FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 1936 /2011

In the matter between:-

KNIPE, MOIRA ELIZABETH	1st Applicant
KNIPE, MOIRA ELIZABETH N.O.	2nd Applicant
KNIPE, MOIRA ELIZABETH N.O.	3rd – 8th Applicants
KNIPE, MOIRA ELIZABETH N.O.	9th 13th Applicants
LOTZ, CAROL JESSIE KATHLEEN	14th Applicant
LOTZ, JOHN-D KNIPE	15th Applicant
LOTZ, ANDRé GUILLUAME KNIPE	16th Applicant
LOTZ, MOIRA ELICIA KRYSTAL	17th Applicant
On behalf of **LOTZ, LINDSAY RICHELLE**	18th Applicant

and

KAMEELHOEK (PTY) LTD	1st Respondent
THE MASTER OF THE FREE STATE HIGH COURT	2nd Respondent

Case No.: 1937/2011

In the matter between:-

KNIPE, MOIRA ELIZABETH	1st Applicant
KNIPE, MOIRA ELIZABETH N.O.	2nd Applicant
KNIPE, MOIRA ELIZABETH N.O.	3rd – 8th Applicants
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LOTZ, JOHN-D KNIPE	15th Applicant

LOTZ, ANDRé GUILLUAME KNIPE	16th Applicant
LOTZ, MOIRA ELICIA KRYSTAL	17th Applicant
On behalf of **LOTZ, LINDSAY RICHELLE**	18th Applicant

and

SCHAAPPLAATS 978 (PTY) LTD	1st Respondent
THE MASTER OF THE FREE STATE HIGH COURT	2nd Respondent

HEARD ON: 23 MAY 2013

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 27 JUNE 2013

I INTRODUCTION

[1] This is the extended return date of rules *nisi* issued in two applications in terms whereof the companies, Kameelhoek (Pty) Ltd and Schaapplaats 978 (Pty) Ltd, were placed under provisional liquidation in the hands of the Master by the Full Bench of the Free State High Court.

II BACKGROUND TO THE LITIGATION IN THIS COURT

[2] Moira Elizabeth Knipe (“Mrs Knipe”) and others, including her daughter Carol Jessie Kathleen Lotz (“Carol”) launched two separate applications under numbers 1936/2011 and 1937/2011 for provisional liquidation of the companies

Kameelhoek (Pty) Ltd and Schaapplaats 978 (Pty) Ltd respectively, which were by agreement simultaneously argued before Jordaan J who dismissed both applications with costs. However leave to appeal was granted to the Full Bench.

[3] On 23 July 2012 both appeals were heard by the Full Bench and in terms of its judgment of 30 August 2012 the appeals succeeded with costs. The orders of the court *a quo* were set aside and provisional winding-up orders were granted against both companies with return date 11 October 2012. When the Full Bench heard the appeals the application papers in each application totalled in number just over seven hundred pages. The paper war continued hereafter and the papers increased in each application to approximately two thousand pages. In this process the rules *nisi* were extended several times.

[4] Pursuant to the granting of winding-up orders Jacqueline Moira Deborah Vigne ("Jackie"), a daughter of Mrs Knipe, brought an application seeking leave to be joined in the applications and to file answering affidavits in opposition of the granting of final relief. These applications were strictly speaking not necessary as she as a shareholder in both companies is an interested party and all interested parties were called upon by the Full Bench to show cause, if any, why final orders of winding-up should not be granted. She therefore had a right to advance reasons which she made use of. Her affidavit consists of sixty six pages and the

annexures thereto ninety three pages. Her brother Johnny, supported by the other brother, André, also advanced reasons why final orders of winding-up should not be granted. His affidavit consists of sixty one pages and the annexures thereto about four hundred and sixty pages.

[5] Mrs Knipe replied to the affidavits of Johnny and Jackie in a eighty page affidavit and the annexures thereto are in excess of eighty pages.

[6] Robert Petrus Jansen ("Pieter") brought an application to intervene in the proceedings. He is the fifth child of Mrs Knipe, the other four having been referred to above, being Carol, Jackie, André and Johnny. The companies opposed this joinder application and both their attorney and André filed affidavits, relying on several further annexures.

[7] Further affidavits were filed by various parties and accepted by agreement. I shall later herein refer thereto. The papers are voluminous and as mentioned contain various sets of affidavits and annexures. Different issues arise, some vital, but the majority merely peripheral. As will be shown later these proceedings, formidable as they are, are but a skirmish in a full-blown campaign – a family war – being fought on several fronts. The *dramatis personae* are Mrs Knipe, an eighty one year old widow and mother of the abovementioned five children, and the five children. Mrs Knipe and Carol are in the same camp, whilst Jackie, André and Johnny are on the other side. Pieter is apparently

fighting his own battle. Mrs Knipe will be referred to herein as such and the children will be referred to, without any disrespect to them, by their names.

III **FACTUAL BACKGROUND LEADING TO THE PRESENT APPLICATIONS**

[8] Mrs Knipe's husband, Henry Bazzet Louis John Knipe, ("the deceased") passed away on 28 June 2007. At the time of his death he had accumulated a considerable estate, *inter alia* consisting of interests in various entities. For purposes hereof the relevant entities are the two companies (Kameelhoek and Schaapplaats), of which he was the sole director, which companies own the farms Kameelhoek and Langeberg respectively. These two farms are adjacent to each other and are, for all intents and purposes, one farm. They are 9597.6323 hectares in extent and worth approximately R60 million. At the time of the death of the deceased the shares in the companies were held by family trusts of which he and Mrs Knipe were the trustees and their five children were beneficiaries of the trusts.

[9] On 15 April 2008 Mrs Knipe and her five children and their legal representatives met at the offices of attorneys Duncan and Rothman in Kimberley where they reached certain agreements *inter alia* also pertaining to the farms Kameelhoek and Langeberg. The terms of the agreements were recorded in writing by Mr Venter of Duncan and Rothman in a letter dated 25 April 2008 addressed to all role

players. Paragraphs 2 and 9 under the heading "Kameelhoek and Langeberg" read as follows:

> "2. Elkeen van die begunstigdes naamlik Carol Lotz, André Knipe, Johnny Knipe, Peter Knipe en Jackie Vigne sal op aanvraag die koste van die waardasie aan Duncan & Rothman betaal.
>
> 9. Indien die eiendom verkoop word sal elkeen van die begunstigdes se aandeel en/of belang aan hulle uitbetaal word en die trust ontbind word."

It was agreed that a valuation of the farms would be obtained to allow André and any other beneficiary to put in an offer to purchase the shares/interest of the others at market value. In the event of no offer being made or the offeror failing to obtain a 100% loan by 30 September 2008, the farms would be sold and for that purpose it was agreed that Auction Alliance auctioneers of Bloemfontein would be instructed to do so by private treaty.

Nowhere in this letter is an indication that the beneficiaries – the five Knipe children - would not share in the proceeds of the farms in equal shares. Furthermore Mrs Knipe, who was appointed as executrix in the estate of the deceased, and on or about 18 November 2008 appointed as sole director of the companies and who was the sole remaining trustee of the trusts that held the shares in die companies, resolved on 21 August 2009 to dissolve the trusts and instructed an attorney to transfer the shares in both companies in equal proportions

to her five children. Such transfer was registered on or about 1 October 2009. When the matter was heard by the Full Bench appellants' counsel accepted that the appeal should be decided on the basis that each of the five Knipe children held 20% of the shareholding in each of the companies.

[10] On a shareholders' meeting of the companies held on 27 August 2010, the legality of which is in dispute, Mrs Knipe was removed as director of the companies and André, Johnny and Jackie were appointed as directors thereof and they subsequently took control of the companies.

[11] Several High Court applications have been launched in the Northern Cape High Court, some of which are still pending and I refer to the following:

11.1 Application no 1568/2007 for the removal of Mrs Knipe as executrix of the deceased estate and trustee of the various trusts – the issue of her removal as executrix is still pending;

11.2 Application no 1132/2008 by Pieter in order to compel Mrs Knipe to comply with her statutory duties as executrix;

11.3 Application no 1968/2010 wherein a declaratory order was sought by Mrs Knipe pertaining to the transfer of shares and the appointment of new directors of the companies – the matter is pending;

11.4 Application 276/2011 pertaining to spoliatory and interim interdictory relief sought by Carol;

11.5 Application no 304/2011 is an application by Carol seeking urgent spoliatory and other interim relief; and

11.6 The failed application for winding-up of the two companies in one application.

[12] It is apparent that members of the Knipe family are at logger heads with each other and that a family feud of tremendous proportions exists which will not be terminated whether or not final orders are granted herein. The Full Bench referred to the admission of Mrs Knipe's averment that the family is "… extremely dysfunctional" as illustrated by "… family feuds, disagreements, fights, disputes and litigation". The companies' counsel submitted that there are wide ranging and bitter disputes between the members of the Knipe family of a magnitude seldom seen. It is also common cause that prior to the provisional winding-up order, André, Johnny and Jackie managed the affairs of the companies to the exclusion of Carol and Pieter and to be able to do so, they had to remove the sole director, Mrs Knipe, and the one person who as trustee of the various trusts dissolved those trusts and allocated the shares to her five children in equal proportions. No meaningful dialogue between the parties is possible. They cannot approach any issue with open minds and in good faith. The children want to harvest the wealth which has been created by their late father with the financial and other support of Mrs Knipe. Accusations of greed are rife.

[13] The Full Bench found that it had been proven on a balance of probabilities that, at the stage when the deceased passed away, the cattle and game on the two farms did not belong to the companies. It is unnecessary for purposes hereof to reconsider this issue again, save to state that this remains a bone of contention. No new evidence was put forward to challenge the finding of the Full Bench. Another bone of contention is Carol's alleged hunting rights on the farms. This was also dealt with by the Full Bench and it is not necessary to deal extensively with this aspect again, save to consider the further allegations made in particular by Johnny in this regard in his reasons why final relief should not be granted.

[14] Jordaan J's finding that there were serious disputes, discord and lack of trust between at least some of the shareholders of the companies and that they were unable to work together were not contested before the Full Bench and consequently the Full Bench, which accepted this approach, merely considered whether the situation was wrongfully caused by Carol. The Full Bench eventually found as follows in para [23]:

> "Whilst I am sure that Carol is as much to blame as any of her siblings for the absence of a personal relationship of trust and confidence between them, I am satisfied that she is not wrongfully responsible for the situation that she relies on for winding-up."

Provisional winding-up orders were therefore granted on the ground that it was just and equitable that the companies be liquidated. It is reiterated that the Full Bench agreed with the court *a quo*'s conclusion that the applicants, either on their own showing are not creditors of the companies, or that their claims were disputed on *bona fide* and reasonable grounds. The Full Bench approached the matter on the basis that Carol was a shareholder of the companies and that she had *locus standi* in that capacity to seek orders based on the ground that it is just and equitable to wind-up the companies.

IV **FACTS NOT IN DISPUTE**

[15] The following facts are not in dispute:

15.1 The companies own the farms Kameelhoek and Langeberg in the district of Kimberley respectively, as set out in paragraph [8], *supra*. These farms are regarded by all and sundry as one farming unit.

15.2 The deceased created family trusts which were allocated shares in both companies in equal proportions.

15.3 The deceased and Mrs Knipe were the only trustees in respect of all these trusts. When the deceased passed away, Mrs Knipe became the sole trustee.

15.4 The family trusts were created for the benefit of the five children and they were equal beneficiaries of the trusts.

15.5 On 15 April 2008 It was accepted that by all and sundry that the five children of the deceased and Mrs Knipe

would equally share in the proceeds of the two farms, whether or not André or one or more of the children bought the shares/interests of his, her or their siblings, or in the event of a private treaty to a third party on the basis as anticipated.

15.6 Mrs Knipe, in her capacity as sole trustee, terminated all the trusts and thereafter transferred the shares in the two companies to the five children in equal proportions and this equal allocation was accepted by all. It must be mentioned at this stage that it turned out that prior to the filing of André's answering affidavit dated 11 May 2011 the three newly appointed directors obtained so-called evidence that André and Johnny are each entitled to 42% shareholding in each company and Carol and Jackie 8% each. These "facts" were suppressed from the court *a quo* and the Full Bench. This is now their case notwithstanding their earlier acceptance of an equal shareholding.

15.7 The members of the Knipe family are engaged in a serious family feud and it is not possible for André, Johnny, Jackie, Pieter and Carol to work together.

V **ISSUES IN DISPUTE**

[16] Numerous issues are in dispute in these application papers, consisting of approximately two thousand pages each. However the essential aspects on which Carol was required to convince this court regarding the question whether a final

winding-up order should be granted on the just and equitable ground can be reduced to the following:

16.1 Whether Carol is the cause, if not the sole cause, of the lack of trust and confidence amongst the shareholders of the companies.

16.2 Whether the companies are domestic companies akin to partnerships in order to qualify for winding-up on the basis of just and equity.

16.3 Whether winding-up is the solution, bearing in mind an alternative remedy such as *inter alia* contained in section 163 of the Companies Act 71 of 2008 ("the Act").

VI **APPLICABLE LAW**

[17] Aspects to be considered are:

17.1 the issue of factual disputes in application procedure and the law concerning that;

17.2 the just and equity ground relating to winding-up of companies and especially whether a "guilty" party should be granted relief in such circumstances;

17.3 whether the option of relief in terms of section 163 of the Act is viable *in casu*; and finally

17.4 what the approach to the application of the intervening applicant (Pieter) should be.

A. **Factual Disputes and Application Procedure**

[18] Carol seeks final relief and in the circumstances the well-known test enunciated by Corbett JA in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634 – 635C is of application and I quote the following:

> "Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*1957 (4) SA 234 (C) at 235E - G, to be:
>
> '... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.'
>
> This rule has been referred to several times by this Court (see *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point)(Pty) Ltd*1976 (2) SA 930 (A) at 938A - B; *Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd*1982 (1) SA 398 (A) at 430 - 1; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere*1982 (3) SA 893 (A) at 923G - 924D). It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by

> the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*1949 (3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) *(g)* of the Uniform Rules of Court (*cf Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another*1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers…"

[19] In motion proceedings the parties thereto may at the hearing of the application request that the matter be referred for oral evidence in order to provide for the proper adjudication of certain specified factual disputes. Normally the applicant is the party who seeks such relief. However in **Kalil v Decotex (Pty) Ltd and Another** 1988 (1) SA 943 (AD) at 979B – E the court found that in a proper case the court should acceed to the request of a respondent to present oral evidence on

disputed issues. This should be so in particular at the stage when a final winding-up order is to be considered.

[20] Courts are generally reluctant in motion proceedings to decide disputes of fact solely on probabilities disclosed in contradictory affidavits in disregard of the additional advantages of *viva voce* evidence. See **Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO** 1978 (4) SA 281 (AD) at 294D – 295A and 299H – 300A. It is accepted that this is particularly apposite in winding-up applications where the consequences of final orders are drastic indeed. Although serious disputes of fact may be found to exist the issue in adjudicating an application is whether the essential aspects on which the applicant is required to convince the court in order to obtain the required relief, are in dispute and whether it is possible to resolve that dispute on the papers. As indicated *supra* the test is where there is a dispute as to the facts a final order should only be granted in motion proceedings if the facts stated by the respondent together with the admitted facts in applicant's affidavit justify such an order, unless it is found that the allegations or denials of the respondent are so farfetched or clearly untenable that the court is justified in rejecting them merely on the papers.

[21] The onus rests upon Carol in seeking a final winding-up order to satisfy the court on a balance of probabilities that it is indeed just and equitable finally to liquidate the companies. The degree of proof is higher than that for the

grant of a provisional order insofar as a mere *prima facie* case needs to be established to obtain provisional winding-up. See **Kalil v Decotex (Pty) Ltd and Another**, *supra* at 979B – E; **Paarwater v South Sahara Investments (Pty) Ltd** [2005] 4 ALL SA 185 (SCA) at para [3] p 186.

B. **Just and Equitable**

[22] In **Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd**1985 (2) SA 345 (W) at p 350 the court considered the just and equity ground to be falling into five broad categories, to wit:

(i) disappearance of the company's *substratum*;
(ii) illegality of the objects of the company and fraud committed in connection therewith;
(iii) deadlock in the management of the company's affairs;
(iv) grounds analogous to those for the dissolution of partnerships;
(v) oppresion.

These categories do not constitute any kind of *numerus clausus* and it is open to the courts to devise other categories, if so required. Only the fourth and fifth categories may be found to be applicable *in casu* and consequently the case law referred to herein will focus on these issues.

[23] Before dealing with applicable case law it is apposite to state that on the accepted evidence, the companies are solvent.

That being the case, their winding-up should be considered in accordance with the provisions of s 81(1)(d) of the Act and not in accordance with s 344(h) of the Companies Act, 61 of 1973 (the 1973 Act). Having said this, the approach in considering whether it is just and equitable to wind-up a company in terms of the Act is in essence not any different to what it is (or was) in accordance with the 1973 Act which still applies to the winding-up of companies which are not solvent. The legal basis for winding-up remains the same. See **Budge and others NNO v Midnight Storm Investments 256 (Pty) Ltd and another** 2012 (2) SA 28 (GSJ) at paras [5] to [12]. The only possible change in attitude might be the fact that there is a greater emphasis in the Act to the rescuing of companies than in terms of the 1973 Act.

[24] A domestic company, or quasi partnership, or a company akin to partnership may be liquidated due to a complete breakdown of the relationship of reasonableness, good faith, trust, honesty and mutual confidence which should exist between the directors and/or shareholders thereof. See e.g. **Moosa, NO v Mavjee Bhawan (Pty) Ltd and Another** 1967 (3) SA 131 (T) at 136 and further; **Ebrahimi v Westbourne Galleries Ltd** [1972] 2 ALL ER 492 (HL) at 500; **Lawrence v Lawrich Motors (Pty) Ltd** 1948 (2) SA 1029 (W) at 1032; **Budge v Midnight Storm Investments** *supra* at paras [15] to [21]; and **Erasmus v Pentamed Investments (Pty) Ltd** 1982 (1) SA 178 (WLD) and the detailed analysis at 181A – 185C. See also the contribution by J J Henning in **LAWSA**,

2nd ed, vol 19, pp 272 and 273 wherein the author specifically deals with "just or lawful cause" pertaining to the dissolution of partnerships. Recently the Supreme Court of Appeal considered the just and equitable ground with reference to some of the above judgments in **Apco Africa (Pty) Ltd and another v Apco Worldwide Inc** 2008 (5) SA 615 (SCA) at paras [16] to [30]. In para [29] the Court found that if one of two partners threatens civil and criminal action, including prosecution for fraud, it will not be possible for them to work together as they ought to do. The Court found in para [30] that, on the analogy of partnership law, the company was in a state which could not have been contemplated by the parties when it was formed and that it ought to be terminated as soon as possible.

[25] In **Paarwater v South Sahara Investments (Pty) Ltd**, *supra*, the one shareholder contended that the respondent was a domestic company or quasi partnership and had to be liquidated due to a breakdown of the personal relationship between the two shareholders. The Supreme Court of Appeal agreed with the findings of the court *a quo* to the effect that it was not possible on the papers to

> "find on a balance of probabilities that a personal relationship existed between the appellant and Bothma, which admittedly is not good, which precludes the further proper functioning of SAB and which destroys the role of new investors in funding the project of the meat processing venture. In addition it has not been established by the appellant that there is scope for coming to the conclusion that the respondent company cannot be

> properly managed and that the applicant and the respondent cannot deal at arm's length with the co-investors in SAB".

Par [14] p 191J – 192B.

It should be noted that in that matter the parties were strangers to each other before they entered into the business venture. The shareholders' agreements entered between the parties recorded pertinently that the relationship between them did not constitute a partnership.

[26] The House of Lords authority in **Ebrahimi v Westbourne Galleries Ltd** 1973 AC 360 and the equally famous **In re Yenidje Tobacco Co Ltd** [1916] 2 CH 426 (CA)) has been accepted by the courts of this country on innumerable occasions. It is settled law, also in this country, that in a case for winding-up of a so-called domestic company on the basis that it is just and equitable, it may properly be held that

> "a limited company is more than a legal entity, with a personality in law of its own; that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals with rights, expectations and obligations inter se which are not necessarily submerged in the company's structure".

Per Lord Wilberforce in **Ebrahimi**, *supra*, at 379B – C.

See also the judgment of Kriegler J in **Rentekor (Pty) Ltd and Others v Rheeder and Berman NNO and Others** 1988

(4) SA 469 (TPD) at 500A – G and in particular the following *dictum*:

> "Our law thus recognises that in the relationship between shareholders in a company there may at one and the same time be a formal pecuniary nexus and also an *intuitus personae*, a special relationship of mutual personal trust. Where that relationship is breached, even dehors the affairs of the company, (for example adultery by one of two directors/shareholders in *Lawrence's* case *supra*), a winding-up order may be found to be just and equitable."

[27] An applicant who relies on the just and equitable ground must come to Court with clean hands. He must not himself have been wrongfully responsible for, or have connived at bringing about, the state of affairs which he relies upon for winding up of the company. However in **Vujnovich and Another v Vujnovich** [1990] BCLC 227 (PC) the Privy Council found at p 231 that although the minority shareholder had been partly responsible for the breakdown in the relationship between the parties, his conduct was not causative of the breakdown in confidence on which the petition was based and therefore this did not bar him from obtaining a winding-up order on the just and equitable ground.

[28] The rights and obligations of minority shareholders who allege oppressive or prejudicial conduct by the majority must be considered. The Supreme Court of Appeal found in a as yet unreported judgment (**Bayly and Others v Knowles**

(174/09) [2010] ZASCA 18 (18 Maart 2010) at para [24] that the principle of encouraging affected parties to use the procedures provided in the articles or in a shareholders' agreement to avoid the expense of money and spirit to be laudable. Furthermore in the context of s 252 of the 1973 Act (the predecessor of s 163 of the Act) the failure of the minority shareholder to accept a reasonable offer for his shares and to leave the company in the hands of the majority, was regarded as at least strong evidence of a willingness to endure treatment which is *prima facie* inequitable despite the choice of a viable alternative and consequently it would not ordinarily behove such a shareholder to continue to complain about oppression.

[29] The following *dictum* in **Bayly**, *supra*, at para [29] is relevant:

> "Counsel for Knowles, perhaps appreciating the weakness of his client's case for the purchase of Bayly's shares, concentrated on the relief of liquidation on the just and equitable ground. But Horn J had not made such an order and Knowles had not noted a conditional cross-appeal against his failure to do so. Strictly-speaking that excludes consideration of the matter. It needs to be pointed out, however, that in urging this aspect of his case, counsel fell into a double trap: liquidation would destroy a perfectly viable company, as all agreed; but, in doing so, it would provide no redress to Knowles for such oppression as he may have suffered. The first consequence is one that a court will avoid except in the most extraordinary circumstances; the second would favour revenge above reason – financially Knowles might even be prejudiced by a sale in liquidation. Nothing more need be said on this aspect."

C. **Section 163 of the Companies Act 71 of 2008**

[30] Although I have indicated *supra* that the companies are solvent and that the winding-up procedure should be considered in accordance with s 81 of the Act and not in terms of the 1973 Act, it is instructive to consider that s 347(2) of the 1973 Act provides that, in the event of a winding-up application by members of the company and it appears that the applicants are entitled to relief, the Court shall make a winding-up order, unless it is satisfied that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound-up instead of pursuing that other remedy.

[31] Section 163 of the Act provides protection against oppressive or prejudicial conduct. Its predecessor, s 252 of the 1973 Act and the case law pertaining thereto, are instructive when interpreting s 163. There is no doubt that the minority shareholders are bound by the decisions of the prescribed majority shareholders in a company if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect the rights of the minority shareholders. However the majority shareholders are obliged to use their powers *bona fide* for the benefit of the company as a whole. See **Sammel and Others v President Brand Gold Mining Co Ltd** 1969 (3) SA 629 (AD) at 678, **Garden Province Investment and Others v Aleph (Pty) Ltd and Others** 1979 (2) SA 525 (D)

at 531 and more recently **Louw v Nel** 2011 (2) SA 172 (SCA) at para [22] and further. There is also no doubt that the mere subordination of the wishes of the minority by the exercise of the voting power of the majority is not of itself oppressive. For a general discussion see **Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others** [2013] 2 ALL SA 190 (GNP) and the conclusion of the court at paragraph [19] p 210 – 211 that the result of the act or omission must be unfairly prejudicial and not the act or omission itself. See also **Henochsberg on the Companies Act 71 of 2008**, vol 1, p 567 and further.

[32] Alleged unfairness disappears if the minority shareholder is offered a fair price for his shares. This is the situation in English Law as well as in this country. See **Bayly v Knowles**, *supra*, at paras [23] and [24]. In the light of open tenders which were made herein whilst I was preparing this judgment, to which I shall refer later again, it is necessary to consider offers for shareholding in more detail. In **Re Data Online Transactions (UK) Ltd** [2003] BCC 510 it was held 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. It is also mentioned in **Henochsberg**, *supra*, at 571 that the offer, although reasonable, may be so tainted by bad faith or ulterior motive as to excuse non-acceptance.

[33] The powers of the court to grant relief in accordance with s 163 are very wide and could touch on many aspects of the

company's business, even including the appointment of directors. Section 163 (2) determines in particular that the court may make any order "it considers fit" and provides some examples of the powers that the court may exercise although the courts' powers are not limited to those. See **Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others** 34403/2011, decided on 11 June 2012 (GSJ) at par [61] as well as **Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others** [2013] 1 ALL SA 601 (GSJ). Courts may order that the majority purchase the shares of the minority or that the majority sell their shares to the minority and they have an unfettered discretion as to the method of fixing the price of such shares which should obviously be a fair price to be determined objectively. See **Henochsberg** at 574. Notwithstanding the wide discretion conferred on Courts it is essential that the party seeking relief under the section formulates such relief. See **Louw v Nel** *supra* at para [32].

D. **Application to intervene**

[34] I have referred to Pieter's application to intervene and this aspect should also be considered. In short, Pieter's application is based on the contention that he is a shareholder of the companies and that the companies are insolvent and unable to pay their debts. The allegation of insolvency is directly in contrast with all the evidence thus

far, the submissions of counsel for applicants and respondents and the findings of the Full Bench. Should the provisional winding-up orders be discharged, Pieter intends to seek fresh provisional winding-up orders based on the inability of the companies to settle their debts. Mr Steyn, on behalf of respondent and Mr Gilliland, on behalf of Pieter were allowed to argue only whether Pieter should be allowed to intervene as intervening applicant.

[35] Several points *in limine* have been taken on behalf of the companies. It is in view of the conclusion I have reached herein unnecessary to consider these. Pieter relies on insolvency or inability to pay creditors and to bolster his case he refers to requisitions allegedly filed with the Master by various creditors. He did not present any proof in this regard. Requisitions are not claims made under oath by creditors for purposes of proof in accordance with the provisions of s 44 of the Insolvency Act, 24 of 1936 read with s 364 of the 1973 Act. The documents referred to have not been attached to his papers. In reply a list of so-called creditors has been attached. No case has been made out in the founding affidavit and Pieter cannot be allowed to build a case in reply. Pieter is guilty of reliance on inadmissible hearsay in order to prove factual insolvency. This cannot be countenanced.

[36] A member of a company can only apply for winding-up on one or other of the grounds referred to s 344 (b), (c), (d), (e) or (h) of the 1973 Act. The inability of the companies to pay

their debts – s 344 (f) - cannot be relied upon by a member as a ground for winding-up. See **Henochsberg** at 722(1). Pieter's case is based on actual insolvency which is in any event not a ground for winding-up, but which may indicate an inability to pay.

[37] Reliance is also placed on evidence of a meeting before the Master's representative in support of a version that a claim had been "proven" against the companies. This is unheard of. No claims can be proven prior to the final winding-up of a company. Pieter has not even made out a *prima facie* case to be allowed to intervene. That being the case, and in the light of the relief to be granted herein in respect of the main applications as well as the fact that Pieter's applications caused an unnecessary increase of almost three hundred pages in the already voluminous bundles of documentation, Pieter is not entitled to costs and should in fact pay the respondents' costs for opposing the applications.

VII **APPLICATION OF THE LAW TO THE FACTS**

[38] In the ultimate analysis this Court has to consider whether Carol as the only remaining applicant with *locus standi* has proven that it is just and equitable that the companies be finally wound up. Both Mr Geyer, on behalf of applicant, and Mr Snellenburg on behalf of Jackie, are of the view that the dispute can be adjudicated on the papers although they seek different outcomes. Mr Geyer has submitted that a proper case has been made out for confirmation of the rules *nisi*

whilst Mr Snellenburg argued that the rules should be discharged. Mr Steyn, on behalf of respondent, submitted that the matter should be referred for oral evidence in order for the Court to be in the best position to adjudicate the disputes. His repeated submission that oral evidence is the medicine required by these matters and the family is cynical and sarcastic. Oral evidence will not heal and is not required to determine the real issues. Submissions were also made on behalf of respondents that liquidation of the companies is in any event not the only option available insofar as the Court has a wide discretion to consider the plight of minority shareholders and in doing so to utilise the provisions of s 163 of the Act. It was submitted that a value can be placed on the shareholding of Carol and orders made as to the sale of her shareholding to the other shareholders and the manner of payment. I have considered all allegations by the various parties, but for purposes hereof it is unnecessary to deal with all these. As stated, relevant aspects are not in dispute. I shall deal only with aspects that might play a role in disturbing the findings of the Full Bench.

[39] Johnny deposed to confirmatory affidavits on behalf of the companies in opposing the application initially. He has now advanced reasons in opposition of the applications for final winding-up orders on behalf of the companies and as an interested party in his capacity as shareholder. André, who deposed to the companies' opposing affidavits initially, filed confirmatory affidavits in his capacity as shareholder in support of Johnny's opposition. From the onset Johnny held

the view that the applications should be referred to oral evidence.

[40] It is apparent that Johnny paid mere lip service to his allegation that “he did not want to steal his mother’s joy or discredit her”. Although this was his initial stance, the remainder of his affidavit shows his animosity towards his mother and Carol to such an extent that he specifically wants his mother, a lady who I have been told is 81 years old, to be subjected to cross-examination on a wide variety of aspects and even the disputes arising in the several Northern Cape High Court matters referred to above. Johnny cannot understand why Carol has such an obsession with the farms as he put it, especially insofar as she and her children will eventually inherit several other farms in respect of the discretion to be exercised by Mrs Knipe in her favour to the ultimate exclusion of the other children, according to Johnny. These discretionary trusts which have been set out in detail in Johnny’s affidavit and which are totally irrelevant for purposes of this application are the Witpan Trust, the Spytfontein Trust, the Rockwood and Pollock Trusts and the Troon Investment Trust. The first four trusts are the owners of several farms and the last trust is the owner of property in Hermanus. Carol is accused that her greed does not have any bounds. The record shows that this is probably a general family attribute. Johnny and André (and Jackie for that matter), have a motive to discredit Carol and Mrs Knipe insofar as they believe that Carol and her children will eventually become the heir/heirs of the remainder of the

wealth accumulated by the deceased and Mrs Knipe. Therefore there is a drive to unilaterally reduce Carol's shareholding in the companies to 8%. They have already ensured that she shall not have any say in the management of the companies by not electing her as director. Mrs Knipe, who was responsible for the allocation of their shares to them, has been kicked out of the management of the companies.

[41] Johnny, André (and for that matter Jackie), rely on certain historical data and averments by the present company secretary, Mr Pretorius, and an auditor, Mr de Jager to the effect that the shareholding of Pieter's trusts in the companies were bought out many decades ago and that André and Johnny's trusts were entitled to an increased shareholding, i.e. 42% each in the two companies. These letters and reports are not under oath, but notwithstanding this, all beneficiaries in the presence of their respective attorneys accepted at the offices of Duncan and Rothman attorneys in Kimberley on 15 April 2008 that the five children should be regarded as equal beneficiaries of the farms owned by the two companies. Everyone also accepted the equal allocation of shares when Mrs Knipe dissolved the trusts in 2009. It is also strange that notwithstanding the information allegedly obtained from the auditors as long ago as October 2010 pertaining to what their shareholding in the companies should be, these facts were suppressed and not conveyed to the court in the initial opposing affidavits. Therefore the Full Bench accepted that the five children are

equal shareholders in the two companies. The insistence by André, Johnny and Jackie that the twins are entitled to 42% shareholding each in both companies is a major cause for concern which must have contributed to the distrust.

[42] Much is made of the fact that the deceased bought the farms belonging to the two companies for the twins, i.e. Johnny and André. The deceased was a businessman and an auditor and the objective facts contradict such an intention. Although the twins were still at university when the farms were bought and the trusts created, the deceased did not do anything over all these years to give managerial powers to Johnny and André by, for example, making them trustees of the trusts and/or directors of the companies. Instead he managed the companies as the sole director and he and Mrs Knipe were at all relevant times the only trustees of the various trusts. There is nothing on record to indicate that the deceased and/or Mrs Knipe at any stage anticipated that Johnny and André would eventually be placed in a position where they could run and manage the companies with the exclusion of any of the other children. It is Johnny's version that Carol's unhappiness is unrelated to her reduced shareholding. What cannot be denied is that the farms owned by the companies have always been run and managed as a domestic family company to the exclusion of any outsiders and there is no reason to conclude that after the death of the deceased it should be any different.

[43] Carol's alleged hunting rights has nothing to do with her shareholding. It is a contractual issue and her disputed rights can and should be adjudicated in another forum. The Full Bench accepted the existence of these rights based on the documentation provided. Instead of challenging this aspect by obtaining statements from the particular Department's officials or evidence of a handwriting expert, Johnny now wants to investigate this through oral evidence and to subpoena witnesses from the Department. This is requested notwithstanding the undisputed evidence that Carol indeed exercised hunting rights during the lifetime of the deceased.

[44] Jackie went out of her way to discredit her mother, Mrs Knipe in particular and also her sister Carol. According to her the exclusive motive in bringing the applications is to benefit Carol and her children. This cannot be true as Carol and all the other shareholders will have to accept that if final winding-up orders are granted, the farms will have to be sold, probably at prices lower than valuation and/or market value and that considerable costs will have to be paid out of the companies' funds before distribution of the nett proceeds to shareholders can be effected. Jackie also mentions that Mrs Knipe is motivated by greed in bringing the application. There is absolutely no basis or foundation for such an allegation. Mrs Knipe cannot gain anything from a winding-up of the companies. It is clear from the evidence that Jackie feels prejudiced insofar as the close corporation which conducted the diary business in which she held

membership was finally wound up and Mrs Knipe and Carol are blamed for this. Jackie describes her mother as a housewife who had absolutely nothing to do with the businesses of the deceased and his creation of wealth. The objective facts show that this is false. Mrs Knipe is from a rich family and she created her own wealth independently from the deceased. She was clearly the deceased's confidant insofar as they have been married for over fifty years and she was co-trustee of the various family trusts. Jackie's impression that Mrs Knipe favoured Carol and her children might be correct and this may also be a motive why Jackie would accuse Mrs Knipe and Carol for causing the dysfunctional family relationship. The version of Jackie pertaining to the birthday party has been shown to be false. Contrary to what she tried to convey in her affidavit, i.e. that she did not attend the party and that no photo was taken of her as was the case with all the other guests, a photo has been submitted showing her enjoying a glass of wine.

[45] The threats and assaults complained of by Mrs Knipe are denied by Jackie, André and Johnny, but the objective facts indicate that Mrs Knipe obtained family violence interdicts against them in 2010. Surely a mother would not do that if there was no cause for concern. It is also indicated by Mrs Knipe that Johnny did not speak to the deceased for seven years prior to his death.

[46] Although there are several disputes that are incapable of being adjudicated upon on the affidavits, the fact remains

that neither Johnny, nor Jackie made any meaningful contribution and neither of them presented acceptable evidence to the effect that Carol was the sole cause for the breakdown in the trust relationship. The findings of the Full Bench were not disturbed. No new facts were disclosed to disturb the findings that there is no relationship of mutual trust and confidence amongst the shareholders which is a requisite for the existence and proper functioning of a domestic family company. Surely it has not been shown that the companies are not domestic family companies.

[47] I have seriously considered other options than granting a final winding-up order, especially insofar as I am of the view that solvent companies should really be wound-up as a last resort only. Unfortunately it is not possible to adjudicate the issue of the shareholding ratio on the papers and in my view it would be an unnecessary waste of time and financial resources to refer the matter for oral evidence in order to ascertain what the true shareholding ratio should be. I can just imagine that it might be very difficult to limit cross-examination as counsel would do their best to cross-examine on a wide variety of matters on the basis that they should be allowed to do so in order to establish the veracity of the versions of the various witnesses. Respondent's counsel has already indicated that he wanted all disputes (also the Northern Cape High Court disputes) to be resolved in this Court by way of the presentation of oral evidence. It is on the evidence before me not possible to make any finding in respect of the purchasing of Carol's shares by one or more

of the other shareholders. It is on the papers before me impossible to come to a just and fair purchase price in the circumstances.

[48] An aspect which is regarded as important when exercising my discretion is the fact that the companies are in reality property holding companies. They don't trade and as found by the Full Bench the cattle and game on the farms are not their property. In this sense winding-up will have the same effect as a forced sale of immovable property held by co-owners who are at loggerheads with each other. The companies don't have an infrastructure such as offices, staff (except may be for one or two labourers), livestock or contracts with third parties such as investors who may be prejudiced by winding-up. Apart from the ongoing civil actions referred to above, the most damning evidence of a lack of trust is the supplementary affidavit filed by André a few days before I heard arguments herein. Therein he stated that the directors of the companies had decided to lay complaints against Mrs Knipe and Carol and that criminal proceedings had been instituted against them following actions and averments which were or still are to be adjudicated by the Northern Cape High Court in the various civil matters. This reminds me of the action taken in **Apco Africa** *supra* and that Court's finding that such action was clear evidence that no working relationship can ever be restored in such circumstances. I am satisfied that Carol has shown on a balance of probabilities that the companies should be finally wound-up on the just and equitable ground.

[49] I have considered the open tenders allegedly made on behalf of the companies and by André, Johnny and Jackie. At first blush these tenders appear to be laudable and a serious attempt to pay Carol what she is entitled to for her shareholdings and to settle all disputes amongst the parties. The provisional liquidators are not parties to the tenders. The directors of the companies retain residual powers to oppose the winding-up applications and to appeal final winding-up orders, but other than that, upon provisional winding-up all their powers and duties as directors terminated and they were deprived of all control over the companies. Therefore they could not make the tenders on behalf of the companies. Furthermore, the offerors insist that the winding-up application be withdrawn immediately whilst they may or may not make payment of the amount offered some time in the future. There is no clear indication that they would be able to raise the purchase price. In conclusion the offers are not *bona fide* and Carol and the other applicants were within their rights to reject same without fear that it might be to her/their prejudice. The *dictum* of the SCA in **Bayly v Knowles** *supra* does not apply.

[50] Pieter's application to intervene is without foundation. Insofar as it is my intention to grant final winding-up orders, the only issue that needs to be considered in that regard, is what costs order should be made. Even on the basis that I might have discharged the rules *nisi*, no case has been

made out by Pieter to intervene. Consequently he is not entitled to any costs and in fact, a costs order should be made against him.

[51] The unsuccessful applicants are not entitled to their costs. However the costs of Carol, the fourteenth applicant, should be costs in the liquidation. The costs of opposition in winding-up matters should be considered in accordance with the provisions of s 342(1) of the 1973 Act, read with section 97(3) of the Insolvency Act, 24 of 1936. See **Pienaar v Thusano Foundation and Another** 1992 (2) SA 552 (BGD) at 592D. In this judgment Friedman AJP was of the view that even a *bona fide* and reasonable opposition was not enough and special circumstances needed to be shown, i.e. real and substantial grounds for opposing and that the opposition assisted the court in coming to a decision. *In casu* no special circumstances have been shown to exist and consequently the costs of the opposition shall not be costs in the liquidation. To the contrary, an unnecessary paper war of great magnitude was created.

[52] Wherefore the following orders do issue:

1. The rules *nisi* in both applications 1936/2011 and 1937/2011 are confirmed and final winding-up orders are granted.
2. 14th Applicant's costs in both applications, on an opposed basis, exclusive of the costs of the

unsuccessful applicants, are to be costs in the liquidations.

3. The costs of opposition, i.e. in opposing the provisional orders for winding-up, as well as the costs of Johnny, André and Jackie in opposing the final winding-up orders in both applications, are excluded from the liquidation costs.

4. The applications of Robert Petrus Jansen Knipe to intervene in applications 1936/2011 and 1937/2011 are dismissed with costs.

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J.P. DAFFUE, J

On behalf of applicants:	Adv H.F. Geyer Instructed by: Symington & De Kok BLOEMFONTEIN
On behalf of respondents:	Adv J.W. Steyn Instructed by: Christo Dippenaar Attorneys BLOEMFONTEIN
On behalf of Jackie Vigne (interested party):	Adv N. Snellenberg Instructed by: Rossouws BLOEMFONTEIN

On behalf of R.P.J. Knipe:	Adv J.G. Gilliland Instructed by: Quinton Grimbeek Attorneys

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