FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: 2120/2016

In the matter between:

ANDRE BAZZETT JANSEN KNIPE Applicant

and

KAMEELHOEK (PTY) LTD 1st Respondent

SCHAAPPLAATS 978 (PTY) LTD (in liquidation) 2nd Respondent

COMPANIES AND INTELLECTUAL PROPERTIES COMMISSION 3rd Respondent

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JUDGMENT: HANCKE, J

HEARD ON: 3 NOVEMBER 2016

DELIVERED ON: 10 NOVEMBER 2016

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[1] This is an application in terms of section 131(1) of the Companies Act, 71 of 2008 (herein later referred to as “the Act”) for an order placing the first and second respondents under supervision and in business rescue proceedings (“BR”).

[2] A provisional liquidation order was issued by Van der Merwe J on 30 August 2012. On the extended return day, 23 May 2013, the matter was argued and a final order of liquidation was issued by Daffue J, on 27 June 2013.

[3] It is important to note that the said order was issued in terms of section 81(1)(b) of the Act, on the ground that it was just and equitable that the companies be liquidated.

[4] In giving judgment, Van der Merwe J stated the following:

> "[15] The category in respect of small domestic companies deals with the case with a small domestic private company in which the cause some arrangement or understanding a particular personal relationship of confidence and trust between the shareholders, similar to that that should exist between partners in a partnership, is contemplated. An understanding of contemplation suffices."

He proceeded as follows:

> "As a determining factor is the destruction or impossibility of the contemplated personal relationship of mutual co-operation, trust and confidence, it matters not that that is no actual voting deadlock, that conduct relied upon was not wrongful but allowed by the articles of an association of the company, nor that the conduct in question is not in connection with a company's business."

[5] Daffue J, when granting the final order, stated the following:

> "[12] It is apparent that members of the Knipe family are at logger heads with each other and that a family feud of tremendous proportions exists which will not be terminated, whether or not final orders are granted herein… The company's counsel submitted that there are wide ranging and bitter disputes between the members of the Knipe family, of a magnitude seldom seen. It is also common cause that prior to the provisional winding up order, André, Johnny and Jackie managed the affairs of the companies to the exclusion of Carrol and Peter, and, to be able to do so, they had to remove the sole director, Mrs Knipe, the one person who as trustee of the various trusts resolved those trusts and allocated the shares to her five children in equal proportions. No meaningful dialogue between the parties is possible. They cannot approach any issue with open minds and in good faith. The children want to harvest the wealth which has been created by their late father with the financial and other support of Mrs Knipe."

[6] Application was made for leave to appeal against the final winding-up order and leave was refused on 25th September 2013. Thereafter application was made to the Supreme Court of Appeal for leave to appeal which was refused on 5 February 2014.

[7] The applicant himself summarises the relationship between members of the Knipe family as follows in his founding affidavit:

> "[18] The liquidation applications were based on allegations that it would be just and equitable to liquidate these companies because of the family feud which had ensued

> between the five children and our mother. It serves no purpose to refer to the many disputes which arose between the said parties. In more than one judgment delivered in this court it has been found that the five children cannot work together. I should explain that we are basically divided into two factions. The one faction is made up of my brother, Johnny Knipe, my sister Jackie Vigne and I. My late mother and my sister, Carrol formed the other faction. My eldest Peter Knipe has often take an independent stance but, in other times he has supported the views adopted by my mother and Carrol.
>
> [19] The crux of the aforegoing is that we do not get along. We all hold different views of what our late father intended with his companies and how he wanted to provide us."

[8] In his replying affidavit, he stated that he had secured the support of his brother, Peter, sister Jackie and other brother. He went on to say that:

> "The holders of 80% of the issued share capital in both companies support a business rescue application. It is only Carrol, who seems to be willing to lose everything as a result of a strong dislike of her siblings, who does not support the business rescue application."

[9] It appears from the application that the companies in liquidation were finally wound up by order of this court as far back as 27 June 2013. On 12 May 2016, that is three years later, the present application was filed with the registrar of the High Court.

[10] During 2014, there was another application to place the first and second respondents under supervision and BR proceedings. This application was brought by the applicant (as second applicant), which application was dismissed with costs.

[11] The first issue to be decided is whether BR is an appropriate remedy, given the fact that the companies were wound-up on the basis of it being just and equitable to do so, in view of the fact that the siblings/shareholders of the two private property owning companies being unable to work together due to on-going family feuds and acrimonious litigation.

[12] The essential requirements for an application of this kind are to be found in section 131 of the Act, which provides in relevant part:

> "(1) Unless a company has adopted a resolution contemplated in section 129, [which provides for voluntary business rescue proceedings], an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.
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> …
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> (4) After considering an application in terms of subsection (1), the court may-
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> (a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that-
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> (i) the company is financially distressed;

(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or

(b) dismissing the application, together with any further necessary and appropriate order, ..."

[13] Section 7 of the Act provides for

"(k) … the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders;"

[14] It is therefore necessary to consider the impact on *all* stakeholders involved and whether as not the support of all stakeholders would be achieved in seeking BR.

[15] It is trite law that small domestic companies which are designed to operate on a basis of trust and confidence between the shareholders, akin to a partnership agreement, are treated differently.

[16] The judgment of Van der Merwe J (*supra*) of the full bench made this clear when granting the provisional winding-up orders herein.

[17] Mr Halgryn, counsel for the 4th intervening party submitted that BR cannot be an appropriate remedy in the event of

small, solvent non-trading and purely property owning companies which have been wound-up by reason of the fact that it was just and equitable to do so due to infighting between the shareholder members. I agree with his submission.

[18] The scenario is even worse if the winding-up on the basis of it just and equitable to do so was *inter alia* due to the plethora of acrimonious on-going litigation between the shareholders, the continued deadlock and distrust which exist between them, and their complete and absolute inability to co-operate in harmony with each other, and the undeniable fact that they will never be able to do so.

[19] The onus is on the applicant to make out a case that there is a reasonable prospect of the BR being successful. In the present circumstances I am of the view that BR cannot, and was not designed to remedy the ailment which caused the rot in the companies in liquidation, i.e. deadlock[1], distrust and bitter infighting and litigation between the shareholders.

[20] Mr Vorster, counsel for the applicant, argued that four of the five shareholders representing 80% of the share capital in each of the companies support the current BR application and it is only the fourth intervening party. Carole Lotz who remains unwilling to work with her siblings; therefore the

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[1] Liquidation has often been regarded as the most appropriate remedy to unravel the deadlock in existence between directors/shareholders **Oakdene Square Properties v Farm Bothasfontein** 2012 (3) SA 273 at 289.

suggestion that BR will automatically fail as a result of the family strife, is incorrect.

[21] It is, however, important to have regard to the nature of the winding-up orders, which were granted due to the fact that the siblings/shareholders cannot work together in what was meant to be small domesticated companies in which all the siblings were supposed to participate equally in their management.

[22] In this regard Van der Merwe J stated the following in [18]:

> "I am satisfied that the companies were intended by the deceased to be family companies wherein all his children would be entitled to participate equally on the basis of mutual trust and confidence. The conclusion that a personal relationship of mutual trust and confidence between the shareholders was contemplated, is the logical conclusion also if Andre (applicant) and John's case as they correctly stated that their father did not intend Carol to be preferred over his other children."

and

> "[19] … It is also common cause that Andre, John and Jacquiline are managing the affairs of the companies to the exclusion of Carol."

[23] It is also important to note what Daffue J stated in [15.7]:

> "The members of the Knipe family are engaging in serious family feud and it is not possible for Andre, Johnny, Jackie, Pieter and Carol to work together."

[24] In the present case, it is alleged by Lotz that nothing has changed and that the acrimony, hatred and distrust continues. She regards them as bullies, common thugs and thieves who during their parent's lifetime made their life a living hell; of which the many family violence interdicts bear evidence.

[25] Our courts will not force parties into any kind of relationship against their will, in these circumstances. This is not what the legislature intended with BR and it is not what this court will sanction.

[26] As mentioned above, this is a second attempt to apply for BR. Discussing the previous application, Wright AJ stated the following:

> "[29] But then again, the applicants waited for an inexplicably long time to even approach this court for business rescue … The respondent appear to be correct in their contention that the application for business rescue was merely a way of further frustrating the liquidation process."[2]

[27] Mr Vorster argued that the inability of the shareholders to get along, will not be an impediment for BR. According to him the

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2 BR proceedings, by their very nature, must be conducted with the maximum possible expedition. **DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others** 2014 (1) SA 103 (KZP) at [27]; **Koen v Wedgewood Village Golf Country Estate** 2012 (2) SA 378 (WCC).

business rescue proposals are sufficiently detailed to satisfy the test enunciated in **Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd** 2013 (4) SA 539 (SCA) and to address the conflict and rivalry between the shareholders. Having regard to the history of the conflict between the siblings, I am not persuaded that BR is the appropriate remedy in the circumstances.

[28] Mr Rossouw, counsel for the first to third intervening parties, submitted that the liquidators are by far the biggest creditors. In view of the fact that the liquidators oppose the present application, section 152 (2) of the Act (dealing with approval of a BR) will not be satisfied. For approval of the proposed business rescue plan on a preliminary basis, the section requires the support by the holders of more than 75% of the creditors' voting interests that were voted, and at least 50% of the support of the independent creditors' voting interests that were voted. In view of the decision reached by me it is not necessary to deal with this aspect, and other issues raised by him.

[29] It follows from the aforegoing that BR is not an appropriate remedy in the event of small, solvent, non-trading an purely property owning companies which have been wound-up by reason of the fact that it was just and equitable to do so due to the infighting between the shareholder members, mentioned above.

[30] The application can therefore not succeed. In fact the application is an abuse of process and warrants a special costs order on an attorney and own client scale.

[31] The following orders are issued:

1. The application is dismissed.
2. The applicant is ordered to pay the costs on an attorney and own client scale.

S. P. B. HANCKE, J

On behalf of the applicant: Adv. E. C. Labuschagne SC
Assisted by Adv I. Vorster
Instructed by:
Horn & Van Rensburg Inc.
BLOEMFONTEIN

On behalf of first to third Intervening parties: Adv. P. Rossouw SC
Instructed by:
Matsepes Inc.
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On behalf of the fourth Intervening party: Adv. L Halgryn SC
Instructed by:
Lovius Block
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