THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 45/10

JOHANNES PETRUS LOUW	**First Appellant**
WILLEM HOFMEYR DU PREEZ	**Second Appellant**
LUCAS LEJARA MOTHUPI	**Third Appellant**
KURT ANDY LINDOOR	**Fourth Appellant**
LEJARA BUSINESS INTELLIGENCE (PTY) LTD	**Fifth Appellant**
LEJARA INVESTMENT HOLDINGS	**Sixth Appellant**
LEJARA ERP SOLUTIONS (PTY) LTD	**Seventh Appellant**
LEJARA INFORMATION MANAGEMENT (PTY) LTD	**Eighth Appellant**
LEJARA ENTERPRISE SOLUTIONS (PTY) LTD	**Ninth Appellant**
LEJARA ENTERPRISE OUTSOURCING (PTY) LTD	**Tenth Appellant**
LEJARA CHANGE MANAGEMENT (PTY) LTD	**Eleventh Appellant**

and

CHRISTIAAN HENDRIK NEL	**Respondent**

Neutral citation:	***Louw v Nel*** **(45/10) [2010] ZASCA 161 (1 December 2010)**
BENCH:	**LEWIS, PONNAN, MHLANTLA and SHONGWE JJA, and BERTELSMANN AJA**
HEARD:	**18 NOVEMBER 2010**
DELIVERED:	**1 DECEMBER 2010**

SUMMARY: Companies Act 61 of 1973 – s 252 – relief from oppression – disputes of fact – cannot be resolved on the papers.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Mavundla J sitting as court of first instance).

1 Both the appeal and cross appeal are dismissed, in each instance with costs, such costs, to include, where applicable, those consequent upon the employment of two counsel.

2 Paragraph 2 of the order of the court below is set aside and in its stead is substituted:

'The applicant is ordered to pay the costs of the application'.

JUDGMENT

PONNAN JA (LEWIS, MHLANTLA and SHONGWE JJA and BERTELSMANN AJA concurring):

[1] This is a case that is by no means easy for an appellate court satisfactorily to deal with, not least because of the rather voluminous and sometimes conflicting affidavits, but also, as importantly, because events intervened as the matter progressed, rendering the principal relief that was originally sought obsolete. Much of the difficulty in this matter arises as well from the manner in which the founding papers were cast and the paucity of the information that they contained in respect of certain crucial aspects of the case. Whether those should prove to be an insuperable obstacle to a decision in the matter is what calls for consideration.

[2] The respondent, Christiaan Nel (Nel), the first appellant, Johannes Louw (Louw) and the second appellant, Willem du Preez (Du Preez), formed a partnership known as EPI-USE Financials Partnership (the partnership), which commenced business on 1 November 2002. The partnership conducted business in the

implementation and continuous operation, including training and problem-solving, of a computer programme used by big business known as SAP. During early 2003 the partnership became involved in certain projects together with the third appellant, Lukas Lejara Mothupi (Mothupi).

[3] By that stage the appreciation had dawned on the three partners that if the partnership was to secure state contracts it was necessary for it to implement a black economic empowerment policy. Mothupi appeared well-suited to achieve that strategic vision of the partnership. After negotiations between the three partners and Mothupi it was decided that the future business of the partnership should be conducted through a company and to that end a shelf company, which was registered and incorporated on 10 January 2003, was acquired. The name of the shelf company was changed first to Lejara Business Intelligence (Pty) Ltd and thereafter to Lejara Consulting (Pty) Ltd (the company). Each of Nel, Louw and Du Preez held 16 per cent of the shares in the company. Mothupi held 52 per cent of the shares. Of his 52 per cent shareholding Mothupi explains:

'I was, however, only the owner of 16% of the shares and not 52% because I held the balance of the shares, namely 36%, as nominee for previously disadvantaged individuals which we intended to become shareholders and directors of [the company] in order to comply with the Black Economic Empowerment legislation. It was the understanding that if no suitable candidates were available to take up the 36% shares held by me, the shares would be divided equally amongst the applicant, the first respondent, the second respondent, the third respondent and myself.'

He continues:

'The four of us were the sole directors of the company and the four of us each brought the following skills to the [company]:

[Nel]: SAP management accounting (controlling) skills and SAP business planning skills;

[Louw]: SAP management accounting (controlling) skills and SAP business planning skills;

[Du Preez]: SAP financial accounting skills and SAP business planning skills;

Myself: SAP logistic skills.

. . .

I was not entitled to rely on the additional 36% shareholding when voting and at meetings of the directors each director had an equal vote which was cast by the showing of hands. I chaired the meeting of directors and had a deciding vote if a stalemate would arise.'

[4] On 23 May 2003 what was termed a 'previously disadvantaged individual', Bhadrakan Chibi, was awarded 16 per cent of the shares in the company which

shareholding was allocated from the 36 per cent held by Mothupi as nominee. Shortly thereafter Chibi returned his shares and resigned as a director. His shares were distributed to the four remaining directors and shareholders. On 1 April 2004 the fourth appellant, Kurt Lindoor (Lindoor), purchased 16 per cent of the Company's shareholding for the sum of R10 000 per share. This was made up of four per cent of the shareholding of each of the other four shareholders. The effect of that transaction was that Mothupi held 36 per cent of the shares and each of the others 16 per cent.

[5] In August 2004 it was decided that the company would expand its business operation. Money had to be borrowed from a financial institution and security in the form of suretyships was required from each of the shareholders for that purpose. That marked the beginning of discontent and distrust between Nel on the one hand and the other shareholders on the other.

[6] According to Nel it 'soon became evident to him that there was a move afoot to sideline him and force him to dispose of his interest in the company'. The other directors on the other hand formed the view that Nel:

'acted in an obstructive and disruptive manner; breached his fiduciary duty as director of [the company]; caused [the company] irreparable harm and damages and strained the relationship with the other directors and shareholders'.

Things came to a head on 16 September 2005 when a general shareholders' meeting of the company resolved by a majority vote of 84 per cent for and 16 per cent against (Nel voting against the motion) that Nel be removed as a director of the company. The allegations levelled against him were inter alia that he had breached his fiduciary duty, stolen the company's intellectual property and conducted himself dishonestly and to the general prejudice of the company.

[7] According to Nel, on 21 November 2005 he attended a shareholders' meeting of the company where he was informed that the 'shareholders loans which were due, could not be paid because that would effectively place [the company] in an insolvent position'. Nel thus formed the view that the company was unable to pay its debts as contemplated by s 344(f) of the Companies Act 61 of 1973. He responded by launching an application on 30 November 2005 to the North Gauteng High Court (Pretoria). To the extent here relevant he sought an order:

'1 Placing the [company] under winding up in the hands of the Master of the above Honourable Court.

2 Directing that the costs of this Application be costs in the winding up of the [company];

Alternatively to paragraphs 1 - 2

3 Declaring that the affairs of the [company] is being conducted in a manner unfairly prejudicial, unjust or inequitable to the Applicant as contemplated in Section 252(1) of the Companies Act, 61 of 1973;

4 Directing that [Louw], [Du Preez], [Mothupi] and [Lindoor] purchase [Nel's] shares in [the company] at a value to be determined by an independent auditor appointed by agreement between the [parties] and, failing such agreement by an independent auditor duly appointed by the current President of the Institute of Chartered Accountants of the Republic of South Africa, having regard to the provisions of Section 252(3) of the Companies Act 61 of 1973;

5 Directing that [Louw], [Du Preez], [Mothupi] and [Lindoor] pay the costs of this Application, jointly and severally, the one paying the other to be absolved.'

[8] In his founding affidavit in support of the winding-up application Nel alleged that:

'In support of my contentions that it would be just and equitable to place [the company] under winding up, I rely, *inter alia* on the following:

frauds have been perpetrated in the conduct and management of the affairs of the company by their controllers namely [Louw], [Du Preez], [Mothupi] and [Lindoor];

I have been excluded from the business affairs of [the company] and its affairs and business have been conducted to its detriment and to my prejudice as an excluded outside shareholder when the intention at the formation of the business of the company was to participate as an equal partner and shareholder;

. . .

the main business of [the company] has been disposed of to other companies whose directors and shareholders are common with that of [the company], save that I have been excluded, [the company] has not been compensated for such disposal and this was in violation of my rights in terms of the Companies Act.

[Louw], [Du Preez], [Mothupi] and [Lindoor] have contrived to ensure that:

(i) the business of [the company] has ceased trading;

(ii) the assets of [the company] have been transferred to companies with common shareholders and directors of [the company] to my exclusion, which companies are *inter alia*:

De La Harpe Trading (Six) (Pty) Ltd [De La Harpe];

Matlotlo Trading 26 (Pty) Ltd [Matlotlo];

[the company] has ceased invoicing for work undertaken by it for its customer base and is not participating in those revenues;

the sales representatives engaged by [the company] have been instructed to, and are no

longer taking orders in the name of [the company] but are now canvassing business for those other entities;

the entire customer base of [the company] has been diverted to the aforementioned companies;

the sales representatives of [the company] have been instructed to and are furnishing quotations to customers of [the company] in the name of the aforementioned companies;

[the company's] customer base and the market which it services have been informed that the affairs of [the company] are being wound down.

there has been a wrongful and wholesale diversion of the business of [the company] to the aforementioned companies;

. . .

I have been removed as director of [the company] and have now been totally excluded from its affairs.

. . .

My entire interest in [the company] has been now eroded and there are in fact now no assets in [the company].

As a result of this conduct and other conduct to which reference is made in this affidavit, there has been a complete breakdown of the relationship of mutual trust and confidence between [Louw], [Du Preez], [Mothupi] and [Lindoor], on the one hand and me on the other. In addition I have a justifiable lack of confidence in their integrity and, in turn, in their ability to honestly manage the affairs of [the company] and to ensure that I receive what dividend is due to me.'

[9] And in support of the alternative relief sought by him, Nel stated:

'(a) In the alternative to winding up, I seek relief from oppression in terms of section 252 of the Act.

(b) I maintain that the affairs of [the company] are being conducted in a manner unfairly prejudicial, unjust or inequitable to me.

(c) I seek relief from oppression in terms of Section 252(3) of the Act, in the form of an Order directing that [Louw], [Du Preez], [Mothupi] and [Lindoor] purchase my shareholding against [the company]. [Louw], [Du Preez], [Mothupi] and [Lindoor] are in a financial position to purchase my shares. In order to achieve this objective I request the appointment of an independent auditor to be agreed by [Louw], [Du Preez], [Mothupi] and [Lindoor], on one hand and me on the other, failing agreement by an independent auditor appointed by the President for the time being, of the Institute of Chartered Accountants for the Republic of South Africa.'

[10] At various stages the record in this matter came to be considerably lengthened by a steady accretion of affidavits. Thus after the usual three sets of affidavits had been filed, which were already quite voluminous, the parties with a blatant disregard for the rules of court, appropriated to themselves the right to file all

manner of further affidavits. The effect is that the papers may have been needlessly long in some respects and, as shall become apparent, grossly deficient in others.

[11] Significantly, in a duplicating affidavit filed on behalf of the appellants during June 2006 Mothupi states:

'that the respondents [Louw, Du Preez, Mothupi and Lindoor] herewith consent to an order in terms of prayer 4 of the notice of motion without admitting that the affairs of the first respondent are being conducted in a manner unfairly prejudicial, unjust or inequitable to the applicant'.

The response it elicited from Nel was:

'I note in . . . the duplicating affidavit, the respondents' consent to an order in terms of prayer 4 of the notice of motion. While I am quite prepared to have my 21%[1] member's interest bought out by the respondents, the wording of prayer 4 ought to be amplified in order to address and resolve the issue between the respondents and me as well as to do me justice.

The purported consent given in prayer 4 of the notice of motion in its current wording was merely a strategy by the respondents to attempt to cheat me of my legitimate interest in [the company], consistent with what they have done to date.

Without an amplification of paragraph 4, the respondents, by their consent, are attempting to avoid dealing with the issue and hope to purchase my shares for no value.

In essence what the respondents hope to achieve is the purchase of my shares in [the company] at a worthless valuation because, in the interim while this matter has progressed, they have made the respondent progressively worthless.

In order to do proper justice, the valuation of my interests in [the company] must be undertaken on the basis that the business appropriated by the respondents and placed into Matlotlo Trading 28 (Pty) Limited (subsequently renamed Lejara ERP Solutions (Pty) Limited) and De La Harpe Trading (Six) (Pty) Limited (now renamed Lejara Business Intelligence (Pty) Limited). This is so because my principal complaint was that what was in essence a partnership business has been appropriated by four of the partners into other entities controlled by them.

As an alternative to winding up an order for payment of my share was sought, which appears now to have been consented to. However, the intention behind the consent is to consent to a purchase of my share of the business after it has been stripped of its assets and revenue.

It is only just and equitable that if I am to be bought out, the purchase of my interest must include the business which has been stripped and transferred to the other entities.'

[12] Thereafter on 14 September 2006 Nel served and filed a notice of amendment. It read:

'By the insertion immediately after prayer 4 of the notice of motion of the following:

For the purposes of such valuation, the said value shall be determined as the equivalent of

1 Nel appears to allocate 21 per cent of the shareholding to Louw, Du Preez, Mothupi and himself and 16 per cent to Lindoor.

21% of the value of the businesses, as a going concern, of Lejara ERP Solutions (Pty) Ltd (formerly known as Matlotlo Trading 28 (Pty) Ltd), Lejara Business Intelligence (Pty) Ltd (formerly known as De La Harpe Trading (Six) (Pty) Ltd), Lejara Investment Holdings (Pty) Ltd, any other entity trading or using the name Lejara in the SAP consulting and/or SAP software industry and [the company] which shall be deemed to be one going concern consolidated as such and all inter-company liabilities or expenses shall be ignored.

The said auditor shall have the same powers as a referee appointed in terms of section 19 *bis* of the Supreme Court Act of 1959 and the provisions of section 19 *bis* (3), (4), (5) and (6) shall be applicable.'

[13] It was met with the objection that 'the amendment that [Nel] seeks is an order against entities which is not a party to this application'. In response Nel filed a supplementary affidavit in which he alleged that:

'Accordingly, to the best of my knowledge there are at least five companies with the name Lejara that have appropriated the business of [the company]. I annex hereto marked "RA39" a copy of the company search printouts. These companies are:

Lejara Business Intelligence (Pty) Limited[2] (which was formerly De La Harpe Trading Six (Pty) Limited).

Lejara Investment Holdings (Pty) Limited.[3]

Lejara ERP Solutions (Pty) Limited[4] (which was formerly Matlotlo Trading 28 (Pty) Limited).

Lejara Informational Management (Pty) Limited.[5]

Lejara Enterprise Solutions (Pty) Limited[6] (which featured in the restraint of trade application).

With the exception of Informational Management (Pty) Limited, all the Lejara companies have, [Louw], [Du Preez], [Mothupi] and [Lindoor] as their directors. In Lejara Informational Management (Pty) Limited the directors are [Louw], [Du Preez], and [Lindoor] and two other directors, [Mothupi] is not a director.

All the companies, with the exception of Lejara Informational Management (Pty) Limited have exactly the same registered office, Unit L13 in the Enterprise Building, Mark Shuttleworth Street, 0087. Lejara Informational Management (Pty) Limited has its registered office at 287 Lynwood Road, Menlo Park. In the case of Lejara Enterprise Solutions (Pty) Limited, it seems that the details of its registered office, according to the company search, have been incorrectly captured, however according to the affidavit of [Mothupi] in the restraint proceedings, it shares its registered office with the other Lejara entities. In this regard I refer to annexure "RA37" above.

By reason of the above, and because of the time that has elapsed since the commencement of these proceedings, as mentioned in my answering affidavit to the respondents' duplicating affidavit,

2 The Fifth Respondent.
3 The Sixth Respondent.
4 The Seventh Respondent.
5 The Eight Respondent.
6 The Ninth Respondent.

I shall be seeking, in the first instance, an order in terms of an amended prayer 4 of the notice of motion.

By reason of the additional facts which have come to light since this matter was last set down, the original proposed notice of amendment, annexure "RA36", ought to be further modified to include a reference to Lejara Informational Management (Pty) Limited, Lejara Enterprise Solutions (Pty) Limited as well as excluding payments made by [Louw], [Du Preez], [Mothupi] and [Lindoor] to themselves by way of remuneration after 31 July 2005.'

[14] As presaged in his supplementary affidavit, prayer 4 of the notice of motion was amended once again by Nel, this time to read:

'Directing that [Louw] [Du Preez] [Mothupi] and [Lindoor] purchase [Nel's] shares in [the company] at a value to be determined by an independent auditor appointed by agreement between [the parties] and, failing such agreement, by an independent auditor duly appointed by the current President of the Institute of Chartered Accountants of the Republic of South Africa, having regard to the provisions of Section 252(3) of the Companies Act, 61 of 1973;

For the purposes of such valuation, the said value shall be determined as the equivalent of 21% of the value of the businesses, as a going concern, of Lejara ERP Solutions (Pty) Ltd (formerly known as Matlotlo Trading 28 (Pty) Ltd), Lejara Business Intelligence (Pty) Ltd (formerly known as De La Harpe Trading (Six) (Pty) Ltd), Lejara Investment Holdings (Pty) Ltd, Lejara Informational Management (Pty) Limited, Lejara Enterprise Solutions (Pty) Limited, any other entity trading or using the name Lejara in the SAP consulting and/or SAP software industry and [the company] which shall be deemed to be one going concern consolidated as such and all inter-company liabilities or expenses, and all payments made to [Louw], [Du Preez], [Mothupi] and [Lindoor] by way of remuneration from [the company] after 31 July 2005, shall be ignored.

The said auditor shall have the same powers as a referee appointed in terms of section 19 *bis* of the Supreme Court Act of 1959 and the provisions of section 19 *bis* (3), (4), (5) and (6) shall be applicable.'

[15] The matter was argued before Mavundla J during October 2007. By then a further two entities – Lejara Enterprise Outsourcing (Pty) Ltd[7] and Lejara Change Management (Pty) Ltd[8] had been joined as respondents in the application. Moreover, by that stage the company had been wound up at the instance of a third party creditor. Judgment was handed down some 18 months later on 19 March 2009. The learned judge ordered Louw, Du Preez, Mothupi and Lindoor to:

'purchase [Nel's] shares in [the company] at a value to be determined by an independent auditor appointed by agreement between [the parties] and, failing such agreement by an independent auditor duly appointed by the current President of the Institute of Chartered Accountants of the

7 The Tenth Appellant.
8 The Eleventh Appellant.

Republic of South Africa, having regard to the provisions of Section 252(3) of the Companies Act 61 of 1973; [and]

individually, jointly and severally, the one paying the others to be absolved, . . . pay the costs of this application'.

Leave to appeal and to cross appeal was granted by the court below.

[16] The order of the court below mirrored in all material respects that consented to by Louw, Du Preez, Mothupi and Lindoor. That notwithstanding they sought and obtained leave to appeal against the judgment and order of the learned judge. So did all of the Lejara entities, the fifth to 11th appellants, although none of them was implicated by the terms of the order of the high court. The judgment of the high court is silent on the fate of the application against the fifth to 11th appellants. Presumably they would have been entitled to a dismissal of Nel's claim as against them and an order of costs in their favour. But that is not the basis on which they are on appeal before us and nothing further need be said about that. The company in the meantime having been placed under winding-up took no part in the appeal. On the eve of the hearing of the appeal, one of the liquidators filed an affidavit with this court which stated:

'I and my co-liquidator have no intention or desire to intervene or participate in these proceedings nor cause the insolvent company to participate therein as same is considered a dispute between the shareholders of the insolvent company in which the liquidators and the insolvent company have no interest.

I and my co-liquidator undertake to abide the decision of this Honourable Court and will sanction any transfer of shares of the insolvent company pursuant to any order made or confirmed by this Honourable Court in respect of the purchase of such shares.'

[17] Against that backdrop the decision by the appellants to prosecute this appeal is perplexing. There is some suggestion in the heads of argument filed on behalf of the appellants that the 'consent' amounted to no more than an offer, which was not accepted by Nel, but rather met with a counter-offer in the form of an amendment to his notice of motion. I do not agree. In my view the 'consent' amounted to a formal admission. In motion proceedings the parties' affidavits constitute both their pleadings and their evidence (see *National Director of Public Prosecutions v Phillips & others*[9] and the cases there cited). In *Gordon v Tarnow*,[10] Davis AJA explained the

9 2002 (4) SA 60 (W) para 36.
10 1947 (3) SA 525 (A) at 531.

import of a formal admission in these terms:

'But this admission in the plea is of the greatest importance, for it is what *Wigmore* (paras 2588-2590) calls a "judicial admission" (cf the *confessio judicialis* of Voet (42.2.6)) which is conclusive, rendering it unnecessary for the other party to adduce evidence to prove the admitted fact, and incompetent for the party making it to adduce evidence to contradict it (See also *Phipson* (7th ed., p 18))'.

And in *Water Renovation (Pty) Ltd v Gold Fields of SA Ltd*[11] it was expatiated upon thus:

'In regard to counsel's first submission, I do not agree that the admission was not a formal admission. It was made in the counterstatement as a formal admission of an allegation made in the statement of particulars, and it constituted what *Wigmore on Evidence* vol IX paras 2588-90 calls a "judicial admission". Such an admission is binding upon the party making it, ie it prohibits any further dispute of the admitted fact by the party making it and any evidence to disprove or contradict it (para 2590). Compare *Gordon v Tarnow* 1947 (3) SA 525 (A) at 531-2 where Davis AJA said:

"*Wigmore* (*loc cit*), speaking of judicial admissions in general, refers to the Court's discretion to relieve a party from the consequences of an admission made in error. It does not seem to me that such a discretion could be exercised, in a case where the admission has been made in a pleading, in any other way than by granting an amendment of that pleading . . . Here, there has at no stage been any such application to amend. But it is only right to add that in any case I see no valid grounds for thinking that there has been any error."'

It follows that the appellants' appeal is misconceived and it must fail. That leaves the cross appeal to which I now turn.

[18] In the present case it seems clear that the parties came together on the basis, substantially, of a partnership between them. The company can properly be designated a small private company. It was at the instance of the partnership that the company was formed. It is thus undisputed that there ought to exist between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to a partnership business.[12]

[19] By the time the matter came to be argued before the learned judge in the high court the company had already been wound up by a third party creditor. Nel thus restricted the relief that he sought to that available to him under s 252 of the Act. Section 252 provides a member with the means of obtaining relief from unfairly prejudicial, unjust or inequitable acts or omissions of a company or conduct of its

11 1994 (2) SA 588 (A) at 605H-J.
12 See *APCO Africa (Pty) Ltd & another v APCO Worldwide Inc* 2008 (5) SA 615 (SCA).

affairs. It provides:

'(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or some part of the members of the company, may, subject to the provisions of subsection (2), make an application to the Court for an order under this section.

. . .

(3) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.'

[20] It has been suggested that s 252 only applies as an alternative to winding-up and that an order in terms of that section can only be made if the company is fit to be kept alive. On this score Professor Gower[13] observes:

'Another valuable point emerges from the speeches in the House of Lords. The fact that the company cannot be preserved as a going concern is no ground for refusing the so-called alternative remedy under section 210. This, too, had been the view of the Court of Session, but a contrary decision had been reached in South Africa under the equivalent section in their Act. Both Lord Keith and Lord Denning expressly advert to this point and happily decide that the section is not restricted in this way.'

The House of Lords decision to which Gower refers is *Scottish Co-Operative Wholesale Society Ltd v Meyer & another*.[14] In it, Lord Keith held (at 86):

'It was said that appeal could not be made to s 210 unless the company had a continuing life ahead of it, and here it was clear that the company would have to be wound-up. But that means that, if oppression is carried to the extent of destruction of the business of the company, no recourse can be had to the remedies of the section. This would be to defeat the whole purpose of the section. The present position is due to the oppression and, but for the oppression, it must be assumed that the company would be an active and presumably flourishing concern. The section is, in my opinion, very apt to meet the situation which has arisen.'

And Lord Denning held (at 89):

'Now I quite agree that the words of the section do suggest that the legislature had in mind some remedy whereby the company, instead of being wound-up, might continue to operate. But it would be wrong to infer therefrom that the remedy under s 210 is limited to cases where the company is still in active business. The object of the remedy is to bring "to an end the matters complained of," that is, the

13 LCB Gower 'Company Law — Oppression of Minorities' (1958) 21 *MLR* 653.
14 [1958] 3 All ER 66.

oppression, and this can be done even though the business of the company has been brought to a standstill. If a remedy is available when the oppression is so moderate that it only inflicts wounds on the company, whilst leaving it active, so, also, it should be available when the oppression is so great as to put the company out of action altogether. Even though the oppressor by his oppression brings down the whole edifice – destroying the value of his own shares with those of everyone else – the injured shareholders have, I think, a remedy under s 210.'

Whilst the contrary South African decision to which Gower alludes is that of Reynolds J in *Irvin and Johnson Ltd v Oelofse Fisheries Ltd; Oelofse v Irvin and Johnson Ltd & another*, which held:[15]

'. . . it seems to me that there is a fourth essential. It must be shown that the order that the Court can make – if it does make it – can remedy the complaints in such a manner that the company can then continue to function properly and will in all probability not perish. This seems to be so from the wording of sub-sec 2 of sec 111 *bis* that the Court makes its order "with a view to bringing to an end the matters complained of" for it would be futile to grant an order which would leave the company so to perish.'

I shall accept in Nel's favour, without deciding, that the grant of a winding-up order is no bar to an invocation by a minority shareholder of s 252.

[21] The wording of the section indicates the conferment of a very wide discretion upon the court.[16] The court has the power to do what is considered fair and equitable in all the circumstances of the case, to put right and cure the unfair prejudice which a minority shareholder has suffered at the hands of the majority of the company.

'The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act 1948 and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal

15 1954 (1) SA 231 (E) at 241A-B.
16 Per Corbett J in *Bader & another v Weston & another* 1967 (1) SA 134 (C) at 148B.

rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence—this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company—so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to 'quasi-partnerships' or 'in substance partnerships' may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words 'just and equitable' sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.' (Per Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd.)*[17]

[22] The same reasoning, I daresay, must apply to the concept of unfairness encompassed by s 252. Fairness, according to Lord Hoffmann (*Re a company (No 00709 of 1992) O'Neill & another v Phillips & others*),[18] is the criterion by which a court must decide whether it has jurisdiction to grant relief. Generally speaking an application of this kind, based upon the partnership analogy cannot succeed if what is complained of is merely a valid exercise of the powers conferred on the majority. To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him. For, as Trollip JA put it in *Sammel v*

17 [1973] AC 360 (HL) at 379 *b* - 380 *b;* [1972] 2 All ER 492 at 500 *a* – *h*.
18 [1992] 2 All ER 961 at 966.

President Brand Gold Mining Co Ltd:[19]

'By becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder . . . . That principle of the supremacy of the majority is essential to the proper functioning of companies.'

[23] The combined effect of subsections (1) and (3) is to empower the court to make such order as it thinks fit for the giving of relief, if it is satisfied that the affairs of the company are being conducted in a manner that is unfairly prejudicial to the interests of a dissident minority. The conduct of the minority may thus become material in at least the following two obvious ways. First, it may render the conduct of the majority, even though prejudicial to the minority, not unfair. Second, even though the conduct of the majority may be both prejudicial and unfair, the conduct of the minority may nevertheless affect the relief that a court thinks fit to grant under subsection 3.[20] An applicant for relief under s 252 cannot content himself or herself with a number of vague and rather general allegations, but must establish the following: that the particular act or omission has been committed, or that the affairs of the company are being conducted in the manner alleged and that such act or omission or conduct of the company's affairs is unfairly prejudicial, unjust or inequitable to him or some part of the members of the company; the nature of the relief that must be granted to bring to an end the matters complained of; and that it is just and equitable that such relief be granted.[21] Thus, the court's jurisdiction to make an order does not arise until the specified statutory criteria have been satisfied.[22]

[24] As Buckley J put it in In *Re Five Minute Car Wash Service Ltd:*[23]

'The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted, ...'

In *Re a company*,[24] Lord Hoffmann put it thus:

'Mr Hollington's submission comes to saying that, in a "quasi-partnership" company, one partner ought to be entitled at will to require the other partner or partners to buy his shares at a fair value. All

19 1969 (3) SA 629 (A) at 678G-H.
20 In *Re London School of Electronics Ltd* [1986] 1 Ch 211 at 222.
21 *Lourenco v Ferela (Pty) Ltd (No1)* 1998 (3) SA 281 (T) at 295F-H.
22 Blackman *Commentary on the Companies Act* Vol 2 p9-44.
23 (1966) 1 All ER 242 at 246.
24 See fn 17.

he need do is to declare that trust and confidence has broken down. . . .'

'I do not think that there is any support in the authorities for such a stark right of unilateral withdrawal. There are cases, such as *Re a company (No 006834 of 1988)*, *ex p Kremer* [1989] BCLC 365, in which it has been said that if a breakdown in relations has caused the majority to remove a shareholder from participation in the management, it is usually a waste of time to try to investigate who caused the breakdown. Such breakdowns often occur (as in this case) without either side having done anything seriously wrong or unfair. It is not fair to the excluded member, who will usually have lost his employment, to keep his assets locked in the company. But that does not mean that a member who has not been dismissed or excluded can demand that his shares be purchased simply because he feels that he has lost trust and confidence in the others. I rather doubt whether even in partnership law a dissolution would be granted on this ground in a case in which it was still possible under the articles for the business of the partnership to be continued. And as Lord Wilberforce observed in *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 at 500, [1973] AC 360 at 380, one should not press the quasi-partnership analogy too far: "A company, however small, however domestic, is a company not a partnership or even a quasi partnership ..." '

[25] The allegations of unfair and oppressive conduct in the management of the affairs of the company boiled down to: first, that Nel had been excluded as a director and thus from the management of the company; and, second, that the majority shareholders had destroyed the substratum of the company by starving it of business, which was diverted to other entities in which they had an interest. Mothupi, on behalf of the appellants, dealt with the first in these terms:

'The applicant's general conduct and the fact that he caused the first respondent damages as aforesaid, caused the relationship between the second, third and fifth respondents on the one side, and the applicant on the other side, to become strained.'

And after detailing various allegations of misconduct that had been levelled against Nel, he said:

'From the aforegoing it is apparent that the applicant acted in an obstructive and disruptive manner, breached his fiduciary duty as director of the first respondent, caused the first respondent irreparable harm and damages and strained the relationship with the other directors and shareholders.

The situation became so untenable that the shareholders had no other option but to convene a general meeting on 6 September 2005 and to consider the removal of the applicant as a director of the first respondent in terms of section 220 of the Companies Act. A copy of the notice of the general meeting as well as the agenda is annexed hereto as annexure "LLM28".'

[26] In substantiation of the second, Nel contended that the business of the company had been diverted to De La Harpe Trading (Six) (Pty) (De La Harpe) and Matlotlo Trading 28 (Pty) Limited (Matlotlo) and in turn to the various Lejara entities

that have been joined as parties to the proceedings. In that regard Nel states:

'The two entities controlled by [Louw, Du Preez, Mothupi and Lindoor] effectively control all the business that was previously the business of [the company]. In the case of De La Harpe Trading (Six) (Pty) Limited (now Lejara Business Intelligence), through the transfer of the business pursuant to a purported sale. In the case of Matlotlo Trading 28 (Pty) Limited (now called Lejara ERP Solutions (Pty) Limited), through a management agreement.'

The answer to that complaint, to paraphrase from Mothupi, is that at a general shareholders' meeting held on 7 June 2005 it was unanimously agreed that the intelligence business division of the company would be sold to De La Harpe and the SAP ERP business to Matlotlo. Whilst Mothupi is correct in his assertion that the decision was a unanimous one, to be fair to Nel, the minutes of the meeting reflect that he abstained from voting on those resolutions: it thus carried as a unanimous resolution.

[27] Mothupi explains the necessity for concluding the agreement with De La Harpe in these terms:

'[Nel], however, before the meeting of 6 September 2005, caused a letter by his attorney of record to be served by the sheriff on the first respondent, foreclosing his loan account in the company and required payment of the amount of R242 377.87 within three weeks after the date of service and threatened to continue with an application for the winding-up of [the company].

[Nel's] loan account plus interest was repaid by [the company] on 13 September 2005 . . .

. . .

As a result of the repayment of [Nel's] loan account by [the company], [the company] was in no position to repay the other shareholders' loan account totalling R646 453.70.

In order to prevent [the company] from becoming insolvent, the directors of [the company] entered into a written agreement with De La Harpe . . . in terms of which:

> the consideration payable in terms of annexure "LLM26" will be R600 000.00 and this purchase price will be set off against the loan accounts of [Louw], [Du Preez] and my loan accounts in the amount of R200 000.00 each. (It should be noted that the [Lindoor] did not have a loan account).'

[28] According to Mothupi the sale agreement between the first respondent and Matlotlo, however, never materialised, resulting in the company and Matlotlo entering into a management agreement on 7 September 2005. A material term of that agreement was that: '[t]he first respondent and De La Harpe . . . will not compete

with each other'. Nel's response is:

'The "management agreement" is not a true agreement. This is nothing more than an attempt by [Louw, Du Preez, Mothupi and Lindoor] to appropriate for themselves the "partnership" business in the first respondent to my detriment'.

Notwithstanding Nel's denial one can hardly, without more, in the face of that provision in the agreement, conclude that Matlotlo was set up by the majority shareholders in competition with the company or that in doing so they subordinated the interests of the company to that of Matloto.

[29] Mavundla J made no finding as such that the affairs of the company were being conducted in a manner by the majority that was unfairly prejudicial to Nel, yet proceeded to grant relief to Nel in terms of s 252. The gist of the learned judge's judgment is to be found in the following three paragraphs:

'It is common cause that the business of [the company] mutated into various entities. These entities are the sixth to the twelfth respondents, and these have been joined in these proceedings. It is common cause that the then partnership did not do any accounting at its dissolution. It is common cause that the [Nel] was never paid for his shares. A partnership is an agreement of utmost trust. The respondents have not honoured the agreement in that they have not paid the applicant for his respective shares in the seven entities.

It brooks no argument that a partnership, although it has been dissolved, is presumed to exist until such time that there has been accounting to all the partners. In casu, the very fact that the business of [the company] devolved into the seven entities, namely the sixth to the twelfth respondents, without any prior agreement between [Nel] and [Louw, Du Preez, Mothupi and Lindoor], is, in my view, sufficient reasons for me to conclude that there is no agreement between the partnership as to how to dissolve the partnership. Further it is not disputed by [Louw, Du Preez, Mothupi and Lindoor] that [Nel] has not been paid his shares. I therefore conclude that the parties have reached a dead end, thus requiring that I must exercise my discretion in the determination of the share of [Nel].

When the business of [the company] subsequently mutated into the seven to the twelfth respondents, it is axiomatic that the 21% interest of the applicant, also mutated into the aforesaid seven entities. It is, in my view, and I find that, it just and equitable that Nel should be paid out, such equity that would be equivalent to his 21% share, from each of the respective subsequent seven entities his equity has also mutated into. It therefore requires that I must determine, what I consider to be a fair and reasonable value of the applicant's 21% share in each individual entity. In this regard, I need to bear in mind what the authorities state, as referred to herein below.'

[30] With respect to the learned judge what he perceived as common cause was in fact not so. For, as Mothupi made plain:

'It is incorrect that five companies with the name Lejara have appropriated the business of the first respondent.

Lejara Business Intelligence (Pty) Ltd purchased the business intelligence business division of [the company] as aforesaid and also pursued other business propositions in the SAP domain as aforesaid which were not part of the business intelligence business division of the first respondent.

As far as I am aware, the following companies bear the "*Lejara name*" and conduct the following business and have the following directors: . . .'

From the aforegoing it is apparent that none of the other companies bearing the name "Lejara" conducts business similar to that of [the company].

Having regard to the fact that:

the other companies conduct business different from [the company] and which was sold by [the company] to Lejara Business Intelligence (Pty) Ltd;

the Lejara companies have different shareholders and directors,

the value of the applicant's shares in the first respondent cannot be equated to 21% of shareholding in any of the aforementioned companies.

In the premises the applicant is not entitled to the relief claimed in the proposed amended notice of motion.'

[31] The nature of the remedy fixed by a court will depend upon its conclusion on the type of oppression. Something that Mavundla J appeared not to appreciate.

'What has to be fixed is a "fair price" (per Lord Denning in the *Scottish Co-operative* case at p 89). What is fair must necessarily depend upon the circumstances of the particular case – it is not necessarily limited to the market value of the shares concerned – and I do not consider that a tribunal other than the Court hearing the application should be required to deal with these considerations. Moreover, I could not exclude the possibility that considerations of the price might legitimately affect the exercise of the Court's discretionary power to make an order in terms of sec 111 *bis*.' (Per O' Hagan J in *Benjamin v Elysium Investments & another.*)[25] There is no rule of universal application as to what is fair. The fairness envisaged is fairness to both sides. The matter can never be conclusively determined until all of the facts of a particular case are known.[26] For, as Blackman cautions: '[t]he very wide jurisdiction and discretion it [s 252] confers on the court must, however, be carefully controlled in order to prevent the section from itself being used as a means of oppression'.[27]

[32] Notwithstanding the wide discretion conferred on the court it is essential that

25 1960 (3) SA 467 (E) at 478D-E cited with approval in *Donaldson Investments v Anglo Transvaal Collieries* 1983 (3) SA 96 (A) at 120A.
26 Blackman p 9-51.
27 Blackman p 9-4.

an applicant should formulate the relief that is sought (*Breetvedt v Van Zyl*;[28] *Lourenco v Ferela (Pty) Ltd (No1)*[29]). Here, as I have already shown Nel has simply failed to establish which *Lejara Entities* (and on what basis) should be encompassed by the order of the court. Every amendment cast the net wider. In heads of argument filed with this court there was yet a further attempt to amend the relief sought to read:

'1.1 For the purposes of such valuation, the said value shall be determined as the equivalent of 21% of the value of the businesses, as a going concern at 28 February 2009, of Lejara ERP Solutions (Pty) Ltd (formerly known at Matlotlo Trading 28 (Pty) Ltd), Lejara Business Intelligence (Pty) Ltd formerly known as De La Harpe Trading (Six) (Pty) Ltd), Lejara Investment Holdings (Pty) Ltd, Lejara Informational Management (Pty) Limited, Lejara Enterprise Solutions (Pty) Limited, Lejara Enterprise Outsourcing (Pty) Ltd, Lejara Change Management (Pty) Limited, any other entity trading or using the name Lejara in the SAP consulting and/or SAP software industry and [the company] which shall be deemed to be one going concern consolidated as such and all inter-company liabilities or expenses, and all payments made to [Louw, Du Preez, Mothupi and Lindoor] by way of remuneration from [the company] after 31 July 2005, shall be ignored.

. . .

1.3 [Louw, Du Preez, Mothupi and Lindoor] shall pay interest to the applicant on the value so determined at the rate of 15,5% per annum from 28 February 2009 to date of payment.'

[33] In addition to the claim for interest that had not been sought in any of its previous incarnations, the order prayed sought relief against the 10th and 11th appellants, Lejara Enterprise Outsourcing (Pty) Ltd, Lejara Change Management (Pty) Limited, and as previously 'any other entity trading or using the name Lejara in the SAP consulting and/or SAP software industry'. It would appear that what was envisaged by the inclusion of the additional unidentified entities was that an order should issue against entities that are not parties to the proceedings. The absurdity of such a course of conduct is patent. Moreover, what was sought, absent any factual foundation, was that all of the identified and unidentified Lejara entities together with the company be deemed to be one going concern and consolidated as such. The absurdity is thus compounded. In any event as s 19 bis[30] is only applicable in circumstances where parties to civil proceedings consent to a referral to a referee, it is plainly inapposite (even if just as a point of reference – which is what counsel submitted) to a situation such as one encounters here where the parties are at

28 1972 (1) SA 304 (T) at 315.
29 1998 (3) SA 281 (T) at 295-296.
30 Subsection (1) of 19 *bis* provides: In any civil proceedings any court of a provincial or local division may, with the consent of the parties, refer . . .'.

loggerheads with each other. Unsurprisingly counsel was unable to point to any such or similar order having issued by courts either in this country or England.

[34] Finally, where a liquidator has reason to believe that a pre-liquidation transaction entered into by a company may be impeachable, it is his or her duty to make proper enquiries into the transaction and if satisfied that it is impeachable it is the duty of such liquidator, provided that the creditors approve of his action, to institute proceedings to set aside those transactions.[31] As it was put in *Sackstein NO v Proudfoot SA (Pty) Ltd*:[32]

'In terms of s 391 of the Companies Act it is the duty of the liquidator "forthwith to recover and reduce into possession" all such assets and property. This means that the liquidator must take all steps necessary to fulfil the prescribed duty. In the case of voidable transactions, he must take the steps that are necessary for the impeachment of the transaction. This he can do in the Republic of South Africa, irrespective of where the property is situate.'

Here, Nel's allegations of asset stripping and diversion of the business of the company, if well founded, ought on the winding-up of the company to have warranted the attention of the liquidators. Had those transactions not survived scrutiny, the liquidators would have been obliged, in the discharge of their duty, to have taken steps to impugn those transactions. The liquidators are given wide

31 *Rennie NO v Gordon & another NNO* 1988 (1) SA 1 (A) at 21J-22A.
32 2003 (4) SA 348 (SCA) para 22.

powers by sections 400[33], 402[34] and 403[35] of the Act. I have little doubt that any such investigations as they may have caused to be made would have been invaluable to the court hearing the matter. Notwithstanding that these were proceedings against fellow directors Nel may have been better served from a practical point of view, in asking for the matter to have been stayed until the liquidators had discharged their duties (even if just preliminarily) and reported on the steps that they had taken in the discharge of their various duties envisaged by the Act.

[35] As is patent from the affidavits that I have set out in greater detail than is absolutely necessary, they reveal sharp disputes of fact upon a number of material issues. In my view those disputes could only have been decided after oral evidence had been heard in terms of the rules of court. To my mind what is envisaged by the

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33 Section 400 inter alia provides:
'(1) A liquidator shall examine the affairs and transactions of the company before its winding-up in order to ascertain—
(a) whether any of the directors and officers or past directors and officers of the company have contravened or appear to have contravened any provision of this Act or have committed or appear to have committed any other offence;
. . .
(2) A liquidator shall, before lodging his final account with the Master, submit to him a report containing full particulars of any such contraventions or offences, suspected contraventions or offences and any such ground which he has ascertained.
(3)(a) Any report submitted to the Master under subsection (2) shall be confidential and shall not be available for inspection by any person.'

34 Section 402 inter alia provides:
'Except in the case of a members' voluntary winding-up, a liquidator shall, as soon as practicable and, except with the consent of the Master, not later than three months, after the date of his appointment, submit to a general meeting of creditors and contributories of the company concerned a report as to the following matters:
(a) the amount of capital issued by the company and the estimated amount of its assets and liabilities;
(b) if the company has failed, the causes of the failure;
. . .
(d) whether or not any director or officer or former director or officer appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company as provided in this Act;
. . .
(f) whether or not further enquiry is in his opinion desirable in regard to any matter relating to the promotion, formation or failure of the company or the conduct of its business;
(g) whether or not the company has kept the accounting records required by section 284, and, if not, in what respects the requirements of that section have not been complied with. . .'

35 Section 403 inter alia provides:
'(1)(a) Every liquidator shall, unless he receives an extension of time as hereinafter provided, frame and lodge with the Master not later than six months after his appointment an account of his receipts and payments and a plan of distribution or, if there is a liability among creditors and contributories to contribute towards the costs of the winding-up, a plan of contribution apportioning their liability.
(b) If the final account lodged under paragraph (a) is not a final account, the liquidator shall from time to time and as the Master may direct, but at least once in every period of six months (unless he receives an extension of time), frame and lodge with the Master a further account and plan of distribution. . .'

section is a full investigation into the circumstances of the alleged oppression, if needs be with viva voce evidence on both sides. It was thus impossible on the disputed, and in some crucial respects meagre, material to arrive at any reasonable conclusion or fair determination under the section. No referral of the disputes to viva voce evidence was sought by Nel either in this court or the one below. It accordingly does not arise. In my view, on the papers as they stood, the various disputes of fact constituted an insuperable obstacle to the grant of relief to Nel under s 252.

[36] There remains the question of costs. As I have shown Nel obtained no more than was consented to by Louw, Du Preez, Mothupi and Lindoor. It follows that but for the consent, the application ought to have been dismissed in its entirety. Given that Nel chose in the face of the consent, to go to a full hearing on the papers in pursuit of the additional relief on which, as I have shown, he was not entitled to succeed, he ought to have been mulcted with those costs in the court below. It follows that the costs order of the court below cannot stand and accordingly falls to be set aside. For the rest, in my judgment, the appeal fails and so does the cross appeal.

[37] In the result:

1 Both the appeal and cross appeal are dismissed, in each instance with costs, such costs, where applicable, to include those consequent upon the employment of two counsel.

2 Paragraph 2 of the order of the court below is set aside and in its stead is substituted:

‘The applicant is ordered to pay the costs of the application’.

V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	C van der Westhuizen SC D B du Preez A R Venter Ross & Jacobsz Inc Pretoria McIntyre & Van der Post Bloemfontein
For Respondent:	J R Peter SC Instructed by: Fluxmans Inc c/o Friedland Hart Solomon & Nicolson Pretoria Lovius Block Bloemfontein