



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case number: 9417/2019P

In the matter between:

WYNAND CORNELIUS VAN ZYL

APPLICANT

and

BOAT LODGE INVESTMENTS CC

RESPONDENT

VERDALE VIVIAN DE VILLIERS

FIRST INTERVENING PARTY

PIERRE JACOBUS ABRAHAM DE VILLIERS

SECOND INTERVENING PARTY

ORDER

The following order is granted:

1. The application for leave to intervene is dismissed.
2. The respondent is hereby placed into provisional liquidation in the hands of the Master of the High Court, Pietermaritzburg, KwaZulu-Natal.
3. A *rule nisi* is hereby issued calling upon the respondent and all other interested persons to appear and show cause, if any, to this court on the 19 day of July 2021 at 09h30 or so soon thereafter as the matter may be heard, why the respondent should not finally be wound up.

4. This order is to be served forthwith on the respondent, and the intervening parties, and published on or before the 2nd day of July 2021 once in the Government Gazette and once in a daily newspaper published and circulating in KwaZulu Natal .

5. The costs of the liquidation application be costs in the liquidation of the respondent.

6. The costs of the application to intervene are to be paid by the first and second intervening parties.

JUDGMENT

HENRIQUES J

Introduction

[1] The applicant instituted proceedings to place the respondent into provisional liquidation on the grounds that it is just and equitable that the respondent be wound-up, and that a liquidator be appointed. The basis for the application is that the applicant alleges the membership of the respondent is in deadlock without any prospect of the deadlock being resolved. The first and second intervening parties opposed the provisional liquidation order, and in addition, sought to intervene in these proceedings.

[2] In addition, the intervening parties also filed a notice to oppose the application on behalf of the respondent.

The relief

[3] The relief which the applicant seeks is premised on s 81 of the Companies Act¹ (2008 Companies Act) which finds application by virtue of s 66 of the Close Corporations Act² (CC Act), the applicant alleging that it is just and equitable to wind-

¹ Companies Act 71 of 2008.

² Close Corporations Act 69 of 1984.

up the respondent as there is a deadlock between the management of the respondent, being himself and the first and second intervening parties.

Issues for determination

[4] The applicant submits that the following issues require determination:

- (a) Whether the intervening parties have established a case for their intervention in the liquidation application, and whether they have established a *prima facie* defence to the liquidation application; and
- (b) Whether the applicant has established, on a balance of probabilities, that *prima facie*, the members are in deadlock and their partnership has terminated, and that it is therefore just and equitable to wind-up the respondent.

[5] The respondent and intervening parties on the other hand, submit that the following issues require determination:

- (a) Whether the applicant has complied with the provisions of rule 6(2) of the Uniform Rules of Court;
- (b) Whether the applicant has complied with s 81(1)(d) of the 2008 Companies Act;
- (c) Whether the applicant has proven on a balance of probabilities that it is just and equitable for the respondent to be wound-up;
- (d) Whether the applicant has launched the liquidation application with 'clean hands'; and
- (e) Whether the intervening parties have a *prima facie* defence to the winding-up application.

The applicant's *locus standi* to institute the application

[6] From the CK2A form, it is clear that the applicant has a 75% member's interest in the respondent, and the first and second intervening parties together hold a 25% member's interest. It is common cause that the applicant initially held a 65% member's interest in the respondent and subsequently acquired a further 10% member's interest from Mr Jan Abraham Van Niekerk. Such interest has not been formally registered with the CIPC. In his founding affidavit, the applicant concedes that of his initial 65% member's interest in the respondent, 24% of such member's interest is held on behalf of the second intervening party although that too has not been registered with the CIPC. However, having regard to the content of the founding affidavit, the applicant

holds a majority member's interest in the respondent of 51% and therefore has locus to institute these proceedings.

The factual matrix

[7] To appreciate the nature of the alleged deadlock, it is appropriate at this juncture to set out how and why the respondent was established, and the nature of the business relationship between the applicant and the intervening parties.

[8] It is common cause that the business of the respondent was that of a property development corporation specifically created to develop land situated in Sodwana Bay, by building and selling units in the development named Jesser Point Boat Lodge (Jesser Point).

[9] The respondent obtained the right to develop the property from Repo Wild 1088 CC (Repo Wild), which entity holds the lease from the Ingonyama Trust, the owner of the land on which the development is situated. The shareholding in Repo Wild is the following: the applicant holds a 51% member's interest, the first intervening party a 25% member's interest and the second intervening party a 24% member's interest. Luxury boat lodge units together with luxury accommodation were constructed. The income of the development consisted of rental income and the sale of units in Jesser Point. Initially, the development was profitable until approximately mid-2017 when there was a slump in market sales. Currently the respondent owns units in the development which are rented out as holiday accommodation.

[10] The applicant owns and runs the Vaal 1 Stop at Villiers which is a petrol station. It is common cause that the applicant advanced the finance for the development of Jesser Point. The second intervening party was the builder who constructed the units, attended to purchasing building materials and oversaw all building operations on the site. The first intervening party attended to the secretarial and administrative services of the development.

[11] Over the years, the parties reached an agreement as to how the applicant would be repaid for financing the development. However, the relationship between the parties

has deteriorated over time to such an extent that they are no longer able to jointly run the operations of the respondent.

[12] The applicant canvassed in great detail the roles which the first and second intervening parties played in the running of the respondent. His role was limited to that of a 'financier'. The affidavit sets out the remuneration due to the first and second intervening parties and the functioning of the respondent. Given that the second intervening party was responsible for the construction of the development, certain disputes have arisen between the body corporate, homeowners' association and the second respondent, some relating to the connection of sewerage services to the development, and a firewall which was the responsibility of the first and second intervening parties.

[13] There are several smaller disputes between the respondent and the body corporate, most of which can be traced back to the second intervening party as the builder. Because of the conflict between the homeowners' association, the managing agent and the second intervening party, the fourth phase of the development was not approved. The focus of the respondent then shifted to rental given the slump in the sales market. The first intervening party moved to Bloemfontein and commenced another business, leaving behind unresolved contractual issues and secretarial matters in relation to the development.

[14] It is common cause that over time the relationship between the intervening parties and the applicant has become antagonistic and aggressive, and that they cannot cooperate with each other to resolve the outstanding issues between the respondent, the body corporate and the homeowners' association. At present there is a loan account with Highway Square CC (the applicant's financing entity for the development), and the respondent has for some months been unable to meet its monthly expenses from the holiday rental income. Either the applicant or Highway Square CC meets the monthly shortfall.

[15] The first and second intervening parties do not contribute financially in any way to the monthly running expenses of the respondent. It is not disputed that it is the responsibility of the first intervening party to attend to company and secretarial matters,

and the contractual issues of the respondent. As an example, the applicant indicates that the first intervening party has failed to attend to the registration of the sub-leases of each unit in the share block scheme.

[16] In addition, the second intervening party's partner, Ms Linda van Niekerk, is employed as a manager of the respondent at Jesser Point, and is responsible for dealing with the day-to-day operations, the collection of rentals, the advertising of the units of the respondent on holiday booking sites, the maintenance of the units and to ensure that the units are regularly serviced. The applicant alleges, which is not seriously disputed, that given the poor relationship between the applicant and the second intervening party, Ms van Niekerk is no longer acting in the interests of the respondent.

[17] The loan account of Highway Square CC is the amount of R12 537 543.55 and the interest on the loan account amounts to R7 626 696.29. In addition, the loan accounts of the first and second intervening parties are in debit and they owe the respondent R1 570 142.25 and R752 694.81 respectively. The applicant indicates that the present situation is untenable and that he and Highway Square CC are prejudiced as it was never the intention for him or Highway Square CC to take responsibility for letting out the 10 units which the respondent owns, and attending to the outstanding development issues and problems with the body corporate and homeowners' association.

[18] In addition, despite discussions and roundtable settlement conferences, the applicant indicates that the first and second intervening parties, through their attorneys, are sabotaging the business of the respondent in order to force a settlement from him. The applicant further submits that the relationship has broken down irretrievably and that they are in a position of serious deadlock.

[19] Subsequent to the issuing and service of the application papers, the respondent gave notice of its intention to oppose the liquidation proceedings on 5 February 2020. Subsequently on 20 March 2020, the first and second intervening parties gave notice of their intention to intervene in the proceedings and also opposed the liquidation

application. In the interim, the registrar had allocated a date for hearing on the unopposed motion court roll for 26 March 2020.

[20] The intervening parties delivered an answering affidavit, which was to also serve as the founding affidavit in their application to intervene. The applicant subsequently delivered a replying affidavit in the main application, and an answering affidavit opposing the application to intervene. It is these three affidavits which the parties require the court to consider for purposes of determining the application to intervene and the liquidation application. In addition, there are various points *in limine* which the first and second intervening parties raise, which also need to be decided on by the court.

[21] In their notice of motion, the first and second intervening parties seek leave to intervene in the liquidation application, and an order staying the liquidation application pending an application by the second intervening party in the Free State Division of the High Court, for a declaratory order against the applicant transferring his 24.5% member's interest in the respondent into his name. In addition, an order is sought that the founding affidavit in the intervention application stand as the answering affidavit in the liquidation proceedings, that the application for liquidation be dismissed with costs, alternatively, that such application be stayed pending the outcome of the application for a declaratory order in the Free State Division of the High Court as aforementioned.

[22] Having regard to the content of the answering affidavit, it is common cause that the applicant had been approached as a 'financier' for Jesser Point by the first and second intervening parties, and subsequently obtained a 51% member's interest in Repo Wild. Similarly, the applicant acquired a 51% member's interest in the respondent. The affidavit deals in detail with the negotiations that took place between the applicant and the first and second intervening parties in relation to the operation and running of Repo Wild and Jesser Point.

[23] There are factual disputes in relation to how the development would be conducted, as well as the nature of the functions of the applicant and the first and second intervening parties. In my view, these are not relevant to a determination of the issues in this matter, and do not warrant the court commenting any further. It is

instructive to note that these disputes, to some extent, have contributed to the breakdown in the business relationship between the parties.

[24] It warrants mentioning that it is apparent from the answering affidavit that the relationship between the parties has broken down irretrievably, to the extent that the first and second intervening parties approached their current attorney of record to enter into roundtable discussions to resolve the amounts in dispute and allegedly owed to them.

[25] The content of the annexures referred to in the first and second intervening parties' affidavit reveal that the parties held roundtable discussions in terms of which the applicant confirmed the first intervening party's 24.5% member's interest in the respondent. The parties were endeavouring to place the first and second intervening parties in a position to pay out the applicant for his member's interest in the respondent, and the monies due by them in their respective loan accounts.

[26] Annexure 'RA4',³ annexed to the applicant's replying affidavit, is correspondence from their attorneys of record which acknowledged that it was impossible for the members to work with each other, and suggested that an urgent application for a declaratory order be pursued in the event of the roundtable discussions failing, and the applicant failing to transfer the first intervening party's member's interest. Additionally, it was indicated that the first and second intervening parties would proceed with a liquidation application.

[27] Most notably 'RA4' records the following:

'. . . en blyk dit verder dat dit tans ontmoontlik is dat die lede verder met mekaar behoorlik kan saamwerk op 'n basis van "just and equitable".'

A reading of the affidavits reveals that the relationship between the parties had broken down irretrievably, and they are no longer able to work together in the interests of the respondent.

³ Page 296-297 of the application papers, volume 3.

Analysis

[28] At this juncture, it is apposite to deal with certain points *in limine* raised in opposition to the application. For purposes of this application and although I have had regard to all the points *in limine* raised by the parties, specifically the applicant in the answering and replying affidavit, in my view given the conclusion reached, it is not necessary for this court to deal with them. In any event, on a practical level these do not serve to advance the matter to finality, which in my view is in the interest of both the applicant, the respondent and the first and second intervening parties. No purpose will be served by upholding all the points *in limine* raised by the applicant.

[29] Some of the points *in limine* raised warrant consideration as they impact directly on the issues for determination in the liquidation application. The first relates to the alleged non-service of the application papers at the respondent's registered office. The procedural requirements for the liquidation application were complied with in respect of service on SARS, the Master and the employees of the respondent. The Master filed a report indicating that there were no queries. Service of the application papers on the respondent occurred on 23 December 2019, at the registered office of the respondent, and were served on the financial manager, Ms De Villiers. This was in terms of the registered office details reflected on the CK2A form. Such service of the papers was acknowledged by Ms De Villiers by way of her signature and dating of the document.⁴

[30] In addition, service of the application papers was effected at Jesser Point itself, the principal place of business of the respondent on 30 January 2020, and was brought to the attention of Ms Linda Van Niekerk, the manager of the development albeit that she refused to accept service of the papers. Employees were notified as a set of the application papers was placed on the notice board and also explained to the employees.⁵

[31] Although the first and second intervening parties have indicated that the applicant has failed to serve the application papers on the respondent's registered

⁴ Page 80-82 of the application papers, volume 1.

⁵ Service affidavit of Lesego Sabelo Makofane, pages 74-79 of the application papers, volume 1.

office, in compliance with the Companies Act, this submission is without merit having regard to the signature of receipt thereof by Ms De Villiers. Although the body of the return of service indicates that the application papers were served on 23 October 2019 at the registered office on Ms Natasha De Villiers, the financial manager of the respondent, this cannot be correct and must be an error on the part of the sheriff. It does not correspond with the page annexed to the return of service which shows that Ms De Villiers signed for the application papers at the registered office on 23 December 2019 at 12h30.

[32] In my view, this is an obvious typographical error in the return of service and there is thus no merit in the submission that the application papers were not served at the respondent's registered office. In any event the Companies Act requires service of the application papers at the registered office, alternatively the principle place of business of the respondent, and the application papers have been served at both addresses.

The application of rule 6(2)

[33] The second point *in limine* which the first and second intervening parties raise, relates to the non-service of the application papers on them and the non-compliance with rule 6(2). It is common cause that the applicant did not serve the application papers on the first and second intervening parties. Rule 6(2) reads as follows:

'When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion must be addressed to both the registrar and such person, otherwise it must be addressed to the registrar only.'

I could find no judgment, nor was I referred to one by Mr Moodley during the course of his submissions in relation to this point *in limine*, which states that a member of a close corporation is an interested party, and hence the application is to be served on such member.

[34] In *Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd*⁶ it was held that the application merely needs to be served at the principal place of business or registered office:

⁶ *Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd* 2015 (2) SA 550 (GJ) para 35.

‘. . . in initiating an application for the winding-up of a company, inevitably the company would be a respondent in such application, and the sheriff would have served on the company at its principal place of business or registered office in accordance with the provisions of rule 4(1)(a)(iv) of the Uniform Rules of Court read with rule 6(2) of the said rules.’

[35] Furthermore, section 346(4A)(a) of the Companies Act⁷ (1973 Companies Act) sets out the categories of parties who are required to be furnished with a copy of the liquidation application. Section 346(4A)(a)(iv) merely requires the company to be furnished with a copy of the application. In *Pilot Freight* the court set out the possible reason for the requirement of section 346(4A)(a) as follows:

‘However, it is possible that the legislature realised that often an application for the winding-up of a company is served by the sheriff at a registered office which has long since been abandoned by the auditor of the company, and the application does not come to the attention of the company. In such circumstances it appears that the court may be entitled to direct that the application be furnished to the company at its principal place of business (not necessarily via service by the sheriff) in addition to the service by the sheriff on the registered office. In such circumstances it is conceivable that the court has in the court file a return of service of the application by the sheriff and in addition an affidavit in terms of s 346(4A)(b) by the person who also furnished the application to the company, in addition to service by the sheriff on the registered office.’⁸

[36] In the commentary, *Erasmus: Superior Court Practice*,⁹ D E Van Loggerenberg notes that it is appropriate to give notice of an application to a person ‘. . . even if no relief is claimed against such person, if the relief claimed is of such a nature that the rights or interests of the person may be affected by any order the court may make pursuant to the application’. There is no specific provision in the Companies Act or in rule 6(2) which requires service of the application papers on individual members of a close corporation. However, the applicant recognises that the intervening parties are members and consequently, the applicant, at the very least, ought to have served the application papers on the first and second intervening parties. However, the failure to do so is not fatal to the liquidation application, and any prejudice has been ameliorated by the application to intervene, this is as it is not a statutory requirement.

⁷ Companies Act 61 of 1973.

⁸ *Pilot Freight supra* para 35.

⁹ D E Van Loggerenberg *Erasmus: Superior Court Practice* (Revision Service 15, 2020) at D1-59.

The application to intervene

[37] The applicant is quite correct that the provisions of rule 6(14) make the provisions of rule 12 applicable to applications. Rule 12 provides that

‘Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to the further procedure in the action as to it may seem meet.’

[38] In essence, a party seeking leave to intervene must firstly prove that ‘[h]e or she has a direct and substantial interest in the subject-matter of the litigation which could be prejudiced by the judgment of the court’. A direct and substantial interest being defined to mean ‘a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the court’. A mere financial interest being an indirect interest, is insufficient for intervening. Such application for intervention must be made seriously and not frivolously and secondly the intervening applicant must show that it has a defence to the relief sought in the main application.¹⁰

[39] Mr Kairinos SC, who appeared for the applicant, submitted that the intervention application was being opposed, not on the basis of the first leg of the test for intervention namely, whether the first and second intervening parties had a direct and substantial interest, but relied on the second leg of the test for intervention, namely that they did not disclose a defence to the winding-up application.

[40] He submitted that the applicant was prepared to accept for purposes of the intervention and the liquidation applications that the first and second intervening parties had an interest by virtue of them being members. However, given that the first and second intervening parties had not disclosed a defence to the liquidation application, the court ought not to grant the intervention application, and ought to mulct the first and second intervening parties with the costs of such intervention application.

¹⁰ *Levay and another v Van Den Heever and others* NNO 2018 (4) SA 473 (GSJ) paras 6-7.

[41] In his heads of argument, Mr Kairinos, referred to the definition of a member's interest in the CC Act. Section 1 defines a member as being 'a person qualified for membership of a corporation in terms of section 29 and designated as a member in a founding statement of the corporation. . .'. In addition, *Henochsberg on the Close Corporations Act*¹¹ also indicates that the registration of an amending founding statement is required before a person can be considered a member. Mr Kairinos makes the submission that the second intervening party cannot be considered to be a member of the respondent, and thus had not established an interest or *locus standi* in order to justify intervention in the liquidation proceedings.

[42] In my view, this submission cannot be correct. The applicant, in his founding affidavit, has acknowledged that he holds the second intervening party's membership interest. His interest is clearly acknowledged and recognised in the correspondence which has been exchanged by the parties, and which has been referred to in his founding affidavit which he has deposed to under oath.

[43] For purposes of the application, I must therefore recognise that the second intervening party is a *de facto* member of the close corporation, and thus has an interest and *locus standi* to oppose the liquidation application and to intervene in these proceedings. The position of the first intervening party is a lot clearer as his interest has been registered in the founding statement of the respondent and consequently he qualifies to intervene in the proceedings.

[44] The applicant concedes that the first intervening party is a registered member of the respondent, and that the other intervening party is a *de facto* although not a registered member of the respondent. Undoubtedly both the first and second intervening parties will be affected by any order that the court makes, specifically in relation to the liquidation of the respondent. Consequently, in respect of the first leg of the test to intervene they must succeed.

[45] Mr Kairinos, submitted that in respect of the second leg of the intervention application, the intervening parties must fail. Considering their opposition to the

¹¹ P M Meskin *et al Henochsberg on the Close Corporations Act* (Service Issue 33, August 2019) at 7-8.

liquidation application, the first and second intervening parties had demonstrated that a complete deadlock existed in the management of the respondent and consequently there was no defence to the liquidation of the respondent. In addition, the respondent could not oppose the liquidation application but rather the first and second intervening parties had done so.

[46] Although the first and second intervening parties' attorneys had filed a notice to oppose by the respondent, it is clear that he could not do so in light of the fact that the majority of members of the respondent had not authorised the respondent's opposition to the liquidation proceedings.

[47] Mr Moodley, who appeared for the first and second intervening parties conceded, correctly in my view, that there was a deadlock in the management of the respondent. It is evident from a reading of the affidavits and annexures that when the relationship between the parties had soured, both the applicant and the first and second intervening parties had instructed attorneys of record. Several settlement discussions were held with a view of resolving the matter in its entirety. The parties were unable to resolve their differences, to the extent that the first and second intervening parties' attorneys threatened to institute liquidation proceedings as early on as July 2019.

[48] The thrust of the complaint by the second intervening party related to the fact that he wanted his member's interest in the respondent transferred to him. The applicant, although recognising his member's interest, did not provide written confirmation thereof at the request of the second intervening party's attorney of record, Mr Chris Liebenberg. I agree with the submission of Mr Kairinos that the requirement of registering the second intervening party's member's interest is not a defence to the liquidation proceedings, and his member's interest in the respondent will be protected should the liquidation application be successful.

[49] In addition, the liquidation proceedings do not need to be stayed for an application to be made for a declaratory order. The applicant has recognised their respective members' interests, and a liquidator can deal with this. In addition, the second intervening party has known for some time that his interest has not been

formally registered. He has not provided any explanation as to why he did not bring such declaratory application earlier.

[50] In relation to whether or not the second leg of the test for intervention has been met, it is necessary to consider the liquidation application and the submissions made by the parties and whether a defence has been disclosed.

The liquidation application

[51] The parties are *ad idem* that the provisions of the 2008 Companies Act make provision for the 1973 Companies Act to apply to the winding-up of a close corporation.¹² In terms of s 344(h) of the 1973 Companies Act, a close corporation may be wound-up if it appears to the court that it is just and equitable to do so.

[52] In relation to the onus of proof in an application for provisional liquidation, the *locus classicus* is the matter of *Kalil v Decotex (Pty) Ltd and another*¹³ in which the Appellate Division held as follows:

‘Where on the affidavits there is a *prima facie* case (ie a balance of probabilities) in favour of the applicant, then, in my view, a provisional order of winding-up should normally be granted and, save in exceptional circumstances, the Court should not accede to an application by the respondent that the matter be referred to the hearing of *viva voce* evidence. This does no lasting injustice to the respondent for he will on the return day generally be given the opportunity, in a proper case and where he asks for an order to that effect, to present oral evidence on disputed issues. As it was put in the *Wackrill* case *supra* at 285H - 286A:

“Ordinarily the consequences of a final winding-up order are drastic indeed, and it could not have been intended that proof of all the allegations necessary for such an order should be anything less than that required generally in civil cases, that is proof on a clear balance of probabilities, with the admission of *viva voce* evidence, where that may be necessary, to resolve material disputes on the affidavits. That also appears to be the standard of proof required for a final sequestration order in terms of s 12 of the Insolvency Act 24 of 1936, according to which the Court must be "satisfied" that the petitioning creditor has established the elements of his case.”

¹² Section 66 of the CC Act, and item 9 of schedule 5 of the 2008 Companies Act.

¹³ *Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 (A) at 979B-F.

Where, on the other hand, the affidavits in an opposed application for a provisional order of winding-up do not reveal a balance of probabilities in favour of the applicant, then clearly no *prima facie* case is established and a provisional order cannot at that stage be granted.'

[53] Although the first and second intervening parties indicate that the applicant has not proven on a balance of probabilities that it is just and equitable for the respondent to be wound-up, I am of the view, on the facts of the matter, that it has discharged such onus on a balance of probabilities. In addition, I disagree with the submission of the first and second intervening parties' counsel that the applicant has not come to court with clean hands.

[54] The winding-up of solvent companies is dealt with in ss 79 to 81 of the 2008 Companies Act. As already indicated, the application is premised on the provisions of s 81 of the 2008 Companies Act, which relevant portion reads as follows:

'81. Winding-up of solvent companies by court order.— (1) A court may order a solvent company to be wound up if—

. . .

(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. . . '

[55] One of the considerations in determining whether it is just and equitable for the respondent to be wound-up is whether a deadlock exists. I now turn to consider this aspect.

What is meant by a 'deadlock'

[56] It is trite that a deadlock is a ground for liquidation on the basis that it is just and equitable for the entity to be wound-up. In *Henochsberg on the Companies Act 61 of 1973* in the commentary to s 344(h), the following is mentioned:

'Unlike the other paragraphs of the section, this paragraph "postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding-up" The Court's reaching of the conclusion that winding-up would be just and equitable involves the exercise, not of a discretion, but of judgment on the facts found by the Court to be relevant; once, however, such conclusion is reached, the making of the order for the winding-up does involve the exercise of a discretion . . .'¹⁴

[57] Furthermore the following is stated with regard to the concept of a deadlock as constituting a ground for liquidation envisaged in s 344(h) of the 1973 Companies Act: 'In the case of a "domestic" company, ie a company with a small membership (it could be a public company but would usually be a private one), winding-up is just and equitable where the "deadlock" principle, derived from *In re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 (CA), can be applied; this is "founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. Usually that relationship is such that it requires the members to act reasonably and honestly towards one another and with friendly cooperation in running the company's affairs. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up, in the same way as, if they were partners, they could claim dissolution of the partnership" . . . The destruction of the relationship may result in literal deadlock, ie where the factions hold equal voting power in general meeting, in which event winding-up must ordinarily inevitably ensue . . . but it is not necessary to establish literal deadlock: it suffices to show that as a result of the particular conduct, there is no longer a reasonable possibility of running the company (through the majority vote) consistently with the basic arrangement between the members . . . (eg constant quarrelling between the only two shareholders with voting rights as such, who

¹⁴ B Galgut *et al* (eds) *Henochsberg on the Companies Act 61 of 1973* (Service Issue 33, June 2011) at 701.

are also the only two directors, leading to a situation where they are not on speaking terms. .
)'.¹⁵

[58] Further on in *Henocheberg*, what is referred to as the factual basis for a deadlock, the authors refer to a situation

‘. . . where a company was formed for a specific purpose, but internal disputes, mutual disillusionment and distrust and the consequent breakdown of the relationship between the shareholders have paralysed the company. . .’.¹⁶

[59] *Thunder Cats Investments 92 (Pty) Ltd and another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and others*¹⁷ also concerned the application for the winding-up of a solvent company in terms of s 81 of the 2008 Companies Act, on the grounds that the directors and/or shareholders were in a deadlock, and as an alternate ground for the winding-up, that it was just and equitable to do so. The court also considered what was required for a deadlock. The court considered the words ‘just and equitable’ as they appear in the 1973 Companies Act as well as the 2008 Companies Act.¹⁸ The question which had arisen in the Supreme Court of Appeal was whether a wide or narrow definition ought to apply to the meaning of ‘just and equitable’ as envisaged in s 81(1)(d)(i), (ii) and (iii).

[60] In considering the submissions and the interpretation to be placed on the provisions of s 81(1)(d)(i) and (ii), when compared with (iii), the Supreme Court of Appeal held the following:

‘The examples of “deadlock” given in s 81(1)(d)(i) and (ii), that is, where either the board or the shareholders are deadlocked are examples only, and, it seems to me, are not exhaustive and do not limit s 81(1)(d)(iii). The use of the word “otherwise” in the subsection does not limit what is meant by “just and equitable”. On the contrary, it extends the grounds of winding-up to include other cases of deadlock. It is conceivable that it may be just and equitable to liquidate even if the shareholders have been unable to elect successors to directors for less than the

¹⁵ Ibid at 704(1)-705.

¹⁶ Ibid at 705..

¹⁷ *Thunder Cats Investments 92 (Pty) Ltd and another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and others* 2014 (5) SA 1 (SCA).

¹⁸ Ibid para 12.

stipulated period that includes two consecutive annual general meeting dates, as s 81(1)(d)(ii) requires.¹⁹

[61] The court held further, having regard to the words 'just and equitable', that: 'Section 344(h) of the 1973 Act provides that a company may be wound up by the court when it is 'just and equitable' to do so. A winding-up on this basis '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. In *Sweet v Finbain* it 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. The fact that the Courts have evolved certain principles as guides in particular cases, or examples of situations where the discretion to grant a winding-up order will be exercised, does not require or entitle the Court to cut down the generality of the words "just and equitable".”

Section 344(h) gave the court a wide discretion in the exercise of which certain other sections of the Act had to be taken into account.²⁰ (Footnotes omitted.)

[62] With regard to the word deadlock, the court held the following:

‘The word “deadlock” is not always given the same meaning. The reference to deadlock in the previous paragraph and also in s 81(1)(d)(i) and (ii) was described as a case of “complete deadlock”, but there is no particular advantage in the introduction of this term. The “deadlock principle”, on the other hand, is —

“founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business”.

The “superimposition of equitable considerations” in such a case may justify the dissolution of such a company under the just and equitable provision.²¹ (Footnotes omitted.)

¹⁹ Ibid para 14.

²⁰ Ibid para 15.

²¹ Ibid para 17.

[63] Among the issues which the first and second intervening parties raise, is the failure by the applicant to come to court with clean hands. This was also considered in *Thunder Cats*, as the appellant had contended that the respondents were to blame for the breakdown of the parties' relationship, and were thus precluded from seeking the liquidation of the company. The court held that 'lack of clean hands was not an absolute bar'.²² After quoting from *Ruut v Head*²³ the court held that:

'A court should thus assess the respective contributions to the breakdown to determine whether it is just and equitable to liquidate. But a party's fault should not necessarily deter a court from winding-up —

"so that the paralysis . . . may be eliminated, a competent functionary (in the person of a liquidator) may be placed in control of [the company] and that functionary may address the question of where the best interests of [the company] lie . . .".'

[64] Turning now to the aspect of the deadlock in this matter, I was referred to the decision in *Kanakia v Ritzshelf 1004 CC t/a Passage to India and another*.²⁴ This matter dealt with an application for the winding-up of a close corporation on the basis that a deadlock existed between the members, and that it was just and equitable for the close corporation to be wound-up. The court considered the provisions of the then s 68 of the CC Act, and the provisions of s 344(h) of the 1973 Companies Act. It came to the conclusion that the phrase just and equitable involved 'a conclusion of law for the winding-up, namely justice and equity'.²⁵

[65] In addition, it opined that the views which have been expressed with regard to companies are applicable to close corporations.²⁶ In considering whether or not it was just and equitable to wind-up the company in circumstances where a deadlock was alleged, the court had regard to various decisions like *Moosa, NO v Mavjee Bhawan (Pty) Ltd*²⁷ and *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd*.²⁸ The court identified five broad categories of circumstances in *Rand Air*, one of which was

²² Ibid para 27.

²³ *Ruut v Head* (1996) 20 ACSR 160 at 162.

²⁴ *Kanakia v Ritzshelf 1004 CC t/a Passage to India another* 2003 (2) SA 39 (D).

²⁵ Ibid at 45A.

²⁶ Ibid at 45D.

²⁷ *Moosa, NO v Mavjee Bhawan (Pty) Ltd and another* 1967 (3) SA 131 (T).

²⁸ *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W).

‘the disappearance of the company's substratum - where the company was formed for a particular purpose for instance and that purpose can no longer be achieved at all. . .’

The court went on to hold that the circumstances identified were not a complete or final list and that it was open to the courts to identify other circumstances or devise other categories which justified a company being wound-up on just and equitable grounds.²⁹

[66] Jali J in *Kanakia*, had to decide whether the existence of a deadlock warranted the winding-up of the company and the dismissal of the counter-application. He relied on the decision of Leon J in *Emphy and another v Pacer Properties (Pty) Ltd*,³⁰ where Leon J stated the following:

‘I am satisfied that the mere existence of a deadlock does not *per se* entitle an applicant to a winding up order under the just and equitable provision. What requires to be emphasised is that the Court is concerned with what is just and equitable and not with whether there is a deadlock or not. The existence of a deadlock is one example of what might be regarded in a proper case as just and equitable but a Court must always have regard to all the circumstances of the case.’

[67] Jali J was of the view that this was the correct approach, and to adopt an approach which merely accepted that the existence of a deadlock would justify a winding-up, would lead to unjust and unfair results, and would be an abdication of the court's responsibility to decide whether or not to wind-up a close corporation.³¹

[68] Following on this, in *Apco Africa (Pty) Ltd and another v Apco Worldwide Inc*³² the Supreme Court of Appeal had cause to consider s 344(h) of the 1973 Companies Act, and what was meant by just and equitable within the meaning of that section. The issue which the court had to decide was whether that which was envisaged in s 344(h) and the just and equitable provision, was limited to cases where the substratum of the company had disappeared or where there had been a complete deadlock.

²⁹ *Kanakia supra* at 45J.

³⁰ *Emphy and Another v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D) at 369A.

³¹ *Kanakia supra* at 46E-G.

³² *Apco Africa (Pty) Ltd and another v Apco Worldwide Inc* [2008] ZASCA 64; 2008 (5) SA 615 (SCA).

[69] The court found that it was well settled that the sub-section postulated ‘. . . a broad conclusion of law, justice and equity as a ground for winding-up’.³³ The court per Ponnann J, went further and held as follows:

‘It is well settled that the subsection giving power to the court to wind up a company on the just and equitable ground is not confined to cases in which there are grounds analogous to those mentioned in other parts of the section. . . Nor, on the other hand, can any general rule be laid down as to the nature of the circumstances that have to be borne in mind in considering whether a case comes within the phrase . . . It must also be recognised that there is no necessary limit to the generality of the words 'just and equitable'. Section 344(h) affords a court a wide judicial discretion in the exercise whereof, however, certain other sections of the Act must be taken account. . .’³⁴

[70] The court concluded that a study of the cases had demonstrated that the just and equitable provision was not to be limited to cases where the substratum of the company has disappeared or where there has been a complete deadlock.³⁵

[71] With regard to the exercise of a court’s discretion in winding-up applications, the court also held that:

‘There are two distinct principles that guide a court in exercising its discretion to wind up a domestic company which is in the nature of a partnership. The first, enunciated in *Loch v John Blackwood Ltd* [1924] AC 783 (PC) at 788, is that it may be just and equitable for a company to be wound up where there is a justifiable lack of confidence in the conduct and management of the company’s affairs grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company’s business. That lack of confidence is not justifiable if it springs merely from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company, but is justifiable if in addition there is a lack of probity in the director’s conduct of those affairs. The second, usually called the deadlock principle, is derived from the *Yenidje Tobacco Company* case. It is founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company’s affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys

³³ Ibid para 16.

³⁴ Ibid.

³⁵ Ibid para 18.

that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up.’³⁶ (References omitted.)

[72] The court further held the following:

‘Actual deadlock is not an essential to the dissolution of a partnership. All that is necessary is to satisfy a court that it is impossible for the partners to place that confidence in each other which each has a right to expect and that such impossibility has not been caused by the person seeking to take advantage of it.’³⁷

[73] The applicant has, in his founding affidavit, dealt with a number of instances on which he relies for the submission that a deadlock exists. Interestingly enough, the first and second intervening parties do not significantly challenge these instances but instead confirm them. If one has regard to the application papers as a whole, the following is apparent. The first respondent was formed for a specific purpose. Given the fact that the fourth phase of the development has not been approved by the homeowners’ association, the purpose for which the respondent was established is no longer relevant and cannot be achieved. The applicant and the first intervening party are members of the respondent, and the second intervening party is a *de facto* member, although his member’s interest has not been formally registered.

[74] The applicant and the first and second intervening parties had specific roles in relation to the operation and administration of the respondent. It is common cause that the applicant and his business was the financier, the first intervening party was responsible for the administration and secretarial work and the day-to-day operations of the respondent, and the second intervening party was the contractor responsible for building the units.

[75] I agree with the submission of Mr Kairinos that such relationship was akin to a partnership and that the respondent was merely the vehicle for such partnership. It is clear that the members are not on a friendly note with each other and there is no co-operation between them. The relationship between the applicant and the intervening parties has irretrievably broken down, and there appears to be considerable acrimony

³⁶ Ibid para 19.

³⁷ Ibid para 21.

between them. The parties do not trust each other and they are no longer conducting themselves in the spirit of the arrangement concluded at the inception of the respondent. The breakdown in the relationship has effectively caused 'a paralysis of the operations of the respondent'. The parties have attempted settlement discussions which resulted in an impasse which necessitated this application.

[76] Despite the denial of a deadlock, it is evident from the answering affidavit that the first and second intervening parties did not dispute that there is a complete breakdown of the relationship, and it appears that given the allegations they make, the parties no longer trust each other and are no longer willing to co-operate with each other. This is confirmed by the correspondence put up by their attorney of record that the parties cannot 'work with each other on the basis of just and equitable', and that in the event of the applicant not acceding to their request, the only viable alternative would be to liquidate the respondent.³⁸

[77] If one considers the principles set out in *Kanakia* and by Ponnan J in *Apco*, it is clear that the members cannot work with each other and are deadlocked. The operations of the respondent have effectively ceased. There is no prospect that the respondent will continue with its building operations and the development of the land as they are at an impasse, and the second intervening party has left the premises.

[78] What then falls to be determined is whether or not the first and second intervening parties have established a defence to the liquidation application. Having regard to the contents of their answering affidavit, and the concession by Mr Moodley that they are unable to work with each other, in my view, they have not. Although they attempt to raise factual disputes, these are in my view not genuine disputes of fact warranting this court referring the matter for the hearing of oral evidence, nor justifying this court refusing a winding-up order. The complaints raised by them can properly be dealt with by any liquidator appointed to wind-up the respondent.

[79] In any event, I agree with the submission of Mr Kairinos that the applicant has in his replying affidavit demonstrated that these are not real and genuine factual

³⁸ Annexure 'RA4' pages 243-244 of the application papers.

disputes, and there is no merit to much of what is contained therein. Moreover, if one applies the principles in *Kanakia* and *Apco*, in my view, it is just and equitable for the respondent to be wound-up.

[80] Having found that the first and second intervening parties do not have a defence to the liquidation proceedings, it must follow that they do not satisfy the second leg of the test for intervention.

[81] That then brings me to the last issue raised in opposition to the liquidation application by the first and second intervening parties, namely the reliance by the applicant on the provisions of s 81(1)(d) of the 2008 Companies Act as the basis for the winding-up of the respondent as this section applies to solvent companies. One must note that the winding-up application was premised on the basis of it being just and equitable to wind-up the respondent, due to the existence of a deadlock between the members of the respondent. Having regard to the request for financial statements and loan accounts, it was submitted that the respondent may be both factually and commercially insolvent, as at present it is not deriving rental income from the units it owns, and its day-to-day running expenses are being paid for by the applicant.

[82] *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd*³⁹ concerned an issue which has vexed a number of high courts around the country with the commencement of the 2008 Companies Act, namely which section applies where an application is made for the liquidation of the company that is commercially insolvent even though its assets may exceed its liabilities. The issue as to what was meant by an insolvent company in terms of 2008 Companies Act was an issue for the court to decide. It is common cause that in terms of the this Act, s 80 deals with the voluntary winding-up of a solvent company, and similarly so too does s 81. What is evident is that the provisions of ss 79 to 81 of the 2008 Companies Act apply to the liquidations of solvent companies.⁴⁰

³⁹ *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA).

⁴⁰ *Ibid* para 13.

[83] The Supreme Court of Appeal in *Boschpoort* also found that s 79(3) of the 2008 Companies Act provides that if during liquidation proceedings of a solvent company it is apparent it is insolvent, then the transitional provisions referred to in item 9 of schedule 5 of the 2008 Companies Act apply, namely the winding-up of the insolvent company may take place under the 1973 Companies Act. *Boschpoort* reinforced that our law has recognised two forms of insolvency, namely factual insolvency (where a company's liabilities have exceeded its assets) and commercial insolvency which describes a position where a company is in such a state of illiquidity that it is unable to pay its debts even though its assets may exceed its liabilities. The court in *Boschpoort* held as follows

'... in order for a solvent company to be wound up in terms of either s 80 or 81 of the new Act, it must be commercially solvent. If it is commercially insolvent it may be wound up in accordance with ch 14 of the old Act, as is provided for in subitem 9(1) of sch 5 of the new Act.'⁴¹

[84] *Thunder Cats Investments 92 (Pty) Ltd and another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and others*⁴² on appeal concerned the question of the scope of s 81(1)(d)(iii) and whether the scope of the words just and equitable in that section is as wide as it had been under s 344(h) of the 1973 Companies Act given the number of conflicting high court judgments on the issue. The court considered the applicability of the provisions of the 1973 Companies Act in relation to the winding-up and liquidation of solvent and insolvent companies, and was of the view

'... that in the event of a conflict between a provision of the previous Act that continues to apply and a provision of part G of ch 2 of the new Act with respect to a solvent company, the provisions of the new Act with respect to a solvent company prevail'.⁴³

[85] In my view, as Mr Kairinos correctly pointed out, at the time of the institution of the application, the respondent was not factually or commercially insolvent but the applicant had indicated that due to the souring of the relationship, he was no longer prepared to continue to fund the operation of the respondent. At the time of the

⁴¹ Ibid para 22.

⁴² *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and Others* 2014 (5) SA 1 (SCA).

⁴³ Ibid para 3.

institution of the application, the respondent was commercially solvent and consequently the applicant's reliance on the section cannot be faulted.

Costs

[86] In relation to the liquidation application, the question of the costs does not really arise as costs will be the costs in the liquidation of the respondent. The intervention application however, is a different issue. Mr Kairinos submitted that although the first and second intervening parties were entitled to intervene as members of the respondent, the respondent could not oppose the liquidation application, and they could not do so on the respondent's behalf. They did not succeed in establishing a defence to the liquidation application and hence, this court ought to grant a costs order in favour of the applicant, including the costs of senior counsel occasioned by the intervention application.

[87] I agree with his submission that as the first and second intervening parties were unsuccessful in satisfying the second leg of the test for intervention, they ought to pay the costs occasioned by the dismissal of such application. However, I am of the view that the matter was not so complex as to justify the employment of senior counsel.

[88] The delivery of this judgment has been delayed. This is largely due to the fact that I do not have a permanent registrar assigned to assist me. This fact has been brought to the attention of the Judge President and the Office of the Chief Justice. In addition the covid-19 pandemic and the rotation of staff had also contributed to the delay.

Order

[89] In the result the following order will issue:

89.1. The application for leave to intervene is dismissed.

89.2. The respondent is placed into provisional liquidation in the hands of the Master of the High Court, Pietermaritzburg, KwaZulu-Natal.

- 89.3. A *rule nisi* is hereby issued calling upon the respondent and all other interested persons to appear and show cause, if any, to this court on the 19th day of July 2021 at 09h30 or so soon thereafter as the matter may be heard, why the respondent should not finally be wound up.
- 89.4. This order is to be served forthwith on the respondent and the intervening parties, and published on or before the 2nd day of July 2021 once in the Government Gazette and once in a daily newspaper published and circulating in KwaZulu Natal.
- 89.5. The costs of the liquidation application be costs in the liquidation of the respondent.
- 89.6. The costs of the application to intervene are to be paid by the first and second intervening parties.



HENRIQUES J

Case Information

Date of Set Down : 19 August 2020
 Date of Judgment : 31 May 2021

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This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 31 May 2021.