IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 1633/2016

In the matter between:

ANITHA HARILAL	**APPLICANT**
and	
VIKASH RAJMAN	**FIRST RESPONDENT**
ARBINDRANATH ROOPANAND	**SECOND RESPONDENT**
VIKASH RAJMAN N.O. in his capacity as a Trustee of the Ishwar Family Trust	**THIRD RESPONDENT**
ARBINDRANATH ROOPANAND N.O. in his capacity as a Trustee of the Veraisha Trust	**FOURTH RESPONDENT**
AFRO PULSE 46 (PTY) LIMITED T/A POWER STATIONARY	**FIFTH RESPONDENT**

JUDGMENT

NXUSANI AJ:

[1] This is an application brought in terms of Section 163 of the New Companies 71 of 2008 (the Companies Act), in terms whereof the Applicant seeks an order directing the First to the Fourth Respondents to purchase her shareholding and loan account in the Fifth Respondent.

[2] The Applicant has also sought other ancillary relief relating to the determination of the price of her shareholding. She wants an agreed Chartered Accountant to valuate her shares and failing that for the South African Institute of Chartered Accountants to appoint a valuator.

[3] The order sought also provided for the powers of the valuator and the procedure which he/she may be directed to follow to arrive at an appropriate valuation of the shares. In the alternative the Applicant sought a final 'just and equitable' winding up of the Fifth Respondent.

[4] The Applicant is married to one Mr Anesh Harilal ('Anesh Harilal'). The Fifth Respondent issued share capital of 100 shares and an authorised share capital of one thousand shares. Initially the shareholders of the Fifth Respondent comprised of one Mitchell Beshe ('Beshe'). He held 25 shares. Anesh Harilal held 25 shares. The Ishwar Rajman Family Trust held 25 shares and the Veraisha Trust held the remaining 25 shares. The shareholders entered into the agreement on 9 April 2008. It is in dispute whether the shareholders Agreement is enforceable.

[5] Beshe sold his shares in terms of the shareholders agreement. When Beshe disposed of his shares on 18 August 2011 some of his shares were allocated to Anesh Harilal, nine (9) shares of which were registered in the name of the Applicant. Nine (9) shares were purchased by Ishwar Rajman for his son Vikash Rajman the First Respondent, Mr Arbindranath Roopanand purchased six (6) shares. The Ishwar Rajman Family Trust and Anesh Harilal each purchased three eighths of the remaining share and Roopanand purchased a quarter of that share which was to be held in the name of Ishwar Rajman as a nominee.

[6] Following upon his conviction for tax evasion, Anesh Harilal transferred his shareholding in the Fifth Respondent to his wife Anitha Harilal the Applicant. Later on 27 March 2013 Anesh Harilal resigned as a Director. His wife the Applicant was then appointed as a Director. There is no evidence that she ever performed any duties as a director.

[7] The effect of the aforegoing was that the Applicant came to hold 34 shares in the Fifth Respondent.

[8] The shareholders agreement contained an elaborate procedure for the disposition of the respective shareholding. It provides for giving of three month's prior written notice of a sale. In it the seller was required to specify the number of shares intended for sale, the price sought and the terms of payment which had to include the rate of interest sought for the payment of any balance not paid immediately. The company's secretary was required to dispatch a copy of the notice of sale to the shareholders and to the auditor of the company. The shareholders were entitled to purchase the shares of the

seller in proportion to their shareholding and if that was not acceptable they were entitled to purchase it at a price to be fixed by the company's auditor. The shareholders had to indicate their intentions to accept the sale within two weeks from the notice of sale or from the date when the company's auditors fixed the price. If there were more than one shareholder seeking to acquire the shares they were entitled to purchase the shares in proportion to the agreement reached by them. In the absence of any agreement the sale had to take place in proportion to their shareholding in the company. It is only in the event that none of the shareholders are willing to purchase the shares that the seller becomes entitled to offer these shares to any third party on no more favourable terms than those set out in the notice of sale.

[9] A Director wishing to dispose of her shareholding is obliged to resign as a Director. The secretary of the company is entitled to refuse to register the transfer of shares so sold by a Director until the Director has tendered her resignation in writing.

[10] The company auditors are required to take the following factors into account in fixing the price of the shares on sale:-

[a] the value of the assets of the company;

[b] the company's viability as a commercial undertaking;

[c] any goodwill possessed by the company;

[d] the number of shares offered for the sale;

[e] the benefits of any long term contract enjoyed by the residual value attaching to any lease of equipment or vehicle which the company had concluded;

[f] the market value of the immovable property owned by the company; and

[g] all other matters and factors generally taking into account by the auditor when called upon to value the shares or a limited liability company.

[11] The shareholding agreement also contains a dispute resolution procedure. All disputes are required to be referred to arbitration. Two arbitrators must be appointed one of whom must be a silk practising at the Durban Bar and the other an accountant.

[12] The procedure to be adopted is informal and is required to complete within twenty one (21) days. The arbitrators are granted extremely wide powers including the power to

make contracts, to cancel the shareholder agreement, to order costs and their order is final and binding.

[13] The shareholders agreement contains a 'Shifren' clause requiring all amendments, consensual extensions, waivers, relaxations suspensions to be in writing and signed by all the parties to the agreement.

[14] The parties have furthermore undertaken in terms of the agreement to promote and maintain the best interests of the company, to exercise good faith towards each other, not to misinform each other, not to withhold material information in relation to the affairs of the company or any matter over which the company may have an interest including misconduct by its employees, associates, debtors, creditors or customers.

[15] After his conviction, Anesh Harilal was not entitled to remain as a Director. In order to transact its business the Fifth Respondent began holding shareholders meetings. Anesh Harilal continued to work for the Fifth Respondent but was then styled as it's Marketing Manager. He attended the shareholders meeting on behalf of the Applicant in terms of a proxy.

[16] Clause 19 of the Memorandum of Incorporation makes provision for shares to be registered in the names of a person for the beneficial interest of another.

[17] The Respondents have contended that the true owner of the shares was Anesh Harilal; that he made all the decisions; that he purported to sell the shares to the remaining shareholders and thereafter caused a third party firm of chartered accountants, Invictus, to attempt to purchase the remaining shares in the Fifth Respondent. I deal with this dispute later on herein.

[18] During their Annual General Meeting in June 2015 the officials of the Fifth Respondent discussed the escalation in the marketing and delivery expenses for the tax year. It had increased from R18 million to R69 million. The Applicant's husband was also present at this meeting. It was then agreed that the Fifth Respondent's auditors would employ a forensic investigator to investigate the matter. The Applicant has denied that there were any red flags. According to her the turnover for the tax year had increased by almost R150 million and that her husband had been requested to make payment of 'commissions for consultants' who had structured and put together certain tender documentation.

[19] The Fifth Respondent then employed a company to perform a forensic investigation.

[20] The Fifth Respondent's officials suspected that Anesh Harilal was acquiring high end assets which appeared to exceed the earnings that he derived from the Fifth Respondent. They laid criminal charges against him.

[21] What emerged from the forensic investigation was that Anesh Harilal was collaborating with two entities which issued fraudulent invoices and the funds paid out of the Fifth Respondent's account were diverted to the Applicant, her husband Anesh Harilal and other third parties for their benefit.

[22] On 15 December 2015 the forensic investigator ('Kasaval'), the company auditor and a police official one Mthethwa met with the Applicant's husband. He initially indicated that he had not authorised an investigation. He agreed to only speak to the forensic investigator and the police official.

[23] Anesh Harilal admitted to using the entities in question to take some R10 million from the Fifth Respondent. The forensic investigator had obtained bank statements from the entity described as 'M & H'. He prepared a schedule demonstrating that the Fifth Respondent had paid over to M & H a sum in excess of R31 million. Kasaval was able to identify payments in the sum of R27 651 976,71 which were made by M & H for the benefit of the Applicant and her husband. There was a second schedule. The forensic investigator prepared this schedule from extracts from the bank statements of the second entity described as 'Tlou'. The Fifth Respondent had paid over the sum of R44 900 233,16. Of that sum the forensic investigator was able to identify an amount of R42 925 233,16 as payments made by Tlou for the benefit of the Applicant and her husband. He showed Anesh Harilal these schedules. When confronted with these figures he told the forensic investigator that he had taken R20 million from the Fifth Respondent.

[24] Anesh Harilal then began to 'horse trade'. He tried to make overtures to the forensic investigator about a mechanism to avoid full detection. The Fifth Respondent decided to place him on suspension pending a disciplinary enquiry. Thereafter he suggested that if he were allowed to continue working he could offset his dividends against the sum of R20 million. He wanted to use the estimated dividend of R600 000,00 to repay the R20 million. The forensic investigator told him that it would take some twenty years to recover the R20 million and that this would not be acceptable. Anesh Harilal then

suggested that he could sell his shares (with an estimated value of R35 million) to the other shareholders for R15 million and he could then resign.

[25] The First, Second, Third and Fourth Respondents were not willing to accept the proposal. They indicated that they would be prepared to resolve the dispute on the condition that Anesh Harilal was willing to transfer his shares and pay an additional sum of R20 million. This was not accepted by Anesh Harilal. It was then that Anesh Harilal agreed to a counter-proposal. In effect he agreed to transfer his shares and pay an additional sum of R10 million together with a sum of R500,000,00 for the forensic investigation. The First to Fourth Respondent accepted the counter-proposal.

[26] The Fifth Respondent's auditor then drew what has been described as an authority for the transfer of shares. It does not properly reflect the actual shares transferred to each.

[27] It is necessary to quote from the document in question.

> *I, the undersigned, Anitha Harilal, do hereby agree and authorise the transfer secretary of Afro Pulse 46 (Pty) Limited Co. Reg No. 2005/043432/07 to transfer my entire shareholdings in Afro Pulse 46 (Pty) Ltd as follows:*
>
> - *Ishwar Rajman Family Trust - 30 shares*
> - *Vikash Rajman – 3 shares*
> - *Arbindranath Roopanand – 33 shares*
>
> *I, Anesh Harilal, do hereby agree to the above Transfer.*
>
> *Signed at Verulam on this 15th day of December 2015.*
>
> *Anitha Harilal'*
>
> *Anesh Harilal"*

[28] Anesh Harilal signed the authority. He also wrote a letter tendering his resignation with immediate effect as well as a letter in his own hand agreeing to hand over the 34 shares held by Anitha and agreed to pay an amount of R10 million for which plans would follow.

[29] Anesh Harilal then told the company officials that they could accompany him to his home where the Applicant was in order for her to sign the agreement. He drove them in his vehicle. When they arrived at his home he first went into his house and thereafter called the forensic investigator and the policeman to join him.

[30] After Anesh Harilal gave the letter in question to the Applicant, the forensic investigator asked her whether she was aware of the import of the document. Anesh indicated that she was aware of its contents. The Applicant read through the document and then signed it.

[31] Anesh Harilal then returned with Kasaval and Mthethwa to the company's premises. It was intended that the Fifth Respondent's attorneys would prepare a comprehensive agreement to deal with the method to secure payment.

[32] Instead on 17 December 2015 the forensic investigator telephoned Anesh Harilal to discuss how the sum of R10 500 000,00 could be repaid. Anesh Harilal agreed to pay R150 000,00 per month over a two year period. It was then agreed that they would assemble at the company's premises at 2 p.m.

[33] The forensic investigator did not arrive on time. Anesh Harilal telephoned him to advise him that he had been to the company premises on two occasions only to find that the forensic investigator was not present. The forensic investigator then arrived and noticed Anesh Harilal driving away from the premises. He then saw the forensic investigator and returned to hold the meeting.

[34] Further discussion took place in the Fifth Respondent's boardroom. Anesh Harilal agreed to pay a sum of R500 000,00 at the end of December and thereafter R150 000,00 per month over a two year period. He was asked about a R5 million Liberty Life Policy. According to Anesh Harilal this sum had been used to provide security to the bank for credit facilities for Mandla's Stationery CC ('Mandla's'). Mandla's was an entity previously owned by the Applicant and her husband. He transferred his shares to the Applicant.

[35] It was then agreed that further meetings would take place between the Fifth Respondent's attorneys and Anesh Harilal. These came to nought.

[36] It would appear that by 21 December 2015 the Applicant and/or her husband had engaged the services of their present attorney one Emlyn Collins ('Collins') of Hulley & Associates Inc. He wanted a copy of the draft agreement so he could advise the Applicant and her husband. Thereafter Collins sought information on how the capital amounts were arrived at. He wanted a copy of the forensic report and details of the criminal investigation. Collins, it would seem wanted to shield the Applicant's husband

from any criminal prosecution. He insisted that such a clause be inserted in the agreement. This was not acceptable to the Fifth Respondent's attorneys. It was agreed that the parties would meet on 23 December 2015 to discuss the matter further.

[37] The meeting that was scheduled for 23 December 2015 did not take place. Instead the Applicant's husband telephoned the investigator to say that he wanted to stand by his undertaking but was receiving poor advice. He wanted an assurance that there would be no criminal prosecution. This assurance was also sought by Collins later than day. The Fifth Respondent's attorneys told Collins it would be unlawful to provide for such a provision.

[38] What then transpired was that Collins sought to re-negotiate the terms of the agreement. It was he who contended that the shares should be valued and that the amount of R10 million should be paid from the value of the shares. Collins then sought an undertaking that the Respondents would not cause the Applicant to be arrested as she was leaving on a holiday and was travelling abroad. Collins further spoke to the Respondents' attorneys and complained that they were not acting reasonably.

[39] During the early part of January 2016 the Fifth Respondent launched applications to wind up an entity known as Raptoscore (Pty) Limited under case number 13465-2015. The Fifth Respondent also brought a similar application against Mandla's Stationery CC. The parties were agreed that I could peruse these papers.

[40] I noted that in the Founding Affidavit in the Raptoscore matter the First Respondent deposed to an Affidavit. He stated that the Applicant was a 34% shareholder in the Fifth Respondent. He also made reference to the properties which the Applicant and her husband had acquired. The deponent in the Raptoscore Affidavit, one Hariperssad Harilal is Anesh Harilal's brother. He stated under oath (at paragraph 17 thereof) that according to the Applicant the two sectional title units purchased at the Seasons Court in Umhlanga were acquired by her and her husband from private resources. It is alleged that they sold Gold Coast Convenience Store CC for R850 000,00 some four years ago and that these funds, augmented by the dividends paid to the Applicant and other funds accumulated, were used to purchase the properties in question.

[41] He also stated in his Affidavit (at paragraph 20 thereof) that the sectional title at The Executive in Umhlanga had been acquired on 4 September 2012 for a purchase price of R4.3 million and was funded by a bond from Standard Bank of some R3.5 million.

He furthermore stated that the Mercedes Benz AMG vehicle had been acquired by the Applicant from her private resources and not those of the Fifth Respondent.

[42] It is alleged by the Applicant in the application to wind up Mandla's Stationery CC that the Fifth Respondent's attorneys had threatened to cause her arrest at the airport before leaving for holiday during December 2015.

[43] The Applicant has, in her Replying Affidavit not denied that the assertions were incorrect. She said that threats were made by the forensic investigator.

[44] In her Answering Affidavit (in case number 13466/2015) the Applicant stated that "the Applicant's attorney threatened to have me and my husband arrested at the airport". She also stated that the two sectional title units were purchased in April 2013, that the sectional title unit at The Executive was purchased in September 2012 and that she and her husband purchased the vehicle from their own funds and that these did not emanate from the Fifth Respondent.

[45] On 6 December 2015 the Applicant instructed her attorney to write a with prejudice letter alleging that she was a 34% shareholder in the Fifth Respondent and that as a result of the winding up application brought against Mandla's Stationery CC and "other reasons" she was prepared to dispose of her shareholding in the Fifth Respondent for a sum of R34 million or 34% of a fair evaluation of the Fifth Respondent. The Respondents did not react to the letter. They took the view that the Applicant had disposed of her shares and was consequently no longer a shareholder. The Respondents also took the stance in the papers that the Applicant did not have the requisite *locus standi* to bring the application because she was not at that stage a shareholder.

[46] I return to deal with this issue later hereon.

[47] In her Replying Affidavit the Applicant alleged that the forensic investigator and the police official made "all sorts of threats against Anesh". She alleged that on the 15 December 2015 the forensic investigator "barked at Anesh accusing him of theft". Even though Anesh sought legal representation the police official remained present "near enough as though he posed a physical threat" to Anesh. Anesh was not offered the opportunity to consider the matter. He was told that he would be charged for fraud and money laundering, theft and that he would be imprisoned. It is alleged that the forensic investigator told Anesh Harilal that the Fifth Respondent's attorney was a notorious

attorney "who always got his man". The forensic investigator apparently mentioned the names of the Applicant's three daughters. He told Anesh that his daughters would never see him save through jail bars and that this went on for some twelve hours. Anesh then "began to crack". He then signed the letter of resignation, the letter agreeing to hand over the 34% shares held in the Applicant's name and to pay R10 million; that he was his wife's proxy; and; finally the authority for the transfer of the shares in the Fifth Respondent which the Applicant also signed.

[48] She also alleges that when her husband arrived at her home on 15 December 2015 he was in the presence of the forensic investigator and the police officials. Her husband "simply placed the authority for the transfer of the shares and told her to sign without question".

[49] In the Founding Affidavit the Applicant stated that two unknown men arrived with her husband and "they threatened to have her husband arrested and locked up if she did not relinquish her shareholding in the company".

[50] She alleged that the threats and "other unlawful conduct" continued. She alleges that the forensic investigator and the Fifth Respondent's attorney Mr Nepaul "directly or indirectly threatened" to have her husband and her arrested if she did not relinquish her shareholding in the company. She and her family had planned to leave on 23 December 2015. The Fifth Respondent's attorney had e-mailed an agreement to her attorney and insisted that she sign it. It carried an "innuendo" that if she did not sign the agreement her husband and she would be arrested at the airport. She refused to sign the agreement.

[51] On the morning of 23 December 2015 the forensic investigator telephoned her husband and directed him to ensure that the Applicant signed the agreement by 13h00 or else she would arrested at the airport. She says that the Fifth Respondent's attorney was "high-handed and arrogant" and refused to make a hard copy of the agreement or the audit report available. However she was not arrested. She went on vacation. She returned on 2 January 2016. On 29 December 2015 the Fifth Respondent's attorney issued urgent winding up papers against Mandla's Stationery CC and caused the matter to be set down for hearing on 6 January 2016.

[52] Her husband attended Court to discuss the Applicant's shareholding with the First to Fourth Respondents but they left the Court precinct.

[53] She states that it became clear to her that the remaining shareholders were "determined to get rid of her as a shareholder" and she instructed her legal representatives to discuss a 'parting of ways' from the Fifth Respondent. The Respondents had brought a contrived winding up application against Mandla's Stationery CC. She had "no trust in the co-shareholders". She had "no relationship with the Fifth Respondent" and was "not on speaking terms with them". They sought to "extort" her into disposing of her shareholding and the Respondents had "conducted themselves oppressively towards her and prejudicially". She thus sought a just and equitable order from this Court to compel them to purchase her shares alternatively to wind up the company.

[54] She did not want to wind up the company because it was a successful business having a lucrative business employing a large number of people relying upon the company to maintain themselves and their family. She was doing so as a last resort.

[55] The first issue that I am required to determine is whether the Applicant has the necessary *locus standi* to bring the application. This in turn depends on the validity of the transfer. The transfer has become mired in controversy. If there was duress the agreement could be voided.

[56] The allegations necessary to rely upon duress are not pleaded and I am unable to determine this issue on these papers.

[57] There are however disquieting features about the Applicant's allegations. It is strange that they never told the forensic investigator that the two sectional titles which are registered in their name were obtained from private resources. It would have been the simplest thing to tell the forensic investigator that they sold a business Gold Coast Convenience Store CC for R850 000,00; that they augmented these funds from dividends paid to the Applicant and with other funds that they had accumulated they purchased the properties in question. One would have expected Anesh Harilal to have said to the investigator that the sectional title purchased at The Executive was purchased in terms of a bond and that the motor vehicle in question had been purchased by the Applicant from her own funds. Secondly, if he had been required to draw monies with the full knowledge of the Respondents for onward transmission to consultants and other intermediaries for services that they rendered on behalf of the Fifth Respondent, Anesh Harilal did not make this assertion in their presence nor in the meetings with the Kasaval and Mthethwa. And, Anesh Harilal did not provide, even in this application, a reasonable plausible explanation for the large sums which were

siphoned from the Fifth Respondent to the Applicant's business. Thirdly, Anesh Harilal has not himself put up an Affidavit setting out what transpired on 15 December 2015 at the company's premises nor what transpired on 17 December 2015. A person who has been unlawfully threatened and who is innocent would have proceeded to the police station on 16 December 2015 to lodge a complaint. There is a deafening silence about what the Applicant and her husband did on the 16 December 2015. Fourthly, when the Applicant and her husband made contact with their attorney they either secreted the truth from him or if they told him it is strange that he did not at any stage record that the Applicant had been induced to give up the shares and that threats were directed at them. I noted from details annexed to the criminal charge sheet that Mr E. Collins represented the Applicant's husband during his criminal proceedings. Fifthly, Anesh Harilal spoke to the investigator to tell him that he wanted to abide by the earlier agreement and was being given bad advice. This is hardly consistent with any threats or duress. Sixthly, the Applicant and her husband went on holiday without seeking to recall the agreement. It is clear that the Applicant and her husband would have been amenable to an agreement which effectively insulated them from any criminal investigation and prosecution. Her husband had recently been convicted of tax evasion and it is likely that any subsequent conviction could result in his imprisonment. Finally, when the Applicant's attorney wrote the letter of 6 January 2015 in which he sought the disposal of the shares for R34 million he did not say therein that the Respondents had behaved in a manner which was oppressive or unfairly prejudicial nor oppressive. The letter said that the reason for the offer was because the Fifth Respondent had sought to wind up her company. He did admittedly say that there were "other reasons". He also did not contend that the Applicant was not bound by the shareholders agreement because the Respondents had repudiated it. This defence only surfaced conveniently when the point was taken. I have no doubt that this stance was an afterthought.

[58] The version of the Applicant does not in my view have a ring of truth to it. The distinct impression that I gained was that the Applicant and her husband had second thoughts about their decision to transfer their shares when the Fifth Respondent refused to agree to withdraw the criminal proceedings against her husband.

[59] The Applicant knew that there would be a dispute on this issue. She knew that the issue would not be capable of any final determination on these papers. Yet, she chose to launch application proceedings knowing this to be the case. It cannot behove an

Applicant seeking final relief to move motion proceedings when the very issue alleged to constitute the oppression is in dispute.

[60] The Respondents went to great lengths to demonstrate how large sums of money were siphoned from the Fifth Respondent into the account of Tlou Business Solutions. For example on 17 September 2013 an amount of R800 000,00 was paid from the Fifth Respondent to Tlou Business Solutions. On the 18 September 2013 an amount of R24 697,00 was paid to the Applicant's husband in respect of one of the sectional title units at the Seasons Court. An additional payment was made to the Applicant's husband in the sum of R755 303,00 in respect of the second of the two sectional title units at the Seasons Court. Thereafter on 17 October 2013 an amount of R2 million was siphoned from the Fifth Respondent's account. On the 18 October 2013 Tlou Business Solutions paid an amount of R844 000,00 to Anesh and the annotation in the bank records referred to the first of the two sectional titles which the Applicant and her husband owned at the Seasons Court. The balance of the R2 million was dispersed to the Applicant's business. The sum was R231 000,00. The remaining amount was paid to the Applicant's husband. It was for an amount of R895 000,00 and the annotation relates to the Applicant's sectional title unit at The Executive. These payments continued unabated. The "Consultants" are nameless and there are no names save that of the ANC. The payments are all in cash. They are for extremely large amounts. There are no invoices. These are not consistent with lawful transactions of the Fifth Respondent.

[61] On 5 February 2015 a sum of R5 000 000,00 was siphoned from the Fifth Respondent's account. Tlou Business Solutions paid an amount of R823 000,00 to NMI Durban South in respect of the Mercedes Benz vehicle referred to in the papers.

[62] The R5 million which had been paid to Tlou Business Solutions was paid over to the Applicant and/or her husband on 23 February 2015. These funds were used to obtain a Liberty Life Insurance Policy.

[63] The bank statements of M & H Suppliers CC shows that there were at least three payments made for and on behalf of the Applicant's husband. The first payment was made on 3 April 2013. An amount of R1 850 697,91 had been deposited into the account of M & H Suppliers. These were drawn from the Fifth Respondent's account. An amount of R1,5 million was paid to the Applicant's business. On the same day an amount of R350 697,00 was paid to the Applicant' s husband and the annotation

reflects that this was in respect of the two apartments at the Seasons Court in Umhlanga. There was an additional payment to Anesh in the sum of R30 000,00 in respect of the sectional title unit at The Executive. Thereafter on 14 February 2014 an amount of R500 000,00 was drawn down from the Fifth Respondent's account. On the following day M & H Suppliers made a payment to the Applicant in the sum of R500 000,00. On the 11 April 2014 a further sum of R250 000,00 was drawn from the Fifth Respondent. M & H Suppliers then made a payment to the Applicant on 12 April 2014 in the sum of R238 000,00.

[64] During the entire period (that is from October 2013 to June 2015) Tlou Business Solutions paid to the Applicant's business a sum of R18 476 000,00. During the same period monies to the tune of R3 730 450,00 were paid to the Applicant and her husband.

[65] M & H Suppliers CC paid the Applicant's business during the period June 2010 to December 2014 a total R36 148 646,44 and an amount of R1 118 697,00 to the Applicant's credit.

[66] Although there is a dispute of fact relating to the Applicant's *locus standi*, I intend to assume that she has the necessary *locus standi* without deciding the issue given the conclusion to which I have reached herein.

[67] I turn now to deal with the shareholders agreement. The Applicant did not explain why she did not comply with the shareholders agreement in her Founding Affidavit. When confronted with the point the Applicant contended that the forensic investigator and the police official, acted on behalf of the Respondent, and as such the Respondents repudiated the shareholders agreement. There is no merit to the contention.

[68] The Applicant bears the onus of proving that the Respondents have repudiated the shareholders agreement[1].

[69] It was held in ***Street v Dublin 1961 (2) SA 4 W at 10*** that:

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[1] In Re: Rubel Bronz and Metal Co and Vos [1918] 1 KB at page 322

"the test as to whether conduct amounts to such a repudiation is whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound."[2]

[70] The doctrine of repudiation is of course not a panacea for one or minor provisions in a shareholders agreement such as was binding upon the Applicant. The Court must look at the nature of the shareholders agreement, the claim made by the Applicant and of course whether the Respondents intended to cancel the shareholders agreement and the import of the shareholders agreement.

[71] In *Rubel's* case the Court said:

"the doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not as a rule be deemed to amount to a repudiation ... but, as already indicated, a deliberate breach of a single provision in a contract may under special circumstances, and particularly if the provision being important, amount to a repudiation of the whole bargain ...

In every case the question of repudiation must depend on the character of the contract the number and weight of the wrongful act or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and the general circumstances of the case."

[72] Shareholders who have struck a bargain to use the procedures provided in a shareholders agreement should as a rule be encouraged to comply with such procedures. It is said to avoid "the expense of money and spirit[3]"

[73] Here the Applicant's main complaint for not complying with the shareholder agreement is that the Fifth Respondent's auditor has aligned himself with the Respondents. However the Applicant has not explained why the auditor would be incapable of determining the price of the shares in accordance with the principles stated in clause 4(j) of the shareholder agreement. And, if the Applicant were dissatisfied with the determination reached by the auditor she would be entitled to thereafter refer that issue to arbitration in terms of clause 11 of the agreement.

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[2] See also Inrybelange (Edms) (Bpk) v Pretorius 1966 (2) SA 416 (A) at 427 and Van Rooyen v Minister Van Openbare Werke en Gemeenskapsbou 1978 (2) SA 835 (A) at 844 – 846 where the test in Street's case was approved as being a correct statement of our law.

[3] Bayly v Knowles 2010 (4) SA 548 SCA at para 24

[74] I am mindful of the fact that an arbitration clause cannot oust the jurisdiction of a Court. The Respondents have to show that I should exercise my discretion in their favour. I believe that the Respondents have discharged that onus. I say so *inter alia* for the following reasons.

[75] The investigation into the alleged misappropriation of the Fifth Respondent's funds and all the details of the beneficiaries has not as yet been completed. I also do not believe that the Applicant has come to Court with clean hands. This applies to a winding up premised on the just and equitable grounds and to an application brought in terms of Section 163 of the Companies Act. This fundamental principle permeates the common law and indeed it is consistent with the purpose of the Act. One of the purposes of the Companies Act is to encourage a high standard of corporate governance and compliance with the Bill of Rights. The tenets of fair play are therefore also applicable to the instant case. This principle is expressed as "memo ex suo delicto meliorem suam conditionem facere potest". It has been translated to mean that no one is allowed to improve her condition by her own wrongdoing. The *prima facie* evidence in this case suggests that the Applicant has benefited from the fraud of her husband. It would in my view be improper to permit her to simply brush the shareholder agreement aside by vague and general statements that the shareholders agreement has been repudiated and that its auditor is biased without putting up any evidence to that effect[4].

[76] Dealing with an application for winding up based on the just and equitable principle Leon J in Emphy and Another v Pacer Properties (Pty) Limited 1979 (3) SA D&CLD said that:

> *"an Applicant relying on the just and equitable provisions of the Companies Act must come to Court with clean hands and if the breakdown in confidence appears to have been due to his misconduct it cannot insist on the company being wound up if they wish to continue."*

[77] It follows therefore that the Applicant is not entitled to the alternative relief of a winding up based on the just and equitable principle. During his submissions for the Applicant Mr Kemp did not press the issue. This appears to be consistent with the stance taken by the Applicant in the Founding Affidavit where she says that it is not her intention to wind the company up and would only seek this relief as a last resort. In my view no case has been made out for the winding up of the company.

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[4] Wimbledon Lodge (Pty) Limited v Gore NO and Others 2003 (5) SA 315 at para 10

[78] In order to succeed under Section 163 of the Companies Act the Applicant must allege and prove that an act or omission of the company or a shareholder has resulted in oppression or unfair prejudice or that it has unfairly disregarded her interests. The Applicant has not alleged that the business of the Fifth Respondent is or has been carried out or conducted in a manner that is oppressive or unfairly prejudicial or that it unfairly disregards her interests. She has not relied on a claim that the powers of the Director are being or has been exercised in a manner that is oppressive or unfairly prejudicial or unfairly disregards her interests.

[79] A perusal of the founding application shows that she complains of oppressive and/or prejudicial conduct. It is directed at the threat of arrest on 15 December 2015 and further alleged threats and unspecified unlawful conduct at the instance of the forensic investigator and the Respondents' attorney. It is also directed at the fact that the Fifth Respondent has sought to wind her company up. All of the allegations are denied.

[80] The Applicant is required to demonstrate that the relief which she seeks would remedy her complaint and that in all the circumstances it is just and equitable to grant the relief which she sought.

[81] In his submission Mr Kemp accepted that there were disputes of facts which he said could not be resolved on the papers. He urged me to refer the parties to trial in terms of Section 163(2)(l) of the Companies Act.

[82] The powers envisaged by Section 163 are wide and flexible. Professor S.H.I. Cassim et al in Contemporary Company Law 2 ED (2012) at 771 – 2 make the point that:

> *"despite the wide ambit of section 163, it must be borne in mind that the conduct of the majority shareholders must be evaluated in light of the fundamental corporate law principle that, by becoming a shareholder, one undertakes to be bound by the decisions of the majority shareholders ... thus not all acts which prejudicially affect shareholders or directors, or which disregard their interest, will entitle them to relief - it must be shown that the conduct is not only prejudicial or disregardful but also that it is unfairly so."*

[83] It is therefore important for the Applicant to rely on clear evidence in order to invoke the relief foreshadowed in Section 163.

[84] It was said in Law and Others v Nel 2011 (2) SA 172 (SCA) at para 23:

> *"An Applicant ... cannot contend 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 had been 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 an end of the matters complained of; and that it is just and equitable that such relief be granted. Thus, the Court's jurisdiction to make an order does not arise until the specified statutory criteria has been satisfied [citations omitted][5]."*

[85] Oppressive connotes conduct that is "burdensome, harsh and wrongful" and it includes lack of probity or good faith and fair dealing in the affairs of a company to the prejudice of some portion of its members[6].

[86] The Supreme Court of Appeal also went on to state in Grancy[7] that Section 163 should be applied "to advance the remedy ... rather than limit it". Such an approach also gives effect to the purposes of the Act set out in Section 7 of the Companies Act. One of those is to balance the rights and obligations of shareholders and directors within the company and to encourage the efficient and responsible management of companies.

[87] In my view it would be prejudicial to the Respondents if I were to grant any of the relief foreshadowed in the Notice of Motion in the present circumstances. In my judgment an important consideration is the extent of the misappropriations, the need for further investigations and remedies to ameliorate the clear wrong perpetrated against the Fifth Respondent. It cannot behove the Applicant to simply say that the charges have been "trumped up" and that the shareholders knew that monies were being channelled to "Consultants". The evidence thus far indicates that although M&H and Tlou Business Solutions have their offices at 549 Servaas Street, Pretoria these premises are also leased by the Applicant's business Mandla Stationery CC. Many hundreds of

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[5] See Grancy Property v Manala 2015 (3) SA 313

[6] Grancy supra at para 22, see also Scottish Co-operative Wholesale Society Ltd v Meyer [1959] AC 324 ([1958] 3 ALL ER 66 (HL)) at 342

[7] Supra at para 26

thousands of rands were cashed in Durban. For example on 27 January 2015 there was a cash withdrawal of R1.2 million out of the bank account of Tlou Business Solutions CC. Throughout February 2015 and mainly at the Briardene branch the encashment of several million rands continued unabated. In March 2015 there was a payment to the ANC and the reference given thereto is that of Anesh. There was also a payment to one 'Mtete' on 25 March 2015 in the sum of R150 000,00. These payments, if they were legitimate payments in the ordinary course of the Fifth Respondent's business should have been reflected as such in their accounts and not in the accounts of third parties. The cash withdrawals from the accounts of the third parties are highly suspicious. These and many of the others were simply fobbed off by the Applicant. She gave a glib response suggesting that she did not want to say "much more on this topic".

[88] When confronted with the overwhelming evidence Mr Kemp reminded me that the Applicant did not make any admissions. However it is clear from the Applicant's papers that although she took umbrage at being described as a puppet of her husband, he made all the major decisions in regard to the shareholding. There is some dispute about whether she attended any of the meetings of the shareholders. The case which the Respondents sought to advance was that the Applicant was in effect a nominee, that she did not pay any consideration for the shares and did not have any active role in the affairs of the Fifth Respondent. Anesh Harilal represented to the Respondents and to third parties that he was the true owner of the shares. This was amply demonstrated in his attempt to sell the shares during September 2013. After his conviction the Applicant's husband sought to comply with the shareholders agreement and gave notice of the sale of his shares. Although the heading in the letter referred to the proposed sale of shares held at Power Stationery by Mrs Anitha Harilal it did not have her signature thereon. He stated in the letter that he had the right to offer the shares to outside parties if the existing shareholders were not willing to purchase them. The Applicant accepts that her husband not only held himself to be the *de facto* owner of the shares but that the Respondents knew and acknowledged that this was so. According to her Anesh acted for the benefit of their joint estate.

[89] The importance of the aforegoing lies in the fact that the Applicant gave the impression, in the founding papers, that she had an ongoing relationship with the co-shareholders; that the relationship had broken down to a point where she was no longer on speaking terms with them and that it was just and equitable to permit of a mechanism to part ways with the co-shareholders. In truth however the Applicant did not have an extant

relationship with any of the co-shareholders. She was not in contact with them. She did not attend the shareholders meetings. She had no relationship whatsoever. This application was brought to recover stolen monies at the hands of her husband. It was obvious that if he brought the application he would be confronted with the overwhelming evidence.

[90] In Visser Citrus (Pty) Limited v Goede Hoop Sitrus (Pty) Limited and Others[8] Rogers remarked that:

> *"It is not enough for an Applicant to show that the conduct of which he complains is "prejudicial" to him or that it "disregards" his interests. The Applicant must show that that the prejudice or disregard has occurred "unfairly". "Oppression" likewise connotes an element at least of unfairness if not something worse."*

[91] If there has been a breakdown of confidence between shareholders it may be only but fair to permit the innocent parties investment to be returned to that party. This principle accords with the other related principle of majoritarianism in company law. Where however the unfairness can be laid squarely at the minor shareholder she cannot be heard to complain. When a Court is faced with such a situation it is not fair nor permissible to "preside over a protracted and expensive contest of virtue between the shareholders and award the company to the winner.[9]"

[92] There are several disputes of fact which cannot be resolved on the papers. However the Applicant for the main put up bare denials without once seeking to deal with any of the serious allegations directed against her husband and herself. She was content to suggest that the disputes should simply be referred to oral evidence. That is not the proper approach.

[93] The correct approach is that relief should only be granted in motion proceedings when the facts set out in the Applicant's Affidavit are admitted and in their totality those put up by the Respondents permit the grant of such an order[10]. It is not correct to suggest that because legislation permits the launch of motion proceedings that even where there are anticipated disputes such a party can come to court in the sure knowledge that they can contend that that they have no right to launch action proceedings. It could

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[8] 2014 (5) SA 179 (WCC) at para 55

[9] Rea Company No. 006834 of 1988 Ex Parte Kremer [1989] BCLC 365 (CHD) at 368

[10] Plascon-Evans Paints (Ltd) v Van Riebeeck Paints (Pty) Limited 1984 (3) SA 623 (A) at 634 E - G

never have been the intention of the legislature to restrict the procedural rights of parties in this way. The Companies Act must therefore be interpreted to mean that motion proceedings are permissible when there are no anticipated disputes of fact or these are easily determined by referral to trial.

[94] The Supreme Court of Appeal has reiterated the correct approach to disputes of fact in motion proceedings. It has said that "a real, genuine and *bona fide* dispute of fact can exist only where the Court is satisfied that the party who purports to raise the dispute has in his Affidavit seriously and unambiguously addressed the facts said to be disputed. There will off course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averments. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or counter veiling evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the Court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stands apart from a broader matrix of circumstances all of which need to be borne in mind when arriving at a decision. A litigant may not necessarily understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the Answering Affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal advisor who settles an .....affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the Answering Affidavit. If that does not happen it should come as no surprise that a Court takes a robust view of the matter[11]"

[95] A litigant who therefore anticipates or knows that there is likely to be a dispute of fact and who nonetheless proceeds by way of motion proceedings runs the real risk that a Court, in the exercise of its discretion, particularly if there is suspicion about that party's version, may result in the application being dismissed with costs.

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[11] Wightman t/a JW Construction v Head Four (Pty) Limited and Another 2008 (3) SA 371 SCA at para 13

[96] Room Hire Co. (Pty) Limited v Jeppe Street Mansions (Pty) Limited[12] is authority for the proposition that it is not proper for a party to commence proceedings by motion "with knowledge of the probability of a protracted enquiry into disputes of fact not capable of easy ascertainment, but in the hope of inducing the Court to apply [Rule 6] to what is essentially the subject of an ordinary trial action".

[97] Mr Kemp, after readily accepting that there were disputes of fact irresoluble on the papers, counted by saying that the Applicant was mandated by the legislature to proceed by way of application proceedings and that the legislature, when it drafted the Companies Act must be taken to have known the difference between application proceedings and trial proceedings. He added that the Applicant had also sought a winding up order which could only be brought on motion. He did not advance any authority for the propositions. Mr Singh who appears for the Respondents on the other hand argued that if a party knew or anticipated a real dispute of fact it would be unwise for that party to proceed on motion to wind a company up. It would be appropriate in those circumstances to first obtain a judgment and then rely thereon to wind the company up. In regard to the first point Mr Singh submitted that a party could proceed by way of a declarator as to that parties *locus standi* or in appropriate instances set out the disputes of fact and identify the issues which ought to proceed to trial.

[98] He called to aid the case of Kalil v Decotex (Pty) Limited and Another 1988 (1) SA 943 AD as authority for the proposition that where in an opposed application for a winding up and the probabilities on the Affidavit are equipoised a Court would gravitate towards the hearing of oral evidence. However if the probabilities do not favour the Applicant a Court would be less likely to exercise its discretion in their favour. The probabilities do not favour the Applicant. The Applicant has not placed any material to exercise my discretion in her favour.

[99] As a norm a Court should not order the hearing of oral evidence where the probabilities favour the Respondent[13]. This is a salutary approach. I associate myself with such a long standing precept.

[100] Motion proceedings are not as a rule designed to determine the probabilities. Where a parties version consists of bald or uncreditworthy denials or raises fictitious disputes

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[12] 1949 (3) SA TPD at 1162

[13] Decotex supra

of fact which are palpably implausible, far-fetched or so clearly untenable it is permissible to reject them out of hand[14].

[101] In my judgment a party seeking relief in terms of Section 163 of the Companies Act who knows that there are disputes which cannot be resolved in motion proceedings is entitled to either set those disputes out in the Founding Affidavit and to identify the issues which should be dealt with in a trial and to seek an order in terms of Section 163(2)(l) of the Companies Act. A Respondent faced with such an application would not be entitled to resist such a procedure. Such a party would also be entitled to bring a declarator that the disputes in question, properly identified, should be referred to trial. Finally, it is open to such a party to record the respective party's contentions and to cause these to be referred to trial.

[102] A party who is aware that there are likely to be serious conflicts of facts is also entitled to proceed by way of action. The answer to any defence that the legislature has restricted the remedy to motion proceedings would be that the factual disputes cannot be resolved on application and that the opposing party cannot complain of any prejudice. A Court would be wrong, in my view, to dismiss the application on this basis. Trial and motion proceedings are designed to arrive at the truth and to do justice between parties. There are clear instances developed in our common law when a party should not proceed by way of application proceedings. Beyond these clear instances, a party is entitled to bring application proceedings when there are no disputes of fact. But he cannot do so knowing that there are factual disputes.

[103] In Garment Workers Union v De Vries and Others[15] Price J issued the following caveat as far back as 1949:

> *"It is becoming a habit to bring applications to Court on controversial issues and then to endeavour to turn them into trial actions. Applicants thereby obtain a great advantage over litigants who had proceeded by way of action and who may have to wait for many months to get their cases before the Court. Such applications – cum – trials interpose themselves, occupying the time of judges and still further delaying the hearing of legitimate trials. Applications for the hearing of viva voce evidence in motion proceedings should be granted only where it is essential in the interests of justice."*

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[14] National Director of Public Prosecutions v Zuma 2009 (2) SA 277 at para [26]. See also Wishard v Bleeden NO 2013 (6) SA 59 KZP at para 60

[15] 1949 (1) SA 1110 W at 1133

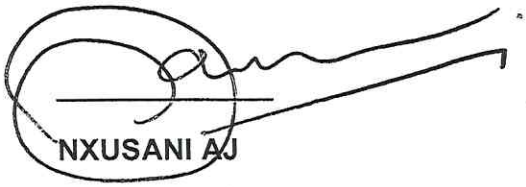
[104] The present application should never have been brought in the hope the matter would be referred to oral evidence. A party who is aware of the dispute but who chooses to remain silent about them in the founding papers and when confronted with evidence puts up a bare denial should expect that a Court would exercise it's discretion against that party and dismiss the application with costs.

[105] In my judgment this is not a proper case to refer to trial for the hearing of oral evidence.

[106] In any event I can conceive of no prejudice to the Applicant. This is not a case where the Applicant is likely to suffer irreparable harm if I were to dismiss the application with costs. I am deeply concerned by the conduct of the Applicant. I would have granted a punitive costs order but Mr Singh did not press the issue.

[107] Consequently I make the following order:-

The application is dismissed with costs.



NXUSANI AJ

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Date of Hearing:	31 October 2016
Judgment handed down:	11 January 2017