



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

JUDGMENT

Not Reportable

Case no: 19726/23

In the matter between:

**DR PIETER FRANCOIS MELCHIOR
BRIERS**

FIRST APPLICANT

DR PRANAV RAMKILAWAN

SECOND RESPONDENT

and

DR J BRUWER AND ASSOCIATES

FIRST RESPONDENT

NO 78 INC

SECOND RESPONDENT

DR ANDRE JACOBUS MAREE

THIRD RESPONDENT

DR ELSKE MARGUERITE FERREIRA

FOURTH RESPONDENT

DR JASPER MICHAEL SMIT

FIFTH RESPONDENT

DR MARSHA HERMANUS

SIXTH RESPONDENT

DR SHARMISTHA HEERALAL

SEVENTH RESPONDENT

DR REINETTE VAN DER WESTHUIZEN

DR SEAN DANIEL

EIGHTH RESPONDENT

DR YOLANDA VINK

NINTH RESPONDENT

THE COMPANIES AND

INTELLECTUAL PROPERTY

TENTH RESPONDENT

COMMISSION

Neutral citation: *Dr Briers and Another v Dr J Bruwer and Associates No 78 Inc and Others* (Case no 19726/23) [2025] ZAWCHC ... (3 October 2025)

Coram: NUKU J

Heard: 14 August 2025

Delivered: 3 October 2025

Summary: Practice: Application for leave appeal to be refused where the appeal would have no reasonable prospects of success and it is not sufficient to point to factual errors that have no bearing on the merits.

ORDER

- 1 The application for leave to appeal is refused; and
- 2 The applicants jointly and severally, the one paying the other to be absolved, are directed to pay the party and party costs, including costs of counsel on scale B.

JUDGMENT

Nuku J:

[1] The applicants seek leave to appeal a decision of this Court made on 27 May 2025, whereby their application for certain relief under section 163 of the Companies Act 71 of 2008 (Companies Act) was dismissed with costs.

[2] The application for leave to appeal sets out ten grounds for the intended appeal, with the first relating to an alleged incorrect factual finding that does not, in fact, affect the merits of the case. During the argument, it was stated that this incorrect factual finding might have caused the Court to be less sympathetic towards the applicants' plight. Clearly, the first ground of the intended appeal does not meet the requirement for granting leave to appeal, and no further discussion is necessary on this ground.

[3] The second ground concerns what the second applicant initially claimed was a unilateral change to his remuneration scheme. However, the facts showed that he signed a consultancy agreement on 24 August 2021. Attached to the consultancy agreement was a schedule outlining the applicable remuneration scheme (the original scheme). On the same day, he signed an addendum to modify the original scheme (the amended scheme). The amended scheme resulted in the second applicant earning about 15% more than he would have earned under the original scheme.

[4] The amended scheme was valid for six months, after which the original scheme would take effect. Due to an oversight, the second applicant was paid under the amended scheme beyond the six months specified. Upon the oversight

being identified, the second applicant was advised that he may have received more than he was entitled to and that it might be necessary for him to pay the difference, if any.

[5] In light of the above facts, counsel for the applicants was compelled to admit that there had been no unilateral change to the remuneration scheme applicable to the second applicant. However, he then shifted his position and argued that the real issue was that both applicants had, in fact, been discriminated against because a lower remuneration had been agreed with them compared to the other practitioners. This was, however, not the case that had been pleaded by the applicants, as their case for unfair discrimination was based on the notion that the second applicant's remuneration had been unilaterally changed to a less favourable scheme. As a result, this ground of appeal lacks merit.

[6] The applicants criticised the Court for adopting a very narrow approach when it held that the respondents were contractually entitled to act as they did in terminating the applicants' consultancy agreements. It was argued that the Court ignored the dictum in *Technology Corporate Management (Pty) Ltd v De Sousa and Others*¹(*Technology*) where the Supreme Court of Appeal (SCA) held that:

‘Even if the majority shareholders act strictly in accordance with the contractual terms governing the shareholders' relationship, they may exercise their powers in a way that is oppressively or unfairly prejudicial to minority shareholders. To that end, the courts have been vested with statutory powers to override the majority's exercise of its contractual powers in order to remedy such oppression or unfair prejudice.’

¹ 2024 (5) SA 57 (SCA) at para [76]

[7] In *Technology*, the SCA addressed the provisions of section 252 of the Companies Act 61 of 1973 (the Old Companies Act), which was the predecessor to section 163 of the Companies Act, and has similar provisions. At para [77] it stated that:

‘The section could be invoked in two situations. The first was where the complaint was that a particular act or omission of the company was unfairly prejudicial to the member or group of members. The second was where the affairs of the company were being conducted in a manner unfairly prejudicial to that member or to some part of the members of the company... While there was potentially an overlap between the two, there was a clear difference in principle, between cases where the complaint arose from the actions of the company and those where it was the manner in which the affairs of the company were being conducted that was alleged to be unfairly prejudicial. The one focused on the company's actions, while the other focused on the manner in which the affairs of the company were being conducted and the actions of those responsible for that conduct.’

[8] In considering a claim based on section 163 of the Companies Act, it is therefore necessary to distinguish between a complaint arising from a specific act or omission of a company and one relating to how the company's affairs are managed. To these two, section 163(1)(c) of the Companies Act has added the exercise of the powers of a director or prescribed officer of the company, or a person related to the company.

[9] The claim in *Technology* was based on the manner in which the affairs of the company were being conducted and at para [78] the SCA stated that:

‘Unfairly prejudicial conduct by the company could arise from matters such as changes in the articles of association to enable the majority shareholder to dispose of their shares; amending the articles of association to confer additional rights on a developer; changes to the voting rights attached to certain shares or the issue of additional shares in such a way as to result in a

shareholder's voting rights being diluted; or to enable the majority to acquire the minority's shares; a merger with, or takeover by, another business; the disposal of the company's business or a major asset of that business; or even the winding-up of the company. Any of those could be structured so as to prejudice the interests of minority shareholders unfairly. Their common feature was that they were actions by the company itself, albeit driven by the majority shareholders.' (footnotes omitted)

[10] Where the complaint concerns the manner in which the affairs of the company are being conducted, the SCA at para [79] referred to a passage in *Aspek Pipe*² and explained that 'Proof was required of an identifiable and discernible course of conduct of the company's affairs that was unfairly prejudicial to the member or part of the members.'

[11] It therefore follows that the applicants had the burden to provide proof of a specific and identifiable course of conduct if their claim concerns how the affairs of the first respondent were managed, or proof of a specific act or omission by the company if their claim concerns the company's conduct. The same applies to the exercise of powers by a director under section 163 (1) (c) of the Companies Act.

[12] The applicants' main argument was that they paid money to acquire their respective drawing powers in the first respondent, and these were assets they possessed which they could sell if they had been the ones who terminated the consultancy agreements. The termination of the consultancy agreements, which resulted in the loss of those assets, was either oppressive or unfairly prejudicial to or unfairly disregarded their interests.

[13] The argument presented by the applicants, when taken to its logical conclusion, would suggest that only the consultants have the right to terminate the

² *Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others* 1968 (1) SA 517 (C) at 529B – D.

consultancy agreement with thirty days' notice, and not the company. However, this is not what the consultancy agreement provides.

[14] The third and fourth grounds concern what the applicants call a failure to recognize the connection between the consideration paid for the right to practice and its termination. These grounds, however, do not advance the matter further because a consultant's right to practice as a consultant with the first respondent is governed by the consultancy agreement. The result of terminating the consultancy agreement is that it ends a consultant's right to continue practicing as part of the first respondent.

[15] There is also a ground related to the failure to hold general meetings, and a statement is made that the applicants might have been able to persuade the other consultants not to vote for terminating their consultancy agreements. However, this ignores the explanation given by the respondents as to why they had to resort to holding meetings by way of round robin, especially regarding how the second respondent behaved during the in-person meetings.

[16] There is also a ground related to the costs associated with an application for the separation of the first applicant's case, which was later abandoned. It was argued that a party typically must pay the costs if it withdraws an application. In this case, it was stated that the court had refused an amendment on incorrect grounds. As a result, the judge, upon recognizing that mistake, took an unusual step for a judge by urging the parties to agree not only on granting the leave to appeal but also on revising the order she had made. Therefore, it was argued that an appropriate order in these circumstances would be for each party to pay its own costs.

[17] It was, however, the first applicant who chose to apply for the separation of his case. He is also the one who decided to abandon it in light of developments. In the absence of an agreement regarding costs, it follows that he should be the one to pay them. The agreement regarding the amendment of the order cannot be used as a basis for each party to pay its costs without a specific agreement to that effect.

[18] Having considered all of the above, I am not convinced that the appeal has a reasonable prospect of success. Therefore, the application for leave to appeal must be refused, and costs should follow the outcome.

Order:

[19] As a result, the following order shall be issued:

19.1 The application for leave to appeal is refused; and

19.2 The applicants jointly and severally, the one paying the other to be absolved, are directed to pay the party and party costs, including costs of counsel on scale B.

LG NUKU
JUDGE OF THE HIGH COURT

Appearances

For applicants: C Joubert SC with G Potgieter
Instructed by: Van Zyl Scheepers Attorneys, Stellenbosch
Care of: Norman Wink Stephans Inc, Cape Town

For respondents: IL Posthumus
Instructed by: Whalley and Van Der Lith Inc, Randburg
Care of: Herold Gie Attorneys, Cape Town