REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES
(3) REVISED.

CASE NO: 29833/2016 &

2495/2016

2/3/2018

In the matter between:-

ANDREW SAUL TAIT NO	First Applicant
LYNETTE TAIT NO	Second Applicant

and

WESCOM BUSINESS VENTURES (PTY) LTD (Registration No: [….])	First Respondent
JOSEF FREDERICK VAN NIEKERK NO	Second Respondent
MARIA MAGDALENA VAN NIEKERK NO	Third Respondent
JACOBUS FRANCOIS VAN HEERDEN NO	Fourth Respondent

AND

In the matter between:-

ANDREW SAUL TAIT NO	First Applicant
LYNETTE TAIT NO	Second Applicant
ANDREW SAUL TAIT	Third Applicant
[IDENTITY NUMBER: [….]]	
WEBCOM BUSINESS VENTURES (PTY) LTD	Fourth Applicant
[Registration No: [….]]	

and

JOSEF FREDERICK VAN NIEKERK	First Respondent
[IDENTITY NUMBER: [….]]	
JOSEF FREDERICK VAN NIEKERK NO	Second Respondent
FIRST NATIONAL BANK	Third Respondent

JUDGMENT

CRUTCHFIELD AJ:

[1] This matter comprised three applications that were heard together. The papers under case number 29833/2016 alone, spanned in excess of 560 pages.

[2] Save where specifically indicated, the parties are referred to as they are cited under case number 29833/2016.

[3] Case number 29833/2016 was an application by the Trustees of the Tait Family Trust for the winding-up of the first respondent, Webcom Business Venture (Pty) Ltd ('Webcom'), ('the winding-up'). The second, third and fourth respondents were the Trustees of the LVN Family Trust (the 'Van Niekerks').

[4] The Tait Family Trust (the'TFT') held 60% of the issued share capital in Webcom, and the LVN Family Trust (the 'LVN'), the remaining 40%.

[5] The applicants (the'Taits'), alleged a deadlock between the TFT and the

LVN and claimed the winding-up of Webcom as a solvent company in terms of section 81(1)(d)(i) of the Companies Act, 71 of 2008 ('the Act').

[6] The Van Niekerks opposed the winding-up applicatio.n

[7] Case number 2495/2016 was an urgent application launched inter alia by the Taits on 14 January 2016, to prevent both the second respondent (an LVN trustee}, and Josef Frederick Van Niekerk, the first respondent under case number 2495/2016 ('Josef'), from accessing Webcom's bank accounts ('the urgent application').

[8] First National Bank was cited as a party under case number 2495/2016 but did not participate in the proceedings and no order was sought against it.

[9] The Taits brought the urgent application, initially ex parte. An interim order was granted on 19 January 2016, without prior service on the second respondent or on Josef. The urgent application was served subsequently, on 20 January 2016, on the Van Niekerks' attorney only.

[10] Both the second respondent and Josef opposed the urgent application and launched a counter-application claiming that the terms of an agreement allegedly concluded between the TFT, LVN and Josef in settlement of their disputes under case numbers 29833/2016 and 2495/2016, be given effect.

[11] The parties agreed at the hearing that only the costs of the urgent application required my attention.

[12] The LVN and Josef sought the following relief in respect of the urgent and counter-applications under case number 2495/2016:

12.1 Payment of the costs of the urgent application heard on 19 January 2016 by the applicants cited under case number 2495/2016; and

12.2 That the first and second applicants, in their representative capacity as the trustees of the TFT be ordered to take all steps necessary to ensure that the Tait Family Trust complies with the terms of the agreement referred to as annexure **'NV28',** concluded between the TFT and the LVN and signed by the second respondent on behalf of the LVN at Barberton on 23 March 2016. (Annexure**'NV28'**is located in Volume 4 pages 321- 337 of case number 2495/2016.)

12.3 Leave to Josef and the second respondent to approach the court on the papers duly filed or supplemented as necessary for:

12.3.1 Appropriate relief in the event that the first and second applicants' fail to adhere to the agreement, annexure **'NV28',** within ten days from date of service of this order on their attorneys of record;

12.4 Payment by the applicants under case number 2495/2016, of the costs of the counter-application on the scale as between attorney and client.

[13] Section 81 of the Companies Act, 71 of 2008 ('the Act'), provides that:

'(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; ...'

[14] A court dealing with an application in terms of section 81(1)(d)(i) is vested with a discretion to grant or refuse the application.

[15] The Taits relied on a deadlock between Webcom's shareholders, caused by the alleged failure of the second respondent, (initially the sole director of Webcom), to keep the first applicant informed as to the running and management of Webcom's business. The applicants alleged that Webcom's business had come to a standstill as a result, and that it was just and equitable that Webcom be wound up.

[16] The Van Niekerks painted a picture wholly at variance with that of the Taits. Whilst the Van Niekerks essentially conceded the deadlock, they alleged that it would be unjust to grant the winding-up order as the first applicant had 'unclean hands'. The first applicant allegedly engineered the deadlock and then sought to rely upon his own misconduct as the basis for the winding-up proceedings.

[17] The first applicant allegedly caused the deadlock with a view to hijacking Webcom's business and financial resources, and took decisions in his own interests to the detriment of Webcom and its shareholders. Thus, the first applicant breached his fiduciary obligations to Webcom and should not escape the consequences of his actions by succeeding in Webcom's winding-up.

[18] The winding-up application was issued during April 2016, on an ex parte basis. Although the application was served on their attorney, the Van Niekerks were not cited as parties to the proceedings. This was not withstanding that the basis for the winding- up was the alleged dispute between the shareholders, and, the Taits' acknowledgment that LVN was the minority shareholder. The result was a successful application for leave to intervene by the Van Niekerks.

[19] The chronology of events in these applications is material:

19.1 It was common cause that Webcom's bank account showed a positive balance of R1 063 444.54 as at 31 December 2015.

19.2 The shareholders meeting at which Josef was removed as the sole director of Webcom, and the first applicant appointed to the position, was convened on 8 January 2016.

19.3 The urgent application was launched on 14 January 2016 and the interim order granted on 19 January 2016.

19.4 Thereafter the first applicant convened a round table conference, held on 18 February 2016.

19.5 The winding-up application was issued on 11 April 2016 to be heard on 30 May 2016.

<u>The costs in the urgent application</u>

[20] The Van Niekerks alleged, and the Taits denied, that the urgent

application was part of an attempted hijacking of Webcom's business and financial resources by the Taits.

[21] The urgent application was premised on the prior removal of Josef as the sole director of Webcom, and the appointment of the third applicant under case number 2495/2016 ('Andrew'), in his stead. The respondents alleged that the removal was unlawful and of no force and effect, as was the appointment of the first applicant.

[22] The applicants alleged that Josef and the second respondent had been furnished with due, proper and timeous notice of the shareholder’s meeting at which the issue of Josef's removal as sole director of Webcom and the appointment of Andrew was to be raised. Furthermore, that Josef and the second respondent had declined to attend the meeting thus justifying the outcome. No proof of delivery of the notice of the shareholders' meeting was placed before the urgent court.

[23] The alleged delivery of proper notice of the shareholders meeting was, however, denied by Josef and the second respondent. In the event of service of the urgent application prior to the granting of the interim order, the absence of notice of the shareholders' meeting to Josef and the second respondent would have come to the attention of the urgent court dealing with the matter.

[24] In effect, Josef and the second respondent's version was that the initial email of 2 December 2015 did not include the attachment, being the notice of the shareholders' meeting. Hence, although the Josef received the covering email and acknowledged as much by way of a 'read receipt', he did not receive the required notice advising of the shareholders' meeting.

[25] Subsequently, a second email, including the attachment, was sent to the Van Niekerks' attorneys on 9 December 2015, but was not received by them. This transpired in the context of difficulties then being experienced by the applicants' attorneys with their email facility.

[26] In so far as the applicants relied upon the 'read receipt' furnished by Josef as proof of delivery of notice of the shareholder's meeting, the 'read receipt' was dated 2 December 2015. It was transmitted in response to the initial email sent

by the applicants on 2 December 2015, without the attachment.

[27] Josef did not deny receipt of the email of 2 December 2015, merely averred that the attachment was not included, a fact that appeared to be borne out by the copy of the 'read receipt' included by the Taits in the winding-up application.

[28] The probabilities favour Josef and the second respondent's version that delivery of notice of the shareholders' meeting did not take place. There would not have been any benefit to them in not attending the meeting, if they had known of it. Thus, the underlying premise of the urgent application lacked cogence. In addition, the LVN was not properly cited as a party to the urgent application.

[29] The completed papers demonstrated, in my **view,** that the urgent application should have been served on the parties thereto prior to the granting of the interim order. The failure to do so resulted in an injustice to Josef and to the LVN, (and potentially also to Webcom,) which could have been avoided.

[30] In the circumstances, I am of the view that the applicants under case number 2495/2016 should pay the costs of the urgent application heard on 19 January 2016 and I intend to make such an order.

<u>The winding-up application</u>

[31] The fact that the winding-up application was brought *ex parte,* notwithstanding the acknowledgment that LVN was an interested party, was a matter for considerable disquiet. The service on LVN's attorneys did not cure that fundamental defect. The basis for the winding-up was the deadlock between the shareholders, the issues in respect of which were heavily contested between the parties.

[32] The Taits alleged that the winding-up was just and equitable in the light of the deadlock.

[33] The Van Niekerks' version was that the winding-upwas sought not in the best interests of Webcom's shareholders or Webcom itself, but in the interests of Andrew personally and a close corporation, Kelsey Construction ('the CC') of which he was the sole member. The Van Niekerks alleged that the first applicant/

Andrew had not acted in good faith and posited a number of instances in which he had allegedly breached his fiduciary obligations in terms of section 76 of the Act. The Taits denied these allegations.

[34] It was common cause, however, that during Josef's tenure as sole director of Webcom, the business was profitable to an extent of approximately R1 million annually. Absent the issues that led to the litigation, the shareholders would have shared (proportionally to their respective shareholding), in Webcom's net profits for that financial year. I have already alluded to the positive balance in Webcom's bank account at the end of 2015.

[35] Josef's successful running of Webcom's business cast doubt over Andrew and the Taits' averments that Josef could not be trusted to continue as the sole director of Webcom, and had to be replaced.

[36] In the event that the applicants were *bona fide* in bringing the winding-up application, the prevailing circumstances called for the citation of the Van Niekerks as parties to the proceedings. The Van Niekerks, the LVN's trustees, were entitled to be cited in the application.

[37] The Van Niekerks argued that Webcom could continue as a going concern if the agreement concluded between the parties (at the round table conference on 19 February 2016), in respect of the sale of LVN's shares, continued, as the deadlock between Webcom's shareholders would then be broken.

[38] The just and equitable basis of a winding-up 'involves a balancing of the interest of the individuals affected with the interest of good governance and the smooth administration of justice'.[1]

[39] In this regard, not only did the Van Niekerks allege that the first applicant had approached the court with unclean hands, but that the applicants relied upon their own misconduct as the basis for the winding-up application. Allegations raised by the Van Niekerks included that:

39.1 The first applicant / Andrew allegedly misappropriated Webcom's funds for his personal financial gain as well as that of the CC;

39.2 The applicants, in initiating the winding-up application, allegedly sought to disguise the first applicant / Andrew's financial misconduct

[1] *Weare & Another v Ndebe!e NO & Others* 2009 (1) 600 (CC) para 42.

aforementioned;

39.3 Andrew *I* the first applicant, having allegedly ousted the second respondent as the sole director of Webcom, allegedly sought to evade and avoid the consequences of his financial misconduct;

39.4 Andrew / the first applicant allegedly breached his fiduciary duties *inter alia* by way of appropriating Webcom's business opportunities for the CC, by failing to act in Webcom's best interests as well as those of the entire body of shareholders, and by failing to act with the appropriate measure of care and skill in respect of decisions regarding Webcom.

39.5 Pursuant to Andrew/ the first applicant allegedly undermining Webcom's financial resources and business, Webcom was reduced to dire financial straits and was barely trading. This was despite Webcom's financial position allegedly being robust as and when Andrew replaced Josef as the sole ·director of Webcom.

39.6 The Van Niekerks drew attention to various alleged material facts that were not disclosed by the applicants in their founding papers, including the alleged transfer of money from Webcom to the CC notwithstanding that the CC still owed money on previous loans taken from Webcom.

39.7 Hence, the Taits were alleged to have approached the court for reasons other than those disclosed by them.

39.8 In short, the Van Niekerks alleged that the Taits abused the process and procedures of the court and that the relief claimed in the winding-up application should not be granted.

[40] I reiterate that the Taits denied the allegations abovementioned. In particular, the Taits furnished a version as to the transfer of the money from Webcom to the CC.

[41] It is self evident from the above broad summary of the Van Niekerks' allegations alone, that a substantial dispute of fact existed in respect of the just and equitable basis of the winding-up application. The Van Niekerks relied upon the rule in *Plascon-Evans*[2] to the effect that such disputes are to be resolved with

[2] *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) *('Plascon-Evans').*

reference to the admitted allegations of the applicants read together with the respondent's version.

[42] An application of the rule in Plascon-Evans must necessarily intercede in favour of the respondents.

42.1 None of the applicants' essential allegations in respect of the winding-up application was admitted. (As to the deadlock, although effectively admitted, if the agreement was allowed to continue the deadlock would be broken.)

42.2 The Van Niekerks' version did not support the conclusion that it was just and equitable for Webcom to be wound up. In effect, the Van Niekerks' demonstrated that such an order should not be granted.[3]

[43] Given the nature and extent of the disputes arising from the various allegations and counter-allegations made by the parties, I do not consider it appropriate to refer the winding-up application to oral evidence or to trial.

[44] In the circumstances, I am of the view that the winding-up application ought to be dismissed and I intend to make such an order. I deal with the costs of the winding-up application below.

The counter-application under case number 2495/2016

[45] Josef, the second respondent and effectively the Van Niekerks, sought an order that the first and second applicants, in their representative capacity as the trustees of the TFT, be ordered to take all steps to ensure that the TFT complies with the terms of the agreement referred to as annexure **'NV28',** concluded between the TFT and the LVN.

[46] Leave to Josef and the Van Niekerks (the trustees of the LVN), to approach the court on the papers duly filed or supplemented as necessary for:

46.1 Appropriate relief in the event of the first and second applicants' failing to adhere to the aforesaid agreement within ten days from date of service of this order on their attorneys of record;

[3] *APCO Africa (Pty) Ltd v APCO Worldwide Inc* 2008 (5) SA 615(SCA).

46.2 Payment by the applicants of costs of the counter-application on the scale as between attorney and client.

[47] The first applicant and the second respondent met on 18 February 2016, in an attempt to settle the disputes between them. It was common cause that they agreed terms at that meeting. Broadly stated:

47.1 The TFT would purchase the LVN's 40% shareholding of Webcom at a value to be determined by an independent evaluator. The Taits' attorneys would draft the sale of shares agreement.

47.2 KPMG would be approached to assist with the valuation of the shares.

47.3 Furthermore, pending finalisation of the agreement, Webcom would continue to pay Josef’s salary, thus affording him a fair opportunity to obtain alternate employment.

[48] The agreement was reduced to writing ('the recordal'), by the Taits' attorneys and remitted to those of the second respondent by way of a portable document format, under cover of correspondence advising that they should furnish comments to the recordal in order for any necessary amendments to be made to the document.

[49] Two clauses additional to those agreed at the meeting, were included by the Taits' attorneys' in the recordal; a clause providing for the handing over by Josef of his personal email address, allegedly used by him in the running of Webcom's business, and a twelve (12) month nationwide restraint of trade.

[50] The second respondent's attorneys retyped the recordal and amended it allegedly to accord with the terms agreed at the meeting. One such amendment specified Josef as an employee of Webcom falling within the definition of *"prescribed employee" i*n the agreement. The clauses in respect of the email address and the restraint of trade were deleted and the effective date of the agreement, alleged by the second respondent as 31 December 2015, was amended.

[51] The second respondent signed the amended recordal on behalf of the

LVN on 23 March 2016, at Barberton ('the amended recordal'), ('annexure **'NV28"),** and returned it to the first applicant's attorneys. (Annexure **'NV28'**is located in Volume 4 pages 321- 337 of case number 2495/2016.)

[52] The second respondent's amendments to the recordal led to the breakdown in the settlement between the parties and caused the Taits to proceed with the winding-up application. Webcom furthermore, ceased payment of Josefs salary, contrary to the agreement. (I mention that the applicants admitted their agreement to pay Josef's salary pending finalisation of the dispute.)

[53] The disputed issues in respect of the sale of shares agreement related to the handing over by the second respondent of his personal email address, the restraint of trade and the effective date of the agreement. I was informed from the bar that the issue of Josef's employment with Webcom was being resolved before the CCMA and I do not deal therewith.

[54] The Taits denied the Van Niekerks' averment that the effective date was agreed as 15 December 2015. Despite that denial, the first applicant did not raise the effective date as a dispute until the applicants' replying affidavits in the urgent application and the winding-up application. Furthermore, the first applicant, despite his denial, did not depose to the date that he alleged was the effective date, a fact of which he had personal knowledge.

[55] Hence, the Taits did not raise a genuine dispute of fact[4] in respect of the effective date of the agreement and the Van Niekerks' averment in that regard must stand.

[56] Nor was the issue of the effective date raised in the Taits' founding affidavit in the winding-up application, which referenced the breakdown of the agreement reached at the round table conference. The date of 16 March 2016, was alluded to by the Taits' counsel in argument and sourced in the recodal.

[57] The second respondent undertook to cease use of his personal email address for the business of Webcom upon implementation of the agreement.

[58] The second respondent / Josef opposed the restraint of trade alleging that it was overbroad in that it operated throughout South Africa, and was not validly

---

[4] *Wightman t/a JW Construciton v Headfour (Pty) Ltd* 2008(3) SA 371 (SCA) at 375E.

enforceable. He alleged however that he was amendable to a reasonable restraint of trade that was fair and subject to adequate compensation being paid in return.

[59] In the circumstances, the issues raised by the applicant do not present real disputes of fact justifying a referral of the counter-application to oral evidence, and the relief sought in respect of the counter-application should be granted together with the costs thereof. The period sought in respect of compliance by the Taits is not sufficient and I intend to extend it to a period that is sufficiently long so as to be fair to both parties, being two months.

[60] The Van Niekerks sought costs of the winding-up application and counter-application on a punitive scale. The Taits on the other hand, sought punitive costs on the basis that the Van Niekerks were vexatious in attaching the papers in the winding- up application, annexure "NV4C", to the Van Niekerks' answering affidavit under case number 29833/2016. I agree with the Taits that the Van Niekerks conduct in this regard was unjustifiable and caused the length of the papers in the winding-up application to be excessively extended. This amounted to an abuse.

[61] The Van Niekerks should be ordered to pay all costs arising from the attachment of annexure "NV4C", paginated pages 319 to 392 of the winding-up application, and all costs orders will be on the party and party scale.

[62] In the circumstances, I grant the following order:

1. In respect of the application under case number 2495/2016, the applicants under case number 2495/2016 are ordered to pay the costs of the urgent application heard on 19 January 2016.
2. The winding-up application under case number 29833/2016, is dismissed.
3. Subject to paragraph 3.1 of this order, the costs of the winding-up application under case number 29833/2016, including the costs of the opposition thereto, are to be paid by the applicants under case number 29833/2016.
   3.1. The costs occasioned by the attachment of annexure **"NV4C"** to the winding-up application (paginated pages 319 to

392), under case number 29833/2016, are to be paid by the second, third and fourth respondents under case number 29833/2016.

4. In respect of the counter-application under case number 2495/2016:

4.1. The first and second applicants in their representative capacities as the trustees of the Tait Family Trust, ('the Taits'), are ordered to take all steps necessary to ensure compliance by the Tait Family Trust with the terms of the agreement referred to as annexure **'NV28',** concluded between the TFT and the LVN and signed by the second respondent on behalf of the LVN at Barberton on 23 March 2016. (Annexure **'NV28'** is located in Volume 4 pages 321-337 of case number 2495/2016.)

4.2. Leave is granted to Josef Frederick Van Niekerk and LVN duly represented by the second and third respondents to approach the court on the papers duly filed or supplemented as necessary for:

4.2.1. Appropriate relief, in the event that the first and second applicants' fail to ensure compliance by the Tait Family Trust with the agreement, annexure **'NV28',** within two months from the date of service of this order on the first and second applicants' attorneys of record.

4.3. The first and second applicants are ordered to pay the costs of the counter-application.

A A CRUTCHFIELD

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

COUNSEL FOR THE APPLICANTS:	Mr L van Gass.
INSTRUCTED BY:	Van Der Merwe & Associates.
COUNSEL FOR RESPONDENTS:	Mr D Davis SC.
INSTRUCTED BY:	Prinsloo Attorneys.
DATE OF HEARING:	13 October 2017.
DATE OF JUDGMENT:	02 March 2018.