THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 232/2025

In the matter between:

SWANVEST 328 (PTY) LIMITED	**FIRST APPELLANT**
LEGACY MANAGEMENT HOLDINGS (PTY) LIMITED	**SECOND APPELLANT**
ALLEN PATRICK BREARLEY	**THIRD APPELLANT**
ALBERTUS HENRICUS DORRESTEIN	**FOURTH APPELLANT**
NEIL GEORGE YATES	**FIFTH APPELLANT**
LEGACY HOSPITALITY MANAGEMENT (PTY) LTD	**SIXTH APPELLANT**
LEGACY HOTELS AND RESORTS (PTY) LIMITED	**SEVENTH APPELLANT**

and

ENSEMBLE HOTEL HOLDINGS (PTY) LIMITED	**FIRST RESPONDENT/CROSS-APPELLANT**
ZIAD JAMAL ALI EL-BARAG	**SECOND RESPONDENT/CROSS-APPELLANT**
MOHAMMED MAHMOUD ALZAROUQ SHAWSH	**THIRD RESPONDENT**

Neutral citation: *Swanvest 328 (Pty) Ltd and Others v Ensemble Hotel Holdings (Pty) Ltd and Others* (232/2025) [2026] ZASCA 101 (21 July 2026)

Coram: ZONDI DP, MOCUMIE and MATOJANE JJA and STEYN and PHATSHOANE AJJA

Heard: 08 May 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 21 July 2026 at 11h00.

Summary: Companies Act 71 of 2008 (Companies Act) – oppressive or prejudicial conduct – relief under s 163 of the Companies Act – whether majority shareholder may invoke s 163(1)*(b)* of the Companies Act – whether irretrievable breakdown of shareholder relationship established – whether minority shareholder established relief under s 163(1)(*c*) – remedy – sale of minority shareholding at independently determined fair value – whether frozen assets regime constitutes impediment to sale of shares – permitted dealings and Ministerial permission under s 26C of the Financial Intelligence Centre Act 38 of 2001 – ministerial exemption – condition attached to order – United Nations Security Council resolutions 1970 (2011), 1973 (2011) and 2009 (2011).

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Adams J sitting as court of first instance):

1. The appeal and cross-appeal are upheld in part to the extent set out in paragraph 2 below.

2. The order of the High Court is set aside and substituted with the following:

‘2.1 The main application succeeds in part.

2.2 The counter-application is dismissed with costs, including the costs of two counsel, where so employed.

2.3 The first applicant, Ensemble Hotel Holdings (Pty) Limited, is directed to sell to the seventh respondent, Legacy Hotels and Resorts (Pty) Limited, which is to repurchase the shares held by the first applicant in the seventh respondent (the shares) and to transfer such shares to the seventh respondent against payment to the first applicant of an amount to be determined by an expert professional valuer (the expert) referred to in paragraph 2.10 below, being the value of and purchase consideration for the first applicant's shares in the seventh respondent as at 29 January 2021, payable within 120 days from the date of the expert’s determination.

2.4 The implementation of paragraph 2.3 above is subject to and conditional upon the parties obtaining such ministerial permission or other authorisation as may be required under ss 26B and s 26C of the Financial Intelligence Centre Act 38 of 2001, read with the applicable United Nations Security Council resolutions. The proceeds attributable to the shareholding of the first respondent shall be dealt with in accordance with any conditions lawfully attached to such permission or authorisation. If no application for such exemption has been brought within six months of this order, or if such application is refused, any party may approach this Court for further directions.

2.5 The second applicant, Mr Ziad Jamal Ali El-Barag, shall, within five days of the date of this order, notify the seventh respondent in writing of his resignation as a director of the seventh respondent.

2.6 The parties shall take all steps, do all things and sign all documents which are necessary to give effect to the provisions of paragraphs 2.3 and 2.5 above as expeditiously as possible, failing which the Sheriff of this Court is hereby authorised and directed to take such steps, do such things and/or sign such documents on behalf of the party or parties for such purpose.

2.7 An expert professional valuer shall be appointed to determine the value of and purchase consideration for the first applicant's shares in the seventh respondent as at the date at which the value is to be determined as provided for in 2.3 above.

2.8 The valuation of, and purchase consideration for, the first applicant's shares are to be determined by the expert, who shall take into account any principles, facts and circumstances that the expert considers to be appropriate.

2.9 The expert's costs are to be paid by the first applicant and the seventh respondent in proportion to their shareholding. These costs are not to be taken into account in the valuation of the first applicant's shares being sold to the seventh respondent.

2.10 In the absence of agreement in writing between the parties within 15 days from date of this order in relation to the identity of the expert, such expert is to be a registered and practising chartered accountant of no less than 15 years' standing to be nominated by the President for the time being of the South African Institute of Chartered Accountants from the valuations division of any one of the following South African accounting and auditing practices: EY, KPMG, PWC and Deloitte.

2.11 The expert is required to meet with and receive representations from each of the parties and their financial representatives in carrying out those functions.

2.12 The expert's powers shall include the power to assess what the expert considers to be fair value for the first applicant's shares.

2.13 In valuing the first applicant's shares the expert shall have the further power to make such adjustments as the expert may consider fair to arrive at what, in the expert's professional opinion, would constitute a ‘fair price’ for the first applicant's shares to be acquired by the seventh respondent as set out in paragraph 2.3 above, including the following adjustments, as the expert determines:

(a) a marketability discount; and

(b) A minority discount.

2.14 Upon transfer of the shares from the first applicant to the seventh respondent, the shares will be cancelled and returned to the authorised share capital of the seventh respondent.

2.15 The relevant parties are directed to pass all resolutions required to give effect to this order in terms of ss 48, 112, 114, 115 and 164, or any other applicable section, of the Companies Act 71 of 2008, failing which the Sheriff of this Court is hereby authorised and directed to take such steps, do such things and/or sign such documents on behalf of the party or parties for such purpose. The requirement for a report to the board in terms of s 114 is hereby waived.

2.16 Each party shall pay its own costs in respect of the main application.’

3. The parties shall bear their own costs in this Court.

JUDGMENT

Matojane JA (Zondi DP and Mocumie JA and Steyn and Phatshoane AJJA)

Introduction

[1] This appeal arises from a dispute between the shareholders of the seventh appellant, Legacy Hotels and Resorts (Pty) Limited (Legacy Hotels). This closely held private company owns and manages a portfolio of hotels in South Africa and Namibia. Its three shareholders are the first appellant, Swanvest 328 (Pty) Limited (Swanvest), which holds 19.39 percent; the second appellant, Legacy Management Holdings (Pty) Limited (LMH), which holds 40.84 percent; and the first respondent, Ensemble Hotel Holdings (Pty) Limited (Ensemble), which holds 39.79 percent. The parties have

agreed that their relationship as co-shareholders has broken down irretrievably and that it must be brought to an end. In the main, the dispute concerns the mechanism by which their separation is to be effected.

[2] The application was brought in the Gauteng Division of the High Court, Johannesburg (the High Court), by Ensemble and the second applicant, Mr El-Barag, a director of Legacy Hotels. The application was opposed by the first to seventh appellants. The first, second and seventh appellants (Swanvest, LMH and Legacy Hotels) counter-applied for the repurchase of Ensemble shares at a fair value determined by an independent expert.

[3] The high court granted Ensemble and Mr El-Barag substantially the relief they sought. It ordered: (a) the production of certain company documents listed in annexure 'A' to the applicants' notice of motion; (b) a declaration that any transactions concluded by Legacy Hotels in breach of clause 11 of the shareholders' agreement, and more particularly the transfer of management contracts to Legacy Hospitality Management (Pty) Ltd (Legacy Hospitality), the sixth appellant, and or any third party are invalid; (c) an order that the third to sixth respondents in the high court (being Mr Paddy Brearley, Mr Bart Dorrestein, Mr Neil Yates and Legacy Hospitality) account to the applicants for profits derived from any such transfer of management contracts or assets; (d) wide-ranging interdictory relief against the third, fourth and fifth respondents; and (e) an order directing that the issued share capital of Legacy Hotels be sold at a private auction at which only Ensemble and the two majority shareholders (Swanvest and LMH) may bid. It dismissed the counter-application by Legacy Hotels and awarded Ensemble and Mr El-Barag their costs in the main application and the counter-application.

[4] The first to seventh appellants (the appellants) appeal against the whole of the judgment with the leave of the high court. Ensemble and Mr El-Barag cross-appeal against the form of the auction, seeking an order that the business of Legacy Hotels (rather than its share capital) be sold at a private auction as a going concern. The appeal and the cross-appeal raise three broad issues. First, whether either of the competing claims for remedial action satisfies the requirements of s 163 of the

Companies Act 71 of 2008 (Companies Act). Second, whether Ensemble's shares in Legacy Hotels are subject to a freeze imposed by United Nations Security Council (Security Council) resolutions as given domestic effect by the Financial Intelligence Centre Act 38 of 2001 (FICA), such that they may not lawfully be sold (the sanctions issue); third, what is the appropriate mechanism for severing the shareholders' relationship: an *inter partes* auction or the sale of shares to the majority shareholders at independently determined fair value (the remedy issue).

Factual background

[5] Legacy Hotels was incorporated in 1989. Ensemble became a shareholder in 1999. The board of Legacy Hotels comprises five directors. Swanvest and LMH together nominated three directors (Mr Brearley, Mr Dorrestein and Mr Yates). Ensemble designated two (Mr El-Barag and Shawsh Mohamed Mahmoud Alzarouq). The parties concluded a shareholders' agreement that regulates, among other things, the composition of the board, quorum requirements, and certain restrictions on transactions affecting Legacy Hotels' assets or business. In particular, clause 11 of that agreement limits the manner in which Legacy Hotels may dispose of its assets or enter into management agreements, other than in the ordinary course of business. The agreement also provides a mechanism for resolving shareholder disputes.

[6] Ensemble's ultimate holding structure is Libyan. Its immediate shareholder is the Libyan African Investment Company (LAICO). LAICO is wholly owned by the Libyan African Investment Portfolio (LAIP), which, in turn, is wholly owned by the Libyan Investment Authority (LIA). LIA is Libya's sovereign wealth fund.

[7] On 26 February 2011, the Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1970 (2011), which imposed an asset freeze on individuals listed in Annex II. On 17 March 2011, the Security Council adopted Resolution 1973 (2011), which extended the freeze to the entities listed in its Annex II, including LIA and LAIP. On 16 September 2011, the Security Council adopted Resolution 2009 (2011), which eased the asset-freeze measures in respect of LIA and LAIP, but provided that their funds, financial assets and economic resources located outside Libya and frozen as at 16 September 2011 remained frozen.

[8] The consequences of these resolutions for Ensemble's shareholding in Legacy Hotels are and remain disputed. The appellants' answering affidavit (which also served as the founding affidavit in the counter-application) asserted that Ensemble's shares in Legacy Hotels constitute frozen assets under the resolutions, and expressly pleaded the sanctioned status of the shares as a fact. It was on that basis that Ensemble and Mr El-Barag sought leave to amend their notice of motion to claim the sale of Legacy Hotels' business rather than the sale of the shares: they accepted the appellants' characterisation that a direct sale of the shares was legally impermissible and sought to circumvent that obstacle.

[9] The appellants, however, later departed from their pleaded case by adopting an inconsistent position in their replying affidavit to the counter-application, contending that the shares were not frozen and relying on Implementation Assistance Notice 1 (Notice 1) issued by the Committee established under paragraph 24 of Resolution 1970 (2011). Notice 1 states that subsidiaries of LIA and LAIP are not subject to the asset freeze, and that member states are not obligated to freeze the assets of entities owned or controlled, in whole or in part, by LIA and LAIP. The same notice records, however, that assets held outside Libya as at 16 September 2011, directly in the names of LIA and LAIP, remain frozen unless an appropriate exemption applies.

[10] From about 2021, the majority of Legacy Hotels' directors began exploring arrangements to transfer hotel management contracts from Legacy Hotels and its subsidiaries to Legacy Hospitality, a company in which the Ensemble-nominated directors have no interest. The appellant directors characterised these arrangements as necessary to protect Legacy Hotels' business from the reputational impact of Ensemble's connection to the sanctioned entities. Ensemble characterised them as the unlawful diversion of corporate opportunities. The appellants maintain that the November 2021 proposal for asset transfer was withdrawn in March 2022, and that no existing management contracts were transferred. It is, however, common cause that: (a) the hotel-management contract for the Swakopmund Station Hotel, previously held by a Legacy Hotels subsidiary, was, on its renewal, concluded in the name of Legacy Hospitality; and (b) the Kuzuko Lodge management agreement was, on expiry, renewed in the name of Legacy Hospitality.

[11] The relationship having become irretrievably deadlocked, Ensemble and Mr El-Barag launched the application which is the subject of this appeal in December 2022. Originally, they sought an auction of the shareholding in Legacy Hotels. After the appellants pleaded the FICA prohibition on the sale of shares, Ensemble amended its notice of motion to seek an auction of the business of Legacy Hotels as a going concern. The appellants counter-applied, seeking the repurchase of Ensemble's shares by Legacy Hotels at a fair value determined by an independent expert.

[12] The three issues raised in this appeal, as highlighted in paragraph 4, are conveniently addressed in the following order: (a) the s 163 issue; (b) the sanctions issue; and (c) the remedy issue. Before turning to them, it is appropriate to record the high court's key findings.

The high court's finding

[13] The high court held that FICA and the Security Council resolutions did not constitute an impediment to the relief it intended to grant. It reasoned that the Committee established under Resolution 1970 had noted that LIA and LAIP's subsidiaries were not themselves subject to the asset freeze. On that footing, the high court ordered that the entire issued share capital of Legacy Hotels be sold by private auction, with both shareholder groups entitled to bid. It found it unnecessary to consider the sale-of-business alternative advanced by the respondents.

The appellants' case on appeal

[14] On appeal, the appellants contend that the high court's finding on the sanctions issue was wrong. The sale of shares was legally impermissible. However, they pressed ahead with their counter-application in the high court, which they contended ought to have succeeded. The respondents (Ensemble and Mr El-Barag) countered, as they did in the high court, that the shares are frozen and that only a sale of Legacy Hotels' business (as opposed to the shares) can lawfully effect the separation of the parties. They therefore support the high court's conclusion on the sanctions issue, but challenge its choice of remedy.

The s 163 of the Companies Act issue

[15] Section 163 of the Companies Act affords relief from oppressive or unfairly prejudicial conduct, or from the abuse of a company's separate juristic personality. A shareholder or director may apply under s 163(1) of the Companies Act 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 unfairly disregards the interests of, the applicant; (b) the business of the company, or a related person, is being or has been conducted in such a manner; (c) the powers of a director or prescribed officer of the company, or of a person related to the company, are being or have been exercised in such a manner; or (d) the company's separate juristic personality is being abused. The present matter engages subsections (a) to (c). Section 163(2) of the Companies Act confers a wide remedial discretion on the court.

[16] This Court in *Grancy Property Ltd v Manala and Others,*[1] held that it is not the motive for the impugned conduct that the court must examine, but the conduct itself and the effect it produces. The court must determine whether, viewed objectively, the effect of that conduct is oppressive, unfairly prejudicial, or unfairly disregards the applicant's interests.

Pleading: must s 163 of the Companies Act be expressly invoked?

[17] The appellants contend that Ensemble did not plead a cause of action under s 163 of the Companies Act, and that the section was raised for the first time in heads of argument in the high court. A party who wishes to rely on a statutory provision as a cause of action must plead that reliance, either by naming the provision or by formulating the facts with sufficient clarity to disclose the statutory right on which it relies.

[18] I accept that, as a general proposition, the cause of action must be identifiable from the founding papers. However, the rule requires attention to substance rather than form. It does not demand that the section number be identified in the affidavit. What it requires is that the founding papers disclose the facts on which the applicant relies, so that the respondent knows the case it must meet. Here, the founding affidavit of Mr El-Barag sets out in some detail the conduct of the appellant directors alleged to

[1] *Grancy Property Ltd v Manala and Others* [2013] ZASCA 57; [2013] 3 All SA 111 (SCA); 2015 (3) SA 313 (SCA) para 27.

be oppressive and prejudicial: the persistent attempts to transfer Legacy Hotels' management contracts to entities in which Ensemble has no interest; the systematic exclusion of Mr El-Barag from access to the records and financial information of Legacy Hotels necessary to discharge his fiduciary duties; and the use of those exclusions as leverage to induce Ensemble to sell its shares at an unfavourable price. Those are precisely the facts on which a claim under s 163 of the Companies Act would be founded. Therefore, the appellants' objection to the pleading must be rejected.

The appellants' case under s 163 of the Companies Act (the counter-application)

[19] The appellants also invoke s 163(1)*(b)* of the Act, contending that the business of Legacy Hotels has been conducted in a manner unfairly prejudicial to them because Ensemble's association with its Libyan-linked ownership structure has generated adverse perceptions among business counterparties and has impeded the company's ability to enter into or renew commercial arrangements. This, the appellants submit, amounts to conduct that is oppressive or unfairly prejudicial to the majority shareholders. I am not persuaded that the counter-claim meets the requirements of s 163(1)*(b)* of the Companies Act.

[20] A claim under s 163(1)*(b)* of the Companies Act requires the identification of conduct, positive acts or deliberate omissions on the part of the respondent that are oppressive or unfairly prejudicial to the appellant's interests. The Libyan ownership structure of Ensemble predates the parties' relationship. It is not an act directed at the majority shareholders, nor was it adopted to harm them. The regulatory burdens that flow from it are the consequence of an international sanctions regime imposed by the Security Council and domestically incorporated through FICA. The appellants cannot transform the minority's inherited ownership structure into oppressive conduct by pointing to the difficulties it creates. Counsel for the appellants, when confronted in argument, did not press the point. The high court was correct to dismiss the counterclaim insofar as it was founded on s 163 of the Companies Act. That conclusion follows independently of the further consequence, addressed below, that the shares are frozen.

Ensemble's case under s 163 of the Companies Act (the main application)

[21] Ensemble's case under s 163 of the Companies Act rests primarily on two categories of conduct. The first is the diversion of management contracts from Legacy Hotels to Legacy Hospitality, a company associated with the majority of directors, in which Ensemble has no interest. The second is the systematic exclusion of Mr El-Barag from access to the records and financial information of Legacy Hotels necessary for the discharge of his fiduciary duties as a director.

[22] As to the first category, the appellants deny that any management contracts were transferred in breach of clause 11 of the shareholders' agreement, and dispute that any existing contracts were transferred to Legacy Hospitality. They contend that the proposal to do so was withdrawn in March 2022 and that only new contracts (on expiry of the old ones) were concluded in the name of Legacy Hospitality. There are genuine and irresolvable disputes of fact on the affidavits in this regard. Under the *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd,*[2] principles, final relief on motion is to be granted only if such relief is justified on the respondents' version of the facts, together with the common cause facts, unless the respondents' version is so far-fetched or untenable as to be rejected out of hand. The appellants' denial of the transfer of existing contracts cannot, in my view, be so rejected.

[23] As to the second category, the position is clearer. It is common cause that Mr El-Barag, as a director of Legacy Hotels, made repeated requests for access to the company's financial records, and that such access was delayed or refused on multiple occasions over an extended period. The appellants' version is that the requests were either responded to in the ordinary course or refused on legitimate commercial grounds. Nevertheless, they do not dispute the fact of the refusals or delays themselves. Directors are entitled to information reasonably necessary to discharge their fiduciary duties (see ss 75 and 76 of the Companies Act, read with the common-law principles governing fiduciary obligations). A pattern of refusal or delay in providing a director with such information, where the withholding is connected to a broader dispute over the disposition of the shareholding, falls within s 163(1)*(c)* of the Companies Act: it is the exercise of the powers of the majority-nominated directors in

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[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C.

a manner that unfairly disregards the interests of the minority shareholder. On the appellants' own version, Ensemble has made out a case under that subsection.

[24] I therefore conclude that Ensemble has satisfied the s 163(1)*(c)* of the Companies Act jurisdictional threshold, at least in respect of the refusal of access to information. Whether that conclusion translates into the full range of ancillary relief claimed by Ensemble is a separate question, which was not pursued before us.

The sanction issue

[25] The foundational question is whether Ensemble's shares in Legacy Hotels were, as at 16 September 2011, funds, financial assets or economic resources owned or controlled, directly or indirectly, by LIA or LAIP, and held outside Libya, within the meaning of paragraph 17 of Resolution 1970 read with paragraph 22 of Resolution 1973. If they were, they remained frozen under paragraph 15 of Resolution 2009, which preserved the freeze on such assets held outside Libya as at that date. By force of s 26A(1) of FICA, a resolution of the Security Council of this kind has immediate effect for the Act upon its adoption. Section 26B(2) of FICA then prohibits any person from dealing with, entering into or facilitating any transaction, or performing any other act, in connection with such property.

[26] The ownership structure of Ensemble is common cause: LIA owns LAIP, which owns LAICO, which ultimately owns Ensemble, which holds shares in Legacy Hotels. Ensemble's shares in Legacy Hotels were therefore indirectly owned and controlled by LIA and LAIP. They became subject to the freeze under Resolution 1973 on 17 March 2011 and, having been held outside Libya as at 16 September 2011, remained frozen under paragraph 15 of Resolution 2009. On the plain language of the resolutions, the shares remain frozen.

[27] The appellants seek to escape this conclusion by relying on Notice 1[3] which the high court accepted. Notice 1 records that the Committee 'notes that subsidiaries of

[3] Implementation Assistance Notice (IAN) No. 1 issued by the Security Council Committee established pursuant to United Nations Security Council Resolution 1970 concerns the scope of the Libya asset

the LIA and LAIP are not subject to the asset freeze measure' and that '[m]ember [s]tates are not obligated to keep frozen assets of entities owned or controlled, either wholly or partially, by the LIA and LAIP'. But the same notice records, in the same breath, that assets held outside Libya as at 16 September 2011, held directly in the names of LIA and LAIP, shall remain frozen unless an appropriate exemption is applied. The high court treated only the first of these statements as authoritative.

[28] In my view, the high court erred in this regard. The domestic obligation under FICA is to give effect to the resolutions themselves, not to the Committee's implementation guidance. Section 26A(1)[4] of FICA provides that a Security Council resolution has immediate effect for the Act upon adoption. The Committee's powers, as defined in paragraph 24 of Resolution 1970, include monitoring implementation, designating individuals and entities, and establishing guidelines to facilitate implementation. The Committee has no authority to amend a Chapter VII Security Council resolution or to determine its legal effect authoritatively. To the extent that Notice 1 purports to restrict the scope of the freeze to assets held directly in the names of LIA and LAIP, it conflicts with the plain language of paragraph 17 of Resolution 1970, which extends the freeze to assets 'owned or controlled, directly or indirectly' by the designated entities. The resolution must prevail.

[29] A second consideration reinforces this conclusion. Whereas Notice 1 addressed assets held directly in the names of LIA and LAIP, Notice 6, issued by the Committee on 17 December 2018, records the same conclusion to assets owned or controlled, directly or indirectly, by the LIA and LAIP held outside Libya and frozen as of 16 September 2011, which it records as remaining frozen. Notice 6 thus employs the 'directly or indirectly' language of paragraph 17 of Resolution 1970 and paragraph 22 of Resolution 1973. The appellants' attempt to read the freeze as confined to assets held directly in the names of the designated entities cannot be sustained: it is

freeze, specifically regarding subsidiaries of the Libyan Investment Authority (LIA/LAFICO) and the Libyan Africa Investment Portfolio (LAIP).

[4] Section 26A states:

(1) A resolution adopted by the Security Council of the United Nations when acting under Chapter VII of the Charter of the United Nations, providing for financial sanctions which entail the identification of persons or entities against whom member states of the United Nations must take the actions specified in the resolution, has immediate effect for the purposes of this Act upon its adoption by the Security Council of the United Nations.

incompatible with the express terms of the resolutions, which extend to assets owned or controlled indirectly.

[30] A further difficulty confronts the appellants. Their own pleaded case in the answering affidavit, which also served as the founding affidavit in the counter-application, was that the shares are frozen assets. Having adopted that position in the founding papers upon which their counter-application depended, they could not, in reply, advance the inconsistent contention that the shares are not frozen. As this Court held in *Director of Hospital Services v Mistry*,[5] a litigant must stand or fall by the case made in its founding papers, which define the case the respondent is called upon to meet. It is therefore impermissible for a litigant to substitute an inconsistent factual version or otherwise seek to make out a new case in reply, as *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*[6] makes clear. The founding papers form the *substratum* of the case.

[31] Paragraph 15 of Resolution 2009 provides that assets situated outside Libya which were frozen as at 16 September 2011 shall remain frozen. The resolutions nonetheless provide for exemptions: paragraph 19 of Resolution 1970 permits the release of frozen funds for basic and extraordinary expenses and to satisfy pre-existing judicial liens, while paragraph 16 of Resolution 2009 permits the unfreezing of funds for, among other things, humanitarian needs and the strengthening of civilian institutions, in each case on notification to, and the absence of objection by, the Committee and after consultation with the Libyan authorities. The stated purpose of the regime, as recorded in paragraph 18 of Resolution 1970 and the preamble to Resolution 2009, is to ensure that assets connected to the former Libyan government are preserved for the benefit of the Libyan people and, in due course, made available to them.

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[5] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B. See also *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* 2022 (4) SA 57 (SCA) para 39.

[6] *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) at 704F-G. See also *National Council of Societies for The Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) para 29.

[32] I accordingly conclude that Ensemble's shares in Legacy Hotels constitute frozen property within the meaning of paragraph 17 of Resolution 1970,[7] read with paragraph 22 of Resolution 1973 and paragraph 15 of Resolution 2009, as given domestic effect by s 26A(1) of FICA. Any transaction in connection with those shares – including their sale, whether by auction or by means of the counter-application's buy-out mechanism – is prohibited by s 26B(2) of FICA.

Consequences for the relief

[33] The conclusion that Ensemble's shares are frozen has three immediate consequences. First, s 26B(1) of FICA prohibits any person from, directly or indirectly, acquiring, using, possessing or owning property, or from providing or making available property or any financial or other service or economic support, for the benefit of, on behalf of, or under the control of a person or entity identified pursuant to a Security Council resolution contemplated in s 26A(1). Section 26B(2) prohibits any person from dealing with, entering into or facilitating any transaction, or performing any other act, in connection with such property. Contravention of s 26B is an offence under s 49A. The only relief from the prohibition lies in s 26C, which empowers the Minister of Finance (the Minister), in writing and on such conditions as the Minister considers appropriate and in accordance with the relevant resolution, to permit a person to deal with property referred to in s 26B in the limited circumstances enumerated in s 26C(2).

[34] Accordingly, the high court's order directing a private auction of Legacy Hotels' share capital cannot stand. It would compel dealings in frozen property in contravention of s 26B(2) of FICA unless and until the Minister grants permission under s 26C.

[35] Second, the cross-appeal, which seeks a sale of Legacy Hotels' business rather than its shares, must be considered on that basis. Third, the counter-application, which sought Legacy Hotels' repurchase of the shares, is subject to the same prohibition. I return to the cross-appeal and the counter-application under the remedy issue below.

[7] Paragraph 17 imposes a comprehensive asset freeze directed at individuals and entities listed in Annex II of the resolution. It obliges all Member States to freeze, without delay, all funds, other financial assets, and economic resources situated within their territories that are owned or controlled, whether directly or indirectly, by the listed persons or entities.

The FICA impediment

[36] As indicated earlier, the high court found that FICA and the Security Council resolutions posed no obstacle to the auction it ordered, relying on a communication from the sanctions committee stating that the subsidiaries of the frozen entities were not themselves subject to the freeze. That finding cannot be supported. It is the central misdirection in the judgment.

[37] The high court did not engage with the text of s 26B of FICA. It did not consider the objects of the Act, in particular the object in s 3(2)(a) of FICA, which is directed at administering measures pursuant to resolutions adopted by the Security Council. Nor did it consider the scope of the prohibition in s 26B(2) of FICA, which reaches not only direct dealings with frozen property but also the facilitation of, or any other act in connection with, a transaction relating to such property.

[38] The fact that a subsidiary is not itself a named entity in the resolutions does not answer the question whether a transaction affecting that subsidiary's shares would, in substance, confer a financial benefit on the frozen entities that stand behind it. Ensemble's shares in Legacy Hotels are, in substance, an asset whose beneficial ownership traces to the LIA and the related Libyan entities. Any proceeds flowing from a compelled sale of those shares would, absent permission under s 26C, be received by, and for the benefit of, entities subject to the asset freeze. Section 26B(2) of FICA is therefore engaged.

[39] Nor does the fact that the order is made in the exercise of the court's discretion under s 163(2) of the Companies Act circumvent the prohibition. A court's discretion to make any equitable order cannot extend to making an unlawful order, as it cannot, in the exercise of a statutory discretion, override a statutory prohibition. The question is whether a lawful remedy exists within the framework created by FICA and the resolutions.

The remedy issue

[40] Three remedies were debated before us: (a) the private auction of the entire issued share capital of Legacy Hotels (the mechanism ordered by the high court); (b) a sale of Legacy Hotels' business as a going concern (proposed by Ensemble and Mr

El-Barag in the cross-appeal); and (c) a repurchase by Legacy Hotels of the minority shareholding at an independently determined fair value (broadly what the appellants sought in their counter-application, though on a different legal basis). Each requires examination.

[41] The auction mechanism ordered by the high court is defective for two reasons. First, it was not sought by either party: Ensemble had, before the hearing in the high court, amended its notice of motion to seek a sale of the business as a going concern, and the appellants sought a private valuation-based sale of the minority shares. The order was made without argument directed at its implications. Second, the order does not engage with the FICA impediment. A private auction, in which either shareholder group may bid, remains a transaction in respect of Ensemble's frozen shares.

[42] The sale of Legacy Hotels' business as a going concern fares no better. After such a sale, Legacy Hotels becomes a shell holding the cash proceeds of its former operating business. Those proceeds would be distributed to shareholders in proportion to their shareholdings, with a portion flowing to Ensemble. That portion constitutes property derived from a transaction connected to Ensemble's frozen shareholding, and its receipt by Ensemble would engage s 26B(2)*(b)* of FICA. Moreover, the shareholders' agreement requires that any disposal of Legacy Hotels' business or a major portion of its assets be approved by shareholders representing 75 percent of the issued share capital.

[43] The appellants have made it plain they will not consent. Whether s 163(2) of the Companies Act is wide enough to override such a contractual protection in the circumstances of this case has not been argued before us, and need not be decided: the further difficulty next described renders the question academic. Even if these obstacles could be overcome, the relief would not achieve its purpose: Ensemble would remain a co-shareholder of the shell company, and the severance of the relationship that the application is intended to achieve would not materialise.

[44] The repurchase of the minority shareholding at an independently determined fair value is, in principle, the appropriate mechanism. It achieves complete separation: once Legacy Hotels repurchases Ensemble's shares, Ensemble exits the

shareholding structure entirely, severing the relationship. The price is set by reference to objective criteria applied by an independent expert, rather than by the parties' relative capacity to bid. A private auction between parties would not produce an objectively fair price.

[45] The difficulty is that even the repurchase mechanism, as ordinarily conceived, involves the payment of money to Ensemble, thereby engaging the prohibition in s 26B(2) of FICA. The question is therefore whether a lawful route to implementation exists within the statutory framework. Although s 26B(2) of FICA prohibits dealings with frozen property, s 26C empowers the Minister, in accordance with the applicable Security Council resolutions, to permit such dealings in the limited circumstances set out in s 26C(2).

[46] Secondly, to the extent that the transaction itself constitutes a dealing in frozen property, it requires permission under s 26C, which empowers the Minister to permit, on conditions, a dealing that would otherwise contravene s 26B. Whether the repurchase falls within the circumstances enumerated in s 26C(2) is a matter for the Minister in the first instance, and I express no concluded view on it; the order is framed so that implementation is conditional on obtaining the necessary permission. The relevant Security Council resolutions contemplate limited exceptions to the asset freeze, which are given domestic effect through the ministerial permission mechanism contained in s 26C of FICA. Notices 1 and 6 do not create that channel but confirm that LIA and LAIP assets held outside Libya, whether held directly or indirectly, remain frozen unless an exemption is applied.

[47] Provided that the requisite permission under s 26C is obtained, an order directing Legacy Hotels to repurchase Ensemble's shares at fair value may lawfully be implemented consistently with the statutory framework and the applicable Security Council resolutions. Such an order serves the purpose of the freeze regime, namely the protection of these assets pending their eventual transfer to the Libyan people, and, at the same time, achieves the required separation of the shareholders.

[48] The court's remedial discretion under s 163(2) is not confined to relief sought by an applicant who establishes the s 163 threshold. The court may make 'any…order

it considers fit'. In this context, that means the court must identify the order that will most justly sever the shareholders' relationship and least interfere with Legacy Hotels' ongoing management, with due regard to the interests of all stakeholders.

[49] This Court addressed the principles applicable to the choice of remedy in *Bayly and Others v Knowles*.[8] *Bayly* endorsed the approach in *Re a Company (No 006834 of 1988), Ex Parte Kremer,*[9] which stated that, in the ordinary case of a breakdown of confidence between shareholders, fairness requires that the minority shareholder should not have to maintain its investment in a company managed by a majority with whom it has fallen out. This Court held that the most practicable order in such a case is to direct that the minority sell its shares at fair value, causing the least interference with the company's management. In *Knipe and Others v Kameelhoek*[10] *(Pty) Ltd and Another*, the court confirmed that the price must be an objectively determined fair price.

Conclusion

[50] On the foregoing exposition, the high court's finding that FICA was not an impediment is untenable. The relief we propose to grant renders the production of company documents, the declaration order, accounting for profits, and the interdictory relief ordered by the high court superfluous. The upshot of this is that the order of the high court must be set aside and substituted.

Costs

[51] Although the substituted order achieves, in substance, the separation the Swanvest parties sought by way of the counter-application, the counter-application itself remain founded on s 163(1)(*b*), which has been rejected; as already alluded to, the buy-out is granted not on that basis, but in the exercise of the discretion conferred by s 163(2), the threshold crossed by the Ensemble under s 163(1)(*c*) but fails on the relief it sought. It follows that in this Court, insofar as each party has achieved partial success, each should bear its own costs.

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[8] *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA) para 23.
[9] *Re a Company (No 006834 of 1988), Ex Parte Kremer* [1989] BCLC 365 (Ch D) at 368.
[10] *Knipe and Others v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 (FB) para 33. See also *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC) at 44.

[52] The position in the high court is less straightforward. Both parties contributed to the procedural difficulties that bedevilled the proceedings below. The appellants vacillated between relying on the FICA regime as an obstacle to the cross-appellants' relief and seeking to minimise its significance when it suited them to do so. Ensemble's amendment of the notice of motion, substituting the sale of business for the sale of shares, was not addressed by the high court and created a disconnect between the relief sought and the order granted. In these circumstances, it is just that each party should bear its own costs in the main application, with the appellants paying the costs of the counter-application.

Order

[53] The following order is made:

1 The appeal and cross-appeal are upheld in part to the extent set out in paragraph 2 below.

2 The order of the High Court is set aside and substituted with the following:

'2.1 The main application succeeds in part.

2.2 The counter-application is dismissed with costs, including the costs of two counsel, where so employed.

2.3 The first applicant, Ensemble Hotel Holdings (Pty) Limited, is directed to sell to the seventh respondent, Legacy Hotels and Resorts (Pty) Limited, which is to repurchase the shares held by the first applicant in the seventh respondent (the shares) and to transfer such shares to the seventh respondent against payment to the first applicant of an amount to be determined by an expert professional valuer (the expert) referred to in paragraph 2.10 below, being the value of and purchase consideration for the first applicant's shares in the seventh respondent as at 29 January 2021, payable within 120 days from the date of the expert's determination.

2.4 The implementation of paragraph 2.3 above is subject to and conditional upon the parties obtaining such ministerial permission or other authorisation as may be required under ss 26B and s 26C of the Financial Intelligence Centre Act 38 of 2001, read with the applicable United Nations Security Council resolutions. The proceeds attributable to the shareholding of the first respondent shall be dealt with in accordance with any conditions lawfully attached to such permission or authorisation. If no application for such exemption has been brought within six months of this order, or if such application is refused, any party may approach this Court for further directions.

2.5 The second applicant, Mr Ziad Jamal Ali El-Barag, shall, within five days of the date of this order, notify the seventh respondent in writing of his resignation as a director of the seventh respondent.

2.6 The parties shall take all steps, do all things and sign all documents which are necessary to give effect to the provisions of paragraphs 2.3 and 2.5 above as expeditiously as possible, failing which the Sheriff of this Court is hereby authorised and directed to take such steps, do such things and/or sign such documents on behalf of the party or parties for such purpose.

2.7 An expert professional valuer shall be appointed to determine the value of and purchase consideration for the first applicant's shares in the seventh respondent as at the date at which the value is to be determined as provided for in 2.3 above.

2.8 The valuation of, and purchase consideration for, the first applicant's shares are to be determined by the expert, who shall take into account any principles, facts and circumstances that the expert considers to be appropriate.

2.9 The expert's costs are to be paid by the first applicant and the seventh respondent in proportion to their shareholding. These costs are not to be taken into account in the valuation of the first applicant's shares being sold to the seventh respondent.

2.10 In the absence of agreement in writing between the parties within 15 days from date of this order in relation to the identity of the expert, such expert is to be a registered and practising chartered accountant of no less than 15 years' standing to be nominated by the President for the time being of the South African Institute of Chartered Accountants from the valuations division of any one of the following South African accounting and auditing practices: EY, KPMG, PWC and Deloitte.

2.11 The expert is required to meet with and receive representations from each of the parties and their financial representatives in carrying out those functions.

2.12 The expert's powers shall include the power to assess what the expert considers to be fair value for the first applicant's shares.

2.13 In valuing the first applicant's shares the expert shall have the further power to make such adjustments as the expert may consider fair to arrive at what, in the expert's professional opinion, would constitute a 'fair price' for the first applicant's shares to be acquired by the seventh respondent as set out in paragraph 2.3 above, including the following adjustments, as the expert determines:

(a) a marketability discount; and

(b) A minority discount.

2.14 Upon transfer of the shares from the first applicant to the seventh respondent, the shares will be cancelled and returned to the authorised share capital of the seventh respondent.

2.15 The relevant parties are directed to pass all resolutions required to give effect to this order in terms of ss 48, 112, 114, 115 and 164, or any other applicable section, of the Companies Act 71 of 2008, failing which the Sheriff of this Court is hereby authorised and directed to take such steps, do such things and/or sign such documents on behalf of the party or parties for such purpose. The requirement for a report to the board in terms of s 114 is hereby waived.

2.16 Each party shall pay its own costs in respect of the main application.'

3. The parties shall bear their own costs in this Court.

KE MATOJANE

JUDGE OF APPEAL

Appearances

For the appellants:	A Subel SC with H Pretorius
Instructed by:	Simpson Incorporated, Johannesburg
	Honey Attorneys, Bloemfontein
For the respondents:	J Peter SC with D Hodge
Instructed by:	David Shapiro and Associates Incorporated, Johannesburg
	McIntyre Van Der Post Incorporated, Bloemfontein.