

NOT REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 2009/07656

DATE: 30/11/2009

In the matters between:

VERASH KUMAR SHANTILAL BHAGWANDAS 1st Applicant

ASHESH ISHWARLAL RANCHOD 2nd Applicant

DIPESH HIMATLAL JOGI NO 3rd Applicant

and

DR GOOLAM MAHOMED OMAR INC 1st Respondent

GOOLAM MAHOMED OMAR 2nd Respondent

As well as in the matter between

CASE NO: 2009/7655

VERASH KUMAR SHANTILAL BHAGWANDAS 1st Applicant

MYSTIC BLUE TRADING 193 (PTY) LTD 2nd Applicant

VIRESH BHAGWANDAS (PTY) LTD 3rd Applicant

DIPESH HIMATLAL JOGI NO 4th Applicant

HEMA HIMATLAL JOGI NO 5th Applicant

MAYA NATHU PATEL NO 6th Applicant

and

GMO IMAGING (PTY) LTD	1 st Respondent
GMO HOLDINGS (PTY) LTD	2 nd Respondent
GOOLAM MAHOMED OMAR	3 rd Respondent

JUDGMENT

C. J. CLAASSEN J:

[1] I have before me two liquidation applications. The one is case number 2009/7655 and the other is case number 2009/07656. The two applications arise from a radiology practice established by Dr Omar many years ago and currently incorporated in two different companies. Dr Omar on occasion intimated that he wanted to retire. His three co-practitioners, who are the applicants in both cases, indicated to him that they would want to buy out his shareholding in the two companies. All of this is documented in a series of letters which are contained in the papers. I need not refer to them.

[2] Dr Omar responded to the request to buy him out by setting certain conditions before a valuation of the shareholding could be made. These are also documented in the correspondence. He demanded a guarantee of R15 million as proof that they were capable of paying the price of his shareholding which would ultimately be determined by a process of evaluation.

[3] On another occasion Dr Omar indicated that the value of his shareholding in the practice was at least R21 million. In this regard I refer to a letter dated 12 November 2008, being annexure VV33 attached to the founding affidavit, where in paragraph 2 the following is said:

“We do not consider it likely that you would locate the potential purchaser at or near to your asking price i.e. R21 million for your shares in the entities, which we consider totally unrealistic.”

- [4] As a result of these differing views between the shareholders, being the applicants on the one hand, and Dr Omar and his son on the other, the shares were never valued and the negotiation of a buyout agreement came to a halt. As a result of this state of affairs, the applications for the liquidation of the two companies were instituted.
- [5] I have to say something about the nature of the two applications for liquidation. In the first, the three applicants, Dr Bhagwandas, Dr Ranchod and Dr Jogi, apply for the liquidation of Dr Goolam Mahomed Omar Incorporated (the "Incorporated company"). This is the incorporated version of what is, in effect, a radiology partnership between the three applicants and Dr Omar. The shareholding in this Incorporated company is evenly balanced. The total shareholding of the three applicants amounts to 50 percent of the issued shares, Dr Omar owns the other 50 percent. Dr Omar is a director of the company as well as Dr Bhagwandas. The two sides are therefore on even keel as far as the ability to make decisions in regard to the future conduct of this company's business is concerned. The nature of the company's business is to render professional radiology services to the public. On the other hand, in the other application for liquidation the three applicants are seeking the liquidation of GMO Imaging (Pty) Ltd ("Imaging") and GMO Holdings (Pty) Ltd ("Holdings").
- [6] The Imaging company owns the radiology equipment which is leased to the Incorporated company. In return the Incorporated company pays a rental. The papers, however, indicate that the rentals differ widely from month to month, which places some doubt as to the reality of this particular leasing arrangement. However, it is not necessary for me to resolve that issue.
- [7] Suffice to say, it is common cause on the papers in both these applications that the relationship between the applicants on the one hand and on the other Dr Omar and his son (also a shareholder in the

Imagaing company), has broken down completely. The two antagonists in regard to these companies are so distrustful of one another that the likelihood of these companies being properly conducted, seems highly unlikely.

- [8] That being the case, it then remains to be decided whether indeed liquidation is the only option to resolve this deadlock. Mr Bagwa has submitted that there are various options other than liquidating the companies which this court can implement.
- [9] He first suggested that this court could consider issuing a judicial management order in regard to the two companies. However, in my view, judicial management does not fit the facts of these cases. The appointment of a judicial manager is only permissible in instances where the companies are being mismanaged and/or cannot pay their debts. It is common cause on the papers before me that up till now both companies have been able to pay their debts and that there are no creditors waiting in the wings to apply for their liquidation. As Mr Bagwa correctly submitted, the companies are still operating at a profit.
- [10] He also suggested that this court could order an inquiry into irregularities which may have been perpetrated by either of the two groups of antagonists. The papers bristle with accusations and counter accusations of irregularities having been committed by the two sides. However, the requirements for an inquiry in terms of section 442 of the Companies Act were not set out in the papers. In my view, that is not a route which this court can adopt.
- [11] Finally, the main submission of Mr Bagwa was that an order should be made for the appointment of an independent valuator, such as a senior auditor, to value the shares and then for the parties to buy one another out at that value. However, if they cannot agree which party is to buy out the other, then an auction is to be held between the parties. The highest bidder will buy out the other at the auction price.

- [12] I have seriously considered this option as a possibility, but I have come to the conclusion that it will not resolve the total breakdown and mistrust existing between the two groups of antagonists. There are too many imponderables which could cause further disputes along the way of ultimately arriving at a price at which one party will buy out the other. The mere fact that shares and the value of company can be valued on a number of different bases is fertile ground for further disputes between the parties. This might result in further court applications in order to determine the correct basis for valuating the shares.
- [13] I can also foresee the possibility that a further dispute may arise in regards to Dr Omar setting as a precondition the delivery of certain guarantees if the applicants are to buy him out. If such a dispute does arise it may very well scuttle the whole process and lead to further litigation.
- [14] There is a further problem. The Imaging company involves further parties, the Holdings company, Dr Omar's son, who is also a shareholder in both the Imaging and the Holdings Companies, as well as certain of Dr Omar's family members. It is not unlikely that disputes will occur with all these additional parties involved.
- [15] These various further individuals will wish to claim rights to be protected in any order granted in regard to the buying out of the respective shareholdings. In my view, it is likely to result in further disputes, which may cause further court applications and ultimately leaving the matter unresolved and dragging on endlessly.
- [16] The applicants came to court on the basis that it is just and equitable for this court to wind up the respective companies. They have the right to do so in terms of section 344 of the Companies Act which provides:
- "A company may be wound up by the court if:-
(h) ...it appears to the court that it is just and equitable that the company should be wound up."

- [17] This subsection postulates no facts, but only a broad conclusion of the law, namely justice and equity, as a ground for winding up a company. It is also trite that the power given to a court to wind up a company on a just and equitable ground is not confined to cases in which there are grounds similar to those mentioned in the rest of section 344.
- [18] Nor can any general rule be laid down as to the nature of the circumstances that fall within the phrase “just and equitable”. The courts are given a very wide discretion to order the liquidation of companies in regard to facts and circumstances which would make it just and equitable to liquidate a company.¹ The case of **Apco Africa** was also an instance where the shareholders in a company were conducting a business akin to a partnership.
- [19] In the present case the Incorporated company in case number 2009/7655 is a service rendering company. It renders professional radiology services to the public. As such, should the company be liquidated, these doctors would be able to continue their profession elsewhere. There is no real prejudice if it were to be liquidated.
- [20] The Imaging company is only a property holding company. It owns radiological equipment. Should the Incorporated company be liquidated no further “rentals” will be received by the Imaging company. It is common cause on the papers that the Imaging company’s only source of income is the rental received from the Incorporated company. It was suggested in the papers that should the Incorporated company be liquidated it does not necessarily follow that the Imaging company is to be liquidated, because it can rent out the radiological equipment to other takers.

¹ See in this regard **Apco Africa (Pty) Ltd and Another v Apco Worldwide Incorporated** 2008 (5) SA 615 (SCA) at para [16].

- [21] However, that possibility is prevented by the entanglement of the antagonists in the two companies. The Imaging company will, as of necessity, have to seek new renting clients for its property. Up until now they have only leased the property out to one entity and that is the Incorporated company.
- [22] Thus, the main problem remains. If the Imaging company is not liquidated the deadlock between the two groups of shareholders will continue. It will have to be resolved in one way or the other. I am therefore of the view that any order in regard to the one company will as of necessity affect the future existence of the other.
- [23] I return to the question whether liquidation is the only viable option. In the **Apco** case at paragraph [18] Ponnán JA specifically stated that the just and equitable provision also applies to instances where a company is in effect being conducted as a partnership as in the present case. Circumstances which would under the law of partnership entitle one or more of the partners to seek termination thereof by way of liquidating the partnership assets would equally be grounds for liquidation of the company which is run like a partnership, under the “just and equitable” provision. In paragraph [19] at page 625B – D the following is stated by Ponnán JA:
- “The second, usually called the deadlock principle, is derived from the *Yenidje Tobacco Company* case. It is founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company’s affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up.”
- [24] In the present instance the papers bristle with accusations and counter accusations by the antagonist parties, all of which I need not resolve, as indeed I cannot on the papers in motion proceedings. However, it clearly indicates the extent of distrust and lack of confidence in one another at which the parties have arrived.

[25] The papers disclose that criminal charges have been brought and threatened; in another instance the bank account was frozen because of fears that another party had been pilfering the funds. I need not go into all the various accusations and counter accusations, suffice to say it is clear that the parties have fallen out of a trustful arrangement existing at the time when the partnership business between them commenced.

[26] In a deadlock of this nature a court must adopt a practical approach to arrive at a feasible solution. In this regard Ponnann JA stated in paragraph [29] at page 628 of the **Apco** case as follows:

“It is plain that a relationship of trust and integrity between the shareholders is integral to the success of the business of the company, as well as the continuation of that relationship. That much is evidenced from the nature of the company’s business as well as the fact that the parties are all privy to sensitive and confidential information. When one of two partners threatens civil or 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. Having regard to the fact that the directors and shareholders cannot communicate with each other and that no business of the company can be carried on, one is inclined to the conclusion that, if there were a state of deadlock, it exists here. If, as Arcay claims, there was fraud by Kamerling and a calculated design to wreck the company and it can establish that in due course, it will have a remedy in damages. In those circumstances there can be no reason to seek to protect Arcay’s rights, as it sought to contend, by sustaining the corporate form.”

[27] In the present case there were also charges of fraud between the two antagonist groups and it seems to me that the facts of the present matter are analogous to the facts in the **Apco** case. Mr Bagwa sought to distinguish the **Apco** case on the basis that the company in that case was dormant and not functioning. In my view that is not a distinguishing feature. What is at stake is not whether the company is currently making a profit or not. The question is whether business of the company can be carried on while there is such a large measure of

distrust and existing acrimony between the respective groups of shareholders.

[28] In any event, the “just and equitable” provision was included over and above all the other grounds for liquidation to cater specifically for this kind of situation where a wide variety of circumstances can result in the effective management of the company being undermined. That, of course, threatens the future of the company, whether it is currently making a profit or not.

[29] It is quite clear that a court will liquidate a company not only when there is an actual deadlock, as in the present case, but also when it is satisfied that it is impossible for the parties to place such confidence in each other, which each has a right to expect, provided such impossibility was not caused by the person seeking to take advantage of it. In the present case both parties are actually alleging that the other has caused this impossibility to arise, which in my view strengthens the case that a deadlock is in existence undermining the future of the company. All the other avenues suggested by Mr Bagwa are just not feasible and not practical in the current state of affairs existing between the two groups of shareholders and directors.

[30] I am therefore of the view that the only solution would be, in fact, to grant a provisional liquidation order in both these instances. I therefore make the following order in both cases as follows:

1. A provisional liquidation order is issued, returnable on 12 January 2010;
2. The costs of this application will be costs in the cause of such liquidation.

THUS SIGNED AT JOHANNESBURG ON THIS DAY OF JUNE 2011.

A handwritten signature in black ink, appearing to read 'C.J. Claassen', written in a cursive style.

C.J.CLAASSEN
JUDGE OF THE HIGH COURT