



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 37063/2018 and 45201/2018

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 22 JANUARY 2021
SIGNATURE [REDACTED]

In the matter between:

JACARANDA HAVEN (PTY) LTD
THE BARBEL FOUNDATION (PTY) LTD

First Applicant
Intervening Party

and

JJP PROPCO (PTY) LTD
JJP PROPCO MEDICAL (PTY) LTD
PIETER HENDRIK STRYDOM N.O.
MARTHINUS JACOBUS BEKKER N.O.
AMANDA LINDOKUHLE VILAKAZI N.O.
JAMES RICHARD BOTHA
MARIA HECK
JACOB PHILLIPPUS GROBLER

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent

and

JJP PROPCO (PTY) LTD

First Applicant

JJP PROPCO MEDICAL (PTY) LTD

Second Applicant

and

JACARANDA HAVEN (PTY) LTD

First Respondent

PIETER HENDRIK STRYDOM N.O.

Second Respondent

MARTHINUS JACOBUS BEKKER N.O.

Third Respondent

AMANDA LINDOKUHLE VILAKAZI N.O.

Fourth Respondent

THE BARBEL FOUNDATION (PTY) LTD

Intervening Party

and

JJP PROPCO (PTY) LTD

First Applicant

JJP PROPCO MEDICAL (PTY) LTD

Second Applicant

and

JAMES RICHARD BOTHA

First Respondent

MARIA HECK

Second Respondent

JACOB PHILIPPUS GROBLER

Third Respondent

J U D G M E N T (Leave to appeal)

DAVIS, J**[1] Introduction**

On 30 October 2020, this court ordered that Jacaranda Haven (Pty) Ltd (then in provisional liquidation) (Jacaranda Haven) be finally liquidated. In a separate application, heard simultaneously, regarding the directorship of Jacaranda Haven, it was ordered that Jacaranda Haven pay the costs of that application. Jacaranda Haven and its current principal shareholder, who had intervened in the liquidation proceedings, now seek leave to appeal these orders.

[2] Application for leave to appeal to the Supreme Court of Appeal

- 2.1 In the closing paragraph of a lengthy application for leave to appeal, Jacaranda Haven and its aforementioned shareholder, contend that leave to appeal should be granted to the Supreme Court of Appeal, “as the judgment concerns three matters of public importance”. These three matters are alleged to be the following:
- 2.1.1 The correct approach to disputed evidence on affidavit;
 - 2.1.2 The correct test of the just and equitable ground for liquidation of a company; and
 - 2.1.3 The making of costs orders against a non-party where the relief had been abandoned.
- 2.2 As to the correct approach to disputed evidence in motion proceedings, the judgment has not determined anything novel in this regard which requires determination by the Supreme Court of Appeal. The trite principles were referred to in paragraphs 3.4 and 3.5 (erroneously numbered 5.1) of the judgment.

- 2.3 At to the test of what constitutes just and equitable grounds for liquidation this has similarly not been determined in a manner which changed the existing scope of our law. Again, a decision by the Supreme Court of Appeal is not warranted.
- 2.4 The issue of a costs order against a “non-party” is also not at play. Costs were awarded against Jacaranda Haven in case no 45201/2018. In that matter, on behalf of the first applicant a Mr Prinsloo alleged that his erstwhile co-directors in Jacaranda Haven, had unprocedurally and unlawfully attempted to remove him as a director. He was right, they did. As part of the relief sought in that application, Jacaranda Haven was cited as a party. It was therefore not a “non-party” as simply alleged in the above closing paragraphs of the application for leave to appeal. Mr Louw SC, who argued this point, referred to a Rule 7 Notice whereby Mr Prinsloo’s attorney’s authority to act on behalf of Jacaranda Haven was challenged. Based on an absence of a satisfactory response to this notice, it was argued that Jacaranda Haven was not a party. Mr Wagener SC, who appeared for the respondents in the application for leave to appeal, pointed out that, in terms of the still applicable provisions of section 163 (2) of the “old” Companies Act, an application such as the one launched in case no 45201/2018 may be brought by a director, shareholder or the company itself. In terms of section 157 of the same act, any of these persons may bring an application in the name (or on behalf) of the company if the company cannot itself do so. The then existing dispute and deadlock between the directors of the company and the conduct of Mr Prinsloo’s co-directors, which conduct he considered to be unlawful and clandestine, entitled him to instruct his attorneys to also act on behalf of the company, resulting in Jacaranda Haven being cited as a party. At the time of the granting of the costs argument, subsequent events, particularly the

liquidation of Jacaranda Haven, have already overtaken the events. It was as a result thereof and, in the circumstances of this particular matter, that I exercised this court's discretion regarding the incidence of costs. The decision was exercised judicially and was case-specific and no general principle of awarding costs against a "non-party" was involved, let alone one which, "in the public interest" need be resolved by the Supreme Court of Appeal.

2.5 So far the bases upon which leave is sought to the Supreme Court of Appeal.

[3] The grounds of appeal

3.1 The remainder of the grounds set out in the application for leave to appeal on which Jacaranda Haven and the intervening shareholder argue that there is a reasonable prospect that another court would come to a different conclusion on appeal, centres around the following issues: was the agreement in respect of which the initial applicants had, on their version, invested some R 9, 8 million into the development and upgrade of the Jacaranda Haven old-age home and the acquisition of the property on which it is situated by Jacaranda Haven itself, a "horizontal" (in the words of Adv Louw SC) agreement between JJP Propco Medical (Pty) Ltd and Via Viva Properties (Pty) Ltd (who then owned shares in Jacaranda Haven) or a "vertical" agreement whereby shares would be issued in Jacaranda Haven to JJP Propco Medical (Pty) Ltd. Ancillary to this is the dispute regarding the *locus standi* of the initial applicants.

3.2 Much was also said about the methodology employed in the judgment to reach a conclusion and the application of the so-called "robust approach" to the factual disputes and the affidavits deployed to address them.

- 3.3 What cannot be ignored, are the undisputed payments made to the conveyancers to enable Jacaranda Haven to acquire transfer of the property. These were, on any construction, payments made in discharge of Jacaranda Haven's debts or obligations. What also cannot be ignored is the fact that the initial applicants have spent hundreds of thousands of rands to enable the running of and continuation in existence of the old age home situated on the property which Jacaranda Haven was going to acquire. While there may be some disputes of the full extent (or usefulness) of the funds expended in construction, maintenance and alteration of the old age home by the initial applicants, it cannot be ignored that the sole reason for such expenditure and investment, was the common intention of all parties to improve and develop the property as an upgraded old age home with a sub-acute facility.
- 3.4 In support of the argument in favour of a "horizontal" agreement as basis for the above, Adv Louw SC has described an affidavit by attorney Van Staden as the "backbone" of Jacaranda Haven's case (clearly because Jacaranda Haven could not rely on the contradictory and patently unsatisfactory version of Dr Botha or Mr Erasmus). Adv Louw SC relied heavily on the fact that Mr Van Staden had said that he had been instructed to draft a set of very complex contracts, one of which was a sale of shares agreement, in accordance with the abovementioned "horizontal" concept. But what Adv Louw SC also conceded, was that, in the period subsequent to those instructions to Mr Van Staden, the parties were (in his words) in a "dynamic situation". Although Jacaranda Haven sought to argue that Mr Van Staden's drafts suggest that the content thereof were the terms of the subsequent agreement, the evidence does not support this contention. The proposition was advanced by the intervening shareholder, who was a latecomer on the scene and who had no direct knowledge of the agreement,

and could not contribute any evidence. It relied on Mr Erasmus, but he gave directly conflicting versions in consecutive affidavits and cannot be relied on. Mr Van Staden himself took no part in the subsequent discussions and could therefore also not assist and Dr Botha was a conflicted and contradicting witness. Adv Louw SC conceded as much about Dr Botha but argues that these contradictions must be understood and viewed against the background of the said “dynamic situation”. What the court was left with, was Mr Prinsloo’s emphatic reason for not signing Van Staden’s draft “because that was not what was agreed upon” and Dr Botha’s missives at the time (i.e not his subsequent version once litigation ensued) where he in writing per email confirmed the registration of shares in July 2017. These writings refute the conditional “horizontal” agreement version.

3.5 Applying the test applicable at the time when a final liquidation (winding-up) order is sought, namely satisfaction of the overall onus on a balance of probabilities, then Jacaranda Haven and its shareholder had not crossed the jurisdictional hurdle of Section 17(1)(a) of the Superior Courts act, requiring a reasonable prospect of success on appeal in favour of its version of a “horizontal” agreement.

3.6 Another line of attack argued on behalf of Jacaranda Haven was that, even if the affidavits put up by it do not pass muster and could rightly be rejected in terms of the Plascon-Evens-rule, then the initial applicants have not made out a case. This was more of an alternative argument, should the finding on the nature of the acquisition of the shares go against Jacaranda Haven. The argument was that no claim on enrichment had been made out. Adv Louw SC argued that to find that once the causa for investment fell

away, it was “too glib” a finding to hold Jacaranda Haven liable for repayment.

- 3.7 Adv Wagener SC’s response, if I understood him correctly, on this point was as follows: it is common cause that the monies invested were paid in terms of a contract, either an issue of shares contract or a sale of shares contract. It is common cause that whatever the contract was, it has been terminated, either through repudiation, cancellation or non-fulfillment of suspensive conditions. It must follow that restitution must take place and, even if the sale of shares argument is followed, the investor is entitled to claim money back from Jacaranda Haven if the latter had been enriched thereby. Apart from all the other monies spent, this brings one back to the issue referred to in paragraph 3.3 above when the minimum enrichment experienced by Jacaranda Haven occurred when conveyancing fees for which it was liable pertaining to the acquisition of the immovable property, was paid by the initial applicants. One need not do the customary valuations regarding enrichment and value added to the property itself in respect of all the other ancillary expenses which one customarily finds in enrichment cases: prior to payment of the fees Jacaranda Haven had a liability in respect thereof for a fixed amount. After the conveyancers had been paid, Jacaranda Haven will be enriched by the amount of the fees if not repaid to the investor, once whatever the agreement may have been, fell away. Whether the actual nature of the cause may be a *condictio indebiti* or a *condictio sine causa* or a *condictio ob causam (rem) datia* makes little difference in this construction. The claim for repayment will still be for the “*recovery of property in which ownership has been transferred pursuant to a juristic act which was ab initio unenforceable or has subsequent become inoperative*” (See: LAWSA, vol 9 Para 77 (a work to which Adv Louw SC has also referred me to) with reference to

Pucjlowski v Johnston's Trustees 1946 WW 16). Despite extensive and lengthy argument, I have not been satisfied that there is a reasonable prospect of success that on appeal, based on this point, the liquidation order would be overturned.

- 3.8 The last attack, argued almost as extensively as all the others, was against the alternative finding that it was just and equitable in the circumstances, that Jacaranda Haven be liquidated. With reference to Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and Others 2014 (5) SA 1 (SCA), Adv Louw SC argued that, in considering this ground, a court should “look forward” and not impose the consequences of a previous deadlock between directors or shareholders on his client, the intervening party as a newcomer shareholder. In the circumstances of this case, it is clear that there are multiple “innocent parties”. This not only includes the newcomer shareholder, but also the erstwhile investors who have been made to part with millions without anything to show for it but leaving Jacaranda Haven with a property which it could never otherwise have afforded, even with a business thereon to be operated by others to the exclusion of the actual investor. It is clear that, should a liquidation order not be granted, this manifestly unjust and inequitable situation would be perpetuated. Thunder Cats made it clear that the “just and equitable” ground retained its wide scope, even if a company was solvent and to be liquidated in terms of Section 81(1) of the “new” Companies Act 71 of 2008. This include the exercise of a court’s discretion without a fixed category of circumstances limiting such a discretion. I find insufficient prospect of success on appeal for a finding that the liquidation should have been uplifted so that one would, in the words of Adv Louw SC “let the fight go its course”.

[4] Conclusion

In the premises I find that, despite the extensive and vehement re-arguing of the case and the attendant criticism of this court's methodology in reaching its conclusions, there are insufficient prospects of success on appeal to merit the granting of the application for leave to appeal. I also find no cogent reason why costs should not follow the event.

[5] Order

The application for leave to appeal is refused with costs.



DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 19 January 2021

Judgment delivered: 22 January 2021

APPEARANCES:

For the Applicant:	Adv P F Louw SC
Attorney for Applicant:	Kokinis Incorporated c/o Couzyn, Hertzog & Horak, Pretoria
For the Respondents:	Adv S D Wagener SC
Attorney for Respondents:	Coetzer & Partners, Pretoria