IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

(JOHANNESBURG)

CASE NO: 2011/22041

DATE: 24 October 2011

REPORTABLE

In the matter between:

HEINRICH MULLER Applicant

And

LILLY VALLEY (PTY) LTD Respondent

JUDGMENT

WEINER J:

1. The Applicant, as a shareholder of the Respondent seeks the winding-up of the Respondent on the basis that it is just and equitable for the Respondent to be wound up as contemplated by Section 81(1)(d)(iii) of the Companies Act 71 of 2008 (*"the new Act"*). The application was, launched under section 344(h) of the Companies Act 61 of 1973 (*"the old Act").*As the legal basis is the same as under section 81(1)(d)(iii) of the new Act, I do not believe that such misnomer is fatal to the application.

2. The provisions of Section 81(1)(d)(iii) of the new Act mirror the *"just and equitable"* ground provided for in terms of section 344(h) of the old Act. On this basis, it is submitted that the same legal principles which held sway in relation to such section of the old Act are applicable to the present inquiry under the new Act.

THE FACTS

3. The Respondent conducts the business of a flower farm. It also owns certain properties. The Applicant is a Horticulturist and a 33% shareholder in the Respondent. The Applicant's co-shareholders in the Respondent are Liesbeth van den Berg (*"Liesbeth"*) (28%) and the Carin van den Berg Trust (*"the Trust"*) (39%).Liesbeth and Carin are co-trustees and Carin is a beneficiary of the Trust. Liesbeth has been a director of the Respondent since 1994. The Applicant was previously a director of the Respondent having been appointed as such during June 2007. He reigned in November 2010. Carin became involved in the business at the end of June 2010 and was appointed a director of the Respondent on 1 September 2010.

4. Prior to Carin becoming involved in the flower farming business of the Respondent, Liesbeth and the Applicant conducted the business together, attending to virtually all aspects of the day-to-day administration and conduct of the Respondent's business and its financial affairs.

5. In 2007, it was agreed that the Applicant would be allocated 33% of the shareholding in the Respondent. It was intended by both the Applicant and Liesbeth that a further 17% shareholding in the Respondent would be acquired by the Applicant in due course.

6. Since prior to 2007, the Applicant has resided on the farm and he continues to do so.

7. From or about June 2007 to November 2010, the Applicant and Liesbeth took equal drawings from the Respondent and were both signatories on the bank account of the Respondent. All the Applicant's living expenses were drawn from the Respondent as were Liesbeth's. According to the Applicant, he ran the flower business whilst Liesbeth took a *"back seat"* although the Applicant always discussed the more important aspects of the conduct of the business with Liesbeth. The Applicant contends that the relationship was essentially one of partnership.

"THE BREAKDOWN"

8. According to the Applicant:

a) During June 2010, Liesbeth indicated that she was no longer prepared to allow the Applicant to acquire the additional 17%. The Applicant felt that she had reneged on an agreement that their holdings would be equal and in accordance with a partnership. Liesbeth informed him that her vision of the company was that it was a *"family business"*.

b) The Respondent owns shares in Multiflora Ltd and part of the income of the Respondent is derived from dividends which accrue to the shareholders from time to time. A dividend of R900 000.00 was paid to the Respondent in May 2010. During June 2010, whilst the Applicant was away on holiday, Liesbeth drew R600 000.00 out of the Respondent's bank account. This withdrawal was not in accordance with the usual business practice and was not authorized by a resolution of the Board of Directors.

c) The involvement of Carin in the conduct of the Respondent's business from June 2010 precipitated Liesbeth's new vision of the way forward for the Respondent (i.e. the change from a vision where the business of the Respondent would be conducted equally for the benefit of the Applicant and Liesbeth (in her personal capacity and as representative of the Trust) to one where Liesbeth intended to make it a family concern. Liesbeth and Carin became secretive and authoritarian in the manner in which they dealt with him and the business. They started making decisions about important matters without consulting him (including drawing large sums of money out of the Respondent without authority). Applicant stated that he became a director in name only. He became concerned that he had all the obligations and liabilities of a director but in practice none of the rights. Accordingly, he resigned his position as director in November 2010.

d) Liesbeth demanded that the Applicant relinquish his motor vehicle which is owned by the Respondent (which he did under threat that its value would be debited to his loan account).Liesbeth also demanded that he vacate the dwelling which he occupies at the farm. He has refused to do this. Liesbeth and Carin have taken it upon themselves to debit the Applicant's loan account with the amount of R8 000.00 per month, without his agreement, purportedly as rental.

9. According to the Respondent:

a) The Applicant based its case for winding up on 5 factual grounds:

i) He is essentially a partner with the other shareholders of the Respondent where a relationship of confidence and trust prevailed; this partnership was carried out in a corporate entity, where he was a director of the Respondent and, by way of agreement, entitled to 33% of the shares of the Respondent; and by way of expectation, entitled to a further 17% of the shares in the Respondent.

ii) He was forced to resign as a director of the Respondent as a result of financial irregularities and being encumbered by all the duties of directorship, while enjoying none of the rights.

iii) The business is being conducted recklessly and to his prejudice as a shareholder.

iv) The benefits of his employment with the Respondent, including housing, vehicle and access rights, have been unlawfully withdrawn without reason.

v) His rights as shareholder have and are being ignored.

b) The Respondent contends that the Applicant ignores the fact that the relationship between the parties operated on two levels:

i) The flower growing business, where the Applicant was a loyal, skilled and trustworthy employee whose level of responsibility increased over time. He was the manager from 2001, entitled to a house, vehicle, access and other incidents of employment. It had been contemplated to conduct this business in a separate corporate entity that was registered but never implemented, and in which the Applicant would hold a 50% interest. Instead, the parties shared equally in the financial benefits afforded by the conduct of the flower growing business from June 2001.The Applicant earned approximately R1mil per year;

ii) The flower growing business is to be distinguished from the pre-existing property or assets of the Respondent. This consisted of 8 properties and a block of Multiflora shares that had been acquired well before the Applicant's involvement in the Respondent and with which his activities were not directly concerned.

c) In 2007, the Applicant was rewarded for his services and dedication by becoming entitled to purchase a 33% shareholding from the Trust valued at one third of the 2001 value, whilst taking into account the appreciation in the Respondent's assets created by the successful conduct of the flower growing business by the Applicant;

d) In June 2007 he was appointed a director;

e) In 2008 the shares were transferred;

f) The possibility of a further transfer of 17% of the Respondent's shares, at a price, was explored but not finalised; this would in any event be contingent upon the Applicant remaining with the Respondent. The initial 33% shares have not been paid for yet.

g) The flower growing business level of the arrangement is a close employment relationship with a profit sharing arrangement predicated upon a continued involvement in the business as manager and employee.

h) In contrast, the shareholding in the pre-existing assets of the Respondent is a strictly commercial one. Its interest is the capital growth generated by the underlying assets.

i) There was no financial irregularity in the R600k drawing:

i) The Respondent's auditors advised the shareholders how they had treated the payment of the Multiflora dividend;

ii) The Applicant, in essence accepted the distribution plan but he wanted 50% of the payment and immediate delivery of a further 17% of the shares; this created conflict which Liesbeth tried to appease by offering to make up the difference personally;

iii) When the deposit was made into Liesbeth's account it was made in full view as the Applicant had access to the Respondent's bank accounts;

iv) The transfer in and out of monies occurred routinely as can be expected in a business of this kind; there was no reason to have left cash in the bank when it could be utilised by a shareholder (and recorded in the books of the Respondent).

v) The Applicant's insistence on formalities is contrived and duplicitous as no such formalities were used in the past.

vi) Other than the Multiflora dividend, despite referring to other financial irregularities none have been shown;

j) there is an independent auditor;

k) He failed to disclose to the court that he actually resigned as an employee in June 2010, effective 15 December 2010. He had distanced himself from the business from October 2010. There was no reason for the Applicant to have resigned as an employee. He went of his own accord (and without citing any of the reasons he now does). He was also sincerely requested to return on more than one occasion.

l) With the voluntary resignation from employment went the Applicant's entitlement to housing, vehicles, access and other employment perks.

m) The business is not being recklessly conducted, but is flourishing and well managed. This is not disputed in reply.

n) The Applicant's rights as shareholder have not been ignored.

10. The Applicant's case for the breakdown in the relationship of trust rests, inter alia, on his allegations of financial irregularities. The main issue here is the treatment of the Multiflora dividend. Liesbeth states that she drew against her credit loan account and that of the trust an amount of R600'000.00 being their share of the multiflora dividend. When the Applicant returned from holiday on or about the 14th of June 2010 he telephoned her and advised her that he had noted this withdrawal. He accused her of doing precisely as she pleased. She explained to the Applicant that she had utilised the money to reduce her bond. She further stated that she and the trust were majority shareholders and that they were entitled to withdraw their share of the multiflora dividend. This had nothing to do with the flower farming business of the Respondent of whom the Applicant was the managing director. The Applicant was informed that he is perfectly at liberty to withdraw his R300'000.00 share of the multiflora dividend against his credit loan account but he chose not to.

11. On the 15th of June 2010, the day after the phone call, Respondent confronted Applicant and told her that he was giving six months notice of termination of employment. Liesbeth stated that she was distressed at this because she valued the Applicant's expertise. She then phoned Carin who was in Holland and advised her to return as the Applicant had terminated his employment and she needed Carin to become involved in the business. Carin returned on the 20th of June 2010. Thereafter, Carin and Liesbeth approached an attorney, one Jordaan, requesting a shareholders agreement. It was prepared on the basis that the Applicant owned a 33 per cent of the shareholding in the Respondent.

12. At that stage Applicant stated that he might have been hasty in giving notice and was prepared to attempt reconciliation. However when presented with the shareholders agreement, Applicant stated that although he did not insist on the 17 per cent shareholding he wanted 50 per cent voting rights. Liesbeth stated that she was not agreeable to this as she foresaw deadlocks and the agreement was never signed. From the 15th of June 2010, the Applicant's involvement in the flower farm reduced.

13. These allegations are not materially disputed in the reply. In the replying affidavit, the Applicant raises the premise of seeking relief from oppression under section 163 of the new Act.

14. At the hearing, the Respondent contended that the Applicant, in essence, had abandoned the relief for winding-up and there was no effort, until 21 September 2011, after the commencement of the hearing, to comply with the service formalities of a winding up under the new Act. However, the Applicants counsel confirmed that the Applicant still sought a winding-up.

15. It is common cause that, at this stage, relief under section 163 of the new Act cannot succeed because the relevant parties (the shareholders and directors) have not been joined. As will be discussed below, the court's discretion, in terms of section 347(2) of the old Act, is based upon whether or not other remedies are available to the Applicant. Section 163 will be considered in the light of that contention.

LEGAL PRINCIPLES

16. The *"just and equitable"* basis for winding-up a company *"postulates not facts but only a broad conclusion of law, justice and equity as a ground for winding-up"*. The *"justice and equity"* is that between the competing interests of all concerned[1].

17. The Applicant relies upon this principle on the basis that the breakdown in the relationship between the shareholders of the Respondent provides *"grounds analogous to those for the dissolution of partnership"*[2]. The argument is that where (as in this case) there is, in substance, a partnership in the form of a private company, circumstances which would justify the dissolution of a partnership would also justify the winding-up of the company under the just and equitable provision.[3]

18. In this regard, the words *"just and equitable"* have been elegantly described by Lord Wilberforce in **Ebrahimi v Westbourne Galleries Ltd**[4] as follows:-

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[1] Moosa NO v Marjee Bhamwan (Pty) Ltd 1979 (3) SA 131 D at 136.
[2] Hennochsberg [Issue 31], Volume 1, page 702; APCO Africa (Pty) Ltd and Another v APCO Worldwide Inc. 2008 (5) SA 615 SCA; Moosa's case (supra) at 136 H.
[3] In re Yenidje Tobacco Company Ltd [1916] (2) Ch 426 (CA) at 430; Marshall v Marshall (Pty) Ltd and Others 1954 (3) SA 571 (N); Lawrence v Lawrich Motors (Pty) Ltd 1948 (2) SA 1029 (W).
[4] [1973] AC 360 (HL) at 379 B.

"… the words "just and equitable" 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. …. The "just and equitable" provision does not … 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 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."

19. Based upon this principle, the Applicant submitted that the relationship of trust and integrity between the shareholders is integral to the success of the business of the Respondent as well as to the continuation of that relationship[5].

20. In this regard, the Applicant's counsel relied upon the second principle referred to in the *Yenidge Tobacco Company* case which was referred to by Ponnan JA in the APCO case supra[6]. Ponnan JA in dealing with this type of scenario when examining the dissolution of

[5] APCO Africa case (supra) at page 628, paragraph 29.
[6] APCO Africa case (supra) at 625

partnership ground stated as follows:

"The second, usually called the deadlock principle, is derived from the Yenidje Tobacco Company case. It is founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists 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 the partnership business. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up. (See also Moosa NO v Mavjee Bhawan (Pty) Ltd and Another 1967 (3) SA 131 (T) at 137; Emphy and Another v Pacer Properties (Pty) Ltd 1979 (3) SA 363 (D) at 336 H - 367 B.)"

21. The Respondent submitted that the Applicant's reliance on the partnership principle was misplaced. Respondents counsel referred to the APCO case[7] in which it was stated that there are certain features of a private company which may justify "the superimposition of equitable considerations". In this regard, Ponnan JA referred to the considerations laid down in the judgment of Lord Wilberforce.[8]

22. Respondent contended that the Applicant had failed to meet the requirements necessary for "the superimposition of equitable considerations" on what is otherwise known in company law as simply a matter of shareholder's voting powers.

[7] Supra at 624 – 625.
[8] Supra

23. Counsel for Respondent referred to the "*two distinct principles that guide a Court in exercising its discretion to a wind up a domestic company which is in the nature of a partnership*" cited in APCO's case[9]-

a) The first, relating to "*a justifiable lack of confidence in the conduct and management of the company's affairs*" does not apply since the Respondent is, on the Applicant's own version prosperous and successful. It is also not disputed that it can be adequately run by the management without him. This is not a case where the company's affairs have come to a standstill because of a dispute between shareholders.

b) The second relates to the existence of "*some arrangement, express, tacit or implied (that creates) a particular personal relationship of confidence and trust similar to that existing between partners in regard to a partnership business. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up*." This is the principle upon which Applicant relies.

24. In the present case, Respondent contends that there is no particular personal relationship in the Applicant's interest in the residual assets of the Respondent. This is to be contrasted with the flower growing business relationship. It is the conflation between these separate relationships that is the source of the Applicant's misdirection in this matter. There may be a personal disagreement in relation to the flower growing business. That does not mean that the relationship in the Respondent has been destroyed.

[9] Supra at [19].

25. It seems that the Applicant has two hurdles to overcome in seeking to bring his case within the *Yenidje Tobacco* principle:

a) Firstly whether the breakdown is as a result of the other shareholders' conduct or his conduct; and

b) Secondly, even if the other shareholders acted contrary to his wishes, is this not simply a matter of the majority binding the minority.

26. In relation to a): It is a matter of dispute on the papers which party caused the "breakdown". This is relevant to whether the Applicant can claim the relief he seeks. i.e. whether he comes to the court "clean hands"[10]. Other than the way in which the Multiflora dividend was dealt with, the Applicant was unable to point to facts which show wrongful conduct by the other shareholders which has destroyed or significantly impaired the relationship. The Applicant claims that by reneging on the agreement to give him the extra 17%, the other shareholders have displayed conduct which has destroyed the relationship. The Respondent claims that firstly, this was not an agreement but an intention to restructure in the future and that, in any event, this happened when the Applicant had already decided to terminate his employment. It could never have been intended that he would get the 17% shareholding whilst no longer being employed by the Respondent. It is not clear on the papers whether the alleged reneging of the agreement was before the Applicant's resignation or after. Both appear to have occurred in June 2010. This was also about the time the issue around the Multiflora dividend occurred. It was before Carin became involved

[10] Apco supra

in the business and was appointed a director. In applying the principles laid down in *Plascon Evans (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd*,[11] the Court must accept the Respondent's version in relation to this dispute.

27. In relation to b): When evaluating the conduct of shareholders within the company, the guiding principle is that:

> *"by becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of the 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"* [12]

28. Lord Wilberforce in the *Ebrahimi* case referred to above dealt with the concept of a "*quasi-partnership*" as follows:

> *"…. 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."*

29. The lack of confidence in the other partners/shareholders must, of course, be justifiable.[13]

30. Both Sections 344(h) and 347(2) of the old Act give the court a discretion in regard to a winding up. A useful point to start with this discussion is the judgment of Stegmann J in

[11] 1984(3) 623 A @634-635; Marshall v Marshall (Pty)Ltd 1954(3) SA 571 N @579
[12] Per Trollip JA in Samuel v President Brand Gold Mining Company Limited 1969 (3) SA 629 (AD) at 678.
[13] Apco supra @625A

Tjospomie Boerdery (Pty) Ltd V Drakensberg Botteliers (Pty) Ltd And Another[14]. He was dealing with a similar argument on section 344(h) read with Sec347(2) (Both of which remain in force under the New Act):

> *"There can be no doubt that when the jurisdictional fact envisaged by s 344(h) has been found to be present (ie the relevant conclusion of law has been drawn), the section invests the Court with a power to grant or withhold a winding-up order. …..The apparent effect of the provision is therefore to confer upon the Court 'a very wide discretionary power': cf Moosa NO v Mavjee Bhawan (Pty) Ltd and Another 1967 (3) SA 131 (T) at 136H per Trollip J (as he then was).*
>
> *……. the Legislature appears to have contemplated that although it might be shown that the relevant circumstances rendered it just and equitable that the company should be wound up, there may nevertheless at the same time be other circumstances which would justify a refusal by the Court to issue a winding-up order. I find myself unable to visualise any circumstances that would justify a refusal to issue a winding-up order that would not at the same time be relevant to the question whether it was just and equitable that the company should be wound up. I am therefore inclined to think that although s 344(h) has undoubtedly set up a form apparently involving two steps, the practical reality is that both steps are covered by one and the same enquiry. In practice any circumstances that would justify a refusal to exercise the discretionary power established by s 344(h) would also demonstrate that it was not just and equitable that the company should be wound up. …… In practice no room is left for the exercise of the discretion formally conferred on the Court and apparently to be exercised as an independent second step. The Legislature has, however,*

[14] 1989(4) 31 T.

found another use for the otherwise superfluous formal provision for the exercise of a discretion. In 1952, by the introduction of s 111bis and an amendment to s 117(2) of the Companies Act 1926 (the substance of which provisions has been re-enacted in s 252 and s 347(2) of the Companies Act 1973) the Legislature made further provision for the manner in which the otherwise purely formal discretion under s 344(h) was to be exercised in particular circumstances. If conduct that was oppressive to some members rendered it just and equitable that the company should be wound up, the apparent discretion to issue or refuse a winding-up order under s 344(h) would no longer have to be exercised accordingly, for the Court was given the further choice of exercising powers under s 111bis of the 1926 Act (now s 252 of the 1973 Act) to deal with the situation in a different way. Similarly, if it appeared to be just and equitable that a company should be wound up, s 117(2) of the 1926 Act (now s 347(2) of the 1973 Act) empowered the Court to exercise its apparent discretion to issue or refuse a winding-up order under s 344(h) in a particular way (ie by refusing such an order) if the applicants for a winding-up order were members of the company and if the Court was of opinion (or was satisfied) that the applicants were unreasonably refusing to pursue some other remedy that was available to them.

31. Taking into consideration the facts and allegations contained in the founding affidavit and admitted by the Respondent, as well as the authorities referred to above in relation to the application of the "partnership principle", as well as the wide discretion granted to the Court, the Applicant has, in my view, failed to establish:-

i) That the misconduct complained of is that of the other shareholders as opposed to his;

ii) That he resigned as an employee and director from the Respondent on justifiable grounds;

iii) That the conduct upon which he relies was such that it destroyed the relationship between the parties and created a "justifiable lack of confidence" in the conduct and management of the Respondent's affairs (insofar as he relies on the partnership principle);

iv) That, even though he was a minority shareholder (and not an equal shareholder) he did not undertook to be bound by the decisions of the prescribed majority of the shareholders;

v) That his position (if the Respondent was not wound up) outweighed the prejudice to the other shareholders as well as the fifty permanent staff members and their families who enjoy cost free accommodation on the premises and the fifty temporary employees, whose livelihood would be affected;

vi) That It would be "just and equitable" that the Respondent be wound up.

32. Section 347(2) of the old Act grants the court a further discretion to issue or refuse a winding up order under section 344(h), if the court is of the opinion or is satisfied that the Applicants were unreasonably refusing to pursue some other remedy that was available to them.

33. Accordingly, even if the Applicant had established that it was "just and equitable" to wind up the Respondent based upon the partnership principle under Section 81(1)(d)(iii), before

a court will grant a winding-up of a solvent company, it must be satisfied that all alternative means have been investigated and failed.

ALTERNATIVE REMEDIES

34. At the hearing, the Applicant submitted that Liesbeth and Carin had unreasonably refused to accept a reasonable offer to buy the Applicant's shares.

35. In response, Liesbeth and Carin stated that the Applicant should have resorted to the provisions of the Articles of Association which relate to the transfer of shares. Applicant contends that this approach fails to take account of the fact that the Applicant, in writing, offered his shares for sale to Liesbeth (in her capacity as shareholder and trustee of the Trust) as early as 1 November 2010. He argues that accordingly, the share transfer provisions in the Articles have no viable application in practice and resort to them affords the Applicant no relief. They are raised by Liesbeth vexatiously and obstructively in a bid to further prejudice the Applicant's rights. It was submitted by the Respondent that the Applicant had other remedies, more particularly, by utilizing the procedure in the articles. The Applicant had not followed the procedure and Liesbeth and Carin had never stated that they were not open to buying the shares. They rejected the Applicant's figure of R2 million. Such figure was not arrived at in terms of the procedure in the Articles. The auditor was never called upon by the Applicant to do a valuation after the parties failed to agree on a price.

36. In addition, several options were presented to the Applicant in correspondence. Such options included the invitation to submit any further proposals that he wished to discuss if

he did accept the options presented by Liesbeth. The Applicant did not take up this invitation. Nor did the Applicant, in accordance with the Articles seek to find a third party purchaser and submit such offer to Liesbeth. Counsel for Applicant stated that such a scenario was improbable within a family business scenario. That may be so, but Applicant cannot, claim that without having explored the option.

37. The Applicant could also, for example, have sought specific performance in regard to the 50 per cent shareholding which he claimed was due to him. Thereafter his rights as an equal shareholder could have been exercised.

38. The Applicant submitted that in terms of Section 347(2), it is for the Respondent to place before the court the other remedies available. The Respondent submitted that the Applicant should have acted in terms of the Articles. Such alternative remedy was not adequately pursued by the Applicant.

39. The Applicant raised in the replying affidavit, the alternative remedy provided by Section 163 of the New Act. Its precursor was Section 252 of the old Act. Sec 252(3) provides that: *'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 an end the matters complained 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…*'

40. Section 163(2) of the New Act provides that *'the court may make any interim or final order it considers fit including –*

.....

(e) an order directing an issue or exchange of shares';

41. There are various other powers which a court has under section163 (2), but the specific power under section 252 (3) to order the *'purchase of the shares of any members of the company by other members thereof or by the company'* is not contained within section 163. It is not necessary in the present matter to consider the reasons for the change in wording. It might be that in terms of section 163(2)(e), the court can order an exchange of shares for cash on a value determined in terms of the articles. The Applicant himself believed that there might be a case to be made out in terms of section 163 as he referred to this remedy in his replying affidavit. Accordingly, he believed that an alternative remedy to winding up may be available.

42. In the result, taking into account all relevant considerations and prejudice to the parties, the Applicant has failed to establish that is it "just and equitable" to wind-up the Respondent. In terms of section 347(2), I am satisfied that there is some other remedy available to the Applicant.

43. The application is accordingly dismissed with costs.

DATED AT JOHANNESBURG THIS 24th DAY OF OCTOBER 2011

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Weiner J

Date of hearing: 22 September 2011

Date of judgment: 24 October 2011

Counsel for the applicant: D Fisher SC

Attorneys for the applicant: Blakes Mphanga Inc.

Counsel for the respondent: D Vetten

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