REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) NOT REVISED.

02 November 2026

SIGNATURE DATE

CASE NUMBER: 27286/15

In the matter between:

OPPRESSED ACSA MINORITY 1 (PTY) LTD	First Applicant
UP-FRONT INVESTMENTS 65 (PTY) LTD	Second Applicant
UP-FRONT INVESTMENTS 64 (PTY) LTD	Third Applicant
and	
AIRPORTS COMPANY SOUTH AFRICA SOC LTD	First Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
MINISTER OF TRANSPORT	Third Respondent
PYBUS THIRTY-FOUR (PTY) LTD	Fourth Respondent
AIRPORTS MANAGEMENT SHARE INCENTIVE SCHEME COMPANY (PTY) LTD	Fifth Respondent
LEXSHELL 342 INVESTMENT HOLDING (PTY) LTD	Sixth Respondent
TELLE INVESTMENTS (PTY) LTD	Seventh Respondent
ADR INTERNATIONAL AIRPORTS SOUTH AFRICA (PTY) LTD	Eighth Respondent
G10 INVESTMENTS (PTY) LTD	Ninth Respondent

Heard: 26-27 May 2025

Delivered: 02 November 2026

J U D G M E N T

YACOOB, J:

INTRODUCTION

[1] The first and third applicants are minority shareholders in the first respondent ("ACSA"). They, together with the second applicant, seek relief in terms of s 163 of the Companies Act ("the Act"),[1] declaring that ACSA and its majority shareholder (the second and third respondents, "Government" and "the Minister" respectively) have engaged in conduct that unfairly prejudiced them, and seeking the purchase of their shares at a fair value determined in a specific manner. The first to third respondents contend that the applicants have not shown that they have been unfairly prejudiced, and that, in any event, the consequential remedy sought cannot be granted.

[2] The first and second applicants brought the application on the basis that they are, together with the fourth, seventh and ninth respondents, empowerment shareholders in ACSA. After the application was issued, it emerged that a transfer of shares from the third to the second applicant that had been requested had not been effected by ACSA. An application was brought to join the third applicant as a result, and this order was granted without opposition on 26 May 2026. At the time of hearing, the second applicant was not, and never had been a shareholder, although it is unclear whether the process to transfer the shares to it is still being pursued. Where I refer to the applicants, this means the first and third applicants.

[3] Government is the majority shareholder of ACSA, holding 74.6% of its shares. The Minister is the designated "Shareholding Minister" in terms of s 3 of the Airports Company Act ("ACSA Act"),[2] and, amongst other things, exercises the rights attached to Government's shares on its behalf. The remaining respondents

[1] 71 of 2008.
[2] 44 of 1993.

are minority shareholders.[3] No relief is sought against them and they do not participate in these proceedings. Where I refer to the respondents collectively, this means the first to third respondents. I shall refer to the second and third respondents collectively as Government, since they are not notionally separated in the context of this case.

[4] All the shareholders other than Government[4] procured shares in ACSA in 1998, as part of the first phase of an intended divestment. The eighth respondent was at the time majority owned by an Italian entity, and purchased its 20% of the shares as a "strategic equity partner" ("SEP"). The applicants and the fourth, seventh and ninth respondents procured their shares when they responded to an invitation to so-called "empowerment" investors. All the shares transferred in 1998 were purchased at a price of R8.19 per share.

[5] The main disputes to be determined are, first, whether the applicants have established conduct that engages s 163 of the Act, and secondly, if the first is determined in their favour, what relief would be appropriate. There are also certain "preliminary" issues raised by the respondents. Some of these issues, although characterised as preliminary, can be determined more conveniently within the main disputes.

[6] The applicants filed an amended notice of motion in 2023, in which they explicitly sought the declaratory order, and amended the method of valuing the shares sought as part of the consequential relief, but in my view not much turns on that as it is based on the same fundamental case.

[7] Government contends that, by adding the declaratory order, the applicants impermissibly change their case. However, as early as in paragraph 22 of their founding affidavit, filed in 2015, the applicants make clear that their case is based on conduct falling within s 163 (1)(a) and/or (b) of the Act. The last paragraph of

[3] The fourth, seventh and ninth respondents procured their shares in the same circumstances as the applicants did, described later in this judgment. The fifth and sixth respondents are shareholders as part of a staff share incentive scheme, holding just over 1% of the shares, while the eighth respondent holds 20% and is now owned by the Public Investment Corporation.

[4] And possibly the fifth and sixth respondents.

that affidavit confirms this. The addition of a prayer for a declaratory order that there has been such conduct does not change their case in any meaningful way.

[8] I set out first a summary of the facts as they emerge from the papers, before dealing with the issues as set out above.

FACTUAL BACKGROUND

[9] The applicants' claim of prejudice is based on the manner in which they came to procure their shares, and various developments which shaped ACSA's focus in the following years, rather than one specific instance of alleged unfair or oppressive conduct. It is therefore necessary to set out the history in some detail. Much of the history is common cause and is a matter of public record. It is also set out in the prospectus issued in June 1998 to invite applications for investment, and that part of the contents of the prospectus, at least, is not in dispute. The historical background is drawn primarily from the prospectus.

[10] Before ACSA was established, South Africa's airports were run by the State, and the land on which they were located, the buildings and other assets were owned by the State.

[11] ACSA was established in 1993 in terms of the ACSA Act. The long title of the Act at that time states that the Act is to

> provide for the transfer of certain assets and functions of the State to a public company to be established and for matters connected therewith.

The "assets and functions" were the airports and related assets and functions.

[12] The scheme of the Act at the time contemplated that the State would be the sole shareholder of ACSA. This changed in 1998, when the Act was amended to allow for other shareholders and in fact demonstrated that the intention at the time was that, eventually, the State would cease to be the majority shareholder. As an example of the changed perspective, the new long title provided that the Act is to

provide for the establishment of a public company and the transfer of the State's shares in the company, to regulate certain activities at company airports; and to provide for matters connected therewith.

[13] As set out above, shares were sold to the eighth respondent as an SEP, after a competitive tender process. It purchased its 20 percent of the issued shares for R819 million. The SEP also had the option to purchase another 10 percent of the shares in the event of an initial public offering of shares on a recognized stock exchange (an "IPO"), and to call for an IPO.

[14] The prospectus placed some emphasis on the introduction of the SEP. It stated that the intention of introducing an SEP was to "significantly enhance the ability of ACSA to improve its operations and financial returns and to achieve maximum value for its shareholders".[5] Naturally the SEP also provided a not insignificant cash injection. It was permitted to appoint directors, and it also provided expertise in the form of personnel, training and technology. Part of its role was to assist ACSA with the development of an IPO strategy. It also had certain veto rights, including the right to veto significant capital expenditures outside an agreed business plan. That the presence of the SEP was clearly intended to be relevant to the decision of applicants for shares to invest is evident by the amount of information provided about the SEP in the prospectus. The special rights of the SEP were to endure until a date on which the Minister and the SEP ceased to own a majority of the shares between them, or until 08 April 2008, whichever was the earlier.

[15] The prospectus was issued on 8 June 1998, inviting applications from "empowerment investors".[6] The prospectus set out in great detail the basis of the invitation, the arrangements with the eighth respondent, and what the plan was for ACSA's commercial future. Although there is a dispute about the meaning and weight of the contents of the prospectus as far as the future was concerned, there is no dispute about the history as set out in the prospectus and what information it provided to investors.

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[5] This is stated on page 5 of the prospectus.
[6] The invitation is set out in para 3 of the "Salient Features" summary in the prospectus, and in more detail in section 5 of the prospectus.

[16] According to the prospectus, the invitation for applications from investors was part of the first stage of a two-stage divestment, with the intended second stage to be an IPO. The invitation to empowerment investors was issued because "Government is committed as part of the process of restructuring State assets to the empowerment of historically disadvantaged persons",[7] which was to be achieved by inviting empowerment investors to apply to purchase up to ten percent of the issued shares, and by transferring ten percent of the shares to the National Empowerment Fund. It does not appear that this second step was taken.

[17] The prospectus invited applicants who qualify as empowerment investors to apply for between one million and 25 million shares at a set price of R8.19 per share, in multiples of one million shares. There was no negotiation of share price and no possibility of purchasing a flexible number of shares. Stamp duty was also applicable. Thus the minimum amount of money it would cost for an empowerment investor to buy any shares would have been R8 210 475, and purchasing any more shares than that could only happen in multiples of that amount.

[18] The prospectus did include disclaimers: that no listing had been applied for, and that the investment must be considered risky because the shares were unlisted and not readily marketable.

[19] An applicant to be an empowerment investor would qualify if they were:

1. a South African entity with the majority of voting shares beneficially owned by previously disadvantaged persons, or a South African union investment company or South African worker retirement fund, and

2. had at least 25 beneficiaries.

If the applicant were a listed entity, its shareholding in ACSA could not exceed 25% of its total assets for as long as ACSA's shares remained unlisted.

[20] The application required a statement that the applicant complied with all these criteria and would continue to do so. Government and its advisors had the sole

[7] *Loc cit*.

discretion to determine whether the applicant complied and was eligible to invest. Government also retains the right to "requisition" any shares and return the purchase price if there were false representations or if the conditions were breached at any time. No applications were to be accepted from partnerships, nominee companies or anyone other than empowerment investors.

[21] The prospectus also contained restrictions on empowerment investors:

1. they were not to record the value of the shares in their books at a value less than R8.19 per share without written approval from Government;

2. they had no power to initiate an IPO or to sell any shares ahead of an IPO, except back to Government with Government's consent (although it is unclear how shares could be sold back to Government without Government's consent);

3. shares that were pledged as collateral could not be released from collateral in a way that allowed the pledgee to become the owner of the shares, except where bankruptcy or receivership or similar occurred, and

4. save for shares actually sold in the IPO, no shares may be sold for twelve months after the IPO.

[22] However, empowerment investors could sell all or part of their shares as part of the IPO. They would also be given the opportunity to sell their shares if Government decided to sell part or all of its shares to a third party before any IPO, to the same third party and on the same terms.

[23] In addition to asserting that the introduction of the SEP was intended to help ACSA increase financial returns and value for shareholders, as well as prepare it for an IPO, the prospectus sets out ACSA's business objectives and lists what are called "future business opportunities", although without specifying that these would be pursued. It was also intended that there would be regular declaration of dividends.

[24] The business objectives listed in the prospectus are:

1. to facilitate safe, secure and exciting airport services;
2. to maximise retail potential;
3. to develop and optimally utilise the property portfolio;
4. to develop innovative products and services, and to maximise service levels through alliances and improved stakeholder relationships;
5. to play an active role in championing the aviation industry, and
6. to create a market- and consumer-oriented culture at the Airports.

[25] The prospectus makes clear that, at the time of its issue, most of ACSA's income came primarily from aeronautical sources, which are regulated by a Regulating Committee. Among the future business opportunities, it was contemplated that retail turnover and property income would be increased.

[26] As a result of this invitation to apply for shares, the applicants and the fourth, seventh and ninth respondents became the holders of a total of 4.21% of ACSA's shares. The first applicant holds 1.4% (7 million) of the shares, while the second/third applicant holds 0.4% (2 million). This application therefore is concerned with 1.8% of ACSA's shares. It is evident that the 10% target for empowerment investment was not reached.

[27] At some point, it is unclear when, it became clear that an IPO was not going to happen in the foreseeable future. ACSA alleges that the decision to indefinitely postpone the IPO was taken by the "majority shareholders". Of course there is only one majority shareholder, that is Government. ACSA also makes the inconsistent allegation that ACSA itself does not intend to undertake an IPO (in the context of asserting that the applicants can no longer be expecting an IPO because it must be clear by now that ACSA does not intend undertaking an IPO).

[28] It is unclear from ACSA's affidavit, then, whether the IPO has simply been indefinitely postponed, or whether there is in fact no intention that there will ever be an IPO. Until Government filed its supplementary answering affidavit in December 2024, it was also unclear whether the decision was ACSA's or

Government's. Government, in its initial answering affidavit, does not disclose who took the decision not to list, but criticises the applicants for not identifying who took the decision.

[29] The position of the respondents, who would be expected to know what the facts are, was initially surprisingly equivocal. It seems to me relevant that amendments to the ACSA Act passed in 2020 and not yet implemented indicate that there is no longer any intention that the State would divest its shares. Legislative amendments being in the public domain, it is not improper to take notice of them. However, that need was obviated by the concession in Government's supplementary answering affidavit in December 2024 that it was the Minister who exercised her discretion not to list ACSA through an IPO. The date of that decision is still not disclosed.

[30] Shares in the SEP were sold by the party who performed the function of SEP to the Public Investment Corporation ("the PIC"), which is wholly owned by Government, in 2005. It is common cause that a special dividend was declared thereafter, apparently to encourage the PIC to purchase those shares. At that time, no offer was made to the empowerment investors to permit them also to exit.

[31] It is clear that there was never an intention for the PIC to perform the same function as the SEP did, as it brought no expertise to the table, and clearly was not going to assist ACSA with its commercial objectives and with readying itself for an IPO or other divestment. It is equally clear that the sale of shares to the PIC allowed an exit for the Italian shareholder without the inconvenience to ACSA of a change in its own shareholding. The respondents contend that the PIC as the current shareholder of the eighth respondent has the same rights as the SEP did, but that is clearly not so, since those special rights, even if they survived the sale of shares to the PIC, expired in April 2008.

[32] In any event, the PIC, being wholly owned by Government, would not have any interest in exercising those rights which may hamper Government's plans. The exit of the SEP meant that there was no longer an outside party with the right to influence ACSA's policies and business plans, and there was no longer any entity

present whose interests were aligned with those of the empowerment shareholders, which had the teeth to ensure those interests were not unduly disregarded. It is not unreasonable to conclude that the empowerment shareholders lost a safeguard that had been much vaunted in the prospectus.

[33] Although ACSA had entered into a Shareholder's Compact with the SEP, and later entered into one with Government, no agreement was entered into with the empowerment shareholders.

[34] Dividends were not paid between 2007 and 2013. Instead, ACSA assumed debt to fund infrastructure development, including building a new airport, King Shaka International.

[35] It appears from a report prepared by Ernst & Young in 2012 that the decision to focus on broader economic development rather than commercial results took place at some point between 2003 and 2006, when "there was an increased pressure for [ACSA] to be involved in an economic development role, particularly in improving airport infrastructure ahead of the 2010 Football World Cup" (which was awarded to South Africa in 2004). The Ernst & Young report states that the SEP exited its investment in 2005 following ACSA's change in strategy, when the shares in the eighth respondent were sold to the PIC. This cannot be coincidental, since the SEP's veto right appears to have the potential of directly affecting ACSA's ability to assist in Government's World Cup project.

[36] According to the Ernst & Young report itself, it was apparently produced in order to assist Government to decide what to do about the empowerment investors. ACSA, however, alleges that the report was produced to formulate possible options to "potentially restructure the empowerment shareholding" in ACSA. ACSA denies that it decreased focus on financial returns in favour of an economic developmental role. It denies that it does not act in the best interests of the company and denies that it is not run with a commercial objective. However, it also agrees that the capital expenditure for which loans were taken "was in part necessary for the hosting by South Africa of the 2010 Soccer World Cup". It is unclear how this "necessity" was in the best interests of the company, or who made the decision that it was necessary. That the decision may have

been in the political best interests of the majority shareholder, demonstrates how the commercial interests of the company and the interests of the majority shareholder were diverging.

[37] At the same time as denying that it began focusing more on an economic developmental role, ACSA aligns itself with a statement by the Minister made in 2013 that ACSA is important for social and economic development in the Republic, and that the "Shareholders' objectives must work with those of the ACSA Board for [the] national interest". According to ACSA this was part of the reason for a "decision not to go for the public listing".

[38] ACSA also alleges that business decisions are taken, not by the shareholder, but by the Board. ACSA contends that statements made by the shareholder representative, the Minister, are therefore irrelevant. It is unclear then what the relevance of the Minister's 2013 statement is. It is also unclear how it came about that the shareholder took the decision that the listing be what ACSA describes as "indefinitely postponed".

[39] Also in 2013, ACSA adopted its Memorandum of Incorporation, which also includes restrictions on the sale of shares. That is not a substantive change, since the shares were already restricted from being freely traded. Nevertheless, it is necessary to note that the MOI was only adopted 15 years after the applicants procured their shares, and any reliance on its terms by the respondents must be seen in that context. The Court has not been favoured with copies of the Articles or Memorandum of Association that preceded the 2013 MOI, apart from some excerpts of the Articles which were annexed to the prospectus.

[40] In 2013, the majority of the empowerment investors made an offer to ACSA that it purchase their shares for R23.05 per share. This offer was rejected, because the Board had obtained a valuation of R10.36 per share. A further valuation was conducted by Deloitte leading to an offer in August 2014 to buy the shares for R12.87 per share plus a dividend of R0.60 per share, subject to all minority shareholders accepting the offer. ACSA and Government contend that this offer was reasonable and that therefore the applicants cannot seek relief in terms of s

163. The offer was rejected, and there was some back and forth among the parties about what a reasonable price might be. According to Government, the Minister made a decision on 16 January 2015 that the shares must be bought by ACSA for R22 per share, and that a two-year dividend holiday should be declared to help pay for this. However, no offer was made to the applicants on that basis. It appears to be common cause that the decision of the Minister was never conveyed to the applicants outside these proceedings. This application was instituted in July 2015.

[41] When the application was initially to be heard, on 1 August 2017, an order was made by agreement between the parties. In terms of that order, ACSA was directed to purchase the applicants' shares, at a price determined by a referee. The order required the referee to adjust the value for oppressive conduct, and left the determination of what oppressive conduct was entirely to the discretion of the referee. A valuation was obtained from Riscura in accordance with the order, and when the applicants made application in 2018 for an order that the valuation be adopted, ACSA opposed it and brought a counter application for a determination that the shares be bought at a different value, on the basis of a valuation by another expert, Professor Wainer.

[42] The application and counter-application were then left in limbo when ACSA and the Government brought an application to rescind, alternatively for leave to appeal, the 1 August 2017 order. The rescission application was successful and was confirmed by the Supreme Court of Appeal in April 2022. Thereafter, in 2023, the applicants filed supplementary affidavits and renewed the application, finding themselves in essentially the same position they had been in five years earlier.

THE ISSUES

[43] The applicants claim that the failure to list ACSA, combined with what they claim is a change in ACSA's focus from ACSA's commercial interests to broader economic development in the country, in the context of the manner in which they obtained their shares and the contents of the prospectus, has had a prejudicial effect on them, which brings them within the ambit of s 163 of the Act. Part of the

prejudice they claim is that returns on their investments have not been enough to service the debt with which they procured the shares. The manner in which ACSA is run also means that the shares are even less marketable than they would have been at the time they were procured. The applicants also cite three specific examples of decisions made by or for ACSA that, according to them, have resulted in prejudice, and which also demonstrate that ACSA's priority is not a commercial one. These are: the various decisions of the Regulating Committee regarding aeronautical revenue; the development of King Shaka International Airport ("KSI"), and ACSA's investment in São Paulo airport.

[44] The respondents contend, amongst other things, that there was no guarantee that ACSA would be listed, that there has been no change in ACSA's focus, and that there is nothing prejudicial that engages s 163. They also contend that, even if the court finds that a case has been made out to engage s163, the remedy sought cannot be granted. ACSA contends that the applicants have no claim because they rejected a reasonable offer, while Government contends that the applicants have no basis for this application because of the Minister's decision that their shares must be bought for R22 per share. Government also raises various separation of powers and constitutional issues in opposing the relief sought.

[45] Before I delve into the specifics, I set out the applicable law.

SECTION 163 OF THE COMPANIES ACT

[46] The parties do not differ in any substantial way on what s 163 means and what the requirements are for relief in terms of the section. Unsurprisingly, they differ fundamentally on the result of applying those principles to the facts before this court.

[47] Section 163 provides:

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

1. 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;

2. 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

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

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

(a) an order restraining the conduct complained of;

2. an order appointing a liquidator, if the company appears to be insolvent;

3. an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131 (4) (a) apply;

4. an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;

5. an order directing an issue or exchange of shares;

6. an order—

9. appointing directors in place of or in addition to all or any of the directors then in office; or

(ii) declaring any person delinquent or under probation, as contemplated in section 162;

(g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;

(h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;

(i) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;

(j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;

(k) an order directing rectification of the registers or other records of a company; or

(l) an order for the trial of any issue as determined by the court.

(3) If an order made under this section directs the amendment of the company's Memorandum of Incorporation—

(a) the directors must promptly file a notice of amendment to give effect to that order, in accordance with section 16 (4); and

(b) no further amendment altering, limiting or negating the effect of the court order may be made to the Memorandum of Incorporation, until a court orders otherwise.

(4) . . . . . .

[48] The applicants refer to a surfeit of comparative law on similar shareholder remedies. Although the approach of courts in other jurisdictions is interesting, I do not think it adds much to what I must consider. The principles are not substantially different, the parties do not differ in any real way on the principles that should be applied, and, as often happens, the outcome in this case is determined by the specific facts before me.

[49] It can be seen that s 163 (2) provides for a wide range of possible remedies, and gives a court the discretion to make any order that is fit. However, the court may only assume that power if it finds that the circumstances described in s 163(1) exist.

[50] ACSA describes the question whether there is conduct that falls within s 163(1) which has a result described in s 163(1) as a jurisdictional issue, without which the jurisdiction of this court to provide relief is not engaged. It insists that this is not part of the consideration whether a case is made out, but rather a preliminary point. While I agree that relief may only be granted if the court finds that there has been the kind of conduct and the kind of consequences described in the section, I disagree that this is properly conceptualised as a preliminary point or that it should be determined as one. It must, of course, be determined before the possibility of any relief is considered.

[51] For a court to find that s 163 is engaged, there must be an act or omission by the company, a related person, a director or a company officer, that is oppressive or unfairly prejudicial or unfairly disregards the applicant's interests, or the business of the company must be or have been conducted in a manner is oppressive,

unfairly prejudicial, or unfairly disregards the applicant's interests. In the interests of brevity I shall describe the proscribed conduct as conduct that is unfairly prejudicial, but this should not be construed as limiting the enquiry.

[52] The question of who is a related person is dealt with in s 2 of the Act. For purposes of this case, a related person is someone who exercises control of ACSA,[8] through control of the majority of voting rights,[9] has the right to appoint directors who control a majority,[10] or has the ability to materially influence the policy of ACSA in a comparable way.[11] It cannot be disputed that, since Government is the majority shareholder and exercises its rights through the Minister, both Government and the Minister are related persons as contemplated. An act or omission of ACSA, Government, or the Minister, or any combination thereof, which is unfairly prejudicial, or has an unfairly prejudicial effect, would entitle the applicants to relief.

[53] The manner in which conduct must be considered to determine whether it is unfairly prejudicial is canvassed in detail by the SCA in *Technology Corporate Management (Pty) Ltd and Others v De Sousa and Others* ("*TCM*").[12] Although that case deals with the predecessor of s 163 (s 252 of the Companies Act, 61 of 1973) the principles remain the same. The SCA takes the same view in *Grancy Property Ltd v Manala and Others* ("*Grancy*").[13] The only relevant difference is that s 252 dealt with unfairly prejudicial acts of the company itself, while s 163 deals with unfairly prejudicial acts of the company or a related person. Incidentally, the SCA in *TCM* agrees with my view regarding different jurisdictions, commenting that "there is little practical difference between" them.[14]

[54] It must be noted that s 163, on which this application is based, was only promulgated in 2008, well after some of the conduct complained of took place.

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[8] In terms of s 2(1)(b) of the Act.
[9] Section 2(2)(a)(ii)(aa).
[10] Section 2(2)(a)(ii)(bb).
[11] Section 2(2)(d).
[12] 2024 (5) SA 57 (SCA)
[13] 2015 (3) SA 313 (SCA) para 22.
[14] *TCM ibid* para 83.

However, all parties confined pleadings and argument to s 163 and there is no need to consider whether it should in fact have been s 252 that was relied on.

[55] The relationship between a company and its shareholders, as well as the relationships between shareholders, is contractual, and is based on its memorandum of incorporation.[15] It is well established as a basic principle of South African company law that a person becoming a shareholder in a company does so on the basis that they are bound by the decisions of the majority of shareholders, as long as they are taken in a lawful manner, and even where the decisions may prejudice a particular shareholder, because the "principle of the supremacy of the majority is essential to the proper functioning of companies".[16]

[56] Legislative provisions such as s 163 provide exceptions to this principle, which provide some relief, in very specific and constrained circumstances, to minority shareholders, softening the effect of the majority rule. Section 163, in particular, provides some remedy for decisions, acts or omissions which may be entirely consistent with the law in general and the company's memorandum of incorporation and other binding precepts, but which nevertheless have an unfairly prejudicial effect on the minority.[17] This is why conduct which is alleged to fall within s 163(1) must be examined carefully and a court must be wary of interfering with the decisions of the majority, or of imposing minority rule which would be unfair in a different way. That being said, a court must also not unduly limit the manner in which 163 is applied. The extensive remedy is there to provide an equitable response to an unfair disregard of the minority shareholder's interests,[18] and being too rigid in evaluating whether the shareholder has interests that have been unfairly disregarded may neutralise the equitable nature of the remedy. Again, the primary determining factor is whether any disregard of any interest was unfair.

[57] Where the complaint is about an act or omission, it must have an unfairly prejudicial effect, and where it is about the manner in which the company is run, the result must still be an unfairly prejudicial effect, but a pattern of conduct is

[15] *Ibid* para 75.
[16] *Sammel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 678G-H.
[17] *TCM ibid* para 82.
[18] *Grancy ibid* para 26.

involved, rather than a single act or omission.[19] What is important is the effect, and not whether the unfair prejudice was deliberate. Even inadvertent prejudice, if unfair, can entitle an applicant to relief in terms of the section.[20]

[58] The question whether there has been an unfairly prejudicial effect is difficult to define, because in each case, it depends on the specific facts.[21] The mere inability to dispose of shares, where there was already a restriction on transfer of shares, while prejudicial, is not necessarily unfair.[22] The disaffected locked in shareholder should not be able to use s 163 to "rewrite the terms on which the parties agreed to conduct the company".[23] An offer to buy shares at fair value may cure any unfairness.[24]

[59] It is clear from the section itself and the authorities, that an allegation that the decisions at issue were made in the ordinary course of business, that they were entirely legitimate decisions, and that there was no malice or deliberate attempt to prejudice the minority shareholders, do not insulate a company or related persons from a finding that there has been an unfair act or omission, or the company has been run in a manner that has been unfair, which resulted in unfair prejudice to the minority shareholders. Thus the assertions by the respondents that all the decisions made were legitimate, and that there was no intention to prejudice the applicants, do not assist them.

THE PROSPECTUS

[60] In order to determine whether there has been any unfair prejudice, and also in order to determine any appropriate remedy, it is necessary to ensure that the compact between the parties as shareholders of the company is not disrupted. The reasons for this should be clear in the context of what I have set out above.

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[19] *TCM ibid* para 79.
[20] *TCM ibid* para 80; *Grancy ibid* para 27.
[21] *TCM ibid* para 81.
[22] *Ibid* para 97.
[23] *Ibid* para 99.
[24] *Ibid* para 108-109.

[61] Both respondents contend that the applicants are attempting to avoid the consequences of an agreement they entered into when they applied to purchase shares. They make bald assertions about what the agreement does not contain, and about how the agreement cannot be rewritten by the court. However, there is little, if any, evidence of what the contents of the agreement are. The respondents' contentions are problematic, since, unlike the situation with the PIC and Government, there is no shareholders' compact with the applicants, and the articles of association and memorandum of association that existed at the time are not before the court.

[62] The applicants contend that the prospectus is therefore the only document that contains information about the terms and conditions relevant to their shareholding. The respondents' position is that the contents of the prospectus are not binding, but they do not suggest what other source there might be which would regulate the relationship between ACSA and the minority shareholders. The court is then left with the prospectus, as well as the ACSA Act.

[63] Government submits that the prospectus is not something it is responsible for, as it was issued by ACSA not Government. In my view that is a cynical avoidance of responsibility and of constitutional imperatives to act in accordance with the values set out in section 195 of the Constitution, on which Government relies to avoid any responsibility it may have towards the applicants. It is clear that the prospectus was issued in furtherance of Government's plan, and that the Board took the steps it did in furtherance of the wishes of its main shareholder. Certainly, in ordinary commercial situations, shareholders are not usually responsible for the contents of documents issued by the Board. But as Government itself points out, ACSA is not an ordinary commercial company, and this was not an ordinary commercial situation.

[64] The prospectus was issued specifically to facilitate the next step in Government's plan for ACSA, and it is consistent with the amendments that were made to the ACSA Act in preparation for the sale of shares and also an eventual divestment. It was issued in pursuance of Government's economic empowerment agenda. It makes statements on Government's behalf, such as "Government reserves the right to scale down applications". There can be no doubt that Government and

ACSA were acting *ad idem* when the prospectus was issued and the shares made available for empowerment investors.

[65] In the specific circumstances of this case, then, I am satisfied that Government cannot avoid responsibility for the contents of the prospectus, and that if I find that any weight can be placed on the prospectus in determining the applicants' claim, the resulting obligation would apply equally to ACSA and Government.

[66] The prospectus is also relevant to the fairness of the decision to either postpone the IPO indefinitely or not to undertake one at all. ACSA and Government seek to split responsibility for the prospectus and the failure to continue with the IPO, with the party responsible for the prospectus not being the party responsible for the IPO, and vice versa. This does not help them avoid responsibility towards the applicants. Even if Government took the later decision and was not responsible for the content of the IPO, it took that later decision fully aware of the contents of the Prospectus and the context in which ACSA and Government invited the empowerment investors to apply for shares. Similarly, even if ACSA did not take the decision to not embark on an IPO, it did not object to the cancellation or postponement of the IPO. In any event, both would therefore be responsible for any resulting prejudice.

[67] ACSA contends that a prospectus is not a binding document but simply an invitation to treat. It cites a number of academic writers in support of this contention. These however deal with the status and nature of a prospectus generally. I do not take issue with what they set out as a general proposition, but the contention is in any event a red herring.

[68] Firstly, the prospectus at issue includes the offer that was made. The offer is not contained in any other document. Secondly, the invitation cannot be described as an invitation to treat but an invitation to apply on prescribed terms. There is no possibility of negotiation.

[69] Thirdly, the prospectus is required to include all relevant information for a prospective investor. The respondents cannot pick and choose what of the information contained in the prospectus is to be considered more relevant. The disclaimers cannot have more weight than the other information that was

included, or the way in which the information was articulated. All the information in the prospectus was put there because it is relevant, and because it was intended to present an attractive prospect to previously disadvantaged investors, even if there was risk resulting from investing in unlisted shares with limited liquidity.

[70] The clear intention of the prospectus was to inform prospective investors that they were being offered the opportunity to benefit from ACSA's intended commercial development. The investment was not, according to the prospectus, for the purpose of raising capital for ACSA. It was to empower historically disadvantaged persons who became investors. There is no other way of empowering those persons other than making sure that ACSA was run in a way that was likely to result in reasonable returns, either by way of dividends or by way the sale of shares. The restriction on the sale of shares meant that the IPO was the real carrot that was provided to empowerment investors. This was not a run-of-the-mill commercial investment, nor was it presented as one. The respondents' attempts to cast it as simply that can hold no water.

[71] The manner in which the SEP's involvement is described in the prospectus is clearly intended to give some reassurance to the prospective investor, that there was an experienced and skilled partner assisting ACSA with streamlining and improving its operations and preparing for an IPO. Together with SEP's rights to request an IPO; its option to purchase further shares; its rights to nominate directors, and its right to veto any expenditure that was not part of an agreed business plan, this gave the prospect of some protection from the vagaries of a single majority shareholder for prospective empowerment investors, who would have no rights to affect the manner in which ACSA was run at all.

[72] It was suggested by the respondents that, because the word "development" appears a number of times in the prospectus, this means that ACSA's focus on broader national economic development was always part of its objectives. This is patently a fallacy. The "development" in the prospectus deals with ACSA's development as a company, developing its services, its properties and its revenue. The difference from the requirement in s 195(1)(c) that public

administration be “development-oriented” is plain and ought not to need further elaboration.

[73] In any event, there are many ways in which a state entity can be development-oriented, and, as Government was at pains to point out, development is a policy decision. The government of the time clearly was of the view that ACSA’s development orientation would take the shape of economic empowerment for employees, historically disadvantaged investors, and the National Development Fund. It would also be found in the contribution the development of world-class airports and services would have to the national economy and national profile. All of this is evident from the prospectus, and, to an extent, the ACSA Act. The contention that it ought always to have been evident that ACSA would be required to act in the national interest above all else is no more than another red herring.

[74] I am satisfied that the prospectus, read together with the ACSA Act, held out that ACSA would be run on commercial lines, that there would be an IPO. Even though the prospectus did not give a predicted date for the IPO, it is clear from its overall scheme that it was expected to happen before the SEP’s special rights expired in 2008. I am also satisfied that there is no other evidence of what the compact with the empowerment shareholders includes, and that there is therefore no prejudice to the company in relying on what was held out in the prospectus.

[75] I must clarify, however, that in so doing I do not elevate the status of the prospectus to a binding contract. Instead, it is simply a reflection of what was understood at the time to be the case. Its contents were relevant to the decision to invest, and a departure from what it envisaged may, depending on the manner, nature and consequences of that departure, result in unfair prejudice for the investors who decided to invest based on its contents.

[76] Government’s submissions that it is immune from claims based on the contents of the prospectus therefore have no merit in the context of this case.

THE IPO

[77] In the context of the facts as they have been set out, it is patent that there is no longer any intention on Government's part of listing ACSA's shares in an IPO. The date of the decision has not been disclosed. But, since December 2024, it is clear that there was a decision and that it was a decision of the Minister. Government submits as part of its defence that the Minister was entitled to make the decision. I accept that. That is not the enquiry.

[78] The respondents contend that the decision not to list is not unfair to the applicants, because it was clear from the prospectus that no IPO had been applied for. As I have already commented, this contention is disingenuous and inconsistent with the very framework which underpinned the invitation to empowerment investors. The IPO, or alternatively the sale of shares to a third party of a commercially viable ACSA, was the ultimate goal of the exercise. This is clear from the contents of the prospectus, the way in which the ACSA Act was amended at the time, and from the rights and obligations of the SEP.

[79] The respondents are correct that the decision not to pursue the divestment/ IPO plan is not in itself inherently unfair. However, the unfairness materialises when the decision is combined with the failure to offer an exit to the empowerment investors at the time when the decision was taken. It is a reasonable inference that the decision was taken at some point before the exit of the Italian SEP. The Minister appears to have already acknowledged the likelihood at a meeting in 2002. The failure to inform the empowerment investors, and to offer them a similar exit, is in my view both unfair and antithetical to the avowed purpose of their investment, that is, the economic empowerment of previously disadvantaged persons. In the context where the investors had to stay invested, the decision not to proceed with the intended IPO was unfair to them.

[80] It is also submitted by the respondents that the failure to follow through with the IPO cannot have been unfair or prejudicial to the applicants, because the IPO would have diluted their shareholding, and the value of their shares. This is yet another red herring. The dilution of the applicant's shareholding would have been neither here nor there where their shareholding does not give them any rights to

influence the company at all. The notional dilution of the value of their shares which may accompany the issue of more shares in an IPO is not a dilution that would have been considered unfair, since the risks associated with the IPO are ordinary investment risks which are inherently part of the risks assumed by the applicants, considering that the IPO was part of what they expected.

[81] As pointed out by the applicants, had the IPO taken place, there would have been other safeguards put in place by the listing requirements, and their shares would eventually, 12 months after listing, been entirely tradeable. The continued presence of the SEP, which the applicants term an “anchor shareholder” would be a safeguard, as would requirements for independent directors, and the need to maximise shareholder value for shareholders unrelated to the majority shareholder would mean that the “deviation” of focus in the manner in which it has taken place, would not have been possible.

[82] Government also suggests that the obstacle to the applicants being able to sell their shares is not the decision not to proceed with an IPO, but that the MOI restricts the sale of shares and requires the applicants to get the Minister’s consent. They suggest that even if there was an IPO, the applicants would not be able to sell. This is a distortion of the interplay between the conditions attached to the empowerment shares (as contained in the prospectus) and the MOI. In any event, had there been an IPO, amendment of the MOI would not only be likely but almost certainly necessary. And, significantly, after the twelve months lock in period, the shares would have been freely marketable.

[83] Government submits further than the applicants have not sought the Minister’s consent to sell shares, and therefore cannot complain. This is yet another misarticulation of the problem. The applicant’s complaint is that there is no market for the shares, rather than that the Minister doesn’t let them sell. Having the Minister’s consent would not change that.

[84] I am satisfied that the intention to apply for an IPO was one of the fundamental legs of the invitation to invest, and the deviation from that intention was unfair in the context.

[85] I am also satisfied that the consequence of that unfair conduct was unfairly prejudicial to the respondents, as it locked them in in a manner that was never contemplated, and prevented them from assuming the ordinary risks and benefits that ought to have been associated with their investment.

THE CHANGE IN FOCUS

[86] The second basis of the applicants' claim under s 163 is their contention that the prospectus, together with the ACSA Act, also held out that ACSA would be run on a commercial basis, that this intention has been abandoned, so that ACSA is now run on the basis that it is a tool in achieving Government's socio-economic goals, and that this change was unfair and has had an unfairly prejudicial effect on them.

[87] The respondents make mutually destructive submissions in this regard. On the one hand, it is contended that there was no change because everyone knew, or ought to have known, that ACSA as a state-owned company was obliged to feed into Government's development goals, and that there are numerous mentions of "development" in the prospectus. On the other hand, it is contended that all of ACSA's business decisions have been commercially sound and there is no decision that was taken that was inconsistent with a commercially run entity. In argument, counsel for ACSA submitted that there had been no abandonment from a commercial focus, but that there had been only a "deviation", In any event, so the argument goes, there was no undertaking of following a particular commercial path, so whether abandonment or deviation, it makes no difference.

[88] Firstly, it is clear in the context of the facts as I have set them out that there was a clear intimation to potential empowerment investors, who were the subject of the invitation for which the prospectus was issued, that putting ACSA on a commercial footing was a priority. It is also clear that this was emphasised in order to encourage investment.

[89] Second, as I have already pointed out, the use of the word "development" in the prospectus and the ACSA Act does not assist the respondents. There are many

different kinds of development. Reference in the prospectus to one kind of development does not mean that the investors ought to have known that ACSA or the Government would consider themselves free to pursue any kind of development. Nor does a general principle that certain decisions related to ACSA must be taken in the public interest.

[90] The prospectus contains the words develop/ developing/ development in the following contexts:

1. The ACSA property division, responsible for development and leasing of airport infrastructure, retail sites, office space and other property (this is mentioned twice, once in the summary and once in the main body).

2. The objects of the company including "acquisition, establishment, development, provision, maintenance, management, control or operation of any airport…".

3. A reference to who is responsible for "property development".

4. Plans had been developed to increase parking capacity at three airports.

5. Under business objectives, there is a reference to ACSA's mission being to manage and develop world-class airports. There is also a reference to two of ACSA's objectives being to "develop and optimally utilise" the property portfolio; and to develop products and services.

6. A statement that the directors believed that there were "many opportunities for ACSA to develop its business"; including "developing property" for commercial use, and the use of unused land owned by ACSA for, inter alia, suitable "demand driven developments" which "offer an opportunity to earn an appropriate market based yield".

7. The commitment of the SEP to assisting ACSA with "retail development", and "the development of an IPO strategy".

8. In setting out ACSA's human resources policy, a reference to a polcy that covers "capacity building, training and development". There is also a reference to ACSA's scheme to encourage the development of talent.

9. That one of the SEP's two directors of ACSA was responsible for "business development" at the Italian entity. The word also occurs in the various biographies of ACSA's then directors.

[91] The ACSA Act also refers to the concept of development, in s 4, which sets out the objects of ACSA in the same terms as contained in the prospectus. It also provides for the Regulating Committee to "develop" guidelines.

[92] The respondents rely too on s 195 of the Constitution, which, amongst others, requires public entities to be "development-oriented".

[93] The respondents' "development" argument is disingenuous. There is a clear difference between the commercial and institutional development contemplated in the prospectus and the ACSA Act, and the development of the country in accordance with Government policy. Section 195 of the Constitution also does not help, firstly because a public entity can be "development-oriented" in many ways (obviously the choice of how it is development-oriented is a policy-laden one), but also because the manner in which ACSA was developed was intended to have the outcome that ACSA was no longer a public entity.

[94] The respondents also rely on the fact that the ACSA Act requires the Regulating Committee to deal with the questions within its purvey, that is the fees that may be charged for aeronautical services, as well as the construction, lease or closure of airports, in a manner that takes into account the public interest, to suggest that this shows that ACSA's focus was intended to be developmental, and there is no change. The respondents submit further that the mere fact that ACSA's aeronautical business is subject to regulation is an indication that ACSA's primary focus must be the public interest.

[95] These arguments are a red herring. The aeronautical business is regulated because ACSA is a monopoly, and also because it is a monopoly in a sector which provides what may be considered to be essential services. But that does

not mean (a) that everything ACSA does is regulated or subject to national development goals, nor (b) that that means that the public interest trumps everything else in everything ACSA does, particularly in its property and retail business, which are unregulated.[25] It also does not mean that ACSA's actions, insofar as they affect the minority shareholders who contend they have been unfairly prejudiced, are immune from scrutiny.

[96] It is clear that, at the time the prospectus was issued, the intention was that ACSA would be "developed" into a commercially viable entity, and that the policy choice that was made that was ACSA's contribution to the development of the country would be as a commercially viable airport operator, which would run airports that would bring in economic advantages to the country as a whole. It is also clear that that intention changed, or was deviated from, at some time before the SEP's exit. The exit of the SEP is both a result of that change or deviation and an indication that it was happening.

[97] It is equally clear that, at the time, ACSA's commercial development was intended to progress in tandem with what can be called public interest considerations, but that the priorities changed so that the public interest considerations and development in a "development of the country" sense became the overriding objective.

[98] This is significant because, ordinarily, the interests of a majority shareholder would be aligned with those of the company's commercial success, so that there is no intrinsic conflict between the interests of the majority shareholder and those of the company, and by extension, minority shareholders. That is not the case here, where the majority shareholder's interests are focused elsewhere, and the majority shareholder has decided to use the company as a tool in pursuance of those other interests (as legitimate and laudable as that might be in the context of national development). The clearest demonstration of this is contained in the shareholder compact concluded between ACSA and the Minister in February

[25] The property and retail business is not entirely unfettered, the manner in which ACSA currently operates means that if ACSA makes too much from that side of the business, the Regulating Committee compensates for it in the next determination of the aeronautical fees.

2015. That document shows clearly that the ACSA contemplated in the prospectus has not come to exist and is no longer on the cards.

THE REGULATING COMMITTEE

[99] One of the examples on which the applicants rely for a finding that ACSA has departed from its commercial path is the allegedly prejudicial setting of tariffs for aeronautical services by the Regulating Committee which is tasked with setting those tariffs by the ACSA Act.[26] The contention is that the Regulating Committee is controlled by the Minister, and therefore its decisions are something that the Minister is responsible for. Where its decisions were prejudicial to ACSA's commercial success, this too is something the Minister is responsible for and these decisions therefore are part of the unfair conduct by the Minister that contributes to the unfair prejudice experienced by the applicants.

[100] There is no merit in these contentions. The Minister's oversight of the Regulating Committee is entirely separate to the Minister's functions as Shareholder Representative. Ministers, as members of the national executive, are required to fulfil various separate functions, and what they do in one capacity does not, without more, lead to consequences for their other capacities.

[101] Further, it is clear from the scheme of the ACSA Act that the Regulating Committee is independent and makes is decisions in a manner that is legislatively regulated. Even if I do not accept the respondents' argument that the applicants must review the Regulating Committee's decisions if they take issue with them, the Regulating Committee is still a separate entity and ought to have been joined, if its actions were going to be interrogated for their effect on the applicants.

[102] In my view, it would be inappropriate to enquire into the Regulating Committee's decisions when the Regulating Committee is not here. I therefore do not consider that particular issue any further.

[26] In terms of sections 11 and 12 of the ACSA Act.

KING SHAKA INTERNATIONAL AIRPORT

[103] Another of the examples that the applicants rely on to show that there was no longer a commercial focus, but rather a focus on a national developmental agenda, is the decision to build KSI in haste for the 2010 World Cup, when there was not enough money for it, and the development at that time was not planned for in advance, which resulted in large amounts of debt being assumed, and the cessation of dividends for a number of years.

[104] The respondents rely on the provisions of the ACSA Act, which require that the construction, lease and closure of airports must take place in the public interest. That is the case. But that does not mean that the decision to build KSI at the time and in the circumstances in which it was done was not also inconsistent with the commercial interests of ACSA, and with the representations made in the prospectus and the ACSA Act.

[105] It is common cause that the KSI decision was taken because it was considered by Government to be necessary for the 2010 World Cup. The respondents suggest that this is sufficient to insulate it from further examination. It is not, because the question here is not whether the decision was otherwise lawful or legitimate. The question is whether it was, at the time, commercially inconsistent with the representations made in 1998, and whether it was then unfair to the applicants.

[106] The decision was taken by Government, and not by ACSA. It was announced by the Minister before the board had taken the decision The reports relied on were produced in 1973, 1981 and 2003, and are simplistic to say the least, showing that the decision was expedited for Government's own purposes without doing the kind of analysis that would have been done had ACSA been acting as a commercial entity. The project was debt funded and went far over budget. Again, this was inconsistent with ACSA acting as a commercial entity.

[107] It must be emphasised that the question is not whether the KSI project was beneficial for the country in the long run, whether it was necessary for the 2010

World Cup, or whether it was in the public interest. Assuming for present purposes that the answer to all these questions is yes, it is simultaneously clear that the decision was not taken in pursuance of the commercial health of ACSA. In fact, the applicants have demonstrated that the development of KSI at the time and in the manner in which it happened, was not commercially appropriate. This is particularly the case because the decision was taken by one shareholder in its own interest, and rather than providing funds for the implementation of the decision, the shareholder required ACSA to find the funding for it through debt.

[108] For the reasons already set out above, in the context of the way in which ACSA sought empowerment investors and what was held out to them, the decision was unfair to the applicants.

[109] It is in my view clear enough already that the applicants have established that there was a change of focus in how ACSA is run, which was unfair to them. The applicants also rely on ACSA's investment in São Paulo airport as an example of a tendency to take decisions that have other priorities than the commercial growth of ACSA. The issues raised by applicants are cited as examples of a general trend in conduct. They are not relied on as specific acts which fall foul of s 163.

[110] I consider it unnecessary then to scrutinise each example. Suffice to say that the respondents do not provide any evidence other than a bald assertion that the decisions are commercially sound and legitimate. Commercial soundness is obviously a matter for evidence, and legitimacy is, for purposes of the enquiry in this case, irrelevant.

[111] I am satisfied that the applicants have established that the respondents have abandoned or deviated from the intention to run ACSA in a manner that place its commercial viability at the forefront, and rather have used it as a resource in Government's plans for the country. I am satisfied also that this was, in the context, unfair to the applicants.

UNFAIR CONDUCT

[112] In summary then, the unfair conduct that I have found established by the applicants is that the investments were sought on the basis that this was an opportunity for empowerment that would come to fruition when there was an IPO of a company that was going to be placed on a commercial footing, that no IPO was undertaken and that the objective of placing the company on a commercial footing was either abandoned or deviated from.

[113] The applicants contend, in response to the respondents' submission that there is no claim under s 163 because the applicants refused an offer made in August 2014 for the purchase of the shares at R12.87 per share, that this was not a fair offer and that this therefore does not ameliorate the unfair prejudice they suffered. I deal with this offer later in this judgment.

[114] The applicants do not otherwise rely on the absence of an offer to buy them out. Nevertheless, I am constrained to note that the unfairness of the respondents' conduct, in my view, rests very much on their failure to consider the empowerment shareholders at the same time as the SEP's exit was being facilitated, and their failure to facilitate a similar exit for the empowerment shareholders at the same time. As I set out above, it is unavoidable to conclude that the SEP's exit was facilitated at the time when the "deviation" was beginning to be implemented, and for obvious reasons.

[115] For those same reasons, it was unfair not to inform the empowerment shareholders of developments and to offer them an exit too. The failure to do so resulted in the later decisions being unfair to the empowerment investors who were then locked into a company that was not following the path that had been represented to them, and which they had no way of influencing.

[116] This is not a simple question, as submitted by the respondents, of an investor dissatisfied with its investment. This is a question of an investor investing on the basis of certain representations, there being no other basis evident on which the investors could have invested, and those representations being abandoned to pursue interests which are not related to the commercial growth of the company.

UNFAIR PREJUDICE

[117] The unfair prejudice cited by the applicants is primarily that their shares are now illiquid, they are locked in and cannot sell their shares, and that the shares are significantly devalued because of the change in focus. The applicants also claim that they have been unable to service the debt which they incurred to purchase the shares, but that is not the main basis on which they claim unfair prejudice.

[118] The respondents' rebuttal of the conclusion that the applicants suffered unfair prejudice is that any prejudice was due to ordinary risks of investment and was not unfair. They also suggest that the applicants cannot now claim unfair prejudice, because they rejected the offer made in 2014.

[119] In my view the prejudice to the applicants that has resulted from the respondents' choices regarding ACSA has been established. They find themselves in an impossible situation. The unfairness of that prejudice is also evident from my analysis above.

[120] With regard to the contention that the prejudice is simply the result of the ordinary risks of the investment, that is clearly not the case. Had there been devaluing which resulted from the trading of the shares on a listed exchange, that would have been a result of the ordinary risks of investment. Had ACSA been run in a manner consistent with the intentions outlined in the prospectus, and the applicants had nevertheless suffered losses, that too would have been a result of ordinary risks of investment, and could not be counted as unfair prejudice. But that is not what happened. I do not need to repeat what did happen, I have already set it out at length.

WAS THERE A FAIR OFFER?

[121] The question of whether the offer made in August 2014 to buy the shares at R12.87 per share ameliorates any unfair prejudice, or obviates the applicants' claim depends on whether the offer was fair. A fair offer that was refused would

demonstrate that the respondents have not acted unfairly, and that any prejudice was not unfair because the applicants had the opportunity to avoid it. The existence of a fair offer is also particularly relevant in this case because the ultimate relief sought by the applicants is that they are bought out at a fair price, and if they unreasonably rejected a fair offer, there would be merit to the respondents' submission that the applicants are attempting to obtain an unfair windfall.

[122] The authorities also acknowledge that an offer to buy shares at fair value may cure unfairness.[27] But, naturally, the existence of an offer that was refused is not an absolute bar to relief in terms of s 163. Both the intrinsic fairness of the offer (with regard to value and conditions), and the reason for refusal may mean that the offer does not cure unfairness or that the refusal does not preclude relief. As the SCA held in *Bayly v Knowles*:[28]

> … the failure of a minority shareholder to accept a reasonable offer for his shares and leave the company in the hands of the majority is, at least, strong evidence of a willingness to endure treatment which is prima facie inequitable despite the choice of a viable alternative. If that is so it would not ordinarily behove him to continue to complain about oppression. The rule, however, cannot be absolute. In *Re Data Online Transactions* (UK) Ltd [2003] BCC 510, for example, it was held reasonable for a petitioner to refuse an otherwise acceptable offer where there was not a reasonable prospect that the offeror would be able to meet the financial commitment involved. One can conceive of cases where the offer, although reasonable, may be so tainted by bad faith or ulterior motive as to excuse non-acceptance.[29]

[123] The applicants contend that the offer was not a fair offer because

1. it was conditional on being accepted by all empowerment shareholders, and they cannot be penalised for it not having been accepted because all the empowerment shareholders rejected it;

2. the price was not based on a fair valuation, and

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[27] *TCM ibid* para 108-109.
[28] 2010 (4) SA 548 (SCA).
[29] *Ibid* para 24.

3. the price offered impermissibly applied a minority discount.

[124] It is plain that the refusal of the offer by all empowerment shareholders means that the applicants' refusal of the offer cannot be held against them in these proceedings. Even if they had accepted it, their acceptance would not have been valid. The offer was therefore not one that stands in the way of relief in terms of s 163.

[125] However, taking into account that a valuation by Deloitte in July 2014 valued the shares at between R11 and R22 per share as at 31 March 2014, the 2014 financial statements put net asset value at R25.37 per share, and mere months later the Minister was of the view that the shares should be bought at R22 per share, which is Government's version, it is unclear how the price offered could be considered to be a fair price. The respondents contend that the applicant provides no basis on which it can be concluded that the price offered was unfair, but on the respondents' own version it is difficult to conclude that the price was not unfair.

[126] According to the report by Mr Harman annexed to ACSA's first answering affidavit, the offer price was arrived at by taking the mid-price of the Deloitte valuation and then deducting a 38% minority and marketability discount. The applicants contend that this was not justified as they would not have had to suffer such a discount if their shares were sold in the IPO or later on a stock exchange.

[127] To the extent that the share price offered to the empowerment shareholders was arrived at with the application of a minority discount, the applicants rely on *Geffen and Others v Martin and Others*[30] as a basis for their submission that the application of the discount disqualified the offer from being fair. In that judgment, Davis J set out principles applicable to what a reasonable offer is, based on guidelines articulated by Lord Hoffman in *O'Neill and another v Phillips and others*.[31] Regarding what a fair value is, it "would ordinarily be the value which

[30] [2018] All SA 21 (WCC) para 34.
[31] [1999] 2 All ER 961 (HL).

represents an equivalent proportion of the total issued share capital without a discount for being a minority holding."[32]

[128] The application of a minority discount would not, on that basis, automatically result in any offer being unfair. However, Lord Hoffman comments that the "existing practice" in such matters is not to apply a discount unless there are special circumstances which justify doing so, and "it will seldom be possible for the court to say that an offer to buy on a discounted basis is plainly reasonable".[33]

[129] Although the applicants rely on the unfairness of the price in their written heads of argument, at the hearing that reliance was disavowed, and the applicants emphasised that the unfairness on which they rely is only that, because of the condition that all empowerment investors must agree to sell, and because the other empowerment investors decline the offer, the offer was never open to them to accept even if they wanted to. The question of the application of a discount will therefore be considered when I deal with the appropriate remedy.

[130] Although the fairness of the price is open to doubt, I do not then need to determine it one way or the other, since I agree that the applicants could not have accepted the offer when the other investors declined it, so that there was no reasonable or fair offer that obviates relief in terms of the section.

REMAINING POINTS RAISED BY THE RESPONDENTS IN DEFENCE

[131] The remaining points raised by the respondents in opposition to the applicant's position engaging s 163 include:

1. The applicants are not entitled to relief under s 163 because the Minister took a decision that the shares must be purchased for R22 per share and that decision has not been set aside.

2. The applicants have not proven that they are empowerment shareholders.

[32] *Geffen ibid* para 34.
[33] *O'Neill ibid* at 975c-e.

3. The applicants have other remedies available to them.

4. Section 48 of the Companies Act precludes the relief sought.

5. The applicants' delay in pursuing these proceedings prejudices the respondents.

[132] I deal with these in turn.

THE MINISTER'S DECISION

[133] Government submits in its initial answering affidavit that the Minister made a decision in January 2015 that the applicants' shares should be bought by ACSA at R22 per share, that the decision is rational and that the decision is still extant. It contended that there was no contention that that decision was irrational, and that the proper course was to review that decision, rather than bring this application.

[134] This argument appears to have been abandoned, as there was no mention of it in argument. The abandonment is appropriate. The decision was neither conveyed to the applicants nor implemented. It therefore had no external effect and could neither be enforced nor reviewed. I pause to note that it is interesting that, even after the institution of the application, rather than make an offer in accordance with the decision, the respondents opposed the application partly on the basis that there was a decision already.

EMPOWERMENT STATUS

[135] ACSA argues that the applicants have not provided any proof of "empowerment status", and that the claim that they are "empowerment" shareholders is only a "strategic ploy". However, it is common cause that the shares were purchased as a result of applications accepted in response to the invitation for empowerment investment. The prospectus set out specific criteria for

empowerment investors, and made it clear that applications would only be considered from those who fulfilled the criteria.

[136] According to ACSA, the applicants' failure to disclose whether they still comply with these criteria is damning. I cannot see how it is. That would not change the circumstances under which the shares were made available, or the purpose of their sale. It would also not change the fact that the holders of those shares are now locked into an arrangement that was not of their choosing, which they could not have reasonably predicted, and which is unfair.

[137] The Ernst & Young report in 2012 seems to show that the first applicant's empowerment investors had already sold out to another entity which may not comply with the empowerment requirements. However, that issue was not fully ventilated before me and I do not consider it appropriate to penalise the first applicant as that development does not change the fundamental facts.

THE AVAILABILITY OF OTHER REMEDIES

[138] Government suggests that the applicants have other remedies at their disposal and therefore should not be permitted to succeed. These include enforcement of the alleged IPO promise and the review of Regulating Committee decisions.

[139] There is nothing that compels the applicants to exhaust all other possible remedies before approaching the court in terms of s 163. These include public law remedies such as review of the various decisions of the Minister and the Regulating Committee, or an application to compel an IPO on the basis of the legitimate expectation, as well as the remedies in the Companies Act which penalise false statements in the prospectus.

[140] As far as the public law remedies, are concerned, on Government's own version that each of the decisions complained of were legitimate, and insulated from judicial interference because they are polycentric, value laden, policy decisions, none of those remedies would succeed.

[141] Government decided to incorporate ACSA and make the Act applicable to it. It had the opportunity to exclude the application of certain sections, and did not exclude s 163. It cannot now say that s 163 should not be available, and that the applicants are obliged to follow public law remedies. Government attempts somehow to rely in support of this suggestion on the fact that this is not a situation of private investors in a commercial company. That submission redounds against Government rather than for it, because the investment was invited on the basis that, eventually, it would be in a commercial company. The fact that it no longer will be highlights the unfairness and prejudice to the applicants. In the specific circumstances of this case, Government's own unfair conduct cannot protect it from the consequences of that conduct.

[142] As far as the remedies for false statements in the prospectus are concerned, that is another deflection. The applicants do not contend that the statements were false at the time they were made. The unfairness claimed is the decision to change course. The applicants rely on the contents of the prospectus because no shareholder's compact was entered into with them.

[143] Government's submission that other remedies are available to the applicants is based on its own re-articulation of the applicants' case. It is not open to it to do that. The case pleaded by the applicants and the relief they seek must be evaluated on their own merits, and not against the case Government would rather meet.[34]

[144] In any event, s 163 is there to provide recourse where a shareholder suffers unfair prejudice as a result of acts that may not, in themselves, be in bad faith, illegitimate or unlawful. The situation in this case is in my view squarely within the bounds of the mischief s 163 exists to relieve.

[34] *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) paras 71 and 72.

SECTION 48 OF THE COMPANIES ACT, 2008

[145] ACSA contends that the relief sought is incompetent because an order that ACSA repurchase its own shares, which is prohibited in terms of s 48(2) of the Act unless the requirements of s 46 are complied with. This deals with the solvency and liquidity of the company once the shares are purchased.

[146] ACSA makes no case that, in fact, any repurchase of shares would lead to it failing the solvency and liquidity test. It does not make any suggestion of what value might be offered that is fair to the applicants and also satisfies the test. This objection is, in my view, simply raised in an attempt to avoid any relief being granted to the applicants.

[147] In any event, the question can be dealt with in a number of ways. The court could order that the price be determined while taking the solvency and liquidity test into account. The order could be that Government purchase the shares rather than ACSA, or that the respondents bear joint and several responsibility for the purchase of the shares. If the fair value arrived at does in fact result in a threat to the solvency and liquidity, the court can be approached to assist in arriving at a fair solution. The point is that a fair value must be fair to everyone, and invoking s 48 at this point shows ACSA's failure to engage *bona fide* with the predicament in which the applicants find themselves.

DELAY

[148] In its supplementary answering affidavit, Government raises the delay between the dismissal of the appeal of the rescission in April 2022 and the filing of the applicants' amended notice of motion as a basis on which it would be in the interests of justice to dismiss this application. The point was not pursued in the two sets of written argument filed, nor in oral argument.

[149] Nevertheless, it seems to me that in the circumstances of this case the delay was not inordinate and a determinative resolution of the matter is in the interests of justice while the mere dismissal for delay would not be.

REMEDY

[150] It is unclear why the respondents appear to be committed to keeping the applicants locked in. Not only was there a failure to make an offer as determined by the Minister in 2015, but there was no offer forthcoming after the ill-fated Riscura valuation which led to the rescission of the order by agreement, not even an offer based on the valuation obtained by ACSA from Mr Wainer in response to the Riscura valuation. The respondents have obviously taken a decision that ACSA will remain a State-Owned Enterprise, and that it will be a resource in Government's various policy agendas. I reiterate that of course they are entitled to do so. But their failure to facilitate a reasonable and fair exit for the applicants in these circumstances is unfathomable. Government cannot seek to avoid all consequences of its decisions, even though it was entitled to take those decisions. Section 163 exists precisely for the circumstance where a legitimate decision leads to unfair prejudice for a shareholder who has no way of mitigating that prejudice.

[151] The remedy sought by the applicants is that the respondents be ordered to purchase the applicants' shares in ACSA, at a value to be determined by an independent expert. The applicants further seek an order regarding the method of valuation and what should be included or excluded from consideration by the expert.

[152] The respondents raise various objections to any order that they be ordered to purchase the shares, but make no concrete submissions about what a just and equitable remedy would be, if this court finds that a case was made out for relief in terms of s 163.

[153] ACSA makes unsupported submissions that any order that the shares be purchased, at a price using any valuation method, would (not may) jeopardise ACSA's financial stability and undermine its public function. It suggests that the purchase of the shares is extraordinary relief for which no case has been made out and that more appropriate relief may be "improved transparency or governance adjustments".

[154] In the context of even the common cause facts, it seems to me that ACSA's submissions regarding the appropriate relief are inconsistent with ACSA's plans for the future, or with Government's plans for ACSA. There is now a clear intention for ACSA to be treated as an organ of state and for it not to have outside shareholders. The suggestion that a court should then interfere in how ACSA is governed in those circumstances may well amount to interference in government policy matters beyond what is desirable. That the purpose of the interference is the retention of investors who own such a small percentage of shares as to be negligible, and who do not fit into ACSA's future anymore, makes it even less appropriate.

[155] The contention that buying out shareholding that amounts to less than two percent at any reasonable price would result in financial disaster for ACSA is risible. Naturally if the price is too high it would not be "fair value", and any "fair value" would have to be such that it did not completely derail ACSA. ACSA however seems to take the view that any price at all would have this disastrous effect, which is a submission that cannot properly be engaged with. The submission is especially disingenuous in view of ACSA's own contention in its second answering affidavit that, after the expert's valuation report is produced, the court would retain discretion about the appropriate value at which the shares should be purchased.

[156] In neither of its two answering affidavits does ACSA submit that the purchase of the shares would not be just and equitable. The only issue taken with the relief is the applicants' proposed methods of valuation and the restrictions the applicants seek to impose on the valuer. These are dealt with later in this judgment.

[157] Government objects to an order that the applicants' shares be bought by the respondents on the basis that it would be "separation of powers insensitive". The objection is based both on the resulting payment of public funds and on "Government's policy concerning its control and shareholding in ACSA". This submission was first raised in Government's second answering affidavit, and included verbatim in its written argument.

[158] Considering that what Government has disclosed to the court about its current policy concerning its control and shareholding in ACSA is both rudimentary and contradictory, it seems clear that this second objection is a grasping at straws that must fall flat. All indications are that Government has changed its policy about its shareholding in ACSA, does not intend to rid itself of its shareholding or the complete control that it has reassumed, and intends to keep ACSA within its fold. This is evident not only from Government's affidavits and the courses of action that have played themselves out over the last twenty-five odd years, but also from the most recent (unproclaimed) amendment to the ACSA Act.

[159] Government purchasing the shares would have no effect on the control of ACSA since the shares at issue come with no control. As far as Government's policy regarding shareholding is concerned, both Government and ACSA have made much of the negligible size of the shareholding at issue. The repurchase of the shares would have no real effect on whatever that undisclosed policy might be.

[160] In any event, the buy-out of the applicants' shares is the least invasive remedy that would alleviate the unfairness, as it would leave Government free to deal with ACSA however it wished (subject to any objections the other shareholder respondents may have). Any remedy that may come close to prescribing how ACSA is run would cut deeper into the polycentric policy-laden core that Government seeks to protect. The objection based on Government's policy on ACSA's shareholding and control has no merit.

[161] The question of the payment of public funds is something that is relevant, but not determinative. It does have an influence of what remedy may be fair to all parties. It may also be accommodated in the determination of the fair value of the shares. Government complains that the applicants have not placed evidence before the court about the effect of any purchase of shares on Government's ability to comply with its constitutional obligations. However, in my view, that is something that Government must demonstrate since it is particularly in Government's knowledge. It is also something that can be referred to the court after the valuation report is produced, in accordance with the submissions made by ACSA.

[162] In its first answering affidavit, Government objects to an order that the shares be bought by the company on the basis that the court has no power to order a buy-back of shares outside of s 164 of the Companies Act. This contention was not followed through in argument, and it has no merit. The authorities show that courts have ordered that shares be bought, whether by the company,[35] the majority shareholder,[36] or even the majority shareholder,[37] as a remedy in terms of s 163. Certainly there is no reason to interpret s 163 as excluding such a remedy. It permits a broad discretionary remedy and is only limited by what is just and equitable in the circumstances.[38] The court "may make any interim or final order it considers fit".[39]

[163] Government also contended in the first answering affidavit that s 217 of the Constitution is applicable to the purchase of the shares, but it is not clear how. This too was not pursued in argument.

[164] Government emphasises the separation of powers point with this *ratio* from *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* ("*ITAC*"):[40]

> Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.[41]

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[35] This possibility is not excluded by the SCA in *De Sousa* (above), even though it set aside the order of the High Court.
[36] For example, in *McMillan NO v Potts and Others* 2011 (1) SA 511 (WCC) ("*McMillan*").
[37] As was the case in *Bayly v Knowles* (above).
[38] *Off-Beat Holiday Club and Another v Sambonani Holiday Spa Shareblock Ltd and Others* 2-17 (5) SA 9 (CC) para 27-28; *Freedom Stationery (Pty) Ltd and Others v Hassam and Others* 2019 (4) SA 459 (SCA) para 27.
[39] Section 163(2) of the Companies Act.
[40] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC)
[41] *Ibid*, para 95.

[165] It should go without saying that there is no possibility of any court usurping a power or function entrusted by the Constitution or legislation to a particular branch of government and imposing instead a decision of the court's "preference". That implies arbitrary and injudicious decision making that is inconsistent with the rule of law. The court must ensure that the branches of government exercise their authority in accordance with the Constitution and applicable legislation. The Constitution itself affirms that South Africa is founded on values including "[s]upremacy of the constitution and the rule of law".[42] One of the primary elements of the rule of law is that nobody is above the law, not even Government. As the Constitutional Court put it in *ITAC*, Government must "wield [its] power subject to the Constitution and the law".[43]

[166] In that context, the mere *ipse dixit* of a member of government is no longer sufficient to invoke judicial deference.[44] Although the authorities deal with administrative decisions and claims to keep information secret, the same principles must apply to government conduct in general, which must be consistent with the law and the Constitution, both when it acts as an ordinary shareholder and when it acts as a political entity. Government cannot use separation of powers as a general shield against consequences for its actions. This is especially so when the application of the Act and its remedies comes about as a result of Government's own decision to make the Act applicable to ACSA. Government also had the opportunity at the time to stipulate that s 163 would not apply to ACSA. It did not do so, and Government must now bear the consequences of its own actions.

[167] If Government contends that a decision will impinge on the inviolable heartland of executive decision-making,[45] it must show the court how, and not simply recite the legal position,[46] or claim that the public interest or government's powers and functions are implicated.[47] In simple terms, he who alleges must prove, with

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[42] Section 1(c) of the Constitution.
[43] *ITAC*, para 98.
[44] *Wingate-Pearse v Commissioner, South African Revenue Service and Others* 2019 (6) SA 196 (GJ) paras 57-59 and the authorities referred to there.
[45] *Ibid*, para 100.
[46] *President of the Republic of South Africa and Others v M&G Media Ltd* 2011 (2) SA 1 (SCA) paras 19-20.
[47] *Nxele v Chief Deputy Commissioner, Corporate Services, Corporate Services, Department of*

reference to facts rather than "perfunctory conclusions".[48] In both *ITAC* and *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* (*OUTA*),[49] the party relying on separation of powers to require judicial deference set out a clear case of how an order by the court would encroach on policy issues, rather than simply making an assertion.

[168] In any event, this case is very different from *ITAC*, which dealt directly with policy formulation and implementation, and in which the Minister put before the court a detailed explanation of what goes into the policy formulation, and how it would be affected by an order. Again, I emphasise that I deal now not with the decision not to list ACSA, or the decision to prioritise ACSA's role in the economic development of the country, but with the remedy for the prejudice that I have found has resulted for the applicants.

[169] Finally, there can be no real objection on Government's part to it buying the applicants' shares, because the prospectus specifies that if the empowerment investors want to sell their shares before any IPO, they may only sell them to Government. The possibility was already foreseen at the time of the invitation to invest, and it prevents any other sale by these investors. What the status of that provision becomes when Government itself has decided there will be no IPO is not the issue, particularly when sale of the shares to any third party in the context of this case is not an option to be considered.

[170] Government's and ACSA's objections to an order that the applicant's shares be bought by them do not hold any water. The alternative remedies suggested by them seem to me to be less fair to both sides, and also are more likely to overstep the separation of powers principle than the share buy-out option.

[171] I am satisfied that an appropriate remedy is to order that the applicants' shares be bought, whether by Government or ACSA or a combination, and for a fair price. As observed by Hoffman J (as he then was):

Correctional Services & Others (2008) 29 ILJ 2708 (LAC) para 46.

[48] *President of the Republic of South Africa and Others v M&G Media Ltd* 2011 (2) SA 1 (SCA) para 30.

[49] 2012 (6) SA 223 (CC)

> It is almost always clear from the outset that one party will have to buy the other's shares and it is usually equally clear who that party will be. The only real issue is the price of the shares.[50]

[172] This brings me to the next consideration regarding the remedy, and that is how the shares are to be valued, or how a fair price is to be arrived at. The fairness of the price has to take into account all the relevant principles, including the prejudice suffered by the applicants and that the funds are public funds. It must also shy away from allowing the applicants an undue benefit, or windfall.

VALUATION

[173] It appears on a consideration of the application as a whole that the fair value of the shares is the most contentious issue. There have already been 5 vastly differing valuations of the shares:

1. In 2014, a valuation by Vunani Capital for the purposes of buying back the empowerment shares, using an undisclosed mandate letter for its frame of reference, arrived at R10.36 per share as at 31 March 2013.[51]

2. In 2014, the Deloitte valuation based on ACSA's financial reports and Corporate Plan, as at 31 March 2014, arrived at a value of R18 to R22 per share.[52]

3. In 2016, a valuation by Mr Greg Harman as at 30 September 2015, for purposes of answering the first phase of this application, set the value at R15.70 before applying a discount for minority shares and lack of liquidity, to end at R11.70 per share.

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[50] *Re a Company (No 004377 of 1986)* [1987] BCLC 94 at 101, cited by Binns-Ward AJ (as he then was) in *McMillan ibid* para 1.

[51] This valuation was much lower than the valuations done by Vunani for earlier years, not because of a decrease in value, but because Vunani applied different factors. The applicants' expert notes an error in calculation and suggests that the correct amount there ought to have been R11.07.

[52] The middle of that range was used for the offer of R12.90 in 2014, after applying a discount of 38% for minority and marketability.

4. In 2017, the Riscura valuation obtained in terms of the court order of 1 August 2017 valued the shares at R77.92 per share.

5. In 2018, a valuation by Professor Wainer in response to the Riscura valuation, placed the value at R36.36 per share. ACSA had initially sought the use of that value for the shares in its counter-application (although it does not appear that an offer was made at that value).

[174] Other share prices for ACSA shares that can be found in the papers are the initial R8.19 per share that all the 1998 investors paid; the R16.75 per share paid by the PIC for shares in the eighth respondent; the offer from the majority of the minorities to ACSA, in 2013, for ACSA to buy the shares at R23.05 per share, and the unimplemented decision of the Minister in 2015, that the shares be bought at R22 per share.

[175] The wide range of values demonstrate that assumptions applied and the choice of factors to consider are vital to the outcome of the valuation process. The issue is complicated by the need for the value to be fair to all parties. It must not result in an undue windfall to the applicants. It must not be so high as to be punitive to the respondents. It must also not prejudice ACSA unduly, or impact unduly on the public purse. That said, the value must also remedy the prejudice that I have found the applicants to have suffered, by having their interests essentially ignored in decisions taken about and, to a lesser extent, by ACSA, and by not having been offered a reasonable exit opportunity at a reasonable time.

[176] The parties disagree on what valuation method is appropriate, on what may be taken into account by the valuer, and what the appropriate valuation date is. The respondents contend that it is not for the court to specify the terms of reference, however, they themselves provided certain terms of references for valuations in the past. The applicants rely on authorities that show that it is not unusual for a court to specify what may be taken into account and how, particularly when those factors may be part of or relevant to the oppression.[53] Reference to the various valuation reports shows that it is not only the particular method that makes a difference, but the factors that are taken into account, and how they are taken

[53] For example the detailed order made in *McMillan.*

into account. A clear indication of this is seen in the difference in the Vunani report produced in 2013 for the purposes of the employee share scheme, and the Vunani report in March 2014, in which the value of the company is significantly lower. Mr Harman states that the difference does not emanate from a real value change but from lower assumptions about revenue and growth during the terminal period.

[177] Whether and to what extent the court determines or limits what a valuer may take into account depends on the circumstances of the case. The court makes the determination of what conduct was fair and therefore also of what a fair value will be based on. Reference to the Riscura valuation, in which the determination of what conduct was oppressive and how it must be accounted for was left to the discretion of Riscura, is sufficient to demonstrate the perils of the court not determining disputed parameters with sufficient clarity in the circumstances of this case In my view Riscura's manner of accounting for what it considered to be oppressive conduct resulted in an unfair valuation, because it valued shares on the basis of value that did not exist.

[178] The applicants' preferred remedy is an order that the respondents acquire the shares jointly and severally, at a price determined by using the price at which the PIC purchased its shares in the eighth respondent in December 2005 (R16.75 per share), escalated to present day value by using ACSA weighted average cost of capital ("WACC") as set by the Regulating Committee each year, until the date on which the valuation is undertaken, to be compounded annually on 31 March.

[179] In the alternative, the applicants seek the acquisition of the shares jointly and severally by the respondents on the basis of a fresh valuation conducted by an independent valuer appointed by agreement, with no procurement processes followed, and based on the following:

1. A discounted cash flow ("DCF") methodology, using an equity value over earnings before interest, tax, depreciation and amortisation ("EV/EBITDA") multiple valuation and a multiple of net asset value ("NAV") as checks.

2. A valuation date of 01 August 2017.

3. No minority or marketability discount.

4. Excluding from the valuation the effect of specified “oppressive conduct”.

5. Escalating to present day value using the WACC

[180] It is the case that an actual sale value may be more useful in determining fair value than notional values achieved by valuations which can be vastly different simply by changing one assumption. However, against this advantage must be ranged the circumstance that the only sale values are from 1998 and 2005, 38 and 21 years ago respectively. Since I have found that the fundamental basis of the prejudice suffered by the applicants is the respondents’ failure to give them the opportunity to exit at the time the SEP did, when it appears to me the decision to change course must have been taken, the 2005 price would a sensible starting point. The difficulty then is the appropriate escalation to be applied.

[181] The respondents submit that a share price from over 20 years ago cannot be a relevant or appropriate place to start, partly because it is so long ago as to be completely irrelevant. There is something in that, but it may be remedied by applying the appropriate escalation. Another advantage of using the 2005 price is that it would not require yet another expensive and extensive valuation exercise from scratch. Naturally, however, if the 2005 price is unworkable, then the exercise would have to be undertaken.

[182] The applicants submit that the appropriate escalation factor is the WACC as determined by the Regulating Committee when performing its statutory functions. The respondents object to this on the basis that the WACC calculated and applied by the Regulating Committee was often higher than ACSA’s actual performance, and that this would result in the overvaluation of the shares. The applicants’ riposte is that this would compensate them for the prejudice they suffered by ACSA not being run in a commercially sound manner. As I have already observed, over valuation is to be avoided, as it relies on value that is simply not there, and would result in unfairness to ACSA and possibly an improper strain on the public purse.

[183] ACSA and Government both submit that using the WACC is inappropriate because ACSA's actual returns were lower than the WACC. ACSA suggests the imposition of interest instead, while Government makes no alternative suggestion. Government's interesting position is that, even if the Court finds that there was conduct which engages s 163, and the applicants were prejudiced, the application must still be dismissed because the methods of valuation proposed by the applicants are not acceptable to Government. This attitude is not an acceptable one. As a prime constitutional actor, Government should be taking a facilitative approach and assisting the court to find a just and equitable solution, rather than calling for dismissal of an application because it does not like the applicants' proposed solution.

[184] I am not satisfied that interest would be an appropriate way of escalating the share price from 2005, as there is insufficient evidence before me to show that it would be a sufficiently nuanced and fair escalation. Nor, as already indicated, am I satisfied that using the WACC would be fair.

[185] This brings me to the second proposed method of valuation, set out above.

[186] The applicants propose that value of their shares be arrived at by means of valuing ACSA in the manner set out above, which is the same method used by most of the experts who have provided valuations in this saga, save for the valuation by Professor Wainer in 2018. I can see no fundamental difficulty with that as a general proposition.

[187] ACSA contends that there is no need for yet another expert report. Nor does it suggest any other method of arriving at a value. Instead, it contends that there is not sufficient evidence before the court to determine a value. It makes the unusual submission that there is no real dispute, there are established methodologies to value the company and the company's financial statements are transparent, and this can therefore be easily calculated. However, on ACSA's own argument, it is an independent expert who will perform this calculation using the established methodologies, some of which are those requested by the applicants.

[188] ACSA also contends that if the court determines what is fair to be taken into account, the expert will only be undertaking a mechanical exercise and there is no point to that. This contention too is flawed. Firstly, on ACSA's own argument, it is the court that must determine what is fair. The court has a wide discretion. The court is not an expert and cannot perform the calculations. It is, on the authorities, as well as logically, entirely appropriate for the court to set parameters for any calculation.

[189] Government makes the submission that certain methodologies were used to value ACSA and therefore its shares in 1998 and again in 2005. It does not, however, disclose what those methodologies are. Had it done so, it may well have been appropriate to order that similar methodologies be used here. Again, the court is somewhat constrained by the failure of Government to assist it in coming to a fair, lawful, just and equitable decision.

[190] The applicants seek that the independent expert be appointed without following procurement processes. I do not see that there is any basis for an order that the independent expert be appointed without following procurement processes. If Government is paying for the expert, no cogent reason is provided why it should not follow the required processes.

[191] Government uses this request by the applicants as a reason why the whole of the relief cannot be granted. Naturally that is not the case. Declining the prayer for the expert to be appointed without procurement processes being followed is the only logical result to that prayer being without basis.

[192] The applicants suggest that the appropriate date of the calculation should be 1 August 2017, and that it should be escalated from that date using the WACC. The reasons for the suggestion are that previous order which was rescinded was dated 1 August 2017, and the Riscura valuation and Prof Wainer's valuations were both for that date; the applicants were not to blame for the failure of that order, and that the applicants should not have to bear the brunt of the effect of Covid-19 on ACSA. I disagree that those are valid reasons. I disagree in particular that there is any basis on which applicants should be entitled to avoid

the effects of Covid-19. While any chosen date would probably be arbitrary, it should have some reasonable basis.

[193] ACSA submits that 1 August 2017 is not an appropriate date. It submits, without any reason, that the appropriate date is the date on which the application was launched (29 July 2015), but at the same time does not agree about how escalation should be calculated, and also wishes for the applicants not to have the benefit of avoiding the effects of Covid-19. It does not make any submission about how this would be achieved if the effective date is 29 July 2015.

[194] On balance, it seems to me that, taking into account the difficulties in finding an appropriate factor for escalation, and that it is my view that the applicants should not benefit by a value that is more than what exists, the appropriate date for valuation is the most recent financial year end before the hearing. That is, 28 February 2025. It can then be escalated to the final valuation date by the application of the applicable *mora* interest rate.

[195] As to the factors that should be taken into account, I have already indicated that the prayer for oppressive conduct be accounted for cannot be granted. It would lead to an unfair result and prejudice ACSA and the public purse unduly. While the effect can be attenuated by the retention of dividends (as the Minister had suggested in 2015) and allowing payment to the applicants to be made in instalments (as the applicants suggested in the application to adopt the Riscura valuation), it would still tip the balance unfairly.

[196] Nevertheless, I am satisfied that the applicants have made out a case that no minority or marketability discount should be applied. Had there been an IPO and the shares been sold on a registered stock exchange, whether at the time of the IPO or a year later, there would have been no such discount. The vagaries of the market may have resulted in a lower or higher value, but no discount would have applied. The value should not, therefore, include a discount. Neither Government's nor ACSA's objections to there being no discount have any merit.

[197] If the outcome of the exercise results in liquidity difficulties for ACSA that cannot be remedied by the retention of dividends and appropriate contribution from the major shareholder, it is still open to the respondents to approach the court and

place the necessary evidence before it to show that the value is not fair in the circumstances. It is to be hoped, however, that the parties are able to agree about what a fair value is in the context of the court's findings and that does not become necessary.

CONCLUSION

[198] On the basis of what I have set out above, it is appropriate to make an order that ACSA and/ or Government, jointly and severally, be responsible for making good the prejudice they have caused, and to purchase the applicants' shares at a fair value.

[199] The applicants seek costs on scale C. The manner in which ACSA and Government have litigated led me to consider imposing a punitive costs order but on reflection, it is not necessary to further encumber the public purse. I therefore make an order for costs on the ordinary scale.

[200] I make the following order:

1. The first to third respondents have caused unfair prejudice to the applicants as contemplated in section 163(1) of the Companies Act, 2008.

2. The first to third respondents, jointly and severally, are to acquire the applicants' shares in the first respondent at a fair value, to be paid in cash within one month of the final valuation being made available to the parties.

3. An independent expert valuer is to be appointed by the first to third respondents, subject to government procurement requirements, and taking any reasonable objection by the applicants into account. The costs of the valuation are to be borne by the first to third respondents, jointly and severally.

4. The appointed valuer shall value the applicants' shares on a pro-rata basis, without applying any discounts for minority shareholding or lack of marketability of the shares, as at 28 February 2025, escalated to the date on which the final valuation is made available to the parties by the application of the *mora* interest rate.

5. The appointed valuer shall use a discounted cash flow methodology, and use an EV/EBITDA multiple valuation and a net asset value valuation as cross-checks, using comparable international companies to determine appropriate multiples. Should the valuer consider that addition methodologies are

necessary to cross-check the value for accuracy, that should be done and reasons given in the valuation report.

6. The first to third respondents, and the applicants, are to provide all and any information to the valuer that the valuer deems relevant, within 7 days of any request by the valuer.

7. The parties shall be permitted to make representations to the valuer on the basis of a draft valuation, before the final value is determined.

8. The final valuation shall be completed within six months of the valuer's appointment.

9. Should there be a need for further relief resulting from the valuation process, or any collateral relief resulting from unforeseen circumstances, the parties may supplement their papers and re-enrol this application.

10. The first to third respondents are to pay the costs of this application, including costs of two counsel, on scale C.

This judgment was handed down electronically by circulation to the parties' representatives by email and uploading to the relevant online platform.

S. YACOOB

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

For the applicants:	A Franklin SC and P Smith
Instructed by:	Pinsent Masons, substituted by Stein Scop Attorneys Inc on 1 October 2026
For the 1st Respondent:	V Maleka SC, P Ngcongo and D Mutemwa
Instructed by:	Edward Nathan Sonnenberg
For the 2nd and 3rd Respondents:	G Marcus SC, A Hassim SC and D Sive
Instructed by:	The State Attorney, Johannesburg