THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 20760/14

In the matter between:

DINES CHANDRA MANILAL GIHWALA	**FIRST APPELLANT**
LANCELOT LENONO MANALA	**SECOND APPELLANT**
DINES CHANDRA MANILAL GIHWALA NO	**THIRD APPELLANT**
SHANTI GIHWALA NO	**FOURTH APPELLANT**
KANTIELAL JERAM PATEL NO	**FIFTH APPELLANT**
NARENDRA GIHWALA NO	**SIXTH APPELLANT**
KIRAN GIHWALA NO	**SEVENTH APPELLANT**

and

GRANCY PROPERTY LTD	**FIRST RESPONDENT**
MONTAGUE GOLDSMITH AG (in liquidation)	**SECOND RESPONDENT**
MINISTER OF TRADE AND INDUSTRY	**THIRD RESPONDENT**

Neutral citation: *Gihwala v Grancy Property Ltd* (20760/2014) [2016] ZASCA 35 (24 March 2016)

Coram: LEWIS, LEACH, SERITI and WALLIS JJA and TSOKA AJA.

Heard: 22 and 23 February 2016

Delivered: 24 March 2016

Summary: Investment agreement – express and tacit terms – breach – damages – heads of damage – claims not excluded by rule in *Foss v Harbottle* – declaration of delinquency in terms of section 162(5)*(c)* of the Companies Act 71 of 2008 – section applies in cases of substantial misconduct by directors – not retrospective in its operation – section a rational response to the problem of delinquency by directors – not unconstitutional – circumstances justifying the making of a declaration of delinquency.

ORDER

On appeal from: Western Cape Division of the High Court (Fourie J sitting as court of first instance):

1 The appeal succeeds to the extent that:

(a) Paragraphs 1(b) and (e) of the first paragraph 1, and paragraphs 3 and 5 of the order in the High Court are set aside;

(b) The amount in paragraph 1(c) is reduced to R41 763.20;

(c) Paragraph 2 of the order in the High Court is varied to read as follows:

'The First, Second and Third Defendants are to make available to the First Plaintiff for inspection and, if desired, the making of copies of all books of account and accounting records, including all supporting vouchers and documents, in their possession relating to the transactions undertaken by and the financial position of the business of the Third Defendant.'

2 The cross-appeal succeeds to the following extent:

(a) Paragraph 1(g) is inserted into the order of the High Court reading as follows:

'The amount of R465 000 plus interest calculated at 15.5 per cent from 3 March 2009 to date of payment.'

(b) The Dines Gihwala Family Trust is declared to be jointly and severally liable, the one paying the others to be absolved, with the first and second defendants, for payment of the amounts referred to in paragraphs 1(a), (b), (c) and (f) and 2(a) to (c) of the order of the High Court.

3 The order of the High Court is accordingly amended to read as follows:

'**IT IS ORDERED THAT:**

1. First and Second Defendants are declared liable, jointly and severally with each other and, in the case of paragraphs (a), (b), (c) and (f), jointly and severally with the Dines Gihwala Family Trust, to pay the following to First Plaintiff:

(a) The amount of R2 051 833,34, together with interest thereon at the rate of 15,5% per annum, calculated from 20 March 2007 to date of final payment.

(b) The amount of R41 763,20 together with interest thereon at the rate of 15,5% per annum, calculated from 28 February 2009 to date of final payment.

(c) The amount of R620 000,00 together with interest thereon at the rate of 15,5% per annum, calculated from 15 June 2009 to date of final payment.

(d) The amount of R213 789,57, together with interest thereon at the rate of 15,5% per annum, calculated from 19 August 2009 to date of final payment.

(e) The amount of R326 740,00, together with interest thereon at the rate of 15,5% per annum, calculated from 19 August 2009 to date of final payment.

(f) The amount of R165, 660,60, together with interest thereon at the rate of 15,5% per annum, calculated from 6 January 2010 to date of final payment.

(g) The amount of R465 000 plus interest calculated at 15.5 per cent from 3 March 2009 to date of final payment.

2. That the First and Second Defendants and the Dines Gihwala Family Trust are declared liable, jointly and severally, to pay the following to First Plaintiff:

(a) The amount of R852 500,00, together with interest at the rate of 15,5% per annum on the amount of R1 705 000,00 calculated from 8 April 2009 to 23 November 2010 and on the amount of R852 500,00, calculated from 23 November 2010 to date of final payment.

(b) The amount of R345 507,09, together with interest at the rate of 15,5% per annum on the amount of R691 014,18, calculated from 1 March 2008 to 23 November 2010, and on the amount of R345 507,09, calculated from 23 November 2010 to date of final payment.

(c) The amount of R612 722,24, together with interest thereon, at the rate of 15,5% per annum, calculated from 24 June 2009 to date of final payment.

3. The First, Second and Third Defendants are to make available to the First Plaintiff for inspection and, if desired, the making of

copies of all books of account and accounting records, including all supporting vouchers and documents, in their possession relating to the transactions undertaken by and the financial position of the business of the Third Defendant.

4. The First and Second Defendants are declared delinquent directors as contemplated in section 162(5)*(c)* of the Companies Act 71 of 2008.

5. No order as to costs is made in respect of the constitutional challenge.

6. The First Plaintiff is declared liable for the costs of the application for amendment, which were reserved on 6 February 2014, including the costs incurred by Second Defendant in opposing same.

7. Save for paragraphs 6 and 7 above, the First and Second Defendants and the Dines Gihwala Family Trust, represented by the Fourth to Eighth Defendants, are declared liable, jointly and severally, for the payment of First Plaintiff's costs of suit on the scale as between attorney and client, which costs are to include the following:

(a) The costs of two counsel, where employed;

(b) The attendance fees and qualifying expenses of the expert witness, Mr H J Greenbaum;

(c) The reasonable costs and disbursements, as followed on taxation incurred by First Plaintiff in respect of Mr KI Mawji, who is declared a necessary witness.'

4 The amended paragraph 3 of the order of the High Court is to be complied with within 30 days of the date of this judgment and the obligation to comply therewith will not be suspended or postponed pending the outcome of any further application for leave to appeal in this or any other case.

5 The appeal is otherwise dismissed with costs, such costs to include those consequent upon the employment of two counsel, but to exclude all costs occasioned by the challenge to the constitutionality of s 162(5) of the Companies Act 71 of 2008, in respect of which each party will pay its or their own costs.

6 The first and second appellants and the Dines Gihwala Family Trust are to pay the costs of the cross-appeal, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Wallis JA (Lewis, Leach and Seriti JJA and Tsoka AJA concurring)

Introduction

[1] In about 2001 Mr Dines Gihwala, the first appellant and an attorney and businessman, met Mr Karim Mawji, an English businessman, while playing golf in Portugal. Their acquaintance ripened

into friendship and in February 2005, together with Mr Lancelot Manala, the second appellant and a friend and business associate of Mr Gihwala's, they entered into a business venture. That went awry and has precipitated a flood of litigation and two prior appeals to this Court,[1] as well as the present proceedings.

[2] This appeal follows upon a lengthy trial before Fourie J in the Western Cape Division of the High Court, Cape Town. It involved the consolidated hearing of two actions[2] brought by Grancy Property Limited (Grancy), the first respondent, and Montague Goldsmith AG, (Montague), the second respondent, both corporate entities controlled by Mr Mawji, principally against Messrs Gihwala and Manala. Other defendants were Seena Marena Investments (Pty) Ltd (SMI), the company through which the business transaction was conducted, and the Dines Gihwala Family Trust (the Trust). SMI initially defended the actions and lodged a claim in reconvention in the 2010 action. At the commencement of the trial it withdrew the claim in reconvention and indicated that it abided the decision of the court. The Trust originally defended the actions jointly with Mr Gihwala, but at the trial and in this

[1] *Grancy Properties Ltd v Manala and Others* [2013] ZASCA 57; 2015 (3) SA 313 (SCA); *Grancy Property v Seena Marena* [2014] ZASCA 50; [2014] 3 All SA 123 (SCA).
[2] Where it is necessary to distinguish between them they will be referred to as the 2010 action and the 2011 action respectively.

Court they were separately represented.[3] Fourie J upheld most of Grancy's claims. He gave judgment against Mr Gihwala and Mr Manala for payment of certain amounts. In addition he ordered Messrs Gihwala and Manala, as well as SMI, to disclose books of account and financial records relating to SMI's affairs, and ordered that the three of them and the Trust render a statement of account to Grancy in regard to the business venture.

[3] Lastly, in terms of s 162(5)*(c)* of the Companies Act 71 of 2008 (the 2008 Act), Fourie J declared both Mr Gihwala and Mr Manala to be delinquent directors. As he added no conditions qualifying that order, its effect was that the two men were barred from acting as directors for any company for seven years,[4] subject to their right after three years to apply for the suspension of the order and its substitution with an order for probation.[5] Fourie J rejected a constitutional challenge to s 162 of the 2008 Act. The Minister of Trade and Industry (the Minister) had been joined, as a party to the proceedings, to argue that s 162 was not unconstitutional.

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[3] Although represented by separate counsel they continued to conduct the litigation on pleadings common to both Mr Gihwala and the Trust and the instructing attorneys remained the same.
[4] Section 162(6)*(b)*(ii) of the Act.
[5] Section 162(11) of the Act.

[4] No one, bar the Minister, was satisfied with the outcome of the trial. Messrs Gihwala and Manala, and the Trust, contended that none of the orders made by Fourie J were justified. Grancy and Montague, for their part, were dissatisfied with Fourie J's refusal to grant certain declaratory orders as well as his dismissal of two monetary claims and his failure to hold the Trust jointly and severally liable on some of the successful monetary claims. They also challenged his rejection of claims under s 424 of the Companies Act 61 of 1973 (the 1973 Act), alternatively s 77(3) of the 2008 Act. When Messrs Gihwala and Manala and the Trust sought leave to appeal, Grancy applied for leave to cross-appeal against the judgment in relation to their rejected claims. Fourie J granted leave to appeal and cross-appeal to this Court. The Minister is also a party to the appeal.

Background

[5] Spearhead Property Holdings Ltd (Spearhead) was a property loan stock company listed on the Johannesburg Stock Exchange (JSE).[6] Its business was to hold and invest in immovable commercial, industrial and retail properties, primarily in the Western Cape, and to derive its income from rentals. Provided its business was successful, as it appears to have

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[6] Many of these have since converted to Real Estate Investment Trusts (REITs).

been, it would generate a steady and reasonably predictable flow of income. The capital structure of the company, as with others of this type, consisted of linked ordinary units with varying rate linked debentures. After deducting operating expenses the net revenue would be distributed to shareholders. Because of the capital structure of the company the distributions made to unit holders were deductible from gross income in its hands before the assessment of tax, and were taxable as income in the hands of shareholders. Such investments are seen as comparable to interest-bearing investments such as bonds. Their attraction to investors lies in the fact that they provide a reasonably consistent return, which tends to grow at least in line with inflation as rentals increase.

[6] At the end of 2004 and early 2005 Spearhead, like many other companies, wished to engage in a Black Economic Empowerment (BEE) transaction to expand its shareholder base in the Black community. To that end it was prepared to make available 3,5 million linked units to a special purpose vehicle (SPV), the shares in which would predominantly held by Black shareholders or organisations or companies that predominantly represented the interests of Black people. The SPV would subscribe for the shares at R15.50 per unit, a price significantly below the then current price of Spearhead shares on the JSE, of around R20 per unit.

[7] Ngatana Property Investments (Pty) Ltd (Ngatana) was incorporated as the SPV through which the BEE transaction would be implemented. Messrs Gihwala and Manala, were offered a 40 per cent stake in Ngatana, which they proposed to take up thorough SMI, an existing company in which the Trust and Mr Manala held equal shares. Prescient Real Estate Ltd (Prescient) and certain other minor investors would take a total of 42 per cent. Bonitas Medical Aid Fund (Bonitas) was offered an 18 per cent share, but withdrew at a late stage in the implementation of the proposal. This is what gave rise to the involvement of Mr Mawji.

[8] Apart from his friendship with Mr Mawji, Mr Gihwala was also a close friend of Mr Anil Narotam, who was at the time the chief operating officer of Montague, a company that administered investments on behalf of Grancy. Mr Gihwala and Mr Manala had been afforded the opportunity of taking up the 18 per cent stake in Ngatana that Bonitas had decided to forego. They in turn, for reasons that do not emerge fully from the record, but appear to have included the fact that Mr Mawji would be in a position to help finance the transaction, decided to involve Mr Mawji in the investment in Ngatana. Initially Mr Gihwala approached Mr Narotam. He did not have authority on behalf of Mr Mawji to make any final decision

on such matters, but conveyed the gist of the proposal to Mr Mawji. He in turn found it sufficiently interesting to come to South Africa and meet with Mr Gihwala.

[9] That meeting took place on 3 February 2005 at a hotel in Johannesburg. Present were Mr Gihwala, Mr Mawji and Mr Narotam. According to several later statements by Mr Gihwala he represented himself, and also Mr Manala, the Trust and SMI, at the meeting. The only oral evidence of what transpired at the meeting was that of Mr Mawji, because neither Mr Gihwala, nor Mr Narotam, gave evidence, although at the stage of the pre-trial conference such evidence had been foreshadowed. Fourie J found that Mr Mawji was a credible witness and that finding was not challenged before us. Some documents dealing with what was agreed are also important, as contemporaneous documents emanating from Mr Gihwala.

[10] The meeting was conducted against the backdrop of the Spearhead BEE transaction and the availability through Ngatana of an interest in 3.5 million units at a price of R15.50. Standard Bank had agreed to provide finance in an amount equivalent to R12.75 per linked unit. The investors in Ngatana needed to provide the balance of R2.75 per unit, as well as to fund the implementation costs to be incurred in implementing

the transaction. With the withdrawal of Bonitas as an interested party an opportunity existed for SMI to obtain an effective 58 per cent stake in the 3,5 million Spearhead units. This would be done by subscribing for 58 per cent of the shares of Ngatana and lending to Ngatana that proportion of the funds needed to pay the balance of the subscription price for the Spearhead units and the anticipated implementation costs. Prescient and the other investors would subscribe for the remaining shares in Ngatana and provide the balance of the funding.

[11] It was explained to Mr Mawji that SMI would be used as the vehicle for the investment. The proposal put to him was fairly simple. In return for a shareholding in SMI he would provide a portion of the funds, estimated as being approximately R3.5 million, needed for SMI to obtain the 58 per cent stake in Ngatana. In addition, as Mr Manala lacked the resources to make his contribution to SMI as a one-third shareholder, Mr Mawji (through Grancy) and Mr Gihwala would each fund one half of Mr Manala's share. These loans would attract interest at a commercial rate and, if and when Mr Manala realised his interests at a profit, Mr Gihwala and Mr Mawji (or their corporate doppelgängers) would share in a proportion of that profit.

[12] Mr Mawji insisted on a one-third shareholding in SMI and Mr Gihwala agreed to this. There was some urgency about the matter and Mr Mawji was told that it was essential for him to make a decision that day. The cause of the urgency is not entirely clear, but it matters not because Mr Mawji agreed at the meeting to participate in the investment on the basis outlined above. In this Court all parties accepted that an agreement was concluded at the meeting on that day.

[13] The business relationship appeared to proceed without problems for a few months. In August 2005 Mr Narotam raised the possibility of Grancy exiting the investment, but nothing came of this and it does not appear to have occasioned any problems. Thereafter the relationship between the parties deteriorated. On 6 October 2005 Mr Narotam wrote asking Mr Gihwala to finalise the shareholders' agreement for SMI and the loan agreement in relation to the loan to Mr Manala. A loan agreement was forthcoming in December 2005 at which stage it became clear that Grancy would hold the investment in SMI.

[14] In November 2005 Spearhead undertook a rights issue. It does not appear that either Mr Mawji or Mr Narotam was aware of this. The effect of the rights issue, which was funded entirely by Standard Bank, was that Ngatana acquired an additional 2 million linked units in Spearhead. Its

existing loan from the bank was discharged and a fresh loan agreement concluded for R93.6 million. Additional security was furnished by way of a pledge of a further 630 000 linked units and by additional suretyships from *inter alia* Messrs Gihwala and Manala.

[15] In the early stages of 2006 information sought by Mr Mawji concerning the Spearhead investment was not forthcoming and the business relationship with Mr Gihwala, which included another venture referred to as 'Scharrig', soured. By the middle of 2006 Mr Mawji was clearly regretting the investment and sought to withdraw from it. On 28 June 2006 Mr Narotam sent an email to Mr Gihwala informing him that a decision had been made to exit the Spearhead investment. He added:

'As the initiators and co-investors we would like to offer to you the opportunity to make a proposal to take over our investment or bring in a new investor of your choice to buy us out. Alternatively if you also wish to exit now to arrange the full disposal.'

This provoked an angry response from Mr Gihwala. Within an hour he replied noting the decision and saying:

'You are NOT and were NOT initiators of this transaction. You invested in this deal through Lance who you lent money.

Please let me have an exit proposal for consideration.

Strictly speaking your investment was with Lance …'

[16] Despite the tone of this communication Mr Narotam appears to have set to work preparing a proposal. While he was so engaged another event occurred. On 26 July 2006 Redefine Income Fund Ltd (Redefine), also a property investment trust, announced its intention to make an offer to unit holders in Spearhead to acquire their units on the basis that they would receive either 6.18 Redefine linked units or R31 in cash for each unit.

[17] Mr Narotam was aware of this offer and the calculations in the proposal he prepared valued the Spearhead units at R30 per unit. He submitted the proposal to Mr Gihwala on 3 August 2006 suggesting that Grancy's interest could be acquired for about R11 million. Less than two hours later Mr Gihwala rejected this figure out of hand saying that Ngatana wished to become a significant investor in Redefine and did not want to exit the investment. He said that but for Redefine's offer the Spearhead price would be nearer R26 per unit. In addition, although the calculations were based on an equal division of the indirect interest of SMI in the Spearhead units originally acquired, resulting in each investor having an interest in 676 666 units,[7] Mr Gihwala claimed that Grancy's interest was limited to 630 000 units. After dealing with costs and some

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[7] SMI's stake in Ngatana was 58 per cent and the original acquisition was of 3.5 million Spearhead units. A 58 per cent share in those units amounted to 2 030 000. One third of that would be 676 666 units, with two remaining.

other issues he suggested that the calculations be redone 'on the basis of 630k units at a realistic price'.

[18] On 3 September 2006 Mr Narotam sent an email to Mr Gihwala, that was copied to Mr Manala and Mr Mawji.[8] As it, and the response to it, set the stage for the disputes that followed it is desirable to set out its terms relatively fully:

'We refer to our investment in Spearhead through Seena Marena Investments (Pty) Ltd which was made in accordance with your e-mail dated 21 February 2005.

The main terms of the investment as clearly indicated in the aforementioned e-mail are as follows:

1. Seena Marena Investments (Pty) Ltd acquired 58% of the 3 500 000 units in Spearhead at R15.50 each of which R12.75 was funded by Standard Bank.

2. For our one third investment (equivalent to 676 666 Spearhead units) we paid to you as requested an amount of R1 976 833.33 plus R75 000.00 for costs.

3. In addition Montague Goldsmith and you equally and jointly, advanced as a loan to Lance Manala an amount of R1 976 833.33 …

Although you proposed drafting an agreement acknowledging our one third share in Seena Marena Investments (Pty) Ltd, such agreement has not as yet been concluded or executed. We request that agreements in the form of a shareholders agreement together with loan agreements between Lance Manala, Montague Goldsmith and you be executed as soon as possible.

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[8] In an affidavit filed in earlier proceedings Mr Narotam claimed that the email was drafted by Mr Mawji and sent on his instructions, but this was denied by Mr Mawji.

As you are aware, our investment was made at very short notice on good faith and on the understanding that the formal agreements containing the terms and basis of our investment (such terms being as per your e-mail of 21 February 2005) would be executed shortly thereafter. This has not been done to date and needs to be regularised immediately.

We are concerned that you have indicated that our entitlement is for 630 000 Spearhead units and not the 676 666 units indicated in correspondence at the time the investment was made. At no time were we subsequently informed of any rights issue etcetera that could lead to a dilution or reduction in our entitlement to Spearhead units. We therefore maintain that we are entitled to 676 666 units.

We are aware that an offer has been made by Redefine and Apex-Hi to the shareholders of Spearhead. As an equal shareholder in Seena Marena Investments (Pty) Ltd we should be consulted on the decision to be made by Ngatana. Please let us have full details of the offer so that we may provide our input.'

Ten minutes after sending this email a further email was sent attaching a copy of Mr Gihwala's email of 21 February 2005.

[19] One week later, on 11 September 2006 Mr Gihwala responded in an email to Mr Narotam, which was also sent to Mr Mawji and Mr Manala. It read:

'I told you and now repeat hopefully for the final time that any reference to any number of units other than 630k is wrong and a mistake. 630k units became available after another participant elected not to proceed with the investment. By this time

Lance and I had already secured 1.4m units. I could therefore not offer any more than was available at the time.

You were never to be a shareholder in our company. You came in behind us for 630k units. It was always so that you would be subject to the decisions of SMI. You were certainly not an independent party as you now try to suggest. When you make investments you expect priority interest on your capital. Why should I bind my credit and take risk for no reward? The position is unnecessarily complicated by your unilateral decision to realise this investment and above all on your terms and conditions. I'm afraid it will not happen in this instance.

I shall conduct the affairs of SMI as I deem fit. You have no say in its affairs. You are NOT a shareholder. You were never intended to be one. You will never be one. Your interest is limited to the 630k units. There is no risk of any dilution; regardless of what we choose to do in SMI we have to account to you for your interest in 630k units. This will only happen once SMI is liquidated for us (Lance & I) to realise our investment. The earlier correspondence you refer to is premised on this grand plan of creating SM Capital. You know what happened and the least said about that the better. Could you perhaps explain why I would want to introduce you to the opportunity the 630k units presented at its cost to us at a time when it was trading at a premium of more than 35% above the price we paid for the units; why would I assume the risk of personal liability to the bank without any indemnity or upside; and why are these issues raised only now and not before even though I told you explicitly I would be charging for my “credit”? I drafted an agreement some time ago and asked my secretary to forward it to you. If she has not done so I can only assume that she wanted me to check it before dispatching same. I will ask her to send it off immediately even though I have not had a chance to check it. The idea of a shareholders agreement is a little disingenuous and a ploy to obtain a position of advantage you are not entitled to. Do you think I could not have personally funded the amount of money you put in or raise it from family and friends etc? …

As far as the Redefine offer is concerned, which is a matter of public knowledge … It is not our intention to take any cash but to take up all the RDF units we are entitled to. Even if we did take some cash it will be used to pay down the debt; in short there will be no cash surplus. Even if there were cash we shall deal therewith in the best interest of SMI and no other party, least of all an opportunistic and expedient one.

I have no intention of dealing with your letter under reply in any more detail. I reserve the right to do so if and when it may become necessary. My failure to do so now should therefore not be interpreted as an acknowledgement of the correctness or otherwise thereof. You should soon be in possession of the agreement I drafted some time ago. You are at liberty to sign such agreement or not. I shall nevertheless act in accordance with that agreement. I can assure you that the realisation of the SMI investment in Ngatana is not imminent unless something dramatic or spectacular happens. Rest assured you will receive a proper accounting for the 630k units or its equivalent in RDF if the offer succeeds when the time to do so arrives. I reserve the right to charge a fee for my services I have rendered and continue to render for SMI. You are liable for a portion of those and other operating expenses based on your 630k units. If and when I need your share I shall call for it and expect you to make payment promptly.

This matter is now closed as far as I am concerned.

Finally, I was the one to arrange this transaction. Lance does not know of any detail of the transaction except that he may be able to confirm that there were only 630k units available. Accordingly, I am the one to deal with.’

[20] There can be little surprise that shortly afterwards Mr Mawji, on behalf of Grancy, consulted attorneys and various letters of demand were sent to Mr Gihwala, Mr Manala and SMI. It is unnecessary to go into any detail regarding this correspondence, save to say that if anything it served to harden the parties' opposing positions. A full account of the funds deposited in the trust account of Mr Gihwala's law firm for the purposes of the Spearhead investment was demanded. In addition a demand was made for full details of the Redefine takeover of Spearhead, including any monetary benefits offered to Spearhead unit holders, the number of Redefine units to be acquired, the nature and extent of SMI's and Ngatana's stake in Redefine and the date on which the takeover became effective.

[21] In November 2007 Grancy launched an application in the Western Cape Division of the High Court claiming against Messrs Gihwala and Manala, SMI and the Trust delivery of a 31 per cent shareholding in SMI. Although this was less than the one-third share originally agreed upon Mr Mawji explained in his founding affidavit that this was being accepted on the basis of a concession by Messrs Gihwala and Manala, whilst reserving Grancy's position to make further claims after receiving a proper account of its investment. In addition to the registration of that

shareholding in its name it sought an accounting in respect of its original investment in SMI.

[22] Messrs Gihwala and Manala, as well as the Trust and SMI, opposed the application. Mr Gihwala deposed to the principal answering affidavit on behalf of himself, SMI and the Trust. The opposition was vigorous, and aspersions were cast on Mr Mawji's personality, integrity and business methods. In essence Mr Gihwala claimed that it had been discovered that Grancy could not be a participant in a BEE transaction and that its interest was now being exercised indirectly through Mr Manala. There was also a considerable excursus in relation to the failure of an attempt to establish a venture capital fund. But the opposition to the application collapsed shortly before the hearing when an offer of settlement was made that in substance conceded all the relief sought by Grancy. Pursuant to the settlement on 9 March 2009 an order[9] was made

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[9] The order read:
'1. The First Applicant is entitled to a 31% direct equity shareholding in the First Respondent.
2. The First to Third and Fifth to Ninth Respondents shall do all things (including but not limited to passing resolutions, allotting, issuing or transferring the shares, registering the transfer thereof and delivering to the First Applicant share certificates and all other documents which establish and evidence its 31% equity stake in the First Respondent) and such other things as are necessary to transfer 31% of the shares in the First Respondent to the First Applicant and to effect the registration of the First Applicant as a member of the First Respondent in its register of members.
3. The Second, Third and Fifth Respondents shall, within fourteen days of this order, render a full and proper account to the Second Applicant in respect of the First Applicant's investment in Spearhead Property Holdings Limited linked units (**"the Spearhead Investment"**) and (**"the Spearhead units"**) and shall provide a statement of account, duly supported by all relevant vouchers, dealing with at least, but not limited to, how, when, by whom and for what purposes the First, **alternatively** the Second Applicant's fund of R4 040 250.00 deposited into the Fourth Respondent's

directing that Grancy be registered as a 31 per cent shareholder in SMI. It further directed Mr Gihwala, in both his personal capacity and as a trustee of the Trust, and Mr Manala to render a full and proper account to Grancy in respect of its investment in the Spearhead investment and the Spearhead units. Pursuant to this order Grancy was registered as a 31 per cent shareholder in SMI on 25 March 2009.

[23] In the interim, while this dispute was raging and even before the litigation was underway, events moved on. The Redefine offer was accepted and the 5.5 million Spearhead units held by Ngatana were replaced by 33.99 million Redefine units. On 7 March 2007 the directors of Ngatana resolved to repay the amounts lent to it by its various shareholders to enable it to conclude the original BEE transaction. This involved the repayment of R6 657 673 to SMI on 15 March 2007.

First National Bank trust account number 51331425227 between February and June 2005, were utilised by any of the said Respondents or any other party.

4. The First to Third and Fifth to Ninth Respondents after rendering the aforesaid account shall:

4.1 debate the aforesaid account;

4.2 pay to the First and Second Applicant, such amount, if any, as may be due to them upon such debatement.

5. The Third Respondent shall pay to the First Applicant the sum of R988 416.66 plus interest thereon calculated monthly from 11 February 2005 to date of payment at the rate equal to the greater of the interest rate on the Quant Plus Call Account of Prescient Investment Management (Pty) Ltd or the dividend yield rate of the Spearhead units, from time to time.

6. The Third Respondent shall pay to the First Applicant, upon the realisation and unwinding of the Spearhead investment and payment of the proceeds thereof to the First Respondent, an amount equivalent to 25 per cent of the amount by which the price of the 700 000 Spearhead units held indirectly by the Third Respondent, upon realisation thereof, exceeds R18.00 per Spearhead unit.

7. The First to Third and Fifth to Ninth Respondents, jointly and severally, the one paying the others to be absolved, shall pay the Applicants' costs in the above proceedings on the High court scale as between party and party, as taxed or agreed, to 5 February 2009, which costs will include the costs of two counsel.’

Thereafter amounts totalling R4 million were paid to the Trust, and shared between Messrs Gihwala and Manala. Nothing was paid to Grancy. Instead, on 2 April 2007 an amount of R2 million was invested in Scarlet Ibis Investments 52 (Pty) Ltd (Scarlet Ibis), a property development company. Later correspondence between Mr Manala and Mr Gihwala showed that Mr Manala had initially suggested that Grancy be repaid its loan to SMI, but at Mr Gihwala's instigation the investment in Scarlet Ibis had been made instead. This may not have been unconnected to the fact that Mr Gihwala's wife and the Trust had an interest in the development.[10] Mr Gihwala apparently believed that there would be a 50 per cent return on the investment within 24 months, but those prognostications proved incorrect and, when the company was liquidated, it is likely that it was lost.

[24] Also on 7 March 2007, Ngatana had resolved to pay an amount of R3 million to Prescient and SMI in equal shares, ostensibly as compensation for their efforts in setting up the BEE transaction. However, at that stage it lacked the necessary funds to make this payment. Needless to say Grancy was not informed of this decision. But in March 2009 Ngatana's board of directors resolved to pay R1.5 million

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[10] When Scarlet Ibis was liquidated they were the sole shareholders.

to Prescient for setting up the transaction and R750 000 each to Messrs Gihwala and Manala as 'directors' fees'. Again Grancy was not aware of this decision or these payments. The resolution noted, '… this matter has already been verbally discussed with many of the shareholders and they will be asked to confirm their consent by signing this resolution.' This recognised that the payments were sufficiently unusual that they necessitated consulting the shareholders before they could be made.

[25] From May 2008 Ngatana started to dispose of the Redefine units that it had received in place of the Spearhead units. This was not discussed with Grancy and it was not informed that it was happening. By April 2009, shortly after the court order, all the Redefine units obtained in the acquisition of Spearhead had been sold. The Standard Bank loan was repaid and substantial dividends were paid from the proceeds. (In the 2008 financial year Ngatana purchased a further 20 million Redefine units as a participant in a BEE transaction by Redefine. It funded this by incurring fresh liabilities to Standard Bank of some R25 Million and to RMB Securities (Pty) Ltd of R116 million.) In October 2008 Ngatana declared a dividend and SMI received R5 572 727.27. This was paid, by way of dividend, in equal shares to the Trust and Mr Manala. Accordingly, while the Trust and Mr Manala had been repaid the money they had lent to SMI to fund the original investment – in Mr Manala's

case, money that he had been lent by Grancy and Mr Gihwala – and had received a substantial dividend, Grancy had received nothing and indeed was unaware that these payments had been made.

[26] After the grant of the order and the registration of Grancy as a shareholder Mr Gihwala continued, as he had said in his email of 11 September 2006 to 'conduct the affairs of SMI as I deem fit'. Demands for access to the company records were rebuffed. And on 15 June 2009 the directors of SMI, by way apparently of a telephone conversation between Mr Gihwala and Mr Manala, agreed to lend the latter R2 million. Another loan of slightly less than R2 million was made at the same time. Overall his ledger account reveals that between 2007 and 2009 Mr Manala withdrew over R9 million from SMI. He had himself provided only R77 000 to SMI so he benefited handsomely from his participation.

[27] A one page account was furnished to Grancy by Messrs Gihwala and Manala and the Trust in purported compliance with the order referred to in para 22. A demand by Grancy for full accounting records was rejected on the footing that the account was adequate. This prompted a further opposed application in June 2009 regarding its adequacy. In the meantime Annual Financial Statements for SMI for 2007, 2008 and 2009

were supplied to Grancy, which objected to them. In September 2009 revised Annual Financial Statements for SMI for 2009 were presented at the AGM and adopted over Grancy's objections. Attempts by Grancy to obtain further information from Mr Gihwala were rejected on the grounds that it was not entitled to this information. In January 2010 Grancy launched the first action.

[28] In April 2010 Binns-Ward J handed down judgment holding that the account tendered in response to the consent order was 'woefully inadequate' and ordering that an improved account be furnished. The further account tendered pursuant to this order and supplemented after its rejection by Grancy, was said by Grancy to be inadequate. After further litigation this Court granted an order holding that it also was inadequate and directing a hearing on that topic.[11] That hearing took place before Traverso DJP who delivered judgment on 29 February 2016, holding the account to be inadequate and making consequential orders. Meanwhile in June 2011 Grancy had brought the 2011 action.

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[11] *Grancy Property Limited and Another v Seena Marena Investment (Pty) Ltd and Others* [2014] ZASCA 50; [2014] 3 All SA 123 (SCA).

The issues

[29] Grancy's case in both the 2010 and the 2011 action was that in various respects Messrs Gihwala and Manala, as well as the Trust and SMI, breached the February 2005 agreement. It alleged that these breaches gave rise to a number of claims to recover compensation for financial loss that it had suffered in consequence of such breaches. In addition to the contractual basis for such claims it also advanced a claim, in respect of some items, under s 424 of the 1973 Act and in the alternative under s 77(3) of the 2008 Act. Apart from these monetary claims it sought orders for the disclosure of financial records and books of account and an accounting against both Messrs Gihwala and Manala and the Trust and SMI. Finally it sought an order that Messrs Gihwala and Manala be declared delinquent directors in terms of s 162(5)*(c)* of the 2008 Act.

[30] A fundamental dispute emerged in regard to the identity of the parties to the February 2005 agreement and also as to its nature and contents. However, in the course of argument in the appeal, counsel for Mr Gihwala made certain important concessions that narrowed the field of dispute. The Trust contended that it was not a party to the agreement at all and accordingly, as the claims were based on an alleged breach of contract, no relief could be claimed against it.

[31] In regard to the monetary claims the respondents contended that they were in truth claims by SMI against its directors, Messrs Gihwala and Manala, and therefore could not be pursued by Grancy in its own right in accordance with the well-established principle of company law known as the rule in *Foss v Harbottle*.[12] Over and above that it was submitted that one of the claims amounted to a duplication and others were not well-founded on the facts.

[32] It was conceded in argument on behalf of Mr Gihwala that he and Mr Manala owed Grancy an obligation to provide information and render an account in regard to its investment, but the scope of those obligations was disputed. It was submitted that the accounting sought related to claims that would be disposed of by the monetary judgments. It was also said that such an accounting overlapped with the accounting ordered in the March 2009 order.[13] Traverso DJP has now held that the accounting pursuant to that order was inadequate, so that is an issue that remains unresolved. Consistent with its attitude that it was not a party to the agreement, the Trust denied any obligation to render an account.

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[12] *Foss v Harbottle* (1843) 2 Hare 461; (1843) 67 ER 189.
[13] See fn 9 above.

[33] The final substantial point of dispute related to the orders made declaring Mr Gihwala and Mr Manala delinquent directors. They both contended that s 162 of the 2008 Act, under which the orders were made, was unconstitutional. Although they did not formally ask for an order to that effect it would necessarily follow from any determination of unconstitutionality.

[34] Flowing from this the following are the issues to be determined in this appeal:

(a) Who were the parties to the agreement concluded on 3 February 2005 and what were its material terms?

(b) Was that agreement breached and, if so, in what respects?

(c) Did Grancy have financial claims arising out of the breach of the agreement?

(d) Were those claims precluded by the rule in *Foss v Harbottle*?

(e) Was Grancy entitled to orders against Mr Gihwala and Mr Manala in terms of s 424 of the 1973 Act or s 77(3) of the 2008 Act?

(f) Was Grancy entitled to an order for access to the books and accounting records of SMI and for the rendering of an account in relation to its investment?

(g) Is s 162 of the 2008 Act unconstitutional and, if not, was Fourie J correct to make orders of delinquency in relation to Mr Gihwala and Mr Manala?

(h) The disposal of the cross-appeal.

(i) What order should be made in regard to costs?

The agreement

Parties

[35] Grancy, Mr Gihwala and Mr Manala were indisputably parties to the agreement. Grancy alleged, and contended before us, that SMI and the Trust were also parties. It is not entirely clear what finding the High Court made in this regard. It accepted that SMI and the Trust might, in the event of specific obligations having been undertaken by them, be regarded as separate contracting parties to the agreement. However, it held that they were not to be regarded as contracting parties to the 'primary overarching joint venture agreement'. In reaching that conclusion the trial judge relied particularly upon a passage in the evidence under cross-examination of Mr Mawji, in which he described SMI as being 'the vehicle that was used by the three partners to carry the investment' and went on to identify Grancy, Mr Gihwala and Mr Manala as the three partners. He also emphasised that in response to a question by counsel for the Trust, Mr Mawji accepted that the Trust had no greater

responsibilities or obligations to Grancy than those contained in the memorandum or articles of SMI.

[36] It is unclear whether the High Court held that there was a primary agreement concluded between Grancy and Messrs Gihwala and Manala and subsidiary agreements to which SMI and the Trust may have been parties, or whether it accepted that SMI and the Trust were parties to a single agreement, but only undertook limited obligations thereunder, not extending as far as the obligations undertaken by Messrs Gihwala and Manala. It is important that this be resolved at the outset. If SMI and the Trust were as much parties to the agreement as Grancy and Messrs Gihwala and Manala, then prima facie their obligations would have been the same as those of Mr Gihwala and Mr Manala. Even if they did not owe specific obligations to Grancy, because only others could perform those obligations, they would nonetheless have incurred the ordinary obligation of all contracting parties not to act in a way, or permit others to act in a way that would stultify the performance of the contract in accordance with its terms.[14]

[14] As to the duty of co-operation in contracts see *A McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 533H-534E.

[37] Mr Mawji said that there were three partners involved in the investment and that these were Grancy and Messrs Gihwala and Manala. Undue weight should not be attached to that. The description of someone as a 'partner' may carry various different connotations. It may, in some contexts, carry a strict legal meaning as a member of a partnership. But business people frequently use it to describe the individuals involved in a business venture, without any technical connotation being attached to it. For example, where a business is conducted through a corporate vehicle, the natural persons interested in it are frequently referred to, and refer to themselves, as partners in that business. That is how Mr Mawji used it when he said 'the partners agreed to use SMI as a corporate vehicle for their common interest on this 3rd of February'. It is also the sense in which Mr Narotam used it when writing to Mr Mawji on 3 March 2005 after Bonitas again expressed interest in participating in the Spearhead BEE transaction. Mr Mawji was a chartered accountant and an experienced and successful businessman, but that does not mean that he was familiar with the niceties of the law concerning partnership. Indeed, elsewhere in his cross-examination, he disavowed such knowledge, beyond a vague and uncertain understanding.

[38] It seems to me preferable to look at the conduct of the parties present at the meeting in order to identify the parties to the agreement that

resulted from that meeting. Mr Mawji and Mr Narotam represented Montague, which is accepted as having represented Grancy. Mr Gihwala was plainly representing Mr Manala and his interests. There is no other basis on which he could have negotiated for Mr Manala to forego one third of his interest in SMI to Grancy, or for the latter to provide a loan to Mr Manala upon the terms for repayment of that loan agreed by him. That leaves SMI and the Trust.

[39] When the meeting commenced the Trust and Mr Manala held equal shareholdings in SMI, that is, each held a 50 per cent stake in SMI. The agreement involved each of them sacrificing one third of their interest in order for Grancy to acquire a one third stake in SMI. That was not something to which Mr Gihwala could commit the Trust in his own right. He could only do so as a representative of the Trust with the authority of his co-trustees.

[40] Not once, in all the litigation that has ensued since February 2005, have his co-trustees questioned his authority to represent them and agree to forgo a one third share of the Trust's interest in SMI. On the contrary, when Grancy brought proceedings to compel delivery of these shares, Mr Gihwala deposed to an answering affidavit in his own right and on behalf

of the Trust. In response to a statement in the founding affidavit by Mr Mawji that:

'… It was never clear whether he [Gihwala] was acting in his personal capacity … or as an authorised trustee of the [Trust]'

Mr Gihwala responded:

'… the deponent was at all times aware that I was acting in my personal capacity and on behalf of the Trust in relation to the Spearhead investment.'

That statement has never been withdrawn or rebutted. It was confirmed in another statement made by Mr Gihwala, this time in response to a complaint about his conduct lodged with the Cape of Good Hope Law Society. Then he said:

'The entities in which I have an interest which were involved in these transactions included the Dines Gihwala Family Trust ("the Trust") and Seena Marena Investments (Pty) Ltd ("SMI"). SMI is a company in which Lance Manala ("Manala") and the Trust each initially had a 50 per cent interest. Grancy now has a 31 per cent equity interest in SMI. The directors of SMI are Manala and myself.'

[41] There was an endeavour by Mr Kirk-Cohen SC, who appeared for the Trust at the trial and in this Court, to suggest that no reliance could be placed on these documents. However, in a pre-trial minute dated February 2012, at a stage when Mr Gihwala and the Trust were represented by the same counsel and attorneys, it was agreed that all documents included in the trial bundle would, without further proof, serve as evidence of what

they purported to be. In the case of these two documents they are respectively an affidavit and a statement by Mr Gihwala in regard to the identities of the parties who he was representing at the meeting. Insofar as he now seeks to challenge the fact that the Trust was a party to the agreement they are admissible as statements against interest made by a representative of the Trust.

[42] In addition, we were informed from the bar, without objection, that a notice had been given in respect of these documents in terms of the provisions of rule 35(10) of the Uniform Rules of Court. That rule permits any party to give to any other party a notice to produce at the hearing the original of any document referred to in the notice and, once produced, it entitles the party giving the notice 'without calling any witness, to hand in the said document, which shall be receivable in evidence to the same extent as if it had been produced in evidence by the party to whom notice is given'. Friedman J said in *Knouwds*,[15] that the rule provides an exception to the general requirement that a document can only be admitted in evidence by a witness who is in a position to identify the document. Mr Kirk-Cohen submitted that nonetheless the contents of the document remain hearsay against the Trust and inadmissible as proof

[15] *Knouwds v Administrateur, Kaap* 1981 (1) SA 544 (C) at 551G-552B.

of their contents. Friedman J disposed of this by drawing attention to[16] an exception in the case of a statement made by a third party, where there existed a privity or identity of interest between the person making the statement and the party that was the subject of the statement. In this case there is a clear identity of interest between Mr Gihwala in his personal capacity and the Trust of which he is a trustee. The objection to the admissibility of these statements was accordingly unfounded.

[43] Mr Kirk-Cohen SC also posed the rhetorical question whether after the meeting Mr Gihwala could, without objection, have caused his interest in SMI to be held by an entity other than the Trust, and answered it in the affirmative. This he said demonstrated that the Trust could not have been a party to the agreement. The problem is that the question is hypothetical and the answer by no means certain. Such a change could only have taken place if the incoming shareholder undertook the same obligations as rested on the Trust in consequence of the agreement. That they could only do by concluding a contract with the other contracting parties. Absent such an agreement it is difficult to see on what basis Mr Gihwala could have substituted some other entity for the Trust. In my view the Trust was clearly a party to the agreement.

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[16] At 552B-G.

[44] I need spend less time on the position of SMI. Under the agreement it would be required to issue the shares that were to be taken up by Grancy. Mr Gihwala and Mr Manala were the directors of SMI and Mr Gihwala was there representing both Mr Manala and SMI. Furthermore loans in substantial sums would have to be made to SMI to enable it in its turn to subscribe for shares in Ngatana and make loans to Ngatana. In those circumstances to suggest that SMI was not a party to the agreement is in my view unjustified. I accordingly agree with the contention on behalf of Grancy that the parties to the agreement were Messrs Gihwala and Manala, the Trust, SMI and Grancy.

Terms of the agreement

[45] Apart from the evidence of Mr Mawji that has been summarised earlier, there were documents that conclusively supported his evidence and dealt with the terms of the agreement. After the meeting Mr Mawji and Mr Narotam remained in South Africa for a short period to attend to other business and to tie up the loose ends of the deal. On 12 February Mr Narotam met Mr Gihwala at the airport in Johannesburg. He prepared a note of that meeting in diagrammatic form showing the structure of the deal. It reflected each of Messrs Gihwala and Manala and Montague as having a one-third interest in SMI. In turn SMI would hold 58 per cent of

the shares in Ngatana, which would hold approximately 13 per cent of Spearhead. The note reflected the details of the loan to Mr Manala and indicated that the cost to Grancy would be R3.5 million. Grancy had already arranged to pay this amount to the trust account of Mr Gihwala's legal firm.

[46] On 21 February 2005 Mr Gihwala sent an email to Mr Narotam saying that the Spearhead deal had been announced and had been favourably received. Ngatana had purchased at R15.50 per unit while the current market price was R20 per unit. He went on to say that he needed 'to regularise our relationship'. Ngatana was acquiring 3.5 million Spearhead units at R15.50 per unit and Standard Bank had agreed to provide finance for 75 per cent of the cost of that number of units at R17 per unit. Accordingly the participants in Ngatana needed to fund R2.75 per unit plus all costs, which he estimated to be approximately R600 000. As SMI's interest related to 58 per cent of the units it, needed to provide R5 830 500. In the result he calculated that each of the three investors had to contribute R1 976 833.33. The loans that he and Mr Mawji were to make to Mr Manala were half of that, or slightly less than R1 million each. When this email was sent, two and a half weeks after the meeting where the agreement was concluded, Mr Gihwala calculated that Mr

Mawji had contributed a little over R450 000 more than was required to effect the investment and asked what should be done with this.

[47] Other than on one aspect that is irrelevant to this case, Mr Narotam confirmed the accuracy of this email in his response on the same day. His approach was that 'the structure of the Spearhead deal was done with Karim and I at the hotel when we met'. All that remained was for Mr Gihwala to do what he had undertaken to do in his email, namely draft an agreement in which he and Mr Manala would acknowledge Mr Mawji's one third share in the company that was to be the vehicle for the investment, which he identified as SMI.

[48] For reasons that are immaterial a portion of the R3.5 million remitted to Mr Gihwala's law firm was used for the purposes of another transaction. This resulted in a further exchange of emails between Mr Narotam and Mr Gihwala concluding with one from Mr Gihwala on 10 May in which he again confirmed the terms of the agreement with reference to his earlier email of 21 February. An additional amount was transferred to Mr Gihwala's firm to bring the total lent to SMI up to slightly more than R3 million.

[49] The documents are entirely supportive of Mr Mawji's description of the agreement. In addition, Mr Mawji testified that they discussed the question of directorships and it was agreed that Messrs Gihwala and Manala would remain as the sole directors of SMI and would be the directors representing SMI's interests on the board of Ngatana. He was perfectly willing to accept this in the light of his friendship with Mr Gihwala and his faith in him. The entire relationship was based upon mutual trust and confidence. It therefore demanded the utmost good faith from Mr Gihwala and Mr Manala.

[50] On behalf of Mr Gihwala it was contended that the agreement merely involved Grancy taking up a shareholding in a private company, SMI, and enjoying the ordinary rights and incurring the ordinary obligations that attach to being a shareholder. In other words that Grancy's rights would be no different from those of a person who purchased shares in a company on the Johannesburg Stock Exchange. I am unable to accept that characterization. Mr Mawji was approached through Mr Narotam on the basis of ties of friendship that he had formed with Mr Gihwala. The investment in Spearhead was presented as an opportunity for them to do business together and it is plain from other correspondence that at the time it was contemplated that this would be one of a number of business ventures that they might undertake jointly.

The nature of the transaction; the fact that Mr Mawji's business operations were conducted from a base in Switzerland; and the fact that Messrs Gihwala and Manala were to be responsible for administering and overseeing the investment, meant that Mr Mawji, and therefore Grancy, were entirely dependent upon them for information regarding the investment and upon their probity and good faith in dealing with it. In those circumstances it was too narrow a view of the nature of the transaction to suggest that Grancy's rights would be delineated solely by the memorandum and articles of SMI and Ngatana.

[51] The factors that I have mentioned all point in the direction of the agreement being subject to a number of important tacit terms, necessary in order to give it business efficacy.[17] The issues that gave rise to this litigation posed the following questions:

- Was SMI to be used as a vehicle solely for the purposes of investing through Ngatana in Spearhead?
- If Ngatana wanted to make investments other than the acquisition of the Spearhead units, or if SMI wished to make an investment other than its shareholding in Ngatana, did this require the consent of Grancy?

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[17] *Wilkins NO v Voges* [1994] ZASCA 53; 1994 (3) SA 130 (A) at 136H-137B.

- Was Grancy entitled to access to all the books and financial records of SMI?
- Were Mr Gihwala, Mr Manala and the Trust obliged to account to Grancy for the money invested in SMI and the proceeds thereof?
- Did Mr Gihwala, Mr Manala, SMI and the Trust owe duties of good faith and fair dealing to Grancy?
- Were Mr Gihwala and Mr Manala, as directors of SMI, precluded from enriching themselves at the expense of Grancy by charging SMI with fees to which Grancy had not consented?
- Were the investors to be treated equally in regard to the receipt of benefits from SMI?

[52] There is no doubt in my mind that had an interfering bystander posed those questions to Messrs Mawji and Gihwala at the meeting the answer in each case would have been an emphatic affirmative. That satisfies the ordinary test for a court to infer the existence of a tacit term. There was some muted argument before us whether these terms operated to limit the powers vested in either SMI or its directors in terms of the memorandum and articles of association of SMI, and it was submitted that to the extent they did they could not be accepted as tacit terms. Reliance was placed upon the principle that a tacit term cannot be inferred where it is contrary to the express terms of the contract. Before a

court can infer the existence of a tacit term there must be room for importing it in the light of the express terms of the agreement.[18]

[53] I see no conflict between the suggested tacit terms and the memorandum and articles of association of SMI. They do not alter those provisions in any way. By agreement *de hors* the company's founding documents, the parties agree as to the manner in which the company and its directors will exercise those powers. Such an agreement is commonplace in the commercial world and one was concluded by the Ngatana shareholders. It is the means whereby parties who intend to conduct a business venture through the vehicle of a company arrange their rights and obligations *inter se*. In the oft-quoted words of Lord Wilberforce[19] '… there is room in Company Law for recognition of the fact that behind it, or amongst it, there are individuals with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure'. Typical examples of provisions in such agreements are those that provide that the investors, or some of them, will be, or will appoint, the directors of the company; provisions relating to

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[18] *Pan American World Airways Inc. v SA Fire and Accident Insurance Co Limited* 1965 (3) SA 150 (A) at 175C.

[19] *Ebrahimi v Westbourne Galleries Limited* [1973] AC 360 (HL) at 379b-380b; [1972] 2 All ER 492 at 500a-h. The passage has been quoted with approval by this Court. *APCO Africa (Pty) Ltd and Another v APCO Worldwide Inc* [2008] ZASCA 64; 2008 (5) SA 615 (SCA) para 17. See also *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1130D-F; *Hulett and Others v Hulett* 1992 (4) SA 291 (A) at 307E-308F.

decisions that will require the consent of the investors; provisions relating to the incurring of credit or the sale of assets of the business; and provisions relating to decisions critical to the strategic direction of the company.[20]

[54] A shareholders' agreement of this type, dealing with the right to be appointed as a director and operating to nullify a provision in the 1926 Companies Act that provided for the removal of directors, was enforced in *Stewart v Schwab*.[21] That judgment has been cited on a number of occasions in provincial divisions. Its correctness was assumed by Trollip JA in *Desai*.[22] Such agreements are frequently entered into in cases where investors wish to regulate their relationship *inter se* when the investment is to be made through the medium of a company. Mr Narotam and Mr Mawji expected that Mr Gihwala would cause such an agreement to be prepared. The email of 21 February contemplated such an agreement and one was prepared in Mr Gihwala's legal office but never signed. Until such an agreement was prepared and signed, the parties were bound by the express terms of the agreement and any tacit terms that formed part of

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[20] The shareholders' agreement concluded in relation to Ngatana provided in clause 10 that a range of what were termed 'material decisions' would only be taken by means of a resolution supported by both Prescient and SMI.
[21] *Stewart v Schwab and Others* 1956 (4) SA 791 (T) at 793D-H.
[22] *Desai and Others v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) at 518G -H.

it.[23] Such an agreement does not alter or vary the company's founding documents. It is an agreement between the parties thereto in terms of which they agree as to the manner in which, and the purpose for which, the powers of the company and its directors will be exercised. There is no reason why such an agreement should not ordinarily be given effect and no reason why it should not be given effect in this case. Section 15(7) of the 2008 Act expressly provides that this is to be the situation. The qualification that the shareholders' agreement may not be inconsistent with the Act and the Memorandum of Incorporation deals with situations where there is a direct conflict between them, not with a qualification in the shareholders' agreement on the manner in which general powers are to be exercised, which may constrain the exercise of those powers.

[55] The last issue to be considered relates to the manner in which the anticipated returns on the investment were to be dealt with. The nature of Spearhead's business was described in paragraph 5. It was not such as to require any active management on the part of either Ngatana or SMI. The practical day to day business of acquiring properties and securing tenants would be managed by Spearhead. Ngatana, as a 13 per cent shareholder, would keep abreast of the operations of Spearhead so as to be aware if it

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[23] *CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) at 92A-C. In *Wilkins NO v Voges* supra, at 144B-D Nienaber JA pointed out that tacit terms are as much part of the agreement as express terms.

appeared to be running into difficulties. They would be alive to, and if necessary respond to, major business decisions by Spearhead and possibly suggest business opportunities if they encountered them. But beyond that oversight role Ngatana's affairs would require little by way of active management and the same was true of SMI. Their accounting records would be straightforward and the costs of administration limited. Neither company would need to have any full-time employees. Nor would they need office premises or any of the administrative infrastructure that characterises other businesses. The annual financial statements of both Ngatana and SMI bear this out, whatever their other defects.

[56] It could accordingly be anticipated that Ngatana would use the revenue it would receive half-yearly from Spearhead to service the loan from Standard Bank, pay its own limited expenses and distribute the remainder to its shareholders, initially by repaying their loans and then by way of dividends. If it realised any of the units – and there was a three year lock-up period applicable to the BEE transaction that would preclude it from doing so immediately – the proceeds would be used for the same purposes. As far as SMI was concerned its position was even simpler. It would receive loan repayments and dividends from Ngatana, pay its extremely limited administrative expenses and distribute the balance by

way of repayment of the initial shareholder loans and dividends to its shareholders.

[57] Did these factors give rise to any terms of the agreement? In my opinion they did. Parties entering into this type of investment anticipate that they will receive a flow of income in accordance with the nature of the investment. Put simply, when funds were available they would be distributed by Ngatana and SMI. Both Ngatana and SMI were presented to Mr Mawji as passive investors, created as SPV's for the purpose of holding linked units in Spearhead. As such, once the loan from Standard Bank was repaid, he would have anticipated that the investment in SMI would generate a regular flow of dividend income to Grancy and this is precisely what he said he expected. There was no reason for either Ngatana or SMI to accumulate income. If either wished to expand the range of their investing activities Grancy would have to be consulted. The fact that it stood at one remove from Ngatana was neither here nor there. SMI held a majority share in Ngatana and in terms of the shareholders' agreement concluded in relation to Ngatana any decision of that character required the consent of both Prescient and SMI. Unless and until there was agreement on a change in the investment the position would remain as described above. In the circumstances, and once again applying the test of the interfering bystander, it seems to me that a question as to what

would happen to the income earned by Ngatana and SMI would have provoked the response, 'Why, it will be distributed to shareholders, of course. What else could we do with it?'

[58] In summary therefore the material terms of the agreement concluded between the parties on 3 February 2005 were the following:

(a) Mr Gihwala (through the vehicle of the Trust), Mr Manala and Grancy would participate in the Spearhead BEE transaction and thereby invest indirectly in Spearhead linked units.

(b) The investment would be undertaken using SMI as a corporate vehicle with each participant (Grancy, the Trust and Mr Manala) holding one-third of the shares in SMI.

(c) The parties would make their investment contributions by way of subscription for shares in and the making of loans to SMI on the basis set out in Mr Gihwala's email of 21 February 2005, which included the making of loans to Mr Manala to enable him to lend his share of the amount required by SMI.

(d) SMI would use the funds so acquired to subscribe for 58 per cent of the shares in Ngatana, which was the corporate vehicle that would hold the 3.5 million Spearhead linked units acquired in terms of the BEE transaction, and lend money to Ngatana to enable it to take up these Spearhead units.

(e) The investment would be directly managed by Messrs Gihwala and Manala, who would be the directors of SMI and SMI's nominees as directors of Ngatana.

(f) Unless otherwise agreed by the investing parties the investment by Ngatana would be restricted to an investment in the 3.5 million Spearhead units and SMI's investment would be restricted to its investment in 58 per cent of the shares of Ngatana.

(g) In the management of the investment Messrs Gihwala and Manala, the Trust and SMI owed Grancy a duty to exercise good faith and to account fully for their stewardship of Grancy's investment. Their relationship with Grancy was a fiduciary one.

(h) Grancy would be entitled on request to be given access to all books and records of SMI relating to its affairs and Grancy's investment in it.

(i) The two directors would procure that the net income accruing to Ngatana from the investment, after servicing the Standard Bank loan and paying its administrative expenses, would be distributed to shareholders, first by repaying shareholder loans and then as dividends.

(j) The net income accruing to SMI after paying its administrative expenses would be distributed to shareholders, first by repaying shareholder loans and then by way of dividends.

(k) The investors would be treated equally so that in the allocation of benefits arising from the investment no investor would be treated less favourably than another and no investor would secure for himself or itself a benefit that was not afforded to the other investors. I refer to this as the principle of parity of treatment.

Nature of the agreement

[59] In its particulars of claim in both actions Grancy characterised the agreement as one of partnership, alternatively one of agency. Fourie J did not accept either characterisation and held that it was rather something akin to a joint venture. But in any event he refused to make declaratory orders dealing with this issue on the basis that they would be academic. In its cross-appeal Grancy sought such declaratory orders, although it addressed no substantive argument in support of the contention that the agreement was one of agency. Its enthusiasm for the argument that it was a partnership waned somewhat after it was suggested that this might mean that its claims could only properly be pursued by way of the *actio pro socio*.[24]

[60] Fourie J correctly said that this was not a partnership. Among the essential elements of a partnership are that the business is carried on for

[24] *Morar NO v Akoo & another* [2011] ZASCA 130; 2011 (6) SA 311 (SCA) paras 10-11.

the joint benefit of the partners and the intention is to make a profit.[25] One cannot separate the latter of these from the former. The intention must be to make a profit jointly, that is, a profit that enures to the benefit of the partnership. Its distribution thereafter to the individual partners is another matter. Here there was no such intention. The parties intended that dividends would flow from Spearhead to Ngatana, or that Ngatana would have the proceeds of realisation of the investment, and that these funds would then flow to Ngatana's shareholders. Once received from SMI they would be distributed to SMI's shareholders. At no stage would the participants in the venture hold the profits for their joint benefit. The aim of the parties was to receive in their own right the dividends that would be paid by SMI. That precluded the agreement from being a partnership.[26]

[61] The agreement could be described as a joint venture, a convenient expression commonly used to describe a business agreement bearing some resemblance to a partnership, but lacking one or more of its essential elements. It does not convey any specific legal meaning, as every joint venture is dependent on the specific terms on which the parties agree. Sometime the distinction between a joint venture and a partnership is blurred completely, and sometimes what is referred to as a

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[25] *Bester v Van Niekerk* 1960 (2) SA 779 (A) at 783H-784A; *Purdon v Miller* 1961 (2) SA 211 (A) at 218B-D; *Pezzuto v Dreyer and Others* 1992 (3) SA 379 (A) at 390.
[26] *Novick v Benjamin* 1972 (2) SA 842 (A) at 851A-H.

joint venture is in fact a partnership.[27] In this case the parties agreed to invest in Spearhead units. They did so through corporate vehicles so that elements of company law would necessarily affect their relationship. They agreed on the terms of their relationship *inter se*, something that bears a resemblance to a shareholders' agreement. Their relationship was governed by mutual trust and imposed fiduciary obligations on Messrs Gihwala and Manala as well as the Trust. In that it had some of the characteristics of partnership. In regard to SMI they agreed to subscribe for shares and make loans to SMI as well as the personal loans that Mr Gihwala and Grancy were to make to Mr Manala. It can best be described as an investment agreement with a range of terms drawn from differing areas of law. There was no need to fit it into the jurisprudential pigeonhole of either partnership or agency. It follows that, to the extent that Grancy sought to do so, that part of the cross-appeal must fail.

Breaches of the agreement

[62] From the very start there were wholesale breaches of the investment agreement by Messrs Gihwala and Manala, as well as by the Trust and SMI acting through Mr Gihwala, who was throughout the

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[27] *United Dominions Corporation Ltd v Brian Pty Ltd and Others* (1985) 60 ALR 741 (HCA) at 746. R C I Banks *Lindley and Banks on Partnership* (8 ed, 2002) para 5-07 where the author expresses the view that every partnership is a joint venture, but not every joint venture is a partnership. B Bamford *The Law of Partnership and Voluntary Associations* 3 ed (1982) 11-12.

driving force in dealing with Grancy and the *alter ego* of the Trust. As he said in his email of 11 September 2006 he had put the investment agreement together and he was accordingly 'the one to deal with'. In what follows I highlight the principal breaches.

[63] The first and primary breach, which coloured all the others, was the refusal from some stage in 2005 or 2006 – the date is unclear but the breach was made manifest in the 11 September 2006 email – to accept that Grancy had a right to a one third shareholding in SMI. This persisted until March 2009 when Mr Gihwala and the other respondents in the proceedings brought by Grancy capitulated and submitted to a court order that it was entitled to a 31 per cent share in SMI. But the breach had more far-reaching effects than merely an obdurate refusal to recognise and implement the investment agreement. It was accompanied by an equally obdurate refusal to afford Grancy access to books and records in SMI that would have enabled it to ascertain what had occurred with the money it had invested and a similar refusal to provide a proper account in relation to that investment. Mr Gihwala and Mr Manala divided the benefits accruing from the investment in Ngatana between themselves to the exclusion of Grancy. The refusal to account has persisted from the beginning until the present day. It is exemplified by the recent judgment by Traverso DJP and the need for her to give a detailed order, declaring

the respects in which the account was inadequate and directing what needed to be done to rectify the position

[64] Another area where there were significant breaches of the agreement related to the investments by Ngatana. In October 2005 they were altered by the acquisition of a further 2 million Spearhead units, which of itself might not be thought to be relevant, had it not been accompanied by Ngatana increasing its indebtedness to Standard Bank from the original R38.5 million to R93.6 million. That was clearly a significant increase in the potential risks inherent in the investment and hence in the risks attaching to Grancy's investment. But Grancy was not consulted over this. Nor was it consulted, notwithstanding its explicit request, over the attitude that Ngatana should adopt to the offer by Redefine to acquire all the linked units in Spearhead. It was not consulted over the disposal of all the Redefine units obtained as a result of this transaction or over the further acquisition of 20 million Redefine units. Fortunately it does not appear as if this caused any financial loss to Grancy, but it was nonetheless a most egregious breach of the investment agreement. In effect, Grancy found itself engaged, entirely without its knowledge and certainly without its consent, in a different investment to the one in which it had agreed to become involved. That was a

fundamental breach of the principles of trust and good faith on which the investment agreement rested as well as of a tacit term of the agreement.

[65] But these breaches were accompanied by several other breaches that did have a detrimental financial impact on Grancy. From the very outset Messrs Gihwala and Manala used SMI to provide themselves with financial benefits to the prejudice of SMI's only other shareholder, Grancy. This started in 2005 when Grancy made its initial payment of R3.5 million to the firm of attorneys of which Mr Gihwala was a partner. In terms of the email of 21 February 2005 the amount allocated to the Spearhead transaction was R3 040 250. That was money that Grancy had lent to SMI. It should have been reflected as such in Grancy's ledgers. But it was not. It was credited to a loan account for Mr Manala. Had that not been done that loan account would have been in debit from the time of the first payment to Mr Manala in May 2007. In fact the account was only maintained in credit by crediting it with 'promotion fees', surety fees and directors' fees improperly raised. None of these fees were permissible but, as explained in more detail below, their improper crediting to Mr Manala's loan account enabled him to withdraw over R9 million from SMI between 2007 and 2009.

[66] An equally serious breach occurred in March 2007 when Ngatana repaid the original loan it had received from SMI to enable it to conclude the Spearhead transaction. Mr Gihwala and Mr Manala arranged for the loan portions of their own contributions to be paid to them, but deliberately did not repay Grancy the money it had lent to SMI. Not only did SMI not do so, but it used those funds to invest in Scarlet Ibis, without informing Grancy and without its consent. This was a flagrant breach of the investment agreement, which was confined to an investment in a relatively safe property investment trust. Fourie J described it as misappropriating funds that should have been paid to Grancy and I can only endorse that description. Grancy was now exposed to the risks inherent in any property development, while its co-investors had secured the repayment of the money they had invested in SMI, including in Mr Gihwala's case the repayment of part of the money lent to Mr Manala.

[67] Although Grancy suffered no immediate financial detriment, the simultaneous decision by Ngatana to pay an amount of R3 million to Prescient and SMI in equal shares for their contribution to setting up the BEE transaction, was a breach of the investment agreement. No plausible justification was advanced for the board of Ngatana agreeing to do this, and it was plainly directed at prejudicing the minority shareholders in Ngatana, and Grancy as the minority shareholder in SMI. Restricting

myself to Grancy there is no question that it was not intended that it would benefit from this, had it been paid. The attitude evinced by Mr Gihwala and accepted by Mr Manala was that Grancy had only an indirect interest in 630 000 Spearhead units and until that overall investment was realised it was not entitled to anything at all. Only Mr Manala and the Trust were intended to benefit from this payment.

[68] This general attitude manifested itself when Ngatana paid a dividend to SMI of R5 272 727 in October 2008. This was immediately declared as a dividend and paid in equal shares to the Trust and Mr Manala. After this payment the Trust and Mr Manala had been repaid their loans to SMI (insofar as they ever made those loans, which may be doubted) and received a substantial dividend, exceeding the amount of those loans. Grancy, however, had received nothing. On what basis Mr Gihwala, as the moving spirit behind these transactions, could have thought that this was permissible in terms of the agreement he had concluded with Mr Mawji, is a mystery. Grancy and Mr Gihwala, via the Trust, were making exactly the same financial investment in money terms, yet they were receiving different returns on their investment. No sensible businessperson would ever have agreed to that and there is no evidence to suggest that Mr Mawji did so. One is led inevitably to the conclusion that Mr Gihwala was simply exploiting his position as the

person in control of the affairs of SMI in order to prefer himself and Mr Manala over Grancy.

[69] There were other equally untenable payments. On 24 June 2009 SMI lent R2 million to Mr Manala. The heads of argument on behalf of Mr Gihwala said that Fourie J erred in finding that 'the R2 million payment to Manala was in breach of the agreement, the payment constituted a loan to Manala, [and] that this payment resulted in the depletion of SMI's assets by R2 million', but no argument was advanced in support of these contentions. Nor did Mr Manala, who was separately represented, attempt to justify the loan. The inescapable conclusion is that with the connivance of Mr Gihwala he was permitted to treat SMI as a personal piggy bank.

[70] Matters did not end there. On 8 April 2009, shortly after the grant of the original order that Grancy be registered as a shareholder of SMI, Messrs Gihwala and Manala, in a telephone conversation, agreed to pay themselves directors' fees in SMI of R2.75 million each. As if that was not enough they had in March 2008 agreed to pay themselves a further R1 114 539 as 'surety fees', that is, as compensation for the suretyships they had given to Standard Bank. In 2009 these amounts were credited to the loan accounts of the Trust and Mr Manala with SMI, and subsequent

withdrawals were made against the resulting credit balances. The fees were utterly unjustifiable. The attempt to justify them when they were previously considered by this Court[28] met with this response:

'… not only is the respondents' evidence on this score untenable but its shortcomings are exacerbated by the absence of a cogent explanation as to why each payment was made in the first place.'

Neither Mr Gihwala, nor Mr Manala, made any attempt on this occasion to justify these fees. In fact, Mr Gihwala's recognition that they were untenable was evidenced by the fact that he repaid the money to SMI on 23 November 2010.

[71] The last payment to which I must refer as illustrative of a gross breach of the investment agreement arose on 3 March 2009. It will be recalled that two years earlier, when resolving to repay to shareholders their initial loans, Ngatana also resolved to pay each of Prescient and SMI an amount of R1.5 million, but at the time it lacked the funds to put this into effect. On 3 March 2009, a month after the offer to settle the litigation in which Grancy claimed its share in SMI, Ngatana passed a fresh resolution. It provided for the payment to Prescient of a 'management fee' of R1.5 million and for the payment to each of Mr Gihwala and Mr Manala of R750 000 as 'directors' fees'. The earlier

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[28] *Grancy Property Ltd v Manala* supra para 35.

resolution would have paid this amount, that is, R1.5 million to SMI, where it would have been available to the Trust and Mr Manala, on the basis then being contended for that they were the only shareholders in SMI. No explanation was advanced for this resolution, nor any explanation of what had happened to the earlier resolution. The inference is that it was simply a different way of giving effect to the original intention. Mr Gihwala and Mr Manala would be enriched at the expense of Grancy.

Grancy's monetary claims

[72] The prime mover in committing these breaches of the investment agreement appears to have been Mr Gihwala. But Mr Manala and the Trust, as his collaborators in resisting Grancy's claims for recognition as a shareholder in SMI as well as his claims for access to information and a proper accounting in relation to its investment, were parties to those breaches. Furthermore, one or other or both of them were the beneficiaries of all the payments made in breach of the agreement. Grancy's monetary claims must be considered against that background.

[73] The principle underpinning the claims was straightforward. Grancy contended that, had there been no breach of the investment agreement, funds that were diverted to other purposes in either Ngatana or SMI

would have flowed through to SMI's shareholders by way of dividends.[29] As they were diverted the shareholders did not receive what they would otherwise have received by way of a return on their investment. Grancy's own loss was calculated on the basis that, if these funds had been available for distribution by SMI and had been distributed, it would have received 31 per cent of them. The amount that it did not receive represented its monetary loss arising from the various breaches of the agreement. The propriety of this mode of calculation was not in issue.

[74] Mr Gihwala and Mr Manala attacked the judgment in respect of most of the monetary claims on the ground that, if valid, they were claims in the hands of SMI and could not be pursued by Grancy in the light of the rule in *Foss v Harbottle*. That is something to which I shall return. First it is necessary to consider whether the claims were established on the basis on which they were advanced. Although we received oral argument on only three claims, they were all dealt with in the heads of argument of Mr Gihwala and I shall likewise deal with each one separately. In doing so I draw no distinction between the monetary claims advanced in the 2010 action and those advanced in the 2011 action. Once I have dealt with the merits of each claim and who is liable in respect of

[29] In other words the investment agreement placed Grancy and the other shareholders in SMI in a position to insist on the payment of dividends from available funds, which is a more extensive right than a shareholder would ordinarily enjoy.

them I shall turn to consider whether any of them are excluded by the application of the rule in *Foss v Harbottle*.

The repaid amount

[75] The largest monetary claim related to what was described as the 'repaid amount'. This was the amount of R6 657 673 paid by Ngatana to SMI on 15 March 2007 as repayment of the initial loan by SMI to Ngatana enabling it to acquire the Spearhead units in terms of Spearhead's BEE transaction. These funds were used by SMI to refund the loans made by the Trust and Mr Manala, with an adjustment to allow for the fact that Mr Manala had borrowed money from Mr Gihwala in order to contribute his share. The balance was used to make the investment in Scarlet Ibis. Grancy received nothing in respect of its contribution of R2 051 833.34.

[76] There were some minor quibbles over the trial judge's description of the source of the R6 657 673, but any misdescription did not affect his conclusion. The attack on the claim was based on the contention that the loan by Grancy was only repayable when the Spearhead investment was finally unwound and that the loan included an amount of R75 000 in respect of SMI's costs, which was not repayable. Neither contention was justified. It was irrelevant whether it was originally anticipated that the

initial loan would only be repaid when the Spearhead transaction was unwound. The reality was that Ngatana repaid the entire loan before that. When the decision was made to repay the Trust and Mr Manala, the principle of parity of treatment of the investors dictated that Grancy should also have been repaid. As regards the fact that the original loan included an amount in respect of SMI's costs in setting up the transaction, this was neither here nor there. The costs were funded by way of the loan and the loan had to be repaid. Fourie J was correct to uphold this claim.

The Scarlet Ibis investment

[77] Fourie J made a separate award of damages in respect of the investment in Scarlet Ibis. He held that this amount would have been available to fund further dividends in SMI and had been irrevocably lost. In the result he awarded Grancy damages of R620 000, equivalent to 31 per cent of the R2 million investment. He rejected the submission that this was a duplication of his award in respect of the failure to repay Grancy's loan. In my respectful view he was wrong to do so. The source of the funds used to make the investment was Ngatana's repayment of SMI's original loan to it. Had those funds been dealt with in accordance with the investment agreement they would have been used to repay Grancy's loan to SMI. Instead they were invested in Scarlet Ibis and lost. But Grancy's loss as a result cannot exceed the amount that it would have

received had it been repaid in compliance with the investment agreement. In that event there would have been no funds available to invest in Scarlet Ibis and no loss arising from such investment. The appeal against this award of damages must succeed.

Promotion fees

[78] There was considerable confusion in regard to this claim. In his email of 21 February 2005, Mr Gihwala said that SMI had incurred costs of R225 000 in setting up the transaction. He included in the amount Grancy was to invest an amount of R75 000 in respect of these costs. But that amount was part of the overall loan made by Grancy and was included in the claim in respect of the repaid amount.[30] It could not form part of another claim.

[79] It is unclear whether any costs were incurred as alleged by Mr Gihwala. In his opening address at the trial counsel for Grancy said that none were, and he added that the accounting treatment of these amounts was inappropriate. Mr Greenbaum, Grancy's expert witness, confirmed this. He drew attention to the fact that in SMI's ledgers the Trust's and Mr Manala's loan accounts had each been debited with R75 000 as

[30] The Grancy loan to SMI was R1 976 833.33. With the addition of the R75 000 in respect of the alleged costs that amounted to R2 051 833.33, which was the amount for which Grancy obtained judgment on the repaid amount claim.

promoter's fees for Mr Manala. Then Mr Manala's loan account had been credited with R150 000 as promoter's fees. The net effect of this, as the loan accounts show, is that the credit balance in Mr Manala's loan account was increased by R75 000 at the cost of the Trust. It had no impact on Grancy at all.

[80] In para 29 of the particulars of claim it was alleged that in the financial year ending in February 2006, Mr Manala and either the Trust or Mr Gihwala had impermissibly credited themselves with promotion fees in an amount of R75 000. In para 47.7 it was alleged that these promotion fees had been credited in an amount of R225 000 and judgment was sought in favour of Grancy for R75 000. The discrepancy between the two figures was apparent and made no sense.

[81] The judgment proceeded on the footing that a total amount of R225 000 was credited to Mr Manala, Mr Gihwala and/or the Trust and reflected in SMI's detailed income statement as at 28 February 2006. It held that there should have been an equal distribution of this amount among the investors in accordance with the principle of parity and awarded damages equivalent to 31 per cent of that amount. But that involved a misconception. This amount appeared in the income statement, but as an expense item under the heading 'legal fees'. Mr

Greenbaum explained that this was incorrect because no legal fees had been incurred. But he then characterised it as having been 'designed nominally to enrich Gihwala and/or Manala'. What the basis was for that statement he did not explain. When he came to give evidence on the topic he drew attention to the entries in the loan accounts of the Trust and Mr Manala and said that there was no invoice for the legal fees shown in the trial balance and the annual financial statements. The R225 000 in the income statement under the heading 'legal expenses' was a red herring. Its characterisation in the particulars of claim as promotion fees merely added to the confusion.

[82] The correct position on the material before this Court is that the R75 000 contributed by Grancy for costs of establishing SMI is included in the amount for which judgment was given in respect of its loan to SMI under the rubric of the repaid amount. Upholding that claim reverses the effects of crediting Mr Manala's loan account with money obtained from Grancy. There was no credit or payment to Mr Manala or anyone else of R225 000. Instead Mr Manala's loan account was credited with a net R75 000 at the expense of the Trust. This did not prejudice Grancy in any way. Accordingly the appeal in respect of the damages awarded under this head must succeed. On the evidence in this case that award should not have been made. I note that Traverso DJP dealt with this in para 11.31

of her judgment and justifiably found the entries in respect of the amount of R225 000 mystifying. The fact that the award of damages under this head is set aside does not amount to a decision that once there has been a proper explanation of these entries Grancy may not have a claim. All that this judgment does is to hold that the claim pleaded in the 2010 particulars of claim was not proved.

Legal fees

[83] The foundation for this claim was a provision for legal fees in an amount of R300 000 in the annual financial statements of SMI for the year ended 28 February 2009. In the following year this provision was reduced by R75 000. However, there is no mention in the evidence of any accounts having been discovered that reflected these fees having been charged and paid. Mr Gihwala argued that accordingly there was no proof that any such fees had been paid. I agree that the mere fact of the provision appearing in accounts, the correctness of which was highly debatable, did not prove that SMI had paid any amounts in respect of legal expenses, much less paid bills for which any of Mr Gihwala, the Trust or Mr Manala, were responsible.

[84] But a number of fee notes were produced showing that SMI had been charged various amounts by the firm of attorneys representing Mr

Manala and SMI in the litigation. The fee notes related, with two exceptions, to fees charged during 2009 and 2010 by counsel representing Mr Gihwala and the Trust. No explanation was proffered that would justify Mr Gihwala's and the Trust's legal bills being paid by SMI. As these on their face amounted to more than R300 000 that might have provided a justification for this award of damages, but for what follows.

[85] The claim was dependent upon an analysis presented by Grancy's counsel and annexed to its heads of argument. That analysis was defective, as emerged when investigating a passing and unsubstantiated submission on behalf of Mr Gihwala that a claim arising from a loan to Mr Manala for the purposes of repaying Grancy's loan duplicated the claim in respect of the repaid amount. On investigation it became apparent that there was an overlap between the claim for legal expenses and the claim in respect of that loan. The outcome must be that the amount of the claim arising from the payment of legal expenses should be reduced.

[86] The attorneys' ledger account annexed to Grancy's heads of argument included six invoices from the attorneys in respect of the fees of counsel appearing for Mr Gihwala and the Trust. They totalled R241 303.78. These invoices were debited to SMI's ledger account with

the attorneys. However, the ledger reflected only R134 720 as paid by SMI in respect of these fees. An amount of R58 140 was transferred from another account and Mr Gihwala paid the balance personally. So, on the face of it, the only improper charging of fees to SMI related to the R134 720. The remaining fee accounts annexed to Grancy's heads of argument were debited to a different ledger account in the name of Mr Manala. The transfer of R58 140 also came from that account. The funds used to pay these accounts came from the second loan made to Mr Manala dealt with in the following section of this judgment. As that is subject to a separate claim, the claim for legal expenses based on these accounts involved a duplication of claims. Accordingly Fourie J correctly upheld this claim, but the amount must be reduced to take account of this duplication. The correct figure is R41 763.20, being 31 per cent of R134 720.

Loans to Mr Manala[31]

[87] On 24 June 2009 pursuant to a resolution of the directors of SMI, that is, Mr Gihwala and Mr Manala, dated 15 June 2009, SMI advanced what was referred to as a loan of R2 million to Mr Manala. In fact the resolution said that it was a payment in reduction of his loan account, but

[31] The first of the two payments to Mr Manala dealt with under this heading was claimed in the 2010 action and the second in the 2011 action.

that could not be correct because it would have resulted in his loan account reflecting a debit balance. Mr Gihwala told the auditors that it was a payment made in error. It was reflected as an 'overpayment' in Mr Manala's loan account in the general ledger of SMI. What is certain is that this sum was paid to Mr Manala on 24 June 2009. However the payment was characterised it was plainly made in breach of a number of the provisions of the investment agreement, as well as the provisions of s 226 of the 1973 Act, and it was not suggested otherwise in argument before us. Instead it was argued that in 2011, when a dividend of R3 450 000 was due to Mr Manala, it was credited to his loan account less the amount of the loan and interest. It was submitted that this 'set off, with interest, the payment previously (and erroneously) paid to Manala, resulting in a repayment of the loan'. For the purposes of considering this argument I assume that it was open to Mr Manala to appropriate the dividend credited to his loan account to the repayment of the loan.

[88] The difficulty is that in cash terms SMI was no better off after the crediting of Mr Manala's loan account. When the loan was advanced Mr Manala received R2 million in cash. Had the loan not been made SMI would have had that R2 million at its disposal. In accordance with the terms of the investment agreement those funds, being surplus to its needs, could and should have been distributed to the shareholders. In that event

Grancy would have received R620 000. It has received nothing as a result of the repayment of this loan and no attempt was made to show that SMI was thereby placed in a position where it could distribute R2 million (or anything at all) to shareholders. This highlights the fact that the question whether Grancy suffered losses is not to be determined by book entries, but by having regard to the actual flow of money in consequence of the disputed transactions. That is why the appeal in respect of the award of damages arising from the Scarlet Ibis investment must succeed and why the appeal against the award in respect of the loan to Mr Manala must fail.

[89] Also on 24 June 2009, a further amount of R1 976 523.34 was paid to Mr Manala as a loan. The ostensible reason was to enable him to repay Grancy its original loan to SMI, less the R75 000 in respect of the alleged costs of establishment. Doing this reflected the contention advanced by Mr Gihwala in the email of 28 June 2006 quoted in para 16 above, that Grancy came in 'behind' Mr Manala and that strictly speaking its investment 'was with Lance'. From this flowed the attitude that it was the latter who was responsible for repaying the loan made by Grancy to SMI. Of course, in the light of the concession that Grancy was entitled to a shareholding in SMI this was palpable nonsense. Mr Manala tendered to pay this amount to Grancy but the tender was justifiably refused. The

money was then used by Mr Manala to fund his legal expenses and for other personal purposes. It has not been repaid.

[90] This loan was as unjustifiable and unlawful as the payment to Mr Manala of R2 million made at the same time. It has not been repaid and SMI's resources for the purpose of making distributions to investors were diminished thereby. Mr Gihwala submitted that only Mr Manala had an obligation to repay it, which may be correct insofar as SMI is concerned, but that does not bear upon his liability for breaches of the investment agreement. He also submitted that the claim in this respect was a duplication of Grancy's claim to the Repaid Amount. That is incorrect. In relation to the Repaid Amount there was money available to repay Grancy's loan, which was diverted to the Scarlet Ibis investment and lost. Here a further amount was diverted to Mr Manala and not repaid. Had that not occurred it would have been available for distribution to investors and hence, in part, to Grancy. This claim was properly upheld.

Ngatana directors' fees

[91] The train of events in this regard was dealt with in paras 67 and 71. In 2007 Ngatana resolved to pay SMI and Prescient R3 million in equal shares. Had the payment been made it would have enured to the detriment of the minority shareholders in Ngatana and, for so long as Grancy was

excluded as a shareholder in SMI, it too would have been excluded from the benefit of SMI's receiving this amount. In March 2009, after the offer to settle the proceedings in which Grancy sought to be registered as a 31 per cent shareholder in SMI, Ngatana passed a new resolution agreeing to distribute R3 million, by way of a payment of R1.5 million to Prescient and by way of the payment of directors' fees of R750 000 to each of Mr Manala and Mr Gihwala.

[92] Fourie J held that there was no evidence linking the two resolutions. I disagree. The identity of the total amount involved – R3 million – and the peculiar structure of the resolution in March 2009, where the two SMI directors received directors' fees and the two Prescient directors did not, cried out for an explanation, which was not forthcoming. The earlier resolution had not been rescinded and it revealed a clear intention to appropriate R3 million of funds in Ngatana for the benefit of Prescient and SMI, which, at the time, meant for the benefit of Messrs Gihwala and Manala. Then, out of the blue in 2009, a fresh resolution appropriating the same sum for the benefit of the same parties was passed by Ngatana. This occurred at precisely the time when Messrs Gihwala and Manala were reluctantly conceding that Grancy was entitled to a shareholding in SMI. Furthermore, when Messrs Gihwala and

Manala agreed to this resolution, that involved a breach of the provisions of the investment agreement set out in paras 58 (g), (i) and (k).

[93] It follows that, subject to the argument in relation to the application of the rule in *Foss v Harbottle*, the cross-appeal in respect of this item should succeed. Messrs Gihwala and Manala received in total R1.5 million that should have been available to SMI for distribution. Grancy was thereby deprived of its 31 per cent interest in that amount. Its claim for payment of R465 000 plus interest at 15.5 per cent per annum from 3 March 2009 to date of payment should have been upheld by the trial court.

Late payment of dividends

[94] In October 2008 SMI received a dividend of R5 272 727 from Ngatana. It promptly declared a dividend in that amount and paid it in equal shares to the Trust and Mr Manala. But for their breaches of the investment agreement, Grancy would have received a dividend at that time of R1 634 545.37. Instead that amount was only paid to it on 29 June 2009. It claimed the loss of interest of R213 789.57 from Messrs Gihwala and Manala.

[95] One other dividend received by SMI from Ngatana was in due course distributed to SMI's shareholders in proportion to their respective shareholdings. But those distributions took place substantially after SMI received the dividend from Ngatana in March 2009. The claim was for the lost interest on the basis that a dividend should have been paid to the investors by 26 March 2009. Instead it was paid in two tranches on 19 August 2009 and 6 January 2010. Grancy's claims were for interest on the amount of each dividend paid to it from 26 March 2009 to the two payment dates.

[96] The judgment proceeded on the footing that Messrs Gihwala and Manala had been paid their share of this latter dividend before Grancy. That was incorrect. But no excuse was advanced for the delay in making payment. SMI had no reason to delay the payment of dividends once the money was received from Ngatana. That was evidenced by the celerity with which the October 2008 dividend was paid to Messrs Gihwala and Manala. The fiduciary duty owed to Grancy, combined with the obligation to distribute funds received from Ngatana referred to in para 58(j) above, required prompt distribution of dividends. There was therefore a breach of their obligations under the investment agreement. The calculation of Grancy's resultant loss on the basis of a loss of interest was not challenged. These claims were correctly held to be good claims.

Directors' remuneration and surety fees

[97] It is convenient to deal with these together. I have already described in para 70 how these amounts were credited to the loan accounts of the Trust and Mr Manala, enabling withdrawals to be made against those accounts at a later stage. Mr Manala did not deal with these credits. Mr Gihwala advanced no argument to justify the directors' remuneration as not being in breach of the agreement. There was some attempt to justify the surety fees, but it was without merit. He argued that because he had repaid these amounts to SMI his liability was discharged and that Mr Manala was separately liable for his share. I will need to revert to the issue of joint and several liability when I deal with the liability of the Trust, so content myself, at this stage, with saying that the claim in respect of the amounts credited to Mr Manala under this head was sound.

Share of the Residue

[98] Under this heading Grancy sought an order in the 2010 action for payment of what it termed its portion of the share of the residue. It asked for an order that this be paid to it together with interest from 26 March 2009. The pleaded basis for this claim was that Grancy's investment in Spearhead units was realised fully when by 12 March 2009 Ngatana had

disposed of all the Redefine units obtained in return for the Spearhead units. It claimed that the amount of its share of the residue could be calculated in accordance with a formula.

[99] I have considerable difficulties with this claim. Its underlying premise is that Grancy invested in a defined number of Spearhead units and that this investment came to an end in March 2009, so that it was entitled to be paid whatever remained of that investment as at that date. This effectively disregarded the corporate identity of both SMI and Ngatana and treated the investment as one in Spearhead units. But that was impermissible. Although both Ngatana and SMI were SPV's established for the purpose of implementing and participating in the Spearhead BEE transaction, Grancy's interest was not directly in the units but in SMI, subject to the terms of the investment agreement.

[100] Another problem is that the claim ignored the fact that the original Spearhead investment by Ngatana had been transformed. The initial acquisition of 3.5 million units with a loan facility of R38.5 million had become an investment in 5.5 million units with a loan facility of R93.6 million. Those units had become 33.99 million Redefine units in 2006. Prior to the implementation of the order recognising Grancy as a shareholder in SMI, the original block of Redefine units had been sold

and a further 20 million acquired through fresh loans. The investment in SMI remained the same, as did SMI's stake in Ngatana, but the underlying investment had altered, initially in extent and subsequently in substance. This cannot be ignored. The moving finger had writ and moved on and, as the poet instructs us, it is not possible to disregard that or overlook it.[32]

[101] There is a further objection. After Grancy secured its stake in SMI it received substantial payments by way of dividends totalling in all about R14.5 million. These payments were generated from the disposal of the original holding of Redefine units. Grancy has been happy to accept these payments from that source, but they were not paid on the basis of the original investment in Spearhead. They were the product of the transformed investment. The first and second loans from Standard Bank have been repaid and Grancy retained an interest in SMI, which in turn had an interest in Ngatana. As at the most recent set of annual financial statements Ngatana held 20 million Redefine shares. Assuming that is still the position, and we were not told otherwise, it is a substantial

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[32] Edward Fitzgerald *The Rubáiyát of Omar Khayyám* quatrain 51:
'The Moving Finger writes; and, having writ,
Moves on: nor all thy Piety nor Wit
Shall lure it back to cancel half a Line,
Nor all thy Tears wash out a Word of it.'

investment.[33] But even if it is no longer in existence, bearing in mind that the loan facilities granted to purchase the 20 million shares were both due for repayment prior to the trial, that does not affect the matter. To uphold this claim would involve Grancy receiving and retaining benefits from the changes in investment by Ngatana, while seeking to be paid on the basis of the original investment by that company. That is not in my view permissible. Accordingly Fourie J was correct to dismiss this claim and the cross-appeal relating to it must fail.

Liability for the monetary claims

[102] Fourie J held Mr Gihwala and Mr Manala liable to pay the monetary claims jointly and severally. The cross-appeal seeks to add the Trust as liable jointly and severally with them in relation to certain of those claims.[34] By contrast the appeal challenges the finding that the liability of the contracting parties was joint and several. I will address each point in turn.

[103] I have already held that the Trust was a party to the investment agreement. As such it owed the same fiduciary duties to Grancy as did Mr

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[33] In recent times Redefine shares have traded on the JSE at a price between R9 and R11 per share giving a total value for the investment of between R180 and R220 million. It paid dividends in the last year of about 80 cents per share.

[34] The relevant claims are those relating to the repaid amount, the legal expenses, both loans to Mr Manala and the claims in respect of directors' fees and surety fees.

Gihwala and Mr Manala. It is so that the monetary claims arise from the actions and decisions of Mr Gihwala and Mr Manala. Were the Trust represented by someone other than Mr Gihwala, so that it could claim ignorance of their actions, the position might have been different. But when Mr Gihwala, in his capacity as a party to the investment agreement and as a director of SMI and Ngatana, took the decisions that gave rise to these claims, he was obliged in his capacity as trustee of the Trust not to do so. That would have been the obligation of an independent trustee and it is unaltered by the fact that Mr Gihwala was acting in two capacities. He could not discard his trustee hat when acting as a director. Accordingly I am of the view that the Trust was as much a party to the breaches of the investment agreement as were Messrs Gihwala and Manala. Grancy's damages claims arising from those breaches therefore lie against the Trust as well.

[104] We were referred to the passage in *Christie*[35] where the authors say that there is a presumption that obligations entered into jointly are joint and not joint and several and that the presumption is a strong one. But the same authors say[36] that where the contract by express words or necessary implication imposes liability *in solidum* that liability is joint and several.

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[35] RH Christie and GB Bradfield *Christie's The Law of Contract in South Africa* 6ed (2011) at 262.
[36] At 263.

The issue must be determined by having regard to the terms of the contract and the nature of the relationship thereby created among the parties to that contract.

[105] The duty of good faith that formed an integral part of the terms of this contract could in this case only be breached by the joint conduct of Messrs Gihwala and Manala (because they were the directors and acted jointly) and, through Mr Gihwala, the Trust. The obligations they undertook to Grancy were indivisible. They carried with them fiduciary duties of good faith that are characteristic of partnership, where liability is joint and several. In *Langermann v Carper*[37] Solomon J said that whether a transaction among businesspeople was described as a joint venture or a partnership 'the same consideration must apply to the dealings of the several parties among themselves as would be applied in the case of an ordinary partnership'. Grosskopf AJ cited that passage with approval in *Koornklip Beleggings*,[38] a case bearing some similarity to the present one. It involved an agreement among various parties to make an investment by way of subscription for shares in a company formed to exploit a diamond concession. Grosskopf AJ described the relationship as analogous to a partnership. The same is true here. In my view, the closer the relationship

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[37] *Langermann v Carper* 1905 TH 251 at 261.
[38] *Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (C) at 677H.

between the parties to that which one expects to exist between partners, the more likely it is that any liability will be joint and several.

[106] A helpful explanation of when liability *in solidum* arises appears in *Wessels*.[39] Liability as debtors *in solidum* exists if the debtors have promised the same thing to the creditor in such a way that the creditor can demand from each debtor performance of the entire obligation. Two essentials must be present. The first is that each debtor must be separately liable as completely as if they were the sole debtor. The second is that each debtor should be debtor of the same thing or the same amount of money, not merely a similar thing or a similar amount of money. In my view that is the case here. Grancy was entitled to demand the same thing from each of Mr Gihwala, the Trust and Mr Manala. They each had to discharge the same duty of good faith in the same way. They are each liable in this case for the same thing, namely the same breach of obligation and the same damages. In my view their liability was joint and several and Fourie J was correct in holding that.

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[39] A A Roberts (ed) *Wessels' The Law of Contract in South Africa* 2 ed (1951) Vol 1 paras 1496 to 1502.

Foss v Harbottle

[107] It is a curious feature of this case that we are asked to apply a rule, or more accurately a combination of rules, of ancient origin that has been abolished in the country of its birth.[40] The rule has two components. The first recognises that a company is a separate legal entity from its shareholders and accordingly, in the ordinary course, any loss caused to the company must be recovered by the company, and not by its shareholders on the basis of the diminution in the value of their shares or the loss of dividends they had anticipated. The second recognises the need for exceptions to this principle in order to avoid oppression and permits a shareholder to recover loss caused to the company by way of what is termed a derivative action. In certain circumstances it also permits recovery of the shareholder's own loss.

[108] A helpful summary of the rule and its different elements is to be found in the following passage from the leading case of *Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)* (*Prudential Assurance*):[41]

[40] See Part 11 of the United Kingdom Companies Act 2006, which provides a detailed structure for the bringing of derivative claims.
[41] *Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)* [1982] 1 All ER 354 (CA) at 357j - 358b. The principles enunciated in this case were approved and applied by the House of Lords in *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 (HL) (*Gore Wood*).

‘The classic definition of the rule in *Foss v Harbottle* is stated in the judgment of Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064 at 1066 - 7 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, *prima facie*, the corporation. (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, *cadit quaestio*; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is *ultra vires* the corporation, because the majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.’

[109] The parameters of the rule are apparent from this passage. It precludes shareholders from suing in their own right where the claim is one in respect of a wrong done to the company causing it to suffer loss. That is so even where the result is to diminish the value of the

shareholder's shares or deprive them of a dividend and the company has declined or failed to take steps to recover the loss. On the other hand, where there is no wrong to the company, but only one to the shareholder, there is no reason to bar the shareholder from suing. That is so even if the measure of the shareholder's loss is the diminution in value of their shareholding. Those two propositions appear clearly from the speeches of Lord Bingham of Cornhill[42] and Lord Millett[43] in *Gore Wood*.

[110] There is a third case described by Lord Bingham[44] in *Gore Wood* in the following terms:

'Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers loss separate and distinct from that suffered by the company caused by a breach of duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other.'

[111] It was unclear under which leg of the rule it was contended that Grancy's claims were precluded. Grancy's claims were undoubtedly claims arising from breaches of obligation separate and distinct from any claim that SMI may have had. They arose from obligations owed to

[42] At 503*a-f*.
[43] At 528*b-h*.
[44] At 503*f-g*.

Grancy by Mr Gihwala, the Trust and Mr Manala under the investment agreement. As such they appeared to fall in the third category referred to in para 110. It is true that in respect of all of them, save that for loss of interest on the late payment of dividends, the measure of Grancy's loss was the pecuniary loss arising from SMI's failure either to repay its loan account or distribute surplus funds to its shareholders by way of dividends. But the fact that SMI did not have the funds available for this purpose because they had been diverted elsewhere does not mean that SMI had a claim to recover those amounts. A brief examination of the different claims is called for.

[112] The claim for the repaid amount cannot, as I have held, be separated from the decision to invest in Scarlet Ibis. The funds that should have been used for the former purpose were used for the latter. That is why Fourie J said that this was a 'wilful misappropriation of Grancy's funds'. But the investment in Scarlet Ibis was an investment that SMI was entitled to make. The impropriety arose not because it exceeded the permissible limits of SMI's investment powers, but because the investment agreement imposed an obligation not to engage in such an investment without Grancy's consent and an obligation to use these funds to repay Grancy's loan. No basis was suggested for saying that SMI could recover the money invested in Scarlet Ibis from anyone. Nor could it

recover from the Trust and Mr Manala the money used to refund their initial loans to SMI. It follows that this claim is not affected by the *Foss v Harbottle* rule.

[113] Under the investment agreement SMI should not have paid legal fees on behalf of Mr Gihwala and the Trust. That does not mean that it would have a claim to recover those fees from the attorneys. If they agreed to pay the fees, as seems to have been the case, the attorneys were entitled to receive and keep them. There is nothing wrong in principle with a person paying another's debt. Nor was there evidence explaining on what basis this was done as between SMI and Mr Gihwala. Not surprisingly it was not argued on his behalf that he breached his fiduciary duties to SMI in making that arrangement. So we are in the dark in regard to the basis for any claim by SMI against anyone to recover the amount of the fees.

[114] The directors' fees and surety fees may have been irregular in that they were not approved as required by article 107 at a general meeting of shareholders. But it was not suggested that, if divorced from the investment agreement, SMI could not have decided to make these payments. They seem grossly extravagant in relation to the actual contribution of the directors – a common plaint by shareholders – but that

alone does not mean that the company would have been entitled to recover them if properly sanctioned by a general meeting. And at a general meeting Grancy would have been outvoted. Grancy's claim is not an altruistic claim to recover these amounts for the benefit of SMI. Its claim is that as a result of breaches of the investment agreement it has suffered financial loss. That is not precluded by the rule.

[115] That leaves the two loans to Mr Manala. Apart from breaching the investment agreement they were unlawful in terms of s 226 of the 1973 Act. This rendered them void *ab initio* and incapable of *ex post facto* ratification.[45] In *Prudential Assurance* it was said that the rule in *Foss v Harbottle* did not apply when the matter was *ultra vires* the company or required a special resolution in order to authorise the act in question. The reason for these exceptions, which must apply equally to conduct that is prohibited by statute, is that the minority shareholder has no means of compelling the errant majority to take steps to remedy the conduct in question, in this case to sue Mr Manala to recover the amount of the loans. Absent an exception to the rule it would be possible for the majority to perpetuate conduct that was contrary to law or the articles of the company, by the simple expedient of doing nothing. Under s 226 an

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[45] See the majority judgment in *Neugarten and Others v Standard Bank of South Africa Ltd* [1988] ZASCA 140; 1989 (1) SA 797 (A) at 808F-J.

unauthorised loan to a director could not be authorised after it had been made. So both loans fell within the exception to the rule. That conclusion renders it unnecessary to consider whether they also fell within the fraud exception referred to in that case or the interests of justice exception referred to in *Foss v Harbottle* itself and applied in *McLelland v Hulett*.[46]

[116] For those reasons it seems to me that the reliance on the rule in *Foss v Harbottle* was misplaced in relation to all of the monetary claims advanced by Grancy. They must succeed or fail in accordance with paras 75 to 101.

Section 424 liability

[117] In the particulars of claim in the 2010 action Grancy invoked s 424 of the 1973 Act as a ground of liability in relation to three claims. They were the claim in respect of the repaid amount and those in respect of promotion fees and legal expenses. In the 2011 action it sought to found liability for all the monetary claims it advanced in either s 424 or alternatively s 77(3) of the 2008 Act. Fourie J rejected all these claims, save that in relation to the repaid amount, but Grancy pursued them by way of its cross-appeal. Indeed it went further by seeking to extend the

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[46] *McLelland v Hulett and Others* 1992 (1) SA 456 (D) at 467C-I.

application of s 424 to all the monetary claims in the 2010 action, both those that had been upheld by Fourie J and those that were the subject of the cross-appeal.

[118] It was throughout unclear why Grancy should continue to pursue s 424 relief if it was successful in its contractual claims. A declaration under s 424 would add nothing to the liability of Mr Gihwala, Mr Manala and the Trust to pay the damages awarded. The proposition in the heads of argument that it would 'impose statutory and unlimited personal liability' on them does not identify on what basis this was any greater liability than a judgment ordering them to pay the damages that were claimed. But this need not detain us because I am satisfied that the claims based on s 424 must fail.

[119] In at least three relatively recent decisions of this Court it has been held that s 424 is only available to a claimant where the company is unable to pay its debts and therefore recovery of the claimant's claim is imperilled.[47] Not only did Grancy not plead a case based on SMI's inability to pay any of the claims it was advancing, but it led no evidence

[47] *L & P Plant Hire BK en andere v Bosch en andere* [2001] ZASCA 147; 2002 (2) SA 662 (SCA) paras 39-40; *Saincic and Others v Industro-Clean (Pty) Ltd An* [2006] ZASCA 83; 2009 (1) SA 538 (SCA); and *Fourie v Firstrand Bank Ltd and Another NO* [2012] ZASCA 119; 2013 (1) SA 204 (SCA) paras 28-29.

in support thereof. Instead it relied in argument on the contents of some emails sent by independent directors of SMI when seeking funds to conduct an investigation into the affairs of SMI. Even that evidence did not emerge in the course of presenting Grancy's case. It emerged when counsel for the Trust was cross-examining Mr Mawji on a completely different issue. I agree with Mr Gihwala's counsel that to permit reliance on them for the purpose of showing that SMI was unable to pay its debts would be unfair and amount to trial by ambush.

[120] We were also urged to hold that the three cases I have mentioned were wrongly decided because they overlooked the use of the words 'or otherwise' in s 424 and also because, so it was said, the judgments overlooked s 219(1)*(d)* of the 1973 Act. The circumstances in which this Court will overrule one of its own decisions, much less three, particularly when they are of recent origin, are limited. It suffices for me to say that I am not satisfied that these decisions were clearly wrong. Accordingly the cross-appeal insofar as it relates to s 424 must fail, whether that related to claims in the 2010 action or claims in the 2011 action. In relation to the latter the claim was advanced in the alternative under s 77(3) of the 2008 Act. That section, in this departing from s 424, does not involve a declaration by the court, but creates a statutory claim in favour of the company against a director, imposing liability on the latter for any loss,

damages or costs incurred by the company in certain circumstances, including where the director acquiesces in the company engaging in reckless trading. It is not a provision that can be invoked to secure payment to a creditor or shareholder in respect of their claim against the company or a director. So the attempt to rely on s 77(3) must also fail.

Right to an account and access to accounting records

[121] At the outset of his argument counsel for Mr Gihwala accepted that the investment agreement gave rise to a relationship of trust and good faith as between Grancy, Mr Gihwala and Mr Manala. This implied that Mr Gihwala and Mr Manala owed Grancy a duty to account for their stewardship of its investment in SMI and indirectly in Ngatana. It also included an obligation to provide Grancy with access to the books and accounting records of SMI. Counsel for Mr Manala and counsel for the Trust did not question the correctness of these concessions. Once it is held, as I have done, that the Trust and SMI were also parties to the investment agreement, they owed the same obligations.

[122] Details of the gross deficiencies in the books of account and records of SMI were canvassed in the evidence and are summarised in the judgment of the High Court. The accounting records were plainly in a deplorable state. Fourie J ordered SMI, Mr Gihwala and Mr Manala to

deliver to Grancy, within 30 days, proper and full books of account and such accounting records as would be necessary fairly to present the state of affairs and business of third defendant, and to explain the transactions and financial position of the business of third defendant for the period January 2005 to date of his judgment.

[123] My concern with this order is two-fold. First, the requirement that proper and full books be produced as well as explanations for the transactions and financial position of the business overlaps to a substantial degree with the existing order to render an account that has been the subject of the various orders referred to above, most recently that of Traverso DJP. The detail that she has ordered to be produced will inevitably clarify the uncertain picture that emerged at the trial. Second, and more importantly, if such books of account and records did not exist or existed only in an imperfect form and had to be reconstructed, albeit unsuccessfully, for the purposes of the trial, the order made in this case relates to books and records that did not exist. An entitlement to access to books and records is not a right to a meticulous set of books properly kept and accurately reflecting the affairs of the business. It is a right to have access to whatever books and records the business has kept. But the terms of the order granted by Fourie J would oblige SMI to create a 'full and

proper' set of books of account and accounting records and provide explanations that would be part of an accounting.

[124] It is not disputed that Grancy has been denied access to the books of account and accounting records of SMI. It is accordingly entitled to an order, but the terms of that order must be limited to the books of account and accounting records that exist. The order granted by Fourie J must be varied accordingly.

[125] Turning then to the accounting that was ordered, the scope for argument was narrowed by the concessions referred to in para 121. It was confined to two issues. First that the orders in relation to an accounting related to monetary claims disposed of by the judgment, and those orders rendered further accounting unnecessary. Second that the account ordered by Fourie J overlapped with the account ordered by the High Court in 2009. Traverso DJP dealt with the accuracy of that account and a detailed order as to the requirements for a satisfactory account has been made. A further order would necessarily cover the same ground and be oppressive to the parties required to render the account.

[126] The contents order granted by Fourie J in regard to the provision of an account was set out in prayers 6 and 7 in the 2010 action and prayers

12 and 13 in the 2011 action. Those prayers detailed in multiple sub-paragraphs the scope of the accounting being called for. On analysis, however, they covered all the matters giving rise to Grancy's monetary claims including the use to which the repaid amount was put; the payment of dividends by SMI; the payment of fees to Mr Gihwala and Mr Manala and an item described as 'any transactions pursued with funds which were unlawfully paid to Gihwala, [the Trust] and/or Manala' or unlawfully retained by them. The prayers in the 2011 action extended this to all payments made by SMI to Mr Gihwala, the Trust, Mr Manala, the Auditors and 'any third party' and 'any and all transactions pursued by them with the said amounts'. The sweep of the final prayer was breathtaking. It required an account from Mr Gihwala, the Trust, SMI and Mr Manala of:

'… any profits or losses which Gihwala, Manala and/or [the Trust] made in connection with or arising from the breaches set forth in paragraphs 24C to 43F of the plaintiffs' particulars of claim'.

How any sense was to be made of that order, much less how anyone could be expected to comply with it, escapes me. It is hopelessly vague and overbroad. I mention only one example by way of illustration. Paragraphs 40A and 40B of the particulars of claim in the 2011 action dealt with the failure of Mr Gihwala and Mr Manala to discharge their statutory obligations in regard to the preparation of annual financial statements for SMI. There was no evidence that suggested that this caused anyone to make a profit or that any account could be rendered in that regard.

[127] There is no doubt that these orders overlapped with the existing order for the rendering of an account. In addition they were formulated when the two actions commenced and do not appear to have been reconsidered by Grancy at the end of the trial, having regard to the possible implications of the monetary claims succeeding. They are couched in extremely general language so that it is impossible to ascertain with any degree of certainty what must be done to comply with them. They cover matters that are irrelevant to Grancy, such as the fate of the Scarlet Ibis investment. The evidence in that regard shows that SMI invested R2 million in that venture that should have been used to repay Grancy's loan. The development failed with the company being placed in liquidation. Grancy sued for and obtained an award of damages arising from the misuse of funds that should have accrued to it. No basis has been advanced for a further account in this regard.

[128] The order also covered matters on which Grancy was already fully informed if its representatives simply read the documents already in their possession. An area covered by the order in the 2010 action was the

conversion of Spearhead units into Redefine units. The details of this appeared from the circular to unitholders that preceded the implementation of the scheme of arrangement under which the conversion was effected.[48] The number of Spearhead units exchanged for Redefine units was set out quite clearly in Ngatana's audited annual financial statements that formed part of the record. What more Grancy needed by way of an account was unclear. It was common cause that all of these Redefine units were disposed of in 2008 and 2009. The brokers' notes in respect of those disposals were also part of the record and the core bundle prepared for the hearing of the appeal. What then was the basis for making an order that an account be rendered to Grancy concerning those disposals?

[129] It is incumbent on a party, seeking an order for an account to be rendered to it in relation to a business relationship or a particular transaction or particular transactions, to define with precision the accounting that it is seeking. It is inappropriate for it to set out a broad and general list of questions to which it would like to have answers and incorporate them in an order. That is especially the case where the order is sought at the end of lengthy litigation in which there has been extensive

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[48] The allegation in the 2010 particulars of claim that there had been a non-disclosure in regard to the terms of this transaction is extraordinary bearing in mind that Mr Narotam was aware of the transaction and the details of the scheme were contained in public documents.

discovery. The order should then be reformulated to require an account in relation to outstanding matters, not in relation to matters that have been clarified in the course of the litigation, much less matters that may be, and as it happened were, resolved by way of awards of damages. An order to produce an account is a precursor to a debatement of that account and an award of what is owing consequent upon that debatement. Where potential monetary claims have been dealt with by judgment there is no room for a further account.

[130] For those reasons the order to render an account granted in this case was inappropriate. Its deficiencies are so manifest that it is incapable of being remedied by way of a variation of its terms. I reach that conclusion reluctantly as it is apparent that Mr Gihwala and Mr Manala have adopted every possible stratagem to avoid discharging their fiduciary obligation to account properly to Grancy for its investment in SMI. But that did not justify the grant of an award that was vague, overbroad, dealt with matters already disposed of by judgment and overlapped an existing order that was in the course of being enforced by the Western Cape Division of the High Court. The appeal against these orders must succeed. It follows that the further order relating to the appointment of independent directors is unnecessary and must also fall away.

Delinquency declarations

[131] Mr Gihwala and Mr Manala were both declared delinquent directors in terms of s 162(5)*(c)* of the Act, which reads:

'A court must make an order declaring a person to be a delinquent director if the person—

…

(c) while a director—

(i) grossly abused the position of director;

(ii) took personal advantage of information or an opportunity, contrary to section 76 (2) *(a)*;

(iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76 (2) *(a)*;

(iv) acted in a manner—

(aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or

(bb) contemplated in section 77 (3) *(a)*, *(b)* or *(c)* … '

[132] Mr Gihwala challenged the delinquency order made against him, contending that it was based on an incorrect appreciation of the evidence, without specifying in what respects Fourie J erred. This argument was without merit and counsel did not deal with it in oral argument. For my part I agree with and endorse Fourie J's findings in regard to the conduct

of Mr Gihwala and Mr Manala and this judgment should not be read as in any way detracting from those findings.

[133] In what follows I propose to refer to Mr Gihwala as the main actor because that appears to have been the situation in fact. That does not excuse Mr Manala from responsibility for the misconduct that will be catalogued. He owed the same fiduciary duty to SMI and to Grancy and was aware of what was being done in his name. He was also a director of Ngatana and party to those matters concerning Ngatana. He was equally responsible for what happened and must bear the same consequences.

[134] The directors of SMI were under an obligation in the performance of their duties to ensure that the share register of the company properly reflected the persons who were entitled to be registered as shareholders. For four years from 2005 to 2009 they breached that duty by refusing to register Grancy as a shareholder and resisting its attempts to secure that. They failed to ensure that SMI kept proper accounting records as required in terms of the 1973 Act and the 2008 Act. That failure was compounded because it led directly to their failure to cause annual financial statements to be prepared fairly reflecting the financial position of the company. On the pretext that Grancy was not a shareholder in the company they refused to provide even the statutory information to which Grancy was

entitled. After it was registered as a shareholder they produced hopelessly inaccurate and incomplete annual financial statements and represented them as fairly reflecting the financial position of the company.

[135] One of the more egregious defects in SMI's accounting records involved the loan made by Grancy to the company as its contribution towards the cost of acquiring the 58 per cent interest in Ngatana. This was reflected in the company's ledger account as a loan made by Mr Manala. That can only have occurred as a result of information given by Mr Gihwala. It was, to his knowledge, false as the money was being lent by Grancy pursuant to the investment agreement. The credit thereby created in Mr Manala's loan account, in conjunction with other improper credits to which I will revert, was then used to enable Mr Manala to be paid over R9 million by SMI, to none of which was he entitled. Part of this sum included the two loans totalling slightly less than R4 million made in June 2009. The one was given on the pretext that Grancy's loan was to him personally and that he had on-lent that amount to SMI and could withdraw his loan to repay Grancy. Had there been any bona fides about that version of matters one would have expected him to repay the money as soon as Grancy refused his tender. But he did not do so. He used some of it to pay his legal fees and the bulk of it he caused to be paid to himself. He has never explained what happened to that money.

[136] The two loans contravened the provisions of s 226 of the 1973 Act. They caused loss to SMI because it has not been able to recover them from Mr Manala. At best that loss was undoubtedly due to gross negligence on the part of both Mr Gihwala and Mr Manala. As I mentioned in the opening paragraph of this judgment Mr Gihwala is a businessman and attorney. He was at the material time the chairman of one of South Africa's largest firms of attorneys and the chairman of Redefine, one of the largest property loan stock companies listed on the JSE. His failure to observe the requirements of s 226 was inexcusable.

[137] Earlier in this judgment the many respects in which the investment agreement was breached to the detriment of Grancy and the personal advantage of Messrs Gihwala and Manala have been summarised. All of those constituted breaches of fiduciary duty on their part as directors of SMI, which was a party to the investment agreement and bound by it. The directors of SMI owed a fiduciary duty to SMI to ensure that it complied with its obligations under that agreement. They consistently breached that duty. Furthermore they involved SMI in litigation when Grancy sought to enforce its rights. That resulted, when they were forced to capitulate shortly before the hearing, in an adverse order for costs, leaving aside SMI's obligation to pay its own legal costs.

[138] This conduct falls squarely within s 162(5)*(c)* of the 2008 Act. It involved gross abuses of the position of a director. Grancy was excluded from the benefits of an investment, which it had substantially financed, while Mr Gihwala and Mr Manala took those benefits for themselves. In four instances they sought their own personal enrichment:

- The use of the repaid amount to repay themselves and to invest in Scarlet Ibis in an attempt to secure a 50 per cent profit in 24 months.
- The payment to themselves of the full amount of the first dividend received from Ngatana in an amount in excess of R5 million.
- The taking of director's fees of R750 000 each from Ngatana to the detriment of SMI.
- The taking of director's fees of R2.75 million from SMI together with surety fees in excess of R1 million.

To that I would add the loans to Mr Manala.

[139] These actions caused harm to SMI. It was in my view wilful misconduct on the part of Mr Gihwala and Mr Manala because it was entirely intentional and with knowledge of the obligations owed to Grancy under the investment agreement. But at the very least it was gross negligence akin to recklessness. It involved a breach of trust in relation to

their performance of their duties as directors. It was entirely inexcusable and ongoing as evidenced by their endeavours to avoid complying with their obligation to provide a proper accounting to Grancy in regard to its investment. A declaration of delinquency was entirely justified.

[140] Realising that this was the case the argument on this issue centred on the challenge to the constitutionality of s 162(5). This had two legs. The first was that the entire section was unconstitutional because it was alleged to be retrospective in its operation. The argument was based upon the fact that the events relied upon to justify the order occurred before the commencement of the Act on 1 May 2011. By then Mr Gihwala had resigned as a director of SMI[49] and Mr Manala did so soon afterwards.[50] The second argument, while expressed in general terms, effectively attacked s 162(5)*(c)*, as read with s 162(6)*(b)*(ii), alone. It focused on the fact that there was no discretion vested in the court either to refuse to make a delinquency order if the requirements of s 162(5)*(c)* were satisfied, or to moderate the period of such order to a period of less than seven years. No argument was addressed to the consequences of the absence of discretion in relation to the other sub-sections of s 162(5).

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[49] He resigned on 28 February 2011.
[50] He resigned on 18 September 2011.

Whether they may be subject to constitutional attack is a matter that must await another day.

[141] The first of these arguments fell away when counsel's attention was drawn to the established principle of our law that a statute is not retrospective merely 'because a part of the requisites for its action is drawn from time antecedent to its passing'.[51] The argument was then confined to the proposition that the absence of flexibility in regard to the imposition of delinquency had the potential to infringe the constitutional rights to dignity,[52] the right to choose a trade occupation or profession[53] and the right of access to courts.[54] In argument the focus fell on the right to dignity.

[142] In order to assess these arguments it is appropriate first to examine the purpose of s 162(5). Contrary to the submissions on behalf of Mr Gihwala and Mr Manala it is not a penal provision. Its purpose is to protect the investing public, whether sophisticated or unsophisticated, against the type of conduct that leads to an order of delinquency, and to protect those who deal with companies against the misconduct of

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[51] *R v St Mary, Whitechapel (Inhabitants)* 116 ER 811 ((1848) 12 QB 120) at 814; *Krok and Another Commissioner, South African Revenue Service* [2015] ZASCA 107; 2015 (6) SA 317 (SCA) para 40. This is all that item 7(7) in Schedule 5 to the 2008 Act provides.
[52] Section 10 of the Constitution.
[53] Section 22 of the Constitution.
[54] Section 34 of the Constitution.

delinquent directors.[55] What is that conduct? It is helpful to examine some of the other provisions of the section. Under subsec 5*(a)* consenting to serve as a director, or acting in that capacity or in a prescribed office, while ineligible or disqualified from doing so attracts delinquency. Under subsec 5*(b)* acting as a director while under a probation order in terms of s 162, or the corresponding provision dealing with close corporations, results in delinquency as both orders are directed at preventing that very conduct.

[143] Turning to subsec 5*(c)* one starts with a person who grossly abuses the position of director, conduct of which I have found Mr Gihwala and Mr Manala guilty. We are not talking about a trivial misdemeanour or an unfortunate fall from grace. Only gross abuses of the position of director qualify. Next is taking personal advantage of information or opportunity available because of the person's position as a director. This hits two types of conduct. The first, in one of its common forms, is insider trading, whereby a director makes use of information, known only because of their position as a director, for personal advantage or the advantage of others. The second is where a director appropriates a business opportunity that should have accrued to the company. Our law has deprecated that for

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[55] *Re Gold Coast Holdings Pty Ltd (In Liq); Australian Securities & Investments Commission v Papotto* [2000] WASC 201 para 22

over a century.[56] The third case is where the director has intentionally or by gross negligence inflicted harm upon the company or its subsidiary.[57] The fourth is where the director has been guilty of gross negligence, wilful misconduct or breach of trust in relation to the performance of the functions of director or acted in breach of s 77(3)*(a)* to *(c)*. That section makes a director liable for loss or damage sustained by the company in consequence of the director having:

'*(a)* acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;

(b) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22 (1);

(c) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose …'

[144] All of these involve serious misconduct on the part of a director. In the affidavits raising the constitutional issue there was a complaint that

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[56] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168; *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2003] ZASCA 137; 2004 (3) SA 465 (SCA).

[57] The section qualifies this by reference to s 76(2)*(a)* of the Act but that section does not limit its scope. It reads:

'(2) A director of a company must—

(a) not use the position of director, or any information obtained while acting in the capacity of a director—

(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or

(ii) to knowingly cause harm to the company or a subsidiary of the company …'

gross negligence could trigger a delinquency order. There is no merit in this complaint. There is a long history of courts treating gross negligence as the equivalent of recklessness, when dealing with the conduct of those responsible for the administration of companies,[58] and recklessness is plainly serious misconduct. It was urged upon us that there might be circumstances of extenuation, or perhaps that, notwithstanding the seriousness of the conduct, the company might not have suffered any loss. But neither of those is relevant to the protective purpose of the section. Its aim is to ensure that those who invest in companies, big or small, are protected against directors who engage in serious misconduct of the type described in these sections. That is conduct that breaches the bond of trust that shareholders have in the people they appoint to the board of directors. Directors who show themselves unworthy of that trust are declared delinquent and excluded from the office of director. It protects those who deal with companies by seeking to ensure that the management of those companies is in fit hands. And it is required in the public interest that those who enjoy the benefits of incorporation and limited liability should not abuse their position. The exclusion is for a

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[58] *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* [1997] ZASCA 92; 1998 (2) SA 138 (SCA) at 143C-144A; *Ebrahim and Another Airport Cold Storage (Pty) Ltd* [2008] ZASCA 113; 2008 (6) SA 585 (SCA) para 13; *Tsung v Industrial Development Corporation of South Africa* [2013] ZASCA 26; 2013 (3) SA 468 (SCA) paras 29 to 31..

minimum period of seven years,[59] but the court has the power to relax that after three years and instead place the person under probation in terms of the section.[60] So there is power to relax the full effect of a declaration of delinquency once the delinquent has demonstrated that this is appropriate. In addition the court may restrict the operation of the declaration of delinquency to one or more particular categories of company. A director declared delinquent in relation to a financial services company may be permitted to be a director of an engineering firm.

[145] It is noteworthy that the section was not attacked on the ground that it was irrational. It is a requirement of our Constitution that all legislation must serve a rational purpose.[61] There must be a rational connection between the purpose of the legislation and the provision under consideration. Section 162 passes that test. Patently it is an appropriate and proportionate response by the legislature to the problem of delinquent directors and the harm they may cause to the public who place their trust in them. We were referred to legislation in other countries where their legislatures have seen fit to vest their courts with a wider discretion in this regard. But I fail to see why that should render the response of our

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[59] Section 162(6)*(b)*(ii) of the Act.
[60] Section 162(11)*(a)*.
[61] *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC) para 24.

legislature constitutionally problematic. Rationality is the touchstone of legislative validity and s 162(5)*(c)*, read with s 162(6)*(b)*(ii), is rational.

[146] Section 22 of the Constitution provides:

'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

The background to the section was explained by the Constitutional Court in *Affordable Medicines Trust*.[62] In para 60 Ngcobo J said:

'Limitations on the right to freely choose a profession are not to be lightly tolerated. But we live in a modern and industrial world of human interdependence and mutual responsibility. Indeed we are caught in an inescapable network of mutuality. Provided it is in the public interest and not arbitrary or capricious, regulation of vocational activity for the protection both of the persons involved in it and of the community at large affected by it is to be both expected and welcomed.'

Even if it is assumed in favour of Mr Gihwala and Mr Manala that being a director of companies is an occupation, trade or profession, a proposition the correctness of which is by no means obvious, they did not suggest that s 162(5) is either capricious or arbitrary. On that ground alone the constitutional challenge under this head must fail.

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[62] *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC) paras 57-60.

[147] The challenge under s 34 was misconceived. The court is involved at every stage of an enquiry under s 162(5). It is the court that makes the findings on which a delinquency order rests. It is the court that decides whether the period of delinquency should be greater than seven years or should be limited to particular categories of company and whether conditions should be attached to a delinquency order and, if so, their terms. It is to the court that a delinquent director turns if they believe that the period of delinquency should be converted into one of probation. The fact that a delinquency order of a specific duration follows upon the factual finding by a court that the director is delinquent is no different from any other provision that provides for a statutory consequence to follow upon a finding in judicial proceedings. It is apparent therefore that before a declaration of delinquency is made the errant director has an entirely fair hearing before a court. It is not the absence of a fair hearing that is in issue but the consequences of an adverse decision. That consequence cannot be challenged under s 34 on the basis that the delinquent director has been deprived of a right of access to court. It can only be challenged on the basis that it is an irrational legislative response to the particular problem, in this case that of directors' delinquency. It stands on the same footing as any statutory provision that disqualifies a person from pursuing a trade, occupation or profession in consequence of their disability or misconduct. Countless examples of such

disqualifications such as minority, insanity, insolvency, criminal conduct, other misconduct or absence of qualification are to be found in legislation.[63]

[148] That leaves the challenge based on the right to dignity. Central though that is in our constitutional dispensation,[64] it is difficult to see on what basis it is engaged in this case. I stress that unlike *Makwanyane* and *Dodo*[65] this case is not concerned with a sentence in criminal proceedings or a sanction for misconduct. *Makwanyane* engaged the right to life in s 12 of the Constitution and *Dodo* the doctrine of the separation of powers, the right to be free from cruel, unusual or degrading punishment and the rights conferred on a criminal accused under s 35 of the Constitution. None of those are relevant in this case. It does not involve questions of the individualisation of punishment, but the appropriateness of the protective measures the legislature has prescribed to deal with delinquent directors.

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[63] The constitutionality of citizenship as a requirement for registration as a security guard was upheld in *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* [2006] ZACC 23; 2007 (4) SA 395 (CC).

[64] See eg *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC) para 144; *Bhe and Others v Magistrate, Khayelitsha and Others (Commission For Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* [2004] ZACC 17; 2005 (1) SA 580 (CC).

[65] *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC).

[149] It must be borne in mind that a delinquency order can only be made in consequence of serious misconduct on the part of a director. It is that conduct that results in delinquency. In the same way if an attorney is guilty of serious misconduct they will lose their right to practice as an attorney. I find the suggestion surprising that the grant of a striking off order or an order suspending an attorney from practice infringes their right to dignity. That ignores the fact that the commission of the misconduct is what leads to that result. And it is the director or the attorney who is guilty of that misconduct. The court investigates the conduct and if it is established by evidence the striking off or suspension or delinquency order is the necessary consequence.

[150] At the end of the day the argument under this head was reduced to saying that the terms of the statute do not permit the court to take into account the individual director's circumstances and degree of blameworthiness. But that is merely an attack on the legislative decision that a delinquency order in particular terms must follow from conduct of the type specified. Such an attack can only be pursued by attacking the rationality of that legislative decision, and that case was not made. It follows that Fourie J correctly rejected the attacks on the constitutionality of s 162 as a whole and that on s 162(5)*(c)*, read with s 162(6)*(b)*(ii), separately. The appeal against the delinquency orders must fail.

The cross-appeal

[151] The Trust was a party to the investment agreement and Mr Gihwala was its *alter ego*. Grancy was a co-investor with the Trust in SMI. In those circumstances the Trust was bound in the same way and by the same duties as were Mr Gihwala and Mr Manala in their personal capacities. In those circumstances Grancy sought an order that the Trust be jointly and severally liable with Mr Gihwala and Mr Manala for certain of its monetary claims. The relevant claims were those in respect of the repaid amount, the legal expenses, the loans to Mr Manala and the claims in respect of directors' fees and surety fees. In my view this part of the cross-appeal must succeed. So must the cross-appeal against the dismissal of the claim against Mr Gihwala and Mr Manala in relation to the Ngatana directors' fees.

[152] The cross-appeal in respect of alleged liability under s 424 of the 1973 Act and s 77 of the 2008 Act must be dismissed. In addition there was a cross-appeal against the trial court's refusal to grant a declaratory order that the investment agreement constituted a partnership and an order appointing a liquidator to the alleged partnership. That too must be dismissed, as must the cross-appeal in regard to the share of residue claim. There was initially a cross-appeal against its refusal to make

declaratory orders spelling out details of specific breaches, but wisely that was not pursued.

Costs

[153] Mr Gihwala and Mr Manala have enjoyed some success in their appeal in that their appeals in relation to the Scarlet Ibis claim and the claim for promotional expenses must succeed in full and the amount of the award in regard to legal expenses must be reduced. In addition the appeal in relation to the order to render an account has succeeded, although that is something of a Pyrrhic victory given the proceedings in regard to an account at present underway in Cape Town. They have also successfully resisted some of the relief claimed in the cross-appeal. The Trust has succeeded in having the order to render an account set aside but on grounds other than those it advanced. Its primary contention that it was not a party to the investment agreement failed. As a result it is now to be held liable in respect of the bulk of Grancy's monetary claims.

[154] From a monetary perspective the successful appeals in relation to the Scarlet Ibis claim, the promotional fees claim and the partial success of the legal expenses claim are largely offset by Grancy's successful cross-appeal in relation to the Ngatana directors' fees and in holding the

Trust liable for the bulk of the monetary claims. The setting aside of the order to account is not a major triumph for the appellants.

[155] The major arguments on behalf of the appellants related to the nature of the investment agreement and the obligations arising thereunder; the application of the rule in *Foss v Harbottle*; and the delinquency orders. On all those issues the appellants have been unsuccessful. In my view they must pay the costs of the appeal and Grancy is entitled to the costs of the cross-appeal. In both instances those costs must include the costs of two counsel. Grancy sought an order that its costs be paid on an attorney and client scale, but the arguments advanced in the appeal were not without merit and enjoyed some success. It cannot be said that there was any impropriety in seeking to challenge the findings of the trial court. Costs must be on the ordinary scale. In regard to the costs occasioned by the constitutional challenge the parties were agreed that the ordinary rule applies that no adverse costs order should be made in that regard.

The order

[156] The order that I make is as follows:

1 The appeal succeeds to the following extent:

(a) Paragraphs 1(b) and (e) of the first paragraph 1, and paragraphs 3 and 5 of the order in the High Court are set aside;

(b) The amount in paragraph 1(c) is reduced to R41 763.20;

(c) Paragraph 2 of the order in the High Court is varied to read as follows:

‘The First, Second and Third Defendants are to make available to the First Plaintiff for inspection and, if desired, the making of copies of all books of account and accounting records, including all supporting vouchers and documents, in their possession relating to the transactions undertaken by and the financial position of the business of the Third Defendant.’

2 The cross-appeal succeeds to the following extent:

(a) Paragraph 1(g) is inserted into the order of the High Court reading as follows:

‘The amount of R465 000 plus interest calculated at 15.5 per cent from 3 March 2009 to date of payment.’

(b) The Dines Gihwala Family Trust is declared to be jointly and severally liable, the one paying the others to be absolved, with the first and second defendants, for payment of the amounts referred to in paragraphs 1(a), (b), (c) and (f) and 2(a) to (c) of the order of the High Court.

3 The order of the High Court is accordingly amended to read as follows:

‘**IT IS ORDERED THAT:**

1. First and Second Defendants are declared liable, jointly and severally with each other and, in the case of paragraphs (a), (b), (c) and (f), jointly and severally with the Dines Gihwala Family Trust, to pay the following to First Plaintiff:

(a) The amount of R2 051 833,34, together with interest thereon at the rate of 15,5% per annum, calculated from 20 March 2007 to date of final payment.

(b) The amount of R41 763,20 together with interest thereon at the rate of 15,5% per annum, calculated from 28 February 2009 to date of final payment.

(c) The amount of R620 000,00 together with interest thereon at the rate of 15,5% per annum, calculated from 15 June 2009 to date of final payment.

(d) The amount of R213 789,57, together with interest thereon at the rate of 15,5% per annum, calculated from 19 August 2009 to date of final payment.

(e) The amount of R326 740,00, together with interest thereon at the rate of 15,5% per annum, calculated from 19 August 2009 to date of final payment.

(f) The amount of R165, 660,60, together with interest thereon at the rate of 15,5% per annum, calculated from 6 January 2010 to date of final payment.

(g) The amount of R465 000 plus interest calculated at 15.5 per cent from 3 March 2009 to date of final payment.

2. That the First and Second Defendants and the Dines Gihwala Family Trust are declared liable, jointly and severally, to pay the following to First Plaintiff:

(a) The amount of R852 500,00, together with interest at the rate of 15,5% per annum on the amount of R1 705 000,00 calculated from 8 April 2009 to 23 November 2010 and on the amount of R852 500,00, calculated from 23 November 2010 to date of final payment.

(b) The amount of R345 507,09, together with interest at the rate of 15,5% per annum on the amount of R691 014,18, calculated from 1 March 2008 to 23 November 2010, and on the amount of R345 507,09, calculated from 23 November 2010 to date of final payment.

(c) The amount of R612 722,24, together with interest thereon, at the rate of 15,5% per annum, calculated from 24 June 2009 to date of final payment.

3. The First, Second and Third Defendants are to make available to the First Plaintiff for inspection and, if desired, the making of copies of all books of account and accounting records, including all supporting vouchers and documents, in their possession relating to the transactions undertaken by and the financial position of the business of the Third Defendant.

4. The First and Second Defendants are declared delinquent directors as contemplated in section 162(5)*(c)* of the Companies Act 71 of 2008.

5. No order as to costs is made in respect of the constitutional challenge.

6. The First Plaintiff is declared liable for the costs of the application for amendment, which were reserved on 6 February 2014, including the costs incurred by Second Defendant in opposing same.

7. Save for paragraphs 6 and 7 above, the First and Second Defendants and the Dines Gihwala Family Trust, represented by the Fourth to Eighth Defendants, are declared liable, jointly and severally, for the payment of First Plaintiff's costs of suit on the scale as between attorney and client, which costs are to include the following:

(a) The costs of two counsel, where employed;

(b) The attendance fees and qualifying expenses of the expert witness, Mr H J Greenbaum;

(c) The reasonable costs and disbursements, as followed on taxation incurred by First Plaintiff in respect of Mr KI Mawji, who is declared a necessary witness.’

4 The amended paragraph 3 of the order of the High Court is to be complied with within 30 days of the date of this judgment and the obligation to comply therewith will not be suspended or postponed pending the outcome of any further application for leave to appeal in this or any other case.

5 The appeal is otherwise dismissed with costs, such costs to include those consequent upon the employment of two counsel, but to exclude all costs occasioned by the challenge to the constitutionality of section 162(5) of the Companies Act 71 of 2008, in respect of which each party will pay its or their own costs.

6 The first and second appellants and the Dines Gihwala Family Trust are to pay the costs of the cross-appeal, such costs to include those consequent upon the employment of two counsel.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For first appellant: L A Rose-Innes SC (with him G G M Quixley)

Instructed by:

Adriaans Attorneys, Cape Town

Honey Attorneys, Bloemfontein.

For second appellant: J Blou SC (heads of argument prepared by J Blou SC and I Goodman)

Instructed by:

Edward Nathan Sonnenbergs Inc, Sandton

Webbers, Bloemfontein.

For third to seventh appellants (the Trust): S C Kirk-Cohen SC

Instructed by:

Adriaans Attorneys, Cape Town

Honey Attorneys, Bloemfontein

For first and second respondents: P B Hodes SC (with him J P V McNally SC)

Instructed by:

Webber Wentzel Attorneys, Johannesburg

Symington & De Kok, Bloemfontein.

For third respondent: H J de Waal (with him S Mahomed)

Instructed by:

The State Attorney, Cape Town and Bloemfontein