



REPORTABLE

CASE NO: SA 106/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

TRANSNAMIB HOLDINGS LTD

Appellant

and

STOCKS & STOCKS LEISURE

(NAMIBIA) (PTY) LTD

First Respondent

SWAKOPMUND STATION HOTEL

(PTY) LTD t/a THE SWAKOPMUND STATION HOTEL

AND ENTERTAINMENT CENTRE

Second Respondent

MINISTER OF WORKS AND TRANSPORT

Third Respondent

MINISTER OF PUBLIC ENTERPRISES

Fourth Respondent

REGISTRAR OF COMPANIES

Fifth Respondent

Coram: SHIVUTE CJ, MAINGA JA and SMUTS JA

Heard: 29 April 2021

Delivered: 14 May 2021

Summary: This is an appeal against the judgment and order of the High Court granting with costs, an application brought under s 260 of the Companies Act 28 of

2004. Section 260 replaced section 252 of the repealed Companies Act 61 of 1973 to empower a court to provide relief to a member of a company from unreasonably prejudicial, unjust or inequitable or oppressive conduct of the company affairs. The issue in this appeal is whether the conduct of the appellant falls within the parameters of the provision and warranting the granting of the application by the court below.

The appellant and the third respondent are both equal shareholders in the second respondent, a company that operated a hotel and entertainment centre at the coastal town of Swakopmund. In 2020 the first respondent commenced a High Court application for relief under s 260. It claimed that the appellant had acted in a manner unreasonably prejudicial to the second respondent and, for that complaint, sought relief pursuant to the provisions of s 260 including compelling the appellant to sell its shares to it for N\$5 million. The application was opposed by the appellant, the third and four respondents. The fifth respondent did not oppose the application and did not also participate to the proceedings in the court below as well as on appeal.

The High Court held that s 260 empowered the courts to provide equitable relief to equal shareholders (and not only minority shareholders) provided that the conduct complained of met the criteria of s 260. The court proceeded to hold that the appellant's refusal to accept a proposal to convert loans into equity as well as its refusing to provide further funds to the second respondent and accepted the offer to sell its share, considering the parlous state of the company, amounted to conduct as contemplated by s 260. The court thus granted the application with costs. It was not necessary for it to deal with the alternative relief in the form of a winding-up order on the grounds of being just and equitable.

The appellant aggrieved, has appealed to the Supreme Court against the decision of the High Court. The appellant argued, amongst other things, that the first respondent had failed to establish any conduct on the part of the company which was unreasonably prejudicial, unjust or inequitable to it. The appellant however conceded that disagreements existed between itself as a shareholder and the first respondent as the other shareholder, concerning the running of business of the

second respondent, but it maintained that disagreement fell short of conduct which engaged s 260. The appellant thus claimed that the court below was wrong to have found that its conduct fell within the parameters of the provision.

On appeal, the Supreme Court held that the first respondent failed to establish unreasonably prejudicial conduct on the part of the appellant. It was further held that the first respondent failed to meet the jurisdictional facts required in s 260(3) that the relief would bring to an end the deadlock complained of and that the relief itself was just and equitable. The Supreme Court also held that the court below should have made an order for the provisional winding-up of the second respondent instead of granting the relief in terms of s 260. That is the order made by this court and the matter is referred back to the High Court for further case management consistent with this order.

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and MAINGA JA concurring):

[1] This appeal concerns the scope and ambit of the remedy provided to a shareholder by section 260 of the Companies Act¹ to obtain relief from unreasonably prejudicial, unjust or inequitable conduct of a company or where its affairs are conducted in such a manner. The heading of the section is 'Remedy of member in case of oppressive or unreasonably prejudicial conduct'. Relevant to this appeal are sub-sections 260(1) and 260(3) which provide:

- '(1) Any member of a company who complains that any particular act or omission of a company is unreasonably prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unreasonably prejudicial, unjust or inequitable to him or her or to some part of the members of the company, may, subject to subsection (2), make an application to the Court for an order under this section.

¹ Act 28 of 2004 (the Act).

(2) . . .

(3) If on any application it appears to the Court that the particular act or omission is unreasonably prejudicial, unjust or inequitable, or that the company's affairs are being conducted in a manner which is unreasonably prejudicial, unjust or inequitable and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make an appropriate order, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members or by the company.'

[2] This appeal has arisen in the following way.

Background facts

[3] At the heart of the dispute between the main protagonists in this appeal is the Swakopmund Hotel and Entertainment Centre (the hotel). It was developed and established some 27 years ago as a joint venture between the appellant, TransNamib Holdings Limited (TransNamib) and Stocks & Stocks Leisure Namibia (Pty) Ltd (Stocks), first respondent in this appeal. The corporate vehicle for this joint venture is a company, Swakopmund Station Hotel (Pty) Ltd (the company). The project entailed converting the historic Swakopmund Station, owned by TransNamib, into a luxury hotel, entertainment and conference centre which would also house a casino complex.

[4] To this end, TransNamib and Stocks entered into a shareholders agreement and each shareholder introduced N\$6 million in loan capital. They also agreed to obtain loans totalling N\$27.5 million from three pension funds, secured

by bonds over the property acquired by the company from TransNamib to develop the hotel.

[5] A further N\$10 million instalment finance facility was obtained from a commercial bank to purchase equipment and a N\$5 million overdraft facility was secured from the same bank. A 90 bedroom hotel with a casino, restaurant and extensive conference facilities was established and has operated for some 26 years until it closed in March last year in the first state of emergency declared by the President in response to the Covid-19 pandemic. It has not re-opened since then.

[6] Stocks and TransNamib each have a 50 per cent shareholding in the company and have equal representation on its board. Unanimous resolutions are required in respect of non-budgeted expenditure exceeding N\$50 000 or any borrowing to be incurred by the company. They also agreed that Stocks related company would build the hotel and another company within the Legacy Group (which has the majority shares in Stocks) later known as Legacy Hotels Management Services (Pty) Ltd (Legacy Management) was appointed to manage the hotel indefinitely (and has done so since the inception). The shareholders agreement also provided that the parties undertook to provide each other mutual support as may be reasonably expected to give effect to the spirit and intent of that agreement.

[7] The surrounding property on which the hotel's parking area is located belongs to TransNamib and is leased by the company. The term of that lease has expired and this property has since been leased on a month to month basis.

[8] In only four of its 26 years of operation did the hotel run at a profit. Following its closure in 2020, the financial position of the hotel became dire. Indeed, it is common cause between the parties that the company is hopelessly insolvent. Its liabilities of N\$110.5 million far exceed the value of its assets estimated at N\$65.5 million. The company also has severe cash flow difficulties to meet security and insurance costs to protect the hotel and to pay a small skeleton staff component. Prior to closure, the hotel's staff component was 178 employees.

[9] Owing to the substantial losses sustained by the company over the years, financial and capital contributions were provided by Stocks and the Legacy Group (Legacy). Apart from its initial capital contribution, TransNamib has over the years of these accumulating losses not made significant financial contributions to the company.

[10] Quite apart from its insolvent position, it is not disputed that the hotel is in need of refurbishment – primarily to improve the rooms. This would require estimated expenditure in excess of N\$40 million.

[11] In board meetings spanning some years preceding these proceedings and in particular from 2018 until August 2020, the two shareholder factions on the board were unable to agree on the terms for much needed recapitalisation of the company.

[12] One of the main stumbling blocks was the unequal ratio of shareholder loans. Stocks had since the early days of the venture provided loans to the

company. These attracted interest which accumulated but was later waived. Stocks' loan account stood at N\$43 million prior to the institution of these proceedings. Furthermore, Legacy acquired the loans of the pension funds when the company defaulted on the repayment terms of those loans. Legacy took over those loans and took cession of the bonds from the pension funds. Those loans had interest at increasing rates which were later considerably higher than ruling commercial rates at the time of their take over. Interest on those loans became capitalised up to the amount of the loans and thereafter further interest was not charged because of the *in duplum* rule. These loans to Legacy are in the sum of N\$39.5 million.

[13] The unequal shareholder loans to the company (including by Stock's holding company, Legacy) complicated recapitalisation discussions as conversion of debt to equity would massively dilute TransNamib's shareholding to a single digit figure. Other alternatives were raised such as one shareholder purchasing the other's interest. TransNamib did not agree to the Stocks/Legacy proposals for recapitalisation and raised issues concerning the performance of Legacy Management and the terms of the management agreement. Following the closure of the hotel due to the emergency regulations, further meetings were held and an external expert was engaged to provide an independent report on the business to the company and its shareholders. The report referred to various options open to the parties to refinance and re-open the hotel. The ensuing discussions and meetings did not result in a resolution. Stocks then brought these proceedings by way of an urgent application in September 2020, set down for 2 October 2020.

The application

[14] In its application, Stocks sought a three pronged order in terms of s 260. Firstly, it sought an order that loans of N\$8.1 million to the company by both TransNamib and Stocks be converted to share capital in the books of the company. In the second instance it sought an order compelling TransNamib to sell its shares for a purchase price of N\$5 million payable by way of an initial instalment of N\$1 million, with the balance of N\$4 million payable from the end of the 2024 financial year provided that a proportion (6.9 per cent) of profits that year could meet that balance or, if not, then the balance would be paid in subsequent years, subject to the same condition. A further order was sought compelling TransNamib to enter into a 20 year lease agreement in respect of the adjacent parking area at a rental as agreed or failing an agreement on rental, the average of sworn valuations obtained by TransNamib and Stocks respectively.

[15] In the alternative to the relief sought under s 260, Stocks applied to liquidate the company.

[16] In support of its relief sought under s 260, Stocks pointed out that it had for some years endeavoured to move TransNamib to make financial contributions to the company or in the alternative to convert certain loans to equity in a bid to reduce the debt ratio and enable the company to borrow commercially so as to obtain further much needed funding in order to pay for needed improvements and improve its liquidity. TransNamib had repeatedly declined these requests. Nor had it agreed to sell its shares to Stocks so that the latter could then capitalise the company. Legacy also offered to provide a loan, provided that the two shareholders pledge their shares as security for repayment of the loan. TransNamib also rejected this proposal.

[17] Several meetings in 2020 directed at resolving the deadlock between the parties came to nothing. Extensive funds were required to re-open the hotel and make it competitive. As other ways to secure further funding were not possible (given the insolvent circumstances of the company), Stocks brought the application as a matter of urgency to break the deadlock.

[18] If Stocks were able to acquire TransNamib shares, it explained that it would convert much of the loans to equity and Legacy would provide the necessary funding to proceed with renovations and to enable the hotel to re-open, and thus securing the employment of the 178 employees of the company.

[19] In support of the application, Stocks contended that TransNamib's refusal to accept its proposal to convert loans into equity and simultaneously refusing itself to provide further funds to the company and effectively prevent Legacy from providing loan funding, in its dire insolvent circumstances, amounted to conduct as contemplated by s 260. This conduct coupled with the refusal to accept the N\$5 million offer for its shares, payable as set out, and TransNamib's refusal to offer any effective solution to the perilous circumstances of the company, meant, according to Stocks, that TransNamib's conduct caused the affairs of the company to be conducted in an unreasonably prejudicial, unjust or inequitable manner to Stocks. Without a forced sale contemplated by the application, Stocks contended that the company would not be able to continue and liquidation would be inevitable as the company was hopelessly insolvent and contended that it would be just and equitable to liquidate the company.

[20] A provisional winding-up order was thus sought in the alternative.

[21] In addition to citing the company and TransNamib, the application also cited the Minister of Works and Transport and the Minister of Public Enterprises, given TransNamib's status as a state-owned enterprise, and the Registrar of Companies.

[22] The application was opposed by TransNamib although it agreed to the first component of the relief sought to convert the equal N\$8.1 million shareholders loans to equity. In its answering papers, reference was made to its position repeatedly stated at meetings spanning some years. TransNamib's representatives on the board had on a number of occasions expressed unhappiness with the performance of the company and the management of the hotel by Legacy Management. This poor performance was represented by significant losses year upon year with only profits generated in four of 26 years. TransNamib had also latterly questioned the calculation and composition of the loan accounts of Stocks and Legacy and stated that it could only consider a capitalisation of this debt if a forensic audit of these loans were first conducted.

[23] In response to these concerns, Stocks and Legacy resisted any revisiting of the management agreement. It was also stated that TransNamib had not objected to the reflection of the loans in the company's annual financial statements over the years, despite ample and repeated opportunity to do so. It was also pointed out that Legacy took over the pension fund loans on the same terms and conditions as applied between the company and the pension funds.

[24] TransNamib also proposed in its answer to the application that the dispute between the shareholders be referred for dispute resolution in terms of the shareholders' agreement. It however failed to spell out the terms of the dispute to be so referred. TransNamib also contended that there was a dispute of fact on the papers concerning the value of shareholder loans and proposed that this issue should be referred to arbitration under the dispute resolution term in the shareholders' agreement alternatively that the dispute be referred to oral evidence, although it failed to spell out the precise terms of the dispute as would be required for a referral to evidence.

[25] TransNamib also denied that the invocation of s 260 by Stocks was appropriate and denied that s 260 found application to their dispute.

[26] TransNamib and the Government respondents opposed the relief relating to the parking area and pointed out that the relief sought would not comply with procurement legislation, given TransNamib's status as a state-owned enterprise. In reply, Stocks abandoned that relief and settled with the Ministers by agreeing to pay their costs. The Ministers thus abided the decision of the High Court and have not participated in this appeal.

[27] In argument in the High Court (as well as in this court), TransNamib contended that s 260 did not apply as the relief sought would not bring an end to the dispute between the parties, given TransNamib's ownership of the parking area. TransNamib also contended that if the relief under s 260 were to be granted, Stocks and Legacy would benefit from their poor performance if a forced sale under s 260 was ordered.

Approach of the High Court

[28] A full bench of the High Court first considered whether the matter should be heard as one of urgency. After hearing argument on that issue on 9 October 2020, the court ruled with appropriate promptness that the matter was urgent on 12 October 2020. The merits of the application were then heard by a single judge, Masuku J, on 20 October 2020. He likewise, with appropriate expedition, delivered his reasoned judgment and order on 10 November 2020.

[29] The High Court held that s 260 not only applied to circumstances where majority power in a company was deployed against a minority shareholder, but could also include a company of equal shareholding as in the present circumstances, as long as the conduct complained of met the criteria of s 260. The court found that TransNamib's conduct fitted snugly within the parameters of the provision, listed by the court as 'prejudicial, unjust or inequitable'. The court concluded that as long as the result of that conduct was 'unreasonable, prejudicial or inequitable', then the court would intervene.

[30] As to TransNamib's complaint about the purchase price not having been established with reference to expert evidence on the value of the shares, the court concluded that there was adequate material before it to conclude that the value of the shares sought to be purchased was nil.

[31] The court further favoured Legacy's offer to recapitalise the company to save the jobs of the large workforce.

[32] The court also found that the parking area was not the main dispute between the parties which centred on the running of the business (and its recapitalisation). The court found that, as the relief concerning the parking area was abandoned by Stocks, this issue should not then be resuscitated by the court and that Stocks would instead need to deal with the issue in the future and that it should not detain the court in resolving the dispute under s 260.

[33] As for the alternatives posed by TransNamib (such as invoking the dispute mechanisms of the shareholder's agreement or referring the matter for oral evidence), the court rejected them on the basis that TransNamib had not filed a counter application to which Stocks could have responded.

[34] The court proceeded to make an order as agreed in respect of converting the respective loans of both shareholders in the sum of N\$8.1 million to equity. The court further ordered TransNamib to sell its shares in the company for N\$5 million, payable as proposed by Stocks with N\$1 million payable at once and the balance payable from the 2024 financial year end and thereafter, depending on the profitability of the company and limited to 6.9 per cent of profits, as set out.

Proceedings in this court

[35] TransNamib noted an appeal against the judgment and order of the High Court. Stocks thereafter approached this court under rule 3(5) for the appeal to be heard outside the court terms prescribed in the rules, given the urgency of the matter. That approach was not opposed by TransNamib. This court acceded to that request and set the matter down for 29 April 2021, with directions given for the filing of heads of argument.

[36] TransNamib as appellant did not however prosecute this appeal in accordance with the rules of court and the directions given by this court. Its notice of appeal was a day late. This was followed by manifold breaches of the rules and directions in respect of almost every further step taken in prosecuting the appeal. The record was filed late. Security, required in terms of rule 14, was late, as were heads of argument on its behalf. Two applications for condonation were filed. The first was to address the late noting of the appeal and the second to deal with the several further non-compliances.

[37] The explanation given in the first application primarily relates to TransNamib's erstwhile practitioner unfortunately contracting and being ill with the Corona-virus. But the failure to take the requisite steps extended beyond his indisposition - both with regard to the failure to note the appeal in time and the further steps required. The subsequent non-compliances are largely attributable to that practitioner. TransNamib subsequently terminated his services and engaged their current practitioners of record.

Condonation

[38] The two-pronged nature of the test for condonation applications has been repeatedly stated by this court, given the disturbing frequency of applications of this nature. The applicant is firstly required to provide a reasonable and acceptable explanation for the non-compliance. In the second instance, there must be reasonable prospects of success on appeal. These requirements are not considered in isolation in the exercise of the court's discretion. Good prospects of success may result in granting condonation even in the face of an unsatisfactory

explanation although an explanation found to be 'glaring', 'flagrant' or 'inexplicable' may result in the dismissal of the application without the need to consider the prospects of success of the appeal.²

[39] As was held by the Chief Justice in *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & others*.³

'In considering whether to grant such, a court essentially exercises discretion, which discretion has to be exercised judicially upon consideration of all the facts in order to achieve a result that is fair to both sides. Furthermore, relevant factors to consider in the condonation application include the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the respondent's interest in the finality of the judgment; the convenience of the court, and the avoidance of unnecessary delay in the administration of justice. (*Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) at 165G-I. See also decisions of the South African Appellate Division in *Federated Employers Fire and General Insurance Co Ltd v McKenzie* 1969 (3) SA 360 (A) at 362G; *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E -G among others.)'

[40] Whilst the erstwhile practitioner of TransNamib was stricken with Covid-19 for a portion of the period in question, this unfortunate circumstance does not cover the entire period. The further explanation tendered for not filing the record in time is entirely inadequate and untenable (namely that there were attempts by the Minister of Public Enterprises to resolve the matter). Plainly settlement overtures do not suspend the operation of the rules as that practitioner ought well to have known.

² *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5; *Sun Square Hotel (Pty) Ltd v Southern Sun Africa & another* 2020 (1) NR 19 (SC) para 13.

³ 2011 (2) NR 469 (SC) para 19.

[41] As in the *Namib Plains* matter, the question is whether TransNamib should be penalised because of the unacceptable lack of diligence on the part of its erstwhile practitioner. As was reiterated in *Namib Plains*, there is a limit beyond which a litigant cannot escape its practitioner's remissness.⁴ As in *Namib Plains*, 'the inadequate explanation for the delay is ameliorated by weighty factors which militate against the refusal'⁵ of condonation on the basis of the inadequacy of the explanation alone, given the public interest nature of the matter, affecting the livelihood of so many employees, and concerning a national asset in the form of the iconic heritage station building in Swakopmund. This is thus not a case where condonation will be refused on the inadequacy of the explanation without a consideration of the prospects of success, even though the cumulative effect of the several non-compliances approaches the level of being glaring and flagrant. The court accordingly heard full argument on the merits of the appeal, given its public importance reflected in the number of jobs at stake and the need for finality on the complex issues raised by the appeal.

Submissions on appeal

[42] Counsel for both parties conceded that there was deadlock between the equal shareholders and that the company was insolvent. They each however proposed that a remedy less drastic than liquidation be adopted.

[43] In the case of TransNamib, counsel argued that the forced sale of shares order of the High Court was incorrect and should be replaced by an order referring the disputes between the parties to arbitration in terms of the shareholders'

⁴ Para 25.

⁵ Para 25.

agreement or to oral evidence or the postponement of the proceedings pending a forensic audit of Stocks' and Legacy's loans to company.

[44] On the other hand, counsel for Stocks supported the judgment of the court below.

[45] Counsel for TransNamib referred to minutes of recent board meetings where Stocks' representatives on the board repeatedly put forward Legacy's position on issues such as stating that Legacy rejected TransNamib's proposals and referring to Legacy as a shareholder in its proposals. Counsel submitted that it was, if anything, for Legacy to complain about TransNamib's conduct and not Stocks. Yet, Legacy was not a party to the proceedings.

[46] It is correct that the Stocks directors spoke of Legacy as a shareholder and advocated its interests in those board meetings or referred to Stocks and Legacy interchangeably. These statements are however to be viewed in the context of Legacy being the holding and controlling company which exercises its rights through its subsidiary, Stocks, which is the shareholder in the company. The statements are thus to be understood as being made by Legacy through its shareholding entity, Stocks. That shareholding entity in turn, as shareholder, had standing under s 260 to bring the proceedings in the High Court. Legacy however exercised further rights in its own capacity as loan giver, having taken over the pension fund debt.

[47] Counsel for TransNamib also argued that Stocks had failed to establish any conduct on the part of the company which was unreasonably prejudicial, unjust or inequitable to it.

[48] It was also contended that TransNamib's conduct complained of was not conduct unreasonably prejudicial, unjust or inequitable to Stocks as contemplated by s 260. There was a disagreement between shareholders as to the commercial soundness of their opposing positions which, so it was submitted, did not constitute impugned conduct for the purpose of s 260. In this regard, it was pointed out that TransNamib was not involved in the day to day management of the company which had, save for four years out of 26, traded at excessive losses over the years. TransNamib's unwillingness to inject funds into the company where it had little say and had little prospect of receiving a return was, so it was argued, not unreasonably prejudicial conduct. Nor, so it was submitted, was its rejection of a further loan from Legacy on condition of TransNamib's shares being pledged as security for the company with its history of loss making.

[49] It was accordingly contended that the jurisdictional fact of conduct on the part of the company or TransNamib had not been met.

[50] Counsel also contended that the relief granted was not appropriate nor fair and equitable as required by s 260(3). It was submitted that there was also no proof of Legacy's ability to recapitalise the company. Nor was there any guarantee that TransNamib would receive the balance of N\$4 million purchase price which, so it was contended, was to be paid by the company from future profits and not Stocks or Legacy. TransNamib also did not accept the correctness of the loan

capital stated in the company's books and sought a forensic audit which may result in a correction in its favour and impact upon the value of its shareholding. The court's acceptance of the purchase price and value of TransNamib's shares without any expert evidence or evaluation was also criticised.

[51] TransNamib's counsel further argued that the relief granted by the High Court would not bring an end to disputes between the parties as the company (and hotel) would require parking upon TransNamib's adjacent property. That issue would remain unresolved following Stocks' abandonment of the relief sought in that regard.

[52] Counsel for Stocks on the other had submitted that the court below had correctly found that the manner in which TransNamib had conducted the affairs of the company was unreasonably prejudicial, unjust or inequitable to Stocks. It was argued that TransNamib's refusal to accept the conversion of shareholder loans to equity and for Legacy to provide loan funding as well as TransNamib's rejection of the offer of N\$5 million amounted to conduct contemplated by s 260 when viewed in the context of the severely insolvent state of the company and without TransNamib proposing any effective alternative. It was submitted that TransNamib's attempt to have undefined disputes referred to arbitration and unspecified issues relating to loans did not amount to any solution in the context of TransNamib not previously contesting or objecting to the loans reflected in annual financial statements and having instead approved those financial statements.

[53] Counsel for Stocks forcefully argued that the order granted was appropriate in the circumstances as it meant that the company would be recapitalised and

saved from liquidation and could re-open its hotel business and secure the further employment of the company's 178 employees and enable it to undertake the necessary renovations.

[54] As the sole shareholder, Stocks, with the backing of the Legacy Group, would be able to restore the company to its hotel and casino business.

[55] It was also argued that the N\$5 million price for TransNamib's shares was more than reasonable, given the fact that the liabilities way exceeded the company's assets, meaning that its net asset book value was nil.

[56] Counsel for Stocks further argued that the ambit of the appeal was narrow because the court below had exercised a discretion to grant the relief to Stocks. It was contended that the exercise of that discretionary power cannot be set aside on appeal merely because another court would have preferred to follow another course.

Ambit of this appeal

[57] In support of Stocks' contention that this appeal against the exercise of the High Court's discretion is limited in its ambit, it was said that the court had exercised a discretion in a strict and narrow sense by acting within its powers to select an option open to it and that this court would only allow the appeal if its discretion had not been properly exercised, in the sense of being exercised capriciously or upon a wrong principle or had not brought an unbiased judgment to bear or not acted for substantial reasons.⁶

⁶ *Ex parte Neethling* 1951 (4) SA 331 (A) at 335D-E.

[58] This court in *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others*⁷ referred to the narrow ambit of an appeal where a discretion is exercised by a court in regulating its own procedures - in that instance concerning whether a proper and satisfactory explanation was given to supplement papers.⁸ In matters of that kind, this court found that, where there was the exercise of a discretion in this 'strict or narrow' sense, the power to interfere on appeal would be strictly circumscribed – and only where 'the court below had exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons, or materially misdirected itself'.⁹ In the course of its reasoning this court approved the principle underpinning a narrow discretion as one where 'the court of first instance is in a better position than an appeal court to decide a question which involves the exercise of a value judgment, especially on a question of procedure' where an appeal court would be reluctant to interfere.¹⁰ Apart from discretionary powers of a presiding judge in controlling the conduct of proceedings (such as granting postponements, amendments and leave to adduce further evidence), other instances within this category include making orders for costs, imposing sentence and authorising the alienation of immovable property in which a minor child has an interest.¹¹

[59] Counsel was unable to cite any authority involving the exercise of discretion in respect of a section similar to s 260 in support of the proposition of the discretion being in a strict or narrow sense thus limiting the ambit and scope of this

⁷ 2013 (3) NR 664 (SC).

⁸ Para 105.

⁹ Para 106.

¹⁰ *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council & another* 1999(4) SA 799 (W) at 805G.

¹¹ *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd & another* 1989 (4) SA 31 at 43G-H (*Tjospomie*).

appeal. On the contrary, appeals involving the South African equivalent provisions¹² contain no indication to this effect and have not been approached in such a confined manner.¹³

[60] As counsel conceded, there is no basis to suggest in a matter of this nature that the court of first instance is in a better position than this court to determine whether the conduct in question engaged s 260 and whether it was just and equitable to grant the relief which the High Court granted to Stocks.

[61] The authorities raised in support of its point in this regard by Stocks furthermore do not support the application of this principle to an enquiry in terms of s 260. In *Media Workers Association of South Africa & others v Press Corporation of South Africa Limited (Perskor)*¹⁴ relied upon by Stocks, a similar argument was raised concerning an appeal involving a court's discretion to make a finding of an unfair labour practice. The court rejected the contention that this involved a narrow exercise of discretion and found¹⁵ that such a decision was not a matter of discretion in the sense referred to in *Ex parte Neethling*,¹⁶ and decided that the power to determine whether certain facts constituted an unfair labour practice was rather a judgment made by the court in the light of all the relevant circumstances and not involving a choice between permissible alternatives.

[62] The other matter raised in support of counsel's argument (*Tjospomie*) is also, upon closer scrutiny, against the application of the principle contended for. In

¹² Previously s 111 *bis* of Act 46 of 1926 and later s 252 of Act 61 of 1973 and currently s 163 of Act 71 of 2008.

¹³ *Louw & others v Nel* 2011 (2) SA 172 (SCA); *Freedom Stationery (Pty) Ltd & others v Hassam & others* 2019 (4) SA 459 (SCA).

¹⁴ 1992 (4) SA 791 (A).

¹⁵ At 800I-J.

¹⁶ *Supra*.

that matter, the court was called up to decide whether the discretionary power of a court in determining that it is just and equitable for a company to be wound up under the erstwhile s 344(h) of the Companies Act, 61 of 1973 would result in the power to interfere on appeal to be circumscribed as contemplated in *Ex Parte Neethling & others*¹⁷. The court emphatically found that the discretionary power established by s 344(h) did not fall within the category of discretionary powers contemplated by *Ex parte Neethling & others*.¹⁸ The court stressed in *Tjospomie* that a court of appeal is in as good a position as the court of first instance to exercise that discretionary power under s 344(h). Indeed a determination to that effect (that it is just and equitable to wind up a company) entails a broad conclusion of law, justice and equity and is a judgment on the facts found by a court to be relevant and not merely a discretion between different options.¹⁹

[63] It follows that Stocks' contention of a narrow ambit to this appeal is misplaced.

Section 260

[64] This section provides a member of a company with a means of obtaining relief from oppressive or unreasonably prejudicial conduct of a company or where a member complains that the affairs of a company are conducted in such a manner. If a member can establish either scenario, s 260(3) vests a court with wide powers to make an order it considers just and equitable in the particular circumstances of a specific case with a view to bring the conduct complained of to an end.

¹⁷ 1951 (4) SA 331 (A) at 335D-E.

¹⁸ At 44D.

¹⁹ *Meskin Henochsberg on the Companies Act* (1994, as updated) Vol 1, p 701 and the authorities collected there.

[65] Section 260 substantially re-enacted its predecessor provision in the previously applicable s 252 of the Companies Act, 61 of 1973²⁰ although with one noticeable difference in its wording. The requirement for conduct in s 260 is 'unreasonably prejudicial, unjust or inequitable' as opposed to 'unfairly prejudicial, unjust or inequitable' to be found in s 252 and its predecessor²¹ and in the equivalent provisions in company legislation in England upon which s 111 *bis* and s 252 are based.²²

[66] It is not clear why the legislature so departed from the wording in s 252 and the provisions in English legislation upon which s 260 is based. The term 'unreasonably' was however employed in the signed Afrikaans text of s 252 of Act 61 of 1973. It has been held that 'unfairly' in s 252 was used in the sense of unreasonably.²³ It would seem that the use of the term 'unreasonably' in s 260 would also connote unfairness given the context and history of the provision. It not only relates to the conduct itself but to the result or effect of the conduct in qualifying the term prejudicial.²⁴

[67] Fairness and reasonableness in the context of the legislative history of the provision confer upon a court wide powers to do what appears just and equitable.

[68] The notion of the fairness in this context was aptly described by Lord Hoffmann with reference to the equivalent provision in England thus:

²⁰ (which has since been replaced in South Africa by a more expansively worded s 168 of the currently applicable Companies Act in South Africa Act 71 of 2008).

²¹ S 111 *bis* of Act 46 of 1926.

²² Section 210 of the Companies Act, 1948 succeeded by s 459 of the Companies Act, 1985.

²³ *Garden Province Investment & others v Aleph (Pty) Ltd & others* 1979 (2) SA 525 (D) at 531C-D.

²⁴ *Garden Province Investment* at 531D; *Livanos v Swartzberg & others* 1962 (4) SA 395 (W). *Aspek Pipe Co (Pty) Ltd & another v Mannenberger & others* 1968 (1) SA 517 (C) at 529.

'In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman *societas*, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.

The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there 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.²⁵

[69] The South African Constitutional Court has recently said of the remedy provided by s 252:

'The just and equitable relief is about institutional governance. In cases of corporate bullying, equitable intervention is necessary and the courts must be given some latitude to intervene and bring to an end the matters complained of'.²⁶

²⁵ *Re a company* (N0 00709 of 1992), *O'Niell & another v Phillips & others* [1999] 2 All ER 961 (HL) (*O'Niell*).

²⁶ *Off-Beat Holding Club & another v Sanbonani Holiday Spa Shareblock Ltd & others* 2017 (5) SA 9 (CC) para 28.

[70] Reasonableness in the form of fairness is the determining criterion. The test is an objective one²⁷ referred to as the ‘reasonable bystander’ test as set out by Nourse, LJ in *Re RA Noble & Sons (Clothing) Ltd*²⁸ as being ‘whether a reasonable bystander observing the consequences of their conduct would regard it as having unfairly prejudiced the petitioner’s interests’. What would be fair or unfair depends on the context of the conduct in question.²⁹

[71] Notions of fairness and reasonableness may transcend the rights of a company or shareholder (either in the articles of association or in shareholder agreements) where it is unreasonable for a party to take advantage of them. A valid exercise of a power under those instruments would ordinarily not engage s 260 unless it is regarded as having been outside or contrary to the contemplation of the powers in question and amounting to an abuse of those powers.³⁰ The exercise may thus on its face amount to a valid exercise of that power yet may not be just and equitable and unreasonably prejudicial, as being contrary to contemplation of the parties.³¹

[72] As was stated by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd*:³²

‘The ‘just and equitable’ provision does not as the respondents [the company] suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does,

²⁷ *De Sousa & another v Technology Corporate Management (Pty) Ltd & others* 2017 (5) 577 (GJ) paras 32-55 for a very helpful survey of both South African and English decision in equivalent provisions.

²⁸ [1983] BCLC 273.

²⁹ At 290-291; *De Sousa* para 35.

³⁰ *O’Neill* 968-9.

³¹ Re a company at 969. *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458 at 467.

³² [1972] 2 All ER 492 (AC).

enable the court to subject the exercise of legal rights to equitable considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or equitable, to insist on legal rights, or to exercise them in a particular way.³³

[73] As stated in *Off-Beat*, s 260 concerns institutional governance. It is in my view directed at abuses of power within that context. Conduct of this nature was aptly described by Lord Cooper in *Elder v Elder & Watson Ltd*³⁴ as:

‘The essence of the matter seems to me to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the standards of fair play on which every shareholder who entrusts his money to a company is entitled to rely.’³⁵

[74] The conduct to be established has also frequently been referred to as entailing a lack of probity or fair dealing within a company³⁶.

[75] In determining whether conduct is unreasonably prejudicial or not requires a balancing of interests involved in a company within the context of the structure and history of the company and in the light of the statutory purpose of s 260 and the principles which underpin the Companies Act with regard to the duties of directors and of majority or controlling shareholders in relation to minority interests and the principles of good corporate governance which the Act seeks to further.³⁷ It was

³³ At 500.

³⁴ 1952 SC 49.

³⁵ At 55. See also *De Sousa* para 39-40; *Benjamin v Elysium Investments (Pty) Ltd & another* 1960 (3) SA 467 (E); *Aspek pipe* 528E-H.

³⁶ *Donaldson Investments (Pty) Ltd & others v Anglo Transvaal Collieries Ltd; SA Mutual Life Assurance Society & another Intervening* 1979 (3) SA 713 (W); *Aspek Pipe supra* at 528; *De Sousa & another & Technological Corporate Management (Pty) Ltd & others* 2017 (5) SA 577 (GJ) para 39.

³⁷ Blackman, Jooste, Everingham Commentary on the Companies Act Vol 2 at 9-26 and the authorities usefully collected by the learned authors.

not disputed that s 260 is not confined in its application to minority shareholders and could apply where there is equal shareholding as is the case in this matter.³⁸

[76] The conduct complained of is thus to be viewed as a whole within that context.³⁹ In their helpful discussion of the equivalent provision in South Africa, Blackman *et al* caution that the very wide discretion conferred upon the court should however be carefully controlled 'in order to prevent the section from itself being used as a means of oppression'.⁴⁰

[77] Against this background, I now turn to the facts and issues raised in this appeal.

[78] Counsel for TransNamib contended that Stocks had failed to establish conduct of the company itself was unreasonably prejudicial. Section 260 however in its terms also posits another scenario for its invocation.⁴¹ It is where a member complains that the affairs of the company are being conducted in a manner which is unreasonably prejudicial, unjust or inequitable to that member. It is the gravamen of Stocks' complaint that TransNamib through its conduct has caused the affairs of the company to be conducted in a manner unreasonably prejudicial to it.

[79] The ensuing question is whether TransNamib's conduct complained of engages s 260. Its impugned conduct pleaded in the papers can be summarised as:

³⁸ *Benjamin* at 476; see also *Re H.R Harmer Ltd* [1958] 3 All ER 689 at 705.

³⁹ *Blackman et al* at 9-26 and the authorities in footnote 3.

⁴⁰ *Blackman et al* at 9-4 cited with approval in *Louw v Nel* 2011 (2) SA 172 (SCA) par 31.

⁴¹ See *Van Zyl & others v Namibian Affirmative Management and Business (Pty) Ltd* 2019 (1) NR 27 (HC) at 35D-F.

- Its refusal to accept a proposal to convert loans to equity and to equalise the unequal shareholder loans, (which would have resulted in TransNamib going from a 50 per cent shareholder to a single digit shareholder);
- Its refusal to inject funds into the company to salvage its insolvent situation and its prevention of Legacy from advancing funds to the insolvent company;
- Its refusal to favourably entertain the offer of N\$5 million, payable as set out, to purchase its shareholding; and
- Its failure to offer an effective solution to the company's predicament and instead raise what Stocks termed vague and imaginary issues relating to the loans and proposing arbitration.

[80] On the facts which served before the High Court, it is clear that the company is hopelessly insolvent. It is also clear that its insolvency did not occur or arise as a result of the enforced closure of the hotel during the emergency in 2020. It had been operating in insolvent circumstances for some years prior to that. Although the company had made a profit in the 2015 – 2016 financial year, its losses were substantial in the ensuing four financial years. These losses were approximately N\$2.5 million in the 2016 – 2017 financial year, N\$8.3 million in the following year, N\$7.9 million in the 2018 – 2019 financial year and N\$5.5 million in the year which followed.

[81] At a directors' meeting in 2018, Stocks proposed a restructuring of the company to enable the company to be placed in better financial position by

addressing the imbalance in the levels of shareholder debt. TransNamib's position stated at that meeting was that it ascribed the perilous financial position of the company to its management. TransNamib made it clear that it was dissatisfied with the management agreement. Addressing that issue to TransNamib's satisfaction was stated as being fundamental to its decision on the future of the company. A TransNamib director undertook to provide comment on the management agreement but failed to do so during her tenure and was subsequently replaced.

[82] At a board meeting on 26 November 2019, Stocks again raised the parlous financial position of the company and again posed different options to address the position, including Legacy exiting as a shareholder or TransNamib doing so or TransNamib equalising the loan accounts and then share refurbishment costs or bringing in a new shareholder or placing the company into liquidation.

[83] TransNamib's position was once again that until the dispute concerning management agreement was resolved, the way forward could not be agreed upon. It was stated that since TransNamib had invested in the hotel, it had received no return. Legacy (and Stocks) indicated that any challenge to the management agreement would be 'defended', reiterating its position on this issue.

[84] After the closure of the hotel in March 2020, meetings and discussions between the shareholders continued and correspondence was also exchanged. TransNamib in April 2020 proposed that the company obtain a loan from a financial institution, as TransNamib was 'unable to make further loans' to the company. In response, Legacy pointed out that the company's insolvent

circumstances precluded this and indicated its preparedness to acquire TransNamib's shares at fair market value 'failing any solution Legacy will have no option but to call (up) its secured debt with its attendant consequences'. A meeting held remotely shortly afterwards on 27 April 2020 was unable to resolve the impasse. Further correspondence was exchanged and included approaches to the Minister of Public Enterprises.

[85] It was agreed to appoint an independent consultant to provide an assessment and report to the parties.

[86] Following the receipt of the consultant's report, a board meeting was held on 5 August 2020. Prior positions concerning the hotel were restated by the protagonists. In addition to asserting that there had been poor management and that TransNamib had not received a return, TransNamib suggested that a new shareholders' agreement should be negotiated. TransNamib also proposed that an audit be done on the loan accounts and interest charges. This was resisted by Legacy/Stocks, stating that TransNamib directors had approved previous annual financial statements without demur.

[87] It was indicated by TransNamib that once it was satisfied as to the value of the loans after such an audit, it could make an offer for Stocks' shares. The Legacy/Stocks position in response was that it offered N\$5 million for TransNamib's shares alternatively TransNamib could pay it that purchase price for Stocks' shares plus the face value of both Stocks' and Legacy's loan accounts. If neither proposal were to be accepted, it was stated by Stocks/Legacy that the third option would be to liquidate the company.

[88] Soon afterwards Stocks launched these proceedings in early September 2020.

[89] Did TransNamib's conduct amount to causing the company being conducted in any unreasonably prejudicial, unjust or inequitable manner *vis a vis* Stocks? The conduct is to be viewed within the context of the relationship between the parties in the company being regulated by their shareholders' agreement and within the context of being equal shareholders. In terms of the shareholders' agreement, the parties each provided loans and the company purchased the property on which the Swakopmund Station was located at a very favourable price from TransNamib. The parties agreed upon a unanimous vote of the directors being required for unbudgeted expenditure of more than N\$50 000 and for borrowings.

[90] The agreement also provided for a referral to an adjudicator in the event of deadlock and the parties agreed to provide to each other with such mutual support as reasonably required to give effect to their shareholders' agreement.

[91] The agreement also provided that a Stocks company would develop the property into a hotel and that another Stocks related company, Legacy Management, wholly owned by Legacy, would manage the hotel indefinitely in terms of a management agreement which was an appendix to the shareholders' agreement. The duration of the management agreement was however subject to 'termination should the manager through poor performance fails to produce profit in any 2 (two) consecutive years . . . '.

[92] One of the principal objectives of the shareholders' agreement is that the hotel business be managed 'to the financial benefit of both parties' and to conduct the business 'in such a manner that the biggest possible return on the parties' investments are attained'.

[93] It was not contended that TransNamib was in direct breach of the shareholders' agreement by declining to inject funds into the company or by not agreeing to the proposed Legacy loan against the pledging of its shares as unanimous consent was required for these. Nor was TransNamib in breach for declining the offer to purchase shares. But did TransNamib's conduct in exercising its veto power in these respects amount to acting in bad faith in the sense of lacking fair dealing or probity or acting oppressively as against Stocks and amount to unreasonably prejudicial, unjust or inequitable conduct for the purpose of s 260?

[94] The purpose of entering into the joint venture between the parties was that it would be to their financial benefit. For several years TransNamib's repeated refrain was that it received no return on its investment and that there was no immediate prospect of this being turned around. It ascribed the continual pattern of substantial losses to the management of the hotel and the management agreement with Legacy Management. TransNamib is supported in this complaint by the terms of the hotel management agreement which made the indefinite tenure of the agreement subject to termination on grounds of poor performance represented by the failure to produce profits in any two consecutive years except for the first three years of operation. When these concerns were raised, Stocks/Legacy representatives indicated that the terms of the management

agreement were not open to negotiation, backed by a threat to defend any legal challenge to it.

[95] TransNamib had over the years expressed a reluctance to further invest in the venture in the face of poor performance and little prospects of a return.

[96] A further issue raised by TransNamib was the size of the loan accounts of both Stocks and Legacy. This was raised in the context of the need to recapitalise and restructure the company. The obvious need was to reduce its huge debt and convert loans to equity. After converting N\$8.1 million to each shareholder's loan accounts, Stocks' loan account is in excess of N\$35 million and the Legacy loan remained capped at N\$39.5 million. If loans were to be converted to equity, TransNamib's shareholding would be reduced to a single digit per centage – of some 6.5 per cent.

[97] TransNamib questioned the calculation and quantum of the Stocks and Legacy loan accounts and proposed that these be forensically audited. Stocks/Legacy resisted such a proposal, correctly pointing out that TransNamib representatives had not raised such issues when previously approving annual financial statements. Stocks/Legacy also stated that the pension fund loans were taken over on the same terms which applied to the pension funds. Interest on those loans was at excessively high rates for historical reasons and there may well have been attempts to renegotiate them in a more arms' length relationship. Furthermore, the terms of the take over from the pension funds, especially the considerations for the loans were not disclosed, despite a challenge in that regard in the answering papers.

[98] It became clear from the meetings and correspondence that Stocks/Legacy were not prepared to renegotiate or agree to an investigation of the size of the loan capital in the process of conversion to equity. This left little incentive to TransNamib to make a contribution given the resultant dramatic reduction in its shareholding and with no immediate prospect of a return given the past financial performance of the hotel. Nor did Stocks/Legacy exhibit any disposition to negotiate or compromise in respect of the management agreement.

[99] Whilst TransNamib's position on these issues could and probably would result in prejudice to Stocks, I am unable to conclude that its conduct in declining to go along with the Stocks/Legacy proposals amounted to unreasonably prejudicial conduct on the part of TransNamib as contemplated by s 260. Nor was its refusal to agree to a Legacy loan against the security of the shareholders' shares being pledged. Nor can its refusal of the purchase offer for its shares be regarded as unreasonably prejudicial.⁴² It had after all, since it invested in the company, not received any return and was then asked to give up its shares for N\$1 million with a highly uncertain prospect of receiving the balance of the purchase price, being dependent upon profits from company which seldom made any. It was also not unreasonable to reject an offer where there was little or no realistic prospect of receiving the bulk of the purchase price. On the other hand, Stocks/Legacy had received some returns on their investment. A related company had attended to and been paid for the construction. Legacy Management, wholly owned by Legacy, had received some N\$58,3 million in management fees over

⁴² See *Re Online Data Transactions (UK) Ltd* [2003] BCC 510 where it was held to be reasonable for a petitioner to refuse an otherwise acceptable offer where there was not a reasonable prospect that the offeror would be able to meet the financial commitment involved.

the years and Stocks and Legacy had also received substantial payments in the form of interest even though the former had for several years waived interest claims, as had the latter when the interest on the loans taken over equalled the capital.

[100] Stocks and Legacy have plainly invested a great deal in the venture and are understandably reluctant to see it fail, which it will, without recapitalisation. Stocks however entered into this joint venture on the basis of equal shareholding in the company and the shareholders' agreement requiring unanimous assent on the issues pertinent to rescuing the company. Stocks and Legacy with some justification feel aggrieved that TransNamib only latterly raised concerns about the loan accounts once the size of those loans became a disincentive for TransNamib to agree to converting loans to equity, when these issues should have been raised much earlier in the exercise of proper corporate governance on the part of TransNamib. Whilst TransNamib directors had repeatedly expressed dissatisfaction with the management of the company, an undertaking by an erstwhile director to pinpoint issues to be addressed in the management agreement came to nought and that director was replaced without any proposals made concerning terms in that agreement, demonstrating another instance of poor corporate governance on its part.

[101] Stocks/Legacy had on the other hand however repeatedly shown a reluctance to negotiate or compromise upon these issues. There was indeed a distinct lack of movement on proposals or any real negotiation between the equal shareholders in seeking to resolve their deadlock.

[102] It is also not correct for Stocks/Legacy to assert that TransNamib had made no proposals. TransNamib had proposed that the parties utilise the dispute resolution mechanism in their shareholders' agreement and agree to an arbitrator.

[103] This might not amount to a specific proposal concerning recapitalisation in monetary terms but is a serious proposal, especially if preceded by mediation. The fact that it was not embodied in a counter application does not mean that the High Court need not have entertained it in the context of proceedings in terms of s 260. It was raised in opposition to the far-reaching relief sought and required consideration. Alternative dispute resolution, despite its limits, would seem to be worth pursuing when direct negotiation is not making any headway. But the point is that TransNamib, although not making counter proposals on the precise terms of recapitalisation proposed alternative dispute resolution as well as addressing items such as the auditing of the loans and renegotiating the management agreement. Progress on the latter issues was indicated by TransNamib as enhancing the prospect of reaching an agreement on recapitalisation. It follows that, whilst TransNamib's governance and prior pursuit of these issues can be criticised, I do not agree with the characterisation that TransNamib proposed no solutions at all.

[104] Movement on these issues may have resulted in further progress. Stocks/Legacy preferred not to be open to negotiate these issues – as is their clear right to do so. But it cannot then complain that TransNamib's failure to negotiate on matters raised by them amounted to conduct unreasonably prejudicial when it declined to negotiate matters related to its own proposals, even

in the context of the need for urgent recapitalisation, given the parlous position of the company.

[105] As Lord Hoffmann put it in *O’Neill*:⁴³

‘Mr Hollington’s submission comes to saying that, in a “*quasi*-partnership”, one party ought to be entitled at will to require the other partner or partners to buy his shares at a fair value. All he need do is to declare that trust and confidence has broken down. . . .

I do not think that there is any support in the authorities for such a stark right of unilateral withdrawal.’

The corollary to this must also be so. There can also not be a unilateral right to compel the other party to withdraw from a joint venture by way of an expropriation of shares where differences arise and there is a breakdown as to the future direction of an imperilled company.

[106] It follows that I do not consider that, in the context of the history and structure of the company and of the parties dealings with one another, Stocks has established that TransNamib’s conduct complained of is unreasonably prejudicial, unjust or unequitable to it as contemplated by s 260 in the sense of amounting to a visible departure in the standard of fair play and violating the conditions of fair play presupposed by their equal shareholding and shareholders’ agreement.

The relief

[107] When invoking s 260, an applicant must not only establish that particular conduct or the conduct of affairs of the company is unreasonably prejudicial,

⁴³ At 972. See also *Louw v Nel* at para 24.

unjust or inequitable to that shareholder, but the applicant must also satisfy the court as to the nature of the relief to be granted to bring to an end the matters complained of and that it is just and equitable for that relief to be granted.

[108] Counsel for TransNamib submitted that the relief sought – a forced buy-out of TransNamib’s shares – would not bring to an end the deadlock situation between the shareholders, given the fact that the issue of a lease of the parking area would remain unresolved. Stocks had after all in its founding papers itself stated that securing rights for the company to use the parking area was imperative to the company. By initially seeking relief in that regard acknowledges and demonstrates the need for the issue to be resolved for the continuation of the hotel and casino business of the company. Whilst the High Court was correct in stating that the issue concerning the parking area was not the main dispute, the fact that the relief was abandoned by Stocks did not mean that the other relief sought would bring to an end the deadlock complained of between the parties. Nor did it mean that this issue could then be overlooked. It was common cause that the use of the parking area was central to the continuation of the hotel business. A forced buy-out of TransNamib as a shareholder would not in the absence of the continued use of the area being resolved bring to an end the deadlock between the parties. In the absence of addressing that aspect, Stocks did not establish that the relief sought and obtained would bring to an end the deadlock between the shareholders, given the outstanding issue of the use of the parking area.

[109] For this reason as well, I am of the view that Stocks did not meet the requisites of s 260.

[110] There is a further reason why the relief granted cannot be sustained. This is because the compulsory acquisition of TransNamib's shares did not in my view establish the requirement of being just and equitable embodied in s 260(3) for the grant of relief under the section.

[111] A survey of cases in both England and South Africa shows that the relief commonly granted under the equivalent provisions is for an aggrieved (usually a minority) shareholder to be bought out at a fair price. There is no reason in principle if a case is made out to this effect for a court, in the exercise of its discretion, to direct that a shareholder sell its shares to the aggrieved shareholder. The price in either event must plainly be fair to both sides.⁴⁴

[112] In this instance, Stocks contended that its price of N\$5 million was more than fair to TransNamib because of the insolvent state of the company because its liabilities massively exceeded its assets.

[113] Lord Hoffmann in *O'Niell* set out factors for the determination of a reasonable offer in this context. Included in these factors is, where the value is not agreed, it should be determined by a competent expert. Usually an expert would be appointed not as an arbitrator but as an expert in the interests of economy and expedition, with the parties having access to the expert.

[114] There was no evidence of an appropriately qualified expert to support Stocks' assertion of a fair price. The fact that the company is insolvent does not mean that TransNamib's shares do not have value to Stocks or at all. The fact that

⁴⁴ See *O'Niell* at 960-961, *Re Data Online Transactions*, *Knipe* para 32, *Blackman et al* at 9-50 and the authorities usefully collected there.

it made that offer demonstrates that. An expert should have assessed that value. In the absence of such evidence, I am not satisfied that Stocks has shown that its offer is fair and equitable.

[115] Furthermore, it is not clear that the price of N\$5 million will be paid. The offer itself may only amount to N\$1 million, given the way it is formulated. In the history of the financial performance of the company, there is a very real prospect that TransNamib would not receive the balance of purchase price. It is incumbent upon Stocks to show that the offer is fair and reasonable. Without any proof (or even a realistic or reasonable prospect) that the full purchase amount would be paid, the offer would not satisfy this requirement.⁴⁵

[116] It follows that when viewed against the whole background Stocks have not only failed to establish unreasonably prejudicial conduct on the part of TransNamib as required in s 260(1), but also failed to meet the jurisdictional facts required in s 260(3) that the relief would bring to an end the deadlock complained of and that the relief itself was first and equitable. The relief in terms of s 260 should not have been granted. It further follows that the appeal would succeed and that condonation and reinstatement should be granted as a consequence.

Costs

[117] The appellant (TransNamib) has succeeded in this appeal and is entitled to the costs of appeal. Both sides were represented by two instructed legal practitioners. Given the complexity of the matter and its importance to the parties, the costs order should include those costs.

⁴⁵ *Re Data Online Transactions (UK) Ltd* [2003] *supra*; *Knipe & others v Kameelhoek (Pty) Ltd & another* 2014 (1) SA 52 (FB) para 32.

[118] In its application in the High Court, Stocks applied for a provisional winding-up order in the alternative. An order to that effect should have been made by the High Court. Even though the primary focus of its application was for an order in terms of s 260, a case was also clearly made out for a provisional winding up order. Stocks' costs in bringing the application in the High Court should accordingly be costs in the liquidation, as should TransNamib's costs of opposition even though it did not oppose liquidation.

[119] As for the costs of the two condonation applications which are granted, Stocks' opposition was not unreasonable and, as a mark of this court's disapproval of the conduct which gave rise to the applications, TransNamib is to pay Stocks' costs of opposition to those applications but on a scale to include only one instructed legal practitioner. For the ease of the taxing master, approximately three quarters of an hour of the court day was spent on addressing condonation.

Order

[120] The following order is made:

- (1) Condonation for the non-compliances with the rules of court is granted and the appeal is reinstated.
- (2) The appeal succeeds with costs.
- (3) The order of the High Court is set aside and replaced with the following order:

- (a) Swakopmund Station Hotel (Pty) Ltd is placed under a provisional winding-up order in the hands of the Master of the High Court in terms of the Companies Act, 28 of 2004;

- (b) A rule *nisi* hereby issues calling upon all interested persons concerned to appear and show cause, if any, to this Honourable Court on 25 June 2021 at 10h00 as to why -
 - (i) A final winding-up order in respect of Swakopmund Station Hotel (Pty) Ltd should not be granted;

 - (ii) That the costs of this application including the costs of opposition, to include the costs of one instructing and two instructed legal practitioners, should not be costs on the winding up.

- (c) Service of this order is to be effected:
 - (i) At the registered office of Swakopmund Station Hotel (Pty) Ltd;

 - (ii) By one publication in each of the Government Gazette, *The Namibian* and *Die Republikein* newspapers.

- (4) The first respondent (Stocks) is to pay the appellant's costs of appeal save for the condonation applications and including the costs of two instructed legal practitioners and one instructing legal practitioner.
- (5) The appellant is to pay the costs of Stocks' opposition to the condonation applications, such costs to include the costs of one instructed and one instructing legal practitioner.
- (6) The matter is referred back to the High Court for further case management consistent with this order.

SMUTS JA

SHIVUTE CJ

MAINGA JA

APPEARANCES

APPELLANT:

AW Corbett (with him N
Bassingthwaighte)Instructed by ENSAfrica | Namibia,
Windhoek

FIRST RESPONDENT:

R Töttemeyer (with him CE van der
Westhuizen)Instructed by Theunissen, Louw &
Partners