

SOUTH AFRICA / JUDGMENT

B and Another v Start-Up Properties 102 CC and Another (59073/2016) [2017] ZAGPPHC 492 (8 August 2017) [2017] ZAGPPHC 492

COURT

North Gauteng High Court, Pretoria

BEFORE

Hughes

CASE / FILE NUMBER

59073/2016

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 59073/2016

Date: 8/8/2017

Reportable: No

Of interest to other Judges: No

In the matter between:

J. M. B. 1ST APPLICANT

A. D. 2ND APPLICANT

and

START-UP PROPERTIES 102 CC 1st RESPONDENT

W. D. B. 2ND RESPONDENT

Coram : HUGHES J

REASONS

HUGHES J

[1] The applicants, J. M. B. and A. D., have a third (1/3) membership each in the first respondent, Start-up Property 102 CC. The second respondent, W. D. B., also has a one third (1/3) membership.

[2] The first applicant, Janine Barrett, and the second respondent were married. The second applicant, A. D., is their daughter from such marriage.

[3] The applicants brought an application seeking the following relief:

"1. Interdicting and restraining the second respondent, with immediate effect, from managing the business of the first respondent, in accordance with its resolution dated 11 December 2015;

2. That the second respondent is to afford the first applicant, and her appointees, immediate, continuous and unfettered access to the premises of the first respondent (situate at Plot [80], Vlakplaats, Tarlton) and to the whole of its business, including access to any and all of its books, records, banking accounts and computer system:

3. That the second respondent is to pay the costs of this application on the scale as between attorney and own client;

4. In the alternative to prayers 1, 2 and 3 hereof, and in the event that this honourable court is not disposed to issue such orders as aforesaid, the applicants pray for an order liquidating and winding up the first respondent, the costs thereof to be paid by the second respondent on the scale as between attorney and own client. "

[4] The second respondent opposed the aforesaid application and raised the following points in limine:

1. That the first respondent is merely a property holding company and does not conduct business;

2. That the affidavit of the second respondent was incorrectly commissioned; and

3. That in these circumstances the CC should have been the applicant.

[5] The matter thus commenced with the parties first arguing the points in limine raised by the second respondent.

[6] From the outset I must state that Mr Gordon, the attorney who represented the second respondent made concessions that the points raised were of no force or effect. In respect of the first point raised he conceded that even though the first respondent was the owner and holding company, it was in the business of renting the property that it held as an asset and thus did it carry on business even though it was not farming of lawn. The second respondent alleges that he conducted his lawn farming business from the first respondent's property as a sole proprietor.

[7] As regards the second point, the second respondent conceded that there was substantial compliance in the commissioning of the second applicant's affidavit as it was clear from the stamp where the document was commissioned and from the force number the relevant

officer who had commissioned the document. The last point the concession was made that Foss v Harbottle (1843) 67 ER 187 as relied upon by the second respondent, to demonstrate that the first respondent ought to have been the applicant as it was being

prejudice, was not applicable with regards to the facts of this case as prejudice in fact fell at the doors of the applicants.

[8] Turning then to the application itself. It was common cause that there was a complete breakdown in the relationship as members of the first respondent. On the one side there were the applicants and other side was the second respondent. It was common cause that the second respondent did as he pleased or acted with impunity as regards the farming of lawn on the property of the first respondent. It was common cause that the operation of the farming of lawn on the property of the first respondent did not make any profit for the applicants nor for the first respondent. The first respondent was not making any profit as a business from the alleged renting of its property to the second respondent. Lastly, the first respondent was not able to pay for its debts that being the bond, rates and municipal charges as it was not making any gains from the aforesaid rental.

[9] In the circumstances it would be just and equitable to grant the alternative prayers of winding up the first respondent sought by the applicants. See Apco Africa (Pty) Ltd & Another v Apco Worldwide Inc [2008] ZASCA 64; 2008 (5) SA 615 at para [19]

"[19] There are two distinct principles that guide a court in exercising its discretion to wind up a domestic company which is in the nature of a partnership. The first, enunciated in *Loch v John Blackwood* (at 788), is that it may be just and equitable for a company to be wound up where there is a justifiable lack of confidence in the conduct and management of the company's affairs grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. That lack of confidence is not justifiable if it springs merely from dissatisfaction at being out-voted on the business affairs or on what is called the domestic policy of the company, but is justifiable if in addition there is a lack of probity in the director's conduct of those affairs. The second, usually called the deadlock principle, is derived from the *Yenidje Tobacco Company* case. It is founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members is entitled to claim that it is just and equitable that the company should be wound up. (See also *Moosa* at 137; *Emphy v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (0) at 366H-3678.)"

- [10] In casu, there is clearly a fortifiable lack of confidence in the conduct and management of the first respondent and there is clearly a deadlock between the members as regards the domestic affairs of the first respondent. Further, there is a lack of trust between the members. The first respondent is not earning any financial gains from it leasing its asset to the second respondent and this is to the detriment of the first respondent.
- [11] Consequently the order for a winding up of the first respondent is fortified in casu.
- [12] With regards to the issue of costs, the Adv. Coetsee for the applicant argued that due to the mala fide conduct of the second respondent, the costs order should be punitive on an attorney and client scale. I am of the view that in casu the second respondent exercised his constitutional right in taking part in the litigation and was entitled to defend the case against him.
- [13] In the circumstances the usual order is appropriate and costs are ordered to be costs in the liquidation.
- [14] In the results the following order was made:
- [14.1] The liquidation of the first respondent is granted and costs are to be costs in the liquidation.

W. Hughes

Judge of the High Court Gauteng Pretoria

Appearances:

For the Applicants: Adv. M Coetzee

Instructed by: Eduard De Lange Attorneys

For the Respondent: Mr CL Gordon

Instructed by: CL Gordon attorneys

c/o Jacobson & Levy Inc

Date heard: 01 August 2017

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