



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

REPORTABLE

CASE NO: 14227/2014

In the matter between:

ASHRIF OMAR

Applicant

And

INHOUSE VENUE TECHNICAL MANAGEMENT (PTY) LIMITED First Respondent
[Registration No. 2003/010503/07]

GEARHOUSE SOUTH AFRICA (PROPRIETARY) LIMITED Second Respondent
[Registration No. 1993/002918/07]

SANDRAGASEN GOVENDER Third Respondent

OFER LAPID Fourth Respondent

NASSER ABBAS Fifth Respondent

JUDGMENT DELIVERED ON 6 FEBRUARY 2015

GAMBLE, J:

INTRODUCTION

[1] It could be said that the circumstances of this case resemble a “*commercial divorce case*”. Two shareholders in a private company, one with a larger portfolio of shares than the other, have fallen out and want to go their separate ways. In the absence of a squabble over children or the involvement of a paramour, it is really just the division of the parties’ jointly held assets that requires the attention of the court.

[2] The Applicant (“Omar”) is the minority shareholder (45%) in the First Respondent (“Inhouse”), which is the corporate entity on the rocks, while the Second Respondent (“Gearhouse SA”, a wholly owned subsidiary of Gearhouse SA Holdings (Pty) Ltd) holds 50% of the shares. The remaining 5% is held by the Third Respondent (“Govender”). The Fourth and Fifth Respondents (“Lapid” and “Abbas”) effectively control Gearhouse Holdings and Gearhouse SA, of which they are both directors. Lapid and Abbas, together with Omar, Govender and three others (Abbas’ wife, Neelofa Khan, James Demore and Nkosinathi Biko) are the directors of Inhouse.

[3] Omar wants to be fairly compensated for his minority shareholding. Lapid and Abbas say that a fair offer has been made to him but Omar is not happy with their proposal and has sought relief under section 163 of the Companies Act, 71 of 2008.¹

¹ “163. **Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company**

(1) A shareholder or a director of a company may apply to a court for relief if-

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

[4] The import of section 163 is, it is common cause, not unlike the provisions of section 252 of the Companies Act, 61 of 1973 (“the old Act”) and in interpreting the former reference may be made to the substantial body of law which has arisen from the application of that section of the old Act.²

[5] Unlike our divorce law which is based on the no-fault principle (where matrimonial misconduct is no longer regarded as relevant before a decree of divorce may be granted), the relief available to an oppressed minority shareholder requires some consideration of the relevant circumstances to enable a party to claim relief under section 163. In O’Neill³, Lord Hoffmann dispelled the submission that it was sufficient to sustain a claim under the similar provision in the English Companies Act of 1985⁴, that an applicant need allege only a breakdown of confidence and trust between the parties.

“I did not think that there is any support in the authorities for such a stark right of unilateral withdrawal. There are cases, such as Re a Company (no. 006834 of 1988), Ex parte Kramer [1989] BCLC 365, in which it has been said that if a breakdown in relations has caused the majority to remove a shareholder from participation in the management, it is usually a waste of time to

oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

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

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

² Grancy Property Limited v Manala and Others [2013] 3 All SA 111 (SCA).

³ Re a Company (no. 00709 of 1992); O’Neill and Another v Phillips and Others [1999] 2 All ER 961 (HL) at 972g-j.

⁴ Secs 459-461.

try to investigate who caused the breakdown. Such breakdowns often occur (as in this case) without either side having done anything seriously wrong or unfair. It is not fair to the excluded member, who will usually have lost his employment, to keep his assets locked in the company. But that does not mean that a member who has not been dismissed or excluded can demand that his shares be purchased simply because he feels that he has lost trust and confidence in the others”.

[6] The learned Law Lord noted⁵ that the English Law Commission too had set its face against a “no-fault” remedy for dissatisfied shareholders:

“In our view there are strong economic arguments against allowing shareholders to exit at will. Also, as a matter of principle, such a right would fundamentally contravene the sanctity of the contract binding the members and the company which we considered should guide our approach to shareholder remedies.”

[7] Earlier in that judgment⁶ Lord Hoffmann dealt with the application of a court’s power to do what was fair under sec 459 of the English Act.

“In s 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history ... that it chose this

⁵ 973a-b.

⁶ 966f-967b.

concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J said in Re J E Cade & Son Limited [1992] BCLC 213 at 227: 'The court ... has a very wide discretion, but it does not sit under a palm tree'.

Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ('it's not cricket') it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.

In the case of s 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is

closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.”

[8] More recently, Rogers J in Visser Citrus⁷ observed that:

“... it is not enough for an applicant to show that the conduct of which he complains is ‘prejudicial’ to him or that it ‘disregards’ his interests. The applicant must show that the prejudice or disregard has occurred ‘unfairly’. ‘Oppression’ likewise connotes an element at least of unfairness if not something worse ...”.

[9] In their written heads of argument on behalf of Omar, Messrs Fitzgerald SC and Goldberg submitted, persuasively in my view, that an applicant for relief under section 163 must establish a lack of probity or fair dealing, or a violation of the conditions of fair play on which every shareholder is entitled to rely. Reliance was placed on cases such as Donaldson Investments⁸ and Garden Province⁹, (which

⁷ Visser Citrus (Pty) Limited v Goede Hoop Citrus (Pty) Limited and Others 2014 (5) SA 179 (WCC) at para [55].

⁸ Donaldson Investments (Pty) Limited and Others v Anglo-Transvaal Collieries Ltd: SA Mutual Life Assurance Society and Another intervening 1979 (3) SA 713 (W) at 722E-G.

⁹ Garden Province Investment and Others v Aleph (Pty) Limited and Others 1979 (2) SA 525 (D&C)

related to sec 252 of the old Act) and the court was urged to examine the unfairness of the conduct complained of and to assess whether it had been established that the majority shareholders had used their greater voting power in such a manner as to preclude the minority from enjoying fair participation in the affairs of the company. This accords with the approach advocated by Rogers J in Visser Citrus¹⁰.

[10] And so I turn to examine some of the issues which gave rise to the irretrievable breakdown of the relationship between the shareholders of Inhouse.

CORPORATE HISTORY

[11] The business of Inhouse currently involves the provision of a wide range of equipment to a variety of clients for the staging of mostly corporate but also public events. Equipment such as public address systems, audio-visual equipment, lighting, rigging and the like, are provided at venues such as the Cape Town International Convention Centre or the Westin Grand Hotel for conferences, product launches and even music events. Its origins go back some 15 years or so.

[12] Omar says that in 2000 he had set up a business known as AV Network which targeted this market and at that stage included the Cape Town International Jazz Festival amongst its clients. The business grew and he gained industry know-how and trade connections.

[13] In about 2002-3 Abbas and his wife Khan moved to Cape Town from the United Kingdom. Prior to that they had worked for Gearhouse PLC, a company listed

at 531C-H.

¹⁰ See paras [54]-[56] at 193C-194B.

on the London Stock Exchange which went into liquidation in 2001. Abbas and Khan knew Lapid in the United Kingdom and they decided to set up a similar business in South Africa under that name. The resultant corporate structure later became known as the “Gearhouse Group”.

[14] At the apex of the Groups’ pyramid was Gearhouse SA Holdings (Pty) Limited in which Lapid held 92,5% of the shares and Abbas 7,5%. The two of them, together with Khan, were the directors of Gearhouse Holdings. Besides Gearhouse SA, (to which reference has already been made) the holding company has a beneficial interest in a host of subsidiary companies which are intended to support and/or compliment the interests of the entire Group.

[15] In the answering affidavit Abbas describes the affairs of the Group as follows:

“9.14 The Group not only provides tailor-made and complete solutions for large events, but has also always catered for smaller events such as conferences, workshops and social functions typically hosted in conference centres or hotels. To ensure that the quality of service was not compromised in supplying services to the smaller events and venues it was thought appropriate that a specific Subsidiary [sic] focussing on these events be established.”

[16] To cater for functions at venues on a small to medium scale, Abbas and Lapid set up Inhouse. Other subsidiaries included, for example, Gearhouse

Splitbeam (Pty) Limited, a company that provides lighting and audio equipment to venues for social and corporate events, Havaseat (Pty) Limited, which provides seating for such events and Gearhouse System Solutions (Pty) Limited, which supplies IT equipment and technical support.

[17] Around 2003-4 Omar was looking to expand the business of AV Network and in the process he was approached by Abbas and Lapid who expressed an interest in acquiring Omar's business for the Gearhouse Group. The result was that Inhouse acquired the business of AV Network for R822 435.00. Omar thereafter held 50% of the shares in Inhouse and was employed by Inhouse drawing a monthly salary (initially R60 000.00 per month), and working flexible hours.

[18] The corporate marriage came to fruition on 11 December 2006 when a sale of business agreement in respect of AV Network was concluded, as well as a shareholders agreement in respect of Inhouse with the directorate that I have already referred to.

[19] Once integrated into the Group, Inhouse ran its business from offices owned by another subsidiary in the Group and made use of the Group's central IT system, marketing, human resources and accounting departments. Abbas says in the answering affidavit that the underlying philosophy of the Group is that the various subsidiaries would ultimately become financially independent entities. Until that occurred, however, the subsidiaries would share in the central costs of corporate administration provided by the Group. Each of the subsidiaries in the Group operated its own bank account but enjoyed the benefits of (and, by implication, assumed the liabilities associated with) a group overdraft facility.

[20] Abbas and Lapid have directorships in all of the subsidiaries and share the stewardship of those companies with others who do not have influence at Group board level, but who all have fiduciary responsibilities and obligations in respect of their respective subsidiaries, and whose primary interest is the growth of the subsidiary. The structure and control of Inhouse is a prime example hereof.

THE REASONS FOR THE BREAKDOWN IN TRUST

[21] Inherent in this corporate structure are the very seeds for potential disagreement and its ultimate demise. Abbas and Lapid's allegiances lie with the Group and Gearhouse SA, the major shareholder of Inhouse, and through their *de facto* control of Inhouse, they are able to promote the financial interests of Gearhouse SA (and ultimately the Group) at the expense, if necessary, of Inhouse.

[22] Omar complains in the founding affidavit of the absence of proper fiduciary responsibility within the subsidiary:

"51. During the initial years (2006 to 2009), the business of [Inhouse] was conducted in a very informal manner. No board meetings were held and all day-to-day decisions were taken by me without much input from [Lapid] and [Abbas], who at all times represented the interests of Gearhouse SA and my other co-directors at the time. This is what was envisaged at the time that my employment and involvement with [Inhouse] was negotiated. I would, however, from time to time meet with [Lapid] and [Abbas]

to discuss the business operations, as [Inhouse] was dependent on funding from the Gearhouse Group as and when needed.”

[23] And, after detailing the improvement of Inhouse’s bottom line he says:

“56. While it was readily apparent that I was succeeding in growing the business significantly, it soon became clear to me that at the level of the board of directors of [Inhouse] ..., I had little say. My designation as managing director became increasingly ignored, particularly by [Lapid] and [Abbas], the ultimate beneficial owners of the Gearhouse Group, who appeared to regard the Gearhouse Group as their own personal fiefdom.”

[24] The papers are replete with references to the promotion by Lapid of the Group’s interests at the expense of Inhouse. The following statement by Lapid in an internal communication probably best encapsulates that alleged approach:

“With all due respect [Inhouse] as a company is a 70 million rand business gearhouse group is around 450 million and quite a few jobs/venues have been awarded to [Inhouse] because of the direct involvement of Gearhouse and therefore with all due respect to the board of directors of [Inhouse] (and I have a lot of respect for them) they must start have [sic] the group interest in the way they conducting [sic] their business and if they will not I

will bully my way [sic] to force the board of [Inhouse] to have group interest at heart.”

[25] The obvious conflict of interests inherent in this situation is manifest from this comment. However it appears to have been disregarded by Abbas and Lapid who run the Group as their exclusive , private venture , ignoring basic principles of corporate governance and oblivious of their statutory obligations of reporting and disclosure. For purposes of advancing the interests of the Gearhouse Group (and as the only shareholders in the holding company), they ultimately persue just their own interests.

[26] It is accordingly the manner in which Inhouse is required to operate as part of the Gearhouse collective (and as dictated by Abbas and Lapid) , that is at the heart of Omar’s complaint and which potentially has a result that is oppressive or unfairly prejudicial to, or that unfairly disregards, his interests.

[27] It is clear that Abbas and Lapid have adopted the mantra suggested by Mr Fitzgerald SC that “*the Group reigns supreme*”, and that they are unable to appreciate that within the subsidiary (Inhouse) there are separate and potentially competing fiduciary interests and issues which may give rise to a conflict of interest.

[28] As a director of Inhouse, Omar has fiduciary responsibility to only that entity. In addition, he has invested a substantial amount of money in Inhouse and is entitled to expect a return therefrom. As Mr Fitzgerald SC further suggested, Omar’s “*corporate motive*” is to grow Inhouse, render it increasingly profitable and increase the value of his shareholding.

[29] The counterpoint to this sees Abbas and Lapid using their shareholder “*muscle*” to advance the broader interests of Gearhouse SA and ultimately the Group to the potential detriment of Inhouse. I do not believe that it is necessary to go into too much detail in this regard since Mr Smalberger for Gearhouse SA, Abbas and Lapid, did not seriously challenge the various breaches of fiduciary responsibility put up by Inhouse. A few examples will therefore suffice.

[30] The first complaint raised by Omar in the founding affidavit is the question of office rental. He explains that there are two buildings at the address at 38-40 Assegaai Road in Parow Industria, Cape Town, from which Inhouse and Gearhouse SA conduct their respective businesses. One building is owned by Gearhouse Properties, a subsidiary in the Group, and the other by a company in which Lapid has a direct interest. Omar explains that Inhouse initially occupied the Gearhouse Properties building where it paid a market related rental of R5 000.00 per month.

[31] However, fairly early on in the corporate relationship, the rental was unilaterally increased by Abbas and Lapid to R10 000.00 per month. The increase occurred without any prior discussion at board level, nor with any input or agreement on the part of Inhouse. At that stage Omar still held a 50% interest in Inhouse and reasonably expected that his voice would be heard at board level. However, he claims that he was effectively ignored as Abbas and Lapid sought to advance the Group’s (and ultimately their personal) interests.

[32] Omar says that in about 2009 Inhouse moved to the adjacent building in which Lapid had a direct interest. It operated as a sub-lessee of Gearhouse SA.

When the rental increased, Omar enquired why. He says he was told that this was necessary to bring the rental in line with that which Gearhouse SA was paying its landlord.

[33] In the answering affidavit, Gearhouse SA seeks to justify the economics of the rent increases but it certainly does not take issue with the claim that there was no discussion at board level. It is the latter, says Omar, which was at the core of the deterioration of the relationship between himself and Abbas and Lapid.

[34] A further cause for complaint, says Omar, related to an annual entry in the financial statements of Inhouse dubbed "*Group charges*". This was intended to be a globular fee payable by Inhouse to compensate the Group for the use of its central IT systems as well as its personnel, marketing, human resource and accounting functions. Initially, in 2007, the charge was R10 000.00 per month. In 2008 it jumped to R25 000.00 per month and over the next five years was regularly hiked to such an extent that by 2014 it stood at R300 000.00 per month.

[35] Omar says that the substantial increase in the Group charges over the years was never discussed at board level. Of even greater concern to him was the fact that it appeared that Group charges were adjusted upwards in accordance with the level of profitability so as to effectively strip out any profit that may have accrued to Inhouse.

[36] Once again, Abbas takes issue in the answering affidavit with the actual figures and the rationale therefor, but he does not dispute the failure to take up the

issues at board level. Various of the minutes of the board meetings of Inhouse (to the extent that there were such meetings) support Omar's complaints.

[37] Matters ultimately came to a head in May/June 2014 when, at the instance of Abbas, Omar was accused of insurance fraud. Omar says that the decision to suspend him (at that stage still the managing director of Inhouse) on 24 June 2014 was not discussed at board level. This step was followed by the inevitable: a notice on 29 July 2014 to attend a disciplinary enquiry on 11 August 2014. This serious step did not form the subject of board deliberations either.

THE OFFER TO ACQUIRE OMAR'S SHARES

[38] In the midst of the disintegration of the corporate relationship Lapid, on behalf of Gearhouse SA, gave Omar notice on Tuesday, 6 May 2014 of his intention to purchase Omar's entire shareholding for R2 million. Payment was to be effected by an initial payment of R500 000.00 and 12 monthly instalments of R125 000.00 each. The customary general conditions applicable to a sale of shares were included. The offer was said to be open until Friday, 9 May 2014 (a little more than 48 hours) whereafter it would lapse and be of no force and effect.

[39] At around 16h00 on that Friday, Omar responded to the offer and indicated that he was unable to accept it, stating *inter alia* that:

- 39.1 the time offered for a response was insufficient and unreasonably short to enable him to come to an informed decision;

- 39.2 he required various items of financial information to assess the value of the company;
- 39.3 he needed copies of the company's memorandum of incorporation, the signed shareholders agreement and his contract of employment;
- 39.4 the offer and any subsequent sale would have to comply with the provisions of the shareholders agreement;
- 39.5 he was not prepared to accept any staggered payment; and
- 39.6 he wished to be released from any applicable restraint of trade agreement.

[40] In declining the offer, Omar made it quite clear that he was willing to engage further with Abbas upon receipt of the requested information. However, Abbas and Lapid did not respond to the refusal in writing. What did occur, though, was that about two weeks later Omar was unexpectedly called upon to explain his absence from work on three days in the preceding week. Following on Omar's reply (to the effect that he worked flexi-time) the aforesaid complaint of insurance fraud surfaced followed later by Omar's suspension from employment.

[41] At this juncture it must be said that in my view an effective 48 hours to consider the offer was manifestly unreasonable in light of the provisions of clause

18.3 of the shareholders agreement which provides that a deemed offer¹¹ for the purchase of shares must be held open for a period of 30 days.

[42] Further, in such circumstances, a deemed offer is to be calculated at 50% of the fair market value of the shares. A reasonable opportunity to value the shares and so properly evaluate the offer was accordingly a *sine qua non* to the acceptance of Abbas' offer.

[43] Finally, I would note that Abbas' offer of 6 May 2014 does not contain any allegation that it is considered reasonable, nor is it premised on any factual matrix suggesting what a reasonable value of the company's shareholding may be. This court is at a complete loss to determine whether even just the quantum of the offer, regardless of the other conditions and the time constraints imposed, is reasonable in the circumstances.

[44] In Bayly¹² Heher JA considered the *dicta* of Lord Hoffmann, both in O'Neill, and in an earlier judgment which he delivered in the Chancery Division.¹³ In the latter case Hoffmann J said:

"This is an ordinary case of breakdown of confidence between the parties. In such circumstances, fairness requires that the minority shareholder should not have to maintain his investment in a company managed by the majority with whom he has fallen out. But the unfairness disappears if the minority shareholder is

¹¹ A deemed offer is applicable where, for instance, a shareholder's employment contract is terminated on grounds of misconduct.

¹² Bayly v Knowles 2010 (4) SA 548 (SCA) at 555 para [23].

¹³ Re a Company (no. 006834 of 1988), Ex parte Krema [1989] BCLC 365 (Ch D) at 368.

offered a fair price for his shares. In such a case, s 459 was not intended to enable the court to preside over a protracted and expensive contest of virtue between the shareholders and award the company to the winner.”

[45] As I have already said, there is no allegation or suggestion by Abbas that his offer of 6 May 2014 is fair or reasonable. I have determined too that the manner of its presentation, the time constraints imposed and the general terms thereof fly in the face of any notion of reasonableness. If one couples that finding with the earlier assessment in regard to the breakdown of the relationship between the consorts to this corporate marriage – that it was occasioned by the manifestly unfair treatment of Omar by Abbas and Lapid – it follows in my view that the provisions of sec 163 of the Act may find application in the instant case.

[46] In argument Mr Smalberger leaned heavily on a passage in Abbas’ answering affidavit¹⁴ and suggested that, at a meeting held a week or so after Abbas’ proposal had been refused by Omar, a basis had been laid for an independent assessment of the value of the shareholding.

[47] Ordinarily, one would have expected that discussions aimed at avoiding looming litigation would be regarded as without prejudice negotiations. In this case, while objection was taken by Omar in the replying affidavit as to the appropriateness of the disclosure of these discussions, there was no application to strike out these paragraphs. The court is therefore at liberty to consider the negotiations on the basis put up by Abbas.

¹⁴ Paragraphs 13.26 to 13.28.

[48] It will be noted that the substance of the parties' discussions is referred to in only the broadest of outline in these paragraphs ("*[Omar's attorneys] indicated a value which it was felt was appropriate for [Inhouse]. It was suggested ... that [Omar's] shares ... be purchased in accordance with [that] ... valuation*"). The tactic employed by Gearhouse in reply was to take Omar at his word, and to suggest that if he believed in the value put up to sell his shares, he should rather take up Gearhouse's shares in Inhouse at the same value less a discount of 20%. This led to Omar's lawyers taking the view that, in reality, they needed more information before a reliable valuation could be arrived at.

[49] The facts put up by Abbas in relation to the value of the shareholding are limited and amount to no more than pre-negotiating posturing. In the replying affidavit Omar declined to become embroiled in the detail of without prejudice discussions, and did not answer the substance of the answering affidavit on this point. In the circumstances, the court is not in a position to properly consider whether the offer made by Abbas was reasonable. To the extent that Gearhouse now asserts that a reasonable offer was made, I am not persuaded that it has discharged the onus of establishing same. The provisions of sec 163 will therefore have to be implemented.

[50] As the preamble to sec 163(2) suggests, the court has a wide power to make both interim and final orders which it considers fit in the circumstances. The orders set out in sec 163(2)(a) to (l) are but some of the suggested options available to a court. In the ultimate draft order put up by Mr Fitzgerald, the court is asked to direct Gearhouse SA and Govender to acquire Omar's shares for their fair market value as at 27 June 2014 which coincides with the time of Omar's suspension.

[51] To calculate that value the court is asked to sanction the appointment of a chartered accountant to fulfil the function contemplated in clause 18 of the shareholders agreement. Such person is to be the agreed choice of the parties, alternatively the appointee of the South African Institute of Chartered Accountants. Mr Smalberger objected to the proposed route suggesting that referral to arbitration was the proper way to resolve the issue. However, he did not criticise the formulation of the draft order as such. I can therefore see no basis in principle (save for the referral to arbitration to which I will refer hereunder) why this should not occur.

[52] Omar asks that when the calculation is made, the accountant should make an appropriate adjustment in his favour due to the fact that Lapid and Abbas have allegedly acted in contravention of sec 75 of the Act. I shall deal more fully with sec 75 below, but pause to mention that the rationale behind this claim is that their repeated contraventions of that section have had a deleterious effect on Inhouse's profitability, and hence the value of its shares. The court expressed concern to Mr Fitzgerald in argument at the ability of an accountant to perform such a function – in reality the unscrambling of an omelette so as to create a different form of culinary delight.

[53] Indeed, a similar concern was expressed by Omar in the founding affidavit where the following was stated at paragraphs 137 and 138:

“137. As a consequence of invalidity, I am advised that the transactions have to be reversed. I am aware that a reversal of these transactions (many hundreds over a number of years) is practically unfeasible. Nevertheless,

my complaints will be satisfactorily addressed were the Court to order the deemed reversal of the transactions so that all amounts paid by [Inhouse] pursuant to these transactions would again reflect as monies to the credit of [Inhouse]. These amounts which have been deemed to be reversed would then be taken into account in the determination of the value of my shareholding in order that my shareholding is given its true value.

138. *I respectfully state that in this manner, I can be paid for my shares their true value rather than the value which may now be ascribed to them which has been manipulated in the manner described above and without any of the disclosures required by the Companies Act.”*

[54] The relief originally sought in the notice of motion did not contain any reference to the contravention of sec 75 nor the consequences of such contravention. Rather, the approach was to demand the furnishing of documents, vouchers, working papers and the like and to call for a debatement of account so as to reconstitute the financial statements of Inhouse from 20 December 2006 to 27 June 2014 (“*or such later date as the above court may deem fit*”). Following such debatement Omar initially sought an adjustment or “*a deemed adjustment*” in respect of “*irregular and unilaterally imposed business expenses for the aforesaid period in respect of, but not limited to, lease payments, group charges and transactions with related persons*”. In reality, Omar sought to reconstitute the financial statements of Inhouse for the entire period of the corporate consortium.

[55] The relief sought in the second of two draft orders handed up by counsel on the day of the hearing followed a radical amendment to the notice of motion of which notice was given in August 2014 and in respect whereof there was no objection. The relief is far-reaching indeed in that it has the potential to revise the financial results of Inhouse, which results have been approved by its board (albeit with the balance of power tilted in favour of Abbas and Lapid). Just how this will affect its tax liability and the statutory rendering of returns under sec 33 of the Act, for example, is not clear.

[56] Mr Fitzgerald SC nevertheless remained convinced that the relief sought was ultimately attainable and capable of implementation provided that the contraventions were described with sufficient particularity, the function of the accountant being clearly defined and the parties given the opportunity to address the accountant in relation to their views on the proposed valuation. In effect then, the accountant will perform a role akin to that of a referee under sec 19*bis* of the Supreme Court Act of 1959.

[57] Mr Smalberger did not support the procedure ultimately suggested by Mr Fitzgerald SC, claiming that the task of the accountant was, in essence, not capable of implementation. He speculated that the draft order contemplated that the accountant was required to examine each and every transaction of Inhouse since June 2006 and suggested that such an approach was impractical. Rather, said Mr Smalberger, the matter should be stayed pending referral to arbitration for determination of all relevant issues under clause 34 of the shareholders agreement. I deal with the proposed referral to arbitration later in the judgment, but I am satisfied that the route proposed by Mr Fitzgerald SC is the more expedient in the

circumstances. I turn then to consider the argument advanced by Mr Fitzgerald SC in respect of sec 75 of the Act, and its applicability to the case at hand.

SECTION 75 OF THE COMPANIES ACT

[58] Sec 75, which carries the heading “*Director’s personal financial interests*” is an innovative provision in the Companies Act which seeks to regulate the position of a director who has personal financial interests in a company’s business. Neither of the parties was able to refer the court to any case law dealing with this section and the matter therefore seems to me to be *res nova*.

[59] The argument advanced by Mr Fitzgerald SC was to the effect that the breach by the directors of Inhouse of their fiduciary duties to that company afford the disenchanted minority shareholder the opportunity to set the record straight. It is contended that all of the boardroom misdemeanours complained of (be they acts or omissions) could be afforded redress under sec 75.

[60] Aside from the avoidance of conflicts of interest, sec 75 itself does not set any minimum standards of corporate governance expected from a company’s directors. These standards are now contained in sec 76 of the Act which is entitled “*Standards of Directors Conduct*”. The former section contains its own brief internal definitions, and then contains a veritable list of do’s and don’ts applicable to the powers and functions of directors.

[61] As the authors of Henochsberg on the Companies Act 71 of 2008 point out at 290(3), directors’ duties are now at least partially codified under the Act. They observe that the common law duties of a director are still applicable and that the

common law remedies flowing from such breaches still apply. The importance, say the authors, of sec 76 is that the distinction between statutory and common law duties has now been clearly defined, and that they must coexist alongside each other.

[62] Counsel for Omar sought to argue that the serial contraventions by Abbas and Lapid of their corporate duties, *qua* director, afforded the Applicant a cause of action under sec 75 read with 76. Mr Smalberger, took only limited issue with this approach.

[63] I shall not recite the provisions of secs 75 (1) – (3) of the Act since, as I have already said, they mostly contain definitions which are not contentious in the instant case. Of importance for purposes of Mr Fitzgerald SC's argument are the following subsections:

“75(4) At any time, a director may disclose any personal financial interest in advance, by delivering to the board or shareholders in the case of a company contemplated in subsection (3), a notice in writing setting out the nature and extent of that interest, to be used generally for the purposes of this section until changed or withdrawn by further written notice from that director.

75(5) If a director of a company, other than a company contemplated in subsection (2) (b) (iii), has personal financial interest in the matter, the director-

(a) must disclose the interest and its general nature before the matter is considered at the meeting;

- (b) must disclose to the meeting any material information relating to the matter, and known to the director;*
- (c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;*
- (d) if present at the meeting, must leave the meeting immediately after making any disclosure contemplated in paragraph (b) or (c);*
- (e) must not take part in the consideration of the matter, except to the extent contemplated in paragraphs (b) (c);*
- (f) while absent from the meeting in terms of this subsection -
 - (i) is to be regarded as being present at the meeting for the purpose of determining whether sufficient directors are present to constitute the meeting; and*
 - (ii) is not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted;**
- (g) must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board.*

75(6) If a director of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest, or knows that a related person has acquired a personal financial interest in the matter, after the agreement or other matter has been approved by the company, the director must promptly disclose to the board or to the shareholders in the case of a company contemplated in subsection (3), the nature and extent of that interest, and the material circumstances relating to the director or related person's acquisition of that interest.

75(7) A decision by the board, or a transaction or agreement approved by the board, or by a company as contemplated in subsection (3), is valid despite any personal financial interest of a director or person related to the director, only if

(a) it was approved following disclosure of that interest in the manner contemplated in this section; or

*(b) despite having been approved without disclosure of that interest ,
it –*

(i) has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest;

(ii) has been declared to be valid by a court in term of subsection (8).

75(8) A court, on application by any interested person, may declare valid a transaction or agreement that had been approved by the board, or

shareholders as the case may be, despite the failure of the director to satisfy the disclosure requirements of this section.

[64] It will be observed then, on a general reading of section 75, that it does not contain any provisions affording either the company, its shareholders or fellow directors, a right of recovery or other cause of action (be it contractual or delictual in nature) for losses occasioned by the breach by an errant director of the provisions of that section. Mr Fitzgerald SC argued that upon a proper reading of section 75(7) non-compliance with the provisions of section 75(5) by Abbas and or Lapid render the particular transaction or agreement approved of invalid unless there has been ratification under section 75(7)(b)(i) or validation by the court under section 75(8). This argument is in my view correct

[65] No attempt was made to ratify any of the impugned transactions or agreements at board level because neither of the directors was remotely aware of their common law obligations nor of the restrictions imposed by section 75, nor of their obligations under section 76. Neither was there any application by any of the respondents for a declaration of validity by the court under section 75(8). Given that the Act only came into operation on 1 May 2011, any non-compliance with section 75 before this date would, however, be legally irrelevant.

[66] The upshot of this is that Omar seeks, in addition to an order consequent upon the application of section 163, a declaratory order that Lapid and Abbas have acted in contravention of section 75. As I have already indicated, Mr Smalberger did not advance any strenuous argument to the contrary and, it seems to

me that, on the ordinary principles applicable to declaratory relief¹⁵ a proper case has been made out for such relief.

[67] In light of the fact that the company was involved in any number of transactions from day to day, it is necessary in my view (and Mr Fitzgerald SC conceded as much in argument) to limit the declaration of invalidity to transactions involving rentals payable by Inhouse , purchases from fellow subsidiaries and the payment of so-called “*Group charges*”.

[68] The extent to which such a *declarator* finds application is another question all together. While the decisions of Lapid and Abbas to ratchet up the so-called “*Group charges*” and rentals were not properly taken at board level, it does not follow that Inhouse is totally exempt from any disbursements in that regard. To be sure, the company would, of necessity, have incurred reasonable expenditure on that score. It is conceivable, however, that had the decisions been taken in accordance with proper corporate governance while having regard to the prescripts of sections 75 and 76, the profitability of the company may have been enhanced.

[69] Improved profitability does not, in my view, however necessarily mean an enhanced share price: this would depend on the method adopted by the person valuing the shares. And, establishing what reasonable or market-related expenses would have been, is manifestly not an excercise which this court could or (would) want to undertake.

¹⁵ Ex parte Nell 1961(1) SA 754 (A)

[70] In an attempt to overcome this hurdle Mr Fitzgerald SC proposed a mechanism cast in the broadest of terms so as to enable the person charged with determining the value of Omar's shareholding to have regard to the consequences of the alleged breaches of section 75. Whether this is a workable option at the end of the day remains to be seen, but I am not persuaded that it is entirely impracticable; this is certainly not a case where the court's order will effectively be a *brutum fulmen*¹⁶ and the parties will have to utilize their best endeavours to give effect to it. And, by applying the mechanism the parties agreed upon in clause 18.5 of the shareholders agreement, as full ventilation as possible of the competing views is likely to follow.

REFERRAL TO ARBITRATION

[71] As indicated above Lapid and Abbas relied heavily on the arbitration clause contained in the shareholders agreement, the important parts whereof read as follows:

"34 ARBITRATION

34.1 Should any dispute arise between the parties in regard to:

34.1.1 The interpretation of;

34.1.2 The effect of;

34.1.3 The parties' respective rights or obligations under;

¹⁶ Reinecke v Incorporated General Insurances Limited 1974 (2) SA 84 (A) at 94H-96A; NAPTOSA and others v Minister of Education, Western Cape and others 2001(2) SA 112 (C) at 124 I-125 E.

34.1.4 A breach of;

34.1.5 The termination of;

34.1.6 Any matter arising out of the determination of;

34.1.7 The rectification of;

this agreement, that dispute shall be decided by arbitration in the manner set out in this clause 33 (sic).

34.2 The arbitrator shall be a practicing attorney or practicing advocate of not less than 15 years standing....

34.3...

34.4 The arbitration shall otherwise be held in accordance with the Rules of AFSA, or if AFSA should not be in existence in accordance with the formalities and procedures settled by the arbitrator, which shall be in an informal and summary manner, that is, it shall not be necessary to observe or carry out either the usual formalities or procedures or the strict rules of evidence, and otherwise subject as aforesaid of (sic) the Arbitration Act 1965 of the Republic of South Africa ...

34.5 ...

34.6...

34.7...

34.8 This clause is severable from the rest of the agreement and shall therefore remain in effect even if this agreement is terminated.

34.9 Notwithstanding that the decision of arbitration shall be final and binding on the parties, this clause 33(sic) shall not preclude any party from obtain interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator.

[72] The arbitration clause is indeed a comprehensive term of the shareholders agreement offering the parties swift and final relief. In many aspects it is well-suited to resolve the issues before this court as finally determined by the parties. It is settled law, nevertheless, that the existence of an arbitration clause does not oust the jurisdiction of a court since the parties to a contract cannot exclude the jurisdiction of a court by agreement¹⁷.

[73] Whether or not an arbitration clause will be enforced by a court and the pending proceedings stayed is a matter falling within the discretion of the court having regard to the facts and circumstances at hand¹⁸. The party relying on a arbitration clause bears the onus of persuading the court that the dispute to be referred falls within the parameters of the the arbitration clause¹⁹ and that the court should exercise its discretion in its favour.²⁰

¹⁷ Foize Africa (Pty) Ltd v Foize Beheer BV and others 2013 (3) SA 91 (SCA) at [21]

¹⁸ *Ibid*

¹⁹ Kather Inv (Pty) Ltd v Woolworths (Pty) Ltd 1970(2) SA 498 (A)

²⁰ Goodwin Stable Trust v DuoheX (Pty) Ltd 1998(4) SA 606 (C) at 615

[74] In my view the respondents have not demonstrated adequately that the dispute falls strictly within the ambit of clause 34.1.

74.1 The claim that the dispute concerns the interpretation of the shareholders agreement is unduly vague in that the respondents have not identified the specific clauses requiring interpretation:

74.2 The substance of the dispute goes far wider than just the parties to the shareholders agreement. Rather it affects the Group as a whole and the interplay between the group and its subsidiaries. These parties cannot be drawn into such an arbitration without their consent and in any event it is unlikely that they would have wanted to become embroiled in the litigation of others.

74.3 There is no suggestion in the shareholders agreement that in the event that Omar ceases to be a shareholder, the shareholders agreement terminates. On the contrary, the facts at hand demonstrate reasonably starkly that it is intended by the majority that this company will continue to function as before under majoritarian ownership. The dispute is therefore not concerned with the shareholders agreement or any matter arising from such termination.

[75] Reference was made to section 166 of the Act which provides a mechanism for parties to voluntarily agree to resolve a dispute, which would otherwise serve before a court of law, by way of arbitration. Given the reference to voluntarism, it is clear, in my view, that a party confronted with such a dispute is given the discretion

to consider going to arbitration. In this instance Omar has elected not to invoke section 166 and his choice is to be respected.

[76] There are, in any event, further considerations which would incline me to refuse to refer the matter to arbitration if I were required to exercise a discretion to do so or not. The case involves the interpretation of novel sections of an important new statute – a statute which brings corporate law firmly within the ambit of the Constitution. While there is no suggestion that an experienced arbitrator may not apply the law correctly, there is the concern that any misapplication of the law will not readily afford a party affected thereby relief by way of redress before a court of law, given the limitations on the reviewability of arbitral awards, particularly in regard to errors of law²¹.

[77] In the circumstances, I am of the view that it is preferable from the point of view of precedent setting, that this dispute should enjoy the attention of our courts.

CONCLUSION

I am accordingly of the view that the following order should be granted:

- 1 The Second and Third Respondents (pro rata to their current shareholding in the First Respondent) are to acquire the Applicant's forty five percent (45%) of the issued share capital in the First Respondent for the fair market value thereof as at 27 June 2014.

²¹ Telcordia Technologies Inc v Telkom SA Ltd 2007(3) SA 266 (SCA) at [85] *et seq.*

2 A chartered accountant shall be appointed by agreement between the parties (or failing such agreement by the Chairperson for the time-being of the South African Institute of Chartered Accountants), to determine the fair market value of the Applicant's shareholding in the First Respondent as at 27 June 2014 in accordance with the procedure contemplated in clause 18 of annexure "AO1" to the founding affidavit herein.

3 The Fourth and Fifth Respondents are declared to have acted in contravention of section 75 of the Companies Act, 71 of 2008 ("the Act") in failing to disclose their personal financial interests in transactions undertaken by the First Respondent.

4 The aforesaid chartered accountant is directed, in the determination of the the fair market value, to take into account the contraventions of section 75 of the Act in respect of purchases from related parties, rental paid to related parties and management fees paid by the First Respondent for the financial years ending 30 June 2011 to date.

5 To the extent that clause 18.5 of Annexure AO1 permits the Applicant to make representations to the chartered accountant, the First Respondent is directed to furnish and make available to the Applicant, all documentation reasonably required by him.

6 The Respondents, save for the third respondent, shall pay the costs of this application jointly and severally, the one paying the other to be absolved.

GAMBLE, J