

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 1058/2014

In the matter between:

LEON LAWRENCE VAN NIEKERK

Applicant

and

DORPER GENETICS BK

First Respondent

JOHANNES DIFELO RAMOTHELLO

Second Respondent

FRANS CORNELIS DU TOIT

Third Respondent

HEARD ON:

31 JULY 2014

JUDGMENT BY:

G.J.M. WRIGHT, AJ

DELIVERED ON:

7 AUGUST 2014

[1] The Applicant applies for the winding up of the First Respondent, a closed corporation. The Applicant avers that he is a member of the closed corporation, the other members being the 2nd and 3rd Respondents. Before this court the Applicant was represented by Advocate Cronje.

[2] The 1st and 2nd Respondents oppose the application and are represented by Advocate Motlounj. The 3rd Respondent did

not indicate any opposition to the application. He did file an affidavit as part of the replying affidavit of the Applicant. The 3rd Respondent abides by the decision of the Court. He does however indicate that he is of the opinion that the liquidation of the 1st Respondent will be justified. (See p 140 paragraphs 9 and 10)

- [3] In their Opposing Affidavit the 1st and 2nd Respondents raised a point *in limine* regarding the *locus standi* of the Applicant. Averments were made regarding the resignation of the Applicant as member of the closed corporation. The point *in limine* is not proceeded with as is evident from the Heads of Argument prepared by Mr Motloun. During the hearing of the matter he confirmed that the Respondents are not proceeding with the point *in limine*.
- [4] Section 15 (2) of the Close Corporation Act provides that, if a member resigns, such resignation only takes effect when an amended founding statement is registered. *In casu* this is yet to take place. The Applicant is therefore still considered to be a member of the 1st Respondent and therefore entitled to bring the application.
- [5] Before the start of proceedings, the 2nd Respondent filed a Notice to Strike Out. In terms of the Notice, the 2nd Respondent wishes to have the whole affidavit of the 3rd Respondent, Du Toit, to be struck out as being inadmissible. The affidavit of the 3rd Respondent is an annexure to the Replying Affidavit of the Applicant.

- [6] When confronted about the late stage at which the application to strike out has been brought, Mr Motloun submitted that the Applicant was made aware of the 2nd Respondent's intention. This was allegedly done in paragraph 38 of the Opposing Affidavit. In that paragraph the 1st and 2nd Respondents respond to paragraphs 46 and 47 of the Founding Affidavit. They attack the contents thereof as being hearsay and therefore inadmissible.
- [7] The Notice to Strike Out however does not refer to these offending paragraphs, but instead to the affidavit of the 3rd Respondent. Mr Motloun submits that the 3rd Respondent confirms the hearsay information and as this confirmation forms part of the Applicant's reply, it should be struck out as it needed to be part of the founding papers (or so the argument of Mr Motloun goes).
- [8] Mr Cronje for the Applicant correctly points out that the 3rd Respondent does not confirm the whole of the Applicant's version as set out in the Founding and Replying Affidavits. He specifically does not confirm the contents of paragraphs 46 and 47 of the Founding Affidavit. The 3rd Respondent only confirmed the Applicant's version regarding the removal of sheep as part of his resignation. This may have been relevant to the attack on the Applicant's *locus standi*. In any event, the Applicant in his Replying Affidavit already indicated that he does not rely on paragraphs 46 and 47 or the hearsay contained therein (see P 116, paragraph 42).

- [9] Mr Motloung further argued that, as Du Toit has been cited as a respondent, it is improper for him to depose to an affidavit supporting the Applicant. This is not a good argument. A respondent is always entitled to side with an applicant if he does not feel it necessary or prudent to oppose the relief claimed in an application. *In casu*, the 3rd Respondent indicated his decision to abide by the decision of the court in the liquidation application.
- [10] Mr Cronje presented arguments regarding the late stage at which the application to strike out was filed. The Notice of Enrolment is dated 17 June 2014 and was served on the Respondents' attorney on 18 June 2014. Heads of Argument for 1st and 2nd Respondent was duly filed on 25 July and contains no reference to an anticipated application to strike out. It therefore does appear that the 2nd Respondent was tardy in launching the application to strike out. However, nothing much turns on this as Mr Cronje indicated that he did have time to prepare. And he was able to properly address me on the relevant issues.
- [11] The 2nd Respondent did not make out a proper case for the striking out of the affidavit of the 3rd Respondent and the application should be dismissed with costs.
- [12] The application for the winding up of the 1st Respondent closed corporation is brought on the ground that it would be just and equitable to wind up the closed corporation. In general it would be just and equitable to wind up a closed

corporation in circumstances where the corporation's substratum has failed or disappeared or where there is a justifiable lack of confidence in the conduct and management of the corporations' affairs.

See: **Moosa NO v Mavjee Bhawan (Pty) Ltd** 1967 (3) SA 131 (T) at 137 B.

- [13] The question whether it would be just and equitable to wind up a closed corporation should be based on a broad conclusion of law, justice and equity.

See: **Cunningham v First Ready Development 249** 2010 (5) SA 325 (SCA) at 327 I.

- [14] The competing interests of all the parties should be considered with due regard to justice and equity.

See **Moosa**, *supra*, at 136 H.

- [15] The Founding Affidavit sets out a history of the deteriorating relationship between the Applicant and the 3rd Respondent on the one side, and the 2nd Respondent on the other. The 2nd Respondent was tasked with the financial management of the closed corporation. The Applicant sets out various instances of seemingly irregular behaviour by the 2nd Respondent in his management of the corporation's finances. The 2nd Respondent who deposed to the Opposing Affidavit of course denies any wrongdoing. He in turn

launched an attack on the Applicant's behaviour. The 2nd Respondent however also refers to the working relationship that has deteriorated. (See p 52 / paragraph 3.4 of the Indexed Papers).

- [16] In his argument, Mr Cronje for the Applicant, referred to the various instances of seemingly irregular behaviour by the 2nd Respondent. He specifically referred to annexure "DLN3" to the Founding Affidavit, found on pp 36 – 38 of the Indexed Papers, and points out that the 2nd Respondent did not attempt to counter the allegations of impropriety by annexing documentation to explain the various cheques and payments. In response, Mr Motloung submitted that the allegations made by the Applicant are so vague that there was no need for the Respondents to answer thereto and that the Applicant did not satisfy the onus which rests on him. Mr Motloung referred in this regard to the judgment in **Geaney v Portion 117 Kalkheuwel Properties CC and Others** 1998 (1) SA 622 (TPD) at 631 H. This part of the **Geaney** judgement however deals with the provisions of section 36(1)(d) of the Closed Corporation Act which governs the cessation of membership. This appears only to be relevant to the argument of Mr Motloung that an alternative remedy is available. In the case of **Wackrill v Sandton International Removals (Pty) Ltd and Others** 1984 (1) SA 282 (W) Margo J held that it is essential that the party who seeks an alternative remedy to a winding-up must set out by way of a notice of motion or in any other appropriate manner 'the

precise relief required'. *In casu* the Respondents made no attempt to do this.

[17] I do not find it necessary to deal with the various factual allegations or to make a finding as to the veracity of the specific allegations made by the parties against each other. The papers as a whole present a clear picture of the three members of the 1st Respondent who clearly cannot work together anymore. All parties are in agreement that the relationship has deteriorated. Mr Motloung conceded that the Applicant showed that there is disharmony amongst the members of the 1st Respondent. He submits however that this is not enough to show a complete breakdown in the relationship. Mr Motloung also submitted that the disagreements between the parties are focused on the non-fulfilment of the conditions relating to the Applicant's resignation.

[18] The disagreements and different viewpoints of the members of the closed corporation deal with more than just the Applicant's resignation. It seems clear that his resignation came as a result of the disagreements. It seems clear that all of it makes it impossible to effectively proceed with the main business and purpose for which the closed corporation was incorporated.

[19] The main argument by the Respondents is that liquidation is not the appropriate remedy and that an alternative remedy is available. If the Applicant is unhappy, he should resign and

be compensate for his share in the membership. Mr Motloung also seem to suggest in argument that the parties should submit to an audit to clarify the financial issues.

- [20] In the circumstances it appears fair and just to end the business relationship between the parties and to do so by liquidating the closed corporation. With analogy to the law of partnerships, it suffices to state that the closed corporation is in a state which could not have been contemplated by the parties when it was formed. The dicta referred to in **APCO AFRICA Incorporated v APCO Worldwide (Pty) Ltd** 2008 (5) SA 615 (SCA) seem to comfortably fit the facts *in casu*. I quote from p 629 F:

“Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation have been held sufficient to justify a dissolution.”

- [21] As in **Geaney** matter, the financial affairs of the 1st Respondent corporation appear to be in a shambles. The winding-up of the 1st Respondent will hold the advantage that the finances of the corporation can be scrutinized and unravelled to the benefit of creditors and members of the corporation. The allegations made by the Applicant regarding financial irregularities can then be properly investigated by the liquidator.

[22] The 2nd Respondent did not really attempt to provide facts indicating that the corporation is in a position to proceed with its core business. The averments made by the Applicant in this regard (paragraphs 48 and 50 of the Founding Affidavit) are merely denied by the 2nd Respondent (see paragraphs 39 and 40 of the Opposing Affidavit). Facts to indicate the contrary were not provided and the 2nd Respondent did not indicate that he plans on proceeding with the business of the corporation should the Applicant and the 3rd Respondent resign their membership.

[23] I am satisfied that a *prima facie* case has been made out for the relief claimed by the Applicant. And I cannot find that the Applicant has an improper or ulterior motive in bringing the application.

See: **Wackrill v Sandton International Removals** (Pty) Ltd
1984 (1) SA 282 (W) at 293 E – F.

[24] It is customary to grant a provisional winding-up order and then issue a rule *nisi* calling on all interested parties to show cause why a final order would not be made. This may be prudent in the light of the averments made by the 2nd Respondent regarding the involvement of the Department of Agriculture and Rural Development in the projects and funding of the 1st Respondent. It is possible that further relevant facts may be forthcoming from the Department. I also consider it prudent to ensure that the Department be made aware of the application and provisional order.

[25] The order that I intend to make differ from the Notice of Motion in that I prefer to give the order in the format generally used by the Registrar in this Division. It encompasses all the relief claimed for by the Applicant.

[26] I make the following orders:

1. The Second Respondent's application to strike out is dismissed;
2. The Second Respondent is to pay all costs pertaining to the application to strike out;
3. The First Respondent is placed under provisional liquidation in the hands of the Master of the High Court;
4. A rule *nisi* is issued calling upon all interested parties to show cause, if any, to the Court on **11 September 2014** at 9h30 why a final order of liquidation should not be granted against the First Respondent;
5. Service of this order must be effected on the First Respondent at its registered office, or its principal place of business within the court's jurisdiction;
6. This order must without delay be published in **Die Volksblad** and **The Government Gazette**;

7. A copy of this order must be served on –
 - 7.1 The Second and Third Respondents;
 - 7.2 Every registered trade union that as far as the Sheriff can reasonably ascertain, represent any of the employees of the First Respondent;
 - 7.3 The employees of the First Respondent by affixing a copy of the order on any notice board to which the employees have access on the premises of the First Respondent or if there is no access to the premises by the employees, by affixing a copy to the front gate of the premises from which the First Respondent conducts any business;
 - 7.4 The South African Revenue Services;
8. A copy of this order as well as the application papers (founding, opposing and replying) must be served on the offices of the Department of Agriculture and Rural Development, Free State Province;
9. Costs of the application shall be costs in the liquidation.

G.J.M. WRIGHT, AJ

On behalf of applicant:

Adv P.R. Cronjé
Instructed by:
Blair Attorneys
BLOEMFONTEIN

On behalf of first and second
respondents:

Adv. S. Motloung
Instructed by:
Qwelane, Theron & Van
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