The court's power to appoint a liquidator in terms of section 163 of the Companies Act 71 of 2008

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Berlein v Salisburg Landy (Pty) Ltd (3330/20) 2023 ZAMPMBHC 52 (26 Sept 2023)

Samevatting

DIE HOF SE BEVOEGDHEID OM 'N LIKWIDATEUR AAN TE STEL KRAGTENS ARTIKEL 163 VAN DIE MAATSKAPPYWET 71 VAN 2008

In Berlein v Salisburg Landy (Pty) Ltd ((3330/20) 2023 ZAMPMBHC 52 (26 Sept 2023)) het die hof 'n likwidateur kragtens artikel 163(2)(b) van die Maatskappywet 71 van 2008 aangestel. Die beslissing word gekritiseer eerstens omdat regshulp kragtens artikel 163(2) toegestaan is sonder dat 'n aansoek op grond van artikel 163 voor die hof gedien het. 'n Hof het geen diskresie om regshulp kragtens artikel 163(2) uit te oefen alvorens die gronde in artikel 163(1) bewys is nie. Tweedens het die hof ten spyte van die wye diskresie wat dit ingevolge artikel 163(2) geniet, 'n likwidateur aangestel terwyl daar verskeie alternatiewe en meer gepaste vorms van regshulp tot die hof se beskikking was wat minder drastiese gevolge vir die maatskappy en ander belanghebbendes sou inhou.

Die feite en beslissing in hierdie saak lig sekere probleme en potensiële probleme met betrekking tot die formulering van artikel 163(2)(b) van die wet toe. Artikel 163(2)(b) van die wet wat die hof magtig

om 'n likwidateur aan te stel, word vergelyk met artikel 241(3)(b) van die Kanadese Corporations Act (RSC 1985 c C-44) en artikel 233(2) van die Australiese Corporations Act 2001. Die regsposisie in Engeland word ook oorweeg.

Die gevolgtrekking word gemaak dat alhoewel die regshulp in die laasgenoemde bepalings in die Kanadese en Australiese reg oënskynlik soortgelyk is aan die regshulp wat in artikel 163(2)(b) vervat is, is daar belangrike verskille in die formulering daarvan. Die bewoording van artikel 163(2)(b) van die wet is boonop uit pas met ander bestaande Suid-Afrikaanse regsbeginsels en statutêre bepalings in die volgende opsig: In Suid-Afrika word 'n likwidateur aangestel deur die meester van die hooggeregshof en nie deur 'n hof nie. Kragtens artikel 163(2)(b) kan 'n likwidateur aangestel word wanneer dit vir die hof voorkom dat die betrokke maatskappy insolvent is. Die bewoording van hierdie artikel is problematies, aangesien die hof blykbaar nou die likwidasie van 'n maatskappy kan beveel sonder enige konkrete gronde of bewyse dat die maatskappy insolvent is. Daar word gevolglik geargumenteer dat die hof se vertolking van artikel 163(2)(b) foutief is aangesien die hof nagelaat het om artikel 163(2)(b) saam met die gronde vermeld in artikel 163 te lees. Die hof se bevinding dat blote bewerings van wanbestuur aanduidend is van 'n maatskappy se insolvensie wat 'n bevel kragtens artikel 163(2)(b) regverdig, word ook krities onder die loep geneem. Die outeurs beveel enkele wysigings tot artikel 163(2)(b) aan.

1. Introduction

Section 163 of the Companies Act 71 of 2008 provides relief from oppressive or prejudicial conduct. Based on an application for relief by a shareholder, or a director of a company in terms of section 163(1), the court hearing the matter has the discretion in terms of section 163(2) *(a)-(c)* (see also sub-sections *(d)*–(*l*) for various other orders that may be considered to address the issue at hand) to

> "make any interim or final order it considers fit, including –
>
> (a) an order restraining the conduct complained of;
>
> (b) an order appointing a liquidator, if the company appears to be insolvent;
>
> (c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131(4)*(a)* apply".

Within this context, the court recently handed down judgment in the matter of *Berlein v Salisburg Landy (Pty) Ltd* (3330/20) 2023 ZAMPMBHC 52 (26 Sept 2023) by appointing a liquidator in terms of section 163(2)*(b)* of the act. An evaluation of the facts and judgment of this case is significant as it raises important legal questions about the appointment, role and functions of a liquidator appointed in terms of section 163(2) *(b)* of the act and the nature of relief the court granted based on its factual findings and the applications that were properly placed before the court.

When a company is wound up, a liquidator or liquidators must be nominated in the terms of the applicable legislation and appointed by the master of the high court. Whether a company is solvent or insolvent will determine the specific legislative provisions that will apply to the winding up of the specific company. Item 9(1) of schedule 5 of the act provides that chapter 14 of the Companies Act 61 of 1973 still applies to the winding up and liquidation of companies. However, sections 343, 344, 346 and 348 to 353 of chapter 14 of the Companies Act 61 of 1973 do not apply to the winding up and liquidation of companies unless the application of these provisions is required to give effect to the provisions of part G of chapter 2 of the act which specifically deals with the winding up and liquidation of solvent companies (item 9(2) of schedule 5 of the act). In terms of section 367 of the Companies Act 61 of 1973 a liquidator or liquidators is appointed by the master of the high court (see *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* 2018 (4) SA 71 (SCA) 84 where it was held that the power to appoint a liquidator or liquidators is an exclusive power of the master). Save for section 80(5), the act does not deal specifically with the appointment and power of liquidators: the procedures

dealing with the nomination and appointment of liquidators in the Companies Act 61 of 1973 also apply to solvent companies placed in liquidation. Section 80(5) provides that a liquidator appointed in a voluntary winding up has all the powers provided for in the act and item 9 of schedule 5. Considering the legislative framework dealing with the nomination and appointment of liquidators described above, the power of the court to appoint a liquidator in section 163(2)*(b)* poses important questions that are of both academic and practical significance.

This judgment presents the opportunity to properly evaluate and consider a court's power in terms of section 163(2)*(b)* to appoint a liquidator when it appears that a company is insolvent. This will be done by briefly considering similar provisions in foreign jurisdictions such as Australia, Canada, and England. It will be concluded that the power of a court to appoint a liquidator in terms of section 163(2)*(b)* deviates significantly from the existing legislative process that already provides for the nomination and thereafter the appointment of the liquidator by the master of the high court as provided for in chapter 14 of the Companies Act 61 of 1973. It subsequently creates uncertainty about the exact purpose, powers, functions and duties of a liquidator who is appointed by a court in terms of section 163(2) of the act.

Section 163(2)*(b)* is also problematic in that a liquidator can be appointed on the "apparent insolvency" of a company. The introduction of this ground creates further confusion. Section 163(2)*(b)* appears to state the "apparent insolvency" of a company as a jurisdictional ground for the appointment of a liquidator. The required "apparent insolvency" of a company in terms of section 163(2)*(b)* creates an unnecessary overlap with the jurisdictional grounds in section 163(1), which entitles a shareholder or director to relief in section 163(2). A court's discretion to grant relief in terms of section 163(2) arises only when the jurisdictional grounds in section 163(1) are proven. "[A]pparent insolvency" as described in section 163(2)*(b)* does not alone constitute such a ground. The court's interpretation and application of section 163(2)*(b)* implies that once "apparent insolvency" is proven a court may grant relief without considering the presence of the jurisdictional grounds in section 163(1). Such a reading of section 163(2)*(b)* is not aligned with the context within which the last-mentioned provision appears in section 163 and the interpretation of the section by the courts.

The application of section 163(2)*(b)* to the facts of the case is also problematic as the liquidator was appointed by the court after dismissing an application for the liquidation of the company based on a lack of evidence that the company is insolvent. It will be recommended that legislative intervention is required to amend section 163(2)*(b)* or to remove this form of relief. Although there is to some degree an overlap between the grounds for the winding up and liquidation of the company on "just and equitable" grounds and the jurisdictional grounds in section 163(1) of the act, there are notable differences. Firstly, the "just and equitable" grounds that may justify the liquidation of a company are much wider than the jurisdictional grounds in section 163(1) of the act, and, secondly, the winding up and liquidation of a company is a remedy of last resort. Preference will be given to relief that would avoid the liquidation of a company, where possible (see *MWRK Accountants & Consultants (Pty) Ltd v HLB International* (72514/2018) 2019 ZAGPPHC 630 (15 Nov 2019) par 25 where the court stressed the winding up of a commercially solvent and viable company on just and equitable grounds is a remedy of last resort; see also Delport "Just and equitable liquidation or just and equitable to liquidate" in IV *De Serie Legenda* Developments in Commercial Law. Insolvency Law (2023) 125-138 for an analysis of the winding up of companies on "just and equitable" grounds).

2. The facts

2.1 The first application

In this matter, the court had to adjudicate two applications. The first application was for the winding up and liquidation of the first respondent in terms of sections 346(1*)(c)* and 344*(f)* of the Companies Act 61 of 1973 (par 1). Both the first and second applicants were directors of and shareholders of the first respondent ("the company") (par 1 read with 3). The second applicant was also a creditor of the company. The applicants argued (par 3) that the company was "hopelessly" insolvent because its liabilities exceeded its assets, and that the first respondent was unable to pay its debts. The application was opposed by the company and the second respondent. The second respondent was also a shareholder and director of the company (par 2-3).

2.2 The counter-application

A counter-application was brought by the second respondent against the applicants in terms of which relief was sought in the form of a court order declaring the applicants as delinquent directors in terms of section 162 of the act (par 17).

3. The main legal question(s) before the court

3.1 The legal questions raised in the original or first application

The court had to determine whether the facts alleged in the founding affidavit justify the winding up and liquidation of the first respondent as it was unable to pay its debts in terms of section 344(f) read with section 345 of the Companies Act 61 of 1973 (par 1 and 10), or, in the alternative, apparently on "just and equitable" grounds in terms of section 344(h) (par 7).

3.2 The legal questions raised during the counter-application

In the counter-application, the court had to decide whether the facts alleged and proven by the second respondent justified an order declaring the applicants as delinquent directors (par 17).

4. Judgment

4.1 The original or first application

The court dismissed the applicant's application for the winding up of the company, on the basis that there was no evidence that the company was unable to pay its debts (par 13-14 and 16). There was no proof that the company failed to adhere to a demand in terms of section 344(f) read with section 345 of the Companies Act 61 of 1973 (par 14 and 16). Although the court was provided with a list of the company's assets and liabilities, the court was unable to determine the value of the assets and liabilities of the companies, as the court was not presented with any evidence in respect of the respective value of the company's assets and liabilities (par 14 and 16). Considering the evidence before the court, it dismissed the application on the basis that it was unable to find that the company was insolvent (par 16).

4.2 The counter-application of the second respondent

The court also dismissed the counter-application with no order for costs, save for ordering the appointment of a liquidator in terms of section 163(2)*(b)* for the company

(par 31). The court found that there was no evidence to prove the allegations of misconduct made against the applicants (par 27-28).

4.3 Relief in terms of section 163(2)*(b)* of the Companies Act 71 of 2008

After the dismissal of both the application and the counter-application, the court proceeded to make an order for the appointment of a liquidator for the company in terms of section 163(2)*(b)* (par 29). The court held that such an order could be made when a court "considers it fit" (par 29). The court also held that the company "appears to be insolvent" based on the serious allegations of mismanagement (par 29-30).

5. Order

The application was dismissed with costs, while the counter-application, save for the order appointing a liquidator for the company in terms of section 163(2)*(b)* of the act, was dismissed with no order as to costs.

6. Comment

6.1 The issues

The court's findings concerning the application and the counter-application cannot be faulted, but the appointment of a liquidator in terms of section 163(2)*(b)* deserves further consideration. The legislative power of a court to appoint a liquidator in terms of section 163(2)*(b)* must be

considered against the wording of section 163(1), the court's factual findings, and in the context of chapter 14 of the Companies Act 61 of 1973 read with the act.

6.2 Were the grounds for relief in terms of section 163(2)*(b)* before the court?

Section 163(2)*(b)* of the act empowers a court to appoint a liquidator if a "company appears to be insolvent". The court's order in terms of this section is problematic for several reasons. Neither the first application nor the counter-application was based on section 163. Relief can be granted only after the consideration of a "competent application" in terms of section 163 (see the commentary on s 163 in Delport *et al Henochsberg on the Companies Act 71 of 2008* (service issue 33)). The first application was based on section 344(f) read with section 345 of chapter 14 of the Companies Act 61 of 1973 (par 10 and 12). This application was dismissed because the court could not find any evidence that the company was unable to pay its debts as envisaged in the last-mentioned statutory provisions (par 16), and the counter-application was based on section 162 of the act (par 17). In considering the counter-application the court found that the "allegations of mismanagement" against the applicants justified relief in the form of the appointment of a liquidator, as the company "may" be insolvent (par 30). It is submitted that the reasoning of the court for finding that the company appears to be insolvent does not follow, as this finding was based on allegations of serious mismanagement only. It is also submitted that relief in terms of section 163 cannot be granted on mere allegations of serious mismanagement. It also does not follow that serious mismanagement or allegations serve as an indicator of the insolvency of a company, especially considering that the court found that there was no evidence that the company was unable to pay its debts (par 16 read with 31). It is also interesting that the court based its justification

for granting relief in terms of section 163(2)*(b)* on "serious allegations that the applicants are guilty of misconduct" but that it could not find any "tangible evidence of such misconduct" for purposes of the counter-application in terms of which a delinquency order was sought against the applicants (par 27 and 30).

Relief in terms of section 163(2) may be granted, provided that the jurisdictional grounds in section 163(1) are proven (see *Gent v Du Plessis* (1029/2019) 2020 ZASCA 184 (24 Dec 2020) par 2; see also the discussion on s 163(2) in Delport *et al Henochsberg*). Therefore, it is submitted the court erred by appointing a liquidator merely because the "company appears to be insolvent" without properly considering the presence of the jurisdictional grounds in section 163(1). The court's approach in this matter ignores the jurisdictional grounds in section 163(1) and elevates the wording "if the company appears to be insolvent" to a separate ground for relief. It is submitted that this is an incorrect interpretation of section 163. However, in *Dolphin Management v Belmont Development Company (Pty) Ltd* ((4704/2015) 2015 ZAECGHC 151 (10 Dec 2015) par 19), the court placed a company in business rescue based on the applicant's reliance on section 131(4)*(a)*(i) as independent ground from section 163 despite section 163(2)*(c)* making specific reference to section 131(4)*(a)*(i). (See the commentary on s 163(2) in Delport *et al Henochsberg* for criticism on the approach in the *Dolphin Management* case.)

6.3 The purpose of relief granted in terms of section 163(2)

Understanding the objective of the relief in the form of section 163(2) is essential, since the historical development that underpins the unfair prejudice remedy stresses the preference for remedies and relief that provide a solution to the dispute between the parties and as an alternative to the winding up and liquidation of companies on "just and equitable" grounds (the *MWRK Accountants* case par 25). Statutory forms of the unfair prejudice remedy were introduced to specifically provide for an alternative remedy to the winding up and liquidation of companies as a form of relief in the event of oppressive or unfairly prejudicial conduct. For example, the heading to section 111*bis* of the Companies Act 46 of 1926 specifically read "[a]lternative remedy to winding up in cases of oppression". Although a court had the discretion to grant alternative forms of relief in terms of section 111*bis* of the Companies Act 46 of 1926 it could only have done so if found on the facts of a particular case that oppressive conduct was present and it would be "just and equitable" to wind up the company (see s 111*bis*(2) of the former Companies Act 46 of 1926). Although the court had the power to grant alternative remedies to the winding up of a company in the event of oppressive conduct, a direct relationship between the unfair prejudice remedy and the winding up of companies was maintained. The default position was that the winding up of the company would be ordered unless such an order would be unfairly prejudicial to other members of the company.

Later forms of the statutory unfair prejudice remedy such as section 252 of the Companies Act 61 of 1973 also provided for alternative forms of relief in terms of the remedy but still required that the relief could only be granted once it was proven that it would be "just and equitable" to do so. This approach was criticised as it was argued by some academics that it would be unnecessary to require an applicant to prove that it would be just and equitable to wind up and liquidate a company in addition to proving oppression (Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996 thesis Unisa) 392-393; in the context of s 111*bis* of the Companies Act 46 of 1926, Hurter recommends that the requirement that it must also be just and equitable to wind up the company, must be done away

with). The omission of the requirement that relief may be granted in terms of the statutory unfair prejudice remedy when it is "just and equitable" to do so is noticeable in the drafting of section 163. It is submitted that the significance of this is that it breaks the direct relationship that existed between the unfair prejudice that must be proven in terms of section 163 and the grounds of the liquidation of a company on a "just and equitable" basis. The omission of the "just and equitable" requirement from section 163 balances the interests of stakeholders more evenly and better positions the remedy in section 163 as an alternative remedy to the winding up and liquidation of a company on "just and equitable" grounds and is also aligned with the approach adopted in other jurisdictions such as England, Australia and Canada as discussed below.

Section 347(2) of the Companies Act 61 of 1973 still applies to winding up in terms of the Companies Act 61 of 1973. When an application for the winding up of a company is brought by its shareholders the section requires that consideration must be given to alternative forms of relief. A similar approach is adopted when dealing with the winding-up applications of solvent companies. In *Knipe v Kameelhoek (Pty) Ltd* 2014 (1) SA 52 (FB) par 47 it was held that a solvent company would be wound up as a measure of "last resort only" (see also *Bayly v Knowles* 2010 (4) SA 548 (SCA) par 29 decided in terms of s 252 of the Companies Act 61 of 1973).

Because the court failed to deal with the grounds in section 163(1), the relationship between the grounds for and the purpose of the appointment of a liquidator is unclear. It is also uncertain how an order in terms of section 163(2)*(b)* would remedy the conduct the second respondent complained of, especially when the court did not deal with the jurisdictional grounds in section 163 of the act and that the court could not find that the company was insolvent, creating a definite disconnect between the relief granted in section 163(2) and the grounds for relief in terms of section 163(1). In terms of South African law, a liquidator(s) is nominated by the creditor and/or shareholders of a company and subsequently appointed by the master of the high court (s 367-369 of the Companies Act 61 of 1973). In terms of section 163(2)*(b)* of the act a court may appoint a liquidator "if the company appears to be insolvent". A company is deemed to be insolvent when a company is unable to pay its debts or is commercially insolvent (*Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA)). It is unclear what the function and purpose of a liquidator who is appointed by a court in terms of section 163(2)*(b)* of the act are, especially when the company is not commercially insolvent and there is no finding that any other grounds exist for the winding up of a company. The appointment of a liquidator by the court is also problematic, as it raises questions about whether such an appointed liquidator is subject to the supervision of the master or the court by whom it is appointed. Because a company's liquidator is appointed on the grounds of apparent insolvency in terms of section 163(2)*(b)* of the act, the liquidator and other stakeholders will seemingly be unable to invoke various provisions in chapter 14 of the Companies Act 61 of 1973 such as section 417.

Section 163(2)*(b)* specifically caters for the appointment of a liquidator as one of the forms of relief that could be granted. The wording of the relief in section 163(2)*(b)* appears to entitle a company that "appears to be insolvent" to relief. It is unclear why this form of relief is reserved for companies that appear to be insolvent to the exclusion of solvent companies where in some circumstances such a form would also

be appropriate. The relief in section 163(2)*(b)* creates potential uncertainty about the statutory provisions that would apply when such an order is made. The objective of restricting relief in terms of section 163(2)*(b)* to a company that "appears to be insolvent" is possibly to give effect to the policy consideration

that relief in terms of which viable companies are wound up and liquidated must be granted only as relief of last resort. It is submitted that the wording of relief in section 163(2)*(b)* is unfortunate as it has the effect of unnecessarily limiting a court's discretion and does not take into consideration the practical reality that in some circumstances there are not any alternatives to liquidating a viable and solvent company as a remedy. Further, a court is not restricted to the relief listed in section 163(2), and a company can be liquidated on a just and equitable basis irrespective of whether the company is solvent or insolvent. Because the court was unable to find that the company was unable to pay its debts or that the applicants committed any of the forms of misconduct alleged by the second respondent, the factual findings and allegations made in this case may be indicative of a breakdown of confidence between the shareholders. This raises the question of whether a mere breakdown of confidence or dissatisfaction with how the business and affairs of a company are conducted justifies this type of relief. In *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* (2013 2 All SA 190 (GNP) par 19.5) the court held that mere dissatisfaction with or disapproval of the conduct of a company's affairs does not constitute unfair prejudice which will attract relief in terms of section 163 of the act. However, such a breakdown in confidence or dissatisfaction may in some circumstances justify the winding up of a company on just and equitable grounds, as it does not require that oppressive or unfairly prejudicial conduct be proven.

It strikes one that despite the various options for relief as provided for in section 163(2)*(a)* to *(l)*, the court opted for liquidation, which is generally viewed as a form of relief of last resort. In this respect, it is also odd that this sub-section provides for the appointment of a liquidator but not specifically for a liquidation order that usually precedes the appointment of a liquidator by the master of the high court. When compared to section 163(2)*(c)*, which empowers the court to consider business rescue as a solution, it is notable that this sub-section at least provides for an order commencing business rescue proceedings if the requirements prescribed for business rescue by court order in section 131(4)*(a)* apply. Section 131(5) also empowers a court granting a business rescue order to appoint an interim business rescue practitioner. So, to this extent, the business rescue option is at least more aligned with the main provision in the act providing for business rescue than is the case with the type of order under discussion, *ie* to appoint a liquidator.

6.4 England

When considering similar provisions in other systems, the English equivalent of section 163 of the act is found in sections 994-996 of the Companies Act 2006. In *Fulham Football Club (1987) Ltd v Richards* (2011 EWCA Civ 855 par 56-57; 2012 1 All ER 414) the court made it clear that the last-mentioned statutory remedy serves as an alternative remedy to the winding up and liquidation of a company on "just and equitable" grounds in terms of section 122(1)*(g)* of the Insolvency Act 1986, which is an exceptional remedy that will be granted when no alternative relief is available. (See *Badyal v Badyal* 2018 EWHC 68 (Ch) par 112, where the court held that the orders provided for in sections 994-996 of the Companies Act 2006 are usually more appropriate than the winding up and liquidation of a company, which is a form of relief that will be granted as a remedy of "last resort". Also see *Hawkes v Cuddy* 2007 EWHC 2999 (Ch) par 246-247; 2008 BCC 390.) Following this approach, the statutory unfair prejudice remedy in sections 994 to 996 of the English Companies Act 2006 does not provide for the appointment of a liquidator or the winding up and liquidation of a company as a form of relief. However, it must be pointed out that

provision is made for the winding up of a company on "just and equitable" grounds in section 122(1)*(g)* of the Insolvency Act 1986. This underscores the view that the unfair prejudice remedy serves as an alternative to the winding up of companies on a "just and equitable" basis.

6.5 Australia

The Australian oppression or unfair prejudice remedy is provided for in section 232 read with section 233 of the Corporations Act 2001. The relief listed in section 233 may be granted if the grounds in section 232 are proved. The grounds in section 232 include conduct that is "oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member or members . . ." (see specifically s 232(e)). When one of the grounds in section 232 is proven, a court can grant relief it "considers appropriate" in terms of section 233, which includes an order "that the company be wound up" (see s 233(1)*(a)*). Australian case law specifically stressed that the relief that is granted by a court in terms of the statutory prejudice remedy in terms of sections 232 and 233 of the Australian Corporations Act 2001 must be fair and reasonable (*Spence v Rigging Rentals WA Pty Ltd* 2015 FCA 1158 par 139). The conduct complained of does not have to constitute grounds for the winding up and liquidation of the company on a "just and equitable" basis (see *Spence v Rigging Rentals WA Pty Ltd* 2015 FCA 1158 par 139; *Joint v Stephens* 2008 VSCA 210 par 136). Although an Australian court may grant the winding up of a company on a "just and equitable" basis in terms of section 461(1)(*k*) of the Corporations Act 2001, such a form of relief will be considered only when no alternative and less intrusive forms of relief are available (concerning the appropriateness of the relief that may be granted in terms of s 233 of the Corporations Act 2001 see *Campbell v BackOffice Investments Pty Ltd* 2008 NSWCA 95 par 121; *Fexuto Pty Ltd v Bosnjal Holdings Pty Ltd* (1998) 28 ACSR 688, 742; *Dernacourt Investments (Pty) Ltd, Re* (1990) 20 NSWLR 588, 620; *Martin v Australian Squash Club Pty Ltd* (1996) 14 ACLC 452, 475).

Section 233(2) specifically states that when an order for the winding up of a company is made in terms of section 233 "the provisions of this Act relating to the winding up of companies apply: (a) as if the order were made under section 461; and (b) with such changes as are necessary". Section 461 contains the general grounds for the winding up of a company, which also specifically include if the "affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner that is contrary to the interests of the members as a whole . . .". The cross-referencing between section 233 and section 461 ensures that there is no disconnect between the winding up of a company in terms of section 232 read with 233 and the general grounds for the winding up of a company. Section 472 entrusts the court that grants a winding-up order to appoint a liquidator. What is noteworthy about forms of relief in section 233(2) of the Australian Corporations Act 2001 is that although the provision does not refer to the appointment of a liquidator a court can make an order for the winding up of a company (s 233(1)*(a)*). The legislator makes it clear that such an order for the winding up of a company will be subject to the provisions dealing with the winding up of companies in terms of the Australian Corporations Act 2001 and will have the same effect as when an order for the winding up of a company is made under section 461. Section 461 provides for the general ground upon which a company may be wound up by a court. Amongst other grounds, a company may be wound up in terms of section 461 where the affairs of the company are conducted in

a manner that is oppressive or unfairly prejudicial or when a court believes that it is "just and equitable" to do so (see s 461(f) and (k), respectively).

6.6 Canada

The wording and structure of section 163 of the act are similar to the unfair prejudice remedy in the Canadian Corporations Act. In terms of section 241(3)*(l)* the court may make "an order liquidating and dissolving the corporation". The last-mentioned provision differs from section 163(2)*(b)* in that it expressly states that the purpose of the appointment of the liquidator is to dissolve the corporation. Further, a liquidator is appointed by the court in terms of section 220. Section 241(3)*(b)* of the Canadian Corporations Act (RSC 1985 c C-44) also provides for the appointment of a "receiver or receiver-manager" (*Distribution Fomazz Inc C Farias* 2014 QCCS 150, 2014 238 ACWS (3d) 627, 2014 Carswell Que 364 (QCCS); *Standal's Patents Ltd c 160088 Canada Inc* 1991 RJQ 1996, 1991 Carswell 1837 (QCCS)). A receiver will be appointed only when oppression or unfair prejudicial conduct is proven (Morrit, Bjorkquist and Coleman *The Oppression Remedy* (2004) 6-20 and 6-21). When the poor administration or insolvency of a corporation places the rights of a complainant at risk a court may grant an order appointing a receiver (the *Distribution Fomazz* case par 47). It is a precondition for the appointment of a receiver to demonstrate the board's inability to manage the

corporation (the *Distribution Fomazz* case par 47). The appointment of a receiver is justified only in exceptional circumstances where no other remedy would adequately remedy the oppression suffered by the complainant (the *Distribution Fomazz* case par 49 and 50).

7. Conclusion

The judgment highlighted a few important interpretational issues relating to the appointment of a liquidator in terms of section 163(2)*(b)*. The appointment of a liquidator is only one of the possible forms of relief a court may grant in terms of section 163(2). A court enjoys wide discretion in terms of section 163(2) to grant relief which "it considers fit" (*Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd* 2012 4 All SA 203 (GSJ) par 61). The relief a court grants must rectify the conduct complained of, and therefore its discretion is formulated in wide terms to provide the court with the necessary flexibility to tailor relief for the specific facts and circumstances of each case (*Inhouse Venue Technical Management (Pty) Ltd v Omar; In re: Omar v Inhouse Venue Technical Management (Pty) Ltd* (13902/2015) 2016 ZAWCHC 18 (26 Febr 2016) par 25).

Considering the historical development and the policy considerations that underpin section 163, it is submitted that relief in the form of the appointment of a liquidator must be viewed as a remedy of last resort, especially when other less drastic and intrusive forms of relief are available. Unfortunately, the court did not deal in its judgment with the other possible forms of relief available. The first is that the court dismissed two applications for the winding up of the company on the basis that there was no evidence that the company was insolvent. Despite the court's finding that the company was not insolvent, the court proceeded to appoint a liquidator on the company's apparent insolvency. This relief was granted by the court based on the wording of section 163(2)*(b)*. This was done despite the fact that neither the application nor the counter-application was based on section 163. Further, the court's discretion in terms of section 163(1) arises only when the jurisdictional grounds in section 163(1) of the act are proven. The court did not clearly state how it

arrived at its finding that the jurisdictional grounds in section 163(1) of the act were present. This finding was based merely on "allegations of mismanagement" (par 30). It is respectfully submitted that the court's reasoning on this point is flawed, as mere allegations of mismanagement do not trigger a court's discretion in terms of section 163(2) of the act and, in addition, such allegations further do not necessarily have any bearing on the insolvency of a company.

The relief granted in this case also places the drafting of section 163(2)*(b)* of the act under the magnifying glass. This provision allows a court to appoint a liquidator. This creates a misalignment with the prescribed statutory process for the appointment of a liquidator by the master as provided for in section 367 and section 368 of the Companies Act 61 of 1973. Entrusting the court in terms of section 163(2) of the act with the power to appoint a liquidator is a deviation from the statutory procedure for the nomination of a liquidator(s) by creditors and/or shareholders and the subsequent appointment of such a liquidator by the master. Because the court directly appoints a liquidator in terms of section 163(2)*(b)* there is uncertainty on how and on what grounds such a liquidator will be nominated and appointed. Since section 163(2)*(b)* does not contain or refer to a provision similar to section 80(5) expressly stipulating the powers of a liquidator in the event of voluntary winding up, it is uncertain what the role, powers and functions of a liquidator who is appointed in terms of section 163(2)*(b)* are. It is strange that although section 163(2)*(b)* directly refers to the court's power to appoint a liquidator, it does not expressly state whether such an appointment is made after the court made a winding-up order in terms of section 163. It may be argued that the making of a winding-up order by the court before the appointment of a liquidator in terms of section 163(2)*(b)* is implied. A court is not limited or restricted to the relief mentioned in section 163(2), as a "court may make any interim or final order it considers fit, including" the relief specifically listed. Further, the court in the *Berlein* case granted the appointment of a liquidator in terms of section 163(2)*(b)* on the apparent insolvency of the company par 29-30. Apparent insolvency is not a ground for the winding up of a company under the Companies Act 61 of 1973, which excludes the last-mentioned act as the basis of the powers and functions of a liquidator who is appointed by the court in terms of section 163(2)*(b)* of the act. It is submitted that this section should be revisited by the legislature, which should either align it with the liquidation procedure or rather replace the term "liquidator" with a kind of special statutory curator with specific statutory powers and duties, including *locus standi* to apply for the liquidation or business rescue of the company. Although the statutory unfair prejudice remedy in foreign jurisdictions such as Australia and Canada empowers a court to grant the winding up of a company, the wording of such relief makes it clear that its purpose is to dissolve the company, which will lead to its eventual deregistration. The appointment of a liquidator is also done in terms of the provisions of the applicable legislation and is not left to the court presiding over the matter.