FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A252/2011

In the matter between:-

MOIRA ELIZABETH KNIPE & 17 OTHERS	Appellants
and	
KAMEELHOEK (PTY) LTD/ SCHAAPPLAATS 978 (PTY) LTD	1st Respondent
THE MASTER OF THE FREE STATE HIGH COURT	2nd Respondent

CORAM: EBRAHIM, J *et* VAN DER MERWE, J *et* MOLEFE, AJ

HEARD ON: 23 JULY 2012

JUDGMENT BY: VAN DER MERWE, J

DELIVERED ON: 30 AUGUST 2012

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[1] By agreement separate applications for the liquidation of Kameelhoek (Pty) Ltd (Kameelhoek) and Schaapplaats 978 (Pty) Ltd (Schaapplaats) were simultaneously argued before the court *a quo*. That court delivered one judgment in terms of which both applications were dismissed with costs. The court *a quo* however granted leave to appeal to the full court in respect of both applications. This judgment therefore deals

with both appeals.

[2] Mr Henry Bazzett Louis John Knipe (the deceased) passed away on 28 June 2007. The deceased clearly possessed good business acumen. At the time of his death he had accumulated a considerable estate, *inter alia* consisting of interests in various entities.

[3] At the heart of this matter lies disharmony that exists between the remaining members of the family of the deceased. These are his wife, Moira Elizabeth Knipe (Mrs Knipe) and their five children, Robert Petrus Jansen Knipe (Pieter), Carol Jessie Cathleen Lotz (Carol), Jacqueline Moira Deborah Vigne (Jacqueline) and the twins, John Douglas Jansen Knipe (John) and André Bazzett Jansen Knipe (André).

[4] At the time of his death the deceased was the sole director of both Kameelhoek and Schaapplaats (the companies). The shares in the companies were held by family trusts of which the deceased and Mrs Knipe were the trustees. Their five children were the equal beneficiaries of the trusts.

[5] Kameelhoek owns the farm Kameelhoek and Schaapplaats owns the farm Langeberg. Kameelhoek and Langeberg (the farms) are adjacent to each other and are for all intents and purposes one farm. The farms are 9597,6323 hectares in extent and worth approximately R60 million. Whether the cattle and game on the farms are the property of the companies, is in dispute and will be dealt with below.

[6] Mrs Knipe is the duly appointed executrix of the estate of the deceased. On or about 18 November 2008 Mrs Knipe was appointed as the sole director of the companies. She was also the sole remaining trustee of the trusts that held the shares in the companies. In this capacity Mrs Knipe on 21 August 2009 resolved to dissolve the trusts and instructed an attorney to transfer the shares in both companies in equal proportions to her five children. Such transfer was registered on or about 1 October 2009. Although Mrs Knipe subsequently changed her mind and liquidation is pending in another court in this regard, counsel for the appellants correctly accepted that the appeal should be decided on the basis that each of the five Knipe children holds 20% of the shareholding in each of the companies. It must be added that

even on the evidence of Mrs Knipe in this regard, which is not necessary to discuss in detail, it is clear that it is intended that the shares in the company will eventually at least be transferred to Carol, Jacqueline, John and André.

[7] As a result of resolutions taken at a meeting of shareholders of the companies that took place on 27 August 2010, Mrs Knipe was removed as director of the companies and André, John and Jacqueline were appointed as the directors of the companies. It is common cause that André, John and Jacqueline subsequently took control of the companies.

[8] There were no less than 18 applicants in each application and therefore 18 appellants in each appeal. The first to fourteenth appellants are Mrs Knipe in various capacities, namely in her personal capacity, in her capacity as executrix of the estate of the deceased and in the alleged capacity of director of the companies and trustee of the trusts. Carol is the fourteenth appellant. The fifteenth to eighteenth appellants are Carol's children. All the appellants alleged that they are creditors of the companies and in that capacity they rely thereon that the companies are unable to pay their debts and that it is just and

equitable to liquidate the companies. Carol in her admitted capacity as shareholder also relies thereon that it is just and equitable to wind up the companies.

[9] André filed answering affidavits purportedly on behalf of the companies. He was in this regard supported by a confirmatory affidavit by John. They alleged that the companies took resolutions to oppose the applications, but did not produce such resolutions. Counsel for the appellants attempted to make much of the absence of such resolutions and/or of supporting affidavits by Pieter and Jacqueline. In my view not much turns on this at present. The appellants did not avail themselves of the provisions of rule 7(1) as envisaged in **UNLAWFUL OCCUPIERS, SCHOOL SITE v CITY OF JOHANNESBURG** 2005 (4) SA 199 (SCA) at 206 – 207 para [13] – [16] and it is rightly accepted that André and John are entitled to oppose in their capacities as shareholders of the companies.

[10] The appellants ask that in the event of the appeal succeeding, final liquidation orders should be made and only in the alternative that provisional liquidation orders should be

granted. In my judgment there is no reason to depart from the longstanding practice of this court to grant provisional liquidation orders in order to afford all interested parties an opportunity to respond to the application. It follows that the question is whether any of the appellants made out a *prima facie* case for liquidation orders and that in the event of factual disputes in this regard, a *prima facie* case is established on a balance of probabilities on the papers. See **KALIL v DECOTEX (PTY) LTD AND ANOTHER** 1988 (1) SA 943 (AD) at 975 J – 980 A.

[11] The court *a quo* found that the appellants either on their own showing are not creditors of the companies or that that was disputed on *bona fide* and reasonable grounds. It suffices to say that we are not convinced that it erred in this regard.

[12] It must therefore be considered whether Carol's application as shareholder should have been granted. Carol's case is that the companies are domestic family companies akin to partnerships where a relationship of mutual trust and confidence between shareholders is contemplated and, as such a relationship is not reasonably possible, it is just and

equitable that the companies be wound up.

[13] The application was launched after the date of commencement of the Companies Act 71 of 2008 (the Act). In my judgment a company is solvent, even though illiquid, if its assets, fairly valued, exceed its actual liabilities. It is clear on the papers that on any view the companies are solvent. It follows that Carol's application is brought in terms of section 81(1)(d)(iii) of the Act.

[14] It has often been stated in respect of the predecessors of the Act that the wide discretion to liquidate a company on the ground that it is just and equitable to do so, rests on a broad conclusion of law, justice and equity and as a ground for liquidation is not an *eiusdem generis* with the other grounds of liquidation. Over the years a number of categories of cases have been developed in this regard, although courts have been at pains to point out that these categories do not constitute a *numerus clausus*. These categories include cases of disappearance of the substratum of the company, illegality of objects and fraudulent purpose, deadlock in administration of the company, fraud, misconduct and

oppression and the case of domestic companies. Save that an actual deadlock in the administration of a company is now an independent ground of liquidation in terms of either section 81(1)(d)(i) or (ii), I do not think that the position in terms of section 81(1)(d)(iii) is any different to what it was before promulgation of the Act.

[15] The category in respect of small domestic companies deals with the case of a small domestic private company in which because of 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 or contemplation suffices. Unless the destruction or impossibility of existence of such relationship was wrongfully brought about by the person seeking the winding-up, the court may wind the company up on the ground that is just and equitable. This is a recognition of the fact that

> "a limited company is more than a mere judicial entity, with a personality in law of its own; that there is room in company law for recognition of the fact that behind it, or amongst it, there are

> individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure".
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> (Per Lord Wilberforce in **EBRAHIMI v WESTBOURNE GALLERIES LTD** 1973 AC 360.)

As the determining factor is the destruction or impossibility of the contemplated personal relationship of mutual co-operation, trust and confidence, it matters not that there is no actual voting deadlock, that the conduct relied upon was not wrongful but allowed by the articles of association of the company, nor that the conduct in question is not in connection with the company's business. In this regard the court *a quo* erred in finding that the discord and disputes in respect of the cattle and game are irrelevant because on Carol's version the cattle and game do not belong to the companies. In **LAWRENCE v LAWRICH MOTORS (PTY) LTD** 1948 (2) SA 1029 (W), for instance, the breakdown in relationship was caused by the fact that the one director of the company had committed adultery with the other director's wife. The onus is on the applicant to show that he or she is entitled to the relief and that onus in my judgment includes showing that the applicant is not wrongfully responsible for the situation relied upon. See **MOOSA, NO v MAVJEE BHAWAN (PTY) LTD AND ANOTHER** 1967 (3) SA 131 (T) at 136 G – 138 H and 152 A – C; **EMPHY AND ANOTHER v PACER PROPERTIES (PTY) LTD** 1979 (3) SA 363 (D) at 365 H – 368 H; **ERASMUS v PENTAMED INVESTMENTS (PTY) LTD** 1982 (1) SA 178 (W) at 181 B – 185 E.

[16] There is a balance of probabilities on the papers that the cattle and game that were on the farms when the deceased passed away, do not belong to the companies. I say this for the reasons that follow. On 15 April 2008 a meeting took place that was attended by all five of the Knipe children, each represented by their own attorney, as well as attorneys of the firm Duncan and Rothman, then representing Mrs Knipe. It is common cause that a comprehensive agreement was reached at that meeting and that that agreement is correctly reflected in a letter by Duncan and Rothman dated 25 April 2008, directed to all concerned. In terms of this agreement the farms would be valued and sold and the proceeds paid to the Knipe children in equal proportions. The agreement reached in respect of the cattle makes it clear that all agreed that the cattle did not belong to the companies. It was agreed that

save for 20 heifers belonging to Carol, the cattle on the farms would be sold for the benefit of the heirs thereof and that the estate would be liable to the companies for rental of the farms calculated at R50,00 per cow per month from date of death of the deceased to the date of sale of the cattle, to be deducted from the proceeds of the cattle. In terms of his will the deceased bequeathed all his cattle to his grandchildren in equal shares. Apart from legacies not now relevant, the deceased bequeathed the residue of his estate to Mrs Knipe. This residue includes the game on the farms, with the exception of 26% of the eland to which André and John is entitled, as was specifically recorded in the letter of 25 April 2008. That the cattle and game do not belong to the companies was common cause at least up to 7 April 2011, when attorneys acting for André, John and Jacqueline and the companies, in a letter specifically recorded that the proceeds of the cattle must be awarded by the executor to the deceased's grandchildren and added that the cattle and game are held in retention by the companies for a claim for arrear rent in respect thereof.

[17] In this light the attempt in the answering affidavits by André

and John to say that unspecified numbers of these cattle and game were owned by the companies, is most unconvincing. As far as indications emanating from the deceased are concerned, they rely on financial statements of the aforesaid trusts as at 28 February 1983 and of Kameelhoek as at 28 February 1992 and 28 February 1996. That the trusts owned cattle and gemsbok in 1983 can hardly be relevant in the circumstances. The Kameelhoek 1996 financial statements in fact indicate that the company only owns the farm Kameelhoek, which is supported by the fact that it is reflected therein that there were sales of game during the 1995 financial year, but not during the financial year ending 28 February 1996. On the other hand statements of personal assets and liabilities made by the deceased on 15 October 2002, 24 November 2003 and 8 December 2004 indicate that he owned large numbers of cattle and game. It is the evidence of Mrs Knipe that these included the cattle and game on the farms. It is undisputed that Mrs Knipe and the deceased had a very close personal and business relationship and that she assisted him especially in the farming operations.

[18] I am satisfied also 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 of the companies was contemplated, is the logical conclusion also of André and John's case, as they correctly state that their father did not intend Carol to be preferred over his other children.

[19] The court *a quo* found that there are serious disputes, discord and lack of trust between at least some of the shareholders of the companies and that they are unable to work together. These findings were rightly not contested before us. The papers abound with proof thereof that there is no reasonable possibility of the establishment or existence between all the shareholders of the contemplated personal relationship. In fact, it is admitted that the family is "... extremely dysfunctional" as illustrated by "... family feuds, disagreements, fights disputes and litigation". It is also common cause that André, John and Jacqueline are managing the affairs of the companies to the exclusion of Carol.

[20] It follows that it must be considered whether this situation was wrongfully caused by Carol. The essential allegations of André and John in this regard are that Carol fabricated agreements in terms of which she obtained exclusive rights of hunting, gaming and tourism on the farms (hunting rights) for no *quid pro quo* and that the whole purpose of the applications for liquidation is to devise a way to enable Carol to continue to exercise such rights. Neither contention is however borne out by the evidence.

[21] First, it cannot be disputed that the deceased, who was then the sole director of the companies and the sole owner of the game on the farms, signed documents (attached to the papers as "K7") indicating that hunting rights are unconditionally granted to Carol for the period of nine years from 2006 to 2015. Mrs Knipe says that she was present when the documents were created and signed by the deceased and Carol. André and John's bare denial hereof does not create a real dispute of fact. It is not disputed that Carol in fact did exercise hunting rights during the lifetime of the deceased. It similarly cannot be disputed that Mrs Knipe, at the time when she was the sole director of the companies and the executrix

of the estate of the deceased of which the game on the farms form part, signed similar documents (“K8”) in terms of which the hunting rights were extended to 2018.

[22] André and John rely in this regard on an affidavit by Mr JL Viljoen deposed to on 25 April 2011 in other litigation. Mr Viljoen is an attorney who acted for Mrs Knipe after the death of the deceased, but who has since seen fit to side against her in the same dispute. Mr Viljoen’s assertions in respect of fraud or impropriety in respect of the granting of the hunting rights are not only legally unfounded, but factually directly contrary to undisputed and unexplained letters previously written by him. In a letter dated 24 March 2009 directed to Carol, Mr Viljoen, on behalf of Mrs Knipe, formally confirmed to Carol the existence of her hunting rights. The letter further states *inter alia* that the letter of confirmation is given in order to assist Carol in any court proceedings for the enforcement of her rights in terms of the agreement in respect of hunting rights and that the author is prepared to assist Carol in case of violation of her said rights by obtaining an interdict and/or other legal remedy. Similarly, by letter dated 16 April 2009, Mr Viljoen in rather provocative terms warned André not to

interfere with Carol's hunting rights ("geregistreerde jagregte (wat sy) hou al vir baie jare"). And in a letter to Carol dated 10 February 2010 Mr Viljoen admitted that the extension of the hunting rights took place in his presence. It is also not disputed that the documents granting the extension of the hunting rights were certified by Mr Viljoen as true copies of the originals on 25 May 2009. In the circumstances it is significant that in the aforesaid letter of 7 April 2011 Carol was notified that her hunting rights are revoked with effect from 8 April 2011 ("dat haar jagregte beëindig is met effek van 8 April 2011").

[23] Second, it appears from what I have said that on 15 April 2008 Carol agreed, as part of a comprehensive settlement of the disputes in the family, to the sale of the farms and the game thereon. This is indicative of willingness to relinquish the hunting rights for the greater good. André and John say that this agreement was not given effect to because Mrs Knipe would not allow it. Similarly Carol's willingness, by way of the applications for liquidation, to place the matter in the hands of a liquidator, is not consistent with *mala fides* or an attempt to enforce non-existing rights. Whilst I am sure that Carol is as much to blame as any of her siblings for the absence of a

personal relationship of trust and confidence between them, I am satisfied that she is not wrongfully responsible for the situation that she relies on for winding-up.

[24] In my judgment therefore, the court *a quo* should have ordered the provisional liquidation of the companies.

[25] The following orders are issued:

1. Both appeals succeed with costs.
2. The orders of the court *a quo* are set aside and replaced with the following order in each of applications 1936/2011 and 1937/2011:

"1. The respondent company is hereby placed under provisional liquidation in the hands of the Master of the High Court.

2. A provisional order is hereby issued calling upon all interested parties to show cause, if any, to the Court on the 11th day of October 2012 at 09h30 why a final order of liquidation should not be granted against the respondent company.

3. Service of this rule, and a copy of the notice of motion and annexures must be effected on the respondent company at its registered office, or its principal place of business within the court's jurisdiction.
4. The order must, without delay, be published in Die Volksblad and the Government Gazette.
5. A copy of the winding-up order must served on:

5.1 Every registered trade union that as far as the sheriff can reasonably ascertain, represents any of the employees of the respondent company;

5.2 The employees of the respondent company by affixing a copy of the application and provisional order on any notice board to which the employees have access inside the respondent company's premises or if there is no access to the premises by the employees, by affixing a copy to the front gate or front door of the premises from which the respondent company conducted any business.

5.3 The South African Revenue Services.

6. The sheriff must ascertain whether the employees of the respondent are represented by a trade union and whether there is a notice board on the premises to which the employees have access."

C.H.G. VAN DER MERWE, J

I concur.

S. EBRAHIM, J

I concur.

D.S. MOLEFE, AJ

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