

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO. EL 1259/11

ECD 2092/11

In the matter between

ZUKISWA JAFTA

Applicant

and

ILIFU TRADING 330 CC

Respondent

JUDGMENT

1. The applicant, a member and creditor of the respondent, seeks an order placing it under provisional winding-up on the “*just and equitable*” ground contemplated by section 68(d) of the Close Corporations Act, No. 69 of 1984 (“The Act”).
2. The respondent conducts business as a seller and supplier of carpeting and other flooring and also owns immovable property.

3. Since 23 June 2005 the applicant, together with *Marcelle Anne Godfrey* and *Grant Godfrey* have each held a thirty percent member's interest in the second respondent, with the remaining 10% being held by *Clint Ernest Du Plessis*.
4. The applicant alleges that the relationship between her and her co-members has "*been dysfunctional*" for some time now and that, as long ago as early 2007, she was approached to disclose the terms upon which she would resign as a member.¹ She made various proposals in this regard which were rejected out of hand.² When she and her co-members could not reach agreement on the terms upon which she would transfer her member's interest to them, they launched an application in this court under case number EL 801/2008 in which they sought an order terminating her membership of the respondent pursuant to the provisions of section 36 of the Act.
5. The applicant rides on the fact that, even then, the section 36 application was justified on the basis that the inter-member relationships had broken down to the extent that a continuation of their association, through the respondent, was untenable. (In the section 36 application the court held it to be "*common cause that the relationship being the applicants on the one hand (the applicant's co-members), and the first respondent's husband (the applicant's spouse) ... on the other hand, has soured to the extent that its continuation is untenable.*" Commenting with concern

1 She suggests that the reasons for this state of affairs is "*not entirely relevant*" to the application, a rather startling submission in an application of this nature where every nuance having a bearing on the breakdown is relevant to the conclusion which this court must reach and ultimately the exercise of its discretion whether to wind-up or not.

2 These were not disclosed to the court.

upon this tenuous relationship, the court noted that “*Mr Madasa, (the applicant’s spouse), who is not a member, seems to be the dominant figure who makes vital decisions with significant consequences and influences matters without incurring any risk as a member.*”)³

6. Although she failed to make any reference whatsoever to the contentious involvement of her spouse in the respondent at the time – plainly abundant from the judgment aforesaid which was annexed to her founding affidavit “*for the sake of completeness*” - the applicant submits that the prior litigation was properly motivated on the basis that the extent of the disagreement between her and her fellow members was of such a nature that any further co-operation between them was impossible. She is careful to point out, however, that she opposed the application on the basis that the consideration tendered for her member’s interest was inadequate and not properly motivated or calculated. In this regard she had been offered only R40 000.00 at the time, an amount limited to what she had in actual fact advanced on loan to the respondent.

7. The application was dismissed with costs after the court found that the applicant’s co-members had not placed sufficient particularity before the court so as to place it in a position to make an appropriate order in terms of section 36(2) of the Act.

8. In May 2008 the applicant obtained a valuation of the respondent’s worth from Messrs *Birch Bruce*, a firm of chartered accountants, which led her

³ The applicant attached the judgment per *Revelas J* in the section 36 application. In her founding statement in the present application she makes absolutely no reference whatsoever to the fact that her husband purported to represent her interest in the respondent or that this caused consternation between the members.

to believe that the value of her member's interest was in the sum of R641 551.00. After delivery of the court's judgment in the section 36 application, on 12 June 2008, a copy of this valuation was provided to her co-members and proposals made as to the terms upon which she would dispose of her interest.⁴ Despite repeated requests for a response to the offer none was forthcoming, and to date nothing further has happened.

9. Aside from this, the applicant vaguely asserts that for some years now she has been excluded by her co-members from participation in any form in the management and business of the respondent and that she is in the dark as to its financial circumstances. As an example of this she mentions that the last financial statements that were provided to her was a draft annual financial statement/management account for the year ending 28 February 2007. Her co-members are all employed by the respondent at salaries unknown to her. Decisions relating to the conduct of the respondent's business have been taken without reference to her, and no meetings of members have been convened.

10. She suggests further that her co-members have ignored the corporate identity of the respondent and "*use it to advance their personal interests*". In this regard she "*suspects*" that all the profits of the respondent's business are being consumed in salaries and other personal benefits to them. When she made her investment in the respondent and took up her interest it was on the basis that she could expect a benefit from it, but to date this had not materialised. Thus she had confidently provided a deed of suretyship for the mortgage loan utilised for the purchase of the

⁴ The valuation was not disclosed to the court, neither the proposal made for the acquisition by the other members of her interest. The contents thereof might have demonstrated the reasonableness or otherwise of the tender.

respondent's immovable property, but her "*entitlements*" are presently being ignored and frustrated by her co-members in preference to their own. She claims that as a result all confidence between her and her co-members has now been lost.

11. The true reason for the applicant wanting to wind-up, however, appears to relate to her inability to dispose of her member's interest in the respondent on her terms. This is apparent from the following assertion in her founding affidavit:

"In as far as all efforts on my part to reach agreement with my fellow members as to the terms and conditions upon which I would cease to be a member of Respondent have floundered, for being frustrated by my fellow members, there is no other alternative available to me other than to seek the winding-up of Respondent that I might realise my interest therein and terminate my relationship with my fellow members."

12. That such is the driving force behind the application is further evident from the consequences which she says she hopes to attract by the winding-up of the respondent. These are that the respondent's assets will be realised by an impartial liquidator; that her loan account will be paid;⁵ she will be released from her suretyship in respect of the mortgage loan agreement and the appointed liquidator will be in a position to investigate the conduct of the respondent's business during the period that she has been excluded from it by way of interrogation or otherwise, which process will enable her to address any undue preferences or voidable

⁵ She advanced a sum of R40 000.00 in respect of which no terms as to repayment were expressly agreed. The loan account is accordingly payable upon demand.

dispositions made by her fellow members during the period that they have excluded her from the conduct of the respondent's business.

13. The respondent opposes the application on the basis that considerations of justice and equity are against the granting of the application for winding-up, and that there are other remedies at the applicant's disposal to achieve her selfish interests.

14. Whilst admitting to an impasse, it attributes this to the deadlock which arose when the other members were not prepared to accept the applicant's insistence that she be represented as member by *Madasa*, rather than to any other conduct *inter-members*. This position, it asserts, is wholly of her own creation.

15. The respondent submits that the particular arrangements made concerning the basis of the applicant's membership at the onset of the respondent's formation colour the whole matter. In this regard the applicant was to be represented by her husband, *Gcinuhlanga Chanty Madasa*, although his involvement would not be active. He was to provide access to certain potential contracts flowing particularly from his BEE accreditation and to assist with the management of the business and its financial affairs. The applicant's main purpose through her membership was to provide an investment. No association agreement was signed and a formal resolution proposed by her nominating *Madasa* to formally represent her in all matters was not adopted. A fall out between the other members and *Madasa* ensued, culminating with a meeting on 6 December 2006 in which the applicant continued to insist that she be represented by him. The other members would not agree to this.

16. *Madasa's* contribution to the respondent was minimal. He saw to the purchase of the shelf close corporation and to the registration of the new CK 2 founding statement. He also obtained an accounting officer. He initially took some part in the management of the respondent and erratically took minutes of meetings. Contrary to his anticipated undertaking, he ultimately failed to secure any business for the respondent. On the contrary, his involvement turned out to be a liability for the respondent. It alleges that, at the time of the purchase of its immovable property, *Madasa* represented to its managing member *Marcelle Godfrey* that the premises were zoned for business purposes, but this turned out not to be the case. This necessitated an application for rezoning granted on 20 April 2006, requiring an unexpected payment of R85 365.45 as a contribution towards road network improvements. Ultimately working with *Madasa* became impossible.⁶

17. Mr *Paterson* (who appeared for the respondent) pointed out that nowhere in the Act is any provision made for the representation of a member by an outsider, as the applicant wishes for. Therefore, in the absence of any provision in an association agreement, or an oral agreement between the parties, she could not insist upon her rights *qua* member being exercised by *Madasa*. The conclusion follows therefore that the remaining members were entitled to resist her insistence on him representing her as the effective member of the respondent on the basis that this would undermine the personal element essential for membership of a close corporation. It was the applicant herself, so it is submitted, who bears the

⁶ Since the applicant annexed the judgment in the prior litigation, the respondent sought the incorporation of the founding affidavit deposed to in that matter. This was attached as annexure "MG 11" without the original annexures thereto.

fiduciary duties towards the respondent described in section 42 of the Act to “*exercise such powers as ... (she) may have to manage or represent the corporation in the interest and for the benefit of the corporation*”. Her insistence at the time on being represented by *Madasa* was not in the circumstances in the interest and for the benefit of the Respondent.

18. The applicant’s loan account of R40 000.00 and her contingent liability arising from the suretyship are admitted. The respondent clarifies in respect of the latter liability that each of the members stood surety in respect of the mortgage bond registered over the respondent’s immovable property, which account was opened as an “*access bond*”. In the latter regard Mr *Paterson* pointed out that the applicant had freely entered into the suretyship even in the knowledge that her real involvement in the respondent was intended to be through *Madasa*.⁷ Insofar as the affairs of the respondent are concerned, each of the members bear the same contingent liability for the whole of the debt, each being jointly and severally liable *in solidum* as surety and co-principal debtor. The final liability resting upon the applicant would only be determined after her right to division against the other sureties had been exercised. In this regard Mr *Paterson* submits that there is no reasonable prospect of the suretyship being called up. Further and in any event, there is no basis upon which to speculate that if approached to substitute a new member as surety the mortgager would reject a consensual substitution in order to discharge the applicant from her obligations in this regard.

⁷ The same could be said about the fact that the mortgage bond was an access bond. The applicant must have appreciated the consequences of such a lending arrangement with its attendant risk.

19. As for the loan account, the loan was part of the original agreement between the members and stands on a different legal footing from their members' interest or any rights of the applicant *qua* members. Further and in any event she has not contested in reply the respondent's assertion that there has been no demand for the repayment thereof. Recovery of the loan, together with reasonable interest, would meet her objective if this was her concern without the need to wind up the respondent.
20. The respondent denies that there has been any deliberate exclusion of the applicant from the affairs of the respondent. On the contrary, it is the applicant who, for example, refused to sign financial statements on an occasion which resulted in it losing a contract.
21. The respondent also denies that no meetings have been convened, but contends that after the breakdown of relationships with *Madasa*, there was no point in informing the applicant of these in any event.
22. It submits further that there are several ways in which the applicant's complaints against the respondent can be ameliorated without resort to the winding up of the close corporation. In this regard *Mr Paterson* submitted that she might, for example, invoke the statutory remedy provided for in section 48 to convene a meeting and to deal with her position formally. The machinery provided for by section 49 affords her the right to complain that the affairs of the close corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to her and to apply to court for wide discretionary relief. The issue of her representation through *Madasa* could, therefore, have been dealt with in a

manner short of the present winding up sought by her.

23. Further, and notwithstanding the co-members' failed application in terms of section 36, there is no reason why the applicant herself should not seek to withdraw from the respondent on the basis provided for in that section. Inasmuch as she contends that she does not have access to the required information, she has the remedies of the Act arising from her membership at her disposal to obtain the facts and financial information such as she may need. In any event the assertion that she has asked for such information and that it has been refused is conspicuously absent from her founding affidavit.

24. Finally the respondent suggests that there is no reason why the co-members would not consent to someone buying her out. Indeed it makes business sense that the substitution of her for another business partner would be welcomed by them.

25. The deponent to the answering affidavit has given some insight into the respondent's financial affairs and furnished copies of financial statements for the financial years ending 28 February 2009 and 2010 respectively.

26. In 2009 the respondent recorded a gross profit of R1 296 955.00 but once expenditure and tax was taken into account the net profit was R32 954.00. In 2010 the gross profit from sales recorded was R831 292.00 but the final position was a loss of R215 292.00. Financial statements for 2011 were not to hand at the time of deposing to the respondent's answering

affidavit, but it was proffered that its position was expected to have improved over that of the previous year.

27. The respondent also listed details of its employees and salaries. *Marcelle Godfrey* is employed as managing manager.⁸ She was paid R301 500.00 in 2009 and R200 975.00 in 2010. *Du Plessis* received R117 00.00 in 2009 and R132 403.00 in the 2010 year as a salary respectively. It denies that there is anything untoward in these payments. *Grant Godfrey* is not employed by the respondent.

28. Additionally the respondent employs one Mrs *Kleynhans* as a salesperson earning a basic salary of R3 000.00 per month, a motor vehicle allowance of R3 500.00 and average commission of R4 000.00 per month. She is alleged to be a single mother with two children. The respondent further employs one Mr *Nodongwane* as its administrative assistant who supports two children and his parents. He earns “R600.00” (sic). Finally, the work of installing carpets and flooring is performed on a sub-contracting basis by one Mr *Elliot Present* who supports four children, and Mr *Ivan Ruiters*, who supports two children. Each earns between R900.00 to R3 000.00 per week. These sub-contracting fees are reflected in the financial statements. In 2009 these were in the sum of R266 946.00 and in 2010 R132 904.00 respectively.

29. The respondent managed to trade through the recession which, according to its managing member is an indication of its “*firm position in the local market*”. The growth of the business such as there has been is attributed

⁸ This was agreed to by the members at the formation of the respondent.

to the contribution of the members other than the applicant. Conversely the respondent alleges that it has experienced no difficulty in successfully running its business despite the absence of any input from the applicant or *Madasa*.

30. The business is conducted from the respondent's owned premises, valued by the municipality at R1.5 million. The market value is estimated to be in the sum of R1.8 million. The respondent does not concede the valuation of *Bruce* at R2 million which it says is not supported by any documentation or methodology.⁹

31. The mortgage bond in respect of which each of the members stood surety is an access bond and its funds are employed as operating capital.

32. The respondent avers that a forced sale would be detrimental to all concerned. In any event the applicant has failed to justify the benefit arising from the sale of its immovable property which is effectively the only asset of the business capable of realisation. Such a sale would probably result in the termination of employment for those of the respondent's employees (and loss of opportunity for the sub-contractors whose "*employment*" falls outside of the scope of section 197 of the Labour Relations Act, No. 66 of 1965) and members would risk exposure arising from their suretyship agreements.

33. As for the allegations that the applicant's co-members have ignored the corporation of the respondent and used it to deny her personal interest,

⁹ I have already alluded elsewhere to the fact that the valuation was not attached to the applicant's papers.

the deponent on behalf of the respondent correctly notes that no factual basis for this statement is advanced. Similarly lacking in any factual foundation is the suggestion that the respondent's profits are being consumed in salaries and other personal benefits to the applicant's co-members. In any event the respondent denies that the applicant's entitlements have been ignored in preference for those of the other members. Indeed none of the other members have thus far benefited from their member's interest in the respondent. To the extent that the respondent might make a profit and the applicant's member's interest is realisable, it concedes that she is entitled to benefit from her investment.

34. The respondent submits finally that the applicant has made out no case whatsoever that an investigation into "*improper conduct*" or undue preferences or voidable dispositions is required by a liquidator or that any such advantage would flow from a winding-up order.

35. It is trite that in opposed motion proceedings the determination of *bona fide* disputes of fact is to be effected by favouring the respondent's version.¹⁰ In this instance the applicant's reply was largely directed at making observations and submissions, with the result that the respondent's version stands uncontested.

36. A corporation may be wound up by a court, if, *inter alia*, "*it appears on application to the court that it is just and equitable that the corporation be wound up*"¹¹. This is the only basis upon which the applicant seeks the

10 Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

11 Section 68 (d) of the Act.

present relief.

37. Section 68(d) of the Act contemplates a conclusion of law founded on justice and equity. The justice and equity are those between the competing interests of all concerned.¹²
38. The court's reaching of the conclusion that winding-up would be just and equitable involves the exercise, not of discretion, but of judgment on the facts found by the court to be relevant. Once such conclusion is reached, however, the making of the order for winding-up does involve the exercise of a discretion, which must be exercised judicially, taking into account all relevant circumstances.¹³
39. In *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd*¹⁴ Coetzee J noted that the “*just and equitable ground*” is not some kind of “*catch-all ground*”, but rather a special ground under which only certain features of the way in which a company is being run or conducted can be questioned to the point of requesting the court to wind it up. It is, for example, not just and equitable to wind up a commercially solvent corporation at the instance of a member (who is also a creditor thereof) simply because such member is in the minority, or unjustifiably finds fault with the internal management thereof when it is acting properly and within its powers. In

12 *Moosa NO v Mavjee Bhawan (Pty) Ltd and Another* 1967 (3) SA 131 (T) at 136. *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W) at 181; *Tjospomie Boedery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd* 1989 (4) SA 31 (T) at 42 – 43; *Cuninghame v First Ready Development 249 (Association incorporated in terms of section 21)* [2010] 1 All SA 473 (SCA) at par 3.

13 *Moosa supra*; *Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA) and *Emphy and Another v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D) at 369

14 1985 (2) SA 345 (W)

this instance the respondent is functioning exactly as the members expected and agreed at its formation, with the exception that *Madasa's* involvement on the basis the applicant wished for could not be sustained.

40. Similarly, the mere suggestion as a ground for winding up under the just and equitable provision that a corporation should have its affairs investigated (especially without any adequate grounds for such intervention being mentioned) must be one of those further categories which do not lie “*within the general line of thrust of legislative intention as interpreted by the Courts here and in England.*”¹⁵

41. Among the kinds of things that can properly be complained of under the just and equitable provision, however, are two categories of relevance. The first is a lack of confidence in the conduct and management of the affairs of the business, and the second is a deadlock in the management which, in an analogous situation, would lead to the dissolution of a partnership.¹⁶

42. With regard to the first, I am in agreement with Mr *Paterson's* submission that there is no substance in the applicant's misgivings and lack of confidence in the conduct of the business of the respondent. The applicant cannot dispute that the respondent has been operating successfully without her involvement. The only criticism which she

¹⁵ *Rand Air supra* at 349 – 351.

¹⁶ See, for example, *Apco Africa Incorporated v Apco Worldwide (Pty) Ltd and another* [2008] 4 All SA 1 (SCA) which confirms the principle that the just and equitable provision has application where there is in substance a partnership, in the form of a private company, and circumstances exist which would justify the dissolution of the partnership in the same way that the winding up of a company under the just and equitable provision is justified.

purports to level at the respondent's business (now that she has had insight into the financial statements) is that the balance of the mortgage loan has increased since she last took note, and that gross sales have fallen. These are, in my view, not considerations which raise any alarm. Further, the suggestion that she has been excluded from participation in the respondent's business is not deliberate on its part. Even on her version, her being "*on the fringe*" appears to be merely an incident of the fall out when the co-members would not agree to *Madasa's* formal representation of her in the respondent, and she withdraw herself. Finally, whilst the respondent concedes that the applicant has not been invited to meetings, the applicant appears to have accepted this state of affairs over a lengthy period without any demur.

43. As to the second, I accept that there are circumstances where it would be just and equitable to wind up a corporate entity with a small membership in order to resolve the impossibility of its continued existence because of internal relationships and that the analogous principles applicable to the dissolution of partnerships would be of application. Mr *Paterson's* submission, however, that a close corporation is not a partnership in disguise is one that particularly commends itself to me. A balance has to be found between the corporate identity of the close corporation and the particular internal relationship between the members. The particular nature of membership of a corporation is apparent from several provisions in the Act. In this regard membership is generally limited to natural persons and excludes representation except in limited circumstances.¹⁷ Further, members themselves bear the fiduciary responsibility to involve themselves in the management of the

¹⁷ Section 29 and 32 (1) and (3).

corporation unless otherwise provided for by agreement between them.¹⁸ In this respect there is nothing onerous in expecting the applicant herself to personally exercise her member interest in the interest and for the benefit of the respondent.

44. An impassable breakdown of relationships may well be a factor to be taken into account in the light of all the circumstances of a case, but a deadlock does not *per se* justify a winding-up of the corporation on the grounds that it is just and equitable to do so. Such an approach would lead to an abdication by the court of its discretionary powers. *Leon J* dealt with this explicitly in *Emphy supra*¹⁹ as follows:

“I am satisfied that the mere existence of a deadlock does not per se entitle an applicant to a winding up order under the just and equitable provision. What requires to be emphasised is that the Court is concerned with what is just and equitable and not with whether there is a deadlock or not. The existence of a deadlock is one example of what might be regarded in a proper case as just and equitable but a Court must always have regard to all the circumstances of the case.”

45. Further, where a deadlock is alleged to exist, the cause thereof is critical. The doctrine of clean hands applies. *Leon J* dealt with this in *Emphy* as follows:

“...(A) petitioner who relies on the just and equitable clause must come to Court with clean hands : if the breakdown between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being

¹⁸ Section 42.

¹⁹ at 369 A.

wound up if they wish it to continue. What was said by Lord CROSS appears to me to be consistent with the statement in *Lindley on Partnership (supra)* that the impossibility must not be caused by the person seeking to take advantage of it. That statement was expressly referred to with approval by BROOME JP in Marshall's case *supra* and by MURRAY J in Lawrence's case *supra*. In the judgment in Moosa's case *supra* the reference to justifiable lack of confidence as well as the furtherance to the relationship being destroyed by one or more of the members makes it clear, I think, that an applicant who relies upon the just and equitable provision, must not have been wrongfully responsible for the situation which has arisen."²⁰

46. In this regard two aspects are of significance. The first is that the applicant was not prepared to rescind *Madasa's* representation of her in the respondent. Her conduct in insisting on being represented by him was what stoked the fire in the first place. Evidently it was his involvement in the respondent which made for an unworkable and untenable relationship *viz a viz* the legitimate members. The applicant could easily have offered to remove *Madasa* from the picture. In my view a shift in attitude and an acceptance of the reality that she was not entitled to foist him on the co-members might well have brought a resolve of the impasse.

47. Further, some time has lapsed since the “*deadlock*” around this issue emerged, yet the applicant has seemingly made no meaningful attempt since then to renew her involvement in the business on a personal basis as she ought, effectively choosing to abandon her interest in the respondent. Her present focus is in reality aimed at seeking her exit from the respondent as member on terms acceptable to her. In the result her assertion in her replying affidavit that all that is important is the admitted fact that the relationships are irreconcilable is opportunistic. Against this

background it cannot be said that the applicant has approached the court with the necessary clean hands.

48. Equity further demands consideration not only of the position of the applicant – which at best is transparently self serving - but also of the other members of the business. It is not only her position, therefore, but also those of the other members of the respondent which must be taken into account. In *Ebrahimi v Westbourne Galary Limited and Others*²¹ Lord Wilberforce expressed the test as follows:

“The ‘just and equitable’ provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.”

49. Further, the applicable cases²² indicate that winding up of a corporation must of necessity be a remedy of last resort and that other remedies must be considered before such a serious step is justified. In this regard the point is well taken that the winding up of the respondent will bear extremely harshly on the applicant’s co-members who have contributed their effort and expertise to the respondent and grown it into a successful and flourishing concern versus the applicant’s minimal contribution and deliberate lack of participation since the fallout with *Madase*.

²¹ [1972] 2 All ER H L 492 at 500 B – C

²² *Moosa supra* at 150 H and 151 – 153.

50. The onus of proving the presence of other available remedies rests on the party seeking to avoid the winding up. In addition, the applicant must be shown to be acting unreasonably by not pursuing the alternative remedies open to her.

51. The question which arises then is whether there are other remedies open to the applicant and if she has acted unreasonably in not pursuing these. Mr *Paterson's* submissions above concerning what options are indeed open to her are not without merit. There are simple measures which she can take. Firstly she can call up her loan account if that is the real bother. She can discuss with the members the possibility of approaching the creditor to release her from her obligations under the mortgage loan. She can involve herself again in the respondent's business. She has now had sight of such of the financial statements as are available and can request whatever she needs to be informed and kept privy with the respondent's affairs. She can invoke her statutory remedy to convene meetings and to deal with her position formally. If she has reason to complain that the affairs of the respondent are being conducted in a manner unfairly prejudicial, unjust or inequitable to her she can apply to court for discretionary relief in terms of section 49 of the Act.

52. There is also the most obvious remedy available to her in terms of section 36 (1) of the Act,²³ the precise purpose of which is to empower the court to dissolve the association between members without winding up the

²³ Inasmuch as the applicant suggested that the respondent itself could have made a counter application in terms of section 36 (1), it is to be noted that such a remedy only avails a member.

corporation. In *De Franca v Exhaust Pro CC (De Franca Intervening)*²⁴ Nepgen J noted that it was “*highly probable*” by enacting the section that one of the purposes of the legislature was “*to create a mechanism whereby the inevitability of winding-up can be avoided where a ‘deadlock’ situation exists between members.*” He remarked that even if this was not the specific intention of the legislature, section 36 of the Act “*clearly has such result.*” I align myself with this view.

53. Whilst there is absolutely nothing untoward about the applicant wanting out, the manner in which she has gone about it is particularly significant and in my view another reason to conclude that she has not approached the court with clean hands.

54. All that has happened since the earlier litigation is that she has presented a single offer to her co-members which represents the terms acceptable to “*her*”. The offer, ostensibly in the sum of R641 551.00 apparently represents “*fair market value*” but the court is left to speculate as to whether it is reasonable or not, or why the applicant feels that her co-members’ failure to take it up is unreasonable in the circumstances. As indicated above the applicant has failed to take the court into her confidence at all as to the precise details of the offer.

55. Somewhat ironically, whilst on the one hand contending that she is bereft of detail and information concerning the respondent and is not privy to its dealings so as to make an informed decision concerning its worth and

24 1997 (3) SA 878 (SECLD) at 896

consequently her interest therein, she is absolutely insistent that her co-members have cocked a snook at an offer which in her view represents a fair value of her interest in the respondent. In addition she has indicated that she sees no purpose in revisiting the offer or revising her member's interest value at present date because she has "*attempted this exercise once only to be frustrated by (her) fellow members (and sees) no purpose in attempting it again*". This smacks of a harrying approach. The cessation of her member's interest will either be secured on her terms on the basis of a once only offer, or the winding-up of the respondent must result. It is not difficult to appreciate, on the limited information available to the court concerning the respondent's financial affairs, that the alleged value of the applicant's stand alone member's interest has been overstated. Further, several years have elapsed since she obtained it. Common sense dictates that there should be a revision of that offer and that subsequent financial statements, which have since been provided, should properly be taken into account. The applicant has adopted such a limp-wristed and one-sided approach in attempting to negotiate a settlement that she can hardly avail herself of a "*last resort*" plea.

56. In the premises, I am not satisfied that it is just and equitable that the respondent be wound up.

57. In the result I issue the following order:

1. The application is dismissed with costs.

B C HARTLE
JUDGE OF THE HIGH COURT

Date of hearing : 22 November 2011

Date judgment delivered : 5 April 2012

Counsel for the Applicant : Mr D H De La Harpe

Instructed by : Bax Kaplan Inc.
Clevedon House
2 Clevedon Road
Selbourne
EAST LONDON
Ref : M Botha/MAT4250

Counsel for the Respondent : Mr T Paterson SC.

Instructed by : Malusi & Co Attorneys

14 St Matthews Road

Southernwood

EAST LONDON

Ref. Mr Malusi/7403-j/civ