

PRETORIA

Respondent

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an application in terms of Rule 30(1.) The second issue relates to a striking out application launched by the Respondent. It sought to strike out a number of paragraphs from Applicant's Replying Affidavit. Although the Heads of Argument for Respondent were prepared by Advocate J E Smit, Advocate Terblanche argued the matter. He informed the Court that Respondent was not persisting with the striking out application. The hearing then continued on the merits.

[2] The respondent is a property development and investment company which commenced business in 2007. It was formed for the purpose of developing leisure properties and resorts throughout South Africa.

[4] In order to finance its operations, the respondent concluded a loan agreement with applicant in terms of which the applicant would loan it the sum of R6 000 000,00 over a period of 24 months, at R250 000,00 per month. (The applicant was formed, with the agreement of the respondent, as a special purpose vehicle by Vuwa Investments (Pty) Ltd for the purposes of this transaction.)

[5] A shareholders' agreement was concluded on 21 November 2007 in Pretoria.

[7] The shareholders' agreement provides, *inter alia* as follows:

"5.2 It is recorded that the initial shareholders have, prior to the entering into of this agreement formed an alliance ("the alliance") to seek funds for the business of the Company from outside sources but -

5.2.1 It is recorded that Vuwa has been issued shares subject to it

*making a loan to the company in an amount of R6 000 000 (six million rands) ("Vuwa loan")*

*5.2.1.1 Vuwa will make the loan contemplated in 5.2.1 to the Company by way of 24 (twenty four) equal monthly instalments in an amount of R250 000 (two hundred and fifty thousand rands) into the trust account of Veneziano Incorporated, Standard Bank Castle Walk, Account Number: 411373749 or such other bank account as nominated by the Board of Vuwa in writing;*

*5.2.1.2 the first instalment of the monies due as contemplated in clause 5.2.1.1 will be paid upon signature of this agreement..."*

It is to be noted that the applicant is referred to as "Vuwa" in the shareholders' agreement.

- [7] The Vuwa loan would only be repayable by respondent once the applicant successfully obtained additional loans for the Respondent totalling R200 000 000,00 (two hundred million rands) over the 24 month period.
- [8] From November 2007 to December 2008, fourteen loans, each in the sum of R250 000,00 (equalling R3,5 million) were made to the respondent by the applicant.

[9] Applicant alleges that in order to be able to raise the sum of R200 million it was envisaged by the parties that the respondent would, by the end of April 2008, be issued:

9.1 with shares amounting to 15% (fifteen percent) of the ordinary issued share capital of Acc-Ross Holdings Limited ("Acc-Ross"); and

9.2 with derivative instruments equating to 45% (forty five percent) of the issued ordinary share capital of Acc-Ross.

[10] The Shareholders' Agreement ("SHA") is preceded by what I call for present purposes a 'cover sheet' which refers to three documents, namely, a "Shareholders Agreement", a "Call Option Agreement" ("COA") and a "Letter".

[11] The SHA was entered into by the initial shareholders who are defined in the SHA as the applicant (referred to in the SHA as "Vuwa"); Before the Wind Investments 300 (Pty) Ltd (referred to in the SHA as "Quattro") and Blue Nightingale Trading 707 (Pty) Ltd.

[12] The SHA relates to these three entities acquiring shares in the respondent.

[13] The COA is between a trust called the Quattro Trust (a different entity from the company referred to in the Shareholders Agreement as "Quattro") and the respondent in relation to an option to purchase by respondent of certain Call Option Shares at a specified call price in Acc-Ross. The Option period was eight months from date of signing of the COA. The COA was signed by Quattro's

representative as grantor on 21 August 2007. The Respondent's representative (as grantee) signed on an unknown date as the space for the day and month is blank save that the year has been typed in as 2007.

- [14] The letter is a letter dated 21 November 2007 on the letterhead of Jansk International Limited ("Jansk") with its registered office listed as being in the British Virgin Islands. The letter, which is addressed to the respondent, states *inter alia*:

*"Re: Proposed Structuring.*

*"Dear Sirs*

*... .*

*We further wish to confirm the proposed transfer (subject to the conclusion of successful negotiations and any required regulatory approvals) to Ukwanda of unencumbered physical shares amounting to 15% of the issued ordinary share capital of Acc-Ross Holdings Limited and unencumbered derivative instruments equating control over a further 45% of the issued ordinary share capital of Acc-Ross Holdings, i.e. the agreement will become effective immediately following such transfer."*

*"We endeavour to complete the proposed agreements for the transfers as referred to above by the end of April 2008.*

*... .*

*[Signed] Jac de Beer - Authorised Representative".*

[15] Applicant says respondent fails or refuses to repay the loan hence the 1<sup>st</sup> ground for the winding up of respondent, i.e. the latter's inability to pay its debts.

[16] The applicant says it is not only a shareholder in the respondent (as per the SHA) but also a creditor of the respondent for the R3,5 million it has loaned it in accordance with the SHA and more particularly in terms of clause 5.2.1 thereof (*supra*).

[17] Respondent denies or disputes that the amount of R3,5 million advanced thus far by applicant is still a loan. It refers to clause 5.2.6 of the SHA where it is stated that the applicant would procure an amount of not less than R200 million for the respondent, failing which the monies loaned as contemplated in clause 5.2.1. and 5.2.2 would be "written off and or donated " to the respondent as per clause 5.2.7 of the SHA.

[18] It is to be noted that the Call Option Agreement was signed some 3 months before the SHA was signed and the letter by Jansk was furnished.

[19] Applicant's Counsel says in his written Heads of Arguments that the COA (between the Quattro Trust and the respondent) was concluded to give effect to the transaction referred to in the letter and that these documents must be read together with the SHA. Respondent's Counsel disagreed.

[20] The applicant says its investment in the respondent was made on condition that

the Acc-Ross transaction took place and on the representation that it would take place. The representation, which was false, was material and induced the applicant in advancing the loan to the respondent. The loan instalments were advanced prior to the expected transaction and in anticipation of the fulfilment of the Acc-Ross transaction and in order to finance the respondent's interim activities.

[21] According to the applicant the rationale behind the planned acquisition of the Acc-Ross interest was that Acc-Ross was a well-established and well-known company engaged in the acquisition and development of residential, commercial, retail and leisure properties in South Africa. It would therefore have given the respondent the much needed credibility and financial viability it needed to raise the R200 million.

[22] Applicant therefore contends that it was a tacit term to the SHA that the transfer of shares and derivatives of Acc-Ross to respondent would take place. Since that failed to take place, so the applicant contends, it was entitled to resile from the agreement and claim the R3 500 000,00 it had so far loaned to respondent.

[23] Respondent for its part denies that there was such a tacit term as the SHA does not make any reference to the Acc-Ross transaction. That contention is untenable. Clause 26.10 of the SHA does refer to the Acc-Ross transaction. It states:

*"The parties to this agreement acknowledge that the Company*

*[respondent] had prior to the signing of this agreement entered into a Call Option Agreement with Quattro Trust IT1472/2005 ( a copy of which is attached hereto for identification purposes) for the purchase of shares issued by Acc-Ross Holdings Limited and by signature hereof the parties ratify the agreement."*

- [24] In Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 532 G 533 B it was held that a court will not readily import a tacit term into an agreement. The court held:

*"Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term . . .".*

- [25] Given all the above facts I am of the view that it was indeed a tacit term of the SHA that the Acc-Ross transaction would take place. Otherwise it would not make business sense in the circumstances for the applicant to agree to lend the respondent R6 000 000 and undertake to obtain additional loans totalling R200 000 000 for the respondent.

- [26] Further support for this view can be found in a meeting of some of the shareholders of the respondent on 4 March 2009 where an oral agreement was reached for the repayment of the loan. Applicant relies on the minute of that



meeting. Respondent counters this on two grounds. Firstly, it says, the applicant did not comply with the SHA by failing to raise the additional R200 million. Applicant for its part says it could not do so as respondent had failed to acquire the Acc-Ross shares worth R74 086 430,01. Secondly, respondent says the alleged oral agreement was merely a *discussion* between some of the shareholders of the respondent. Not all the shareholders were present. Hence, it could not be construed to be a shareholders' meeting where the respondent agreed to repay the loan of R3,5 million. In my view what is important here is that the Chief Executive Officer ('CEO') of the respondent, Mr Peter Barbas undertook to repay the loans to the applicant. The day to day running of a company is vested in its Board of directors and not the shareholders. That the CEO of the respondent agreed to repay the loan lends further credence to applicant's submissions in this regard.

- [27] Respondent submits that there is a bona fide dispute of fact and relies on the so-called 'Badenhorst principle' derived from BADENHORST v NORTHERN CONSTRUCTION ENTERPRISES LTD, 1956(2) SA 347(7) at 347H where it was held:

*"Die maatskappy betwis die geldigheid van die vordering van 120 Pond, en wanneer 'n skuld ter goeder trou betwis word, moet 'n likwidasie-aansoek geweier word. Hierdie proses is nie bedoel vir die beslissing van twyfelagtige skulde nie".*

- [28] In view of what I have said above the respondent's reliance on the "Badenhorst

principle" that there is a bona fide dispute about whether the debt is owing fails to be rejected. Therefore on this first ground alone, the applicant has made out a case for the winding up of the respondent.

[29] However, applicant also relies on an additional ground for winding up respondent. The applicant contends that not only is the respondent unable to pay its debts but, in addition, it would be just and equitable to finally wind up the respondent.

[30] The applicant says that the stated objective of the respondent to invest in and develop properties throughout South Africa can no longer be accomplished because of the failure of the Acc-Ross acquisition. The effect has been that there is a disappearance of the respondent's sub-stratum. Applicant's Counsel submitted that the factual matrix justifies the conclusion that it is just and equitable to wind up the respondent. For this submission he gives the following grounds:

- 30.1 the respondent is not a trading company with employees;
- 30.2 the applicant is a shareholder of the respondent;
- 30.3 the applicant has invested R3 500 000,00 in the respondent;
- 30.4 the investment in the respondent was clearly premised on the understanding that the Acc-Ross shares would be purchased;
- 30.5 it is common cause that the Acc-Ross transaction did not take place;
- 30.6 the respondent will have obtained an unwarranted and unjustified windfall

of R3,5 million for nothing.

Respondent's Counsel submitted that the applicant has not demonstrated that the objectives set out in respondent's memorandum and articles of association are untenable. A broad and general submission was made that respondent "can invest in and develop properties". This submission is not tenable. The respondent was dependent on the R6 million loan from the applicant and the further and much more substantial R200 million loan that was to be raised for it to realise its objective of developing leisure properties and resorts. The prospects of acquiring the shares and derivative instruments in Acc-Ross are extremely remote if not impossible. In this regard the applicant has made the undisputed statement in its founding affidavit that Acc-Ross has since merged to become part of an entity called Pinnacle Point Ltd.

Applicant relies on this ground on the basis that it "postulates not facts but only a broad conclusion of law, justice and equity as a ground for winding up". (Moosa NO v Mavjee Bhavan (Pty) Ltd 1967 (3) SA 131 (T)). In the matter of Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492, (cited with approval by the Supreme Court of Appeal in Apco Africa (Pty) Ltd & Another v Apco Worldwide Inc 2008 (5) SA 615 (SCA)), Lord Wilberforce says at 499-500:

*"My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts*

*may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act 1948 and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable consideration; consideration, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."*

**[2-1]** The respondent's annual financial statements for the period ending 30 June 2008 (which are attached to the Applicant's founding affidavit) shows that it is a holding company with no turnover during the period and it has made a loss of R947 328,00 after taxation. A long term loan from Vuwa of R2 000 000 is shown. It made no profit at all for the 2007 financial year. It did not attach its latest financial statements for the year ending 30 June 2009 which it could have

done if its financial position has since improved. I am compelled to draw the adverse inference that its position has, at best not improved or, it has worsened. The applicant is a shareholder of the respondent and has invested R3 500 000 in the respondent. Respondent's purpose, according to the applicant - which is not disputed by respondent - is to develop leisure properties and resorts. The respondent was clearly reliant on the additional funding of R200 000 000 that was to be procured to achieve its stated objective. This did not materialise, whatever the reasons might be for the failure and cannot in the circumstances achieve its stated objectives.

[34] In all the circumstances, I am of the view that it is also just and equitable to finally wind up the Company.

It is ordered:

1. That the Respondent company be placed under final winding up in the hands of the Master of this Court;
2. That the costs of this application be costs in the winding up of the Respondent.

  
N RANCHOD

ACTING JUDGE OF THE HIGH COURT