THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 628/2023

In the matter between:

MSIBITHI INVESTMENTS (PTY) LTD	**FIRST APPELLANT**
TSHIRA CONSOLIDATED INVESTMENTS (PTY) LTD	**SECOND APPELLANT**
WOMEN IN CAPITAL GROWTH (PTY) LTD	**THIRD APPELLANT**
PHAMBILI INVESTMENT CORPORATION (PTY) LTD	**FOURTH APPELLANT**
THE TRUSTEES FOR THE TIME BEING OF THE MBAZENI TRUST	**FIFTH APPELLANT**
MASHUDU ELPHAS TSHIVHASE	**SIXTH APPELLANT**
WECBEC LIMITED	**SEVENTH APPELLANT**
MASHUDU ELIAS RAMANO	**EIGHTH APPELLANT**
AKHONA TRADE AND INVESTMENT (PTY) LTD	**NINTH APPELLANT**

and

AFRICAN LEGEND INVESTMENT (PTY) LTD	**FIRST RESPONDENT**

OFF THE SHELF INVESTMENTS
FIFTY SIX (RF) (PTY) LTD **SECOND RESPONDENT**
THE DIRECTORS OF AFRICAN LEGEND
INVESTMENT (PTY) LTD **THIRD TO EIGHTH RESPONDENTS**
THE DIRECTORS OF OFF THE
SHELF INVESTMENTS
FIFTY SIX (RF) (PTY) LTD **NINTH & TENTH RESPONDENTS**

Neutral citation: *Msibithi Investments (Pty) Ltd and Others v African Legend Investment (Pty) Ltd and Others* (628/2023) [2025] ZASCA 61 (14 May 2025)

Coram: MOLEMELA P and KATHREE-SETILOANE and KEIGHTLEY JJA and GORVEN and DOLAMO AJJA

Heard: 18 November 2024

Delivered: 14 May 2025

Summary: Company Law – directors' resolution – attack on basis of failure to comply with s 74 of Companies Act 71 of 2008 (the Act) – notice given – s 74 complied with.

Company Law – directors' resolution – attack on basis that resolution taken for improper purposes – test – dominant purpose to benefit company – proper purpose established – subsidiary purpose no basis to set aside.

Company Law – directors' resolution – attack that no rational basis for resolution – subjective test – directors had reasonable belief that rational – case not made out.

Company Law – attack on resolution on basis that it constitutes oppressive conduct – s 163(1)*(a)* of the Act – exceptional circumstances not shown.

Company Law – declaration of delinquency of director – s 162 of the Act – evidence for – no material factual disputes on essential issues – multiple breaches of fiduciary duty – case of delinquency made out.

Company Law – resolution in 1998 giving rise to invalid share issue – s 97 of Companies Act 61 of 1973 – discretion of high court to validate invalid share issue – strict discretion – properly exercised – no basis for appeal court to set aside.

ORDER

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

1 The appeal against the order dismissing the main application is dismissed with costs, such costs to be paid jointly and severally by the first to ninth appellants, and to include those consequent on the employment of two counsel.

2 (a) The first cross-appeal is upheld with costs, such costs to be paid jointly and severally by the first to eighth respondents in the cross-appeal, and to include those consequent upon the employment of two counsel.

(b) The order of the Gauteng Division of the High Court, Johannesburg dismissing the main counter-application by the cross-appellants is set aside and substituted by the following orders:

'1 The eighth respondent in the main counter-application is declared to be a delinquent director in terms of s 162(2)*(a)* read with s 162(5)*(c)*(iv) and s 162(6)*(b)* of the Companies Act 71 of 2008 for a period of seven years.

2 The first to eighth respondents in the counter-application are directed to pay the costs of the counter-application jointly and severally, such costs to include those consequent upon the employment of two counsel wherever that was done.'

3 (a) Save for paragraph 3(b) hereof, the second cross-appeal against the dismissal of the extended counter-application is dismissed with costs, such costs to be paid jointly and severally by the first and third to eighth respondents in the main appeal and to include those consequent upon the employment of two counsel.

(b) The costs order in the Gauteng Division of the High Court, Johannesburg in the expanded counter-application is amended by excluding the second, ninth and tenth respondents in the main application in that court from the costs order.

JUDGMENT

Gorven AJA (Kathree-Setiloane and Keightley JJA concurring)

Introduction

[1] This matter arises from a struggle for control of African Legend Investments (Pty) Ltd (ALI). Four related applications arising from the struggle served before the Gauteng Division of the High Court, Johannesburg (the high court) and were heard together. After argument, Moorcroft AJ granted the orders referred to below.

[2] In this judgment, after the persons involved are initially named, they will be referred to by their surnames only. Companies which have undergone name changes will be referred to by their current names. For simplicity's sake, the two groupings concerned will be referred to as the Ramano group and the Ahmed group respectively. This will be done unless it is necessary to identify individuals separately and even though not all of the actions of each person in each group were necessarily group actions. The main protagonist in the Ramano group was Mr Mashudu Ramano (Ramano) and that of the Ahmed group was Mr Abdoolrawoof Ahmed (Ahmed).

[3] The main application (the main application) concerned a resolution of the board of directors of ALI taken on 25 February 2020 (the impugned resolution). It was brought by Msibithi Investments (Pty) Ltd and eight other applicants, one of whom was Ramano. The first eight applicants were all shareholders in ALI. The ninth applicant was Akhona Trade and Investments (Pty) Ltd (Akhona), which was also a shareholder. These constituted the Ramano group. The remaining shareholders were cited as the 14th to 38th respondents in the main application. None of these played any part in the applications or appeals.

[4] The foundational relief sought in the main application was:

'That the resolution BR13/2020 of the directors of the First Respondent of 25 February 2020 be declared invalid, of no force and effect and be and is hereby set aside.'

The impugned resolution approved a subscription agreement between ALI and the eleventh respondent, the trustees of the Astron Energy Employee Participation Plan Trust (the Astron Trust), which did not participate in the applications or the appeal.[1] It provided for shares in ALI to be allocated to the Astron Trust against payment of R24 million to ALI. Of this, some R23 million was made available to Off the Shelf Investments 56 (RF) (Pty) Ltd, the second respondent (OTS56). OTS56 was a company related to ALI. The application sought to set aside all of the acts flowing from the impugned resolution. These included the consequent transfer of shares to the Astron Trust. It also sought a declaration that votes cast by shareholders in the subsequent shareholders' meeting held on 27 February 2020 be rescinded, that certain directors of ALI be removed and others appointed, alternatively that the board of ALI be directed to take certain steps. The high court dismissed the main

[1] The twelfth and thirteenth respondents were Glencore South Africa Oil Investments (Pty) Ltd and Astron Energy (Pty) Ltd. They took no part in the applications or appeals but, as will become apparent below, were involved in the events giving rise to the litigation.

application and directed that the applicants pay the costs thereof jointly and severally, including those consequent on the employment of two counsel.

[5] The second application (the main counter-application) was launched by ten of the respondents. The first two of these were ALI and OTS56 respectively. The third to eighth respondents were directors of ALI and the fifth, sixth and eighth to tenth respondents were directors of OTS56. These constituted the Ahmed group. Ramano was a director of both companies. The principal relief sought was that Ramano be declared a delinquent director for a period of seven years or such other period as the court may determine, alternatively that he be declared to be under probation for a certain period. Further orders not necessary to consider in this appeal were also sought. The Ramano group, minus Akhona, opposed the main counter-application. The High Court dismissed the main counter-application and directed that the counter-applicants pay the costs jointly and severally, including those consequent on the employment of two counsel.

[6] The third application was referred to by the high court as the expanded counter-application. It was brought by the Ahmed group, minus OTS56 and directors unique to it. The expanded counter-application sought to set aside as invalid a share issue which took place between 1998 and 2000 pursuant to a special resolution of the shareholders of ALI adopted on 30 October 1998 on the basis that it was invalid. The fourth application was a conditional counter-application to the expanded counter-application and was brought by the Ramano group. It was conditional on a finding of invalidity and sought an order validating the share issue in terms of s 97 of the Companies Act 61 of 1973 (the old Act). Akhona did not enter the lists in these two applications. The high court found that the creation, allotment and issue of shares to the directors pursuant to that resolution was invalid but granted an order

validating the share issue and allocation. The nett effect was to dismiss the expanded counter-application and to grant the relief sought by the Ramano group. The Ahmed group was ordered to pay the costs, including those of two counsel where so utilised. It is common cause that OTS56 and directors unique to it were incorrectly included in the costs order.

[7] The high court granted leave to appeal to: (a) the Ramano group concerning the dismissal of the main application; (b) the Ahmed group concerning the dismissal of the main counter-application (the first cross-appeal); and (c) the Ahmed group concerning the order validating the share allocation which took place between 1998 and 2000 (the second cross-appeal). It is those appeals which are before us.

Background

[8] It is necessary to sketch the historical backdrop to the applications in some detail. ALI was founded as a company promoting Broad-Based Black Economic Empowerment (B-BBEE) around 1996 with some 28 shareholders. ALI is the ultimate holding company of OTS56.

[9] It is undisputed that in 1998 the then directors of ALI resolved to restructure the shareholding. At that point, of the present directors, only Ahmed and Mr Welcome Mazibuko, who only joined the board in February 2019, were not directors. This resolution allocated 40 percent of the votes to Ramano. At the time he held a 7 percent economic interest in ALI. According to the Ramano group this resolution was passed to incentivise and empower Ramano to build the company. It also enabled the balance of the directors to acquire 20 percent of the voting rights while holding a 13 percent economic interest in ALI. The nine appellants comprise 9 out of the 38 shareholders of ALI. Prior to the impugned resolution, they held

22.8911 percent of the economic interest and 49.0074 percent of the voting rights in ALI. Ramano held the position of Executive Chairperson of ALI from inception until February 2019. That situation obtained, apparently without demur, until the events mentioned below.

[10] These largely arose from an agreement concluded between the 12th respondent, Glencore South Africa Oil Investments (Pty) Ltd (Glencore SA) and Glencore Energy UK Ltd (Glencore UK) on the one hand, and OTS56 on the other. This was styled a Pre-Emption Framework Agreement (the Framework agreement). Glencore UK and Glencore SA shall be referred to as Glencore unless it is necessary to distinguish them.

[11] The conclusion of the Framework agreement arose as follows. During 2000 to 2001, ALI and its three consortium partners, via OTS56, acquired a 23 percent shareholding in Astron Energy (Pty) Ltd (Astron). The purchase price of R782 million was funded by way of vendor finance by Chevron Global Energy Incorporated (CGEI). The shares did not vest in OTS56 immediately. It was envisaged that future profits would be used to pay the debt and that convertible and redeemable preference shares would be redeemed and converted into ordinary shares.

[12] The profits never materialised and by 2013 few shares had been redeemed and converted. At that stage, OTS56 held only 14 830 ordinary shares in Astron, constituting about 1 percent of the shareholding. The transaction was valued at R1 in the books of OTS56. At stages, the indebtedness to CGEI approached R1 billion. Had the transaction been funded on a commercial, as opposed to a vendor finance, basis it would have collapsed due to lack of payment.

[13] During 2014, due to changes in the B-BBEE legislation, Astron initiated discussions with OTS56. At the time, OTS56 was represented by a task team comprising Ramano, Mr Mpho Scott and Ahmed. CGEI agreed to an immediate vesting of the entire 23 percent shareholding in OTS56. This resulted in the nett asset value of OTS56 increasing from R1 to R585 million.

[14] The position was that CGEI thereafter owned 75 percent of the shareholding in Astron and 100 percent of the issued share capital of Astron Botwana. OTS56 held 23 percent of the shares in Astron and enjoyed a right of pre-emption if CGEI elected to sell its shares in Astron and Astron Botswana. The remaining 2 percent of the shares of Astron were, and still are, held by the Astron Trust.

[15] In early 2016, CGEI offered its shares in Astron and Astron Botswana for sale by auction. The successful bidder, announced in March 2017, was SOIHL Hong Kong Holding Limited. Because OTS56 had a right of pre-emption, CGEI addressed a letter to it dated 20 July 2017 constituting an irrevocable offer to sell to OTS56 75 percent of the issued share capital of Astron, 100 percent of the issued share capital in Astron Botswana, the existing OTS56 debt of some R600 million and the shareholder claim of USD300 million.

[16] OTS56 wished to exercise the right of pre-emption but did not have the financial capacity to do so. It consequently sought and secured financial assistance from Glencore. As a result, on or about 6 October 2017 OTS56, Glencore UK and Glencore SA concluded the Framework agreement to the effect, inter alia, that:

(a) OTS56 would exercise its right of pre-emption to acquire from CGEI 75 percent of the issued share capital of Astron and 100 percent of the issued share capital of Astron Botswana. Glencore funded this by way of an exchangeable loan

agreement in the sum of approximately USD1.1 billion. This was termed Transaction 1 and required Competition Commission approval.

(b) OTS56 would on-sell the acquired shares and other assets to Glencore SA as soon as possible after acquiring them. The purchase price would be offset against the loan of approximately USD1.1 billion. This was termed Transaction 2 and also required approval by the Competition Commission and that of the shareholders of ALI by special resolution. If Competition Commission approval was not obtained, OTS56 would be obliged to repay the loan of some USD1.1 billion within two days of this.

(c) OTS56 was given an option to acquire a further 7 percent of the issued share capital of Astron and up to 30 percent of that of Astron Botswana within 12 months of the closing of Transaction 2. This was at the same price paid by Glencore SA for the shares acquired from CGEI via OTS56. If taken up, the shareholding of OTS56 in Astron and Astron Botswana would thus total 30 percent in each.

(d) A success fee of USD20 million was payable by Glencore to OTS56. USD5 million would be payable upon OTS56 formally notifying CGEI of its intention to exercise its right of pre-emption. The balance of USD15 million would be payable on the closing of Transaction 2.

(e) OTS56 and Glencore undertook to:

'. . . each use their best endeavours to procure that the Conditions . . . in the [Glencore agreements] are satisfied and shall take such steps as may be required to effect the transactions contemplated by this Agreement, in each case on the best possible terms for [Astron, Astron Botswana, Glencore and OTS 56] and, in particular, that no condition or obligation is imposed upon (or which would otherwise adversely affect) Glencore's other operations or investments and neither [OTS56] nor Glencore shall do anything which might delay or otherwise adversely affect such satisfaction on such terms.'

[17] Pursuant to the Framework agreement, two share purchase agreements were concluded in relation to the acquisition of the relevant shareholdings in Astron and Astron Botswana. These contained the following clauses:

'Each Party will perform its obligations . . . and . . .use all reasonable endeavours at each Party's own cost to procure that the Conditions are satisfied . . . and each Party shall not, and shall procure that none of its Representatives shall, take any action that could reasonably be expected to adversely affect the satisfaction of the Conditions.'

The Framework agreement and these two agreements shall collectively be referred to as the Glencore agreements. The undertakings, taken together, shall be referred to as the parties' undertakings.

[18] To ensure compliance with the Glencore agreements, Glencore obtained irrevocable and unconditional undertakings from shareholders with 79 percent of the voting rights in ALI (the shareholder undertakings). Ramano, as a shareholder, provided such an undertaking on 12 September 2017. The shareholder undertakings stated:

'I hereby irrevocably and unconditionally undertake . . . in favour of Glencore SA . . . not to take any action or make any statement which is reasonably likely to be prejudicial to the success of the Proposed Transaction, including voting in favour of any share issues or share repurchases at ALI.'

The shareholders also undertook not to do anything which might reasonably prejudice the success of the Glencore agreements. These shareholder undertakings were formally accepted by Glencore SA. The 'Proposed Transaction' included Transaction 2 and the sales pursuant to the Astron and Astron Botswana agreements.

[19] On 18 September 2017, to give effect to the Glencore agreements, Glencore SA advanced USD100 million as a non-refundable deposit payable by OTS56 to CGEI. On 27 September 2018, Glencore SA advanced the sum of

USD965 million as the balance of the purchase price. The two amounts were paid to CGEI in order for OTS56 to exercise its rights of pre-emption.

[20] Transaction 1 was approved by the Competition Commission. Glencore reimbursed OTS56 for the expenditure incurred in Transaction 1 in the sum of R30 million. Ramano travelled to London to sign agreements on behalf of OTS56 in the closing ceremony for Transaction 1 on 27 September 2018. OTS56 thereby acquired an additional 75 percent of the share capital in Astron and 100 percent of the share capital in Astron Botswana. On the same day, Glencore SA wrote a letter to OTS56 which concluded:

'We also agree that at any time between the date of this letter and T2 you may make to us for our consideration in good faith a commercially attractive offer of an acquisition by you of the Shares. If there is any conflict between the provisions of this letter and the provisions of any agreement entered into between ourselves or our affiliate and you, then the provisions of this letter shall prevail. This letter is legally enforceable.'

This shall be referred to as the September letter. It came to assume a central place in the disputes which arose between the Ahmed and Ramano groups. Despite this, Ramano did not share this letter with his fellow-directors or shareholders until much later.

[21] On 5 October, Ramano wrote to Glencore on behalf of OTS56. Based on the September letter, he stated that in his view OTS56 could buy Glencore out if it found a different partner. The reply by Glencore dated 8 October made it clear to Ramano:

'. . . we were happy to provide an acknowledgment that if OTS were to make a "commercially attractive" offer to buy the Shares, then Glencore would consider this. But again, there is no *option* here - OTS has a right to make an offer but does not have an option to purchase them. Similarly,

Glencore does not have any obligation to sell the Shares to OTS. Our priority is to close as soon as possible our acquisition of the 75% shareholding from OTS.'[2]

That was a clear and accurate exposition of the legal effect of the September letter. Ramano did not respond to that letter.

[22] Instead, he called an urgent board meeting of OTS56 on 12 October. Despite the views expressed in the Glencore letter of 8 October, he informed the board at this meeting that Glencore had agreed to provide OTS56 with a letter 'which allows OTS[56] to buy out Glencore before T2'. He had still not shared the September letter or that of 8 October with the board. The board was accordingly reliant on his report as to the contents. In the light of what he had reported, the OTS56 board, including those members of the Ahmed group on it, agreed that it would be best to retain the shares in furtherance of the transformation objectives of OTS56 and ALI and resolved to seek a different partner who could finance this buyout.

[23] Ramano met with members of Glencore on 16 October. A minute of this meeting recorded that it had been clarified and agreed that the legal form of the Glencore agreements would be followed. It further recorded that this meant that OTS56 did not have an option to acquire the shares destined for Glencore when Transaction 2 closed. It had only the opportunity to make an offer to Glencore for its consideration. In the replying affidavit Ramano admitted that the minute was accurate in these respects.

[24] Despite this, Ramano wrote to Glencore on 8 November saying, inter alia, that 'we intend to pursue our entitlement in terms of the 27 September 2018 undertaking

[2] Emphasis in the original.

by Glencore in favour of OTS acquiring a part or the whole of Glencore's potential shareholding in Astron'. He concluded by saying:

'In light of the above course of action which OTS intends taking pursuant to Glencore's written undertaking, we believe that it would be sensible for OTS and Glencore to suspend the current processes relating to the competition filings in South Africa and Botswana pending the outcome of the above proposed course of action.'

He thus signalled his intention to suspend compliance by OTS56 of its obligations under the Glencore agreements and the parties' undertakings.

[25] On 12 November, Ramano gave effect to this with an email to Ahmed and Scott and one Mr Molapo of Astron, saying that 'OTS has suspended the Glencore OTS competition commission processes pending negotiations on shareholding'. This was a unilateral act taken on his part without board knowledge or approval.

[26] On 15 November Glencore responded to the letter of 8 November by referring to the terms of the Framework agreement. The letter then stated:

'Glencore is fully complying with these obligations and wishes to continue to co-operate with OTS as its partner but this must be strictly within the scope of the documents which have been agreed and signed. On the other hand, OTS has, since we provided our draft SA filing in mid-September, sought to frustrate the process and to push an alternative agenda of owning all, or a greater proportion, of Astron.

OTS is in ongoing breach of its obligations to procure that the conditions to closing T2 are satisfied as soon as practical, including adhering to the contractually agreed five business day periods as the reasonable period of time for provision of documents and information. OTS's obligations also include the prohibition of "any action that could reasonably be expected to adversely affect the satisfaction of [the conditions to the T2 closing]". These obligations are straightforward and easy to comply with. We would again request that OTS complies with its obligations. In particular, given that your breaches are deliberate, any liabilities arising, including legal fees incurred, will be set off against the remaining $15 million fee otherwise due to you.'

Ramano responded to this letter denying that OTS56 was frustrating the process and indicating that it was seeking legal advice. He asserted that Glencore was to blame for any delays.

[27] In the meantime, on 15 and 16 November, one of the directors of OTS56, Ms Keely Mtshizana-Canca, wrote to the other board members, including Ramano. She indicated that she had just read some of the letters dealt with above and expressed concern as to the tone. The response from Ramano was that she should not panic and he was pursuing the 'strategy' of the board.

[28] A shareholders meeting of ALI was called for 30 November. Ramano initially omitted from the agenda the special resolutions in terms of s 115 of the Act required to satisfy the second condition of Transaction 2. However, he was subsequently persuaded to include them.

[29] From 27 November an exchange of emails ensued between various board members of ALI. Ahmed mailed the directors, advising that Ramano took the view that the proposed special resolutions required for the Glencore transactions should be withdrawn. He advised that shareholders had signed irrevocable and unconditional undertakings to support the transaction. He asked whether the directors agreed to Ramano's proposed course of action.

[30] Scott replied that day advising that ALI required legal counsel, that OTS56 had signed the parties' undertakings and that Glencore had paid the initial instalment of the success fee of USD5 million. Webber Wentzel, the current lawyers for OTS56, advised it late that day that the parties' undertakings and shareholder

undertakings were binding. Any conduct contrary to the undertakings could result in legal action to enforce them or to claim damages.

[31] That prompted Ramano to ask the Webber Wentzel representative, Mr Hlatshwayo, whether he was 'discounting the letter of entitlement', referring to the September letter. Hlatshwayo responded that if OTS56 made an offer and Glencore accepted it, Glencore would not hold shareholders to any undertakings. He pointed out, however, that the shareholders had to abide by the terms of their undertakings unless OTS56 and Glencore agreed on a different transaction.

[32] Ahmed then sent an email to Ramano saying that the Webber Wentzel opinion on the shareholder and parties' undertakings had serious implications for board members and shareholders. He requested permission to share the opinion with the board members. This elicited a dismissive response from Ramano saying, among other things, 'It's not the only opinion'.

[33] At the AGM chaired by Ramano on 30 November, and notwithstanding the opinion of Webber Wentzel and the agreement on 16 October, Ramano contended that the special resolutions should not be voted on but deferred until he had time to explore options to either buy out Glencore or dilute its shareholdings. He advised the shareholders that his view was that Glencore's majority shareholding in Astron should be reduced and stated that there was a letter 'that supersedes any other agreements'. This was a reference to the September letter. The shareholders then resolved to withdraw the special resolutions from the agenda and to defer them until the meeting of the board on or before the end of March 2019. This was in clear breach of the parties' undertakings and the shareholder undertakings.

[34] On 3 December Ramano emailed Glencore saying that OTS56 intended to make an offer to buy some or all of the shares in Astron by paying part or all of the funds advanced to OTS56 by Glencore to acquire the 75 percent shareholding. The response of Glencore was to refer Ramano to its earlier email of 15 November which had alleged breaches and concluded by reserving its rights.

[35] Linklaters, attorneys representing Glencore, emailed Ramano on 14 January 2019 detailing a series of breaches by OTS56 of the parties' undertakings to fulfil its obligations under the Glencore agreements (the first Linklaters letter). It referred to previous letters of breach and also made 30 requests concerning matters which it said would further the progress of Transaction 2. It pointed out that OTS56 had failed to attend a meeting with the Competition Commission or to provide a response to the Commission's questions. It recorded that although OTS56 had recently agreed to meet with the Commission, it only did so a month after it had been requested to. It alleged that the conduct of OTS56 had resulted in significant delays and given rise to losses. It called on OTS56 to remedy those breaches.

[36] This was followed by an email from Glencore inviting Ramano to a meeting in Cape Town. He forwarded that mail to other directors of OTS56 and referred to the letter from Linklaters detailing breaches as being 'obviously nonsense'. He also stated that the responses which OTS56 would give to the Competition Commission 'would provide ammunition for the Commission to suspend Glencore's filing until we have finalised agreement on the letter of undertaking to us from Glencore to make an offer'. The latter statement alarmed the Ahmed group since OTS56 was contractually prohibited from delaying or frustrating the transaction.

[37] The first Linklaters' letter caused Canca to email her fellow OTS56 directors indicating that she was disturbed by it, but that she had been advised by Ramano that there was nothing to worry about. She indicated, however, that she had received a phone call from a director of Glencore in London confirming the first Linklaters letter detailing the breaches and reiterating the threat of legal action. She called for an urgent board meeting to get a proper explanation from Ramano as chairperson and recorded that the allegations were 'serious with grave repercussions for all of us'. Mr Dondolo, another director, supported this call. A board meeting of OTS56 directors was convened for 4 February.

[38] Concerned by the situation, the directors of OTS56 and ALI, other than Ramano and one Ms Chapman, appointed and consulted attorneys Cliffe Dekker Hofmeyr (CDH) at their own expense. CDH had been involved in the Glencore agreements. These directors said that they were aware of their fiduciary duties and did not want to place OTS56 or ALI at risk. They requested advice on whether the September letter created any legally binding rights and obligations and on the liability of directors and shareholders of OTS56 and ALI if the Glencore agreements and parties' undertakings were not honoured.

[39] Ramano made a presentation to the Competition Commission on behalf of OTS56. The presentation gave effect to his intention to persuade it to reject or delay approval of Transaction 2. As a result, the Commission raised a number of issues with Glencore, including reference to a demand by Ramano for the right of OTS56 to pay back the loan of USD1.1 billion. There was, of course, no such right. The presentation was entirely at odds with the Glencore agreements which were binding on OTS56.

[40] Dondolo addressed a letter dated 31 January 2019 to the directors of OTS56. He expressed his concern at the allegations in the first Linklaters letter. He proposed that:

(a) Ramano give a detailed response to every allegation, with copies of responses from OTS56's attorneys.

(b) The attorneys provide written advice confirming that OTS56 was not in breach of the Glencore agreements.

(c) The OTS56 transaction team, comprising Ramano, Scott and Ahmed, provide a progress report.

(d) The board arrange an urgent meeting with Glencore to 'deliberate the way forward to remedy the allegations and to close the communication gaps'.

[41] Ramano had terminated the services of Webber Wentzel and appointed new attorneys, DM5 Incorporated. He sent a copy of the letter of Dondolo to DM5 saying, 'This is a coup. They have already concluded that the allegations are true and therefore the board must now take over and meet with Glencore'. He sent a similar communication to Ahmed.

[42] Ahmed responded by sending Ramano a report setting out how he saw the situation. He expressed his support for the goal of a majority South African owned Astron. But he warned Ramano that the shareholders who had given undertakings were exposed to damages claims, and said that OTS56 urgently needed to obtain senior counsel's advice on the alleged breaches and the September letter. He requested that its legal representatives should respond to the first Linklaters letter dealing with the alleged breaches in detail.

[43] In the meantime, on 1 February Linklaters sent a further letter of breach referring to the submission of Ramano to the Competition Commission. It stated that Glencore had received a communication from the Commission. This recorded allegations made by Ramano to which it required a response. It stated that those allegations were false and were calculated to delay the process in breach of the obligations of OTS56 under the Glencore agreements.

[44] A meeting of the OTS56 board took place on 4 February. Ramano defended his view that the September letter was being breached by Glencore. This was his constant refrain, on the basis that it gave OTS56 a binding option to procure a different partner to Glencore if it could pay the USD1.1 billion. At this meeting, Canca stated that she had never seen the September letter, despite the passage of more than four months. The board was not prepared to accept the say so of Ramano that Glencore, and not OTS56, was in breach of the Glencore agreements. It wanted each allegation of a breach made by Glencore to be addressed in writing by Ramano with accompanying advice from the lawyers representing OTS56. Ramano stated that DM5 was preparing a response to the first Linklaters letter which he would email to directors. The board also required clarity on the exposure of directors and Ramano similarly undertook to provide this.

[45] On 4 February, DM5 wrote to Linklaters baldly denying the allegations in the two Linklaters' letters and promising responses to certain queries at a later date. It claimed that OTS56 remained committed to 'closing the deal' but that 'there are various aspects of the deal that are still outstanding at this point' without specifying the nature of those aspects.

[46] On 5 February, Ramano wrote to his fellow directors of OTS56. He stated that DM5 was busy 'finalising an opinion for the board on the so-called breach letter'. He then said that the attorney dealing with the matter at DM5, '. . . believes that the letter of undertaking given to OTS is a valid contract'. This statement was simply untrue. It is common ground that neither DM5, nor any of its attorneys, provided any such opinion.

[47] On the same day, Ramano wrote to Glencore calling for a meeting in London. He suggested reviewing 'a number of issues in our relationship'. He reminded the recipient that he remained 'the person with the mandate to conclude any deal between OTS and Glencore'. He stated that 'just as you want the best deal for Glencore much as I also want the best deal for OTS. Perhaps somewhere in this continuum there could be a sweet spot for Glencore and OTS'. Once again, this ignored the fact that the Glencore agreements were binding on OTS56. The letter prompted a reply by Glencore on 7 February referring to its offer of a meeting prior to the Competition Commission hearing which Ramano had declined. It went on to say:

'Since then you and OTS56 have continued to flagrantly and deliberately breach the contractual agreements between us.

There is no deal to negotiate as we have already concluded the transaction between Glencore and OTS56 and it is only your obstruction and delaying tactics that have prevented it closing in the proper time.'

[48] On 14 February Linklaters sent a letter to DM5, referring to the first Linklaters letter. It advised that the Competition Commission 'is now requiring an unequivocal advice from your client whether it supports or objects to the approval of the Transaction'. It pointed to aspects of the Glencore agreements requiring

OTS56 to use its best endeavours to progress the transaction and to make submissions to the Competition Commission in support of obtaining its approval.

[49] On 13 February CDH had provided the directors who had consulted it with advice. This prompted four of the directors, Scott, Canca, Dondolo and Professor Taole Mokoena to write to the Competition Commission on behalf of OTS56 on 15 February. The letter stated that a majority of the directors had no objection to the merger application concerning Glencore's acquisition of the shares in Astron and that they were committed to giving the Commission the full support of OTS56 in finalising the matter.

[50] That day the same four directors wrote to Ramano. They referred to his submission to the Competition Commission which had attempted to frustrate the sale to Glencore of the Astron shares. They also referred to his:

' . . . unsustainable submission that the letter from Glencore SA dated 27 September 2018 entitles OTS to not proceed with the sale of the relevant shares to Glencore SA on the basis that the transaction is suspended and that OTS has an option to acquire/retain the shares and/or that Glencore SA has made an offer to OTS 56 to this effect.'

They contended that the actions of Ramano were placing OTS at risk of breaching its obligations under the Glencore agreements. They also pointed out that the directors owed fiduciary duties to OTS56 and that exposing it to such risks would breach those duties. They concluded by notifying him that they intended to call an urgent board meeting confirming the commitment of OTS56 to the Glencore agreements and to co-operate with the Competition Commission. They also notified him that they had written to the Commission to mitigate any further risk to OTS56. On the same date, two of these directors addressed a letter to Ramano requesting him to call an urgent board meeting to deal with certain business and resolutions.

[51] DM5 wrote to Linklaters on 19 February alleging that Glencore had committed a serious breach of trust. It gave this as a reason why OTS56 was insisting that the parties 'must finalise all outstanding obligations prior to closing'. It accused Glencore of refusing to meet with OTS56 'to discuss the parameters of implementing' the September letter and that this was 'in total disregard and disrespect to our client'. However, at that point, DM5 had not provided the directors with an opinion on the enforceability of the September letter. Senior counsel subsequently confirmed the advice of Webber Wentzel and CDH that the September letter did not grant an option and that Glencore's only obligation arising from it was to consider any commercially attractive offer from OTS56. That advice was conspicuously correct.

[52] Ramano stated in his founding affidavit that, despite legal advice to the contrary from DM5, the Ahmed group 'simply accepted the unfounded allegations of breach made by Glencore'. He stated that this advice appeared from the letter of DM5 to Linklaters dated 19 February. But that letter did not contain advice to the board. No such advice had been given. That no such advice had been given was confirmed in a memorandum provided by DM5 to the board that very day. DMS categorically stated, in the memorandum, that it had not yet considered whether OTS56 was in breach of its contractual obligations as alleged by Glencore.

[53] The upshot of all of this was that:

(a) On 21 February, six of the seven directors of ALI resolved to remove Ramano as chairperson of the board and to replace him with Oliphant.

(b) On 22 February, four of the six directors of OTS56 resolved to revoke any authority previously given to Ramano to represent it in relation to the Glencore agreements and the Competition Commission, to appoint Scott, Professor Taole

Mokoena and Ahmed to do so and to remove Ramano as chairperson of the board and appoint Scott in his stead. Ramano remained a director of both OTS56 and ALI.

[54] On 27 February 2019, after his removal as chairperson of ALI, Ramano purported to give notice to the shareholders of a meeting to be held on 13 March. He signed the notice under the words, '[b]y order of the Chairman'. On 1 March, Oliphant directed Ramano to refrain from holding himself out as chairperson and informed him that the board was treating his notice as a request to convene a shareholders meeting, which it was going to hold in early April. A letter was sent to shareholders pointing out that the notice was invalid, that Ramano had been removed as chairperson on 21 February and that no shareholders meeting would proceed on 13 March. Despite this, on 3 March Ramano emailed shareholders making a number of allegations and reiterating that 'there will be a meeting of shareholders as the notice indicated'. He styled himself 'Executive Chairman African Legend Group' in this email. On 5 March Herold Gie Attorneys wrote to the shareholders on behalf of Ramano stating, among other things, that 'the meeting of 13 March 2019 will take place and all shareholders are encouraged to attend'.[3] After Oliphant again wrote to shareholders in response to say that the meeting would not proceed, Herold Gie Attorneys doubled down with a further letter on 6 March insisting that it would. To make matters worse, the proposed agenda of Ramano did not contain the special resolutions in terms of s 115, which were required by the Glencore agreements to close Transaction 2.

[55] The shareholders' meeting did not proceed on 13 March. The board of ALI convened a shareholders' meeting for 4 April, the primary purpose of which was to

[3] Emphasis in the original.

table the special resolutions in question. Glencore sought confirmation from shareholders of ALI who had provided the shareholder undertakings that they would vote in favour of the special resolutions. Ramano and some other shareholders who had provided undertakings did not respond timeously and Glencore proceeded to court to compel such confirmation. Herold Gie, claiming to represent all of the respondents in that application, proposed on a with prejudice basis that their clients would vote in favour of the special resolutions at the meeting if OTS56 and Glencore agreed 'to commence negotiations aimed at finalising' various aspects, including some arising from the Framework agreement. The effect of this, of course, was to attempt to render the irrevocable, unconditional undertakings conditional. The court ordered that the undertakings be given effect to. The requisite special resolutions were accordingly carried on 4 April.

[56] Meanwhile, on 12 March the Competition Commission had approved Transaction 2. In its comments in the executive summary, it recorded:

'OTS also submits that it had previously agreed with Glencore that it will, at any time between 27 September 2018 and prior to the conclusion of the instant transaction . . . acquire a greater (controlling stake) in [Astron] by buying shares from Glencore. Glencore indicates that there was never such an agreement.'

And:

'Given the above, it was unclear if OTS still wanted to continue with the current transaction . . . Furthermore, OTS had initially advised that it requires time to consult and take proper legal direction on whether to support the . . . Transaction or not support. However, the Commission has since received a submission directly from the majority of OTS board of directors who confirmed that they are in support of the transaction. However, Mr Mashudu Ramano, the chairman of OTS has *subsequently* advised that there are unresolved and outstanding contractual matters with Glencore, which impact on his continued participation in the proceedings before the competition authorities and he is unable to continue participating in the merger proceedings pending the

resolution of these matters by Glencore to his satisfaction . . . The Commission will however proceed on the basis that OTS supports the proposed transaction as the majority of the OTS board of directors . . . are in support of the proposed transaction.'[4]

The clear import of this is that, after the four directors wrote to the Commission indicating the support of OTS56 for the Glencore agreements, Ramano contacted the Commission and attempted to further stall the process.

[57] As a result, both of the conditions to close Transaction 2 had been fulfilled. That Transaction closed on 8 April. Seventy-five percent of the issued share capital in Astron and 100 percent of the issued share capital in Astron Botswana was transferred to Glencore against the settlement of Glencore's loan to OTS56. Despite Glencore's well-founded contention that OTS56 had been in breach of the Glencore agreements, it paid the balance of USD15 million of the USD20 million success fee to OTS56 without deduction.

[58] At the shareholders meeting of 4 April, it was also resolved to appoint a Shareholders Oversight Committee (SOC) to investigate the conduct of the ALI directors and to report and make recommendations to the shareholders. On 19 December 2019, the SOC delivered a final report to the shareholders of ALI. It recommended a wholesale restructuring of the board, that independent persons be appointed, that the tenure of persons appointed to the board be limited as per the King Report and that women be represented on the board.

[59] After the closure of Transaction 2, negotiations took place. The acquisition of additional shares was seen by all to benefit OTS56. The negotiations focussed on

[4] Emphasis added.

ways of financing the options for OTS56 to acquire an additional 7 percent of the shareholding in Astron and to acquire a 30 percent shareholding in Astron Botswana. The options had to be exercised by 7 April 2020, 12 months after Transaction 2 closed. OTS56 obtained advice from CDH and Standard Bank to the effect that it should acquire a further three percent of Astron's shares and 26 percent of those of Astron Botswana. Glencore was prepared to vendor finance the additional three percent of Astron shares. OTS56 proposed to Glencore that it finance a deposit of R24 574 000 for the Astron Botswana shares with the balance of the shares being acquired through vendor finance.

[60] Glencore responded in November 2019, declining to finance the deposit for the Astron Botswana shares. This response was circulated to all the directors including Ramano, and he and the others were invited to a further series of meetings. Ramano participated in at least one of these. It was clear at this stage that OTS56 wished to exercise that option and that ALI would need to issue shares to raise the capital of about R24 million required for the deposit. Details of those shares were provided to all the directors as well as the diluting effect of this on the voting rights of ALI shareholders. At no stage between November 2019 and February 2020 did Ramano object to the exercise of the option to acquire the Astron Botswana shares or the sale and issue of shares to facilitate it.

[61] In late January 2020, the Astron Trust was identified as a potential investor and discussions commenced. The Ahmed group considered it to be a good fit in aligning the interests of ALI, OTS56 and the employees of Astron, as well as promoting B-BBEE. On 7 February, the Astron Trust agreed to acquire the new shares in ALI, subject to obtaining finance which Astron then undertook to provide.

A fair value of R9.12 per share had been obtained from BDT Chartered Accountants Incorporated.

[62] On 12 February 2020, a shareholders' meeting of ALI was convened for 27 February. At the time it was convened, the Ramano group held 51 percent of the vote. Ramano requested that the notice of the meeting should include a report back by the SOC and a resolution for the removal of the directors in the Ahmed group and the appointment of specific named persons as directors in their stead. It is common ground that those named supported the Ramano group. These items were placed on the agenda.

[63] On 25 February, at 11h12, Ahmed sent an email to all the directors of ALI. He gave notice in terms of s 74 of the Act that they should sign and return the impugned resolution. The resolution and supporting documents proposed, inter alia, that ALI issue the shares to the Astron Trust at R12 per share for a total consideration of some R24 million. This was a premium on the assessed value of R9.12 per share. Of this, ALI planned to utilise R23 million to fund a deposit for OTS56's acquisition of the shares in Astron Botswana. As indicated, the option to do so was to expire on 7 April 2020.

[64] Ramano claimed that this email was the first he had heard of the intention of the Ahmed group to conclude such a transaction. The only action taken by him, however, was to send an email asking whether this had been discussed at a directors meeting. At 12h21 of that day, Ahmed sent an email notification to all the directors of ALI stating that the impugned resolution had been adopted by a majority of directors.

[65] Pursuant to the impugned resolution, the Astron Trust was entered into the share register of ALI as a shareholder on 26 February, holding 17.48 percent of the voting rights. This meant that after the other voting rights were adjusted accordingly, the Ramano group no longer held sufficient votes to constitute a majority at shareholders meetings. It would then not be able to carry its proposed resolution to remove the Ahmed group and replace it with directors sympathetic to Ramano. Ramano launched an urgent application on the morning of 26 February set down for 14h00 that day seeking to interdict the holding of the AGM. This was struck from the roll on the basis of a lack of urgency.

[66] At the 27 February shareholders meeting, the resolution to remove the Ahmed group and replace it with directors supportive of Ramano was not carried. The only shareholders who voted in favour were the nine applicants and African Equity Empowerment Investments Ltd. Ramano was voted off the board.

[67] Shortly after these events, and as a result of the spread of the coronavirus, the price of crude oil plummeted. On 27 February, the price of Brent Blend was USD52.18 per barrel. By 27 March, it was USD24.93 and on 7 April, the date on which the option had to be exercised, it was USD31.87. OTS56 was advised by its transactional advisors that the deal had been compromised by the onset of the pandemic which could have resulted in a significant depreciation in value of the shares to be acquired. On 27 March, accordingly, OTS56 wrote to Glencore saying, '[d]ue to recent supervening market circumstances in relation to the substantial decrease in the price of crude oil . . . OTS has had to re-evaluate the share price contemplated in the Agreement'. It then requested 'an extension of the 12-month period contemplated in clause 6.2 of the Agreement, for a period of at least 12 months'. Glencore did not agree to this. The option to acquire the Astron Botswana

shares was accordingly not exercised. The Ahmed group said that the R23 million would be applied either to a renewed option or to other matters benefitting OTS56. It still hoped to find finance for the option concerning the shares in Astron Botswana.

The main application

[68] The Ramano group founded its case on three propositions:

(a) That the Ahmed group decided to approve the impugned resolution without affording the directors due notice contrary to the Act and contrary to ALI's MOI.

(b) That the actual purposes behind the agreement were to avoid the removal of the Ahmed group as directors and to ensure the removal of Ramano.

(c) That even if the Ahmed group acted for a proper purpose, the means chosen by them to achieve that purpose bore no rational connection to that purpose.

[69] The first basis was that no proper notice of the impugned resolution was given to directors. The requirement for notice in the MOI is governed by clause 31.4.3.1. This provides for a notice period of seven days unless directed otherwise by the chairperson. Section 73(4) and (5)*(a)* of the Act govern notice of meetings generally. These provide:

'(4) The board of a company may determine the form and time for giving notice of its meetings, but-

(a) such a determination must comply with any requirements set out in the Memorandum of Incorporation, or rules, of the company; and

(b) no meeting of a board may be convened without notice to all of the directors, subject to subsection (5).

(5) Except to the extent that the company's Memorandum of Incorporation provides otherwise-

(a) if all of the directors of the company-

(i) acknowledge actual receipt of the notice;

(ii) are present at a meeting; or

(iii) waive notice of the meeting,

the meeting may proceed even if the company failed to give the required notice of that meeting, or there was a defect in the giving of the notice.'

It is clear that s 73 relates to formal meetings of the board. Section 74 of the Act, on the other hand, provides:

'(1) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, a decision that could be voted on at a meeting of the board of that company may instead be adopted by written consent of a majority of the directors, given in person, or by electronic communication, provided that each director has received notice of the matter to be decided.

(2) A decision made in the manner contemplated in this section is of the same effect as if it had been approved by voting at a meeting.'

[70] Clearly, the notice of the impugned resolution was intended to be given in terms of the provisions of s 74. All that is required by way of notice under that section is receipt by the directors of 'notice of the matter to be decided'. In the heads of argument and the papers, the Ramano group submitted that there was no proper notice because there had been no advance notice that the resolution would be circulated for the directors to consider and either accept or reject. In argument, it appeared that the Ramano group had confused the need for prior notice in terms of s 73 for meetings with notice required for what is known as a round robin resolution in terms of s 74. It is clear that s 74 does not require notice in advance but simply notice of the matter to be decided.

[71] The submission of the Ramano group was not clearly formulated but seemed to boil down to the fact that Ramano had been taken by surprise when the majority of directors approved the resolution so soon after circulation. But it was conceded that when the notice called for the resolution to be signed by those in support, it was foreseeable that this could take place at any point thereafter. It is clear that the notice

complied with s74 of the Act and affords no basis on which to set aside the impugned resolution.

[72] The second line of attack was that the actual purposes behind the impugned resolution were to avoid the removal of the Ahmed group and to ensure the removal of Ramano from the board. It was submitted that, absent the impugned resolution, the removal of the Ahmed group would have taken place at the shareholders' meeting on 27 February 2020 and a board supportive of Ramano appointed. It was submitted that these were not proper purposes. This ground implicates s 76(3)*(a)* of the Act which reads:

'Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-

(a) in good faith and for a proper purpose . . .'

Subsections (4) and (5) do not apply to this subsection.

[73] The parties could find no authority in our jurisdiction for the interpretation of what is meant by 'proper purpose' in the present context. Nor could I.[5] It is thus necessary to construe this phrase without such assistance. The test for interpreting documents is now well-worn. In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*,[6] this court held:

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[5] The matter of *CDH Invest NV v Petrotank SA (Pty) Ltd* [2019] ZASCA 53; 2019 (4) SA 436 did not deal with a situation such as the present one and is distinguishable. In that matter, a memorandum of understanding concluded by two companies provided for the issue of 100 000 shares by CDH. Due to an error at registration, this was reflected in the Memorandum of Incorporation as 1 000 shares. A director sent a resolution for adoption by round robin increasing the number of shares to 1 000 000. It was motivated by way of what this court held was a misrepresentation. This court held at para 24:

'By their actions and their continued refusal to provide a justification for the need to increase the authorised shares to 1 000 000, they committed a misrepresentation, which at the very least was designed to obfuscate the real purpose behind the resolution. Their conduct did not comport to the standard of good faith required of directors in terms of s 76(3) of the Act and thus raises the question as to whether they exercised their powers as directors for a proper purpose.'

[6] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA); [2014] 1 All SA 517 (SCA).

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise".'[7]

The words in s 76(3)*(a)* which require interpretation are 'must exercise the powers and perform the functions of director . . . in good faith and for a proper purpose'.

[74] The difficulty as to what is meant by proper purpose arises when more than one purpose is at work. Some foreign authorities suggest that, in such a case, each of the purposes must be proper. But the majority of foreign authorities appear to favour the 'primary or substantial purpose' approach in those circumstances. This holds that, where there is more than one purpose, if the dominant, or primary, or substantial, purpose is a proper one, that suffices even if another purpose, or other purposes, would not pass muster if considered alone. Some examples of the application of the dominant purpose approach follow.

[75] In *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL*,[8] the Supreme Court of Victoria was faced with a situation where directors had issued shares. The share issue obtained the best agreement for the company but at the same time deprived the plaintiff shareholder who had intended to replace the directors of its voting majority, thus frustrating this objective. The court agreed that the question to be decided was:

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[7] Ibid para 12. Citations omitted.
[8] *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co Ltd and Another* [1967] VicSC 130 (*Harlowe's Nominees*).

'Was the purpose of the Board in placing the shares to affect the voting of any shareholders at any general meeting of the company or, to put it in the negative form, was the dominant purpose of the Board of Directors in issuing the shares to raise further capital for the company?'[9]

The latter was held to have been the case and the exercise of the powers of the directors was held to have been a proper one. The matter was confirmed on appeal by the High Court of Australia which endorsed the dominant purpose approach.[10]

[76] In *Teck Corporation v Millar*,[11] Teck intended to replace the board of directors of Afton with its own nominees to cause Afton to contract with Teck for the exploitation by Teck of mineral rights owned by Afton. Before this could be done, and so as to prevent it, the directors of Afton concluded an exploitation agreement with a different company, Canex. The British Columbia High Court applied the primary purpose test and held:

'In the case at bar the primary purpose of the directors was to make the best contract they could for Afton. I find that the primary purpose of the directors was to serve the best interests of the company . . . They were not motivated by a desire to retain control of the company. They may have thought the issuance of shares under the contract with Canex would enable them . . . to regain control from Teck. If they did, that was a subsidiary purpose.'

The exploitation agreement with Canex was held to be valid.

[77] To similar effect was the matter of *Darvall v North Sydney Brick & Tile Co Ltd and Others*.[12] In that matter, the New South Wales Court of Appeal was divided on the facts but in agreement on the law. Kirby P, dissenting on the facts, set out the test to be applied:

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[9] *Harlowe's Nominees* at 10a (139).
[10] *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483 (HC of A).
[11] *Teck Corporation v Millar* (1973) 33 DLR (3d) 288 para 165.
[12] *Darvall v North Sydney Brick & Tile Co Ltd & Others* (*Darvall*) (1989) 15 ACLR 230.

'In common with other decision making, directors may have multiple purposes for reaching a particular decision. This is especially so in a collegiate body such as a board of directors. Therefore, a task of characterisation is required of the court. The court must determine whether the complainant has shown that the substantial purpose of the directors for the conduct impugned was improper or collateral to their duties as directors of the company . . . This task of characterisation has been assisted by the provision of a rule of thumb, suggested by the High Court, for classification of the facts as they emerge in evidence. By that rule, it is necessary for the court to determine whether *but* for the allegedly improper or collateral purpose, the directors would have performed the act which is impugned.'[13]

[78] The majority, per Mahoney JA with whom Clarke JA concurred in a separate judgment, held:

'There is a distinction in principle between a transaction for the purpose of defeating a takeover offer and one prompted by the takeover offer but, in the end, entered into because the directors believe it to be in the interests of the company as a whole. And, in my opinion, the learned judge's finding was that it was of the latter kind. It is a finding with which I agree.'[14]

The majority accordingly held that the directors had not acted improperly even when their actions defeated an existing takeover offer where the primary purpose of the transaction was to secure a higher offer for shares and to secure a choice for future directors regarding the use of the company's assets.

[79] In *Howard Smith Ltd v Ampol Petroleum Ltd and Others*,[15] the Lords of the Judicial Committee of the Privy Council heard an appeal from the Equity Division of the Supreme Court of New South Wales. As regards the test, their lordships said:

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[13] *Darvall* at 248.
[14] *Darvall* at 291.
[15] *Howard Smith Ltd v Ampol Petroleum Ltd and Others* [1974] UKPC 3; [1974] AC 821; [1974] 1 All ER 1126; [1974] 2 WLR 689; 118 SJLB 330.

'[I]t is . . . necessary for the court, if a particular exercise of [the power of directors] is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not.'[16]

Applying the substantial purpose test, the Privy Council found that the directors did not issue and allot shares for a proper purpose and set it aside.

[80] A different approach to the substantial purpose test was mooted in *Eclairs Group Ltd v JKX Oil & Gas PLC*.[17] In that matter, the Supreme Court of the United Kingdom heard an appeal from the Court of Appeal which had allowed an appeal from a decision of Mann J in the court of first instance. The latter had held on the facts that the imposition by the directors of a public company under its articles of association of restriction notices on certain shares of the company held by nominees was done for an improper purpose and set them aside. The Supreme Court upheld the appeal on the basis that Mann J's finding on the facts was correct. Lord Sumption, in whose judgment Lord Hodge concurred, considered the proper purpose rule and asked the question, 'what if there are multiple purposes, all influential in different degrees but some proper and others not?'.[18] He cited s 171(b) of the English Companies Act which provided that a director must 'only exercise powers for the purposes for which they are conferred'.[19] He stated that, in construing the word 'only', the duty of directors 'is broken if they allow themselves to be influenced by *any* improper purpose'.[20] However, the majority, comprising Lords Mance, Neuberger and Clarke, doubted the correctness of this approach but declined to express themselves on the point since the matter turned on the facts. They preferred to leave the question open for another occasion.

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[16] Ibid at 7.
[17] *Eclairs Group Ltd v JKX Oil & Gas PLC (Eclairs Group)* [2015] UKSC 71.
[18] Ibid para 17.
[19] Ibid para 14.
[20] Ibid para 21. Emphasis in the original.

[81] As to our law, Blackman espouses the dominant purpose approach:

'As in all cases where an exercise of their powers by the directors is challenged on the ground of improper purpose, the court will determine what the substantial or primary purpose for their action was. And where the directors' substantial or primary purposes was improper, the directors will have acted in breach of duty, notwithstanding that they also acted for other purposes which were proper.

On the other hand, where the directors' primary or substantial purpose is a proper one, their exercise of a power is not rendered improper, merely because they knew that it would also have the effect of bringing about a state of affairs which, had it been their primary or substantial purpose to attain, would have rendered improper their exercise of the power.'[21]

That passage related to the old Act but applies equally to the present enquiry.

[82] Section 76(3)*(a)* requires of directors that they 'must exercise the powers and perform the functions of director . . . in good faith and for a proper purpose'. Company life and dynamics mean that there is often more than one purpose for board decisions. This situation results in a number of consequences. Some of these may be adverse to other interested parties. But, as has been seen in the foreign cases reviewed above, directors sometimes feel it necessary to prevent others acting in what they genuinely consider to be to the detriment of the company. It seems to me that the lodestone for assessing whether the directors have acted for a proper purpose is their *bona fide* belief that they have acted in the best interests of the company even if, as a result, it is to the detriment of others. The section appropriately links good faith with proper purpose.

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[21] M S Blackman et al *Commentary on the Companies Act* Juta revision service 8 (2011) at 8-96.

[83] Even though the section mentions ‘a’ proper purpose, I do not think it was intended that the existence of a subsidiary, proper purpose sanitises a dominant, improper purpose. It is equally difficult to conceive that a subsidiary purpose which, if taken alone, is not a proper one, should disqualify a dominant purpose which is in the interests of the company and is a proper one. In the result, I take the view that where multiple purposes manifest themselves, if the dominant or primary purpose is a proper one, the exercise of power by the directors cannot be impeached even if the subsidiary purpose, or purposes, would not pass muster if standing alone. For this reason, I am not disposed to follow the thinking of Lord Sumption in *Eclairs Group*.

[84] The questions in the present matter are therefore whether more than one purpose was at play and, if so, which was the dominant purpose and was it a proper one? In their heads of argument, the Ramano group gave six reasons for their contention that the purposes were not proper. I shall deal briefly with each in turn:

(a) But for the dilution of the shareholding, the Ahmed group was to be removed at the AGM. That was, of course, a possible, even probable, outcome. It certainly motivated the Ahmed group to take the resolution ahead of the shareholders meeting. The Ahmed group stated, without challenge, that the Ramano group would not have agreed to the share issue to the Astron Trust had it held a majority of directors. That does not necessarily mean that the dominant purpose of the resolution was to prevent their removal.

(b) The effect of the transaction was to remove Ramano as director. That is correct. Once again, however, this does not mean it was the dominant purpose for the adoption of the resolution.

(c) The inexplicable speed of the transaction. OTS56 had until 7 April 2020 to exercise the options but the resolution was taken within a fortnight of some directors meeting representatives of the Astron Trust. However, Ramano himself had agreed

to the Framework agreement. It was this which granted OTS56 the option to increase its shareholding in Astron Botswana. The board of OTS56 was *ad idem* that the option should be exercised. Exercising it by way of a share issue had been settled since Glencore declined to do so by vendor finance. No other way of financing it had been found or suggested. The only aspect settled shortly before the adoption of the impugned resolution was the identity of the entity which would take up the shareholding. In any event, the haste with which a transaction has been concluded does not of necessity result in its being concluded for an improper purpose.

(d) The resolution was adopted even though Glencore had not agreed to sell any shares to OTS56. This was not the case. The Framework agreement granted OTS56 the options to purchase an additional 7 percent of the shares of Astron and 30 percent of the shares of Astron Botswana at an agreed price. After the closing of Transaction 2, Glencore held those shares. As such, Glencore had agreed to sell the shares if the option was exercised.

(e) The Ahmed group took the decision contrary to an undertaking delivered on oath. This was said to have been given in an affidavit delivered in response to an application by Ramano. On the papers it is clear that no such undertaking was given. The undertaking given related to the relief sought in that application. There was no undertaking not to sell the shares of ALI.

(f) Glencore, through Astron, gave the Astron Trust the funds to purchase the ALI shares. Because Ramano attempted to thwart the transaction with Glencore, this left Glencore with a board entirely sympathetic to its intentions. That might be so but does not bear on the question whether the impugned resolution was taken for a proper purpose.

[85] It is clear that the strategy of the Ahmed group was to pass the impugned resolution before 27 February. They explained this as follows:

'. . . at the risk of stating the obvious, had the share issue not been finalised, and the ALI respondent directors been removed as directors at the ALI AGM (which was not a given), a Ramano aligned board would clearly not have proceeded with the share issue . . .'

At least one of the purposes in proceeding as it did was to guard against that eventuality. The Ahmed group claimed that its purpose in doing so was to ensure that the proposed sale of shares could take place.

[86] There were a number of consequences of the adoption of the impugned resolution. One is that capital was raised which placed OTS56 in a position to exercise its option to purchase shares in Astron Botswana. Another is that the issue and sale of ALI shares resulted in the dilution of voting power of existing shareholders. This in turn resulted in the Ramano group being unable to vote the Ahmed group off as directors and to replace them with directors aligned to the Ramano group at the shareholders meeting on 27 February.

[87] The question is which of these consequences formed the dominant purpose for the adoption of the impugned resolution. Was it simply a petty internecine struggle between the Ahmed and Ramano groups? Or was it to place OTS56 in a position to exercise the option to acquire Astron Botswana shares? The option to do so had its genesis in the Framework agreement concluded in 2017. It was the last step in the process after the closing off of Transactions 1 and 2. Ramano had concluded the Framework agreement on behalf of OTS56 and at no stage questioned the desirability of OTS56 exercising the option. This was so of the entire board. From April 2019, the common goal of the board was to negotiate ways of enabling OTS56 to do so. Vendor finance had been obtained from Glencore for the exercise of the option to acquire additional shares in Astron. What was outstanding and required resolution was how to finance the option concerning Astron Botswana.

Glencore declined to do so. No other funders had been found or suggested. It was agreed to do so by way of a sale of ALI shares to raise the capital. Without the sale, OTS56 would not have been in a position to exercise the option. From at least the November 2019 meeting, Ramano was aware that this would take place, as well as the consequence that the voting power of existing shareholders would be diluted. The only outstanding issue was the identity of the purchaser. Whether it was the Astron Trust or any other purchaser, that sale would have been of the same number of shares and would have resulted in the same dilution of the voting power of existing shareholders. The sale achieved that purpose. On any version, this was in the interests of OTS56. From that angle, it is hard to conceive that such was not the dominant purpose in adopting the impugned resolution.

[88] This conclusion can be further tested by applying the rule of thumb mentioned by Kirby P in *Darvall*. He said that the enquiry should be 'whether but for the allegedly improper or collateral purpose, the directors would have performed the act which is impugned?'.[22] It can hardly be contended that, if the Ahmed group did not wish to position OTS56 to take up the option, the impugned resolution would nevertheless have been adopted. It seems clear that it would not have been. There was also no suggestion that, if the voting rights had not been diluted by the impugned resolution, it would not have been adopted. The dominant purpose was clearly to place OTS56 in a position to exercise the option by raising capital through the sale of ALI shares. I do not consider that the Ramano group has made out a case that the dominant purpose of the impugned resolution was to avoid the removal of the Ahmed group and to remove Ramano from the board of ALI. The second line of attack on the impugned resolution must therefore be rejected.

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[22] *Darvall* at 248.

[89] The third line of attack was that, even if the Ahmed group acted for a proper purpose, the means chosen bore no rational connection to that purpose. The section of the Act touching on rationality is s 76(4), to which s 76(3)*(b)* and *(c)* are made subject:

'(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-

. . .

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person-

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.

(4) In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company-

(a) will have satisfied the obligations of subsection (3)*(b)* and *(c)* if-

(i) the director has taken reasonably diligent steps to become informed about the matter;

(ii) either-

(aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or

(bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph *(aa)*; and

(iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company. . . '

[90] Only s 76(4)*(a)*(iii) was invoked, bringing into focus whether the decision 'had a rational basis'.[23] In *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd*, after reviewing a number of authorities, Rogers J held that this involved a subjective test:

'What is required is that the directors, having taken reasonably diligent steps to become informed, should subjectively have believed that their decision was in the best interests of the company and this belief must have had "a rational basis".'[24]

What this, in essence, means is that a court is not entitled to determine objectively what was in the best interests of a company. It is confined to deciding two matters; whether the director or directors concerned believed that the decision was in the best interests of the company and whether the director or directors concerned had a rational basis for so believing. As mentioned, it is the latter which was challenged.

[91] The impugned resolution of 25 February 2020 must be evaluated against this test. Did the belief of the Ahmed group that the impugned resolution was in the best interests of ALI have a rational basis? In the light of the exercise of the options having been provided for as far back as the Framework agreement and the desire even on the part of Ramano to increase the shareholding of OTS56 in Astron and acquire one in Astron Botswana, it is difficult to hold otherwise. No other way of funding such a transaction was available or had been suggested by Ramano. It seems that the criticism of the Ramano group was not of the need to sell shares so as to raise the necessary capital but of the entity to which the shares were sold. This affords no basis for a finding of irrationality. This ground of attack by the Ramano group must likewise fail.

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[23] It was not contended that the directors who voted in favour of the impugned resolution had not 'taken reasonably diligent steps to become informed about the matter' as required by s 76(4)*(a)*(i) of the Act.

[24] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & Others (Visser Sitrus)* [2014] ZAWCHC 95; 2014 (5) SA 179 (WCC) para 74.

Oppressive conduct

[92] Akhona aligned itself with the Ramano group in supporting the main application. It contended that the adoption of the impugned resolution by the Ahmed group amounted to oppressive conduct towards Akhona as a minority shareholder. It was the only applicant which invoked this basis for setting aside the impugned resolution. Its complaint was that its shareholding had been diluted by 17.48 percent as a result of the impugned resolution. It said that the dilution put an end to the intended purpose of the AGM to be held on 27 February 2020. Akhona conceived that purpose to be that all of the directors ought to have been removed at the AGM and others appointed in their place, as was the recommendation of the SOC. Instead, the Ahmed group concluded the agreement pursuant to the resolution so as to preserve its control over ALI. This was oppressive of a minority shareholder such as Akhona.

[93] This contention brings into focus the provisions of s 163(1)*(a)* of the Act which provides:

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

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

The predecessor to this section in the old Act was considered by the Constitutional Court in the matter of *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others*.[25] Its purpose was held to be to enable a court to come to the relief of minority shareholders experiencing 'unfairly prejudicial, unjust or inequitable acts or omissions of the company or conduct of its affairs'.[26] Where the

[25] *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others* [2017] ZACC 15; 2017 (7) BCLR 916 (CC); 2017 (5) SA 9 (CC).
[26] Ibid para 27.

standards of s 76 of the Act have been met by the board, there is a high threshold before a case can be made out under this section. As was held by Rogers J:

'Framing the proposition specifically with reference to board decisions, the circumstances of a case would, I think, have to be exceptional before one could find that a board decision, taken in accordance with the standard set by s 76, has caused a shareholder prejudice which can properly be described as "unfair" within the meaning of s 163.'[27]

I agree with that view.

[94] I have found that the provisions of s 76 were satisfied. The dominant purpose was to raise capital to place OTS56 in a position to exercise the option to acquire Astron Botswana shares. The way of achieving this was to issue ALI shares. A necessary corollary of this was that the voting power of existing shareholders, including Akhona was diluted. No exceptional circumstances were adverted to by Akhona in support of this complaint. Secondly, it certainly cannot be held that the purpose of the shareholders' meeting was to remove all of the directors of ALI. This was a recommendation contained in the report by the SOC. But the agenda item concerning the SOC report was limited to the presentation of the report only. None of its recommendations were included as resolutions to be put to the meeting. It was clear that the SOC report was controversial. In the result, no case for oppressive conduct was made out by Akhona. It did not press this aspect in argument before us. The high court correctly held that the case was not made out.

[95] Taking into account all of the facts in this matter, the finding of the high court in the main application that the impugned resolution should not be set aside cannot be faulted. It correctly dismissed the main application and the related costs order was appropriate.

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[27] *Visser Sitrus* para 65.

The main counter-application

[96] The main counter-application invokes the provisions of s 162(2) of the Act, which provides:

'A company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company may apply to a court for an order declaring a person delinquent or under probation if-

(a) the person is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and

(b) any of the circumstances contemplated in-

(i) subsection (5)*(a)* to *(c)* apply, in the case of an application for a declaration of delinquency; or

(ii) subsections (7)*(a)* and (8) apply, in the case of an application for probation.'

The delinquency provision is dealt with in the relevant parts of sections (5)*(a)* to *(c)*, which provide:

'(5) 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;

. . .

(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'.

[97] The high court held that the approach adopted in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,[28] precluded such a finding on the basis that there

[28] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634H-635B.

were factual disputes which could not be resolved in favour of the Ahmed group on the papers. Unfortunately, the factual disputes preventing this were not clearly detailed in the judgment of the high court. In addition, the judgment contains a material misdirection in that the high court found that Ramano 'had received legal advice to the effect that the [September letter] was legally binding and constituted an enforceable option'. That is not correct. This factual finding appears to have formed the lynchpin for the high court's decision. As a result, the high court concluded that 'there were foreseeable disputes of fact as to whether Ramano was delinquent or merely misinformed or acting on incorrect advice'.

[98] It was urged on us in argument that the dismissal of the counter-application on the basis that factual disputes could not be resolved on the papers was based on a true discretion exercised by the court of first instance. Two kinds of discretions have been described:

'A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of s 35 of the Restitution of Land Rights Act. It is "true" in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.

In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in *Knox*, a discretion in the loose sense—

"means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision".'[29]

[29] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) *(Trencon)* paras 85 and 86.

It is clear that the discretion exercised by the high court in this matter was a true one.[30] In such cases, an appeal court's ability to interfere with it is highly circumscribed:

'When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised—
"judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles". [Footnote omitted.]
An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.'[31]

[99] In *Mamadi*, in the light of factual disputes, the court had dismissed the application rather than referring it to oral evidence. The Constitutional Court held that, as a result, it was at large to interfere despite the strict discretion.[32] That applies equally to the present matter and is further buttressed by the clear misdirection on a fact foundational to the case of Ramano as mentioned above. As a result we are at large to arrive at our own conclusions.

[100] Although there were certain factual disputes concerning the conduct of Ramano, much of his conduct is common ground, arising as it does from correspondence sent to and by him, along with other uncontested facts and documents. It was submitted before us that the common ground conduct in question warranted a finding of delinquency on his part. It is this which must now be considered.

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[30] *Mamadi and Another v Premier of Limpopo Province and Others (Mamadi)* [2022] ZACC 26; 2023 (6) BCLR 733 (CC); 2024 (1) SA 1 (CC) para 46.
[31] Ibid para 88. See also *Ferris and Another v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) (2014 (3) BCLR 321; [2013] ZACC 46) para 28.
[32] *Mamadi* fn 30 para 46.

[101] In the first place, Ramano misrepresented to the board of OTS56 that he had received advice from DM5 that the September letter amounted to an enforceable option to obtain the shares destined for Glencore when Transaction 2 closed. He said that the DM5 attorney, '. . . believes that the [September letter] given to OTS is a valid contract'. This was a deliberate untruth and a wilful misrepresentation to the board. He was aware that at no stage had DM5 given advice on the import of the September letter.

[102] In the second place, he caused OTS56 to breach the Framework agreement itself as well as the parties' undertakings to use their best endeavours to procure that the conditions in the Glencore agreements were satisfied and would do nothing which might delay this. He did so in at least the following ways:

a) He delayed the Competition Commission process which was one of two conditions for closing Transaction 2. First, he delayed meeting with the Competition Commission by approximately one month. Secondly, his submission to the Competition Commission on behalf of OTS56 was calculated in his own words to 'provide ammunition for the Commission to suspend Glencore's filing until we have finalised agreement in the letter of undertaking to us from Glencore'. It had precisely that effect. Thirdly, even after the majority of the board had written to the Commission signifying the support of OTS56 for the Glencore agreements, Ramano continued to attempt to persuade the Commission not to approve Transaction 2 in an email to the Commission.

b) He unilaterally and without the authorisation of the board suspended compliance with the Glencore agreements. This caused OTS56 to default on its obligations under a binding agreement and to breach the parties' undertakings. As was said in *Gihwala and Others v Grancy Property Ltd and Others*:

'The directors . . . owed a fiduciary duty to [OTS56] to ensure that it complied with its obligations under that agreement.'[33]

Wallis JA dealt further with the actions of the directors in *Grancy*:

'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 . . . A declaration of delinquency was entirely justified.'[34]

Ramano was aware the OTS56 was legally bound to give effect to its obligations to Glencore. This had been repeatedly pointed out to him and he had agreed that this was the case in the meeting with Glencore on 16 October 2018. As in *Grancy*, his conduct in preventing OTS56 from complying with its legally binding obligations qualifies as wilful misconduct and breached his fiduciary duty.

c) He persuaded the ALI shareholders not to vote on the special s 115 resolutions at the shareholders meeting of 30 November 2018. The need for the special resolutions was one of two conditions of Transaction 2, along with Competition Commission approval. Supporting those resolutions was specifically committed to by OTS56 in the parties' undertakings. He attempted to frustrate the fulfilment of this condition and certainly delayed it. His conduct also led to a further delay in Transaction 2 being closed since the resolutions were only voted on at a meeting held on 4 April 2019.

[103] Thirdly, on 27 February 2019 after his removal as chairperson of ALI Ramano purported to call a shareholders meeting for 13 March. He signed the notice under the words, '[b]y order of the Chairman'. As has been detailed above, when reminded

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[33] *Gihwala and Others v Grancy Property Ltd and Others* [2016] ZASCA 35; 2017 (2) SA 337 (SCA); [2016] 2 All SA 649 para 137 (*Grancy*).
[34] *Grancy* para 139.

that he had no authority to do so by the board and after it informed shareholders that this was the case, he on three further occasions communicated with the shareholders, either directly or through his attorneys Herold Gie, insisting that the meeting would proceed. This conduct of Ramano demonstrated a blithe disrespect for corporate governance and also breached his fiduciary duty as a director.

[104] Finally, Ramano breached his own undertakings given to the board at the meeting of 4 February 2019. He undertook to give written responses to each allegation of breach made by Glencore with accompanying legal advice from the lawyers representing OTS56 as well as clarity on the potential exposure of directors. He reneged on those undertakings. His written response was never given, nor did DM5 give legal advice on the breaches. His failure to give effect to his undertakings to the board once again breached his fiduciary duty. This was especially egregious in the face of the serious concerns expressed by the board for the exposure of OTS56 to legal action which had caused the board to seek those undertakings.

[105] In my view, the conduct of Ramano outlined above justifies a finding that he 'acted in a manner that amounted to . . . gross negligence, wilful misconduct [and] breach of trust in relation to the performance' of his functions within and duties to OTS56. This falls foursquare within the ambit of s 162(5)*(c)*(iv) of the Act. A court has no discretion to decline to declare a director delinquent if the factual findings bring his conduct within the ambit of that section.[35] It is clear that the common cause facts outlined above amply warrant such a finding, especially when taken together. As a consequence, the high court was obliged to declare Ramano delinquent.

[35] *Grancy* para 140.

[106] The order sought was one declaring Ramano a delinquent director for a period of seven years. Section 162(6)*(b)* of the Act provides that:

'A declaration of delinquency in terms of-

. . .

(b) subsection (5)*(c)* to *(f)*-

(i) may be made subject to any conditions the court considers appropriate, including conditions limiting the application of the declaration to one or more particular categories of companies; and

(ii) subsists for seven years from the date of the order, or such longer period as determined by the court at the time of making the declaration, subject to subsections (11) and (12).

The latter subsections do not apply at this stage.[36] As Wallis JA said in *Grancy*, the section:

'. . . 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.'[37]

[107] As such, the high court was bound to declare Ramano delinquent for a period of seven years. In failing to do so and in dismissing the counter-application with costs, the high court erred.

The expanded counter-application

[108] The 1998 AGM of ALI authorised the issue of shares to the then directors of ALI at a subscription price equal to the full diluted net asset value per share (after the allotment and issue thereof) as determined by the auditors of the company as at 'the latest practical date prior to the allotment and issue of the shares'. The resolution of the 1998 AGM was to be implemented in October 1999 but there was insufficient

[36] They deal with options available to a person who has been declared delinquent after the order is made to have the period reduced or conditions altered.
[37] *Grancy* para 140.

authorised share capital at the time. At the AGM of 29 September 2000, a special resolution was passed increasing the authorised share capital. A general resolution was also passed authorising the directors to allot and issue shares in accordance with the 1998 resolution. The directors who were to be recipients were named. The pricing terms contained in the 1998 AGM remained in place. There is a dispute concerning the price at which the shares were in fact issued. The Ahmed group contended that the shares were issued at a very considerable discount to the net asset value. It asserted that they were issued at par value.

[109] The high court correctly held that the implementation of the resolution of 1998 redistributing the shareholding was invalid. The factual disputes as to the manner in which the shares were valued and should have been valued cannot be resolved due to a lack of records. It is not possible to determine the value at which the shares ought to have been obtained. The evidence of Ahmed does not amount to expert evidence. In any event, the primary documents on which such an opinion would be based are not available.

[110] This is where an evaluation in terms of s 97(1) of the old Act comes in. This provides:

‘Where a company has purported to create, allot or issue shares and the creation, allotment or issue of such shares was invalid by virtue of any provision of this Act or any other law or of the memorandum or articles of the company or otherwise, or the terms of the creation, allotment or issue were inconsistent with or not authorized by any such provision, the Court may upon application made by the company or by any interested person and upon being satisfied that in all the circumstances it is just and equitable to do so, make an order validating the creation, allotment or issue of such shares or confirming the terms of the creation, allotment or issue thereof, subject to such conditions as the Court may impose.’

A court is afforded a discretion when determining whether or not to validate an invalid share issue and the conditions which should attach to the validation. It was conceded that the high court exercised a true discretion in approaching this evaluation.[38]

[111] The high court listed some eleven factors which it held weighed in favour of validating the issuing and redistribution of the shares. They were carefully formulated and relevant. It cannot be said that the high court did not exercise its true discretion judicially or that any of the other bases for interference in the discretion were made out. The Ahmed group, when confronted with the nature of the discretion and these factors in argument, did not press the appeal against this order of the high court any further. We are accordingly unable to interfere with the exercise of the discretion of the high court. The order of the high court in the expanded counter-application must thus stand.

[112] Only one further matter requires comment. The Ahmed group correctly submitted that if the outcome of the merits of the validation application is not interfered with, the costs award in that matter should be limited to ALI and the Ahmed group. This is correct as mentioned above because OTS56 and the directors who were unique to that company did not enter the lists in that application. The costs order in that matter then requires amendment.

[113] In the result, the following orders issue:

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[38] See para 98 supra concerning the test for interference by an appeal court with the exercise of a strict discretion.

1 The appeal against the order dismissing the main application is dismissed with costs, such costs to be paid jointly and severally by the first to ninth appellants and to include those consequent on the employment of two counsel.

2 (a) The first cross-appeal is upheld with costs, such costs to be paid jointly and severally by the first to eighth respondents in the cross-appeal and to include those consequent upon the employment of two counsel.

(b) The order of the Gauteng Division of the High Court, Johannesburg dismissing the main counter-application by the cross-appellants is set aside and substituted by the following orders:

'1 The eighth respondent in the main counter-application is declared to be a delinquent director in terms of s 162(2)*(a)* read with s 162(5)*(c)*(iv) and s 162(6)*(b)* of the Companies Act 71 of 2008 for a period of seven years.

2 The first to eighth respondents in the counter-application are directed to pay the costs of the counter-application jointly and severally, such costs to include those consequent upon the employment of two counsel wherever that was done.'

3 (a) Save for paragraph 3(b) hereof, the second cross-appeal against the dismissal of the extended counter-application is dismissed with costs, such costs to be paid jointly and severally by the first and third to eighth respondents in the main appeal and to include those consequent upon the employment of two counsel.

(b) The costs order in the Gauteng Division of the High Court, Johannesburg in the expanded counter-application is amended by excluding the second, ninth and tenth respondents in the main application in that court from the costs order.

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T R GORVEN

ACTING JUDGE OF APPEAL

Molemela P (Dolamo AJA concurring)

[114] I have read the judgment of my colleague, Gorven AJA (the first judgment) and agree with paragraph 3 of the order proposed therein. The facts of the case have been correctly set out in the first judgment and need not be rehearsed in this section of the judgment. Suffice it to emphasise that it is plain from those facts, that the Ahmed group rely on the same facts to oppose the application seeking the setting aside of the impugned resolution (main application) and in support of the main counter-application for an order declaring Ramano a delinquent director. That this is so, is expressly admitted by Ahmed in his answering affidavit to the main application (seeking the setting aside of the impugned resolution) and his founding affidavit in the main counter-application. He stated as follows in his answering affidavit:

'*The facts and circumstances which are germane to the main application and the counter-application are inextricably intertwined.* This affidavit accordingly sets out the facts and evidence which form the sub-stratum of both the opposition to the main application, and the counter application'. (Emphasis added)

This overlap of facts is recorded by Ahmed as follows in the founding affidavit to the main counter-application:

'As I stated in my answering affidavit, *it contains a recitation of facts which are principally relied upon in answer to the main application*, but also facts which are germane to this counter-application…' (Emphasis added).

An attestation to the 'inextricably intertwined' facts of the main application and counter application is that in giving the outline of the structure of his affidavit, Ahmed explained that he would respond to the averments in the respective founding and supporting affidavit' and also set out the grounds upon which he and the directors aligned to him sought an order declaring Ramano to be a delinquent director. Put differently, both the basis for the opposition of the main application and

the legal basis on which the counter-application is founded are supported by the same factual material.

[115] From my point of view, the making of a case in the main application was hampered by the disputes of facts that were raised by Ahmed in his answering affidavit as well as in the main counter-application. Against the backdrop of affidavits replete with factual disputes that are irresoluble on the papers, there is no basis for concluding that the dominant purpose of the impugned resolution was to benefit either ALI or OTS56. It is for this reason that I am unable to agree with the reasoning of the first judgment relating to paragraph 1 of its order and respectfully disagree with both the underlying reasons and order granted in paragraph 2 (ie the cross-appeal relating to the main counter-application (seeking an order that Ramano be declared a delinquent director). In my opinion, the cross-appeal relating to the counter-application cannot succeed because the order granted by the high court (a dismissal of the counter-application on account of material factual disputes) did not finally dispose of the matter,[39] and it is not in the interests of justice to entertain this leg of the cross-appeal. The cross-appeal relating to the main counter-application is therefore not appealable.

[116] It is common ground that the high court found that there were material disputes of fact that prevented it from granting an order declaring Ramano a delinquent director. The first judgment's take on the matter is that the high court erred in that conclusion. It points out that the factual disputes on which the high court relied for its conclusion were not clearly detailed in its judgment. It also finds that

[39] See *Mamadi and Another v Premier of Limpopo Province and Others* [2022] ZACC 26; 2024 (1) SA 1; 2023 (6) BCLR 733 (CC) para 22. In this matter, the Constitutional Court held that a dismissal of an application on account of factual disputes is not a dismissal on the merits.

the common cause facts it has outlined amply warrant a finding that Ramano was a delinquent director, especially when taken together. On this latter aspect, I need only point out at this stage that where there are material factual disputes on essential issues, it is impermissible to *select* common cause facts and to predicate an outcome on the basis of such common cause facts; evidence that is material to the dispute must be considered in totality.

[117] In the ensuing paragraphs, I will show that there are probabilities and improbabilities in both versions and that the material factual disputes render it impossible to decide this matter on the papers. The high court's finding that there were material factual disputes as to whether Ramano was delinquent or merely misinformed or acting on incorrect advice in his interpretation of the September letter identifies the nub of these factual disputes. The high court noted that the board members were at loggerheads and referred to correspondence that attests to this. It sketched an important background about how a Shareholders Committee known as the Shareholders Oversight Committee (SOC) came into existence. It observed that at a general meeting of ALI held on 4 April 2019, proposals were made for the removal of ALI directors, including Ramano, and also for the appointment of new directors. The proposals were not voted on; instead, the SOC was established by the shareholders unanimously for purposes of investigating the impasse on the board and other issues. The SOC submitted interim reports to the board. A final report was submitted in December 2019. The SOC intended to table its findings at a shareholders' meeting.

[118] In its judgment, the high court alluded to the acrimonious relationship between the Ramano and Ahmed groups, the circumstances under which the SOC was established and its reports, as well as correspondence that was exchanged

between the two groups. There can be no doubt that the high court would have noted all the material factual disputes alluded to in the succeeding paragraphs. Its conclusion that there were foreseeable disputes of fact 'as to whether Ramano was delinquent or merely misinformed or acting on incorrect advice' is borne out by the record relating to the main application and counter application.

[119] The rest of the material factual disputes on essential issues are self-evident from the evidence that was considered by the high court, ie the averments made by various deponents and the annexures to the affidavits. I consequently find that the high court judicially exercised its discretion when it found that material factual disputes prevented it from granting an order declaring Ramano a delinquent director, and that this Court is not at large to tamper with that decision. To the extent that it might be contended that the high court did not exercise a discretion at all, it remains open to this Court to exercise its discretion[40] by reviewing the facts to determine whether there were indeed foreseeable disputes of fact that precluded the adjudication of the application on the papers. Given the fact that this judgment is not unanimous, it is essential to highlight the fundamental disputes of facts without being exhaustive.

[120] The Ramano group essentially founded the main application, inter alia, on the proposition that the share subscription agreement was contrived, and that the actual purpose of the impugned resolution was to frustrate the removal of the Ahmed aligned directors and to facilitate the removal of Ramano from the board. They asserted that the impugned resolution was aimed at diluting shareholding as a way

[40] *United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Service and four other cases* (CCT 94/23; CCT 98/23; CCT 66/23; CCT 72/24; CCT 320/23) [2025] ZACC 2; 2025 (5) BCLR 530 (CC) para 377.

of ensuring that the Ramano group no longer held sufficient votes to constitute a majority at shareholders' meetings.

[121] The allegations mentioned in the preceding paragraph were denied by Ahmed (the company secretary of ALI) and the Ahmed aligned group. They asserted that Ramano had sought to exercise his rights as a director of OTS56 and shareholder of ALI 'with inequitable and disproportionate voting rights, to unfairly disregard the interests of the director respondents in a manner which is oppressive and unfairly prejudicial to them.' In paragraph 6.3 of his affidavit, Ahmed stated as follows:

'The heart of the relief sought [in the counter-application] under section 163 of the Companies Act concerns the exercise by Ramano of grossly disproportionate voting rights attached to his small majority shareholding. He has sought to exercise these in a manner which is oppressive and prejudicial of the majority shareholders.'

[122] The Ahmed group asserted that the Ramano group 'had long since been aware that a share issue by ALI formed part of the financing arrangements relating to the options' to acquire additional shareholding in Astron and Astron Botswana, respectively. They also asserted that insofar as Ramano may not have known about those discussions, it was only because of his egregious conduct which manifested itself in him not attending some of the meetings. The answering affidavit then went into details in an effort to show that the passing of the impugned resolution was justified. Ahmed averred that 'the actions on the part of Ramano (and those with whom he is in concert) which are germane to both the main application and the counter-application span a period of 20 months'.

[123] The Ahmed group denounced Ramano's conduct dating back to the conclusion of T1 and contended that Ramano jeopardised the conclusion of T2.

Oliphant stated that Ramano's relationship with Glencore had 'completely broken down'. He remarked that 'we are led to believe that Glencore no longer trusts [Ramano's] *bona fides*'. He mentioned that this was 'not conducive to a good shareholder relationship going forward and compromises any future negotiations with Glencore'. According to the Ahmed group, Ramano's egregious conduct led to his removal as the Chairperson of ALI and as the member of the OTS56 transaction team. The Ahmed group relies on the same conduct as their basis for seeking an order declaring Ramano a delinquent director. It is in that context the litany of material factual disputes came to the fore.

[124] In an attempt to illustrate Ramano's objectionable demeanour or his apparent lack of interest in company-related matters after his removal as a chairperson of ALI, Ahmed pointed out that Ramano had resorted to either absent himself from important board meetings entirely or participating in the meeting by dialing in. The minutes of the OTS56 board meeting dated 7 November 2019 reveal that Ramano sent an apology indicating that he could not attend the meeting as he would be traveling aboard.

[125] The minutes reveal that Ramano had at some instance complained that it seemed as if the dates of board meetings were intended to coincide with other events that precluded him from attending the meeting. Significantly, Oliphant, asserted that due to the manner in which Ramano had conducted himself in the past, Glencore had indicated that Ramano was not welcome to attend the meeting scheduled to be held in Cape Town. As a result, all the directors attended except Ramano.

[126] The minutes of the special meeting held on 6 April 2020 record that Ramano stated that he had previously mentioned that he had been prevented from

participating in discussions with Glencore regarding OTS acquiring additional shareholding in Astron and 30% shareholding in Astron Botswana. He complained that he was not aware of some information that had come to light at the previous board meetings. He lamented the fact that he had not been informed that the board was going to have a meeting with Glencore in London and had thereafter not been apprised of the discussions that were held at that meeting in his absence.

[127] A very significant consideration in this regard is that the subscription of further shares which diluted the voting rights of the Ramano group came about as a result of the impugned resolution. Once that had happened, the Ramano group no longer commanded the majority vote and the resolution for the removal of the ALI directors could not be passed. Ahmed acknowledged that if the share issue had not been finalised before annual general meeting scheduled for 27 February 2020, 'a Ramano aligned board would clearly not have proceeded with the share issue, which would have had the effect of diluting all of their voting rights, but in particular Ramano's, (at least in absolute terms), and hence his ability to control the company in a shareholders' meeting.' This averment is rather curious, considering that at this stage, the SOC had already advocated for a restructured board of ALI with independent directors who owed no allegiance to any particular shareholder.

[128] Bearing in mind Ahmed's assertion that Astron had agreed to fund the purchasing of OTS56 shares by the Trust, and that vendor funding could have been sought from other sources, the following assertion by Ahmed is quite striking:

'From ALI's perspective the proposal to allot both A ordinary and N shares in ALI would also have been attractive to the Astron Employee Trust, as those shares would give it relatively significant voting rights in ALI. As this honourable Court will appreciate, any prospective subscriber or purchaser of shares in ALI would have been concerned by the ongoing ructions

caused by Ramano, with this enhanced historical voting rights in the company. In the difficult circumstances which prevailed in relation to Ramano in 2018 to early 2020, including the parlous state of his relationship with Glencore, ALI's partner and major creditor, no reasonable investor would have been willing [to] invest in the region of R24 million in ALI, let alone pay a premium for the shares acquired, *unless the voting rights attached thereto gave him/her a reasonable degree of control over the company at shareholder level, and did not leave him/her in the position where the investment was exposed to the whims of Ramano and his acolytes*.' (Emphasis added).

There can be little doubt that averments of this nature can only have a bearing on probabilities in a matter that is ventilated through oral evidence.

[129] The Ramano group asserts that the dilution of their voting rights and the subsequent removal of Ramano as a director was orchestrated by Glencore, the very entity which financed its acquisition of shares in Astron in terms of Transaction 1 and controls Astron and Astron Botswana. This is no small matter. If proven on a balance of probabilities, it would fall squarely within the categories of prejudicial conduct within the meaning of s 163 of the Act.[41] In *Technology Corporate Management (Pty) Ltd and Others v De Sousa and Another*,[42] this Court explained the need for good faith among members of a company as follows:

'[T]here will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.'

Self-evidently, a factual dispute pertaining to whether a dilution of voting right is premised on an alleged lack of good faith or an improper purpose is a dispute that goes to the heart of the relationship between the shareholders and the company. As such, it would therefore constitute a dispute of fact on an essential issue.

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[41] See *In re Sam Weller Ltd* [1990] 1 Ch D 682 at 689G-H, as cited in *Technology Corporate Management (Pty) Ltd and Others v De Sousa and Another* [2024] ZASCA 29; 2024 (5) SA 57 (SCA**)** para 78.
[42] Ibid para 82.

[130] At para 84, the first judgment alludes to the contentions made by the Ramano group in support of their allegation that the passing of the impugned resolution was for an improper purpose. It *inter alia* states as follows:

'c) . . . The board of OTS56 was *ad idem* that the option should be exercised. Exercising it by way of a share issue had been settled since Glencore declined to do so by vendor finance. No other way of financing it had been found or suggested. The only aspect settled shortly before the adoption of the impugned resolution was the identity of the entity which would take up the shareholding.'

In my view, there are material disputes on this aspect. Notwithstanding various averments made by the Ahmed group to the effect that Ramano had been aware that a share issue by ALI formed part of the financing arrangements relating to the options, there is no documentary evidence that unequivocally supports their averments on this aspect. None of the minutes of the OTS56 and ALI meetings show that a resolution was taken on the matter.

[131] The draft minutes of the ALI board meeting held on 5 November 2019, which Ramano attended, do not suggest that a firm resolution was taken on the matter. It was recorded that 'OTS must acquire 30 per cent Astron Botswana with vendor finance. The minutes then record that the Astron Botswana transaction is 'to be financed with B Pref shares and a down payment' and mention that 'there is no reason to hold the A ordinary shares'. What is missing is a conclusion that the board had decided to opt for share subscriptions as a way of raising capital for the Astron Botswana transaction.

[132] The 'summary of the meeting' held with Glencore and OTS56 in Cape Town on 11 and 12 November 2019 (which Ramano was not permitted to attend) provides no clarity on the matter. The summary mentions that 'OTS submitted a proposal to

Glencore at the July 2019 meeting in London. Glencore provided a response to the proposals on 4 November 2019. The meeting in Cape Town was to interrogate the position of Glencore on the OTS proposals'. Under the heading 'Acquisition of Additional Stake in Astron SA and Astron Botswana, the only reference to a further subscription of shares is set out as follows: ALI to provide details of proposed new shareholder to fund initial deposit on Astron Botswana acquisition. OTS to provide details.'

[133] Ahmed claims to have sent a 'report relating to the proposed share' in the same e-mail in which the impugned resolution was sent to the board. There is a dispute of fact regarding whether this report was previously sent to the board. In any event, this report is dated 13 December 2019 and plainly could not have been sent to the board earlier than that date. Except for Ahmed's say so, there is no document that supports a discussion on a share subscription having taken place between May 2019 and July 2019 as alleged by Ahmed. Ramano denies this. Whereas Ahmed averred that a share issue by ALI 'had been under discussion since May 2019' and that Glencore's response dated November 2019 was sent to directors of OTS56 and ALI in November 2020, Ahmed also asserted that the share issue to enable the payment of a deposit for shares was 'conceived and communicated to directors in February 2020'. Although this appears as a consistency on the record, it might perhaps be easily clarified in oral testimony.

[134] At best, Ahmed's report expresses Ahmed's own 'preliminary conclusion' that ALI could 'remedy the situation' by repurchasing all the shares issued to Ramano and directors at par, or converting all A ordinary and N ordinary shares to a new class of shares having equal votes, or amending the Memorandum of

Incorporation by reducing the voting on A ordinary shares equal to N ordinary shares.

[135] In a letter dated 27 January 2020 addressed to Glencore, no details are furnished regarding the matter. Ahmed concludes the letter by stating that the plan set out in that e-mail will run concurrently with ALI's 'endeavours to raise additional capital'. He points out that the issue is being 'interrogated extensively'. As can be seen from these facts, there is nothing conclusive on the issuing of further shares; there are no common cause facts. I am therefore unable to agree that what remained was merely to identify the entity that would acquire the shares. That being the case, I am unable to agree with the proposition that suggests that Ramano had previously not objected to the exercise of the option for purposes of acquiring the Astron Botswana shares or the sale and issue of shares to facilitate it.

[136] As to whether alternative methods of obtaining funding were discussed, it is evident from the SOC reports that these were indeed discussed. For example, the SOC questioned why Glencore was chosen as the vendor funder when RMB Bank, which was an ALI shareholder, and other financial institutions could be approached to finance that transaction do the same. The SOC had also raised concerns about the financing solution being limited to a vendor finance solution with Glencore, whilst financial institutions like RMB, which was an ALI shareholder, and other financial institutions could be approached to assist with that transaction. The SOC final report further stated that Glencore was already appearing to be having significant influence over the controlling directors, and the situation was likely to be exacerbated if Glencore became the financier that enabled OTS56 to exercise its equity acquisition options.

[137] The import of the SOC reports is that there was no unanimity among shareholders regarding how the purchase of the Botswana shares was to be financed. This does not accord with the version of the Ahmed group, which asserts that an issuing of further shares as a method of financing the Astron Botswana shares had already been agreed upon. Self-evidently, there is a material dispute of fact regarding the purpose of the passing of the impugned resolution a few days before a scheduled board meeting. This dispute plainly cannot be adjudicated on the papers.

[138] It bears mentioning that in a letter dated 4 December 2019, addressed to the chairperson of the SOC (Mjekula), Oliphant raised a concern about SOC's questions regarding the 'strategic transaction'. He stated that 'the strategic transaction has nothing to do with the SOC's mandate, and the SOC has no basis for interfering in the board's relevant communications with the shareholders'. In response to the statement that the strategic transaction had nothing to do with the SOC, Mjekula responded by pointing out that Oliphant's letter 'contains several false assumptions and makes invalid inferences'. He went on to point out that SOC came to know about developments regarding the strategic transaction when Ahmed alluded to it at a SOC and board members' meeting. Ahmed had undertaken to provide further details of the strategic transaction to the SOC. Mjekula further stated that Oliphant's view that the SOC had no basis for in the board's communication with shareholders 'appears to ignore the fact that SOC was established by ALI shareholders and represent the interest of all shareholders, despite baseless assertions to the contrary'.

[139] A further aspect that warrants consideration is that there was a dispute about the correctness of some of the minutes of the joint meeting held by the SOC and the board. Oliphant stated that Ahmed had provided an amended draft of those minutes because he had noted that they contained omissions and misstatements. In response,

Mjekula stated that he disagreed with several of the amendments proposed by Ahmed. Given the litany of disputed facts in this matter, I am not inclined to conclude that the SOC, a committee created by a unanimous resolution of shareholders, was controversial.

[140] The stated purpose of the Companies Act is to balance the interests of shareholders and directors and to encourage the efficient and responsible management of companies. It is common ground that the broader shareholding of ALI was drawn from various empowerment groups, entrepreneurs and a trade union. Akhona, a private company which constituted a women's empowerment grouping within ALI (representing approximately three thousand women), decried the fact that its voting rights were diluted by approximately 17 per cent. Since ALI was founded as a B-BBEE company espousing transformation objectives, it is appropriate to refer in passing to the Sustainable Development Agenda adopted by the UN member states in 2015, which set a 2030 deadline for the achievement of gender equality and the empowerment of women. One of the goals set out in the agenda is to undertake reforms to give women equal rights to economic resources, as well as access to economic resources, in accordance with national laws.

[141] To the extent that it is contended that any share issue would, in any event, have resulted in a dilution of shares, this is not always the case; it suffices to mention for present purposes that a share issue can be structured so as to cater for a company's unique needs. Issuing a specific class of shares may raise capital without significant equity dilution. Notably, it appears that the shareholders were concerned about the governance of ALI and held the view that the directors' actions were motivated by self-interest as they held shares in ALI.

[142] At the shareholders meeting of 4 April 2019, held a few days before the closing of T2, it was unanimously resolved to appoint a SOC to investigate the conduct of the ALI directors and to report and make recommendations to the shareholders. The SOC was formed approximately a year before the subscription agreement was signed. Several SOC interim reports were furnished. On 19 December 2019, the SOC delivered a final report to the shareholders of ALI. In that report, a concern was raised to the effect that governance processes were not being followed.

[143] Several allegations made in the SOC report also reveal that the shareholders were disgruntled with *both* the Ramano and Ahmed groups, to the point that they expressed the wish to have a board comprising 'independent' directors. The SOC report reveals that the shareholders believed that both the Ahmed and Ramano groups were driven by their respective self-interests as they held shares in the company. The SOC raised concerns about the absence of 'independent directors' and advocated for non-executive director appointments to be made. It identified a need for more gender representivity on the board and recommended that the tenure of persons appointed to the board be limited as per the King Report.

[144] The undisputed sequence of events preceding the passing of the impugned resolution is intriguing. According to the Ahmed group, the special resolution for the allotment of further shares by OTS56 for purposes of raising finance for an acquisition of shares in Astron South Africa and an additional 30 per cent in Astron Botswana had previously been discussed at previous of board-meetings.

[145] According to Ramano, the matter had never been discussed at a board meeting, hence his enquiry, upon receiving the impugned resolution, regarding

whether the matter had previously been discussed at a board meeting. No one responded to that enquiry. Instead, within two hours, the impugned resolution had received a majority vote. On the very next day, 26 February 2020, Astron Trust was entered into the share register of ALI as a shareholder holding approximately 17 per cent of the voting rights. This means that the transaction diluted existing ALI shareholders' rights by the same percentage. As a result of that dilution, the Ramano group no longer held sufficient votes to constitute a majority at shareholders meetings. Consequently, the Ramano group was not able to carry its proposed resolution of removing the Ahmed group at the meeting held on 27 February 2020.

[146] While Ramano did not expressly object to the taking of a round robin resolution, his e-mail on the same date of his receipt of the circulating round robin resolution, in which he asked whether the matter had been discussed by the board before, cannot, by any stretch of the imagination, be considered to be an acquiescence. Implicit in his response, at the very least, was a view that the matter was one that ought to be discussed by the directors before being finalised on a round robin basis. Sight must not be lost of the fact that at that stage, a shareholders meeting had already been convened, the purpose of which was to remove some of the appellant directors.

[147] On Ahmed's own version, it was envisaged that the shareholders' inputs would be required at the shareholders meeting scheduled for 7 February 2020 regarding the finalisation of the additional shareholding transaction.[43] Based on Ahmed's e-mail to Glencore dated 27 January 2020, the exercise of the option to

[43] This is self-evident from Ahmed's letter to Glencore, dated 27 January 2020, in which Ahmed stated that 'it would place the current board in an extremely strong position to obtain shareholder support to accept and finalise the transaction'.

acquire further shareholding in Astron Botswana was in any event going to be discussed with the shareholders. Ahmed circulated the round robin a mere two days before the date of a shareholders meeting at which the fate of several directors, including Ahmed, was to be decided.

[148] On Ahmed's own version, the Astron Trust had 'recently been identified by the OTS56 transaction team' and the discussions with the Trust commenced in 'late January 2020'. The investment opportunity was only 'presented and reviewed in detail' at a meeting held on 7 February 2020. According to Ahmed, Astron had agreed to fund the acquisition of those shares by the Trust. This begs the question why the share subscription route was considered necessary to raise capital when Astron was prepared to provide funding. All these aspects suggest that there was no pressing need for the board to short-circuit a discussion of the resolution by taking a round robin resolution two days before the scheduled shareholders meeting.

[149] The alacrity of concluding the transaction for the acquisition of additional Astron and Astron Botswana seems to have ended on 26 February 2020, when Astron Trust was entered into the share register of ALI. Glencore's letter dated 27 March 2020 mentions that 'OTS56 has indicated many times that it will not be able to exercise its option (which expires on 7 April 2020), due to a lack of available funding'. As can be noted, this statement was made at a time when OTS56 had already sold shares to Astron Trust for purposes of raising capital. These, in my view, are aspects that somehow lend credence to Ramano's contention that the dominant purpose of the impugned resolution was to manipulate the voting rights so as to avoid resolutions being passed for the removal of the Ahmed aligned directors from the board and to facilitate Ramano's removal as a director.

[150] Having said the above, sight must not be lost of the fact that according to the Ahmed group, the need to issue further shares had been discussed at several meetings, and the reason that Ramano did not know this was because his attendance of board meetings had waned since the termination of his chairpersonship. If it is true that the matter was discussed at several board meetings which Ramano chose not to attend, then there can be nothing untoward in taking such a resolution by round robin. Given the dispute of fact pertaining to the reason for Ramano's non-participation in board meetings, the issue as to whether the taking of the resolution was motivated by improper purpose or lack of good faith cannot be resolved on the papers. It is for that reason that I hold the view that the dismissal of the matter ought to be on the basis of the existence of foreseeable factual disputes that cannot be resolved on the papers.

[151] The first judgment remarked that the high court did not give any reasons for finding that there are disputes of fact. However, a perusal of the judgment of the high court reveals that it specifically stated that those factual disputes would be revealed in the succeeding paragraphs of its judgment. Even though the high court's reasons for concluding that that there were foreseeable factual disputes were not summarised in a dedicated paragraph of its judgment, it is evident that it was alive to the fact that it was within its discretion to dismiss the application if there were foreseeable factual disputes that rendered the application irresoluble on the papers. It made an express finding that factual disputes existed and then highlighted the essence of those factual disputes. It therefore cannot be said that it did not exercise any discretion. It was in the exercise of that discretion that it declined to declare Ramano a delinquent director and dismissed the application.

[152] It is trite that motion proceedings are not suitable to adjudicate matters which involve material factual disputes. In the seminal judgment of *Room Hire v Jeppe Street Mansions*,[44] the court cautioned that where there is a real dispute of fact, a court should ordinarily decline to decide the dispute purely on the probabilities as disclosed in the affidavits. It should, at its discretion, select the most suitable method of employing viva voce evidence for the determination of the dispute'. It is with the benefit of oral testimony and cross examination that a court can assess and evaluate the probative weight of all the evidence pertaining to the dispute. In a trial, a court is able to determine the cogency and probative weight of the evidence that has been adduced. It is the totality of evidence as juxtaposed against the set standard of proof that will reflect where the probabilities lie.[45] A court must avoid a piecemeal process of reasoning; judicial reasoning must be based on a holistic evaluation of all the proved facts.

[153] In *Mamadi*, the Constitutional Court stated as follows:

'The purpose of the court's discretion under [Rule 6(5)(g)] to dismiss an application is to discourage a litigant from using motion proceedings when the court will not be able to decide the dispute on the papers. This is a waste of scarce judicial resources and prejudicial to the respondent. An applicant should not be able to use motion proceedings when the worst outcome is confined to a referral to oral evidence or trial. Rule 6(5)(g) thus vests a power in courts, where motion proceedings have been inappropriately used in this way, to penalise a litigant through dismissal without rendering a final decision. In short, therefore, a dismissal in terms of rule 6(5)(g) serves to punish litigants for the improper use of motion proceedings.'[46]

These passages are apposite and explain why the high court dismissed the application on its finding that there were foreseeable factual disputes.

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[44] *Room Hire Co (Pty) Ltd v Jeppe Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).
[45] *Mabona v Min of Law and Order* 1988 (2) SA 654 (SE) at 662D-E.
[46] *Mamadi* fn 30 para 42.

[154] As a point of departure, it is common ground that OTS56 was considered to be a B-BBEE entity. It is evident from the record that since OTS56 was a 100 percent black owned business, Transaction 1 was perceived to be a transaction that would have a positive effect on the ability of OTS56, as a company owned by previously disadvantaged individuals, to be competitive.[47] The Competition Tribunal had to consider, among others, whether the proposed transaction could be viewed as an outright dilution of B-BBEE shareholding.[48] The Competition Tribunal recorded that OTS56 had submitted that both Glencore and OTS56 had made a commitment to a vision of transformation and empowerment of historically disadvantaged individuals. The Competition Tribunal had also found that there were several commitments that had been made by Glencore in the Framework Agreement, which pertained to transformation, that would benefit small businesses as well as Black-owned small businesses.[49] This, in my view, provides the necessary context to Ramano's interpretation of the letter authored by Glencore on 27 September 2018 (the September letter).

[155] In terms of clause 3.6 of the Framework Act, it was agreed that OTS56 may make a proposal to sell an interest in Glencore Oil to PIC or another third party for consideration by Glencore.[50] In the September letter, Glencore undertook to consider a commercially attractive offer that OTS56 could put up for its consideration. Although that undertaking could be considered to be an unenforceable *pactum de contrahendo*, as stated by the high court, what should not be lost sight of is that Glencore gave an assurance that the September letter was 'legally enforceable'. It

[47] Paras 23-24 of the Redacted Confidential Report on Transaction 2.
[48] Ibid.
[49] Para 32-33 of the Redacted Confidential Report on Transaction 2.
[50] This is recorded in Oliphant's letter dated 9 March 2019.

also stated that the offer could be made ‘at any time between the date of the letter [27 September 2018 and the closing of] T2’.

[156] It is of significance that Glencore sent the September letter notwithstanding the conclusion of the Framework Agreement. Notably, the letter in question categorically stated that where there was a conflict between the letter and ‘the provisions of any agreement entered into between ourselves or our affiliate and you, then the provisions of this letter shall prevail’. Ramano’s allegedly misinformed interpretation of the legal effect of the September letter must be seen in that context. Once regard is paid to this important context, the conclusion that Ramano caused OTS56 to breach the Framework agreement becomes incongruent, in my view.

[157] Another area of dispute is whether Ramano had received legal advice that buttressed his views regarding the legal status of the September letter. While it should be accepted that DM5 did not give legal advice *to the board* stating that the September letter could be equated to an enforceable option, the letter that DM5 sent to Glencore’s lawyers on 19 February 2019 and to Linklater did mention that Glencore had committed a serious breach of trust. This was with specific reference to the September letter and Glencore’s perceived refusal to meet with OTS56 to discuss the parameters of implementing the contents of that letter. Ahmed was highly critical of this letter and described it as ‘remarkable’. He considered the letter in question to be ‘a staggering attack on Glencore’s integrity’. The advice that Ramano may have received from D5 prior to the dispatch of that letter is unknown, but it seems to me that the letter suggests that the author laboured under the impression that Glencore was under an obligation to at least consider OTS56’s views on the matter. Thus, the high court’s reference to Ramano having acted on legal advice

must be seen in that light. That finding does not, in my view, constitute a misdirection.

[158] As correctly pointed out by the high court, at the annual general meeting of ALI held on 30 November 2018, the company's shareholders unanimously passed a resolution to the effect that the special resolution that was required for the implementation of Transaction 2, be deferred to the end of March 2019. It appears that at that stage, some of the ALI directors, including Ahmed, knew about the contents of the September letter. It was open to them to set the record straight, if they had a different understanding of the September letter. The fact that the resolution was adopted by the shareholders unanimously implies that Ramano was not on a frolic of his own; his views were shared by some of the shareholders.

[159] There were various allegations and counter-allegations about Ramano and the Ahmed group of directors having misrepresented facts to the shareholders. Reference was made to e-mail correspondence, reports and minutes of meetings. Because I do not wish to overburden this judgment, I will only refer to some of the documents that show that there is no basis for rejecting Ramano's version on affidavits that reveal foreseeable, material factual disputes. Moreover, these factual disputes pertain to essential issues that could, with the benefit of cross-examination, pinpoint the door at which the blame for gross misconduct warranting a declaration of delinquency should be laid.

[160] As regards instances of misconduct which allegedly warrant Ramano being declared a delinquent director, there is correspondence that suggests that Ramano genuinely believed that he was acting in the best interests of OTS56 in all his

endeavors.[51] In a letter sent by Ramano's attorney, Herold Gie, to the shareholders, it is categorically stated that Ramano denies having advised any shareholder not to honour their obligations in terms of the irrevocable undertakings in favour of Glencore signed in September 2017. I am not persuaded that the shareholders' failure to adopt that resolution should be attributed to Ramano having misrepresented the facts to them. Against these e-mail exchanges and other documentary evidence, there was nothing to suggest that Ramano's version was far-fetched or clearly untenable such as to warrant the rejection of his version on papers that reveal material factual disputes.

[161] To the extent that Ramano was seen as acting unilaterally, it is interesting that one of the directors, Mr Oliphant, in an e-mail sent to Herold Gie dated 9 March 2019, attached to Ahmed's affidavit, stated that resolutions were passed by the board to replace Ramano as the chairperson and revoked 'authority that may have been given to him to act unilaterally on behalf of ALI and its board'. Again, on 9 May 2019, Oliphant wrote to Ramano and inter alia stated that 'as you are aware, we removed you as chairperson of the board during February this year, and curtailed some of your assumed authority to act unilaterally.'

[162] There is also an e-mail between Ramano and an official of Glencore, which indeed suggests that Ramano was seen as the chief negotiator of ALI and OTS56 in respect of Transaction 1. For example, in his answering affidavit, Ahmed mentions that Ramano went to London, attended a meeting with Glencore officials and signed off on a media release that announced Transaction 1. Before signing off, Ramano sent an e-mail to the Glencore representative, Nash, asking whether Glencore was

[51] See para 42 of the first judgment.

committed to transformation, and pointing out that transformation was a ‘key thing for South Africa’. In his response, Nash admitted that T2 would ‘untransform’ but pointed out that Glencore had no issue with ‘localisation’.

[163] It is striking that the September letter was authored on the same day on which this discussion was held. The affidavits and correspondence reveal factual disputes regarding the circumstances surrounding the making of the undertaking made by Glencore in the September letter. Having already secured the Framework agreement, it is unclear what led Glencore’s officials to make the undertaking set out in the September letter.

[164] The circumstances preceding the making of the undertaking and the reason why Glencore made it are, in my view, relevant considerations in assessing whether Ramano’s conduct warranted him being declared a delinquent director as envisaged in s 162 of the Companies Act. There are factual disputes regarding this important aspect. This seems to be an aspect of the case that weighed heavily with the high court too, hence its remark that ‘the fact that Glencore’s undertaking was not legally binding does not answer the question why such an undertaking was made and what was meant with the words ‘this letter is legally enforceable’. In my view, there was no basis for rejecting Ramano’s explanation on the papers, bearing in mind that he was the respondent in the counter application.[52] All things considered, there is no basis for rejecting Ramano’s version on the papers, as it does not fall under the category of far-fetched or untenable assertions.

[52] This is on the application of the well-known *Plascon Evans* rule.

[165] Given the overlap of facts relating to both the main application and the counter-application, which Ahmed described as intrinsically intertwined, and against the face of the material factual disputes mentioned above, it would serve no point to determine the probabilities in the application and counter-application on affidavits. The pointlessness of an attempt to analyse the various allegations, minutes, correspondence and other documentary evidence in any detail if there are probabilities and improbabilities in both versions is fortified by the following observation aptly made by this Court in relatively similar circumstances in *National Scrap Metal v Murray (Murray)*:[53]

'These factors, particularly collectively, do cast a measure of doubt on the appellants' version, which is certainly improbable in a number of respects. However, as the high court was called on to decide the matter without the benefit of oral evidence, it had to accept the facts alleged by the appellants (as respondents below) unless they are 'so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. *An attempt to evaluate the competing versions of either side is thus both inadvisable and unnecessary as the issue is not which version is the more probable but whether that of the appellants is so far-fetched and improbable that it can be rejected without evidence.*

As was recently remarked in this court, the test in that regard is "a stringent one not easily satisfied". In considering whether it has been satisfied in this case, it is necessary to bear in mind that, all too often, after evidence has been led and tested by cross examination, things turn out differently from the way they might have appeared at first blush. As Megarry J observed in a well-known dictum in *John v Rees* [1970] Ch 345 at 402:

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

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[53] *National Scrap Metal v Murray* [2012] ZASCA 47; 2012 (5) SA 300 (SCA) paras 22-30.

Moreover, it is also necessary to guard against approaching a case such as the present on the assumption that businessmen will act in a businesslike manner or with meticulous concern for the keeping of accurate records. All too often they do not. As Harms JA has pointed out:

‘‘Businessmen are often content to conduct their affairs with only vague or incomplete agreements in hand. They then tend to rely on hope, good spirits, *bona fides* and commercial expediency to make such agreements work.’’

. . .

It is necessary to remember that minutes of board meetings do not purport to be a verbatim record of what was said; rather they tend to be a fairly terse synopsis of what was discussed, highlighting what the compiler, usually the company secretary, considered to have been of importance. Merely because something is not specifically recorded in a minute does not necessarily mean that it was not mentioned, even in passing, and this should be borne in mind when considering what effect the minutes have upon the probabilities.

. . .

I do not think that any useful purpose would be served by attempting to analyse the various allegations, minutes, correspondence and other documentary evidence in any greater detail. Suffice it to say that there are probabilities and improbabilities in the versions of both sides. But, as I have already stressed, that is not the issue. In the light of the facts as I have already mentioned, it does not seem to me that, even though the appellants’ version is improbable in certain respects, it can on the papers be rejected as palpably false in regard to the allegation that on oral long-term lease had been concluded . . .’[54] (Emphasis added).

Based on the discussion in the preceding paragraphs of this section of the judgment, in which I have highlighted the factual disputes, there can be no doubt that the insightful observations made in the passage above are equally apposite in this matter.

[54] Ibid.

[166] As correctly mentioned in the judgment of the high court, the Ramano group had, in a separate action, filed an application seeking an order declaring Ahmed and other directors to be delinquent directors and the Ahmed group had already filed a plea disputing the allegations. That lawsuit was still pending when the high court heard the applications that constitute the subject of this appeal. Noting the disputes of facts on this issue, the Ramano group's choice of action procedure was prudent, as it allowed assertions and counter assertions of impropriety to be reliably tested through cross-examination. In my view, the high court's remark that the best course for the Ramano group would have been to file a counter-claim, was apt. In *Mamadi*, the Constitutional Court held that a dismissal on account of material factual disputes does not disentitle a litigant from subsequently proceeding by way of action procedure in respect of the same dispute.[55] The filing of a counterclaim in the action instituted by Ramano therefore remains a course that is open to Ahmed and other implicated directors, should they be so inclined. Their decision to opt for a piecemeal adjudication of fiercely contested issues in motion proceedings instead of filing a counterclaim in the pending litigation was misplaced.

[167] To sum up, the high court was correct when it held that there were foreseeable factual disputes as to whether Ramano was delinquent or merely misinformed or acting on incorrect advice, and that it was therefore inappropriate to decide the delinquency issue on affidavits. Since these factual disputes were irresoluble on the papers, the applicants in the counter-application did not make out a case for an order declaring Ramano a delinquent director. It follows that the high court correctly dismissed the application on the application of the Plascon Evans rule. In my view,

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[55] See *Mamadi* fn 30 above.

the high court correctly declined to grant the order declaring Ramano a delinquent director. In my opinion, the dismissal of the counter-application not appealable. I would therefore dismiss the first cross-appeal and make a costs order in the respondents' favour.

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M B MOLEMELA

PRESIDENT

Appearances

For the 1st to 8th appellants:	N Arendse SC with him E Cohen
Instructed by:	Knowles Husain & Lindsay Incorporated, Johannesburg McIntyre van der Post Incorporated, Bloemfontein
For the 9th appellant:	I Veerasamy
Instructed by:	Pather & Pather Attorneys Incorporated, Johannesburg Kramer Weihmann Attorneys, Bloemfontein
For the respondents:	J G Dickerson SC with him J D Mackenzie and R S Bradstreet
Instructed by:	Cliffe Dekker Hofmeyr Incorporated, Johannesburg Honey Attorneys, Bloemfontein.