



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 113/2021

In the matter between:

HLB INTERNATIONAL (SOUTH AFRICA) (PTY) LTD

APPELLANT

and

MWRK ACCOUNTANTS AND CONSULTANTS (PTY) LTD

RESPONDENT

Neutral citation: *HLB International (South Africa) v MWRK Accountants and Consultants (113/2021) [2022] ZASCA 52 (12 April 2022)*

Coram: Petse DP, Zondi, Makgoka and Plasket JJA and Meyer AJA

Heard: 22 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be at 9:45 am on 12 April 2022.

Summary: Practice – judgments and orders – interpretation of order – applicable principles.

ORDER

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

1. Subject to paragraph 2 below, the appeal is dismissed with costs.
2. Paragraph 3 of the high court's order is set aside and replaced with the following:
 '3. The costs of this application are to be paid by the first respondent.'

JUDGMENT

Meyer AJA (Petse DP, Zondi, Makgoka and Plasket JJA concurring):

[1] This appeal concerns the principles applicable to and the interpretation of a court order. The order in question was granted by the Gauteng Division of the High Court, Pretoria (Davies AJ) on 15 November 2019 (the first order).

[2] The respondent, MWRK Accountants and Consultants (Pty) Ltd (MWRK), holds 49% of the shareholding in the appellant, HLB International (Pty) Ltd (HLB), and Par Excellence Finance and Leasing (Pty) Ltd (PE) - the second respondent in the high court - holds 51% of the shareholding in HLB, a property holding company; it was the owner of Erf 3726, Benoni Extension 10, Ekurhuleni (the property). MWRK launched an application for equitable relief - the winding-up of HLB in terms of s 81(1)(d)(iii) of the Companies Act 71 of 2008 (the Companies Act) on the basis that it is just and equitable for HLB to be wound up - or for relief from oppressive or prejudicial conduct in terms of s 163 - for PE to buy MWRK's 49% shareholding in HLB at a purchase price equivalent to the highest of 49% of the present market value of the property or for the purchase price paid for the property plus an escalation of 8% per year compounded from 6 March 2017 (the equitable application).

[3] The high court refused to wind up the solvent HLB, but held that the action of HLB and its majority shareholder, PE, is unfairly prejudicial, unjust and inequitable to

the minority shareholder, MWRK, as contemplated in s 163 of the Companies Act. It held that '[t]he most equitable remedy lies in ascertaining the value of the [MWRK's] shares, and realising the same effectively and timeously'. The high court ordered the sale of the property, in the first place by way of private treaty, or otherwise by way of public auction. The first order, against which there was no appeal, reads as follows:

- '1. The parties are directed forthwith to mandate at least three registered estate agents to procure the sale of the relevant immovable property, Erf 3726, Benoni Extension 10, Ekurhuleni.
2. If [MWRK] and [PE] are unwilling or unable to agree on and accept an offer to purchase within three months of this order, then Erf 3726 must be sold by public auction.
3. The aforesaid public auction must be held within two months of the expiry of the three-month period referred to in paragraph 2 above.
4. The net proceeds of the sale of Erf 3726 must be distributed between [MWRK] and [PE] *pro rata* according to their respective shareholdings.
5. [HLB] and [PE] are directed to pay interest on [MWRK's] share of the purchase price at the prescribed rate, calculated from 14 March 2019 until the date of final payment.
6. [MWRK] is directed to pay the wasted costs occasioned by the matter standing down on 21 May 2019.
7. [HLB and PE], jointly and severally, are directed to pay the costs of this application.'

[4] A dispute arose as to the meaning of the first order. MWRK's interpretation of the order was that the property must be sold 'free of any lease relating to the property' and HLB's interpretation (and also that of PE) was that the high court's first order is clear and unambiguous and did not require to be clarified and corrected by having regard to the high court's reasons for the first order or the background facts that preceded the litigation and order.¹ The order meant that the property was to be sold subject to the lease. HLB leased the property to Certified Master Auditors Inc – now HLB CMA South Africa Inc (CMA). MWRK, therefore, instituted a second application against HLB and PE in which it sought the clarification and correction of the first order by the inclusion in the relevant paragraphs thereof of the phrase that the sale of the property by private treaty or public auction is to be 'free of any lease relating to the

¹ HLB relied and still relies on *Administrator, Cape and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 716C, where this Court said that '[i]f the meaning of an order is clear and unambiguous, it is decisive, and cannot be extended by anything else stated in the judgment', in support of its contention.

property' (the correction application). It was opposed only by HLB, and not by the majority shareholder, PE.

[5] By order dated 21 September 2020, the high court interpreted and corrected its first order (the second order). It reads thus:

'1. The judgment and order of this Honourable Court dated 15 November 2019 under the above case number is clarified to stipulate that the sale and auction envisaged in respectively paragraphs 1 and 2 of the order of 15 November 2019 should not be subject to the lease agreement which was signed between [HLB] and [CMA].

2. The first and second orders (*sic*) [paragraphs] are hereby varied to read:

"1. The parties are directed forthwith to mandate at least three registered estate agents to procure the sale of the relevant immovable property Erf 3726, Benoni Extension 10, Ekurhuleni, the said sale to be free of any lease relating to the property;

2. If [MWRK] and [PE] are unwilling or unable to agree on and accept an offer to purchase within three months of this order, then Erf 3726 must be sold by public auction, which sale must be free of any lease relating to the property."

3. The costs of this application are to be paid by [HLB] on the scale as between attorney and client.' (Underlining added.)

[6] The appeal, with the leave of the high court, is against the second order. It bears emphasis that the first order is not on appeal before us and we are therefore not required to consider the correctness thereof. This appeal only concerns the high court's interpretation and correction of the first order in terms of the second order.

[7] It is necessary to place the first order in proper perspective and to consider the context in which it was made.² Ms Lesley Anne Reynolds is the sole shareholder and director of MWRK. She is married to Mr Michael Wayne Reynolds, a chartered accountant who conducted his practice through a professional personal liability company, MWRK Accountants & Auditors Inc. (MWRKAA), until 1 March 2017. Mr Marius Johannes Maritz is the chairperson, a director of, and a shareholder in CMA. The MJMN Trust (the trust) holds 99.999% shares and Mr Maritz holds 0.0001%

² *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 14; *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others* [2010] 4 All SA 398 (SCA); 2011 (4) SA 149 (SCA) para 43 *et seq.*

shares in PE. Mr Maritz and his daughter, Ms Nadine van Dyk, are beneficiaries of the trust. Mr Maritz was the sole director of PE until he resigned on 6 November 2017, on which date Ms van Dyk was appointed its sole director.

[8] During 2016, negotiations ensued between Mr Maritz, representing CMA, and Mr Reynolds, representing MWRKAA, to merge Mr Reynolds' professional audit practice into CMA. The negotiations culminated in the conclusion of a written agreement and addendum thereto, on 23 December 2016, between CMA and Mr Reynolds (the CMA/Reynolds agreement). In terms thereof the professional audit practice of Mr Reynolds was merged into CMA and Mr Reynolds was appointed the managing director of CMA. The CMA/Reynolds agreement also contained provisions for Mr Reynolds' withdrawal or demerger from CMA.

[9] In order to accommodate the physical integration of Mr Reynolds' professional audit company into CMA, it was agreed between Mr Maritz, representing HLB and PE, Ms Reynolds, representing MWRK, and Mr Reynolds, that once a suitable immovable property had been found to accommodate such physical integration (Mr Reynolds and his staff compliment), it would be purchased by and registered in the name of HLB, which at that stage was a dormant personal liability company without any assets or liabilities and in the process of being converted to a private company with limited liability. HLB would be utilised as the property holding company once the immovable property had been purchased. PE would subscribe to 51% of HLB's new share capital and MWRK to 49% at a share price of 51% and 49% respectively of the purchase price to be paid for the immovable property and any improvements to it. A suitable immovable property was thereafter found.

[10] On 6 March 2017, a shareholders agreement was concluded between PE, MWRK, Mr Reynolds (as an interested party and spouse of MWRK's representative, Ms Reynolds), and HLB. The terms mentioned in the previous paragraph found their way into the shareholders agreement and require no repetition. By way of introduction, the following is stated in the shareholders agreement:

'The First Shareholder [PE] and the Second Shareholder [MWRK] are desirous to become joint Shareholders in HLB International (South Africa) Inc. with registration number

2006/009577/21 in which the First Shareholder will hold 51% (Fifty One Percent) of the Shares and the Second Shareholder will hold 49% (Forty Nine Percent) of the shares.

HLB International (South Africa) Inc., duly represented by Marius Johannes Maritz in his capacity as Director, is a party to a Sale of Immovable Property Agreement between Gancho Jose Penetra Antunes Identification Number: 630416 5054 089 (the "SELLER") and HLB International (South Africa) Inc. Registration Number 2006/009577/21 (the "PURCHASER"). The immovable property which forms the subject of the Sale of Immovable Property Agreement is Erf 3726, Benoni Extension 10 Ekurhuleni Metropolitan Municipality Gauteng Ekurhuleni.'

[11] Paragraphs 7 and 8 of the shareholders agreement are presently relevant and provide as follows:

'7. PRE-EMPTIONS AND TRANSFER OF SHARES

7.1 The Parties acknowledge and agree that the professional Audit Practice of Michael Wayne Reynolds, Identity Number 610614 5078 084, was merged into Certified Master Auditors Inc, registration number 1997/013001/21, in terms of agreements between Michael Wayne Reynolds, related entities and Certified Master Auditors Inc.

7.2 The Parties agree that in the event of Michael Wayne Reynolds giving notice of intent to withdraw his audit practice from Certified Master Auditors Inc., that the First Shareholder shall have the right to offer to the Second Shareholder to purchase the First Shareholders' interest in HLB International (South Africa) Inc. within 5 business days of the event, and in that instance, the Second Shareholder will have 22 (Twenty Two) business days from the date of the election of the First Shareholder to sell its shares, to settle the purchase price. The purchase price for the First Shareholder's Shares shall be the highest of:

7.2.1 51% (Fifty One Percent) of the market value of the property;

or

7.2.2 The purchase Price of the 51% (Fifty One Percent) Shares plus escalation of 8% (Eight Percent) per year compounded.

8. RENTAL AND UTILISATION OF THE PROPERTY

8.1 The property will be rented exclusively to Certified Master Auditors Inc. for an initial period of 9 (Nine) years, renewable for an additional 9 (Nine) years at the election of Certified Master Auditors Inc. on the basis that Certified Master Auditors Inc. will pay all operating costs in relation to the immovable property in a timeous manner.

8.2 Michael Wayne Reynolds' income from Certified Master Auditors Inc. and related companies will be reduced with 49% (Forty Nine Percent) with the aforementioned cost.'

[12] The immovable property referred to in the shareholders agreement is situated at 19 Twin Road, Farrarmere, Benoni. It was purchased for R2,3 million and a further amount of R887 469.92 was spent on effecting improvements to the property. An office building is erected on the property, which can accommodate 40 to 50 persons. The purchase price for the property and the cost of the improvements were paid by PE and MWRK proportionate to their shareholding in HLB, and ownership of the property was transferred to and registered into the name of HLB.

[13] On 31 May 2017, an agreement of lease was concluded between HLB as lessor and CMA as lessee (the lease). In terms of the lease, HLB rented the property to CMA³ with effect from ' . . . 1 June 2017 and shall subsist for an initial period of 9 (Nine) years, renewable for an additional period of 9 (Nine) years at the election of . . . ' CMA.⁴ The rental payable in terms of the lease are ' . . . all Operating Costs in relation to the Premises in a timeous manner . . . '⁵ and the parties agreed that "Operating Costs" means the reasonable costs in connection with the ownership, management, maintenance, repair and operation of the Property and the Building/s, including, but not limited to, the Rates and the costs of . . . cleaning the Building and the Property . . . providing security in respect of the Property and Building/s . . . insuring the Building/s . . . electricity, water, sewage, refuse removal and related municipal charges . . . [and] maintaining internal walls and finishes'.⁶ Mr Reynolds and his staff compliment moved into the office building on the property.

[14] The relationship between Mr Reynolds, on the one hand, and Mr Maritz and CMA, on the other, soured to such an extent that Mr Reynolds, on 1 March 2018, gave notice of his intention to withdraw his audit practice from CMA with effect from 31 March 2018. Mr Maritz, on behalf of CMA, stated in HLB's answering affidavit that the reason for the souring of the business relationship 'was the alleged fraud committed by Michael Wayne Reynolds as well as defrauding the South African Revenue Services'. Ms Reynolds, in MWRK's replying affidavit, stated that 'Maritz's gratuitous reference to fraud allegedly committed by [her] husband confirms the irretrievable

³ Clause 3 of the lease.

⁴ Clause 4 of the lease.

⁵ Clause 5 of the lease.

⁶ Clause 6.1 of the lease.

breakdown of the relationship between us and him'. Mr Maritz also stated that '[t]he involvement of the director of [MWRK] in the alleged fraud committed by Mr Michael Wayne Reynolds with her husband still needs to be determined by the forensic audit since she is very closely involved in the management operations of her husband's business operations'. Ms Reynolds replied that those 'allegations are false, scurrilous and defamatory'. In response to Mr Reynolds' notice of withdrawal, Mr Maritz *inter alia* advised him that 'the Farramere offices [the property] is subjected to a lease to Certified Master Auditors Inc and whenever you withdraw from CMA Inc, whether in accordance with our agreements or in breach of our agreements, you should vacate the premises on that day'. Mr Reynolds withdrew his professional audit practice entity from CMA and vacated the property.

[15] In a letter from MWRK's attorney dated 19 April 2018, an offer was made to purchase the 51% shareholding of PE in HLB at the market value of the property. On 23 April 2018, PE's attorney responded that PE has no intention of selling its 51% shareholding in HLB nor of purchasing MWRK's 49% shareholding. Hence the equitable application to the high court. As I already have mentioned once the high court had made the first order a dispute arose as to the meaning of that order. The result was that no marketing of the property by estate agents as envisaged in the first order took place. The reasons, according to MWRK, were that it was confirmed to it by an estate agent that no competitive purchase price would be obtained if the property was to be sold subject to the existing lease, and because of the dispute that had arisen between PE, HLB and MWRK, whether a sale as envisaged in the court order had to be subject to the lease, or not.

[16] On 25 February 2020 Mr Maritz, on behalf of HLB, instructed Aucor Properties (the auctioneer) to sell the property at an auction subject to the lease, despite MWRK's objection. The property was accordingly sold on 17 March 2020 at 12:00 to Silver Meadow Trading 12 (Pty) Ltd (Silver Meadow) for a meagre sum of only R300 000. The property, as I have mentioned, was purchased by HLB for a total amount of R2,3 million and a further R887 469-92 was spent on effecting improvements to it.

[17] The correction application, in which MWRK sought the clarification and correction of the first order, was served on HLB on 17 March 2020 at 16:13. The high

court interpreted and corrected its first order in accordance with the interpretation that MWRK had throughout advanced. In his reasons for the second order, Davies AJ stated that, due to an oversight on his part, it was not pertinently stated in the first order that the sale of HBL's property was to take place free of any lease relating to the property. That was a mere omission on his part and the first order, as formulated, did not give effect to its true intention.

[18] There is no essential difference between an 'order' and a 'judgment': it is said in some of the cases that an 'order' refers to a decision given upon relief claimed in an application on notice of motion, petition or other machinery recognised in practice, while a 'judgment' refers to a decision given upon relief claimed in an action. The word 'judgment' when used in the general sense comprises both the reasons for the judgment and the judgment or order.⁷

[19] Rule 42(1)(b) of the Uniform Rules of Court provides that the high court may, in addition to any other power it may have, on its own initiative or upon the application of any party affected, rescind or vary an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*,⁸ the interpretation of rule 42(1)(b) was placed in its proper context. It was held that the context was the common law before the introduction of the Uniform Rules and that the 'guiding principle of the common law is certainty of judgments', with the effect that generally speaking, when a judgment has been given, it is final and unalterable: the judge becomes *functus officio* and may not ordinarily vary or rescind his own judgment. There are, however exceptions that relate to 'the correction, alteration and supplementation of a judgment or order'. It was, the court held, 'against this common law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced', catering for the rectification of the same types of mistakes that the common law had recognised.

⁷ *Administrator, Cape and Another v Ntshwaqela and Others* 1990 (1) SA 705 (AD) at 715B-F.

⁸ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* [2003] 2 All SA 113 (SCA); 2003 (6) SA 1 (SCA) paras 4-6.

[20] The exceptions recognised in the pre-constitutional case law are referred to in *Firestone South Africa (Pty) Ltd v Genticuro*.⁹ They include the exceptions that the court may: (a) 'clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order'; and (b) ' . . . correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention', which ' . . . exception is confined to the mere correction of an order in expressing the judgment or order so as to give effect to its true intention' and 'does not extend to altering its intended sense or substance'. This Court elaborated on this exception thus:

'KOTZÉ, J.A., made this distinction manifestly clear in the *West Rand* case, *supra* at pp. 186-187,¹⁰ when, with reference to the old authorities, he said:

"The Court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced."

[21] In *Thompson v South African Broadcasting Corporation*¹¹, the following passage in *S v Wells* was quoted with approval:¹²

'The more enlightened approach, however, permits a judicial officer to change, amend or supplement his pronounced judgment, *provided that the sense or substance of his judgment is not affected thereby (tenore substantiae perserverante)* . . . According to Voet a Judge may also, on the same day, after the pronouncement of his judgment add (*supplere*) to it all remaining matters which relate to the consequences of what he has already decided but which are still missing from his judgment. He may also explain (*explicare*) what has been obscurely stated in his judgment and thus correct (*emendare*) the wording of the record *provided that the tenor of the judgment is preserved*.'

⁹ *Firestone South Africa (Pty) Ltd v Genticuro A.G.* [1977] 4 All SA 600 (A); 1977 (4) SA 298 (A) at 307A-308A.

¹⁰ *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 178.

¹¹ *Thompson v South African Broadcasting Corporation* [2001] 1 All SA 329 (A); 2001 (3) SA 746 (SCA) at 749B-D.

¹² *S v Wells* 1990 (1) SA 816 (A) at 820C-F.

[22] The ambiguous language or the patent error or the omission must be attributable to the court itself.¹³ A 'patent error or omission' has been described as an error or omission as a result of which the judgment granted does not reflect the intention of the judicial officer pronouncing it.¹⁴ It is irrelevant whether the reasoning of the court was sound or unsound.¹⁵ If an order does not reflect the true or real intention of the court, it is indicative of a patent error, which falls to be corrected.¹⁶

[23] In *Zondi v MEC, Traditional and Local Government Affairs, and Others*,¹⁷ the Constitutional Court said this:

[32] An analysis of our pre-constitutional case law suggests that these exceptions were grounded on at least two interrelated considerations. The first was the need to do justice. Support for this is to be found in the *West Rand Estates* case, which is probably the first case in which the Appellate Division was called upon to consider whether it had the power to amend its order. In that case the Appellate Division had inadvertently omitted to award interest that had been claimed to a successful litigant. In amending the order, the Court concluded that "the only course to pursue is to adopt the one which justice demands". The Court observed that "the Court is merely doing justice between the same parties". And it added that this "is a plain matter of necessity and justice". Subsequent case law did not suggest otherwise. This language makes it plain that in amending the order, the Court was motivated by the need to do justice.

[33] The other consideration relates to the need to adapt the common law to the changing times and circumstances. In *West Rand Estates*, and in dealing with the time limit for prescription of one day within which the amendment of an order was allowed under common law, the Court observed that what was considered to be an expedient or reasonable time previously may not be expedient or reasonable at the present time. It added that "(t)ime and circumstances bring about change and development; and modern exigencies and conditions may well require the observance of a longer period of prescription". Thus in *Estate Garlick*¹⁸ the Court adopted the common law *ex necessitate rei* to meet the modern exigencies caused by the practice of making the costs orders without hearing argument.

¹³ *Seattle v Protea Assurance Co Ltd* 1984 (2) SA 532 (C) at 541C; *First National Bank of South Africa Ltd v Jurgens and Others* 1993 (1) SA 245 (W) at 246E-F.

¹⁴ *Seattle* at 541C.

¹⁵ *Seattle* at 541D.

¹⁶ *Wessels & Co v De Beer* 1919 AD 172 at 173; *Marks v Kotze* 1946 AD 29 at 30-31; *Adonis v Additional Magistrate, Bellville, and Others* 2007 (2) SA 147 (C) para 17.

¹⁷ *Zondi v MEC, Traditional and Local Government Affairs, and Others* 2006 (3) SA 1 (CC), paras 32-35.

¹⁸ *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499 at 503-4.

[34] What emerges from our pre-constitutional era jurisprudence is that the general rule that an order once made is unalterable was departed from where it was in the interests of justice to do so and there was a need to adapt the common law to changing circumstances and to meet modern exigencies. It is equally clear from the case law that in departing from the general rule, the Court invoked its inherent power to regulate its own process. Thus in *West Rand Estates*, the Court held that:

“It is within the province of this Court to regulate its own procedure in matters of adjective law. And, now that the point has come before it for decision, to lay down a definite rule of practice. I am of the opinion that the proper rule should be that which I have just stated. The Court, by acting in this way, does not in substance and effect alter or undo its previously pronounced sentence, within the meaning of the Roman and Roman-Dutch law. The sanctity of the doctrine of *res judicata* remains unimpaired and of full force, for the Court is merely doing justice between the same parties, on the same pleadings in the same suit, on a claim which it has inadvertently overlooked.”

[35] This approach to the general rule by the Appellate Division is consistent with the Constitution. It is now entrenched in s 173 of the Constitution, which provides that:

“The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.” (Footnotes omitted.)

[24] I now turn to the relevant rules of interpreting a court’s judgment or order. In *Firestone* this Court said this:¹⁹

‘The basic principles applicable to construing documents also apply to the construction of a court’s judgment or order: the court’s intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See *Garlick v Smartt and Another*, 1928 A.D. 82 at p. 87; *West Rand Estates Ltd. v New Zealand Insurance Co. Ltd.*, 1926 A.D. 173 at p. 188. Thus, as in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no intrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. (cf. *Postmasburg Motors (Edms.) Bpk. v. Peens en Andere*, 1970 (2) S.A. 35 (N.C.) at p 39F-H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise – see *infra*.²⁰ But if

¹⁹ At 304D-H.

²⁰ In *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc and Others* 1996 (3) SA 355 (A) at 362I-J, Corbett CJ said that ‘[t]he correction of a judgment is dealt with more fully by

any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court *a quo* and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it. See *Garlick's case, supra*, 1928 A.D. at p. 87, read with *Delmas Milling Co. Ltd. v Du Plessis*, 1955 (3) S.A. 447 (A.D.) at pp. 454F-455A; *Thomson v Belco (Pvt.) Ltd. and Another*, 1960 (3) S.A. 809 (D).' (Footnotes omitted.)

[25] Since *Firestone* there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. The modern approach to interpretation was set out thus by this Court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:²¹

'Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermine the purpose of the document. . . . The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

And in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*,²² this Court made the point that '[t]he former distinction between permissible background and surrounding circumstances, never very clear has fallen away'; that interpretation is now 'essentially one unitary exercise'; and that it 'is no longer helpful to refer to the earlier approach'.

Trollip JA in the *Firestone* case at 306F-E. It is to this passage that the notation "see *infra*" refers'. In other words, that is where this Court refers to the exceptions to the general principle that once a court duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it.

²¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18, cited with approval by majority of the Constitutional Court in *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) SA 1 (CC) fn 105, and followed in a unanimous judgment of that court in *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Others* [2015] ZACC 12 (CC); 2015 (5) SA 370 (CC).

²² *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) para 12.

[26] The now well established test on the interpretation of court orders is this:

‘ . . . The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention. . . . ’²³

[27] The manifest purpose of the judgment is to be determined by also having regard to the relevant background facts which culminated in it being made.²⁴ For as was said in *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*,²⁵ ‘context is everything’²⁶.

[28] A fairly recent illustration of the linguistic, contextual and purposive approach to the interpretation of a judgment or order is to be found in *Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd*,²⁷ in which it was said that ‘[a]n order is merely the executive part of the judgment and, to interpret it, it is necessary to read the order in the context of the judgment as a whole’²⁸, and-

‘ . . . [a]s part of the “usual well-known rules” of interpretation, according to Olivier JA,²⁹ is- “dat mens jou nie moet blind staar teen die swart-op-wit woorde nie, maar probeer vasstel wat die bedoeling en implikasie is van wat gesê is. Dit is juis in hierdie proses waartydens die samehang en omringende omstandighede relevant is”. (Footnotes omitted.)

Loosely translated:

“One should not stare blindly at the black-on-white words, but try to establish the meaning and implication of what is being said. It is precisely in this process that the context and surrounding circumstances are relevant.”

²³ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) para 13 and endorsed by the Constitutional Court in *Eke v Parsons* 2016 (3) SA 37 (CC) para 29.

²⁴ *Cross-Border Road Transport Agency* para 22, see also *Speaker, National Assembly and Another v Land Access Movement of South Africa and Others* [2019] ZACC 10 (CC); 2019 (6) SA 568 (CC) para 43.

²⁵ *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at 409I.

²⁶ The original phrase was used by Lord Steyn in *R v Secretary for the Home Department, ex parte Daly* [2001] 3 All ER 433 (HL) at 447. This was first approved by this Court in *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) para 1.

²⁷ *Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd* [2018] SCA 165; 2019 (3) SA 441 (SCA).

²⁸ Para 16.

²⁹ *Plaaslike Oorgangsraad, Bronkhortspruit v Senekal* 2001 (3) SA 9 (SCA) at 18J-19A.

[29] *Elan* was an appeal against the dismissal of an application for the recognition and enforcement of a foreign civil judgment sounding in money delivered by the Supreme Court of Queensland, Brisbane, Australia against a South African couple. They had formed an Australian company of which they were the directors. The company was the sole trustee of an Australian trust set up by them. The company on behalf of the trust purchased two 'off-the-plan' apartments in a development at Surfers Paradise in the State of Queensland from Elan, an Australian company. The obligations of the purchaser were guaranteed by the couple in respect of the one apartment and only by the husband in respect of the other. Elan issued a claim out of the Supreme Court of Queensland against the purchaser for damages for breach of contract and against each of the husband and wife for recovery of the monies pursuant to the guarantees given by them. The Supreme Court of Queensland gave judgment in favour of Elan, and, ordered *inter alia* that '[t]he defendants pay to the plaintiff the sum of AUD 1 172 614,26.'

[30] Having set out the relevant contextual background facts which culminated in the order being made and the Australian court's reasons for it,³⁰ this Court concluded thus:³¹

'In my view a South African court is not precluded from construing the order in the light of the judgment and the reasons therefor and concluding that at all material times the intention of the Australian court was to impose joint and several liability upon the Essacks [the couple]. Indeed, this conclusion is inescapable in the light of the fact that the Australian judgment was granted in favour of the appellant 'on its claim', which in respect of the Essacks was founded upon their provision of guarantees in respect of the liability assumed by the purchaser under the various contracts of sale. . . . It thus seems clear from the contracts, read as a whole, that liability was intended to be joint and several. Clearly, it could never have been the intention of the Australian court, as the Essacks would have it, to have ordered each of the defendants before it to have been liable only for their aliquot share of the judgment debt. Such a conclusion would fly in the face of the judgment and the provision by the Essacks of guarantees. Indeed, such a conclusion would be absurd; it would carry with it the necessary implication that the purchaser was, in terms of the judgment, only liable for its joint, ie one third portion, of the judgment.'

³⁰ Paras 1-9 and 15.

³¹ Para 17.

[31] In this case the property was acquired by HLB and paid for by its only two shareholders, MWRK (the Reynolds company) and PE (the Maritz company), proportionately to their respective 51/49% shareholding in HLB, in consequence of the merger of Mr Reynolds' professional auditing entity, MWRKAA, with that of CMA, of which company Mr Maritz is the chairperson, a director and a shareholder. A lease was entered into between HLB and CMA for a non-market related minimal rent to provide office accommodation to Mr Reynolds and his staff compliment. When Mr Reynolds and his auditing company withdrew from the merger with CMA, they had to vacate the property and their investment (through the vehicle of HLB) was locked in, and unrealisable, due to the potentially 18-year lease concluded between HLB and CMA. In consequence, MWRK approached the high court for equitable relief in terms of the provisions of s 81(1)(d)(iii) of the Companies Act - on the basis that it is just and equitable for HLB to be wound up - or for relief from oppressive or prejudicial conduct in terms of s 163 of the Companies Act - on the basis that the conduct of HLB's majority shareholder, PE, in failing to co-operate in the proper severance of their commercial relationship on fair and equitable terms in order to enable it to withdraw its investment in HLB, amounted to oppressive or prejudicial conduct. The application was opposed by HLB and PE. Relief in terms of s 163 of the Companies Act was, despite opposition, granted to MWRK.

[32] In granting the first order, the high court reasoned thus: Its point of departure was a recognition that the '... fundamental question before [it] is whether equitable considerations are present in this matter that are so compelling as to allow [MWRK] to terminate the business relationship with [HLB], and withdraw its capital ...'; and if so, '... whether the equitable relief should take the form of winding-up, or some other form of relief in terms of s 163 of the Companies Act'. The high court recognised that HLB '... is a commercially solvent and viable company'. It found '... that winding-up on just and equitable grounds must of necessity be a remedy of last resort and that all other remedies must be considered before such a step is taken'.

[33] The high court pertinently observed that counsel appearing for HLB and PE conceded that CMA's option to renew the lease for another nine-year period would in all probability be exercised. That concession, according to the high court '... has an important bearing on the matter since [MWRK] is confronted with the situation where

it cannot realise its investment or withdraw its capital for the better part of eighteen years, during which time [HLB] would be paying a nominal rental calculated largely according to the operating costs'. It *inter alia* relied on an English case in which the following example was considered to be a standard case of unjust, inequitable or unfair treatment: shareholders who ' . . . have entered into an association upon the understanding that each of them who has ventured his capital will also participate in the management of the company . . . ' and the participation of any such shareholder is terminated. The high court added that that would also be the case where ' . . . the shareholders have expected to benefit by their capital expenditure'. It held that ' . . . [t]hat fundamental assumption of the parties has now fallen away to the clear prejudice of [MWRK] and the Reynolds family, and to the commensurate unwarranted benefit of CMA and Maritz'. In such a case, according to the high court, ' . . . it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participating in the management or enjoying rewards, without giving the minority shareholder the opportunity to remove its capital on reasonable terms'.

[34] The high court also held that the insistence of HLB and PE ' . . . that the *status quo* should remain intact for a decade and a half or more, during which time [MWRK] cannot withdraw the benefit from its capital investment, is . . . a clear injustice that falls squarely within the ambit of s 163 of the Companies Act . . . '; and that, viewed in the context of ' . . . the relationship between the parties, and in particular the failure of the merger that was the fundamental *raison d'être* of [HLB], . . . [MWRK] must be allowed to realise its investment'. The most equitable remedy, so the high court held, ' . . . lies in ascertaining the value of [MWRK's] shares, and realising them effectively and timeously'. The high court expressed its ' . . . misgivings about the appointment of a third party to [evaluate] the shareholding' and considered it best 'that the parties should be afforded the opportunity to guide their own destiny'. The 'primary question', according to the high court, ' . . . is the value of [the property], and the open market is the best arbiter of its value . . . ', with the result that the parties ' . . . should therefore be given an opportunity to sell the immovable property through normal channels, to their mutual advantage . . . ', failing which, the property ' . . . must be sold by public auction'. The high court recognised ' . . . the fact that clause 7.2 of the Shareholders Agreement makes mention of an escalation of 8% per year, compounded, as a means

of arriving at a value for the shareholding . . .', but did not consider that that ' . . . figure necessarily represents the true appreciation of the property's value, and again the market is the best arbiter'. In conclusion the high court held that ' . . . [t]he proceeds of the sale must be distributed to the relevant shareholders in accordance with their pro-rata shareholding'.

[35] HLB argues that the high court did not intend the property to be sold free of the lease since that would be an order in terms of s 163(2)(h)³² of the Companies Act, in terms of which the high court set aside the lease agreement between HLB and CMA without having considered whether or not HLB or CMA should be compensated. The simple answer to this argument is that we are not concerned with the correctness of the first order, which as already mentioned, was never appealed against. It is irrelevant whether the reasoning of the high court in respect of that order was correct.

[36] Proper interpretative analysis leads to the inevitable conclusion that the high court's omission to state in its first order that the sale of the property contemplated in the order is to be free of the lease, was a 'patent error or omission' in expressing the order, which resulted in the first order not giving effect to the high court's true intention. In its second order, the high court correctly rectified the patent omission so as to give effect to its true intention, which correction did not alter the intended sense and substance of the order.

[37] This conclusion is inescapable in the light of the fact that MWRK approached the high court in its capacity as a 49% shareholder of HLB, *inter alia* for relief from HLB's oppressive or prejudicial conduct in terms of s 163 of the Companies Act. The high court judgment was granted in favour of MWRK's s 163 claim. The oppressive or prejudicial conduct found by the high court on the part of HLB, was the insistence of HLB and PE for the *status quo* to remain intact for a decade and a half or more, during which time MWRK could not withdraw or benefit from its capital investment, despite the failure of the merger of Mr Reynolds's professional audit entity into CMA, which merger, so the high court held, was the fundamental *raison d'être* of HLB (a previously

³² Section 163(2)(h) of the Companies Act provides that the court may make any order it considers fit, including 'an order varying or setting aside a transaction or an agreement to which the company is a party compensating the company or any other party to the transaction or party'.

dormant company) acquiring the property to facilitate and give effect to the merger, which *raison d'être* had fallen away. The high court clearly intended to permit MWRK to realise its initial capital investment in HLB without having to wait the better part of 18 years.

[38] The high court intended that MWRK receives back the amount of its initial investment plus its proportionate share of the amount of 'the true appreciation of the property's value' as determined by the open market. In other words, it was foundational to the high court's order that the property had to be sold free of the lease between HLB and CMA. It could never have been the intention of the high court, as HLB would have it, to have ordered the sale of the property to be subject to the lease and for the common law principle of *huur gaat voor koop* to apply. Such a conclusion, as was held in a different context in *Elan*, would be absurd: it would carry with it the necessary implication that MWRK, although its application for relief from HLB's oppressive or prejudicial conduct succeeded, received no such relief and, instead, lost most of its initial capital investment and the market related appreciation thereof. Indeed, such a conclusion would defeat the purpose the first order to prevent prejudice to the minority shareholder due to the existence and long duration of the lease, which lease was at the core of the case, and unwarranted benefit to the majority shareholder.

[39] It remains to consider HLB's further arguments that MWRK failed to demonstrate that it launched the correction application within a reasonable time of the granting of the first order; that the legal interests of both CMA (the lessee of the property) and Silver Meadow (the purchaser of the property) were affected by the second order and they should, therefore, have been joined or notified of the second application. These arguments, too, are unmeritorious. The high court had a discretion to excuse the delay, which it tacitly did. There is no reason for this Court to interfere with the high court's exercise of its discretion, especially in the light of MWRK's strong prospects of success, which, in itself, may excuse an inadequate explanation for the delay.³³

³³ In *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62 (SCA); [2020] 3 All SA 397 (SCA); 2021 (1) SA 42 (SCA) para 38, this Court said that 'very weak prospects of success may not offset a full, complete and satisfactory explanation for a delay; while strong merits of success may excuse an inadequate explanation for the delay (to a point).'

[40] In HLB's answering affidavit in the correction application, Mr Maritz made the bald allegation that he was '... advised that to date hereof CMA has not received notice of this application'. MWRK refuted that allegation in its replying affidavit. It produced the return of service by the sheriff of Halfway House in which it is certified that a copy of the correction application '... was duly served upon Mr MJ Maritz, director, a person in charge, apparently not less than sixteen years of age after the original document had been shown and the nature and contents thereof explained to the said person'. Such service, according to the sheriff's return of service took place '... on the 17 March 2020 at 6:13 at CMA Inc Office and Conference Park, 234 Alexandra Avenue, Halfway House being the registered address of Certified Master Auditors Incorporated'.

[41] By way of the second order in the correction application, the high court interpreted and corrected its first order that was made on 15 November 2019, which was long before the property was sold to Silver Meadow at the auction that was held on 17 March 2020 at 12:00. It obviously had no interest in the equitable application and the first order. The second order that was made on 21 September 2020, merely interpreted and corrected the first order.

[42] Finally the matter of costs. The high court ordered HLB, who was the first respondent in the correction application, to pay the costs of the application '... on the scale between attorney and client' on the basis that its opposition was 'untenable' and had '... the effect of delaying the proper adjudication of the correctness or otherwise of the judgment. . .' In departing from the general rule that costs should follow the event and that the successful party is awarded costs as between party and party unless it is one of those 'rare occasions' where an award of punitive costs is warranted,³⁴ the high court failed to exercise its discretion judicially. HLB's opposition to the correction application was certainly not unreasonable and the award of punitive costs was not warranted. This is demonstrated, firstly, by the high court's subsequent order granting HLB leave to appeal to this Court, which by necessary implication means that the high court was of the opinion that the appeal would have a reasonable

³⁴ See *LAWSA* Vol 3 Part 2 Second Edition paras 292 and 320.

prospect of success as contemplated in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, and, secondly, by a reading of this judgment. Furthermore, before Mr Maritz instructed the auctioneer to sell the property by public auction, he had obtained counsel's opinion regarding the meaning of the first order, and he was therefore satisfied that the sale of the property was to be subject to the lease.

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

1. Subject to paragraph 2 below, the appeal is dismissed with costs.
2. Paragraph 3 of the high court's order is set aside and replaced with the following:
 '3. The costs of this application are to be paid by the first respondent.'

P A MEYER
ACTING JUDGE OF APPEAL

Appearances

For appellant: HF Oosthuizen SC

Instructed by: Carel van der Merwe Attorneys, Midrand
Webber Attorneys, Bloemfontein

For respondent: JG Bergenthuin SC

Instructed by: Griesel & Breytenbach Attorneys, Pretoria
Phatshoane Henney Attorneys, Bloemfontein