THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 665/12
Reportable

In the matter between:

GRANCY PROPERTY LIMITED	**APPELLANT**
and	
LANCELOT LENONO MANALA	**FIRST RESPONDENT**
SEENA MARENA INVESTMENTS (PTY) LTD	**SECOND RESPONDENT**
DINES CHANDRA MANILAL GIHWALA NO	**THIRD RESPONDENT**
SHANTI GIHWALA NO	**FOURTH RESPONDENT**
KANTIELAL JERAM PATEL NO	**FIFTH RESPONDENT**
NARENDRA GIHWALA NO	**SIXTH RESPONDENT**
KIRAN GIHWALA NO	**SEVENTH RESPONDENT**

Neutral citation: *Grancy Property Limited v Manala* (665/12) [2013] ZASCA 57 (10 May 2013).

Coram: **Mthiyane DP, Nugent, Lewis, Tshiqi and Petse JJA**

Heard: **18 March 2013**

Delivered: **10 May 2013**

Summary: **Company law – Section 163 of the Companies Act 71 of 2008 – exercise of court's discretion to grant relief from oppressive or prejudicial or abusive conduct – court enjoying wide latitude in the exercise of its discretion under s 163.**

ORDER

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

1 The appeal is upheld with costs including the costs of two counsel.

2 The order of the court below is set aside and in its stead is substituted the following:

'1 It is ordered in terms of s 163(2)(f)(i) of the Companies Act 71 of 2008 that:

1.1 Mr B J Manca SC, a senior advocate practising at the Cape Bar, and Mr Louis Strydom, a senior Chartered Accountant (SA) of Pricewaterhouse Coopers Inc, are appointed independent directors of Seena Marena Investments (Pty) Ltd.

2 The independent directors appointed in terms of paragraph 1.1 of this order shall have the sole right, in their absolute discretion, to the exclusion of any other directors nominated by the shareholders of Seena Marena Investments (Pty) Ltd, to determine whether an investigation into the affairs of Seena Marena Investments (Pty) Ltd, in the light of the complaints made on behalf of Grancy Property Limited, is necessary and if so to conduct such an investigation.

3 The said independent directors may not be removed as directors save by a unanimous vote of the shareholders of Seena Marena Investments (Pty) Ltd or an order of the high court, having jurisdiction.

4 The independent directors shall constitute the Board of Directors of Seena Marena Investments (Pty) Ltd together with such directors as each of the shareholders may appoint to the Board save that each shareholder shall be entitled to appoint only one director.

5 The directors are to receive such reasonable remuneration as determined by the Head of the Legal Department at Deloitte & Touche at Woodlands Drive, Woodmead, South Africa.

6 This order shall operate pending the finalisation of the action proceedings pending in the Western Cape High Court under case no 12193/11 in the matter between *Grancy Property Limited & another v Dines Chandra Manilal Gihwala & others* unless the Western Cape High Court determines otherwise.

7 The first and third to seventh respondents are ordered to pay the costs of this application jointly and severally, the one paying the others to be absolved, including the costs of two counsel.'

JUDGMENT

PETSE JA (Mthiyane DP, Nugent, Lewis, Tshiqi JJA concurring):

[1] This appeal is concerned with one of several legal wrangles which have occurred during what appears to be the somewhat tortuous journey of the litigation involving the same parties in the court below. It emanates from one of a number of interlocutory applications in interrelated proceedings instituted in the court below. The pending main action, to which the application now on appeal in this court is said to be incidental, was instituted by the appellant, Grancy Property Limited (Grancy), as the first plaintiff, against the respondents on 17 June 2011 in which wide-ranging relief is claimed.

[2] The principal issue on appeal is whether Grancy had made out a case ─ on the facts presented by it in the court below against the respondents ─ entitling it to relief under s 163(2)(f)(i) of the Companies Act 71 of 2008. More particularly the appellant made multiple allegations of malfeasance and moral turpitude against the first respondent, Lancelot Lenono Manala and the third respondent, Dines Chandra Manilal Gihwala in their capacities as directors of Seena Marena Investments (Pty) Ltd (SMI).

[3] It is necessary to set out a brief narrative of certain facts and circumstances giving rise to the litigation, which bear on the questions to be decided in this appeal, as they emerge from the record.

[4] On 28 September 2011 Grancy brought an urgent interlocutory application under rules 6(11) and (12) of the Uniform Rules of Court in the Western Cape High Court seeking an order for, inter alia, the appointment of what it described as 'objective and independent' directors for SMI. The one director was to be appointed by the Chairperson of the Cape Bar Council from the ranks of senior advocates practising in the field of corporate law. The other director, a senior Chartered Accountant and registered Auditor, was to be appointed by the Chief Executive Officer of the Independent Regulatory Board for Auditors.

[5] The relief sought – which was characterised as interim[1] in nature – was intended to operate until either confirmed or discharged at the trial of the action proceedings instituted by Grancy against the respondents which are pending in the court below. We were informed at the hearing of this appeal that the trial is imminent.

[6] In its application, Grancy essentially sought an order compelling Manala and Gihwala who are majority shareholders in SMI to undertake certain defined acts to appoint two independent directors who would constitute the Board of Directors of SMI. Once appointed these directors would, over and above their routine responsibilities, also investigate the affairs of SMI from 2005 (which is when Grancy became a minority shareholder of SMI) to date. Grancy predicated its case upon allegations of misconduct against Manala and Gihwala which, inter alia, entailed alleged breaches of fiduciary obligations, misappropriation and misuse of assets, misrepresentations, fraud, unauthorised use of company funds and denying Grancy its entitlements as a shareholder of SMI.

[1] Considerable time and effort was devoted to this aspect in counsel's heads of argument but given what lies at the heart of the dispute between the parties, as will emerge from the judgment, it is not germane.

[7] Both Manala and Gihwala were appointed directors of SMI in June 2003 until they resigned from their directorships on 28 February 2011 and 18 September 2011 respectively. SMI was incorporated as a special purpose vehicle with the sole purpose of channelling investment in Spearhead Property Holdings Ltd (Spearhead) to be made by Manala, Gihwala, Dines Gihwala Family Trust (DGFT), Montague Goldsmith AG in liquidation (MG) and Grancy. The proceeds derived from investments made in Spearhead for the benefit of SMI's shareholders would be paid as dividends to SMI's shareholders in proportion to their respective contributions to the acquisition costs once any profits on the investment were realised by SMI.

[8] In its main founding affidavit (deposed to by Karim Issa Mawji) Grancy elaborated on its allegations of unfair and prejudicial conduct on the part of Manala and Gihwala against it as follows:

'31. In January 2010, Grancy and MG instituted the 2010 action proceedings against, *inter alios*, Manala, Gihwala and SMI to recover various amounts that are owing to Grancy and MG under the Agreement.

. . .

32. In the 2010 action proceedings, Grancy and MG set forth, *inter alia*, the following conduct by Manala, Gihwala, the DGFT and SMI (acting on the directions of Manala and Gihwala):

32.1 breaches of numerous contractual and/or fiduciary obligations contained in the Agreement and imposed by law;

32.2 unlawful preference by Manala and Gihwala of the DGFT and Manala as creditors above Grancy;

32.3 misappropriation, by Gihwala and Manala, of funds from Ngatana which were destined to SMI and its shareholders, including Grancy;

32.4 acting in bad faith and with the fraudulent intention to deceive and prejudice Grancy and MG; and

32.5 carrying on the business of SMI, for the purposes of s 424(1) of the Companies Act, 1973 ("the 1973 Companies Act"), with the intent to defraud creditors, *alternatively* recklessly.

. . .

36. In October 2010, Manala and Gihwala, in their capacities as directors of SMI, circulated a "draft" copy of SMI's annual financial statements for the year ended 28 February 2010; further "*draft[s]*" of these financial statements were circulated in January and February 2011 (collectively, "the 2010 financial statements").

. . .

37. All three versions of the 2010 financial statements reveal numerous, serious ethical breaches, and civil and criminal wrongs having been committed by Manala, Gihwala, the DGFT and SMI (acting on the directions of Manala and Gihwala), including theft, fraud and multiple statutory and fiduciary breaches.

38. These breaches and wrongs include the:

38.1 unauthorised and unlawful payment of directors' remuneration to Manala and Gihwala in the amount of R5, 500, 000.00 for the 2010 financial year ("the Directors' remuneration");

38.2 unauthorised and unlawful payment of fees in the amount of R1, 114, 539.00 to Manala and Gihwala, purportedly for "*providing suretyship[s]*" on behalf of SMI ("the Suretyship fees");

38.3 unauthorised and unlawful payment of an amount of R2, 898, 145.00 to Manala;

38.4 unauthorised and unlawful payment of an amount of R101, 529.00 to Mr Hyman Bruk and Bruk Munkes & Co ("the Auditors"), as "*Auditors' remuneration*";

. . .

41. In effect, Gihwala and Manala have transferred funds out of SMI to themselves when these funds should have been transferred, by way of dividends, to the three shareholders. The party who has been excluded and thus . . . unfairly disregarded is Grancy. Manala and Gihwala . . . have consistently preferred themselves and DGFT above the interests of Grancy as a minority shareholder.'

[9] Following the resignation of Manala and Gihwala as directors of SMI the latter was left without directors. This state of affairs prompted Grancy to invite Manala and the DGFT, as shareholders in SMI, to consent to a mechanism in terms of which the appointment of two independent directors to the board of SMI could be made. This invitation elicited no response from Manala and Gihwala

representing the DGFT. This in turn precipitated the application mentioned above in the court below which is now on appeal in this court.

[10] The court below (Henney J) dismissed the application with costs. It subsequently granted leave to appeal to this court. In dismissing the application the learned judge essentially approached the matter along the following lines. First, he found that Grancy had not made out a case for the relief it sought. In this regard he reasoned that: (a) it was not enough for Grancy to base its case 'squarely' on the same allegations which are the foundation for its claims in the action proceedings; (b) that serious doubt was cast upon the case of Grancy since Manala, Gihwala and the Dines Gihwala Family Trust had satisfactorily refuted the allegations of impropriety made against them; and (c) that Manala and Gihwala had relinquished their directorships; offered Grancy the right to institute an independent forensic investigation into the affairs of SMI at its cost; Gihwala had repaid the disputed director's remuneration whilst Manala asserted that he was entitled to the remuneration paid to him; the fact that Manala and Gihwala had offered Grancy a right to appoint two directors notwithstanding that clause 107 of SMI's articles of association accords Grancy a right to nominate one director only.

[11] Second, the high court found that Grancy contented itself with presenting evidence of past infringements only and thus failed to establish a well-grounded apprehension of irreparable harm. Third, it found that in any event Grancy had another satisfactory alternative remedy available to it, namely its right to nominate someone for appointment as a director of SMI. I shall return to these grounds later in this judgment.

[12] It is apposite at this stage to mention that Grancy's application in the court below was resisted on a number of grounds. First, it was contended that the relief sought by Grancy was not of an interim nature but was final in effect. It was thus contended that Grancy was required to satisfy the test for final relief on motion

which it had failed to do. Second, that Grancy had, contrary to the prescripts of s 163(2)(f)(i) of the Act, sought that the court below delegate its powers to appoint directors to third parties and also to impose obligations on such directors. Third, that Grancy had satisfactory alternative remedies at its disposal that it could have pursued before approaching the court below for relief. Fourth, that the denials on the papers by Manala and Gihwala of the allegations of impropriety imputed to them by Grancy created a genuine dispute of fact that rendered the matter incapable of resolution on the papers. Fifth, that the application was in any event not urgent.

[13] The foregoing grounds were persisted in on appeal in this court. For reasons that will become apparent later in this judgment it is, in my view, unnecessary to traverse all the grounds advanced by Manala and Gihwala in resisting the grant of the relief sought by Grancy nor all of the findings of the court below.

[14] As I have mentioned, the final fate of the relief sought by Grancy in the court below, if granted, will be determined at the trial of the action instituted by Grancy against, inter alios, Manala, DGFT and Gihwala. In that pending action, allegations of malfeasance are made which are denied. More particularly it is alleged that: (a) the 2010 financial statements of SMI reveal ethical breaches and various wrongs perpetrated by Manala and Gihwala as directors of SMI. These wrongs entail alleged unauthorised and unlawful payments of directors' remuneration, suretyship fees, a payment of R2 898 145 to Manala and payment of R101 529 to SMI's auditors.

[15] In considering the approach of the court below to the matter, one should not lose sight of what Grancy sought to achieve when it instituted its so-called interlocutory application. The sole purpose of that application, as Mr Hodes, who appeared together with Mr McNally for the appellant, contended in argument before us, was to arrest the continuation of the oppressive and unfairly prejudicial

conduct that unfairly disregarded the interests of Grancy as a minority shareholder in SMI perpetrated by Manala and Gihwala. This would be achieved by the court itself appointing directors either in place of or in addition to those directors in office to ensure that SMI was not exposed to further risks.

[16] To my mind, we must determine whether Grancy had made out a case entitling it to relief under s 163 of the Act.

[17] It was submitted on behalf of Grancy that its averments in its various affidavits established, at the very least on a prima facie basis, that: (a) Manala and Gihwala abused their powers as directors and shareholders of SMI; (b) consistently acted in a manner that was oppressive and unfairly prejudicial to Grancy; and (c) their decisions and actions as directors and shareholders of SMI manifested a complete and unfair disregard for the interests of Grancy and SMI, serving exclusively their own interests. The cumulative effect of these factors warrant, concluded the argument, the court's intervention to appoint independent and objective directors not only to oversee SMI's financial and corporate affairs but also to investigate such affairs so as to unravel the extent of the malfeasance complained of by Grancy.

[18] Grancy's averments are, unsurprisingly, denied by Manala and Gihwala on whose behalf it was submitted that such denials cast a shadow of doubt thereon. Mr Hodes sought to meet this argument by submitting that Manala and Gihwala have contented themselves with bare denials of Grancy's factual allegations. Thus, so went the argument, such denials come nowhere close to creating a dispute of fact and are consequently no bar to the grant of the relief sought by Grancy. This is particularly so, it was argued, if regard is had to the fact that: (a) the payment of R5,5 million to Manala and Gihwala as directors' remuneration; R1 114 539 million to Manala and Gihwala supposedly in respect of suretyship fees; R2 898 145 million to Manala; and the resolution to pay Manala R15 000 per month are all not seriously disputed; (b) the report made by

SMI's auditors to the Independent Regulatory Board for Auditors reporting on grave irregularities committed by Manala and Gihwala in conducting SMI's corporate affairs which has not been gainsaid; and (c) both Manala and Gihwala persist in their assertions that they were entitled to the various amounts paid to themselves.

[19] It is apposite at this juncture to deal with the contention of the respondents' counsel that the denials of the appellant's allegations by Manala and Gihwala are not of such a nature that a court would be justified in rejecting their evidence on the papers. For this contention counsel called in aid the often cited judgment of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[2] As I have already said, counsel for the appellant countered this contention by arguing that the respondents contented themselves with bare denials without refuting the substance of the allegations in the appellant's affidavits. It seems to me that the proper approach to a situation such as the one that has arisen in this case is that re-stated in *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) in which the following was stated (para 13):

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of

[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-G where it is stated that where factual disputes in motion proceedings arise, relief may only be granted if the facts averred in the applicant's affidavit that have been admitted by the respondent, together with the facts alleged by the respondent, justify the order sought.

which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[20] In my view Grancy's submissions that the denials of Manala and Gihwala do not constitute real disputes of fact, at least in relation to the payment of the amounts mentioned in para 18 above, are correct. Accordingly, to the extent that the court below approached the matter on the basis that the versions of Manala and Gihwala on this score sufficiently cast a shadow of doubt on Grancy's version, it erred. As I see it the record reveals that the versions of Manala and Gihwala did not appropriately answer the central case made by Grancy but sought to 'envelope [their case] in a fog which hides or distorts the reality'.[3] The reality is that there is no serious dispute in relation to the amounts mentioned in para 18 above nor the irregularities reported on by SMI's auditors. Indeed Mr Slon, who appeared for Manala, was constrained to concede as much.

[21] In my view, as I have said, the central issue for determination is whether or not Grancy has made out a case for the relief it sought in its application in the court below. As alluded to earlier, Grancy's case is founded on s 163 of the Act. Section 163 of the Act provides a shareholder (which is what Grancy is) with a remedy against any oppressive or unfairly prejudicial acts or omissions of a company or related person that unfairly disregard the interests of a party such as Grancy. It provides:

'(1) A shareholder or a director of a company may apply to a court for relief if-

[3] *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para 16.

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or

(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

(2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including-

(a) an order restraining the conduct complained of;

. . .

(f) an order-

(i) *appointing directors in place of or in addition to all or any of the directors then in office*; or

(ii) declaring any person delinquent or under probation, as contemplated in section 162;

. . .

(l) an order for the trial of any issue as determined by the court.' (My emphasis.)

[22] There is a substantial body of case law on the import of s 252 of the Companies Act 61 of 1973, which, in material respects, is the previous equivalent of s 163 of the Act. In my view there is a benefit to be derived from considering the jurisprudence developed over the years as to what constitutes oppressive or unfairly prejudicial conduct. To determine the meaning of the concept of 'oppressive' in s 163 it is apposite to refer to *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA 517 (C) which held (at 525H-526E):

'I turn next to a consideration of what is meant by conduct which is "oppressive", as that word is used in sec. 111 *bis* or sec. 210 of the English Act. Many definitions of the word in the context of the section have been laid down in decisions both of our Courts and in England and Scotland and as I feel that a proper appreciation of what was intended by the Legislature in affording relief to shareholders who complain that the affairs of a

company are being conducted in a manner "oppressive" to them is basic to the issue which presently lies for decision by me, it is necessary to attempt to extract from such definitions a formulation of such intention. "Oppressive" conduct has been defined as "unjust or harsh or tyrannical" . . . or "burdensome, harsh and wrongful" . . . or which "involves at least an element of lack of probity or fair dealing" . . . or "a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely" . . . It will be readily appreciated that these various definitions represent widely divergent concepts of "oppressive" conduct. Conduct which is "tyrannical" is obviously notionally completely different from conduct which is "a violation of the conditions of fair play".

. . .

"[T]yrannical" conduct represents a higher degree of oppression than conduct which is "harsh" or "unjust". *The Shorter Oxford Dictionary* defines "tyrannical" as "severely oppressive; despotically harsh or cruel". For reasons which I shall now set out I do not think it is necessary for an applicant to have to go to the lengths of establishing conduct of such a nature before he is entitled to relief under sec. 111 *bis*.' (Citations omitted.)

[23] There is also the decision of the House of Lords in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] A 324 HL at 342 which is to the effect that the concept of 'oppressive' denotes conduct that is 'burdensome, harsh and wrongful' and that such conduct would include lack of probity or good faith and fair dealing in the affairs of a company to the prejudice of some portion of its members.

[24] The next case to which I wish to refer is *Garden Province Investment v Aleph (Pty) Ltd* 1979 (2) SA 525 (D) at 531 where Friedman J said:

'It seems to me that a minority shareholder seeking to invoke the provisions of s 252(1) of the Companies Act must establish not only that a particular act or omission of a company results in a state of affairs which is unfairly prejudicial, unjust or inequitable to him, but that the particular act or omission itself was one which was unfair or unjust or inequitable. Similarly, looking at the second part of the section, where the complaint relates to the manner of conduct of the business, it is the manner in which the affairs have been conducted as well as the result of the conduct of the business in that manner

which must be shown to be unfairly prejudicial, unjust or inequitable. In the Afrikaans version the word "unfairly" is translated as "onredelike" and in point of fact it was the Afrikaans version of the Act which was signed. The word "unfairly", therefore, whether it qualifies only the word "prejudicial" or whether it qualifies the words "prejudicial, unjust or inequitable" means therefore "unfairly" in the sense of "unreasonably", and it seems to me that the use of the word "unfairly" in this sense in the section fortifies my belief that the section relates both to the manner and nature of the conduct as well as to the results or effect of that conduct. When one looks at the second part of the section it is stated explicitly that the manner in which the affairs of the company are being conducted must be shown to be unfairly prejudicial, unjust or inequitable. This conclusion seems to me also to be consistent with what has been said on a number of occasions with regard to the predecessor of this section, namely the previous s 111 *bis*.'

[25] In *Louw v Nel* 2011 (2) SA 172 (SCA) this court said the following (para 23):

'The combined effect of ss (1) and (3) is to empower the court to make such order as it thinks fit for the giving of relief, if it is satisfied that the affairs of the company are being conducted in a manner that is unfairly prejudicial to the interests of a dissident minority. The conduct of the minority may thus become material in at least the following two obvious ways. First, it may render the conduct of the majority, even though prejudicial to the minority, not unfair. Second, even though the conduct of the majority may be both prejudicial and unfair, the conduct of the minority may nevertheless affect the relief that a court thinks fit to grant under ss 3. An applicant for relief under s 252 cannot content himself or herself with a number of vague and rather general allegations, but must establish the following: that the particular act or omission has been committed, or that the affairs of the company are being conducted in the manner alleged, and that such act or omission or conduct of the company's affairs is unfairly prejudicial, unjust or inequitable to him or some part of the members of the company; the nature of the relief that must be granted to bring to an end the matters complained of; and that it is just and equitable that such relief be granted. Thus, the court's jurisdiction to make an order does not arise until the specified statutory criteria have been satisfied.' (Citations omitted.)

[26] According to Professor FHI Cassim *et al*[4] the extensive nature of the remedy for which s 163 provides is underscored by the inclusion of the element of unfair disregard of the applicant's interests. I agree with this view for it derives support from a judgment of this court in *Utopia Vakansie-Oorde Bpk v Du Plessis* 1974 (3) SA 148 (A) at 170H-171D where it was stated that the concept of 'interests' (in the context of s 62 *quat* (4) of the 1926 Companies Act) is much wider than the concept of 'rights'. Accordingly there is much to be said for the proposition that s 163 must be construed in a manner that will advance the remedy that it provides rather than limit it.

[27] In concluding on this particular aspect of the case it bears mention that in determining whether the conduct complained of is oppressive, unfairly prejudicial or unfairly disregards the interests of Grancy it is not the motive for the conduct complained of that the court must look at but the conduct itself and the effect which it has on the other members of the company (see eg *Livanos v Swartzberg & others* 1962 (4) SA 395 (W) at 399).

[28] Against that backdrop I return to the facts of this case. It was submitted on behalf of Grancy that the court below, in coming to the conclusion that Grancy had not established that Manala and Gihwala had, by their conduct, unfairly disregarded its interests, glossed over and failed to have regard to several factors which are manifestly prejudicial to the respondents' case. These factors were: (a) the report made by SMI's auditors to the Independent Regulatory Board for Auditors detailing some of the respondents' unlawful and prejudicial conduct; (b) the admission by Manala and Gihwala that they paid themselves R5,5 million supposedly as directors' remuneration; (c) the admission by the respondents that R2 898 145 million was paid to Manala without any lawful basis for such payment; (d) the admission by the respondents that SMI's financial statements contained errors despite the respondents' attempt to downplay the significance of such errors; and the respondents' failure to proffer any plausible explanation as

[4] F H I Cassim *Contemporary Company Law* 2 ed (2012) at 770-771.

to the basis for paying to Manala and Gihwala substantial amounts in respect of directors' fees, suretyship fees and a payment of R2 898 145 to Manala regard being had to the fact that SMI's sole purpose was to invest in Spearhead.

[29] In giving consideration to these contentions it is convenient to commence by referring to the case of *Bader v Weston* 1967 (1) SA 134 (C). There Corbett J dealt with an analogous situation under s 111 *bis* of the Companies Act of 1926 which provided a remedy to a minority shareholder who is unfairly prejudiced as a result of the conduct of the majority shareholders. The learned judge found (at 147E) that:

'The words "such order as it thinks fit" are of wide import.'

[30] In dealing with s 252 of the Companies Act 61 of 1973 in *Louw v Nel* 2011 (2) SA 172 (SCA) this court recognised that its [s 252] objective was 'to empower the court to make such order as it thinks fit for the giving of the relief, if it is satisfied that the affairs of the company are being conducted in a manner that is unfairly prejudicial to the interests of a dissident minority'.

[31] Professor FHI Cassim *et al* in *Contemporary Company Law* 2 ed (2012) at 769-775 have expressed the view that the provisions of s 163 of the Act are of wide import and constitute a flexible mechanism for the protection of a minority shareholder from oppressive or prejudicial conduct. The authors also consider that the list of orders that a court may make under s 163(2) is non-exhaustive and open-ended. The latter is of course clear from subsection (2) itself which provides that a court may make any interim or final order it considers fit including a variety of orders listed in (a) to (l) thereof such as, in the context of this case, 'an order for the trial of any issue as determined by the court'.

[32] But MS Blackman in *Commentary on the Companies Act* vol 2 (2002) at 9-4 cautioned that:

'The very wide jurisdiction and discretion [s 252] confers on the court must, however, be carefully controlled in order to prevent the section from itself being used as a means of oppression.'

Dealing with the wide ambit of s 163 of the Act, Cassim *et al* make the telling point that (p771-772):

'Despite the wide ambit of s 163, it must be borne in mind that the conduct of the majority shareholders must be evaluated in light of the fundamental corporate law principle that, by becoming a shareholder, one undertakes to be bound by the decisions of the majority shareholders.[5] . . . Thus not all acts which prejudicially affect shareholders or directors, or which disregard their interests, will entitle them to relief ─ it must be shown that the "conduct" is not only prejudicial or disregardful but also that it is *unfairly* so.'

[33] The principal argument advanced by the respondents in resisting the appeal is four-fold. First, the respondents submitted that although the relief sought by Grancy was intended to be of limited duration its effect would be final. Consequently Grancy was required to satisfy the requisite threshold of proof for final relief on motion which it failed to meet. Second, that s 163(2)(f)(i) contemplates that it is the court itself which should appoint directors and not third parties to whom the court has delegated that power. Third, the application was not urgent and that in any event Grancy did not meet the requirements for urgency. Fourth, the application was entirely unnecessary as Grancy had other satisfactory alternative remedies available to it.

[34] I do not find it necessary to traverse all of the contentions advanced by the respondents. Suffice it to say that as I have already mentioned in para 16 above, as I see it the real issue is whether Grancy has made out a case for the relief it sought in the court below. As far as the nature of the relief sought by Grancy is

[5] See eg: *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 678G-H; *Garden Province Investment v Aleph (Pty) Ltd* 1979 (2) SA 525 (D) at 534A-535C.

concerned, even accepting that the order is final in effect, the undisputed facts alleged by Grancy, together with the facts alleged by the respondents, which is the test to be applied in such cases as laid down by *Plascon-Evans*, Grancy is entitled to such relief. As to the lack of urgency contended for, it must be said that there is nothing to be made of that fact in this court as the court below chose to deal with the merits of the application and thereafter dismissed it.[6] Thus the real question before us now is whether the application should have been dismissed.

[35] This then brings me to the questions whether Grancy has established conduct of the nature contemplated in s 163 of the Act and whether the relief that it seeks has been properly formulated on the papers.[7] I have already dealt above with the allegations made by Grancy against the respondents. Both Manala and Gihwala dispute Grancy's entitlement to any relief. It is, however, manifest from the record that neither the payments made by them to themselves which Grancy claims constituted a diversion of moneys destined for SMI (and thus the ultimate benefit of all its shareholders) nor the irregularities reported on by SMI's internal auditors are in dispute. Accordingly in the circumstances of this case Grancy's assertions against Manala and Gihwala have to be accepted as correct. To my mind 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 such payments were made in the first place.

[36] Moreover the record reveals that the legitimacy of the payments that Manala and Gihwala made to themselves has always been contested by Grancy. Yet there seems to have been no demonstrable attempt by Manala and Gihwala to meaningfully address Grancy's protestations concerning those contested

---

[6] *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Services v Hawker Aviation Partnership & others* 2006 (4) SA 292 (SCA) paras 9-11.

[7] Compare: *Breetveldt v Van Zyl* 1972 (1) SA 304 (T) SA 304 (T) at 315A-E; *Lourenco v Ferela (Pty) Ltd (No1)* 1998 (3) SA 281 (T) at 295F-296C.

payments.[8] This is borne out by the fact that Grancy was compelled, more than once, to resort to litigation to assert its rights. Consequently, those undisputed facts as have emerged from the record warrant, in my view, an in-depth investigation by objective and independent directors[9] and depending on the outcome of such investigation it may be necessary that the trial court in the pending main action make a final determination on such issues. Put differently, these contentious payments in themselves justify the grant of the relief sought by Grancy.

[37] Both in the written heads of argument and their oral submission counsel for Grancy persisted in their contention that the two independent and objective directors should constitute SMI's Board to the exclusion of any other directors that SMI's shareholders would otherwise be entitled to nominate under clause 105 of SMI's articles of association. The foundation for Grancy's contention in this regard was that between them, Manala and the DGFT were entitled to nominate four directors who would then constitute a majority on the Board. Thus, concluded the argument, those directors could potentially use their position as the majority to undermine anything that the two independent and objective directors might consider best served SMI's corporate interests.

[38] To my mind it is only fair that all of SMI's shareholders should be allowed the right to nominate one director who would serve on the Board in collaboration with the two independent and objective directors appointed by this court. But given that we are satisfied that Grancy has made out a case under s 163 of the Act, care must be taken to ensure that the directors appointed by this court are not hamstrung in their task in determining whether or not there has been any malfeasance concerning SMI's corporate affairs. Thus it will be necessary to put

[8] Compare: *Re Marco (Ipswich) Ltd* [1994] 2 BCLR 354 in which unfairly prejudicial conduct against minority shareholders was found to have been established where specific acts of mismanagement which were repeated over a period of time with no attempt by the majority shareholders to prevent or rectify them.

[9] Compare: *Parker v National Roads and Motorists' Association* (1993) 11 ACSR 370 CA (NSW) where it was held that directors must act with fair procedures in regard to complaints and challenges by minorities or individual members.

measures in place to ensure that the two independent directors are free to undertake their task without let or hindrance by incorporating an appropriate provision in this court's order.

[39] For all the foregoing reasons I am satisfied that the court below erred in holding that Grancy failed to make out a case for the relief it sought in its application. The totality of the allegations made in Grancy's affidavits is, despite denials by Manala and Gihwala, such as to make a compelling call for this court to come to Grancy's assistance by exercising its discretion in Grancy's favour substantially in the terms prayed.

[40] In the result the following order is made:

1 The appeal is upheld with costs including the costs of two counsel.

2 The order of the court below is set aside and in its stead is substituted the following:

'1 It is ordered in terms of s 163(2)(f)(i) of the Companies Act 71 of 2008 that:

1.1 Mr B J Manca SC, a senior advocate practising at the Cape Bar, and Mr Louis Strydom, a senior Chartered Accountant (SA) of Pricewaterhouse Coopers Inc, are appointed independent directors of Seena Marena Investments (Pty) Ltd.

2 The independent directors appointed in terms of paragraph 1.1 of this order shall have the sole right, in their absolute discretion, to the exclusion of any other directors nominated by the shareholders of Seena Marena Investments (Pty) Ltd, to determine whether an investigation into the affairs of Seena Marena Investments (Pty) Ltd, in the light of the complaints made on behalf of Grancy Property Limited, is necessary and if so to conduct such an investigation.

3 The said independent directors may not be removed as directors save by a unanimous vote of the shareholders of Seena Marena Investments (Pty) Ltd or an order of the high court, having jurisdiction.

4 The independent directors shall constitute the Board of Directors of Seena Marena Investments (Pty) Ltd together with such directors as each of the shareholders may appoint to the Board save that each shareholder shall be entitled to appoint only one director.

5 The directors are to receive such reasonable remuneration as determined by the Head of the Legal Department at Deloitte & Touche at Woodlands Drive, Woodmead, South Africa.

6 This order shall operate pending the finalisation of the action proceedings pending in the Western Cape High Court under case no 12193/11 in the matter between *Grancy Property Limited & another v Dines Chandra Manilal Gihwala & others* unless the Western Cape High Court determines otherwise.

7 The first and third to seventh respondents are ordered to pay the costs of this application jointly and severally, the one paying the others to be absolved, including the costs of two counsel.'

_____

X M PETSE

JUDGE OF APPEAL

Appearances:

Appellant:	P B Hodes SC (with him J P McNally SC) Instructed by: Webber Wentzel, Johannesburg Symington & De Kok, Bloemfontein
For 1st Respondent:	B M Slon Instructed by: Edward Nathan Sonnenberg Inc, Sandton Webbers, Bloemfontein
For 3rd – 7th Respondent:	S C Kirk-Cohen SC Instructed by: Thompson Wilks Inc, Cape Town Honey Attorneys Inc, Bloemfontein