



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **22123/23**

In the matter between:

MELANIE RÖNTGEN N.O.

First Applicant

(In her capacity as a trustee for the time being
of the Wolfkop Landgoed Trust, IT 1054/95)

EVERHARDUS JOHANNES LOUBSER N.O.

Second Applicant

(In his capacity as a trustee for the time being
of the Wolfkop Landgoed Trust, IT 1054/95)

WERNER RÖNTGEN N.O.

Third Applicant

(In his capacity as a trustee for the time being
of the Wolfkop Landgoed Trust, IT 1054/95)

and

AFRICAN BELL TENT COMPANY

First Respondent

Registration Number: 2017/024156/07

Registered Address: 5[...] V[...] Street, Citrusdal,
Western Cape, 7340

This judgment was handed down electronically by circulation to the parties' legal representatives by email publication and release to SAFLII. The date for hand-down is deemed to be on 06 February 2025.

JUDGMENT

MAPOMA AJ

Introduction

- [1] This is an application in terms of the provisions of section 81(1)(d)(i) and (iii) of the Companies Act 71 of 2008 ("the Companies Act") for the winding up of the first respondent, a solvent company named African Bell Tent Company (Pty) Ltd ("ABT", or "the company"). The application is brought by the trustees of Wolfkop Landgoed Trust, IT 1054/94 ("the Trust") on behalf of the Trust which is a 50% shareholder of ABT. The applicants allege that disputes between the directors of the company have mutated to a deadlock in managing the company and the shareholders are unable to break the deadlock, resulting in the injury to the company in that the business of the company cannot be conducted for the benefit of the shareholders.
- [2] The alleged disputes relate to the terms on which the respective directors' related entities would be entitled to buy tents from the company at cost price and for their own respective uses. This issue according to the applicants has resulted in a complete breakdown of relationship between the directors and the shareholders of the company, a situation that has rendered conducting the business of the company for the benefit of the shareholders impossible.
- [3] The application is opposed by the second respondent, Jeremy Nicholas Owen Wyatt ("Wyatt"), one of the only directors presently residing at 1[...] K[...] Road

in Nairobi, Kenya. Wyatt is the shareholder of the remaining 50% of ABT. On 7 February 2024, Wyatt sought and obtained leave to intervene in the winding up application and was duly joined in the proceedings as second respondent. Wyatt brought a counter-application to stay the winding up application pending the final determination of the application that he intends to launch in terms of sections 162, 163 and 165 of the Companies Act. Should the relief he seeks in the application yet to be launched be granted, Wyatt will again seek a further relief for the stay of the winding up application pending the final determination of “any action proceedings” or arbitration proceedings that he intends to launch.

- [4] In opposing the winding up application, Wyatt alleges that the breakdown in relationship is caused by the third applicant, Werner Röntgen (Röntgen), who is the other director of ABT. According to Wyatt, Röntgen, being a director of the company, had breached the fiduciary duties owed to the company and is facing accusations of fraud.
- [5] Wyatt further cites various ground of opposition. *Firstly*, that the disputes that have created a deadlock are capable of being resolved through the proceedings mentioned above. *Secondly*, that the Trust has contributed to the deadlock by failing to fulfil its obligations in terms of the shareholder agreement. *Thirdly*, that Trust has failed to exhaust the deadlock breaking mechanisms that are provided for in the shareholders agreement. *Fourthly*, that Röntgen did not approach the court with clean hands and as such, the Trust has no basis to rely on just and equitable as a ground for winding up of ABT.

Relevant Background Facts

- [6] Wyatt is the sole director and shareholder of African Bell Tents in Kenya (“ABT Kenya”). On 19 January 2017, Wyatt founded a separate but related ABT company in South Africa. Both ABT Kenya and the ABT company (in South Africa) are in the business of selling in Kenya and South Africa respectively, imported tents from China.

- [7] On registration of ABT, Wyatt was the sole shareholder of ABT's 120 issued shares until he sold 50% of his shareholding to the Trust on 20 August 2018. Pursuant to the sale of shares, a Shareholders Agreement between the Wyatt, the Trust and ABT was concluded. Memorandum of Incorporation ("Mol") was adopted by a special resolution of the general meeting on 20 August 2018. Thereafter, the third respondent, who is a trustee of the Trust, was appointed as a director of ABT on 30 August 2018. In short, ABT is controlled by the two shareholders, Wyatt and the Trust, who own equal shares, and is governed by the two directors, namely, Wyatt and Röntgen.
- [8] The relationship between the shareholders of ABT is governed by the shareholders agreement and memorandum of incorporation. Clause 6.1 of the shareholders agreement describes the business of the company as being:

“to import and export different types of tents or any such business is agreed to in writing from time to time by a special majority of the Shareholders, which business and responsibilities and/or responsibilities are divided between the shareholders as follows....”

- [9] Clause 6.1 of the shareholders agreement also defines the business responsibilities of the two shareholders. In particular, the responsibilities of Wyatt are: to bring the name, brand, website and company set up; to bring the customised tents developed by the manufacturer in China; to organise the manufacturer in China for new orders and products development; organise freight; to purchase tents for onward shipment to his wholly owned African Bell Tents Company in Kenya and ensure all costs, shipping and taxes will be refunded to the South African ABT company and that no costs be incurred by the South African company for the tents going to Kenya; exporting of tents from the South African company to Namibia Mozambique and Botswana; and lastly, marketing and capital funding. The responsibilities of the Trust are storage of tents; stock controlling management of tents; point of sale for direct sales; marketing and promotion of festivals including websites; marketing at resorts and capital funding.

[10] Both Wyatt and Röntgen have related entities that procure tents from ABT. Wyatt is the director of and controls African Bell Tents Company in Kenya, which uses tents in Kenya. Werner Röntgen is the director of a company called Wolfkop Camping Villages (Pty) Ltd whose shareholder is his mother, who is not a trustee of the Trust. Wolfkop Camping would purchase tents and rent them out to various festivals and other uses.

[11] Central in the deadlock between the directors and shareholders of ABT is the dispute relating to the terms on which the directors' related entities respectively are to procure the tents from ABT. Wyatt on the one hand contends that his related entity, ABT Kenya, is entitled to purchase the tents from the ABT at cost price and that Röntgen's related entity, Wolfkop Camping is liable to purchase the tents from ABT at retail price. To buttress his contention, Wyatt relies on Clause 6.1.5 of the shareholders' agreement that stipulates one of his responsibilities as follows:

“6.1.5 Purchase tents for onward transmission to his 100% owned African Bell Tents Company (Pty) Ltd in Kenya and ensure all costs, shipping and taxes will be refunded to the South African company and that no cost will be incurred by the South African company for the tents going to Kenya”

[12] Röntgen disputes Wyatt's interpretation of the above clause. He also contends that it was agreed between him and Wyatt prior to the conclusion of the shareholders' agreement that Wolfkop Camping would be entitled to buy tents from ABT at cost price plus 10% commission to cover administrative costs. This is disputed by Wyatt, denying that there was any such agreement with the Trust. He contends that no such clause exists in the shareholders agreement. He insisted that any entity other than ABT Kenya would buy tents at retail price (which is higher than the cost price). This is how the dispute relating to the terms of purchase of tents by the related entities gave rise to deadlock between the directors and the shareholders of ABT.

[13] The dispute regarding the terms of purchase of tents by the related entities arose between the two directors, in that Wyatt claims that Wolfkop Camping

owes a shortfall in the amount of R234 907.00 which represents the difference between the retail price that should have been paid and the cost price that Wolfkop Camping paid instead. Wyatt also insists that Wolfkop camping is indebted to ABT for the total of R640 731.00, arising from all the purchases of the tents made by Wolfkop from the company at cost price. This is disputed by Wolfkop and Röntgen. This is not a matter to be adjudicated in these proceedings, suffice it to say that it is an illustration of the deadlock between the directors that had not and could not be resolved by the shareholder being Wyatt and the Trust of which Röntgen is a trustee.

[14] Attempts of a buyout of the Trust by Wyatt have also failed. The dispute regarding an offer by Wyatt to purchase the shares of the Trust arose on or about 19 September 2022 when Wyatt offered to purchase the shareholding of the Trust in the company. The offer made by Wyatt for buyout of the Trust was predicated on him insisting that the fair market value of the share be arrived by recognising and including the disputed claim of R640 731.00 against Wolfkop Camping in the assets of the company. This offer was rejected by the Trust, contending that the price offered by Wyatt was one-half the cost price of the assets of the company. This dispute also remains unresolved by the shared shareholders of the company who are at poles apart in arriving at a fair price for the purchase of shares by Wyatt.

[15] Another dispute arose when Wyatt made allegations of fraud against Röntgen, where Wyatt claimed that Röntgen lodged a fraudulent insurance claim on behalf of the company for alleged theft of tents that Röntgen purportedly bought from the company without Wyatt's knowledge. In a letter dated 31 January 2023, Wyatt through his legal representatives, issued a Notice of Breach in terms of Clause 17.1.5 of the shareholders agreement, where he alleged that the company was the owner of those tents, and that Röntgen had no authorisation to remove them from the company. Röntgen denies these allegations. The above number of disputes is by no means an exhaustive list.

Issues

- [16] Whilst the parties have filed voluminous papers, each setting out their allegations against another regarding the causes of the differences between the two directors and putting blame on the doorsteps of each other, the real issues are narrow. It is my considered view that in these proceedings, the court is not called upon to adjudicate the dispute and accusations placed by the directors against each other.
- [17] In my view, the central issue for determination in these proceedings is whether based on facts presented before court there is indeed a deadlock between the directors that results in an injury to the company or that renders the business of the company unworkable for the benefit of the shareholders, and whether the shareholders are unable to resolve the deadlock. Alternatively, whether based on all the facts it is just and equitable to wind up the company. Further, the court will determine whether the grounds advanced by the second respondent justify the stay of the winding up proceedings.
- [18] The applicants contend that the directors of the company are deadlocked in the management of the company, and that the shareholders have not been able to break the deadlock. This deadlock, so goes the applicants' argument, is resulting or may result in irreparable harm to the company, or that as a result of the deadlock the business of the company cannot be conducted to the advantage of the shareholders. On this basis the applicants contend that the company should be wound up in terms of section 81(1)(d)(aa) and (bb) of the Companies Act. The alternative ground is that it is just and equitable for the company to be wound up in the circumstances in terms of section 81(1)(d)(iii) of the Companies Act.
- [19] In resisting the application, the second respondent contends that there is no basis for the winding up, in that he disputes that created the deadlock are capable of being resolved through other legal proceedings. His further contention is that it would be prejudicial to him as a shareholder and director of ABT, and to ABT itself being a solvent company to be wound up. Essentially, Wyatt contends that it is just and equitable to wind up the company on various bases mentioned in this judgment.

The applicable legal principles

[20] Section 81(1)(d)(i) and (iii) of the Companies Act provides for the winding up of a solvent company by court order if the company, or its director(s) or its shareholder(s) applied for the winding in certain circumstances. The first scenario is in terms of section 81(1)(d)(i)(aa), where is a deadlock by the directors in the management of the company and the shareholders are unable to break the deadlock, resulting or which may result in the irreparable injury to the company. The second scenario is in terms of section 81(1)(d)(i)(bb), in circumstances where the deadlock referred to above result in a situation where the business of the company cannot be to the advantage of the shareholders generally. The third scenario is in terms of section 81(1)(d)(iii) in circumstances where it is otherwise just and equitable for the company to be wound up. More precisely, the relevant sub-section of section 81 reads:

“(1) A court may order a solvent company to be wound up if:

(a)

(b); or

(c);

(d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that-

(i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and;

(aa) irreparable injury to the company is resulting, or may result, from the deadlock; or

(bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock; or

(ii)

(iii) it is otherwise just and equitable for the company to be wound up”.

[21] In all cases where the ground of winding up has been established the courts has a discretion, which should be exercised judiciously, whether to grant the winding up order sought irrespective of the ground upon which the order is sought.¹

[22] The destruction of the relationship may result in literal deadlock, where the shareholders hold equal voting power in general meeting, in which event winding up must ordinarily inevitably ensue.² But it is not necessary to establish literal deadlock (formal deadlock). It suffices to show that as a result of the particular conduct, there is no longer a reasonable possibility of running the company consistently with basic arrangements between the members or shareholders;³

[23] Constant quarrelling between the only two shareholders with the voting rights as such, who are also only two directors, leading to a situation where they are not on speaking terms is the ground for winding up of the company.⁴

Discussion

Is there a deadlock?

¹ F & C Building Construction Company (Pty) Ltd v Macsheil Investments (Pty) Ltd 1959(3) SA 841 (D) at 844.

² Henoschberg on the Companies Act, 71 of 2008, Vol 1, 332(1) Issie [19]; See also In re Yenidje Tobacco Company Ltd [1916] 2 Ch at 435

³ In re Yenidje Tobacco Company Ltd [1916] 2 Ch at 431

⁴ Apco Africa v Incorporated v Apco Worldwide (Pty) Ltd [2008] 4 All SA 1 (SAC) at para 21

[24] The first issue that requires consideration is whether on the facts before court there exists a deadlock between the directors in managing the company and whether the shareholders are unable to resolve the deadlock. Wyatt admits that the relationship between the directors has irretrievably broken down and parties cannot work together in ABT in future. It is the view of the court that the disputed accusations of one director against the another and vice versa are an illustration that indeed there is deadlock between the directors in managing the company. The shareholders who are represented by the directors are unable to break the deadlock, for they themselves are deeply immersed in the deadlock. This situation is inflicting sustained injury to the company, in that since the deadlock, the business of the company is not being conducted and managed by the directors working together. As things are, conducting the business of the company for the benefit of the shareholders generally is not possible in the circumstances.

[25] Regarding the relationship between the directors, in *Erasmus v Pentamed Investments (Pty) Ltd 1982 (1) SA 178*, the court held as follows:

“the relationship between the directors was more than a purely commercial one; that an understanding or at least a contemplation that the original shareholders of respondent, whilst they remained such, would also be and remain directors, thus participating in the management of the company, is to be inferred. As Mr Du Toit put it, the partnership relationship outside the company characterised the relationship of the shareholders inside it.”

[26] This brings me to the grounds advanced by Wyatt for the stay of the winding up application. Wyatt contends that there are other avenues to be explored through court proceedings to break the deadlock, and that winding up should be a last resort. For this reason, he seeks to stay the winding up application. Wyatt’s seeks to stay the winding up application pending the application proceedings he intends to launch in terms of section 162 to have Röntgen declared delinquent director. He also intends to seek relief in terms of section 163 for an order to regulate the affairs of the company by directing ABT to

amend the memorandum of association to provide for an additional director to be appointed, and another director to be appointed to replace Röntgen once removed. He intends to launch the application in terms of section 162 and 163 once the process prescribed in section 165 of the Companies Act has been exhausted. His further plan is to institute derivative action later on should the section 162 and 163 reliefs be successful.

[27] It is my considered view that the intended application by Wyatt fortifies the reality that the deadlock between the directors of ABT has reached a point of no return in the management of the company. This is so because Wyatt's intended litigation in terms of section 162 to declare Röntgen a delinquent director is based on allegations that are denied and thus the contestation between the parties would be endless. In any event, the declaration of Röntgen a delinquent, if at all it is feasible, would not break the deadlock between the shareholders of ABT. The shareholders are the Trust that is owned by Röntgen's mother and Wyatt himself. While the court does not pre-empt the outcomes of the intended application, it is worth considering that the change of directors in circumstances where the shareholders are inseparably intertwined with the directors will not solve the underlying deadlock between the shareholders themselves. The same applies to the section 163 application, for this section applies in cases that do not obtain in the present case.

[28] Moreover, the intended applications are aimed at dealing with the person of Röntgen as a director, and do not serve as a mechanism to break the prevailing deadlock between the shareholders who appoint the directors. The allegations levelled against Röntgen are denied by Röntgen who has provided detailed explanation that vitiates the allegations. The court is not persuaded that the intended future applications in terms of section 162, 163 and 165 justify the stay of the proceedings. As mentioned above, these applications will not resolve the deadlock. The dispute regarding the denied allegations by Wyatt against Röntgen is a matter to be best dealt with by the liquidator.

[29] Having considered all the facts, I am satisfied that indeed there is true deadlock between the directors of ABT. The shareholders are also deeply immersed in

the deadlock themselves so much so that they are incapable of breaking the deadlock. The current situation has severely harmed the company in that it is not possible to conduct business for the benefit of the shareholder generally under the circumstances. I have also considered the alternative remedies raised by the second respondent but have found that these alternatives are not suitable to break the deadlock.

[30] The applicants have, in my view, succeeded in making out a case for the winding up of the first respondent on the basis that there is a deadlock between the directors in the management of the company and the shareholders are unable to break the deadlock. The deadlock has resulted in the irreparable injury to the company, and the business of the company cannot be conducted for the advantage of the shareholders generally in the circumstances as a result of the deadlock.

[31] While the court has found that *in casu*, a case has been made out by the Trust for winding up of the company based on the existing deadlock, the court finds it prudent to deal with the alternative ground and address the question whether it is otherwise just and equitable that the company be wound up in the circumstances of this case.

Just and Equitable

[32] the Trust relies on section 81(1)(d) (iii) of the Companies Act in alleging that it would otherwise be just and equitable to company to be wound up based on the grounds that *first*, that the substratum of the company has disappeared; *second*, that there is a justifiable lack of confidence by all in the corner to management of the affairs of a pity; and third that ABT is a quasi-partnership and grounds exist for the dissolution of the partnership. In opposing the winding up application, Wyatt contends that the Trust is not entitled to rely on the just and equitable ground to support the winding up of ABT on the basis that the shareholders agreement requires that there must be a special resolution taken by 85% votes for ABT to be wound up.

[33] This court, per Ndita J in *Navigator Property Investment (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd and Others* [2014]JOL 32101 (WCC) held that a provision in a shareholders agreement that precludes a shareholder from applying for winding up because of a deadlock between the shareholders is *pro non scripto* as the Legislature could not have intended the parties to contract contrary to the statutory provision. Clause 6.5 of the shareholders agreement is *pro non scripto* to the extent that it excludes or restricts the right afforded to a shareholder by the Companies Act to approach the court for winding up in appropriate circumstances. It there cannot stand as ground to muzzle the Trust from postulating just and equity as a basis to seeking winding up.

[34] Similarly, the court held that an agreement that provides that such a deadlock will be referred to arbitration, thereby denying shareholder the right to access to a court was found to be a void in the *Navigator Property Investment (Pty) Ltd* case at para 22. Wyatt contends that the Trust is bound by Clause 27 of the shareholders agreement to exhaust a dispute resolution procedure, and in particular arbitration, before seeking winding up. Clause 27 provides for negotiation and mediation as dispute resolution mechanism, and not arbitration. It is not in dispute that mediation has not yielded results. The expedited arbitration process agreed upon between the parties related only to a specific dispute between ABT and Wolfkop Camping regarding the amount of R234 907.00 not the deadlock between the directors and shareholders. The insistence on arbitration as a condition precedent to winding up application is unmeritorious. Thus, the court finds that there is nothing in the arbitration agreement that prevents any of the shareholders from approaching court for winding up application in the event of there being a deadlock as envisaged in section 81(1)(d) of the Companies Act.

[35] The ground of just and equitable postulates not facts but a broad conclusion of law, justice and equity as a ground of winding up. (See *Moosa NO v Mavjee Bhawan (Pty) Ltd* 1967 (3) SA 131 (T). A decision as to what is just and equitable involves a balancing of the interests of the individuals affected with the interests of good governance and the smooth administration of justice. (See *Niland v Huntershill Safari CC and Another* (5622/2015) [2016] ZAECHC).

[36] It is common cause that there is a complete breakdown of relationship between the directors and shareholder of the company *inter se*, so much so that there are no reasonable prospects of the parties working together and conduct business of the company for the benefit of the shareholders generally. The mutual trust and confidence between the shareholders who wield equal power in a relatively small company has been destroyed, yet there is a deadlock on the sale of shares by one shareholder to the other, so that the latter could remain operating the company's business. The company is suffering, in that the purpose for which it was founded is not being pursued because of the lost relationship. The purpose for which the stay of the proceedings is sought is not intended to reconcile the directors and shareholders but to advance vengeful litigation against each other. All the factor mentioned above point to the conclusion that the substratum of the company has disappeared.

[37] An applicant who relies on this ground must come to court with clean hands. What this means is that the applicant must not have building fully responsible for will have connived at the bringing about the state of affairs which he asserts results in its being just equitable to wind up the company. (See *Ebrahimi v Westbourne Galleries* [1973] AC 360 [HL] at 374). However, lack of clean hands is not always a bar to apply for winding up. In *Thunder Cats Investment 92 (Pty) Ltd and Another v Nkonjane Economic Projects and Investments (Pty) Ltd and Others* [2014] 1 All SA 474 (SCA) para 28, the Supreme Court of Appeal said:

“as a matter of logic, lack of clean hands could not be an absolute bar, else otherwise for example where both partners are equally at fault, neither could obtain a winding up order. Nonetheless it must be an important factor in the exercise of the court's discretion along with other factors such as whether the partnership is truly deadlocked.”

[38] On proper conspectus of the facts, the court takes the view that both the Trust and Wyatt, as well as Wyatt and Röntgen in their respective capacities directors stand to blame for the impasse in the company. It would not be just to adopt

the lack of clean hands approach as a bar to the winding up application in the circumstances.

[39] In conclusion, having considered all the facts, the court is satisfied that a case has been made out for the winding up of the first respondent in terms of section 81(1)(d)(i) (aa) and (bb) of the Companies Act of 2008, on the basis that there is a deadlock between the directors in the management of the company and the shareholders are unable to break the deadlock. Further, having considered the totality of the facts and circumstances of this case, the court holds a considered view that it is just and equitable that the first respondent be wound up in terms of section 81(1)(d)(iii).

[40] Accordingly, I make the following order:

- 1) The application to stay the winding up application is dismissed with costs.
- 2) The second respondent shall pay costs of the application to stay the winding up as between party and party on the High Court Scale B.
- 3) The first respondent is placed under final winding up in the hands of the Master of the High Court.
- 4) Costs shall be costs in the winding up.

Z.L. MAPOMA

Acting Judge of the High Court

Appearances

For the Applicants : **David V Gess SC**
Instructed by : Springer Nel Attorneys

Cape Town

For the Respondents:

Renee Graham

Instructed by :

Dingley Marshall Law
Claremont