IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Not Reportable
Case no: 19726/2023

In the matter between:

DR PIETER FRANCOIS MELCHOIR BRIERS	**FIRST APPLICANT**
DR PRANAV RAMKILAWAN	**SECOND APPLICANT**

and

DR J BRUWER AND ASSOCIATES NO 78 INC	**FIRST RESPONDENT**
DR ANDRE JACOBUS MAREE	**SECOND RESPONDENT**
DR ELSKE MARGUERITE FERREIRA	**THIRD RESPONDENT**
DR JASPER MICHAEL SMIT	**FOURTH RESPONDENT**

DR MARSHA HERMANUS	**FIFTH RESPONDENT**
DR SHARMISTHA HEERALAL	**SIXTH RESPONDENT**
DR REINETTE VAN DER WESTHUIZEN	**SEVENTH RESPONDENT**
DR SEAN DANIEL	**EIGHTH RESPONDENT**
DR YOLANDA VINK	**NINTH RESPONDENT**
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**TENTH RESPONDENT**

Neutral citation: *Dr Briers and Another v Dr J Bruwer and Associates No. 78 Inc and Others* (Case no 19726/2023) [2025] ZAWCHC 223 (27 MAY 2025)

Coram: **NUKU J**

Heard: 12 February 2025

Delivered: 27 MAY 2025

Summary: **Companies –** Oppressive conduct- remedies under s 163 of the Companies Act 71 of 2008 available to a former shareholder claiming loss of shares through alleged oppressive conduct

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ORDER

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1. Part B of the application is dismissed.

2. The first applicant is directed to pay the costs of the respondents in opposing the separation application as per scale C.

3. The applicants jointly and severally, the one paying the other to be absolved, are directed to pay the costs of the opposition of the respondents of part B of the application as per scale C.

JUDGMENT

Nuku J

Introduction

[1] The controversy in this matter relates to two decisions taken by the shareholders of Dr J Bruwer and Associates No. 78 Inc (first respondent) to terminate consultancy agreements that the first respondent had concluded with Dr Pieter Francois Melchoir Briers (first applicant) and Dr Pranav Ramkilawan (second applicant) and who are collectively referred to as the applicants.

[2] The applicants contend that Dr Jasper Michael Smit (fourth respondent), who has largely been enabled and supported by the other shareholders of the first respondent, has abused his position as the sole director of the first respondent, and has thereby acted, and carried on the business of the first respondent, in a manner that is oppressive and unfairly prejudicial to, and/or that unfairly disregards their interests as minority shareholders. As a result, the applicants seek relief in terms of section 163 of the Companies Act 71 of 2008.

[3] The primary relief that the applicants sought was the setting aside of the termination of the consultancy agreements. However, having regard to the personal nature of the relationship between them and the other shareholders of the first respondent, the applicants do not persist with the primary relief and are content with the

alternative relief that they receive compensation for their shares in the first respondent based on fair market value thereof.

[4] The application is opposed by the second to fourth as well as sixth to ninth respondents who were all shareholders of the first respondent at the time that the dispute arose and they are collectively referred to as the respondents. The fifth and tenth respondents have not participated in this application.

[5] The respondents oppose the application, essentially on two grounds. The first is that the applicants do not have the *locus standi* to claim relief in terms of section 163 of the Companies Act. The second is that the applicants have not establish the requirements for relief under of section 163 of the Companies Act.

[6] The claim that the applicants lack the locus standi to seek relief under section 163 of the Companies Act, is based on the notion that the applicants are no longer shareholders of the first respondent as the termination of their consultancy agreements triggered a forced sale of their shares.

[7] As to the merits, the respondents' case is that the consultancy agreements with the applicants were lawfully terminated in accordance with the provisions contained therein and that the applicants have not provided evidence in support of their claim that the fourth respondent acted in a manner that was oppressive and unfairly prejudicial to, and/or that unfairly disregarded their interests.

[8] It is necessary to provide a brief factual background before considering the dispute between the parties and to which I turn.

Factual background

[9] The first respondent was incorporated for the purposes of conducting a medical practice at the premises situated at 95 Blaauwberg Road, Table View, Cape Town. Its

shareholding is limited to practitioners who are registered in terms of the Health Professions Act No 56 of 1974 (Health Professions Act) and who practice the profession of a medical practitioner, dentist, psychologist or a supplementary health service contemplated in section 32 of the Health Professions Act. In terms of its Memorandum of Incorporation (MoI), it has a maximum of 1000 (One Thousand) ordinary shares with a par value of R1.00 each.

[10] A practitioner who desires to acquire shares in the first respondent is required to first conclude a consultancy agreement with the first respondent. The consultancy agreement regulates the acquisition and loss of shares in the first respondent under certain circumstances.

[11] The terms of the consultancy agreement that is concluded with each practitioner are similar. Of relevance to these proceedings are clauses dealing with the subscription for shares, the duration and termination of the consultancy agreement as well as some of the consequences of termination of the consultancy agreement. These are clauses 4, 5.1 and 5.3.4, respectively in the consultancy agreement concluded with the first applicant and clauses 5, 6.1 and 6.4.4 respectively in the consultancy agreement concluded with the second applicant. These clauses are identical, and I only set out the ones contained in the consultancy agreement that was concluded with first applicant.

[12] Clause 4 provides that 'The Consultant hereby subscribes for 1 (One) ordinary share in the share capital of the Company at the par value thereof and the Company hereby agrees to allot and issue to the Consultant as soon as possible after the signature of this agreement and in any event prior to the payment of any consideration by the Company to the Consultant.'

[13] Clause 5.1 deals with the right of each party to terminate the consultancy agreement and reads 'Notwithstanding the date of signature hereof this Agreement shall be deemed to have commenced on the effective date and shall continue in full force and

effect indefinitely subject to the right of either party to terminate this agreement by giving to the other party 30 (Thirty) days written notice of termination.'

[14] Clause 5.3.4 which deals with some of the consequences of the termination of the consultancy agreement reads 'On termination of this Agreement the Consultant shall forthwith be deemed to have sold his/her share in the Company to any other shareholder nominated by the director/s of the Company for a purchase price of R1.00 (One Rand). For the purposes of the sale, the Consultant hereby nominates, constitutes and appoints any director of the company, with the power of substitution, to be his/her lawful attorney and agent in his/her name, place and stead to sign any document necessary to procure the transfer of the share including but not limited to the signature of a share transfer form.'

[15] The acquisition of shares in the first respondent was regulated as follows in respect of its first shareholders: the first respondent concluded a sale and purchase agreement with each practitioner in terms of which the first respondent sold to each practitioner what is referred to as 'the drawing power' in the first respondent's business. The drawing power includes goodwill, a patient base, reputation and a practice site. The conclusion of the sale and purchase agreement was followed by the conclusion of the consultancy agreement with each practitioner. As already stated, the terms of the consultancy agreement are, to a large extent, the same. The conclusion of the consultancy agreement was followed by allotment of shares in the first respondent.

[16] A practitioner who terminates the consultancy agreement is able to sell the drawing power subject to certain conditions that are not relevant to this application. In that event, the practitioner receives payment from the purchaser of such drawing power and the first respondent's obligation is to conclude a consultancy agreement with the purchaser of such drawing power. Importantly, the purchaser of the said drawing power pays no consideration to the first respondent for the acquisition of the 1 (One) share that is allotted to him or her pursuant to concluding the consultancy agreement.

[17] In the event of death of a practitioner, the executor/executrix of his or her estate is also able to sell the drawing power that had been purchased by the deceased practitioner, also subject to certain conditions not relevant for the present purposes. Similarly, the executor/executrix receives payment from the purchaser of such drawing power and the first respondent's obligation is to conclude a consultancy agreement with the purchaser of such drawing power. Also, the purchaser of the said drawing power pays no consideration to the first respondent for the acquisition of the 1 (One) share that is allotted to him or her pursuant to concluding the consultancy agreement.

[18] The first applicant concluded a sale and purchase agreement with the first respondent on 11 October 2007 in terms of which he purchased the drawing power from the first respondent for the sum of R210 000.00 and further undertook to enter into a consultancy agreement with the first respondent. In line with the aforesaid undertaking, he signed the consultancy agreement on 27 February 2008 pursuant to which he was allotted 1 (One) ordinary share in the share capital of the first respondent. The first applicant paid the sum of R210 000.00 in respect of the purchase of the drawing power to the first respondent. He paid no separate consideration in respect of the allotment of the 1 (One) ordinary share in the share capital of the first respondent.

[19] The second applicant concluded a sale of practice agreement with an executrix of the estate of the late Doctor Pierre Rossouw (the late Dr Rossouw) on 5 February 2021. The late Dr Rossouw, during his lifetime, was one of the first respondent's shareholders and consultants. In terms of this sale of practice agreement, the second applicant acquired the drawing power that had been purchased by the late Dr Rossouw from the first respondent. The purchase consideration was the sum of R300 000.00 which the second applicant paid to the executrix of the estate of the late Dr Rossouw. Thereafter, the second applicant concluded the consultancy agreement with the first respondent on 24 August 2021, and pursuant thereto he was allotted 1 (One) ordinary share in the share capital of the first respondent. The second applicant paid no consideration to the first respondent for the allotment of the 1 (One) ordinary share.

[20] On 1 March 2022, the first respondent's board of directors resolved to allot 9 (Nine) ordinary shares to each of its consultants including the applicants. As the fourth respondent explains in the answering affidavit, this was done for administrative purposes. This would, for example enable the first respondent to allocate the shares of a practitioner who had terminated his consultancy agreement to the remaining practitioners.

[21] The consultancy agreement concluded with the second applicant made provision for him to be remunerated on a sliding scale based on the aggregate monthly fees charged by the first respondent in respect of medical services he rendered to the first respondent's patients. In terms of this remuneration structure (the original remuneration structure) the second applicant was to be remunerated as follows:

21.1 35% of the aggregate monthly fees that are less than R114 080.94; or

21.2 40% of the aggregate monthly fees that are equal to or more than R114 080.94 but less than R136 897.56; or

21.3 45% of the aggregate monthly fees that are equal to or more than R136 897.56 but less than R180 251.36; or

21.4 48% of the aggregate monthly fees that are equal to or more than R180 251.36 but less than R228 164.10; or

21.5 50% of the aggregate monthly fees that are equal to or more than R228 164.10 but less than R319 430.61.

21.6 60% of aggregate monthly fees in excess of R319 430.61.

21.7 50% of the first respondent's gross monthly profit in respect of materials, consumables and injections used by the second applicant,

21.8 70% of aggregate monthly fees in respect of theatre procedures conducted in a Medicross registered theatre, and

21.9 50% of the aggregate monthly fees in respect of theatre procedures conducted in other registered theatres

[22] The original remuneration structure was amended when the applicant and the first respondent concluded an addendum on the same date of the signature of the consultancy agreement. In terms of the amended remuneration structure, which was to apply until 28 March 2022, the second applicant was to be remunerated at a flat rate of 50% of the aggregate monthly fees charged by the first respondent in respect of medical services he rendered to the first respondent's patients. The second applicant's remuneration would revert to the original remuneration structure from 1 March 2022.

[23] The second applicant's remuneration, however, continued based on the amended remuneration structure beyond 28 February 2022. According to the first applicant, the second applicant's remuneration and that of Doctor Nizaam van der Schyff (Dr van der Schyff) were amended to a less favourable sliding-scale structure which differs materially from the remuneration structure that applied to the other shareholders. This is, however, denied by the fourth respondent who points out that the remuneration of the second applicant was not amended during 2023 but that it was agreed upfront that the second applicant would be remunerated on a sliding-scale other than for the period that the amended remuneration structure applied, that is until 28 February 2022.

[24] Further, according to the first applicant, the amendment of the remuneration structure applicable to the second respondent was a unilateral decision that was made by the first respondent through the fourth respondent. And that this was notwithstanding the fact that the second applicant had negotiated an addendum to his consultancy agreement which had the effect that he was remunerated on a scale equal to the other

shareholders. Again, this is denied by the fourth respondent who points out that the original remuneration structure was agreed upfront and was to apply from 1 March 2022, as per the addendum to the consultancy agreement.

[25] When the first respondent became aware of the oversight relating to the remuneration of the second applicant during June 2023, the second applicant was advised that his remuneration would revert to the original remuneration structure. According to the first applicant, the second applicant queried the motives and reasons for his and Dr van der Schyff's remuneration structure being less favourable than the other shareholders but was told not to ask questions.

[26] According to the first applicant Dr van der Schyff terminated his consultancy agreement and sold his shares in the first respondent to a third party for an amount of R800 000.00 and that this was because of the oppressive behaviour by the first respondent. The fourth respondent, however, denies that Dr van der Schyff sold any shares he held in the first respondent. Instead, Dr van der Schyff terminated the consultancy agreement in terms of its provisions and sold his participating drawing power as he was entitled to after having terminated the consultancy agreement. In short, his exit was done in compliance with the provisions of the consultancy agreement.

[27] According to the first applicant, he together with the second applicant realised that an Annual General Meeting (AGM) of the first respondent had not been called. Notwithstanding this, the fourth respondent had circulated minutes of an AGM ostensibly held on 31 March 2023. This is disputed by the fourth respondent who states that the AGM was conducted by way of a round robin process due to the conduct of the second respondent.

[28] On 13 August 2023, TS Law Inc attorneys, acting on behalf of the applicants, addressed a letter, to Medicross Healthcare Group (Pty) Ltd and the first respondent

raising a number of issues that were of concern to the applicants and suggested a meeting for the purposes of attempting to resolve the aforesaid issues.

[29] The letter referred to above raised the following issues relating to the second applicant:

29.1 that the second applicant had received an email on or about 1 August 2023 from the first respondent claiming that the second applicant was owing some monies;

29.2 that the second applicant placed on record that the agreed remuneration structure had been unilaterally changed despite the initial understanding and agreement that the amended remuneration structure would apply;

29.3 that the second respondent had made various attempts to have the issue of the remuneration structure remedied so that the amended remuneration structure continues to apply;

29.4 that the second applicant had been paid R20 000 short for the period between June and July 2023, without any valid reason;

29.5 that the first respondent had advised that it did not remunerate the consultants uniformly and that it had failed to accede to the second applicant's requests to have the remuneration of the consultants standardised;

29.6 that the second applicant was of the view that the remuneration structure is designed to disadvantage only certain shareholders which the second applicant considered to be highly unethical; and

29.7 that the second applicant intended to institute a claim to recover all monies that were due to him by the first respondent.

[30] The letter also raised some issues relating to Dr Gouws, who it appears, was employed by the first applicant as a locum. The first applicant was concerned with the first respondent's attempts to employ Dr Gouws essentially poaching Dr Gouws away from him.

[31] According to the first applicant, the second applicant attempted, on 16 August 2023, to discuss the matter with the fourth respondent who refused to engage meaningfully other than indicating that he would terminate the second applicant's consultancy agreement.

[32] On 18 August 2023, the second applicant was served with a thirty-day notice of the termination of the consultancy agreement and was advised that the effective date for the termination of the consultancy agreement would be 17 September 2023.

[33] On 8 September 2023, Lizette Smit (Ms Smit) of Parker Attorneys addressed a letter to the respondents' legal representatives requesting the first respondent's MoI as well as the resolution in terms of which the consultancy agreement with the first respondent was terminated. The letter further requested an extension of the effective date of the termination of the consultancy agreement in order to afford the second applicant time to consider his rights so that he could make an informed decision.

[34] The respondents' attorneys responded on 11 September advising that the second applicant's tenure would not be extended and that a 'forced sale of shares', a reference to clause 6.4.4 of the consultancy agreement concluded with the second applicant, had been triggered through the termination of the consultancy agreement.

[35] Ms Smit responded on 13 September 2023 advising that the second applicant would not accept payment of R300 000, a reference to the amount that the second

applicant had paid when he purchased the late Dr Rossouw's drawing power. Instead, Ms Smit advised that the second applicant would accept payment of the sum of R800 000, an amount based on what Dr van der Schyff, who had also been one of the first respondent's consultants and shareholders, had sold his drawing power in the first respondent.

[36] In response, the respondents' attorneys advised that (a) the first respondent had made no offer to pay R300 000, (b) the counter-offer of R800 000 by the second applicant was rejected, (c) the consultancy agreement provides that R1.00 is payable upon termination, and (d) the first respondent did not consent to the second applicant finding an alternative consultant to acquire his share from him.

[37] On 3 October 2023, the applicants' attorneys of record addressed a demand for a shareholders' meeting in terms of section 61(3) of the Companies Act to the respondents' attorneys. The demand listed the following issues to be deliberated upon at the said meeting; namely:

37.1 the different classifications of the current issued share capital of the Practice and the consequences for shareholders;

37.2 the inconsistencies between the deeming provisions in the Practice's MoI and consultancy agreements pertaining to termination and deemed offer and/or sale of shares;

37.3 the appointment of an independent valuer to obtain the value of each shareholder's shareholding in the Practice, to determine the purchase price when a shareholder's consultancy agreement is terminated;

37.4 the amendment of the MoI by special resolution to classify the Practice as having one class of ordinary non-par value shares to bring it consistent with the Practice's conduct and in compliance with the Companies Act;

37.5 the amendment of the MoI by special resolution to allow a shareholder to appoint any other person as a proxy as provided for in the Companies Act; and

37.6 the amendment of the MoI by special resolution to provide for the Practice to have at least 3 (Three) directors who are also shareholders and practitioners of the Practice

[38] On 19 October 2023, the first applicant was served with a thirty-day notice of the termination of the consultancy agreement and was advised that the effective date of the termination of the consultancy agreement would be 18 November 2023.

[39] On 1 November 2023, the applicants' attorneys wrote to the respondents' attorneys following up on the demand for a shareholders' meeting. The respondents' attorneys reverted on the same day advising that the provisions of the consultancy agreement relating to forced sale had been triggered and that the first applicant no longer had a legal standing to insists upon any shareholder meetings. The applicants' attorneys were also requested to provide the banking details into which to pay the amounts due to applicants.

[40] The above response from the respondents' attorneys prompted the present application which had two parts. Part A was an urgent interdictory relief which was heard on 17 November 2023 and which was directed at preventing the respondents from implementing the decision to terminate the consultancy agreement with the first applicant as well as implementing the 'forced sale of shares' triggered by the termination of the consultancy agreements concluded with the applicants, pending the relief sought in Part B. Part A of the application was dismissed, and it is Part B that came before me. There were, however, some interlocutory proceedings that took place before the hearing of Part B that I need to deal with.

Litigation history

[41] As already stated, the application was launched during November 2023 for hearing of Part A on 17 November 2023. The relief sought in Part A was refused and the respondents filed their supplementary answering affidavit on 11 April 2024.

[42] On 18 April 2024, the applicants filed an application for leave to amend the notice of motion which was opposed by the respondents. The application for leave to amend came before Cloete J on 24 April 2024 who delivered her judgment on 30 May 2024 granting the first applicant leave to amend the notice of motion and refusing it in respect of the second applicant.

[43] On 14 June 2024, the applicants filed an amended notice of motion as well as an application for leave to appeal. On 25 July 2024, the first applicant filed an application in terms of Rule 10 (5) of the Uniform Rules of Court to separate the hearing of his application from that of the second applicant (separation application).

[44] The respondents opposed the separation application and was set down for hearing on 20 November 2024. On 5 November 2024, Cloete J made an order granting the second applicant leave to amend and this appears to have been based on an agreement between the parties.

[45] On 6 November 2024, the first applicant withdrew the separation application with costs standing over for later determination. Thus, one of the issues to be determined in this application are the costs in relation to the separation application.

The Applicants' case

[46] The applicants say that they have approached the Court as minority shareholders each holding 10% of the issued shares in the first respondent. They contend that the fourth respondent has abused his position as the sole director of the

first respondent, and has thereby acted, and carried on the business of the first respondent, in a manner that is oppressive and unfairly prejudicial to, and/or that unfairly disregards their interests as minority shareholders. The remaining shareholders, so the argument goes, have largely enabled and/or supported the fourth respondent's conduct.

[47] The applicants argue that their rights to practice as consultants in the first respondent in terms of their consultancy agreements, were unilaterally terminated by the first respondent under the control and on the initiative of the fourth respondent, upon thirty days' notice. At the heart of the relief sought they seek, is their contention that such termination followed as a direct result of their querying the treatment of the second applicant, as well as their requests and demands addressed to the fourth respondent to hold an annual general meeting and/or shareholders' meeting in order to re-elect a director for the first respondent and to address certain concerns regarding the fourth respondent's autocratic governance of the first respondent. They argue that they were not given an opportunity to defend themselves and make representations in an effort to avoid their membership of and participation in the first respondent being voided. The unilateral and summary termination of their consultancy agreements, it was submitted, constitutes glaringly oppressive and prejudicial conduct.

[48] Regarding the termination of the second applicant's consultancy agreement, the applicants argue that his consultancy agreement was unilaterally amended during 2023 by way of an addendum, which in effect introduced a six-month period during which his commission structure was set at a less favourable sliding-scale structure than applicable to other shareholders. They point out that the respondents' explanation for this, that was intended to afford the second respondent six months to "find his feet" and that it was negotiated with him, does not detract from the fact that he was treated differently.

[49] The other factor relied upon by the applicants, is the response that the second respondent received when he queried the motives and reasons for the unilateral

amendment of his remuneration structure, namely that he was told not to ask questions. The applicants then refer to the case of Dr Van der Schyff who terminated his consultancy agreement as a result of similar treatment that he received and sold his right to practise in the first respondent for an amount of R800 000.

[50] The applicants then refer to the failure to hold an annual general meeting of which notice was given for 31 March 2023 to other shareholders but not to them, which prompted the second applicant to request the convening of a formal shareholders meeting in order to raise their concerns which the fourth respondent refused to do. Regarding the fourth respondent's response, the applicants argue that the fourth respondent does not address the averment that the applicants were not notified of the meeting and it was submitted that this conduct was not only patently unfair, but in fact unlawful.

[51] With regard to the reasons provided for the termination of the second applicant's consultancy agreement, it was submitted that it is abundantly evident that the reason for terminating the second applicant's right to practise in the first respondent, was his dissatisfaction with the remuneration structure as recorded in his consultancy agreement as well as the various other issues which he had sought to raise with the first respondent and its administrator. Astonishingly, it was emphasised, the decision to terminate the second applicant's consultancy agreement was taken at a meeting to which he was not invited and without affording him an opportunity to protest or defend himself.

[52] Lastly, the applicants refer to the fourth respondent's response, in his answering affidavit, wherein he confirms that the decision to terminate the second applicant's consultancy agreement was arrived at during the meeting between shareholders, followed by the following remark:

> ‘I confirm that the termination is in terms of clause 6.1 of that consultancy agreement and that such termination has been fulfilled. To this end, no further engagement on this issue is required.’

[53] The applicants accept that it is so that clause 5.1 of first applicant’s consultancy agreement and clause 6.1 of the second applicant’s consultancy agreement provide for the “right of either party to terminate this agreement by giving to the other party 30 (thirty) days written notice of termination”. However, so it is submitted, such right to termination by the first respondent is subject to the legal principles relating to section 163 of the Companies Act, and the principles of good faith in the law of contract.

[54] The conduct of the fourth respondent, it was submitted, was exacerbated by the first respondent’s refusal to extend the termination period with an additional month to enable the second applicant to consider his rights and make an informed decision and the intransigent stance that a “forced sale of shares had been triggered”. A “… lack of probity or fair dealing, or a violation of the conditions of fair play on which every shareholder is entitled to rely”, to use the words of Gamble J in *Omar* aptly describes the fourth respondent’s conduct, ratified by the remaining shareholders, in terminating the second applicant’s consultancy agreement without giving him the opportunity to make representations in this regard.

[55] Regarding the termination of the first applicant’s consultancy agreement, the applicants point out that the first applicant started practising as a consultant and shareholder of the first respondent in 2007. He became acquainted with the second applicant during 2021, and they became dissatisfied with the way in which the fourth respondent conducted the affairs of the first respondent.

[56] The applicants refer to a partners’ meeting which was called by the fourth respondent (to which the second applicant was not invited) which was held on 9 October 2023. At the meeting the first applicant learned that his request for a shareholders meeting had not been communicated to other shareholders, and he

proceeded to hand the notice in terms of section 61 (3) of the Companies Act to the other shareholders.

[57] As already stated he was served with the notice of termination on 19 October 2023, and the applicant argue that the reasons contained in the termination notice are significant:

> 'We record that the stakeholders of the company had a meeting on the 19th October 2023, to discuss your dissatisfaction with the contracting of a locum as well as various other issues which you have continuously sought to raise with the company and its administrator.
> You are hereby notified that during the meeting on the 19th October 2023 the Company has resolved to terminate your consultancy agreement, as it is entitled to do in terms of clause 5.1 of the agreement.'

[58] The applicants contend that at the root of the first respondent's behaviour, is the fourth respondent's (who is in *de facto* control of the first respondent) misconceived conception that the shares issued to applicants, hold no value and that the issuing of shares to a shareholder, is nothing more than a mere administrative endeavour undertaken by the first respondent in order to conform to the prevailing legislation which governs an entity within the medical professional realm. This, the applicants contend, is incorrect, contrived and not only in conflict with the provisions of the first respondent's MoI but disregards the provisions of the Companies Act relevant to the rights and obligations of shareholders of a company registered in terms of the Companies Act in South Africa.

[59] The applicants further regarding the first respondent's stance that the applicants are not entitled to find consultants to replace them to be further manifestation of the oppressive conduct. This, they say, is contrary to the provisions of their consultancy agreements which entitles them to do so.

[60] Lastly, the applicants rely on what is stated by the first applicant but denied by the fourth respondent that “It has always been the understanding of the first and second applicants that they would be allowed to continue working as partners of the first respondent until such time as they made themselves guilty of gross misconduct” in support of their argument that the conduct complained of is in violation of mutual understanding among the shareholders of the first respondent. Ultimately it was submitted that all of the above conduct is manifestly prejudicial, oppressively unfair, unreasonable and unjust and liable to be remedied in terms of section 163 of the Companies Act.

[61] The applicants submitted that each party should pay its own costs in relation to the separation application which was withdrawn because the separation application was withdrawn for no other reason than that it had become moot and that costs in such circumstances are considered broadly on the same basis as the costs of a matter that has been settled.

The respondent’s case

[62] As stated above, the respondents take the position that the relief in terms of section 163 of the Companies Act is no longer available to the applicants after the termination of their consultancy agreements. This issue is raised as both lack of *locus standi* by the applicants as well as incompetence of the relief under section 163 of the Companies Act in the circumstances.

[63] On the issue of the *locus standi*, the respondents’ argument is that the applicants’ shares in the first respondents, have been transferred in terms of the deeming provisions and as such the applicants are no longer shareholders of the first respondent. The argument goes further that section 163 of the Companies Act does not foreshadow that a past holder of shares may launch proceedings because the definition of “shareholder” in the Companies Act makes it plain that such parties must be current shareholders and not shareholders of past rights. The applicants referred this court to

the decision of the Supreme Court of Appeal in ***Smyth***[1]dealing with a definition of persons entitled to invoke section 252 of the Companies Act, 61 of 1973.

[64] It was submitted further that the application was issued after the decisions to terminate the consultancy agreements had been implemented and so was the amendment that introduced the relief seeking the setting aside of the decisions to terminate the consultancy agreements.

[65] On the competency of the relief under section 163 of the Companies Act, the argument was that the facts relied upon by the applicants cannot sustain the relief they seek. This is because the consultancy agreements were lawfully terminated in compliance with their provisions and this was followed by the transfer of shares which was also done in compliance with the provisions of the consultancy agreements. In short, the consultancy agreements provided for termination by either party upon giving of thirty days' notice. The applicants were given thirty days' notice of termination and that cannot be conduct that is oppressive, unfairly prejudicial to or unfairly disregards their interests.

[66] It was further submitted that the other complaints by the applicants relating to alleged failure to hold an AGM, the failure to allow the applicants to sell their shares and the failure to hold a shareholders' meeting have no merit in that (a) the AGM was dealt with by way of a round-robin, (b) the applicants would only have been entitled to sell their drawing powers, not their shares, and only if they were the ones who had terminated the consultancy agreements, and (c) the issues that the applicants sought to raise in the shareholder meetings that they wanted convened were all contractual matters between each practitioner and the first respondent and thus not shareholder issues as such.

[67] Regarding the costs of the separation application, it was submitted on behalf of the respondents that these should be paid by the applicants. This is because the normal

[1] Smyth and Others v Investec and Another 2018 (1) SA 494 (SCA) at paras [41] to [45].

– default position – is that where a litigant withdraws an action, very sound reasons must exist why a defendant or respondent should not be entitled to his costs[2] and no such very sound reason has been proffered by the first applicant.

[68] The respondents also distinguished the authorities relied upon by the first applicant, ***Wildlife***[3]on the basis that the Wildlife matter concerned public interest litigation relating to environmental law whereas the first applicant here was seeking to advance his claim when he launched the separation application. I consider each of the issues below.

Discussion

[69] The starting point must be the consideration of the *locus standi* issue. Central to this application is the applicants' dissatisfaction with the termination of their consultancy agreements which, according to the respondents triggered the forced sale of the applicants' shares. It cannot be seriously suggested that the applicants do not have the locus standi to seek a relief setting aside a decision to terminate the consultancy agreements. And if that is the case it would not make sense to deprive them of *locus standi* merely because of the applicants' invocation of the provisions of section 163 of the Companies Act.

[70] Whilst it may be so that the applicants are no longer shareholders of the first respondent pursuant to the termination of their consultancy agreements, a successful challenge to the decision to terminate the consultancy agreements would restore their shareholding in the first respondent. In that case, it would be absurd to suggest that it would only be from that point that they can pursue remedies under section 163 of the Companies Act.

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[2] Germishuys v Douglas Besproeiingsraad 1973 (3) SA 299 (NC) at 300 and Waste Products Utilisation (Pty) Ltd v Wilkes (Biccari interested party) 2003 (2) SA 590 (W) at 596D-E and 597A-B.

[3] Wildlife and Environmental Society of South Africa v MEC for Economic, Environment and Tourism, Eastern Cape and Others 2005 (6) SA 123 (E).

[71] It is one thing for a person who has never been a shareholder of a company to claim relief under section 163 of the Companies Act and it is another for a past shareholder who seeks to challenge the decision to deprive him or her of such shares. In my view, until the final resolution of a dispute relating to the applicants' loss of shares in the first applicant, the remedy under section 163 of the Companies Act remains available to the applicants. To hold otherwise would result in the dilution of the effectiveness of the remedies provided for in section 163 of the Companies Act.

[72] Sight should also not be lost of the fact that the provisions of section 163 of the Companies Act, as their heading suggests, are directing at providing relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of a company. Where the loss of shares is caused by the oppressive or prejudicial conduct or abuse, the provisions of section 163 would be undermined by non-suiting the victims of such conduct.

[73] As the Supreme Court of Appeal held section 163 of the Companies Act 'must be construed in a manner that will advance the remedy it provides rather than to limit it. Such an approach is consonant with the objectives of s 7 of the Companies Act, which include balancing the rights and obligations of shareholders and directors within the company and encouraging the efficient and responsible management of companies. Denying the remedy granted by legislation to an aggrieved shareholder would obviously have a chilling effect on the Companies Act's efforts to balance the rights and obligations of all stakeholders. Insofar as it would negate the objects of that Act, it would be wrong in law.'[4] This, in my view, disposes of the locus standi point and the applicants have the necessary locus standi to seek relief under section 163 of the Comapanies Act. I now turn to the merits of the application.

[74] The applicants, in my view, have not only misconstrued the basis upon which they contracted with the first respondents but have in some instances misstated the

[4] Parry v Dunn-Blatch and Others (394/2022) [2024] ZASCA 19 (28 February 2024) at para [33]

facts. In addition, some of the facts that they seek to rely on are seriously disputed by the respondents.

[75] For starters, the applicants state that they approach the court as holders of 10% shares each in the first respondent. This, is however, not borne out by the evidence. As set out above, the first respondent's authorised share capital is 1000 (One Thousand) ordinary shares of R1.00 par value. At the commencement of this application each of the consultants in the first respondent had 10 shares, that is, 1 (One) that was issued after the conclusion of a consultancy agreement with each consultant and 9 (Nine) that were issued during March 2022 for administrative purposes. It is thus, not correct that the applicants each hold 10% of the first respondent's issued share capital.

[76] The applicants' case proceeds on the mistaken premise that the second applicant's remuneration structure was amended unilaterally during 2023. This is, however, disproved by the consultancy agreement that was signed by the second applicant when read with the addendum thereto. As I have set out above, the second applicant contracted on the basis of being remunerated on a sliding scale as per the original remuneration structure, but this was immediately amended into the flat rate, for a fixed period of six months in terms of the amended remuneration structure contained in the addendum. It is thus, not factually correct to suggest that the second applicant's remuneration structure was unilaterally amended during 2023.

[77] The applicants also appear to treat the amounts they paid when they purchased the drawing power as if that was a payment for the acquisition of shares in the first respondent. This, however, on close examination of the various agreements is not the case. Whilst the purchase of the drawing power is the first transaction that ultimately leads to the allotment of a share in the first respondent, the two are not the same and no consideration is paid to the first respondent for the allotment of a share. This is aptly demonstrated in the case of the second respondent who purchased the late Dr Rossouw's drawing power from the latter's executrix and paid R300 000.00 not to the first respondent but to the executrix of the late Dr Rossouw's estate.

[78] Having paid no consideration to the first respondent for the shares that were allotted to him, the second respondent would now have the first respondent or the remaining shareholders paying him for the termination of the consultancy agreement. That would, in my view, be unfair to the remaining shareholders of the first respondent who must compensate the second respondent in circumstances where they never received any consideration from him.

[79] The consultancy agreements allowed each party to terminate on giving thirty-days' notice and this is what happened in respect of both applicants. The applicants' complaints, however, are that the termination was because of disagreements in relation to the issues that they had raised. And they suggest that this was at the instance of the fourth respondents.

[80] Whilst it is so that the termination of the applicants' consultancy agreements followed after the applicants had raised some issues, the decisions to terminate were, however, made not by the fourth respondent as a director but by the other shareholders of the first respondent. That this is so, is evidenced by the resolution that was annexed to the papers filed. Thus, the decision to terminate the applicants' consultancy agreements is that of the shareholders and there is no suggestion that they were not entitled to take such a decision.

[81] As to the claim that there was a violation of a mutual understanding, it is curious that the applicants say that it was their understanding that they would be allowed to continue working as partners until they made themselves guilty of gross misconduct, without suggesting that the other shareholders were also of the same understanding. This is in any event denied by the fourth respondent.

[82] The applicants have referred to a decision by this Court in ***Omar***[5] where it was held that "an applicant applying for relief under s 163 must establish lack of probity or

[5] Omar v Inhouse Venue Technical Management (Pty) Ltd and Others 2015 (3) SA 146 (WCC) at para 9.

fair dealing, or a violation of the conditions of fair play on which every shareholder is entitled to rely". The question that must be asked therefore is whether the applicants have established any of these requirements.

[83] Regarding the termination of their consultancy agreements, which is the main issue if not the only issue, the applicants could not point to any violation of a condition of fair play to which every shareholder is entitled to rely. This is because the termination of all the first respondents' consultants is subject to the termination upon giving of a thirty-day notice. The applicants were at liberty to give thirty-day notice, as did Dr van der Schyff, but they chose not to. Had they done, so they would have been able to sell their drawing powers in the first respondent in the same manner as Dr van der Schyff.

[84] The evidence relating to Dr van der Schyff, if anything, demonstrates the fairness of the manner in which the provisions of the consultancy agreement operate in relation to termination. The first respondent had to accept the thirty-day notice given by Dr van der Schyff and the converse must also hold true. That the applicants were unable to sell their drawing powers, is a function of the provisions of the consultancy agreement which cannot be attributed to the fourth respondent.

[85] The applicants' complaints about the failure to hold an AGM as well as shareholders' meeting, cannot by themselves be evidence of any conduct that is oppressive, prejudicial to or unfairly disregard the applicants' interests. In my view, the applicants have failed to establish the requirements for a relief under section 163 of the Act and the application must fail.

Costs

[86] The respondents have been successful and in my view the costs should follow the result. The first applicant withdrew the separation application and other than relying on the mootness of the relief, he has provided no cogent reason why he should not be liable for the costs of the separation application.

Order

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

87.1 Part B of the application is dismissed.

87.2 The first applicant is directed to pay the costs of the respondents in opposing the separation application as per scale C.

87.3 The applicants jointly and severally, the one paying the other to be absolved, are directed to pay the costs of the opposition of the respondents of part B of the application as per scale C.

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JUDGE OF THE HIGH COURT

Appearances

For applicants:	C Joubert SC and G Potgieter
Instructed by:	Van Zyl Scheepers Attorneys, Stellenbosch
Care of:	Norman Wink Stephens Inc, Cape Town
For 1st to 9th respondents:	I L Posthumus
Instructed by:	Whalley and Van Der Lith Inc, Randburg
Care of:	Herold Gie Attorneys, Cape Town
For 10th respondent:	No appearance