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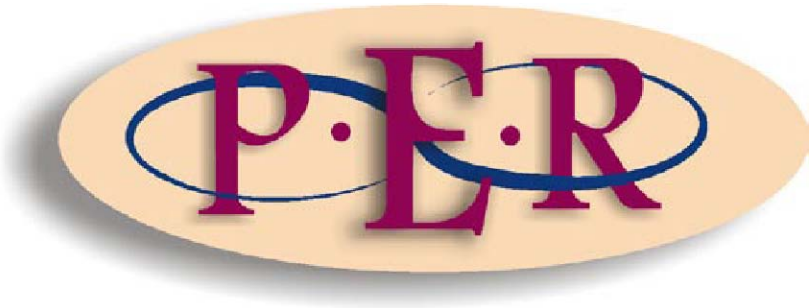

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1 Introduction

Peel v Hamon J&C Engineering (Pty) Ltd[1] (*Peel*) is the second reported judgment to deal with the remedy provided for in section 163 (the oppression remedy) of the *Companies Act* 71 of 2008 (the Act). The Court was confronted with a complex and unique set of facts that raised some important questions regarding the application of section 163 of the Act and the inherent requirements that need to be satisfied in order to entitle applicants to relief in terms this section.

Although Moshidi J dealt in detail with the provisions of section 163 (he even sought assistance from section 232 of the Australian *Corporations Act* 50 of 2001 and section 241 of the Canada *Business Corporations Act* RSC 1985 c C-44), with respect, we do not agree with his finding that the applicants *in casu* proved that a result had manifested and that the result was oppressive or unfairly prejudicial to them, or that the result unfairly disregarded their interests, as required by section 163(1) of the Act. We agree with the respondents that "the applicants [had] failed to bring themselves within the requirements of the section"[2] and we disagree with the Court "that the applicants [had] succeeded to prove on a balance of probabilities that they ... [were] entitled to the relief".[3]

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1 *Peel v Hamon J&C Engineering (Pty) Ltd* 2013 2 SA 331 (GSJ) (*Peel*).

2 *Peel* para [27].

3 *Peel* para [70].

2 The facts

The dispute between the applicants and respondents arose from the discovery, after the formation of a joint venture company incorporated and registered as Hamon J&C Engineering (Pty) Ltd (Hamon J&C; the first respondent), of certain transactions concluded before the formation of Hamon J&C.

The formation of Hamon J&C resulted from a sale and transfer agreement between the applicants (all of whom were shareholders of J&C Engineering (Pty) Ltd (J&C)) and Hamon South Africa (Pty) Ltd (Hamon SA; the second respondent), concluded during October 2010,[4] effective 1 October 2010 (para 12). The sale and transfer agreement between the applicants and Hamon SA entailed that the business of J&C would be transferred to Hamon J&C, which was not yet incorporated at that stage. In exchange for the transfer of the business, 7 000 ordinary shares in Hamon J&C would be issued to Peel Jnr (the first applicant) and/or other members of the Peel Family, as well as Pandela (the third applicant), and 7 000 ordinary shares to Peel Snr (the second applicant).[5] The total value of the issue would be R14 million.[6] In exchange for 3 500 ordinary shares in Hamon J&C, Hamon SA would transfer assets to Hamon J&C, including the Hamon trade name and trademarks, as well as associated business connections. Hamon SA further agreed to purchase the 7 000 ordinary shares in Hamon J&C that would be issued to the second applicant. The result of the implementation of the sale and transfer agreement was that Hamon SA held 10 500 ordinary shares in Hamon J&C, while the balance of 7 000 ordinary shares was held by the first, third and fourth applicants.[7]

The transactions concluded before the formation of Hamon J&C that gave rise to the dispute between the applicants and respondents are subsequently discussed.

On 29 July 2010 the holding company of Hamon SA, Hamon & Cie (International SA) (Hamon International; the third respondent) sold 26% of its shares in Hamon SA to

4 *Peel* para [9].
5 *Peel* para [13], read with para [9].
6 *Peel* para [13].
7 *Peel* para [14].

two of Hamon SA's employees, November and Mangwana.[8] The effect of the sale of shares by Hamon International was that November and Mangwana each held 13% of Hamon SA's shares. The purpose of this sale of shares was to improve Hamon SA's empowerment status in terms of the *Black Economic Empowerment Act* 53 of 2003 (BEE status). The agreements for the sale of shares of Hamon International with November and Mangwana respectively provided Hamon International with an option to repurchase the shares at any time, on simple request.[9] The selling of the shares to November and Mangwana took place before the formation of the joint venture company and accordingly, before the applicants became shareholders of Hamon J&C. Hamon International admitted to terminating these agreements for the sale of shares during December 2010.[10] According to the applicants the shares were simply taken back by Hamon International on 7 January 2011.[11] Mangwana reported this issue to the Department of Trade and Industry (DTI) on 19 January 2011, however, the matter was still under investigation at the time this application was argued.[12] The taking back of the shares took place after the formation of the joint venture company and accordingly, after the applicants became shareholders of Hamon J&C.

The applicants alleged, for several reasons, that Hamon International's conduct constituted simulated transactions to artificially improve Hamon SA's BEE status,[13] the respondents admitted that it was an improper BEE transaction, and the Court held that it "clearly was not a genuine transaction".[14]

Because a substantial part of Hamon J&C's business was sourced from organs of state, public entities and other large companies who were concerned about their service providers' BEE status,[15] the applicants contended that the improper BEE

8 *Pee*/ para [17].
9 *Pee*/ para [19.2].
10 *Pee*/ para [29].
11 *Pee*/ para [19.13].
12 *Pee*/ para [20].
13 *Pee*/ para [16], read with para [19].
14 *Pee*/ para [58].
15 *Pee*/ paras [21], [57].

transaction had the potential of destroying their business prospects and, accordingly, they were exposed to serious business risks for the future.[16]

Another contention was that the improper BEE transaction was a material matter that was not disclosed to the applicants before the business of J&C was transferred to Hamon J&C, which non-disclosure disregarded their interests.[17] However, it is unclear how the improper BEE transaction could be disclosed to the applicants before the business of J&C was transferred to Hamon J&C, as the agreements for the sale of shares were terminated, and the shares taken back by Hamon International, only after the business of J&C had been transferred to Hamon J&C.

The applicants' attitude was that the improper BEE transaction was so serious in nature that they simply could not be associated with Hamon SA and Hamon International.[18] They argued that the improper BEE transaction, along with the fact that Hamon SA and Hamon International did not take the appropriate measures to remedy the conduct, was oppressive.[19] Accordingly, the overarching relief sought by the applicants was to sever all ties with Hamon SA and Hamon International by exercising the oppression remedy,[20] and asking the Court to grant the following:

> ... an order directing an exchange of shares between the second applicant and Hamon SA as envisaged in sec 163(2)(e); and/or directing the restoration of Hamon SA by the applicant of a part, alternatively, the whole of the consideration that Hamon SA paid for the shares, with conditions as envisaged in sec 163(2)(g); and/or varying or setting aside the sale of shares transaction between Hamon SA, the second applicant and Hamon J&C and compensating Hamon J&C and/or the second applicant, or any other of the applicants as envisaged in sec 163(2)(h); and that Hamon SA pay compensation to the second applicant and/or Hamon J&C, as envisaged in section 163(2)(j) ...[21]

16 *Peel* paras [22], [46].
17 *Peel* paras [39], [46].
18 *Peel* paras [16], [22].
19 *Peel* para [55].
20 *Peel* paras [23], [46].
21 *Peel* para [23].

3 The judgment

The Court made three findings on the facts, relating to the requirements contained in section 163(1)(a), on which it based its judgment. It found that it was the intention of the parties "that J&C Engineering should benefit from the use of the "Hamon" name as well as its alleged goodwill" and, accordingly, that the improper BEE transaction caused the applicants to be prejudiced.[22] It found the fact that the improper BEE transaction was not remedied by the respondents to be oppressive to the applicants,[23] as the credibility of a company such as Hamon J&C's BEE status was vital to ensure ongoing business.[24] Finally, the Court found the non-disclosure of the improper BEE transaction to be unfairly prejudicial to the applicants and to unfairly disregard their interests.[25] Although the Court found that "[t]he applicants were ... exposed to serious business risks especially if the DTI eventually [found] that the whole BEE issue was a sham" it did not indicate whether this exposure amounted to unfair prejudice, oppression, or a disregard of the applicants' interests.[26] In other words, the Court's finding that the applicants were exposed to serious business risks was not indicated to satisfy any specific result as required in section 163(1)(a).

4 Comments

4.1 Introduction

In casu the Court held that "[a] careful consideration of the interpretation given by our courts to the provisions of sec 252 of the old Companies Act and the provisions in sec 163 of the new Companies Act ... shows a continuing intention by the legislature to broaden relief in these provisions, rather than to limit them".[27] It based its finding on the fact that the Act provides for a new ground on which an applicant can rely, namely conduct that unfairly disregards the interests of the applicant; the

22 *Peel* para [59].
23 *Peel* paras [55], [59].
24 *Peel* para [57].
25 *Peel* paras [55], [59].
26 *Peel* paras [55], [62].
27 *Peel* para [52]; see also *Grancy (Pty) Ltd v Manala* 2013 3 All SA 111 (SCA) (*Grancy*) para [26].

fact that *locus standi* is extended to the directors of the company; the fact that relief can now be sought regarding the conduct of a person related to the company; as well as the fact that section 163 now contains a wide range of relief that the Court can grant.[28]

In our opinion, it is important to draw a distinction between the application of section 163 and the orders that the Court can make to provide relief in terms of subsection (2). Section 163 applies where an applicant can prove that the specified statutory criteria provided for in subsection (1) have been satisfied, while subsection (2) contains an open-ended list of orders that the Court can make to provide relief for a successful applicant. Clearly, the application of section 163 of the Act is wider than the application of section 252 of the previous Act. Accordingly, we agree with the Court that *locus standi* is extended to the directors of the company and that relief can now be sought regarding the conduct of a person related to the company. We also agree that subsection (2) contains a wide range of orders that the Court can make to provide relief for a successful applicant. In fact, the relief that can be provided in terms of section 163(2) seems to be wider than the relief that could have been provided in terms of section 252. For example, in terms of section 163(2)(f)(i) the Court can make "an order ... appointing directors in place of or in addition to all or any of the directors then in office". This power was apparently excluded under section 252 of the previous Act.[29] However, it should be noted that the relief that could be provided in terms of section 252(3) of the previous Act was, just like the list of orders provided for in section 163(2) of the Act, open-ended. Accordingly, the fact that some of the orders listed in section 163(2) of the Act (for example, the order listed in par (f)(i)) effectively extend the powers of the Court to grant relief in terms of the oppression remedy does not mean that none of the orders listed in subsection (2) could be made in terms of section 252 of the previous Act. More importantly, although we agree that "[a] careful consideration of the interpretation given by our courts to the provisions of sec 252 of the old Companies Act and the provisions in sec 163 of the new Companies Act ... shows a continuing

28 *Peel* para [53].

29 See Delport *et al Henochsberg* 572, with reference to *Ex parte Avondzon Trust (Edms) Bpk* 1968 1 SA 340 (T) 342-343.

intention by the legislature to broaden relief in these provisions, rather than to limit them",[30] we deem it necessary to stress the fact that this does not mean that the oppression remedy is available to applicants in circumstances where the requirements of section 163(1) are not satisfied. The oppression remedy is available only if an act or omission by a company or a person related to the company has had a result that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a shareholder or a director of the company; or if the carrying on of the business of the company, or the exercising of the powers of a director or a prescribed officer of the company is oppressive or unfairly prejudicial to a shareholder or a director of the company. Relief cannot be granted in terms of subsection (2) where the requirements of subsection (1) – the specified statutory criteria - have not been satisfied.

In *Louw v Nel*[31] (*Louw*), regarding the application of section 252 of the previous Act, the Court held that "[a]n applicant ... must establish the following: that the particular act or omission has been committed, or that the affairs of the company are being conducted in the manner alleged and that such act or omission or conduct of the company's affairs is unfairly prejudicial, unjust or inequitable to him or some part of the members of the company; the nature of the relief that must be granted to bring to an end the matters complained of; and that it is just and equitable that such relief be granted" and that "the court's jurisdiction to make an order does not arise until the specified statutory criteria have been satisfied".[32] Similarly, in *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd*[33] (*Count Gotthard*), regarding the application of section 163 of the Act, the Court held that "the Applicant would be entitled to relief in terms of s 163 if he can prove ... (1) any act or omission on the part of ... [the respondent] ... (2) which had a result or consequence ... (3) which was oppressive, unfairly prejudicial or unfairly disregarded the interests of the Applicant".[34] These requirements, as well as the requirement that the applicant must

30 *Peel* para [52].
31 *Louw v Nel* 2011 2 SA 172 (SCA) (*Louw*).
32 *Louw* paar [23].
33 *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* 2013 2 All SA 190 (GNP) (*Count Gotthard*).
34 *Count Gotthard* para [17.7].

be a shareholder or a director of the company, as envisaged in subsection (1), are the specified statutory criteria that must be satisfied.

In our opinion the Court erred in relying on the fact that *locus standi* is extended to the directors of a company and that relief can now be sought regarding the conduct of a person related to the company, as well as the fact that relief that can be provided in terms of section 163(2) seems to be wider than the relief that could have been provided in terms of section 252, to justify such a broad approach to the application of the oppression remedy, that even non-compliance with some of the specified statutory criteria did not preclude the applicants from being successful in their application in terms of section 163.

The statutory criteria specified in section 163, as well as the question of whether the criteria was satisfied in *Peel*, are subsequently discussed.

4.2 Brief analysis of section 163

A shareholder or a director of a company has to prove that an act or omission by his or her company, or a person related to his or her company, has had a result that is oppressive or unfairly prejudicial to him or her, or a result that unfairly disregards his or her interests (section 163(1)(a)). Alternatively, the shareholder or director has to prove that the carrying on of the business of his or her company (section 163(1)(b)), or the exercising of the powers of a director or a prescribed officer of his or her company (section 163(1)(c)), is oppressive or unfairly prejudicial to him or her, or unfairly disregards his or her interests. It is interesting to note that, unlike an act or omission that must have had a result that unfairly disregards the applicant's interests, the carrying on of the business of the company, or the exercising of the powers of a director or a prescribed officer, need not have had such a result, but it must be conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the applicant's interests.

4.3 Applicant

It is clear from the wording of section 163(1) that only a shareholder or a director of a company has *locus standi* to exercise the oppression remedy.

Some authors contend that the wording of section 163(1) implies that an applicant may exercise the oppression remedy if the conduct complained of occurred before he or she became a shareholder or a director of the company.[35] While we agree that section 163(1) does not specifically provide that an applicant has to be a shareholder or a director of the company when the conduct occurs, we submit that it is not settled that this section should be interpreted to provide that the oppression remedy may be exercised by an applicant who was not yet a shareholder or a director of the company when the conduct occurred. In fact, in our opinion section 163(1) should rather be interpreted to limit *locus standi* to shareholders or directors who have been such at the time the conduct complained of occurred. Such an interpretation should ensure that the floodgates are not opened for applications in terms of section 163 and that the section itself is not used as a means of oppression. In other words, we are of the opinion that the Court's jurisdiction in terms of section 163 should be controlled, just as the Court's jurisdiction in terms of section 252 of the previous Act had to "be carefully controlled in order to prevent the section from itself being used as a means of oppression".[36] Further, "under s 252(3) [of the previous Act] 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 interests of the company itself";[37] and we are of the opinion that the same applies to section 163 of the Act.

So, while we agree that "the provisions in sec 163 of the new Companies Act ... [show] a continuing intention by the legislature to broaden relief in these provisions, rather than to limit them",[38] as stated above, this does not mean that *locus standi*

35 Cassim *et al Company Law* 759 n 11.

36 Blackman, Jooste and Everingham *Companies Act* 9-4, quoted by the Court in *Louw* para [31] and *Grancy* para [32].

37 *Bayly v Knowles* 2010 4 SA 548 (SCA) para [25]; see also the reference to this principle in *Peel* para [44].

38 *Peel* para [52]; see also *Grancy* para [26].

should be extended further than it has already been extended by section 163, in comparison with section 252 of the previous Act.

Although, *prima facie*, it may seem as though *Peel* is by implication authority for the contention that a shareholder or a director who wants to exercise the oppression remedy need not have been a shareholder or a director at the time of the conduct as, *in casu*, the applicants were never shareholders or directors of Hamon SA or Hamon International, and they were neither shareholders, nor directors of Hamon J&C when Hamon International sold 26 percent of its shares in Hamon SA to November and Mangwana but, nevertheless, succeeded in their application in terms of section 163. It should be noted, however, that the conduct complained of had not been completed by the time the joint venture company was incorporated and the applicants became shareholders of Hamon J&C (during October 2010), as the agreements for the sale of shares were terminated during December 2010 and the shares were taken back by Hamon International on 7 January 2011. In *Count Gotthard* the Court agreed that in order to be able to exercise the oppression remedy "the act must be completed".[39] Therefore, in our opinion, the applicants were shareholders when the conduct occurred. Accordingly, in our opinion *Peel* should not be regarded as authority for the contention that a shareholder or a director who wants to exercise the oppression remedy need not have been a shareholder or a director of the company at the time of the conduct.

Regarding section 252 of the previous Act, in *Garden Province Investment v Aleph (Pty) Ltd*[40] (*Aleph*) the Court held that an applicant had to prove that the conduct, as well as the effect of the conduct, was unfairly prejudicial to him or her. In other words, under section 252 an applicant had to be a member of the company at the time of the conduct.

Accordingly, we submit that it is still an open question whether the oppression remedy can be exercised by an applicant who was not a shareholder or a director of the company at the time of the conduct.

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39 *Count Gotthard* para [17.6].
40 *Garden Province Investment v Aleph (Pty) Ltd* 1979 2 SA 525 (D) (*Aleph*) 531.

4.4 Conduct

The conduct complained of *in casu* was that a person related to Hamon J&C, namely Hamon International, conducted an improper BEE transaction, that this transaction was not disclosed to the applicants before the business of J&C was transferred to Hamon J&C, and that the conduct was not remedied by the respondents.

As stated earlier, the applicants contended that the improper BEE transaction had the potential of destroying their business prospects and, accordingly, that they had been exposed to serious business risks for the future.[41] Further, they contended that the improper BEE transaction was a material matter that was not disclosed to them before the business of J&C was transferred to Hamon J&C, which non-disclosure disregarded their interests.[42]

While the improper BEE transaction, together with the fact that it was not remedied, seems to constitute conduct for the purpose of section 163(1), the applicants' contention that the improper BEE transaction was not disclosed to them prior to the transfer of the business of J&C to Hamon J&C makes it seem as though they wanted to rely on a material misrepresentation as the basis for the contract (the sale and transfer agreement) to be rescinded. The fact that the Court granted the relief as prayed for in the notice of motion, by ordering the restitution of shares, the cancellation of all licensing and shareholder agreements, and the resignation of all the directors appointed by Hamon SA to the board of directors of the joint venture company, and that the name of the joint venture company be changed to J&C Engineering (Pty) Ltd, further makes it seem as though the applicants wanted, and the Court granted, *restitutio in integrum*. It should be noted that the respondents also argued that "[t]he real complaint of the applicants ... [was] that they ... [believed] they ha[d] done a poor commercial deal by contracting with the second and third respondents".[43] Accordingly, in our opinion it would have been more appropriate for the applicants to have made use of a remedy in terms of the law of contract than to have made use of the oppression remedy. As indicated below, we

41 *Peel* paras [22], [46].
42 *Peel* paras [39], [46].
43 *Peel* para [32].

are of the opinion that the applicants should not have been successful in their application in terms of section 163.

4.5 Result

Section 252(1) of the previous Act did not refer to the term "result", as is the case in section 163(1)(*a*) of the Act. However, regarding section 252 of the previous Act, in *Aleph*[44] the Court held that an applicant had to prove that the conduct complained of, as well as the effect (the result) of the conduct, was unfairly prejudicial to him or her. Accordingly, the result-requirement of section 163(1) is not an additional requirement. It should also be noted that neither para (b) nor para (c) specifically refers to the term "result". In our opinion, the purpose of the reference to the term "result" in section 163(1)(a) is to highlight the fact that the company's conduct must have already had a detrimental effect on the applicant when an application is made to Court. The result of the conduct complained of should have impacted on the interests of the applicant. In *Kudumane Investment Holdings Ltd v Northern Cape Manganese Company (Pty) Ltd*[45] (*Kudumane*) it was held that the concept of interests is much wider than the rights of an applicant. A shareholder's "interests" flow from the rights of a patrimonial nature which are attached to the share held by that shareholder.[46] The Court in *Count Gotthard*[47] appears to have given the word "interests" a wider meaning, stating that "interests" do not have to flow from the rights stipulated in the Memorandum of Incorporation but may also flow from an understanding that forms the basis of their relationship.

While we agree with the Court in *Kudumane* that "[s]ection 163 does not require all possible results to have eventuated" and that "[o]nly one result – 'a result' – is required which meets the requirements of the section",[48] we do not agree that lack of confidence and uncertainty is a result that satisfies the requirements of section

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44 *Aleph* 531.
45 *Kudumane Investment Holdings Ltd v Northern Cape Manganese Company (Pty) Ltd* 2012 4 All SA 203 (GSJ) (*Kudumane*) para [58].
46 *Utopia Vakansie-Oorde Bpk v Du Plessis* 1974 3 SA 148 (A) 181.
47 *Count Gotthard* para [17.4].
48 *Kudumane* para [55].

163(1).[49] Similarly, we do not agree with the Court in *Peel* that "a serious business risk" is a result that satisfies the requirements of section 163(1). Moreover, the Court held that "[t]he applicants were and are exposed to serious business risks especially if the DTI eventually [finds] that the whole BEE issue was a sham".[50] It seems as though the Court did not find that the applicants were exposed to a serious business risk, but that they would be exposed to a serious business risk if the DTI eventually found that the BEE transaction was improper. As stated earlier, the Court also did not specifically indicate that this exposure constituted prejudice, oppression, or a disregard of the applicants' interests.[51] The Court's finding implies that not only is a serious business risk a result that satisfies the requirements of section 163, but also that the same is true for the mere possibility of a serious business risk.

We submit that uncertainty whether a specific event may materialise or not cannot be regarded as a result which satisfies the requirements of section 163(1)(a). A risk is not an eventuality; it implies that something may or may not happen. Claiming that a risk is serious does not change the fact that something still may or may not happen. The possibility of a risk is removed even further from an eventuality. *In casu*, the Court effectively held that the applicants may or may not lose business in the future if the DTI found that the BEE transaction was improper, which it may or may not do. So, even if the DTI finds that the BEE transaction was improper, it is still possible for the applicants not to lose any business.

4.6 Detriment

If uncertainty is held to be enough to satisfy the result-requirement of section 163(1), by implication an applicant need not prove oppression, unfair prejudice, or any unfair disregard of his or her interests as required by section 163(1) either, as potential oppression, potential unfair prejudice, or any potential unfair disregard of his or her interests will suffice. Clearly, this is what happened in *Peel,* where the Court found that the applicants had a reasonable expectation to profit financially from their association with the reputable trade name and marks of Hamon SA and

49 See also Beukes and Swart 2012 *SA Merc LJ* 470.
50 *Peel* para [55].
51 See *Peel* paras [55], [62].

Hamon International, but because of the improper BEE transaction this expectation was destroyed and, accordingly, the applicants were prejudiced.[52]

It is clear from the wording of section 163(1) that an applicant has to prove that the result of the conduct complained of is oppressive or unfairly prejudicial to him or her, or that the result of the conduct unfairly disregards his or her interests. Further, this detriment has to exist when an applicant applies to Court. *In casu*, the applicants failed to prove that there was any oppression, unfair prejudice, or any unfair disregard of their interests at the time of the application. Accordingly, in our opinion the application in terms of section 163, as well as the Court's finding that the applicants were prejudiced by the improper BEE transaction, and that the failure to remedy the conduct was oppressive toward them, were premature.

Another important issue that should be kept in mind is that an applicant must experience detriment in his or her capacity as a shareholder or director of the company. In *Count Gotthard* the Court held that conduct "must result in unfair prejudice to [the applicant] in his capacity as a shareholder".[53] In *Peel*, even if the risk would materialise, this result would directly affect the interests of Hamon J&C, but only indirectly those of the applicants. As "[s]ection 163 protects the interests of a shareholder or director ... [while] s 165 protects the legal interests of the company",[54] an application in terms of section 165 of the Act to protect the interests of Hamon J&C would have been more suitable under the circumstances.

5 Conclusion

As stated earlier, in our opinion *Peel* should not be regarded as authority for the contention that a shareholder or a director who wants to exercise the oppression remedy need not have been a shareholder or a director of the company at the time of the conduct, as the conduct complained of *in casu* had not been completed by the time the joint venture company was incorporated and, accordingly, the applicants were shareholders of Hamon J&C when the conduct occurred.

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52 See *Peel* para [59].
53 *Count Gotthard* para [17.6].
54 See Beukes and Swart 2012 *SA Merc LJ* 472.

If section 163(1) of the Act had not extended its application by incorporating the conduct of "a related person", the applicants would not have been able to prove that the conduct-requirement had been satisfied, as it was not an act or omission of Hamon J&C that resulted in the applicants experiencing oppression or unfair prejudice, but the act by the holding company of Hamon SA, Hamon International, of selling 26 percent of its shares in Hamon SA to November and Mangwana and then terminating these agreements for the sale of shares. Thus, *Peel* is another example of how the conduct of a person related to a company can expose the company to an application in terms of section 163 (see also *Kudumane*) and how important it is for a company in a group to assess how the conduct of other companies in the group will impact on it.

We submit that two of the requirements of section 163(1) had not been satisfied in *Peel*, namely the result-requirement and the detriment-requirement.

As stated earlier, we are of the opinion that uncertainty that there will be a result is not a result and, accordingly, that the Court incorrectly found the applicants to have proven that the result-requirement of section 163(1) had been satisfied. It should be noted, however, that we do not question the fact that the oppression remedy can be utilised to ensure that an applicant is not exposed to "further risks", as was the situation in *Grancy*.[55] However, at least "a risk" must have materialised in order to satisfy the result-requirement of section 163(1). As stated earlier, we agree with the Court in *Kudumane* that "[s]ection 163 does not require all possible results to have eventuated" and that "[o]nly one result – ;a result; – is required which meets the requirements of the section".[56]

As the result-requirement of section 163(1) was effectively ignored, the applicants did not have to prove oppression, unfair prejudice, or an unfair disregard of their interests. Accordingly, the unproven contention that their expectation to profit financially from their association with Hamon SA and Hamon International had been

55 See *Grancy* para [15].
56 *Kudumane* para [55].

destroyed was enough to convince the Court that the detriment-requirement of section 163(1) had been satisfied.

Had the Court not allowed the applicants to rely on section 163, they would not have been without remedy. As indicated earlier, the dispute between the parties could and should have been resolved by making use of a remedy in terms of the law of contract. The applicants could have been provided relief by the Court granting *restitutio in integrum* which, as indicated earlier, the applicants seem to have wanted and the Court seems to have granted. However, even where an applicant has no other remedy section 163 should not be extended beyond its statutorily intended reach.

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LIST OF ABBREVIATIONS

BEE	Black Economic Empowerment
DTI	Department of Trade and Industry
SA Merc LJ	South African Mercantile Law Journal