A fair and reasonable exit from a company under section 163(2) of the Companies Act 71 of 2008

1 Introduction

An implied term of a company's memorandum of incorporation is that a shareholder is bound to the principle of majority rule (*Grancy Property Limited v Manala* 2013 3 All SA 111 (SCA) para 32; *Knipe v Kameelhoek (Pty) Ltd* 2014 1 SA 52 (FB) para 31; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* 2014 5 SA 179 (WCC) para 64; *Pakade v Lukhanji Leisure (Pty) Ltd* 2017 JDR 0449 (ECG) para 31; see also *Sammel v President Brand Gold Mining Co Ltd* 1969 3 SA 629 (A) 678)). Because the strict enforcement of this principle can lead to injustice and unfairness, statutory remedies were incorporated to protect shareholders and to recognise the relationships of shareholders behind the company structure (*Croly v Good* 2010 EWHC 1 (Ch) para 6; *Waldron v Waldron* 2019 EWHC 115 (Ch) paras 23-24; see also *Ebrahimi v Westbourne Galleries Ltd* 1973 AC 360, 1972 2 All ER 492 (HL)).

Section 163 of the Companies Act 71 of 2008 (the Act) is such a remedy (another example is s 164). Relief is provided to a shareholder or director who can prove unfairly prejudicial conduct or an unfair disregard of his or her interests. Once a shareholder or director has proven the grounds in section 163(1) of the Act, a court may grant the relief it considers fit (s 163(2); *Gent v Du Plessis* (1029/2019) 2020 ZASCA 184 (24 December 2020)). The fact that a resolution has been adopted lawfully does not mean that all shareholders have been treated fairly. In *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* 2013 2 All SA 190 (GNP) para 16.3, the court held that for purposes of section 163 the fairness of the consequences of the conduct must be considered – not the lawfulness thereof (*Grancy Property Limited v Manala* para 27; also see Cassim *et al Contemporary Company Law* (2021) 1027-1028).

A court has a wide discretion to grant relief in terms of section 163(2) (*Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd* 2012 4 All SA 203 (GSJ) para 61; *Grancy Property Limited v Manala* para 31). The wording of section 163(2) does not restrict a court to the forms of relief listed in section 163(2) of the Act. The court's discretion must be exercised judicially, and the relief must be as least intrusive as possible to provide redress for the unfairness caused (*Inhouse Venue Technical Management (Pty) Ltd v Omar; In re: Omar v Inhouse Venue Technical Management (Pty) Ltd* (13902/2015) 2016 ZAWCHC 18 (26 February 2016) para 25; see also *Grancy Property Limited v Manala* para 32 where the court cautioned against the use of as section 163 as a potential instrument of oppression, considering that a shareholder is bound to the decisions of the majority). Courts should further not intervene in the internal matters of companies unless necessary (*Maynard v Office Appliances (SA) (Pty) Ltd* 1927 WLD 290; *Levin v Felt and Tweeds Ltd* 1951 2 SA 401 (A) 414-415; *Yende v Orlando Coal Distributors*

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(Pty) Ltd 1961 3 SA 314 (W) 316; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* para 64), and should consider the effect of the relief on the interests of persons who are not directly involved in a dispute (*Bayly v Knowles* 2010 4 SA 548 (SCA) para 25). The relief in section 163(2) in most cases provides an alternative to the winding up of a company, as courts are reluctant to wind up solvent and viable companies (*Knipe v Kameelhoek (Pty) Ltd* 2014 1 SA 52 (FB) paras 23 and 47).

One form of relief the court may grant under section 163(2), is an order requiring the company or other shareholders to buy the shares of the shareholder who seeks relief in terms of section 163. The practical value of such an order is that it terminates the relationship between the parties in dispute and allows the oppressed or unfairly prejudiced shareholder to exit the company while preserving the existence of a viable company (*Bayly v Knowles* para 15). This form of relief prevents the investment of a shareholder who has been subject to unfairly prejudicial conduct from being locked in the company, while giving effect to the principle of majority rule (*Bayly v Knowles* paras 26 and 27; also see Cassim (2021) 1043 regarding the principle of majority rule). A buyout aligns with the principle of majority rule as the majority will often be required to buy out the minority (Delport (2024) 574(3)). Only in exceptional circumstances, will a buy-out order justifiably require a minority shareholder to buy out a majority shareholder (*Bayly v Knowles* paras 26 and 27; Cassim (2021) 1049).

This note evaluates how the fair value of shares is determined for a buyout order under section 163(2)(g). The objective is not to comment on existing financial models which establish the value of a company's shares, but to analyse the legal principles that underpin the foundation of the valuation of shares subject to an order in terms of section 163(2) (for an overview of the basic financial principles that may apply to the valuation of shares see Firer *et al Fundamentals of Corporate Finance* (2012) 214-252).

2 The order under section 163(2)(g)

2 1 Section 163(2)(g) of the Act

Courts often order the buyout of shares to resolve internal company disputes (*Hickman v Oban Infrastructure (Pty) Ltd* (2008/18332) 2010 ZAGPJHC 9 (3 March 2010); *McMillan v Pott* 2011 1 SA 511 (WCC)). Section 163(2)(g) provides for similar forms of relief. Although the provisions of section 163 are formulated in wide and flexible terms, the wording of the section remains the point of departure when interpreting and applying the provisions. A court must avoid a mechanical application of section 163 and grant relief that is appropriate to the facts and circumstances of a particular matter. In crafting appropriate relief, the rights and interests of the parties directly involved in the dispute, must be considered, as well as the rights and interests of others who are indirectly involved in the dispute (while considering an application in terms of s 252 of the Companies Act 61 of 1973 (previous Act). The court in *Bayly v Knowles* para 25, held that "[i]n any exercise of a discretion under section 252(3) the court is bound to consider not only the interests of the warring shareholders but also those of shareholders who have stood apart, and the best interests of the company itself." A shareholder does not have a unilateral right to withdraw its investment from the company.

Section 163(2) provides a range of forms of relief. However, a court is not limited to the relief expressly listed in the section (s 163(2) provides *inter alia* "…any interim or final order it considers fit…", see for instance, *Edery v Brands 2 Africa Proprietary Limited* (2021/58016) 2023 ZAGPJHC 85 (3 February 2023) para 62; also see Cassim (2021) 1045-1050 for a discussion of s 163(2)). Often, a court resolves disputes based on section 163 by ordering that the shareholder who suffered the unfairly prejudicial conduct referred to in section 163(1) be bought out. A form of this relief is provided for in section 163(2)(g), which states that "an order 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…"When a court finds that a shareholder suffered unfairly prejudicial conduct, often, the most appropriate form of relief is for the oppressed party to divest from the company. A more detailed analysis of the wording of section 163(2)(g) will now be provided.

2 2 "The company or any other person"

In terms of section 163(2)(g) a court may order that the shares of a shareholder be bought by the company or any other person, usually the majority shareholders (*Bayly v Knowles* para 27; this was also the position under s 252(3) of the previous Act where a buyout order could be made against the company or shareholders. See also the buyout order made in *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 3 SA 146 (WCC) in terms of s 163(2) of the Act)). When the company is ordered to buy out a shareholder(s), the interests of the company, its shareholders, and its creditors may be conflicted (Delport *Henochsberg on the Companies Act 71 of 2008* Service issue 34 (2024) commentary on s 163 574(3)). In addition, any payment made by the company to a shareholder may impact on the company's solvency and/or liquidity which can potentially prejudice the interests of creditors (Delport (2024) 574(31)). Creditors rely on a company's solvency and liquidity for timely payment and satisfaction of their claims against the company (s 4 of the Act). It is submitted that a buy-out order against the company should be subjected to the solvency and liquidity test in section 4, to protect the rights and interests of creditors who may not be part of, or aware of the unfair prejudice dispute.

However, when shareholders of a company are ordered to buy out co-shareholders in the company, this procedure involves no risk for creditors, because the company is not a party to the buyout as it is only shares issued by the company that are transferred which will not affect the solvency and liquidity of the company. Generally, the unfair prejudice remedy creates a mechanism in terms of which a shareholder, amongst others, can seek relief in the form of the withdrawal of his or her investment in the company, and exit the company, provided that the grounds in section 163(1) of the Act can be proven. The unfair prejudice remedy therefore seeks to balance the interests of the company, the principle of majority decision-making and the protection of minority interests, in the least disruptive manner possible (*Grancy Property Limited v Manala* 2013 3 All SA 111 (SCA) para 32).

2 3 "Restore any part of the consideration paid for the shares"

The first option in section 163(2)(g) requires that "any part of the consideration paid for the shares" must be restored. This provides some guidance regarding the value to which a shareholder who is bought out will be entitled to. It implies that the original purchase price of the shares is important and relevant and will be considered during the valuation process.

An important consideration when making a buyout order is that the statutory unfair prejudice remedy serves as alternative relief to the winding up of a company on "just and equitable" grounds (see also Delport (2024) 574(22) on the term "just and equitable", and the interaction between the grounds for winding up and grounds for the oppression remedy). The implies that a shareholder must not receive less than what the shareholder would receive in the event of the liquidation of the company. This further raises the question whether, for purposes of the valuation of a company's shares, such valuation must be done on the breakup value of the company's assets or whether the valuation must be done assuming that the company is a going concern (this aspect will be considered in paragraph 3 below).

Section 163 applies to the internal affairs and relationships within the company structure. When shares are bought on the secondary market, the purchase price may hinge on factors irrelevant to the company. Furthermore, when a substantial amount of time has elapsed from the purchase date, or where there was a significant fluctuation in the value of the shares, an order where a shareholder is restored with the full consideration or part of the consideration paid for the shares may not necessarily reflect a fair value of the shares as required by case law, and that probably accounts for the use of the phrase "any part of the consideration paid for the shares".

2 4 "Pay the equivalent value"

Section 163(2)(g) also refers to a second option, namely the payment of an "equivalent value" to a shareholder. Section 5 read with section 7 requires that section 163(2)(g) must be interpreted and evaluated against the purposes of the Act and the remedy in section 163 (see also s 158). Companies would be able to attract more capital at lower costs if the rights and interests of shareholders are protected and provision is made for adequate relief where necessary (s 5(1) read with s 7; see also s 158). The Act seeks to balance the rights and obligations of directors and shareholders (s 7(i)). Because all directors and shareholders are bound to a company's Memorandum of Incorporation it is submitted that it is implied that the rights and obligations of shareholders *inter se* must also be balanced (s 15(6)). Although the provisions of section 163 are based on equitable considerations, it must be applied in a principled manner so that judicial intervention is consistent and predictable, and to ensure the efficient governance and management of companies (s 7; see also *O'Neill v Phillips* 1999 UKHL 24; 1999 1 WLR 1092, 1098-99 in the context of s 459 of the United Kingdom Companies Act 1985).

The point of departure is determining the fair value of the shares that are subject to a buy-out order (*Omar v Inhouse Venue Technical Management (Pty) Ltd* para 78. See also *Knipe v Kameelhoek (Pty) Ltd* para 33 where the court held that an objective "a fair price" must be determined for the purposes of a buy-out order). The term "equivalent value" referred to in section 163(2)(g) is not defined in the Act or case law. Section 164, which regulates the appraisal rights of shareholders, also does not define fair value, but provides guidance in subsection 164(16) as to the date of the determination of such fair value of the shares, namely the date on which, and immediately before the resolution/s contemplated in section 164(2) of the Act (also see Cassim "The shareholder's appraisal remedy under the Companies Act: How should the courts gauge 'fair value'" (2024) *SALJ* 310). The obvious difference between section 163 and section 164 is the fact that the shares under section 163 can be bought by either the company, a third party, or other current shareholders of the company, in contrast to section 164, where the shares must be bought by the company. Although the oppression remedy and the appraisal right have distinctly different purposes (Cassim (2021) 1051-1052), there are overlaps between these two remedies, for instance, where the Memorandum of Incorporation of the company is amended, a shareholder may choose which remedy to use. In certain circumstances an aggrieved shareholder may choose between section 163 and section 164, and in some circumstances both remedies may apply (Cassim (2021) 1051), although not necessarily simultaneously (see for example in the circumstances discussed in the judgment of *Juspoint Nominees* (*Pty*) *Ltd and Others v Sovereign Food Investments Limited and Others* (*BNS Nominees* (*Pty*) *Ltd and Others Intervening*) (878/16) [2016] ZAECPEHC 15 (26 April 2016) paras 63-65; Delport (2024) 574(12)). A comparison of these two remedies falls beyond the scope of this note but for a detailed analysis see MF Cassim "The appraisal remedy and the oppression remedy under the Companies Act 71 of 2008, and the overlap between them" (2017) 2 *SA Merc LJ* 305).

Because "equivalent value" is not defined in the Act, courts have sought guidance on the interpretation of the phrase further afield as provided in section 5(2) of the Act. In the English judgment of *O'Neill v Phillips* (1999 2 All ER (HL) 961 975) more light is shone on the phrase "fair value". The court in *O'Neill v Phillips* held that shares should be bought at a fair value, and this implied that the value should be a value "…representing an equivalent proportion of the total issued share capital, without a discount for its being a minority holding" (*O'Neill v Phillips* 975). It is submitted that it would be fair to argue that the legislature also intended this meaning in section 163(2)(g). This interpretation of the phrase is confirmed in *De Sousa v Technology Corporate Management (Pty) Ltd* which of course, means a pro rata part of the value of the company, without a minority discount (*De Sousa v Technology Corporate Management (Pty) Ltd* para 132; for a discussion of minority discount, especially where quasi-partnerships are involved, see Cassim (2021) 1048). Minority discounts will only be considered in exceptional circumstances, for instance, where the oppressed shareholder acquired the shares at a significantly discounted price. Such a discount may be applied in circumstances where the minority shareholder contributed to the decrease in the value of the shares (See in this context R Brockett "The valuation of minority shareholdings in an oppression context – a contemporary review" (2012) 24 *Bond Law Review* 101, 123.).

Courts have been inconsistent in the terminology used in describing the value at which the shares subject to a buyout order must be bought. In *Omar v Inhouse Venue Technical Management Ltd* para 78, the court made a buyout order in terms of section 163 where the relevant shares were to be bought out at "fair market value" (*Hickman v Oban Infrastructure*, in which reference is made to "fair price" and "fair market value"; see also *McMillan v Pott* where the court referred to "fair value" for the purpose of s 252 of the previous Act). It is important to distinguish between "fair market value" and" fair value" generally. The fair market value of shares refers to the value that a willing seller and a willing buyer are prepared to exchange in an open market, with each party having full knowledge of the relevant facts (https://corporatefinanceinstitute.com/resources/accounting/fair-market-value/ (accessed 26 August 2024); https://www.wallstreetprep.com/knowledge/fair-market-value/ (accessed 26 August 2024).

When a buyout of shares is ordered under section 163(2), the transaction is not executed between a willing seller and/or willing buyer, and the fair value of the relevant shares must be determined (in the context of the equivalent of the unfair prejudice remedy in English law, see *Sunrise Radio Limited, Re* 2009 EWHC 2893 (Ch) para 298. See also *CVC/Opportunity Equity Partners Ltd v Almeida* 2002 UKPC 16 para 44). When valuing shares, the court may take various factors into account in determining a fair value which may include, inter alia, the fair market value of the shares (see for example *Omar v Inhouse Venue Technical Management Ltd and Others Ltd* 2015 3 SA 146 (WCC) where the court ordered that contraventions of s 75 of the Act must be considered).

Therefore, the fair market value of shares may be indicative of but does not necessarily constitute the fair value of shares. The fair value of shares is based on equitable considerations and cannot be determined mechanically using a mathematical method or formula. When valuing the shares of a company one must be conscious of this difference and the particular facts and circumstances of the case (see the English case *CVC/ Opportunity Equity Partners Ltd v Almeida* para 44 in this regard).

In the context of a buyout order, the seller and/or the buyer are unwillingly selling or buying the shares (*Sunrise Radio Limited* para 298. See also *CVC/Opportunity Equity Partners Ltd v Almeida* para 44; Davies and Worthington *Gower principles of modern company law* (2016) 680). In addition, the actual value of the shares may be adjusted to rectify the prejudicial effects of the unfair conduct on the value of the shares of the petitioner (*Maidment v Attwood* 2012 EWCA Civ 998 para 26. See also in the context of section 252 of the previous Act, Van Rooyen "Die statutêre beskerming van minderheidsbelange in die maatskappyreg – Belangrike ontwikkelings in die Engelse regspraak" 1988 *TSAR* 268, 290. See further Oosthuizen "Statutêre minderheids-beskerming in die maatskappye-reg"1981 *TSAR* 223, 237).

The court in *Knipe v Kameelhoek (Pty) Ltd* para 33 ruled that the fair value should represent an objectively adjudged and fair price for the shares. In *De Sousa v Technology Corporate Management (Pty) Ltd* 2017 5 SA 577 (GJ) para 132, the court considered whether the price offered to the oppressed party constituted a fair value of the shares. In addition to the price offered for the shares the court emphasised the importance of a "reasonable offer" or a "fair arrangement" between the parties, as this would facilitate the sale of the oppressed party's shares in the company at a fair value to compensate the oppressed party for any disadvantage that he or she may have suffered (see *De Sousa v Technology Corporate Management (Pty) Ltd* paras 130-131; and on appeal *Technology Corporate Management (Pty) Ltd and Others v De Sousa* 2024 2 All SA 684 (SCA) paras 106 and 107). To establish whether an offer to the prejudiced or oppressed party is fair, and to evaluate whether it represents the fair value of the shares, it is trite that the oppressed shareholder should have had access to all the relevant financial information of the company to gauge whether the offer reflects the equivalent or fair value of the shares (*De Sousa v Technology Corporate Management (Pty) Ltd* para 131).

The unfairness of the prejudicial conduct normally ends when the unfairly prejudiced shareholder receives a reasonable offer for the purchase of his or her shares (*Bayly v Knowles* paras 23 and 24; *Knipe v Kameelhoek* para 32; Cassim (2021) 1045; Delport (2024) 574(20)). However, a shareholder may reject a reasonable offer or the offer of a fair price, for instance, where the offeror would not be able to meet the financial obligations of its offer (*Bayly v Knowles* para 24, with reference to *In Re Data Online Transactions (UK) Ltd* 2003 BCC 510). It is submitted that this is the exception, rather than the rule. Therefore, it is important to establish when an offer will be regarded as a fair price and a reasonable offer.

The development of clear legal principles which can be consistently applied is stifled by the practice that many share valuation disputes are adjudicated in alternative dispute resolution forums, and courts often refer the valuation of shares to experts or auditors (see for instance, *Omar v Inhouse Venue Technical Management Ltd and Others Ltd* para 77). Consequently, there are no formal law reports or records to set precedents or guidelines for future decisions. It is therefore submitted that further research as contained in this note is essential in the development of guidelines that can assist courts, adjudicators and valuators to contribute and promote towards predictability, legal certainty and consistency in the valuation of shares under section 163(2)(g) and buy-out orders.

3 Date of determination of "fair value"

3 1 Introduction

This note focuses on the buyout under section 163(2)(g), with specific reference to the fair value of shares. A detailed analysis of all other possible dates that be used for the purpose of the valuation of shares subject to a buyout order deserves further research and a separate publication. The valuation of the shares subject to a buyout order under s 163(2)(g) can be determined with reference to various possible dates. Section 163(2)(g) refers to the first possible date, namely, the date on which the shares were acquired. The advantage of using this date is that it neutralises the effect of the unfairly prejudicial conduct had on the value of the shares. This also prevents the potential purchasers, usually those who committed the unfairly prejudicial conduct, from being unduly enriched at the expense of the petitioner by acquiring the shares at a lower price because of their conduct (see *Sunrise Radio Limited, Re* para 283. See also *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 par 54 where the court had to deal with an increase of value).

Other possible dates that can be used are the date on which the unfairly prejudicial conduct occurred, a date before the date of the unfairly prejudicial conduct, the date of institution of the legal proceedings, the date of the latest balance sheet, the court order date, a date indicated in the court order, or, the valuation of shares may be done as closely as possible to the date on which the sale of the shares will take place (see Delport (2024) 574(33).

It follows that the date of valuation has a significant impact on the value of the shares. In *McMillan v Pott* para 50, the court held that the date to be used as the basis for the valuation of shares must be "… fair to both sides". The duty to determine the fair value of shares rests with the court. Although the court may be assisted by experts, the opinion of these experts must be based on the findings of the courts. It is therefore imperative for a court to clearly outline the legal principles and considerations that apply to a particular case for experts to provide an opinion on the valuation of the shares subject to a buyout order. The court must specifically determine the date that must be used as a basis for the valuation.

In the English case of *Shepherd v Williamson* 2010 EWHC 2375 (Ch) para 152 the court, and it is submitted correctly so, stressed that "…decisions are best made with all relevant evidence before the Court. However, it does not seem to me that expert evidence on values at different times affects the Court's decision as to which date should be selected. That is the wrong way round." The approach in *Shepherd v Williamson* is not only practical but also prevents an artificial manipulation of the value of the shares by using a specific date on arbitrary grounds. For purposes of this note only the most frequently used dates for the valuation will be highlighted

3 2 Date of unfairly prejudicial conduct

In *Omar v Inhouse Venue Technical Management (Pty) Ltd* para 78 the court used the date on which the unfairly prejudicial conduct occurred as the date on which the shares which were subject to a buyout order had to be valued (also see for example *Croly v Good* 2010 EWHC 1 Ch paras 117 and 119). This date generally negates the effects of the prejudicial or oppressive conduct to ensure the fair treatment of the oppressed (see *Croly v Good* para 118).

3 3 Date of legal proceedings

Another frequently used date is the date on which the legal proceedings are instituted (*Scottish Co-operative Wholesale Society v Meyer* 1959 AC 324, 364). According to some, this date is the most appropriate as it reflects the date on which the shareholder or director formed the view that he or she is subjected to unfairly prejudicial conduct (*Croly v Good* para 117; see also *Cumana, Re* 1986 BCLC 430 435-436). In *Shepherd v Williamson* para 146, the court explained that the date of the presentation of the petition may be regarded as the most appropriate date because this is the date upon which the conduct complained of became unfairly prejudicial to such an extent that the petitioner required relief from a court. However, this approach is not perfect as it may in certain circumstances be inappropriate because of changes in the value of the shares because of the alleged unfairly prejudicial or oppressive conduct. For instance, in the English case of *Profinance Trust SA v Gladstone* 2001 EWCA Civ 1031 para 37, the court provided the example where "… a major change in the (whether for the better or for the worse) in the company's capital structure and business …" occurred (the court also referred to *Re OC (Transport) Services* 1984 BCLC 251). Several factors were highlighted in *Profinance Trust SA v Gladstone* which may justify the use of an earlier valuation date. However, a petitioner is not entitled to an earlier valuation date merely because this date will be more advantageous (*Profinance Trust SA v Gladstone* para 61).

3 4 Date of sale of shares

One of the approaches followed in English law is that the valuation of shares may be done as closely as possible to the date on which the sale of the shares will take place (*Croly v Good* para 105. See also *Estera Trust (Jersey) Ltd & Anor v Singh & Ors* 2018 EWHC 1715 (Ch) para 632; *Sunrise Radio Limited, Re* paras 285-288; see also *Shepherd v Williamson* para 146; *Brownlow v Marshall* 2000 2 BCLC 655. In *London School of Electronics Ltd, Re* 1986 Ch 211 224 the court stressed that this is especially the case when the shares of the company are to be valued as a going concern). This approach holds that the value of the relevant shares must be based on the date on which the buyout is ordered, in other words, the date of the court order (Cassim (2021) 1048-1049). This approach remains subject to the primary requirement that it must be fair in the context of the specific case (*Profinance Trust SA v Gladstone* para 60).

3 5 Concluding remarks

It is trite that disputes under section 163 present a real challenge for courts because of their intricacy and the sheer number of factors to be considered when adjudicating on these matters (Delport (2024) 574(28)). Therefore, when courts refer the valuation of the shares to experts, they should carefully consider the facts of each individual case and provide full legal guidance on the factors that the expert evaluator/s must consider (see for instance, the order in *Omar v Inhouse Venue Technical Management (Pty) Ltd* para 77).

4 Conclusion

Section 163 allows a court to order the buyout of shares in circumstances where a shareholder can prove unfairly prejudicial conduct. The relief listed in section 163(2) serves as a guideline as to the nature of the order a court can make but is not an exhaustive list. However, the section does not prescribe the terms and conditions of such a buyout order, how the shares subject to such a buyout must be valued or the date on which the valuation should be affected. The overall guiding factor is that the relief must be fair to all parties affected by the relief. The legislature formulated the discretion of a court in wide terms to enable it to tailor relief for the specific facts and circumstances of a case.

The above evaluation of section 163 revealed some aspects that need further consideration when relief is granted in terms of section 163(2). The first is when the company is ordered to buy the shares, as this will require the consideration of the interests of creditors. It is submitted that such an order must be subject to the solvency and liquidity test in section 4 to ensure that the interests of creditors are not prejudiced by such an order. Secondly, the section does not prescribe how the fair value of shares must be determined. Case law and some of the provisions in the section do provide some guidance on what needs to be considered in valuing shares. The first of these considerations is that section 163 serves as an alternative remedy to the winding-up of a company. The implication of this is that shares that are subject to a buyout must be valued as the shares of a going concern and therefore a value equal to a dividend that a shareholder would receive as a liquidation dividend would not constitute a fair value. Further, the fair value of shares does not equate to the market value of shares. The market value of shares is only an element to determine the fair value of shares. The shares must be bought out at an equivalent value, which means that no minority discount must be applied to the value of the shares, unless exceptional circumstances are present. Such an approach also gives effect to the fundamental company law principle of majority decision-making.

The valuation of shares subject to a buyout order is not a mere mechanical calculation based on recognised valuation methods. The valuation depends on the facts and circumstances of each case and what a court considers to be equitable in that case. One such consideration is the date that must be used as a basis for the calculation of the value of shares and to what degree this valuation must be adjusted to compensate the shareholder for the loss of value that was incurred because of the unfairly prejudicial conduct. Courts are therefore reminded of the intricate role they play in determining the fair value of shares that are subject to a buyout order and are therefore cautioned against delegating their legal duty to do so to an expert without clear instruction on the legal factors the valuation must consider. The development of guidelines on how legal considerations must be applied in the determination of the value of shares subject to a buy-out order or for purposes of relief in terms of section 163(2)(g) will play a significant role in enhancing legal certainty and predictability.

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