IN THE KWA-ZULU NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 5047/13

In the matter between:

ROSEBUD GUGULETHU HLATSWAYO N.O.	1ST APPLICANT
LAWRENCE THULANI MTHETHWA N.O.	2ND APPLICANT
LANCE CRAIG PETERSEN N.O.	3RD APPLICANT
AND	
SILVER FALCON TRADING 99 (PTY) LTD	1ST RESPONDENT
PREVIN NAIDOO	2ND RESPONDENT
TARISHA SINGH	3RD RESPONDENT
RMS CORPORATE SOLUTIONS (PTY) LTD	4TH RESPONDENT
RAND MERCHANT BANK LIMITED	5TH RESPONDENT

JUDGMENT

THATCHER AJ:

Introduction

[1] The applicants are the trustees of the Ekuthuleni Family Trust ("the trust"). Previn Naidoo, the second respondent, and Tarisha Singh, the third respondent, each hold one third of the shares in the first respondent, Silver Falcon Trading 99 (Pty) Ltd. Each of them also acknowledges the trust's right to the remaining one third of the shares in the first respondent. The first respondent owns an immovable property on Prince Street in Durban and which is known as the South Beach

Shopping Centre. Rental income is obtained from the tenants of the shopping centre. Differences arose between the trust on one hand and the second and third respondents on the other. Those differences resulted in an order being made in this court on the 24 June 2005 that, pending the determination of an action to be brought by the trust against the first, second and third respondents for an order, *inter alia,* that the share register of the first respondent be rectified to reflect the trust as holding 33,3% of the shares in the first respondent, the second and third respondents were interdicted and restrained from withdrawing any funds from the first respondent's bank account other than by cheques also signed by the first applicant. Further in terms of that court order, the predecessor of the fourth respondent was appointed to manage the day to day affairs of the first respondent, including the collection of rentals from the tenants at the shopping centre, the payment of expenses of the first respondent and the retention of income earned by the first respondent in a trust account while paying into the first respondent's bank account sufficient funds to meet any duly signed cheques.

[2] The action contemplated in the court order was instituted and subsequently settled. The settlement agreement put in place a mechanism by which the trust and the second and third respondents would part company. In terms of that settlement agreement, the second and third respondents were to purchase the trust's one third shareholding in the first respondent for R4 000 000,00, payable within six months of the 17 October 2007. The first respondent was to register a mortgage bond over the South Beach Shopping Centre in favour of the trust to secure the repayment by the first respondent to the trust for an amount of R2 620 000,00 loaned by the trust to the first respondent. In the event of the second and third respondents not paying the sum of R4 000 000,00 before the expiry of the six month period, the full amount of the trust's loan would immediately become due and payable by the first respondent to the trust which would then be entitled either to enforce the sale or to cancel it, or to call up the loan and foreclose on the bond, "or take such other steps as it may be advised including an application for the winding up of" the first respondent. Pending the payment of the R4 000 000,00 "and until the final resolution of all matters referred to in" the settlement agreement, the fourth respondent's predecessor would

continue to manage the day to day affairs of the first respondent as provided for in the court order of the 24 June 2005.

[3] The sum of R2 650 000,00 was made available by the trust to the first respondent from monies loaned by the fifth respondent to the trust. According to the first applicant, the instalments payable by the trust to the fifth respondent were not being paid by the fourth respondent and the trust began doing so. She states that the trust is unable to continue paying the instalments on the loan made by the fifth respondent. According to the first applicant, the fourth respondent (which, it is common cause, has replaced its predecessor) is obliged to make these monthly payments to the fifth respondent in terms of the court order of 24 June 2005 but , the first applicant contends, the fourth respondent “is being pedantic in this regard and requires an order specifically” to do so.

[4] Accordingly the applicants launched this application on 5 May 2013, some 22 months ago, for two orders. The orders sought were, firstly, that the fourth respondent pay to the trust the sum of R2 455 184,50 being the total of the instalments paid by the trust to the fifth respondent since March 2004, or whatever amount is held by the fourth respondent in its trust account. Secondly, the applicants sought an order that the fourth respondent pay all future mortgage bond instalments in respect of the mortgage bond passed over the shopping centre in favour of the trust directly to the fifth respondent.

[5] The third respondent opposed the application and brought a counter application for, *inter alia*, an accounting in respect of the loan of R2 620 000,00, and, upon receipt of that accounting, the first respondent tendered to pay to the applicants the sum of R1 947 729,96 standing to the credit of the first respondent in the trust account administered by the fourth respondent in part settlement of the loan of R2 620 000,00. In the alternative, the third respondent seeks an order that the first respondent be wound up on the grounds that it is just and equitable to do so.

[6] The fourth respondent delivered an affidavit in which it advised that aside from the rentals collected in any given month, it holds no money in trust for the first respondent and it has never done so. All monies from the rentals, presumably after the first respondent's expenses have been deducted, are transferred to the first respondent's ABSA Bank account, over which the fourth respondent has no control. In most months there would be sufficient nett income to pay the loan instalment to the fifth respondent. However that is not always the case and accordingly the fourth respondent stated that if the court ordered it to make payment of all future instalments directly to the fifth respondent, the order would have to be subject to the proviso that there are sufficient funds to do so.

[7] The first applicant replied to the answering affidavits. She sought the dismissal of the counter application and persisted in seeking the relief set out in the notice of motion.

The relief now claimed by the applicants

[8] In the heads of argument delivered on behalf of the applicants on 26 February 2015, less than a week before the hearing, it emerged that the applicants no longer persisted in the relief originally sought by them and set out in paragraph [4] above. Rather, the applicants sought a money judgment against the first respondent for R2 622 000,00. This is based upon the settlement agreement concluded on 17 October 2007, over seven years ago. They also claimed interest on that sum up to 1 September 2004 in the amount of R66 154,33. This amount is the interest on the sum of R2 620 000,00 from the 24 March 2004 until 31 August 2004, calculated at the rate of 6% per annum being the amount paid by the Standard Bank on deposits invested on call from time to time which is the formula provided in clause 1.2 of the mortgage bond. The applicants claimed interest from 1 September 2004 to 28 February 2004 in the amount of R1 650 600,00 being the interest which accrued at the same rate from 1 September 2004 to 28 February 2015. They also claimed interest at the rate of 6% per annum on the sum of R2 620 000,00 from 1 March 2015 to date. In the alternative to the claim for interest in the amount of

R1 650 600,00, the applicants claimed R1 747 867,00 calculated in accordance with the interest rates payable by the Standard Bank on money invested on call with it which varied between 4,9% per annum and 11,25% per annum over the period September 2004 to February 2015. In addition, in the alternative claim, the applicants claimed interest at the rate of 5.25% per annum from 1 March 2015, being the current call rate at the Standard Bank.

[9] In both amended orders, the applicants sought an order that the first, second and third respondents effect payment to the applicants of the amount standing to the credit of the first respondents ABSA Bank account in partial discharge of their judgment debt.

[10] At the hearing, Mr *Pitman*, who appeared for the third respondent opposed the amended relief sought and moved for the alternative relief sought in the third respondent's counter application, namely for the winding-up of the first respondent on the basis that it was just and equitable to do so.

[11] Mr *Pillemer* SC, who appeared with Mr N *Moosa* for the applicants, submitted that the applicants were entitled to seek the amended relief since the evidence in support of that claim appeared from the founding papers. Counsel for the applicants in their heads of argument addressed this aspect in the following terms:-

> "Although the founding papers are a little confusing and the notice of motion requires a slight adjustment, the applicants' claim in essence is for payment of monies which it is owed by the first respondent and which are secured by a mortgage bond."

Later in their heads of argument, the change in relief is described as follows: "the papers and notice of motion sought to take a short cut and direct the fourth respondent to make the appropriate payment directly to the fifth respondent which lent applicants the money. This is not appropriate relief and so the relief that was originally sought in that regard (prayer two of the notice of motion) is no longer persisted in."

[12] It is true that the founding affidavit refers to the settlement agreement and alleges that the second and third respondents did not pay the sum of R4 000 000,00 referred to in the settlement agreement. However the founding affidavit then proceeds to set out facts in an endeavour to justify the grounds of the relief sought in prayers one and two of the notice of motion which requires the fourth respondent to do certain things. There is nothing in the founding affidavit to indicate that the applicants intend seeking a money judgment against the first respondent based upon the settlement agreement. It would have been a relatively simple exercise to plead a claim for a money judgment of R2 620 000,00 against the first respondent based the settlement agreement, alleging that:-

(a) in terms of clause 9 of the settlement agreement, in the event of the second and third respondents not paying the sum of R4 000 000,00 within six months of the 17 October 2007, the full amount of the trust's loan of R2 620 000,00 would immediately become due, owing and payable by the first respondent to the trust;

(b) the sum of R4 000 000,00 has never been paid and so the sum of R2 620 000,00 is due owing and payable;

(c) the trust is exercising its right to call up the loan.

However, there is no endeavour to make this case in the founding affidavits.

[13] In the case of *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008(2) SA 184 (SCA) 200C-E Cloete JA stated as follows:

> "It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party, may well be prejudiced because evidence may

> have been available to it to refute the new case on the facts. … In motion proceedings, the affidavits constitute both the pleadings and the evidence: *Transnet Ltd v Rubenstein* [2006(1) SA 591 (SCA) [28]] and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted."

See also: *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009(4) SA 628 (SCA) at 638B-F.

Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa & Others 1999(2) SA 279 (T) at 323F-324C, quoted with approval in *MEC for Health, Gauteng v 3P Consulting* 2012(2) SA 542 (SCA) at 550F-551D.

[14] The applicants no longer contend for the relief originally sought. However the founding affidavit is brief, not confusing, and provides no indication of the amended relief the applicants now seek. The approach of the respondents in their answering affidavits was to meet the case made out in the founding affidavits, not the amended relief. If the relief now sought had been sought from the outset, the respondents' approach to the application would, I have no doubt, have been different. The application was launched some 22 months ago. The applicants cannot, a week before the hearing of the application, change their relief from that originally sought in so drastic a manner. This is trial by ambush. In the circumstances the applicants' amended relief cannot be granted.

[15] Mr *Pitman* moved for the alternative relief in the counter application, that is, for the first respondent to be wound up on the basis that the shareholders of the first respondent were deadlocked in the management of the first respondent. In addition, he argued that it was just and equitable that the first respondent be wound up by reason of the breakdown in their relationship between the trust represented by the first applicant on one hand, and the third respondent on the other.

[16] Section 81(1)(d) of the Companies Act, No.71 of 2008, provides that a company may be wound up at the instance of one or more shareholders on the grounds of deadlock situations set out in sub sections (i) and (ii) or, in terms of sub section (iii), that "it is otherwise just and equitable for the company to be wound up …".

[17] There is no fixed category of circumstances which may provide a basis for a winding up on the just and equitable ground under the Companies Act, 2008. These circumstances include those which provided a basis for a winding up on just and equitable grounds within section 34(4)(h) of the 1973 Act. *Thunder Cats v Nkonjane Economic Prospecting* 2014(5) SA 1 (SCA) at 9E-F.

[18] Where there is in substance a partnership in the form of a private company, circumstances which would justify the dissolution of the partnership would justify the winding up of the company under the just and equitable provision.

Apco Africa (Pty) Ltd & Another v Apco Worldwide Inc. 2008(5) SA 615 (SCA) at 624G-H.

Where the purpose for which the company was formed could not be achieved, it may also be wound up on the basis that it is just and equitable to do so because the *raison d' être* for the company has ceased.

Apco Africa (Pty) Ltd & Another Worldwide Inc. (supra) at 621E-G.

[19] Mr *Pitman* contended that the evidence of the first applicant and the third respondent demonstrated that the parties were in substance in partnership with the partnership business being conducted through the vehicle of a company. He also submitted that the evidence demonstrated a breakdown of the relationship between the first applicant on one hand and the third respondent on the other.

[20] Mr *Pitman* submitted that the business for which the respondent had been formed could not be achieved. He submitted that the object of the first respondent was not merely to obtain rental income from the South Beach Shopping Centre. Rather, when the trust and the second and third respondent joined forces, their object was to demolish the existing buildings on the properties and to construct a multi-storey development comprising a shopping centre and possibly commercial offices and luxury residential flats. Once the properties were acquired (which was going to cost R13 000 000,00), the plan was to approach major property development and construction companies to obtain their participation in the development. Ultimately it was envisaged that the entire project would realise some R240 000 000,00 with the project reaping a profit of some R66 000 000,00 so that the trust would receive a profit of some R13 200 000,00 and over and above having received repayment of the initial loan of R2 600 000,00 and the interest thereon. However events did not unfold as anticipated or hoped. According to the third respondent, the first applicant became disenchanted, contending that she had been defrauded because, so she alleged, she had not realised that neither the third respondent nor her father nor the second respondent had invested any of their own money in the project. According to the third respondent, they were unable to secure a partner with the necessary finance to acquire further properties in the area and to fund the development. As a result, the business of the first respondent is now simply an investment in a shopping centre generating rental income and its business is managed by a neutral party as a result of the lack of trust which subsists between the applicants on one hand and the third respondent on the other. The object of the first respondent has not been achieved and given the climate of distrust, its initial object will not be achieved.

[21] Mr *Pillemer* submitted that the court is required to make a value judgment and conduct a balancing exercise to determine whether it is just and equitable to wind up the first respondent. He submitted that it was not just and equitable to do so because the first respondent is a solvent company being administered by the fourth respondent, an independent third party. He conceded that the parties do not get along, but submitted that as there is a mechanism in place to manage the first

respondent's business, the parties do not have to work together or deal with each other.

[22] Mr *Pillemer* also argued that the third respondent had not come to court with clean hands because the second and third respondents have never complied with the settlement agreement of 17 October 2007, and the application to wind up the first respondent was simply a stratagem to prevent the trust from obtaining the money it was admittedly owned. There was therefore an ulterior motive in bringing the winding up application.

[23] He further submitted that a forced sale of the property, which would almost inevitably follow the winding up of the first respondent would not result in the proper value of the property being realised which rendered its winding up not just and equitable.

[24] It cannot be disputed by the applicants that the first respondent is in substance a partnership and that the relationship between the parties has broken done. I say so because the first applicant in 2009 deposed to an affidavit in support of an application to wind up the first respondent on the basis that the relationship between the trust, represented by the first applicant, and the second and third respondents was "intended to have the character of a joint venture or partnership which was dependent upon good faith and mutual trust and understanding in the conduct of the affairs of" the first respondent. In her affidavit in support of that application, the first applicant contended that it was just and equitable to wind up the first respondent because "its original contemplated venture has failed and the relationship between [the second and third respondents] has disintegrated". Furthermore, in her founding affidavit in this application, the first applicant stated that the appointment of the fourth respondent as the manager and administrator of the first respondent arose "due to the breakdown in communication between the trustees of the trust and the second and third respondents".

[25] Almost from the commencement of the first respondent's business the parties have been at loggerheads. This is evidenced by the following (and this is gleaned from the founding affidavit of the first applicant in this application and her founding affidavit in the application brought in 2009 to wind up the first respondent):-

(a) the first applicant was approached by the second respondent and the father of the third respondent in February 2004 with a proposal to develop immovable properties on the corner of Prince Street and Crieff Place in the Addington area in Durban, the proposal being the demolition of the existing buildings on the properties and the construction of a multi-storey development to be named uShaka Towers;

(c) by August 2004, the relationship between the trust, represented by the first applicant on one hand, and the second and third respondents on the other, had completely broken down;

(d) in August 2004, the first applicant laid a complaint with the South African Police Service, alleging fraud on the part of the second respondent;

(f) In 2005, this Court, in the application brought by the trust, made an order interdicting the second and third respondents from withdrawing funds from the first respondent's bank account save by cheques also signed by the first applicant, and appointing the fourth respondent's predecessor to manage the affairs of the first respondent pending the determination of an action to be instituted by the trust;

(g) in 2005 the trust brought the envisaged action in this court against the first, second and third respondents;

(h) on 17 October 2007, that action was settled on the terms set out in paragraph [2] above;

(i) In May 2009 the applicants brought an application to wind up the first respondent on the grounds that it was just and equitable to do so: the founding affidavit in that application deposed to by the first applicant is replete with allegations that:

(i) the development was in essence a joint venture between the trust and the second and third respondents;

(ii) the relationship of trust and cooperation which was supposed to characterise this joint venture was absent and relations between the parties had broken down completely;

(iii) prior to the settlement of the action on 17 October 2007, the first applicant was advised that she should bring an application to wind up the first respondent on the grounds that it was just and equitable to do so because "the relationship of trust and cooperation which was supposed to characterise this joint venture and the relations between the parties had completely and utterly broken down";

(iv) the first applicant believed that first, second and third respondents did not have the ability to pay R4 000 000,00 and if the trust cancelled the settlement agreement, nothing would be achieved because the parties would revert to the *status quo ante,* that is, they would remain locked in as shareholders in the first respondent "in a relationship which is bereft of any mutual confidence and good faith".

[26] In consequence of the complaint laid by the first applicant with the South African Police in which she alleged that the third respondent was guilty of fraud. In 2005 the second and third respondents were arrested, charges were laid and subsequently withdrawn, again laid and withdrawn, and then in 2010 the second and third respondents and her father were charged again but the charges were subsequently withdrawn against the third respondent (I was advised by Mr *Pitman* from the Bar at the hearing on 4 March 2015 that on the previous day, 3 March 2015, the charges against the second respondent and the third respondent's father had been provisionally withdrawn, but not as a result of any conduct of the first applicant,

but because the prosecuting authority could not proceed: I did not understand Mr *Pillemer* to dispute this).

[27] According to Mr Larsen, the representative of the fourth respondent administering the shopping centre, all of the shareholders of the first respondent “are highly litigious and have been at each other’s throats for a number of years with seemingly no resolution in sight”.

[28] The view of Mr Larsen that there is seemingly no resolution in sight is correct if one has regard to the first applicant’s replying affidavit. She indicates that she intends bringing further litigation against the second and third respondents. In her replying affidavit she states as follows:

(a) proceedings are being instituted against the third respondent for her removal as a shareholder and director “based on grounds of fraud perpetrated upon the trust and the first respondent”;

(b) she “will in due course, whilst the criminal trial is pending, seek to remove the second and third respondents as directors and shareholders, as a result of the fraud perpetrated upon [her] by them”, and “since the third respondent has now claimed full knowledge”, the first applicant intends “to have her prosecuted”;

(c) she intends to “to obtain the return of the shareholding … as [she] was defrauded into the allocation of the shareholding and such fraud is being perpetrated upon [her] by the second and third respondents together with the father of the third respondent”;

(d) she “persists in [her] submissions [she] was defrauded in this matter and the present criminal charges are being considered by the commercial crimes court”;

(e) she intends bringing a further application because of the broken relationship amongst the shareholders (it appears that this application is to be brought for the removal of the second and third respondents as directors and shareholders);

(f) she intends to pursue the criminal charges against the third respondent and her father "should same become necessary to protect [her] rights".

[29] The remarks of Ponnan JA in *Apco Africa (Pty) Ltd & Another v Apco Worldwide Inc.* (supra) at 628H-J are apposite in this regard. The learned judge stated as follows:

> "When one of two partners threatens civil and criminal action, including prosecution for fraud, is it reasonable to suppose that those two partners can work together in the manner in which they ought to work in the conduct of the partnership business? Can they do so when things have reached such a pass as we have here? Common sense seems to dictate that the answer has to be a resounding 'no'. In those circumstances it seems to me that it is just and equitable that a court should intervene, for plainly this is not what the parties contemplated by the arrangement into which they entered. On the contrary they assumed that each would conduct itself reasonably and with basic courtesy towards the other."

The court in this case, faced with a similar situation, ought to intervene and order the first respondent to be wound up on the basis that it is just and equitable to do so.

[30] Mr *Pillemer* submitted that the third respondent had not come to court with clean hands and accordingly was precluded from bringing the application for the first respondent's winding up. However, lack of clean hands, if indeed there is such a lack, is not an absolute bar. *Thunder Cats v Nkonjane Economic Prospecting* (supra) at page 13 F-G.

[31] In this case, it is difficult to apportion with any degree of precision the blame for the breakdown in the relationship. From a very early stage in the relationship, the first applicant has contended that she was defrauded because, she said, she was not aware that the second and third respondents were not contributing any money towards the venture and had she known this, she would not have "consented". The third respondent has alleged in her affidavit that in the criminal prosecution, the evidence was that the first applicant had complained to an attorney acting for her at the time that she would be the only one providing finance for the project and that she had complained in this regard before she actually advanced any money. Thus the allegation by the first applicant of non-disclosure by the second and third respondent is disputed. The second applicant in turn has denied the allegation that she had made such a complaint to her attorney.

[32] It is accordingly difficult to conclude that the cause of the breakdown in the relationship is attributable to the second and third respondents' conduct. What is clear is that over the lengthy period of time in which the parties have been at loggerheads, no one has been prepared to reach out to the other to seek to restore the relationship in order to pursue the object for which the first respondent is in business. Given the first applicant's intentions as expressed in her replying affidavit, the first applicant clearly has no desire to seek to mend their relationship and every desire to terminate their relationship through further litigation. In those circumstances the first applicant is at least as blameworthy as the third respondent with regard to the continued breakdown in the relationship. Thus I do not believe that the second and third respondents can validly be accused of conduct disqualifying them from moving for the winding up of the first respondent on just and equitable grounds.

[33] It is regrettable that it may be that during the course of the liquidation process, the property has to be sold, as it may not be in the parties' economic interests that this occurs. However the parties must have been aware that this was a possible consequence of their inability to get on and is not a factor which should prevent the first respondent being wound up.

I accordingly make an order dismissing the application with costs and I grant the alternative relief set out in the counter application. I thus make an order in the following terms:

1. The application is dismissed with costs.

2. A *rule nisi* shall issue calling upon the first respondent and all other interested parties to show cause to this court on the 14th May 2015 at 9h30 or as soon thereafter as counsel may be heard, why an order should not be made that the first respondent be finally wound up.

3. A copy of this order shall be:
   (a) published in the Government Gazette and in The Mercury on or before the 24th day of April 2015
   (b) served in compliance with section 346A of the Companies Act 1973.

4. This order shall operate as an order provisionally winding up the first respondent pending the return date of the rule nisi.

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Date of Hearing	:	4 March 2015
Date of judgment	:	25 March 2015
Counsel for Applicants'	:	Adv. M Pillemer SC Adv. N Moosa
Instructed by	:	Govender, Mchunu & Associates 031-3098338 (LG/DN/18H087001)
Counsel for 3rd Respondent	:	Adv. M.B Pitman
Instructed by	:	Ashnee Reddy & Associates 031-5693592 (AR/LP/T008)