CASES / VONNISSE

SCA Provides Clarity on the Requirements Needed for the Court to Grant Remedial Action for Oppressive and Unfair Conduct in Terms of Section 163 of the Companies Act 71 of 2008

Parry v Dunn-Blatch [2024] ZASCA 19

1 Introduction

The "oppression remedy", while having arguably undergone substantial legislative development over time, has long been a contentious issue for South African courts. The use of this remedy allows shareholders or directors to challenge, and seek relief from, certain acts or omissions they believe are oppressive or unfairly prejudicial, or that unfairly disregard their interests (see generally Lehloenya and Kgarabjang "Defining the Limits of the 'Oppression Remedy' in the Wake of Section 163 of the Companies Act 71 of 2008 Grancy Properties Limited v Manala [2013] 3All SA 111 (SCA)" 2015 36(2) *Obiter* 511). In *Parry v Dunn-Blatch* ([2024] ZASCA 19), the Supreme Court of Appeal (SCA) had to consider whether the act or omission envisaged in section 163(1) of the Companies Act 71 of 2008 (the 2008 Act) had taken place as alleged by the applicant. The decision of the SCA in *Parry v Dunn-Blatch* (*supra*) is important as the court provided much-needed clarity as to what will be required by an applicant who wishes to bring a successful application for use of the remedy found in section 163 of the 2008 Act.

2 Facts

The applicant, Alice Parry, and the first respondent, Rosalene Dunn-Blatch (first respondent), had registered two companies, a private company called TRADSA Proprietary Limited (TRADSA) and a non-profit company called International Trade Institute of South Africa (ITRISA). Applicant and respondent were equal shareholders and both were directors of TRADSA and of ITRISA (*Parry v Dunn-Blatch supra* par 2).

ITRISA was set up for the purposes of offering distance-learning programmes and other educational services in the field of international trade. TRADSA was set up to be the vehicle through which the applicant and the

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respondent were to hold their intellectual property rights as co-authors of the educational course materials to be used by ITRISA. Both applicant and first respondent managed and were in the employ of ITRISA and received salaries from ITRISA (*Parry v Dunn-Blatch supra* par 2). The salaries were meant to compensate them for the intellectual property they owned through TRADSA, and no compensation was paid directly to TRADSA for use of the intellectual property (*Parry v Dunn-Blatch supra* par 2). In May 2012, the applicant resigned as a director of ITRISA but remained as a co-shareholder and director of TRADSA. The relationship between applicant and first respondent deteriorated over the years. In June 2015, the applicant and first respondent concluded a licence agreement that formalised the relationship between ITRISA and TRADSA in respect of the use by ITRISA of TRADSA's intellectual property, being the copyright works (*Parry v Dunn-Blatch supra* par 3).

The material terms of the licensing agreement were that the applicant and first respondent agreed that they were the joint authors of the copyright works, confirmed that they assigned their ownership of the copyright in the copyright works to TRADSA, and simultaneously confirmed the existence of an exclusive licence that ITRISA had to use the copyright works (par 4). The applicant subsequently insisted on TRADSA's entitlement to receive compensation from ITRISA for the use of TRADSA's intellectual property, whereafter a dispute arose that prompted the applicant to approach the High Court for relief (*Parry v Dunn-Blatch supra* par 5).

The applicant's desired relief was based on section 163 of the 2008 Act. It was argued by the applicant that the first respondent had, in her running of the business affairs of ITRISA, engaged in oppressive or unfairly prejudicial acts that disregarded the interests of TRADSA insofar as TRADSA was being deprived of compensation due to it by ITRISA for ITRISA's use of TRADSA's intellectual property (*Parry v Dunn-Blatch supra* par 5). The applicant also contended that on a plain reading of the licence agreement, there was no mention of the licence agreement being royalty-free, but the fact that the licence agreement was silent on royalties did not mean that she and the first respondent waived their right to royalties. Furthermore, the fact that the respondent was benefiting from remuneration paid to her by ITRISA, while the applicant was excluded, was argued to have created an inequitable situation that was prejudicial to the applicant and that disregarded her interests as a shareholder of TRADSA (*Parry v Dunn-Blatch supra* par 5).

The relief sought by the applicant encompassed variation of the licence agreement such that the inferred term (that no consideration was payable to TRADSA for the use of the intellectual property) be deleted, and that a term that compensation be payable by TRADSA to ITRISA for the use of the intellectual property be included (*Parry v Dunn-Blatch supra* par 5).

The first respondent argued that the jurisdictional requirements of section 163 of the 2008 Act had not been met and raised various points in limine. It was argued, first, that since Parry had freely and voluntarily concluded the licence agreement, the court should not conclude a new agreement for the parties under the guise of section 163 of the 2008 Act. Secondly, any claim the applicant might have had had long since prescribed (*Parry v Dunn-Blatch supra* par 6–7). Thirdly, that insofar as there was any harm, it was

harm inflicted on TRADSA and not the applicant and that the applicant did not have the necessary *locus standi* to apply for the relief she sought. Fourthly, the copyright that the applicant relied on was no longer in the same form since the course material had been substantially updated and modified, and the new copyright works became vested in ITRISA. Lastly, the relief sought by the applicant impermissibly required the court to impose new contractual terms on ITRISA and TRADSA (*Parry v Dunn-Blatch supra* par 6–7).

The first respondent contended that the copyrighted works, in relation to which the licence agreement had been concluded, had since been modified and thus substantially adapted into new copyrighted works (*Parry v Dunn-Blatch supra* par 7). Furthermore, the respondent asserted that if ITRASA were to compensate the applicant for her intellectual property, it would defeat the purpose of ITRASA, as it was an NPC aimed at educating the community (*Parry v Dunn-Blatch supra* par 8).

3 Proceedings in the High Court

The High Court found that the impugned conduct of the first respondent, ITRISA and TRADSA "was manifestly oppressive and unfairly prejudicial and unfairly disregarded the interests of the applicant as a director and shareholder" of TRADSA (*Parry v Dunn-Blatch supra* par 9). It held that the applicant established a case entitling her to the relief envisaged in section 163(2) of the 2008 Act. The court granted the relief she had sought but referred to trial the question of the royalty rate to be paid by ITRISA to TRADSA (*Parry v Dunn-Blatch supra* par 9). The respondents were aggrieved by that decision and were granted leave to appeal to the full court.

The full court found that the High Court had effectively concluded a new licence agreement for the parties by including new terms therein. It held that the licence agreement was an exclusive licence agreement between TRADSA and ITRISA and was evidently royalty-free. It further found that the first respondent had failed to establish oppressive or unfairly prejudicial conduct contemplated in section 163(1) of the 2008 Act. It held that, insofar as any cause of action might exist, such cause of action would vest in TRADSA and not in the first respondent (*Parry v Dunn-Blatch supra* par 12). Furthermore, the full court stated that the fact that the first respondent was a director and shareholder of TRADSA did not overcome the difficulty that the proper applicant in a claim based on a wrong allegedly done to TRADSA was *prima facie* TRADSA itself (*Parry v Dunn-Blatch supra* par 13).

4 Issues

The first issue that the SCA was tasked with determining was whether the applicant had legal standing to bring an application in her capacity as shareholder and director under section 163 of the 2008 Act (*Parry v Dunn-Blatch supra* par 15–16). Secondly, the court had to decide whether the applicant had indeed established the act or omission of which she complained, and lastly whether such conduct should be considered as

oppressive and prejudicial towards her, in line with the above-mentioned provision (*Parry v Dunn-Blatch supra* par 15–16).

5 Judgment

Molemela JA (Saldulker, Makgoka, Hughes JJA and Mali AJA concurring) concluded that the applicant did have legal standing to bring the claim in terms of section 163 of the 2008 Act (*Parry v Dunn-Blatch supra* par 30–33).

In their determination of whether the applicant's interest had been unfairly disregarded, the court had to consider the issue of compensation with respect to the terms of the licence agreement between the applicant and first respondent (*Parry v Dunn-Blatch supra* par 44). The court found that the applicant could not contend that the variation of the agreement, which she had voluntarily signed, was oppressive or unfairly prejudicial or unfairly disregarded her interests. The applicant's lack of evidence to support her claims and, in addition, her unclear intention on whether to include a royalty clause at the time of drafting the agreement, indicated that she had agreed to the conduct that she later claimed was oppressive (*Parry v Dunn-Blatch supra* par 45–48).

Molemela JA concluded that the applicant had failed to establish that the business of TRADSA was being or had been carried on, or conducted in a manner that was oppressive or unfairly prejudicial to, or that unfairly disregarded, her interests, or, that any act or omission of TRADSA, had had a result that was oppressive or unfairly prejudicial, or disregarded her interest, or that the first respondent exercised her powers as a director of TRADSA in a manner that unfairly disregarded her interests as required by section 163(1) of the 2008 Act. In other words, the applicant had not established that the impugned conduct fell within that envisaged in section 163(1)(*a*), (*b*), or (*c*) of the 2008 Act. The full court, accordingly, correctly upheld the appeal (*Parry v Dunn-Blatch supra* par 50).

The applicant's special leave to appeal the full court's decision was accordingly dismissed with costs (*Parry v Dunn-Blatch supra* par 51–52).

6 Discussion

6 1 The nature of section 163(1) of the Companies Act

Section 163(1) of the 2008 Act provides:

> "(1) A shareholder or a director of a company may apply to a court for relief if–
>
> *(a)* any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant;
>
> *(b)* the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant; or
>
> *(c)* the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in

> a manner that is oppressive or unfairly prejudicial to, or unfairly disregards the interests of the applicant."

The section 163 remedy above, also known as the "oppression remedy" has historically been applied in cases pertaining to prejudicial conduct towards "members" of the company and minority shareholders (Delport "Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008" 2016 1 *THRHR* 19 79; see also *Technology Corporate Management (Pty) Ltd v De Sousa* [2024] ZASCA 29 par 77–78; *Louw v Nel* [2010] ZASCA 161; 2011 (2) SA 172 (SCA); [2011] 2 All SA 495 (SCA) par 7).

However, the right to apply for relief in the above-mentioned cases has developed significantly within South African company law, as well as on a global scale (Furniss *Statutory Protection of Minority Shareholders* (LLM thesis, University of Pretoria) 2016 6). The oppression remedy was first introduced through the adoption of section 111*bis*, as per the amendment to the Companies Act 46 of 1926 (the 1926 Act) (*Parry v Dunn-Blatch supra* par 20). This provision permitted an applicant to apply for relief provided that the conduct complained of was oppressive towards some members of the company (including the applicant), that the facts presented would justify a winding-up order on the basis that it was just and equitable to do so, but that the winding-up of the company would unfairly prejudice the oppressed members, and that an order made by the court would remedy the irregularity such that the company could continue to function effectively. This section provided an alternative to the harsh pre-1926 winding-up remedy as the winding-up of a company would be detrimental to oppressed members, especially to those members who were minority shareholders (*Parry v Dunn-Blatch supra* par 20).

Eventually, the oppression remedy under section 252 of the Companies Act 61 of 1973 (the 1973 Act) would be significantly developed to cater for the specific protection of minority shareholders. The introduction of section 252 to the 1973 Act, which replaced section 111*bis* of the 1926 Act, widened the scope of application of the remedy. This allowed for prejudiced persons to apply for relief in their capacity as "members" of the company (s 252 of the 1973 Act).

Section 252(1) of the 1973 Act afforded protection to minority shareholders only (see *Technology Corporate Management (Pty) Ltd v De Sousa supra* par 82). This is because minority shareholders often find themselves discontent with decisions made by the board of a company or by majority shareholders. Section 252, however, offered little to no recourse as the applicant still had to prove that the conduct in question was "unfairly prejudicial, unjust or unequitable" towards them – a requirement that is currently not necessarily settled *(Bayly v Knowles* 2010 (4) SA 548 (SCA) 24). Ultimately, the legislature and judiciary would develop the oppression remedy into what it is today. Section 163(1) of the 2008 Act provides for the protection not only of shareholders, but directors as well. Although this may seem a trivial amendment, the acknowledgement that shareholders, irrespective of whether they are minority or majority shareholders, are able to seek relief from oppressive or unfairly prejudicial conduct, is indicative of the progressive nature of our law.

The case law on the meaning of "unfairly prejudicial" in the context of section 252 of the 1973 Act (see *Technology Corporate Management (Pty) Ltd v De Sousa supra* par 78; see also *Greenhalgh v Arderne Cinemas Ltd* (No 2) [1950] 2 All ER 1120 (CA); *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Ltd* 2017 (5) SA 9 (CC); *In re Sam Weller Ltd* [1990] 1 Ch D 682 689G–H; *Garden Province Investments (Pty) Ltd v Aleph (Pty) Ltd* 1979 (2) SA 525 (D); *Bader v Weston* 1967 (1) SA 134 (C) 146F–H)), and on the term "oppressive" in section 111bis of the 1926 Act, largely continues to apply to the remedy in section 163 in the 2008 Act because of similarities in wording. Section 252 of the 1973 Act and section 111bis of the 1926 Act were predecessors to section 163 of the 2008 Act. It has been accepted that the court is enjoined to take cognisance of foreign law in terms of section 5(2) of the 2008 Act (*Parry v Dunn-Blatch supra* par 20). It is also common practice for South African courts to consider the judgments of the courts in English law as the oppression remedy was originally based on equivalent provisions in English law, whose decisions would accordingly be relevant to the interpretation of section 163 of the 2008 Act (see *Elder v Elder & Watson Ltd* [1952] SC 49 55; *In Re Harmer Limited* [1958] 3 All ER 669 (HL) 689; Lehloenya and Kgarabjang 2015 *Obiter* 511 512; the section 163 remedy also closely resembles section 241 of the Canada Business Corporations Act, RSC 1985 c. C-44; *Parry v Dunn-Blatch supra* par 20).

The text of section 163 in the 2008 Act is clear that a shareholder or director of a company is specifically accorded the right, and therefore has *locus standi*, to challenge oppressive or prejudicial or disregardful conduct, whether by that company or a "related person". The section 163 remedy may be granted if a shareholder or director of a company or a related person is oppressive or unfairly prejudicial to the applicant or unfairly disregards their interests. An act or omission by a director may amount to an act or omission of the company where it is done in breach of a fiduciary duty of the company (see FHI Cassim, MF Cassim, R Cassim, Jooste, Shev and Yeats *Contemporary Company Law* 3ed (2023) 1028; *Re Stewarts (Brixton) Ltd* [1985] BCLC 4 8; *Civils 2000 Holdings (Pty) Ltd v Black Empowerment Partner Civils 2000 (Pty) Ltd* [2011] ZAWCHC 6; [2011] 3 All SA 215 (WCC); *Parry v Dunn-Blatch supra* par 21).

In terms of section 163(1)(*a*) of the 2008 Act, in circumstances where the applicant complains about an act or omission of a company or related person, the focus is on the result of the act or omission. In terms of subsection 1(*b*), the right to challenge the impugned conduct is afforded if oppression or unfair prejudice or unfair disregard for the applicant's interests has occurred as a result of the manner in which the business of the company (or a related person) has been carried out. The term "business of the company" is undefined in the 2008 Act (*Parry v Dunn-Blatch supra* par 22). It is significant that, in *Scottish Co-operative v Meyer* 1958 (3) A E R 66 (71), the English court, addressing itself to the phrase "oppression in the conduct of the business" as envisaged in section 210 of that country's Companies Act of 1948 (which is a provision equivalent to section 163 in the 2008 Act), remarked that "oppression under section 210 may take various forms. It suggests, to my mind, ... a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members" (see also *Benjamin v Elysium Investments* 1960 (3) SA 467 (E) 476; *Livanos v*

Swartzberg 1962 (4) SA 395 398; *Grancy Property Ltd v Manala* [2013] ZASCA 57; [2013] 3 All SA 111 (SCA); 2015 (3) SA 313 (SCA) 22; *Strategic Partners Group (Pty) Ltd v The Liquidators of Ilima Group (Pty) Ltd (in liquidation)* [2023] ZASCA 27; [2023] 2 All SA 658 (SCA) 26; *Parry v Dunn-Blatch supra* par 22). The court in *Livanos v Swartzberg* (*supra*), deciding an application premised on section 111*bis* of the 1926 Act, held that in secretly forming another company that competed with the business of their company, the respondent shareholder and director was guilty of conducting the affairs of the company in a manner that was unfair and thus oppressive to the applicant shareholder and director (at 399 of the judgment; see also *Scottish Co-operative v Meyer supra* 71). Given the wording of the provision, the business of the company may be conducted oppressively through omission, where, for example, the directors do nothing to defend the company's interests when it ought to take some action (*Scottish Co-operative v Meyer supra* 367; *Parry v Dunn-Blatch supra* par 22).

In terms of subsection 1(*c*), the right to challenge the impugned conduct is granted if the powers of a director or prescribed officer of a company, or a related person, are being exercised oppressively or unfairly prejudicially to, or in unfair disregard of the interests of the aggrieved applicant. Cassim *et al* are of the view that this ground will be particularly useful where the relevant exercise of power by a director or prescribed officer amounts to neither the "conduct of the business of the company" nor an "act or omission of the company or a related person" (Cassim *et al Contemporary Company Law* 1030 par 23).

According to Molemela JA, in each of the three scenarios pertaining to section 163 (1)(*a*), (*b*) or (*c*), the shareholder must show that he or she has been adversely affected by the impugned conduct complained of. Thus, to succeed in obtaining relief in terms of section 163, the applicant must prove to the court that the relevant conduct complained of was oppressive or unfairly prejudicial or unfairly disregarded the applicant's interests. In the present case (see par 24), the applicant was required to establish that:

a) any act or omission of TRADSA or "a related person" has had a result that is oppressive or unfairly prejudicial to or that unfairly disregards her interests as the applicant; or
b) the business of TRADSA or a related person is being or has been carried on or in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards her interests; or
c) the powers of the first respondent, as a director of TRADSA, are being or have been exercised oppressively, unfairly prejudicially or in a manner that disregards her interests.

6 2 Section 163 and locus standi

The first respondent argued that the applicant did not have *locus standi* to invoke the remedy found in section 163 of the 2008 Act. It was contended on the respondents' behalf that where the conduct complained of by the shareholder results in a loss in respect of which the company has a claim of its own, then that shareholder cannot rely on their reflective loss unless they are able to allege and prove that the loss they suffered is not a loss in

respect of which the company also has a claim (*Parry v Dunn-Blatch supra* par 25). According to the first respondent, the proper applicant in respect of a claim alleging that a wrong was done to TRADSA was TRADSA itself and not the applicant. It was argued that the fact that the relief sought was a payment to TRADSA and not Parry also illustrated that the wrong was done to TRADSA and not to Parry (*Parry v Dunn-Blatch supra* par 25).

Molemela JA indicated that it was evident that the applicant's section 163 application was based in general terms. According to Molemela JA, for the applicant to succeed in her application, she had to demonstrate that the conduct, as envisaged in subsection 1(*a*), (*b*) or (*c*), is not only oppressive or prejudicial or disregardful of her interests, but also that this occurred unfairly (see *Grancy Property Ltd v Manala supra* par 32; *Parry v Dunn-Blatch supra* par 26). The court is, in terms of section 163(2), granted a wide discretion to craft an order to appropriately address or cure any oppressive, unfairly prejudicial or unlawfully disregardful act or omission suffered by an applicant at the hands of a respondent (see *Off-Beat Holiday Club v Sanbonani Holiday Spa Share Block Ltd* [2017] ZACC 15; 2017 (7) BCLR 916 (CC); 2017 (5) SA 9 (CC) 28). Molemela JA was of the view that the fact that a court may, in terms of section 163(2)(*h*), and not in the setting of a derivative action envisaged in section 165 of the 2008 Act, grant an aggrieved shareholder an order varying or setting aside a transaction or an agreement to which the company is a party and compensate the company or any other party to the transaction or agreement shows the fallacy of the respondent's contention that only TRADSA could be the proper applicant in the matter (*Parry v Dunn-Blatch supra* par 26).

The applicant considered the use of TRADSA's copyright through the first respondent without compensation as oppressive conduct. This was so because the applicant believed that the first respondent was unfairly benefiting from that arrangement, because ITRISA was paying her remuneration from income derived through the use of TRADSA's intellectual property (*Parry v Dunn-Blatch supra* par 27). The applicant described the first respondent's entitlement to receive remuneration as "an inequitable situation" that was prejudicial to her. She asserted that under the circumstances, it was only fair that the licence agreement be varied to include a clause entitling TRADSA to receive compensation for ITRISA's use of TRADSA's works. She averred that by refusing to agree to vary the agreement, the first respondent was unfairly disregarding her interests as a co-shareholder, which was unfairly prejudicial to her (*Parry v Dunn-Blatch supra* par 27).

According to Delport, acting without the knowledge and concurrence of the director in apparent conflict with the duties of that director is oppressive and, under the circumstances, also prejudicial to shareholders (Delport *Henochsberg on the Companies Act 71 of 2008* Vol 2 Issue 30 (2023) 574(24)–574(25); *Parry v Dunn-Blatch supra* par 28). The applicant brought the application in a dual capacity as both shareholder and director of TRADSA. The applicant contended that the first respondent owed a duty to TRADSA, and her failure to act in TRADSA's interests had resulted in its business being carried out in a manner that was prejudicial to her (*Parry v Dunn-Blatch supra* par 28). According to Molemela JA, the breach of

fiduciary duty that the applicant describes falls under oppressive and prejudicial conduct and is in accordance with the view expressed by Delport (*supra*). The conduct described by the applicant is also in keeping with the oppressive and prejudicial conduct referred to in case law (see *Scottish Co-operative v Meyer supra*; *Livanos v Swartzberg supra*; *Parry v Dunn-Blatch supra* par 28).

Molemela JA stated that the argument by the respondents that the applicant had no *locus standi* because none of the respondents fell within the definition of "a related person" in relation to TRADSA had no merit. According to Molemela JA the respondents failed to consider the effect of the conjunction "or" before the phrase "a related person" in section 163(1), and to consider that an applicant can locate the impugned conduct in section 163(*a*), (*b*) or (*c*) against the categories of persons mentioned in that subsection, or a related person (*Parry v Dunn-Blatch supra* par 29).

A proper reading of section 163 did not prevent the applicant from instituting an application based on section 163(1) of the 2008 Act (par 30). The applicant had made various allegations that describe conduct falling squarely within the purview of that provision. Therefore, the applicant would be entitled to relief and an order in terms of section 163(2) if she succeeded in establishing that the refusal of first respondent, qua director, to vary the licence agreement amounts to conduct envisaged in section 163(*a*) or (*b*) or (*c*) and that such impugned conduct had an adverse effect on her interests (see *Gamlestaden Fastigheter AB v Baltic Partnership Ltd v Baltic Partners Ltd* [2007] UKPC 26, [2007] Bus LR 1521; *Parry v Dunn-Blatch supra* par 30).

In particular, section 163(1)(*c*) of the 2008 Act stipulates that an aggrieved shareholder may invoke the section 163 remedy if "the powers of a director or prescribed officer of the company, or a person related to the company" have been exercised oppressively or unfairly prejudicially or in unfair disregard of the aggrieved shareholder's interests (*Parry v Dunn-Blatch supra* par 31).

The respondents in the High Court relied on the rule in *Foss v Harbottle* ((1843) 67 ER 189; (1843) 2 Hare 461) to argue that the applicant lacked *locus standi* to bring an application in terms of section 163. In contending that the applicant lacked *locus standi* to invoke the section 163 remedy in the High Court, reliance was placed on the applicability of what is now known in English law as the *Foss v Harbottle* rule (see *Foss v Harbottle supra*; *Parry v Dunn-Blatch supra* par 32). The origin of that rule can be traced to some early nineteenth-century decisions on the law of partnership (see Beuthin and Luiz *Beuthin's Basic Company Law* 3ed (2003) 153–156; see generally *Contemporary Company Law* 1052–1059). Sir James Wigram VC stated that, in respect of wrongs done to a company, "the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative" (Wedderburn "The Rule in Foss v Harbottle" 1957 *Cambridge Law Journal* 194 and 1958 *Cambridge Law Journal* 93: these articles are primarily concerned with the modern rule and the exceptions to it, but also provide an introduction to the history of the rule). Exceptions to the rule in *Foss v Harbottle* (*supra*) have been established even though there has not always been agreement upon

their exact nature. The exceptions to the rule are listed by Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064).

The exception to the rule in *Foss v Harbottle* (*supra*) is available where what has been done amounts to fraud, and the wrongdoers are themselves in control of the company. According to Wedderburn, the exceptions to the rule in *Foss v Harbottle supra* are not exceptions at all (Wedderburn "Shareholders' Rights and the Rule in Foss v Harbottle" 1957 *Cambridge Law Journal* 203). There are situations in which there is no chance of confirmation by the majority, and these are therefore situations where the rule in *Foss v Harbottle* (*supra*) does not apply (*Parry v Dunn-Blatch supra* par 13 and 34).

The rule in *Foss v Harbottle* (*supra*) was the basis of the rule against claims for reflective loss and is referred to in subsequent cases such as *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) ([1982] 1 Ch 204; [1982] 1 All ER 354 (HL)), in terms of which the principle was refined, exceptions were developed and the rule was also relaxed as against the development of the law in general (see also *Hlumisa Investment Holdings (RF) Ltd v Kirkinis* [2020] ZASCA 83; [2020] 3 All SA 650 (SCA); 2020 (5) SA 419 (SCA)). The rule in *Foss v Harbottle* (*supra*) essentially provides that any loss suffered by the company must be recovered by the company itself and not by any of its shareholders (*Parry v Dunn-Blatch supra* par 32).

The first respondent relied on the rule in *Foss v Harbottle* (*supra*) to support her argument that the applicant did not have *locus standi* to invoke the remedy set out in section 163 of the 2008 Act and submitted that such a cause of action can only be pursued by TRADSA (*Parry v Dunn-Blatch supra* par 33). According to Molemela JA, this contention is not in keeping with the decided case law and academic writings, which indicate that a shareholder's remedy for oppressive conduct is not a novel concept in South African company law. It was first introduced in our company law with the promulgation of an amendment (see s 90 of the Companies Amendment Act of 1926) of the 1926 Act in 1952, which introduced section 111*bis* (*Parry v Dunn-Blatch supra* par 33).

Molemela JA indicated that the first respondent's reliance on the *Foss v Harbottle* rule was misplaced. The SCA provided a detailed explanation of the application of the rule in *Foss Harbottle* (*supra*) in *Hlumisa Investment Holdings (RF) Ltd v Kirkinis* (*supra* par 34). In *Hlumisa*, a claim was made by shareholders of a company against its directors and auditors for damages allegedly suffered as a result of the diminution in the value of the shareholders' shares. The SCA concluded that the shareholders' claim was essentially for reflective loss (par 38 of the judgment) (in other words, reflective only of the losses suffered by the company and therefore recoverable by the company itself) and held that the company, rather than the shareholders, was the proper plaintiff in respect of a claim against the directors. It is of significance that the court acknowledged in that judgment that there were exceptions to the *Foss v Harbottle* principle. It also observed that "[i]n the present case there is no hint by the applicants of a derivative claim and no assertion of oppression by the majority of shareholders" (*Hlumisa supra* par 38). Accordingly, Molemela JA stated that the judgment

in *Hlumisa* is clearly distinguishable from the present case (*Parry v Dunn-Blatch supra* par 34).

The court in *Grancy Property Ltd v Manala* (*supra*) indicated that case law on the import of section 252 of the 1973 Act shows that, in material respects, that section is the earlier equivalent of section 163 in the 2008 Act (par 22 of the judgment). In *Standard Bank of South Africa Ltd v Neugarten* (1988 (1) SA 652 (W)), the court provided clarity on section 226 of the 1973 Act. The court said that the purpose of that provision was

> "to prevent directors or managers of a company acting in their own interests and against the interests of the shareholders by burdening the company with obligations which are not for its benefit but are for the benefit of another company and/or for the benefit of its directors and/or managers." (684F–G)

On the other hand, the remedy under section 163 is aimed at achieving a balancing of the interests of all shareholders and directors (see *Neugarten v Standard Bank of South Africa Ltd supra* 802A–C par 32).

In *Grancy Property Ltd v Manala* (*supra*), having concluded that section 163 was the equivalent of section 252 of the 1973 Act, the SCA held that section 163 must be construed in a manner that would advance the remedy it provided for rather than limit it (par 26 of the judgment; see also Lord Denning's judgment in *Scottish Co-operative v Meyer supra* par 33). According to Molemela JA, this approach was in accordance with the objectives of section 7 of the 2008 Act, which include balancing the rights and obligations of shareholders and directors within the company, and encouraging the efficient and responsible management of companies. Molemela JA stated that denying a 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. Furthermore, such denial might have the effect of undermining the objects and purport of the Act, which would be wrong in law (*Parry v Dunn-Blatch supra* par 33).

Molemela JA confirmed that section 163 must be interpreted in a manner that advanced rather than limited the remedy in section 163 (*Grancy Property Ltd v Manala supra* par 26). Furthermore, the rule in *Foss v Harbottle* (*supra*), which has been relaxed over the years, should not serve as a bar to invoking the section 163 remedy. This was especially so, according to Molemela JA, because the remedy was available even in instances where the interests of the applicant, and not necessarily their rights, had been affected. Interests are wider than rights and include equitable considerations (see Cassim *et al Contemporary Company Law* 1024). Under the circumstances, denying an applicant the right to invoke the remedy on the grounds of a lack of *locus standi* in circumstances like the present would defeat the very purpose for which the remedy was granted. It must also be noted that it is in instances where applications were dismissed on account of the applicant having failed to establish oppressive conduct that the courts considered such a failure not to have a bearing on *locus standi*. In *Gent v Du Plessis* ([2020] ZASCA 184 par 10, 17–20), the remedy was denied to a shareholder, not because of a lack of *locus standi* in terms of section 163, but on the basis that the shareholder had "failed to show that

the majority shareholder's conduct towards him was oppressive or unfairly prejudicial or that his interests had been unfairly disregarded". Molemela JA stated that the respondents conflated the failure of the applicant to prove her case with the absence of *locus standi* (*Parry v Dunn-Blatch supra* par 35) and that the finding of the full court on the aspect of *locus standi* was erroneous and therefore could not stand. This was so because if the cause of action vested only in TRADSA, as was held by the full court, this would result in an absurd result that TRADSA would never be able to launch such an application because of the deadlock between the applicant and the first respondent, as equal shareholders and co-directors. This restrictive approach would, according to Molemela JA, thwart the stated purpose of the 2008 Act – namely, to balance the interests of shareholders and directors, and encourage the efficient and responsible management of companies as contemplated in section 7 (*Parry v Dunn-Blatch supra* par 36).

6 3 The impugned conduct

In instances where a court is presented with an application based on section 163 of the 2008 Act, a court must satisfy itself a) of the existence of the impugned conduct by way of a positive act or omission; and b) that the relevant conduct was either oppressive, or unfairly prejudicial or unfairly disregarded the interests of the applicant. In the present matter, each shareholder held 50 per cent of the shares. Previously, under section 252 of the 1973 Act, the oppression remedy was a remedy for the relief and protection of minority shareholders. However, in *Benjamin v Elysium Investments (Pty) Ltd* (*supra*), the court granted relief to a shareholder who shared voting control equally with another shareholder. In the author's view, nothing precludes this court from coming to the assistance of an aggrieved shareholder under similar circumstances (see also *Livanos v Swartzberg supra; Parry v Dunn-Blatch supra* par 37).

In the present case, the fact that the applicant was not a minority shareholder was of no consequence because the remedy in terms of section 163(1) was available to directors and shareholders alike. A businesslike approach to the section 163 remedy demanded that the remedy be available to all companies, including quasi-partnership ones (see Cassim *et al Contemporary Company Law* 1025; *Parry v Dunn-Blatch supra* par 38). If any provision of the 2008 Act, or a document in terms of that Act read in its context, could be reasonably construed to have more than one meaning, a court must prefer the meaning that best promotes the spirit and purpose as set out in section 7 of the 2008 Act and would best improve the realisation and enjoyment of rights established by the 2008 Act (*Parry v Dunn-Blatch supra* par 38).

Several cases have indicated that for applicants to be entitled to relief pursuant to an application predicated on section 163, they must point out the nature of the impugned conduct and establish that the conduct in question was oppressive or unfairly prejudicial or unfairly disregarded their interests (*Parry v Dunn-Blatch supra* par 39). In *Livanos v Swartzberg* (*supra* 399H), the court stated that it was not the motive for the conduct complained of that the court must look at, but the conduct itself (see also *Garden Province Investment v Aleph (Pty) Ltd supra* 531; *Grancy Property Ltd v Manala supra*

par 27; see also *Louw v Nel supra* par 23; *Parry v Dunn-Blatch supra* par 39). It would therefore be prudent for the applicant to adduce clear evidence in order to merit the granting of the relief foreshadowed in section 163 (see *Louw v Nel supra* par 23; *Geffen v Martin* [2018] 1 All SA 21 (WCC) 23; *Technology Corporate Management (Pty) Ltd v De Sousa supra* par 113; *Parry v Dunn-Blatch supra* par 39).

According to Sibanda, the court is provided with an unlimited discretion in terms of section 163(2) of the 2008 Act to make a suitable remedy to assist a complainant. The range of orders that may be made by the court under section 163(2) are wide and some of them have far-reaching consequences – for example, an order for the amendment of a shareholder agreement and the setting aside of agreements or transactions of the company with third parties (Sibanda "The Statutory Remedy for Unfair Prejudice in South African Company Law" 2013 38(2) *Journal for Juridical Science* 74).

In the present case, Molemela JA noted that email exchanges between the applicant and respondent did not unequivocally convey the common intention to include the payment of compensation for ITRISA's use of TRADSA's intellectual property (*Parry v Dunn-Blatch supra* par 41–43). While the applicant asserted that she and the respondent always intended to receive royalties, the court noted that in her replying affidavit the applicant acknowledged that the licence agreement would be a royalty-free agreement while she was still employed at ITRISA and that she had since attempted to vary the inferred term as it was alleged to have resulted in undue prejudice to the applicant (*Parry v Dunn-Blatch supra* par 44).

The court established, in both the applicant's and respondent's versions, that the conclusion of the licence agreement was motivated by a possible sale of the business of ITRISA to a third party. However, it noted that it was odd that the applicant, for three years from her resignation in 2012, complained about ITRISA's non-payment of compensation for intellectual property but omitted to see the inclusion of the critical royalty clause in the licence agreement. Such a licence agreement was held to have been signed by the applicant without any objection (*Parry v Dunn-Blatch supra* par 47).

Molemela JA concluded that insofar as the applicant chose to sign the licence agreement in its current form, she acquiesced to the non-inclusion of a royalty clause. In terms of the applicant's founding affidavit, Molemela JA was of the view that the applicant conceded that it could be inferred from the licensing agreement that no consideration was payable to TRADSA for the use of its literary works. Molemela JA therefore concluded that the applicant could not now contend for the varying of the agreement that she voluntarily signed on the basis that it was oppressive or unfairly prejudicial or unfairly disregarded her interests (see *Irvin and Johnson Ltd v Oelofse Fisheries Ltd; Oelofse v Irvin and Johnson* 1954 (1) SA 231 (E) 243A–B; see also Cassim "A Critical Analysis on the Use of the Oppression Remedy by Directors Removed From Office by the Board of Directors Under the Companies Act 71 of 2008" 2019 40 *Obiter* 159–161; *Latimer Holdings Ltd v SEA Holdings New Zealand Ltd* [2004] NZCA 226; [2005] 2 NZLR 328 95; *Technology Corporate Management (Pty) Ltd v De Sousa supra* par 99; *Parry v Dunn-Blatch supra* par 47).

The applicant had failed to establish that the business of TRADSA was or had been carried on, or conducted in a manner that was oppressive or unfairly prejudicial to, or that unfairly disregarded her interests, or, that any act or omission of TRADSA, had had a result that was oppressive or unfairly prejudicial, or disregarded her interest, or that first respondent exercised her powers as a director of TRADSA in a manner that unfairly disregarded her interests as was required by section 163(1) of the 2008 Act. Accordingly, the applicant had not established that the impugned conduct fell within that envisaged in section 163(1)(*a*), (*b*), or (*c*) of the 2008 Act (*Parry v Dunn-Blatch supra* par 50).

7 Conclusion

The SCA in *Parry v Dunn-Blatch* (*supra*) has confirmed that an applicant would be successful in bringing an application under section 163 of the 2008 Act if they have satisfied the court that all the elements of the remedy have been met. The judgment emphasises that there must be a balance between application of the remedy in section 163 and the existence of the elements that must be proved by the applicant. When the elements of the remedy have been proved by the applicant, the court then has the discretion to make any order that it may deem appropriate in the circumstances. The court, in these circumstances, must be careful to ensure it does not adopt a strict approach that could result in deserving applicants being deprived of the remedy. A key aspect of the judgment is its emphasis that for an applicant to be entitled to relief in terms of section 163, the applicant must satisfy the court that the conduct in question is oppressive or unfairly prejudicial or unfairly disregards their interests. The SCA in *Parry v Dunn-Blatch* (*supra*) confirmed that an applicant cannot content themself with vague and rather general assertions and that clear evidence is required for a court to grant the relief sought in terms of section 163 (see *Grancy Property Ltd v Manala supra* par 36; *Parry v Dunn-Blatch supra* par 35). The court also confirmed that section 163 must be construed in a manner that would advance the remedy it provided rather than limit it. Such an approach is consistent with the objectives of section 7 of the 2008 Act, which include balancing the rights and obligations of shareholders and directors within the company, and encouraging the efficient management of companies (*Parry v Dunn-Blatch supra* par 36).

The judgment in *Parry v Dunn-Blatch* (*supra*) has also provided clarity as to who would have *locus standi* to bring an application in terms of section 163 of the 2008 Act. Essentially, section 163 of the Act permits a shareholder or director of a company to apply to court for relief if any act or omission by the company, or a person related to the company, has had a result that is oppressive or unfairly prejudicial, or that unfairly disregards the interests of the applicant. To trigger the court's remedial power in terms of section 163(2) of the Act, the court must be satisfied that a) the relevant conduct or omission exists on the facts before it, and b) the relevant conduct or omission was either oppressive or unfairly prejudicial or unfairly disregarded the interests of the applicant. It can be concluded that the protection afforded to shareholders and directors, under South African company law, has adapted to cater for the many circumstances in which a

shareholder or director may be subject to oppressive or unfair treatment. Not only has the remedy broadened its scope of application, but there is an apparent focus on fairness. Assessing the fairness of the conduct in question has allowed courts to apply an objective test when determining whether such conduct is indeed oppressive or prejudicial in nature. Notably, although judicial precedent continues to refine the interpretation of section 163 of the 2008 Act, courts must ensure that they do not adopt too broad an interpretation so as to defeat the purpose of the provision or encourage the arbitrary use thereof. If the remedy were to apply to all applicants who believed that their interests had been unfairly disregarded but they were not able to prove the facts of their case, it would significantly jeopardise good corporate governance under South African law.

Darren Subramanien
LLB LLM PhD
School of Law, University of KwaZulu-Natal
Pietermaritzburg, South Africa
https://orcid.org/0000-0002-0297-2335

Dehal Jivan
LLB LLM
LLM graduate, University of KwaZulu-Natal
Pietermaritzburg, South Africa

Suhail Ebrahim
LLB LLM
LLM graduate, University of KwaZulu-Natal
Pietermaritzburg, South Africa