

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO.: 2023-033422**

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: NO

Date: 19 August 2024

E van der Schyff

In the matter between:

BIANCA TIANA BICCARD N.O.

FIRST APPLICANT

ATHOLL DAVID VICTOR LIEBMAN N.O.

SECOND APPLICANT

JAQUELINE JUNE LIEBMAN GENTILE N.O.

THIRD APPLICANT

and

JOHANNES OUPA NDWANDWE

FIRST RESPONDENT

THEMBA HENDRY MKHBELA

SECOND RESPONDENT

BRADLEY BRETT LIEBMAN N.O.

THIRD RESPONDENT

ANDREA LIEBMAN N.O.

FOURTH RESPONDENT

JONATHAN HUGH STEPHENS

FIFTH RESPONDENT

|                                                       |                       |
|-------------------------------------------------------|-----------------------|
| ANGELENE POOLE N.O.                                   | SIXTH RESPONDENT      |
| JANETTA EVELYN CARR N.O.                              | SEVENTH RESPONDENT    |
| PUMEZO DAVID N.O.                                     | EIGHTH RESPONDENT     |
| MURRAY JAMES BARNETSON N.O.                           | NINTH RESPONDENT      |
| KANABO GUGULETHU SKHOSANA N.O.                        | TENTH RESPONDENT      |
| THE MASTER OF THE HIGH COURT,<br>PRETORIA             | ELEVENTH RESPONDENT   |
| THE COMPANIES AND INTELLECTUAL<br>PROPERTY COMMISSION | TWELFTH RESPONDENT    |
| CHRISTIANA BICCARD                                    | THIRTEENTH RESPONDENT |

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## JUDGMENT

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Van der Schyff J

### Introduction

[1] The applicants approached the court seeking an order:

- i. Declaring the special resolution placing Nyakaza Property Development (Pty) Ltd (Registration No: 2005/031219/07) (Nyakaza or the company) under voluntary winding up to be of no force and effect as envisaged in section 351(1) (alternatively section 350(1)) of the Companies Act 61 of 1973 (the Act);
- ii. That the voluntary winding up be set aside in terms of section 354(1) of the Act;
- iii. That the respondents opposing the application pay the costs jointly and severally, the one paying the other to be absolved.

## Context

- [2] Nyakaza is a private company. Its shareholders are the first respondent (Mr. Ndwandwe), with 31 shares; the second respondent (Mr. Mkhbela), with 31 shares; the K&RL Trust, with 19 shares; and the BBL Trust, with 19 shares. Mr. Ndwandwe and Mr. Mkhbela are BEE shareholders.
  
- [3] The applicants are acting in their capacities as trustees of the K&RL Trust. The second applicant is deceased.
  
- [4] Mr. Ndwandwe, Mr. Mkhbela, and the thirteenth respondent, Ms. C. Biccard, are Nyakaza's directors. A resolution was taken at a meeting of shareholders of the company on 18 May 2022 to place the company into voluntary liquidation. It is this meeting and the special resolution taken at the meeting that underpins the litigation.
  
- [5] The applicants inform the court that they were informed by Ms. C Biccard, a director of Nyakaza, that Nyakaza's board of directors did not resolve to call for a shareholder's meeting to be convened to pass a special resolution that Nyakaza be placed into voluntary liquidation. They contend that it 'appears' that the voluntary winding up was improperly achieved, with the decision ostensibly being taken at a meeting of which notice has not been given. They base the assertion that the decision was taken at a meeting of which no notice was given on an annexure attached to the founding affidavit, FA 14, a completed Form CM25A.<sup>1</sup> It is common cause that the document was signed by or on behalf of all the shareholders except K&RL Trust.
  
- [6] Mr. Ndwandwe and Mkhbela, the first and second respondents, oppose the application. They deny that the deponent to the founding affidavit has any personal knowledge of the issues referred to in the founding affidavit since she only became a trustee of the K&RL Trusts in July 2022, after the events referred to in the founding

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<sup>1</sup> CM25 is a pro forma template of a document titled 'Consent to propose and pass Special Resolution at Meeting of Which notice has not been given'.



affidavit. They aver that she failed to disclose all the relevant facts to the court and claim that their shareholding and directorship is nothing but a 'sham'. They explain that they are mere laborers and not sophisticated businessmen. Everything they did relating to the company between 2019 and 2022 was at the direction of the second and third applicants, the now-deceased Mr. Liebman, and his daughter Ms. Gentile. The second and third applicants, on the one hand, and the third respondent, in his personal capacity, on the other, are engaged in acrimonious litigation. Both camps approached Messrs. Ndwandwe and Mkhabela for their support and promised stability regarding their employment and the regular payment of their salaries in return. I pause to note that this tug of war for Messrs. Ndwandwe and Mkhabela's support is evident from particularly the answering and replying affidavit and annexures thereto.

- [7] Mr. Ndwandwe and Mkhabela inform the court that Nyakaza has not traded since 2020, that Nyakaza's secretary and the company's auditors resigned in July 2021, and that Nyakaza is, to their knowledge, *de facto* insolvent. The company was placed into deregistration by the CIPC on 10 December 2020, but the process was canceled on 7 July 2021. They do not know who canceled the deregistration.
- [8] They claim that the second and third applicants controlled Nyakaza's bank account since 2019. They never had any control over Nyakaza's funds save for having been granted access to view the bank balance. In October 2020 Messrs. Ndwandwe and Mkhabela called for a shareholders' meeting, among others, to remove Ms. C. Biccard as a director, and to terminate the second and third applicants' mandate as signatories to Nyakaza's bank account, but the meeting did not proceed. They claim their demand was ignored, but in reply, affidavits are attached wherein they state that they no longer require a shareholders' meeting since they were brought under false pretenses by the third respondent. Messrs. Ndwandwe and Mkhabela aver that Miss. C. Biccard effectively acted as a proxy for the second and third applicants. I pause to note that this averment is not addressed in reply except through a general averment that:

'The Answering Affidavit is unduly prolix and verbose and constitutes an egregious abuse of process because, save for a few

paragraphs, it contains matter which is wholly irrelevant to the issue in this application, and which quite clearly has been included for the ulterior and improper purpose of creating atmosphere adverse to the Applicants. ... In the premise Applicants will in this replying affidavit deal only with those aspects of the Answering Affidavit which call for a reply insofar as Applicants do not deal with any of the remaining contents thereof, they are to be construed as denied.'

[9] In February 2022, the fifth respondent, Mr. Stephens, approached Mr. Ndwandwe and Mkhabela and asked whether they were willing to place Nyakaza in voluntary liquidation in order for the company's affairs to be investigated by the proper authorities. Mr. Ndwandwe claims that he called Ms. C. Biccard telephonically and invited her to attend a Board meeting on 6 April 2022 at Mr. Stephen's offices. She failed to attend the meeting, and Messrs. Ndwandwe and Mkhabela as the majority of directors. took a resolution to call a shareholders' meeting with the purpose of taking, among others, the following resolutions:

- i. That Ms. C. Biccard be removed as a director of Nyakaza, and
- ii. That Nyakaza be placed into voluntary liquidation.

[10] On 12 April 2022, a notice of a shareholder's meeting to be held on 18 May 2022 was distributed to the shareholders. On 18 May 2022, the majority of shareholders (81%) took the resolution to place Nyakaza in voluntary liquidation. Messrs. Ndwandwe and Mkhabela explain that CM25 was completed and signed out of an abundance of caution because the applicants threatened that the shareholders' meeting that was concluded would have no legal effect. The special resolution taken at the general meeting on 18 May 2022 has been registered with the CIPC on 26 May 2022.

[11] To date, the Renaissance Trust, also represented in this litigation, is the only creditor that proved a claim of about R16 million. The claim was provisionally accepted.



- [12] The applicants aver in reply that Ms. C. Biccard was not called to a director's meeting to be held on 6 April 2022. A confirmatory affidavit from Ms. C. Biccard is attached to the replying affidavit. As a result, they contend, the meeting of shareholders was convened only by two directors and not the board of directors. It then follows, they submit, that because the purported resolution of the Board of Directors calling for a shareholders' meeting was not valid, the subsequent shareholders meeting held on 18 May 2022 was not properly convened, and the purported resolutions taken at the shareholders meeting are not valid and of no force and effect.

## Discussion

- [13] Affidavits are important, not only for the facts averred in them but also for the aspects not dealt with therein. I find it highly relevant that the applicants do not contradict the averment that Nyakaza is factually insolvent. I likewise find it significant that Ms. C. Biccard, a director of Nyakaza, did not find it necessary to take issue with the directors' meeting that was held on 6 April 2022 in her absence. I note that Ms. C. Biccard's confirmatory affidavits were attached to the founding and replying affidavits, but where an application is premised solely on the fact that the impugned directors' meeting of 6 April 2022 was held in her absence and without her knowledge, more is expected.
- [14] The Supreme Court of Appeal in *Eskom Holdings Soc Ltd v Masinda*<sup>2</sup> criticised the 'slovenly practice' of adducing evidence by way of hearsay allegations in a main affidavit, supported by a confirmatory affidavit by a witness who should have provided the necessary details but who merely sought to confirm what had been said in the main affidavit 'insofar as reference [has been] made to me'. In *Drift Supersand (Pty) Limited v Mogale City Local Municipality*<sup>3</sup> the Supreme Court of Appeal referred to the 'sloppy method of adducing evidence by way of a hearsay allegation', and then stated:

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<sup>2</sup> 2019 (5) SA 386 (A) at para [3].

<sup>3</sup> [2017] 4 All SA 624 (SCA) at para [31].

'This might be an acceptable way of placing non-contentious or formal evidence before court, but where, as here, the evidence of a particular witness is crucial, a court is entitled to expect the actual witness who can depose to the events in question to do so under oath.'

- [15] The whole of the founding and replying affidavit constitute hearsay evidence, as Ms. B. Biccard, the deponent to these affidavits, only became a trustee of K&RL Trust after the events underpinning the application occurred. She does not explain how the facts she proclaims to fall within her own knowledge came to her knowledge.
  
- [16] The failure or success of the application, from the applicants' perspective, revolves around the question of whether a shareholders' meeting was validly called for. A clear dispute of fact exists in this regard, a dispute that the applicants could and should have foreseen after having received the answering affidavit. They did not file Ms. C. Biccard's version of what transpired nor seek an order referring the issue to oral evidence.
  
- [17] The applicants approached the court for the setting aside of Nyakaza's voluntary winding-up almost a full year after the resolution was taken and registered with the CIPC, whilst they were fully apprised of the resolution being taken. They fail, however, to provide any explanation whatsoever for the delay in instituting the proceedings.
  
- [18] The respondent's claim that Ms. C. Biccard was telephonically informed of and called to the meeting of the board of directors that was held on 6 April 2022 is not so untenable or far-fetched that it can summarily be disregarded. The applicants could have instituted legal proceedings to prevent the shareholder's meeting scheduled for 18 May 2022 or attacked the validity of the special resolution in May 2022 already when the facts surrounding the calling of the respective meetings would have been fresh in the minds of Ms. C. Biccard and Messrs. Ndwandwe and Mkhabela. They delayed for almost a year and can hardly now expect that detailed information regarding the telephone conversation be provided for the averment to be accepted. In addition, Ms. C. Biccard did not take issue with the fact that a board of directors'



meeting apparently occurred in her absence during April 2022. Her silence and inaction support an inference that she had knowledge of the said meeting and decided not to attend.

- [19] Even if an irregularity occurred in this regard, I have to consider that it is an irregularity that could easily have been cured. It would still be within Messrs. Ndwandwe and Mkhabela's power to again call for a meeting of the board of directors if the voluntary winding up is set aside. I also have to consider the fact that Messrs. Ndwandwe and Mkhabela, the majority shareholders, were nothing but pawns to the major role players, but these same parties are quick to indicate that if the application is dismissed, Messrs. Ndwandwe and Mkhabela must be responsible for the costs.
- [20] The main purpose of this application is to obtain an order provided for in section 354(1) of the Companies Act 61 of 1973 (the Act), setting aside Nyakaza's voluntary winding-up. All issues raised need to be considered through the prism of section 354(1) of the Act.
- [21] Section 354 of the Act provides as follows:

'(1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.

(2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.'

- [22] Except for relying on a disputed irregularity in convening the general meeting for the passing of the resolution placing Nyakaza into voluntary winding-up, the applicants do not proffer any reason in the founding or replying affidavits for why all the



proceedings in relation to the winding-up ought to be stayed or set aside in circumstances where it is not contested that Nyakaza is *de facto* insolvent,<sup>4</sup> have no physical address, has not traded since 2020 in any form or fashion, and ostensibly do not have any auditors, with the auditors having resigned in July 2021.

- [23] The special resolution to place Nyakaza in voluntary surrender was taken by the majority of shareholders, who cumulatively held 81% of the shares. In the circumstances set out above, without being provided with the rationale for the relief sought, it has not been established that all proceedings in relation to Nyakaza's winding-up should be set aside.

### **Costs**

- [24] The general principle that costs follow success applies. Having regard to the complexity of the issues, and the applicant's unexplained delay in instituting the litigation costs of counsel stands to be allowed on scale C.

### **ORDER**

**In the result, the following order is granted:**

- 1. The application is dismissed with costs, costs of counsel on scale C.**

  
  
 E van der Schyff  
 Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

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<sup>4</sup> See *Storti v Nugent* 2001 (3) SA 783 (W).