



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

JUDGMENT

Not Reportable

Case no: 25789/2024

In the matter between:

JAKOBUS ALEXANDER VAN DYK

APPELLANT

and

DKD MACHINE SERVICES (PTY) LTD
(REG NR: 2013/179612/07)

RESPONDENT

Neutral citation:

Coram: ROUX AJ

Heard: 26 May 2025 and 18 June 2025

Delivered: 30 JULY 2025

Summary: Mere factual insolvency does not, without more, establish commercial insolvency. The proper enquiry is not confined to a balance sheet analysis, but rather whether the company has accessible or realizable assets or means to discharge its obligations as they arise.

Where an application for the winding-up of a company is brought in terms of section 344(h) of the Companies Act 61 of 1973, under the established category that the company falls to be characterised as a corporate quasi-partnership, founded on an

informal arrangement of trust and confidence, it is implicit in such a relationship that the parties intended to confine their association exclusively to themselves.

Consequently, in circumstances where the applicant has resigned as a director, the conduct of the only remaining director in declining to procure the appointment of another director in the applicant's stead, is consistent with the parties' personal relationship of trust. Accordingly, the applicant's exclusion from participation in the management of the company as a result of such refusal, without more, is insufficient to establish a prima facie case that it is just and equitable to wind-up the company.

In such circumstances – namely where the applicant's exclusion from participation in the management of the company is without any fault on the part of the other shareholder and remaining director – the mere fact that the applicant is locked into the company without a reasonable exit offer, is insufficient to establish a prima facie case for a winding-up order on the just and equitable ground.

Furthermore, the complete breakdown in trust between the shareholders, without more, is also insufficient to justify the grant of a winding-up order on the just and equitable ground.

ORDER

- (a) The application is dismissed.
- (b) The applicant is ordered to pay the respondent's costs, including the costs of counsel on scale B, except for the costs occasioned by the postponement of the matter on 26 May 2025, in respect of which each party shall pay its own costs.

JUDGMENT

ROUX AJ:

[1] This is an application for the provisional winding-up of the respondent company. The application is brought in terms of the provisions of chapter 14

of the Companies Act 1973 (“the Companies Act 1973”), which continue to apply to the winding-up and liquidation of companies pursuant to item 9(1) of Schedule 5 of the Companies Act 2008 (“the Companies Act 2008”), save for certain sections relating to the winding-up of solvent companies, which are not applicable to the present matter.

- [2] The application is founded on two distinct grounds: (a) firstly, that the respondent company is commercially insolvent, within the meaning of section 344(f), read with section 345(1)(c) of the Companies Act 1973; and (b) secondly, and in the alternative, that it is just and equitable that the respondent company be wound up, within the meaning of section 344(h) of the Companies Act 1973.
- [3] The respondent company opposes the application on four grounds: (a) it is alleged that the applicant has failed to establish locus standi to bring this application on the basis of commercial insolvency; (b) the respondent company denies that it is commercially insolvent; (c) it is further denied that the applicant has made out a case that it is just and equitable to wind up the respondent company; (d) additionally, it is contended that the applicant has not approached the Court with clean hands, has abused the legal process and has engaged in conduct that is prejudicial to the respondent company.

FACTS AND CIRCUMSTANCES

- [4] The respondent company conducts business as a distributor of woodworking machinery and consumables. It was incorporated in 2013, with the applicant, Mr Van Dyk, and Mr De Klerk appointed as co-directors, each holding an equal 50% shareholding in the company. Prior to the establishment of the respondent company, the applicant and Mr De Klerk were jointly employed at another entity operating in the same industry. Accordingly, they formed the respondent company based on a pre-existing relationship. The respondent company’s financial statements reflect that both were remunerated equally as directors, and that, when necessary, each made loans to the respondent company in identical amounts. Furthermore, the memorandum of

incorporation (“the MOI”) is in the standard form, and no bespoke modifications were made to reflect any special arrangements between the two shareholders. There is also no shareholders’ agreement regulating the relationship between the parties.

- [5] The respondent company bears the hallmarks of a typical small company established by two former colleagues on the strength of a personal relationship founded on mutual trust and confidence. The parties saw no need to formalize their understanding in writing, which reinforces the inference that their working relationship was premised on trust rather than legal formality.
- [6] It is common cause that the parties agreed to participate equally in the business: they each rendered services, advanced shareholder loans in equal amounts, and exercised equal voting power — each holding 50% of the shares and board representation.
- [7] In the circumstances, I am of the view that the respondent company operates in substance as a corporate quasi-partnership, despite its formal incorporation.
- [8] The applicant’s primary role within the respondent was in the area of sales and client development, which necessitated extensive travel. Over time, the demands associated with this role became increasingly burdensome, particularly as the applicant sought to spend more time with his family. As a result, Mr Van Dyk formed the intention to resign as director.
- [9] One of the main issues in dispute concerns the question whether Messrs Van Dyk and De Klerk reached an agreement with a certain Mr Els to each transfer 10% of the shareholding in the respondent company to Mr Els. In March 2023 the respondent company approached attorneys to draft a sale of shares agreement to provide for the transfer of 20% of the shareholding in the respondent company to Mr Els, 10% from each of Messrs Van Dyk and De Klerk. Provision was made for the payment of a nominal amount. However, the said draft agreement was never signed by any of the parties thereto. No

explanation was given by Mr De Klerk for the failure to do so or why the matter remained unresolved.

- [10] In or about April 2023 the applicant advised Mr De Klerk of his intention to resign as director of the respondent and requested him to prepare the necessary documents to give effect thereto. This was not done. The applicant also requested that arrangements be made for the appointment of a director to replace him, which is denied by the respondent.
- [11] Shortly after 2 November 2023 Mr Van Dyk informed Mr De Klerk that he would not sign the draft agreement for the transfer of shareholding to Mr Els. Most notably, on 6 November 2023, Mr Van Dyk sent an email to Mr De Klerk in which he proposed that Mr De Klerk acquire his shareholding, and that they should meet to discuss the way forward. They held a meeting that evening. On 7 November 2023 Mr De Klerk through an email confirmed the contents of their discussion. It appears from the said email that it was agreed that: (a) the applicant would sell his shares to Mr De Klerk for R360 000; (b) Mr Els would acquire 10% of the shareholding in the respondent company from Mr Van Dyk, the amount payable to be determined in accordance with a valuation that had already been carried out; (c) Mr Van Dyk would finalise service agreements with two of the respondent company's tier one clients located in the Cape Town region.
- [12] On 7 November 2023, Mr Van Dyk replied to the aforesaid email, indicating that Mr De Klerk should defer any payments, as he first wished to consult the respondent company's external accountant in relation to the matter, and in particular, needed to obtain advice regarding the tax implications thereof.
- [13] It is apparent from the said email exchanges that the parties agreed in principle to the proposed share acquisition. However, it appears that despite the existence of a broad understanding regarding the applicant's exit, the parties failed to conclude a final and binding agreement on all the material terms.

- [14] Two issues remained unresolved: (a) the purchase payable for the shareholding;¹ and (b) the identity of the tier one clients to whom services would be rendered.
- [15] It is clear from the papers that had Messrs Van Dyk and De Klerk been able to resolve the aforesaid issues or at least came to an agreement on the purchase price payable for the acquisition of Mr Van Dyk's shares, that there would have been no need for a winding-up application.
- [16] The path to such agreement was obstructed by two core disputes, which drove a wedge between Messrs Van Dyk and De Klerk.
- [17] The first of the two principal disputes concerns the question concerning the acquisition of shareholding by Mr Els, referred to hereinabove. The disagreement regarding Mr Els' alleged entitlement to a 10% shareholding from each of the parties created uncertainty as to whether the applicant's shareholding available for sale to Mr De Klerk amounted to 50% or 40%, which in turn made it very difficult for the parties to agree on the purchase price payable.
- [18] The second issue relates to the alleged effect which the applicant's resignation as director had on the respondent's ability to secure credit. Mr De Klerk alleges that the applicant acted in breach of a prior agreement not to resign as director until such time as the necessary funding was secured for the acquisition of new machinery. The applicant disputes that any such agreement was concluded.
- [19] The combined effect of these disputes was to derail the negotiation process concerning the proposed sale of the applicant's shares, resulting in the

¹ The reference to the sale of shares is somewhat of a misnomer, in the sense that in proper legal terms such a transaction amounts to a cession of the rights attached to the shares concerned. (See: *Independent Community Pharmacy v Clicks Group Ltd and others* 2023 JOL 58358 CC at para 233.) However, for ease of reference the parties' description of their contemplated transaction as being a sale of shares will be used.

complete breakdown of trust and confidence between Messrs Van Dyk and De Klerk.

- [20] The first cracks in the relationship became evident when Mr Van Dyk re-approached Mr De Klerk towards the end of the 2024 financial year concerning his resignation as director and the arrangements made for his replacement as such. It is alleged that Mr De Klerk became visibly hostile and aggressive in his response.
- [21] While Mr De Klerk does not dispute that his conduct may have appeared aggressive, he justifies it on the basis that the applicant was acting selfishly and in a manner contrary to the best interests of the company, its staff, and its clients. As stated, it is disputed that any request was made for the appointment of a director in the applicant's stead.
- [22] The applicant, Mr Van Dyk, formally resigned as a director of the respondent company with effect from 4 March 2024, but retained his 50% shareholding in the company. Following his resignation, the relationship between the parties deteriorated rapidly.
- [23] Mr Van Dyk subsequently established a competing business, and alleges that Mr De Klerk, acting on behalf of the respondent company, engaged in conduct aimed at undermining or interfering with his new business operations. Specifically, Mr Van Dyk alleges that Mr De Klerk warned certain customers that the respondent company would reconsider its commercial relationship with them should they continue to procure services from Mr Van Dyk.
- [24] In support of this allegation, Mr Van Dyk relies on an email sent by Mr De Klerk to a customer, in which it was conveyed that the respondent was dissatisfied with the customer's decision to engage Mr Van Dyk without first affording the respondent the opportunity to provide the relevant services. The email further suggested that such conduct was not conducive to a "productive business relationship" and requested clarity on the nature of the commercial relationship going forward.

- [25] The respondent denies any unlawful interference in the applicant's business and alleges that its communications with customers were undertaken in the legitimate protection of its own commercial interests. It alleges that customers were merely advised not to bypass the respondent company by approaching Mr Van Dyk directly in respect of machines that had been sourced by the respondent company.
- [26] The legal issue that arises from the aforesaid communication is whether the respondent company's conduct amounts to unlawful interference with the applicant's newly formed business, or whether it constituted a lawful assertion of its own commercial rights. It is not alleged or contended that the respondent has interfered with any contractual relationship which the applicant may have with any of his customers. It is also not alleged or contended that the applicant lost or will lose customers as a result of the alleged interference. No attempt was made by the applicant to connect the alleged interference with any of the tier one clients which he allegedly by agreement could render services to. The applicant merely alleged that the said conduct constituted proof that the respondent had no intention to collaborate in future, which is insufficient to establish the necessary causal link with the parties' broad agreement on the applicant's exit from the respondent. The applicant also failed to show why such alleged interference in law could be regarded as unlawful. No legal argument was advanced in support thereof. In the circumstances, the applicant failed to establish any unlawful act of interference.² Moreover, and in any event, the alleged interference appears to be irrelevant to the applicant's objection to being locked in the respondent company without the prospect of a reasonable offer for his shareholding.
- [27] Irrespective of the legal characterization of the aforesaid conduct, the exchange underscores the escalation in hostilities between Messrs Van Dyk and De Klerk and serves as further evidence of the breakdown in the

² Van Heerden Neethling, *Unlawful Competition*, 2nd edition, at pp 78-82; 245-252.

relationship of mutual trust and confidence which had previously underpinned their corporate association.

[28] It is alleged that on 5 June 2024 Mr Van Dyk attended the respondent's premises to collect parts and made threatening remarks to the staff members to the effect that they should begin seeking alternative employment as he intended to close down the respondent company within two months. Notably, the said allegation is not supported under oath by any of the staff members. On the face of it, the allegation appears to be based on hearsay evidence, alternatively relates to a factual dispute in respect of which the probabilities could easily have been tilted in one or the other direction through the confirmatory affidavits of the relevant staff members.³ No explanation was offered for the failure to introduce available evidence from persons who would probably be regarded as neutral witnesses. Not surprisingly, the applicant denies the said allegation. In the circumstances the said issue cannot be decided on the probabilities.

[29] Moreover, the said conduct, even if true, appears to be a once-off incident, precipitated by the dispute concerning the terms of the applicant's exit from the respondent. It is not alleged that the said incident led to the loss of any employees or otherwise had an effect on the respondent company's business. At best, it amounted to an unsuccessful attempt by Mr Van Dyk to unlawfully interfere with the respondent's relationship with its employees, which conduct thereafter came to an end.

[30] In the circumstances, even if the probabilities on the issue favoured the respondent, the said conduct cannot fairly be described as the cause of the breakdown in the parties' relationship and at best shows that the applicant was partly to be blamed for the said breakdown. For the reasons stated, the said conduct does not justify a finding that the applicant approached the Court with 'unclean hands'.

³ It is trite that an application for a provisional order is decided on the probabilities. See: *Kalil v Decotex (Pty) and Another* 1988 (2) All SA 159 A.

- [31] On 18 June 2024 the respondent company, through its attorneys, informed the applicant that a sale of shares agreement would be prepared by its attorneys and that the 2024 financial statements would be used as the basis for obtaining a more accurate equity valuation of the company. In the same correspondence Mr Van Dyk was urged to cease making false representations concerning the respondent company's financial position to employees or third parties. Most importantly, Mr Van Dyk was invited to attend a meeting with the respondent company's accountants during the week of 29 July 2024, at which meeting the 2024 financial statements would be discussed with a view to facilitate the negotiations concerning the sale of shares.
- [32] The applicant, through his attorney, responded to the aforesaid communication on 18 June 2024. The reply was measured and constructive, and it appeared, at that stage, that both parties, acting through their attorneys, were amenable to resolving the impasse.
- [33] It was agreed that the 2024 financial statements would serve as the basis for valuation. It was further proposed that Mr Smith, the respondent's external accountant, would be best placed to explain the financial statements to the parties. In addition, an undertaking was furnished to encourage Mr Van Dyk to maintain a peaceful relationship with the respondent company and, by implication, its employees.
- [34] On 30 July 2024 Messrs Van Dyk and De Klerk signed the financial statements of the respondent company for the financial year ending February 2024. Notably, notwithstanding Mr Van Dyk's resignation as director with effect from 4 March 2024,⁴ both he and Mr De Klerk were willing to jointly sign the respondent's financial statements. The said act demonstrates that, even amidst a deteriorating relationship, the parties remained aligned in their objective to resolve the principal issue confronting them, namely the negotiation and conclusion of a sale of shares agreement.

⁴ See: section 70(1)(b)(i) of the Companies Act.

- [35] The 2024 financial statements reflect a mixed financial position and results. On the one hand, the respondent's total liabilities exceeded its total assets by R6 879 279, resulting in a negative equity position. Similarly, the respondent's total current liabilities exceeded its total current assets by R4 842 006. Of particular note - though not mentioned by the applicant – is the fact that the trade payables had escalated to R14 007 981 that is an increase of more than R10 million compared to the previous financial year. Notwithstanding the above, the respondent company still managed a net profit of R2 229 557. Apart from listing the aforesaid results, neither the applicant nor any other deponent on his behalf attempted to explain or interpret the said results in the context of the respondent company's ability to pay its current demands in the normal course of business.
- [36] On 22 August 2024 Mr Smith furnished a valuation of the equity value of the shareholders' interest in the respondent company, which he quantified at R2 935 000. Based on that valuation, Mr Van Dyk's legal representatives demanded payment from Mr De Klerk in the sum of R1 467 500 representing the alleged value of his 50% shareholding.
- [37] It was at this juncture that the two core disputes, referred to hereinabove, came to the fore and effectively derailed the negotiation process. In particular, on 16 September 2024, the attorneys for Mr De Klerk sought to whittle down the valuation by raising two objections. First, it was alleged that Mr Van Dyk had previously agreed to dispose of 10% of the shareholding in the respondent to Mr Els, and that his effective stake was therefore only 40%, not 50%. Second, it was alleged that, following Mr Van Dyk's untimely resignation, the respondent was constrained to procure funding from Vodaland at an onerous interest rate of 28%. It was alleged that this financing arrangement occasioned financial loss to the respondent in the amount of R560 000, being the cost of the loan, which amount it was asserted should be deducted from Mr Smith's valuation. Importantly, the valuation itself was not impugned; rather, Mr De Klerk contended that it required adjustment to account for the abovementioned factors.

EVALUATION OF CORE DISPUTES

- [38] It is questionable on what basis the alleged full cost of the loan obtained by the respondent company can be justified as a basis for a deduction to be made from the value of Mr Van Dyk's shares. Both parties failed to deal with the said issue with any particularity.
- [39] Essentially, it is alleged that Mr Van Dyk's resignation as director on 4 March 2024 in the face of the bank's warning that it would result in the reduction of the respondent's credit facilities and render it difficult for the company to obtain finance for the purchase of new machines - which appears to be the life-blood of the respondent company - constituted a breach of a prior agreement to delay such resignation until the necessary funding had been procured. It is reiterated that Mr Van Dyk denies the conclusion of the alleged prior agreement.
- [40] In terms of the correspondence received from the bank – on which the respondent company relies to establish the said breach – it is clear that the bank informed the parties that if there were to be any change in the shareholding – not the directorship – it would result in the review of the credit facility and there was a risk that the respondent company might not qualify for the same credit amount or even might not qualify for any credit. It was also reiterated that both shareholders were required to sign as sureties. Accordingly, the bank foresaw a potential risk in the case of a change in shareholding, not in directorship. In my view, it is unlikely that a prior agreement would have been concluded on terms inconsistent with the bank's correspondence.
- [41] However, the respondent's contention that Mr Van Dyk's act of resignation caused the respondent some financial strain, in a limited sense, is supported by the facts. In this regard it was alleged that the bank withdrew the respondent's overdraft facility as a result of Mr Van Dyk's resignation. It appears from the 2024 financial statements that the respondent company had a credit facility with an outstanding amount to the tune of R567 573. However,

in terms of the 2025 management statements no credit facility is indicated, which is indicative of the fact that the full outstanding amount was paid. Accordingly, the financial statements provide some indication that the credit facilities of the respondent company came to an end between the period 1 March 2024 and 28 February 2025, which is consistent with the respondent's allegation that the bank withdrew the respondent's credit facilities as a result of Mr Van Dyk's resignation.

[42] Accordingly, on the probabilities Mr De Klerk succeeded in establishing a causal connection between Mr Van Dyk's resignation as director and the acquiring of the Vodaland loan.

[43] However, the amounts involved do not tally, in the sense that the Vodaland loan amount of R2 000 000 by far exceed the credit facility amount of R567 573, which without explanation cannot simply be assumed to relate to the credit amount which was required by the respondent company. As a matter of fact, no particulars of same were given in the papers. It is noteworthy that the replacement of one credit facility with another will ordinarily only result in additional costs incurred insofar as the one facility is more costly than the other; similarly, if the incurring of further credit was inevitable, any loss occasioned would be based on the difference in costs between the actual costs incurred and the costs which would have been incurred had Mr Van Dyk not resigned.

[44] It is further noteworthy that the costs of the Vodaland loan was connected to a loan period of about 1 year. However, the loan was fully repaid on or before 31 October 2024, which equates to a loan period of about 7 months and 11 days. That means the full cost of the loan was probably substantially less than R560 000 – being the alleged full cost of the loan -, to the knowledge of Mr De Klerk, and that he failed to adjust his demands accordingly.

[45] As a result, the allegation that Mr Van Dyk's resignation as director caused the respondent company a loss of R560 000 and that he thereby breached the prior agreement, is not supported by the facts and is also improbable.

Conversely, it rather appears that Mr Van Dyk's resignation as director caused the respondent some financial strain and necessitated the procurement of another loan. However, there are insufficient particulars about the extent of the loan required due to Mr Van Dyk's resignation, as well as the additional costs incurred as a result thereof. Furthermore, it is clear that Mr Van Dyk's impending exit from the respondent company through the disposal of his shareholding may potentially have an adverse effect on the respondent company's ability to obtain credit facilities.

- [46] In the circumstances, Mr De Klerk acted unreasonably in attempting to reduce the value of Mr Van Dyk's shares by deducting the full amount of the Vodaland loan on the basis of the alleged prior agreement or any alleged breach thereof. However, he is not unreasonable in contending that the respondent did and will suffer some financial strain for which a deduction may have to be made. However, there are insufficient facts on the papers to decide the extent, if any, of such deduction. Accordingly, Mr De Klerk's conduct in contending for a deduction cannot be characterized as unreasonable or mala fide.
- [47] The other thorny issue relates to the transfer of 20% of the shareholding to Mr Els, 10% from each of Messrs Van Dyk and De Klerk. The said issue is the subject of another High Court application instituted by Mr Els against Mr Van Dyk.
- [48] As stated previously, Mr De Klerk alleged that as part of the offer of employment made to Mr Els he was also offered 20% shareholding in the respondent company. He was employed with effect from September 2021. Furthermore, it is alleged that the respondent's main supplier made it a pre-condition for doing business with the respondent company – on the strength of a distribution agreement - that the said shares had to be transferred to Mr Els.
- [49] As stated, in March 2023 attorneys were approached to prepare a sale of shares agreement to give effect to the sale of 20% of the shareholding to Mr Els. In support of the said allegation, the respondent company attached an

email from the said attorneys which was addressed to both Messrs Van Dyk and De Klerk. It appears from the email that Messrs Van Dyk and De Klerk each intended to sell 10% of the shareholding in the respondent company to Mr Els. The email also contained a statement to the effect that Mr Els would add value as a skilled employee, as well as a director and shareholder. Attached to the said email was a draft sale of shares agreement.

- [50] It is noteworthy that the attorneys who drafted the sale of shares agreement advised the parties that the intended sale would have tax obligations for all concerned. In respect of Mr Els, it was advised that the true value of the shares would be considered taxable income in his hands. The attorneys, as an example, stated that if the true value of the shares was R1 000 000, it would mean that Mr Els would be liable for income tax on the said amount. In respect of the respondent company, it was advised that if PAYE was deducted it would be liable to collect and pay the PAYE on the sum of R1 000 000 to SARS.
- [51] Notwithstanding the fact that the draft sale of shares agreement was provided to the parties on 14 June 2023 it was never signed by any of the parties thereto. No explanation was offered by Mr De Klerk for Mr Van Dyk's refusal to sign. It is simply alleged that he in November 2023 indicated his refusal to sign. No explanation was also given why the matter remained unresolved for such a long period.
- [52] Lastly, it is alleged by Mr De Klerk that Mr Els in January 2025 instituted legal proceedings against Mr Van Dyk to enforce transfer of 10% of the shareholding to him. Although the affidavit filed by Mr Els in the said proceedings was attached to the answering papers, no reference was made to any allegation made therein.
- [53] Mr Van Dyk in his founding papers described Mr De Klerk's attempt to rely on a contractual right to acquire 10% of the shareholding in the respondent company from Mr Van Dyk as an act of bad faith and an excuse to reduce the value of his shares. However, nothing more was said about the issue.

- [54] In reply, Mr Van Dyk added more flesh to his version. He disputed that Mr Els was employed by the respondent company only with effect from September 2021, as alleged by Mr Van Dyk. To the contrary, it is alleged that Mr Els already joined the respondent company from September 2020 on a consulting basis. The said allegation is supported by an extract from the respondent company's general ledger. This was not disclosed by Mr De Klerk. It is contended that the said fact provides proof that Mr Els' employment was initially not tied to the procurement of a distribution agreement with Biesse, the overseas supplier.
- [55] Furthermore, it is alleged that Mr Els was in fact employed on a full-time basis with effect from 1 March 2021 and not from September 2021. He was paid a salary and also earned substantial commission. Again, the said allegation was supported by written proof reflecting Mr Els' earnings for the period March 2021 to February 2022.
- [56] In light of the aforesaid allegations, which are duly supported by written proof, Mr De Klerk's allegation that Mr Els was employed with effect from September 2021 appears to be incorrect. It is however questionable whether the aforesaid error and omission on its own are sufficient to warrant an inference that Mr Els' employment was not connected to the Biesse distribution agreement. The omissions on the part of Mr De Klerk – to deal with the correct dates and the commencement of the employment relationship with Mr Els more than a year before the business proposal was sent to Biesse - must be seen in the context of Mr Van Dyk's failure to deal with this thorny issue head-on in the founding papers. He must have known that Mr De Klerk would raise it as justification for the derailment of the negotiations pertaining to the sale of Mr Van Dyk's shares. Accordingly, from Mr De Klerk's perspective there was very little to answer to.
- [57] Furthermore, the fact that Mr Els' employment is in time further removed than alleged by Mr De Klerk does not take away the fact that the parties appeared to believe that they would have stood a better chance to secure the

distribution agreement if they represented to Biesse that Mr Els was in fact a shareholder of the respondent company. Mr Van Dyk alleged that the said representation was Mr De Klerk's idea and not his. Conversely, Mr De Klerk alleged that the said representation was made on the strength of the parties' agreement to transfer 20% of the shareholding to Mr Els. Irrespective of the said dispute, it is clear that the representation was made at a time when the parties were working in unison and that either Mr De Klerk or both of them truly believed that the said representation would significantly improve their prospects of securing a distribution agreement. It is unlikely that such a significant document did not carry the approval of both parties or at the very least was not acquiesced to by Mr Van Dyk.

[58] It is alleged by Mr Van Dyk that he was under the impression that Biesse would enter into a distribution agreement with the respondent company the moment Mr Els was fully employed by the respondent company. From his perspective, the distribution agreement was the ultimate goal.

[59] Although not referred to by any of the parties, it is striking that Mr Els, in the affidavit filed in his matter against Mr Van Dyk and which is attached to the answering papers, alleged that he finalized and presented the business proposal to Biesse, that is the proposal in which the representation was made that he was a 20% shareholder. That, in a limited sense, supports Mr Van Dyk's version that he was not party thereto. However, if it is true that Mr Els was entrusted with the preparation of the proposal it also, in a limited sense, supports Mr De Klerk's version, in that it is unlikely that a new appointee like Mr Els would make a false representation of 20% shareholding without the approval of the other directors. Furthermore, if he was entrusted with the said duty, it confirms that the parties at the time believed he possessed knowledge and experience which made him more equipped than themselves to do such a proposal, which ties in with the version that his appointment was causally connected to his relationship with Biesse.

[60] More importantly, Mr Els alleged that he was appointed by the respondent company on the understanding that Biesse would accept the said business

proposal. In terms of the proposal Biesse is invited to appoint the respondent company as its preferred agent for the whole region or the coastal parts thereof.

[61] It is in this context that Mr Van Dyk alleged that no distribution agreement was ever concluded with Biesse. In support of the said allegation Mr Van Dyk attached an email from Mr Stefano and a WhatsApp message from Ms Monceri, both of whom are employees from Biesse.

[62] It is instructive that Mr De Klerk simply made a bald allegation that a distribution agreement was entered into with Biesse. Similarly, it is baldly alleged that Biesse insisted that the transfer of shares to Mr Els was a pre-condition for doing business with them, as Mr Els' shareholding was apparently crucial to acquiring Biesse's business. However, without any explanation no written distribution agreement was attached, nor was any explanation offered why Biesse for years carried on doing business with the respondent company without fulfilment of the alleged pre-condition. It is self-evident that bald allegations which are vitiated by obvious inconsistencies left unexplained must carry very little, if any, weight and do not create real disputes of fact. Accordingly, it appears that Mr Van Dyk's version that no formal distribution agreement was concluded is more probable.

[63] Most significantly, no attempt was made by Messrs De Klerk or Els to explain why the simple act of transferring 20% shareholding to Mr Els never took place. It is understandable that once Mr Van Dyk decided to sell his shares, which seem to have occurred in April 2023, that it would not have been in his best interest to sell 10% of the shareholding in the respondent company to Mr Els for a song, that is not for its true value but for a nominal value of R10. In this regard the sale of shares agreement made provision for a nominal amount of R10. However, from March 2021 (or September 2021 on Mr De Klerk's version) to April 2023 no steps were taken to complete the simple act of transferring shares to Mr Els. Clearly, there must have been a reason for the failure to do so.

- [64] A plausible inference from the evidence seems to be that the offer made to Mr Els may have been subject to a term or condition that a formal distribution agreement had to be concluded with Biesse. This never happened, which may be the true reason why Mr Els never attempted to enforce the offer made to him and/or why Messrs Van Dyk and De Klerk never took steps to complete the transfer. However, neither of the parties properly dealt with this issue.
- [65] It is also noteworthy that no formal employment agreement for Mr Els was produced by any of the parties.
- [66] Most significantly, Mr De Klerk attached an email to his papers addressed to Mr Van Dyk in which he recorded the parties' conversation about Mr Van Dyk's plan to sell his shares and where he reiterated that Mr Els still had to pay for 10% of the shareholding in the respondent company as per the valuation that was done. It is instructive that Mr De Klerk failed to deal with the said statement at all. Surprisingly, Mr Van Dyk also did not deal with the said statement in reply. The statement is clearly relevant, as it conveys the notion of an agreement to the effect that Mr Van Dyk would sell shares to Mr Els in accordance with some or other valuation that was done.
- [67] It is in this context that the draft sale of shares agreement must be evaluated. The said agreement only provides for payment of a nominal sum of R10, which clearly does not represent an amount arrived at through a valuation. Accordingly, Mr De Klerk's reliance on the draft sale of shares agreement is inconsistent with his statement made in the aforesaid email and for that reason very little, if any, weight can be attached thereto, and it is insufficient to create any real dispute of fact.
- [68] Most interesting is the fact that the draft sale of shares agreement was sent under cover of an email by an attorney who advised the parties of what he understood the tax implications of the transfer of shares would be. Suffice to say, it appears that according to the attorney it would have significant tax implications.

- [69] Surprisingly, none of the parties made any attempt to explain their response to the said potential tax implications.
- [70] In conclusion, the thorny issue concerning Mr Els's right to acquire 10% of the shareholding in the respondent company from Mr Van Dyk has not been properly dealt with by either party, for the reasons stated hereinabove. Furthermore, there are a number of probabilities and/or inferences drawing in opposite directions. In the circumstances, it is not an issue that the Court can decide on the probabilities without the aid of oral evidence, which was not requested by any of the parties.
- [71] On 4 November 2024 Mr Els, through his attorneys, reiterated its client's entitlement to 20% of the shareholding in the respondent company and demanded transfer of 10% of such shareholding from Mr Van Dyk. No doubt, the said demand increased the pressure on Mr Van Dyk, who perceived it as being part of a tactic employed to reduce the valuation of his shareholding. The battle lines were drawn and Mr Van Dyk must have known that no agreement would be concluded facilitating his exit without giving away 10% of his shareholding for a song. This appears to have been the final straw and resulted in the winding-up application being issued on 29 November 2024.

LAW APPLICABLE TO COMMERCIAL INSOLVENCY AND THE APPLICATION THEREOF TO THE FACTS

- [72] The applicant, Mr Van Dyk, relies on the provisions of section 346(1)(c) of the Companies Act 1973 in order to establish the necessary locus standi to bring the winding-up application. The said section, inter alia, provides that one or more of a company's members may apply for the winding-up of such company. It is not in dispute that the applicant is a member and shareholder of the respondent company and therefore falls within the category of persons contemplated in the aforesaid sub-section. However, the respondent correctly points out that section 346(2) of the Act imposes a limitation on such a member's right to apply for winding-up, by providing that a member may do so only on one or more of the grounds set out in section 344(b), (c), (d), (e) or

(h). The ground relied upon by the applicant, namely that the respondent company is unable to pay its debts, falls within the ambit of section 344(f) read with section 345 of the Companies Act 1973. On this basis, it was contended on behalf of the respondent that the applicant lacks locus standi as a member to bring the application on the basis of commercial insolvency.⁵

[73] In an attempt to overcome this difficulty, the applicant contended that the respondent company is indebted to him by virtue of a loan account in his favour, and that he is accordingly entitled to apply for winding-up as a creditor. However, this contention is not supported by the facts. Nowhere in the founding or replying affidavits is it alleged that the applicant relies on such loan account for purposes of establishing standing as a creditor. The said allegation was made for the first time in a supplementary affidavit filed on 12 June 2025. Although it is common cause that the respondent's financial statements reflect a material loan account in favour of the applicant, it appears—on the respondent's version, supported by the confirmatory email of the company's accountant annexed to the answering affidavit—that the said loan account was not regarded as legally enforceable. The applicant, tellingly, did not meaningfully dispute the said allegation in reply or in the supplementary affidavit.

[74] In the result, it is held that the applicant has not succeeded in establishing locus standi to apply for the winding-up of the respondent on the basis that it is unable to pay its debts as contemplated in section 345 of the Companies Act 1973.

[75] To the extent that such finding may be incorrect, it is deemed appropriate to consider the applicant's case on the merits concerning the respondent company's alleged inability to pay its debts. It bears noting, and is in any event common cause, that the applicant has the requisite locus standi to pursue the application for winding-up on the alternative ground that it is just

⁵ *Wiseman v Ace Table Soccer (Pty) Ltd* 1991 (4) All SA 317 W.

and equitable to do so, as contemplated in section 344(h) of the Companies Act 61 of 1973.

[76] It is trite that the test for commercial insolvency is whether a company is unable to meet its current liabilities, inclusive of contingent and prospective liabilities, as and when they fall due in the ordinary course of business. The enquiry is not directed at a balance sheet analysis — i.e., whether the company's liabilities exceed its assets on paper—but rather whether the company has accessible or realizable assets or means to discharge its obligations as they arise. These means may include available cash resources, anticipated receipts in the ordinary course of trading, or credit facilities that may be utilized to settle debts. It may also extend to readily realizable assets such as shares, book debts or other instruments convertible into cash in the short term. The test is to be applied with reference to the financial position of a company at the time of the application, and into the immediate future, in order to determine whether the company is capable of continuing with normal commercial operations.⁶

[77] As stated hereinabove, the applicant based his case for commercial insolvency mainly on factual insolvency. It is trite that factual insolvency may be indicative of a company's inability pay its debts and clearly is a relevant and material factor in deciding whether a court should exercise its discretion to grant a winding-up order.⁷ However, the mere fact that the respondent's total liabilities exceeded its total assets, or that its total current liabilities exceeded its total current assets, is insufficient to establish commercial insolvency. As stated, the enquiry is not directed at a balance sheet analysis, but rather whether the company has accessible or realizable assets or means to discharge its obligations as they arise.

[78] An applicant who relies on the financial results of a company to establish commercial insolvency should at the very least interpret such results or

⁶ *Murray NO and others v African Global Holdings (Pty) Ltd and others* 2020 (2) SA 93 SCA at para 28-31; *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and others* 1993 (4) SA 436 (C) at 440-441.

⁷ *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930.

otherwise explain why it justifies an inference of commercial insolvency.⁸ The applicant not only failed to interpret or explain the results on which he relies, but co-signed the 2024 annual financial statements in which he positively stated that the respondent was not commercially insolvent. In particular, under the directors' section of the said statements it was confirmed that the fact that the total liabilities exceeded the total assets did not hinder the company's ability to pay its debts as they became due in the normal course of business. It was further recorded that the company had access to sufficient borrowing facilities to meet its foreseeable cash requirements.

[79] It is self-evident that the mere analysis of a company's assets and liabilities, non-current and current, does not account for the availability of all accessible or realizable means to discharge its obligations as they may arise. For instance, it is a common occurrence for a private company to finance its business operations by way of shareholders' loans or to otherwise raise loans secured by the personal suretyship of one or more of its shareholders.⁹ In this matter it was not even necessary for the shareholders to put their hands in their pockets. In fact, following the applicant's resignation as director, the respondent company obtained a loan from Vodaland and fully repaid it before the due date. That is not consistent with an inability to pay its current demands.

[80] The only outstanding debt referred to by the applicant relates to commissions owed to Mr Els to the tune of R3 015 568.20. However, Mr De Klerk denies the correctness of the said outstanding amount and alleges it does not account for deductions. Furthermore, it is alleged that R2 600 000 was paid to Mr Els. The applicant in reply did not deal with the issue in a meaningful way. Accordingly, on the probabilities it cannot be found that any commission amount is due and payable to Mr Els.

⁸ *Wiseman v Ace Table Soccer (Pty) Ltd* 1991 (4) All SA 317 W.

⁹ *Ex parte De Villiers & another NNO: In re Carbon Developments (Pty) Ltd* (in liquidation) 1993 (1) All SA 441 A at 502E.

- [81] Apart from the aforesaid, no other allegations were made concerning a particular debt that was not paid, or that the respondent company was called upon by any of its creditors to pay a particular debt and refused to do so or that there is any impending or pending legal proceedings concerning any outstanding debt. Accordingly, the financial results and position, as per the respondent company's financial statements, have not translated into any evidence of an inability to pay current demands.¹⁰
- [82] The applicant in his replying affidavit contended that a negative inference ought to be drawn from the respondent company's failure to provide up to date financial information and annual financial statements, as well as management accounts. In response, the respondent filed a supplementary affidavit in which it gave reasons for its failure to file the 2025 annual financial statements, citing the alleged unavailability of its accountant, Mr Smith, and alleging that as a result it engaged the services of another accounting firm. Although no formal application was made for the filing of the said supplementary affidavit, the contents thereof are clearly relevant and it is in the interests of justice that it should be admitted.
- [83] The applicant in response to the said supplementary affidavit also filed a supplementary affidavit in which it fairly replied to the allegations made by the respondent. The reply is also relevant. Accordingly, on the said basis, the filing of the applicant's supplementary affidavit is admitted.
- [84] In particular, the applicant attached the respondent's management accounts for the year 2025, drafted in the form of annual financial statements. The said statements reflect a most unusual entry under trade payables, to it deposits received in the amount of R23 692 627. However, no attempt was made to interpret the said entry or to explain it in the context of the respondent's business operations. The respondent filed a further supplementary affidavit in which it was stated that Mr Smith, the accountant, agreed that further information was required from the respondent about the said entry and that it

¹⁰ Wiseman (supra) at p180.

was clearly incorrect. The said response was clearly relevant and constitutes a fair reply to the applicant's introduction of the management accounts. Accordingly, it is admitted.

[85] In summary, the contentions advanced with reference to the said management accounts are tainted by the same fundamental deficiency: no effort was made to interpret or contextualize the financial results with reference to the alleged state of commercial insolvency on the part of the respondent.

[86] As a result, the late flurry of supplementary affidavits did not advance the applicant's case. In the premises, the applicant failed to establish that the respondent is commercially insolvent.

LAW APPLICABLE TO THE JUST AND EQUITABLE GROUND FOR WINDING-UP

[87] It is trite that section 344(h) postulates as a ground for winding-up a broad conclusion of law, namely justice and equity. Accordingly, it postulates a general legal conclusion grounded in equitable considerations. The statutory language imposes no restriction on the nature of the circumstances which may give rise to such a conclusion, nor is the phrase "just and equitable" to be interpreted in a confined or restrictive manner. The court's discretion under this provision is accordingly a wide one, guided by the interests of fairness and equity.¹¹

[88] In **Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W)** at 350 C-H the Court considered the just and equitable ground to be falling into five broad categories, to wit: (a) disappearance of the company's substratum; (b) illegality of the objects of the company and fraud committed in connection therewith; (c) deadlock in the management of the company's

¹¹ *Apco Africa (Pty) Ltd and another v Apco Worldwide Inc* 2008 (5) SA 615 SCA.

affairs; (d) grounds analogous to those for the dissolution of partnerships; and (e) oppression.

[89] It is trite that the said categories do not constitute any kind of *numerus clausus*. South African courts have long accepted that the development of this area of the law has been strongly influenced by English jurisprudence. Under English law, a clear distinction is drawn between functional and non-functional deadlock. Functional deadlock applies where an inability of shareholders/members to co-operate in the management of the company's affairs leads to an inability of the company to act at board or shareholder level. It is not limited to a deadlock at board level and applies regardless of the nature of the company, that is irrespective whether the company is in the nature of a partnership or not. It is a remedy for paralysis. Accordingly, breakdown of trust is not a requirement, albeit breakdown of trust and functional deadlock may exist together and frequently do.¹²

[90] In this regard, the description of deadlock adopted in category (d) of **Rand Air (supra)** – namely deadlock in the management of the company's affairs, should be understood in accordance with the broad approach reflected in English law. Given the wide discretionary powers conferred by section 344(h) of the Companies Act, there is no principled reason to exclude the wider operation of this principle from the scope of circumstances in which a winding-up may be deemed just and equitable.¹³

[91] It is trite that in the context of a domestic company which is in the nature of a partnership a court is guided by two distinct principles in exercising its discretion to wind-up a company on the ground that it is just and equitable to do so.¹⁴

[92] The first principle finds application where there is a justifiable lack of confidence and/or lack of probity in the conduct and management of the

¹² *Chu v Lau* 2020 UKPC 24 at para 14-17, 24.

¹³ *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting and Investment (Pty) Ltd and Others* (2014) 1 All SA 474 (SCA); 2014 (5) SA 1 (SCA).

¹⁴ *Apco* (supra) at para 19-21.

company's affairs grounded on conduct of the directors in regard to the company's business.

- [93] The second principle finds application where the shareholders stand in a relationship of personal trust and confidence—arising from an express, tacit, or implied arrangement or understanding akin to that of partners in a partnership—and such relationship is destroyed by conduct that is wrongful or inconsistent with that understanding or arrangement.¹⁵ Notably, the application of the second principle does not require the existence of an actual or functional deadlock. It is sufficient if it is impossible for the members/shareholders to place that confidence or trust in each other which each has a right to expect and that such impossibility has not been caused by the person seeking advantage of it.¹⁶ The last-mentioned proviso is described as 'the clean hands principle', which precludes a party responsible for the breakdown from relying on it to seek winding-up relief.
- [94] The underlying rationale for the second principle is that parties do not enter into quasi-partnerships unless there is mutual trust and confidence. Once this trust/confidence has irretrievably broken down and the parties can no longer work together as originally intended as per their informal arrangement, the relationship ought to be brought to an end—save where the party seeking termination is solely to blame for the breakdown.¹⁷
- [95] The importation of equitable, partnership-like principles into the realm of company law—where the relationships among shareholders are regulated primarily through the memorandum of incorporation (previously the memorandum and articles of association) and shareholders' agreements—gives rise to an inherent tension. This is the tension between formal legal rights enforceable in law and informal understandings which, though not ordinarily enforceable, may be given effect to inequity through the application of section 344(h).

¹⁵ *Apco (supra)*; *Rentekor (Pty) Ltd and others v Rheeder and Berman NNO and others* 1988 (4) SA 469 T at p500-501.

¹⁶ *Apco (supra)* at par 21.

¹⁷ *Ebrahimi v Westbourne Galleries Ltd* 1973 AC 360 HL; *Chu (supra)* at par 19;

- [96] Fortunately, the jurisprudence under both South African and English law provides substantial guidance on the circumstances under which the breach of an informal arrangement of trust/confidence in a corporate quasi-partnership may render it just and equitable to grant a winding-up order, despite the absence of any breach of a strict legal right, or even in the face of the exercise of such strict legal right, if the manner in which it is exercised renders the granting of a winding-up order just and equitable, as contemplated in terms of section 344(h).
- [97] It falls to be emphasized that the breakdown in the relationship between shareholders is not in itself sufficient justification for the winding-up of a company. An applicant is required to establish facts and circumstances justifying the legal conclusion that it is just and equitable for the company to be wound up. Such facts and circumstances include, but are not limited to, a breach of the shareholders' informal arrangement of trust/confidence or a justifiable lack of confidence/trust or probity in the conduct and management of the company's affairs. The scope of the requirement is sufficiently broad to include a change in circumstances under which the parties entered into the informal arrangement of trust/confidence - beyond the parties' control - and which results in mistrust, which cannot fairly be described as unreasonable.¹⁸ The informal arrangement of trust/confidence has been held to give rise to a duty to act reasonably and honestly towards one another and with friendly co-operation in running the company's affairs, which duty may fairly be described as a duty of trust, the breach of which would ordinarily justify a winding-up order.¹⁹
- [98] It must also be recognized that in the context of small, closely held companies with characteristics resembling partnerships, no aspect of the members' business relationship is irrelevant. The Court in **Ebrahimi (supra)** emphasized that "just and equitable" considerations are not confined to the shareholder's formal rights but may encompass any matter affecting the

¹⁸ Chu (supra) at para 15 and 24; Apco (supra) at par 19.

¹⁹ Rentekor (supra) at pp500-501.

relationship between the shareholder and the company or among the shareholders. In the matter of **Rentekor (supra)** the Court even went so far as to hold that conduct occurring outside the formal affairs of the company and which had the effect of destroying the relationship of trust may, in certain cases, justify a winding-up order.²⁰

[99] In the oft-quoted²¹ case of **Ebrahimi v Westbourne Galleries Ltd (supra)** Lord Wilberforce explained that the just and reasonable ground for winding-up does not entitle a shareholder to disregard the statutory regime or the articles of association by which shareholders agree to be bound. However, equity (as understood in the context of English law) permits a court to impose equitable considerations that may render the exercise of strict legal rights unjust in a particular context. He cautioned that the mere fact that a company is a small one does not of itself give rise to equitable considerations. In many cases the relationship is purely commercial and adequately and comprehensively dealt with in the articles. He reiterated that some additional element must be present - such as: (a) an association formed on the basis of a personal relationship involving mutual trust/confidence; (b) an agreement or understanding that all or some of the shareholders would participate in the conduct of the business; (c) a restriction on the transfer of the members' interest in the company – so that if confidence/trust is lost, or one member is removed from management, such member cannot take out his or her stake and go elsewhere.

[100] In **Technology Corporate Management (Pty) Ltd and others v De Sousa and others 2024 ZASCA 29** the Supreme Court of Appeal was tasked with interpreting section 252 of the Companies Act 1973. It had to decide whether a case had been made out that the affairs of the company had been conducted unfairly prejudicial to the plaintiff on the basis that there was a breakdown in the relationship between or among the shareholders giving rise to a right to exit and imposing an obligation on the remaining shareholders to make a reasonable offer to acquire the shares of the disaffected shareholder.

²⁰ Rentekor (supra) at p500.

²¹ Apco (supra) and numerous other cases.

In the said context the court was required to give meaning to the words ‘unfairly prejudicial’. The judgment is instructive for its analysis of the tension between formal legal rights and informal arrangements, and while the context was unfair prejudice within the meaning of section 252, the court’s observations are illuminating in relation to winding-up under section 344(h).

[101] The Court noted that in some instances irreconcilable differences between shareholders may justify an order for winding up the company, but such differences may not without more amount to unfair prejudice. The contrary position seems less troublesome. It is difficult to think of a situation where unfairly prejudicial conduct resulting in the breakdown of trust will not also constitute just and equitable grounds for winding-up²², although it may possibly give rise to an argument that such unfairly prejudicial conduct may provide such member with an alternative remedy, which may be a ground for the refusal of a winding-up order under section 347(2) of the Companies Act.

[102] The Supreme Court of Appeal in **Technology Corporate Management (supra)** identified two recurring factual situations that frequently ground claims of unfair prejudice by minority shareholders.

[103] First, where there is a tacit or informal understanding that shareholders will contribute labour or capital and participate in management, and a shareholder is later excluded - whether by removal, dismissal, or marginalisation - from fulfilling such a role. In such cases, the exclusion itself may constitute unfair prejudice.²³

[104] These principles apply with equal force in the context of small, domestic companies that operate in substance as quasi-partnerships. They resonate with the requirements stated in **Ebrahimi (supra)** for the imposition of equitable considerations. Accordingly, by parity of reasoning, where a shareholder is excluded from fulfilling the role contemplated in terms of the shareholders’ informal understanding or arrangement, it should generally be

²² Chu (supra) at par 58.

²³ Technology Corporate Management (supra) at para 87-91.

sufficient to establish a prima facie case for the winding-up of a company on the ground that it is just and equitable to do so.

- [105] Notably, the Court in **Technology Corporate Management (supra)** held that such informal arrangements may evolve or change over time. It is therefore necessary to establish not only the existence of an informal understanding at inception, but also that it continued to operate at the time the breakdown in trust occurred. By parity of reasoning, the said principle should apply with equal force in the case of winding-up applications premised on section 344(h).
- [106] The Supreme Court of Appeal further reaffirmed that although shareholders may regulate their relationship through a memorandum of incorporation or a shareholders' agreement, it is not ordinarily unfair to conduct the affairs of a company in conformity with those instruments. The Court, however, drew a distinction between, on the one hand, overriding an otherwise lawful exercise of a right on account of the manner in which it was exercised - particularly with reference to an informal arrangement or understanding between shareholders²⁴ - and, on the other, conferring rights beyond those agreed or imposing obligations which were not consented to by the other shareholders.²⁵ By parity of reasoning, it follows that a shareholder ought not to be denied relief merely because another shareholder acted within the bounds of their strict legal rights, if it is established that the manner in which such rights were exercised, when viewed in light of the shareholders' informal arrangement or understanding, renders it just and equitable for the company to be wound up.
- [107] The second situation identified by the Supreme Court of Appeal in **Technology Corporate Management (supra)** concerns minority shareholders who are effectively "locked in" and unable to realise their investment in the absence of a share disposal mechanism. The Court endorsed the reasoning in the well-known English case of **O'Neill and another v Phillips and others**²⁶, which draws a distinction between cases

²⁴ Technology Corporate Management (supra) at 82 and 90.

²⁵ Technology Corporate Management (supra) at para 93-94.

²⁶ 1999 UKHL 24; 1999 2 All ER 961 at 972.

where a shareholder has been excluded and those cases where no exclusion has occurred. The Court in **O'Neill (supra)** remarked that in the case where a breakdown in relations occurred it would usually be a waste of time to try to investigate who caused the breakdown, which seems to suggest that irrespective of who caused it, it would be considered unfair to keep a shareholder locked in who was excluded from participating in the management of the company or who was dismissed. However, the Supreme Court of Appeal in **Technology (supra)** dispelled any possible uncertainty by unequivocally affirming that, absent unfairness in the exclusion itself, the mere failure to extend a reasonable offer to a shareholder who finds themselves effectively locked in does not, without more, amount to unfairness. Perforce, in the case where a shareholder has not been excluded and merely alleged a loss of confidence, it was held that such loss did not, without more, entitle that shareholder to demand a buy-out.

[108] The Court in **Technology Corporate Management (supra)** expounded on the said reasoning by stating that one of the risks of conducting business with others in a small private company was that leaving the business and disposing of one's interest in it might be difficult or practically impossible. It also cautioned that where the memorandum of incorporation or shareholders' agreement dealt with the disposal of a shareholder's shares a court cannot simply ignore such provisions because the departing shareholder declared his or her loss of trust in the majority. The Court explained that if the loss of faith in the majority on its own would give rise to a right to demand that the majority acquire the minority's shareholding, it would effectively confer a right to exit the company at will and at the expense of the remaining shareholders. It cautioned that such a right might even imperil the future of a company and prejudice its creditors and remaining shareholders.²⁷

[109] The said principle should apply with equal force where a shareholder seeks to invoke section 344(h) to obtain a winding-up order on the basis that such shareholder has lost confidence in a co-shareholder and/or co-director and

²⁷ Technology Corporate Management (supra) at para 102-108.

cannot exit the company. Without more, such loss of confidence ought not to be sufficient to establish a prima facie case.

[110] Conversely, where the loss of trust/confidence is attributable to misconduct, and/or exclusion contrary to the informal arrangement or understanding between or among the shareholders, and such shareholders are locked in and cannot sell their shares and/or are not presented with a reasonable offer, it should be sufficient to establish a prima facie case for the winding-up of a company on the ground that it is just and equitable to do so. In the leading English case of **O'Neill (supra)** it was stated even more emphatically. It was described as almost invariably unfair for a minority shareholder to be excluded without an offer to buy their shares or some other fair arrangement. However, the making of a reasonable offer may, in appropriate circumstances, cure the inequity.²⁸

[111] While it is a requirement that an applicant must not be solely responsible for a breakdown in trust, it does not follow that partial responsibility disqualifies such a shareholder from obtaining relief. In **Knipe and others v Kameelhoek (Pty) Ltd and another 2014 (1) SA 52 FB** the Court, relying on English law, held that blameworthiness is not a bar, unless the applicant caused the breakdown. English authorities recognise that disputes often arise over time, and few parties are entirely blameless. Accordingly, criticism of an applicant's conduct without more does not preclude relief. By example, where all the shareholders are equally to blame it cannot be said one is solely to blame.²⁹

[112] It is trite that, even where the applicant establishes entitlement to a winding-up order, the court retains a discretion to refuse the relief under section 347(2), where the respondent shows, on a balance of probabilities, that an alternative remedy is available and that the applicant is acting unreasonably in seeking winding-up rather than pursuing that remedy.³⁰

²⁸ Bayly and others v Knowles 2010 (4) SA 548 SCA at para 23-24; Technology (supra) at par 109; Chu (supra) at p8.

²⁹ Dosanjh v Balendran and another 2025 EWHC 507 (Ch) at para 13 and 15; Chu (supra) at par 15.

³⁰ Moosa NO v Mavjee Bhawan (Pty) Ltd 1967 (3) SA 131 (T) at 152.

[113] The legal position under section 344(h) may thus be summarised as follows:

- (a) Section 344(h) confers a wide discretion on the court, unconstrained by any closed list of circumstances.
- (b) Case law has developed guiding principles for particular categories of cases.
- (c) One such category arises where a functional deadlock exists within a company, whether at board or shareholder level. In such cases, the deadlock alone may justify a winding-up order, regardless of whether the company is a corporate quasi-partnership or not.
- (d) Another established category arises where a breakdown in trust/confidence occurs, in which event a winding-up order may be granted if the company falls to be characterised as a corporate quasi-partnership.
- (e) In such cases, the applicant must establish:
 - (i) the existence of a corporate quasi-partnership based on an informal arrangement of trust/confidence, including the nature and scope of the arrangement and any variation thereof;
 - (ii) a breakdown in trust/confidence attributable to misconduct and/or a breach of the terms of the arrangement of trust/confidence and/or a justifiable lack of trust in the probity of those conducting the company's affairs and/or any other circumstance which renders it just and equitable to grant a winding-up order;
 - (iii) that the impugned conduct affects the applicant's relationship of trust/confidence with the company (acting through its board) or other shareholders;

- (iv) in the case of exclusion from participation in the management or conduct of the company's affairs, either by way of removal as director, or dismissal or marginalisation of an anticipated and accepted role, and/or which has the effect that the applicant is locked in without a reasonable exit, that such exclusion and/or locking-in is attributable to misconduct and/or a breach of the terms of the informal arrangement of trust/confidence and/or a justifiable lack of confidence/trust or probity in the conduct and management of the company's affairs and/or any other circumstance which would render it just and equitable to grant a winding-up order;
- (v) where such exclusion and/or locking-in resulted from the exercise of strict legal rights derived from formal instruments of agreement (MOI/shareholders' agreement), that it is just and equitable to grant a winding-up order, having regard to the manner in which such rights were exercised in the light of the informal arrangement of trust/confidence;
- (vi) that such override of strict legal rights does not have the effect of conferring new rights which the shareholders agreed not to have or imposing new obligations which the shareholders did not undertake to bear.

APPLICATION OF THE LAW TO THE FACTS AND CIRCUMSTANCES

[114] The respondent company is a typical example of a corporate quasi-partnership. From the respondent's inception in 2013 Messrs Van Dyk and De Klerk each held 50% of the shareholding in the respondent company and both were directors until Mr Van Dyk's resignation on 4 March 2024. Accordingly, at shareholder and board level they had equal voting rights. The dispute concerning Mr Els' right to receive 20% of the shareholding only came to the fore in November 2023 and does not detract from the fact that prior thereto

the relationship between Messrs Van Dyk and De Klerk – who in the context of their shareholding dispute is referred to as “the parties” – was similar in nature to that of a 50/50 partnership. It is also doubtful that the inclusion of a third shareholder would have detracted from the corporate quasi-partnership nature of the respondent company.

[115] It is common cause that the relationship of trust/confidence between Messrs Van Dyk and De Klerk has completely broken down.

[116] Although the applicant did not expressly allege the existence of an informal arrangement of trust/confidence, it is clear that his case is premised on such an arrangement. In terms thereof it was agreed that Messrs Van Dyk and De Klerk would participate equally in the conduct and management of the business, both at shareholder and board level. As a result, they owe each other a duty to act reasonably and honestly in their dealings towards one another and with friendly co-operation in running the company’s affairs, which duty may properly be characterised as a duty of trust.³¹

[117] It is further clear that the parties, upon being called up to deal with Mr Van Dyk’s impending exit, spontaneously agreed in broad terms that his shareholding would be acquired by Messrs De Klerk and Els.³² However, no final agreement was concluded. In the context of the parties’ relationship of trust, it appears that both Messrs Van Dyk and De Klerk instinctively knew that it would be fair and just to agree on a reasonable price for Mr Van Dyk’s shares. Furthermore, although they were unable to agree on a reasonable price, they subsequently agreed that the respondent’s external accountant would be best placed to carry out a valuation of Mr Van Dyk’s shares. Notably, Mr De Klerk did not impugn the said valuation itself, but contended that two additional factors had to be taken into account, being the core disputes in this

³¹ Rentekor (supra).

³² Although it was also agreed that Mr Van Dyk could render services to tier one clients of the respondent company located in the Cape region, there was a clear dispute whether the said arrangement would extend to all or only some of the clients. However, the said dispute clearly falls outside any formal agreement. Furthermore, none of the parties attempted to establish that it formed part of their informal arrangement of trust/confidence or any variation thereof.

matter, which have the effect of substantially reducing the said valuation. In this context, it is alleged that Mr De Klerk acted maliciously.

[118] It is clear from the facts that there is no reasonable prospect that the parties would come to an agreement on the price to be paid for Mr Van Dyk's shares. Accordingly, Mr Van Dyk is locked in the company, with no prospect of being able to sell his shares to Mr De Klerk, whilst at the same time being excluded from participation in the management of the company. This is clearly inconsistent with the parties' informal arrangement of trust/confidence.

[119] Having regard to the aforesaid, the question arises whether Mr De Klerk breached his duty of trust in his dealings with Mr Van Dyk in two respects: (a) Mr Van Dyk's exclusion due to his resignation and Mr De Klerk's subsequent failure to arrange for another director to replace Mr Van Dyk. (b) The fact that Mr Van Dyk appears to be locked in the company.

[120] It is common cause that the informal arrangement of trust/confidence was materially altered when Mr Van Dyk, due to personal reasons unrelated to any misconduct or breach of duty of trust on the part of Mr De Klerk, informed Mr De Klerk of his intention to resign as director in April 2023 and in fact resigned as director with effect from 4 March 2024. As such, it was never the applicant's case that his resignation as director and therefore his exclusion from participation in the management of the company affairs was attributable to any misconduct or breach of duty of trust.

[121] Moreover, and in any event, Mr Van Dyk's communication of his intention to resign as director did not cause the breakdown of the parties' relationship of trust, nor did the act of resignation cause it. As a matter of fact, the respondent company has continued its operations to the date hereof without any evidence of paralysis. Furthermore, even if it were to be found that any of the said acts caused the breakdown, it would follow that Mr Van Dyk was the sole cause of such breakdown. For the reasons given hereinabove, Mr Van Dyk would in such a case not be entitled to rely on section 344(h) for the winding-up of the respondent company.

[122] Mr Van Dyk alleged that he on more than one occasion requested Mr De Klerk to arrange not only for his resignation, but also for the appointment of another director in his stead. This was met with a bare denial.

[123] The applicant contends that upon a proper construction of the MOI the respondent company is required to have two directors. It is further alleged that due to the breakdown in trust/confidence the parties would be unable to agree on the appointment of a director to fill the alleged vacancy. However, the provisions of the MOI do not bear the meaning contended for by the applicant. In fact, it contains the standard provision that if the company at any time only has one director, as contemplated in section 57(3) of the Companies Act 2008, the authority of that director to act without notice or compliance with any other internal formalities, as set out in that section, is not limited or restricted by the MOI.

[124] However, the absence of a strict legal right is not necessarily fatal to the applicant's case. As stated, Mr Van Dyk is locked in the company, whilst at the same time being excluded from participation in the management of the company. In terms of the parties' informal arrangement of trust/confidence, Mr Van Dyk would ordinarily be entitled to participate in the management of the company at board level, unless Mr De Klerk can show that his refusal to agree thereto is not unfair or inequitable in the circumstances.

[125] It is self-evident that Mr De Klerk cannot be blamed for Mr Van Dyk's resignation as director. The applicant did not attempt to make out a case that Mr Van Dyk, as a consequence of the parties' failure to reach agreement on the price to be paid for his shares, is entitled to be re-appointed as director. It is conceivable that Mr De Klerk would be able to mount strong objections to Mr Van Dyk's re-appointment. As a result of the applicant's failure to deal with this issue front-on in his papers, Mr De Klerk was deprived of the opportunity to raise any such objection. The applicant wisely did not pursue this avenue.

[126] Instead, the applicant contends that the parties find themselves in a deadlock because they will not be able to agree on the appointment of another director. However, the appointment of a person other than one of the parties, is the antithesis of a personal relationship founded on mutual trust and confidence. It is implicit in such a relationship that the parties intended to confine their association exclusively to themselves.

[127] In the result, Mr De Klerk cannot be faulted for ignoring the request for the appointment of a replacement director, if such request was indeed made.

[128] Moreover, and in any event, Mr Van Dyk did not attempt to make out a case that another director be appointed because he is locked in. His request was made at a time when the parties were still negotiating the sale of his shares. The negotiation only failed much later. It is self-evident that if the parties managed to come to an agreement concerning the sale of the shares, there would have been no need for the appointment of another director. Accordingly, at the time that the request was made, Mr Van Dyk was not yet locked in with no prospect of being able to dispose of his shares. As a result, it cannot be said that Mr De Klerk acted unreasonably in ignoring the request for the appointment of another director, if such request was in fact made.

[129] In the result, the applicant failed to establish any misconduct or breach of duty of trust on the part of Mr De Klerk insofar as it is alleged that he refused to arrange for the appointment of another director in Mr Van Dyk's stead.

[130] As stated hereinabove, absent unfairness in the exclusion itself, the mere failure to extend a reasonable offer to a shareholder who finds themselves effectively locked in does not, without more, amount to unfairness. In the premises, the applicant's failure to establish that his exclusion from participation in the management of the respondent was the result of any misconduct or breach of duty of trust on the part of Mr De Klerk - whether in relation to his resignation as director or his request for the appointment of another director in his stead - is fatal to his cause, unless the applicant is able

to establish other circumstances which would, independently, render it just and equitable for a winding-up order to be granted.

[131] In this regard, it is contended that Mr De Klerk acted in bad faith by raising the two core disputes with the intent to reduce the valuation of Mr Van Dyk's shares, as carried out by Mr Smith.

[132] In essence the said contention amounts to an assertion that Mr De Klerk failed to extend a reasonable offer, which does not, without more, amount to unfairness.

[133] It bears emphasis that the applicant failed to allege or establish that the parties' broad agreement in terms whereof Mr Van Dyk's shareholding would be acquired by Messrs De Klerk and Els constituted a variation of their informal arrangement of trust/confidence. Similarly, it is also not alleged that the parties' conduct pursuant to the said broad agreement, including the procurement of the valuation carried out by Mr Smith, constituted a variation of their informal arrangement. Accordingly, the alleged bad faith of Mr De Klerk is not founded on any breach of the parties' informal arrangement of trust.

[134] Furthermore, the respondent company's memorandum of incorporation does not contain any provision regulating the exit of a shareholder. In addition, no shareholders' agreement was concluded. Accordingly, the alleged mala fides of Mr De Klerk cannot be founded on any breach of a strict legal right regulating a shareholder's exit.

[135] In the circumstances, the applicant's reliance on the alleged mala fides of Mr De Klerk is fundamentally flawed and unsustainable in law.

[136] Furthermore, the said contention is also not sustainable on the facts.

[137] Despite the parties' broad agreement on 6 November 2023 and their conduct pursuant thereto in procuring a valuation, they remained in splendid

disagreement. Mr De Klerk contended that the valuation had to be adjusted downwardly to account for two factors: (a) the fact that Mr De Klerk was only acquiring 40% of the shareholding in the respondent, due to Mr Els' alleged entitlement to 10% of such shareholding; (b) the alleged loss suffered by the respondent as a result of Mr Van Dyk's alleged breach of the so-called prior agreement.

[138] For the reasons stated, Mr De Klerk was unable to establish the conclusion of the so-called prior agreement or any breach thereof. He also failed to establish that the respondent suffered a loss of R560 000 as a result of the Vodaland loan. Mr De Klerk's unilateral deduction of the full cost of the said loan from Mr Smith's valuation was clearly unreasonable.

[139] However, as demonstrated hereinabove, Mr De Klerk was correct in asserting that Mr Van Dyk's resignation resulted in the withdrawal of the respondent's credit facility and therefore necessitated the procurement of another loan. Although the respondent was unable to establish the extent of the loan required to replace the withdrawn credit facility and the additional costs incurred as a result thereof, Mr De Klerk cannot be faulted for contending that some deduction may have to be made therefore. Furthermore, the disposal of Mr Van Dyk's shares may potentially have an adverse effect on the respondent's ability to secure credit in future, which may also justify a possible downward adjustment of the valuation of Mr Van Dyk's shares.

[140] Accordingly, Mr De Klerk's overall conduct in contending for a downward adjustment of the valuation on account of Mr Van Dyk's resignation and exit cannot be characterised as unreasonable. Notably, neither party took the manifestly reasonable and obvious step of referring the issue to Mr Smith, whose involvement could have resolved the impasse.

[141] Moreover, for the reasons stated, the issue concerning Mr Els' acquisition of 10% of the shareholding in the respondent company cannot be decided on the probabilities. If anything, the facts support a finding that it was agreed that Mr Els would acquire some shares from Mr Van Dyk, but not for a song, as

alleged by Mr De Klerk. However, for the reasons stated, there is clearly a bona fide dispute concerning Mr Els' alleged contractual right. Accordingly, irrespective of the resolution of the dispute concerning the potential downward adjustment of the valuation, Mr Van Dyk would in any event have remained locked in, until the dispute concerning Mr Els' entitlement has been resolved.

CONCLUSION

[142] In the result, the applicant has failed to make out a case for the winding-up of the respondent company. There is no reason why costs should not follow the result, except for the costs occasioned by the postponement of the matter on 26 May 2025, in respect of which each party shall pay its own costs. The said postponement was by agreement to enable Messrs Van Dyk and De Klerk to put in one last effort to come to an agreement on Mr Van Dyk's exit, which is consistent with their duties of trust owed to each other.

[143] Accordingly, the following order is issued:

(a) The application is dismissed.

(b) The applicant is ordered to pay the respondent's costs, including the costs of counsel on scale B, except for the costs occasioned by the postponement of the matter on 26 May 2025, in respect of which each party shall pay its own costs.

W ROUX
ACTING JUDGE OF THE HIGH COURT

Appearances

For Applicant: Adv. Potgieter

Instructed by: Mr Hannes Zwiegers of Hannes Zwiegers Inc.

For respondent: Adv. Hamers

Instructed by: Ms Grobbelaar of STBB Attorneys