

SOUTH AFRICA / JUDGMENT

Berlein and Another v Salisburg Landy (Pty) Ltd and Another (3330/20) [2023]

ZAMPMBHC 52 (26 September 2023)

[2023] ZAMPMBHC 52

COURT

Mbombela High Court, Mpumalanga

BEFORE

Z Gumede

CASE / FILE NUMBER

3330/20

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FLYNOTES:

COMPANY – Oppressive or prejudicial conduct – Appointment of liquidator – Applicant shareholders seeking liquidation – Providing insufficient information to determine if company insolvent – Counter-application seeking to declare applicants delinquent directors also not succeeding – Allegations of mismanagement together with the facts set out by applicants indicate that company may be insolvent – Justifies an order for the appointment of a liquidator – Companies Act 71 of 2008, s 163(2).

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)
CASE NO.: 3330/20
(1)
REPORTABLE:NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED: YES
DATE: 26/09/2023
SIGNATURE

In the matter between: MARTIN EDGAR
BERLEIN
1st Applicant
CHRISTOPHER LAURENCE
DUNSHEA
2nd Applicant
and
SALISBURY LANDY (PTY)
LTD
1st Respondent
VANESSA LEE
BERLEIN
2nd Respondent

JUDGMENT

GUMEDE AJ

1. The applicants are the shareholders of the first respondent. In addition to being a shareholder, the second applicant is a creditor of the first respondent. They brought an application in terms of section 346(1)(c) and 344(f) of the Companies Act,[1] to liquidate the first respondent which is a private company duly incorporated in terms of the laws of the Republic.
2. The application is opposed by the second respondent who is also a shareholder of the first respondent.
3. Applicants allege that the first respondent is hopelessly insolvent as its liabilities exceed its assets by a great margin due to, inter alia, nonpayment of debtors and decline in turnover. They further allege that the first respondent has no means of injecting more

capital into the business and that the applicants have no meaningful communication with second respondent who is the third director and is opposing this application.[2]

4. Applicants listed assets of the first respondent as motor vehicles, plant equipment, office furniture, computer equipment and collectable

debtor's book.[3] There are no details, identifying any of the listed assets and their estimated values are also not disclosed.

5. Applicants indicated thirteen creditors, with a collective debt totaling R1 359 161.24.
6. Applicants then conclude that it is just and equitable due to the non-profitability of the first respondent that it be put in liquidation.
7. The second respondent opposes the application and raises the following points in limine:

- a. The second respondent contends that the applicants have no locus standi as they did not obtain a resolution passed at a general meeting to grant them locus standi to bring an application for the liquidation

of the first respondent.

- b. She further contends that the applicants have not complied with section 344(f) of the Companies Act as they have failed to aver that a demand for payment by a creditor has not been met and also failed to prove that the first respondent is unable to pay its debts.
 - c. She also contends that the applicants have not complied with section 344(h) in that they failed to provide reasons why it would be just and equitable for the first respondent.
 - d. And lastly, she contends that the applicants have failed to comply with section 346(3) of the Companies Act in that security for costs was issued on 3 March 2021 when it should be issued no less than 10 days before the application;
8. In addition to the preliminary points, the second respondent alleges that the applicants have stopped following up on debtors as they are deliberately running the company to the ground in order to start a new company without having to pay her for her share and to the detriment of creditors.[4] She annexes a copy of a text message with a picture, which shows a few vehicles in a car park and a message saying “21 August 1 week before you and Richard wanted me out – car park still full. Sales were good. This is not Covid”[5]
 9. She also annexed an email conversation confirming that the first applicant met with a real estate agent to discuss cancellation of a lease as well as the likelihood of setting up a new company to house the landtech business, which she alleges is the same business that is conducted by the first respondent that the applicants seek to liquidate.[6] She alleges that the applicants started Crimari Investments (Pty) Ltd t/a Iconic Landy in 2020. According to her, this is a new parallel company which the applicants operate on the goodwill of the first respondent and service the same clients as the first respondent and is even using the same email address that was used by the first respondent. An extract of a minute of a meeting dated 28 August 2020 is attached to the answering affidavit which records that it was discussed that the applicants would manage the liquidation of the first respondent before someone else does and that they had a plan for life after the first respondent which the second respondent is not part of. According to second respondent, this indicates a ploy by the applicants to remove her from the business without buying her out and also to start over a new business without paying their old creditors.[7]

APPLICABLE LEGAL PRINCIPLES

10. Applicants rely on section 346(1) and 344(f) of the Companies Act of 1973 for their application.

11. Section 346(1)(c) empowers one or more members of the company to bring an application for its winding up. In this case, the applicants are indeed shareholder of the first respondent and are entitled in terms of this section to bring this application. The objection by the second respondent that the applicants have no locus standi therefore cannot stand.
12. Section 344(f) provides that a company may be wound up if it is unable to pay its debts as described in section
345. According to section 345, a company is deemed to be unable to pay its debts if a creditor, to whom the company is indebted in no less than one hundred rand, has served a demand which the company has neglected to pay for a period of three weeks or has obtained a

judgment

which has not been satisfied through attachment by the sheriff.

13. Applicants in their application, although they make the allegations that the company is hopelessly insolvent, they do not provide any evidence as required by section 345.
14. In their application, applicants simply list what they allege are the debts of the first respondent which amount to R1 359 161.24.

They make no allegation as to which of their creditors has made a demand which remains unpaid or has obtained judgment which has not been satisfied. Moreover, applicants list assets of the first respondent without proper description of the assets or valuation thereof. For instance, applicants simply lists: motor vehicles, plant and equipment, office furniture, etc. such vehicles or plant and equipment are not described or valued.[8]

15. It is trite that in motion proceedings, applicants must make their case in the founding papers which must contain sufficient facts upon which a court may find in the applicants' favour.[9]
16. As stated above, applicants failed to provide evidence that is required under section 345 of the Act. They also failed to indicate the value of the company assets. In the premises, there is insufficient information before this court to make a determination whether the first respondent is indeed insolvent. The application therefore stands to be dismissed. Having so concluded, it becomes unnecessary to decide the further objections raised by the second respondent.

SECOND RESPONDENT'S COUNTER APPLICATION

17. The second respondent launched a counter application in terms of section 162 of the Companies Act of 2008 ("The Act"), wherein she seeks an order to declare both the applicants as delinquent directors. She further seeks an order prohibiting them from acting as directors of any company for a period of seven years and that they be held personally liable for the liabilities of the first respondent and be ordered to repay any money that was illegally or fraudulently taken from the first respondent and to compensate the first

respondent for all equipment and stock that was illegally removed from it.

18. She contends that the applicants were undermining the business of the first respondent in order to start a new business without having to pay her out and to avoid having to pay other creditors. She further contends that the new business, Crimari Investments was started in September 2020 and that applicants simply moved all assets of the first respondent to their new business, even taking over the employees without signing new employment contracts.
19. She submits that the loan of over R2 million from the second applicant to the first respondent was not utilized to further the business of the first respondent and contends that she is uncertain whether such a loan was indeed paid to the first respondent.[10]
20. At the outset of their opposition to the counterapplication, applicants complain about a condonation order that was granted in respect of the late filing of the second respondent's papers. This court is not an appeal court as such, will not deal with this objection.
21. Applicants deny the allegations of mismanagement.
22. Applicants allege that the liability of the first respondent to the second applicant reflects in the balance sheet which was prepared by the second respondent herself as early as 29 February 2020 in the amount of R2.9 million.[11]
23. Applicants contend that they unsuccessfully made attempts to repay the loan of the second applicant, which loan remains unpaid together with other debts to creditors.
24. They allege that during February 2021 they made a request to the second respondent to sign a resolution to liquidate the first respondent

which the second respondent she refused.[12]

25. Applicants deny that the first respondent had a turnover of R8 million for the month of February 2020 as alleged by the second respondent.
26. In terms of section 162(5)(c) of the Act[13] this court must make an order, declaring the first and the second applicants to be a delinquent director if it is found that while being directors, they:
 - (i) grossly abused the position of director; (ii) took personal advantage of information or an opportunity, contrary to section

76(2)(a); (iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76(2)(a); (iv) acted in a manner (aa) that amounted to gross negligence, willful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or (bb) contemplated in section 77(3)(a),

- (b) or (c).

27. In this case, although the second respondent makes serious allegations that the applicants are guilty of misconduct as set out in section 162(5)(c) of the Act, she fails to provide tangible evidence of such misconduct. Her allegations are denied by the applicants in the manner indicated above.
28. Based on all the circumstances of this case especially the disputed allegations by both sides, I am unable to conclude that the applicants committed the misconduct as alleged.
29. Section 163(2) of the Act empowers this court to make an order it considers fit, including an order appointing a liquidator, if the company appears to be insolvent.[14]
30. The allegations of mismanagement made by the second respondent together with the facts set out in the applicants' application in my view, warrant the conclusion that the first respondent may be insolvent and justifies an order for the appointment of a liquidator in terms of section 163(2)(b) of the Act.
31. In the circumstances I make the following order:
 1. The application of the first and second applicants is dismissed with costs.
 2. Prayer 3 of the second respondent's counterapplication is granted in the following manner, save for the costs sought therein:
 - 2.1 The appointment of the liquidator for the first respondent in terms of section 163(2)(b) of the Companies Act of 2008 is hereby authorized.
 3. The balance of the prayers of the counterapplication of the second respondent are dismissed with no order as to costs.

Z GUMEDE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 26 September 2023 at 10:00.

APPEARANCES

For the applicant : HF FOURIE

Instructed by : DOMAN WITSZ ATTORNEYS, WHITERIVER

For the Respondent : AS ATTORNEYS

Date of hearing : 23 MAY 2023

Date of judgment : 26 SEPTEMBER 2023

- [1] The correct Act is 1973 but erroneously stated as 2008
- [2] FA, para 8
- [3] FA, para 10
- [4] AA, p106.15, para 43 and 46
- [5] Bundle, annexure V1, p106.29
- [6] AA, p106.18, para 53 and annexure V8, p106.43
- [7] AA, p106.19, para 59 and annexure V12, p106.52
- [8] FA, para 10
- [9] Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008
- (2) SA 184 (SCA) at 200D
- [10] FA, p106..63, pare 24
- [11] AA, p119, para 9.1
- [12] AA, p122, para 18.2
- [13] Companies Act of 2008
- [14] My underlining
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Prepared on 11 October 2026 · Esheria