REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **42781/2015**

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED

14/10/16
Date:

WHG VAN DER LINDE

In the matter between:

CLAUDIA DE VILLIERS	**Applicant**
and	
KAPELA HOLDINGS (PTY) LTD	**First Respondent**
KAPELA INVESTMENT HOLDINS (PTY) LTD	**Second Respondent**
ISTRAEL BIZIWE SKOSANA	**Third Respondent**
FRANK HENRI STAAL	**Fourth Respondent**
JOHANNES CHRISTOFFEL KRITZINGER	**Fifth Respondent**
FATIMA ABRAHAMS	**Sixth Respondent**
MAKHUPARETSA PAUL NYAMA	**Seventh Respondent**
DAPHNE RAMAISELA MOTSEPE	**Eighth Respondent**

Summary: Relief from oppressive conduct – section 163 of Companies Act 71 of 2008 – whether offer by majority to buy out minority shareholder at fair value forecloses minority's entitlement to relief – held not in the circumstances.

Minority shareholder in related companies retrenched, triggering deemed offer in terms of shareholders' agreements to dispose of shares – minority alleging retrenchment mala fide, seeking

interim interdict pending action for final relief under section 163 – majority shareholders alleging that buy-out offer to minority at fair value disentitling minority to relief protecting shareholding.

Held – minority entitled to interim interdict on basis of parties' common understanding that all shareholders would sacrifice salaries in start-up years in return for investment upside in later years – interim interdict granted.

Judgment

Van der Linde, J:

Introduction and background

[1] This is an application for an interim interdict pending a trial action that has already been instituted. In its presentation, the relief sought is to preserve the status quo of the applicant's minority shareholding in two private companies (the first and second respondents) pending that action, in which final relief will be sought in terms of s.163 of the Companies Act 71 of 2008, to cement the status quo. The applicant, a chartered accountant by training, is currently favoured by a judgment and two interim orders that were given, after an opposed hearing in the urgent court on 10 December 2015, before Sutherland, J. The application before this court is to extend the operation of the two interim orders until the trial, and to add two further interim orders to them.

[2] The background is as follows. The first and second respondents are investment holding companies in the market for Black Economic Empowerment investments. In other words, as BEE companies they make minority investments in companies so as to enhance the BEE rating of the investee companies.

[3] The applicant was, until her contested dismissal in the last quarter of last year, an employee of the first respondent. Precisely what her employment entailed is contested. She says that she was jointly responsible for business analysis and modelling, sourcing of funding, deal

implementation, statutory requirement management, management accounting and audit oversight, investee support and deal sourcing. The respondents, who apart from the two BEE investor companies are the other shareholders in them, deny this. They say that she was tasked to do the management accounting and statutory work of the Kapela Group, but that this had eventually been outsourced.

[4] The applicant owns 7,5% of the issued shares in the first respondent, and 4,8% of the issued shares in the second respondent. The relationship between shareholders in both companies is regulated by, amongst others, shareholders' agreements that are essentially identical. They contain arbitration provisions for the resolution of a deadlock between shareholders or directors as to any resolution proposed. A *"deadlock"* is not defined but presumably refers to the situation that pertains when the majority required for a resolution in terms of the relevant Companies Act cannot be attained.

[5] The shareholders' agreements also contain what is called a *"Deemed Offers"* clause. That clause provides that if certain defined events occur, a shareholder is deemed to have offered his/her shares to the relevant company for purchase. If the company does not take up the offer, or to the extent that it does not do so, the shares are deemed to be offered to the remaining shareholders, proportionately to their shareholding. There is provision for determining the price at which the shares are to be sold, absent agreement. This determination is to be at what is called *"fair value."*

[6] On such triggering event is described in clause 10.1.5:

"The shareholder in question is an Executive Director or Executive of the Kapela Group and is dismissed, resigns or leaves the employment of the Kapela Group for whatever reason, prior to reaching the retirement age of 63 (sixty three) years."

[7] It is common cause on these papers that the applicant was employed in 2010 and worked full-time as what is called an *"executive."* The protagonists are further agreed that the applicant (and the other executives) took no salary for several years, and thereafter only a portion of her salary, as her employer was unable to pay full salaries at the time. This was

part of the sacrifice that they all undertook to make, because they expected to make *"many millions of Rands in upside, in the form of substantial increases in the value of the underlying investments disposed of,"* once the investments matured in due course.[1]

[8] During late 2014 the relationship between the applicant and some of the other shareholders began declining, when an investment was made through the second applicant, in which the applicant has the 4.8% shareholding and not the first respondent, in which the applicant had the larger, 7.5% shareholding. She protested, and the investment was switched.

[9] During mid-2015, the first and second respondents embarked on a retrenchment process. The applicant says this was designed to oust her from the group. On 7 September 2015, in pursuance of this process, the first respondent gave the applicant notice that her services would be terminated effective 31 October 2015. This precipitated the action that was instituted on 11 November 2015.

[10] On the next day, 12 November 2015, the two respondent companies formally set in motion the mechanism to trigger the sale by the applicant of her shares in those companies. This conduct led to the urgent application that came before Sutherland J on 10 December 2015.

[11] The applicant's notice of motion was divided into a Part A and Part B, the first containing two proposed prayers and the second four proposed prayers, the first two of which were identical to the two proposed prayers in Part A.

[12] Part A was argued before, and granted by, Sutherland J. Its two proposed prayers were for temporary interdicts, pending Part B, prohibiting the respondents from: taking any steps to interfere with the applicant's ownership and possession of her shareholding; and taking any steps in furtherance of the deemed offer of the applicant' shareholding.

[13] The prayers in Part B asked for the same two prayers, but pending the action; and for two additional temporary interdicts, also pending the action, prohibiting the respondents from: disposing of any funds or assets in the companies without providing any adequate

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[1] Founding affidavit, page 10, paragraph 14; answering affidavit, page 161, paragraph 120.

protection for the preservation of the value of the applicant's shareholding; and distributing dividends or making distributions or payments to shareholders without pari passu distributions or payments to the applicant, in proportion to her shareholding (alternatively making appropriate provision by way of escrow arrangement).

[14]In effect therefore, Part A sought to freeze the implementation of the deemed offer pending the hearing of Part B; and Part B now also seeks to freeze the implementation of the deemed offer pending the action but, in addition, seeks to protect the value of the shareholding pending the action. There is therefore currently in force an order freezing the implementation of the deemed offer, potentially up for reconsideration now; and in addition, there are the value protection prayers which are to be considered de novo.

[15]In her founding affidavit the applicant contends that her dismissal was unlawful. In the context in which she used this appellation, the retrenchment process, she meant at least *"unfair"* for the purposes of the Labour Relations Act 66 of 1995.[2] She has initiated legal process for reinstatement in the Labour Court in terms of s.157, read with s.191 and following, of the Labour Relations Act. That court has exclusive jurisdiction to determine the unfairness of the applicant's dismissal.

[16]But the applicant also used the description of *"unlawful"* in relation to her dismissal in the sense of qualifying as offensive conduct as described in s.163(1)(a) of the Companies Act.[3] Here she relies on the principle that the same set of facts can give rise to different claims in law, which may be justiciable by different courts. She says: *"Arising from the same set of facts, the applicant has a claim under the Labour Relations Act based on the statutory remedy of unfair dismissal. But this does not in any way deprive the Court of jurisdiction to*

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[2] Founding affidavit, page 26, paragraph 72; page 10, paragraphs 15 to page 11 paragraph 21.
[3] Applicant's particulars of claim, page 59, paragraph 31; applicant's heads of argument page 16, paragraph 23 to page 18, paragraph 24.11; page 14, paragraph 21.

determine the applicant's claim as shareholder for relief in terms of section 163 of the Companies Act."[4]

[17]One further fact needs to be added. The respondents made an open tender, with prejudice but without admission of liability, on 23 May 2016. It was for an order in terms of the first two prayers of Part B (freezing the deemed offer), and for an order that any dividends that would have been payable to the applicant would be held in trust at the respondents' attorneys (a reference to the fourth prayer of Part B). Costs between 11 December 2015 and 23 May 2016 were also tendered.

[18]The tender was open for acceptance within 15 days of its receipt, and so until the end of 13 June 2016, the day on which the respondents' heads of argument were finalised. Their heads of argument acknowledge that the tender had not been accepted, but they expressly persist with the tender, and approach the application on the basis that all that remains (substantively) in dispute is the applicant's *"failure to have made out a prima facie claim for the relief sought in prayers 1.3 and 1.4 of the notice of motion under Part B."*

[19]Prayer 1.4 is however also not in dispute, according to the respondents' heads of argument, because with reference to their tender they say that paragraph 2 of the tender is *"effectively the relief sought in prayer 1.4 of Part B."* If the tender was being persisted with, despite its non-acceptance by 13 June 2016, being the due date for its acceptance, then the non-contestation of prayer 1.4 of Part B also endured.

[20]In short then, according to the respondents' heads of argument, their attitude was that, despite the fact that the applicants simply ignored the tender, all that remained for consideration at this stage were: the relief claimed in the third prayer of Part B (disposing of funds without preservation protection); the applicant's rule 30(3) irregular step application; and costs.

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[4] Applicant's practice note dated 24 May 2016, page 4, paragraph 6.14.

[21]At the hearing, however, the respondents changed their attitude, and argued that since the tender was not accepted, the whole of Part A and Part B was up for consideration at this time. The first issue that will have to be decided is whether this change in tack is permissible.

[22]Two issues remain to be mentioned by way of introduction. The first is that there were preliminary points relating to the propriety of the respondents' supplementary answering affidavit. The respondents had been given leave to file such an affidavit, but instead filed a notice to argue law points under rule 6(5)(d)(iii). Sometime later they nonetheless filed a supplementary answering affidavit. The applicant considered that this was an irregular step and applied in terms of rule 30(3) to strike out the affidavit. In the event this was not pressed.

[23]The second issue is simply to record that after some argument during the hearing I allowed both parties to submit further written argument after the hearing. This was done by the respondent on Friday 16 September 2016, and by the applicant on Wednesday 21 September 2016. I am grateful for the assistance given in those written arguments, but also for that given in the initial sets of heads of argument; as well as for the helpful submissions made from the Bar during the hearing of the matter.

[24]I propose approaching this judgment by considering first whether the respondents are permitted to change tack as they have; and thereafter to consider whether the applicant has established the four usual requirements for temporary interdicts, being a prima facie right although open to doubt; a well-grounded apprehension of irreparable harm if the relief sought is not granted; the absence of a suitable alternative remedy; and a favourable balance of convenience. The issue of costs will be considered at the end.

Is it permissible for the respondents now to place prayers 1.1, 1.2 and 1.4 in dispute?

[25]The tender was open for acceptance by 13 June 2016. It was not accepted by that date, and so it lapsed in terms. The respondents' heads of argument were drawn and presented on the

basis that the tender had not been accepted by 13 June 2016, but they nonetheless stated positively that they persisted with the tender; and that the result of the tender is that *"for purposes of this application"* the issues have become circumscribed as explained above.[5]

[26]It was not possible to have made that statement if the respondents' intention were not to have adopted then and there the contents of the tender as the respondents' position in the application. That position is inconsistent with persisting in opposing all of the Part B prayers, and so in my view it constitutes an abandonment of such opposition.

[27]Accordingly I approach the application on the basis that prayers 1.1, 1.2 and 1.4 are not in dispute. Since prayer 1.3 is still in dispute, it remains necessary to consider whether the applicant has made out a case, on the usual basis, for a temporary interdict in its terms.

A prima facie right, although open to doubt

[28] The applicant need only establish a prima facie right, although open to doubt. She must show that on her version, together with the allegations of the respondents that she cannot dispute, she should obtain relief at the trial. If, having regard to the respondents' contrary version and the inherent probabilities serious doubt is then cast on the applicant's case, the applicant cannot succeed.[6]

[29]This well-tried approach was significantly qualified by a full bench of this court in Ferreira v Levin, NO and Others; Vryenhoek and Others v Powell, NO and Others.[7] Ferreira, which received the imprimatur of the Constitutional Court,[8] materially lowered the bar set by Gool. The latter required that on the asserted case the applicant *"should"* obtain final relief at trial; the former requires only *"a"* prospect of success, albeit *"weak."*

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[5] See respondents' heads, paragraphs 29 to 32.
[6] Webster v Mitchell, 1948 (1) SA 1186 (W) at 11189, as qualified by Gool v Minister of Justice and Another, 1955 (2) SA 682 (C) at 688E.
[7] 1995 (2) SA 813 (W).
[8] South African Informal Traders Forum and Others v City of Johannesburg and Others, 2014 (4) SA 371 (CC) at [25].

[30]The correct perspective, however, of these ostensibly dichotomous positions is, in my view, captured by Holmes, J (then) in Olympic Passenger Service (Pty) Ltd v Ramlagan,[9] approved by Holmes, JA in Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another,[10] in turn followed by Ferreira, and approved by the Constitutional Court:

"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted."

[31]The concept is then that *"a prima facie right, though open to some doubt"* conveys that the strength of the right is allowed to fluctuate from strong to weak: if it is strong, the other requirements for an interim interdict may be weak; if it is weak, the other requirements for an interim interdict may be strong.

[32]The perspective of the meaning of *"a prima facie right, although open to some doubt"*, as collected by Ferreira from Erikson Motors and Olympic Passenger Service and approved by the Constitutional Court, seems to me to render, in the context of the strength of the prima facie right, future reliance on Webster and Gool otiose; they remain pertinent, of course, in the context of factual disputes on the affidavits. The remedy remains *"an extraordinary*

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[9] 1957 (2) 382 (D) at 383 D.
[10] 1973 (3) SA 685 (A) at 691.

remedy within the discretion of the Court," as Erikson Motors underscored,[11] but that is a description apt for the entire discretion-exercising process, not only the first element of it.

[33]That brings one to a consideration of what the applicant's case is. Since the relief sought is to pend the determination of the trial action, one needs to go to the particulars of claim. It is there expressly stated that the claim is in terms of s.163 of the Companies Act, and in paragraphs 30 to 37 the case for the asserted *"oppressive and unfairly prejudicial conduct or conduct that unfairly disregards the interests of the plaintiff"* is spelt out.

[34]The structure of these paragraphs is to describe the allegedly offensive conduct in paragraphs 30 and 31. Paragraph 31 asserts that the dismissal was unlawful, and was unfairly prejudicial to the applicant's rights and interests, or unfairly disregarded the applicant's interests. It is then asserted in paragraph 32 that the consequence of the defendant's conduct is that the deemed offer provisions are triggered; and in paragraph 33 reasons are given why the effect of the triggering of the deemed offer provisions is unfairly prejudicial to the applicant's rights or unfairly disregarding of her interests. Paragraphs 34 to 37 contain consequential averments.

[35]The point is, the concept which founds the applicant's case is that the deemed offer provisions were, as a matter of law, triggered; and the consequential forced sale of her shares is what is particularly unfairly prejudicial for purposes of s.163 of the Act.

[36]But the applicant's case is also that her dismissal was unlawful for purposes of s.163 of the Act and so, necessarily, she interprets the shareholders' agreement as providing that the deemed offer provisions are triggered even where the dismissal, standing alone and ignoring its consequences, is unlawful.

[37]There is, in my view, a substantial argument to be made that the clause does not envisage that the deemed offer provisions will be triggered by an unlawful dismissal. First, textually, the words *"for whatever reason"* qualify only the words *"leaves the employment of the*

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[11] At page 691.

Kapela group", since resignation is separated by the normally disjunctive *"or"*, and in turn dismissal is separated by a comma.

[38]Second, there is an approach, putting it no higher than that, which requires the interpretation of statutes and civil instruments which reference conduct, to regard such reference as being, depending of course on context, to conduct which is lawful. Third, the context of the clause does suggest that what the parties were concerned about, is the case where the shareholder leaves the company, whether it be for dismissal, resignation, or for whatever (other) reason. Dismissal already implies of itself the employee leaving; and so does resignation; the concept of *"for whatever reason"* is not necessary to add any value to those two events.

[39]And fourth, it would have been strange if the employer could, as happened here on the applicant's assertions, by its own mala fide election decide to repudiate the employment contract, thereby triggering a forced sale of a minority's shares at a time propitious for the employer and disastrous for the employee. Generally, as a principle of our law, a person is not permitted to take advantage from his/her own unlawful conduct.

[40] In Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Ltd[12] Van Zyl, AJA said in this context:[13]

"[12] The rationale for this rule is twofold: A party to a contract should not by its own unlawful conduct be allowed to obtain an advantage for himself to the disadvantage of his counterpart. 'It is a fundamental principle of our law that no man can take advantage of his own wrong' and 'to permit the repudiating party to take advantage of the other side's failure to do something, when that failure is attributable to his own repudiation, is to reward him for his repudiation'. The converse is that the innocent party is not expected to make the effort or incur the expense of performing some act when, by reason of the repudiation, 'it has become nothing but an idle gesture'. This is consistent with the general principle that the law does not require the performance of a futile or useless act. These principles are of general application and may find application in a variety of circumstances. The doctrine of fictional fulfilment of contractual terms is, for example, similarly based on the principle that a contractant cannot take advantage of its own wrongful conduct to escape the consequences of the contract."

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[12] [2014] ZASCA 22 (28 March 2016).
[13] At [12].

[41]In my view, therefore, it is unlikely that the parties intended to include unlawful dismissal as a trigger event. Rather, they intended that the employer should have acted lawfully, but not necessarily the employee. If the employee walks away, or abandons, his/her employment by repudiating the employment contract, that would qualify leaving the employment *"for whatever reason."*[14]

[42]If this were the proper interpretation, on the applicant's case there was no trigger of the deemed offer provisions, and she could have ignored the first respondent's attempts to do so with impunity.

[43]The difficulty for this interpretation is that the respondents too subscribe to the applicant's interpretation. They say unreservedly[15] that the deemed offer is triggered even by breach of contract on the part of the employer. And they too were parties to the shareholders' agreement.

[44]In my view, where the parties to a contract attach the same interpretation to it, particularly after disputes have arisen between them, it is not, generally, open to a court to attach a different interpretation to it. And so the applicant's case is that the deemed offer provisions were effectively and thus lawfully triggered; but that even though they were effectively and thus lawfully triggered, in this case the lawful implementation the deemed offer provisions would result in a situation which justifies a court, by dint of its powers under s.163 of the Act, interfering in the civil law consequences of a contract between private parties.

[45]The applicant thus uses the alleged unlawfulness (in the sense of offending s.163(1)(a) of the Act) of the dismissal here, not as a legal obstacle to a deemed offer being triggered, but instead as a factor which the court should employ in affording relief under s.163 of the Act. The proceedings in the Labour Court however remain squarely relevant for the s.163

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[14] I have had regard to Reeves & Another v Marfield Insurance Brokers CC & Another, 1996(3)SA 766 (AD), referred to by the respondents in their further written argument. The context and manner in which the words *"for any reason whatsoever"* appear in that case (at 768 D), are very different from the present matter.

[15] Answering affidavit, page 153, paragraph 81.

proceedings, because that court has the power retrospectively to reinstate the applicant. Should that occur, there would have been no dismissal, and so no event triggering the deemed offer provisions.

[46]The cornerstone facts for the applicant's case fall into two classes. First, there are the background facts which are common cause, as I have set them out above; namely that all the shareholders sacrificed upfront in order later to reap the anticipated substantial upside of the investments.

[47]The second class of facts is contentious. It comprises the notion that, given the events of 2014 and in particular the design and manner of the retrenchment process, the dismissal was meant to disown her, the troublesome minority, of her shares at a precipitously cheap price.[16]In other words, the retrenchment process was a means, she says, whereby to trigger the deemed offer provisions which, if implemented, would result in what would redound to an expropriation. The applicant says a valuation now will deprive her forever of the legitimate and anticipated return on past sacrifices.

[48]Accepting then that such is the applicant's case, the question is whether the respondents' central answer bowls it out. Their central answer is that in considering the applicability of s.163 of the Act, and its predecessor, s.252 of the Companies Act 61 of 1973, a minority does not establish unfairly prejudicial conduct (using the phrase loosely as a catch-all for conduct offensive under those sections) where the majority offers to buy out the minority's shares at a reasonable price. They rely on a principle articulated by Heher, JA in the SCA in Bayly & Others v Knowles[17] and the cases there quoted with approval.

[49]That argument, to be valid, must of course presuppose objectionable or otherwise unlawful conduct on the part of the majority; if it does not, and if the majority has been conducting itself lawfully, s.163 relief does not arise.

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[16] Founding affidavit, page 20, paragraph 62 to page 26, paragraph 73.
[17] 2010 (4) SA 548 (SCA).

[50]Before examining more closely the principle relied on by the respondents, two relevant dimensions must be identified. First, one is not here concerned with deadlock. The applicant, although an *"executive"*, was not part of the *"executive team"*, and her shareholding is so small that she would not be able to cause a deadlock in resolutions. In fact, she says in paragraph 97.1 (and no doubt can be held to it): *"I hold a small fraction of the issued share capital of Kapela and KIH, and am unable to (and do not intend to) cause disruption to the operation of the day to day business of the group."*

[51]Second, what one is really concerned with here is what in other jurisdictions has been called a *"squeeze out"*.[18] It invokes the question whether the majority is entitled, unreservedly, and relying on its own objectionable conduct, to terminate the investment of the minority provided only that a fair price is offered for its shares. The principle relied on by the respondents may now be considered.

[52]Returning then to Bayly: the applicant, Knowles, a 25.5% shareholder, sought to compel the sale to him by the respondent, Bayly, of the latter's 25.5% shareholding, on the basis of what Knowles considered was oppressive conduct on the part of Bayly. Bayly had earlier offered to buy out Knowles at what was admittedly a fair price; and, importantly, Bayly had the support of Martin, who held 29.17%.

[53]Knowles succeeded in the High Court, but the SCA upheld Bayly's appeal. Heher, JA referred[19] with approval to dicta by Lord Hoffman in the then House of Lords in O'Neill v Phillips[20] to the effect that where the majority shareholder wishes to put an end to the association, it would almost always be unfair for the minority to be excluded without a majority offer to buy its shares; and that the unfairness lay not in the exclusion per se of the minority, but in the exclusion without a reasonable offer.

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[18] See Paul Ratana, Fieldlaw (a Canadian internet publication), sub nom "Squeeze Out", www.fieldlaw.com.
[19] At [23].
[20] [1999] 1 WLR 1092 (HL) at 1106H to 1107C.

[54]To be fair, Bayly did not elevate these words to an immutable rule. Heher, JA expressly said that there might be circumstances in which the offer, even if reasonable, was so tainted by bad faith or ulterior motive as would excuse non-acceptance.[21]

[55]But more importantly, Heher, JA said that the interests of the company and of the shareholders that have stood apart should also be considered. The learned judge pointed particularly to the fact that Bayly, for all intends and purposes, commanded majority support in the company. In the end the SCA found that Knowles' application compulsorily to buy out Bayly should have been dismissed.

[56]One takes the following points away from Bayly. First, the discretion of the court remains. Second, that court was not concerned with a troublesome minority shareholder who was not part of the executive, and whose holding was so small as to render its ability to force a shareholders' deadlock moot. And third, Bayly was not concerned with the situation where the very offer was being challenged as the oppressive conduct.

[57] The respondents relied too Henochsberg on the Companies Act 71 of 2008[22]for the proposition that a court will not interfere with the management of a company, if its decisions are arrived at in accordance with the law, even if they adversely affect the minority's rights as a shareholder. That principle is accepted, with respect, as far as it goes.

[58]But one is of course not concerned here with the court being asked to interfere in the manner in which the majority manages the companies; one is concerned with something very different, being conduct of the companies and the majority designed solely to terminate the minority's membership. It must be remembered that one is viewing the matter from the perspective of the applicant's case. She says, as pointed out, that the retrenchment is a ruse; it is all just a deliberate plot to rid her of her shares.

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[21] At [24].
[22] Edited by Prof PA Delport, vol I, page 585.

[59]The respondents relied too on dicta in Visser Sitrus v Goedehoop Sitrus[23]to the effect that a South African court would take the principle of majority rule as its starting point in considering appropriate relief. But Visser also expressly referred with approval to Lord Hoffman who said in Re Saul D Harrison & Sons plc[24] that *"... keeping promises and honouring agreements is probably the most important element of commercial fairness."*

[60]This resonates with the applicant's express reliance on the common cause background[25] of past sacrifice for future reward. But since this understanding is not part of the shareholders' agreement, it is as well that one reflects briefly on whether a court has the power under s.163 to grant relief which overrides the express terms of a shareholders' agreement protected by a Shifren clause.

[61]The feature of statutory inroads into pacta sunt servanda is well-recognised in many fields of our law: from the sale of immovable property to suretyships to credit agreements to execution of judgments. Therefore, provided only that s.163 is sufficiently wide in its terms, there is no reason why the terms of the shareholders' agreement would foreclose reliance on s.163.

[62]The starting point for the broader consideration of the respondents' submission is the text of s.163, and particularly its absence of limiting language. Two recent judgments in this division, referred to by the applicant, have expressly underscored the wideness of the section. In Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others,[26] Satchwell, J described the general approach to the interpretation of the predecessor s.252 of the 1973 Companies Act as being to advance the remedies rather than to limit them; and she transposed that general approach onto s.163 of the present Act.

[63]With respect to the learned judge, there seems every legitimate justification to have done so. The legislature is taken to have been aware of the existing case law when it repeals and

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[23] 2014(5)SA 179 (WCC) at [61], [62].
[24] [1995] 1 BCLC 14 at 18.
[25] Founding affidavit, page 10 paragraph 14; answering affidavit, page 161, paragraph 120.
[26] [2012]4 All SA 203 (GSJ) at [60], [61].

re-enacts legislation, and that notwithstanding it introduced no limiting words here. Satchwell, J's approach was subsequently vindicated by the SCA in Grancy Property Ltd v Manala & Others.[27]

[64]Petse, JA said in Grancy, of the background to the current legislation:

"[22] There is a substantial body of case law on the import of s 252 of the Companies Act 61 of 1973, which, in material respects, is the previous equivalent of s 163 of the Act. In my view there is a benefit to be derived from considering the jurisprudence developed over the years as to what constitutes oppressive or unfairly prejudicial conduct. To determine the meaning of the concept of 'oppressive' in s 163 it is apposite to refer to Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others 1968 (1) SA 517 (C) which held (at 525H – 526E):

'I turn next to a consideration of what is meant by conduct which is oppressive, as that word is used in sec 111 bis or sec 210 of the English Act. Many definitions of the word in the context of the section have been laid down in decisions both of our Courts and in England and Scotland and as I feel that a proper appreciation of what was intended by the Legislature in affording relief to shareholders who complain that the affairs of a company are being conducted in a manner oppressive to them is basic to the issue which presently lies for decision by me, it is necessary to attempt to extract from such definitions a formulation of such intention. Oppressive conduct has been defined as unjust or harsh or tyrannical . . . or burdensome, harsh and wrongful . . . or which involves at least an element of lack of probity or fair dealing . . . or a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely. . . .

"(T)yrannical" conduct represents a higher degree of oppression than conduct which is "harsh" or "unjust". The Shorter Oxford Dictionary defines "tyrannical" as "severely oppressive; despotically harsh or cruel. For reasons which I shall now set out I do not think it is necessary for an applicant to have to go to the lengths of establishing conduct of such a nature before he is entitled to relief under sec 111 bis.' [Citations omitted.]

[23] There is also the decision of the House of Lords in H Scottish Co-operative Wholesale Society Ltd v Meyer [1959] AC 324 ([1958] 3 All ER 66 (HL)) at 342 which is to the effect that the concept of 'oppressive' denotes conduct that is 'burdensome, harsh and wrongful' and that such conduct would include lack of probity or good faith and fair dealing in the affairs of a company, to the prejudice of some portion of its members.

[24] The next case to which I wish to refer is Garden Province Investment and Others v Aleph (Pty) Ltd and Others 1979 (2) SA 525 (D) at 531 where Friedman J said:

'It seems to me that a minority shareholder seeking to invoke the provisions of s 252(1) of the Companies Act must establish not only that a particular act or omission of a company results in a state of affairs which is unfairly prejudicial, unjust or inequitable to him, but that the particular act or omission itself was one which was unfair or unjust or inequitable.'"

[27] 2015 (3) SA 313 at [26].

[65]The second judgment in this division is that of Peel and Others v Hamon J & C Engineering (Pty) Ltd and Others,[28] where Moshidi, J referred with approval to the Canadian case of Ontario Inc v Harold E Ballard Ltd E[29] where it was said (emphasis supplied):

"Shareholder interest would appear to be intertwined with shareholder expectations. It does not appear that the shareholder expectations which are to be considered are those that a shareholder has as his own individual wish list. It must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders."

[66]Without necessarily linking these words to *"legitimate expectation"*, a concept with its own substantial baggage,[30] one recognises again, in this context of *"the compact of shareholders,"* the common cause background of past sacrifice for future reward to which reference was made earlier, and on which the applicant squarely relies.

[67]To much the same effect is the following dicta from the English Court of Appeal in *Tobian Properties Ltd,*[31] quoted by the applicant in her further written argument, per Arden LJ (emphasis supplied):

"21.The key phrase in section 994(1),[32] "unfairly prejudicial", comprises two elements, unfairness and prejudice but both of these must be understood in the context of company law. The concept of fairness inherent in this phrase is flexible and open-textured but it is not unbounded. The courts must act on a principled basis even though the concept is to be

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[28] 2013 (2) SA 331 (GSJ), at [49], [50].
[29] (1991) 3 BLR (2d) 113 (Ont Div Ct) at 185 to 186.
[30] Compare Meyer v Iscor Pension, 2003 (2) SA 715 (SCA) 733, where the SCA was concerned with the doctrine of *"substantive legitimate expectation"* of English law applied in connection with administrative law. At p733B, Brand, JA held: *"These judgments may be understood to constitute authority for the proposition that in English law the doctrine of legitimate expectation has now developed into a comprehensive code that embraces a spectrum of administrative relief ranging from a claim for procedural fairness to a claim for substantive relief. ... Despite these decisions, I believe that we must decline Meyer's invitation to follow them in this case. The question whether we should emulate the developments in English law by incorporating what has been described as the doctrine of substantive legitimate expectation into our law is a difficult and complex one. Before simply transplanting a legal concept from one legal system of law to another it is imperative first to examine the context in which the concept originated and developed in a system of origin. In deciding whether to adopt the doctrine of substantive legitimate expectation as part of our law, we will have to consider the possibility that the doctrine was developed as a solution to problems arising from the rule in English law that, generally speaking, an undertaking without valuable consideration is not enforceable. Since our law does not require valuable consideration for the enforceability of an undertaking... the problem does not arise."*
[31] [2012] EWCA Civ 998.
[32] The English equivalent of s.163.

approached flexibly. They cannot decide whether to grant or refuse relief from unfair prejudice on the basis of palm-tree justice. The impact of the context was explained by Lord Hoffmann in O'Neill v Phillips [1999] 2 BCLC 1...

22. One of the most important matters to which the courts will have regard is thus the terms on which the parties agreed to do business together. These are commonly found in the company's articles. They also include any applicable rights conferred by statute. In addition, the terms on which the parties agreed to do business together include by implication an agreement that any party who is a director will perform his duties as a director."[33]

[68]It seems plain then that agreements and understandings of the non-formal kind may, depending on the circumstances, found justification for relief under s.163.

[69]The respondents also relied, in their further written argument, on the judgment of Vermooten, J in Investors Mutual Funds Ltd v Empisal (SA) Ltd.[34] In that case the minority applied to interdict the holding of a meeting in terms of s.228 of the 1973 Companies Act. The learned judge refused the relief, holding that s.252 contained no provision empowering a court to interfere with the ordinary running of the business of a company by its directors or controlling shareholders. He held that if a court were to find that ultimately the transaction concerned was unfairly prejudicial to the minority, the remedy of the latter was to be bought out by the majority, and so not be locked into the unfavourable transaction.

[70]The present case is, however, not concerned with a minority seeking to interdict the ordinary running of the company, so to avoid being locked into an unfavourable transaction. Here the minority seeks to achieve the opposite: to interdict mala fide conduct under a shareholders' agreement, so as to avoid being locked out of favourable transactions. The running of the companies is unaffected; there is no deadlock.

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[33] See too the quotations listed in from some English courts collected in McMillan NO v Pott and Others, 2011(1) SA 511 (WCC), referred to by the applicant in paragraph 20 of her original heads of argument.
[34] 1979 (3) SA 170 at 177B.

[71]The respondents also quote in their further written argument from the judgment of Trollip, JA in the locus classicus of Sammel v President Brand Gold Mining Co Ltd.[35] But here the slip shows in the respondents' argument, because although that case was concerned with a take-over, it was held to have been bona fide. Trollip, JA referred[36] to English cases dealing with *"expropriation"* cases, where the majority passed resolutions the effect of which was to take over minority holdings.

[72]In two of the cases to which he referred the relevant resolutions were held impeachable as not having been passed bona fide for the benefit of the company as a whole, but for the advantage of the majority at the expense of the minority. In two others, the resolutions were upheld, because they were found to have been passed for the benefit of the company as a whole.

[73]The learned judge said, earlier in the judgment:[37]

> *"Minority shareholders are entitled to be protected against the acts of majority shareholders only if the majority have not acted in good faith and for the benefit of the corporators as a general body; i.e. if the effect of what has been done is to discriminate between the majority shareholders and the minority shareholders, so as to give the former an advantage of which the latter were deprived."*

[74]The present case seeks an injunction against mala fide, not bona fide, conduct. One is concerned here with a mala fide application of the provisions of a shareholders' agreement, aimed at expropriating the minority; not with conduct bona fide intended in the best interests of the companies.[38]

[75]Concluding on the question of limitations to the reach of s.163, it is in my view fair to say of that section: that its reach is expressly and deliberately wide, both as regards jurisdiction

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[35] 1969 (3) SA 629 (AD) at 680 to 681.
[36] At 680 G to 681 A.
[37] At 646 D to E.
[38] The respondents afford a substantial part of their further written argument to submitting that the applicant's retrenchment was genuine. But given the form of process with which one is engaged, effectively one defers, at least for now, to the applicant's version of the events.

and as regards remedy;[39] that it stands not apart from its history nor of that of its predecessors; that well-trodden fundamental principles of our company law remain the prism through which it must be regarded; but that those principles include notions of bona fides, probity, fair dealing, and respect for clear and legitimate understandings between company members.

[76]In response then, to the respondents' central submission, there is in my view no principle of fairness, derived from the larger concept of majority rule in company law, which compels a court always to honour a majority offer to buy out a minority, provided only that the price was right, and irrespective of the circumstances. And here, as pointed out, the circumstances are two-fold: first, the common cause background that the shareholders all sacrificed in the early days so as to benefit in the later years, yet to come; and second, the retrenchment process, mala fide in its design and application, so as to trigger the deemed offer provisions by means of which to expropriate the applicant's shares at undervalue.

[77]I also do not believe that it is an answer to say that the fair value provisions in the shareholders' agreements would make appropriate provision for the applicant's value anticipation. Of course there are nowadays intricate valuation models in the market by means of which to try unravel the crystal ball, but ultimately they do not match (to import half a metaphor) the bird in the hand.

[78]It follows that in my view a prima facie right has been shown to protect the share value, as prayer 1.3 of Part B anticipates.

[79]The respondents' submission that the prayer as framed is obviously too wide, must be accepted; and indeed it was accepted by the applicant, who has limited it in her proposed draft order by the words, *"other than within the ordinary course of business"*. Is it still too wide? There may be an argument that the first and second respondents' endeavour is no

[39] Louw and Others v Nel 2011 (2) SA 172 (SCA) at [21].

"ordinary business"; but in my view the proposed words refer to ordinary, bona fide conduct in the course of the particular business upon which the two companies are actually engaged.

[80]Has the applicant shown a well-grounded apprehension of irreparable harm if the prayer 1.3 relief (so limited) is not granted; the absence of a suitable alternative remedy; and a favourable balance of convenience? That must now be considered.

A well-grounded apprehension of irreparable harm, the absence of a suitable alternative remedy and a favourable balance of convenience

[81]These requirements may be grouped together since they are interlinked. As regards the first, there is a principle that in vindicatory actions harm is rebuttably presumed.[40]This is not a vindicatory action in the usual sense, but it is an action to protect the value applicant's property. The same underlying considerations would apply: an owner whose property is lost or damaged prima facie suffers a loss.

[82]The respondents' answers[41] to these points are that there is no evidence of a threatened dissipation of the companies' assets; and that prayer 1.3 would interfere with the ordinary functioning of the companies. As concerns the first, as has been pointed out, the respondents were required to have gone further, and to have shown why dissipation of the companies' assets other than in the ordinary course of business would not have the effect of gnawing away at the value of the applicant's shares.

[83]Bear in mind too that the applicant has alleged egregious conduct on the part of the respondents – still all subject to proof, of course – and the prospect of irreparable harm is not so remote that it may be disregarded.

[84]As to whether an order in terms of payer 1.3 would hamper the ordinary functioning of the companies, in my view the qualification conceded by the applicant at the hearing answers the point.

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[40] Stern & Ruskin NO v Appleson, 1951 (3) SA 800 (W) at 813 B to C.
[41] Respondents' heads of argument, page 11, paragraphs 43, 44.

[85]It follows that the applicant has satisfied the requirements for a temporary interdict in the terms of prayer 1.3 as amended. Prayers 1.1 and 1.2 as granted by Sutherland, J will be extended, and prayer 1.4, substantially as proposed by the respondents in their tender (with the applicant's gloss), will issue. The issue of costs remains.

Costs

[86]In considering this issue, the following three factors weigh. First, after the respondents' 13 June 2016 reinstatement of their tender the only issue of substance between the parties was whether an order in terms of prayer 1.3 as then formulated, should issue. Prayer 1.3 as then formulated was plainly too wide, and it was saved only by the applicant's concession at the hearing by limiting it to dispositions other than within the ordinary course of the companies' business.

[87]Second, the respondents too could of course have included prayer 1.3, suitably qualified as in the event it was, in their tender, but they did not.

[88]Third, the applicant established a prima facie case on the basis of allegations of impropriety on the part of the respondents. The assertion that the retrenchment process was all a dishonest ruse, mala fide designed only to trigger a share expropriation, will yet require persuasive proof.

[89]In my view the appropriate order is to direct that the costs of this application be costs in the trial, and such an order will issue.

Conclusion

[90]In the result I make the following order:

a) Pending the action instituted by the applicant against the respondents under case number 39903/2015 in this court, the respondents are interdicted from:

(i) Taking any steps to interfere with the applicant's ownership and possession of her shareholding in the first and second respondents;

(ii) Taking any steps in furtherance of the purported deemed offer for the applicant's shareholding, in terms of clause 10 of the shareholders' agreements in respect of the first and second respondents;

(iii) Disposing of any funds or assets in the first or second respondents other than within the ordinary course of business without providing adequate protection for the preservation of the value of the applicant's shareholding in the first and/or second respondents.

b) Any dividend, distribution or payment by the first or second respondents which would, but for the purported deemed offer for the applicant's shareholding be allocable to the applicant will, pending the aforesaid action, be paid into an interest-bearing trust account with attorneys Werksmans, established under s.78(2)(A) of the Attorneys Act 53 of 1979, and

(i) The account will be designated "The disputed payments in case 39903/2015 in the South Gauteng High Court"; and

(ii) No payments will be made from this account save by express written agreement between the parties, or by order of court.

c) The costs of this application will be costs in the said action.

WHG van der Linde
Judge, High Court
Johannesburg

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