REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **2024-069982**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

25 April 2025
DATE SIGNATURE

In the matter between:

DAVITH KAHWA	Applicant
and	
LITTLEFISH APP (PTY) LTD	First respondent
LITTLEFISH INTERNATIONAL INC	Second respondent
BRANDON ROBERTS	Third respondent
IDO SUM	Fourth respondent
EFAYOMI EVAN GERALD CARR	Fifth respondent
NEHA KUMAR	Sixth respondent
TIDE AFRICA II FUND	Seventh respondent
FLOURISH VENTURES FUND LLC	Eighth respondent
STALKILY (PTY) LTD	Ninth respondent
STEPHEN PROWSE	Tenth respondent

JUDGMENT

HA VAN DER MERWE, AJ:

Introduction

[1] This is an application under section 163 of the Companies Act 71 of 2008 (*the Act*). The applicant is a shareholder of the first and the second respondents. The first respondent is a private company incorporated in South Africa. The second respondent is a company incorporated in the state of Delaware, in the United States of America.

[2] The applicant's case is that he is the victim of oppressive and unfairly prejudicial conduct by the respondents, such that an order should be made directing the third, seventh, eighth and ninth respondents to purchase his shares in the first and second respondents for an amount of $2 680 000.00.

[3] In the alternative, the applicant seeks an order that the third, seventh, eighth and ninth respondents should purchase his shares for fair market value at a price to be determined by the Court. Further, should the determination of the value of the applicant's shares be less than $2 680 000.00, then the applicant claims an award of compensation for the difference between the value determined by the Court and the amount of $2 680 000.00.

[4] In the further alternative, the applicant claims similar orders, but that the purchasers of the shares should be the first and second respondents themselves, instead of the third, seventh, eighth and ninth respondents. The applicant also claims an order that the first and second respondents should take all reasonable steps to procure the applicant's release from liability under any guarantee that he may have given for the first and second respondents' liabilities.

[5] The compulsory purchase of the applicant's loan accounts also features in the formulation of the orders he seeks, but as there is no evidence before me of any loan accounts held by the applicant against the first or second respondents, no

more need to be said about it. The same goes for guarantees that the applicant may have given for the first and second respondents' liabilities. There is no evidence of such guarantees either.

Issues

[6] The respondents raise a point in limine to the effect that this Court does not have jurisdiction to make an order under section 163 of the Act against the second respondent. The way in which the point in limine is phrased tend to conflate two separate and distinct concepts. The jurisdiction of this Court over the second respondent is one question, namely, the power or competence of this Court to hear and determine the case against the second respondent.[1]

[7] Quite apart from that question, the question is whether section 163 applies to a foreign company. Despite the use of the word "jurisdiction" in the way in which the point in limine was raised, as I understood the respondents' argument, its case is limited to the contention that section 163 does not apply to a foreign company, not that this Court does not have jurisdiction over the second respondent in the strict sense of the word. I will therefore deal with issue on that basis.

[8] To understand why the applicant framed his case as he did, I need to deal with the essential facts.

The facts

[9] Around 2019 the applicant and third respondent were the shareholders of a company called Nybble Technologies (Pty) Ltd (*Nybble*). The business of Nybble was to "develop a digital platform to provide small to medium sized enterprises with capabilities required by them to succeed in today's digital economy", in the applicant's words. What exactly that means is not evident from the affidavits, but it is of no consequence. The intellectual property in the platform to be developed for this enterprise were to be held by the first respondent. Initially the applicant and the third respondent each held 50% of the shares in Nybble and in the first respondent.

[1] *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) at 263B

[10] According to the answering affidavit, the third respondent was primarily responsible for the development of the intellectual property and the applicant was primarily responsible for garnering custom for the enterprise.

[11] In time, the tenth respondent became involved in the enterprise and 20% of the shares in Nybble and the first respondent were transferred to the nineth respondent (the tenth respondent's nominee, it seems), with the applicant and third respondent each holding 40% of the shares.

[12] In early 2023 a dispute arose between the applicant, on the one hand, and the third respondent and the tenth respondent, on the other.

[13] The applicant's version is that he introduced the seventh respondent to the third respondent and the ninth respondent, with a view convincing the seventh respondent to invest in the business conducted by Nybble and the first respondent. The seventh respondent in turn brought the eighth respondent into the picture, to share the risk of the investment among the two of them. The seventh respondent and the eighth respondent are venture capitalists – that is companies that make it their business to invest in other businesses in the early stages of their development.

[14] The introduction of the seventh and eighth respondents culminated in an agreement between the applicant, the third respondent, the nineth respondent (referred to in the founding affidavit as "the founders") and the seventh and eighth respondents (referred to in the founding affidavit as "the investors") called a "Termsheet" that was concluded on 14 March 2023.

[15] In the Termsheet, the founders and the investors agreed that the first respondent had a "pre-investment" value of $6 700 000.00. At the time when the Termsheet was concluded, the applicant held 40% of the shares in the first respondent. 40% of $6 700 000 is the amount of $2 680 000.00. That is where the applicant's claim for payment of $2 680 000.00 for his shares in the first respondent (and the second respondent for reasons that follow below) comes from.

[16] In terms of the agreement reached with the investors, they would invest $2 500 000.00 in the first respondent, by way of a share subscription. Once the

investment has been made, according to the parties' agreement, the first respondent would have a "post-investment" value of $9 200 000.00.

[17] In time, the agreement between the founders and the investors was reflected in a number of formal, written agreements which are collectively referred to in the founding affidavit as "the Transaction Agreements". The particulars of the suite of agreements that make up the Transaction Agreements are not important. What is important that under those agreements, the founders and the investors agreed that another company would be incorporated to hold the intellectual property of the enterprise. The second respondent became that company. In this way, the business that was once that of the first respondent was spilt in two – the intellectual property went to the second respondent and the remainder of the business was left in the first respondent. The parties also agreed that the founders and the investors would hold shares in the first respondent and the second respondent.

[18] That is how it came about that the founders and the investors became co-shareholders in the first respondent and the second respondent.

[19] One of the Transaction Agreements is an agreement called a "Memorandum of Agreement", which was concluded on 21 April 2023. This agreement contain a number of terms that are relevant to the issues I am to decide: (a) the applicant sold his 40% shareholding in Nybble to the third and tenth respondents; (b) Nybble sold its intellectual property to the first respondent; (c) the third respondent "will continue to be actively involved and engaged in [the first respondent's] business operations"; (d) the applicant and the tenth respondent, in the words used in this agreement, "will continue to support [the first respondent's] future business operations into the foreseeable future, over the next 36 … months, in capacities that both cater to their strengths, the intention is to get material and tangible benefits which benefit [the first respondent]"; (e) the applicant's shareholding in the first respondent would be reduced to 15%, but the third respondent's would be 42.5%.

[20] The term quoted in (d) above, riddled as it is with tautologous business-speak, is hardly model of clarity. However, the difference between the description of the

future roles of the third respondent compared to that of the applicant is clearly different.

[21] On 30 April 2023 the applicant sent an email to the third respondent in which he outlined his perception of what his future role in the first respondent's business would be. Included in his email was a table setting out several "key performance indicators" (KPIs). The language used in this table is another example of barely intelligible business-speak, but it does not suggest an active role in the management of the first respondent's business.

[22] On 25 October 2023 the founders concluded an agreement entitled "Founders Restricted Share Subscription Agreement" (the FRSSA). In terms of the FRSSA, in the event of the termination of the applicant's "continuous service status", the first respondent would then be entitled to repurchase the applicant's "unvested" shares for a nominal amount. In terms of the FSRSSA, initially all the applicant's shares were subject to the first respondent's right to repurchase the applicant's shares for a nominal amount. On 18 May 2024, one quarter of the applicant's shares were to be released from the first respondent' repurchase right and thereafter, 1/48th of the applicant's shares were to be released from that right monthly thereafter. The aim of this arrangement was to motivate the applicant to prevent the termination of his "continuous service status", for the period of four years after May 2024.

[23] The FRSSA in substance mirrors the description of the applicant's future role in the Memorandum of Agreement. That is, his "continuous service status" for purposes of the FRSSA. The applicant's "service status" is a matter of the first respondent's requirements and the applicant's "skillset". The applicant's "skillset", so far as it is described in the FRSSA in a meaningful manner, is a matter of him putting his "extensive network" to use to garner business for the first respondent.

[24] What is important for present purposes is that the applicant's future role was for the first respondent to determine, both in its extent and in its nature. The first respondent was entitled to set the standard against which the applicant's performance were to be measured (described as "targets" in the FRSSA, which may be taken as synonymous with KPIs). The first respondent was also entitled to

determine the nature of the applicant's future role, that need not be as an employee. The operative phrase being "… such service role being delivered by the Subscriber's [sic] to the [first respondent] in the [sic] formal or informal capacity as an executive employee, contractor, consultant or advisor, as determined in [sic] by the Board of Directors".

[25] The striking difference between the future roles of the applicant and the third respondent in the Memorandum of Agreement is echoed in the FRSSA.

[26] On 17 November 2023, the parties (that included the applicant) concluded an agreement entitled "Right of First Refusal and Co-Sale Agreement"). In terms of this agreement, the applicant was to hold 10.92% of the shares in the first respondent. The applicant's shareholding in the second respondent was in the same percentage.

[27] During December 2023 the applicant agreed to resign as a director of the first respondent and the second respondent.

[28] In an email dated 9 April 2024, the applicant expressed his concern that the vesting of his shares was at risk. In context, it seems that the applicant's anxiety was that the first respondent would exercise its right to determine the applicant's future role in the first and second respondents in such a way that the first respondent's right to acquire his shares at a nominal value could be triggered. On the back of this concern, the applicant suggested that the formalities of removing him as a director should be held over for the time being.

[29] On 8 May 2024, the applicant's attorneys addressed a letter to the respondents in which it is contended that the applicant was the victim of unfairly prejudicial and oppressive conduct. The applicant was not satisfied with the KPIs that the first respondent proposed; he alleged that the third respondent sought to remove the applicant as a director of the first and second respondents for no legitimate reason; and the third respondent was accused of harbouring a vendetta against him. The applicant also accused the respondents of, in context, conspiring to trigger the repurchase right in respect of the applicant's unvested shares.

[30] In the correspondence that followed the applicant's dissatisfaction with the KPIs was raised again. On 14 June 2024 the applicant was invited to propose KPIs that met with his approval. The applicant did not take up the invitation. This application followed two weeks later.

The application of section 163 to foreign companies

[31] The first order of business is to consider whether section 163 applies to a foreign company like the second respondent.

[32] Whether section 163 applies to a foreign company has important consequences for the applicant's case. The applicant seeks an order that his shares in the first *and* second respondents should be purchased for $2 680 000.00, without allocating any part of that amount to his shares in the one or other of the two. Whether it could be proper to make an order for the compulsory purchase of the shares in two companies for one price is not without problems in and of itself. However, if an order can only be made in respect of one of the two companies, then it would clearly not be sound to order a compulsory purchase of the shares in only one company, for the same price as would appropriate for the shares in two companies, unless one of two has no value at all.

[33] The applicant does not make an attempt to place a value on his shares in the first respondent or the second respondent other than to rely on the parties' agreement that the "pre-investment" value of the first respondent was $6 700 000.00. That was the value that was placed on the first respondent before its intellectual property was transferred to the second respondent. So long as the intellectual property has some value, it must follow that the value of the first respondent after the transfer to the second respondent is less than it was before the transfer. Then the value of the first respondent therefore must be less than $6 700 000.00.

[34] Even if one could therefore accept the parties' agreement on the value of the first respondent "pre-investment" as the value of the first respondent for purposes of an order for the compulsory purchase of the applicant's shares in the first respondent, an order as sought by the applicant cannot then be granted in respect of the first respondent.

[35] There is no evidence before me on the value of the intellectual property that was transferred to the second respondent. No-one has suggested that the intellectual property had no value. That apart, as the parties went through the trouble of incorporating the second respondent precisely so that the intellectual property could be transferred to the second respondent, it would be remarkable if they did so for the sake of a worthless asset, at least in their own perception of its value.

[36] In any event, it seems to me that it is for the applicant to establish the facts on which an order can be made that the applicant's shares should be the subject matter of a compulsory purchase by any of the respondents. Those facts must include the price at which the shares are to be purchased. The price is a matter of the value of the first respondent's shares.

[37] The long and the short of it therefore is that the moment that the intellectual property was transferred to the second respondent, the value of the first respondent was thereby reduced, but by how much cannot be determined on the affidavits. The result is that the value of the first respondent cannot be determined on the affidavits and therefore the price that ought to be paid for the applicant's shares in the first respondent, if a compulsory sale is ordered, cannot be determined.

[38] Neither Ms Howard who appeared for the applicant, nor Mr Redman for the respondents found a judgement that deals with the application of section 163 to a foreign company. My own research came up empty as well.

[39] It seems clear enough however that section 163 does not apply to a foreign company. In terms of section 1 of the Act:

> "**'company'** means a juristic person incorporated under this Act, a domesticated company, or a juristic person that, immediately before the effective date-
>
> *(a)* was registered under the-
>
> (i) Companies Act, 1973 (Act 61 of 1973), other than as an external company as defined in that Act; or

(ii) Close Corporations Act, 1984 (Act 69 of 1984), if it has subsequently been converted under Schedule 2;

(b) was in existence and recognised as an 'existing company' under the Companies Act, 1973 (Act 61 of 1973); or

(c) was deregistered under the Companies Act, 1973 (Act 61 of 1973), and has subsequently been re-registered under this Act."

[40] The second respondent was incorporated after the commencement date of the Act, so that the only part of the definition that is relevant is "a juristic person incorporated under this Act, [or] a domesticated company…". The second respondent is clearly not one incorporated under the Act. Nor is it a "domesticated" company. (In terms of section 1, a domesticated company is a foreign company "whose registration has been transferred to the Republic…".)[2]

[41] There is nothing in section 163 to indicate that for purposes of that section, "company" should have a meaning different to its defined meaning in section 1. To the contrary, it is hard to see how a South African court could order a foreign company to, for instance, amend its memorandum of incorporation or to rectify its registers (sections 163(2)(d) and (k)).

[42] Ms Howard argued that the second respondent should have registered with the Companies and Intellectual Property Commission in terms section 23 of the Act as an external company. That may or may not be so, but it does not assist the applicant's case. The second respondent would then still be a foreign company and section 163 would still not apply to it.

[43] That should be the end of the matter for the applicant, unless I make an order under section 163(2)(l) for the matter to go to trial. I am not minded to do so. The applicant chose to found his case for the price that should be placed on his shares, squarely and exclusively on the parties' agreement that the "pre-investment" value of the first respondent was $6 700 000. The value of the first respondent on any other basis does not feature in the founding affidavit or the replying affidavit for

[2] See also *Cooperativa Muratori & Cementisti and Others v Companies and Intellectual Property Commission and others* 2021 (3) SA 393 (SCA) at para [12] on the definition of "company" in section 1 of the Act and the fact that it excludes a foreign company

that matter. The respondents placed no value on the first respondent or the second respondent. Their case goes no further than to dispute the applicant's case on the value on the first respondent and the second respondent.

[44] Where section 163(2)(k) refers to "any issue" that may be referred to trial, it seems to me that it should be an issue on the affidavits, that is to say, one or more allegations made by the applicant that is denied by a respondent. In *Fischer and Another v Ramahlele and Others*[3] it was found:

> "Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for '(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone."
>
> It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship

[3] 2014 (4) SA 614 (SCA) at para 13-14.

between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.

(footnotes omitted and underlining added)

[45] To refer the fair value of the first respondent to trial would not be consistent with the principle that, generally, the function of a court is to decide only those issues that the parties chose to place before it.

[46] That principle also indicates that, for purposes of section 163(2)(k), the proper interpretation of "any issue" means any issue on the affidavits. The purpose of the section is clearly to grant a court a wide range of orders that it can make, to address a wide range of ways in which a shareholder or a director of a company could be the victim of the kind of conduct the section is concerned with. However, not only is it fundamental to our adversarial system that the issues for the court's determination are limited to those the parties chose, all sort of unexpected or unintended consequence may flow from ignoring that principle. Raising the one or the other issue, may, for instance, have a cost implication that a party is not willing to incur, or it may imply evidence to be led that a party prefers to keep out the public eye.

[47] Unless the circumstances are truly remarkable, no court will be in a better position than the parties to make a proper assessment of the issues that should be decided and the wider consequences of such choices. The sensible, businesslike interpretation is therefore one that limits "any issue" in section 163(2)(k) to issues on the affidavits.[4]

[48] The order sought by the applicant that the price should be determined by the Court does not save the applicant's case. The principle referred to above means also that it is for the applicant to make out his case. The applicant cannot foist on the Court the task of seeking out and presenting the evidence required for the order he seeks. Our adversarial system does not sanction such an approach, not under

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18; *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) at para 64.

section 163 at least. It might be a different matter under section 164(15)(c)(ii) and (iii). In terms of those sections a Court may appoint one or more appraisers to assist the Court in coming to a price to be paid to a shareholder faced with an adverse amendment to a company's memorandum of incorporation. Both sections 163 and 164 permit a compulsory purchase of a shareholder's shares, so it is not immediately obvious why a similar regime does not apply to section 163, but so long as it does not, it is not permissible for an applicant under section 163 to leave it to the Court to determine the price at which an applicant's shares should be purchased.

[49] The application should therefore be dismissed.

The conduct required for section 163

[50] If I am wrong in dismissing the application on the aforegoing basis, it seems to me that the applicant failed to make out a case for the kind of conduct section 163 requires to begin with.

[51] The applicant claims that there has been an irretrievable breakdown in the relationships between him and the other shareholders. The respondents deny this allegation, but in a qualified way. By the nature of things, when one party to a relationship claims an irretrievable breakdown of the relationship, it is more or less conclusive of the matter. The other party might have a more benevolent disposition towards the one claiming the breakdown, but a functional relationship requires that both parties should have a shared belief in the functional nature of the relationship.

[52] So, when the applicant says that the relationship is irretrievably broken, I do not understand the respondents to contend that the applicant is mistaken in his own view of the relationship. Nor do I understand the respondents to contend that the relationship may be mended with the passage of time. Instead, the respondents contend that the applicant's view of his relationship with the other shareholders is legally irrelevant, in that it is not required that the applicant and other shareholders should be on friendly or cooperative terms.

[53] To this extent, it seems to me that the respondents have the law on their side. It does not follow from the souring of a once friendly relationship between

shareholders that an order under section 163 should follow. It is only if the applicant had a legitimate expectation of active participation in the management of the company's affairs, that a breakdown in the relationship between shareholders is relevant.[5] One must be careful not to take the metaphor of a divorce too far in a case such as this. To call this an application for a 'commercial divorce' as such proceedings are sometimes called, takes for granted that there is a 'commercial marriage' to begin with. The mere fact of shareholding in a private company does not make the shareholders each other's commercial spouses.

[54] It is a different matter if the breakdown is the result of prejudicial and oppressive conduct. In that event, the breakdown of the relationship makes the applicant's participation in the management of the company's affairs unworkable, so that it is only when the breakdown is the result of blameworthy conduct by the other shareholders, that section 163 comes into play. The focus therefore ought not to be on the current state of the relationship between the shareholders in the first instance. The focus ought to be on the conduct on which the applicant relies that he contends is oppressive or unfairly prejudicial, or which disregards the applicant's interests. It is only if there is such conduct on the evidence, that the orders that a court may make under section 163 may be available to the applicant.

[55] The applicant's reduced role in the conduct of the business of the first respondent and the second respondent was with his acquiescence, in that he was party to the agreements referred to above that left the determination of his role in the hands of the first respondent. The applicant's principal complaint is that he was excluded from the management of the affairs of the first respondent in various ways. The exclusion, however, is consistent with the agreements that he concluded with the respondents. As pointed out above, under those agreements, it was for the first respondent to determine whether the applicant shall be an employee or not and it was for the first respondent to determine the extent of his duties. As such, the applicant cannot complain that he is unfairly prejudiced.[6]

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[5] *Henochsberg on the Companies Act 71 of 2008,* volume 2, issue 24, p. 574(12) – 574(14)
[6] *Technology Corporate Management (Pty) Ltd and others v De Sousa and others* 2024 (5) SA 57 (SCA) at para 208.

[56] I do not understand the applicant's case to be that he is unfairly prejudiced by the mere fact of the dilution of his shareholding in the first and second respondents. Even if it was his case, that was also clearly with his acquiescence.

[57] The applicant also contends that he is unfairly prejudiced because it was represented to him, when he concluded the agreements referred to above, that the third respondent and the tenth respondent would act in good faith, be true and faithful to the applicant in their dealings with him and comply with their contractual commitments. The applicant's acquiescence is equally a complete answer to this part of his case.

[58] In the result, I make the following order:

1. The application is dismissed.

2. The applicant is to pay the respondents' party and party costs, on scale C.

H A VAN DER MERWE
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 4 and 5 March 2025

Date of Judgment: 25 April 2025

For the Applicant: Adv K Howard instructed by Barter McKellar Attorneys.

For the Respondents: N Redman SC instructed by CDV Attorneys