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

JUDGMENT

Not Reportable

Case no: 2025-008257

In the matter between:

RORY GEORGE GILDENHUYS	**First Applicant**
CHLOE BRUNA GILDENHUYS	**Second Applicant**
and	
MICHAEL JAMES WIGGETT	**First Respondent**
HENDRIK AND FLORIPES SEAFOOD RESTAURANT CC trading as Madeiras Bar and Bistro	**Second Respondent**

Neutral citation:

Coram: MGENGWANA AJ

Heard: 6 November 2025

Delivered electronically: The judgment is handed down electronically by circulating to the parties or legal representatives by email. The date for the handing down of the judgment is deemed to be 27 February 2026.

Summary: Cessation of membership based on unfairly prejudicial conduct – Section 36 read with section 49 of the Close Corporation Act 69 of 1984 - Onus.

ORDER

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[1] In the result, I grant the following order:

(a) First and Second Applicant's application in terms of paragraphs 4 – 8 of Notice of Motion is granted.

(b) First Respondent is to pay First and Second Applicant's costs on a party-party scale including costs of counsel on Scale B inclusive of the costs of the application of 5 May 2025.

JUDGMENT

MGENGWANA AJ:

Introduction

[1] This is an application in which the Applicants seek the following relief:

1. An order directing the First Respondent to cease to be a member of the Second Respondent in terms of section 36 and 49 of the Act; and

2. An order in terms of section 49(2) directing the Second Respondent to acquire First Respondent's member's interest in the Second Respondent, alternatively, directing First Respondent to sell his member's interest in the Second Respondent to the First Applicant at a fair value.

[2] The relief sought above is based on the First Respondent's oppressive conduct which is unfairly prejudicial and disregards First Applicant's interest as a member in the Second Respondent.

Background

[3] During 2019 First Respondent expressed an interest in establishing a restaurant business with the Applicants. This expression of interest came out naturally from the First Respondent as the Applicants, the First Respondent and his wife (Janine) had socially known each other for a number of years. The expression of interest culminated in a meeting that took place in the middle of 2019 between the parties mentioned above. The purpose of this meeting was to discuss prospects of entering into a business relationship with one another.

[4] It was then agreed in the aforementioned meeting that a business opportunity wherein the First Respondent would inject the capital would be sought. It was also agreed at this meeting that the aforementioned business would be run by the First and Second Applicant ("the Applicants").

[5] This plan materialized in late 2019 when the First Applicant and the First Respondent took joint control of a Close Corporation called Hendrik and Floripes Seafood Restaurant CC trading as Madeiras ("the Second Respondent"). The First Applicant and First Respondent acquired a 50% member's interest each in the Second Respondent.

[6] The understanding between the First Applicant and First Respondent was that the First Respondent would be a silent partner since he had injected the full capital into this business venture however, he would be entitled to a 50% share of the nett profits whilst the Applicants would be in control of the restaurant enterprise with Janine in control of the financial operations of the Second Respondent's business. At this point, the Second Applicant was earning a salary from the Second Respondent.

[7] When Covid kicked in in 2020, the Applicants, First Respondent and Janine agreed to use this period to effect renovations to the restaurant. It was also agreed that these renovations would be financed by the First Respondent. It was also agreed that the amounts paid on renovations would be repaid by the Second Respondent when it was able to do so.

[8] The First Respondent's investment in Second Respondent and the renovations that were done in 2020 were repaid to the First Respondent in full and neither the First Applicant nor the First Respondent have a loan account with the Second Respondent.

[9] On 1 March 2023, the Applicants and First Respondent entered into a Partnership Agreement ("the agreement") on, *inter alia*, the following terms:

"That Mike (First Respondent) and Rory (First Applicant) are currently each 50% shareholders of Gillet Ventures CC, registration number 2008/141804/23 which purchased a restaurant known as Madeiras Bar & Bistro, 161 Main Road, Bergvliet (hereinafter referred to as “Madeiras”).

That Chloè (Second Applicant) is considered an equal share business partner she is actively involved with the running of Madeiras.

That Rory is no longer involved in the business on any level whatsoever but undertakes to sign certain documents where required and hands all power over to Chloè with regards to ownership and the benefits thereof.

That Mike agrees that Chloè is his 50/50 partner in the business and undertakes to sign all and any documents required in respect of her position at the business.

That **“the partners”** means Michael James Wiggett and Chloè Ogden or any of them as the context may require;

That **“the partnership”** means the partnership constituted on the effective date between the parties, the terms of which are recorded in this agreement.

That the partnership will commence on the Effective Date and shall continue indefinitely subject to the right of any partner to withdraw from the Partnership by giving not less than 90 (Ninety) days written notice to the other partner.

That the partners agree that proper books and records of the partnership and/or business purchased by them will be kept in a suitable manner and form and be made available to the parties at all times.

That Mike will be Managing Director and he will head the acquisitions in any manner or form and maintain relationships with suppliers and investors as required:

That Chloè will be Operations Director and head all of the operations of Madeiras including kitchen controls, stock controls, cash control, staff and any other activities required for the business to run effectively and profitably during trading hours;

That each will take guidance from the other as and when required.

That once the month end expenses have been covered, including all loans due, only then will profit or loss be able to be calculated, which will be metered out equally and fairly according to the Participation Ratios.

That the parties agree that re-investment into the business is necessary from time to time to ensure growth and that this might affect profits/loss share from time to time.

Each of the partners shall owe to the other a duty of the utmost good faith and be obliged to devote himself/herself to the progress and welfare of the partnership.”

[10] What is common cause from the agreement is the following:

a. That it was entered into by the Applicants and the First Respondent.

b. That the roles that were going to be played by each party to the agreement were clearly defined.

c. That the First Respondent ceased to be a “silent partner” and was expected to be actively involved in the running of the business.

d. That the Second Applicant was considered an equal share business partner in the Second Respondent as she was actively involved in the running of the business of Second Respondent.

e. That Janine was never party to the agreement and that no role was set out for her in the business of the Second Respondent in terms thereof.

Events leading to a deadlock from Applicants’ perspective

[11] The First Applicant averred that the following are incidents that led to a deadlock between the Applicants and the First Respondent:

11.1 The First Respondent had limited success in securing supplier deals for the benefit of the Second Respondent.

11.2 The First Respondent’s continued involvement in and contribution in terms of effort to the Second Respondent waned to a point where, not only was he failing to carry out his responsibilities, but he no longer associated himself with the progress and welfare of the

Second Respondent and thereby undermined the Second Respondent's commercial interests and directly prejudiced its profitability.

11.3 The First Respondent started to interfere with the defined roles of the Second Applicant and in the process undermined her authority and thereby sowing discord among staff. This had the effect of destabilising the operations of the business of the Second Respondent. For an example, when the Second Applicant sought to admonish the First Respondent's daughter ("Josie"), who was employed as a General Manager by the Second Respondent for consuming intoxicating liquor while on duty, and for generally being rude to fellow employees, the First Respondent and Janine called Josie aside and left with her in the middle of her duty on a busy Friday evening and thereby allowed a situation detrimental to the business of the Second Respondent to continue.

11.4 The First Respondent frustrated the process of instituting disciplinary proceedings against Josie for her unbecoming behaviour at work by persuading the Second Respondent's labour consultant to find procedural flaws in the way the proceedings were handled by the Second Applicant and thereby acted contrary to Second Respondent's interest.

11.5 The First Respondent refused to take a step back from the business of the Second Respondent even though he had been diagnosed with Post Traumatic Stress Disorder ("PTSD"). His emotional health status was revealed by Janine who simultaneously advised that she would be taking over from the First Respondent as he is contemplating retirement. Instead of retiring, he frequented the business premises of the Second Respondent where he would lay bare intimate personal secrets of some staff members in the presence of the patrons of the business of the Second Respondent to such an extent that staff members would be uncomfortable when he is around.

11.6 The First Respondent also started making himself guilty of unfairly prejudicial conduct by unilaterally assuming benefits from the business of Second Respondent to the prejudice of the business and the Applicants by taking large quantities of alcohol from the business without paying for same and granting complimentary meals to friends thereby depleting the assets of the Second Respondent.

11.7 The First Respondent and Janine unjustifiably assaulted the Second Applicant verbally for inviting her Facebook friends over to the business of the Second Respondent for celebratory drinks to celebrate the five-year milestone of the business of the Second Respondent.

11.8 The First Respondent spoke condescendingly about the First Applicant. His behaviour was meant to demean and humiliate the Applicants.

11.9 The First Respondent allowed Janine to inappropriately involve herself in the affairs of the Second Respondent even though she had no powers to. For an example, Janine had written to the accountants of the Second Respondent and instructed them not to share information relating to the business of the Second Respondent with the Second Applicant even though she was a director of operations and a partner in the Second Respondent. Janine also falsely suggested to the accountants that the First Applicant had resigned from the Second Respondent and thereby misrepresenting the membership structure which constitutes oppressive conduct to the First Applicant and prejudicial to the proprietary rights of the Second Respondent.

11.10 The First Respondent boasted about getting 50% of the nett profits of the business of the Second Respondent at the end of each month knowing very well that he does not deserve any of that as he was not contributing at all to the development and continued welfare of the business of the Second Respondent.

11.11 That when a proposal to cease to be a member of the Second Respondent and sell his interest to the Second Applicant was put to the First Respondent, he refused even though he knew that the relationship between himself and the Applicants had gone "pear-shape".

[12] According to the Applicants, the above incidents resulted in the business relationship of the Applicants and the First Respondent becoming quickly toxic and intolerable. This, in turn, led to the Applicants becoming deeply concerned about the impact the rapid deterioration of the relationship is having on the successful business operations of the Second Respondent.

[13] As a result of the above, the Applicants aver that they consulted their attorney of record towards the end of 2024. Applicants' attorney of record sent a letter to the First Respondent wherein he made the following broad proposals after advising that his instructions are that the business relationship between the Applicants and the First Respondent in relation to the Second Respondent has broken down irretrievably and that all parties recognise that

this breakdown is incompatible with the continued joint ownership and management of the businesses by the parties through the Second Respondent:

13.1 That either of the Applicants will purchase First Respondent's members interest in the Second Respondent based on a figure to be obtained from a suitably qualified business valuator.

13.2 That the Applicants are amenable to a round table meeting being held at the offices of the Applicants' attorneys of record to discuss the above.

[14] The Applicants further aver that the first proposal was never reverted to and the proposed round table never took place between the parties.

First Respondent's response to Applicants averments

[15] The First Respondent foregrounded his response to the averments made by the First Applicant in his Founding Affidavit by averring that the averments made by the First Applicant have not been articulated with sufficient particularity and that this has resulted in him having trouble with responding thereto meaningfully other than to deny the contents thereof.

[16] Thereafter he made the following averments:

16.1 He admitted that the Second Applicant plays a key role in conducting the business of the Second Respondent, but that she does so in order to usurp the control he and Janine have over the Second Respondent and conducts herself contrary to their wishes and the best interest of the business.

16.2 He admits that there is a deadlock caused by the dispute between the Applicants and themselves (ie. First Respondent and Janine) which prevents the Second Respondent from functioning in a beneficial manner.

16.3 He denies that it was their intention that the Second Respondent's restaurant would be "run principally" by the Second Applicant and him as the restaurant would be run principally by Janine and himself.

16.4 He further averred that Second Applicant was an Operations Director of the business of the Second Respondent whose input was welcome however, she had no authority over the conducting of the Second Respondent's business whatsoever, as any decision pertaining to Second Respondent would have to meet with his approval as its Managing Director.

16.5 He denied that he never devoted himself to the business of the Second Respondent and avers instead that he has always complied with his duties.

16.6 He admits to being diagnosed with PTSD but avers that his stress and anxiety is caused by the Second Applicant's conduct.

16.7 He admits to having made disparaging remarks about the First Respondent and to swearing a lot.

16.8 He denies seeking to micromanage the Second Applicant and instead avers that the Second Applicant ignores all forms of requests and instructions and does so with the intent to undermine and usurp his authority. He further avers that the stratagem of the Applicants is to forcibly remove Janine and him from the business in order to take control thereof.

16.8 He admits that no agreement was reached in relation to the dissolution of the partnership.

16.9 He averred that the Applicants opportunistically and most disconcertingly regard his health as means to capitalize upon by usurping Janine and his role in the Second Respondent.

16.10 He also denied that Josie conducted herself in the manner complained of, he instead avers that the Second Applicant targeted her by raising the most insignificant and miniscule complaints against her so as to render his involvement in the business of the Second Respondent as invidious as possible.

16.11 He admits to removing Josie from the business of the Second Respondent as he was of the opinion that she is being targeted, the Second Applicant was both rude and confrontational towards her.

16.12 He averred that his intention to retire does not equate to an intention on his part to sell his interest in the Second Respondent.

16.13 He admitted the existence of palpable acrimony which eventually led to an impasse between the Applicants and themselves but avers that this was a result of the Second Applicant's intention to usurp his role in the business of the Second Respondent.

16.14 He averred that the employees of the Second Respondent who filed Confirmatory Affidavits in support of the Applicants' application did so because they were ultimately financially rewarded, in plain language, they were bribed by the Applicants.

16.15 He averred that the taking of alcohol from the business of the Second Respondent without paying for it was part and parcel of his perks as member with interest in the Second Respondent.

[17] Besides First Respondent's lamentations that the Applicants have failed to set out the allegations made in the Founding Affidavit with sufficient particularity, he also averred in his answering affidavit that the Applicants have failed to support their allegations with any form of evidence and/ or factual basis to justify the invocation of section 36 and 49 of the Act read together with section 163 of the Companies Act 71 of 2008 ("the Companies Act"). This averment was made despite the fact that the Founding Affidavit deposed to by the First Applicant, contents whereof has been confirmed by the Second Applicant has numerous electronic mails, WhatsApp messages and Confirmatory Affidavits attached thereto.

[18] First Respondent also avers that he has advanced both factual and legal grounds as a basis of his opposition to the application and in so doing, has established numerous material factual disputes. This averment is made despite the First Respondent attaching only a Confirmatory Affidavit deposed to by Janine to his Answering Affidavit.

Issues for determination

[19] Based on the averments made by the Applicants and the First Respondent, this court is therefore enjoined to make a determination on whether:

(a) There are indeed factual disputes in the matter.

(b) There is indeed a complete breakdown of the working relationship between the Applicants and the First Respondent.

(c) The breakdown is a result of a conduct that is unfairly prejudicial, unjust or inequitable effect to the Applicants and Second Respondent.

Applicable law and legal principles

[20] The application which has been instituted by the Applicants is governed by section 36 and section 49 the Close Corporations Act 69 of 1984. Section 36 of the Act reads as follows:

"(1) On application by any member of a corporation a Court may on any of the following grounds order that any member shall cease to be a member of the corporation:

(a) Subject to the provisions of the association agreement (if any), that the member is permanently incapable, because of unsound mind or any other reason, of performing his or her part in the carrying on of the business of the corporation;

(b) that the member has been guilty of such conduct as taking into account the nature of the corporation's business, is likely to have a prejudicial effect on the carrying on of the business;

(c) that the member so conducts himself or herself in matters relating to the corporation's business that it is not reasonably practicable for the other member or members to carry on the business of the corporation with him or her; or

(d) that circumstances have arisen which render it just and equitable that such member should cease to be a member of the corporation:

Provided that such application to a Court on any ground mentioned in paragraph (a) or (d) may also be made by a member in respect of whom the order shall apply.

(2) A Court granting an order in terms of subsection (1) may make such further orders as it deems fit in regard to—

(a) the acquisition of the member's interest concerned by the corporation or by members other than the member concerned; or

(b) the amounts (if any) to be paid in respect of the member's interest concerned or the claims against the corporation of that member, the manner and times of such payments and the persons to whom they shall be made; or

(c) any other matter regarding the cessation of membership which the Court deems fit."

[21] Section 49 of the same Act reads as follows:

"(1) Any member of a corporation who alleges that any particular act or omission of the corporation or of one or more other members is unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, or that the affairs of the corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, may make an application to a Court for an order under this section.

(2) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable as contemplated in subsection (1), or that the corporation's affairs are being conducted as so contemplated, and if the Court considers it just and equitable, the Court may with a view to settling the dispute make such order as it thinks fit, whether for regulating the future conduct of the affairs of the corporation or for the purchase of the interest of any member of the corporation by other members thereof or by the corporation.

(3) When an order under this section makes any alteration or addition to the relevant founding statement or association agreement, or replaces any association agreement, the alteration or addition or replacement shall have effect as if it were duly made by agreement of the members concerned.

(4) A copy of an order made under this section which—

(a) alters or adds to a founding statement shall within 28 days of the making thereof be lodged by the corporation with the Registrar for registration; or

(b) alters or adds to or replaces any association agreement, shall be kept by the corporation at its registered office where any member of the corporation may inspect it.

(5) ..."

[22] Nepgen J stated the following when discussing the application of section 49 in *De Franca v Exhaust Pro CC (De Franca Intervening)* 1997 (3) SA 878 (SECLD):

"Section 49 deals with the situation where conduct (an act or an omission) of the close corporation or one or more of its members, or where the manner in which the affairs of the close corporation are being conducted, is unfairly prejudicial, unjust or inequitable to a member of the close corporation. When this occurs such member may make an application to the Court for an order that will have the effect of "settling the dispute" (s 252 of Act 61 of 1973 provides for an order having the effect of bringing an end to the matters complained of"). As to what an applicant must establish, see Gatenby's case (supra at 124B – G). The Court has a wide discretion with regard to the order that it decides to make to bring about the required result (cf Gatenby's case supra at 122F – 123J). Such order can, however, only be made "if the Court considers it just and equitable" to do so." [1]

[23] Jones J extensively cited what was stated by Friedman J in *Garden Province Investment v Aleph (Pty) Ltd* [2] and which is as follows before making a finding as to the onus placed on the Applicant in a section 49 application:

"It seems to me that a minority shareholder seeking to invoke the provisions of section 252(1) of the Companies Act must establish not only that a particular act or omission of the company results in a state of affairs which is unfairly prejudicial , unjust or inequitable to him, but that the particular act or omission itself was one which was unfair or unjust or inequitable. Similarly, looking at the second part of the section, where the complaint relates to the manner of conduct of the business, it is the manner in which the affairs have been conducted as well as the result of the conduct of the business in that manner which must be shown to be unfairly prejudicial, unjust or inequitable. ….When one looks at the second part of the section it is stated explicitly that the manner in which the affairs of the company are being conducted must be shown to be unfairly prejudicial, unjust or inequitable. This conclusion seems to me also consistent with what has been said on a number of occasions with regard to the

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[1] *De Franca v Exhaust Pro CC (De Franca Intervening)* 1997 (3) SA 878 (SECLD) at 893 C - E
[2] Garden Province Investment v Aleph (Pty) Ltd 1972 (2) SA 525 (D) at 531 C - G

predecessor of this section, namely the previous 111 *bis*. Thus in the case of *Livanos Swartzberg and Others* 1962 (4) SA 395 (W) Cillie J said at 399:

"In any event it is not the motive for the conduct that the Court must look at but the conduct itself and the effect which it has on the other members of the company""

He then proceeded to conclude as follows:

"Section 49 places a similar onus upon a member of a close corporation who considers that he is being unfairly prejudiced."[3]

[24] Jali J held as follows in *Kanakia v Ritzshelf 1004 CC t/a Passage to India* when discussing the application of section 36 of the Act and the onus required for its invocation:

"The provisions of s 36 may be invoked by a member of the close corporation. A member who makes the application under s 36(1) bears the onus of proving that he is entitled to the relief which he seeks and it is incumbent upon him to place before the Court the necessary evidence not only to enable the Court to decide whether it should grant an order in terms of s 36(1)(a), (b), (c) or (d), but also to make any further order envisaged in s 36(2) (see Geaney v Portion 117 Kalkheuwel Properties CC and Others 1998 (1) SA 622 (T) at 631H-632A"[4]

[25] Preiss J held as follows in *Donaldson Investment (Pty) Ltd and Others v Anglo – Transvaal Collieries Ltd: SA Mutual Life Assurance Society and Another Intervening* with regards to onus:

"it seems to me that the new wording of s 252 means, at least, what was set out in some of the cases dealing with the old s111 bis, where the requirement was placed at the less stringent level. In my view, the application must establish a lack of probity or fair dealing, or a visible departure from the standards of fair dealing, or a violation of the conditions of fair play on which every shareholder is entitled to rely. …….The emphasis is upon the unfair ness of the conduct complained of. It must be the conduct which departs from the accepted standards of fair play, or which amounts to an unfair discrimination against the minority." [5]

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[3] Gatenby v Gatenby 1996 (3) SA 118 (ECD) at 124 G

[4] Kanakia v Ritzshelf 1004 t/a Passage to India 2003 (2) SA 39 (D) at 48 E

[5] Donaldson Investments v Anglo – Transvaal Collieries 1979 (3) SA 713 (WLD) at 722 E - G

[26] Jones J also states the following with regards to the object of section 49 of the Act:

"The object of s 49 is to come to the relief of the victim of the oppressive conduct. The section gives the Court the power to make orders "with a view to settling the dispute" between the members of a close corporation if it is just and equitable to do so. To this end the Court is given wide discretion. It may "make such order as it thinks fit", within the framework of either "regulating the future conduct of the affairs of the corporation" or "the purchase of the interest of any member of the corporation by other members thereof or by the corporation". These are far-reaching powers. One member can be compelled to purchase the interest of another at a fair price, whether he wants or not."[6]

[27] Nepgen J also stated the following when discussing the application of section 36 in *De Franca v Exhaust Pro CC (De Franca Intervening)*:

"Section 36 of the Act also deals with an application to Court by a member of a close corporation, but such member is not required to establish conduct of a nature referred to above when discussing s 49 of the Act, namely conduct affecting him. It is the carrying on of the business of the close corporation that must be affected, either by the existence of the circumstances envisage by ss (1)(a) or by conduct as described in ss (1)(b) and (1)(c). Subsection (1)(d), however, gives wide and virtually unlimited scope for the application of s 36 of the Act, the only limitation being the "just and equitable" requirement. The order that a Court can make in terms of s 36(1) of the Act is circumscribed, namely an order that a member shall cease to be a member of the close corporation. Once a Court decides that an order for such cessation of membership should be made, it has a discretion to make further orders referred to in s 36(2) of the Act. While a Court could, applying the provisions of s 49 of the Act, make an order compelling one member to purchase the interest of another, which would have the effect of such member's membership in the close corporation ceasing, that which would have to be established before this is done is quite different is quite different to what would have to be established under s 36 of the Act."[7]

[28] Bosielo J held as follows in *Smyth and Another v Mew*[8]:

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[6] Gatenby v Gatenby and Others 1996 (3) SA 118 (ECD) at 122 E-F
[7] De Franca v Exhaust Pro CC (De Franca Intervening) 1997 (3) SA 878 (SECLD) at 893 F - I
[8] 2010 (6) SA 537 (SCA)

"[25] It should be clear from the provisions of s 36(1) and (2), as quoted above, that the court retains a discretion, firstly whether to grant an order for the cessation of a member's interest in the corporation, and secondly as regards the disposition of such member's interest and the terms and conditions under which such disposition should occur.

[26]…Such discretion can only be exercised if there is sufficient information before the court to enable it to 'make such further orders as it deems fit' in regard to the matters referred to in s 36(2): *De Franca* at 896H; *Gearny at* 631H-I. The member who makes the application in terms of s 36(1) must place the necessary evidence before the court: see *Gearney* at 631 H and *Kanakia* at 48E-F."

[29] Turning to the question of whether there is a dispute of facts in this application, it is prudent to focus our mind the case of *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (AD), which is regarded as a locus classicus in setting out the approach to be adopted in determining matters involving factual disputes, Corbett JA, as he then was held as follows:

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. (see in this regard Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd, 1949 (3) SA 1155 (T), at pp 1163-5; Da Mata v Otto, NO, 1972 (3) SA 585 (A), at p 882 D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf. Petersen v Cuthbert & Co Ltd, 1945 AD 420, at p 428; Room Hire case, supra, at p 1164) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg. Rikhoto v East Rand Administration Board, 1983 (4) SA 278 (W), at p 283 E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the Associated South African Bakeries case, supra, at p 924 A)" [9]

[30] Heher JA held as follows in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [10] when dealing with dispute of fact:

"[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.

[31] The general rule as was stated by Van Wyk J in *Stellenbosch Farmer's Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) as follows:

[9] Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (AD) at 634H-635C

[10] 2008 (3) SA 371 (SCA)

"…where there is a dispute as to the facts a final interdict should only be granted in notice oof motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order…Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted"[11]

[32] There are however two exceptions to the above general rule and these exceptions are as follows:

> "1. In certain cases a denial by respondent of a fact which has been alleged by applicant may be insufficient to raise a real genuine or **bona fide** dispute regarding this alleged fact. If, in such a case, respondent has not availed itself of the right to apply for the deponent concerned to be called to be cross examined in terms of Rule 6(5)(g) of the Uniform Rules of Court, and the Court is satisfied as to the inherent credibility of the factual averment of applicant, it may proceed on the basis of the correctness of this averment and include it within the factual matrix upon which it determines whether applicant is entitled to the final relief sought. With regard to this exception, the meaning of a denial by respondent of a fact alleged by applicant which may be insufficient to raise a real, genuine or **bona fide** dispute of facts was set out in **Petersen v Cuthbert Co Ltd** 1945 AD 420 at 428-429 thus:
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> "The lessors say that they require the premises and state in detail the reasons for requiring them. The lessee admits in his affidavit that the questions whether the lessors require the premises for their own use and whether such requirement is reasonable are matters peculiarly within the lessor's own knowledge, yet he challenges most of the statements made by the lessors as to the difficulty and inconveniences due war conditions which arise under the present system of carrying on business. He cannot truly say that he denies statements made by the lessor, because he has no real knowledge of the facts, but he questions their truth and says the matter should be investigated in a trial action. Now this is not, in my opinion, a real dispute of fact, it is merely a suggestion that the difficulties and inconveniences have been exaggerated, and that the lessor's desire to make use of its own premises for conducting their business in their own ways is an unreasonable requirement. The answer to that contention is that the lessors have shown **prima facie** that they have good reason for requiring the premises for their own use. If the lessee wished to test the validity of their reasons by cross examination, he could have done so under the rules of court to which reference has been made'.
>
> See also **Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd**. 1949(3) SA 1155 (T) 1164.

[11] Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235E - G

> 2. By contrast, the second exception operates where a respondent's answer contains a denial of allegations which were so far fetched, so untenable that a court is justified in rejecting them on the papers. This is different to a case where respondent questions the truth of averments made by applicant in circumstances where he has no real knowledge of the facts. The second exception is designed to deal with a case in which respondent seeks to subvert the **Stellenvale** rule, namely where a respondent makes certain bald allegations or farfetched denials which are manifestly untenable, not supported by any evidence or reason and which have been designed simply to exploit the **Stellenvale** rule to the latter's advantage and to the determent of applicant whose factual averments cannot be attacked on any plausible basis. See also **South Africa Veterinary Council and Another v Szymanski** 2003 (4) SA 42 (SCA) at 50-51."[12]

The submissions of counsel for the Applicants

[33] To support his conviction that the Applicants are entitled to the relief sought, Applicants' counsel made the following submissions on behalf of the Applicants:

> [33.1] That following the execution of the partnership agreement, the First Respondent's active participation in the business waned, and he ceased fulfilling his obligations under the partnership agreement.
>
> [33.2] That the Respondent himself confirmed, on more than one occasion, that he was retiring from active involvement in the business due to ill-health.
>
> [33.3] That the admission of ill health and imminent retirement underscores the impracticability of any continued joint management of the affairs of the Second Respondent.

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[12] *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 152C-153C

[33.4] That the fact that the business relationship between the parties has broken down irretrievably justifies the relief sought in terms of section 36 and 49 of the Act. The deadlock between equal members has made it impractical for the Second Respondent to continue its business with both members as contemplated in section 36(1) of the Act. Section 49(1) of the Act empowers the Court to grant relief where a member's conduct is oppressive or unfairly prejudicial to the interests of another member.

[33.5] That evidence demonstrates that the First Respondent has persistently acted in a manner unfairly prejudicial to the Applicant's rights and interests as co-members of the Second Respondent and has breached the duty of utmost good faith owed both under the Act and the partnership agreement.

[33.6] That the actions of the First Respondent as detailed at paragraph 16 of this judgement breach the fiduciary duty imposed by section 42(2)(a) of the Act which places an obligation on members to act honestly and in good faith towards the corporation and such conduct in its very nature is unfairly prejudicial to other members of the Second Respondent.

[33.7] That the First Respondent's verbal assaults and uses demeaning language toward the Applicants during meetings and in front of staff were calculated to humiliate and undermine them, destroying any remaining trust necessary for joint business administration.

[33.8] That based on the above and what is contained in paragraph 16 of this judgement, the Applicants have established that the First

Respondent's conduct is unfairly prejudicial within the meaning of section 49(1) and that it is just an d equitable for the Court to order that the First Respondent cease to be a member of the Second Respondent and that his member's interest be acquired by the Applicants or the Second Respondent.

[33.9] That the relief sought will preserve the viability of the business, safeguard employment, and ensure that the Second Respondent continues under effective management while the liquidation of a solvent and profitable entity would, by contrast, be destructive and contrary to the equitable considerations underpinning section 36 and 49 of the Act.

[33.10] With regard to the issue of dispute of facts, the Applicants counsel submitted that the denials of fact made by the Applicants by the First Respondent is not such that they raise a real, genuine or bona fide dispute of fact. Applicant's counsel also submitted that the version of the Applicants in their respective affidavits are supported by contemporaneous documents, is logical and further supported by staff members of the Second Respondent whilst First Respondent's version is plagued by bare denials and illogical explanations, so his version stands to be disregarded as it is untenable and bereft of factual and legal substratum.

The submissions made by counsel for the First Respondent

[34] In opposing the relief sought by the Applicants, counsel for the First Respondent submitted as follows:

[34.1] That Applicants' application is for all intents and purposes stillborn as the Applicants have fallen desolately short in establishing a right to the relief sought. In fact, apart from its inherent shortcomings, the application is but a manifestation of a stratagem on the part of the Applicants to appropriate the business established by the First Respondent and his wife.

[34.2] That the application is fatally defective and stillborn for the following reasons:

[34.2.1] Apart from complaints about certain expletives which the First Respondent has used in the past, and certain acts committed on the part of his daughter whilst in the employ of the Second Respondent, the Applicants have failed, singularly, to advance any form of factual basis to justify the invocation of sections 36 and 49 of the Act as the authorities applicable to these provisions establish a high onus on the Applicants to succeed with the relief sought. The Applicants have most certainly failed to discharge this onus.

[34.2.2] Applicants seek final relief in their application. The legal principles applicable to final relief are therefore germane, as established in the *locus classicus* of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) ("the *Plascon-Evans* rule")

[34.2.3] In advancing their case, applicants have relied on secondary facts as opposed to primary facts, accordingly an underlying factual basis, other than conclusions, are relied upon.

[34.2.4] Firstly, applicants rely solely on secondary facts, namely their own misplaced inferences and conclusions, as opposed to primary facts, which would consist of evidence which the Honourable Court could rely upon to make a finding and to determine the veracity of the secondary facts.

[34.2.5] Without primary facts, the Honourable Court is left with respondent's conclusions alone, without evidence to support such conclusions.

[34.2.6] Therefore, applicants cannot obtain the relief they seek on that stated in their founding affidavit.

[34.2.7] The First Respondent advances both factual and legal grounds as a basis of opposition, and in so doing, establish numerous material factual disputes.

[34.2.8] Accordingly, even if the Honourable Court were to find that applicants have made out a case for the relief as sought in their founding affidavit, which is denied, the Honourable Court cannot come to applicants' assistance by virtue of the *Plascon-Evans* rule given the factual disputes.

[34.2.9] The only manner in which the Honourable Court can come to applicants' assistance is to find that the exceptions to the *Plascon-Evans* rule are germane. As is demonstrated hereunder, a finding of this nature cannot be made.

[34.3] What is more, and as will be demonstrated hereunder, applicants were aware of these disputes prior to the institution of their application and would therefore be hamstrung in seeking a referral for oral evidence under Uniform Rule 6 (5) (g). At the very least, applicants were made aware of the factual disputes at the time first respondent delivered his answering affidavit.

[34.4] That when the grounds of opposition raised on the part of the First Respondent are considered *in casu*, it cannot be said that the exceptions to the "Plascon-Evans rule" do not apply thereto.

Discussion and findings

[35] The elephant in the room in this application is whether there is indeed a dispute of fact which militates against this Court granting the relief sought by the Applicants in this matter. As stated somewhere in this judgement, a real, genuine and *bona fide* dispute of fact can only exist where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. Unfortunately, the First Respondent has made no effort to genuinely and unambiguously engage with the averments set out in the founding affidavit of the First Respondent but had resorted to denials not supported by facts,

reasons or specific details. This Court therefore finds that there is no genuine dispute of fact herein.

[36] Having made the above finding, this Court finds that the following are not in dispute:

[36.1] That First Applicant and First Respondent are members of the Second Respondent who hold 50% membership interest each in the Second Respondent.

[36.2] That the First Respondent injected capital into the business of the First Respondent while the Applicants would run the business of the Second Respondent, the business of the Second Respondent was essentially run by the Second Applicant as she had previous restaurant experience.

[36.3] That since the beginning of March 2023, the business relationship between the Applicants and the First Respondent with regards to the Second Respondent is regulated by the Partnership Agreement.

[36.4] That as a result of this agreement, the First Respondent became the Managing Director and head of acquisitions and relationships maintenance with suppliers and investors whilst the Second Applicant became the Operations Director and head of operations of the business of the Second Respondent including kitchen controls, stock controls, cash control, staff and any other activities required for the business to run effectively and profitably during trading hours, in line with her experience.

[36.5] The First Respondent had limited success while performing his duties in terms of the agreement and his general involvement in the business of the Second Respondent waned. He failed to carry out his responsibilities and devote himself to the progress and welfare of the Second Respondent. Even though the First Respondent sought to deny this fact he did not successfully do so, because the evidence that he sought to present as proof that he was performing his duties as required by the partnership agreement was only for the months of September, October, November and December 2024.

[36.6] That it later transpired that the First Respondent's non-performance was a result of PTSD that he was suffering from which had prompted him to consider retiring soon. The plan was that Janine would take over his responsibilities.

[36.7] That the First Respondent and Janine, who had absolutely nothing to do with the Second Respondent sought to interfere with the work of the Second Respondent when they called Second Respondent to a meeting and took issue with a post posted on her personal Facebook page wherein she invited her Facebook friends over to the business of the Second Respondent for a celebratory drink to celebrate the five-year milestone of the business of the Second Respondent. Janine insisted that the Second Applicant should be removed as a member of the Second Respondent for posting the said post without their consent.

[36.7] That the First Respondent also spoke condescendingly about the First Applicant in this meeting something that the Second Applicant did not take kindly to. The meeting did not end well as the Second Respondent proposed the dissolution of the partnership together with the Second Respondent and that one party buy the other out. Second Applicant's proposal was accepted by the First Respondent who also advised that he will consider an exit strategy for either party and revert at the end of the meeting. This was a clear acceptance by the First Respondent that the business relationship between the parties has broken down irretrievably. This acceptance was repeated at a subsequent meeting when the First Respondent acknowledged that things between the parties have gone "pear-shaped".

[36.8] That Janine and the First Respondent were in the practice verbally assaulting the Applicants, showing total disdain for the First or Second Applicant and belittling them in full view of staff members of the Second Applicant. This evidences that they never regarded the Applicants as equal partners despite this being so in terms of the agreement. This also clearly comes out of the Answering Affidavit of the First Respondent when he avers that "the Second Applicant was to be regarded as an Operations Director, and although we welcomed her input, she had no authority over the conducting of the of the Second Respondent's business whatsoever, as any decision pertaining to the Second Respondent would have to meet with my approval as its Managing Director". This was First Respondent's opinion however misplaced it is.

[36.9] That the First Respondent also interfered with the disciplinary proceedings which had been initiated by the Second Applicant with the assistance of the Second Respondent's labour consultant against the daughter of the First Respondent ("Josie") who was employed as a General Manager of the Second Respondent. Josie made herself guilty of untoward conduct of being rude to fellow employees of the Second Respondent, abusing alcohol during working hours at the restaurant among other things.

[36.10] That First Respondent also allowed Janine who had instructed the accountants of the Second Respondent to deny the Second Applicant access to the accounting records of the Second Respondent, to interfere in the operational matters of the Second Respondent.

[36.11] According to the Applicants, all of the aforegoing was a clear indication that the First Respondent and Janine had no intention of allowing the Second Applicant the leeway to perform her duties as head of operations without interference. This, *per se*, resulted in their business relationship becoming quickly toxic and intolerable. This, in turn, led to the Applicants becoming deeply concerned about the impact the rapid deterioration of the relationship is having on the successful business operations of the Second Respondent.

[36.12] As a result of the deterioration in business relationship between the Applicants and the First Respondent, the Applicants consulted their attorney who sent a letter with a settlement proposal to the First Respondent but nothing positive came out of the said letter.

[37] It clear from the undisputed facts outlined above that the business relationship between the parties to the partnership agreement has broken down irretrievably. It is also clear that all the parties to the partnership agreement are aware of this irretrievable breakdown as at least two attempts have been

made in order to bring the parties to the table have taken place and both of them have failed.

[38] The First Respondent has made it clear that he is not prepared to sit around the same table with the First Applicant in order to resolve whatever problems they have with each other amicably. It is therefore clear from the above set of facts that the parties to the partnership agreement have now reached a deadlock. It is a result of this deadlock that the Applicants have now turned to this Court for an appropriate relief.

[39] As previously stated somewhere in this judgement, a member seeking to invoke the provisions of section 36 of the Act, bears the onus of proving that he is entitled to the relief sought and it is incumbent on him to place before Court the necessary evidence not only to enable the Court to decide whether it should grant the order in terms section 36(1)(a) – (d), but to also make any further order envisaged in section 36(2) of the Act.

[40] Similarly, a member seeking to invoke the provisions of section 49 of the Act must establish not only that a particular act or omission results in a state of affairs which is unfairly prejudicial, unjust or inequitable to him or her, but that the particular act or omission itself was one which was unfair or unjust or inequitable.

[41] Based on the above requirements, it is the finding of this Court that the Applicants have managed to show that the First Respondent is permanently incapable as a result of his PTSD to perform his part in the carrying on of the business of the Second Respondent, that his conduct of interfering with the clearly defined roles of the Second Applicant while neglecting to perform his clearly defined roles is likely to have a prejudicial effect on the carrying on of

the business of the Second Respondent and that as a result of the aforementioned conduct it has now become not reasonably practicable for the Second Applicant to carry on the business of the Second Respondent with him. Moreover, this Court also finds that based on his conduct of interfering with the Second Applicant's defined role, protecting his daughter Josie who is accused of being rude to fellow employees, encouraging her to consume alcohol while on duty and allowing Janine to be clandestinely involved in the business of the Second Respondent even though she had no right to be, it is just and equitable that the First Respondent should cease to be a member of the Second Respondent and that his interest in the Second Respondent should be acquired by the Applicants. This order is made in line with section 36(1) and (36)(2) of the Act.

[42] Based on the same set of facts, this Court also finds that the Applicants have also succeeded in showing that the conduct of the First Respondent is unfairly prejudicial, unjust or inequitable to the Applicants in terms of section 49 of the Act in that despite the fact that the First Respondent plays no positive role in the welfare of the business, that he continuously interferes with the successful execution of the Second Applicant's duties and uses underhand tactics (such as instructing accountants of the Second Respondent not to furnish her with information relating to the business) to undermine her but still shares equally with the Second Applicant in the nett profits of the business.

[43] As previously stated somewhere in this judgement, the objective of section 49 is to come to the relief of the victim of oppressive conduct, it empowers the Court to make orders "with a view to settling the dispute" between the members of a close corporation if it is just and equitable to do so.

Therefore, and in line with this objective, it will be just and equitable for the First Respondent to sell his member's interest to the Applicants.

[44] In the circumstances, this Court grants an Order as follows:

1. The First Respondent shall cease to be a member of the Second Respondent;

2. The Applicants shall acquire and take transfer of the total member's interest held by the First Respondent in the Second Respondent, against payment of a purchase price representing a fair market value for the First Respondent's member's interest ("the purchase price"), which must be determined in the manner set out below, alternatively for a value as determined by this Honourable Court;

3. The purchase price shall be determined by:

   3.1 An expert practising as a professional accountant of at least 10 years' experience appointed by the Chief Executive Officer of the South African Institute of Professional Accountants ("the valuer");

   3.2 The costs of the valuer/receiver shall be borne by the Second Respondent;

3.3 The Applicants and First Respondent are ordered to cooperate with and to assist the said valuer/receiver in all respects (including the provision of all documentation and information requested by the valuer) in expeditiously producing the determination of the purchase price and or the partnership asset value;

3.4 In addition, the valuer is also hereby directed and/ or authorised:

3.4.1To determine whether the second respondent has any claim against the first respondent; and/or

3.4.2 To determine whether First Respondent has any claim against Second Respondent;

3.4.3 To take these amounts into account (make adjustments, deductions and/or apply set-off where possible) in determining the purchase price. Such amounts should be added to or subtracted from the purchase price;

3.4.4 Authorised in his or her sole discretion to call for and to receive oral and/or written representations from the respective parties;

3.4.5 Authorised in his or her sole discretion to call for and receive further documents or evidence and/or may him/herself undertake further investigations and enquiries and the parties are instructed to cooperate with the valuer in this regard. The valuer shall have the broadest possible powers in this regard.

3.5 The determination of the purchase price and net asset value of the Second Respondent shall be completed within sixty (60) days from the date of an order herein;

3.6 The Applicants shall forthwith pay the purchase price to the

First Respondent, whereupon the First Respondent shall, against such payment, take all steps necessary to effect transfer of his member's interest to the Second Applicant.

3.7 Against payment of the purchase price, the parties shall do all things necessary to effect transfer of the First Respondent's member's interest in the Second Respondent to the Second Applicant alternatively the Second Respondent.

4. The Sheriff of the above Honourable Court is hereby authorized to do all such things necessary for and on behalf of the Respondents including signing documents on their behalf, in order to give effect to the orders sought herein.

5. The First Respondent shall provide to the Applicants all the financial information and documents relating to the Second Respondent in his possession, including but not limited to all accounts and vouchers, the First Respondent shall cooperate with any audit or investigation pursuant thereto, whether conducted by the Applicants or any party.

7. The First Respondent to pay and/or compensate and/or restore to the Second Respondent any amount or benefit, held by any Court, to have been improperly paid to or misappropriated by First Respondent.

8. The First Respondent shall pay the party & party costs of this application inclusive of counsel's costs on … scale including the costs of the application of 15 May 2025.

TJ MGENGWANA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant:	Mr. G. Potgieter
	Cape Bar
Instructed by:	Matthews Enslin Inc.
For the First Respondent:	Mr. L. Zazeraj
	Cape Bar
Instructed by:	Rwasabisi Attorneys Inc.