IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: 1961/10

In the matter between:

GRANCY PROPERTY LIMITED	First Plaintiff
MONTAGUE GOLDSMITH AG IN LIQUIDATION	Second Plaintiff

And

DINES CHANDRA MANILAL GIHWALA	First Defendant
LANCELOT LENONO MANALA	Second Defendant
SEENA MARENA INVESTMENTS (PTY) LTD	Third Defendant
DINES CHANDRA MANILAL GIHWALA NO	Fourth Defendant
SHANTI GIHWALA NO	Fifth Defendant
KANTIELAL JERAM PATEL NO	Sixth Defendant
NARENDRA GIHWALA NO	Seventh Defendant
KIRAN GIHWALA NO	Eighth Defendant
NGATANA PROPERTY INVESTMENTS (PTY) LTD	Ninth Defendant

And

Case No: 12193/11

GRANCY PROPERTY LIMITED	First Plaintiff
MONTAGUE GOLDSMITH AG IN LIQUIDATION	Second Plaintiff

And

DINES CHANDRA MANILAL GIHWALA	First Defendant
LANCELOT LENONO MANALA	Second Defendant
SEENA MARENA INVESTMENTS (PTY) LTD	Third Defendant
DINES CHANDRA MANILAL GIHWALA NO	Fourth Defendant
SHANTI GIHWALA NO	Fifth Defendant
KANTIELAL JERAM PATEL NO	Sixth Defendant
NARENDRA GIHWALA NO	Seventh Defendant
KIRAN GIHWALA NO	Eighth Defendant
NGATANA PROPERTY INVESTMENTS (PTY) LTD	Ninth Defendant
BRUK MUNKES & CO	Tenth Defendant
HYMAN BRUK	Eleventh Defendant
MINISTER OF TRADE AND INDUSTRY	Twelfth Defendant

JUDGMENT DELIVERED: 26 JUNE 2014

FOURIE, J:

INTRODUCTION AND BRIEF BACKGROUND

[1] The above consolidated actions form part of protracted litigation between plaintiffs and a number of defendants. The actions were instituted on 29 January 2010 and 17 June 2011, respectively, and are conveniently referred to as the 2010 and 2011 actions. The relief sought by plaintiffs in the actions is wide-ranging and aims to impose liability upon a number of defendants in terms of a variety of causes of action.

[2] During the course of the trial, it became clear that the claims are advanced by first plaintiff only, as the role played by second plaintiff was that of an investment adviser to, and a representative of, first plaintiff. With regard to the defendants, third defendant did, at the commencement of the trial, withdraw its defence and abides the decision of the court. No relief is sought against ninth defendant, whilst a settlement was reached, before the commencement of the trial, between plaintiffs and tenth and eleventh defendants. The twelfth defendant is the relevant executive authority joined in the proceedings for purposes of the determination of the constitutional issue, to which I will in due course refer.

[3] As appears from pages 140 to 178 of the 2010 action, second and third defendant's instituted claims in reconvention against the plaintiffs. Third

defendant, who abides the decision of the court, has not pursued its claim in reconvention. On 13 February 2014 (the seventh day of the trial) second defendant formally withdrew his counterclaim and tendered the wasted costs occasioned thereby.

[4] The main role players in the events giving rise to the litigation, are the following:

4.1 The first plaintiff **("Grancy")**, a company duly incorporated under the laws of the British Virgin Islands, with principal place of business in Vaduz, Principality of Liechtenstein.

4.2 The second plaintiff **("MG")**, a company with principal place of business in Zurich, Switzerland.

4.3 Mr. KI Mawji **("Mawji")**, a British citizen permanently resident in the United Kingdom, who was at all relevant times the directing mind and will of Grancy and MG.

4.4 Mr. AK Narotam **("Narotam"),** at the relevant time the Chief Operating Officer of MG.

4.5 The first defendant **("Gihwala")**, at the relevant time a practising attorney of the High Court of South Africa and chairman of Hofmeyr, Herbstein and Gihwala Inc. **("HHG")**. Gihwala has been

a director of third defendant **("SMI")** from June 2003 until, at least, 28 February 2011. He is also and has been a director and chairman of ninth defendant **("Ngatana")** since March 2006.

4.6 The second defendant **("Manala")**, a director of companies who has been a director of SMI since June 2003 until his registration on 18 September 2011. He has also been a director of Ngatana since October 2004.

4.7 The Dines Gihwala Family Trust **("DGFT")**, as represented by its trustees, the fourth to eight defendants. The evidence shows that Gihwala was the managing trustee of the DGFT.

[5] Central to the actions and the issues which arise, is an investment in linked units in Spearhead Property Holdings Limited **("Spearhead")**. Spearhead is a commercial property loan stock company listed on the Johannesburg Securities Exchange. It wished to attract black investors with the potential to add value to its assets and operations and to raise further capital. Ngatana is a black economic empowerment company, which took up units in the Spearhead investment. SMI, of which Gihwala and Manala were then the only shareholders, had been offered a 40% shareholding in Ngatana, while another investor , namely Bonitas Medical Fund, had been offered an 18%

shareholding in Ngatana. However, Bonitas decided not to take up this shareholding in Ngatana.

[6] In January 2005, Gihwala approached Narotam, a close friend of his, with the suggestion that MG should take up this 18% shareholding in Ngatana. He explained that, because the offer of Spearhead units to Ngatana was an empowerment transaction, it would be advisable for MG to take up the 18% through SMI. MG would fund the purchase by SMI of the additional 18% shareholding in Ngatana, and would become the third shareholder in SMI, with Gihwala and Manala. SMI would then have a 58% shareholding in Ngatana.

[7] On 3 February 2005, and at the Sandton Sun Hotel, Johannesburg, Gihwala, Narotam and Mawji met, and concluded an agreement ("the February 2005 agreement"), with regard to the anticipated investment in Spearhead units, via the two special purpose vehicles, i.e. SMI and Ngatana.

[8] This agreement serves as the foundation for the 2010 and 2011 actions, as well as several other proceedings instituted by plaintiffs during the course of the protracted litigation between the parties. I will, when necessary, refer to such other proceedings in more detail.

[9] The plaintiffs contend that, those defendants against whom they seek relief in the 2010 and 2011 actions, have breached their obligations arising from the February 2005 agreement, and these alleged breaches of contract form the basis for the relief sought against them.

THE NATURE, TERMS AND CONDITIONS OF THE FEBRUARY 2005 AGREEMENT

10] As mentioned above, the meeting at which this agreement was arrived at, was attended by Gihwala, Narotam and Mawji. At the trial Mawji testified on behalf of plaintiffs regarding the conclusion of the February 2005 agreement, while defendants decided not to call any witnesses to testify on their behalf. Narotam had, subsequent to February 2005, left MG and it appears that, at the time when this trial commenced, he found himself in the defendants' "camp". The minute of a pre-trial conference recorded that Narotam would be called as a witness to testify on behalf of the defendants. This did not happen. There is accordingly no *viva voce* evidence presented by defendants to gainsay the evidence of Mawji, as to what was discussed and agreed upon at the meeting of 3 February 2005.

[11] According to Mawji, the material terms of the agreement agreed upon orally on 3 February 2005, are the following:

11.1 The plaintiffs (as subsequently transpired, through the medium of Grancy), Gihwala and Manala would pursue the Spearhead investment by utilising the two special purpose vehicles, SMI and Ngatana. I will hereinafter refer to the three contracting parties to the February 2005 agreement, as Grancy, Gihwala and Manala, respectively.

11.2 Gihwala, Manala and Grancy would each hold a one third share in SMI. SMI, in turn, would hold a 58% share in Ngatana. Ngatana would hold the Spearhead linked units. Gihwala and Grancy also agreed to provide Manala with a loan to finance his investment in SMI.

11.3 Manala and Gihwala would be the directors of SMI and SMI would also, by virtue of its majority shareholding, be in control of Ngatana and its board of directors.

11.4 The Spearhead investment as contemplated under the agreement, would be implemented, managed and controlled by Gihwala and Manala.

[12] Mawji explained that, as Grancy and those in control of it, in particular Mawji and Narotam, were based abroad, they placed their trust and faith in Gihwala and Manala to keep proper control of the investment. Mawji says that he did not know Manala at the time, but he was acquainted with Gihwala and some background checking showed that Gihwala was a highly respected attorney and businessman. He was, at the time, the chairman of HHG, a major South African law firm.

[13] On 21 February 2005, Gihwala sent an e-mail to Narotam in which he sought to *"regularise"* the relationship of the parties. In the main, the e-mail sets out the financial contributions to be made by the three parties to the February 2005 agreement. Each would be responsible for payment of an amount of R1 976 833-33, while the e-mail confirms that MG (Grancy) and Gihwala would lend Manala his share by means of a contribution of R988 416-66 each. Gihwala also confirmed that SMI had incurred costs of approximately R225 000-00 in setting up the deal and that, in respect thereof, the three parties would accordingly be liable for payment of R75 000-00 each. Finally, Gihwala recorded that he proposed drafting an agreement in due course whereby he and Manala would acknowledge MG's (Grancy's) one third share *"in our holding company"*, namely SMI.

[14] It is common cause that Gihwala did not in due course attend to the finalising of a written agreement setting out the rights and obligations of the relevant parties. It is further common cause that Grancy had subsequently complied with the financial obligations undertaken by it in terms of the February 2005 agreement. Gihwala too complied with his financial obligations, but I should mention that he made it through the medium of the DGFT, with the result that the latter, and not Gihwala personally, took up the shareholding in SMI. Manala, by means of the loans made to him by Grancy and the DGFT, took up his agreed shareholding in SMI. Notwithstanding continued insistence by Mawji that, in terms of the February 2005 agreement, Grancy was entitled to take up its agreed shareholding in SMI, this did not happen until much later, as the events detailed hereinafter, will show.

[15] Returning to the nature and terms of the February 2005 agreement, it was stressed by Mawji that, having regard to the peculiar circumstances, this was an agreement underpinned by confidence, trust and utmost good faith. In its pleadings Grancy has labelled the agreement as one of partnership, alternatively agency. Grancy therefore contends that the implied and tacit terms, that one would normally find in an agreement based on a close relationship such as a partnership or agency, are applicable in the instant case. In my view, there can be no doubt that this was an agreement underpinned by confidence, good faith

and trust. In this regard it has to be borne in mind that this was the first time Mawji had done business with Gihwala and Manala, with Manala being completely unknown to Mawji. Mawji would be physically remote from the investment and therefore reliant on Gihwala and Manala to keep him advised of any development in regard thereto. What is of significance too, is the fact that a decision whether or not to participate in the investment, had to be made on 3 February 2005, while the necessary finance had to be made available soon thereafter.

[16] In these circumstances, it is fair to say that Mawji, who is permanently resident in the United Kingdom and Grancy, a foreign company, would be wholly reliant upon Gihwala and Manala to keep control of the investment and to protect Grancy's interests. Furthermore, Gihwala and Manala were the sole directors of SMI and also served as directors of Ngatana, with the result that they could be seen as being able to exercise a measure of control over these two special purpose vehicles.

[17] In view of the aforesaid, I am in agreement with the submission on behalf of Grancy, that the testimony of Mawji, regarding the relevant surrounding circumstances and of matters which would have been present to the minds of

the contracting parties on 3 February 2005, established the basis for a finding that, apart from the express terms to which I have already referred, the February 2005 agreement was subject to the following implied or tacit terms:

17.1 that Gihwala and Manala, and through them SMI, would keep proper and full books of account and such accounting records as would be necessary fairly to present the state of affairs and business of the investment.

17.2 that Grancy would be allowed full access to such books and records.

17.3 that Gihwala and Manala would apprise Grancy of any material information, events, changes and/or contemplated changes relating to the investment in Spearhead linked units.

17.4 that Gihwala and Manala would seek Grancy's approval in respect of all decisions materially related to this investment.

17.5 that Grancy would be entitled, without delay, to the full economic benefit arising from its contribution to the investment. In particular, the proceeds of the investment would be distributed to Gihwala, Manala and Grancy as soon as any profits on the investment were available for distribution.

17.6 that, as SMI was a special purpose vehicle for pursuing the investment in Spearhead units, all dividends flowing from Ngatana would, subject to the deduction of necessary costs and expenses, promptly be declared and paid as dividends in favour of SMI's shareholders.

17.7 that, save as may be subsequently agreed by Grancy, Manala and Gihwala, no investments other than the investment made in Spearhead units through Ngatana, would be made by SMI.

[18] I have mentioned that Grancy has labelled the February 2005 agreement as one of partnership, alternatively an agreement of agency. The defendants, on the other hand, contend that, all that the February 2005 agreement amounted to, was an agreement that Grancy would be entitled to a shareholding in an investment company, namely SMI. They accordingly submit that Grancy's rights and obligations in relation to the other shareholders (the DGFT and Manala) are confined only to those of a shareholder, governed by the Articles of Association and Memorandum of Incorporation of SMI and company law generally.

[19] I do not agree with this narrow view that Grancy was to be nothing more than a shareholder in SMI. As held earlier, I am of the view that the evidence clearly shows that this was an investment agreement underpinned by confidence, trust and good faith, on the terms referred to hereinabove. The shareholding in an investment company, i.e. SMI, is but one facet of the overarching agreement concluded by the relevant parties. The position taken by the relevant defendants that Grancy is merely a shareholder in SMI, is gainsaid by the detailed evidence given by Mawji as to the nature and terms of the agreement.

[20] That it was not the intention of the parties to the February 2005 agreement, to have the investment and the rights and obligations of the investors regulated only in accordance with the rights and obligations governing the shareholders of SMI *inter se*, is underscored by the fact that Mawji was not, prior to investing, provided with copies of SMI's Memorandum and Articles of Association and that he did not insist on a shareholders' agreement being drawn up before committing to the investment and paying over substantial sums of money. Mawji struck me as being an astute businessman, and I find it difficult to believe that, had this only been an investment in SMI, he would have committed himself thereto without having taken steps to obtain such

documentation. His conduct rather shows that he depended entirely on his "partners".

[21] It may be so that Grancy's labelling of the agreement is not correct. It seems to me that one of the *essentialia* of a partnership agreement, namely to carry on business for the joint benefit of all the partners, is not present in the February 2005 agreement. This requirement is stated as follows in the **Law of South Africa**, Second edition, volume 19, at para. 261:

> *"This requirement implies, in the first place, that a partnership cannot be formed if each party is entitled to obtain an individual benefit from the business. Thus, for example, an investment in shares cannot be a partnership if the object is not to make a profit jointly, but that each party, individually, should obtain half of the shares for his exclusive advantage."*

See also **Novick v Benjamin** 1972 (2) SA 842 (A) at 851.

[22] In **Botha v Coetzee** (459/09) [2010] ZASCA 90 (31 May 2010), two investors agreed to acquire properties by using a company as a vehicle for such acquisition. The one would initially hold all the shares in the company as a matter of convenience, but on request he would transfer 50% of the shares to the

other. The Supreme Court of Appeal commented as follows on the nature of the contractual relationship, at para. 9:

> *"It follows from this summary of the terms of the agreement that it was not a partnership in the legal sense but rather something akin to one- probably a joint venture if a label is necessary. In any event, the terms of the agreement, if established in due course, provide a cause of action, albeit not one based on partnership."*

[23] The fact that Gihwala, Manala and Grancy would, in terms of the February 2005 agreement, each obtain one third of the shares in SMI for his/its exclusive advantage, indicates that this was not a partnership agreement in the legal sense. Insofar as it may be necessary to provide a label for the agreement, I believe that the description of a joint venture agreement, as suggested in **Botha v Coetzee**, supra, would be legally more acceptable. However, as pointed out in **Botha v Coetzee,** supra, at para. 7, the question is not whether the agreement is correctly called a partnership, but what the terms of the agreement were and whether those terms could provide a cause of action.

[24] I should also add that it is not uncommon that members of a company may have claims *inter se*, arising from a special relationship between them, unrelated to the affairs of the company. **Blackman, Commentary on the**

Companies Act, Volume 2, refers to this unique position under the rubric *"Domestic companies or quasi-partnerships"* at pages 9-138 to 9-138.1, as follows:

> *"Although a limited company is a legal entity with a personality in law of its own, there is room in company law for recognition of the fact that behind it or amongst it the members may have rights, expectations and obligations inter se which are not necessarily submerged in the company structure. In such a case, some of the principles applicable to the relationship between partners come into play, even though the shareholders of the company concerned are not necessarily found to have been in substance partners. Our law thus recognises that in the relationship between shareholders in a company there may at one and the same time be a formal pecuniary nexus and also an intuitus personae, a special relationship of mutual personal trust. Where that relationship is breached that may constitute a ground for relief under s252 or, even where the breach is dehors the affairs of the company, a ground for a winding up order on the just and equitable grounds in s344(h). But, at least in certain circumstances, these rights may also be directly enforceable by the member whose rights have been infringed."*

See also **Rentekor (Pty) Ltd v Rheeder and Berman NNO and Others** 1988 (4) SA 469 (T) at 500 D-G.

[25] In **Hulett and Others v Hulett** 1992 (4) SA 291 (A), it was held that the relationship subsisting between the three members of a limited liability company was one based upon trust and confidence and that, apart from their

rights *inter se* as shareholders, they would also, as individuals, have rights, expectations and obligations internally, which are not necessarily submerged in the company structure. At 307I-308A, the court concluded as follows:

> *"In the instant case the picture which emerges from the evidence reveals that, within the external structure of the company, the relationship between the shareholders which existed internally was one which may be loosely described as a 'quasi-partnership'. A more precise legal tag need not be appended. The crucial fact of the matter is that the members of the trio considered themselves as being partners…and that they appreciated that good faith is required from a partner in his dealings with his co-partners."*

[26] In **Erasmus v Pentamed Investments (Pty) Ltd** 1982 (1) SA 178 (W) at 188-9, Nestadt J (as he then was) said the following in this regard:

> *"Nevertheless it is apparent that the relationship between the directors was more than a purely commercial one; that an understanding or at least a contemplation that the original shareholders of respondent, whilst they remained such, would also be and remain directors, thus participating in the management of the company, is to be inferred. As Mr. Du Toit put it, the partnership relationship outside the company characterised the relationship of the shareholders inside it…An alternative, although related, finding which is, I consider, at least prima facie, justified is that it was tacitly agreed that a personal relationship of confidence and trust should exist between the directors and shareholders and that the Kobrin faction breached it."*

[27] I have already found that, on 3 February 2005, a joint venture agreement was concluded between Gihwala, Manala and Grancy on the terms and conditions set out above. This gave rise to contractual and fiduciary obligations owed by these parties *inter se*, which, if breached, would provide the innocent party with a contractual remedy against the co-contracting party who breached the terms of the agreement. The fact that the three contracting parties in this matter made use of special purpose vehicles, and, in particular SMI, in which they each would have a one third shareholding, does not detract from the contractual relationship between them, based upon trust and good faith. Such contractual rights and incidental remedies would be separate from and additional to any rights which the innocent party may have in his or its capacity as a shareholder of SMI. Put differently, the shareholdings in SMI represented merely one facet of the overarching joint venture agreement and the rights of the participants in the joint venture, are not restricted to such rights as they may derive from their shareholding in SMI.

[28] In view of the conclusions reached above, it follows that the defendants' reliance on the rule in **Foss v Harbottle** [(1943) 2 Hare 461; 676 ER159], is misplaced. This rule embodies the principle that, where harm is wrongfully caused directly to the company and indirectly to a shareholder, the right to pursue an action for compensation, is given to the company and not to the

individual shareholder. There are exceptions to the rule in **Foss v Harbottle**, such as the employment of a derivative action, a procedural device that allows a shareholder to act on the company's behalf in enforcing its rights. See section 266 of the Companies Act, 61 of 1973 ("the 1973 Companies Act") and section 165 of the Companies Act, 71 of 2008 ("the 2008 Companies Act").

[29] As I see it, the present actions of Grancy are not based upon a wrong caused directly to SMI and indirectly to Grancy, but a claim pursued in Grancy's own right by virtue of the alleged breach by one or more of the contracting parties to the February 2005 agreement, which, according to Grancy, led to a loss directly suffered by it. The cause of action is accordingly contractual in nature and not a claim derived indirectly as a shareholder where harm is wrongfully caused directly to the company. Therefore, the rule in **Foss v Harbottle** does not find application.

EVENTS SUBSEQUENT TO THE FEBRUARY 2005 AGREEMENT

[30] Notwithstanding due compliance by Grancy of its obligations in terms of the February 2005 agreement, and, in particular, the payment of the funds due by it to acquire the Spearhead units and to provide the loan to Manala to enable him to acquire his one third interest, Grancy found that Gihwala and Manala did

not provide it with any material information pertaining to the investment. Repeated requests were made for such information, but it was not forthcoming. However, Grancy assumed that its investment was properly managed in accordance with the February 2005 agreement. All of this appears from the undisputed evidence of Mawji.

[31] On 11 September 2006, however, Grancy received an e-mail in which Gihwala, *inter alia*, conveyed the following:

31.1 Grancy was never intended to be and would not be a shareholder in SMI.

31.2 Grancy was not entitled to be informed about the affairs of SMI, Ngatana or the investment.

31.3 Grancy was not entitled to be consulted on or to have any input in relation to any decision by SMI or related to the investment.

31.4 Grancy would be subject to the decisions made exclusively by Gihwala and Manala in relation to the investment.

31.5 Gihwala would conduct the affairs of SMI as he deemed fit.

[32] The evidence of Mawji shows that Gihwala and Manala subsequently persisted in this conduct, with Gihwala adopting the attitude that Grancy would *"come in behind"* him and Manala and would be entitled to no more than *"the full economic benefit"* of 630 000 units in Spearhead. In response thereto, Grancy launched several legal proceedings over the past seven years to vindicate what, it believed, to be a blatant disregard of its legal rights arising from the February 2005 agreement. This included an application in this court under case number 15757/07, for an order recognising Grancy's entitlement to the shareholding in SMI and to a full statement and debatement of account and disgorgement of any profits made, as well as the repayment of the loan made to Manala.

[33] The latter application was initially opposed by Gihwala, Manala, the DGFT and SMI. However, shortly before the hearing of the matter, the parties came to a settlement, which was made an order of court on 9 March 2009. It was accepted that SMI had acquired only 630 000 Spearhead units on behalf of Grancy, which is equivalent to a 31% shareholding in SMI. The court order recognised the entitlement of Grancy to a 31% shareholding in SMI. In addition, the rendering of a full statement of account, debatement thereof and payment of any amounts due from such debatement, was also ordered. Pursuant to the order

of 9 March 2009, Grancy was officially registered as a 31% shareholder in SMI on 25 March 2009.

[34] According to Mawji, more information was subsequently obtained showing various breaches of the February 2005 agreement by Grancy's co-contracting parties, with the result that, on 30 June 2009, notice was given on behalf of Grancy of its cancellation of the agreement. In the letter of cancellation the February 2005 agreement is referred to as one of partnership, but as previously indicated, the question is not whether the correct label was used, but whether the agreement provides Grancy with a cause of action.

[35] The evidence of Mawji, supported by relevant documentation, shows that the February 2005 agreement had been breached in several material respects by Gihwala and Manala as co-contracting parties, which breaches clearly justified the cancellation of the agreement by means of the letter of 30 June 2009. In general, the following breaches may be highlighted (I will in due course, when dealing with the individual claims brought by Grancy, deal with the specific breaches giving rise to the different claims).

35.1 The failure to keep proper books of account or to ensure that proper books and records were kept, also at SMI level;

35.2 The failure to allow Grancy access to such books and records;

35.3 The failure to disclose material information to Grancy regarding the Spearhead investment;

35.4 The failure to seek Grancy's approval in respect of decisions materially related to the investment;

35.5 The failure to distribute proceeds of the investment, in proportion to Grancy's 31% entitlement;

35.6 Preferrring themselves or related entities as creditors over Grancy;

35.7 Misappropriating funds of the joint venture, or funds destined for the joint venture or SMI, for their benefit;

35.8 Making a secret profit, thereby preferring themselves over Grancy.

[36] It is necessary, at this stage, to make it clear that, as I understand the evidence, the parties to the February 2005 joint venture agreement were Grancy, Gihwala and Manala. I do appreciate, as submitted on behalf of Grancy, that other parties, such as the other entities involved (SMI, Ngatana and the DGFT) may, in the event of specific obligations having been undertaken by them, be regarded as separate contracting parties to the February 2005 agreement and owe Grancy specific contractual obligations thereunder. However, this can only

be established on a case-by-case (or rather claim-by-claim) basis and it does not follow, in my view, that such other entities are to be regarded as contracting parties to the primary overarching joint venture agreement.

[37] I believe that this was made clear by Mawji in his evidence, particularly with regard to the contractual position of the DGFT. As he put it, they were three partners in SMI, the latter being *"the vehicle that was used by the three partners to carry the investment"*. Mawji specifically identified Manala, Gihwala and Grancy as the three partners and said that he was not at the time of the February 2005 agreement, informed by Gihwala of the possible involvement of the DGFT as a shareholder in SMI. In response to a question put to him by counsel for the DGFT, Mawji emphasised that the DGFT had no greater responsibilities or obligations to Grancy than that contained in the Memorandum or Articles of SMI, upon Grancy becoming a (registered) shareholder in SMI.

[38] I will shortly proceed to a consideration of the various claims brought by Grancy and in respect of each I will determine whether there has been a breach of the February 2005 agreement causing Grancy a loss; which defendant(s) has so breached the agreement and caused Grancy the loss and whether such

defendant(s) is liable to Grancy for the loss. In so doing, it has to be borne in mind that, in seeking relief, Grancy has adopted a blunderbuss approach, which has resulted in a great deal of overlap between the relief sought in the different alternative formulations. However, before embarking upon an analysis of the different claims in the consolidated actions, it is convenient to deal with the statutory liability in terms of section 424 of the 1973 Companies Act, which Grancy seeks to impose upon Gihwala and Manala in both the 2010 and 2011 actions.

SECTION 424 LIABILITY

[39] In both actions, certain of the conduct ascribed to Gihwala and Manala, is relied upon by Grancy in support of a prayer that they be held liable, jointly and severally, for some of the debts of SMI under section 424 of the 1973 Companies Act.

[40] Section 424 (1) of the 1973 Companies Act provided as follows:

> *"When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any*

creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct."

[41] The first question which arises, is whether it is competent for Grancy to seek a remedy under section 424 of the 1973 Companies Act, in the 2011 action. As mentioned earlier, the 2011 action was instituted on 17 June 2011, which is after the effective date of the 2008 Companies Act, namely 1 May 2011. In terms of section 224 of the 2008 Companies Act, the 1973 Companies Act (including section 424) was repealed, subject to the transitional provisions in Schedule 5 to the 2008 Companies Act.

[42] Item 10 (1) of the Schedule 5 transitional provisions, allows for the continued application of repealed provisions of the 1973 Companies Act, in terms of that Act, as if it had not been repealed, but only applies to proceedings instituted under the 1973 Companies Act before the effective date of 1 May 2011. The proceedings under the 2011 action, have obviously not been instituted before 1 May 2011, with the result that section 424 (1) of the 1973 Companies Act cannot be available as a remedy in the 2011 action.

[43] It has been submitted on behalf of Grancy, that item 13 (1) (c) of Schedule 5 to the 2008 Companies Act, also makes provision for the continued application of the 1973 Companies Act after 1 May 2011. I do not agree. This item deals with the continued investigation and enforcement of pending investigations by the Minister or Registrar or the Securities Regulation Panel, for a period of three years after 1 May 2011, and for a court to make any order under the 1973 Companies Act in respect thereof. The clear wording of this item, in my opinion, shows that it is not a general empowering provision entitling the court to make any order under the 1973 Companies Act, but only orders relating to such continued investigations. Therefore, Grancy can only seek a remedy under section 424 of the 1973 Companies Act, in the 2010 action.

[44] Having regard to the wording of section 424 (1) of the 1973 Companies Act, it is clear that this statutory remedy presupposes the existence of a debt owing to a third party by the company concerned. Moreover, a litigant invoking section 424 (1) is required to plead and prove that the company against which it has the claim, is unable to pay its debts. The latter requirement was reaffirmed in **Fourie v First Rand Bank Limited** 2013 (1) SA 204 (SCA) at 215A-E, as follows:

> *"...if, despite the reckless conduct of the company's business, it is nevertheless able to pay its debt to a particular creditor, that creditor has no cause of action under section 424 against those responsible for the reckless conduct. This is so… because section 424 was not intended to create a joint and several liability between the company and those responsible for the reckless conduct of its business, but rather to protect creditors against the prejudice they may suffer as a result of the business of the company being carried on in that way. Logic dictates that unless the company is unable to pay, no such prejudice would follow. That does not mean that the plaintiff-creditor has to liquidate or excuss the company, but only that there must be evidence of the company's inability to pay.*

[45] When dealing with the separate claims under the 2010 action, I will, insofar as reliance is placed on section 424 (1) of the 1973 Companies Act, consider whether or not Grancy has succeeded in showing that the two requirements for the implementation of this section, are present.

RELIEF CLAIMED IN THE 2010 ACTION

The Repaid Amount

[46] This claim concerns an amount of R6 657 673-00 which was paid by Ngatana to SMI in March 2007, representing the repayment of the respective financial contributions, plus interest, initially made to acquire the Spearhead

units. The amount due to Grancy was R2 051 833-34, but Gihwala and Manala, as directors of SMI, caused SMI to pay R2 643 722-00 to the DGFT or Gihwala and R1 350 000-00 to Manala, while no payment was made to Grancy.

[47] This failure constitutes a clear breach of the terms of the February 2005 agreement, in that the parties to the joint venture had to receive payment of the repaid amount in accordance with their initial contributions. In particular, it constituted a breach of contract by Gihwala and Manala, who, in their capacity as directors of SMI, failed to cause SMI to make payment to Grancy of its share, but utilised same for an unauthorised investment for their own benefit.

[48] I am in agreement with the submission on behalf of Grancy, that the February 2005 agreement is a contract which imposes joint and several liability on Gihwala and Manala. Although our law, in the absence of agreement to the contrary, imposes contractual liability on co-debtors that is merely joint, there are certain well-recognised exceptions catering for claims against certain types of co-debtors whose obligations are deemed to be intrinsically joint and several. See **Christie's**, **The Law of Contract in South Africa** 6th Edition p. 263; **Tucker and Another v Carruthers** 1941 AD 251 and **Shraga v Chalk** 1994 (3) SA 145 (N) at 156.

[49] Joint and several liability is imposed in a contractual setting where, *inter alia*, the contract clearly by necessary implication imposes liability *in solidum*. In my view, this principle applies to the February 2005 agreement, by virtue of the following circumstances:

49.1 This was an agreement underpinned by confidence, trust and utmost good faith, with Gihwala and Manala owing a fiduciary duty to Grancy, in undertaking to implement the investment on Grancy's behalf.

49.2 Grancy entrusted a substantial financial investment to Gihwala and Manala and they were the only parties who knew how the funds were to be utilised. Grancy was entirely dependent upon them to protect its interests.

49.3 Gihwala and Manala were appointed as directors of SMI and Ngatana, which provided them with the ability to exercise a measure of control over the investment.

49.4 Gihwala and Manala were contractually bound to keep Grancy advised of matters relating to the investment and to ensure that Grancy would, without delay, receive the full economic benefit arising from its contribution to the investment.

[50] In the particulars of claim, Grancy also seeks an order that Gihwala and Manala be declared liable for this loss under section 424 (1) of the 1973 Companies Act. In this regard, I refer to my earlier finding that section 424 liability may be imposed under the 2010 action, if the requirements of that section are met.

[51] I do accept that SMI, as the special purpose vehicle, is, in this regard, to be regarded as a separate contracting party to the February 2005 agreement, and that it had the obligation to pay Grancy its portion of the repaid amount. This would satisfy the first requirement of section 424 (1) of the 1973 Companies Act, namely the existence of a debt or liability on the part of SMI.

[52] As mentioned earlier, the second requirement to be proved by Grancy in this regard, is that SMI is unable to pay its debts. At the outset, it is significant to note that there is no allegation in Grancy's particulars of claim in the 2010 action (nor in the 2011 action), that SMI is unable to pay its debts. The question then arises whether this jurisdictional requirement for the imposition of liability under section 424 of the 1973 Companies Act, has been proved by Grancy.

[53] What is required, is proof of commercial insolvency, as opposed to factual insolvency. It is accordingly a question of fact, namely, whether the company is unable to pay its debts when they fall due. In **Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Other** 1993 (4) SA 436 (C) at 440F-H, Berman J stated the requirement thus:

> *"The primary question…is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities; once the court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts."*

[54] The financial statements of Ngatana for the year ended February 2012, show that SMI's shareholding in Ngatana has a substantial capital value which has generated substantial dividend income in the past. These statements show that Ngatana made a net profit of some R6 million for the 2012 financial year and that it has net assets of approximately R15 million. Gihwala and Manala submit that this serves as sufficient proof of SMI's commercial solvency.

[55] However, evidence elicited during the cross-examination of Mawji, paints a different picture. This shows that Mr. Patrick Chong, an independent director of SMI, has expressed the view that SMI has no funds available to pursue an investigation into the conduct of Gihwala and Manala, as envisaged in the judgment of **Grancy Property Ltd v Manala and Others** [2013] 3 ALL SA 111 (SCA). Chong has set out the debts of SMI in an e-mail of 12 February 2014 (including debts which SMI would have to pay in the ordinary course), stating that it clearly cannot pay such debts as they fall due, without an urgent injection of funds of some R1 million. From this it follows that SMI cannot meet its normal trade debts, nor the expense of undertaking an independent investigation into the conduct of Manala and Gihwala. It should be borne in mind that SMI generates no income and its only source of income is dividend payments from Ngatana, which have not been declared since the 2010 financial year. SMI can obviously not oblige Ngatana to declare dividends and Chong has described Ngatana as *"not being cooperative"*. Moreover, Ngatana is apparently facing a multi-million rand tax and penal liability.

[56] Furthermore, an extrapolation of the SMI balance sheet for the year ended 28 February 2010, shows that, as at 28 February 2011, the current liabilities of SMI cannot be met out of its current assets. Also, as pointed out on behalf of Grancy with reference to exhibit K, SMI cannot even meet a fee of R5000-00

for annual duty and secretarial fees, or pay its legal fees for December 2013 and January/February 2014.

[57] In these circumstances, I am satisfied that Grancy has proven, on a balance of probabilities, that SMI is unable to pay its debts. It follows that the second requirement for the imposition of liability in terms of section 424 (1) of the 1973 Companies Act, has also been met.

[58] It should be borne in mind that Grancy does not seek a general declaration rendering Gihwala and Manala liable under section 424 (1) of the 1973 Companies Act. It rather seeks declarations that Gihwala and Manala are personally liable under section 424 for payment of specific amounts, including the amount of R2 051 833-34 claimed under the above rubric.

[59] In my view, there could have been no doubt in the minds of Gihwala and Manala that their conduct in preferring themselves by utilising the repaid amount, and in particular using Grancy's portion thereof for their own unauthorised purpose, was not only in breach of the February 2005 agreement, but clearly wrongful. It constituted a reckless breach of their fiduciary

obligations owed to Grancy under the February 2005 agreement, as well as their fiduciary duty owed to SMI.

[60] For the sake of completeness, I should mention that the evidence shows that, what Gihwala and Manala did, was to misappropriate Grancy's portion of the repaid amount, by investing R2 000 000-00 in the Strand/Scarlet Ibis investment. No amount was paid to Grancy. Had they duly complied with their obligations in terms of the February 2005 agreement, Grancy would have received its share in the amount of R2 051 833-34. This represents Grancy's loss for which Gihwala and Manala are liable, jointly and severally, under the February 2005 agreement and for which they are also personally liable in terms of section 424 (1) of the 1973 Companies Act. Moreover, Grancy is entitled to the payment of interest on this amount, at the prescribed rate of 15,5% per annum, calculated from the date that the first of these 2007/8 distributions was made, namely 20 March 2007, to date of final payment.

[61] An aspect which I should also mention with regard to this claim, is that, in June 2009, Manala tendered payment of an amount of R1 976 000-00 to Grancy, being Manala's calculation of the amount due to Grancy as its portion of the repaid amount. Grancy refused to accept this tender, as it took the view

that such payment was due by SMI and, in any event, the tender was not made in a currency acceptable abroad.

Promotion Fees

[62] It appears from SMI's books of account that an amount of R225 000-00 in respect of promotion fees was credited to Manala, Gihwala and/or the DGFT. There is some uncertainty as to the date of the transaction, but it does appear in SMI's detailed income statement for the year ended 28 February 2006. Grancy claims one third of this amount from Gihwala and Manala, jointly and severally, as being an unauthorised crediting of themselves contrary to the terms of the February 2005 agreement. Grancy also asks that Gihwala and Manala be declared personally liable for the payment thereof in terms of section 424 (1) of the 1973 Companies Act.

[63] What the evidence of Mawji shows, is that Gihwala and Manala impermissibly credited themselves with promotion fees in an amount of R225 000-00. In so doing, they clearly breached the February 2005 agreement, as they had no authority to credit themselves with this amount. Their conduct necessarily led to them being preferred with the amount so credited, while Grancy received no payment. Had they not breached their contractual and

fiduciary obligations owed to Grancy, in this regard, an additional amount of R225 000-00 would have been available for distribution by SMI to the shareholders. I find that Gihwala and Manala are accordingly, jointly and severally, liable to Grancy in this regard, for payment of 31% of R225 000-00, namely R69 750-00, together with interest thereon at the rate of 15,5% per annum calculated from 28 February 2006 to date of final payment. This conduct also constituted a reckless breach of the fiduciary duty owed to SMI.

[64] I do not, however, believe that liability under section 424 of the 1973 Companies Act, arises in respect of this claim. It was Gihwala and Manala who improperly caused SMI to credit them with the promotion fees of R225 000-00. In these circumstances there is no liability on the part of SMI for payment of this claim to Grancy. On the contrary, SMI may have a claim against Gihwala and Manala for repayment or damages. The first requirement for a claim in terms of section 424 (1) of the 1973 Companies Act, is therefore not present and a declaration in this regard cannot follow.

Legal Fees

[65] Grancy's claim in this regard is for payment of 31% of R300 000-00, which Gihwala and Manala caused SMI to pay for personal legal expenses

incurred by the DGFT or Gihwala and Manala in the financial year ending February 2009. Once again, it is clear that Gihwala and Manala acted unlawfully in this regard and contrary to their contractual and fiduciary obligations in terms of the February 2005 agreement. Had they not done so, an additional amount of R300 000-00 would have been available in SMI for payment to its shareholders. In addition, their conduct constituted a reckless breach of their fiduciary obligations owed to SMI.

[66] It follows that, as a consequence of this breach of contract, Gihwala and Manala caused Grancy a loss of R93 000-00 (31% of R300 000-00), for the payment of which, together with interest thereon at the rate of 15,5% per annum calculated from 28 February 2009 to date of final payment, they should be held liable, jointly and severally.

[67] For the reasons already advanced in respect of the claim for promotion fees, I do not believe that Grancy is entitled to an order under section 424 (1) of the 1973 Companies Act, in respect of this claim. The wrongful misappropriation of the amount of R300 000-00, cannot result in a claim by Grancy against SMI. Grancy's claim is against Gihwala and Manala personally,

while SMI may have a claim against Gihwala and Manala, but this does not result in a liability on the part of SMI.

Loan to Manala

[68] On 24 June 2009, and unbeknown to and without the authority of Grancy, an amount of R2 million was paid to Manala, pursuant to a resolution of SMI's directors (Gihwala and Manala), dated 15 June 2009. This payment was in clear breach of the February 2005 agreement and resulted in the depletion of the assets of SMI by R2 million. Manala has not repaid this loan.

[69] As a result of this breach of contract and the fiduciary duty owed to Grancy by Gihwala and Manala, Grancy was caused a loss of R620 000-00, being 31% of the unlawful loan of R2 million. In the result Gihwala and Manala are liable, jointly and severally, to pay the sum of R620 000-00 plus interest thereon at the rate of 15,5% per annum, calculated from 15 June 2009 to date of final payment. This conduct certainly also constituted a reckless breach of their fiduciary obligations owed to SMI.

[70] While Grancy, in the body of its particulars of claim, purports to rely on section 424 of the 1973 Companies Act for purposes of this claim, it does not,

in terms of the relevant prayer, seek to hold Gihwala and Manala statutorily liable for payment of this claim.

Strand/Scarlet Ibis Investment

[71] During March 2007, Gihwala and Manala, ostensibly acting as SMI, used R2 million which was due to Grancy (the repaid amount referred to above) to make an investment in Strand/Scarlet Ibis on their own behalf. This was done without consulting or obtaining Grancy's consent. This clearly constituted a wilful misappropriation of Grancy's funds. The evidence shows that the development was unsuccessful with the result that SMI's assets have been depleted by R2 million due to this unauthorised conduct.

[72] This conduct of Gihwala and Manala clearly constituted a breach of their fiduciary and contractual obligations owed to Grancy in terms of the February 2005 agreement. This has resulted in a loss to Grancy equal to 31% of the misappropriated sum of R2 million. The conduct also constituted a reckless breach of their fiduciary obligations owed to SMI.

[73] It follows, in my view, that Gihwala and Manala, jointly and severally, are liable to Grancy for payment of the sum of R620 000-00 plus interest at the

rate of 15,5% per annum calculated from the date of payment of the amount of R2 million (2 April 2007) to date of final payment.

[74] As in the case of the previous claim, Grancy has not sought in its relevant prayer to have Gihwala and Manala declared statutorily liable for payment of this amount in terms of section 424 of the 1973 Companies Act.

[75] Gihwala and Manala submitted that, to award this claim, would amount to a duplication, as Grancy's loss of R2 million would be covered by the amount claimed by Grancy in respect of the repaid amount (paras 46 to 61 above). I do not agree. As I see it, the fact of the matter is that SMI's assets have been depleted by R2 million and that will forever be the case, resulting in R2 million less to be paid out by way of dividends to shareholders. Grancy has accordingly suffered a separate loss in this regard.

[76] I should mention that Grancy also brought this claim against the DGFT. As explained earlier, Mawji did not regard the DGFT as a party to the February 2005 agreement and the DGFT cannot, in my view, be held liable for payment of this loss caused by the breach of contract by Gihwala and Manala.

Payment of directors' fees to Gihwala and Manala by Ngatana.

[77] On 3 March 2009, the directors of Ngatana resolved to pay, *inter alia*, a director's fee of R750 000-00 to each of Gihwala and Manala. The payment of this remuneration is reflected in the Ngatana 2010 financial statements. As submitted on behalf of Gihwala, in terms of SMI's articles, the SMI directors on the Ngatana board of directors, were entitled to receive such remuneration without having to account for it to SMI. The payment of such directors' remuneration to Gihwala and Manala therefore seems, on the face of it, to have been a lawful payment.

[78] Grancy seeks to link this payment to Gihwala and Manala, to a resolution of the Ngatana directors taken on 7 March 2007. In terms of this resolution it was agreed that a R3 million fee be paid to SMI and Prescient Real Estate for, amongst other things, *"their assistance in putting the SPE deal and the RDF/Hyprop deal for New Trust together."* According to the resolution, the fee of R3 million would be split equally between SMI and Prescient.

[79] There is no evidence or other basis for linking the two resolutions. In particular, there does not seem to be any basis for a finding that the payment of

the directors' remuneration to Gihwala and Manala in March 2009, was the appropriation by them of a 2007 fee owing to SMI.

[80] I therefore conclude that this claim cannot succeed, whether on a contractual or delictual basis, as contended for by Grancy.

Late dividend payments to SMI shareholders

[81] As I understand this claim, it relates to dividends declared by Ngatana in October 2008 and March 2009 and thereafter onpaid to SMI. There is no dispute as to the dates and amounts of the dividends received by SMI and the manner and amounts in which SMI's declaration of dividends to its shareholders were implemented. Grancy's complaint is that, in effecting payment of dividends to the SMI shareholders, Gihwala and Manala assured that prompt payment was made to the DGFT and Manala, while payments to Grancy were only made after unexplained delays.

[82] This conduct constitutes a breach of the February 2005 agreement, which requires Grancy, without delay, to be entitled to the full economic benefit arising from its contribution to the investment. As a consequence thereof,

Grancy suffered a financial loss, being the loss of interest on the amounts of dividends received late.

[83] I therefore find that Gihwala and Manala are jointly and severally liable to Grancy for payment of this loss, as calculated in paragraphs 47.3, 47.4.1 and 47.4.2, read with prayers 13.1 to 13.3, of Grancy's particulars of claim.

[84] I have mentioned that Grancy only became a registered shareholder of SMI on 25 March 2009. Although the first leg of Grancy's claim for late payment of dividends (paragraph 47.3, read with prayer 13.1) partially covers a period before Grancy's registration as shareholder of SMI, I believe that Gihwala and Manala, jointly and severally, should be held liable for the full amount of the interest lost in this regard, as it was their unlawful conduct (as explained above) which caused Grancy's belated registration as a shareholder on 25 March 2009.

[85] In sum, Gihwala and Manala is declared liable, jointly and severally, for payment of the following:

85.1 R213 789-57 (being the lost interest calculated on the late payment of R1 634 545-37 for the period 15 October 2008 to 19 August

2009), plus interest thereon at the rate of 15,5% per annum calculated from 19 August 2009 to date of final payment.

85.2 R326 740-00 (being the lost interest calculated on the late payment of R5 270 000-00 for the period 26 March 2009 to 19 August 2009), plus interest thereon at the rate of 15,5% per annum calculated from 19 August 2009 to date of final payment.

85.3 R165 660-60 (being the lost interest calculated on the late payment of R1 364 000-00 for the period 26 March 2009 to 6 January 2010), plus interest thereon at the rate of 15,5% per annum calculated from 6 January 2010 to date of final payment.

Share of the residue

[86] I have to confess that I find Grancy's claim in this regard rather confusing. It seems to me that, what it boils down to, is a contention that Gihwala and Manala in their capacities as directors of Ngatana, could and should have controlled the immediate declaration and payment of dividends by Ngatana to SMI. Grancy accordingly claims consequential relief based upon the amounts available to be distributed by Ngatana to SMI, but which were not distributed, thereby causing Grancy a financial loss.

[87] It appears to me that, as submitted on behalf of Gihwala, this contention is based upon a misconception. Ngatana had five directors of whom Gihwala and Manala were two. According to Mawji, SMI would have been entitled to appoint the majority of directors to the Ngatana board and so control the board. This view fails to take account of clause 10 of the Ngatana shareholders' agreement which deals with material decisions, such as the declaration of dividends. In such event, SMI and Prescient, as shareholders in Ngatana, both have to agree on the relevant material decision. Put differently, SMI could not control the declaration and payment of dividends without the approval of Prescient.

[88] In addition, the declaration of dividends was a matter for the Ngatana board to decide upon, having regard to the financial circumstances of that company. In the result, I am not persuaded that it was a term (either express, implied or tacit) of the February 2005 agreement, that Gihwala and Manala were required, in their capacity as directors of Ngatana, to ensure that Ngatana immediately distributed its profits in the form of dividends to its shareholders (including SMI).

[89] I therefore conclude that this claim cannot succeed, whether on a contractual or delictual basis, as contended for by Grancy.

Declarations and relief sought regarding the alleged partnership

[90] Under this rubric I refer to the declarators sought by Grancy, regarding the existence of a partnership, alternatively a relationship of agency; that the alleged partnership had been terminated and that a liquidator be appointed to attend to the liquidation of the assets of the alleged partnership.

[91] I have already found that the February 2005 agreement was not one of partnership, but rather a joint venture agreement. In the result the declarations sought, based on the agreement being one of partnership, should not be granted.

[92] As held in paragraphs 34 and 35 above, the February 2005 agreement was duly cancelled by means of the letter of cancellation of 30 June 2009. The fact that this letter referred to the cancellation of a partnership agreement and not a joint venture agreement, does not detract from the fact that it constituted a cancellation of the February 2005 agreement. See in this regard the analogous reasoning of Cloete J (as he then was) in **Bulldog Hauliers (Pty) Ltd v Santam Insurance Ltd** 1992 (1) SA 418 (W) at 424 A-C. .

Abstract or incidental declarations

[93] In prayers 2, 3 and 4 of its particulars of claim, Grancy seeks declaratory orders in relation to the underlying conduct relied on for the substantive relief sought by it. As submitted on behalf of Gihwala, a court does not grant declarators of this nature, but either upholds or dismisses the substantive relief sought. The declaratory orders sought in this regard are accordingly refused.

Remaining relief

[94] What remains of the relief sought in the 2010 action, is the prayer for the delivery of books and records (prayer 5); the prayers relating to the delivery of a statement of account and relief consequential thereto (prayers 6-8), as well as a declaration disqualifying Gihwala and Manala from being directors of a company, pursuant to the provisions of sections 218 and 219 of the 1973 Companies Act.

[95] This remaining relief overlaps in certain respects with similar relief sought in the 2011 action. I will therefore deal with this relief in conjunction with the relief sought in the 2011 action.

RELIEF CLAIMED IN THE 2011 ACTION

[96] In this action Grancy also seeks a number of abstract or incidental declaratory orders. For the reasons already furnished, such orders will not be granted. Insofar as underlying conduct may be relevant with regard to relief sought, such conduct will be considered in either upholding or dismissing the substantive relief.

[97] For the sake of clarity, I should mention that these abstract or incidental declarations are sought in prayers 1.1-1.9, 1A-C, 3, 5 and 8 of the particulars of claim. It should also be borne in mind that prayer 11, in which relief is sought against the 10th and 11th defendants, has fallen away by virtue of the settlement reached before the commencement of the trial.

[98] In dealing with the claims under the 2011 action, it has to be borne in mind that I have found that section 424 of the 1973 Companies Act has been repealed with effect from 1 May 2011, with the result that section 424 (1) of the 1973 Companies Act is not available as a remedy in the 2011 action.

[99] I now proceed to deal with the individual claims in the 2011 action and commence, conveniently, with the monetary claims as set out in prayer 9 of the

particulars of claim. At the outset it should be noted that, in respect of each of the six monetary claims in prayer 9, Grancy seeks to hold Gihwala, Manala, the DGFT and SMI liable by virtue of the breach of the February 2005 agreement. In addition, Grancy seeks to hold Gihwala and Manala personally liable, jointly and severally, under section 424 (1) of the 1973 Companies Act, alternatively, under section 77 (3), read with section 77 (6), of the 2008 Companies Act, for payment of the relevant amounts.

Directors' remuneration

[100] On 8 April 2009, Gihwala and Manala, without the knowledge or consent of Grancy, caused SMI to pay them R2,75 million each as a director's fee. This conduct constituted a clear breach of the obligations of Gihwala and Manala under the February 2005 agreement. In addition, the payment was made in breach of the provisions of Article 107 of the Articles of Association of SMI. In particular, no general meeting contemplated in Article 107 was lawfully held, nor was the directors' remuneration ever determined as contemplated in Article 107.

[101] This constituted an unlawful misappropriation of the funds of SMI, to the financial detriment of Grancy. The unauthorised misappropriation certainly also

constituted reckless, or at least grossly negligent, conduct on the part of Gihwala and Manala as directors of SMI.

[102] Gihwala has (at least by necessary implication) acknowledged the unlawfulness of this conduct by repaying an amount of R2 750 000-00 to SMI on or about 23 November 2010. This has resulted in Grancy's loss being reduced to R852 500-00, being its 31% share in one half of the amount paid out as directors' remuneration, and which has not been repaid. In my view, Gihwala and Manala are jointly and severally liable to Grancy for payment of this amount, by virtue of the breach of their contractual and fiduciary obligations arising from the February 2005 agreement.

[103] The next question which arises, is whether, in these circumstances, it is open for Grancy to invoke section 77 (3) of the 2008 Companies Act and thereby have Gihwala and Manala declared statutorily liable for this debt. The difficulty that I have with a declaration on this basis, is that section 77 (3) of the 2008 Companies Act provides that a director of a company is liable for any loss, damages or costs sustained by the company (my emphasis) as a direct or indirect consequence of the director having acted in the manner set out in the subsection. On my reading of section 77 (3), it renders the director liable to the

company and not to a third party creditor. Grancy argues that, in view of the remedy which a creditor had to hold a director personally liable under section 424 of the 1973 Companies Act, it is unthinkable that the legislature has now put paid to the remedy which previously availed creditors to hold a director personally liable for his or her reckless and fraudulent conduct.

[104] It appears to me that this submission does not take proper account of the fact that the remedy under section 424 of the 1973 Companies Act, was available in a different context, i.e. in circumstances where the company was liable to the creditor and the director who acted fraudulently or negligently, may be declared liable for the debt in circumstances where the company is unable to pay its debts. This is not the aim of section 77 (3), which, in my opinion, does not, on a proper interpretation of the plain wording thereof, confer standing on anyone other than the company. In any event, section 218 (2) of the 2008 Companies Act, provides that any person (this would include a director of a company) who contravenes any provision of the Act, is liable to any other person for any loss or damage suffered by that person as a result of that contravention. It follows that a director who does not comply with the standards of directors' conduct as set out in section 76 of the 2008 Companies Act, would be liable to any person suffering a loss as a consequence thereof.

[105] In my view, there is in any event no need for Grancy to rely on section 77 (3) of the 2008 Companies Act, to hold Gihwala and Manala personally liable in respect of this claim. As I have already indicated, they are liable, jointly and severally, by virtue of their contractual and fiduciary breaches of the February 2005 agreement.

[106] Finally, I have to deal with Grancy's alternative contention, namely, that the DGFT and SMI are also liable for payment of this claim. In fact, this alternative claim is made in respect of each of the monetary claims under prayer 9 of the 2011 action.

[107] As explained above, the loss under this rubric was occasioned by the unlawful conduct of Gihwala and Manala, which also constituted a breach of their contractual and fiduciary obligations owed to Grancy in terms of the February 2005 agreement. The DGFT and SMI cannot, in my view, be held liable for repayment of this amount, as they have not caused the loss occasioned to Grancy.

[108] I therefore find that Gihwala and Manala are jointly and severally liable to Grancy for payment of the amount of R852 500-00, with interest at the rate of

15,5% per annum on the amount of R1 705 000-00 (31% of R5,5 million) calculated from 8 April 2009 to 23 November 2010 and on the amount of R852 500-00, calculated from 23 November 2010 to date of final payment to Grancy.

Surety Fees

[109] On 1 March 2008, Gihwala and Manala caused SMI to pay an amount of R1 114 539-00 to each of them as surety fees. As was the case with the unlawful payment of directors' remuneration, the payment of the surety fees amounted to an unlawful taking of funds to which Gihwala and Manala were not entitled under the February 2005 agreement. Not only were the payments made in breach of the February 2005 agreement, but also contrary to Article 107 of the Articles of Association of SMI. The surety fees were paid in circumstances where, in my view, any reasonable person would have realised that it was unlawful to do so. This constituted reckless or, at least, grossly negligent conduct on the part of Gihwala and Manala.

[110] On 23 November 2010, Gihwala repaid the amount of R1 114 539-00 received by him, but Manala has failed to do so. This conduct of Gihwala and Manala has resulted in a depletion of the assets of SMI and has caused Grancy

to suffer a loss equal to 31% of the unpaid balance of R1 114 539-00, namely R345 507-09, together with interest at the rate of 15,5% per annum on the amount of R691 014-18 calculated from 1 March 2008 to 23 November 2010 and on the amount of R345 507-09 calculated from 23 November 2010 to date of final payment to Grancy. Gihwala and Manala are liable, jointly and severally, for payment thereof to Grancy.

[111] As this loss to Grancy was caused by the unlawful conduct of Gihwala and Manala, as set out above, the DGFT and SMI cannot be held liable for payment thereof. I should add that, for the reasons furnished in paragraphs 103/4 above, Grancy cannot invoke section 77 (3) of the 2008 Companies Act in respect of this claim.

Auditors' remuneration

[112] Grancy alleges that, between 1 March 2009 and 28 February 2010, Gihwala, the DGFT, Manala and SMI caused SMI to pay an unnecessary expense of R101 529-00 by way of auditors' remuneration. This, Grancy contends, constituted a breach of the February 2005 agreement.

[113] I am not persuaded that Grancy has proved, on a balance of probabilities, that the auditors' remuneration was unnecessary or excessive. The only evidence tendered was that of Grancy's expert witness (Greenbaum), who expressed the opinion that *"costs totalling R52 759-00 charged to auditors' remuneration appears to be excessive."* As submitted on behalf of Gihwala, this opinion is not benchmarked against any measure of what might amount to reasonable audit fees. It is also apparent that Greenbaum does not profess to be an expert in matters of auditors' remuneration. In the absence of any other evidence that establishes that the auditors' remuneration was unnecessary or excessive, I conclude that this claim has to fail.

Manala transfer

[114] This claim is based on an alleged transfer of an amount of R2 898 145-00 to Manala by SMI, as appears from the latter's financial statements for the year ending February 2010. However, an analysis of the evidence shows that the claim based on this amount, overlaps with the claim based on the R2 million payment to Manala, which has been addressed in the 2010 action (see paragraphs 68 to 70 above).

[115] As I understand the position, there was only one payment of R2 million made to Manala on 24 June 2009, as appears from the evidence of Greenbaum. This payment is reflected in the analysis of SMI's Standard Bank call account. (See bundle A5/4350). The payment was authorised on 15 June 2009, as appears from the resolution at bundle A5/4593. This is the amount upon which the claim in the 2010 action is based. It is also this payment that gave rise to the amount of R2 898 145-00 in SMI's financial statements, which serves as the basis for the current claim. R898 145-00 apparently represents interest on the loan of R2 million. No evidence was presented showing a different or separate payment of R2 million, apart from the single payment of R2 million made to Manala on 24 June 2009.

[116] I therefore conclude that this claim in the 2011 action, does overlap with the claim already dealt with in the 2010 action. Grancy is accordingly not entitled to any relief in respect of this claim.

June 2009 loan to Manala

[117] In June 2009, Gihwala and Manala caused an amount of R1 976 523-34 to be made available by SMI to Manala, to facilitate the repayment of Grancy's initial contribution. I have earlier alluded to this amount being tendered to

Grancy, which tender was rejected, as the payment was due by SMI and not Manala, and it was made by means of a South African cheque in Rand which does not constitute payment abroad. Upon rejection, Manala took no further steps to repay the amount, but utilised same for his own purposes.

[118] The payment of this amount to Manala, constituted a breach of the terms of the February 2005 agreement, which requires the parties to the joint venture agreement to be treated equally. Gihwala and Manala, as the directors of SMI, who authorised this unlawful payment, thereby caused the assets of SMI to be depleted, with a resultant loss to be suffered by Grancy. In the circumstances it ought to have been clear to any reasonable person that it was unlawful to do so and the conduct of Gihwala and Manala in this regard, was reckless or, at least, grossly negligent. In the circumstances they should be held liable, jointly and severally, for payment of Grancy's loss being equal to 31% of the unauthorised loan to Manala. This loss amounts to R612 722-24 together with interest thereon at the rate of 15,5% per annum calculated from 24 June 2009 to date of final payment.

[119] As this loss was caused by Gihwala and Manala's unlawful conduct, and not by the DGFT and SMI, the latter should not be liable for payment thereof. I

should add that, for the reasons furnished in paragraphs 103/4 above, Grancy cannot invoke section 77 (3) of the 2008 Companies Act, in respect of this claim.

Further Manala Payments and Opposition Decision

[120] This is a claim preferred against Manala and SMI. Firstly, it relates to Manala's decision to levy a R15 000-00 per month director's fee from 1 August 2011, and, secondly, to a decision taken by Manala in June 2011, acting on behalf of SMI, to oppose the relief sought by Grancy in the 2011 action. I should, however, mention that it is not clear from the evidence whether any monthly payments of R15 000-00 were received by Manala.

[121] The payments of R15 000-00 per month to Manala from 1 August 2011, if made, would have represented a breach of the February 2005 agreement. Furthermore, the payments, if made, would have been in contravention of Article 107 of the SMI Articles of Association, in that no general meeting was held, nor was any remuneration determined, as contemplated in Article 107.

[122] However, in view of the absence of proof that these payments were made to Manala, Grancy is not entitled to relief under this claim.

[123] With regard to the SMI decision to oppose the relief sought by Grancy in the 2011 proceedings, I find it difficult to follow why it should be regarded as unlawful conduct. It was a decision taken by SMI when faced by the 2011 action, in which wide-ranging relief was sought, also against SMI. It seems to me that, at least initially, it was not unreasonable for SMI to defend the action. In my view, this leg of the claim should also fail.

REMAINING RELIEF SOUGHT IN 2010 AND 2011 ACTIONS

Procedural Matters

[124] There are two procedural matters that I have to deal with before considering the remaining relief. The first relates to a memorandum of January 2009 and the second concerns a General Meeting of SMI held on 14 February 2011.

[125] The January 2009 memorandum was prepared by Gihwala and forwarded to Grancy in anticipation of settlement discussions to take place between the parties. I do not wish to dwell unnecessarily on this issue, as my conclusion is that, *ex facie* the document, it was clearly intended to facilitate a settlement and that it is inadmissible in evidence. It was submitted on behalf of Grancy that the memorandum itself contains fraudulent statements designed to deceive Grancy,

and to cause it to settle on a manifestly false basis, to its detriment. Therefore, Grancy contends, it did not constitute a *bona fide* settlement offer at all and should not be regarded as a privileged document.

[126] In this regard, it was submitted that the general rule that settlement discussions should not be admissible in evidence, does not apply, as it would be contrary to public policy to consider the memorandum to be privileged. I do not agree with this submission, particularly in view thereof that the settlement offer, made in the memorandum, does not appear to me to be directly relevant to an issue in the case. In this regard reference can be made to **Zeffert** et al, **The South African Law of Evidence,** 2nd edition, where the following is said at 704:

> *"The fact that an offer contains statements which are fraudulent and even criminal does not in itself make it admissible, but it may tend to show that the offer was not made in good faith. If this is so , the offer will not be privileged, but the court will not investigate the matter unless the bona fides of the offer or the commission of the crime or fraud is directly relevant to an issue in the case."*

[127] Mawji conceded that he was not misled by anything in the memorandum. In fact, he rejected the proposals made in the memorandum. Nor has there been any attempt to avoid the settlement agreement which was subsequently reached

in March 2009, and which was made an order of court. In these circumstances, plaintiffs have not shown that the statements made in the memorandum are relevant to an issue in the case.

[128] Counsel on behalf of Grancy submitted that reliance is placed upon this memorandum to prove a case against Gihwala under section 424 of the 1973 Companies Act. However, this reliance, too, seems misplaced. The content of the memorandum does not relate to any business of the company, as required in terms of section 424, but rather to a private attempt to settle a dispute, i.e. the Spearhead dispute. I therefore conclude that the memorandum of January 2009, is inadmissible in evidence.

[129] This brings me to the meeting of 14 February 2011, the transcript of which was provisionally introduced in evidence, with the issue of the admissibility thereof to stand over for later determination. During the course of the trial, it became clear that Grancy does not place any significant reliance on what was said at this meeting. As I understood counsel for Grancy, the purpose of introducing the transcript would be to provide material for the cross-examination of Gihwala. As Gihwala did not testify, the transcript did not play any role in the trial.

[130] For the sake of completeness, I may state that, by their very nature, the proceedings at an annual general meeting of a company would not normally be conducted without prejudice. I accordingly consider the transcript to be admissible in evidence, save for the part where a topic is expressly raised or discussed on a without prejudice basis. In this regard, the only affected part of the transcript is to be found at Bundle A 6446.21, where the issue of directors' fees was discussed on a without prejudice basis.

[131] I therefore find that, save for the discussion on the issue of directors' fees, the transcript of this meeting is admissible in evidence.

Books of Account and Financial Statements

[132] The documentary evidence, together with the evidence of Mawji and, in particular, Greenbaum, paints a rather sad picture of an ongoing failure by SMI to keep proper books and records, whilst under the stewardship of Gihwala and Manala. As submitted by Grancy, it is remarkable that, in a company which was to have but one asset (a 58% shareholding in Ngatana), to date no accurate or complete books of account have been brought into existence.

[133] Instead, several versions of conflicting revised financial statements, ostensibly for the same period, have been drafted by SMI's previous auditors, the tenth defendant. Thereafter it was necessary to have another bookkeeper, Mr. Roomaney, reconstruct SMI's books of account. These reconstructed books and records are, strangely enough, at odds with the previous financial statements and books of account. This covers the period of time that SMI was under the control of Gihwala and Manala as its directors.

[134] As pointed out on behalf of Grancy, the following books of account and financial records of SMI now exist:

134.1 One set of audited annual financial statements, signed by the auditor and the directors for the years ended 2006 to 2008 respectively.

134.2 Three sets of unsigned draft annual financial statements for the year ended 28 February 2009.

134.3 Three sets of unsigned draft annual financial statements for the year ended 28 February 2010.

134.4 Revised unsigned annual financial statements, attaching to the working papers of tenth defendant, as furnished to Grancy in April 2013.

134.5 An alternate set of (materially different) annual financial statements of SMI, signed by the directors, but not the auditors, for the years ended 2007 and 2008.

134.6 Another set of financial statements for the 2006 financial year which was attached to the account furnished by Gihwala, Manala and the DGFT to Grancy in May 2010.

134.7 The revised books of account, for the years 2006 to 2010, and supporting documentation thereto, prepared by Roomaney.

[135] The inadequacy of these financial records were confirmed by Dr. Konar, an independent auditor approached by Gihwala, who recorded that *"it is patent that SMI's annual financial statements for the financial years 2006, 2007, 2008 and 2009 provide an inaccurate account of the financial position of SMI, its shareholders and its creditors".* Dr. Konar further opined that *"the financial statements submitted are deficient in a number of respects…"*.

[136] These findings are confirmed by Greenbaum who, in addition, has identified many more failings, which may, *inter alia*, be summarised as follows:

136.1 The failure to properly record Grancy's contribution in the Spearhead investment.

136.2 The consistent failure by SMI to provide group annual financial statements and/or to consolidate its financial statements with those of Ngatana, its subsidiary.

136.3 The failures to disclose material information, such as the fact that the shareholders in the Strand Property/Scarlet Ibis project were in fact parties related to Gihwala, being the DGFT and Gihwala's wife.

136.4 The unauthorised manner in which directors' and surety fees allegedly owing to Gihwala and Manala, were credited to Manala and the DGFT.

136.5 The numerous breaches of both the 1973 Companies Act and the 2008 Companies Act.

136.6 The material differences between, and patent errors pertaining to, the calculation and recording of the values of loan accounts, allegedly owing by SMI to the DGFT, Gihwala and Manala.

136.7 The conflicting characterisations of the amount of R225 000-00, credited to Gihwala and Manala, which was variously referred to in SMI's financial statements as "legal fees", "fees", "promoter's fees" and "promotions fees".

[137] The fact that Roomaney had to reconstruct SMI's books of account, underscores the failure, not only of SMI, but, in particular Gihwala and Manala, in their capacity as directors, to ensure that accurate books and records were kept. An additional worrying factor is that, on the same day that the audited financial statements of SMI for the year ending February 2007, were signed by Gihwala, Manala and the auditors, Gihwala and Manala signed duplicate financial statements, similar in most respects to the original financials, but for the fact that both Gihwala and Manala were now credited with R3 million each as directors' remuneration. These duplicate financials were, notwithstanding numerous requests by Grancy for the production of all relevant documentation, only made available by way of discovery in these proceedings in May 2013.

[138] All of this underscores the fact that, at all relevant times, SMI and Gihwala and Manala have failed to ensure that such accounting records, as are necessary fairly to present the state of affairs and business of SMI, were kept. (See section 284 of the 1973 Companies Act and sections 28 and 29 of the 2008 Companies Act). The evidence clearly shows that Gihwala and Manala, if not party to such failure, at the very least failed to take reasonable steps to secure compliance with this requirement. This constituted gross negligence in the execution of their duties as directors of SMI.

[139] In view of the aforesaid, I conclude that Grancy has shown that it is entitled to the relief sought in regard to the books of account and financial statements of SMI.

Failure to account to Grancy

[140] As I have indicated earlier, Grancy experienced ongoing difficulties in obtaining relevant information and documentation from Gihwala and Manala, regarding the affairs of the joint venture. It has to be borne in mind that, at all material times, the relevant information has been in the sole purview of Gihwala and Manala, but, notwithstanding repeated requests, they have failed to make such information available to Grancy.

[141] Grancy eventually resorted to the use of legal means when its requests for information were disregarded by Gihwala and Manala. This led to litigation in the form of an application in this court, which, as I have mentioned earlier, was settled, and on 9 March 2009, Gihwala, Manala and the DGFT were ordered to render a full and proper account in relation to the initial investment of the joint venture.

[142] Grancy was thereafter provided with a one page statement of account, which it considered to be inadequate, but its request that it be supplemented, was refused. This led to a further application in this court by Grancy to compel these defendants to furnish an improved account.

[143] The application was opposed, but on 15 April 2010, Binns-Ward J ordered the defendants to furnish an improved account, after finding that the previous account was *"woefully inadequate"*.

[144] The relevant defendants delivered a further account, which Grancy still considered to be inadequate. Grancy brought yet another application to compel the delivery of a proper account, which was also opposed. The matter ultimately culminated in the Supreme Court of Appeal (in 2014) referring the adequacy of the account, to be debated through a curial procedure. It should be borne in mind that the aforesaid litigation merely concerned the adequacy of the accounting pertaining to the use of Grancy's initial contribution. Similar difficulties have been encountered when Grancy attempted to ascertain any information regarding the state of SMI and its investment. Repeated requests for the opportunity to inspect and take copies of SMI's books of account and

financial statements, were not responded to. This conduct, as explained earlier, led to the cancellation of the February 2005 agreement by Grancy.

[145] Subsequent to the cancellation of the February 2005 agreement, the annual financial statements of SMI for the years ended 2006, 2007 and 2008 were made available to Grancy, but access to the books and records of SMI was refused. Further requests by Grancy for the production of documentation relating to SMI and the joint venture, have not been complied with. A conspectus of the evidence as a whole, shows that Grancy is justified in submitting that, at every level, and in every conceivable manner, Gihwala, Manala, SMI and the DGFT have failed to make the relevant books and records available to Grancy. All attempts to gain proper access to such information have been obstructed, even in the face of court orders.

[146] In view of the aforesaid, it follows that Gihwala and Manala are in breach of the February 2005 agreement, as it was always envisaged that Grancy would be entitled to all information relevant to its own investment; to SMI and to the joint venture. I conclude that Grancy has made out a case for the rendering of a full and proper statement of account, as sought in the particulars of claim, in both the 2010 and 2011 actions. I should add that, in my view, Grancy has

clearly shown that, on the principles enunciated in **Doyle and Another v Fleet Motors PE (Pty) Ltd** 1971 (3) SA 760 (AD), it is entitled to such accounts and relief ancillary thereto. I find that the parties involved and accordingly liable for the rendering of the statements of account, are Gihwala, Manala, the DGFT and SMI.

[147] It may be that some of the relief granted in this regard, will have been overtaken by the substantive relief to be granted in this consolidated action, as well as the relief granted in the other proceedings to which I have referred. However, that should not present a problem, as a statement of account should then be rendered taking into account any relevant orders made herein and in the other proceedings.

Delinquency declaration

[148] As mentioned earlier, Grancy seeks the disqualification of Gihwala and Manala, as directors, in terms of sections 218 and 219 of the 1973 Companies Act. Upon reflection, I have concluded that Grancy is not entitled to this relief. The reason is that these sections were repealed with effect from 1 May 2011, and the transitional provisions in Schedule 5 to the 2008 Companies Act, do not preserve the continued operation of sections 218 and 219 after 1 May 2011,

unless proceedings had commenced in a court in respect of the same conduct before 1 May 2011.

[149] The amendment to Grancy's pleadings in terms of which this disqualification declaration is sought under sections 218 and 219 of the 1973 Companies Act, was only effected during the course of the trial, well after 1 May 2011. It follows, in my view, that proceedings in respect of conduct which could serve as a basis for such a disqualification declaration, had not commenced prior to 1 May 2011. Therefore, disqualification under the 1973 Companies Act cannot be sought in the 2010 or 2011 action. Grancy will accordingly have to rely on the provisions of section 162 of the 2008 Companies Act, for relief of this nature, i.e. a delinquency declaration.

[150] Before dealing with Grancy's claim based upon section 162 of the 2008 Companies Act, I have to consider the constitutional challenge raised by Gihwala and Manala.

The Constitutional Challenge

[151] In their amended pleas in the 2011 action, both Gihwala and Manala have challenged the constitutionality of the delinquency provisions of the 2008

Companies Act. In particular, they contend that section 162 (5) (c) of the 2008 Companies Act is unconstitutional, in that:

151.1 The wide scope, inflexible application and severe consequences thereof violate the constitutional rights of directors to dignity and to freely practise their trade, occupation or profession (sections 10 and 22 of the Constitution, 1996).

151.2 It affords the court no discretion to refrain from granting a delinquency declaration or to shorten the duration thereof. To that extent, the section deprives a court of its power to fashion an appropriate remedy and thus violates the separation of powers.

151.3 Insofar as the section may be held to operate with retrospective effect to conduct that took place before the effective date of the 2008 Companies Act, namely 1 May 2011, it imposes a post facto punitive regime that restricts directors' rights to practise their chosen trade or occupation and thus violates the rule of law, thereby exacerbating the infringement of sections 10 and 22 of the Constitution, whilst also violating the right to equality (section 9 of the Constitution).

[152] Having had regard to the written and oral submissions on behalf of Grancy, Gihwala, Manala and the 12th defendant ("the Minister"), I intend, firstly, to consider the background, objectives and impact of section 162 of the 2008 Companies Act, and then to determine the following issues:

152.1 Does section 162 (5) (c) apply retrospectively to conduct perpetrated by directors prior to 1 May 2011?

152.2 If so, does such retrospective operation violate the rule of law and/or does it constitute an unjustifiable limitation of the rights of Gihwala and Manala under section 9 of the Constitution?

152.3 Does the alleged wide scope, inflexible application, lack of discretion and severe consequences of section 162 (5) (c), constitute an unjustifiable violation of Gihwala and Manala's rights to professional freedom and dignity under sections 22 and 10 of the Constitution?

Background, objectives and impact of section 162 of the 2008 Companies Act

[153] The background and objectives of the 2008 Companies Act are conveniently dealt with in a policy paper published by the Department of Trade

and Industry and published in GG26493 of 23 June 2004, as well as in the Memorandum on the Objects of the Companies Bill, 2008.

[154] These documents show that section 162 of the 2008 Companies Act was introduced with the following objectives in mind:

154.1 A need was identified for greater protection of the public and investors against the conduct of unscrupulous company directors. Such directors are to be eliminated, not only to prevent losses to investors, but also to boost confidence in the South African Regulatory System in order to attract investment and stimulate growth.

154.2 In order to achieve the objectives, it was necessary, in the first place, to define the rights, duties and obligations of directors in the 2008 Act itself, and not rely on ill-defined common law rights, duties and obligations.

154.3 It was further necessary to provide an effective enforcement mechanism for those harmed by the conduct of rogue directors. The threat of criminal prosecution proved to be an ineffective deterrent. It became necessary to add an array of administrative and civil remedies to the 2008 Act, aimed at deterring directors from

abusing their office and eliminating those found guilty of improper conduct from operating in South Africa.

[155] Section 162 contains one such civil remedy. As explained by the Minister, the innovative aspect of section 162 (5) is not that grounds for disqualification have been expanded considerably from what they were before, nor that the periods of disqualification are necessarily longer. The innovation lies therein that section 162 introduces a new civil remedy for those harmed by the conduct of delinquent directors.

[156] I now turn to the provisions of section 162 which are relevant for purposes of the present debate. Section 162 (2) provides for, *inter alia*, a shareholder of a company to apply to court for an order declaring a person delinquent or under probation if the person is a director of that company or, within the 24 months immediately preceding the application, was a director of that company. The application may be brought where any of the circumstances contemplated in section 162 (5) (a) to (c) apply. Whilst subsections 5 (a) and (b) relate to individuals serving as directors when already prohibited from so doing, subsection 5 (c) relates to what can be termed "substantive" abuses of office.

[157] Section 162 (5) (c) provides that a court must declare a person a delinquent director if such individual, while a director-

157.1 grossly abused the position of director;

157.2 took personal advantage of information or an opportunity, contrary to section 76 (2) (a) (which provides that a director of a company must not use the position of director, or any information obtained while acting in the capacity of a director, to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or to knowingly cause harm to the company or a subsidiary of the company);

157.3 intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76 (2) (a);

157.4 acted in a manner-

(aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or

(bb) contemplated in section 77 (3) (a), (b) or (c). (These subsections cover conduct such as a director acting on behalf of a company despite knowing that he/she lacked the authority to do so; acquiescing in the carrying on of the

> company's business despite knowing it was conducted recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose or being a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company or had another fraudulent purpose).

[158] A delinquency declaration under section 162 (5) (c) may be made subject to any conditions the court considers appropriate and subsists for seven years from the date of the order, or such longer period as determined by the court at the time of making the declaration. In terms of subsections 162 (11) and (12), a person declared delinquent in terms of 162 (5) (c), may apply to court at any time more than three years after such declaration, to suspend such order of delinquency and substitute an order of probation, which the court may grant if satisfied that the conditions attached to the original order have been complied with and, effectively, where there is a reasonable prospect that the applicant would be able to serve successfully as a director of a company in the future.

[159] Section 69 (8) (a) of the 2008 Companies Act, provides that a person is disqualified to be a director of a company if a court has declared such person to be delinquent in terms of section 162. The real effect of a declaration of delinquency is accordingly disqualification from the office of director.

Does section 162 (5) (c) apply retrospectively to conduct prior to 1 May 2011?

[160] Section 224 (1) of the 2008 Companies Act, states that the 1973 Companies Act *"is hereby repealed, subject to subsection (3)"*. Subsection (3) provides that the repeal of the 1973 Companies Act, does not affect the transitional arrangements, which are set out in Schedule 5 to the 2008 Companies Act. From this it follows that the provisions of the 1973 Companies Act, have effectively been repealed, subject to the transitional arrangements found in Schedule 5 to the 2008 Companies Act.

[161] Item 7 (7) of Schedule 5 to the 2008 Companies Act, provides as follows:

> *"A right of any person to seek a remedy in terms of this Act applies with respect to conduct pertaining to a pre-existing company and occurring before the effective date, unless the person had commenced proceedings in a court in respect of the same conduct before the effective date".*

[162] Section 162 of the 2008 Companies Act, resorts under Part B of Chapter 7 of the Act, which deals with *"rights to seek specific remedies."* Section 162 clearly provides a specific remedy, to have a director of a company declared delinquent. What item 7 (7) conveys, is that the right to seek a remedy under section 162 applies with regard to conduct pertaining to a pre-existing company and occurring before the effective date. The only qualification is to be found with regard to circumstances where the applicant had commenced proceedings in a court in respect of the same conduct before 1 May 2011.

[163] In my view, the wording of item 7 (7) is unambiguous and its meaning is clear, namely, that, in an application under section 162 of the 2008 Companies Act, past conduct of the relevant director may be taken into account, unless proceedings in respect thereof had already been commenced before the effective date. Such interpretation does not, in my opinion, lead to any absurdity.

[164] I am, in any event, in agreement with the submission on behalf of Grancy, that item 7 (7) does not, in fact, create true retrospectivity and therefore does not implicate any presumption against retrospectivity. It does not attempt to visit unlawfulness upon previously lawful conduct. It simply attaches prospective

consequences to previously unlawful conduct in the interest of protecting the public and maintaining appropriate standards of corporate governance.

[165] The Minister contends that item 7 (5) of Schedule 5 to the 2008 Companies Act, read with Item 7 (7), justifies the conclusion that section 162 (5) (c) is not intended to apply to pre-1 May 2011 conduct. This interpretation is in direct conflict with the clear, unambiguous and unqualified wording of item 7 (7). In any event, items 7 (5) and 7 (7) have different objectives and subject matter. As explained earlier, item 7 (7) deals with remedies under the 2008 Companies Act. A delinquency declaration is one such remedy. Item 7 (5), on the other hand, deals with provisions of the 2008 Companies Act relating to the duties, conduct and liability of directors.

[166] The Minister places specific reliance on item 7 (5) (a), which reads as follows:

> *"Despite anything to the contrary in a company's Memorandum of Incorporation, the provisions of this Act respecting the duties, conduct and liability of directors apply to every director of a pre-existing company as from the effective date."*

The duties, conduct and liability of directors are dealt with in sections 76 and 77 of the 2008 Companies Act. The purpose of item 7 (5) is revealed in the context

of related provisions of the 2008 Companies Act. Item 4 (4) of Schedule 5, states that, from 1 May 2011 to 30 April 2013, if there is a conflict between a provision of the Act and a provision of a pre-existing company's Memorandum of Incorporation, the latter provision prevails, except to the extent that Schedule 5 provides otherwise.

[167] As submitted on behalf of Grancy, item 7 (5) is precisely the item which provides otherwise. It makes it clear that the provisions of the Memorandum of Incorporation in respect of the matters specified in item 7 (5) (a) to (d), will not prevail over inconsistent provisions of the 2008 Companies Act during the aforementioned two year period. The purpose of item 7 (5) is clearly to expand, not restrict, the application of the 2008 Companies Act. It caters for the fact that certain of the company finance and governance provisions in the 2008 Companies Act, are so significant that they ought not to be overridden by the Memorandum of Incorporation, even during the two year transition period. There is no hint at all in item 7 (5) that its inclusion was intended to limit item 7 (7). In any event, as stated earlier, items 7 (5) and 7 (7) have different objectives and subject matter. Item 7 (7) deals with remedies under the 2008 Companies Act, which item 7 (5) does not purport to do.

[168] I therefore find that, contrary to the submission on behalf of the Minister, item 7 (5) does not limit item 7 (7), and that the latter, in fact, serves to afford Grancy the right to institute delinquency proceedings in terms of section 162 of the 2008 Companies Act, against Gihwala and Manala in respect of their pre- 1 May 2011 conduct.

[169] This conclusion is underscored by recent case law decided under section 162 (5) of the 2008 Companies Act. In this regard reference can be made to **Msimang NO v Katuliiba** and Others [2013] 1 ALL SA 580 (GSJ); **Lobelo v Kukama** [2013] ZAGPJHC 137 (31 May 2013) and **Cape Empowerment Trust Ltd v Druker** 2013 JDR 1360 (WCC). In all of these cases some of the conduct relied upon for delinquency declarations in terms of section 162 (5) (c), pre-dated 1 May 2011.

Is section 162 (5) (c) unconstitutional by virtue of its retrospective application?

[170] The consensus is that, in order to determine whether section 162 (5) (c), applied retrospectively, is inconsistent with the rule of law and the right to equality, one needs to compare the 2008 Companies Act with the 1973 Companies Act. Gihwala concedes that, *"if it can be said that directors are*

faced with a similar sanction for similar conduct under both the 1973 and 2008 Act", then it would be *"difficult to argue"* that the section violates the right to equality and the rule of law.

[171] At the outset, I should state that I believe that the correct approach is to limit comparison between the two regimes to the parts of section 162 (5) which Gihwala and Manala are alleged to have contravened, i.e. section 162 (5) (c). However, Gihwala and Manala contend that the constitutional validity of this statute should be determined objectively, *inter alia*, by having regard to the whole of section 162 (5), including those parts which they are not alleged to have contravened. In this regard they place reliance on **De Reuck v DPP**, **WLD** 2004 (1) SA 406 (CC) at para. 85, where the court held that:

> *"This court has, however, repeatedly made plain that the subjective position of a particular applicant is irrelevant to the determination of the validity of a statutory provision; a statutory provision is objectively either valid or invalid".*

[172] Similarly, in **Ferreira v Levine NO & Others**; **Vryenhoek and Others v Powell NO and Others** 1996 (1) SA 984 (CC) the court said the following at para. 26:

> *"The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequences of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another."*

[173] However, the fact that the constitutional validity of a statutory provision is determined objectively, does not mean that Gihwala and Manala are entitled to challenge parts of section 162 (5) which are not applied to them. As pointed out on behalf of the Minister, the only basis on which they have standing to challenge section 162 (5), is in their own interest, as envisaged in section 38 (a) of the Constitution. They only have such an interest in respect of section 162 (5) (c), being the subsection applied to them. In this regard reference can be made to **Poswa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape** 2001 (3) SA 582 (SCA) at paras. 21-22.

[174] In **Poswa** the complaint was directed only against para. (a) of the relevant legislation. In argument Poswa also attempted to rely on para. (b) of the legislation, which did not apply to his case. The Supreme Court of Appeal

found that he could not do so, as para. (b) had no direct application to his situation. By contrast, in both **De Reuck** and **Ferreira,** the attacks were only directed against the provision of the relevant legislation which had direct application to the situation of each of them.

[175] Turning to the comparison between the 1973 and 2008 regimes, I believe that it is, firstly, important to reiterate that the main change brought about by section 69 (8) (a), read with section 162, of the 2008 Companies Act, is the introduction of a new civil remedy in respect of conduct which was also unlawful under the 1973 Companies Act. In this regard, I have to agree with the submission on behalf of the Minister, that it is not unfair for a director to face removal, in terms of a new and more effective enforcement procedure, for conduct which was unlawful at the time when it was committed. In particular, it is clear that all the categories of conduct provided for in section 162 (5) (c) of the 2008 Companies Act, would have been covered by section 219 (1) (c) (ii) of the 1973 Companies Act (dealing with the disqualification of a director).

[176] Section 219 (1) (d) of the 1973 Companies Act, also provided for the removal of a director once a declaration had been made under section 424 (1) of the Act. The latter section dealt with personal liability of a director where he/she

had carried on the business of a company recklessly or with the intent to defraud creditors or for any fraudulent purpose. In **Tsung and Another v Industrial Development Corporation of South Africa Limited and Another** 2013 (3) SA 468 (SCA) at para. 31, the court held that the carrying on of the business of a company recklessly, means carrying it on by conduct which evinces a lack of any genuine concern for its prosperity. Again, it is clear that all the conduct listed in section 162 (5) (c) of the 2008 Companies Act, would fall under the description of conduct which evinces a lack of genuine concern for the relevant company's prosperity.

[177] With regard to the severity of the respective sanctions, the 1973 Companies Act did not set minimum or maximum periods of removal. The 2008 Companies Act provides that a declaration of delinquency subsists for a minimum period of seven years, although the person concerned may, at any time more than three years after the date of the order, apply to have the order suspended and substituted with an order of probation.

[178] As pointed out on behalf of the Minister, a comparison of the severity of the respective sanctions under the two Acts, cannot really be made in the abstract, but should rather be done on a case-by-case basis. However, insofar as

the sanctions of the two regimes may be compared, it is significant that, although the 2008 Companies Act provides for a declaration of delinquency to last for at least three years, a court, under the 1973 Companies Act, had the power to disqualify a director for whatever period the court deemed fit, with the affected ex-director being entitled to apply to court to set aside the operation of such an order.

[179] Furthermore, in terms of the 1973 Companies Act, a disqualification order under section 219 would result in the relevant person being disqualified from any involvement in the management of a company. Under the 2008 Companies Act, conversely, the declaration of delinquency only affects the impugned individual's position as a director or as a prescribed officer. It therefore appears that, in certain respects, the sanction under the 2008 Companies Act is less severe than under the 1973 Companies Act.

[180] More important, however, is the fact that the sanctions imposed under the 2008 Companies Act, simply reflect the seriousness of the transgressions set forth in section 162 (5) (c), which transgressions concern substantive abuses of office, including the fraudulent, reckless and/or grossly negligent carrying on of the business of a company. In my view, a comparison between the two regimes,

necessarily leads one to the conclusion that there is no merit in the submission that section 162 (5) (c) of the 2008 Companies Act, applied retrospectively, is inconsistent with the rule of law. As far as the alleged violation of the right to equality is concerned, it is correctly pointed out on behalf of the Minister, that this is merely a repetition of the same argument in a different form. If the conduct was already unlawful and cause for disqualification under the 1973 Companies Act, then there can be no arbitrary differentiation.

[181] I therefore find that section 162 (5) (c) of the 2008 Companies Act, is not unconstitutional by virtue of its retrospective application.

Is section 162 (5) (c) unconstitutional in that it infringes upon directors' constitutional rights under sections 10 and 22 of the Constitution?

[182] Again, the analysis is to be limited to section 162 (5) (c) of the 2008 Companies Act. Gihwala and Manala have no interest in a finding whether or not any of the other subsections in section 162 (5), are unconstitutional.

[183] The challenge launched by Gihwala and Manala in this regard, is that section 162 (5) (c) is unconstitutional by virtue of the fact that it is overbroad; that it does not confer a discretion upon the court to decide whether or not a

director should be declared delinquent and that it does not confer a discretion upon the court to determine the period of the declaration of delinquency.

[184] As I understood the argument on this part of the challenge, Gihwala and Manala contend that section 162 (5) (c) infringes upon the doctrine of separation of powers, as well as their constitutional rights to professional freedom (section 22 of the Constitution) and human dignity (section 10 of the Constitution).

[185] I agree with the submission that the contention that the section is overbroad, effectively collapses into the second prong of the attack, i.e. that the section is unconstitutional because it does not confer a discretion to the court on whether or not to declare a person to be a delinquent director. The reason why it is contended that the section is overbroad, is precisely because it does not confer a discretion regarding an order of delinquency in certain instances.

[186] Turning to the relevant substantive constitutional challenges raised by Gihwala and Manala, I firstly deal with the alleged separation of powers (as an element of the rule of law) violation. In this regard Manala argues as follows:

> *"We submit that it is inimical to the rule of law- in particular, the separation of powers- for the legislature to compel the judiciary to impose a punishment that disregards the individual circumstances of a case or which is disproportionate to the misconduct at issue."*

[187] In this regard reliance is placed on the judgment of the Constitutional Court in **S v Dodo** 2001 (3) SA 382. Whether this judgment is helpful, is debatable, as it dealt with the test adopted by the Constitutional Court in criminal sentencing matters. Be that as it may, it, in any event, appears from paragraph 34 of **Dodo** that the question whether there is sufficient discretion in legislation, is to be determined with reference to the Bill of Rights. In the result the relevant inquiry in regard to the alleged infringement of the separation of powers principle, is whether section 162 (5) (c) of the 2008 Companies Act, is inconsistent with Gihwala and Manala's constitutional rights as enshrined in sections 10 and 22 of the Constitution.

[188] During argument it became clear that the main attack of Gihwala and Manala upon the constitutional validity of section 162 (5) (c), is based upon section 22 of the Constitution. In this regard there is consensus that section 22, in this instance, relates to the right to practise a profession and not the right to choose a profession. From this it follows that, as section 162 (5) (c) merely

regulates the right to practise the profession of a director, the only question is whether such regulation is rational.

[189] Dealing, firstly, with the lack of a discretion regarding an order of delinquency, the question is whether it is rational to eliminate a person from serving as a director for a period of time, on the basis that he or she was guilty of conduct falling within the categories specified in section 162 (5) (c). This, in turn, involves an analysis of the specified categories of conduct. A perusal of these categories, shows that all of them deal with instances of serious misconduct, constituting gross abuses of the position of a director of a company.

[190] There is, in my view, no doubt that the elimination of a person from serving as a director for a period of time, for conduct falling within any of the categories of conduct stipulated in section 162 (5) (c), is not an irrational response.

[191] As indicated earlier, section 162 (5) (c) is, in my opinion, rationally related to its objectives. It is necessary to eliminate rogue directors from operating in South Africa to protect investors, as well as to boost confidence in

the South African Regulatory System in order to attract investments and stimulate growth.

[192] In considering whether a lack of discretion with regard to the period of the order of delinquency, renders section 162 (5) (c) unconstitutional, it is, once again, necessary to consider whether the purpose of prescribing a minimum period for an order of delinquency, is rational.

[193] Firstly, in this regard, it has to be borne in mind that the prescribed declaration of delinquency for a period of seven years, is ameliorated by the discretion of the court to make the declaration subject to any conditions the court considers appropriate, as well as the affording of a discretion to the court to suspend the order and substitute same with an order of probation, at any time more than three years after the original order had been made.

[194] The purpose of prescribing minimum periods for an order of delinquency, is obviously to ensure that the objectives of the legislature, as set out above, are met by removing unscrupulous directors in order to protect investors. Further objectives would be to ensure greater consistency in the application of section 162 and to ensure that the section has a sufficient deterrent effect.

[195] I therefore agree with the contention that, to achieve these objectives, a minimum period of delinquency of three years, is rational, given that a delinquent director can hardly contend that he or she will be able to demonstrate *"satisfactory progress towards rehabilitation"* in a shorter period than three years.

[196] I therefore conclude that, also in regard to the lack of a discretion with regard to the period of the order of delinquency, section 162 (5) (c) is rational and does not infringe upon Gihwala and Manala's constitutional rights, in particular the rights enshrined in section 22 of the Constitution.

[197] With regard to the alleged infringement of the right to dignity, I have to agree with the submission on behalf of the Minister, that it is difficult to understand how the human dignity and integrity of a person can be affected by his or her removal as director, on valid and substantial grounds as set out in section 162 (5) (c) of the 2008 Companies Act. If this were to be the case, then it would be virtually impossible for shareholders to remove rogue directors because such a removal would inevitably affect the directors' dignity and integrity.

[198] However, as explained by the Minister, the real difficulty with reliance on human dignity in the present matter, is that it runs contrary to the principle of subsidiarity. This principle requires that norms of greater specificity should be applied to the resolution of disputes before norms of greater abstraction. In the case of the right to dignity, this translates into a rule that a specific right giving effect to a particular aspect or application of the general right to dignity, should be invoked in preference to reliance on the general right. In the present matter the more specific right is the professional freedom right which should be invoked in preference to the general right to dignity. See **Nokotyana v Ekurhuleni Metro Municipality** 2010 (4) BCLR 312 (CC) at para 50.

[199] In view of the aforesaid, I conclude that the provisions of section 162 (5) (c) do not infringe upon Gihwala and Manala's constitutional rights under sections 10 and 22 of the Constitution.

[200] I now proceed to consider whether Grancy is entitled to the delinquency declarations sought in these proceedings. I should mention that, in seeking this relief, Grancy sought to rely only upon the conduct cited in the 2011 action. However, as I understand the provisions of item 7(7) of Schedule 5 to the 2008 Companies Act, Grancy will also be entitled to rely upon the conduct cited in

the 2010 action. Particularly so, as relief of this nature had not been sought under the 2010 action, save for the belated amendment in terms of which relief was sought under sections 218 and 219 of the 1973 Companies Act. I have, in paragraph 149 above, held that such relief was not validly introduced under the 2010 Act, as the amendment was only effected after 1 May 2011. It follows, in my view, that Grancy is entitled to also rely on the conduct cited in the 2010 action, insofar as it may be relevant to the delinquency declarations sought in the 2011 action.

[201] It follows that Grancy is entitled to rely upon the following conduct of Gihwala and Manala. I firstly deal with the 2011 action:

201.1 The unlawful payment of R2,75 million to each of them as directors' fees.

201.2 The unlawful payment of R1 114 539-00 to each of them as surety fees.

201.3 The unlawful loan of R1 976 523-34 to Manala.

201.4 The failure to ensure that such accounting records as are necessary fairly to present the state of affairs and business of SMI, were kept.

[202] In addition, Grancy may also rely on the following conduct of Gihwala and Manala, cited in the 2010 action:

202.1 The unauthorised crediting of themselves with promotion fees of R225 000-00.

202.2 The unauthorised payment of their personal legal fees in an amount of R300 000-00.

202.3 The unauthorised loan of R2 million to Manala.

202.4 The unauthorised investment of R2 million in Strand/Scarlet Ibis.

[203] When regard is had to the above conduct of Gihwala and Manala, it is clear that they have grossly abused their positions as directors of SMI. What the evidence shows, is that they have taken personal advantage of information or opportunities at their disposal, in their capacity as directors of SMI, to gain advantages for themselves. Their conduct constituted repeated unlawful misappropriation of funds involving substantial amounts.

[204] The conduct of Gihwala and Manala with regard to the initial investment made in terms of the February 2005 agreement, was commented on by the Supreme Court of Appeal in **Grancy Property Ltd v Manala and Others**,

supra, by referring to *"multiple allegations of malfeasance and moral turpitude, which assertions… have to be accepted as correct".*

[205] What aggravates the matter, is the continued failure and refusal on the part of Gihwala and Manala to allow Grancy access to information and documentation, relating to their management and control of the investment and the affairs of SMI. To date hereof, they have not yet provided Grancy with anything close to a full and complete accounting. Also, the manner in which they failed to ensure that proper books of account of SMI were kept, justifies the conclusion that they had set out on a course of conduct with only their interests in mind and, in this manner, carried on the business of SMI in a reckless and/or grossly negligent manner.

[206] When their conduct is evaluated objectively, it is abundantly clear that it falls far short of the standard of a reasonable director. The inescapable conclusion is that they were, at all material times, consciously aware of their wrongdoings, but persisted regardless of the consequences thereof, repeatedly perpetuating instances of unlawful conduct with the aim of benefiting only themselves. This was done at the expense of Grancy and SMI, to whom, fiduciary duties were owed.

[207] In view of the aforesaid, I have to agree with the submission on behalf of Grancy, that this court has, in the face of the uncontested evidence pertaining to such serious misconduct, no option but to declare Gihwala and Manala delinquent directors, thus guarding the public against such unscrupulous directors. In view of their conduct, set out in detail above, they are simply no longer fit to hold the office of director or to be entrusted with the fiduciary responsibility of managing corporate entities. In view of their persistent serious misconduct, I believe that this is not a case where I should consider imposing conditions limiting the application of the declarations of delinquency.

[208] I have had regard to the instances in which our courts have issued declarations of delinquency under the 2008 Companies Act (see the cases cited in para. 169 above). A reading thereof shows that declarations were on occasion granted in circumstances where the conduct of the relevant directors was far less serious than that of Gihwala and Manala, and often of a technical nature. As submitted on behalf of Grancy, the conduct of Gihwala and Manala dwarfs that which has previously resulted in delinquency and is such that it must result in unqualified declarations of delinquency.

Application to appoint independent directors to the board of SMI

[209] In **Grancy Property Ltd v Manala and Others,** supra, the Supreme Court of Appeal substituted an order made by this court, declaring that the order appointing independent directors to the board of SMI, will operate pending the finalisation of the 2011 action, unless the court, in the present matter, determines otherwise.

[210] Having regard to the evidence placed before the court in this trial, it is clear to me that, until Grancy is provided with a full and proper accounting, including proper books and records of SMI and details of any and all transactions, and are paid all amounts due to it, SMI, as the vehicle through which the parties made the Spearhead investment, should remain under objective and independent oversight.

[211] I accordingly agree that, in this regard, the order of this court, as substituted by the Supreme Court of Appeal on 10 May 2013, should be extended on the basis set out hereunder.

COSTS OF SUIT (EXCLUDING THE COSTS OF THE CONSTITUTIONAL ISSUE)

[212] The general rule is that costs follow the result. Having regard to my findings above, and the orders made, it is clear that Grancy has had substantial success in this matter. It should therefore be entitled to its costs.

[213] I have at the outset indicated that the second plaintiff was no more than an agent of, and investment adviser to, Grancy, and that it is not entitled to any relief sought in the actions. It therefore has no entitlement to a costs order in its favour.

[214] The defendants have submitted that there is room for a departure from the general rule as to costs, particularly having regard to the manner in which Grancy conducted this litigation. In this regard reference has been made to the voluminous documentation introduced by Grancy, the majority of which was not utilised in the trial.

[215] In my view, the defendants' submission that a special costs order should therefore be granted in their favour, does not take sufficient account of the reasons why the documentation was so voluminous. In particular, Grancy

anticipated that Gihwala, Manala and Narotam would be testifying and that at least one opposing expert witness was to be called. In addition, SMI was opposing the relief sought and Manala and SMI were advancing counterclaims. Much of the documentation was included in the various bundles by Grancy, in anticipation of the cross-examination of these witnesses and to address the variety of issues to be decided by the court. It was only on the eve of the trial that SMI elected to abide the court's decision, and on the seventh day of the trial that Manala abandoned his counterclaim. Also, it was only at the end of Grancy's case that the defendants confirmed that no witnesses would be called on their behalf.

[216] In the circumstances, I find that Grancy was justified in producing the various trial bundles and that no special costs order can be sustained on this basis.

[217] Grancy seeks a costs order against Gihwala, Manala and the DGFT, jointly and severally. The lion's share of the relief in the consolidated action is granted against Gihwala and Manala, jointly and severally, but this does not, in my view, mean that no costs order should be made against the DGFT. It should be borne in mind that the evidence shows that the DGFT is, effectively, the alter

ego of Gihwala. As appears from the evidence, the DGFT did not only make payments on behalf of Gihwala under the February 2005 agreement, but it received various benefits. At the outset, the shareholding in SMI, to which Gihwala was entitled in terms of the February 2005 agreement, was registered in the name of the DGFT. The dividend payments attributable to this shareholding were also received by the DGFT. Further payments made by SMI, were received by the DGFT and/or Gihwala, such as the repaid amount, promotion fees and legal fees. Account should also be taken of the fact that directors' fees and surety fees paid to Gihwala, were credited to the DGFT.

[218] In these circumstances, I believe that it would be fair and just to hold the DGFT liable, jointly and severally, with Gihwala and Manala, for the payment of Grancy's costs.

[219] Grancy seeks costs on a punitive scale. Having regard to the history of this matter, in particular the conduct of Gihwala, Manala and the DGFT, as described in detail above, I believe that a punitive costs order on the scale as between attorney and client, including the costs of two counsel (where employed), is justified. I am not persuaded that an award of costs between attorney and own client should be made. Such an award has variously been

described as *"uitsonderlik"*, *"very punitive"*, and indicative of *"extreme opprobrium"*. See: **Sentrachem Ltd v Prinsloo** 1997 (2) SA 1 (A) at 22D; **Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd** 1995 (4) SA 790 (A) at 807D; **Cambridge Plan AG v Cambridge Diet (Pty) Ltd** 1990 (2) SA 574 (T) at 589 D.

[220] In my view Grancy would not only be sufficiently compensated by an award of attorney and client costs, but an award on the higher scale would negate the fact that the defendants have had some success in defeating some of Grancy's myriad of claims.

[221] Grancy also seeks an order that Mawji be declared a necessary witness, as well as an order that specified items of cost incurred by him, are recoverable. I have no doubt that he should be declared a necessary witness, although the need for such a declaration appears to have fallen away. See **Transnet Ltd v Witter** 2008 (6) SA 549 (SCA). However, as is customary, I will, *ex abundanti cautela*, make such a declaration. I also have no doubt that Mawji's costs attending the trial and any consultations held in South Africa, including travelling, subsistence and accommodation costs, should be recoverable. However, apart from recommending the payment thereof, I do not intend making a specific

order in this regard, as it would be tantamount to the court usurping the function of the taxing master. See **Transnet Ltd and Another v Witter**, supra, at para. 19.

[222] Furthermore, Grancy seeks an order that Mawji's costs relating to security arrangements, be paid by the defendants. I believe that the question, whether costs of this nature should be allowed as part of attorney and client costs, should be answered by the taxing master and not by the court. In any event, I do not have sufficient information as to the nature and extent of this expense, to enable me to come to a decision on this issue.

[223] As far as Grancy's expert witness, Mr. HJ Greenbaum, is concerned, I believe that his full professional attendance fee, including his qualifying fees, should be recoverable.

[224] With regard to its legal representation, Grancy asks the court to order the payment of the travelling, subsistence and accommodation expenses of its attorneys and second counsel. These attorneys and counsel are Johannesburg based and attended the trial in Cape Town. I believe that this, too, is a matter which should be decided by the taxing master. The question is whether these

costs are reasonable in the context of an award of attorney and client costs. On the information before me, I am unable to pronounce on this issue. But, in any event, it appears to me that, if I were to do so, I would be usurping the function of the taxing master.

[225] Finally, Grancy seeks a costs order in its favour with regard to the application for the amendment of its particulars of claim, which amendment I granted on 6 February 2014. I then ordered that the costs of the application are reserved for later determination. It will be recalled that this relates to the introduction of a cause of action based on sections 218 and 219 of the 1973 Companies Act. It will also be recalled that I have, upon reflection, come to the conclusion that the amendment did not introduce a valid cause of action based on sections 218 and 219 of the 1973 Companies Act.

[226] In view thereof, and with the benefit of hindsight, it appears that Manala, who opposed the application for amendment, did have valid grounds for his opposition. In these circumstances, I believe that it would be fair and just to order that the costs of the amendment application be borne by Grancy.

THE COSTS OF THE CONSTITUTIONAL ISSUE

[227] Grancy contends that, in view of the unsuccessful constitutional challenge raised by Gihwala and Manala, they should be held liable, jointly and severally, for the costs thereof. The rule in constitutional matters is that an unsuccessful party is not ordinarily ordered to pay costs, lest litigants be discouraged from asserting their constitutional rights. However, if the constitutional challenge is frivolous or vexatious, or in any other way manifestly inappropriate, the litigant instituting same should not expect that the worthiness of its cause will immunise it against an adverse costs award. See **Biowatch Trust v Registrar, Genetic Resources and Others** 2009 (6) SA 232 (CC) at para. 24; **Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another** 2011 (4) SA 42 (CC) at para. 76.

[228] In my view, it cannot be said that the constitutional challenge was frivolous or vexatious. It seems to me that the challenge raised genuine constitutional questions of broad concern regarding the delinquency provisions of the 2008 Companies Act. In view thereof, Gihwala and Manala should not, as unsuccessful parties, be ordered to pay the costs of the application. Seeing that this involved constitutional litigation between private individuals, I believe that no order as to the costs of the constitutional challenge should be made.

ORDERS

[229] In the result the following orders are made:

A. Monetary relief claimed in the 2010 action

1. The first and second defendants are declared liable, jointly and severally, to pay the following to first plaintiff:

   (a) The amount of R2 051 833-34, together with interest thereon at the rate of 15,5% per annum, calculated from 20 March 2007 to date of final payment.

   (b) The amount of R69 750-00, together with interest thereon at the rate of 15,5% per annum, calculated from 28 February 2006 to date of final payment.

   (c) The amount of R93 000-00, together with interest thereon at the rate of 15,5% per annum, calculated from 28 February 2009 to date of final payment.

   (d) The amount of R620 000-00, together with interest thereon at the rate of 15,5% per annum, calculated from 15 June 2009 to date of final payment.

(e) The amount of R620 000-00, together with interest thereon at the rate of 15,5% per annum, calculated from 2 April 2007 to date of final payment.

(f) The amount of R213 789-57, together with interest thereon at the rate of 15,5% per annum, calculated from 19 August 2009 to date of final payment.

(g) The amount of R326 740-00, together with interest thereon at the rate of 15,5% per annum, calculated from 19 August 2009 to date of final payment.

(h) The amount of R165 660-60, together with interest thereon at the rate of 15,5% per annum, calculated from 6 January 2010 to date of final payment.

B. Monetary relief claimed in the 2011 action

2. The first and second defendants are declared liable, jointly and severally, to pay the following to first plaintiff:

(a) The amount of R852 500-00, together with interest at the rate of 15,5% per annum on the amount of R1 705 000-00, calculated from 8 April 2009 to 23 November 2010 and on

the amount of R852 500-00, calculated from 23 November 2010 to date of final payment.

(b) The amount of R345 507-09, together with interest at the rate of 15,5% per annum on the amount of R691 014-18, calculated from 1 March 2008 to 23 November 2010, and on the amount of R345 507-09, calculated from 23 November 2010 to date of final payment.

(c) The amount of R612 722-24, together with interest thereon at the rate of 15,5% per annum, calculated from 24 June 2009 to date of final payment.

C. Relief relating to books of account and financial records

3. The first, second and third defendants are ordered to deliver to first plaintiff, within 30 days of this order, proper and full books of account and such accounting records as would be necessary fairly to present the state of affairs and business of third defendant, and to explain the transactions and financial position of the business of third defendant, for the period January 2005 to date of this judgment.

D. Statements of account and ancillary relief

4. (a) An order is granted in terms of prayers 6 to 8 of plaintiffs' particulars of claim in the action under case number 1961/2010, against the first, second and third defendants and the Dines Gihwala Family Trust as represented by the fourth to eighth defendants. The order is granted in favour of first plaintiff and the said defendants are to comply with prayer 6 within 30 days of this order.

(b) An order is granted in terms of prayers 12 to 14 of plaintiffs' particulars of claim in the action under case number 12193/2011, against the first, second and third defendants and the Dines Gihwala Family Trust as represented by the fourth to eighth defendants. The order is granted in favour of first plaintiff and the said defendants are to comply with prayer 12 within 30 days of this order.

E. Delinquency declaration

5. The first and second defendants are declared delinquent directors as contemplated in section 162 (5) (c) of the Companies Act 71 of 2008.

F. Independent directors of Seena Marena Investments (Pty) Ltd

6. It is ordered that paragraphs 1 to 5 of the order of the Western Cape High Court under case no. 12193/11, as substituted by the Supreme Court of Appeal under case no. 665/12 on 10 May 2013, shall operate until the later of:

   (a) the finalisation of the statement and debatement of account procedure ordered in paragraphs 4 (a) and (b) above;

   (b) the payment of all amounts which may be due to first plaintiff pursuant to such procedure and any order granted under or in respect of the action proceedings under case numbers 1961/10 and 12193/11.

G. Costs

7. No order as to costs is made in respect of the constitutional challenge.

8. The first plaintiff is declared liable for the costs of the application for amendment which were reserved on 6 February 2014, including the costs incurred by second defendant in opposing same.

9. Save for paragraphs 7 and 8 above, the first and second defendants and the Dines Gihwala Family Trust, represented by the fourth to eighth

defendants, are declared liable, jointly and severally, for the payment of first plaintiff's costs of suit on the scale as between attorney and client, which costs are to include the following:

(a) The costs of two counsel, where employed;

(b) The attendance fees and qualifying expenses of the expert witness, Mr. HJ Greenbaum;

(c) The reasonable costs and disbursements, as allowed on taxation, incurred by first plaintiff in respect of Mr. KI Mawji, who is declared a necessary witness.

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P B Fourie, J