



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NO: 2661 / 2021

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

29 March 2022

DATE

SIGNATURE

In the matter between:

JOHAN VISSER

APPLICANT

And

**AN EXCLUSIVE GUEST HOUSE
(PTY) LTD**

FIRST RESPONDENT

IZAK JACOB VILJOEN

SECOND RESPONDENT

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 29 March 2022.

- [1] A court may order a solvent company to be wound up if it is otherwise just and equitable for the company to be wound up – see section 81(1)(d)(iii) of the Companies Act, no. 71 of 2008. It is on this basis that the Applicant seeks the winding up of the First Respondent. The Applicant argues that it would be just and equitable in that the business relationship between the shareholders has deteriorated to the extent that there is no meaningful communication between them due to lack of trust. The Applicant and the Second Respondent are the only shareholders in the First Respondent with the Applicant owning 60% interests, leaving 40% for the Second Respondent. In fact, the little communication they had since September 2020, was through their legal representatives. The Application is opposed by the Second Respondent.
- [2] The sad state of affairs between the two shareholders signals the end of the era which started in 2012 when they started a partnership and registered a company through which they conducted a guesthouse business which they jointly owned with similar shareholders' interests. The two were also the only directors of the company (the First Respondent) who were in charge of managing its affairs. The company affairs were initially dealt with by the Applicant who for the initial years,

was seen as the only director by anyone who got involved with the First Respondent. The reason for this is subject of dispute. According to the Applicant, the Second Respondent just disappeared and was absent throughout. The Second Respondent alleges that the Applicant physically stopped him from entering the premises of the First Respondent. They however swapped the roles in 2020 when the Second Respondent applied to the Companies Tribunal for the Applicant to be removed as a director, and the Applicant decided to resign instead; leaving the Second Respondent as the only director of the First Respondent.

- [3] The relationship between the two shareholders has since deteriorated to the extent that the mutual trust that once existed, is totally gone. One needs to just to read through the minutes of the only meeting ever held between the shareholders to understand the hostilities between the Applicant and the Second Respondent.¹ The founding and the answering affidavits also display the level of mistrust and lack of respect between them. The Second Respondent avers that the Applicant committed fraud when he sat as a director of the First Respondent going to the extent of stating that he, together with the Hawks were investigating further criminal charges against the Applicant.
- [4] The fact that charges were laid against the Applicant should not be seen as a suggestion that the Second Respondent was wrong in taking such steps. If fraud was uncovered, he may have been obliged to lay criminal charges. Equally, this should not be seen as accepting that fraud was committed by the Applicant. That would be a question for consideration by another forum if it comes to that. It suffices to state that both sides seem to be *ad idem* on the breakdown of communication between them. I am therefore persuaded

¹ See p. 34 of the paginated bundle: Annexure FA3

to agree that there are no prospects of a normal business relationship being restored between the two.

- [5] Circumstances under which a solvent company can be wound up are detailed in section 81 of the Companies Act no. 71 of 2008 as follows,

81. Winding-up of solvent companies by court order

(1) A court may order a solvent company to be wound up if-

(a) the company has-

(i) resolved, by special resolution, that it be wound up by the court; or

...

(c) one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that-

...

(ii) it is otherwise just and equitable for the company to be wound up;

(d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that-

(i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and-

(aa) irreparable injury to the company is resulting, or may result, from the deadlock; or

(bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;

(ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or

(iii) it is otherwise just and equitable for the company to be wound up;

... [My emphasis]

[6] I make the emphasis above to highlight that the legislation recognised that for a company to properly function, it is imperative for the directors to avoid deadlocks and that where it happens, the shareholders should be able to break it; and that the company business should be conducted to the advantage of shareholders generally. In *Thunder Cats Investments 92 (Pty) Ltd v Nkonjane Economic Prospecting & Investment (Pty) Ltd*,² the Supreme Court of Appeal (the SCA) held that winding-up on the basis of section 81(1)(d)(iii) “postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding-up. The subsection is not confined to cases which were analogous to the grounds mentioned in other parts of the section. Nor can any general rule be laid down as to the nature of the circumstances that had to be considered to ascertain whether a case came within the phrase. There is no fixed category of circumstances which may provide a basis for a winding-up on the just and equitable ground.” It went on to quote with approval from the decision of *Sweet v Finbain*³ where the following was said;

‘The ground is to be widely construed; it confers a wide judicial discretion, and it is not to be interpreted so as to exclude matters which are not *ejusdem generis* with the other grounds specified in s 344 [of the Companies Act, no. 61 of 1973]. The fact that the Courts have evolved certain principles as guides in particular cases, or examples of situations where the discretion to grant a

² 2014 (5) SA 1 (SCA) para 15.

³ 1984 (3) SA 441 (W)

winding-up order will be exercised, does not require or entitle the Court to cut down the generality of the words "just and equitable".'

- [7] As indicated above, the impasse between the Applicant who is the majority shareholder and the Second Respondent who is the only other shareholder is common cause. Two issues are however raised by the Second Respondent in his opposition to the application. The first one is that the stalemate between the two is as a result of the Applicant's own deeds. It was submitted on Second Respondent's behalf that the application should be refused as the Applicant's does not come with clean hands. The Applicant's hands are alleged to be dirty based on the same accusations which caused the Second Respondent to seek the Applicant's removal as a director which also form the basis of the criminal charges that he laid against him. The second issue is that winding up of the First Respondent should only be resorted to as a last avenue. The Second Respondent argues in this regard that the Applicant could have appointed another director to look after his interests or even consider selling his shares in the First Respondent.
- [8] I do not understand how the appointment of a new director would resolve the deadlock which currently exist between the shareholders. The deadlock is not between the directors but between the shareholders. Even if a new director is appointed, the shareholders will remain being the Applicant and the Second Respondent who cannot have a meaningful communication without erupting into an argument. A simple task of handing over items privately owned by the Applicant ended up with letters of threats being sent from their legal representatives. There is no basis for this submission in my view.

- [9] While it is desirable that winding up should be the last resort, the alternative suggested by the Second Respondent has been exhausted by the parties involved. The Applicant alleges that he made an attempt to have the Second Respondent buy his shares, but he was not prepared to accept the offer made by him in return. The Second Respondent also indicated to the Applicant that he was not in a financial position to purchase the Applicant's shares.⁴ The Second Respondent does not deny this averment. It is for this reason that I hold the view that this option has been fully exhausted. I also accept the undisputed submission by the Applicant to the effect that it would be impractical to get a third party to purchase the shares because the value thereof, would be disproportionate because of the individual loans that the current shareholders have in the First Respondent.
- [10] As for the clean hands' theory, I am guided once more by the judgment in *Thunder Cats*⁵, where the appellants contended that the respondents were to blame for the breakdown in the parties' relationship and that, for this reason, they were precluded from seeking the liquidation of the company. The appellants, in other words, invoked the principle that a person who applies for winding-up on the just and equitable ground must come to court with 'clean hands'. If the breakdown in the relationship is due to an applicant's misconduct, it cannot insist on the company being wound up. However, the SCA held that lack of clean hands is not an absolute bar. It held that a court should thus assess the respective contributions to the breakdown to determine whether it is just and equitable to liquidate as a party's fault should not necessarily deter a court from winding-up. In reaching this conclusion, the SCA referred to the Australian authority, *Ruut v Head*⁶ where Santow J said,

⁴ See para 45 of the founding affidavit on p. 23 of the paginated bundle.

⁵ Supra at para 27.

⁶

'As a matter of logic, lack of clean hands could not be an absolute bar, else otherwise for example, where both partners are equally at fault, neither could obtain a winding-up order. Nonetheless it must be an important factor in the exercise of the court's discretion along with other factors, such as whether the partnership is truly deadlocked.'

[11] The Applicant's hands are said to be stained because fraud accusations. Although the first documentation of these accusations dates back to September 2020, or even earlier, the Applicant is yet to be convicted, let alone being arrested and charged of any of the several charges laid against him. It is again not clear as to how the commission of fraud by the Applicant, presuming it was proved, would result in a deadlock between the two shareholders to the extent that they currently only communicate through their legal representatives and the courts. Can it be that the Second Respondent refuses to interact with a person whom he believes to be a fraudster? Investigations are said to be underway already. What bars the two shareholders from meeting and take the resolutions to be carried out by the First Respondent?

[12] The Applicant attached several letters in which he asked for financial statements of the First Respondent, and some calling for a meeting of the shareholders. The requested statements were not furnished, the emails went unanswered and no meeting was held, or the Second Respondent failed to attend. The Second Respondent received these mails and chose not to respond because according to him, the Applicant "did not take proper steps and protocol in the requesting of information and meetings."⁷ The least that the Second Respondent could have done if he was genuine was to indicate to the Applicant as to what proper steps and protocol he was missing for the

⁷ See para 32.1 of the Answering Affidavit on p.72-73 of the paginated bundle.

meeting to take place or for the financial statements to be furnished. It is for these reasons that I am unable to find that the Second Respondent is with clean hands in this impasse.

[13] The First Respondent owes its loyalty to the shareholders and its business as a company has to be run to their advantage. The Applicant is not just a shareholder, but a majority shareholder in it. The nature of the relationship between the Applicant and the Second Respondent was more than a commercial one. It appears as if that Nestadt J in *Erasmus v Pentamed Investments (Pty) Ltd*⁸ must have had in mind a similar relationship when he said,

“the relationship between the directors was more than a purely commercial one; that an understanding or at least a contemplation that the original shareholders of respondent, whilst they remained such, would also be and remain directors, thus participating in the management of the company, is to be inferred. As Mr Du Toit put it, the partnership relationship outside the company characterised the relationship of the shareholders inside it.”

[14] After evaluating all the facts, including the communication between the shareholders, the need for the company to operate to the advantage of the shareholders, the period that lapsed while the stalemate between them prevails and other such factors as they appear in this judgment, I am of a view that it is just and equitable to have the First Respondent wound up.

[15] Consequently, the following order is made:

[15.1] The First Respondent is hereby placed under final winding-up.

[15.1] Costs of this application to be costs in the liquidation.

⁸ 1982 (1) SA 178 (W) at 188C-D.


TV RATSHIBVUMO
JUDGE OF THE HIGH COURT

FOR THE APPLICANT	: ADV. MOLENTZE
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	NELSPRUIT
DATE HEARD	: 03 MARCH 2022
JUDGMENT DELIVERED	: 29 MARCH 2022