

SOUTH AFRICA / JUDGMENT

Du Buys v Starling Ranch (Pty) Ltd and Others (39230/2014) [2014] ZAGPPHC 1019 (24 November 2014) [2014] ZAGPPHC 1019

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo

CASE / FILE NUMBER

39230/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE NO:

39230/2013

DATE: 24 NOVEMBER

2014

NOT REPORTABLE

NOT OF INTEREST

TO OTHER JUDGES

DU BUYS,

LEON.....APPLICANT

and

STARLING RANCH

(PTY)

LTD.....1st

RESPONDENT

DU BUYS,

ALLEN.....2ND

RESPONDENT

BARNARD, LENETTE

PATRICIA.....3rd

RESPONDENT

JUDGMENT**KHUMALO J****INTRODUCTION**

- [1] The Applicant is the youngest of the Du Buys siblings that owns a farm known as Portion 1 and Remaining Extent of the farm, Pretoriuskloof 553, Registration Division, L Q, that is located in Limpopo and 856.5320 H and 1180.3082 H in extent ("the family farm"). The family farm is registered in the name of Starling Ranch (Pty) Ltd ("the First Respondent"). The Applicant, his eldest brother Allen Du Buys and sister Lynette Patricia Barnard, 2nd and 3rd Respondent respectively are all shareholders in the 1st Respondent, holding 16%, 51% and 33% shares in that order.
- [2] This is an Application for the winding up of the First Respondent sought by the Applicant on the basis that it would be just and equitable to do so.

Factual

background

- [3] The family farm was bought by Du Buys senior, the parties' deceased father, in 1975 in partnership with the 2nd Respondent, each holding a 50% share in the 1st Respondent. In 1985 the deceased donated to each of the other two siblings, the Applicant and the 3rd Respondent a 16% share in the 1st Respondent and remained with 18%. 3rd Respondent transferred 1% of her shares to 2nd Respondent making the latter a majority shareholder with a 51% shareholding. In 1993 when the deceased passed away, 3rd Respondent inherited the remainder of the deceased shares in 1st Respondent and all the movable property in the family farm, including the cattle.
- [4] 1st Respondent is solvent and the family farm is its sole asset. 2nd Respondent is its sole director.
- [5] The Applicant is alleging that it would be just and equitable to wind up the 1st Respondent as:
- [5.1] the Respondents and himself are constantly and continuously involved in disputes. There is no trust or communication between them.
- [5.2] He has been refused access to the books/financials of the 1st Respondent since 2007 and only received for the first time some of the financial statements in May 2013 after threatening to apply for winding up of the 1st Respondent.

[5.3] 2nd Respondent has leased 2036.84 hectares of the family farm to the 3rd Respondent's son, Jan Buys Barnard ("Jan"), far below its market value at a nominal amount of R2 000 per month plus vat with an escalation clause of only 5% per year without the consent of the Applicant. The market related monthly rental that was confirmed by Agri Lephalale is R10 140.00 for 2036.84 hectares of land.

[5.4] He also became aware in November 2012 that 3rd Respondent's husband ("Bernard") is renting out land and houses built on the farm to a company called Lonerock Construction (Pty) Ltd and had allowed the company to build a tar road through the farm. On May 2013 he received a written confirmation from Lonerock Construction that they pay monthly amounts of R15 000 and R20 000 for rental of the chalets and site camp respectively, to the 3rd Respondent's husband instead of 1st Respondent.

[5.5] The Respondents each year allow farmers to hunt making up to approximately R300 000 to R400 000 per year and refuse to divulge the information relating to the income generated from this business activity.

[5.6] 2nd Respondent is not acting in accordance with his fiduciary duties towards the 1st Respondent and the shareholders. Accordingly if his conduct persists, Applicant will continue to suffer irreparable harm or injury,

alternatively, remain to be in a disadvantaged position. Applicant has for that reason in a letter dated November 2012 given the

Respondents an option to buy his 16 % shares or alternatively to transfer 400 hectares of the farm to him in lieu of his 16% shares. The Respondents refused both options. It will therefore be just and equitable to place the 1st Respondent under liquidation.

[5.7] No shareholder's meeting was ever conducted on behalf of the 1st Respondent.

[5.8] No dividends have been paid out by the First Respondent to the shareholders. The 2nd Respondent as director declared that the financial position of the company does not justify payment of dividends. The auditors also confirmed that no dividends have been declared by the 1st Respondent.

[6] The Respondents are opposing the Application and in their answering affidavit deposed to by the 2nd Respondent deny that it would be just and equitable for the 1st Respondent to be wound up, alleging that:

[6.1] At the time of the acquisition of the farm, 2nd Respondent paid all the expenses towards the purchase price whilst Du Buys senior farmed in cattle for his own account and paid for the monthly expenses of the farm. On the deceased's demise in 1993, 2nd Respondent took over the monthly expenses and cattle farming, having bought the cattle from 3rd Respondent.

[6.2.] From 2007 Jan Barnard ("Jan"), the 3rd Respondent's son, has been renting a portion of the family farm from 2nd Respondent and paying the farm's monthly expenses. Therefore the rental (of R2 000) that Jan and 2nd Respondent are paying for the 2036.8402 hectares is justified since they are responsible for the upkeep and maintenance of the

improvements. The lease agreement was signed by 2nd Respondent as the sole director and ratified by the 3rd Respondent. Applicant refused in 2011 to sign the agreement and rejected a payment of his rental portion that is equivalent to his 16 % shares since 2011.

[6.3] There is one lease agreement signed for the chalets and site camp for the rental amounts of R5 000 and R15 000. 3rd Respondent is entitled to the rental amounts and has designated payment of the rental into the bank account of JSF Barnard, her husband. Barnard pays over R5 000 of the rental amount to the 2nd Respondent. 1st Respondent is entitled to the rental income. The payment is to end temporarily in September 2013.

[6.4] 2nd Respondent has in 2007 withdrawn his activities at the farm and moved his cattle maize activities to Thabazimbi and Potchefstroom whilst 3rd Respondent and her husband moved into the rest of the farm.

[6.5] No dividends were ever paid as 2nd Respondent carries the burden of paying for every expense towards the upkeep, infrastructure and fencing of the farm and has never sought any contributions from Applicant and the 3rd Respondent.

[6.6] There is nothing untoward in any of the business dealings conducted by the 1st Respondent. The company can fully account for all of its business dealings and agreements. Applicant was furnished with the financials

on 30 April 2013.

[6.7] 2nd Respondent has assisted Applicant to set up a farming business that applicant presently runs in Rietfontein, 16km from the family farm.

[6.8] Applicant has however made an impractical demand that 320 hectares of the farm that lies on the other side of the road separated from the rest of the farm and consists of about 16 % of farmland be cut off and be transferred to him. As a result tension has built up between the Applicant and the Respondents since this demand and worsened in 2011.

[6.9] Applicant has failed to take any steps from his side to resolve any dispute or to traverse any of the remedies afforded to him in terms of the Companies Act 71 of 2008.

[7] The Respondents therefore deny that the relationship between the three shareholders has broken down or that there is no trust between them and allege that it is the Applicant that does not trust the Respondents.

[8] Their motion in the premises is for the winding up application to be dismissed with costs.

- [9] Applicant has filed a reply, in brief basically denying that his demand for the portion of the farm with an alternative offer to sell is impractical and that the 2nd Respondent has been solely liable for the expenses of the farm as he has also paid for the upkeep of the buildings and gate. He also bought, inter alia, a Nissan LDW for the farm. He further denied that 2nd Respondent assisted him to set up his farming business.

The law applicable

- [10] The winding up of solvent companies is dealt with in ss 79 and ss 81 of the new Companies Act, Act 71 of 2008 ("the Act"). The particular section in the Act under which a solvent company in the circumstances of the 1st Respondent can be wound up on the basis that it is just and equitable, s 8 (1) (d) reads as follows:

A court may order a solvent company to be wound up if-

- (d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds, that-
 - (i) the directors are deadlocked in the management of the company and the shareholders are unable to break the deadlock, and-
 - (aa) irreparable injury to the company is resulting, or may result, from the deadlock; or
 - (bb) the company business cannot be conducted to the advantage of shareholders generally, as a result of a deadlock;
 - (ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or
 - (iii) it is otherwise just and equitable for the company to be wound up..."

- [11] Applicant has indicated, as it also appears in his Counsel's heads of argument that as one of the shareholders his Application is in terms of s 81 (1)

- (d) (iii) due to the breakdown concerned with an application under the alternative ground for winding up where it is 'otherwise just and equitable for the company to be wound up'.

[12] In *Cilliers v Duin & SEE* 2012

- (4) SA 203 (WCC), Binns-Ward J discussed, with reference to the use of the word 'otherwise', the concept of deadlock in the context of s 8 (1) (d) (iii) and suggested that a wider and loose sense of the concept found in the context of the so called "deadlock principle", applies in respect of consequences of a breakdown of trust and confidence between members of a company which, because of its peculiar character, is in substance akin to a partnership, and thus amenable -subject to important qualifications -to dissolution as a partnership would be, if relations between the partners became untenable through no fault of the partner claiming dissolution. The proposition was contrary to the rigidity with which the words 'just and

equitable' were interpreted to exclude any other grounds of deadlock forming a basis of winding up, restricting them to s 8 (1)

- (d) (i) and (ii); see *Budge and Others NNO v Midnight Storm investment 256 (Pty) Ltd and Another* 2012
- (2) SA 28 (GSJ). The use of the word 'otherwise' in the subsection was found not to limit what is meant by just and equitable but on the contrary to extend the grounds of winding up to include other cases of deadlock; see *Thunder Cats investments 92 (Pty) Ltd v Nkonjane Economic Prospecting and investment (Pty) Ltd* 2014
- (5) SA 1 (SCA).

[13] In *Knipe and Others v Kameeihoek (Pty) Ltd and Another* 2014

- (1) SA 52 (FB) D, it was held that:

"the following principles were relevant: A solvent company would be wound up on just and equitable grounds under s 81 (1) (d) (iii) for the same reasons as an insolvent company under s 344 (h) of the 1973 Act. These reasons included the deadlock in the management of the company's affairs, oppression, both of which were relevant here.

Malan A J in *Thunder Cats* said that a winding up of a company in terms of s 344 (h) on the basis of it being just and equitable 'postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding up'.

[14] This matter is about the alleged loss of trust and the failure of the relationship between the shareholders, which is defined and referred to as the 'the deadlock principle' in *Thunder Casts*. As illustrated in the authorities already mentioned, the principle is founded on the analogy of a 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 with regard to the partnership

business. The company can only function if the relationship of confidence and trust between the parties is maintained. In *Apco Africa (Pty) Ltd and Another v Apco worldwide inc* [2008] ZASCA 64; 2008

- (5) SA 615 (SCA) it was mentioned that 'the super imposition of equitable considerations in such a case may justify the dissolution of such a company under the just and equitable provision/ The provision does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; 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/

[15] The 2nd Respondent in this case has hinted in defence of his actions that as sole director he is permitted to acting and deciding solely.

[16] Apco gives an illustration of a further principle besides the principle of justiciable winding up of a company where there is lack of confidence in the 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 outvoted 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. Applicant's Counsel has also hinted on the second principle being applicable as well in this case.

Issues

to be determined in casu

[17] The issues to be determined are simple and straightforward, that is :

[17.1] Whether the relationship between the parties has broken down such that there is no trust as alleged by Applicant? if so,

[17.2] Whether the Applicant is the sole cause of the breakdown of the relationship?

[17.3] Whether the company is a domestic company similar to a partnership to qualify to be wound up on just and equity ground?

Breakdown or failure in the relationship

[18] Applicant's biggest grievance against the Respondents is the fact that he has virtually been kept in the dark on the operations of the farm, which operations are disadvantageous or prejudicial to him as a shareholder and of no benefit to the 1st Respondent as the money generated that is supposed to be an income of the 1st Respondent is used by the 2nd and 3rd Respondents as they wish and for their own personal benefit. He alleges that this, understandably so, has resulted in the breakdown

of the relationship between him and the Respondents.

[19] 2nd Respondent has concluded lease agreements in respect of the family farm excluding the Applicant, not consulting or reporting to

Applicant as a shareholder either on the agreements or their terms and conditions. The agreements involve the use of the farm by the 3rd Respondent's family for profit, not gainful to the 1st Respondent or himself, initiated and arranged by the 2nd Respondent. The 3rd Respondent's family in turn lets out the properties in the farm and the proceeds go to 3rd Respondent's husband and a portion to 2nd Respondent. Information relating to other operations has been kept from the Applicant, like the exact amount generated from hunting activities that takes place at the family farm and to what happens to the proceeds, proving 2nd Respondent's lack of probity in the manner in which he runs the 1st Respondent's affairs. All this is to the prejudice of the Applicant. He alleges to have lost confidence in the 2nd Respondent's fair management of the affairs of the 1st Respondent to the benefit of all the shareholders.

[20] Respondents have not denied Applicant's allegations that since 2007 he has not been given access to the financial statements of the 1st Respondent, which statements could have assisted Applicant as a shareholder to ascertain how the business is operated in the instance

the director could not or was not willing to fulfill his duty to report to shareholders. The Applicant was as a result disadvantaged.

Applicant seems to have been furnished with financial statements for the first time on 21 May 2013 after he threatened the Auditors in November 2012. The situation is exacerbated by the fact that whilst access to financial statements was denied no dividends were declared as well. All this caused by the manner in which the 2nd Respondent conducts the business of the 1st Respondent, conducting and sanctioning activities not to benefit the 1st Respondent and all its shareholders, but himself, 3rd Respondent and her family. The income generated being distributed between them without accounting. This indicates that Applicant is under absolute dominance and 2nd Respondent in apparent breach of his fiduciary duties towards the company and all its shareholders. The conduct has as alleged by Applicant led to him not having any trust or confidence in the other shareholders/parties.

[21] The Applicant states that he has always believed the company to be of a domestic partnership nature as the siblings are shareholders and therefore requiring not only a fiduciary duty to the 1st Respondent but a duty of trust and bona fides between the shareholders, that 2nd Respondent failed to adhere to. The Respondents are not disputing that fact and actually indicated that the company was previously run by their deceased father, Du Buys senior and the eldest brother, consensually, as a family business with the shares continuing to be kept within the family. The company is therefore supposed to be run with some form of cohesion between the shareholders for it to sustain its existence and be of benefit to all the shareholders, otherwise it would continue to be run oppressively and to the prejudice of the Applicant. Alternatively the Respondents should have allowed the Applicant to then opt out as offered.

Fault of the Applicant

[22] In turn the 2nd Respondent could not explain the decisions that he had taken that Applicant had proven to be neither beneficial to all the shareholders

nor to the 1st Respondent and also his failure to consult or include and report to shareholders on the decisions he make on the business activities of the 1st respondent, furnish or give them access to the financial statements. He attempted to justify only one business deal, also unconvincingly, the lease agreement he concluded with Jan. Unconvincingly since he claimed that Jan was paying and leasing the farm since 2007 but the agreement that he sought Applicant to sign was only concluded in 2011. He also alleged that in 2007 he moved all his farm operations to Thabazimbi and Potchestroom. At the same time he could not point out any actual or specific conduct of the Applicant that contributed in causing the break down in the relationship of the shareholders in relation to the 1st Respondent. He instead allege that the fact that Applicant demanded a portion of the farm to be transferred to him in lieu of his 16% share in the 1st

Respondent, which can hardly be regarded as unreasonable, when there is lack of trust or confidence was the cause of the tension between the parties. There is no reference made to the option to sell his shares that Applicant gave the Respondents as an alternative, which Respondents refused, even though admitting that the relationship has broken down and got worse in 2011 when the Applicant made the demand. The Respondents have not offered any solution and the situation cannot be allowed to proceed. It therefore would be just and equitable for the 1st Respondent to be wound up.

[23] 2nd Respondent has indicated that he no longer run any activities from the farm and he moved his cattle farming and everything in 2007

already to Thabazimbi. So in essence the 3rd Respondent, her husband and son are the ones that are running the farm whilst the Applicant is excluded from any participation. There is an standoff between the parties with no solution on sight. The winding up of the company can only be the only solution as Applicant's offered options have been refused. 2nd Respondent as well agrees that the relationship between the Applicant, 3rd Respondent and himself had deteriorated and led to a final breakdown in communication, although during 2011.

[24] Applicant has established a proper case for the granting of an order placing the 1st Respondent under provisional liquidation on just and equitable grounds. He has proven that there is a deadlock in the running of the 1st Respondent resultant from the breakdown of his relationship with his siblings which is neither due to his fault and his loss of confidence and trust in the management of the 1st Respondent by the 2nd Respondent. There is no mutual trust between Applicant and the Respondents and therefore I cannot find any prospects of a working relationship.

[25] The Applicant need only establish prima facie that it is indeed just and equitable for the company to be placed under provisional liquidation as compared to an order for final liquidation where he has to prove such justification and equitability on a balance of probabilities. I therefore make the following order:

[25.1] The First Respondent is placed under provisional winding up in the hands of the master of the above Honourable Court;

[25.2] All interested persons are called upon to come and show cause on 12 January 2015 at 10h00, if any, why a final order of winding up of the First Respondent should not be granted.

[25.3] A copy of this order be forthwith served on the Respondent company at its registered office and be published in the Government Gazette and in a local daily newspaper;

[25.4] A copy of this order be forthwith served upon the Respondent company's employees at its principal place of business;

[25.5] A copy of this order be forthwith forwarded to each known creditors by prepaid registered post.

N V KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA

Appearances:

On behalf of the Applicant: T Colyn

Casper Le Roux Inc

c/o Andrea Rae Attorneys

On behalf of Respondent: P J Greyling

Instructed by: Wilsenach, Van Wyk,

Goosen & Bekker

Ref: S White, Pretoria

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