REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.:31250/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 31January 2025 E van der Schyff

In the matter between:

HERCULES PHILLIP BEY	APPLICANT
and	
CONSTANTIA METERING SERVICES (PTY) LTD	FIRST RESPONDENT
ANDRÉ CHARLES BUCKLE	SECOND RESPONDENT
JUAN BUCKLE	THIRD RESPONDENT
STANLEY BUCKLE	FOURTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The applicant, Mr. Hercules Phillip Bye (“Mr. Bey”), approached the court for relief in terms of section 163 of the Companies Act 71 of 2008 (“the Companies Act”). He wants the court to declare that the actions of the second, third, and fourth respondents (collectively referred to as the Buckle respondents”) were, or have had a result that is oppressive or unfairly prejudicial to and that unfairly disregards his interests, and seeks ancillary relief. If the court finds that section 163 of the Companies Act does not apply, Mr. Bye seeks an interdict in the same terms as the ancillary relief sought.

[2] Three main issues potentially stand to be determined. The first is whether Mr. Bey made a case under section 163 of the Companies Act. If he succeeds, the second issue that needs to be determined is the remedy that should follow the declaration. Only if the court is convinced that his shares are to be bought out does the issue of the value and valuation of shares come into play. If the court finds that Mr. Bey did not make out a case for relief in terms of section 163 of the Companies Act, the question is whether he succeeded in making out a case in terms of the common law and met the requirements for an interdict.

Section 163 of the Companies Act

[3] Section 163 is aimed at providing protection against oppression or unfair prejudice in any one of three described categories. A shareholder or a director of a company may apply to court for relief under this section in one of three situations, namely, if:

i. 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;

ii. 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

iii. 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 that unfairly disregards the interests of the applicant.

[4] In each of these categories provided for in the respective sub-sections of section 163(1) a different facet is highlighted. In section 163(1)(a) the focus falls on the consequences of the impugned conduct of a company or related person (collectively referred to in this paragraph as 'the company'). Not only the consequences of the impugned act or omission, but also the performer of the act sets this category aside. In section 163(1)(b) the manner or way in which the business of the company is conducted is the gateway to seek relief under this section. In section 163(1)(c) the emphasis is on the manner in which the director or prescribed officer of a company exercises their powers as director or prescribed officer. In all three categories the effect or result of the identified actor's acts must be oppressive or unfairly prejudicial, alternatively unfairly disregards the interests of the applicant.

[5] In a recent judgment, *Technology Corporate Management (Pty) Ltd and Others v De Sousa and Another,*[1] the Supreme Court of Appeal comprehensively unpacked the scope of section 252 of the Companies Act 61 of 1973, the predecessor of section 163 of the Companies Act 71 of 2008. The decision and *ratio* remain highly relevant to this matter. As Wallis JA pointed out, decisions on section 252 are of assistance in relation to cases arising under section 163(1), which substantially re-enacted it.[2]

[6] Although trite, it is necessary to highlight the following principles enunciated in *TCM:*

[1] 2024 (5) SA 57 (SCA), hereafter referred to as *TCM*.
[2] *TCM*, *supra*, at para [29].

i. The relationship between a company and its members, and the members *inter se*, is contractual and based primarily on the memorandum of incorporation. As a result, the views of the majority will ordinarily prevail on any disputed issue;[3]

ii. The legislature, however, vested courts with statutory power to override the majority's exercise of its contractual powers to remedy oppression or unfair prejudice caused to minority shareholders even if the majority shareholders acted strictly in accordance with the contractual terms governing the shareholder relationship;[4]

iii. There is a tension between the principle of majority rule and the power ascribed to courts to intervene in a company's affairs on equitable grounds;[5]

iv. The enquiry is objective, and although motive is not always irrelevant, proof is not required of a lack of *bona fides* or an intention to cause prejudice.[6] An applicant cannot simply make a number of vague and generalised allegations of unfairness or oppression. An applicant has to establish the particular act or omission that has been committed or that the affairs of the company have been conducted in the manner so alleged.[7]

v. When reliance is placed on actions causing unfair prejudice, mere prejudice is insufficient to invoke the remedy. The remedy is only available where unfair prejudice was caused, and the unfairness and the prejudice must affect the shareholder;[8]

vi. Dissatisfaction and disagreement or disapproval of the conduct of the business of a company does not in itself mean that the member has suffered unfair prejudice. While the fact that there are irreconcilable differences between shareholders may, in some circumstances, justify an order for the winding-up of a company, it is not, without more unfair prejudice;[9]

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[3] *TCM*, *supra*, at para [75].
[4] *TCM*, *supra*, at para [76].
[5] *TCM*, *supra*, at para [82].
[6] *TCM*, *supra*, at para [80].
[7] *TCM*, *supra*, at para [113].
[8] *TCM*, *supra*, at para [80].
[9] *TCM*, *supra*, at para [81].

vii. Courts should be wary not to confer rights on minority shareholders that are greater than, or differ from, the rights for which they have bargained and impose burdens on the majority that it did not undertake to bear;[10]

viii. A shareholder might find itself locked-in even where there is no exclusion from participation in the affairs of the company, or where the exclusion was not unfair. It is not enough merely to show that the relationship between the parties has irretrievably broken down. The legislature did not intend to provide a remedy to enable a 'locked-in' minority shareholder, without more, to require the company to buy him out at a price that he considers adequately reflects the value of his shares;[11]

ix. The mere fact that a minority shareholder wishes to exit the company and claims to have lost trust and respect for the majority shareholders does not on its own mean that it has suffered unfair prejudice within the ambit of s 163. One of the risks of conducting business with others in a small private company is that leaving the business and disposing of one's interest in it may be difficult 'or practically impossible'.[12] The Companies Act does not provide for a 'general unilateral right of withdrawal at the instance of a minority or dissentient shareholder.'[13]

x. A loss of faith, trust, and confidence in the majority shareholders occasioned by the affairs of the company being mismanaged, and a lack of probity in the conduct of the company's affairs may constitute unfair prejudice.[14]

[7] In each matter where relief is sought under section 163, the factual context of that specific matter will dictate the outcome.

Factual context

Common cause facts

[10] *TCM*, *supra*, at para [94].
[11] *TCM*, *supra*, at para [95].
[12] *TCM*, *supra*, at para [97].
[13] *TCM*, *supra*, at para [100].
[14] *TCM*, *supra*, at para [111].

[8] The common cause facts preceding the litigation are reasonably simple. Constantia Metering Services (Pty) Ltd ("the company" or "Constantia Metering") had its humble origins in Constantia Metering CC. The only members of the closed corporation, Mr. Bey (snr) and Mr. A. Buckle, each held a 50% membership interest. The closed corporation was later converted to a company, and Mr. Bey (snr) and Mr. A. Buckle likewise held 50% of the shares in the company.

[9] Mr. Bey (snr) and Mr. A. Buckle agreed at some point after their respective sons attained majority to divest themselves of their respective shares. The shareholding was divided as follows during 2018, with the share certificates ostensibly issued in February 2019:

i. Mr. J. Buckle, the third respondent, acquired a 40% shareholding;

ii. Mr. S. Buckle, the fourth respondent, acquired a 20% shareholding; and

iii. Mr. Bey, the applicant, acquired a 40% shareholding.

[10] Different reasons are proffered by the respective parties for the diminishing of the Bey family's shareholding in the company and the Buckle family obtaining control of the company through a collective majority shareholding. The reason for the *status quo* is neither here nor there. The reality is that Mr. Bey currently holds 40% of the shares in Constantia Metering, with the Buckle brothers collectively holding 60% of the shares.

[11] Mr. Bey (snr) and Mr. A. Buckle were the company's directors. Mr. Bey, the applicant, and Mr. Bey (snr) were employed by the company, as was Mr. J. Buckle. Mr. Bey (snr) unfortunately passed away in December 2021, leaving Mr. A. Buckle the sole remaining director. After his father passed away, Mr. Bey approached Mr. A. Buckle, the director of Constantia Metering. Mr. Bey's expectation was that he

would step into his father's shoes, both as far as his father's employment with Constantia Metering and his directorship of the company were concerned.

[12] Mr. A. Buckle, Constantia Metering's senior management, and the other shareholders did not share Mr. Bey's future plans. The discord that flared up resulted in the termination of Mr. Bey's employment with Constantia Metering. Again, whether Mr. Bey resigned or was dismissed is, neither here nor there because a settlement was reached between Mr. Bey and the company that allowed for the severance of the employment relationship.

[13] Mr. Bey ultimately indicated that he and Constantia Metering should part ways. Mr. A. Buckle agreed. To enable him to ascertain the values of his shares, Mr. Bey requested the company's financial statements. Mr. Bey was provided with two different sets of financial statements for what he regards to be corresponding periods of time. The existence of these two sets of financial statements seems to be the catalyst for this application. The application primarily turns on the question of whether the issuing and provision of two sets of financial statements fall within any or all the categories provided in section 163(1).

[14] To understand the finer nuances of the factual context, it is necessary to consider the respective parties' perspectives on the events that preceded the litigation.

Mr. Bey's contentions

[15] Mr. Bey portrays Constantia Metering as a typical domestic company run by two families. He clearly seems to have been under the impression that he was his father's heir, so to speak, as far as Constantia Metering is concerned. His father allegedly told him he would take his position as director and shareholder upon the former's retirement. Mr. Bey was also employed by Constantia Metering since 2014 and trained by his father to take over his position in Constantia Metering eventually.

[16] Mr. Bey avers that Mr. A. Buckle, the company's sole director, controls the affairs of the first respondent in conjunction and with the assistance of his sons, the third and fourth respondents.

[17] After his father passed away, Mr. Bey started making enquiries with Mr. A. Buckle regarding his future participation in the company, but it became apparent to him that the Buckles had no intention of allowing him to participate further in the company's affairs and that they were on a mission to exclude him from being involved, participating or becoming a director of Constantia Metering. I pause to mention at this juncture that Mr. Bey's subjective impression is not supported by the objective evidence presented in the papers. There is, likewise, no evidence supporting Mr. Bey's perception that the Buckle respondents 'vehemently opposed and have done everything in their power to prevent [him] from being involved in the affairs of Constantia, especially with respect to the financial affairs…'.

[18] During this time of discord, Mr. Bey's employment relationship with Constantia Metering was severed. He alleges he was dismissed while the Buckle respondents aver that he resigned. Be that as it may, a severance agreement was reached, and neither party provided sufficient detailed evidence to allow a factual finding on this point. At best, it can be said that a factual dispute exists regarding this issue.

[19] Due to Mr. Bey's impression that he was being excluded and victimised, and because his view that it was merely a formality for him to step in his father's shoes was not shared by the director and other shareholders, he requested Constantia Metering's financial statements to enable him to assess the value of his shares.

[20] Mr. Bey regards Mr. A Buckle as an authoritative, almost dictatorial, director who reigns his sons, the remaining shareholders, with an iron fist.

[21] Mr. Bey submits that issuing two different sets of financial statements for corresponding periods constitutes breaches of specific provisions of the Companies Act and the Income Tax Act. This, he contends, illustrates a '*modus operandi*' he cannot associate himself with as a future director and shareholder in fulfilling his fiduciary duty towards the company. Mr. Bey states later, in reply, that he has no fiduciary duty towards the company in his capacity as shareholder.

[22] As a result of what Mr. Bey perceived to be the irregularities appearing from the two sets of financial statements, he concluded that the only explanation for the two sets of financial statements was that SARS was being defrauded, and he no longer wanted to pursue obtaining a directorship in the company and being promoted to fulfill his father's position in the company. He subsequently denied invitations to attend shareholders' meetings and explained his decisions as follows:

> 'Having experienced the oppressive and prejudicial manner in which the First Respondent under the control of the Second Respondent had treated me since the passing of my late father, I had no doubt that my attendance at any shareholders meeting would simply be another opportunity for me to be abused.'

[23] Mr. Bey states in his founding affidavit that he appointed Mr. J Ferreira as auditor to investigate the irregularities that appear in the company's financial statements. Mr. Ferreira responded in a letter, later confirmed under oath, stating that he requires various additional documentation and information in order to prepare a final valuation report. He did not express any view regarding any perceived irregularity, save for stating that no meaningful information can be extracted from the documents supplied to him, among others, because the general ledger for the 2021 financial period does not correspond to the financial statements provided. Mr. Ferreira provided an extensive list of documents he required.

[24] In reply, Mr. Bey provided further expert evidence by including a report from Mr. A. Prakke, a forensic auditor. Mr. Prakke confirmed the objectives of the report were,

among others, to establish the integrity of the two sets of annual financial statements for the accounting period ending 28 February 2021 and to establish whether the directors were diligent in the execution of their duties when preparing the financial statements. He stated that he was not mandated to investigate whether the directors complied with the prescripts of the Companies Act.

[25] Mr. Prakke concluded, without providing any basis whatsoever for his finding that the approval of the two sets of financial statements was –

> 'done to mislead the actual financial state of CMS's financial status, including having a further effect that SARS could not determine the correct obligations and, therefore, the fiscus.'

[26] Mr. Prakke states that further investigation, particularly the Accounting Officer report, would reveal the factual extent of such discrepancy. He then reflects on what he coins 'misrepresentations' and explains, among others, that the financial statements are solely based on the 'accrual basis'.

The Buckle respondents' submissions

[27] The Buckle respondents' answering affidavit contains a significant portion of irrelevant information. I deal only with the aspects therein that I regard of significance to this application.

[28] Mr. A. Bucke vehemently denies that Constantia Metering is a domestic company resembling a partnership. He claims the respective shareholding belies such a contention. The shareholding is indicative of the control exerted by the Buckle shareholders.

[29] The second highly relevant portion of the answering affidavit is the explanation proffered for the existence and purpose of the impugned sets of financial statements. Mr. A. Buckle informs that ABSA and First Rand Bank informed

Constantia Metering that the banks changed their respective accounting policies and methodologies and required financial statements drawn in accordance with those methodologies. Both financial institutions were provided with statements drawn in accordance with this methodology and with the statements destined for SARS. Mr. A. Buckle denied that SARS was being defrauded.

[30] The Buckle respondents submitted the confirmatory affidavit of Mr. Van Dyk, Constantia Metering's accountant. He confirmed that the existence of a second set of financials is simply a requirement of the relevant bankers. He explained that Constantia Metering's accounting records were initially done using the 'cash basis' accounting method. Therefore, it did not recognise trading debtors and creditors, but only income and expenses when the cash is realised. The banks, however, required that debtors and creditors be accounted for, and a new set of statements was prepared for the banks using the 'accrual basis' of accounting.

Discussion

[31] That Mr. Bey and, at least, Mr. A Buckle do not see eye to eye is evident from the voluminous answering, replying, and conditional supplementary affidavits. As indicated above in the discussion regarding section 163, the mere existence of acrimony between a director of a company and a shareholder is not, in itself, enough to invoke the relief provided by the section.

[32] The underlying tension that existed between the Bey and Buckle role players, expressed to some extent by Mr. A. Buckle, came to a head when Mr. Bey approached Mr. A. Buckle, demanding what he regarded as his 'rightful place' in the company. Mr. Bey did not complain of any behavior or incidents that preceded his father's passing.

[33] I fail to find any objective evidence indicating any acts or omissions that resulted in Mr. Bey being oppressed or unfairly prejudiced or that his interests were unfairly

disregarded when Mr. A Buckle dismissed the succession plan proposed by him. Not only did Mr. Bey not call for the matter to be discussed at a shareholders' meeting, but the company, its director, and shareholders also were not bound to realise Mr. Bey's subjective expectations. His view that it was a mere formality that he would succeed his father as director, is not supported by the terms of the company's memorandum of incorporation that provides for the election of directors. The dismissal of his proposal by the company's director cannot be the basis for a finding that the respondents did not want Mr. Bey involved as a shareholder.

[34] Mr. Bey cannot complain of being excluded from the company's business as shareholder when he elected, for whatever reason, not to participate in shareholders' meetings.

[35] Having regard to the non-existent basis for invoking section 163(1) based on the interaction between Mr. Bey and the company, its director, and his fellow shareholders, it is understandable that counsel representing Mr. Bey focused his address almost solely on the ostensible effect, and impact of the existence of two sets of financial statements for corresponding time periods on Mr. Bey's future involvement in Constantia Metering.

[36] Although it is evident that the sets of financial statements are not identical and that certain discrepancies exist, no case is made out that the company's affairs are mismanaged or that there is a lack of probity on behalf of the director. Mr. Prakke states that more information is needed to establish the factual extent of the discrepancies. The respondents provided a cogent explanation, supported by their expert witness, for the existence not only of the two sets of financial statements but also for the existing discrepancies. On the papers filed of record, no finding is justified on this aspect. In light of this evidence provided in answer by the respondents, I cannot find that the existence of the two sets of financial statements, without more, is indicative of dishonesty or a failure to act ethically. For the same reasons, I cannot find, as a fact, that sections of the Companies Act or Income Tax Act were contravened.

[37] I can, likewise, not find, as urged to do in the heads of the argument, that Mr. A. Buckle is a delinquent director. I pause to note that this relief is not sought in the notice of motion.

[38] As for the contention that Constantia Metering is a domestic company, there is no indication on the papers that any personal relationship of trust existed between the shareholders and directors, even before Mr. Bey (snr.)'s passing, similar to that existing between partners in regard to the partnership business. Mr. Bey failed to establish that Constantia Metering (Pty) Ltd is a company akin to a partnership. The shareholding is not held equally, and there is no evidence that the respective families would be treated equally. A friendly relationship between the respective is not a prerequisite to the running of the company's affairs, and the destruction of the trust relationship between Mr. Bey and Mr. A. Buckle will not result in a deadlock, nor that there is no longer a reasonable possibility of running the company consistently with the basic arrangement between the members.

Interdictory relief

[39] The applicant's failure to make out a case that the existence of two sets of financial statements is evidence of irregular and unlawful conduct is also fatal to the application for interdictory relief. Mr. Bey, additionally did not make out a case that he, as shareholder is likely to suffer irreparable harm if the relief sought is not granted.

Miscellaneous

[40] The parties agreed *inter partes* that the late filing of the answering and replying affidavits be condoned, and that the conditional supplementary affidavit filed by the respondents be accepted into evidence.

Costs

[41] The principle that costs follow success applies. Having regard to the nature of the application and the complexity thereof, it is fair and just if costs are awarded on Scale B.

ORDER

In the result, the following order is granted:

1. **The application is dismissed.**
2. **The applicant is to pay the costs of the first to fourth respondents on Scale B.**

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E van der Schyff

Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant:	Adv. S.D. Wagener SC
Instructed by:	Geyser Van Rooyen Attorneys
For the first to fourth respondents:	Adv. S. W. Davies
Instructed by:	JW Wessels & Partners Inc.
Date of the hearing:	21 January 2025
Date of judgment:	31 January 2025