

SOUTH AFRICA / JUDGMENT

Ackerman v Kalon Venture Partners Limited (2022/050857) [2025]

ZAGPJHC 267 (13 March 2025)

[2025] ZAGPJHC 267

COURT

South Gauteng High Court, Johannesburg

BEFORE

Dlamini

CASE / FILE NUMBER

2022/050857

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER

JUDGES: NO

(3) REVISED: NO

13 March 2022

CASE

NO: 2022-050857

In

the matter between:

WILLEM

HENDRIK ACKERMAN

APPLICANT

And

KALON

VENTURE PARTNERS LIMITED

RESPONDENT

Coram Dlamini J

Date

of Request for Reasons: 12 February 2025

Delivered: 13 March 2025 – This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 13 March 2025.

JUDGMENT

DLAMINI J.

INTRODUCTION.

- [1] The applicant, a shareholder of the respondent, files this application seeking the respondent's winding up under Section 344(h) of the Companies Act,[1] (the Act), on the grounds that it would be just and equitable to do so.
- [2] Before I deal with the issue for determination in this matter, I note that, in his founding affidavit, the applicant sought an order placing the respondent under final liquidation. However, at the hearing, the applicant's counsel informed the court that the applicant was now only seeking a provisional winding up order.

BACKGROUND

FACTS.

- [3] I set out a brief narrative of the relevant facts and circumstances that are relevant to the determination of this matter.
- [4] Mr. Ackerman, an adult businessman (the applicant), signed an offer to subscribe for 3,400 ordinary shares in Grovest Tech Limited ("Grovest") on 15 June 2016. In July 2017, Grovest changed its name to Kalon Ventures Partners Limited, the respondent ("Kalon"). Subsequently, the applicant was issued a share certificate confirming his ownership of 3,400 fully paid shares in the respondent.
- [5] The respondent (Kalon Venture) is a venture capital firm established under venture capital legislation and Section 12(J) of the Income Tax Act. The respondent invests in qualified, unlisted companies.
- [6] The applicant avers that, at the end of 2022, based on the respondent's Annual Financial Statement (FS), he valued his shares at R9 520 000,00. The applicant also mentions that he approached the respondent and expressed his desire to sell his entire shareholding to the respondent.
- [7] Numerous discussions and negotiations took place between the applicant and the respondent in an effort to find an amicable

solution regarding the disposal of the applicant's shareholding in the respondent.

- [8] On 14 October 2022, the applicant's attorneys of record wrote to the respondent's attorneys, demanding that the respondent purchase the applicant's shares.
- [9] On 19 October 2022, the respondent's attorneys replied to the aforementioned letter of demand and informed the applicant that the respondent did not intend to acquire its own shares at this juncture. They also drew the applicant's attention to clause 17 of the MOI, which outlines the requirements for a share transfer.
- [10] Following the respondent's aforementioned letter, the applicant's attorneys sent another letter to the respondent on 14 November 2022, demanding that the respondent purchase his shares.
- [11] On 15 November 2022, the respondent attorneys of record replied and reiterated their position that they were unable to buy back the applicant's shares. Instead, they offered to assist the applicant by advising other shareholders of the applicant's

desire to dispose of his shareholding and inquired whether the respondents could refer such interested shareholders to the applicant

directly or if they could direct these individuals to the applicant's attorney's office.

- [12] There was neither an acknowledgment nor a response from the applicant to the respondent's proposal. Instead, the applicant launched this application, contending that it will be just and equitable that the respondent be wound up. The applicant avers that a liquidator would be able to examine the affairs of the respondent and determine its true state of financial affairs and will also be able to sell off the assets of the respondent at the best attainable price and thereafter distribute the proceeds to the shareholders.
- [13] I pause here to mention that the applicant, in his founding affidavit, curiously makes no reference to the critical correspondence from 15 November 2022, in which the respondent offered a tangible, amicable, and practical solution to the applicant's

request regarding the disposal of his share. Additionally, the applicant makes no reference to his letter of demand dated 14 November 2022, in which he notably revised his valuation of shares to R 7,208,272.00, as opposed to the amount of R 9,520,000.00 mentioned

in his letter of 14 October 2022, which is attached to his founding affidavit. No explanation or reasons are provided by the applicant

for why he chose to proceed with the amount stated in his founding affidavit rather than the lesser amount.

- [14] In any event, as I mentioned earlier, after the respondent's letter dated 15 November 2022, the applicant launched this application seeking an order that it is just and equitable for the respondent to be placed in final liquidation.

- [15] The application is opposed by the respondent. The respondent is adamant that the applicant has not established a case for winding up the respondent as outlined in the founding affidavit. The respondent asserts that this application constitutes an abuse of the court process and the provisions of the Act. Additionally, the respondent contends that winding up the company would not be in the best interest of its shareholders or the various companies in which it has invested and that liquidation would destroy value to the detriment of its stakeholders.

ISSUE FOR DETERMINATION.

- [16] The crisp issue to be determined is whether, based on the evidence before this court, it is just and equitable to place the respondent under provisional liquidation.
- [17] The principles of just and equitable are now well established and have been confirmed in a number of our court decisions.
- [18] The principle was eloquently set out in *Ebrahimi v Westbourne Galleries Ltd*,^[2] as follows: “The just and equitable provision does not, as the entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way”.
- [19] Relief for the winding up of a solvent company on a just and equitable basis approaches the matter in two stages.
- [20] In the first stage, the court must make a judgment on the facts found by the court to be relevant to whether the facts support winding up on a just and equitable basis. However, if the court concludes that the facts do not support such a case, then the application will be dismissed.
- [21] Once the court finds that the facts do support such a case, in that event, the court is then called upon to exercise discretion as to whether a winding-up order should be granted. The discretionary power is of a judicial nature and must be exercised on justified grounds.^[3]
- [22] Broadly, the following categories are now generally recognized as falling within what is considered just and equitable grounds for winding up:
- (1) disappearance of the company’s substratum; (2) illegality of the objects of the company and fraud in connection therewith; (3) a deadlock in the management of the company’s affairs which can only be resolved by winding up; (4) grounds analogous to those for the dissolution of partnership and (5) oppression.^[4]
- [23] There are various grounds under which the applicant seeks an order declaring that it is just and equitable to place the respondent into provisional liquidation. For example, the applicant questions the accuracy and truthfulness of the respondent’s financial statements. Additionally, the applicant disputes the management and directors’ fees paid to the

respondent's board. More allegations have been made against the respondent, asserting that its directors are incompetent, and the applicant suggests that the respondent operates like a pyramid scheme. The applicant argues that he is unable to sell his shares, claiming he is locked in, while the respondent refuses to buy his shares. Below, I will discuss these allegations under different headings and demonstrate that none of these grounds support the applicant's claim that it is just and equitable to place the respondent into liquidation, even provisionally. Finally, I will address the issue of alternative remedies.

FS / Directors and Management Fees.

- [24] In this regard, the applicant disputes and complains about the management fees paid to the respondent's related company. According to the applicant, such fees are excessive and far more than the total revenue of the respondent. The applicant raises a similar complaint about the director's fees paid by the respondent to its directors.
- [25] The case presented by the applicant highlights two payments reflected in the financial statements for the year ending 2022. The first payment amounts to R199,500.00 for director's fees. The second payment totals R3,088,901.00 for management fees paid to a related party of the respondent. The applicant notes that the respondent's revenue for the same period is R 546,729.00.

The applicant argues that the respondent's expenditures for management purposes far exceed its total revenue.

- [26] Mr. Ackerman argues that the amount exceeding R3 million paid to the directors through its management company cannot be justified when considering the relatively small turnover.
- [27] The applicant submits that it is apparent that the respondent is being unlawfully used by its directors for their own benefit, considering the management costs in relation to the respondent's income. Furthermore, the applicant asserts that this clearly demonstrates the incompetence of the directors and that the respondent's financial statements are misleading and unreliable.
- [28] In argument, the respondent denies that the director's fees were excessive. Kalon Ventures insists that the director's fees are consistent and are in line with the industry norms. The respondent avers that apart from receiving board attendance fees, the respondent directors have received no further fees from the respondent or Kalon Management.
- [29] The respondent argues that its board of directors and management team have acted with due diligence, care, and skill. Consequently, this has led to an increase in the respondent's investment and the estimated value of its shares.
- [30] In my view, the applicant's submission in this regard lacks merit. This is because the applicant's submissions are clearly ambiguous. First, the applicant challenges the validity and accuracy of the FS, yet in the same breath, he admits the revised valuations of his shares based on the same FS that he disputes. The applicant's challenge regarding the management

and directors' fees cannot stand. This is simply because the agreements relating to the management and directors' fees were entered into by the respondent and its related entities long before the applicant became a shareholder in the respondent.

- [31] Interestingly, the applicant fails to acknowledge that the same management company and the respondent's directors have diligently managed the respondent to such an extent that the applicant's shares have increased in value, as shown in the FS. Therefore, it beggars belief that the company that had grown the applicant's shares so significantly should be liquidated.
- [32] In my view, this application was not launched bona fide; the true reasons for its launch can be found in the applicant's founding affidavit. In paragraph 12, he states, "The FS of the Respondent contain numerous assets which could be liquidated in order to purchase the shares. It refuses to do so". It is evident that the application is self-serving and intended to pressure the respondent into buying back the applicant's

shares. This trend continues as the applicant disputes the FS while simultaneously seeking to gain benefits from the same FS.

- [33] Faced with analogous facts, the court in *Zukiswa Jafta v Ilifu Trading*,^[5] had this to say at (49): "Further, the applicable cases indicate that winding up of a corporation must be considered before such a serious step is justified. In this regard, the point is well taken that winding up of the respondent will bear extremely harsh on the applicant's co-members who have contributed their efforts and expertise to the respondent and grown it into a successful and flourishing concern versus the applicant's minimal contribution and deliberate lack of participation since the fallout with Madase". I concur with the court's findings as they also pertain to the applicant in this case.

Is Respondent A Pyramid Scheme?

- [34] Mr. Ackerman claims that the respondent directors are operating a type of pyramid scheme by misleading shareholders of fraudulent and grossly inflated share values.
- [35] Insofar as the applicant's allegation that the respondent is operating a pyramid scheme, no case has been made to support this claim. This is a bald allegation, and the applicant has submitted no evidence to support it. Thus, it must be dismissed. In any event, the respondent is a financial service provider. Therefore, the applicant is entitled, in terms of the FAIS Act, if he chooses, to file a complaint with the Financial Service Board, which is a statutory body empowered with the authority to handle such complaints.

Unable To Sell Shares/ Remedy.

- [36] The issue for consideration is whether there are other remedies available to the applicant and whether Mr Ackerman has been unreasonable by not pursuing those.
- [37] The allegation by the applicant that he is "locked in" and unable to sell his shares lacks merit. This is because the respondent has no legal obligation to buy back the applicant's

shares. In my view, the applicant is not without remedy. If the applicant so wishes, he can invoke section 24 of the respondent's

memorandum of incorporation. This section clearly outlines the procedure and process that must be followed in the event a shareholder seeks to have the respondent buy back his shares.

[38] Significantly, the respondent attorneys of record, in a letter dated 15 November 2022, informed the applicant that the respondent was willing to assist by advising other shareholders of the applicant's intent to sell his shares and inquired whether Kalon could refer any interested shareholders to the applicant or the applicant's attorneys of record. The applicant neither acknowledged nor replied to this request; therefore, this offer remains available to the applicant.

[39] In light of all the circumstances alluded to above, the applicant has failed to discharge the onus that rested on his shoulders that he is entitled to the order that he seeks.

[40] I am, therefore, not satisfied that it is just and equitable for the respondent to be provisionally wound up.

COSTS.

[41] The trite principle of our law is that costs should follow the event. Having regard to the complexity of the matter, I am satisfied that the costs in accordance with Scale C, including the costs of two counsels, are warranted.

[42] I make the following order.

ORDER.

1. The application is dismissed.
2. The applicant is ordered to pay the costs of this application in accordance with Scale C, in so far as Scale C is applicable to any portion of this matter, which costs are to include the costs of two counsels where so employed.

J DLAMINI

Judge of the High Court

Gauteng Division, Johannesburg

FOR THE APPLICANT: Adv. N Riley

EMAIL:

N/A

INSTRUCTED BY:

Darryl Furman & Associates

EMAIL:

info@furmanlaw.co.za

FOR THE RESPONDENT: Adv. S Symon SC

Adv. T Ossin

EMAIL:

symon@counsel.co.za

terence@rivoniaadvocates.co.za

INSTRUCTED BY: Andrew De Vos & Associates

EMAIL:

andrew@devoslaw.co.za

niroshas@devoslaw.co.za

[1] 61 of 1973

[2] 21 [1972] 2 All ER H L 492 AC 360

[3] See Tjospomie Boerdery (Pty) Ltd v Drakensburg Botteliers (Pty) Ltd 1989 4 All SA 228 (T);
1989 (4) SA 31 (T)

[4] See Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd.[4]Thunder Cats v Nkonjane
Economic Prospecting 2014 (5) SA 1 (CSA)

[5] 330 CC [2013] JOL 30407 (ECG).

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Prepared on 10 October 2026 · Esheria