THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1291/2021

In the matter between:

STRATEGIC PARTNERS GROUP (PTY) LTD	**FIRST APPELLANT**
NJILO CAPITAL INVESTMENTS (PTY) LTD	**SECOND APPELLANT**
MZOLISI DILIZA	**THIRD APPELLANT**
DAVID MOSHAPALO	**FOURTH APPELLANT**
EPHRAIM SIBANDA	**FIFTH APPELLANT**

and

THE LIQUIDATORS OF ILIMA GROUP (PTY) LTD (IN LIQUIDATION)	**FIRST RESPONDENT**
THE MAGISTRATE, KRUGERSDORP	**SECOND RESPONDENT**
THE MASTER OF THE HIGH COURT	**THIRD RESPONDENT**

Neutral citation: *Strategic Partners Group (Pty) Ltd and Others v The Liquidators of Ilima Group (Pty) Ltd (in liquidation) and Others* (Case no 1291/2021) [2023] ZASCA 27 (24 March 2023)

Coram: DAMBUZA AP, GORVEN, WEINER and GOOSEN JJA and KATHREE-SETILOANE AJA

Heard: 27 February 2023

Delivered: 24 March 2023

Summary: Company Law – shareholder liquidated – rights of liquidators to information – not limited to rights of shareholder – rights under s 414 and 415 of Companies Act 61 of 1973 applicable – application to limit rights correctly dismissed – counter-application for declaration of relevance of documents correctly upheld – counter-application for declaration in terms of s 163 of Companies Act 71 of 2008 of non-applicability of clause of Memorandum of Incorporation correctly upheld – appeal dismissed.

ORDER

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

The appeal is dismissed with costs, including those of two counsel where so employed.

JUDGMENT

Gorven JA (Dambuza AP, Weiner and Goosen JJA and Kathree-Setiloane AJA concurring)

[1] Ilima Group (Pty) Ltd (Ilima) was placed in final liquidation in April 2010. The first respondents were appointed liquidators (the liquidators). Ilima holds 16 million ordinary shares in Strategic Partners Group (Pty) Ltd (Strategic), the first appellant. The shareholding is an asset of Ilima (the Ilima shareholding). It represents 11.784 percent of the shares of Strategic. The liquidators have a statutory duty to realise the shareholding and to distribute the proceeds. In order to dispose of the Ilima shareholding to the benefit of its creditors, it is necessary to place a value on it.

[2] On 5 November 2013, the liquidators requested a valuation of the Ilima shareholding from Strategic. This developed into something of a war of attrition between Strategic and the liquidators. It revolved around the market value of the Ilima shareholding. In particular, it turned on what information liquidators of an insolvent shareholder in a company are entitled to obtain from that company and the means which can be used for that purpose.

[3] The upshot was an application (the main application) brought by Strategic against the liquidators in the Gauteng Division of the High Court, Johannesburg (the high court). Other respondents in the main application were the Magistrate, Krugersdorp, who was the second respondent and the Master of the High Court, Johannesburg, who was the third respondent. They are also respondents in the appeal. They elected to take no part in the main application, the counter-application or the appeal. The second applicant was Njilo Capital Investments (Pty) Ltd, a shareholder in Strategic. The third applicant was Mr Mzolisi Diliza, a director and executive chairperson of Strategic. The fourth applicant was Mr David Moshapalo, the deputy executive chairperson of Strategic and the fifth applicant was Mr Ephraim Sibanda, a representative of the auditors of Strategic. The last three of these had been subpoenaed to appear in the insolvency enquiry referred to below. The second to fifth appellants are all associated with Strategic, made common cause with it and will together be referred to as Strategic, unless it is necessary to distinguish them.

[4] In the main application, the appellants sought an order:

‘1. Declaring that the liquidators of Ilima Group (Pty) Ltd (in liquidation), a shareholder in Strategic Partners Group (Pty) Ltd, are entitled to no more documents from any of the applicants other than those documents which fit into the categories of documents described in the following statutes:

(a) sections 26 and 31 of the Companies Act of 2008 alternatively,

(b) section 113 of the Companies Act of 1973.

2. Directing that those respondents who oppose this application pay the costs hereof.'

The liquidators were the only respondents who opposed the main application. They, in turn, brought a counter-application seeking the following relief:

'1.1 That the relief sought by the applicants in the main application is dismissed with costs, such costs to include the costs of two counsel.

1.2 Declaring that in terms of section 163(2)*(h)* of the Companies Act, 71 of 2008 ("the Companies Act"), the provisions of clause 27 of the Memorandum of Incorporation of Strategic Partners Group (Pty) Limited ("SPG"), as approved at the General Meeting of shareholders SPG held on Tuesday, 30 June 2020, do not apply to the shareholding or sale of such shareholding held by Ilima Group (Pty) Ltd (in liquidation) ("Ilima") in SPG.

1.3 Declaring that the documents and records sought by the first respondent at the following "insolvency enquiry" proceedings, which were held in terms of section 414 and 415 of the Companies Act, at the Krugersdorp Magistrates Court, namely:

1.3.1 The "insolvency enquiry" proceedings held on 23 March 2018, as ordered by the second respondent, as confirmed by annexures "A1.1", "A1.2" and "A1.3" hereto, and

1.3.2 The "insolvency enquiry" proceedings held on 15 June 2018, as ordered by the second respondent, as confirmed by annexures "B1.1", "B1.2", "B1.3" and "B1.4" hereto,

fall within the category of documents to which the first respondent is legally entitled, in terms of the provisions of sections 414 and 415 of the Companies Act and are to be provided to the first respondent.

1.4 Ordering the fifth applicant to provide to the first respondent the documents in annexure "B1.3" hereto.

1.5 Ordering the first to fourth applicants to provide to the first respondent the documents and records set out in annexure "C" hereto.

1.6 That the first to fifth applicants are ordered to pay the costs of both this application and the counter-application on an attorney and client scale, such costs to include the costs of two counsel'.

[5] The high court, per Maier-Frawley J, dismissed the main application with costs, including those of two counsel and granted an order in terms of prayers 2 to 5 inclusive of the counter-application. She also granted an order in the counter-application that '[t]he first to fifth applicants are ordered to pay the costs of the counter-application on an attorney and client scale, such costs to include the costs of two counsel'. This appeal is with her leave.

[6] It is necessary to sketch the sequence of events in some detail. After the liquidators requested that the Ilima shareholding be valued, Strategic appointed Mazars Corporate Finance (Pty) Ltd (Mazars) to do so. On 27 May 2014, Mazars completed the valuation. It was performed according to the provisions of a disputed shareholders' agreement (the impugned shareholders' agreement). A copy of the valuation was furnished to the liquidators only in August 2014. Debate ensued concerning the valuation. The liquidators were not satisfied and rejected it on 14 November 2014.

[7] On 23 January 2015, the liquidators caused a subpoena to be issued against Mr Diliza, calling for certain documents. On 5 June 2015, the liquidators prepared and submitted to Strategic and its shareholders an offer to sell the Ilima shareholding for an amount of R100 million. This value had been arrived at by Mr Peter Zeelie, a chartered accountant appointed by the liquidators. Strategic contended that the valuation was inflated and rejected it. The Mazars valuation which had been provided by Strategic was based on the impugned shareholders' agreement. This purported to set out the manner in which the Ilima shareholding would be calculated on liquidation. Without the knowledge of the liquidators, one of the directors of Strategic was appointed to represent Ilima in this exercise. The liquidators viewed

this as an attempt to procure an advantage for Strategic and to disadvantage Ilima and its creditors.

[8] On 11 November 2015, the liquidators brought an application to have the impugned shareholders' agreement set aside. On 17 August 2018, Unterhalter J granted a declaration that:

'[N]o valid or binding shareholders agreement (including but not limited to annexure FA3 to the applicant's founding affidavit in this application) has been validly concluded between the shareholders of the first respondent'.

The basis of the judgment was that there was no proof that all the shareholders had consented to the impugned shareholders' agreement.

[9] This brought into sharp focus the question of how to arrive at the value of the Ilima shareholding. The liquidators criticised the valuation of Mazars based on a report by Mr Zeelie. Some criticisms were that, in the first place, the valuation differed markedly from the one by Mazars of 18 June 2013 for purposes of acquiring shares of one Mr Manana (the Manana agreement). In addition, the nett asset value of Strategic of R207 million reported in June 2013 had been restated as R550 million in June 2014. This was accepted by both the directors and auditors of Strategic as being accurate. Mr Zeelie's valuation for the Ilima shareholding was between R119 million and R147 million. His criticisms of the valuation of Mazars prompted Strategic to appoint PricewaterhouseCoopers (PWC) to provide a valuation. The valuation was completed in 2016. However, it, too, was done on the basis of the impugned shareholders' agreement. It concluded that the value of the 11.784 percent Ilima shareholding was R8.1 million. In contrast, the value of Mr Manana's 2.3 percent shareholding had been assessed in June 2013, prior to the restatement of the nett asset value of Strategic, as R7.52 million.

[10] Strategic has a shareholding in Bombela Concession Company (Pty) Ltd (BCC). BCC has an agreement with the Gauteng Provincial Government relating to the operation of the Gautrain project. Bombela Civils Joint Venture (Pty) Ltd (BCJV), a subsidiary of BCC, was involved in the construction of the Gautrain project. PWC was told of a dispute in which BCJV claimed a contribution of R746 million from Strategic. Strategic opposed this claim. The approach of PWC was to 'initially deduct the maximum exposure to which [Strategic] is exposed, followed by a subsequent price adjustment to the amount paid to Ilima for their shareholding, once the outcome of the anticipated arbitration process in connection with the BCJV claim is known'. That information and the outcome of the dispute was clearly germane to the valuation.

[11] PWC also confirmed that it had not been informed of the involvement of Strategic in the Gautrain project. PWC accepted that those facts would have materially affected the value of Strategic and, as a result, the Ilima shareholding. This was complicated by a dispute between BCJV and the Gauteng Province. In November 2016, newspapers reported a settlement of that dispute. On 9 January 2017, the liquidators enquired whether an amended valuation, taking account of the settlement, had been obtained from PWC. This request was repeated on a number of occasions between 21 February 2017 and 13 February 2018, but to no avail. When it appeared that no response would be forthcoming, the liquidators instructed Mr Zeelie to produce an updated valuation. He, in turn, indicated that he required additional information and documentation in order to do so. A series of requests for this was sent between 15 February 2018 and 15 March 2018, also without result.

[12] The liquidators decided to hold an insolvency enquiry to obtain the necessary information and documentation. Subpoenas were issued to attend a meeting of creditors to be held on 23 March 2018. The third and fourth appellants attended. There they agreed, and were ordered, to provide the documents and information contained in the subpoenas by 13 April 2018. The liquidators stated that two files containing some, but not all, of the required documents were handed to them during April, albeit after the deadline. On 4 June 2018, further subpoenas were issued to the fourth and fifth appellants and a representative of the auditors of Strategic to attend an enquiry on 15 June 2018. Those persons sought and obtained an adjournment of the enquiry to 3 August 2018. They undertook to hand over the documentation by 13 July 2018, failing which they would attend the enquiry. They failed both to provide the documents and information then or thereafter.

[13] The enquiry was postponed to 9 November 2018 in an attempt to reach agreement regarding the value of the Ilima shareholding. It was agreed that the fourth appellant and the auditors would hand over the documents requested. A meeting with a view to reach a settlement was held on 14 September 2018 to no avail. The promised documents were also not furnished. On that date, Strategic launched the main application with the Notice of Motion having been signed and the founding affidavit deposed to the day before.

[14] The declaratory relief sought in the main application was to the effect that the documents to which the liquidators were entitled were limited to those described in ss 26 and 31 of the Companies Act, 71 of 2008 (the new Act) and s 113 of the Companies Act 61 of 1973 (the old Act). Strategic complained that the provisions of ss 414 and 415 of the old Act did not apply. The sections relied upon by Strategic were limited to shareholder rights. In essence the contention of Strategic was that

the liquidators of a shareholder have no greater right to documents than would a shareholder itself. As such the inference seems inescapable that the launch of the main application signalled the end of any prospect that Strategic would provide any further documents.

[15] Significantly, neither Strategic nor any of those subpoenaed ever sought to set aside the subpoenas on these or any other grounds. These had been issued by the Magistrate, Krugersdorp who was presiding over the enquiry. The relevant provisions of s 414(2) of the old Act are:

'The Master or officer who is to preside or presides at any meeting of creditors, may subpoena any person–

(a) . . . who in the opinion of the Master or such other officer may be able to give material information concerning the company or its affairs, in respect of any time before or after the commencement of the winding-up, to appear at such meeting, including any such meeting which has been adjourned, for the purpose of being interrogated; or

(b) who is known or on reasonable grounds believed to have in his possession or custody or under his control any book or document containing any such information as is referred to in paragraph *(a)*, to produce that book or document or an extract therefrom at any such meeting or adjourned meeting.'

And those of s 415(1) are:

'The Master or officer presiding at any meeting of creditors of a company which is being wound-up and is unable to pay its debts, may call and administer an oath to or accept an affirmation from any director of the company or any other person present at the meeting who was or might have been subpoenaed in terms of section 414(2)*(a)*, and the Master or such officer and any liquidator of the company and any creditor thereof who has proved a claim against the company, or the agent of such liquidator or creditor, may interrogate the director or person so called and sworn concerning all matters relating to the company or its business or affairs in respect of any time, either before or after the commencement of the winding-up, and concerning any property belonging to the company'.

[16] At the inception of the hearing, counsel for Strategic expressly disavowed the contention that the liquidators are limited to no more documents than those referred to in ss 26 and 31 of the new Act and s 113 of the old Act. It was also conceded that the provisions of ss 414 and 415 of the old Act did apply. That put paid to the appeal against the dismissal of the main application since those were the contentions on which it was founded.

[17] This then brings into focus the counter-application, which involves the following issues:

(a) Whether the high court correctly found that the provisions introduced by clause 27 of the amended MOI amounted to conduct contemplated in s 163(1) of the new Act as regards its application to the Ilima shareholding.

(b) If so, whether the high court correctly exercised its remedial jurisdiction in terms of s 163(2) of the new Act.

(c) Whether the orders of the high court enforcing the various subpoenas were justified and/or capable of execution.

(d) Whether the high court's punitive costs order against the appellants in the counter-application should be set aside.

[18] A number of matters concerning the response of Strategic to the main and counter-applications, bear mention. First, its constant refrain was that the date of valuation which applied was that of the PWC report in 2016. This contention was persisted in, right up to the penultimate paragraph of its replying affidavit. It was correctly retreated from in argument before us and it became common cause that a current valuation is required. There is no such valuation.

[19] Secondly, and allied to the first matter, it has been consistently contended by Strategic that the valuation of the Ilima shareholding which applied, was that of PWC. Apart from this dating back to 2016, it is common cause that it did not take account of the settlement of the Gauteng Province dispute. It was for this reason that Strategic requested Prof Wainer to update that valuation. He performed a calculation using the valuation of PWC and in some way applied the settlement, arriving at a value of some R59 million. This does not resolve the dispute whether the valuation of PWC, prepared in terms of the impugned shareholders' agreement, should apply. That issue lies at the heart of the dispute.

[20] In the third place, Strategic submitted that the liquidators had 'sufficient' documents by which to arrive at a valuation. This begs at least two questions. Why, if that was the case, were the requested documents promised and who should determine what is sufficient? No answer was given to the first of these. As to the second, Strategic arrogated to itself that determination. In argument, it could provide no legal basis for that submission. On the contrary, having been pressed by the liquidators on its undertakings to provide additional documents and in the light of the looming insolvency enquiry, it launched the main application. As has been noted, this contended that the liquidators were entitled to no more documents than those described in ss 26 and 31 of the new Act and s 113 of the old Act. During the hearing, it conceded that this contention was untenable.

[21] Against that general backdrop, the issue of clause 27 of the amended MOI must be considered. Here, the sequence of events sets matters in stark relief. Subpoenas were issued between March 2018 and June 2018 requiring documents to be produced for the insolvency enquiry set down for 15 June 2018. This was adjourned to 3 August 2018 at the instance of those subpoenaed. They undertook to

provide the documents by 13 July 2018. It was agreed that the enquiry on 3 August 2018 would be postponed to 9 November 2018 so as to attempt settlement. It was agreed that Mr Moshapalo and the auditors would hand over the documents requested. On 17 August 2018, the impugned shareholders agreement was declared invalid by Unterhalter J. It was on the basis of this document that the Mazars and PWC valuations had been performed. On 7 September 2018, the liquidators sent a letter recording that the documents had not been provided. This was repeated on 13 September 2018, in the light of the settlement meeting scheduled for 14 September 2018. That meeting bore no fruit. This is hardly surprising since that day Strategic launched the main application, claiming that the liquidators were entitled to only those documents referred to in ss 26 and 31 of the New Act and s 113 of the Old Act. As already indicated, this amounted to an unequivocal repudiation of its earlier undertakings to provide further documents.

[22] After the launch of the main application, Strategic rejected the suggestion of the liquidators that its shareholders should offer R125 million for the Ilima shareholding. On 29 April 2019, Mr Zeelie, having poured over the documents provided, sent a list containing 35 issues which he thought merited discussion at the forthcoming Annual General Meeting of Strategic. A further communication from Mr Zeelie to Strategic on 18 February 2020 raised a number of issues, many of them repetitions of those raised the previous year. Two such issues bear mention. First, that it appeared that the Manana agreement had resulted in Strategic itself purchasing the shareholding of Mr Manana. Instead of cancelling the shares as ought to have been done, it was alleged that the board had transferred them to the Share Incentive Scheme at no value despite their having material value at the time. Secondly, that dividends of R55 million had been declared at a time when Strategic had only R35 Million available. This dividend, he contended, had caused retained losses

which was not permissible. There were further allegations of dubious corporate governance on the part of the board. Four persons representing Strategic hotly contested these allegations, and provoked retorts, but failed to provide any substantive responses. It is neither possible nor advisable to make findings on any of these contentions. However, it is clear that the outcome one way or the other could well affect the value of the Ilima shareholding.

[23] It was this latter exchange which was followed soon after by the calling of the Special General Meeting of shareholders of Strategic. It was called on 8 June for 30 June 2020. At the meeting, the majority passed a resolution substituting an entirely new MOI for the existing one. The material terms of clause 27 thereof were:

'27.1 A shareholder shall be deemed to have committed an act of insolvency, winding-up or business rescue if:

27.1.1 save for solvent re-organisation or reconstruction, it is wound-up, provisionally or finally, or is placed under provisional or final judicial management; or

. . .

27.2 If a shareholder commits an act of insolvency, winding-up or business rescue, then:

27.2.1 Upon receipt by the Defaulting Shareholder, (or its statutory representative), of written notice from those Aggrieved Shareholders whose aggregate Equity Proportion Inter Se is not less than 50%, a Right to Call in respect of the Equity of the Defaulting Shareholder shall be deemed to have arisen on the Business Day immediately preceding the date of the event giving rise to the act of insolvency; and

27.2.2 the purchase consideration for the Forced Sale in this clause shall be the Forced Sale Price.'

The forced sale price is defined in paragraph 1.2.24 of the MOI as:

'[T]he price at which a Shareholder may become obliged to sell its Equity to the other Shareholders after a Forced Sale Event has occurred as expressed in this Agreement, which price shall mean a value determined, in the first instance by written agreement between the Shareholders or their representative, and failing such agreement being reached within 5 (five) Business Days after

written request for an agreed determination being delivered by any Shareholder to the others, then by an independent Merchant Bank division of any of the largest 6 (six) commercial banks in South Africa to be appointed by agreement between the Shareholders, or failing such agreement by the Chairman of the South African Institute of Chartered Accountants:

1.2.24.1.1 which shall have reference to the value of the Equity in the open market on a going concern basis as between a willing purchaser and willing seller;

1.2.24.1.2 which shall give each party an opportunity to make written submissions to him concerning the manner in which the Forced Sale Price should be determined;

1.2.24.1.3 which shall value the Shareholder's Loans at their face value;

1.2.24.1.4 whose decision (save for manifest error) shall be final and binding on the Parties; and

1.2.24.1.5 whose costs of valuation shall be borne by the selling Shareholder(s) on the one hand and the Call Shareholders on the other hand in equal shares, the liability of the Call Shareholders for their half of such costs portion to their Equity Proportion Inter Se.'

A forced sale event is defined in terms of clause 1.2.25 as:

'[A]ny event provided for in this MOI pursuant to which a Shareholder may become obliged to sell its Equity to the other Shareholders, other than a voluntary sale.'

[24] The liquidators viewed this amendment as an attempt by Strategic to have the valuation performed without furnishing the liquidators with any further information and documentation. The fact that the liquidators would be entitled to make written submissions begs the question as to how they could do so without access to documents which Mr Zeelie considered to be material to the valuation. Once the valuation was arrived at, the liquidators would be bound by it. They submitted that, in effect, Strategic would have all of the relevant information on which to base its submissions, and the liquidators very little. There was accordingly no equality of arms in this contentious matter. There would be no knowing what had and had not been taken into account by the valuer. In essence, there would be no possibility of an informed debate. Part of the relief sought in the counter-application was,

accordingly, relief under s 163 of the new Act. The relevant parts of this section read:

'(1) 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;

. . .

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

(a) an order restraining the conduct complained of'.

[25] This clearly envisages a two-step procedure. For the purposes of the present matter, the high court was initially obliged to make a determination on the facts. It had to consider whether the act of amending the MOI by introducing clause 27 had a result which operated oppressively or unfairly prejudicially against the liquidators or which unfairly disregarded their interests. If that was found to be the case, the high court was vested with the discretion to make an order which it saw fit.

[26] In *Grancy Property Ltd and Another v Manala and Others*[1] (*Grancy*), this Court approved a dictum in *Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others*,[2] relating to the predecessor of this section in the old Act:

'"Oppressive" conduct has been defined as "unjust or harsh or tyrannical" . . . or "burdensome, harsh and wrongful" . . . or which "involves at least an element of lack of probity or fair dealing" . . . or "a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely".'[3]

This Court went on to hold:

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[1] *Grancy Property Ltd v Manala and Others* [2013] ZASCA 57; [2013] 3 All SA 111 (SCA) (*Grancy*) para 22.
[2] *Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others* 1968 (1) SA 517 (C).
[3] Ibid at 525H-526E.

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

[27] The factual background shines with piercing clarity on the question whether the passing of clause 27 of the amended MOI amounted to conduct covered by s 163(1) of the new Act. Valuations by Mazars and PWC (as updated by Prof Wainer) based on forced sale provisions, were the previous basis for refusing further documents. Once the impugned shareholders' agreement was declared invalid, there was no basis for any claim that those valuations should be accepted as is. A rear-guard action ensued to avoid providing requested documents and information in the context of the insolvency enquiry. When this loomed, and negotiations failed, Strategic launched the main application which sought to avoid furnishing documents subpoenaed and providing information at the enquiry itself. While the main application was pending, inconvenient questions were asked concerning corporate governance. The only way to avoid further disclosure was to pass a forced sale provision which would apply to the Ilima shareholding. If that was invoked, the shareholding could be sold without any further documents being furnished.

[28] It is accepted by all, as it must be, that the liquidators are duty bound to obtain sufficient documents for the purpose of placing a value on the Ilima shareholding.

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[4] *Grancy* para 26. References omitted.

Liquidators are required to be diligent in the interests of creditors in recovering and distributing assets of the company in liquidation. As was accepted by this Court of the duties of the liquidator in *Receiver of Revenue, Port Elizabeth v Jeeva*:[5]

'It is his duty to the whole body of shareholders, and to the whole body of creditors, and to the Court, to make himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the course of his investigation, which is material to ascertain the exact truth in every case before the Court. And it is for the Judge to see that he does his duty in this respect.'[6]

[29] In response to the contention that the amendment was designed to restrict access to information and documents and to limit the manner in which the liquidators can dispose of the shareholding, the replying affidavit simply asserted that this was irrelevant. That is certainly not the case. It is clear from what I have said above that the effect of clause 27 of the amended MOI is to undermine the performance by the liquidators of their duties referred to in *Grancy*. It operated oppressively or unfairly prejudicially against the liquidators and unfairly disregarded their interests in obtaining an accurate valuation. Accordingly, the factual finding of the high court that the conduct of Strategic implicated s 163(1) of the new Act is unimpeachable.

[30] This vested the high court with a discretion to grant an order which befitted the situation. The order granted was that the provisions of clause 27 of the amended MOI would not apply to the Ilima shareholding or its sale. It can hardly be said that the exercise of this discretion of the high court can be interfered with. It seems to me to be an entirely appropriate order which goes no further than necessary. It simply serves to allow the liquidators to properly perform their duty to obtain as accurate a

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[5] *Receiver of Revenue, Port Elizabeth v Jeeva and Others; Klerck and Others NNO v Jeeva and Others* 1996 (2) SA 573 (A) at 578F-I.

[6] Citing with approval *In re Contract Corporation (Gooch's case)* (1871-1872) 7 Ch App 207 at 211.

valuation as possible so as to dispose of the Ilima shareholding for the benefit of creditors of Ilima.

[31] The next issue concerns the declaration by the high court that the liquidators are entitled to the documents sought in the subpoenas. The submission of Strategic in its heads of argument that the description of the documents was too vague to give effect to was not pressed before us. This was appropriate. If undertakings had already been given, it can hardly be contended that Strategic cannot adequately identify the documents. That was never its complaint.

[32] I have dealt with the contention of Strategic that the liquidators had sufficient documents for that purpose. There are a number of answers to that submission. First, there is no current valuation. Secondly, it does not appear to be genuinely disputed that, in order to perform an accurate valuation, the documents sought are necessary. Finally, as has been repeatedly pointed out, Strategic undertook to furnish the liquidators with the documents sought rather than to set aside the subpoenas on the basis of lack of relevance or compellability. As such, the order of the high court must stand.

[33] This leaves the final submission of Strategic that the high court erred in granting a punitive costs order against it in the counter-application. This was also not pressed before us in argument. It is clear that, in doing so, the high court exercised a discretion. The reasons for doing so were clearly set out by Maier-Frawley J and do not afford a basis on which to interfere on appeal. On the contrary, it is my view that the punitive order was amply warranted.

[34] In the result, the appeal is dismissed with costs, including those of two counsel where so employed.

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T R GORVEN

JUDGE OF APPEAL

Appearances

For appellants:	L J Morison SC (with him T Scott)
Instructed by:	Knowles Husain Lindsay Incorporated, Johannesburg
	Claude Reid Incorporated, Bloemfontein
For first respondent:	A Subel SC (with him J Hershensohn)
Instructed by:	Lawtons Africa, Johannesburg
	Matsepes Incorporated, Bloemfontein.