

SCA ruling: A lesson for minority shareholders

By [Alisa Malindi](#)

26 Mar 2024

The Supreme Court of Appeal (SCA) in *Armitage NO v Valencia Holdings 13 (Pty) Ltd and Others [2023]* considered an appeal from the full court of the High Court in relation to section 163(1) of the Companies Act 71 of 2008 (the Act)...



Image source: [Rabia Elif Aksoy – 123RF.com](#)

Section 163 provides that a shareholder or a director of a company may apply to court for relief if any act or omission by the company, or a related person to the company, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

In essence, the section aims to provide protection and relief to minority shareholders who are bound by the decisions of the majority shareholders which could prove to be oppressive, unfairly prejudicial, or unfairly disregards the minority shareholder's interests.

If successful, the court can make an order –

- restraining the conduct complained of;
- appointing a liquidator, if the company appears to be insolvent;
- placing the company under supervision and commencing business rescue proceedings in terms of chapter 6, if the court is satisfied that the circumstances set out in section 131 (4) (a) apply;
- to regulate the company's affairs by directing the company to amend its memorandum of incorporation or to create or amend a unanimous shareholder agreement;
- directing an issue or exchange of shares;
- appointing directors in place of or in addition to all or any of the directors then in office or declaring any person delinquent or under probation, as contemplated in section 162;
- directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;
- varying or setting aside a transaction or an agreement to which the company is a party and compensating the

company or any other party to the transaction or agreement;

- requiring the company to produce to the court or an interested person, within a time specified by the court, financial statements in a form required by this Act, or an accounting in any other form that the court may determine;
- to pay compensation to an aggrieved person subject to any other law entitling that person to compensation;
- directing rectification of the registers or other records of a company;
- for the trial of any issue as determined by the court.

This section subverts one of the general rules of company law, which is that when a person becomes a shareholder of a company, they undertake to be bound by majority decisions of the company even if those decisions affect their rights as a shareholder.

Considering the wide-reaching relief contained in section 163 of the Act, the courts are careful to scrutinise every application before it to ensure that the section is not abused by those who are not entitled to its relief, as seen in the case of *Armitage NO v Valencia Holdings 13*.



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Facts of the case

Michelle Armitage NO (the appellant) instituted an action against the respondents in the High Court in her capacity as the executrix of the estate of her late husband, Alan Armitage (the deceased). She claimed payment of R6,768,900, being the proceeds of a life insurance policy paid to the respondents. She alleged amongst the numerous grounds for the action, that the respondents engaged in oppressive and prejudicial conduct envisaged in section 163 of the Act.

The deceased, who died in December 2013, was a minority shareholder in the first respondent, Valencia Holdings 13 (Pty) Ltd (Valencia). The second to fifth respondents were co-shareholders in Valencia together with the deceased and they were joint directors of Valencia and its wholly owned subsidiaries.

The company's shareholders agreement provided that the shareholders would take out and maintain a 'buy and sell' indemnity insurance on each other's lives in the event of the death or disability of one of them. From 29 February 2012 to 29 February 2016, when the deceased and the respondents required funds for personal expenses, they would acquire the same by means of interest-free shareholder loans (the loans) that were described as advance payments on future dividends. As and when Valencia declared a dividend, it would first amortise the loans against the dividend due to the relevant shareholder and pay any remaining credit balance to the shareholders.

Upon the death of the deceased, the life insurance policy paid out R6,768,900 to the surviving shareholders. From 2014 to

2017, the respondents made multiple failed offers and attempts to purchase the deceased's shares from the appellant, who alleged that the respondents enjoyed a substantial benefit by way of 'huge interest-free loans made by Valencia' to her exclusion.

The appellant, among other claims, alleged that the respondents acted in concert and engaged in 'oppressive and/or unfairly prejudicial' conduct under section 163(1) and (2) of the Act in disregard of her interests.

High Court application

In the appellant's initial application to the high court, the court ordered the respondents to pay a sum of R6,768,900 in terms of section 163(2)(j) of the Act, in proportion to the proceeds received when they realised the insurance. It reasoned that the appellant had been unfairly excluded from shareholder benefits and that:

'apart from not benefiting from the proper distribution of the profits of the company, [the appellant] was also prejudiced by the non-payment of the interest on [the] loans. This constitutes a violation of the conditions of fair play on which every shareholder is entitled to rely on.'

On appeal to the full court, the decision of the High Court was reversed and found that the conduct complained of did not entitle the appellant to relief in terms of section 163 of the Act. It further held that the appellant was not entitled to conveniently use an oppression remedy for the ulterior purpose of avoiding compliance with the terms of the shareholders' agreement.



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The issue before the SCA was whether oppressive or unfairly prejudicial conduct had been established. The appellant's case centered around the loans and their characterisation as advance dividends and that since the appellant 'was to be considered a shareholder, the effect of not paying her such advance dividends was clearly prejudicial and unfairly disregarded her interests.'

The SCA provided that the test for oppressive and unfairly prejudicial conduct contained in section 163, is an objective one as held by the court in *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others*:

'The prejudicial inequity or unfairness lies not in the legally justifiable exclusion of the affected member from the company's management, but in the effect of the exclusion on such member if a reasonable basis is not offered for a withdrawal of his or her capital.'

The SCA in *Louw and Others v Nel* sets out the criteria for granting relief as follows:

'An applicant for relief under s 252 [Old Companies Act] cannot content himself or herself with a number of vague and rather general allegations, but must establish the following: that the particular act or omission has been committed, or that the affairs of the company are being conducted in the manner alleged, and that such act or omission or conduct of the company's affairs is unfairly prejudicial, unjust or inequitable to him or some part of the members of the company; the nature of the relief that must be granted to bring to an end the matters complained of; and that it is just and equitable that such relief be granted. Thus, the court's jurisdiction to make an order does not arise until the specified statutory criteria have been satisfied.'

Is the conduct complained of oppressive or prejudicial?

Before the deceased's death, the deceased made use of and benefited from the loan scheme. This the respondents claimed vitiated the appellant's claim. The provisions of the memorandum of association read with the shareholders' agreements bound the appellant in relation to the management of the deceased's assets in Valencia.

The loan account ledger showed that Valencia maintained the deceased's loan account beyond his death which the SCA asserts does not assist the appellant's assertion of unequal treatment. The deceased's estate continued to reap the benefits of the loan and dividend arrangement for years subsequent to his death.

The SCA concluded that the circumstances of this case cannot sustain the relief provided by section 163(2) of the Act as there was no act or omission that was oppressive or unfairly prejudicial.

Further, the appellant's refusal to accept the respondents' numerous offers to purchase the deceased's shares at fair market value and later, for a sum close to the amount awarded to the appellant by the high court, the SCA found countered the appellant's reliance on the oppression remedy.

Lessons learnt

This case serves as a cautionary tale to minority shareholders that they cannot on the one hand benefit from an arrangement or decision by the majority shareholders for many years and in the same breath claim that the same decision is oppressive or unfairly prejudicial when they want a bigger slice of the pie.

In this case, the SCA's refusal to grant the appellant the relief provided for in section 163 of the Act, maintains the integrity and importance of the section to protect minority shareholders who are truly at the mercy of the majority shareholders who make decisions that only serve their interests at the expense and detriment of the company and minority shareholders.

ABOUT THE AUTHOR

Alisa Malindi is an Associate at Herold Gie Attorneys. This article was vetted by Raffique Mbtala, Director at Herold Gie.

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