IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

2015.04.10 | [signature]
DATE | SIGNATURE

CASE NUMBER: 58179/13

DATE: 14 April 2015

ANIBAL PANTALEAO MENDONCA DE FREITAS — Applicant

V

DE FREITAS INVESTMENTS CC — First Respondent

(REGISTRATION NUMBER: 1989/007787/23)

MANUEL CASIMIRO MENDONCA DE FREITAS — Second Respondent

JUDGMENT

MABUSE J:

[1] The applicant seeks the following order against the respondent:

"1. That the first respondent be placed under provisional winding-up in the hands of the Master of the above Honourable Court;

2. That a Rule Nisi be issued calling upon the second respondent and all other interested parties to furnish reasons, if any, to the above Honourable Court on a date to be determined by the Court at 10h00 or as soon thereafter as the matter may be heard as to why: 2.1 a final winding-up order should not be granted; and,

2.2 the cost of this application should be cost in the liquidation."

[2] Despite the applicant's prayers as set out above, counsel for the applicant argued strongly that there is no need for the Court to grant a provisional order and that on the facts before the Court, considering the fact that the application has been served on the respondents and the grounds on which the application is brought, the Court may instead issue a final winding-up order. I will deal with the basis of the application later in the judgment and decide whether the facts on which the applicant relies in seeking the final order justify such an order.

[3] The applicant is an adult businessman who resides and conducts business at 977 8th Avenue, Wonderboom South, Pretoria. The first respondent is described as a close corporation duly registered in terms of the Close Corporation statutes of this country. While its principal place of business is situated at 468 Hertzog Street, Wonderboom South, its registered office is located at 562 Main Road, Erasmia, Pretoria. The second respondent is an adult male businessman who resides at 886 Nicola Street, Silver Lakes, Pretoria. He conducts business at the same premises as the applicant.

[4] The applicant and the second respondent are brothers. Each one of them holds 50% of members' interest in the first respondent.

[5] Although the application for the winding-up of the first respondent is said to be brought in terms of s 81(e)(i) and (ii) of the Companies Act 71 of 2008 ("the Act"), the relief sought is based on the fact that the applicant and the second respondent have reached a deadlock in the management of the first respondent; that the said deadlock cannot be broken and that it may cause irreparable injury to the close corporation. This is what is provided for by s 81(1)(d)(i) and (ii) of the Act and not s 81(e)(i) and (ii) or s 81(1)(d)(i) and (ii) of the Act. It is clear from the heads of argument that both counsel understood that "the application is brought on the basis that the applicant is a member of the first respondent and that there is a deadlock in the management of the first respondent's business" according to the respondent's heads of argument and "a member of the close corporation may apply to court for an order winding-up the close corporation if the members have reached a deadlock in the management of the close corporation which cannot be broken and which causes or may cause irreparable injury to the close corporation", according to the applicant's counsel's heads of argument.

[6] Accordingly the aforegoing sounds a death knell to the point raised by Mr. van der Merwe that the application is brought in terms of s 81(e)(i) and (ii) of the Act. Apart from the fact that in his heads of argument he understood and treated this matter as an application based on a deadlock between the applicant and the second respondent and that the parties themselves understood the application likewise, it was pointed out and argued by counsel for the applicant that the argument that the application was brought in terms of s 81(e)(i) and

(ii) of the Act was brought up rather late and had not been properly raised. I will deal with this aspect later.

[7] The applicant has set out his case against the first respondent as follows. It is the applicant's case that the assets and income of the first respondent are being misapplied and wasted by the second respondent, the controlling member of the first respondent. The second respondent is also acting in a fraudulent manner in conducting the business of the first respondent. In addition the second respondent keeps all the income generated by the first respondent for himself and has done so since 2005. The second respondent mismanages the first respondent's assets and income by using the generated income and assets for his personal purpose leading thereto that the creditors of the first respondent are not paid.

[8] From the conception of the business relationship between the applicant and the second respondent they shared equally in the profits of the business. This, as indicated earlier, stopped during or about July 2005. After July 2005 the second respondent, on his own accord, withheld the applicant's share of the profits of the business. He has since then failed to give any reason or explanation for his actions. As a consequence of this periods of arguments between the members arose and a complete breakdown of communication and trust between them came about.

[9] It is the following events that led to deterioration in the brother's relationship. During or about 2007 it was brought to the attention of the applicant by a third party that the second respondent, contrary to their agreement, registered and incorporated Meat Queen Traders (Pty) Ltd with him as the sole shareholder thereof. The applicant also discovered that the

second respondent, again and contrary to their agreement and in particular during 2003, had the shareholding of Impi Truck Centre (Pty) Ltd registered on the following basis:

1. the second respondent as a 40% shareholder;
2. his wife, Ida, a 30% shareholder, and;
3. Anna Sofia Poppie Shoko as a 30% shareholder.

In addition it was discovered that the second respondent had the applicant registered as the sole shareholder of Rotorec Diesel Gezina (Pty) Ltd.

[10] The second respondent failed to disclose to the applicant that he had the shareholding registered on the basis as set out above and in fact throughout led the applicant to believe that they were equal shareholders in all the companies they had purchased together. When the applicant confronted him about this the second respondent answered simply by stating that the applicant did not need to worry and that Impi Truck Centre (Pty) Ltd was only a window dressing exercise. He also indicated that despite the manner in which the shareholding was registered they were and would remain partners both owning the companies in equal shares. Furthermore he reassured him that the arrangements they always had regarding their businesses and ownership thereof would remain intact. According to the applicant this obviously was not the case as the second respondent withheld his share of the profits generated by their companies and continued to do so. In the eyes of the applicant the actions of the second respondent and his behaviour constituted a serious break of trust between the members.

[11] Another indication that the trust between the members had dissipated was the fact that Impi Truck Centre (Pty) Ltd traded whilst utilising an overdraft facility of the first respondent. The second respondent and the applicant had bound themselves as sureties and principal

debtors of the first respondent for the said overdraft facility. At the time the applicant had come to know of the second respondent's actions the said overdraft facility ran into millions. This caused the applicant great tension and anxiety as he could not be held personally liable for the debts of the company in which the applicant had no shareholding and about which the second respondent had lied to him. During or about January 2007 the applicant settled the overdraft in full. Having done so, the applicant cancelled the overdraft facility of the first respondent which was utilized by Impi Trucks (Pty) Ltd. The second respondent became furious and threatened the applicant. The applicant found the actions of the second respondent to be completely unacceptable and confronted him as a result thereof. He requested him to rectify the situation regarding the shareholding of the various companies. The second respondent blatantly refused to do so. This caused the relationship between the two of them to deteriorate even further. On this basis the applicant contends that it is quite evident that he and the second respondent are unable to conduct the business of the first respondent together.

[12] There are other factors that caused the deterioration in the relationship between the members, among them failure by the second respondent to share the profits generated by Impi Truck Centre (Pty) Ltd. According to the applicant initially he received 50% of the profits generated by Impi Truck Centre (Pty) Ltd. This continued until approximately 31 August 2005. Since then he has not received any further share in the profits. It was also at that same time that no work was channelled by Impi Truck Centre (Pty) Ltd to Rotorec Diesel Gezina (Pty) Ltd. This left the applicant and Rotorec Diesel Gezina (Pty) Ltd impecunious. He confronted the second respondent about this and a further argument ensued. The second respondent continued with his refusal to rectify the shareholding of the companies and the business relationship between them. During the aforementioned

confrontation which occurred during January 2006 the second respondent stated that the applicant had no interest or shares in Impi Truck Centre (Pty) Ltd and that since he did not hold any shareholding in the company he had no right to any income generated by it and that he did not have any say in the manner in which the second respondent conducted the business. It became clear to the applicant that the second respondent had no intention of honouring their original or later agreements and that he had decided to keep all the income generated by the businesses for himself. Secondly, despite the agreement between the second respondent and the applicant that Rototec Diesel Gezina (Pty) Ltd would do all the electrical and diesel pump work for Impi Truck Centre (Pty) Ltd, Impi Truck Centre (Pty) Ltd stopped sending electrical and diesel work to Rotorec Diesel Gezina (Pty) Ltd during the end of 2006. The result was that the second respondent, through these actions, deprived the applicant and Rotorec Diesel Gezina (Pty) Ltd of any income. The obvious result thereof was that Rotorec Diesel Gezina (Pty) Ltd became unable to meet all its financial obligations.

[13] The applicant investigated the matter and found out that the second respondent had, without the knowledge or consent of the applicant, formed a new company named Rotorec Diesel Centre (Pty) Ltd during or about 2007. The second respondent channelled the work which was due to Rotorec Diesel Gezina (Pty) Ltd, in accordance with their understanding, to his new company, Rotorec Diesel Centre (Pty) Ltd. This was done obviously in order to defraud the applicant and Rotorec Diesel Gezina (Pty) Ltd and to enrich himself and his newly formed company.

[14] The following incidents are the principal issues why there is a deadlock in the management of the first respondent between the applicant and the second respondent. The main business of the first respondent is the letting of certain portions of the properties as business

premises. The first respondent has approximately fourteen tenants. The companies and businesses referred to above are also tenants of the first respondent. The total monthly income amounted to approximately R200,000.00 (two hundred thousand rand). The applicant however conceded that because he does not have all the full details regarding the income of the rental, he was unable to furnish the Court with a precise amount of the income that was earned from the rental of the premises. The last time he was furnished with the relevant information, according to him, was in 2007. Since then the second respondent has refused to furnish him with any further information. As a result the relationship between the applicant and the second respondent has soured and became acrimonious. The second respondent avoids and ignores him completely.

[15] The second respondent has gone as far as attempting to sabotage the business the applicant now runs. He did so by causing old and new oil to be spilled on the pavement directly at the entrance of his business. He reported the incident to the police and the second respondent was given the order to clear the spillage.

[16] The second respondent as a shareholder of Impi Truck Centre (Pty) Ltd, Rotorec Diesel Centre (Pty) Ltd and Meat Queen Traders (Pty) Ltd, who are all tenants of the first respondent, has stopped paying the payment of rental due and owing by these companies to the first respondent. This quite obviously has a profound impact upon the first respondent as it derives the largest part of income from rental of the aforementioned premises. The first respondent's failure to generate income results therein that the creditors of the first respondent are not paid. This exposes the applicant and the first respondent to legal action for the recovery of the debts owed to the creditors.

[17] Accordingly the applicant views these actions by the second respondent not only as amounting to reckless management of the first respondent but that the second respondent, in acting as it does, conducts the business of the first respondent with intent to defraud the creditors of the first respondent.

[18] It is contended by the applicant that apart from the fact that the second respondent not only ensured that Impi Truck Centre (Pty) Ltd, Rotorec Diesel Centre (Pty) Ltd and Meat Queen Traders (Pty) Ltd did not pay rent to the first respondent, he also failed to collect the rent due by other tenants. In addition the second respondent, as a controlling member, did not make payment of the amounts due in respect of rates and taxes and municipal accounts of the first respondent. The second respondent's failure to pay rent on behalf of his other businesses and to collect the rent from other the other tenants as he was supposed to have done, has deprived the first respondent of its much needed income. In his view the business of the first respondent has not been conducted to the benefit of its members.

[19] The second respondent utilized the income generated by the first respondent to purchase two very expensive Mercedes Benz motor vehicles. He purchased these vehicles for his own use and did so without informing the applicant. The animosity between the applicant and the second respondent is of such a nature that the respondent came to his house where he fired a shot at him. It is abundantly clear that a complete deadlock has arisen between the applicant and the second respondent regarding the manner in which the first respondent's business should be conducted. It is also evident that the business of the first respondent is not connected in such a manner as to benefit the applicant or the second respondent. The applicant contends that he and the second respondent cannot proceed

with a normal business relationship and it is therefore imperative that the first respondent be wound-up.

[20] The second respondent causes the business of the first respondent to be conducted in a fraudulent and deceptive fashion and does so for his own benefit. All the applicant's efforts to obtain information pertaining to the first respondent are hampered by the second respondent. The second respondent is presently in control of the affairs and running of the day-to-day business of the first respondent. The second respondent uses his shareholding in the first respondent in order to benefit the other companies and businesses referred to above and do so as he in turn benefits from the income generated by these businesses. It is the applicant's case that it is essential for the first respondent to be wound-up and for a liquidator to take control of the affairs of the first respondent as the liquidator would be able to see to it that all the outstanding debts are collected and the creditors are paid.

[21] The applicant has taken steps to settle the disputes regarding the management of the first respondent with the second respondent but to no avail. In an effort to do so the second respondent and the applicant agreed to the appointment of one, Conrad Thompson ("Conrad") from Devine Land Projects, to divide the properties owned by the first respondent amongst the two of them. During or about 2012 the applicant was presented with heads of agreement attached to the papers as Annexure 'APM11' which agreement was drafted by attorneys on instructions of the said Conrad. In terms of the aforementioned agreement the second respondent wanted to pay the applicant an amount of R8,000,000.00 (eight million rand) representing his, the applicant's 50% membership interest in the first respondent and a 50% membership interest in Mazezo Farm CC. The second respondent was to resign as trustee of the De Freitas Family Trust and was to sign the necessary founding statement

"CK2" and "CK2A" forms in order to effect the change in members' interest of both the first respondent and Mazezo Farm CC. The applicant would receive the transfer of Erf 269 Gezina. The second respondent has resigned as trustee of the De Freitas Family Trust but has failed to comply with the greatest parts of the parties' agreement. The second respondent, however, had made certain payments to the applicant in terms of the aforementioned agreement over a longer period but not as set out in the agreement. As the applicant was experiencing financial difficulty as a result of the second respondent's actions, he, the applicant, was forced to accept these payments whenever they were made by the second respondent. Despite various requests and demands to settle the disputes the second respondent failed to make any further payments to the applicant.

[22] As a consequence of the second respondent's attitude he instructed his attorneys to send a letter of demand to him which was done on 15 July 2013. In terms of the said letter of demand the second respondent was given 7 (seven) days to pay the amount of R3,015,000.00 (three million fifteen thousand rand), plus interest at a rate of 9% per annum. Upon receipt of the said letter the second respondent contacted the applicant's attorneys and alleged that the amounts were not due and payable. This allegation is supported by an affidavit by the applicant's attorneys. The affidavit is attached to the papers and marked Annexure 'APM12'. The attorney requested him to contact his attorneys as this was a serious matter. On 25 July 2013 the second respondent's attorneys wrote a letter in which they alleged that the amount due should be R2,645,000.00 (two million six hundred and forty five thousand rand). They also stated further that the payment of the agreed purchase was subject to their second respondent's cash flow finances. In reply to this correspondence the applicant's attorneys supplied them with a copy of the agreement and referred them to paragraph 7 thereof. Paragraph 7 is a prohibition on the conclusion of any oral agreements

outside that written agreement. In the same letter the applicant's attorneys disputed that the amount that the second respondent owed the applicant was R2,645,000.00 (two million six hundred and forty five thousand rand). On 24 July 2013 and as no further payments had been made the applicant instructed his attorneys to cancel the said agreement which they did in a letter dated 24 July 2013. This letter was served on the second respondent. The consequence of the cancellation of the said agreement was that all payments that the second respondent had made were forfeited as set out in paragraph 6 of the said agreement.

[23] It is important to point out that the second respondent denied most of the allegations contained in the founding affidavit. In particular he disputed the applicant's *locus standi*. He denied that the applicant was still a member of the first respondent and contended that on that basis the applicant had no right in the circumstances to launch this application; he denied furthermore that he had appropriated the assets and income of the first respondent; that he acted in any fraudulent manner; he contended that it would be costly to liquidate the respondent. Finally he admitted that the relationship between him and the applicant has deteriorated.

[24] Counsel for the applicant, Ms. Spangenberg, submitted that the second respondent did not, in his answering affidavit, deny that there was a deadlock between the applicant and the second respondent. Secondly she referred the Court to paragraph 50 of the answering affidavit in which the second respondent admitted that the relationship between him and the applicant had become deteriorated. By implication that there existed a deadlock between the applicant and the second respondent they both appointed one Conrad to assist them to resolve their disputes. Finally the purpose of the agreement the parties signed on 29 March

2012 was concluded in order to resolve the disputes between the applicant and the second respondent. It states so in clause 3.1 thereof. On the bases of the aforegoing she submitted that the applicant has established that the members have reached a deadlock; that the deadlock cannot be resolved between the two matters no matter how hard they strove to do so and finally that that deadlock has caused or will cause injury to the first respondent.

[25] The nature of the injury the first respondent sustained is clearly showed in its diminished income, failure to pay creditors and furthermore failure to conduct business normally.

[26] In his turn Mr van der Merwe, counsel for the respondents, indicated to the Court that there were two points he wanted to raise against the application. He submitted that on the bases of those two points the application should fail.

[27] According to his first point, the application had serious defects. As one of such defects he referred the Court to paragraph 4.1 on page 10 of the founding affidavit. This is the paragraph in which the applicant had stated that:

"This is an application for the winding-up of the first respondent in terms of s 81(e)(i) and (ii) of the Companies Act, 71 of 2008."

To support his view that there was no misunderstanding as to the nature of the application the applicant brought before Court and that the applicant always meant to bring an application in terms of the provisions as set out in s 81(e)(i) and (ii) of the Act, one needs only look at the allegations contained in the founding affidavit. He had been persuaded by such words as "fraudulent" or otherwise "illegal" appearing in the said section of the Act. In the first place where a contradiction exists between the section of an Act of Parliament referred to and the contents of the affidavit, a Court may resolve such an inconsistency by having regard to the contents of the affidavit that sets out all the facts on the basis of which relief is sought. It will be unwise for a party to cry foul on usage of the wrong section or to ignore the statement that sets out the facts of the matter for the relief sought. In the end the crucial question that the Court has to ask itself is whether the applicant has on the facts before it made out a good case. In the midst of what a party states in its affidavit, has he discharged the onus of proof that lies on him or her? I have already pointed out that the parties were not confused about the matter they were dealing with. It is for that reason that the respondents did not raise this aspect in the answering affidavit.

[28] The second point that was raised by counsel for the respondents was that the applicant had failed to attach security by the Master of the High Court. This argument was raised because in paragraph 46.1 of the founding affidavit the applicant had stated that:

"I will ensure that the required security is lodged with the Master of the High Court prior to the bringing of this application and will attach hereto a certificate by the Master of the High Court in support thereof."

No such certificate was attached to the applicant's papers at the hearing of this matter nor was it handed over to the Court at such hearing. Mr. van der Merwe then latched to the failure of the applicant to provide such a certificate to frustrate the application.

[29] The said certificate was required by s 346(3) of the Companies Act 61 of 1973 ("the Old Companies Act"). In the first place this application was not brought under s 345 of the Old Companies Act. It was brought under s 81 of the New Act (Act 71 of 2008). The section under which the application was brought does not require of the applicant to provide

security. Besides s 9(2) of Schedule 5, Transitional Arrangements of Act 71 of 2008, provides as follows:

"(1) Despite the repeal of the previous Act, until the day determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act have not been repealed subject to sub-items (2) and (3).

(2) Despite sub-item (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of part G of Chapter 2."

As set out in s 81 under which the application is brought the first respondent in this matter is a solvent company. In the premises there is no merit, in my view, on this point.

[30] The applicant does not have *locus standi*. The second respondent contends that the applicant does not have *locus standi* to launch this application because the agreement that the parties had concluded on 29 March 2012 was not validly cancelled. The second respondent stated in his affidavit that the applicant had undertaken that he would, on signature of the aforementioned agreement, Annexure 'ANP11' to the founding affidavit, provide the second respondent with a signed copy of the audited financial statements of both the first respondent and the other close corporations for the year ending on 28 February 2007. The second respondent contends that the production of the aforementioned financial statements was a requirement before he could get financial assistance from a bank, in circumstances in which he would have put up the first respondent's property as security for such a loan. According to the second respondent, the applicant has breached the agreement in as much as he failed to provide him with the audited financial statements as promised. For that reason the second respondent accepted the advice that if one party to a

contract is himself guilty of breaching an agreement, he cannot complain of and rely on the breach of the same agreement by the other party.

[31] In his replying affidavit, the applicant's response was that he was not aware that he had to present the second respondent with an audited statement because he was not informed or required telephonically or in writing to do so. This is despite the fact that he signed the agreement. One would accept that before signing an agreement a party has acquainted himself with the contents thereof and that he would not have signed it if it did not contain what he wanted.

[32] There are however problems with the second respondent's contentions. It is as clear as crystal that he himself did not make sure that he understood the contents of the agreement. Clause 15.5, which he complains that the applicant has flouted, stands alone. It was not made subject to his obligation to pay as undertaken in clause 5.5 of the agreement. It was never an agreement between the parties to the said 'ANP11' that the second respondent would pay the amount set out in clause 5.5 of the said agreement only if the applicant furnished him with the audited financial statements. Secondly, despite the provisions of clause 5.5 he committed himself to pay the purchase consideration on certain named dates in complete disregard to the contents of the said clause 5.5. Thirdly on 15 July 2013 the applicant's attorneys wrote a letter to the second respondent which was delivered to the second respondent by hand. The last paragraph of the said letter stated that:

"In terms of paragraph 6 of the agreement you are hereby given 7 (seven) days from the receipt of this letter to pay such amount failing which our client will cancel this agreement, and in terms of paragraph 6, all payments made shall be forfeited into our client as agreed pre-liquidated damages."

The second respondent never complained that he did not receive the said letter. Secondly he never raised the applicant's failure to comply with clause 5.5 of the agreement as a reason for refusing to pay. It is clear that he never considered the audited financial statements as the prerequisite of his obligation to pay. Similarly he failed to raise the same defence even after he had received by hand the applicant's attorney's letter dated 24 July 2013 in which the agreement was cancelled as stated in the last paragraph thereof.

[33] Finally the applicant had always been a member of the first respondent until formal transfer of his member's interest in the first respondent had been transferred to the second respondent. There is no proof in the papers that that has happened. All the correspondence in this matter and attached to the papers before the Court point out into one direction only and that is the applicant had not transferred his interest in the first respondent to the second respondent as had been contemplated by the parties. Accordingly the applicant is still a member of the first respondent. In that capacity he has *locus standi* to bring this application.

[34] I pointed out earlier that counsel for the applicant indicated that the applicant now seeks a final winding-up order. The papers were properly served on the respondents. The matter was fully argued before this Court. The facts before the Court justify the making of such an order. The second respondents, though speaking with a fork tongue in that he deny that there was a deadlock between the facts, admitted though that the relationship between the members has become deteriorated. In the premises I am of the view that the applicant has made out a good case for the relief that he seeks and that he is therefore entitled to it. Accordingly the following order is made:

1. The first respondent is hereby placed under final winding-up.
2. The cost of this application shall be costs in the liquidation.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	*Adv. C. Spangenberg*
Instructed by:	*Jasper van der Westhuizen & Bodenstein Inc.*
Counsel for the respondents:	*Adv. M.P. van der Merwe*
Instructed by:	*Couzyn Hertzog & Horak*
Date Heard:	*16 March 2015*
Date of Judgment:	*14 April 2015*