

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2024-135403

DATE: 16 December 2024

In the matter between:

EMMANUEL SPANOGIANNIS

First Applicant

**FINSBUREY MANAGEMENT SERVICES (PTY) LTD, AS THE
TRUSTEE FOR THE TIME BEING OF THE EOLOS TRUST**

Second Applicant

and

EMGEO (PTY) LIMITED

First Respondent

**THE TRUSTEES OF THE TIME BEING OF
THE MATHAMY TRUST**

Second Respondent

Neutral Citation: *Spanogiannis and Another v Emgeo and Another* (2024-135403) [2024] ZAGPJHC --- (16 December 2024)

Coram: Adams J

Heard: 10 December 2024

Delivered: 16 December 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:30 on 16 December 2024.

Summary: Civil procedure – urgent application – for the final winding up of the respondent – s 344(f), read with s 345(1)(c), s 345(1)(a)(i) and s 344(h) of the Companies Act 61 of 1973 – also Schedule 5 of the Companies Act 71 of 2008 – respondent unable to liquidate its indebtedness to applicant – respondent factually, commercially and legally insolvent – also, there is a clear deadlock between shareholders, who cannot get along with each other – therefore, ‘just and equitable’ that respondent be wound up – s 344(h) of the Companies Act – in the case of a domestic company with a small membership, winding up is just and equitable where the deadlock principle can be applied – the relationship is of such a nature that it requires the members to act reasonably and honestly towards one another and with friendly cooperation in running the company’s affairs – it is not necessary to establish a literal deadlock – it suffices to show that as a result of the particular conduct, there is no longer a reasonable possibility of running the company –
Urgent application for winding up granted.

ORDER

- (1) The applicants' non-compliance with the Uniform Rules of Court relating to time periods, service and filing is condoned, and the matter is heard as one of urgency in terms of Rule 6(12).
 - (2) The first respondent be and is hereby placed under final winding up in the hands of the Master of the High Court.
 - (3) The costs of this winding up application shall be costs in the winding up of the first respondent.
 - (4) The first respondent's counterapplication for security for costs is removed from the roll with no order as to costs.
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JUDGMENT

Adams J:

[1]. This is an opposed urgent application by the first applicant (Mr Spanogiannis) and the second applicant (Finsburey) for the winding up of the first respondent (Emgeo) in accordance with the provisions of s 344(f), read with s 345(1)(c) and s 345(1)(a)(i), alternatively, s 344(h) of the Companies Act 61 of 1973, as amended (the Companies Act), also read with Schedule 5 of the Companies Act 71 of 2008 (the 2008 Companies Act).

[2]. The first applicant is one of the two directors of Emgeo and he is also a 50% shareholder of the said company. As such, he is as a 'member' of Emgeo, as contemplated in terms of s 346(1)(c) and (d) of the Companies Act, entitled to launch this winding up application. Finsburey is a creditor of Emgeo, and, as such is entitled to apply for its liquidation in terms of s 346(1)(b) of the Companies Act. There is no dispute about the fact that Emgeo is presently indebted to Finsburey in the total sum of US\$1.2 million, which originally

translated into ZAR28 249 222, being R22 million lent and advanced plus interest, less an amount written off. The said sum, so it is averred by the applicants, is presently due, owing and payable. Finsburey holds no security in respect of Emgeo's aforesaid indebtedness to it.

[3]. The second respondent (Mathamy Trust) is the other 50% shareholder of Emgeo, and its main Trustee, George Sinovich (Mr Sinovich), is the other director of Emgeo.

[4]. During or about 2020, Messrs Spanogiannis and Sinovich agreed to enter into a joint venture with a view to acquiring certain immovable property, for purposes *inter alia* of establishing and operating a restaurant, as well as for purposes of a residential and commercial development. Emgeo was to be the vehicle which they would use for the joint venture. Mr Spanogiannis and Mr Sinovich would both be 50% shareholders of Emgeo and both were to be appointed as co-directors of the company. Finsburey, which in essence is Mr Spanogiannis' Trust, was to loan Emgeo R22 million as start-up capital, to be utilised *inter alia* to purchase four immovable properties in the Parktown and Parktown North areas ('the properties').

[5]. The R22 million was lent and advanced by Finsburey to Emgeo in terms of and pursuant to a written loan agreement concluded between them on 8 January 2021, with an effective date of 8 January 2021, in terms whereof the said sum was to be loaned to Emgeo for a period of 5 years. Interest would be charged on the loan amount at 8% per annum, from 1 July 2021 and was payable annually on 30 June. The loan agreement also provided for repayment of the capital amount in four instalments, the first instalment being payable on or before 30 June 2023.

[6]. This loan enabled Emgeo to purchase and acquire the four properties referred to above, which were subsequently transferred to and registered in the name of Emgeo.

[7]. It is the applicants' case that from the outset it was clear that the Joint Venture was a disaster and would not achieve its objectives. It was also apparent that Emgeo was going to default on its first capital repayment on 30 June 2023. This resulted in the parties, during April 2023, entering into a written agreement in terms of which the properties would be sold on auction to settle the loan with a 6% commission of the nett proceeds to be paid to Mr Sinovich for his assistance and the remainder of the proceeds were to be paid to Finsburey. In addition and as per clause 5 of the said agreement, the shareholders, namely Mr Spanogiannis and the Mathamy Trust were required to pledge their shares to Finsburey in *securitatem debiti*.

[8]. The attempts at auctioning off the properties pursuant to the 2023 agreement were to no avail. The pledging of the shares also did not materialize. In a final effort to ensure repayment of the loan, the parties, during or about August 2024, concluded an Addendum to the Loan Agreement, in terms of which Finsburey agreed to write off €424 563 and the parties agreed to an extension of the repayment period, to commence in August 2024 and to run to July 2029. The parties also agreed that the share capital in Emgeo would be ceded to Finsburey.

[9]. The Addendum, according to the applicants, have been breached because none of the payments for August, September, October and November 2024, have been made. Moreover, the share certificates and transfer documents have not been handed over to Finsburey.

[10]. All of the foregoing, so it is contended on behalf of the applicants, mean that Emgeo is clearly unable to liquidate its indebtedness to Finsburey, which, in turn, means that Emgeo is factually, commercially and legally insolvent.

[11]. I find myself in agreement with these contentions. By all accounts, Emgeo is unable to pay its debts as contemplated in terms of s 344(f), read with s 345(1)(c) and 345(1)(a)(i) of the Companies Act, and therefore falls to be wound up. What is more is that there is a clear deadlock between Messrs

Sinovich and Spanogiannis, who cannot get along with each other as directors and shareholders. It is thus, in my view, 'just and equitable' that Emgeo be wound up, within the meaning of s 344(h) of the Act.

[12]. I also find that the application is urgent if regard is had to the history of the dispute between the parties and the failed attempts to resolve those issues between them. It is, as contended by the applicants, that Mr Sinovich, as representative of the shareholder, has breached every agreement concluded between the parties with a view to enable repayment of the loan amount, the most recent having been concluded in August 2024.

[13]. There is furthermore an issue relating to the collection of rentals in respect of the leasing of the properties, in respect which, according to the applicants, Mr Sinovich fails to account for rent collected. Mr Spanogiannis contends that he and Mr Sinovich are now hopelessly deadlocked. He says he cannot trust him and Emgeo is effectively rudderless, since effectively, there is deadlock at both board and at shareholder level. This alone is, in my view, sufficient reason for winding up the company on an urgent basis.

[14]. The simple point about this matter is that Emgeo, being a small company with two shareholders and two directors, is actually a partnership between Messrs Spanogiannis and Vinovich. Mr Spanogiannis says that he cannot work with Mr Vinovich, given his conduct in the running of the business of Emgeo. The applicants therefore contend that it is imperative that this partnership be dissolved as a matter of urgency, so that its assets may be preserved and its income controlled by a Liquidator. I agree with this contention.

[15]. In that regard, I associate myself respectfully with the opinion of the learned authors of *Henochsberg on the Companies Act Vol 1 Service*¹, in which the following is stated: -

'In the case of a domestic company with a small membership, winding up is just and equitable where the deadlock principle can be applied. This is founded on the analogy of partnerships and

¹ *Henochsberg on the Companies Act Vol 1 Service, Issue 33 at 704-705.*

is strictly confined to those small domestic companies requiring a particular personal relationship of confidence and trust, similar to that existing between partners in regard to their partnership business. As is the case herein, the relationship is of such a nature that it requires the members to act reasonably and honestly towards one another and with friendly cooperation in running the company's affairs. The destruction of this relationship may result in literal deadlock, but it is not necessary to establish a literal deadlock. It suffices to show that as a result of the particular conduct, there is no longer a reasonable possibility of running the company.' (Emphasis added).

[16]. As was held by the Full Court of this Division in *Barbaglia N O and Others v Noble Land (Pty) Ltd and Others*², in winding up a company on the basis that it is 'just and equitable' to do so, the SCA's pragmatic and common-sense approach should be adopted. Both parties may or may not be to blame for the deadlock and all that is necessary to be established is that the parties can no longer place confidence in each other. That is exactly the case *in casu*. The company is now in a state which could not have been contemplated by the parties when the company was formed and the state of affairs encountered should not be allowed to continue.

[17]. In sum, I conclude that the applicants have made out a case for the winding up of Emgeo on an urgent basis and an order to that effect should be granted.

[18]. In light of my foregoing findings, it is not necessary for me to deal, in the urgent court, with the first respondent's counterapplication for security for costs in terms of Uniform Rule of Court 47(1). I therefore intend removing that application from the roll, with no order as to costs.

Order

[19]. In the result, I make the following order:

² *Barbaglia N O and Others v Noble Land (Pty) Ltd and Others* (Appeal Judgment) 2021 JOL 50829 (GJ) at 35.

- (1) The applicants' non-compliance with the Uniform Rules of Court relating to time periods, service and filing is condoned, and the matter is heard as one of urgency in terms of Rule 6(12).
- (2) The first respondent be and is hereby placed under final winding up in the hands of the Master of the High Court.
- (3) The costs of this winding up application shall be costs in the winding up of the first respondent.
- (4) The first respondent's counterapplication for security for costs is removed from the roll with no order as to costs.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	10 December 2024
JUDGMENT DATE:	16 December 2024 – Judgment handed down electronically
FOR THE FIRST AND SECOND APPLICANTS:	Mark Nowitz
INSTRUCTED BY:	Hirschowitz Flionis Attorneys, Rosebank, Johannesburg
FOR THE SECOND RESPONDENT:	Dave Watson
INSTRUCTED BY:	Keith Sutcliffe & Associates Inc, Dunkeld West, Johannesburg
FOR THE FIRST RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance