THE SUPREME COURT OF APPEAL
**REPUBLIC OF SOUTH AFRICA**

**MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

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| **FROM** | The Registrar, Supreme Court of Appeal |
| **DATE** | 1 December 2010 |
| **STATUS** | Immediate |

***Please note that the media summary is for the benefit of the media and does not form part of the judgment.***

# *Louw v Nel*
# (45/10) [2010] ZASCA 161(1 December 2010)

**Media Statement**

Today the Supreme Court of Appeal delivered judgment in an appeal and cross appeal against a judgment by Mavundla J in the North Gauteng High Court (Pretoria) ordering the appellants, the directors in a company, to purchase the shares of the respondent, a minority shareholder in the company.

The respondent, Christiaan Nel (Nel), the first appellant, Johannes Louw (Louw) and the second appellant Willem du Preez (Du Preez) formed a partnership known as EPI-USE Financials Partnership (the partnership), which conducted business in the implementation and continuous operation, including training and problem-solving, of a computer programme used by big business known as SAP. During early 2003 the partnership became involved in certain projects together with the third appellant, Lukas Lejara Mothupi (Mothupi). After negotiations between the three partners and Mothupi it was decided that the future business of the partnership should be conducted through a company and to that end a shelf company, first named Lejara Business Intelligence (Pty) Ltd and thereafter Lejara Consulting (Pty) Ltd (the company) was acquired. It was decided that the company would expand its business operation. Money had to be borrowed from a financial institution and security in the form of suretyships was required from each of the shareholders for that purpose. That marked the beginning of discontent and distrust between Nel on the one hand and the other shareholders on the other. Nel felt that this was a move to sideline him while the other directors argue that

Nel acted in an obstructive and disruptive matter which strained the relationship between him and the other directors and shareholders.

Matters came to a head when a general shareholders' meeting of the company resolved by a majority vote that Nel be removed as a director of the company. He later attended a shareholders' meeting of the company where he was informed that the shareholders loans which were due, could not be paid because that would effectively place the company in an insolvent position. Nel thus formed the view that the company was unable to pay its debts as contemplated by s 344(f) of the Companies Act 61 of 1973. He responded by launching an application on to the North Gauteng High Court (Pretoria) seeking an order placing the company under winding up and in the alternative pursuant to s 252 of the Companies Act a declaration that the company's affairs were being conducted in a manner unfairly prejudicial, unjust or inequitable to him as minority shareholder and that the other directors be directed to purchase his shares at a value to be determined by an independent valuer.

In support of this Nel in his affidavit stated that the main business of the company has been disposed of to other companies whose directors and shareholders are common with that of the company, save that he been excluded. He averred that the company had not been compensated for such disposal and this was in violation of his rights in terms of the Companies Act. At various stages the prayer for the alternative relief under s 252 was amended to add to the list of companies Nel felt had appropriated the business of the company.

In a duplicating affidavit on behalf of the appellants Mothupi stated that the other directors consented to an order in terms of this prayer for the alternative relief under s 252 without admitting that the business of the company had been conducted in a manner unfairly prejudicial, unjust or inequitable to Nel.

When this matter was heard before Mavundla J the company had been wound up at the instance of a third party. The judgment ordered the other directors to purchase Nel's shares at a value to be determined by and independent auditor.

The SCA dismissed the appellants' appeal against this order. The court found that the consent by the appellants amounted to an admission and on this basis the appeal stood to be dismissed.

Turning to the cross appeal the SCA held that in order for a court to be empowered to make a decision in terms of s 252 it must first be satisfied that the affairs of the company are being conducted in a manner that is unfairly prejudicial to the interests of a dissident minority. The conduct of both parties needed to be taken into account. An applicant for relief under s

252 cannot contend themselves with a number of vague or general allegations but must establish that a particular act was committed or that the company's affairs were unfairly prejudicial, unjust or inequitable to the minority shareholder. The court's jurisdiction to make such an order does not arise until the specified statutory criteria had been satisfied.

The papers reveal sharp disputes of fact on a number of material issues. The court held that these disputes could only be decided after oral evidence had been heard as the section envisaged a full investigation into circumstances of alleged oppression. It was impossible on the disputed facts to arrive at a conclusion or fair determination under the section. As a referral for oral evidence had not been sought either in this court or the court below this court finds that as a result the various disputes of facts constituted an insuperable obstacle to the s 252 relief sought by Nel.

Both the appeal and cross appeal where dismissed with costs.

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