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**HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO: A132469/2023

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

DATE: 26 FEBRUARY 2025

SIGNATURE

In the matter between:

L[...] D[...]

Appellant

and

M[...] P[...] I[...] (PTY) LTD

First Respondent

T[...] M[...] D[...]

Second Respondent

CASE NO: A133154/2024

T[...] M[...] D[...]

Appellant

and

M[...] P[...] I[...] (PTY) LTD

Respondent

Summary: *Company Law – two applications relating to the affairs of the same company served before the court a quo. A composite judgment was delivered wherein both an application for leave to proceed with litigation by way of a derivative action and an application for the winding-up of the company were refused. The appeals against both refusals were heard simultaneously. Held: that the court was not satisfied that the derivative action would have a material benefit or be in the best interests of the company. Leave was therefore correctly refused. As to the winding-up application, it should have been found that there was an irresolvable deadlock between the only two directors in respect of both the running of the company and its future. The appeal in respect of the refusal to liquidate the company was upheld and a final winding-up order was granted.*

ORDER

1. The appeal in case no A132469/2023 is dismissed.
2. The appeal in case no A133154/2024 is upheld and the order of the court a quo is replaced with the following: *“M[...] P[...] I[...] (Pty) Lt is placed under final winding-up in the hands of the Master. Costs of the application shall be costs in the liquidation”.*
3. Each party to pay its own costs in the respective appeals.

JUDGMENT

The matter was heard in open court and the judgment was prepared and authored by the judge whose name is reflected herein and was handed down electronically by

circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of handing-down is deemed to be 26 February 2025.

DAVIS, J (with whom Sutherland DJP and Du Plessis J concur)

Introduction

[1] Mr and Mrs D[...] were, until shortly before the joint hearing of their respective appeals, married to each other. The patrimonial consequences of their recent divorce have been separated from other issues and remain part of ongoing acrimonious litigation, which had commenced as long ago as in 2017.

[2] Mrs D[...] averred that her husband at the time, owed and still owes a company which featured in their divorce proceedings, M[...] P[...] I[...] (Pty) Ltd (M[...]) in excess of R14 million. She applied in the court a quo for leave to pursue the recovery of these funds by way of a derivative action on behalf of M[...]. This was done in terms of section 165 of the Companies Act¹. The court a quo refused her application and before us she appealed this refusal.

[3] Mr D[...], alleging that the funds he took from M[...]’s accounts were, to the knowledge of Mrs D[...], spent on the joint household and other expenses of their marriage, claimed that M[...] should be liquidated. This was done on the basis of the existing deadlock that existed between him and Mrs D[...] as the only directors of M[...] and that it was otherwise just and equitable to do so. The liquidation application was also refused and is the subject of Mr D[...]’s appeal.

[4] The court a quo gave a composite judgment wherein both applications had been refused and consequently both appeals were heard jointly. Despite this, each application and each appeal has to be considered separately, having regard to the different requirements relating to each of the initial applications.

Background facts

¹ 71 of 2008.

[5] In addition to the facts already sketched in the introduction, the history of M[...], its assets and the claims on which Mrs D[...], in particular, relies need to be summarized.

[6] M[...] was initially a “shelf-company” called [...] & [...] T[...] S[...] (Pty) Ltd. It became M[...] in 2003. Its name is derived from a combination of the names of the D[...] children. The two shareholders of M[...] are the L[...] D[...] Trust and the T[...] D[...] Trust, in equal shares. Currently, the D[...] children are the beneficiaries of both trusts together with each of the parents in respect of the respective trusts that bear their names.

[7] The trusts were created shortly after the D[...]s’ marriage in 1992 for estate planning purposes, and when an immovable property, being a holiday home in Salt Rock, Kwa-ZuluNatal (the S[...] R[...] P[...]) was purchased in 2004, it was registered in the name of M[...], but with the trusts as shareholders, also for estate planning purposes.

[8] M[...] also, for a period of time, later owned a vacant piece of land in another property development, but this has since been disposed of and its ownership played no part in the current disputes.

[9] Since its incorporation and until the D[...]s’ separation in 2016, Mr D[...] was the sole director of M[...]. Subsequent to the parties’ separation, they ceased to bilaterally be trustees of the two trusts, and Mrs D[...] became a co-director of M[...].

[10] The disputes in the parties’ divorce, spilled over into the boardroom of M[...].

[11] So far the common cause facts.

The Section 165 Application

[12] Mrs D[...] stated that a few years after a family holiday home had been built on the S[...] R[...] P[...], Mr D[...] wanted to sell the property, due to the high

maintenance costs thereof. This was not done, but since 2012 the property was rented out for short term rentals in order to generate income to defray the maintenance costs, including the bond payments.

[13] Pursuant to the parties' separation in 2016, Mr D[...] again "pressurized" Mrs D[...] to sell the S[...] R[...] P[...]. Mrs D[...] resisted and took over the administration of the rental of the property.

[14] Since becoming a director, Mrs D[...] ascertained that, during the period up to February 2010, Mr D[...] had withdrawn R5 685 000.00 from M[...]’s bank account. Thereafter, and up until 28 February 2016, Mr D[...] had withdrawn a further R8 90 497.00. The withdrawals were reflected in M[...]’s financial statements in a loan account in favour of Mr D[...]. Mrs D[...] claims that this is M[...]’s largest asset, since the S[...] R[...] P[...] has since significantly reduced in value (to an estimated R5 million).

[15] In addition, Mrs D[...] referred to a sale of immovable property by another company, Erf 7 Extension 6 L[...] (Pty) Ltd (L[...]). The sale was for R12,5 million and she claims that, as L[...]’s sole shareholder, M[...] became entitled to this amount. However, only some R6 million was transferred from L[...] to M[...] in February 2013. Another R3,74 million was paid by L[...] to an account under the control of Mr D[...]. From this account, Mr D[...] had transferred R2,24 million to M[...]’s bond account with Standard Bank.

[16] Mrs D[...] also alleged that other funds were withdrawn from M[...]’s bond account and paid to the T[...] D[...] Trust.

[17] Based primarily on the above, but also numerous, largely historical, allegations of breaches of fiduciary duties by Mr D[...], whom she no longer trusts, Mrs D[...] claimed leave in terms of section 165 of the Companies Act to institute derivative proceedings on behalf of M[...] against Mr D[...], after finalisation of a forensic investigation funded by him. In parts B and C of her notice of motion, she also claimed that Mr D[...] be removed as a director and declared a delinquent director, together with certain ancillary relief and costs.

[18] In considering the final relief claimed by Mrs D[...], one must bear in mind the application of the Plascon Evans-rule². The effect of this is that Mrs D[...] would only have been entitled to relief if, on the facts averred by Mr D[...], together with such facts averred by Mrs D[...] which had not been disputed, she was entitled thereto.

[19] The thrust of Mr D[...]’s defence against the accusation of having misappropriated company money for himself was this: during the periods in question, the parties’ expenses and the lifestyle that they had lived, caused their expenses to exceed their income or available funds by R12 705 090.99. This rather precise figure was obtained after a financial analysis had been performed by an auditor, one Mr Pretorius, who had produced financial statements and spreadsheets and who had deposed to a confirmatory affidavit.

[20] Mr D[...] stated that the funds withdrawn from M[...]’s accounts, had not only been utilised to pay for this shortfall, but had been so utilised with the full knowledge of Mrs D[...]. There was never really a “loan” to him of these funds and the usage of a loan account in the books of M[...], was merely the manner in which the withdrawals had been reflected for accounting purposes.

[21] In this regard, it is notable that Mrs D[...], in her founding affidavit, herself stated that the purported loan was “of questionable” validity. She further acknowledged that “at various times”, payments had been made from M[...]’s account to pay the bond instalments on the couples’ matrimonial home.

[22] In respect of the balance of some R1,9 million withdrawn from M[...]’s account, Mr D[...] explained that this was used to partially repay the T[...] D[...] Trust’s funding of the construction of the Salt Rock home. It is common cause that M[...] had no funds of its own when the vacant land had been purchased it had no funds to pay for the construction of the holiday home. The costs of construction alone was R3 155 254.00. The bond which was later passed in the amount of R2,8

² After *Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

million, was not used to pay for the construction, but also to grant the parties access to funds to finance their lifestyle.

[23] In respect of the L[...] payments, Mr D[...] explained that, due to a restructuring of a group of companies in which he was involved at the time, D[...] H[...] (G[...]) Pty Ltd, M[...] became the nominee shareholder of a number of property holding companies. L[...] was one of them, but there were others as well, namely T[...] P[...] O[...] (Pty) Ltd, M[...] Properties 12 (Pty) Ltd and Portion 15 of Erf 2 Frankenwald (Pty) Ltd. M[...] neither bought the shares in these companies and neither were the shares donated to M[...]. The nominee shareholding was a temporary measure put in place in 2005.

[24] When assets of these companies were disposed of, the nett proceeds of the sales went to the actual beneficial shareholders. Despite this, and despite M[...] not otherwise being entitled to it Mr D[...] caused the transfer of the amounts mentioned by Mrs D[...], from L[...] to M[...], to enable it to continue to fund the parties' lifestyle.

[25] Regarding amounts which flowed to and from M[...] to the Trust D[...] Trust, Mr D[...] provided an analysis, which resulted in M[...] still being indebted to the said trust for about R100 000.00.

[26] In the court a quo, Vally J referred to the three requirements listed in section 165(5)(b), which had to be satisfied before a court could grant leave to a person who had made a demand on a company, to proceed by way of a derivative action. These are that the court must be satisfied that *“(i) the applicant is acting in good faith, (ii) the proposed or continuing proceedings involve a trial of a serious question of material consequence to the company and (iii) that it is in the best interests of the company that the applicant be granted leave ...”*.

[27] Vally J found that *“... there is no doubt that Mrs D[...] honestly believes that a good cause of action exists. She cannot believe otherwise, as Mr D[...] has admitted to unlawfully withdrawing monies from M[...].”*

[28] I respectfully disagree with the latter finding. Mr D[...] has not admitted to any unlawful conduct. He was the sole director at the time and able to take unilateral decisions. To the knowledge of Mrs D[], the moneys were used to the benefit of the parties and, presumably their children. For Mrs D[] now, years later cry foul and allege that she is merely acting in the discharge of her later acquired fiduciary duty to the company, smacks of opportunism. When this is done mid-divorce and with either a view to prejudicing Mr D[] or to secure a benefit in which she, or at least the trust in which she and the children are the beneficiaries, may share as shareholders, does not appear to be so *bona fide* as Mrs D[] wanted the court a quo to believe. Her position is exacerbated when regard is had to her concession that some of the funds were utilised to pay the bond on the matrimonial home, without disclosing the extent of these payments or taking them into account in her calculations. I am of the view that the court a quo could not have been satisfied of Mrs D[]'s *bona fides*.

[29] As to the second requirement, Vally J found, in addition to the issue of purported unlawfulness, that Mr D[] had caused harm to M[]. Admittedly, the funds withdrawn should have been reflected as a distribution of a dividend or an ex gratia payment or otherwise, rather than a loan, but the withdrawals were not, as Mrs D[] had averred, to line Mr D[]'s own pocket and neither was the company "harmed". In circumstances where the S[] R[] P[] had been rented out in order to defray expenses and surplus funds were distributed to the D[]s, but did not leave the company in dire straits_ or in insolvent circumstances, then the finding of "harm" fades. The mere diminishing of funds did not, in the peculiar circumstances of a family-run property owing company, equate to the harm otherwise contemplated in section 165.

[30] But even if I were to be wrong in the above respects, I am not satisfied that the third requirement had been met. In circumstances where all the evidence has been put in the open, it was not clear that the pursuance of claims alleged by Mrs D[], would have such prospect of success that it would be in the "best interests" of M[] to allow a derivative action to proceed.

[31] Certainly there is no merit in pursuing a claim against L[], based on a cause of action which M[] simply didn't have. Notably, Mrs D[] said nothing about the

other companies in respect of which M[...] had temporarily held the shares as a nominee, nor did she say anything about any of those companies' assets. She must have then accepted that the shares had merely been held as a nominee, with no right to claim the proceeds of assets.

[32] Even if one were, on a beneficial interpretation of Mrs D[...]’s version, foresee some measure of success in a claim against Mr D [...], the litigation to achieve that, if the divorce proceedings are anything to go by, coupled with the allegations of Mrs D[...] having shared in the same funds which she intends to recover, would be lengthy, acrimonious and costly.

[33] More importantly, it would mostly definitely result in cementing the irresolvable deadlock between the two directors of the company. This can never be in a company’s best interests.

[34] I therefore agree with Vally J, that the third requirement prescribed in section 165(5)(b) had not been satisfied, although Vally J found this to be by reason of a lack of recovery of real value, as disclosed by Mrs D[...] herself in a separate affidavit.

[35] Accordingly, I am of the view that Mrs D[...]’s application was correctly dismissed. The consequence of this finding is that the appeal in case no A132460/2023 must be dismissed. It appears from the judgment in the court a quo that only part A of her application was proceeded with before that court and not parts B and C as well and no findings need to be made thereon.

The liquidation application

[36] Mr D[...]’s application for the winding-up of M[...] was, according to him, based on three “primary reasons”.

[37] Firstly, Mr D[...] confirmed the common cause position that the D[...]s were firmly deadlocked on the issue of the sale of the S[...] R[...] P[...]. They have been deadlocked for many years on this issue, but the marital rift had solidified the parties’ irreconcilable differences, not only as spouses, but also as directors of M[...].

[38] There is, secondly, and quite apart from the deadlock, a complete breakdown of trust between M[...]’s directors, to the extent that they cannot even work together to run M[...] as a property-owning company. Mrs D[...] has accused her co-director of numerous acts of financial impropriety and Mr D[...] equally mistrusts his co-director who he says, is conflicted between her own interests of aiming to secure the maximum benefit for her in the divorce proceedings, and the interests of the company, who might do well to dispose of an asset which is ever-decreasing in value.

[39] Mr D[...]’s third contention is that the purpose for which the small domestic company had been acquired, namely to own and maintain a family holiday home as part of estate planning purposes, has fallen away. The marriage is over and the holiday home will no longer be used for family holidays. Moreover, the estate planning purposes have also come to an end. The joint ownership of M [...], through the respective trusts of which the erstwhile spouses are trustees, has, although not yet legally, but for all other practical purposes, run its course through the divorce court.

[40] The deadlock principle is separately catered for in sections 81(1)(d)(i) and 81(1)(d)(ii) of the Companies Act, while Mr D[...] relied on the just and equitable principle, which is catered for in section 81(1)(d)(iii) of the Act. Nothing much, in my view, turns on this. The point was not raised in the court a quo and neither was it raised before us. I am in any event of the view that in considering whether it is just and equitable that a solvent company be wound up, the existence of a directors’ or shareholders’ deadlock should be considered as a relevant factor.

[41] Despite M[...] notionally still being able to continue to exist as a mere property holding company, it was never intended to be run as such for profit. It is currently, however, “moribund and unable to be governed” jointly by its present co-directors.

[42] I find that, in these circumstances, it would be just and equitable for M[...] to be wound-up. The added equitable benefit of such an order in the particular circumstances is that, should there be any merit in pursuing any of the claims

mentioned by Mrs D[...] in her section 165 application, they can be evaluated and pursued, if necessary, by independent, unbiased liquidators who would not be conflicted or burdened by any of the considerations infusing the ongoing divorce action.

[43] In these premises, the appeal against the refusal of the winding-up order should succeed and a winding-up order should be issued against M[...].

Costs

[44] Customarily, costs would follow the event. This will already be the case in the winding-up application, where costs of the initial application would follow the liquidation. In circumstances where one appeal succeeds and one not, I am of the view that one should be mindful of the ongoing divorce action and, as it were, treat the present appeals as yet another set of interlocutory skirmishes in that litigation. I would propose that the court exercises its discretion and order each party to pay its own costs in respect of the two appeals.

Order

[45] With concurrence of the other two judges who heard the appeals, the following orders are granted:

1. The appeal in case no A132469/2023 is dismissed.
2. The appeal in case no A133154/2024 is upheld and the order of the court a quo is replaced with the following: "*M[...] P[...] I[...] (Pty) Ltd is placed under final winding-up in the hands of the Master. Costs of the application shall be costs in the liquidation*".
3. Each party to pay its own costs in the respective appeals.

N DAVIS

Judge of the High Court
Gauteng Local Division,

Johannesburg

Date of Hearing: 5 February 202

Judgment delivered: 26 February 2025

APPEARANCES:

For the Appellants: Adv K D Iles

Attorney for the Appellants: Clarks Attorneys, Johannesburg

For the Respondents: Adv L de Wet

Attorney for the Respondents: Barter McKellar Attorneys, Johannesburg