IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, PORT ELIZABETH

Case No. 878/16

In the matter between:

JUSPOINT NOMINEES (Pty) Ltd	First Applicant
KEVIN WILLIAM JAMES NO	Second Applicant
CLIVE DENNIS KERN NO	Third Applicant
CLINTON CHARLES HOLING NO	Fourth Applicant
SYNAPP INTERNATIONAL LIMITED	Fifth Applicant
MARIELLE COLETTE REGINE LECLUSE	Sixth Applicant
COLIN RODNEY JAMES	Seventh Applicant

and

SOVEREIGN FOOD INVESTMENTS LIMITED	First Respondent
THE TAKEOVER REGULATION PANEL	Second Respondent
JSE LIMITED	Third Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fourth Respondent

and

BNS NOMINEES (Pty) Ltd	First Intervening Party
THE TRUSTEES FOR THE TIME BEING OF THE CILLIERS FAMILY TRUST	Second Intervening Party
ABRAHAM ALBERTUS CILLIERS	Third Intervening Party

JANINE CILLIERS Fourth Intervening Party

Date heard: 24 March 2016

Handed down: 26 April 2016

JUDGMENT

STRETCH J:

[1] On 16 March 2016 the applicants (hereinafter referred to as "Juspoint"), by way of a certificate of urgency sought certain interdictory relief against the first respondent (hereinafter referred to as "Sovereign") pertaining to the consideration and/or the voting upon a list of resolutions at a general meeting of the shareholders of Sovereign to be held at 10h00 on 29 March 2016.

[2] A directive was issued for the applicants to invoke the rule *nisi* procedure, which resulted in Alkema J issuing the following order on 17 March 2016:

> '[1] That a rule *nisi* is hereby issued calling upon the respondents to show cause at 09h30 on Thursday, 24 March 2016 why an order should not be granted in the following terms-
>
> a. The applicants' non-compliance with the Rules of this Court with regard to service and time limits is condoned and the application is to be heard as one of urgency in terms of Rule 6(12) of the Rules of this Court.
> b. The first respondent is ordered not to allow special resolutions number 1.1 to 1.8, special resolution number 2, special resolution number 3, special resolution number 4, ordinary resolution number 1 and ordinary resolution number 2 contained in the Notice of New General Meeting dated 19 February 2016 issued by the first respondent to be proposed, considered and/or voted on, whether with or without modification, at the general meeting of shareholders of the first respondent scheduled to be held at the Sun International Boardwalk Hotel, Beach Road, Summerstrand, Port Elizabeth at 10h00 on Tuesday 29 March 2016.

c. The first respondent is interdicted from allowing [the aforesaid resolutions] to be proposed at any adjourned meeting of the general meeting referred to in 2 above, or at any other general meeting of the shareholders of the first respondent that may be convened, unless and until the first respondent has issued a circular to its shareholders which complies with section 65(4) of the Companies Act 71 of 2008 by providing sufficient information or explanatory material to enable a shareholder who is entitled to vote on the resolutions referred to above to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolutions, including:
   i. That special resolution number 2 contained in the "*Notice of General Meeting"* of the first respondent dated 26 November 2015, namely, *"Special Resolution Number 2: Approval of the Scheme in terms of Sections 48(8)(b), 114(1)(c), 114(1)(e), 114(1)(f) and 115(2)(a) of the Companies Act"* which special resolution was voted on at the general meeting of the first respondent held on 14 January 2016, has no force or effect;
   ii. That it is not to be represented by the first respondent to its shareholders that the special resolution referred to in c.i above is required to be revoked and/or is capable of being validly revoked.
d. It is declared that special resolution number 2 contained in the *"Notice of General Meeting"* of the first respondent dated 26 November 2015, namely, "*Special Resolution Number 2: Approval of Scheme in terms of [the aforesaid] sections of the Companies Act"* never became operative or effective.
e. It is ordered that the first respondent pay the costs of the application, save that in the event of opposition by any other respondent(s), the respondent(s) opposing the application be ordered to pay the costs of the application, jointly and severally, with the first respondent.

[2] That the applicants must cause a copy of this order and of the application papers to be served upon the Respondents in terms of Rule (4) by close of business, by 12h00 noon on Tuesday, 22 March 2016.'

[3] The day before the application was due to be heard the applicants delivered an application to strike out which was subsequently abandoned to expedite the hearing of the matter.

[4] On the day of the application the intervening parties (hereinafter collectively referred to as BNS) delivered an application to intervene, to which initial opposition from Sovereign was also abandoned in order to facilitate the hearing of the main application.

[5] The relief which the intervening parties seek in the alternative is on all fours with that sought by the applicants. However, first prize for them would be an order directing Sovereign to make an offer for payment of fair value to the first intervening party for shares held by BNS on behalf of the other intervening parties, and in the event of the offer having been accepted, that BNS would take the steps set out at section 53 of the Companies Act 71 of 2008 ("the Act") to effect transfer of the shares. Alternatively, and in the event of BNS not accepting the offer, that it will be entitled to approach this Court for a determination of fair value.

[6] On 24 March 2016 the applications were extensively and competently argued on behalf of all the role-players. I indicated to counsel at that stage that, regard being had to the complexity of the matter, the bulk of documents and case law to be perused, and the fact that the application was being heard at the 11th hour, it would be both prudent and in the interests of justice for the meeting or the issues pertaining to the resolutions to be postponed for a few weeks in order for the issues to be properly ventilated and analysed, as to do things otherwise would be tantamount to adopting a "sentence first – verdict afterwards" approach (taken from the words of the Red Queen in Alice in Wonderland by Lewis Carroll).

[7] However Sovereign persisted in its prayer for an order to be made before the scheduled date of the meeting.

[8] Notwithstanding this, and having satisfied myself that a properly informed and researched judgment could not be delivered before the meeting, this Court handed down the following order at 08h30 (the time having been agreed upon amongst the parties) on the date for which the meeting was scheduled:

‘1. Sub-paragraphs 1.a. and b. of the rule *nisi* issued on 17 March 2016 are confirmed.
2. The remainder of the relief referred to in the aforesaid rule *nisi,* together with the relief contended for by the intervening parties in their notice of motion dated 22 March 2016 (insofar as this relief has not been provided for at paragraph 1 of this order), as well as all issues pertaining to costs, are adjourned pending judgment in this matter.
3. The remainder of the rule *nisi* is accordingly extended until confirmed or discharged by virtue of the aforesaid judgment.’

[9] I am advised that, consequent upon the handing down of this order, the meeting was postponed to Friday, 29 April 2016. Any references hereinbelow to the 29 March 2016 meeting must be read in the context of that postponement.

[10] What follows then, is the promised judgment.

History

[11] Sovereign may be described as a fully-integrated poultry business producing chicken portions for a niche market within and beyond the borders of South Africa. This business includes breeder, hatchery and broiler operations as well as a feed mill and processing plants. Sovereign is a public company with shares listed on the Johannesburg Stock Exchange (JSE).

[12] Juspoint is the registered holder of a number of beneficially owned shares (in the region of eight per cent) in Sovereign’s issued share capital. These shares are owned by the Buzby Trust (represented by the second, third and fourth applicants), and are also owned by the fifth, sixth and seventh applicants (hereinafter referred to as “the beneficial shareholders”).

[13] BNS (also being a minority shareholder) is the holder of 642 000 shares in Sovereign’s issued share capital, which shares are beneficially owned as follows:

a. The Cilliers Trust (second intervener) : 22 000
b. Abraham Cilliers (third intervener) : 550 000

c. Janine Cilliers (fourth intervener) : 70 000

The December 2015 circular

[14] On 11 December 2015 Sovereign issued a circular which is described by Juspoint as voluminous and traversing a range of complex and interrelated transactions and events, and making extensive use of definitions (157 to be exact), rendering this circular difficult to follow and understand in various respects.

[15] Some of the transactions provided for in this circular include the acquisition by Sovereign and the Sovereign Foods Investments Limited Share Trust ("the Esop Trust") of a certain number of shares in Sovereign, of which it was proposed that Sovereign would buy some of these shares from eligible shareholders ("the repurchase shares") and the Esop Trust would acquire (at the same price being R8, 50 per share) a number of shares from participating shareholders. Any shortfall in Esop's share purchase would be made up by Sovereign to bring the total of repurchased shares to 7 336 168.

[16] The shares to be purchased by Sovereign would be acquired pursuant to a scheme of arrangement in terms of section 114(1)(c), (e) and (f) of the Act, as proposed by Sovereign's board of directors ("the board").

[17] "Eligible shareholders" is defined in the circular as being shareholders who would be registered as such by 26 February 2016, excluding members of Sovereign's executive committee, the Esop Trust and a company called "Crown Chickens" (a wholly owned subsidiary of Sovereign).

The appraisal right condition precedent

[18] In terms of para 4.8 of the circular, implementation of this scheme would be subject to various conditions precedent, one of which relates to the exercise by the shareholders of their appraisal rights in terms of section 164 of the Act. It is, for purposes of this judgment, necessary to reproduce certain relevant extracts from the December circular:

‘**4.7 Offer period**

The Offer will open at 09:00 on the Offer Opening Date, being Friday, 15 January 2016, and will close at 12:00 on the Offer Close Date, being Friday, 26 February 2016.

4.8 Conditions precedent

The Share Acquisition (including implementation of the Scheme) is subject to the fulfilment of the following conditions precedent by no later than 17:00 on 1 April 2016 or such later date as Sovereign may in its sole discretion determine subject to the approval of the JSE and the TRP, if required:

- Shareholders passing the following Resolutions at the General Meeting, or at any adjournment or postponement thereof:
  - Special Resolution number 1 detailed in the Notice of General Meeting authorising the specific repurchase of the Repurchase Shares in terms paragraph 5.69 of the Listing Requirements; and
  - The Repurchase Resolution;
- fulfilment of the conditions precedent to the BEE Transaction, save for any condition requiring fulfilment of the Share Acquisition conditions precedent;
- to the extent applicable:
  - the approval of the Scheme by the High Court of South Africa … and
  - Sovereign not treating the Repurchase Resolution as a nullity, as contemplated in terms of section 115(5)(b) of the Companies Act;
- Receipt of unconditional approvals, consents or waivers from all regulatory bodies, including the TRP …, or to the extent that any such approvals, consents or waivers are subject to conditions, such conditions being satisfactory to Sovereign;
- With regard to Shareholders exercising their Appraisal Rights, either:
  - Shareholders give notice objecting to the Repurchase Resolution and /or the Notional Funding Repurchase Resolution as contemplated in section 164(3) of the Companies Act and vote against the Repurchase Resolution and / or the Notional Funding Repurchase Resolution at the General Meeting, in respect of no more than, in aggregate, 5% (five percent) of all the Shares; or
  - If Shareholders do give notice objecting to the Repurchase Resolution and / or the Notional Funding Repurchase Resolution at the General Meeting, in respect of more than, in aggregate, 5% (five percent) of all the Shares, then

within 25 (twenty five) Business Days following the date on which the Company has sent notice to such Shareholders in accordance with section 164(4) of the Companies Act, Shareholders have not exercised Appraisal Rights, by giving valid demands in terms of sections 164(5) to 164(8) of the Companies Act, in respect of more than, in the aggregate, 5% (five percent) of all the Shares.

Should all of the conditions precedent referred to above not be fulfilled or waived by Sovereign (where possible), as the case may be, then the Share Acquisition (and the Scheme) will not become operative and shall be of no force or effect, in which event:

- The Esop Acquisition will not proceed and the Esop Trust will purchase Shares in the market in the ordinary course; and
- The BEE Transaction and the New Executive Remuneration Policy will not be implemented.

If the Share Acquisition becomes operative, then following completion of the Repurchase and the ESOP Acquisition, the BEE Transaction will be implemented.'

[19] The beneficial shareholders duly exercised their appraisal rights relating to the January 2016 special resolutions. On 13 January 2016 Juspoint (as a dissenting shareholder on behalf of the beneficial shareholders) gave notice to Sovereign in terms of section 164(3) of the Act objecting to the January 2016 special resolutions as well as the ordinary resolutions to be proposed at such meeting, and in terms of section 115(8) of the Act, of the intention of the beneficial shareholders as holders of voting rights, to oppose the January 2016 special resolutions as well as the ordinary resolutions to be proposed at the meeting.

The January 2016 general meeting

[20] Indeed, at the January 2016 general meeting the beneficial shareholders voted against the January special resolutions proposed at that meeting. On 15 January 2016 Sovereign notified the beneficial shareholders that the January 2016 special resolutions had nevertheless been adopted at the January meeting.

[21] On 22 January 2016 Juspoint demanded in terms of section 164(5) to (8) of the Act, that Sovereign pays Juspoint fair value for Juspoint's beneficially owned shares.

[22] Juspoint contends that the 25 business day period provided for in the appraisal right condition precedent expired on 19 February 2016 (being 25 days calculated from 15 January when Juspoint received notice from Sovereign), and at that point the shares owned by the beneficial shareholders exceeded in aggregate five per cent of Sovereign's issued shares. It is accordingly contended that as at 19 February 2016, the condition precedent relating to the five per cent had not been fulfilled, nor had it been waived by Sovereign. This means that:

- The appraisal right condition had not been timeously fulfilled or waived;
- The proposed scheme, in its own terms, never became, and could not become operative or effective;
- The appraisal rights of the beneficial shareholders never became operative or effective and their shareholder rights (including all voting rights attached to each of the shares of the beneficial shareholder) remains unaffected and intact.

[23] It is trite that a condition precedent suspends the exigible content of a contract pending the fulfilment or non-fulfilment of the condition (see *Ming-Chich Sheng v Meyer* 1992 (3) SA 496 W at 497H-J). Differently put, it is a term that qualifies a contractual obligation in such a manner as to make its operation and consequences dependent on whether an uncertain future event will, or will not happen (Van der Merwe *et al*: *Contract: General Principles* JUTA, Cape Town 4ed at 249).

[24] In this matter the coming into operation of the proposed scheme was rendered subject to the appraisal right condition precedent. A specific date by which such condition precedent should either be fulfilled or not fulfilled, or be waived, was stipulated. According to Juspoint that date is 19 February 2016. According to Sovereign, that date is 1 April 2016 or such later date as Sovereign may in its sole discretion determine (subject to the approval of the JSE and the TRP).

[25] It is common cause that the appraisal right condition precedent has not been fulfilled. Nor has it been waived. Sovereign contends however, that a proper interpretation of the text, context and purpose of clause 4.8 leads to the conclusion that Sovereign retained and retains the right, throughout what it refers to as the "condition period" to waive the appraisal rights condition. The "condition period" it is argued, comes to an end on 1 April 2016 or on any later date which Sovereign may determine.

[26] On 9 February 2016 Sovereign's board (clearly unhappy with the number of shareholders who had exercised their appraisal rights pursuant to the appraisal rights resolution) circulated an "update" regarding the transactions approved by shareholders at the general meeting of 14 January together with proposed revisions thereto. Therein reference is made to a hostile competitor and to the dissenting shareholders (referred to as the competitor's "associates) participating in frustrating action and voicing public criticism. As a result of this, the report says, "the Board engaged constructively and pro-actively with *key* (my emphasis) Shareholders" and reaffirmed that, although there continued to be overwhelming support for the transactions (in other words the proposed scheme), the board would not allow a competitor or its associates to frustrate Sovereign's legitimate business strategies and initiatives and were accordingly putting up a revised proposal. The report further reads as follows:

> 'Furthermore, the Competitor's Associates are and have been aware that the Transactions are subject to the condition precedent … that shareholders holding more than 5% of Sovereign's shares do not exercise their appraisal rights … Although the Board may, at its election, waive the Condition Precedent, in making its election the Board would have to take into account the burden that such a large and unintended share buy-back would place on Sovereign's balance sheet …
>
> If the Revocation and the Revised Transactions are approved at the New General Meeting, Dissenting Shareholders' rights in respect of their Shares will be reinstated in accordance with section 164(9) and (10) of the Companies Act. In such event, the Company shall not proceed to implement the Repurchase (including the Scheme) nor the Notional Funding Repurchase (in excess of 5% (five percent) of the issued Shares) and the Company will not be required to offer to make payment to the

> Dissenting Shareholders of an amount considered by the Directors to be the fair value of their Shares, as envisaged in section 164(11) of the Companies Act.'

[27] The significance of this update is to illustrate that Sovereign had now devised a further alternative scheme aimed at the same corporate restructuring against which Juspoint and BNS had previously voted, but which is aimed at not triggering the appraisal rights in terms of section 164 of the Act. It is further significant that nowhere in the report is reference made to the dissenting shareholders not being allowed to attend the proposed meeting. Clear reference is however made to the board's recalcitrance to waive the condition precedent, as such a "large and unintended" share buy-back would place a burden on Sovereign's balance sheet. It seems to me that this is the very reason why proposals were made to revoke the previous resolutions and to start on a new page. It was never Sovereign's intention to waive the condition precedent. According to the report, that would simply not have been in Sovereign's best interests.

[28] More particularly, when this report was made on 9 February 2016, Sovereign, in terms of clause 4.8 of the December circular, still had until 19 February 2016 to fulfil or to waive the condition precedent, but it is clear that waiver was not part of the plan, because then the very scheme which had backfired on Sovereign would come into operation. It is also clear that when the matter was argued before me on 24 March 2016 (one court day before the proposed meeting) no mention had been made of the suspensive condition having been waived, or that Sovereign had determined a later date (not for fulfilment, because that had already been frustrated) but for waiver (which was highly unlikely). There is no evidence before me that Sovereign has determined such a later date, and indeed, what the purpose would have been for doing so. It may well be that Sovereign may exercise sole discretion when selecting a later date, but such discretion must logically be exercised before the final date for the fulfilment of the condition precedent, and it flows from there that all interested parties should be made aware of the dates (see *Mekwa Nominees* (*infra*) at 502A).

[29] In my view it is quite clear, particularly when applying the principles of interpretation referred to by Wallis JA in *Natal Joint Municipal Pension Fund v*

Endumeni Municipality 2012 (4) SA 593 SCA at 604E (that from the outset one considers the context and the language together, with neither predominating over the other), that Sovereign has not waived the conditions precedent, and not having determined a later date for waiver, its opportunity to waive has lapsed. In my view the waiver argument is nothing but a red herring. Even if this conclusion is not necessarily correct, I am satisfied that my interpretation of the circular in the light of Sovereign's conduct favours the granting of an order which does not lead to oppressive consequences. In this regard Wallis JA said the following at [26]:

> 'In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

[30] Wallis JA also referred with approval to the following statement by Sir Anthony Mason CJ in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315:

> 'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.'

[31] The effect of a condition precedent having or not having been timeously fulfilled or waived is explained by Hoexter JA in *Peri-Urban Areas Health Board v Tomaselli & Another* 1962 (3) SA 346 AD at 351H:

> 'If the condition is fulfilled, then the making of the contract is the legal act of the disposal, and if the condition is not fulfilled the making of the contract had no legal

> effect at all; but the fulfilment of a causal condition can never constitute an act of disposal on the part of either party to a contract.'

[32] In the premises I agree with Juspoint that the non-fulfilment of the appraisal right condition precedent has the effect that the scheme, as well as the appraisal rights under it, have no legal effect at all, and are rendered *void ab initio.* This is particularly so in the light of the fact that only fulfilment (and not waiver) has a specified date (being 1 April) in terms of the introductory portion of clause 4.8.

[33] The date for the fulfilment of the appraisal right condition precedent was 19 February 2016. As a matter of law, it is really only possible for Sovereign to have waived the appraisal right condition precedent on or before the stipulated date. A condition precedent which is for the exclusive benefit of one party (as in the matter before me) can be waived, provided that such waiver takes place before the date for fulfilment of the condition. This principle was settled by the Appellate Division in *Trans-Natal Steenkoolkorporasie Bpk v Lombaard en 'n Ander* 1988 (3) SA 625 A, in which Van Heerden JA stated the following:

> 'In 'n aantal Transvaalse gewysdes is die houding ingeneem dat indien so 'n bepaling ten gunste van slegs een party verly is, hy ook na die spêrdatum van die voordeel daarvan afstand kan doen. In die tagtigerjare is egter in drie uitsprake bevind dat 'n latere afstanddoening nie tot herlewing van die kontrak kan lei nie. … Ek hoef slegs te sê dat ek ten volle saamstem met die gevolgtrekkings wat in hierdie drie sake bereik is.'

[34] I also agree with Juspoint, that the December circular is not a model of clarity or specificity, for one because the drafters have elected to use bullet points and hyphenation to indicate sub-paragraphs, so that it is not at all clear where emphasis lies and whether prioritising is intended. Clause 4.8 thereof, dealing with the conditions precedent as cited above, is a clear example of such obscurity.

[35] It is not in dispute that this 25 day period ended on 19 February 2016, and that it is the period during which dissenting shareholders were permitted to make demand, failing which they would be deemed not to have exercised their appraisal

rights, obviously to give Sovereign the opportunity to calculate whether they exceed the five per cent limit. It is no different, for example, from the situation where a purchaser is afforded (for his own benefit) a time limit for obtaining a bond. These were the circumstances dealt with by Coetzee J in *Mekwa Nominees v Roberts* 1985 (2) SA 498 (W) at 501J – 502A when he said the following (cited with approval in *Trans-Natal (supra)*:

> 'It seems to me that, even if the instant condition is exclusively for the benefit of the purchaser, it necessarily follows from the stipulation of the time limit for obtaining the bond that that is also the time limit for the exercise of the purchaser's right of waiver of the condition *and communication of his decision'* (emphasis added).

[36] Sovereign's counsel has attempted to persuade me that the relevant date (for waiver) is not 19 February, but 1 April (which he refers to as the "long-stop" date). For the reasons mentioned hereinbefore, I do not agree. But even if 1 April was the long-stop date for waiver, I am satisfied (regard being had to the curious arrangement that the general meeting be held on 29 March 2016 being two days before the long-stop date, and regard being had to the contents of the update above), that Sovereign had no intention of waiving the condition precedent, and has not done so.

The February 2016 circular

[37] On 24 February the next circular was issued, incorporating notice of the March general meeting.

[38] Juspoint contends that this circular is also voluminous commencing with an attack directed at Countrybird Holdings Limited ("CBH") described as the "competitor" and at the beneficial shareholders (referred to as the "competitor's associates"). The nature of the attack, so Juspoint says, is confirmed by the contents of the founding affidavit to Sovereign's urgent application launched in the competition tribunal on 8 March 2016 in which Sovereign seeks relief, inter alia, preventing the beneficial shareholders from voting their shares at the proposed March 2016 general meeting. It is argued on Juspoint's behalf that this application is

inconsistent with the February 2016 circular, which states that the beneficial shareholders (dissenting shareholders) are not entitled to vote any shares in respect of which appraisal rights have been exercised, or to attend the March 2016 general meeting, unless such dissenting shareholder withdraws the exercise of its appraisal rights. Indeed, the relevant portion of the February circular (which is repeated in that document) reads as follows:

> 'VOTING AND ATTENDANCE AT THE NEW GENERAL MEETING
> If you are a Dissenting Shareholder whose rights have not been reinstated in terms of section 164(10) of the Companies Act, you will not be entitled to attend and vote at the New General Meeting. However, if you withdraw your demand made in terms of section 164(5) to 164(8) of the Companies Act, then your rights in terms of the Shares held by you will be reinstated in terms of section 164(10) as read with section 164(9)(a) of the Companies Act and you will be entitled to attend and vote at the New General Meeting.'

[39] It is Juspoint's contention that the aforesaid position adopted by Sovereign is legally flawed and untenable, and breaches the rights of beneficial shareholders in that it unlawfully seeks to prevent the beneficial shareholders from exercising their irrevocable right to vote as provided for in section 37 of the Act.

[40] In my judgment, this position adopted by Sovereign also exacerbates the uncertainty which exists with respect to the positions of dissenting shareholders. As stated by Juspoint's legal representative, should dissenting shareholders accede to Sovereign's conditions, they will be rendered vulnerable, given Sovereign's stance (that the repurchase resolution and the proposed scheme remain extant and capable of implementation) and that the proposed resolutions to be voted on at the March 2016 meeting can be modified or withdrawn, so as to enable Sovereign to proceed with another proposed scheme which will exclude the kicking-in of appraisal rights. In such event, having withdrawn their appraisal rights, the dissenting shareholders will be bound by the resolutions adopted and the implementation of the proposed scheme, but will have lost their appraisal rights.

[41] In the February circular, the board also proposed that:

- Shareholders revoke the January 2016 special resolutions as well as the ordinary resolutions passed at the January 2016 general meeting ("the January 2016 resolutions");
- Instead the shareholders should approve the revised transactions referred to in para 4 of the February 2016 circular relating to revised repurchase, the BEE transaction and the new executive remuneration policy.

[42] The implementation of the revised transactions is conditional on the revocation having been approved, and the revocation in turn is subject to the fulfilment of a condition precedent which reads as follows:

> "**4.1 Condition precedent**
> The Revocation is subject to the fulfilment of the condition precedent, by no later than 17:00 on 3 May 2016 or such later date as Sovereign may in its sole discretion determine. Subject to the approval of the JSE, if required, of Shareholders passing, at the New General Meeting, or at any adjournment or postponement thereof, the New Resolutions detailed in the Notice of New General Meeting.
> Should the condition precedent referred to above not be fulfilled, the Revocation will not be implemented and shall be of no force or effect, in which event the Company may proceed to implement the Previous Transactions."

[43] The manner in which Sovereign has chosen to frame the resolutions to be proposed at the March meeting suggests that notwithstanding the approval of the proposed revocation of special resolutions 1 and 2 (that is the repurchase resolution), the effect of which is that in terms of section 164(9) and (10) the rights of the beneficial shareholders in respect of their shares are "reinstated without interruption", nevertheless such reinstatement is delayed (or simply ignored) thereby precluding the "reinstated applicants" from voting with respect to any of the other resolutions.

[44] According to Juspoint, the following features of the February circular are significant:

- The beneficial (dissenting) shareholders are not entitled to participate at the March general meeting;
- Sovereign regards the scheme envisaged in the December 2015 circular as still being capable of implementation.

[45] With respect to the second feature, Juspoint contends that:

a. The exclusion of the beneficial shareholders from attendance at the meeting is premised on the scheme proposed in terms of the December 2015 circular being extant and capable of implementation;
b. The proposed revised transactions which include the revised repurchase in terms of which Sovereign would acquire up to 3 811 113 shares, are premised on the proposed scheme being extant and capable of implementation and are conditional on the revocation which includes the revocation of the January 2016 resolutions;
c. The aforesaid revocation is in turn subject to the fulfilment of the condition precedent that shareholders pass the resolutions to be proposed at the March 2016 general meeting as reflected in the February 2016 notice ("the new resolutions").
d. Only if the revocation is approved at the March meeting will the rights of the beneficial shareholders be reinstated.

[46] Accordingly it is argued on Juspoint's behalf that because the appraisal right condition precedent had neither been fulfilled nor waived by 19 February 2016 (or at all for that matter), the scheme in its own terms never became, and could not become operative or effective, the primary upshot of which is that the shareholder rights of the beneficial shareholders, including their rights to attend any meetings of shareholders and to vote their shares, remain unaffected and intact.

[47] Juspoint contends that the February circular is not only unclear and confusing (and as such defective), but that it is also misleading, in that:

a. It is premised on the scheme remaining extant, whereas it never became operative. Accordingly special resolution 1 of the new resolutions is based on a wrong premise.
b. It treats the exercise by the dissenting shareholders of their appraisal rights as valid and extant, whereas these rights never came into effect; alternatively were rendered to be of no legal effect due to the non-fulfilment of the appraisal right condition precedent.
c. It excludes dissenting shareholders from voting at the March meeting, whereas, because the appraisal rights of these shareholders never came into effect or are of no legal effect, no lawful basis exists for excluding the beneficial shareholders from attending and voting at the March meeting.
d. The attendance of these dissenting shareholders at the March meeting is stated to be subject to the withdrawal of the demand made by the beneficial shareholders in terms of section 164(5-8) of the Act, coupled with their reinstatement in terms of section 164(10) as read with section 164(9)(a) of the Act, however such withdrawal and reinstatement are neither necessary nor possible in view of the appraisal rights not having come into effect or having been rendered invalid.
e. Contrary to what is conveyed to shareholders in the February 2016 circular, the dissenting shareholders are fully entitled to attend and to vote their shares at the meeting.
f. The effect of the "inter-conditionality" of special resolutions 1.1 to 1.8, 2, 3 and 4 as well as ordinary resolutions 1 and 2 is that it is thereby presented to shareholders that it is necessary to revoke each of the January 2016 resolutions, whereas the revocation of the January 2016 special resolutions 1 and 2 are neither necessary nor competent, as the scheme never came into effect.

[48] Juspoint has further raised the point that on 8 March 2016 Sovereign launched an urgent application in the competition tribunal directed at preventing the applicants from voting their shares at the March 2016 meeting. If indeed Sovereign's notices, circulars and resolutions were so simple and clear, I have some difficulty in understanding why Sovereign would have gone to such lengths. There is certainly some merit in the contention that this conduct reveals that Sovereign itself is

uncertain as to the entitlement of the dissenting shareholders to attend and to vote at the March meeting.

[49] Juspoint contends that although the beneficial shareholders are in the minority, as shareholders they (and all other shareholders) are still entitled to:

a. be provided with necessary and relevant information regarding the proposed resolutions to be voted on;
b. insist that they and other shareholders do not receive information which is inaccurate, incomplete, misleading and/or which lacks relevant clarity and specificity;
c. obtain the interdict which they sought, either on the aforesaid bases or based on the fiduciary duty of the board to make disclosure of relevant information in regard to any proposed resolution.

[50] According to Juspoint the lack of clarity and the confusion in the February 2016 circular is also evident from the February notice, the effect thereof being that the proposed resolutions as set forth in the February notice do not comply with the requirements of section 65(4) of the Act in that they are not expressed with sufficient clarity and specificity, and are not accompanied by sufficient information or explanatory material so as to enable shareholders to decide whether to vote or not.

The February 2016 notice

[51] The February 2016 notice contains four special and two ordinary resolutions to be proposed at the March meeting. Special resolutions 1.1 to 1.8 deal with the revocation of the January 2016 resolutions. The introduction to these resolutions reads as follows:

> 'RESOLVED THAT, as a separate but inter-conditional resolution in each case and conditional upon the passing of Special Resolution number 2, Special Resolution number 3, Special Resolution number 4, Ordinary Resolution number 1 and Ordinary Resolution number 2 (save to the extent that such resolutions are conditional upon the passing of these Special Resolutions) each of the following Special Resolutions

> and Ordinary Resolutions which were set out in the Notice of Previous General Meeting and which were adopted at the Previous General Meeting, be and are hereby revoked.'

[52] Juspoint and BNS contend that not only is the revocation of the special resolutions inter-conditional upon the passing of each of special resolutions 2, 3 and 4, and ordinary resolutions 1 and 2 intended to be proposed at the March meeting, but that special resolutions 1.1 to 1.8 are premised on the proposed scheme still having been capable of implementation, and there being a need to revoke the January special resolutions 1 and 2, whereas due to the appraisal right precedent not having been timeously waived or fulfilled, the proposed scheme never became operative; alternatively, it is contended that even if the scheme did become operative, the shareholder rights of the applicants in respect of their shares are reinstated without interruption in terms of section 164(9) and (10) of the Act.

[53] Juspoint accordingly contends that the proposed resolutions have failed to comply with section 65(4) (regarding clarity and information), section 37 (failure to comply with general voting rights), and section 164(9) and (10) of the Act (failure to reinstate without interruption).

Section 163 of the Companies Act

[54] In this regard Juspoint is to some extent supported by BNS (albeit on different grounds). BNS avers that Sovereign's conduct has been oppressive and unfairly prejudicial to them and that their interests have been unfairly disregarded, and thus seek relief in terms of section 163(1) read with section 163(2)(g) of the Act, for this Court to direct Sovereign to make BNS a fair value offer for its shares. In the alternative BNS seeks the same relief as that which is sought by Juspoint.

Oppressive and unfairly prejudicial conduct

[55] The relevant section of the Act reads as follows:

> '**163. Relief from oppressive or prejudicial conduct …**

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

(a) any act or omission of the company, or a related person , has had a result that is oppressive and 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) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including –

(a) an order restraining the conduct complained of;

…..

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

…..

(j) an order to pay compensation to an aggrieved person'.

[56] The jurisprudence developed in respect of the previous equivalent of this provision (section 252 of the Companies Act 61 of 1973) is relevant to determine what oppressive or unfairly prejudicial conduct is. See in this regard *Grancy Property Limited v Manala* [2013] 3 All SA 111 (SCA) para 22; *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* [2013] 1 All SA 190 (GNP) at para 17.12; *Peel v Hamon J&C Engineering (Pty) Ltd* 2013 (2) SA 331 GSJ at paras 41 to 53; *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC) at para 4.

[57] In *Peel (supra* para *52)* Moshidi J stated the following:

'[52] A careful consideration of the interpretation of our courts to the provisions of s 252 of the old Companies Act and the provisions in s 163 of the new Companies Act, and as argued by counsel for the applicants, correctly in my view, shows a continuing

intention by the legislature to broaden relief in these provisions, rather than to limit them.

[53] That this intention is carried forward into the new Companies Act is apparent from a number of factors, including:

[53.1] The introduction of a new ground, namely conduct 'that unfairly disregards the interests of, the applicant,' indicating a far wider basis upon which relief may be sought – in other words, the conduct now need not be limited to oppressive conduct or conduct which is 'unfairly prejudicial, unjust or inequitable.'

[58] Conduct may accordingly be oppressive or prejudicial within the meaning of the section, even where it does not violate any rights of the applicant. This is now made even clearer in the new Act by the inclusion of unfair disregard of the applicant's 'interests' (as contrasted with his rights). Cassim, *et al*, *Contemporary Company Law* JUTA, Cape Town at 770 opines that it would seem that section 163 has been drafted to include 'interests' in order to underline or emphasise the principle that the oppression remedy is not limited to the strict infringement of legal rights, but that it extends also to the protection of the interests of the applicants. I agree.

[59] As I have said, it is common cause that on 14 January 2016, Sovereign held a general meeting at which six special and two ordinary resolutions were adopted. The effect of these resolutions was that all shareholders who had objected to these resolutions (which would include the applicants and the intervening parties) were at that point entitled, as dissenting shareholders, to exercise their appraisal rights in terms of section 164 of the Act.

[60] On 26 January 2016 BNS demanded that Sovereign pay it the fair value of all the Cilliers shares. Although Sovereign has accepted the demand, it has not responded with an offer. Nor has BNS withdrawn its demand. Instead Sovereign gave notice of a new general meeting at which Sovereign would propose for favourable acceptance at that meeting, a resolution which would revoke the previous ones.

[61] As pointed out by the deponent to the BNS affidavit, Sovereign has (through its board of directors) determined that all dissenting shareholders in the positions of Juspoint and BNS who have exercised their appraisal rights in terms of section 164 but who have not withdrawn their demands for the payment of fair value for their shares pursuant thereto, will not be able to participate in and vote on, not only the resolution which seeks to revoke the previous resolution, but on all business proposed at the new general meeting including voting on three further special resolutions and two ordinary resolutions. In any event, so BNS contends, whilst it is so that in terms of section 164(9) of the Act BNS has no further rights in respect of its shares other than to be paid fair value for them, these rights are reinstated "without interruption", if for example Sovereign revokes the adopted resolution which gave rise to the appraisal rights (which is coincidentally the first resolution to be voted on at the new meeting). However, the applicants and the intervening parties are excluded from the rest of the meeting which is in violation of their rights in terms of section 64(10) to be reinstated without interruption once Sovereign has dealt with the first resolution.

[62] BNS contends that in order to justify the exclusion of the applicants throughout the entire duration of the meeting, Sovereign has made the revoking resolution inter-conditional with and conditional upon the adoption of the further resolutions to be voted on at the new general meeting, and in doing so has contrived a situation in which BNS (and Juspoint for that matter) will not be able to exercise their rights upon their re-instatement in terms of section 164(10) of the Act.

[63] I agree with BNS. Sovereign's conduct and its proposed course of conduct is prejudicial and oppressive of the rights of dissenting and minority shareholders and disregards their interests. It is unfair, in my view, for a board such as Sovereign's to manipulate and create this type of lock-in situation by not allowing minority/dissenting shareholders to enjoy fair participation in its business.

[64] It had been contended by counsel on Sovereign's behalf that it is easy for the other parties to attend the meeting. They must simply withdraw their demand in terms of section 164(9)(a) of the Act and their rights will be restored in terms of section 164(10). This however amounts to Sovereign dictating to its shareholders

and is not fair. More importantly, should the dissenting shareholders forego the rights which have accrued to them by virtue of section 164 they are placed in an invidious position. While they may be able to participate in and vote at the new general meeting, it may reasonably be apprehended that the proposed resolutions will not be adopted, in which event the previous resolutions will stand, but dissenting shareholders will have lost their appraisal rights which arose pursuant to the previous resolutions and which were validly exercised then in accordance with those resolutions. Thirdly, as correctly pointed out by BNS's counsel, if sufficient shareholders withdraw their demands before the new general meeting, it may be that Sovereign elects to withdraw the resolutions proposed for the new general meeting, and attempt to proceed with the corporate restructuring it was initially desirous of implementing. In such instance, if the dissenting shareholders have relinquished their appraisal rights they will be prevented from re-asserting them and Sovereign would be entitled to proceed with its initial scheme (against which the dissenting shareholders voted) but without the consequences of having to allow the dissenting shareholders to follow their appraisal rights.

[65] In my view this would be manifestly unjust, unfair and unreasonable (particular regard being had to the Afrikaans text of section 163 of the Act which extends the conduct complained of to include unreasonable conduct by the use of the word 'onredelik'), and denies the dissenting shareholders fair participation in the affairs of Sovereign (see *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA 517 (C) at 527).

[66] In its answering papers in the intervention application, Sovereign quite correctly points out that the appraisal rights conferred by the Act are a mechanism which allows a dissenting shareholder to exit from the company on fair terms, when a fundamental transaction is passed that the dissenter finds repugnant to its continued membership of the company. Of this Coombes (the deponent to the answering affidavit) says the following:

> 'Appraisal rights are not intended to be a means to speculate on the fluctuating share prices. If the resolutions approving the fundamental transaction that the dissenters find repugnant to their continued relationship remain passed (i.e. the resolutions are

> not revoked), then the dissenters will get their offer and have all the rights associated with being paid out their fair value, as set out in section 164. If the repugnant transactions are indeed revoked, they no longer have a basis to seek to exit. There is no unfairness in this.'

[67] I have one fundamental problem with this over-simplification of the state of affairs. As pointed out by the dissenting shareholders, the resolutions proposed at the new general meeting are contrived so as to deprive the intervening parties of their rights immediately upon their restoration.

[68] The third intervener (Mr Cilliers) says that this could have been easily cured by allowing all the dissenting shareholders to exercise their rights upon the adoption of the first resolution proposed at the general meeting and allowing them to attend the meeting and vote on the further resolutions should the first resolution have been adopted. In this regard, Cilliers says the following:

> '[Sovereign] seeks to effect a fundamental re-organisation of its corporate structure while depriving shareholders who oppose such re-organisation of the right to vote against it and/or exercise appraisal rights in relation thereto. In short they wrongfully seek to lock in shareholders to the deal without affording them the opportunity to vote in relation thereto… The intervening parties are long-term investors in Sovereign who oppose the corporate restructure proposed by Sovereign, and by virtue of events in which they have played no part, they stand to be denuded of not only their shareholder's rights but also their rights to exit the company on fair terms.'

[69] I agree.

Ulterior motives

[70] As mentioned, Sovereign's answering affidavit in the main application was deposed to by its chief executive officer, who is a chartered accountant by the name of Christopher Coombes ("Coombes"). According to Coombes, the applicant group has, as its primary entity, Country Bird Holdings (Pty) Ltd ("Country Bird"), which operates in direct competition to Sovereign, and that not only are Country Bird and the second applicant (in his personal capacity) behind the strategic thinking

underpinning this application, but that the applicants are deliberately underplaying Country Bird's mischievous role in this application, in that Country Bird's objective is to acquire control of Sovereign.

[71] Coombes avers that in the light of the economic harm which Sovereign would suffer as a result of various tactics (including this application) to facilitate the take-over, it proposed at a second meeting to revoke the resolutions passed at the first meeting and to pass new ones:

- Limiting the extent of the share buy-back to five per cent of its issued share capital (as opposed to ten);
- Proceeding with its attempts to introduce a black economic empowerment ("BEE") shareholder.

[72] According to Sovereign then, the real motive for launching this application is not a genuine concern for the clarity and the integrity of the contents of the February circular, but rather a self-interested intention to interfere with Sovereign's corporate affairs (as Country Bird's rival) in order to substantially weaken Sovereign as a direct competitor and/or to acquire control of its rival at the cheapest possible price.

Waiver

[73] Sovereign contends that the application is fatally flawed in the following respects:

a. It incorrectly assumes that a contract cannot provide for the waiver of a condition on a date beyond that of its fulfilment;
b. It relies on a contrived interpretation of the December circular (convening the first meeting and informing shareholders of resolutions proposed to be passed at that meeting) to have intended to have the effect that the transactions approved at the first meeting never came into effect for failure of a condition); and

c. It represents a misconceived notion that, if this were so, the legal effect would be that the applicants have lost all their appraisal rights.

[74] That the December 2015 circular is confusing and misleading to say the least, is manifested in the different approaches taken and interpretations given by the three respective groups of litigants in this matter:

a. Juspoint is of the view that the implementation of the scheme was subject to certain conditions precedent which have not been fulfilled or waived, thus the scheme never came into operation and accordingly the appraisal rights arising from the scheme never became effective, which means that Juspoint's rights, including the right to attend the March meeting, remain unaffected and intact.
b. BNS's interpretation is that Sovereign is subjecting it to unfair treatment by, on the one hand failing to make a fair value offer to BNS for its shares, and on the other hand, preventing it from attending the proposed meeting. This interpretation must be prefaced on an interpretation that the scheme does in fact exist.
c. Sovereign's interpretation seems to be that the dissenting shareholders' appraisal rights came into existence, were exercised by them and remain of force and effect. In terms of clause 4.8 the share re-acquisition was subject to the fulfilment or waiver, within the "condition period" (which Sovereign says is 1 April 2016 or such later date as Sovereign may in its sole discretion determine) of the condition precedent (which it is common cause was introduced to protect Sovereign against the situation where more than five per cent of the shareholders exercised their appraisal rights in terms of section 164 of the Act). Sovereign concedes that the condition precedent was not fulfilled, but maintains that Sovereign retained the right, throughout the condition period, to waive the appraisal rights condition.

[75] In *Marais v Van Niekerk* 1991 (3) SA 724 ECD, dealing with the issue of the waiver of a suspensive condition, Ludorf J held as follows:

> 'With respect I find myself in agreement with the latter line of reasoning. I would add that in the present matter it is expressly stated in clause 12 that the entire sale is subject to the suspensive condition being fulfilled, and that, in my judgment, includes clause 12 itself. If that is so, I have difficulty in comprehending how defendant could 'waive' any right accruing to him in terms of clause 12 after the lapse of that clause on expiry of the time stipulated.'

[76] It appears from the February circular that Sovereign has created a situation in which it no longer intends proceeding with the scheme under the December 2015 circular, and is in any event unable to do so. Despite this, Sovereign nonetheless relies on the same scheme in order to exclude the dissenting shareholders from participating in any way at the March general meeting.

[77] I am inclined to agree with counsel's submission on behalf of Juspoint, that the far-reaching curtailment of the rights of a shareholder who has invoked the appraisal rights provided for in section 164 is premised on such shareholder's only interest being to receive payment of fair value for its shares. However, once it is clear that such payment will not be forthcoming because the proposed scheme is not operative or effective, the *fons et origo* of the appraisal rights ceases to exist and the rights of the shareholder which had been sterilised, are reinstated.

Section 65(4) of the Companies Act

[78] Even if I am not correct in this regard, and particularly if I am not correct, then this is one of those matters where the nature and the effect of the provisions of section 65 of the Act must be considered as against the backdrop of the proposed meeting, and the exclusion of dissenting shareholders therefrom.

[79] Section 65(4) –(6) states that:

> '(4) A proposed resolution is not subject to the requirements of section 6(4), but must be-
>
> (a) Expressed with sufficient clarity and specificity; and
>
> (b) Accompanied by sufficient information or explanatory material,

to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution.

(5) At any time before the start of the meeting at which a resolution will be considered, a shareholder or director who believes that the form of the resolution does not satisfy the requirements of subsection (4) may seek leave to apply to a court for an order-

(a) restraining the company from putting the proposed resolution to a vote until the requirements of subsection (4) are satisfied; and

(b) requiring the company, or the shareholders who proposed the resolution, as the case may be, to-

(i) take appropriate steps to alter the resolution so that it satisfies the requirements of subsection (4); and

(ii) compensate the applicant for costs of the proceedings, if successful.

(6) Once a resolution has been approved, it may not be challenged or impugned by any person in any forum on the grounds that it did not satisfy subsection (4).'

[80] Sovereign contends that section 65(4) does not apply to the dissenting shareholders because they are not entitled to vote (assuming the scheme still exists). For purposes of this judgment, it is necessary to repeat the relevant extracts of the notice of the new general meeting to be held on 29 March 2016:

'**PURPOSE OF THE NEW GENERAL MEETING**

The purpose of the New General Meeting is to consider and, if deemed fit, to pass, with or without modification, the following resolutions:

SPECIAL RESOLUTIONS

1. **SPECIAL RESOLUTIONS NUMBER 1.1 TO 1.8: REVOCATION OF THE ORDINARY RESOLUTIONS AND SPECIAL RESOLUTIONS PERTAINING TO THE PREVIOUS REPURCHASE, THE BEE TRANSACTION AND THE NEW EXECUTIVE REMUNERATION POLICY**

"RESOLVED THAT, as a separate but inter-conditional resolution in each instance and conditional upon the passing of Special Resolution number 2, Special Resolution number 3, Special Resolution number 4, Ordinary Resolution number 1 and Ordinary Resolution number 2 (save to the extent that such

resolutions are conditional upon the passing of these Special Resolutions) each of the following Special Resolutions and Ordinary Resolutions which were set out in the Notice of the Previous General Meeting and which were adopted at the Previous General Meeting, be and are hereby revoked:

1.1 Special Resolution number 1, pertaining to the specific repurchase by Sovereign of Shares in terms of paragraph 5.69 of the Listing Requirements, pursuant to the Previous Repurchase;

1.2 Special Resolution number 2, pertaining to the approval of the Scheme in terms of section 48(8)(b), 114(1)(c), 114(1)(e), 114(1)(f) and 115(2)(a) of the Companies Act….

…….

The reason for Special Resolutions number 1.1 to 1.8 is to revoke the Ordinary Resolutions and Special Resolutions pertaining to the Previous Repurchase, the BEE Transaction and the New Executive Remuneration Policy adopted at the Previous General Meeting. The effect of Special Resolutions number 1.1 to 1.8 is that the Company will revoke the Ordinary Resolutions and Special Resolutions pertaining to the Previous Repurchase, the BEE Transaction and the New Executive Remuneration Policy in order to enable the Company propose the Revised Transactions.'

[81] In a nutshell, the above paragraph simply tells the reader that the reason for the special resolutions is to revoke previous repurchase resolutions, and that the effect of the special resolutions is that the company *will* revoke the previous repurchase resolutions (my emphasis). This must then be read in conjunction with the final paragraph of the notice which reads:

'**DISSENTING SHAREHOLDERS**

In terms of section 164 of the Companies Act, Shareholders who have sent a demand in terms of sections 164(5) to 164(8) of the Companies Act have no further rights in respect of those Shares. In the circumstances, Dissenting Shareholders whose rights have not been reinstated in terms of section 164(10) of the Companies Act will not be entitled to attend or vote at the New General Meeting. However, those Dissenting Shareholders who withdraw their demands in terms of section 164(5) to 164(8) of the Companies Act will have their rights in respect of the shares owned by them reinstated in terms of section 164(10) as read with section 164(9)(a) of the Companies Act, and will be entitled to attend and vote at the New General Meeting.'

[82] The upshot of this is that the dissenting shareholders who previously voted against the repurchase resolution which was nevertheless passed as they were in the minority, and who, as a result of the passing of the resolution made demand for payment of fair value of their shares, are, because they made demand (with no response), prevented from attending a meeting where the very resolution which propelled their further actions is likely to be revoked, and the only explanation they are given in the notice is that the "reason" for the special resolutions is to revoke the previous resolutions, and the "effect" of this is that the previous resolutions will be revoked.

[83] This makes as little sense to me as it has to Juspoint and BNS. It certainly does not comply with the requisites of clarity, specificity, sufficient information or explanatory material. It explains nothing at all, particularly to shareholders who have no clarity about their entitlement to vote at the meeting in the first place. In any event, whilst section 65(4) of the Act makes reference to the fact that resolutions must be such that shareholders who are entitled to vote can make informed decisions, section 65(5) which deals with appropriate relief does not refer to shareholders who are entitled to vote, but says that any shareholder or director who believes that the form of the resolution does not satisfy the aforesaid requisites, may apply for an interdict together with ancillary relief similar to that which has been sought by Juspoint and by BNS. Section 65(6) makes it clear that such an application must be brought before the meeting. There is no second bite at the cherry. Once the resolution has been approved, it is above and beyond any form of challenge whatsoever.

The relief sought

[84] The principle applicable to the right of a shareholder (either on his own behalf and/or on behalf of other shareholders) to obtain a court order to prevent a meeting from proceeding was succinctly stated by Farlam JA in *Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others* 2009 (4) SA 89 SCA at [36], as follows:

> 'It is clear that a shareholder's right to information regarding the proposition to be voted on at a general meeting has developed and been extended down the years, particularly since the practice of giving proxies has become so widespread. As I have said, a shareholder's right to receive the necessary information arises from an implied term in the company contract. Regard being had to the fact that an individual shareholder will be bound by the votes of the majority, it must follow that the shareholder's rights extend not only to his or her being furnished with the necessary information but that all his or her fellow shareholders do not receive information which is inaccurate and to enforce such right by applying for an interdict to prevent a meeting from proceeding.'

[85] BNS's counsel has submitted that the proper manner in which to have sought the opinion of the shareholders on corporate restructuring would have been to propose a self-standing revoking resolution allowing all the shareholders to vote. I am inclined to agree. To prohibit minority shareholders from participation even though a resolution revoking a previous resolution (where the minority did participate) is likely to be adopted, falls foul of the requisites of section 163 and in my view constitutes oppressive and/or unfairly prejudicial conduct which disregards the interests of the dissenting shareholders.

[86] Sovereign's counsel relies, inter alia, on the judgment of *Porteus v Kelly and Others* 1975 (1) SA 219 (W) in support of a further contention that the application is premature, in that the proposed voting at the proposed meeting has not yet taken place. Not only was that matter dealt with under section 252 of the old Act, but it is also distinguishable from the matter before me in a number of respects:

a. In that matter the act complained of was the proposed passing of a resolution; alternatively the future holding of a meeting where such resolution would be proposed. Nicholas J held that although it may have been a *casus omissus*, section 252 refers to an act which has already taken place.
b. On the other hand section 163 not only incorporates acts or omissions but refers to any unfair disregard of the interests of the applicant.

c. The prejudice complained of by both Juspoint and BNS is that Sovereign has already sent out a circular giving notice to them of a meeting to be held which, notwithstanding the fact that decisions are going to be made at that meeting which directly affects their interests, they are precluded from attending.
d. As aptly summed up by BNS's counsel, the decree/dictate which is unfairly prejudicial and which affects their interests, has arisen by virtue of this very circular and the construction of the suite of resolutions in a manner that effectively excludes the dissenting parties not just from voting on the issue of revoking the previous resolution proposing the scheme, but all other resolutions thereafter as well, notwithstanding the fact that if the revocation resolution is passed, the dissenting parties' rights in respect of their shares are reinstated without interruption, in terms of section 164(10) of the Act.

[87] In order for me to grant the main relief sought by BNS I would have to find that the scheme is still extant. For the reasons already mentioned above, I am satisfied that the condition precedent referred to under the second hyphen below the fifth bullet point under item 4.8 of the December 2015 circular has neither been fulfilled nor has it been waived, and that the share acquisition (and the scheme) have not become operative. Juspoint and BNS are accordingly entitled to declaratory relief in that respect.

[88] I am also satisfied that Sovereign's proposed resolutions for the 29 March meeting are not expressed with sufficient clarity and specificity and are not accompanied by sufficient information or explanatory material to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in any meeting called to seek to influence the outcome of the vote on the resolutions.

[89] Furthermore, I am satisfied that BNS has persuasively illustrated that Sovereign's conduct towards its dissenting shareholders (including Juspoint and BNS) is not only oppressive and unfairly prejudicial to these dissenting minority

shareholders, but in particular that it unfairly disregards the interests of the applicants, the intervening parties and minority shareholders in general.

[90] Because BNS have not succeeded with their main application, but in the alternative in the sense that they make common cause with the relief sought by the applicants, I intend only making a partial costs award in their favour.

Order

[91] The order I make is as follows:

1. The remainder of the rule *nisi* issued on 17 March 2016 (insofar as subparagraphs 1.a and 1.b thereof were confirmed on 29 March 2016) is confirmed.
2. The first respondent is directed to pay the applicants' costs, which costs shall include the costs of two counsel.
3. The first respondent is directed to pay 50 per cent of the intervening parties' costs.

_____

I.T. STRETCH **25 April 2016**
JUDGE OF THE HIGH COURT

FOR THE APPLICANTS:
P.T. Rood SC and M. Engelbrecht
Instructed by Kern & Partners
Care of Goldberg & De Villiers
Port Elizabeth

FOR THE FIRST RESPONDENT:
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Instructed by Cliffe Decker Hofmeyr Inc
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FOR THE INTERVENING PARTIES:

R.D.E. Gordon

Instructed by Pike Law

Care of Greyvensteins Inc

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