THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 24 December 2020

Status: Immediate

***Gent and Another v Du Plessis* (1029/2019) [2020] ZASCA 184 (24 December 2020)**

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

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Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against a decision of the Full Court of the Gauteng Division of the High Court, Pretoria (Botes AJ, Mavundla and Mali JJ concurring), which involved an application for the winding up of a company and, in the alternative, for relief from oppressive or prejudicial conduct under section 163 of the Companies Act 71 of 2008 (the Act). The SCA had granted the first appellant, Ms Anita Julia Gent, special leave to appeal the order of the full court; and denied the respondent, Mr Pieter Daniël Jacobs du Plessis, special leave to cross-appeal against that order.

The matter concerned the shareholding of Ms Gent and Mr du Plessis in the second appellant, Bonnox (Pty) Ltd (the company). The company was established in 1957 by Ms Gent's father (Mr Schadewaldt), who was the majority shareholder and also the managing director until his retirement in 2010. During 1994 Mr Schadewaldt transferred 15 shares in the company to Mr du Plessis. In 1998 he transferred the rest of his shares in the company as follows: 80 shares to Ms Gent; a further 45 shares to Mr du Plessis; and 10 shares to the company's accountant, Mr Smith. As a result of her majority shareholding, Ms Gent became the company's sole director until she resigned of her own accord on 18 January 2012. During 2012 Mr du Plessis also

acquired the shares of Mr Smith. Ms Gent and Mr du Plessis thus became the sole shareholders in the company, Ms Gent holding 53.33 percent and Mr du Plessis the remaining 46.67 percent. Ms Gent was re-appointed as a director of the company on 18 January 2013.

Mr du Plessis was employed by the company from 1986, where he started as a fitter and turner. He was promoted to general manager during 2010 and, ultimately, was appointed as a director during 2012, when Ms Gent resigned as such. He was, however, removed as a director at a meeting of the shareholders on 6 March 2013. Mr du Plessis was subsequently suspended and, after being found guilty on four counts of gross misconduct (one of which involved dishonesty) at a disciplinary hearing, dismissed as an employee during August 2014. Amongst other things, Ms Gent had uncovered that Mr du Plessis engineered a simulated transaction for his own benefit and to the detriment of the company; and that he maliciously and surreptitiously obtained an order placing the company in business rescue, one day before the shareholders' meeting where a resolution for his removal as a director was to be tabled, in an attempt to avoid his imminent removal.

On 30 June 2014, Mr du Plessis brought an application in the Gauteng Division of the High Court for an order that the company be wound up on the basis that it was just and equitable. In the alternative, he sought an order directing Ms Gent to purchase his shareholding in the company at a price to be determined by an independent expert. The alternative relief was sought on the basis of Mr du Plessis' allegation that Ms Gent, in her capacity as the majority shareholder and director of the company, had acted in an unfairly prejudicial and oppressive manner towards him.

The court a quo (Hughes J) dismissed the application with costs on 30 March 2016. It found that although the relationship between the two shareholders had broken down irretrievably, and was not capable of being resolved, there was no deadlock that rendered it just and equitable to wind up the company. It was Mr du Plessis' own conduct that caused the breakdown in the shareholders' relationship and he was thus furthermore precluded from relying on the just and equitable ground by the doctrine of unclean hands. In respect of the relief sought under section 163, Mr du Plessis had not established the requisites for that section to be invoked: neither his alleged loss of confidence in the manner in which the company's affairs were being conducted, nor his resentment at having been outvoted, fell within the purview of s 163 of the Act.

Mr du Plessis appealed to the full court which, on 18 April 2019, upheld the court a quo's finding that Mr du Plessis had failed to prove the requisites of s 163(1) of the Act and consequently dismissed the appeal. It nevertheless went on to grant relief in terms of s 163(2) of the Act, holding that it was duty-bound to design or craft a mechanism that would result in a 'clean break' between the parties. It justified this approach on the ground that the relationship between the parties had broken down irretrievably and that it was not in their best interests to remain 'in the same bed'. The full court accordingly directed Mr du Plessis to purchase Ms Gent's shares at a fair and reasonable value.

On appeal to the SCA it was held that, due to his application for special leave to cross-appeal having been refused, Mr du Plessis was precluded from obtaining a variation of the order of the full court. The SCA confirmed Appellate Division authority for the point that, in the absence of a cross-appeal, a respondent is not entitled to an advantageous variation of the order of the court below, save perhaps for exceptional circumstances where there is no detriment to the appellant.

This was not without significant ramifications. For one, the option to liquidate the company was no longer available. Secondly, what Mr du Plessis sought was, instead of him buying Ms Gent's shares, which is what the full court ordered, that she in fact be ordered to buy his shares. However, Ms Gent had already indicated that this was not within her means and it was clear that such a variation would undoubtedly be to her detriment. Mr du Plessis was therefore precluded from seeking an order that Ms Gent be directed to purchase his shares and, on this ground alone, the appeal was good. The SCA nevertheless found that Mr du Plessis had failed to show oppressive or unfairly prejudicial conduct on the part of Ms Gent, as the full court had found, and bolstered this finding with objective facts. The SCA concluded that the full court had clearly misdirected itself in making the order that Ms Gent be ordered to sell her majority shareholding to Mr du Plessis.

In the result, the appeal was upheld with costs, including those of two counsel. The order of the full court was set aside and the order of the court a quo (Hughes J) reinstated.
