

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 45341/19

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED. ✓
28/1/2020	
DATE	SIGNATURE

In the matter between:

JOHANNES MARTINUS DANIEL DAFFUE

Applicant

And

JOHAN ESPACH

First Respondent

**CROCODILE COTTAGE PROPERTIES (PTY) LTD
(In liquidation)**

Second Respondent

**CROCODILE RIVER HOUSE (PTY) LTD
(In liquidation)**

Third Respondent

JOHANNES ZACHARIAS HUMAN MULLER N.O

Fourth Respondent

ANA PAULA DE OLIVEIRA N.O

Fifth Respondent

(In their capacities as joint provisional liquidators of the
Second and Third Respondents)

**THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

Sixth Respondent

ABSA BANK LTD

Seventh Respondent

JUDGMENT

RANCHOD, J

Introduction

[1] The applicant in this matter seeks an order that the second and third respondents, both solvent companies that are under final liquidation (in both of which he holds a 50% shareholding and the first respondent the remaining 50%), be placed under business rescue, alternatively that the order by which the companies were placed in liquidation be set aside on the ground that it was obtained in his absence.

[2] The application was initially launched in the urgent court on 17 July 2019. Judgment was handed down on 22 July 2019 by Van Der Schyff AJ, who struck the matter off the roll with costs for lack of urgency. There was a further alternative prayer in the urgent application viz, for an interim order which would enable the companies to trade pending the subsequent hearing of the business rescue and or rescission application. The matter having been struck off the urgent roll the further alternative prayer is no longer relevant.

The facts

[3] Van Der Schyff AJ handed down a written judgment in which the facts are succinctly set out and I can do no better than take the liberty of repeating them here to avoid the proverbial 'reinvention of the wheel.' They appear at paragraphs [4] to [5.13] of the judgment:

[4] Despite the fact that the documents filed in this application amount to approximately 720 pages, the facts underpinning the application are quite simple. It can essentially be summarised as follows: two solvent companies with the same two shareholders were liquidated in an application brought in terms of s 81 of the Companies Act, No 71 of 2008. One shareholder now wished to prevent the dissolution of the companies and preserve them as a going business concern (*sic*), while the other shareholder could not care less for the economic value of the companies but just wants to realise his shareholding and shake the proverbial dust off his feet.

[5] A more detailed exposition of the facts, is as follows:

5.1 The applicant and the first respondent started a business enterprise around 1997. They founded two companies. The one company acquired an immovable property while the other company leased the property and conducted the trading business.

- 5.2 They were the only shareholders and both were managing directors. The business was operated akin to a partnership and based on mutual trust.
- 5.3 However, the relationship between the companies' two shareholders-*cum*- managing directors deteriorated in the face of mutual disillusionment , internal wrangling and distrust.
- 5.4 The applicant and first respondent found it impossible to work together and were frequently at loggerheads. To their credit, however, they succeeded in concluding a management agreement in 2016 which *inter alia* that (*sic*) provided for:
- 5.4.1 the first respondent's resignation as a joint managing director and employee of the third respondent;
- 5.4.2 a dividend pre-payment of R20 000,00, or *pro rata* share thereof, to be made on a monthly basis to the first respondent; and
- 5.4.3 the appointment of an independent manager.
- 5.5 At this stage, the acrimony between the applicant and the first respondent did not paralyse and seriously interfere with the normal operations of the companies after the agreement was concluded.
- 5.6 The first respondent left the property as agreed and for a period of approximately 13 months, he received on a monthly basis the R20 000,00 dividend pre-payment as provided for in the agreement.
- 5.7 From February 2018 there was an interruption in the continuum of monthly dividend pre-payments. Thereafter sporadic payments were made to the first respondent. The applicant's

explanation is that the trading company went through a difficult period that is often experienced during the first six months of the year, but as business picked up it was possible to make payments again, hence the payments commenced again in the second half of the year.

5.8 The first respondent, convinced that the applicant was intent on causing him financial harm and dishonouring the agreement, instituted liquidation proceedings in the High Court and premised the liquidation application on the dual basis that (i) he is a creditor of the companies because he did not receive all the dividend pre-payments he was entitled to, and (ii) a deadlock exists which can only be resolved through liquidation.

5.9 Both the second and third respondent companies were finally wound up on 10 April 2019, despite both being solvent companies. The final winding-up orders were granted in the absence of the applicant. Despite him being represented by an attorney, the applicant contends that he was not aware of the date on which the final liquidation applications were set down.

5.10 The applicant contends that he became aware that the companies were finally liquidated on 20 May 2019. He attempted to negotiate with the provisional liquidators to allow the companies to trade whilst in liquidation. The provisional liquidators were prepared to agree but subject to the consent of both shareholders. The first respondent refused to consent to the continued trading. It is evident from the first respondent's approach that he has no interest in trading through the second and fourth *[sic]* respondents as prospering companies. He, as I

have mentioned, desires the dissolving of the companies and liquidating is *[sic]* 50% shareholding thereby severing ties with the applicant for good.

- 5.11 On 28 June 2019 the applicant delivered the notice of motion and founding affidavit to the first respondent's legal representative. The application was also delivered by email to the fourth and fifth respondents on 28 June 2019 and by Sheriff on 01 July 2019. Service on the sixth respondent was effected by email on an undisclosed date and by Sheriff on 03 July 2019. Service on the seventh respondent was done by email on 28 June 2019. Service on the South African Revenue Service and the Master of the High Court was effected by email on 14 and 15 July 2019 and by hand on 16 July.
- 5.12 The matter was enrolled for hearing in the urgent court on 16 July 2019 and was argued on 17 July 2019.
- 5.13 By this time the relationship between the parties has deteriorated to the extent that they completely distrust each other – a fact evinced by the tone in which the affidavits filed in this application were drafted and the content of the affidavits.'

[4] It is only the first respondent who opposes the application.

[5] As stated earlier, it is common cause that there is a deadlock in the management of the companies and to break that deadlock an agreement was concluded in December 2016 between the applicant (Daffeu) and the first respondent (Espach) in terms of which an independent third party financial

manager was appointed and Espach no longer participated in the management of the two companies.

[6] For the sake of convenience I will refer to the second respondent as the 'property company' and the third respondent as the 'trading company.'

[7] As is pointed out earlier, the applicant contends that rather than liquidating the two solvent companies they should be placed under business rescue.

[8] Espach contends that the request for business rescue is an abuse of proceedings and is clearly an afterthought.

[9] The deadlock does not appear to have been resolved as Van Der Schyff AJ pithily put it in sub-paragraph 5.13 of her judgment.

Discussion

[10] Before a Court can order a business rescue, there has to be a reasonable prospect – with the emphasis on '*reasonable*' – that the business can be rescued. Mere speculative suggestions are not enough. The basis for business rescue must be set out in the founding papers.¹

¹ *Oakdene Square Properties v Farm Bothasfontein (Kayalami)* 2013 (4) SA 539 (SCA) at par 29.

[11] The applicant wants to conflate the two companies. He cannot do so. It is abundantly clear from the papers that the property company is not in financial distress. According to its 2019 financial statements the property company has a favourable cash balance in its ABSA cheque account of R311 968,00 and trade debtors of R65 078,00.²

[12] The concept of a financially distressed company has been defined in section 28 of the new Companies Act, 71 of 2008. The definition reads as follows:

'Financially distressed

In reference to a particular company at any particular time, means that –

- (i) It appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediate ensuing six months; or*
- (ii) It appears to be reasonably likely that the company will become insolvent within the immediate ensuing six months.'*

[13] It is clear from the papers that the property company has enough money in its account to pay all its creditors and even leave a surplus. However, on the applicant's own version there can be no rescue of the trading company, if the rescue is not linked somehow to that of the property company. Without having the benefit of the asset of the property company, the trading company cannot trade.

² Answering affidavit, par 53, p370.

[14] In *Oakdene supra*,³ the Supreme Court of Appeal confirmed the decision in the Court of First Instance, where Claassen J listed the various considerations which will assist a court in deciding between a business rescue and a liquidation if the court is faced with both options.⁴ In that case the Learned Judge preferred a liquidation over a business rescue for *inter alia*, the following reasons:

- 14.1 A liquidator will be able to sell assets as good as a business practitioner.⁵
- 14.2 The fact that there are a number of pending court cases and litigation pending militates against a business rescue.⁶
- 14.3 A liquidation will be better if there is uncertainty as to what happened to company funds and income, and if the financial statements have not been finalised. (In this matter before me this point is particularly apt in the instance of the trading company in which there are no financial statements.)⁷
- 14.4 Business rescue proceedings are open ended and could probably result only in further applications to court which would simply

³ See footnote 1.

⁴ *Oakdene* 2012 (3) SA 273 (GSJ) at par.49.

⁵ *Oakdene a quo* at 287C.

⁶ 287F.

⁷ *Oakdene* at 288B.

cause delays and which would frustrate creditors and shareholders.⁸

14.5 Importantly, for purposes of this case, liquidation was held to be more appropriate in the case of a deadlock. In the words of Claassen J:

*'Where deadlocks occur in private or domestic companies, liquidation has often been regarded as the most appropriate remedy to unravel the deadlock in existence between the creditors and or the shareholders.'*⁹

14.6 Claassen J then continued:

'If a business rescue order were to be granted in this case, it is highly unlikely that it will be terminated and converted to liquidation proceedings in terms of section 132(2)(a)(ii) as a result of the deadlock and unwillingness of the antagonists to cooperate.'

14.7 The advantage of a business rescue practitioner mediating cannot apply to this case because of all the disputes and this was a pertinent finding made by Claassen J in *Oakdene*.¹⁰

⁸ *Oakdene* at 288F.

⁹ *APCO Africa (Pty) Ltd & Another v APCO Worldwide Inc* 2008 (5) SA 615 (SCA) at par.29 and 30.

¹⁰ At 289G

14.8 There is no provision for the taxation of the fees, costs or expenses of a business rescue practitioner, whereas a liquidator's costs are subject to taxation. There is independent control over the costs of a liquidation.¹¹

[15] The companies were liquidated on the basis of the 'just and equitable' ground. A recognised feature of liquidation on that ground is a deadlock in the management as well as grounds analogous to those for the dissolution of partnerships.¹²

[16] The applicant contends that it is precisely because of the deadlock that an independent third party was appointed as manager. Hence, the argument seems to be, Espach cannot rely on deadlock as a ground for liquidation of the companies. However, it is clear from the papers that the deadlock was not finally resolved.

[17] The leading authority for a liquidation on the just and equitable ground, in recent times, appears to be *Thunder Cats Investments 92 (Pty) Ltd & Another v Nkonyane Economic Prospecting & Investments (Pty) Ltd*.¹³

[18] In *Thunder Cats* the court held that the '*just and equitable ground in section 81(1)(d)(iii) retained its wide scope and should not be interpreted so as to include only matters similar to the other grounds stated in section 81(1).*' The

¹¹ *Oakdene* at 290E.

¹² *Re Yenidje Tobacco Co Ltd* (1916) 2 CH 426 (CA).

¹³ 2014 (5) SA 19 (SCA).

company was solvent, but the court held that the lack of trust between the shareholders rendered the operations of the company dysfunctional, justifying its winding-up. The court confirmed that the disappearance of its substratum; a deadlock; oppression and grounds similar to the dissolution under the just and equitable ground could all justify winding up of the company.

[19] In *Thunder Cats* the court held that a deadlock does not mean that there has to be a '*complete deadlock*', but the deadlock principle is founded on the analogy of partnership and is confined to small domestic companies in which the shareholders share confidence and trust similar to that existing between partners in regard to partnership business.

[20] I am not persuaded by Daffue's submission that the employment of a manager resolved the deadlock. Even if it did there are still grounds analogous to those for the dissolution of partnerships, namely, a complete loss of trust and confidence between the parties, which is common cause.

[21] There is a further aspect. Daffue has not put up a defence in this application against the facts set out in the founding affidavit in the liquidation application. To put it another way – there is no 'good cause' for the setting aside of the winding-up of the companies as contemplated in section 35 of the previous Companies Act.

[22] A final aspect is that Daffue says he was not aware of the date on which the liquidation application was set down and it was granted in his absence. The

facts in this matter are in various respects similar to that of *Herbst v Hessels NO & Andere*.¹⁴ In that case the company was also allegedly solvent and although the 50% shareholder knew about the liquidation application he later alleged in an application for rescission that he was advised by his attorney that there is nothing that he can do about the application. He then applied to court on the basis that the creditor who had applied to court for the liquidation actually had no *locus standi* and no claim against the company. Eloff J as he then was, analysed the requirements for a rescission of a liquidation. The court referred with approval to the remarks of Claassen J in *Aubrey & Cramer v Wells NO* 1965 (4) SA 304 (W) in which the court held at 305: '*The application is an extraordinary one and one which would be granted it at all in only rare cases.*'¹⁵

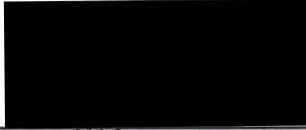
[23] The court endorsed the principle that generally under both section 354 of the Companies Act and section 149 of the Insolvency Act: '*Unusual or special or exceptional circumstances must exist in order to justify such relief.*' The court also approved the approach that a court in a rescission application will not reassess the merits, whether the defences have been raised or not, and it is not good enough for an applicant in a rescission to raise grounds which would have constituted a good defence on the merits to the liquidation proceedings.

[24] On the applicant's own version there are deep factual disputes. His attempt in reply to restrict the factual disputes to the interpretation of the management agreement is clearly an afterthought.

¹⁴ 1987 (2)SA 105 (T).

¹⁵ *Herbst* at 108G.

[25] In all the circumstances, the application is dismissed with costs.



RANCHOD, J
JUDGE OF THE HIGH COURT

Appearances

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