaction' envisaged by s 163(2)(h) and repayment of the R1m as equitable compensation.

[22] Gasvoorsieners' AFS shows loans advanced to the MSF Trust. The balance owed by the latter to Gasvoorsieners at the end of each financial year is as follows: R4 000 620,00 (2019/2020); R3 305 720,00 (2020/2021); R5 061 944 (2021/2022); R7 078 300,00 (2022/2023); R7 079 486,00 (2023/2024). It is common cause that the present loan balance owing to Gasvoorsieners is R8 954 024,41 (plus interest).

[23] It is unclear in the pleadings as to the precise date in the 2019/2020 financial year when the loan agreement pertaining to the initial R4m was concluded and the funds advanced. This information falls outside Applicants' knowledge and is squarely within the knowledge of the First, Second, Fourth, Fifth, and Sixth Respondents. They failed to disclose that information in their answer nor to the Applicants, despite the latter requesting access to that information on 3 November 2022 by way of FA12.

[24] Therefore, it is unclear whether the initial loan of approximately R4m was issued prior to or after the Second Respondent's appointment as director of Gasvoorsieners. Put differently, it remains uncertain if the decision to proceed with the initial R4m loan was made solely by the First Respondent in the capacity of a director, or in collaboration with the Second Respondent as a co-director. In these circumstances, the case was argued before me on the basis that the initial loan of approximately R4m in 2019/2020 was made when the First Respondent served as

the company's sole director. Quite evidently, all the subsequent loans were made after the Second Respondent became a co-director.

[25] The MSF Trust is recorded in Gasvoorsieners' AFS as a 'related party'. This term is defined in the AFS as referring to 'a person or entity with the ability to control or jointly control the other party, or exercise significant influence over the other party, or vice versa, or an entity that is subject to common control, or joint control'. The MSF Trust is an *inter vivos* trust registered in 2017 pursuant to the Trust Property Control Act 57 of 1988 for the purpose of holding the Second Respondent's share of any asset distributed to her by the EWF Trust as part of de Wit snr's restructuring exercise. At all material times for purposes of the main application, the First and Second Respondents are the majority trustees in the MSF Trust. Thus, they jointly control the MSF Trust.

[26] None of the loans to the MSF Trust was authorised by the EWF Trust. All loans to the MSF Trust are classified in Gasvoorsieners' AFS as a 'related party transaction', a term defined therein to mean 'a transfer of resources, services or obligations between a reporting entity and a related party, regardless of whether a price is charged'.² All loans to the MSF Trust were advanced on the following agreed terms:

'The loans are unsecured, bear interest at rates as agreed between parties and is repayable by mutual consent of both parties.'³

[27] The First Respondent admits that the MSF Trust is not servicing payment of its R8,95m debt to Gasvoorsieners. He further admits that the trustees of the MSF Trust intend to commence repaying that debt only once its liability to its other creditor (namely, the bank which funded its immovable property purchase) 'has been cleared'.⁴

² **Record:** page 404.

³ **Record:** page 407.

⁴ **Record:** page 244 (para 109).

[28] The Applicants aver that every loan agreement and every sum advanced to the MSF Trust constitutes an exercise of directorship power that has the result of being oppressive or unfairly prejudicial to the EWF Trust. On this basis, they aver that every loan agreement and every sum advanced by Gasvoorsieners is 'a transaction or an agreement to which the company is a party' as envisaged by s 163(2)(h) of the Companies Act. They seek their setting aside and compensatory repayment of the approximately R8,95m (plus interest) as equitable relief.

[29] Eighth Respondent is Worcester Gas (Pty) Ltd. First and Second Respondents are its sole director and shareholder, respectively. Applicants aver that the First and Second Respondents are using this company to compete with Gasvoorsieners.

[30] On this basis, the Applicants aver that the First and Second Respondents are conducting themselves in a manner that is unfairly prejudicial to Gasvoorsieners within the contemplation of s 163(1)(c) of the Companies Act and that the Applicants are entitled to a restraining order catered for in s 163(2)(a) as equitable relief.

Submissions

Applicants' submissions

[31] Concerning the counter-application, Mr van Eeden SC submitted that it lacks merit. To this end, he relied on the following considerations:

- (a) First, a stay of proceedings is severely prejudicial to the EWF Trust and its interests;
- (b) Secondly, the cause of action pleaded in the pending action has prescribed;
- (c) Thirdly, even if the pending action succeeds, that outcome would not matter at all concerning the rights and interests flowing from the EWF Trust's shareholding in Gasvoorsieners, as the plaintiffs in that action seek an order on a prospective basis only. Therefore, Mr van Eeden SC argued, the pending

lawsuit has no bearing on the EWF Trust's rights and interests as shareholder for the period 2018 to 2024;

(d) Fourthly, the pending action has minimal, if any, prospect of success. Mr van Eeden SC argued that, as a matter of fact, at all material times there was mere discussions regarding the possible allocation and transfer of the EWF Trust's 50% shareholding in Gasvoorsieners to the First and the Second Respondents in defined proportions. He pointed out that since no final decisions were taken, no resolutions were passed by the trustees of the EWF Trust. Therefore, so he submitted, the EWF Trust qualifies as a juristic person under the Companies Act, maintaining its rights to the 50% shareholding in Gasvoorsieners, and no enforceable claims were created against the EWF Trust in the hands of either the First or the Second Respondent for any share transfer; and

(d) Fifthly, the interests of justice favour the refusal of the stay order.

[32] As regards the main application, Mr van Eeden SC submitted that, applying the *Plascon-Evans* rule, the Applicants discharged their onus of proving that the jurisdictional requirements for invoking s 163(1)(c) of the Companies Act are met, warranting the exercise of my wide equitable discretion under s 163(2) by granting appropriate relief. For the reasons articulated later, this submission holds merit.

[33] Mr van Eeden SC accurately noted that the material facts forming the substratum of the Applicants' case for relief under s 163 are largely common cause. This includes the declaration by the directors' board of two separate dividends in the aggregate sum of R1,5m exclusively for the First Respondent as shareholder, along with the distribution of both dividends to him to the exclusion of the EWF Trust, being a shareholder in the same class of shares. Mr van Eeden SC argued that this is oppressive and/or results in unfair financial prejudice to the latter of party. He argued that the EWF Trust's interests as co-shareholder were, in violation of s 37(1) and/or s 75, also unfairly disregarded when the directors exercised their directorship powers.

[34] Mr van Eeden SC submitted that the loan agreements concluded with the MSF Trust and subsequent loan advances in terms thereof occurred in

contravention of s 45 and/or s 75(3) of the Companies Act, thereby rendering them void ab initio. He submitted further that the loan agreements and the advances pursuant thereto constituted the exercise of directorship powers in a way oppressive or unfairly prejudicial to the EWF Trust, or in unfair disregard of the EWF Trust's interests as shareholder of Gasvoorsieners. This included, inter alia, the unfair use of its retained income for lending to a 'related party' which is under the First and the Second Respondents' control. They are the majority trustees of the MSF Trust. Additionally, they are beneficiaries thereof and, therefore, conflicted.

[35] On this basis, Mr van Eeden SC submitted that, as regards the various loans to the MSF Trust totalling the sum of R8 954 024,41, the Applicants have established the jurisdictional facts enumerated in s 163(1)(c) of the Companies Act, warranting the exercise of my equitable powers under s 163(2)(f)(i) and (h) as prayed.

[36] As regards the restraining order sought under s 163(2)(a), Mr van Eeden SC submitted that if the First and/or the Second Respondent is/are substituted as director(s), then the relief sought in prayer 1.11 of the NoM would not need to be granted. I agree. For this reason, the issuing of a restraining order is not considered below as a remedy under s 163(2).

[37] Mr van Eeden SC submitted further that the relief sought in prayer 1.10 of the NoM does not arise from ss 163(1)(c) and (2) of the Companies Act, but is relief to which the Applicants are entitled to ensure that the rights and interests of the EWF Trust as shareholder of Gasvoorsieners is protected. I disagree. There is no basis for this relief in the Companies Act. For the reasons advanced in paragraph [44] below, there is also no justifiable, factual foundation for the relief sought. Thus, I refuse same.

[38] Mr van Eeden SC submitted that the points *in limine* raised in opposition to the main application (namely, lack of *locus standi*; the operation of the time-bar provision in s 77(7) of the Companies Act; and the prescription of claims argument rooted in section 12(3) of the Prescription Act 68 of 1969) are legally unsound and should be dismissed. I agree. In any case, the Respondents' counsel did not pursue them with any vigour.

[39] Finally, Mr van Eeden SC submitted that Applicants are entitled to their costs, even if only substantially successful, including costs for two counsels on tariff scale C. I deal with the issue of costs separately below.

Respondents' submissions

[40] Mr Manca SC did not pursue any of the points *in limine*, at least not with any vigour. Acknowledging the import and effect of the decisions in *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others* 2017 (5) SA 9 (CC) paras 43 - 53 and *Lotter v Lona Fruit Cape (Pty) Ltd* (19818/23) [2025] ZAWCHC 196 (12 May 2025) paras 56 - 63 which was relied upon by the Applicants' counsel, Mr Manca SC rightly disavowed reliance on the prescription point as concerns the Applicants' case rooted, for all intents and purposes, in s 163(1)(c) of the Companies Act.

[41] Concerning *locus standi*, Mr Manca SC argued that if the EWF Trust is a shareholder of Gasvoorsieners, then Applicants have standing under s 163(1) of the Companies Act. I agree. See *Parry v Dunn-Blatch and Others* 2024 JDR 0864 (SCA) paras 25 - 36. For the reasons appearing from this judgment, I find that the EWF Trust is a Gasvoorsieners' 'shareholder' as this term is defined by the Companies Act.

[42] Since the Applicants do not seek relief against the directors of Gasvoorsieners under s 77(2) or s 77(3) of the Companies Act, Mr Manca SC rightly accepted that the time-bar provision catered for in s 77(7) does not apply in casu.

[43] Concerning the counter-application, Mr Manca SC argued that I ought to stay the main application in the interests of justice. He argued that a stay would not cause prejudice to the EWF Trust, as it 'will continue to be registered as a shareholder in Gasvoorsieners until such time as the action proceedings are finally determined'.⁵ In so doing, Mr Manca SC, in effect, conceded that the EWF Trust is a shareholder and

⁵ **Respondents' Heads of Argument:** para 122 (page 38).

has been so throughout all material times during the financial years 2017/2018 to 2023/2024. Mr Manca SC, correctly in my view, did not contest Mr van Eeden SC's submission that the claim in the pending action is for the prospective (not retrospective) transfer of the EWF Trust's shareholding in Gasvoorsieners. Interestingly, although Mr Manca SC did not seek an order for the hearing of oral testimony in the main application on the question of the First and the Second Respondents' alleged claim to the EWF Trust's 50% shares in Gasvoorsieners, he argued that the main application should be stayed so that oral testimony could be heard in due course in the pending action on this issue, which he contended, would benefit the parties in the main application. I deal with the counter-application separately below.

[44] As regards the main application, Mr Manca SC submitted that the relief sought in para 1.10 of the NoM for information ought to fail because, inter alia, the information sought was provided in the First Respondent's answering papers. I agree. This is evident from a reading of the court papers. By virtue of the order which I will grant under s 163(2)(f)(i), any information which the Applicants believe is not yet in their possession could be procured through calling for disclosures at board level internally.

[45] On the issue of the R500 000,00 dividend declaration, Mr Manca SC submitted that, applying the *Plascon-Evans* rule, the Applicants failed to prove that the version pleaded by the First Respondent on this issue is *mala fide* or fabricated, specifically that 'on 14 December 2017, Elbert Snr and I (as directors of Gasvoorsieners) resolved to declare a dividend of R500000'.⁶ On this basis, Mr Manca SC submitted that there is no justifiable basis for an order under s 163(2)(h) of the Companies Act to order repayment as equitable compensation. I agree with these submissions. Therefore, I find that the Applicants are not entitled to relief in this regard under s 163(2).

[46] Mr Manca SC submitted that there was no justifiable basis for an order under s 163(2)(h) of the Companies Act in relation to the R1m dividend declaration, as the

⁶ **Record:** page 241 (para 95).

co-directors did not act in breach of their directorship powers when they declared the dividend. In the alternative, he submitted that if I were inclined to grant relief, then I should limit the compensation order to R500 000,00 payable to the EWF Trust, being a half-share in the dividend declared.

[47] Regarding the issue of relief under s 163(2)(f)(i) of the Companies Act, Mr Manca SC submitted that there is no justifiable basis to replace of any of the directors, as the Applicants failed to prove the jurisdictional facts required by s 163(1)(c) for the exercise of my discretion conferred by s 163(2). He argued that if I were predisposed to issue an order under s 163(2)(f)(i), then I should not remove both directors, but instead only the Second Respondent as she succeeded her late father who had represented the EWF Trust on Gasvoorsieners' board.

[48] Regarding the loans, Mr Manca SC argued that if the loan agreements between Gasvoorsieners and the MSF Trust are indeed void ab initio as contended by Mr van Eeden SC, then the relief sought under s 163(2)(h) is not competent. He argued that this is due to the fact that this provision applies to voidable loans, rather than those that are void ab initio. This is a compelling and novel argument on a point of law. I discuss this critical aspect in some detail below. Mr Manca SC submitted further that the Applicants' case must be confined to its pleaded position for relief in relation to the initial loan of approximately R4m and should not include any subsequent loans which the First Respondent acknowledged in his response. In the alternative, Mr Manca SC submitted that if I were inclined to order repayment of the more than R8,95m balance, then I ought to give the MSF Trust at least 36 months to pay.

[49] On the issue of the payment of interest, with reference to the decisions in *Steyn v Janse van Rensburg* 2012 (3) SA 72 (SCA) paras 18 - 20 and *Off-Beat Holiday Club* supra, Mr Manca SC submitted that the liability for interest runs from the date of judgment in which the Applicants are declared entitled to relief under s 163(1)(c) read with (2) of the Companies Act. In reply, Mr van Eeden SC conceded this point. The concession was well made.

[50] On the issue of liability for costs, Mr Manca SC sought a costs order, including costs for two counsel on tariff scale C in relation to the counter-application and the main application (as the case may be). Alternatively, he argued that each party should pay their own costs, irrespective of the degree of their success. I deal with this later.

[51] I now determine the outcome of these issues as distilled. I commence with the counter-application, and then deal with the issues that arise in the main application.

Issue 1: does the counter-application have merit?

[52] The counter-application is a disingenuous effort by the First and the Second Respondents, both in their personal capacities and as the majority trustees of the MSF Trust, to frustrate the trustees of the EWF Trust in their pursuit of legitimate rights as representative shareholders of Gasvoorsieners. The grounds relied on are spurious.

[53] The counter-application seeks to postpone adjudication of the main application until case no. 2025-014536 winds its way through the court system. This process will require several years. The delay would be seriously prejudicial to the Applicants and their commercial interests in Gasvoorsieners. The First and the Second Respondents are unlawfully locking out the EWF Trust from Gasvoorsieners. Neither have they provided undertakings as to how the rights and other interests of the EWF Trust in Gasvoorsieners would be protected pending the litigation. This bolsters my view that they are acting in bad faith.

[54] Mr Manca SC submitted that the EWF Trust's rights are protected during the ongoing action as it will remain a registered shareholder of Gasvoorsieners throughout the litigation. This submission offers little reassurance to the Applicants. They were compelled to approach this Court precisely because the First and the Second Respondents refused to recognise the EWF Trust as shareholder, along with the associated rights under the Companies Act. They are denying the EWF Trust, inter alia, access to company records; the right to convene shareholder meetings; the right to share in dividends declared; and the right to be consulted prior to

decisions being taken as envisaged by, for e.g., s 45 of the Companies Act regarding loans or other financial assistance to related persons. This is not an exhaustive list.

[55] The intentional denial of rights to a 50% shareholder in a multi-million rand family-owned and family-run business prejudices the shareholder. The on-going denial of rights to the EWF Trust underscores my view that a stay of proceedings is not in the interests of justice. Indeed, I conclude that doing so would be a miscarriage of justice.

[56] That the conduct of the First and the Second Respondents is deliberate and likely to continue appears from the following extract quoted earlier in paragraph [18]:

‘Maryke and I held (*and still hold*) the view that a distribution [of shares] had taken place and that the Trust’s consent was not required.’ (my emphasis added)

I find no reason to believe that this pleaded factual position has changed, or will change while case no. 2025-014536 is being litigated. If anything, the First and the Second Respondents have reaffirmed their position, contending in their particulars of claim filed in the action that they each became entitled to the EWF Trust’s shares in Gasvoorsieners in defined proportions during 2019 and 2017 respectively.

[57] While an order to stay the main application would result in serious harm to the Applicants (as already discussed), a refusal to stay will not cause any real prejudice to the First and/or the Second Respondents, nor the MSF Trust. If they succeed in the action, then the share transfers would occur in accordance with s 37(9)(a)(i) and (b)(i) of the Companies Act. Their transfer of shares would not be retrospective in effect. Therefore, even if the Applicants do not succeed in the ongoing action, the EWF Trust will continue to be a shareholder of Gasvoorsieners at all times relevant to the main application.

[58] I deem it unnecessary to engage with the question of the First, Second, Fourth, Fifth, and Sixth Respondents’ prospects of success in the pending action,

save to say that, based on the facts before me, those prospects seem to be somewhat bleak.

[59] For all these reasons, I dismiss the counter-application with costs. At this juncture, it becomes necessary to engage with the disputes in the main application.

Issue 2: what are the jurisdictional requirements for invoking s 163(1)?

[60] Section 163 of the Companies Act contains the so-called ‘oppression remedy’ (*Parry v Dunn-Blatch* supra para 21). As in applications generally, the onus is on an applicant to demonstrate that it is entitled to relief under the umbrella of s 163(2). To overcome this evidential burden, a two-step procedure is involved: first, a court must determine whether the factum probandum laid down in s 163(1) are met; secondly, and only after a positive determination is made in the first step, can consideration be given to the granting of relief under s 163(2). In the latter setting, consideration must be given to the nature of the complaint and the kind of relief which would fit the context to end the matter underpinning the complaint. See *Business Doctor Consortium Ltd and Another v Old Mutual Finance (RF) (Pty) Ltd and Others* [2022] 4 All SA 719 (WCC) para 55.

[61] To understand the nature and extent of an applicant’s onus, it is necessary to quote from s 163. I do so here only so far as its contents are relevant to adjudicate the present application. The relevant extracts of s 163 reads:

‘163. Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company.— (1) A shareholder or a director of a company may apply to a court for relief if — ...

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

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

(a) an order restraining the conduct complained of; ...

- (f) an order— (i) appointing directors in place of or in addition to all or any of the directors then in office; or ...
- (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; ...
- (j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation; ...'

[62] To succeed under s 163(1), the trustees for the time being of the EWF Trust must adduce primary facts which satisfies me about: (i) the existence of the alleged conduct, whether past (i.e. completed) and/or on-going (see *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) para 61); and (ii) that the conduct, in the form of an act or omission, has had or is having the relevant adverse effect (namely, oppression or unfair prejudice, or unfair disregard of interests). While motive for the impugned conduct is generally irrelevant, motive may be used to determine if an outcome is unfair. See *Technology Corporate Management (Pty) Ltd and Others v De Sousa and Others* 2024 (5) SA 57 (SCA) para 80. The Applicants must not only show that the impugned conduct is oppressive, prejudicial, or disregards the EWF Trust's interests, but also that the EWF Trust has been adversely affected in a way which, in the particular circumstances, is unfair. See *Parry v Dunn-Blatch* supra paras 24, 30.

[63] Jurisdiction to grant relief under s 163(2) hinges on whether the conduct relied on for purposes of s 163(1) has had, or is having or producing, an unfair result. The requirement of fairness frees courts from having to decide the jurisdictional issue in s 163(1) on the basis of rights, or a violation of rights. Courts are imbued with wide powers to grant just and equitable relief of such a nature as would befit a particular situation. The concept of fairness must, in each case, be applied judicially and be grounded on rational principles. The determination of whether conduct gives rise to fair or unfair outcomes is a context-specific enquiry. There are no predetermined rules that can be established beforehand. See *De Sousa* supra para 82.

[64] This Court has determined that the so-called reasonable bystander test is applicable for the purposes of section 163. See *Business Doctor Consortium Ltd*

supra paras 58 - 59. In casu, the factual enquiry involved is whether, when viewed objectively, the impugned conduct of the First and Second Respondents has had, or is having, an effect on the EWF Trust that is oppressive, unfairly prejudicial, or unfairly disregarding the interests of the EWF Trust. See *De Sousa* supra para 80.

[65] To succeed in casu, the Applicants must demonstrate that the First and the Second Respondents' impugned conduct is affecting, or has affected, the EWF Trust adversely qua shareholder of Gasvoorsieners (not in any other capacity). See *De Sousa* supra para 80. They need not prove intention, nor a lack of bona fides by the directors when the impugned commercial conduct was undertaken. See *De Sousa* supra para 80.

[66] Section 163 operates for the benefit of directors and shareholders alike. This is so irrespective of whether a shareholder is part of a minority, majority, or is a member with an equal shareholding (as is the position in the present case). See *Parry v Dunn-Blatch* supra paras 37 - 38. Section 163 does not operate for the benefit of the company whose affairs are being managed in a manner contemplated by s 163(1) (such as, Gasvoorsieners). The wording in s 163(1)(a), (b), and (c) makes this clear.

[67] Section 163(1) can be invoked in two situations. The first is where conduct has had or is having an oppressive or unfairly prejudicial effect; or where conduct has had or is having the effect of unfairly disregarding an applicant's interests. The second is where a company's affairs are being managed or conducted by those in charge in a way oppressive or unfairly prejudicial to an applicant, or that unfairly disregards its interests. See *De Sousa* supra para 77. As appears from the factual matrix summarised earlier and discussed further below, this case has elements of both types of situations.

[68] The Applicants aver that the EWF Trusts 'interests' in Gasvoorsieners are unfairly disregarded by the First and the Second Respondents. When adjudicating whether this is proved, the ambit of 'interests' must be understood. To fulfil the objective of s 163(1), the concept of 'interests' is, within its context, wider than rights and encompasses equitable considerations. See *Parry v Dunn-Blatch* supra para 35.

[69] The Applicants base their case on section 163(1)(c). They aver that the First and the Second Respondents have exercised their directorship powers in a manner which, inter alia, is 'unfairly prejudicial' to the EWF Trust in its capacity as a 50% shareholder of Gasvoorsieners. The EWF Trust is a 'juristic person' for purposes of the Companies Act. See the definition of this term in s 1 of the Companies Act.

[70] The expression 'unfairly prejudicial' as used in s 163(1) is not capable of precise definition. Although there are some recognised categories of 'unfairly prejudicial' conduct (see *De Sousa* supra para 78), it is accepted that whether commercial conduct is 'unfairly prejudicial' in the sense contemplated by s 163(1) is a question of fact. Except in extremely unusual circumstances (which do not apply in casu), the prejudice must take the form of commercial prejudice. See *De Sousa* supra para 80.

[71] It is noteworthy that mere dissatisfaction or disagreement by a shareholder with a board of directors' decision, and a shareholder's mere disapproval of certain conduct by those persons responsible for a company's affairs, does not, in and of itself, mean that an applicant shareholder is oppressed or prejudiced, let alone unfairly. Additional elements are necessary to fulfil the requirements of s 163(1). See *De Sousa* supra para 81.

[72] When applying ss 163(1) and (2), its aims must be borne in mind. In this way, the purpose underlying s 163 is advanced. Section 163 aims to balance the interests of a company's shareholders with those of its directors. Therefore, the provisions of s 163 are to be interpreted in a way that most effectively promotes the remedies catered for in s 163(2), rather than which circumscribes them. In *Parry v Dunn-Blatch* supra para 33, it was held:

'Such an approach is consonant with the objectives of s 7 of the Companies Act, which include balancing the rights and obligations of shareholders and directors within the company and encouraging the efficient and responsible management of companies. Denying the remedy granted by legislation to an aggrieved shareholder would obviously have a chilling effect on the

Companies Act's efforts to balance the rights and obligations of all stakeholders. Insofar as it would negate the objects of that Act, it would be wrong in law.'

[73] It is in this context, that consideration should now be given to the novel argument raised by Mr Manca SC (see paragraph [48] above). To recapitulate: in response to Mr van Eeden SC's submission that the loan agreements with the MSF Trust, and loan advances thereunder, are void and are to be set aside, Mr Manca SC argued that the relief catered for in s 163(2)(h) (quoted in paragraph [61] above) presuppose 'a transaction or an agreement' which, in the eyes of the law, is capable of being set aside. He posited that a transaction or agreement which is void ab initio cannot be set aside. Therefore, so Mr Manca SC hypothesised, it cannot be the subject of relief under s 163(2)(h). As a matter of juridical logic and legal principle, I agree.

[74] However, assuming for present purposes that the impugned loan agreements and loan advances are void ab initio as submitted by Mr van Eeden SC, then the real issue is whether a void transaction (such as, loan monies advanced to the MSF Trust), or a void agreement (such as, the loan agreement(s) between Gasvoorsieners and the MSF Trust), can be a justifiable basis to award relief under s 163(2)?

[75] The answer to this as yet untested question of law arising from Mr Manca SC's submissions, hinges on an interpretation of the effect which the word 'including', that appears in the opening phrase of s 163(2), has in this sub-section read in its totality (and within the broader context of s 163). Based on the ensuing interpretation, I hold that a court is not limited to granting relief in relation to valid or voidable transactions and agreements as envisaged by s 163(2)(h). Rather, a court is also empowered to fashion an equitable compensatory remedy to address unfairness of the kind anticipated in s 163(1) arising from an internal process that culminates in a company's directors approving or entering into a transaction or agreement which is void ab initio.

[76] My starting point is the trite rule that statutory interpretation is an objective, systematic exercise that does not occur in stages. Statutory interpretation is a unitary process that occurs within a cohesive framework. That process entails a cohesive analysis of a law-text having regard to: (i) its language (including matters of grammar and syntax); (ii) its context (both internal and external contextual considerations); and (iii) its intended purpose. For the principles of statutory interpretation generally, see *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28.

[77] Section 39(2) of the Constitution, 1996 holds significance when interpreting any legislation. It commands statutory interpretation to occur through the prism of the Bill of Rights. Therefore, to safeguard fundamental rights so far as they may apply in this corporate context, s 163 of the Companies Act must be read through a constitutional lens.

[78] When interpreting section 163, it is essential to take into account the objectives of the Companies Act as outlined in its preamble. This includes to 'provide appropriate legal redress for investors and third parties with respect to companies'. To be effective in achieving this goal, the legislature crafted s163(1) in a way that does not limit its reach to only conduct which gives rise to valid or voidable acts. This is consistent with the fact that, ex facie s 163(1), it is not concerned with the lawfulness or validity of conduct, rather with whether commercial conduct is oppressive, unfairly prejudicial, or occurs in a way that unfairly disregards the interests of an applicant shareholder or director.

[79] If any of these grounds is established, then a court should consider granting an equitable remedy of such a nature and effect which, in the judicious exercise of its discretion, is considered appropriate ('fit'). Section 163(2)(a) to (l) lists twelve (12) possible remedies from which a court may select to effectively address and resolve an applicant's complaint(s). That list is introduced by the word 'including'.

[80] When used in a statute to introduce a list within a definition or other provision, the word 'includes' and 'including' is most commonly used to signify that the ensuing list is non-exhaustive in its remit. In other words, the list provided would be flexible and capable of being broadened by the inclusion of items similar in kind to those

legislated. However, there are instances where ‘includes’ or ‘including’ introduces an exhaustive (i.e., finite) list. See *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC) para 18; *City of Tshwane v Blom and Others* 2014 (1) SA 341 (SCA) paras 12 - 18.

[81] When the word ‘including’ in s 163(2) is viewed in conjunction with the conferral in s 163(2) of an equitable discretion (‘may’) to ‘make any interim or final order it considers fit’, then this signifies that, contextually, the listed remedies is not a *numerus clausus*. Therefore, a court’s discretion remains unfettered and is not confined to the relief specified in the list as legislated. Additional forms of equitable relief that is not listed in s 163(2) may be awarded.

[82] The interpretation embraced here supports the realisation of the legislature’s purpose in s 163 and, consequently, enhances the efficacy of the remedies it established in s 163(2). I am fortified in my interpretation by the following additional considerations:

[82.1] first, s 163(2) empowers a court to grant ‘any interim or final order it considers fit’. Linguistically, the word ‘any’ is an indefinite word that is not used in a limiting sense. ‘Any’ casts extremely widely the net of the relief which a court ‘may’ make. See *Body Corporate of Greenacres v Greenacres Unit 17 CC and Another* 2008 (3) SA 167 (SCA) para 5; *ARMSA v President of the Republic of South Africa and Others* 2013 (7) BCLR 762 (CC) paras 33-35.⁷

[82.2] secondly, it would do violence to the legislature’s aims if the equitable remedial action envisaged by s 163(2) is limited to, *inter alia*, setting aside of only valid and voidable transactions under sub-section (h) and no equitable remedy may be granted to counteract commercial prejudice which arises from, or directly relates to, impugned conduct falling within the ambit of s 163(1) which leads to the conclusion of a

⁷ See also *Southern Life Association Ltd v CIR* (1984) 47 SATC 15 (C) at 18 - 19; *CIR v Ocean Manufacturing Ltd* 1990 (3) SA 610 (A) at 618; *Commissioner for Customs and Excise v Capital Meats CC (in liquidation) and Another* (1999) 61 SATC 1 (SCA) at 5.

void transaction or agreement (rather than a valid or voidable one). Such an interpretive result would be absurd and lead to inequitable results. It should be averted because it undermines the attainment of the legislature's goal. Potentially, it would have a chilling effect of the kind alluded to in *Parry v Dunn-Blatch* supra para 33 (see quote in paragraph [72] above);

[82.3] thirdly, to bolster the efficacy of the oppression remedy, the legislature broadened a court's power in s 163(2) regarding the granting of equitable relief (see the discussion in paragraph [83] below).

[83] Section 163(2) is framed in a way that 'shows a continuing intention by the legislature to broaden relief in these provisions, rather than to limit them' (*Peel* supra para 52). An example of this extension is that s 163(2) permits both interim and final relief, whereas its predecessor in s 252 of the (old) Companies Act 61 of 1973 catered for final relief only. Moshidi J, in *Peel* supra para 53, highlighted the following additional factors which he, correctly so, held illustrate the point that, when s 163(2) is compared with its predecessor in the old Companies Act, then it is evident that s 163(2) is couched much more broadly as regards the judicial power to grant equitable relief:

- 53.1 The introduction of a new ground, namely conduct "*that unfairly disregards the interests of, the applicant*" indicating a far wider basis upon which relief may be sought – in other words, the conduct now need not be limited to oppressive conduct or conduct which is "*unfairly prejudicial, unjust or inequitable*";
- 53.2 The relief is now granted not only to shareholders but also to directors;
- 53.3 The relief granted is not only in relation to the conduct of the company or its affairs as was the case in respect of sec 252 of the old Companies Act, but also as a result of:
 - 53.3.1 any act or omission of the company or a related person;
 - 53.3.2 the business of the company or a related person;
 - 53.3.3 the powers of a director or prescribed officer of the company, or a person related to the company;

53.4 Extensive examples of the kinds of orders that may be granted, even including the following orders:

- 53.4.1 An order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for the shares, or paid the equivalent value, with or without conditions;
- 53.4.2 An order declaring 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;
- 53.4.3 An order directing rectification of the registers or other records of a company; or
- 53.4.4 An order for the trial of any issue as determined by the Court.

[84] For these reasons, I conclude that even if the impugned loan agreements with, and the loan advances to the MSF Trust, or any of them, are void under the Companies Act, then this would not preclude an equitable interim or final remedy being granted in the exercise of this Court's wide discretionary powers under the aegis of s 163(2). This is so provided that I am satisfied that the jurisdictional requirements of s 163(1) are met. It is to this factual issue that I now turn my attention.

Issue 3: did the applicants prove the jurisdictional requirements of s 163(1)(c)?

[85] An applicant shareholder seeking relief under s 163(2) must plead its case with 'a high degree of specificity' (*Business Doctor Consortium Ltd* supra para 57), including identifying with precision the offending conduct in which the directors are alleged to have engaged in, and the specific remedy required to cure such conduct. Also, see *Louw and Others v Nel* 2011 (2) SA 172 (SCA) para 23. As appears from my narration of the salient facts alleged in the pleadings (see 'Background facts') as amplified in this part, I find the Applicants complied with these duties resting on them.

[86] Since this is a motion proceeding, the oft-cited rule in *Plascon-Evans* applies. This means that the disputed factual issues are to be decided on the common cause facts emerging from the pleadings taken with the respondents' pleaded version, except to the extent that the latter version can be rejected owing to it being far-fetched, contrived, or clearly untenable. See *Business Doctor Consortium Ltd* supra para 58.

[87] The applicants aver that '[b]oth the payment of the dividends to Smit [the First Respondent] as well as the loans to the Maryke Smit Family Trust have had a result that is oppressive, unfairly prejudicial *and* unfairly disregards the interests of the [EWF] Trust'.⁸ (my emphasis added) Although the Applicants plead all three jurisdictional grounds catered for in s 163(1)(c), they need not prove all of them to prevail in casu.

[88] Section 163(1)(c) is quoted in paragraph [61] above. For present purposes, the relevant part is 'in a manner that is oppressive *or* unfairly prejudicial to, *or* that unfairly disregards the interests of, the applicant'. (my emphasis added) The structure and formulation of this phrase indicates that the requirements of oppression, unfair prejudice, and unfair disregard of an applicant's interests are stated disjunctively (not conjunctively). The word 'or' separates these requirements. 'Or' differentiates clearly between three self-standing requirements, each of which operate as alternatives (not additionally) to one another. The disjunctive effect of 'or' is unlike the conjunctive effect that would have prevailed in s 163(1)(c) if the word 'and' was used. See *MV Iran Dastghayb Islamic Republic of Iran Shipping Lines v Terra-Marine SA* 2010 (6) SA 493 (SCA) para 22; *Master Currency v CSARS* 2014 (6) SA 66 (SCA) para 15.

[89] Consequently, to come home under s 163(1)(c), the Applicants must prove at least one of the three listed jurisdictional requirements (not necessarily all three). Although they pleaded all, Mr van Eeden SC focussed his oral presentation on unfair prejudice to, and unfair disregard of the interests of, the EWF Trust. I will do likewise here, save to say that the First and the Second Respondents impugned conduct qua

⁸ **Record:** page 42 (Founding Affidavit at para 111).

directors, when viewed individually and cumulatively, also had the undesirable effect of commercial oppression in the sense envisaged by s 163(1)(c), discussed in *Strategic Partners Group (Pty) Ltd and Others v Liquidators of Ilima Group (Pty) Ltd (in liquidation) and Others* [2023] 2 All SA 658 (SCA) para 26. On that basis too, I would have granted the Applicants relief pursuant to s 163(2) of the Companies Act.

[90] Gasvoorsieners is a small, family-owned, family-run business which, before de Wit snr's death, operated successfully on a high degree of trust. That trust is broken. Prior to 2004, the company was owned by the EWF Trust whose nominee on the board was de Wit snr. In 2004, First Respondent became a co-equal shareholder and has served as his own nominee on the company's board up to the present day. In this manner, each co-owner always participated in managing Gasvoorsieners' affairs.

[91] Since approximately 23 November 2021, the First and Second Respondents, as Gasvoorsieners' directors, have precluded the EWF Trust's trustees from exercising their right and legitimate expectation to participate in the company's management and decision-making. Their refusal to do so, and their refusal to grant the EWF Trust access to the company and its records, is contrary to the Companies Act. It stems from their disingenuous 'view' quoted in paragraph [18] above, namely, that the EWF Trust distributed its shares. That belief lacks factual and legal foundation. It is mala fide.

[92] In December 2019, several months following de Wit snr's death, the Second Respondent was appointed by the First Respondent, her husband, as co-director of Gasvoorsieners. She is de Wit snr's daughter, and the First Applicant's sister, and a beneficiary of the EWF Trust. The Applicants did not object to her appointment. They trusted both directors. Until that point, the trustees of the EWF Trust had no reason to believe that the husband and wife duo would, in concert, act for their own benefit and in breach of their fiduciary duties. That is precisely what they did. Their conduct directly led to the contested litigation forming the subject of this judgment.

[93] The first sign of trouble occurred on 22 November 2021. It happened at a shareholders' meeting. The meeting was held to discuss the Applicants' concerns

regarding the dividend declarations and payments to the First Respondent, as well as the loans to the MSF Trust by Gasvoorsieners. The Applicants' alarm at the First and Second Respondents' response at the meeting led them to despatch a formal letter to the directors. They did so on the very next day. This is the letter marked annexure FA10 dated 23 November 2021. It recorded the trustees' concerns. The letter concluded with the trustees reserving their rights to take action against the directors.

[94] In FA10, and consistent with their pleaded position, the Applicants complained about the following directors' decisions that they viewed as being prejudicial to the EWF Trust's interests as shareholder of Gasvoorsieners: specifically, they noted, firstly, the declaration of dividends to the First Respondent in the 2019 and 2021 financial years totalling R1,5m. The letter recorded that the dividend declarations were unlawful ('onregmatig') on the basis 'die [EWF] Trust 50% van die aandeel in die Maatskappy hou en dus behoort te deel in die dividende'. Secondly, the letter recorded an objection to the directors' decision to lend R4 000 620,00 to the MSF Trust. The letter stated that the trustees of the EWF Trust view the loans as unlawful by reason that 'geen spesiale besluit soos vereis in Artikel 45 van die Maatskappywet ... geneem was deur aandeelhouers nie'.

[95] FA10 was the first salvo fired by the Applicants. Understandably, they used strong language. In FA10, the trustees reminded the directors that the various AFS signed by them recorded the EWF Trust as a shareholder of Gasvoorsieners so that the directors could not contend, as they did at the shareholders' meeting on 22 November, that the EWF Trust is no longer a shareholder. The contents of FA10 ought to have deterred the directors from continuing to conduct the company's affairs as they were doing. However, they disregarded both the letter and the law. They reinforced their position and excluded the EWF Trust from the affairs of Gasvoorsieners.

[96] Despite being advised that the trustees of the EWF Trust viewed the MSF Trust loans in existence at 28 February 2021 as unlawful owing to the absence of the Applicants' consent under the Companies Act, and despite the directors being warned that the trustees of the EWF Trust object to any loans being made to the

MSF Trust without their prior consent as required by the Companies Act for loans to related persons, the First and the Second Respondents forged ahead with the same conduct.

[97] The directors approved more loans to the MSF Trust and disbursed the loan funds from Gasvoorsieners' coffers. The directors proceeded without consulting with, or seeking the consent of, the Applicants, despite their lawful demands in FA10. These additional loans resulted in the MSF Trust now owing Gasvoorsieners an increased sum exceeding R8,95m. In conducting the affairs of Gasvoorsieners as they did, the First and the Second Respondents acted in a way that is unfairly prejudicial to the EWF Trust, and in a way that unfairly disregarded its interests in Gasvoorsieners. All this is conduct falling squarely within the ambit of s 163(1)(c) of the Companies Act.

[98] The First and Second Respondents, in their roles as directors, acted in a manner that was inconsistent with their duties under s 75(5) of the Companies Act when providing additional loans to the MSF Trust (see discussion later). Furthermore, each director violated his/her duty under s 76 of the Companies Act.

[99] In this regard, each director violated s 76(2)(a)(i). This is because each director used his/her position as director to conclude the loan agreements with the MSF Trust on terms unduly favourable to the borrower (not the lender), and then advanced substantial sums to the MSF Trust which enabled the latter to finance the acquisition of immovable properties, thereby gaining a financial advantage for each director in his/her personal capacity as beneficiary of the MSF Trust. In doing so, each director did not act in the best interest of Gasvoorsieners as required by s 76(3)(b), but rather acted in his/her own personal interest. Each director also violated his/her duty under s 76(4)(a)(ii) in relation to the conclusion of the loan agreements with the MSF Trust and the advances then paid to it in terms thereof. All this is seriously prejudicial to the EWF Trust from a financial perspective, and unfairly so as envisaged by s 163(1)(c).

[100] I emphasise that, as stated in paragraph [26] above, the AFS of Gasvoorsieners records the MSF Trust is a 'related party' to the directors of

Gasvoorsieners within the meaning of this term as defined in the financial statements. That definition corresponds with the meaning of the term 'related' in s 1 of the Companies Act read with ss 2(1)(b) and (2)(c) thereof. In this regard, see also *Peel* supra para 56.

[101] During the hearing, there was debate about the First and the Second Respondents' averment that, in their capacity qua directors, they believed that they were not acting in contravention of the Companies Act when they excluded the EWF Trust from Gasvoorsieners' affairs and did not distribute any dividends to it because they viewed (and still view) the EWF Trust as no longer being a shareholder. This matter holds importance in the main application. This is also important regarding the matter of liability for costs. For these reasons, I will now address these issues.

[102] Section 76(4)(b)(ii) of the Companies Act provides that, in the performance of a director's functions or the exercise of any directorship power, a director is entitled to rely on an opinion and/or statement prepared or presented by anyone in the category of persons listed in s 76(5). Section 76(5)(b) includes 'legal counsel, accountants or other professional persons retained ... by the board as to matters involving skills or expertise ... (i) within the particular person's professional or expert competence'.

[103] 'Maryke and I have also relied on the advice of legal representatives and auditors' (para 299 of First Respondent's answer). This alleged advice relates to the dividend declarations and the loans to the MSF Trust. It is not averred that the 'view' of the First and the Second Respondents quoted in paragraph [18] above is based on an opinion from legal counsel or other professional contemplated by s 76(5)(b). As a result, their perspective that the EWF Trust is no longer a shareholder entitled to shareholder rights is based on their personal opinion regarding a legal matter that exceeds their skills and expertise. As such, the First and the Second Respondents failed to act with the requisite degree of care, skill, and diligence that can reasonably be expected of a director. In so doing, each director acted in contravention of the standard of directors' conduct imposed by s 76(3)(c) of the Companies Act.

[104] It was not alleged that a written opinion or written advice to the directors as contemplated by s 76(4)(b)(ii) existed; nor was any advice 'prepared or presented' to the board attached to the court papers filed of record; nor was any confirmatory affidavit filed in relation to these factual allegations. Based on the provisions in the Companies Act regarding shareholding, loans to related persons, and dividend declarations and distributions (see discussion below), as well as the absence of proof of the alleged written advice when the directors exercised their powers to declare and pay a dividend to the First Respondent in 2021 and extended the loans to the MSF Trust, I find that the averment made that the directors acted on legal and other professional advice is neither credible, nor bona fide. In my view, it is contrived.

[105] My view is supported by additional considerations. Initially, the First Respondent admits that 'the [EWF] Trust is a shareholder of Gasvoorsieners'.⁹ Secondly, the First and Second Respondents aver that they declared and paid dividends exclusively to the First Respondent in 2021 based 'on the advice of Boshoff and Moore'.¹⁰ This allegation is not borne out by the facts emerging from the 'Independent Auditor's Report' of Boshoff & Moore which form part of the 2021/2022 AFS of Gasvoorsieners enclosed with the First Respondent's answering papers.¹¹ In relevant part, the report reads:

'During the previous year audit, a dividend of R1,000 000 was declared and paid to the shareholder, JG Smit. According to the share register and share certificates available for inspection during the audit, JG Smit owns only 50% of the shares in the company No provision has been made for a dividend payable to the other 50% shareholder, Elbert de Wit Familietrust, *as the directors are of the opinion that JG Smit is the 100% shareholder of the company.*' (my emphasis added)

[106] In accordance with trite company law principles, the audit report records the entitlement of the EWF Trust, as registered shareholder of Gasvoorsieners, to a share in any dividends declared and distributed by the directors pursuant to their

⁹ **Record:** page 212 (para 10).

¹⁰ **Record:** page 262 (para 224).

¹¹ **Record:** pages 424 - 425.

powers in s 46 of the Companies Act. The audit report clearly states that the decision not to award and distribute dividends to the EWF Trust in the 2020/2021 financial year is based entirely on the directors' own opinion that the First Respondent is the only shareholder of Gasvoorsieners, even though the share register indicates otherwise.

[107] According to the audit report, this 'opinion' was shared with the auditors by the directors. This opinion conflicts with the case pleaded by the First and the Second Respondents in the main application, the counter-application, and the action in case no. 2025-014536. This contradictory position reinforces my view that First and Second Respondents' pleaded version about the EWF Trust's share distribution is contrived.

[108] The Applicants reject the First and the Second Respondents alleged 'view' that the EWF Trust's 50% shareholding in Gasvoorsieners has been distributed. The Applicants aver that they have not resolved to distribute the EWF Trust's shareholding because they await beneficiary approval. On this basis, the Applicants, correctly so in my view, deny that the EWF Trust's 50% shareholding in Gasvoorsieners has vested in the Second Respondent, being the position pleaded by the First and the Second Respondents in the court papers before me.¹² The respondents aver:

'Maryke and I explained that the dividend was paid because the Trust's interest in Gasvoorsieners had already been distributed for Maryke, whereafter Maryke and I would result in us holding 100% of the issued share capital.'¹³

[109] This pleaded version is contradicted by the share transfer claims in the action sued out in case no. 2025-014536. Whereas it is pleaded there that the EWF Trust's shareholding in Gasvoorsieners is to be distributed to the First and the Second Respondents in specified proportions,¹⁴ the version in the extract quoted in the

¹² **Record:** pages 22 - 23 (paras 30, 35, 36) read with **Record:** page 257 (para 187).

¹³ **Record:** page 265 (para 251.2).

¹⁴ **Record:** pages 495 – 496.

preceding paragraph is that the EWF Trust's shares in Gasvoorsieners have been distributed to the Second Respondent alone. As stated in paragraph [107], a different version was given by the First and the Second Respondents to the auditors to justify a declaration and distribution of dividends solely to the First Respondent. The fact that the directors are all over the place (proverbially speaking) on this aspect underscores my view that their pleaded version on this issue lacks truth and substance.

[110] Annexure AA12E forms part of the First Respondent's court papers. This document is the minutes from the inaugural De Wit family meeting convened following the passing of de Wit snr. The meeting was attended by the First and the Second Respondents. The following content therein further undermines their version that a final trustee resolution was taken before de Wit snr's death concerning the distribution of the EWF Trust's shares in Gasvoorsieners:

'The main item at the meeting involves the division of the [EWF] trust. Toerien explains that because there are so many different assets, each with its own tax implications, it may be the fairest to determine the net (after-tax) value of the [EWF] trust. Then we award a quarter of the after-tax value of the [EWF] trust to each of the 4 children (beneficiaries). The [EWF] trust will then be responsible for paying the tax when distributions are made.'

[111] It is also telling that the first time when the First and the Second Respondents took the position that the EWF Trust is no longer a shareholder of Gasvoorsieners was at a shareholders' meeting attended by the Applicants on behalf of the EWF Trust. At that meeting, the directors were taken to task for directorship decisions that were viewed as being prejudicial to the EWF Trust financially. In an ill-considered attempt to defend the indefensible, the First and the Second Respondents then, surprisingly to those present at the meeting, averred that the EWF Trust is no longer a shareholder of Gasvoorsieners and, on that basis, it was not eligible to be consulted about the loans advanced to the MSF Trust. If the EWF Trust was not a shareholder, then it makes no sense that the directors of Gasvoorsieners would attend a shareholders' meeting with the EWF Trust's trustees which was convened for the express purpose of the directors accounting to the shareholder for loans

advanced to the MSF Trust and for dividends paid exclusively to the First Respondent as shareholder.

[112] There is no justifiable basis either in fact or in law for the First and the Second Respondents to view the EWF Trust as a former shareholder of Gasvoorsieners which is no longer entitled to share in dividends declared, nor to participate in shareholder decision-making processes. This finding aligns with the Companies Act.

[113] The term ‘shareholder’ is used in s 163 for its intended purposes discussed earlier in this judgment. This term also appears in other sections of the Companies Act. ‘Shareholder’ bears its meaning as defined in s 1 of the Companies Act, namely, ‘the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be’. Section 37(9)(a)(i) provides that a person acquires the rights associated with issued shares ‘when that person’s name is entered in the company’s certificated securities register’. Section 37(9)(b)(i) states that a registered shareholder ‘ceases to have the rights associated with any particular securities of a company – when the transfer to another person ... has been entered in the company’s certificated securities register’.

[114] The share register of Gasvoorsieners records the EWF Trust as holder of 50% of its issued shares. Since the EWF Trust has not ceased to be a registered shareholder, it enjoys all the benefits associated with shareholding. On this basis, the company directors are obliged to respect the EWF Trust’s position as shareholder.

[115] In the premises, I hold that the EWF Trust has locus standi for purposes of the oppression remedy in s 163 of the Companies Act.

[116] The First and the Second Respondents aver that the EWF Trust ceased to be a shareholder of Gasvoorsieners once its trustees resolved to distribute its shares. They aver that a resolution to that effect ‘is sufficient’.¹⁵ Assuming for argument’s sake that such a resolution was passed (which I find is not the case), then that would, by law, not be adequate for the EWF Trust to cease being a Gasvoorsieners’

¹⁵ **Record:** page 256 (para 179).

shareholder. The First and the Second Respondents' contention to the contrary is clearly untenable.

[117] By reason of the EWF Trust's continued shareholding in Gasvoorsieners, the Companies Act recognises that the EWF Trust holds a 'beneficial interest' in Gasvoorsieners. The term 'beneficial interest' is defined in s 1 to encompass various rights and entitlements. In the context of that definition, these are listed to be:

'the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to—

- (a) receive or participate in any distribution in respect of the company's securities;
- (b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or
- (c) dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities,

but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002).'

[118] Based on the definition of 'beneficial interest', as read in conjunction with s 37 of the Companies Act, I find that the EWF Trust was, and remains, entitled to all the rights and entitlements as a shareholder. This includes the rights (i) to attend and cast a vote at a shareholder's meeting; (ii) to request that a shareholder's meeting be convened; (iii) to share in the distribution of dividends; and (iv) to participate in the management and control of Gasvoorsieners' affairs. I conclude that the denial to the EWF Trust by the directors of these rights and entitlements is unfairly prejudicial to the EWF Trust, and is an unfair disregard of the EWF Trust's interests as shareholder. In this context, the pleaded defence of estoppel is misguided. Therefore, it is rejected.

[119] The loans to the MSF Trust, both before and after 28 February 2021, caused, and continues to cause, unfair financial prejudice to the EWF Trust as shareholder within the contemplation of s 163(1)(c) of the Companies Act. The making of the loan

agreements and the advancing of loan funds in disregard of the EWF Trust's position as shareholder is also an unfair disregard of its interests contemplated by s 163(1)(c).

[120] Mr Manca SC argued that the loans to the MSF Trust were on terms comparable to that of other loans extended by Gasvoorsieners to related persons with the consent of the EWF Trust's trustees. On this basis, Mr Manca SC contended that the EWF Trust lacks a valid reason to raise concerns regarding the loan terms with the MSF Trust. I disagree.

[121] The fact that other related party loans were made on comparable terms to that given to the MSF Trust is of no moment. Those loans were made with shareholder consent. Therefore, those loans are not problematic. The EWF Trust was entitled to be approached for its consent in relation to the loan agreements with the MSF Trust, and to consider their proposed terms. The EWF Trust was entitled to consider its position in relation, inter alia, to the loan sums; to the proposed loan repayment terms; and to the provision of security. For reasons already discussed, the EWF Trust was wrongly denied its right to participate in the decision-making process prior to the loans being issued to the MSF Trust; nor were they approached for ratification. All this is because the First and the Second Respondents refuse to recognise the EWF Trust as a current shareholder of Gasvoorsieners. Their decision not to approach the EWF Trust for consent had nothing to do with the terms of the loan agreements. It would be unfair to the EWF Trust if it must now simply accept the matters as fait accompli.

[122] The conclusion appears inescapable that the First and Second Respondents, in their capacity qua directors of Gasvoorsieners, went to extreme, even unlawful, lengths to evade obtaining consent from the EWF Trust for the substantial sums which they sought to withdraw from the coffers of Gasvoorsieners for their own benefit in the MSF Trust as beneficiaries at the expense of the EWF Trust (and its beneficiaries).

[123] After the shareholders' meeting on 22 November 2021, and receipt of the demands in FA10, the First and Second Respondents engaged in stratagem which,

inter alia, entailed excluding the EWF Trust from all Gasvoorsieners' affairs, even denying the EWF Trust its status as 50% shareholder. This exclusion then enabled the First and the Second Respondent to run the company as they saw fit, without any accountability to, or oversight by, the trustees of the EWF Trust. The absence of checks and balances enabled the directors to abuse their position and to engage in acts of self-enrichment to the financial prejudice of the EWF Trust, and unfairly so.

[124] In all these circumstances, I find that the Applicants discharged their onus of proving the jurisdictional facts enumerated in s 163(1)(c). They proved that the First and the Second Respondents are exercising, and have exercised, their directorship powers in a manner unfairly prejudicial to the EWF Trust as a shareholder of Gasvoorsieners. Furthermore, their actions have shown an unfair disregard for the interests of the EWF Trust in Gasvoorsieners as a shareholder. The prejudicial inequity or unfairness lies not only in the unjustifiable exclusion of the EWF Trust from Gasvoorsieners' management and decision-making processes; it also lies in the prejudicial financial effect flowing from that exclusion (such as, by not being permitted to share in dividends declared and paid; and by not being permitted to participate in determining the financial terms of any loans to the MSF Trust).

Issue 4: what equitable relief should be granted under s 163(2)?

[125] Based on the foregoing discussions, the Applicants proved that the EWF Trust suffered, and continue to suffer, prejudice of a financial nature owing to the First and Second Respondents' impugned conduct when managing and controlling Gasvoorsieners' affairs as directors. This entitles the Applicants to equitable relief.

[126] In the prevailing circumstances, it would be equitable to grant an order replacing the Second Respondent as director of Gasvoorsieners. Doing so is necessary to arrest the situation and bring an end to the grip which the First and the Second Respondents have on Gasvoorsieners and its affairs to the exclusion of the EWF Trust. I endorse the Applicants' proposal that one of its trustees be appointed in place of the Second Respondent. An order to this effect will be granted pursuant to s 163(2)(f)(i), including such other orders as is necessary to give effect hereto. In this way, the EWF Trust would again be represented on the company's board as it was

always from the time that it acquired shares in Gasvoorsieners. In that way, the EWF Trust would be able to meaningfully participate in the daily operations of the company and its decision-making processes. This would be an equitable outcome in this case.

[127] On the facts before me, I do not consider it equitable for the First Respondent to be replaced as a director in addition to his wife being replaced. Despite serious breach of his fiduciary duties and other obligations under the Companies Act, the First Respondent is an equal co-owner and is, as such, entitled to participate in the company's management. He has significant financial interests at stake. To order his replacement would be overkill. It would go beyond what is reasonably required to restore parity in the control of the Gasvoorsieners' board. If the directors are unable to collaborate effectively in the company's best interests and that of its shareholders, then there are other remedies available. I urge the Applicants to finalise the distribution of the trust's 50% shares in Gasvoorsieners. Doing so would bring stability.

[128] As regards the R1m dividends declared and distributed to the First Respondent in the 2020/2021 financial year under s 46 of the Companies Act, the exclusion of the EWF Trust from this profit sharing was unfairly prejudicial to it. The reason for its exclusion has no proper foundation in fact or in law. To address the inequity caused by its exclusion, the EWF Trust ought to be compensated. I share Mr Manca SC's view that it would be equitable to direct the First Respondent to compensate the EWF Trust by paying it one-half (i.e., R500 000,00) of the dividends distributed to him, rather than setting aside the dividend declaration and directing the First Respondent to repay the R1m to Gasvoorsieners. Accordingly, an order will be granted under s 163(2)(j) of the Companies Act, rather than under s 163(2)(h) as sought by the Applicants.

[129] Concerning the loan advances to the MSF Trust in the sum of R8 954 024,41, it would be inequitable for these loans to be left intact. The loan agreements were concluded, and the funds advanced, without compliance with the procedures prescribed by the Companies Act for good, clean governance. It would be an injudicious exercise of my discretion if the loan agreements and the funds advanced

were left untouched, bearing in mind the circumstances surrounding their coming into being. The facts in casu call for judicial intervention to ensure a just and fair outcome.

[130] As recorded in paragraph [73] above, at the hearing, counsel debated the question whether the loan contracts and loan advances in terms thereof are capable of being set aside under s 163(2)(h) of the Companies Act. Mr Manca SC argued, with merit in my view, that relief under this provision would not be tenable if, as argued by Mr van Eeden SC, the loan contracts ('agreement') and advances ('transaction') are void. To resolve this question of law, it is necessary that I engage the issue whether, in terms of the Companies Act, the loan contracts and advances pursuant thereto have the status of being valid, voidable, or void ab initio.

[131] More than one loan contract was concluded between the MSF Trust, as borrower, and Gasvoorsieners, as lender. As at 28 February 2021, the former owed the latter a nett balance of R4 000 620,00, including interest on monies advanced. After this date, further loan contracts were concluded and monies advanced, subject to the payment of interest. At 28 February 2025, the MSF Trust owed Gasvoorsieners a nett balance of R8 954 024,41, including interest. Accordingly, every loan contract concluded between the MSF Trust and Gasvoorsieners is an 'agreement' within the contemplation of s 163(2)(h) as read with the definition of 'agreement' in s 1.¹⁶

[132] If the loan agreements, or any of them, concluded between the MSF Trust and Gasvoorsieners is/are valid, voidable, or void, then every advance of monies pursuant thereto will, as a matter of logic and principle, carry the same status in law. Accordingly, in the context of this case, a determination of the validity, voidability, or voidness of the loan agreements in question would determine whether an advance pursuant thereto is similarly a valid, voidable, or void 'transaction' under s 163(2)(h). For this reason, the ensuing discussion focusses on the loan agreements themselves.

¹⁶ Section 1 of the Companies Act defines 'agreement' as including 'a contract, or an arrangement or understanding between or among two or more parties that purports to create rights and obligations between or among those parties'.

[133] As stated in paragraph [24] above, the loan agreements which pre-dated 28 February 2021 are, for purposes of adjudicating this case, deemed to have been made at a time when the First Respondent was the sole director of Gasvoorsieners. At the same time, he was an equal co-shareholder of the company with the EWF Trust. As a result, s 75(3)(a) of the Companies Act applied. It reads:

‘(3) If a person is the only director of a company, but does not hold all of the beneficial interests of all of the issued securities of the company, that person may not—

(a) approve or enter into any agreement in which the person or a related person has a personal financial interest; ...

unless the agreement or determination is approved by an ordinary resolution of the shareholders after the director has disclosed the nature and extent of that interest to the shareholders.’

[134] In the context of s 75(3)(a) , the term ‘agreement’ bears the same meaning as in s 163(2)(h), read with its definition in s 1 (see quote in footnote 16). For purposes of s 75(3)(a), the Second Respondent is a ‘related person’ to the First Respondent by virtue of s 2(1)(a)(i) of the Companies Act, namely, they are married to each other.

[135] In the context of s 75(3)(a), the term ‘personal financial interest’ bears its definitional meaning in s 1, namely, ‘when used with respect to any person — (a) means a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed’. In this definition, the word ‘material’ bears its prescribed definitional meaning in s 1 as follows:

‘when used as an adjective, means significant in the circumstances of a particular matter, to a degree that is—

(a) of consequence in determining the matter; or

(b) might reasonably affect a person’s judgement or decision-making in the matter’.

[136] The First and the Second Respondents each have a 'personal financial interest' (as defined) in relation to every loan contract approved by the director(s) of Gasvoorsieners, and in every loan agreement entered into by the company's directors with the trustees of the MSF Trust. Apart from the First and the Second Respondents being the majority of trustees in the MSF Trust at all times material to the approval and entering into of the various loans forming the subject of the present discussion, each of them are also beneficiaries of the MSF Trust and were so at all material times.

[137] As beneficiaries of the MSF Trust, the First and the Second Respondents will each potentially enjoy a trust benefit of a financial or monetary nature, or one to which a monetary value may be attributed. This benefit arises from loan contracts that are approved by the directors of Gasvoorsieners, followed by the funds subsequently being advanced to the MSF Trust in accordance with the approved loan contracts.

[138] Under these circumstances, the First and the Second Respondents had a 'personal financial interest' (as defined) in the loan agreement(s) approved by the First Respondent when he was a sole director and which agreement(s) he entered into on behalf of Gasvoorsieners with the trustees of the MSF Trust prior to 28 February 2021. Consequently, by virtue of the stipulation in s 75(3)(a), the First Respondent was obliged to obtain approval from the EWF Trust for the loan contract(s) and its/their conclusion. It is common cause that he did not seek, nor obtain, that consent.

[139] Section 75(7) stipulates that an agreement approved by a sole director that falls in the net of s 75(3) is valid 'only if' the requirements of sub-sections (7)(a), or (b) are met. In s 75(7)(a), the agreement would be valid if the director has disclosed his personal financial interest to the shareholder(s) in the manner stipulated in s 75(4). Section 75(7)(b) provides for validity if ratification occurs, or a court declares an agreement to be valid. Since neither of these requirements are met, the agreement(s) with the MSF Trust pre-dating 28 February 2021 are not clothed with validity under s 75(7). Is such an agreement void as contended by Mr van Eeden SC?

[140] Agreements that are approved by a company's board of directors, and contracts that have been entered into, in breach of s 75(3) are, on my interpretation of the Companies Act, voidable (not void). As such, a shareholder may use s 163(2)(h) to have such contract set aside. My interpretation advances shareholders' rights and their legitimate interests in a company's contractual affairs. My interpretation that a contract entered into in violation of s 75(3) is voidable also aligns with s 75(7)(b) of the Companies Act. This sub-section caters (i) for ratification by shareholders of agreements concluded in contravention of s 75(3); and (ii) for a declaration of validity by order of court. A contract cannot be ratified nor validated if it is void ab initio.

[141] On this basis, I conclude that the loan contracts and terms approved by the First Respondent as sole director of Gasvoorsieners and the loan contracts subsequently entered into by him in that capacity with the trustees of the MSF Trust, are voidable due to breach of s 75(3) of the Companies Act. Consequently, I conclude that s 163(2)(h) may be used by the EWF Trust to set aside the voidable contracts. The First and the Second Respondents, as directors, elected not to seek ratification under s 75(7)(b)(i) because, on spurious grounds and for their own advantage, they refuse to recognise the EWF Trust as a shareholder of Gasvoorsieners. They also elected not to seek an order from this Court declaring any of the loan contracts to be valid. Presumably acting on legal advice, they did not perceive such an application to have prospects of success. Whatever their position may have been, in my view, a setting aside of the voidable loan contracts concluded pre-28 February 2021 is merited, as well as an order directing the MSF Trust to repay the loan monies with interest as compensation. Twin orders to this effect will do justice and ensure a fair outcome. Accordingly, I will grant orders of this nature pursuant to s 163(2)(h) of the Companies Act, including an order affording the MSF Trust approximately twelve months to effect such payments. This is a fair period of time. In my view, the thirty-six months proposed by the MSF Trust would be inequitable in the context of this case.

[142] As regards the loan agreements approved by the First and the Second Respondents, who acted as co-directors of Gasvoorsieners, and entered into by

them as directors of Gasvoorsieners, consideration must be given to s 75(5) of the Companies Act. Its provisions were contravened by the First and the Second Respondents when they, as co-directors of Gasvoorsieners, took the decision to approve the loans to be made to the MSF Trust and later, as directors, entered into a loan agreement(s) with the trustees of the MSF Trust on the terms agreed upon and reflected in the financial statements of Gasvoorsieners. To understand the nature of the contravention of s 75(5), its provisions must be considered. I quote them in full here:

‘(5) If a director of a company, other than a company contemplated in subsection (2) (b) or (3), has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director—

- (a) must disclose the interest and its general nature before the matter is considered at the meeting;
- (b) must disclose to the meeting any material information relating to the matter, and known to the director;
- (c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;
- (d) if present at the meeting, must leave the meeting immediately after making any disclosure contemplated in paragraph (b) or (c);
- (e) must not take part in the consideration of the matter, except to the extent contemplated in paragraphs (b) and (c);
- (f) while absent from the meeting in terms of this subsection—
 - (i) is to be regarded as being present at the meeting for the purpose of determining whether sufficient directors are present to constitute the meeting; and
 - (ii) is not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted; and
- (g) must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board.

[143] On the basis of the same facts and reasons outlined in paragraphs [134] to [137] above, both the First and the Second Respondents, as directors of Gasvoorsieners, had a 'personal financial interest' in the 'matter' that was to be considered by them as Gasvoorsieners board of directors, namely, the approval of a loan(s) to be made to the MSF Trust and the approval of the terms and conditions of the loan agreement(s). By reason of the stipulations in s 75(5)(d) and (e), neither the First nor the Second Respondent was permitted to participate in the decision-making process at board level regarding the approval of the loans and its/their terms.

[144] Consequently, no valid board of director's decision was taken by the First and the Second Respondents acting as co-directors pertaining to the loan agreements with the MSF Trust and its/their terms and conditions. Moreover, by virtue of the prohibition in s 75(5)(g), neither the First nor the Second Respondent could execute, nor participate in the execution of, any directors' resolution authorising the entering into of any loan agreement(s) with the MSF Trust and/or authorising its/their terms and conditions. Moreover, neither of them, acting in their capacity as director of Gasvoorsieners, could execute on behalf of Gasvoorsieners any agreement, whether written or oral, that would constitute a loan contract with the MSF Trust.

[145] The provisions of s 75(7) discussed in paragraph [139] above apply equally to agreements approved and contracts entered into in violation of the stipulations in s 75(5). By virtue of s 75(7), any decision taken by Gasvoorsieners' directors in breach of s 75(5) approving any loan with the MSF Trust and/or approving any term or condition for such loan(s), as well as the execution of any director's resolution in breach of s 75(5) and any loan contract executed in violation of s 75(5), would be valid 'only if' the provisions of s 75(7)(a) or (b) discussed in paragraph [139] above are met.

[146] The requirements in ss 75(7)(a) and (b) were not met in casu. Applying the reasons given in paragraph [140], I hold that an agreement approved and a contract concluded in breach of s 75(5) of the Companies Act is voidable at a shareholder's instance. This interpretation of the Companies Act benefits shareholders and their business interests.

[147] On this basis, any loan contract entered into by the First and the Second Respondents as co-directors of Gasvoorsieners with the trustees of the MSF Trust, is voidable and may be set aside under s 163(2) of the Companies Act. Having regard to the facts in their totality (including those mentioned in paragraph [141]), the setting aside of every such loan contract would be just and equitable. I will grant orders of this nature pursuant to s 163(2)(h) of the Companies Act, including an order affording the MSF Trust approximately twelve months to effect such payments. This is a fair period. As stated before, the thirty-six months proposed by the MSF Trust is inequitable here.

[148] During the hearing , Mr Manca SC argued that the Applicants were not entitled to relief in relation to the R8 954 024,41. It will be recalled that this balance surfaced for the first time in the First Respondent's answering papers. The founding affidavit mentions the sum of R4 000 620,00. This latter sum was mentioned because it was the last balance known to the Applicants. That was the figure disclosed to the EWF Trust at the shareholders' meeting as far back as 22 November 2021. Subsequent thereto, and prior to this litigation, the First and the Second Respondents steadfastly refused to disclose any financial information pertaining to Gasvoorsieners. This was predicated on the averment that the EWF Trust was not a shareholder and, therefore, its trustees were not entitled to be privy to the financial records of Gasvoorsieners, a company in which they, allegedly, had no interest as shareholder.

[149] It was for this reason that the Applicants sought relief in this application which would compel the First and the Second Respondents to make available to the EWF Trust all updated financial statements. This became unnecessary after the financial statements were included as part of the First and the Second Respondents' answering papers. The conduct referred to here, and all the other conduct of the First and the Second Respondent already discussed above, forms part and parcel of my reasons for the costs order which I will grant later.

[150] It was the belated disclosure during this litigation of the increased loan balance owed by the MSF Trust to Gasvoorsieners which alerted the Applicants thereto. The Applicants cannot be blamed for their failure to mention the updated

R8,95m balance in the founding papers. Neither the First nor the Second Respondent, nor the trustees of the MSF Trust (of which the First and Second Respondents are in the majority), can benefit from the intentional non-disclosure of Gasvoorsieners' financial information.

[151] The Applicants' foreshadowed the possibility that the sum mentioned in their founding affidavit may not reflect the updated loan balance owed by the MSF Trust to Gasvoorsieners. In anticipation thereof, the Applicants framed their Notice of Motion accordingly. Paragraph 1.5 thereof seeks an order against the Fourth to the Sixth Respondents that would 'refund the Third Respondent the balance of the loan sums advanced to the Maryke Smit Family Trust and still owing to the Third Respondent'. The framing of this clause in the NoM entitles the Applicants to an order that encompasses the balance owing by the MSF Trust. In terms of the common cause facts, the balance is R8 954 024,41 as disclosed by the respondents. The Fourth to Sixth Respondents cannot reasonably contend that they are caught by surprise.

[152] Moreover, it would be inequitable if the Applicants were obliged to start legal proceedings afresh to obtain compensatory relief under s 163(2)(h) of the Companies Act in relation to the loan contracts approved and entered into after 28 February 2021.

[153] Finally, if I am wrong in my interpretive conclusions outlined in paragraphs [140] and [146] above and the relevant contracts concluded in breach of s 75(3) and/or (5) are actually void ab initio, then, for the reasons given in paragraphs [75] to [82], the Applicants would still be entitled to equitable relief as fashioned by me. In such event, I would have granted them the same compensatory relief as framed in the relevant order below, save that I would not have granted it pursuant to s 163(2)(h), nor would I have ordered a setting aside of the relevant loan contracts because they would be void.

Costs

[154] There is no reason why costs ought not to follow the result in both the main application and the counter-application. The Applicants have been substantially successful. I have, in some detail, explained the First and the Second Respondents' conduct which led to this litigation. While I did so mainly in their capacity as directors of Gasvoorsieners, their conduct as trustees of the MSF Trust is self-evident from my discussion. It must not be overlooked that in both capacities, the First and the Second Respondents engaged in conduct that breached provisions of the Companies Act, which entitled the Applicants to relief under s 163(2). To add insult to injury, the trustees of the MSF Trust opposed the main application and launched an ill-considered and ill-fated counter-application. All the acts in question have consequences. Costs form part thereof.

[155] In exercising my discretion regarding costs, I took into consideration the factors listed in Uniform Rule 67A(2) and (3)(b), and that the Applicants did not seek a punitive costs order in their Notice of Motion. The Applicants and the relevant Respondents appointed silks to argue their respective cases, with junior counsel. All this is an indication of their acknowledgement that the issues involved here had considerable complexity, requiring advanced levels of legal knowledge, and technical expertise of senior practitioners with specialist skill-sets in the field of company law.

[156] Considering all this, I will grant costs on a party-and-party scale in the main application and counter-application, including costs for two counsel (where employed), with costs for senior counsel on tariff scale C and for junior counsel on tariff scale B.

Order

[157] In the result, the following orders are granted:

- 1) The Applicant's application succeeds with costs.
- 2) Consequent on the order in 1 above, final relief is granted pursuant to the provisions of section 163(2) of the Companies Act 71 of 2008 as follows:
 - a) In accordance with s 163(2)(f), the Second Respondent is replaced as a director of the Third Respondent by the appointment of Toerien de Wit in

her stead; but if Toerien de Wit is for any reason unable or unwilling to be appointed as director, then such other person nominated in writing by resolution of the trustees for the time being of the Elbert de Wit Familie Trust is forthwith appointed as director in place of the Second Respondent;

b) In accordance with s 163(2)(h), every loan agreement concluded between the Third Respondent and the trustees of the Maryke Smit Family Trust (MSF Trust) and every loan advance giving rise to its indebtedness to the Third Respondent in the sum of R8 954 024,41 (Eight Million Nine Hundred and Fifty-Four Thousand Twenty Four Rands and Forty One Cents) is set aside. The trustees for the time being of the MSF Trust is directed to compensate the Third Respondent by payment to it of the sum of R8 954 024,41 with interest at the prescribed legal rate computed from the date of this order until the date of final payment, both days included, which monies shall be paid in full by no later than 31 August 2026; and

c) In accordance with s 163(2)(j), by no later than 30 September 2025, the First Respondent shall compensate the trustees for the time being of the Elbert de Wit Familie Trust by payment of R500 000,00 (Five Hundred Thousand Rand) with interest at the prescribed legal rate computed from the date of this order until the date of final payment, both days included.

3) At the Third Respondent's costs, the Ninth Respondent shall forthwith deregister the Second Respondent as director of the Third Respondent and shall register the replacement director forthwith pursuant to the provisions of 2(a) above.

4) The counter-application is dismissed with costs.

5) Costs in the main application and counter-application is awarded to the Applicants as against the First, Second, Fourth, Fifth, and Sixth Respondents, including cost for two counsels (senior counsel's fees are allowed on scale C; his junior on scale B), such liability to be joint and several, the one paying the other to be absolved.

F. MOOSA
ACTING JUDGE OF THE HIGH COURT

Appearances

For Applicants: P van Eeden SC (with P Gabriel)
Instructed by: Marais Muller Hendricks (J Grobbelaar)

For the Respondents: B Manca SC (with MM van Staden)
(First to Eighth Respondents)
Instructed by: Mostert & Bosman Attorneys