



**In the High Court of South Africa
(Western Cape Division, Cape Town)**

Case No: 19605/2024

In the matter between:

Tom Gelderblom	First Applicant
Christopher Sauls	Second Applicant
Francois Marais	Third Applicant

and

The Sandown Bay Fishing Company (Pty) Ltd	First Respondent
Philippus May	Second Respondent
Rudolph Jantjies	Third Respondent
Adele Baadjies	Fourth Respondent
Elton May	Fifth Respondent
Erica Gillion	Sixth Respondent

Coram: ROUX AJ

Heard: 25 August 2025

Delivered: 30 April 2026

Summary: Unfairness for purposes of s 163 of the Act must be determined within the legal and contractual framework governing the company, including its memorandum of incorporation, any shareholders' agreement, and the applicable statutory and common-law principles of company law. As a general rule, it will not be unfair for the affairs of a company to be conducted in accordance with the strict legal rights arising from such instruments, even if the exercise of those rights prejudices a minority shareholder. This reflects the foundational premise that shareholders, by electing to operate through the corporate form, accept the consequences of majority rule and the binding force of the company's constitutional arrangements.

While it is not possible to formulate an exhaustive definition of the circumstances in which the enforcement of strict legal rights may nevertheless be unfair, the authorities recognise that equitable considerations may, in appropriate cases, temper their application. This is particularly so in closely held companies displaying features of a corporate quasi-partnership, where an informal arrangement based on mutual trust and confidence may inform the fairness enquiry. English law has established equitable rules in this area of the law from which South African courts have drawn in appropriate cases. In the premises, "unfairness" under section 163 does not denote some indefinite notion of fairness, but is an objective standard anchored in established company law principles.

ORDER

In the result, the following order is made:

(a) All banking transactions of the first respondent ("the company") shall require the authorisation of at least two directors, one of whom shall be either the first, second or third applicant, unless the company's shareholders by unanimous assent or an order of court direct otherwise. Such authority shall be exercised under the direction of the company's board of directors, which shall determine which directors are authorised to perform banking transactions.

(b) The second respondent is prohibited from participating in, or voting on, any board resolution relating to:

- (i) advances against remuneration, salaries and/or bonuses;
- (ii) loans or financial assistance made by the company to directors and/or shareholders and loans received by the company from directors and/or shareholders, including the approval of repayment of such loans;

unless the company's shareholders by unanimous assent or an order of court direct otherwise.

(c) Any resolution authorising payments contemplated in paragraph (b) shall not be valid unless:

- (i) full particulars of the proposed payment, including the amount, recipient, terms and basis therefor, have been disclosed to all directors in advance; and
- (ii) such resolution is supported by at least one of the applicants;

unless the company's shareholders by unanimous assent or an order of court direct otherwise.

(d) The second respondent is interdicted from performing any act on behalf of the company without the approval of the company's board of directors, unless the company's shareholders by unanimous assent or an order of court direct otherwise.

(e) The second, third, fourth, fifth and sixth respondents shall, within five business days of the date of this order, furnish the applicants with copies of the following documents for the period 28 February 2019 to date:

- (i) the company's bank statements, including in respect of the accounts held at ABSA with account numbers 4[...] and 9[...];

- (ii) booking records in respect of whale watching trips;
- (iii) cash receipts;
- (iv) records of daily and/or monthly commission payments to service providers;
- (v) records of daily and/or monthly income;
- (vi) general ledgers;
- (vii) the agreement concluded with Barloworld for the purchase of a new engine and gearbox.

(f) The company shall provide monthly financial reports to all directors, unless the company's shareholders by unanimous assent or an order of court direct otherwise.

(g) The second, third, fourth, fifth and sixth respondents shall, jointly and severally, the one paying the others to be absolved, pay the applicants' costs, including the costs of counsel on scale B.

JUDGMENT

A. INTRODUCTION

[1] This is an application for wide-ranging relief, mainly premised on section 163 of the Companies Act 71 of 2008 ("the Act").

[2] Each of the first, second and third applicants are shareholders and directors of the Sandown Bay Fishing Company (Pty) Ltd ("the company"). The second, third, fourth, fifth and sixth respondents are the other shareholders and directors of the company. All the shareholders have equal shares and enjoy equal voting powers. The company mainly conducts whale-watching charter operations. Essentially, the company owns a whale cruiser which provides whale-watching tours during the months of June to December. The company is cited as the first respondent.

- [3] It is common cause that each of the shareholders and directors has or had a specific role in the business. Mr Gelderblom, the first applicant, is the operations director, Mr Sauls, the second applicant, is a tour guide, Mr Marais, the third applicant, is a skipper, Mr May, the second respondent, is the managing director, Mr Jantjies, the third respondent, is a retired tour guide, Ms Baadjies, the fourth respondent, is a tour guide and administrative assistant, Mr A May, the fifth respondent, is a tour guide and Ms Gillion, the sixth respondent, was initially a general worker but currently works as a tour guide. For ease of reference, the second to sixth respondents shall be referred to as “the respondents”, whilst the company shall be referred to as such.
- [4] The legal relief sought under section 163 of the Act is a statutory claim, which like all causes of action, consists of certain elements or requirements which have to be alleged and proved in order to sustain such cause of action. In order to determine whether the factual allegations advanced by the applicants were relevant and of sufficient evidential weight to discharge the onus resting on them, the cause of action will be analysed first.
- [5] Thereafter, the relevancy and evidential weight of the facts advanced in support of the cause of action will be evaluated and determined. That includes the resolution of the factual disputes, whereafter the applicable legal principles will be applied to such factual allegations made by the applicants which are relevant and sufficiently cogent to support factual findings, and in respect of which the respondents have failed to create real disputes of fact.

B. THE CONSTITUTIVE ELEMENTS OF SECTION 163 OF THE ACT

- [6] Section 163(1) of the Act provides that:

“A shareholder or a director of a company may apply to a court for relief if—

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly

disregards the interests of, the applicant;
(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or
(c) the powers of a director or prescribed officer 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.”

- [7] The applicant must be a shareholder or director. This requirement is jurisdictional. It is common cause that the applicants are both directors and shareholders; accordingly this requirement has been satisfied.
- [8] The section identifies three categories of impugned conduct: a) an act or omission of the company or related person that has a specific result; b) the conduct of the company’s business that has a specific result; or c) the exercise of powers by directors or prescribed officers that has a specific result.
- [9] These categories are not mutually exclusive and often overlap. The central enquiry is whether the act, omission or conduct complained of has a result that is: a) oppressive, or unfairly prejudicial, or unfairly disregards the interests of the applicant. Accordingly, a causal link between the act, omission or conduct and the prejudice must therefore be established. These are disjunctive grounds. Proof of any one suffices.
- [10] Oppression denotes conduct that is burdensome, harsh, and wrongful or which involves an element of lack of probity or fair dealing or a visible departure from the standards of fair dealing.¹
- [11] The concept of a result that is ‘unfair prejudicial’ to the interests of applicant, introduces an objective standard and comprises two requirements. First, the impugned conduct must be prejudicial. Save in extremely exceptional circumstances, such prejudice will be commercial prejudice.² Where such

¹ Aspek Pipe Co (Pty) Ltd v Mauerberger 1968 (1) SA 517 C- quoted with approval in Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and others 2016 JOL 35404 WCC.

² Technology Corporate Management (Pty) Ltd and others v De Sousa and others 2024 (5) SA 57 SCA at para 80;

exceptional circumstances are present, consideration must be given to the obiter dictum of the SCA in the matter of **Grancy Property Ltd v Manala and others 2015 (3) SA 313 SCA** at para 26, where it expressed its support for a construction of section 163 that advances the remedy that it provides rather than limit it. Second, applicants must show that the prejudice to their interests has occurred unfairly. It is self-evident that the concept 'interests' is much wider than strict legal rights.³

[12] Similarly, conduct that unfairly disregards the interests of the applicant comprises both the effect of such conduct, namely a disregard for the interests of the applicant and the objective evaluation whether such effect has been brought about unfairly.

[13] The concept of unfairness, although objective in its focus, is not to be considered in a vacuum.⁴ An assessment that an act, omission or conduct is unfair has to be made against the legal background of the corporate structure under consideration.

[14] The relationship between a company and its members, as well as the members inter se, is contractual and based primarily on the memorandum of incorporation (formerly the memorandum and articles of incorporation).⁵

[15] In addition, it is common practice for shareholders to enter into shareholders' agreements in terms whereof they agree as to the manner and purpose for which the powers of the company and its directors, arising from the memorandum of incorporation ("the MOI"), will be exercised. Unless such a qualification of the powers of the company and its directors is in direct conflict with the MOI, it is permissible.⁶ Furthermore, such an agreement may be subject to tacit terms which may be necessary to give it business efficacy.⁷

[16] Furthermore, by agreeing to conduct their business through the vehicle of a company, the parties by operation of law subject themselves to the applicable

³ Technology Corporate Management (supra) at para 26.

⁴ Grace-v-Biagioli, Titanium Electrode Products Ltd. Re [2006] BCC 85.

⁵ Technology Corporate Management (supra) at para 75.

⁶ Gihwala and others v Grancy Property Ltd and others 2017 (2) SA 337 SCA at para 45-54.

⁷ Gihwala (supra).

provisions of the Act, as well as all applicable common law provisions and company law rules,⁸ the most pertinent of which in the present matter being the company law provisions concerning the validity of shareholders' and directors' meetings and decisions taken at such meetings, the fiduciary and legal duties of the company's directors and the rules of 'majority supremacy' and 'business judgment'. Insofar as the powers of directors are concerned, it is trite that the exercise of any power conferred on them must be exercised in good faith, for a proper purpose and in the best interests of the company. Directors must also avoid a conflict of interest and must communicate at the earliest opportunity to the board any information that they reasonably believe is relevant to the company.⁹ In addition, directors are under a duty to act with the care, skill and diligence that may reasonably be expected of a person carrying out their functions and having regard to their general knowledge, skill and experience.

[17] The fiduciary duty of directors to act in the best interests of the company, together with their legal duty to exercise care, care, skill and diligence, is qualified by the business judgment rule, as given expression to in section 76(4)(a) of the Act 71. That provision affords directors a measure of protection where, in taking a decision, they have complied with the prescribed requirements. In terms of s 76(4)(a), a director will be regarded as having satisfied the duties contemplated in s 76(3)(b) and (c) if the director took reasonably diligent steps to become informed about the matter, had no material personal financial interest (or properly disclosed such interest), and had a rational basis for believing, and did believe, that the decision was in the best interests of the company.

[18] It follows that, in determining whether a director has complied with these duties, a court is not concerned with the correctness or commercial wisdom of the decision. The enquiry is a limited one. In this regard, courts are slow to substitute their own judgment for that of directors acting within the ambit of their powers.¹⁰ Commercial decisions - typically involving the weighing of risks, costs

⁸ Gihwala (supra) at para 61.

⁹ Visser (supra) at para 58; section 76 of the Act.

¹⁰ Visser (supra) at para 64; Howard Smith Ltd v Ampol Petroleum Ltd [1974] UKPC 3 at p7-8, or [1974] AC 821 (PC).

and potential returns, or a choice between competing commercial strategies or options - constitute business judgments. Provided such decisions are taken within the bounds of the directors' powers, on an informed basis, and are supported by a rational belief that they serve the company's best interests, a court will not undertake a reconsideration of their merits, nor will it determine which of several reasonable alternatives ought to have been preferred.

[19] The company law rule of 'majority supremacy' is one of the fundamental rules of company law. The principle of the supremacy of the majority is essential to the proper functioning of companies. In terms of this principle, where the alleged wrong constitutes an irregularity in the conduct of the company's affairs and does not infringe a personal right of a shareholder,¹¹ the proper plaintiff is the company itself, and it is ordinarily for the majority of shareholders to determine whether the company should pursue, abandon, or ratify the impugned conduct. Courts will accordingly be reluctant to interfere at the instance of a minority shareholder in circumstances where the matter complained of falls within the competence of the majority and is capable of ratification by ordinary resolution, provided such ratification is not itself unlawful or contrary to public policy, and does not constitute a fraud on the minority.¹² Such fraud occurs where the wrongdoers are guilty of dishonest or unlawful conduct or attempting to appropriate or have appropriated to themselves property or opportunities to which the company is entitled or in which other shareholders are entitled to participate, and the wrongdoers are themselves in control of the company. Thus, if a transaction can be made binding on the company by a simple majority of shareholders, and that majority does not want to take action against a director or directors for a breach of duty or irregularity in relation to it, the majority can, as a general rule, waive the breach or ratify the irregular acts of the director or directors, unless an exception to such rule is applicable. There is no reason in principle why such ratification should be raised as a mere

¹¹ *Communicare* (supra).

¹² *Communicare v Khan* (12/2012) [2012] ZASCA 180 (29 November 2012) at para 4, and 10-17;

theoretical possibility. However, in a given case and subject to sufficiently strong evidence, the probability of such ratification may be a relevant factor.¹³

[20] An exception arises where the conduct complained of infringes a shareholder's personal rights, or where the Act provides for remedies. In this context, section 163 provides a remedy for oppression or unfairness and section 165 provides a derivative action in respect of wrongs done to the company. In such circumstances, judicial intervention may be warranted notwithstanding the general rule of non-interference in internal management.

[21] In *Sammel v President Brand Gold Mining Co Ltd*¹⁴ Trollop JA defined the rule of 'majority supremacy' as follows:

"By becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions of the shareholders are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder (cf. secs. 16 and 24). That principle of the supremacy of the majority is essential to the proper functioning of companies."

[22] The regulation of the relationship between shareholders and the company and between members inter se through strict legal rights leaves limited scope for mitigating the potential harshness that may result from the enforcement of such rights. It is trite that open-ended standards such as fairness and reasonableness do not operate as free-standing rules in the law of contract. They are best deployed as tools that perform creative, informative and controlling functions that underlie and inform the substantive law of contract.¹⁵

[23] In this context, the legislature has intervened through section 163 of the Act (and its predecessors) by introducing fairness as an objective statutory standard against which the conduct of a company and its directors may be

¹³ *Tianrui (International) Holding Company Ltd (Appellant) v China Shanshui Cement Group Ltd (Respondent) (Cayman Islands)* [2024] UKPC 36.

¹⁴ 1969 (3) SA 629 A at 678H.

¹⁵ *Beadica 231 CC and others v Trustees, Oregon Trust and others* 2020 (5) SA 247 CC at para 73.

assessed. The importation of equitable principles into the realm of company law - where the relationships among shareholders are regulated primarily through the MOI and shareholders' agreements - gives rise to an inherent tension between the enforcement of strict legal rights and the discretionary amelioration of their effects through statutory fairness-based relief under s 163.

[24] This tension is reflected in the development of the jurisprudence in this area, which has been strongly influenced by English law. Similar statutory remedies in English company law evolved from partnership principles, under which the exercise of strict legal rights could be restrained where their enforcement would be contrary to good faith in relationships of mutual trust. These principles were later extended to company law, particularly in relation to small, domestic companies operating in substance as quasi-partnerships.¹⁶

[25] In the oft-quoted¹⁷ case of **Ebrahimi v Westbourne Galleries Ltd**¹⁸ Lord Wilberforce explained, in the context of a winding-up on the "just and equitable" ground, that company law may recognise personal relationships between shareholders involving mutual confidence and trust which are not entirely submerged in the company structure, as defined by the Companies Act and by its articles of association. He cautioned that considerations of equity do not entitle a shareholder to disregard the statutory regime or the articles of association by which shareholders agree to be bound. Equity, in this context, operates to mitigate the strict application of legal rights where their enforcement would, in the particular circumstances, be unjust. He further cautioned that the mere fact that a company is small does not, without more, justify the importation of equitable considerations; there must be some additional feature, such as a relationship of mutual trust and confidence, an understanding of participation in management, or restrictions on the transfer of shares, such that loss of confidence renders the continuation of the relationship unfair.

[26] The Supreme Court of Appeal in **Technology Corporate Management (supra)** identified two recurring factual situations that frequently ground claims of unfair

¹⁶ *Technology Corporate Management (supra)* at para 82.

¹⁷ *Apco (supra)* and numerous other cases.

¹⁸ *Ebrahimi v Westbourne Galleries Ltd* 1973 AC 360 HL.

prejudice by minority shareholders. First, where there is a tacit or informal understanding that shareholders will contribute labour or capital and participate in management, and a shareholder is later excluded - whether by removal, dismissal, or marginalisation - from fulfilling such a role. In such cases, the exclusion itself may constitute unfair prejudice.¹⁹ The second situation identified concerns minority shareholders who are effectively “locked in” and unable to realise their investment in the absence of a share disposal mechanism.

[27] The Supreme Court of Appeal reaffirmed that shareholders may regulate their relationship through a memorandum of incorporation or a shareholders’ agreement, and that it is not ordinarily unfair to conduct the affairs of a company in conformity with those instruments. The Court, however, drew a distinction between, on the one hand, overriding an otherwise lawful exercise of a right on account of the manner in which it was exercised - particularly with reference to an informal arrangement or understanding between shareholders²⁰ - and, on the other, conferring rights beyond those agreed or imposing obligations which were not consented to by the other shareholders.²¹ It follows therefore that an applicant ought not to be denied relief merely because the company or its directors acted within the bounds of their strict legal rights, if it is established that the manner in which such rights were exercised, when viewed in light of the shareholders’ informal arrangement or understanding, renders the effect thereof oppressive or unfairly prejudicial to the interests of the applicant or has the effect of unfairly disregarding the interests of the applicant.

[28] In the premises, in such cases the applicant must establish the existence of a corporate quasi-partnership based on an informal arrangement of trust/confidence, including the nature and scope of the arrangement and any variation thereof. This might be an arrangement regarding participation in the management or concerning the dividend policy or remuneration.²² It important to emphasize that the reference to a corporate quasi-partnership does mean that the parties relationship is altered to that of partners. They have chosen to

¹⁹ Technology Corporate Management (supra) at para 87-91.

²⁰ Technology Corporate Management (supra) at 82 and 90.

²¹ Technology Corporate Management (supra) at para 93-94.

²² Visser (supra) at para 61-62.

the vehicle of a company to operate their business and remain bound by the corporate form they have chosen and by the provisions of the Companies Act and the company's constitutional documents.

[29] Having regard to the aforesaid, "unfairness" for purposes of s 163 of the Act must be determined within the legal and contractual framework governing the company, including its memorandum of incorporation, any shareholders' agreement, and the applicable statutory and common-law principles of company law. As a general rule, it will not be unfair for the affairs of a company to be conducted in accordance with the strict legal rights arising from such instruments, even if the exercise of those rights prejudices a minority shareholder. This reflects the foundational premise that shareholders, by electing to operate through the corporate form, accept the consequences of majority rule and the binding force of the company's constitutional arrangements.

[30] While it is not possible to formulate an exhaustive definition of the circumstances in which the enforcement of strict legal rights may nevertheless be unfair, the authorities recognise that equitable considerations may, in appropriate cases, temper their application. This is particularly so in closely held companies displaying features of a corporate quasi-partnership, where an informal arrangement based on mutual trust and confidence may inform the fairness enquiry. English law has established equitable rules in this area of the law from which South African courts have drawn in appropriate cases. Such equitable rules remain a valuable fountain of knowledge and experience. In the premises, "unfairness" under section 163 does not denote some indefinite notion of fairness, but is an objective standard anchored in established company law principles.

C. THE RELEVANT FACTS AND CIRCUMSTANCES

[31] The applicants alleged that during August 2022 Mr May paid salaries which were not authorised. It was also alleged that the amounts paid, as reflected in the bank accounts, were at odds with the amounts reflected in the company's UIF reports. In support of the said allegation the applicants attached the bank statements of the company for the end of August 2022 and the UIF reports for the month of June 2022. It was also alleged that the payments did not match the salaries.²³

[32] Having regard to the aforesaid, the applicants compared the bank statements for the end of the month of August 2022 with the UIF report for the month of June 2022. No reason was given for the failure to compare the bank statements for the same month as that of the UIF report or vice versa. It may be inferred, in favour of the applicants, that the figures for the months of June and August 2022 would have remained unchanged. However, even if one assumes that it did, it is of no assistance to the applicants.

[33] The bank statements reflect a number of payments made as salaries in the amount of R53 432.28, as well as a few smaller payments. It must be noted that the said figures were not listed in the founding affidavit. Accordingly, the said factual allegations suffer from two shortcomings. First, it is trite that if a party wishes to rely on facts or information stated in an annexure, that such facts or information must be stated in the affidavit itself. Second, the failure to do so means that the facts or information stated in the annexures have not been confirmed under oath. However, even if one looks past such defects, the figures in the UIF reports do not appear to be at odds with the payments reflected in the bank statements, as alleged by the applicants. The UIF report reflects payments of salaries in the amount of R75 000. Although not dealt with in the papers, it is rather obvious that the UIF report reflects the gross amount payable as salary, whereas the bank statements reflect the net amounts payable. Furthermore, although not dealt with in the papers, a rough calculation of the PAYE tax payable on the said amounts, plus the UIF contribution payable, appears to be a plausible explanation for the difference in the two

²³ Par 23 of the founding papers.

amounts. Quite remarkably, this obvious difference was not dealt with at all in the papers, and the Court was left on its own to analyse these factual issues. In this sense, it is not necessary for the Court to make definitive factual findings on this point. It suffices to state that the evidence does not support a finding that there is in fact an inconsistency between the salaries reflected in the bank statements and the UIF report.

[34] The applicants' further statement that the payments did not match the salaries payable is also of no evidential value. First, it is uncertain whether the said statement is tied to the obvious error made, as explained hereinabove. Second, it amounts to a conclusion of a fact stated in a way which does not allow the Court to test the correctness thereof. The Court does not know if it is based on a comparison with the amounts paid for salaries the previous months, and if so, no reason was given why the Court was not placed in possession of such simple evidence.

[35] Furthermore, Mr Gelderblom's statement that the payment of the salaries was not authorised is inconsistent with the other evidence. Mr Gelderblom acknowledged that he and Mr May differed about the use of company profits. Mr May was of the view that it should be paid as increased salaries or bonuses. Although not stated, such an approach has obvious tax benefits and cannot be rejected as irrational without any objective evidence to the contrary. Mr Gelderblom further acknowledged that he wanted to put into place so-called operational systems and wanted cash reserves to be preserved, which means he wanted to retain profits for operational use. Notably, he did not state for what potential use and did not refer to any directors' meeting at which he tabled such a proposal. More importantly, it can be inferred from the aforesaid facts, that the company in the past paid out its profits as salaries and bonuses, but that Mr Gelderblom wanted to stop that practice, which means Mr May, in paying higher salaries to match the company profits were acting in accordance with past practices.

- [36] The practice is confirmed by the minutes of the company meetings, that is both at the level of shareholders and directors. In this regard, it appears that the meetings of the company do not show a clear distinction between the two forms of meetings, and decisions are taken at both directors' and shareholders' level irrespective of the name given to the meeting. For instance, the meeting dated 14 February 2023 is described as an annual meeting of the company, but included decisions about the day-to-day activities of the company, such as expenses to be incurred for the service of the company bakkie and the appointment of employees, which are classical directors' decisions.
- [37] Notably, the shareholders all confirmed that they signed letters confirming the salaries received. The loans made by each to the company were also confirmed. Accordingly, it appears to have been the practice that salaries were paid in accordance with confirmatory letters signed by each director and shareholder. As such, it appears decisions concerning the payment of salaries were dealt with informally through confirmatory letters. Notably, Mr Gelderblom did not address this informal practice, which may be indicative of an established course of dealing in which the directors acquiesced.²⁴
- [38] Furthermore, although Mr Gelderblom did not attend the meeting, the second applicant, Mr Sauls, did. Although it does not appear that the issue concerning the payment of such salaries was placed on the agenda for the meeting, nothing precluded Messrs Sauls and Gelderblom from insisting that the said issue be tabled at such meeting or any one thereafter. As it is, a number of directors' meetings took place thereafter. It is instructive that it does not appear from the minutes of any such meeting that Mr Gelderblom, or any other director, raised an objection to such unauthorised salary payments. It also bears mentioning that each of the directors received the same salary payment and none has demanded that any such payment be repaid or that steps be taken against Mr May for his alleged unauthorised conduct or insisted that he should cease from such unauthorised conduct.

²⁴ Wolpert v Uitzigt Properties (Pty) Ltd 1961 (2) SA 257 W at 267.

[39] It is trite that the business and affairs of a company are managed by or under the direction of the board of directors. Hence, Mr Gelderblom was expected to act through the board to address the alleged unauthorised conduct of Mr May, but failed to do so. He probably did not adopt this course as he knew he would not have obtained a majority vote on the issue.

[40] Furthermore, at the directors at the meeting held on 13 December 2023, it was resolved that the budget proposed by Mr Gelderblom for payments to be made in December 2023 was approved, and that any remaining funds would be paid to the shareholders before the end of the 2024 financial year. Accordingly, it appears that Mr Gelderblom, quite some time following the payments made in August 2022, was afforded an opportunity to table a decision concerning the company's budget for December 2023, which decision was approved. Furthermore, at the same meeting, the directors agreed to distribute the remaining company profits to the shareholders, which appears to be consistent with the established practice of not retaining company profits but to distribute it to the shareholders. It is not clear whether the payments would be made as salaries or dividends. Irrespective, consistent with the established practice the board, which comprised Mr Gelderblom and the other applicants, resolved not to retain the company's profits, but to distribute them, a fact conveniently left out by Mr Gelderbom in his founding papers.

[41] Accordingly, the evidence does not support a finding that such payments were unauthorised. To the contrary, the evidence shows that such payments were received by the directors, who through their conduct in retaining such payments within the context of an established course of dealing and practice of directly or indirectly distributing profits to the shareholders, acquiesced therein.²⁵

[42] Moreover, there is no evidence that Mr May was seeking to advance his own interests, as oppose to the interests of the company, in making such payments, or otherwise acted with an improper purpose or irrationally. Accordingly, Mr

²⁵ *Runciman v Walter Runciman* [1992] BCLC 1084 at 1092d; *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316 at para 83-84.

Gelderblom seeks to invoke the provisions of section 163 on what appears to be a bona fide dispute whether the company should retain its profits or use it to fund increased salaries or bonuses. Such decisions are regarded as commercial decisions. Courts are not called upon to substitute such decisions with their own views. Such decisions will also not be interfered with, unless the decision-making process is defective.²⁶

[43] The second factual issue raised by Mr Gelderblom relates to the purchase of a new engine for the whale cruiser to replace the old engine. Many objections were raised concerning this transaction.

[44] It is alleged that such purchase was not authorised and that despite request, the applicants were not provided with the minutes of the meeting where the alleged decision was taken. However, they do concede that such minutes were subsequently provided to them.

[45] The allegation that such purchase was not authorised is contrary to the further allegations made by Mr Gelderblom. In this regard, he also alleged that the decision to purchase the engine was made without due consideration by the respondents of the applicable technical and mechanical requirements and whether it was the most practical and economical fit. It is alleged that Mr May admitted he did not know about such requirements. Most significantly, it is alleged that the third to sixth respondents did not consider those aspects when they voted in favour of Mr May's proposal to accept the Barloworld quote for the purchase of the new engine. It is self-evident that Mr Gelderblom, in making such allegations, has admitted that the third to sixth respondents voted in favour of accepting Barloworld's quote. The said admission is destructive of the applicants' submission that the resolution only authorised the negotiation of the purchase of a new engine, but not the conclusion of the contract itself.

²⁶ Section 76(4) of the Act; *Howard Smith Ltd v Ampol Petroleum Ltd and others* [1974] AC 821 (PC).

[46] It appears from the minutes of the meeting of the directors held on 16 February 2023 that the directors resolved to acquire a new engine and that they were waiting for the quotation from Barloworld. They expressly resolved that the acquisition of a new engine from Barlow World had to be subject to certain favourable repayment terms, namely the payment of a deposit and the balance through instalments only commencing in the new season.²⁷ It bears emphasis that it was recorded that such agreement had to be concluded with Barloworld. Accordingly, the minutes support an interpretation that the new engine had to be purchased from Barloworld, subject to such favourable terms. The said interpretation is consistent with the applicants' understanding of the pertinent resolutions contained in such minutes, as evidenced by the admission made. Notwithstanding, the applicants in their replying affidavit persisted in making the allegation that the purchase was not authorised by the directors, without adducing any evidence to attenuate the evidential weight to be accorded to their admission made.²⁸ It was even submitted that Messrs Gelderblom and Marais attended the meeting held on 16 February 2023, although that appears to be an error.

[47] It was contended on behalf of the applicants that the terms of the contract concluded with Barloworld were never put to the directors for approval. The submission assumes that unless every director has familiarised themselves with the terms of a contract, the approval of such contract by the board of directors is not valid. The said contention is contrary to established authority and is inconsistent with the ordinary practice of boards. The situation could have been different had the applicants protested against such approval without being afforded the opportunity to consider such terms and to state their views at a meeting of the board with the view to influence the outcome of the decision to be made.²⁹ This was however not the case which the applicants set out to make.

²⁷ Rec: 144

²⁸ Rec: 221

²⁹ *Novick and another v Comair Holdings Ltd and others* 1979 (2) SA 116 W; *Transcash SWD (Pty) Ltd v Smith* 1994 (2) SA 295 C; *Rentokor (Pty) Ltd and others v Rheeder and Berman NNO and others* 1988 (4) SA 469 T at 495-496.

[48] It bears mentioning that it is evident from annexure “**TG4**” that Mr May only on 27 February 2023 accepted Barloworld’s quote. The applicants did not rely on this fact in support of their argument that the quote was never authorised by the board of directors. Had it not been for the admission made by Mr Gelderblom that the third to sixth respondents voted to accept the quote, I would have been inclined to prefer an interpretation that the resolution taken on 16 February 2023 only authorised the material repayment terms on which Barloworld’s quote could be accepted, and not the acceptance of the quote itself in advance.

[49] The respondents have denied the allegations made by Mr Gelderblom concerning the purchase of the engine. They have positively alleged that the applicants have elected not to attend the meeting held on 16 February 2023. The said allegation was not disputed in reply.³⁰ Furthermore, the respondents have alleged that Mr Gelderblom was dishonest in alleging that the applicants only became aware of the decision to purchase the engine in March 2023. Accordingly, on the respondents’ version, which is not disputed in reply, the applicants were given notice of the said meeting, but elected not to attend. In the circumstances, based on the application of the Plascon-Evans rule, the said factual disputes are decided on the respondents’ version. Accordingly, it is held that the applicants were given notice of the meeting but elected not to attend and they knew about the decisions taken at such meeting before receiving the payment notification in March 2023.

[50] It is instructive that the applicants have not complained that the notice of the meeting was insufficient or inadequate. Accordingly, it is accepted that the applicants received adequate notice of the meeting held on 16 February 2023,

³⁰ Rec: 184, 225. It does appear from annexure “**TG42**” that Mr Gelderblom on 8 February 2023 informed the other directors and shareholders through their whatsapp platform that he would be leave the area of Western Cape for a few days, and a result requested that the meeting to be held on 16 February 2023 be postponed to 7 March 2023 (Para 109 on p46). It is not clear from the said request whether he would still have been outside the Western Cape on the 16th of February 2023. No allegation to that effect was made. Accordingly, it remained his choice not to have attended. The applicants are legally represented and it is presumed that they would have known the significance of such a factual scenario in the context of company law (See: Majola Investments (Pty) Ltd v Uitzigt Properties (Pty) Ltd 1961(4) SA 705 T at 710-711). Moreover, it appears that the whatsapp exchanges related to the annual meeting to be held on 14 February 2023. However, this apparent error was not corrected by the applicants and the Court’s left with what appears to be an inconsistency left unexplained.

but chose not to attend. As a result, they were afforded the opportunity to persuade the majority of their views, but chose not to do so. In the circumstances, they cannot seriously complain that they were never consulted about the purchase of such engine. Furthermore, their complaint about the respondents' alleged failure to have considered the applicable technical and mechanical requirements and whether the engine was the most practical and economical fit, cuts both ways. It means that Messrs Gelderblom and Marais, who claim they have some knowledge of such requirements and knew that expert opinion of such matters had to be obtained, failed to provide the board of directors with such information.

[51] The same considerations are applicable to the allegation that the new engine comes with a gearbox, which implies that the new engine is not suited for the current gearbox. It is also not clear what the significance is of the said allegation. Is it alleged that they should have purchased an engine which is compatible with the existing gearbox, or is it presented as proof that the engine is not compatible with the cruiser at all, or is it both? Accordingly, at best their evidence established that the decision to purchase the engine required expert opinion and that the respondents failed to obtain such opinion.

[52] The weight to be accorded to such finding is however not without difficulty. First, the applicants chose not to impart their knowledge on these issues to the other directors, which may ground an argument that they failed to exercise the required care and diligence. Second, the respondents in fact obtained a quote from Barloworld, which implies that the relevant employee of Barloworld considered the engine to be suitable and fit for purpose. The Court can take judicial notice of the fact that Barloworld is a large corporation and therefore has the capacity to supply suitable engines and to employ suitably qualified persons to carry out quotes for the supply of such engines. In the circumstances, it is likely that the person who prepared the quote at the very least represented to possess some expert knowledge which enabled him or her to carry out the quote. Third, the applicants are of the view that the whale cruiser does not need a new engine, but that a major service, either entailing a

complete engine overhaul or a remanufactured engine, at a cost of about R1.5 million, would have sufficed. Mr Gelderblom estimated that the new engine was purchased for about R3 169 815, that is based on the 20% deposit paid in the amount of R633 963.56. Accordingly, it appears to be common cause that the company cannot carry on with the current engine. It either needs to be replaced with a new engine or be completely overhauled or remanufactured.

[53] Notwithstanding the aforesaid, the applicants still considered it appropriate to contend that Mr May's assertion that there was nothing wrong with the current engine, which statement he made to explain why the whale cruiser did not require a comprehensive service, as oppose to a normal service, due to the fact that the new engine was about to arrive, implies that there was no need to purchase a new engine. The said contention is not supported by the facts, which show that the company was faced with two choices, that is to either purchase a new engine or to completely overhaul or remanufacture the current engine.

[54] The respondents, however, did not present any evidence in support of their bare denial of the applicants' allegations concerning the lack of information about the suitability and fitness of the engine purchased. The respondents' bare denial of these allegations does not raise any genuine dispute of fact. In this regard, the respondents merely stated that on these matters they held different views. However, they failed to state their particular view, and, more importantly, they failed to disclose the facts supporting such view, which in effect amounts to a bare denial. They have personal knowledge of the facts and considerations they in fact took into account and those they did not take into account. In the circumstances, they were required to meet Mr Gelderblom's allegations with more than a bare denial and this issue falls to be decided on the applicants' version. Accordingly, it is found that the respondents failed to obtain information about the suitability and fitness of the engine purchased. However, for the reasons stated, the weight to be accorded to the applicants' version is doubtful. It is for instance entirely possible that the company suffered no loss or damage as a result of the aforesaid failure, in the sense that an independent expert may

confirm that the engine is indeed suitable and fit for purpose and was acquired at a market-related price.

[55] Furthermore, the question arises what the legal consequences of such failure is. The applicants contend that the facts alleged, inter alia, justify an order setting aside the agreement concluded between the company and Barloworld for the purchase of the new engine. However, it is trite and pretty straightforward that a court cannot set aside a contract without notice to the other contracting party. Such a party clearly has a direct and substantial interest in the order sought. In fact, the order seeks to take away or destroy such party's contractual rights. It is manifestly unsound to seek such an order without notice to the other contracting party. Had such notice been given, it is expected that Barloworld would have disputed such relief on the basis that the parties had concluded a valid contract and should be kept to their contractual promises. Accordingly, the relief sought is fundamentally flawed and had no realistic chance of succeeding.

[56] Moreover, the applicants have failed to advance a factual or legal basis for such relief. In particular, it is not expressly stated on what basis such relief would be sought. It is assumed that the applicants would challenge the agreement on the ground that it was allegedly not authorised. However, on the available evidence such a claim has very little, if any, prospects of success. At best for the applicants it could be alleged that Mr May, the managing director of the company who was authorised to obtain a quote from Barloworld and to negotiate certain terms, was not authorised to accept the quote without approval from the company's board of directors. However, it is common cause that Mr May is the managing director of the company and that he communicated to Barloworld the company's assent to the quote. In the circumstances, it is doubtful on what basis the company would be able to overcome a defence based on the ostensible authority of Mr May to have accepted such quote on behalf of the company.³¹ The applicants have not even

³¹ One Stop Financial Services (Pty)Ltd v Neffensaam Ontwikkelings (Pty) Ltd and another 2015 (4) SA 623 WCC.

attempted to address this issue, which is the most obvious obstacle in their way.

[57] It is also not alleged that the respondents exercised their decision-making power to accept the Barloworld quote for an improper purpose or that they were in any way influenced by mala fides. Notably, Mr Gelderblom under oath stated that annexure “**TG3**” is a copy of his query about what the large payment was for. That means, on his own version, upon making an inquiry, Mr May disclosed the true reason for the payment. Hence, there was no attempt to conceal the nature of the payment. However, and unfortunately typical of the manner in which the applicants chose to present evidence in this matter, annexure “**TG3**” has no bearing on the purchase of the engine and does not constitute proof of any query about a large payment made.

[58] Furthermore, in the absence of expert evidence it is impossible to determine whether the purchase of the engine was in the best interests of the company. No allegation was made to the effect that there was any conflict of interest at play. Accordingly, the facts do not support any finding that the respondents breached their fiduciary duties owed to the company. At best for the applicants, the facts potentially ground an argument that the respondents breached their legal duty to act with the care, skill and diligence that may reasonably be expected of directors in their position, that is by not obtaining expert advice in regard to the purchase of the engine. However, in the same breath, the facts potentially ground an argument that the applicants, having regard to their knowledge, skill and experience, breached their duty owed to the company to act with the care, skill and diligence that may reasonably be expected of them, by not informing the respondents of the fact that expert advice was required in regard to the purchase of the engine. However, for the reasons stated, the evidence is insufficient to establish that any such potential breach caused the company any loss or damage. Furthermore, even if it were to transpire that the company did suffer loss or damage, that would constitute a wrong suffered by the company itself. In such circumstances, it is for the company to decide whether to pursue a remedy. Should it fail to do so, and if the facts support a

derivative action, section 165 of the Act would be available to the applicants to ameliorate any resulting unfair prejudice.

[59] In the circumstances, I am of the view that the facts do not support a finding that the decision taken by respondents, in their capacities as directors, to purchase a new engine from Barloworld in accordance with the quote obtained and without the input of expert opinion, constituted unfairly prejudicial conduct or conduct that unfairly disregarded the applicants' interests.³²

[60] The applicants also complain that they, despite request, have not been provided with a copy of the hire purchase agreement, and that the documents which have been provided to them contain clauses which they deem harmful to the company. In this regard, no real factual dispute has been created concerning the respondents' failure to have provided the applicants with all documents pertaining to the hire purchase agreement. The said failure is inexcusable. It is self-evident that the applicants cannot discharge their oversight duties as directors without being provided with such documentation. The respondents' refusal to do so has not been explained and raises serious questions about their willingness to comply with their legal and fiduciary duties. Section 76(2)(b) of the Act obliges a director to do so. Section 76(2)(b) appears to be a restatement of the common law fiduciary duty to disclose information that is material to the company, in particular the fair dealing rule. The fair dealing rule requires a director to reveal information which is likely to influence the company's decision in a particular matter.³³ As Hoffman J observed in **In re TR Technology Investment Trust Plc [1988] BCLC 256**, at 276: **"the company, through its existing board, is given the unqualified right to insist that contests for the hearts and minds of shareholders are conducted with cards on the table"**. The same principle is applicable to directors, who must ensure a fair contest at board level by disclosing all material information at the earliest practicable opportunity.

³² Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and others 2016 JOL 35404 WCC at para 58-66.

³³ Novick v Comair Holdings Ltd 1979 (2) SA 116 W at 153.

[61] The applicants' complaint that Mr May's acceptance of the quotation, on the basis that payments would be made as and when funds became available, constitutes reckless conduct and creates the impression that the company is financially distressed is without merit. To the contrary, if such favourable terms were accepted by Barloworld, which is doubtful, Mr May would have secured exceptionally favourable terms for the company - a result that ought to be commended rather than deprecated.

[62] The applicants' third complaint relates to an allegation that they were given short notice of a shareholders' meeting. It is alleged that the respondents failed to give the applicants adequate notice of the annual general meeting held on 23 April 2024. Notice was furnished on 12 April 2024. The applicants objected on the basis of short notice, but their objection was rejected. They accordingly elected not to attend, and the meeting proceeded in their absence. Section 62(1)(b) requires that notice of a shareholders' meeting be delivered at least 10 business days before the meeting. The notice afforded the applicants 11 days' notice, four of which fell over weekends.

[63] The respondents denied any irregularity and stated that, although Messrs Gelderblom and Marais did not attend, Mr Sauls was present and agreed that the meeting could proceed on the basis that it was quorate and properly constituted. Reliance was placed on annexure "**TG40**", said to be the minutes of the meeting. In reply, the applicants admitted Mr Sauls' attendance but denied that he voted, and contended that annexure "**TG40**" does not record any voting.

[64] Unfortunately, both parties' failed to engage accurately with the facts. Annexure "**TG40**" records the minutes of a meeting held on 14 February 2023. The complaint, however, concerns the meeting of 23 April 2024. The annexure is thus irrelevant to the dispute.

[65] Despite this, the applicants admitted that Mr Sauls attended the meeting, confining their challenge to the absence of any recorded voting. In doing so, they failed to appreciate that annexure "**TG40**" does not support the

respondents' version at all. The admission must therefore be approached with caution: it may reflect a correct concession, coupled with a misapprehension as to the annexure, or it may have been induced by that misapprehension.

[66] In either event, the respondents' version that Mr Sauls attended cannot be rejected as far-fetched or untenable. Applying the Plascon-Evans rule, the dispute falls to be resolved in their favour. It is accordingly accepted that Mr Sauls attended the meeting of 23 April 2024.

[67] In these circumstances, the complaint of short notice does not avail Mr Sauls for purposes of relief under section 163.

[68] Messrs Gelderblom and Marais (and Mr Sauls) contend that the short notice prejudiced them in that they lacked sufficient time to prepare.³⁴ The allegation is devoid of evidential substance. Prejudice is a conclusion that must be supported by primary facts. In their absence, the court cannot assess whether the conclusion is justified.³⁵

[69] Moreover, section 163 requires a showing of conduct that is oppressive, unfairly prejudicial, or that unfairly disregards the interests of the applicant. While such prejudice will often be financial, it is not confined thereto. In the present matter, however, the bare assertion of prejudice, unsupported by factual material, carries no weight.

[70] Furthermore, in the absence of any evidence of prejudice, the failure to have given adequate notice is an example of conduct of an irregularity which may be ratified by the majority of shareholders. Accordingly, in the context of this matter, such short notice does not advance the applicants' case.

³⁴ In their written objection the applicants also raised other issues. However, such issues were not referred to in the founding affidavit.

³⁵ *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* (3413/02) [2002] ZAWCHC 53; [2003] 1 All SA 164 (C); 2003 (4) SA 207 (C) (3 October 2002)

[71] The applicants' next complaint relates to the company's financial statements for the 2022 financial year. Mr Gelderblom alleges that those statements recorded a loan in favour of Mr May arising from the purchase of certain equipment. It is alleged that Mr May initially purchased the equipment in his personal capacity with a view to reselling it at a profit, but was defrauded by the seller. Thereafter, he allegedly asserted that the purchase had been made on behalf of the company and that the amount constituted a loan due to him. The company subsequently repaid the amount. The applicants contend that neither the purchase nor the repayment was authorised, and deny that Mr May was entitled to treat the transaction as a loan to the company. They maintain that the loss was personal to Mr May.

[72] The respondents denied these allegations. Mr May stated that Mr Sauls attended the annual general meeting held on 14 February 2023, at which the shareholders unanimously approved the financial statements for 2022. Those statements reflected a loan by Mr May in the amount of R100 000. The minutes of that meeting, annexed as "**TG40**", record that the financial statements were unanimously approved and that the loans made to the company were confirmed by the shareholders present. The reliance on annexure "**TG40**" also explains the earlier confusion concerning the meeting of 23 April 2024.

[73] Significantly, Mr May did not engage with the allegation that he suffered a personal loss through a fraudulent transaction and thereafter procured that the amount be reflected as a loan to the company. These are matters within his personal knowledge. A bare denial in the face of such allegations is insufficient to create a genuine dispute of fact. Accordingly, the applicants' version on this issue prevails.

[74] On the applicants' version, Mr May effectively procured, by way of a majority vote, that his personal loss of R100 000 be borne by the company. Such conduct constitutes an impermissible use of his position and influence. Reliance on a majority resolution cannot legitimise conduct that is otherwise unlawful or in breach of fiduciary duties. The effect of the transaction was to shift Mr May's personal loss to the company, and thus indirectly to the other

shareholders. That is plainly prejudicial to Messrs Gelderblom and Marais. The fact that Mr Sauls, according to the minutes, supported the resolution does not detract from the prejudicial effect of the conduct.

[75] The applicants did not seek specific relief in respect of the repayment of the R100 000. Nevertheless, it is apparent that the financial statements reflected the amount as a loan by Mr May. In terms of section 30(3) of the Act, annual financial statements must be approved by the board. Accordingly, Mr May, in his capacity as a director, participated in the approval of financial statements that recorded a personal loss as a liability of the company, and thereafter presented such statements to the shareholders. In doing so, he purported to rely on majority approval for what is an improper re-characterisation of the transaction, which constitutes a material breach of his fiduciary duties as a director.

[76] The next complaint concerns a resolution adopted at a directors' meeting held on 15 June 2023, in terms of which Messrs Gelderblom and Sauls were removed as signatories on the company's ABSA bank account, and Mr Gelderblom was removed as a person authorised to do internet banking transactions. Mr Gelderblom alleged that the established practice was that Mr May would load payments and that he would authorise them.

[77] Mr May disputed this. He alleged that Mr Gelderblom had unilaterally, and without notice, altered the company's banking profile so as to require his authorisation for all internet transactions. He further stated that the minutes of the directors' meeting of 15 June 2023 accurately record the reasons for the decision. Those minutes reflect that Messrs May and Sauls attended at the bank to enquire about the changes, and that the bank advised that such changes could only have been effected by two authorised signatories.

[78] Significantly, Mr Sauls did not deal with these allegations in reply. It is improbable that he would have attended at the bank to investigate changes if such changes were authorised. In the absence of any explanation from him, Mr May's version cannot be rejected as far-fetched or untenable. Applying the

Plascon-Evans rule, this issue must be determined on the respondents' version. It follows that Mr Gelderblom altered the company's banking arrangements without proper authority.

[79] In reply, Mr Gelderblom alleged that the notice of the directors' meeting misrepresented the agenda. This contention is not borne out by the notice, which expressly referred to changes to authorised signatories. It also listed internet banking as an item. Given the relatively small size of the company and Mr Gelderblom's operational role, and his prior conduct in altering the company's internet banking arrangements and his refusal to make a certain payment or payments, he would have understood the import of those items. Given the emergence of two clearly defined camps, and the fact that the applicants acted collectively in objecting to the meeting, there can be little doubt that Mr Gelderblom would have articulated and justified his position to the other two applicants. Accordingly, the applicants' complaint that the notice was misleading is without merit.

[80] The applicants further contend that they were afforded insufficient time to prepare for the meeting. What constitutes reasonable notice of a directors' meeting is a fact-specific enquiry. It depends on the nature of the business, the relationship between the directors, and the urgency and subject matter of the proposed deliberations. Past practices are also relevant. In the context of a small, closely held company, where directors are engaged in the day-to-day management of its affairs, formalities are often attenuated, and shorter notice will ordinarily suffice - particularly where the issue to be considered is not novel, but one with which the directors are already familiar.

[81] Decisions affecting control over a company's banking facilities are, by their nature, capable of requiring urgent attention, given the potential for immediate financial prejudice. In the present matter, the issue had already arisen and been engaged with: Mr Gelderblom had altered the company's internet banking arrangements and had formed the view that a certain payment or payments should be refused. The meeting was thus convened against the backdrop of an existing and live dispute, rather than to introduce a new matter requiring

extensive preparation. In these circumstances, and having regard to the exigencies of the situation, the notice afforded to the applicants cannot be said to have been unreasonable.

[82] The next complaint concerns a number of advances made to directors against their salaries, without any prior deliberation or authorisation by the board of directors. An amount of R60 000 was paid to Ms Gillion, the sixth respondent, and R15 000 to Ms Baadjies, the fourth respondent, as advances on anticipated special bonuses. These payments were made during the off-season, at a time when it was uncertain whether the company's profits in the forthcoming season would be sufficient to sustain them.

[83] The respondents did not engage with these allegations, but contented themselves with a bare denial. Such a denial, in respect of matters falling within Mr May's personal knowledge, does not give rise to a genuine dispute of fact. Accordingly, it is found that Mr May made all these payments without any authority and in breach of the Act and the MOI, thereby unlawfully excluding the applicants from the management of the company.

[84] The advances must also be viewed against the backdrop of a prior dispute concerning the retention of profits as opposed to their distribution to shareholders. Although the existence of an established practice of distributing profits has been accepted, the payment of advances in anticipation of profits constitutes an impermissible extension of that practice. Unlike a distribution of realised profits, such advances expose the company - and, indirectly, the applicants - to the risk that the anticipated profits may not materialise. In these circumstances, Mr May would have known that he was likely to have faced some opposition from the applicants, but chose to exclude them. In the absence of any explanation, such conduct is clearly unfairly prejudicial to the applicants' interests. It is also disconcerting that the respondents, in the face of legal proceedings under section 163, chose not to provide any particulars regarding such payments or who, apart from Mr May, purported to authorise them. Such failure, in itself, constitutes a breach of their statutory and fiduciary

duty to communicate material information to the other directors at the earliest practicable opportunity.

[85] An allegation was made concerning further advances against salaries, but no supporting particulars were provided. The Court was simply referred to the bank statements. Such an approach to the presentation of evidence is generally impermissible for two reasons. First, where a party seeks to rely on a specific portion of an annexure, that portion must be clearly identified in the affidavit. Second, where reliance is placed on the truth of a fact contained in an annexure, that fact must be set out in the affidavit itself; failing this, it does not constitute evidence under oath.

[86] In the present instance, it may be contended that the reference to advances against salaries sufficiently identifies the relevant entries in the bank statements. Having regard to the respondents' failure to engage with these allegations, a more flexible approach to the evidence is warranted. On a proper consideration of the bank statements, it appears that advances against salaries were made on five occasions, totalling R55 000. The payment of such advances, absent deliberation and authorisation, attracts the same criticism as that set out above and constitutes conduct that is unfairly prejudicial to the applicants' interests.

[87] The applicants further alleged that Mr May fully repaid all directors' loan accounts without any deliberation or authorisation by the board of directors. Mr May did not engage with these allegations. The payments were made during November 2022 and in total amounted to about R580 000. For the same reasons stated hereinabove, such conduct is unfairly prejudicial to the interests of the applicants. It may be contended that the effect of such conduct is not prejudicial in the sense that all directors' loan accounts were paid in full. However, the said payments included the R100 000 personal loss which Mr May suffered, referred to hereinabove, and which he unlawfully converted into a company expense which he alleged to have paid on behalf of the company. Furthermore, the company is entitled to the collective wisdom of the board, which is clearly being undermined by Mr May's conduct.

[88] The applicants noted on the directors' WhatsApp group that a substantial payment was made on 12 December 2023 in the amount of R1 383 468.88. It appears from the screenshot of the messages that notification of the payment was posted on the directors' WhatsApp group, and that Mr Gelderblom immediately requested an explanation for the transaction. No response was received from any of the respondents. The respondents failed to engage with these allegations; accordingly, no genuine dispute of fact is raised. The conduct in question is subject to the same criticism set out above and is unfairly prejudicial to the applicants' interests.

[89] It is to be noted that the applicants all attended the directors' meeting held on 13 December 2023, as evidenced by annexure **"TG44"**. It does not appear from the minutes that the issue of the substantial payment was raised. It is difficult to understand why this was not queried at that meeting, which took place only one day after the payment had been made. In terms of section 73 of the Act, meetings of the board are to be convened in accordance with the requirements of the MOI, and must be conducted in a manner that enables the board to fulfil its statutory function of managing the company's affairs.

[90] Against that backdrop, it cannot be said to be in the company's interests to impose rigid procedural constraints that unduly inhibit the convening of directors' meetings, including an inflexible requirement of seven days' notice or a prescribed agenda in all circumstances. Commercial reality requires a degree of flexibility to enable boards, particularly in small closely held companies where directors are also operationally involved, to respond to urgent developments as they arise. Equally, the effective discharge of directors' duties under section 76 of the Act would be undermined if meetings could only be convened on short notice in narrowly defined exceptional circumstances, or if discussion of pressing commercial issues were constrained by overly formalistic agenda requirements. Properly construed, the statutory framework requires a balance between procedural fairness and commercial efficacy. The relief sought by the applicants, in requesting an amendment of the MOI providing for seven business days' notice and with a properly described

agenda, unless exceptional circumstances direct otherwise, unduly emphasises formality at the expense of the board's ability to respond to urgent and material business considerations.

[91] The next complaint relates to the applicants' request for a number of documents, including the annual financial statements, bank statements, booking records, cash receipts, commission records, daily management sheets for income and general ledgers. It is trite that directors, particularly in the context of small companies where they are all, or almost all, operationally involved, must take such steps as are reasonably necessary to obtain all material information for the discharge of their fiduciary and legal duties. Correspondingly, directors who are in possession of such information and documents are obliged to make them available as soon as is reasonably practicable.

[92] Furthermore, in the context of section 163 proceedings, which import equitable considerations, the relationship between members of companies operating as corporate quasi-partnerships, such as the present, is subject to an implied obligation that the parties act towards one another in good faith, which includes a duty to cooperate.³⁶ Accordingly, the respondents were under a duty to disclose and make available the information and documents requested. It is no answer to contend that the applicants could have searched for such documents at the company's premises, particularly where they had informed the respondents that they were unable to locate the documents there.

[93] In this regard, the facts demonstrate that the applicants were not furnished with all the documents and information requested, and where such documents were furnished, Mr May did not always do so within a reasonable time. On 12 July 2023 the applicants, through their attorneys, requested the book in which all minutes of meetings are kept, the financial statements for the past three years,

³⁶ The applicants failed to raise this point explicitly. However, in the context of the matter, the common cause facts clearly support such a finding. The parties are equal shareholders with equal votes as directors; they all performed a role in the company and was employed as such (until retirement); they failed to regulate their relationship through a shareholders' agreement and adopted the standard MOI; all of which facts point to an informal arrangement of trust.

and the notices and minutes of meetings where certain decisions were made. The said decisions relate to Mr May's appointment as managing director, a decision that no decision would be taken without notice to all directors, the payment of the sum of R100 000 (the alleged loan), the payment of the deposit to Barloworld and the appointment of Mr Hansen and particulars about his duties and salary. The applicants also requested the reasons for the decision to remove Messrs Gelderblom and Sauls from the control of the company's banking. No response was received.

[94] On 14 August 2023, Mr Gelderblom requested an explanation for certain large payments, namely six payments totalling approximately R1 400 000. No response was received. Notably, Mr Gelderblom was only able to make these enquiries because he had access to the relevant bank statements.

[95] On 18 August 2023, a further demand was made in which it was contended that the deposit paid to Barloworld was unlawful and should be recovered; that the appointment of Mr Hansen was unlawful and should be set aside; that the removal of Messrs Gelderblom and Sauls from control over the company's banking should be reversed; that the decision requiring all directors to be kept apprised of company decisions should be reinstated; that the sum of R100 000 should be repaid to the company; that a budget should be prepared; and that the applicants' legal costs should be paid. It bears mentioning that, at the directors' meeting held on 13 December 2023, the board approved the implementation of a budget prepared by Mr Gelderblom. Mr May responded to the demand on 1 September 2023 and explained, with reference to the Act, why he believed that the meeting held on 15 June 2023 complied with the applicable provisions of company law. He further reiterated that Mr Gelderblom was removed as a person authorised to conduct banking transactions on behalf of the company due to his unilateral and unlawful alteration of the company's banking arrangements, which enabled him to refuse payments. He did not respond to the other demands.

[96] It is further alleged that, since November 2023, Mr Gelderblom has been requesting copies of the cash receipts and commission records. The

respondents have, however, failed to provide these documents. Mr Gelderblom states that he was unable to account for approximately R700 000 in cash and annexed calculations in support of this contention. Those calculations are not explained in the affidavit and their evidential value is therefore limited. At best, they demonstrate that Mr Gelderblom applied his mind to the issue and sought to substantiate his concerns regarding a lack of accountability in respect of cash receipts in the approximate amount of R700 000.

[97] It is, however, apparent that the respondents did furnish bank statements for the period December 2023 to February 2024 to Mr Sauls at his residence in response to an email request.

[98] On 5 February 2024, the applicants, through their attorneys, made a request in terms of section 26 of the Act for the notices and minutes of all shareholders' and directors' meetings, as well as the annual financial statements for the years 2022 and 2023. On 19 February 2024, Mr May furnished the requested documents, save for the minutes of the meeting held on 13 December 2023, which he stated were not available. The applicants' attorneys complained that the response lacked formality and was incoherent and not chronological. Such complaints are not consistent with a duty of cooperative engagement.

[99] The respondents did not take umbrage at the applicants' unnecessarily formalistic approach and, through their attorneys, again responded to the section 26 request on 6 March 2024. These exchanges demonstrate a breakdown in trust between the parties. Mr Gelderblom alleged that Mr May failed to furnish him with the minutes of all meetings. However, he did not identify any specific meeting in respect of which minutes were not provided. In the absence of such particularity, the allegation is too vague and generalised to sustain a factual finding.

[100] On 13 March 2024, Mr Gelderblom requested the company's expenses file for the period June to December 2023, indicating that previous requests had gone unanswered. He also requested the book recording cash receipts and payments, including commission records and the petty cash book for the 2023

whale season, as well as proof of various other payments totalling approximately R160 000. No response was received. On 19 March 2024, Mr Gelderblom informed Mr May that he had attended at the company's offices to search for the requested documents, without success. No response was received.

[101] Mr May did not meaningfully engage with these allegations. He merely denied them and asserted that they demonstrated that Mr Gelderblom had, in fact, received the requested documents, thereby revealing a pattern of dishonesty on the part of the applicants. This contention is without merit and misconceived.

[102] Mr May was under a statutory and fiduciary duty to provide such information and documentation to his co-directors as soon as reasonably practicable. Furthermore, in the context of the parties' quasi-partnership relationship, to which section 163 gives equitable effect, he was also under a duty to act in good faith and to cooperate. These duties were breached in at least two respects.

[103] First, certain requests for documents and information were simply ignored, including in the answering papers. Such conduct effectively excludes the applicants from participation in the management of the company and constitutes a classical example of unfairly prejudicial conduct as contemplated in section 163.

[104] Second, the procurement of material information and documentation ought not to be unduly onerous. Requiring persistent demands for access to basic financial information is inconsistent with the duties imposed by section 76 of the Act and with the obligation of cooperative governance. It is important to emphasise that this issue is determined with reference to the respondents' duties as directors. It is trite that directors are not generally obliged to furnish reasons for their decisions to shareholders, and that shareholders' rights of access to information and documentation are limited. However, the duties of directors owed to their co-directors are of a different nature.

[105] Mr Gelderblom's objection that Mr Hansen's appointment was unlawful is not supported by the evidence. It appears from the minutes of the shareholders' meeting held on 14 February 2023 that his appointment as a guide was approved by a majority of the shareholders, including Mr Sauls. In the absence of any allegation that the meeting was not properly constituted, Mr Gelderblom is bound by the resolution adopted by the majority.

[106] Mr Gelderblom has not articulated the grounds for his contention that the appointment was unlawful. The only apparent basis for this contention must be gleaned from annexure "TG34", namely that discussions with Mr Hansen took place prior to the meeting and that he was not privy thereto. This contention is without merit.

[107] It is further alleged that Ms May was appointed on a temporary basis to stand in for Ms Gillion during her maternity leave. However, upon Ms Gillion's return, Ms May remained employed without any deliberation or decision by the board. The respondents did not engage with the said allegations. Such conduct amounts to the exclusion of the applicants from participation in the management of the company and is unfairly prejudicial to their interests.

[108] Mr Gelderblom also referred to an incident in which there was a dispute as to whether the whale cruiser was fit to take passengers into open sea conditions, as well as the most appropriate and efficient method of addressing a leak. These are plainly commercial decisions involving the selection of the best option from among competing alternatives. Such business judgments are not susceptible to judicial review.

[109] Lastly, Mr Gelderblom objected to the installation of new floors at the office. Although the directors at the meeting held on 16 February 2023 resolved to obtain quotes for such installation, it is alleged that the quote was never presented to the board for approval. Mr May denied the said allegation. However, in amplifying his denial, it is clear that Mr May solely relies on the approval to obtain a quote and did not address the pertinent issue, namely that the quote itself was not presented for deliberation and approval by the

board. Accordingly, also in this instance May has unlawfully excluded the applicants.

D. CONCLUSION

[110] In the premises, and for the reasons set out above, the applicants have established that the company, acting through the majority shareholders and directors comprising the second to sixth respondents, has unfairly prejudiced and disregarded the interests of the applicants. Similarly, the applicants have established a right to delivery of the documents identified in the notice of motion.

[111] Furthermore, for the reasons set out above, the applicants have failed to establish a case for the amendment of the MOI and for the setting aside of the agreement concluded with Barloworld for the purchase of a new engine.

[112] The applicants seek an order removing Mr May, the second respondent, as a director. This Court has wide powers under section 163 of the Act. Such powers must be exercised with the objective of restoring fairness in the circumstances of the case, rather than punishing wrongdoing. In the circumstances, intervention is required in relation to the following powers of the directors:

- (a) the authority to perform banking transactions on behalf of the company;
- (b) resolutions concerning the approval of advances on remuneration, salaries and bonuses, as well as the approval of loans to and from directors and/or shareholders and the repayment of such loans;
- (c) the furnishing of financial information.

[113] Insofar as costs are concerned, there is no reason why costs should not follow the result. Although the respondents acted unfairly within the meaning of section 163 of the Act, I am not convinced that their conduct justifies a punitive

costs order. The dispute arose in the context of parties who, for years, cooperated without difficulty and together achieved substantial success. In the midst of a breakdown in their relationship of trust, they have unfortunately lost sight of that prior success and made errors of judgment.

[114] In the result, the following order is made:

(a) All banking transactions of the company shall require the authorisation of at least two directors, one of whom shall be either the first, second or third applicant, unless the company's shareholders by unanimous assent or an order of court direct otherwise. Such authority shall be exercised under the direction of the company's board of directors, which shall determine which directors are authorised to perform banking transactions.

(b) The second respondent is prohibited from participating in, or voting on, any board resolution relating to:

- (i) advances against remuneration, salaries and/or bonuses;
- (ii) loans or financial assistance made by the company to directors and/or shareholders and loans received by the company from directors and/or shareholders, including the approval of repayment of such loans;

unless the company's shareholders by unanimous assent or an order of court direct otherwise.

(c) Any resolution authorising payments contemplated in paragraph (b) shall not be valid unless:

- (i) full particulars of the proposed payment, including the amount, recipient, terms and basis therefor, have been disclosed to all directors in advance; and
- (ii) such resolution is supported by at least one of the applicants;

unless the company's shareholders by unanimous assent or an order of court direct otherwise.

(d) The second respondent is interdicted from performing any act on behalf of the company without the approval of the company's board of directors, unless the company's shareholders by unanimous assent or an order of court direct otherwise.

(e) The second, third, fourth, fifth and sixth respondents shall, within five business days of the date of this order, furnish the applicants with copies of the following documents for the period 28 February 2019 to date:

- (i) the company's bank statements, including in respect of the accounts held at ABSA with account numbers 4[...] and 9[...];
- (ii) booking records in respect of whale watching trips;
- (iii) cash receipts;
- (iv) records of daily and/or monthly commission payments to service providers;
- (v) records of daily and/or monthly income;
- (vi) general ledgers;
- (vii) the agreement concluded with Barloworld for the purchase of a new engine and gearbox.

(f) The company shall provide monthly financial reports to all directors, unless the company's shareholders by unanimous assent or an order of court direct otherwise.

(g) The second, third, fourth, fifth and sixth respondents shall, jointly and severally, the one paying the others to be absolved, pay the applicants' costs, including the costs of counsel on scale B.

W ROUX
ACTING JUDGE OF THE HIGH COURT

Appearances:

For applicants: Adv McChesney.

Instructed by: L Weakley of Vorster & Steyn Inc.

For respondent: Adv Moolla

Instructed by: D Smit of TSP Inc.