

SOUTH AFRICA / JUDGMENT

Ferreira v Swift-er (Pty) Ltd and Another (4565 /2019) [2019] ZALMPPHC 66 (12 December 2019)

[2019] ZALMPPHC 66

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

4565 /2019

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT
OF SOUTH AFRICA
LIMPOPO DIVISION,
POLOKWANE

(1)

REPORTABLE: YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

CASE

NUMBER: 4565 /2019

In

the matter between: JOHAN
THEO FERREIRA
APPLICANT
AND
SWIFT-ER
(PTY) LTD
FIRST
RESPONDENT
PIETER
IGNATIUS PAPSDORF
SECOND RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The applicant and the second respondent are both directors and shareholders of the first respondent. They each hold 50% shareholding in the first respondent. The first respondent is rendering emergency medical services around Hoedspruit area in Limpopo. The ambulances that are being used by the first respondent are registered in the names of the second respondent as a temporary arrangement. The applicant was entrusted with the day to day management of the first respondent.
- [2] The applicant has brought an application seeking an order that the first respondent be finally wound-up and placed in the hands of the Master in terms of section 81 (1) (d) of the Companies Act[1] (the Act).
- [3] The grounds upon which the applicant has based his application are that whilst he was busy compiling an application to apply for the necessary licence from the Department of Health to enable them to practice as emergency services providers he discovered quite a number of irregularities in the business which was previously operated by the second respondent. When he confronted the second respondent about the irregularities, he became violent to the extent that it was impossible to properly manage the business of the first respondent. The second respondent did a sim-swap of his emergency cell phone without his knowledge. The second respondent confronted him in the office and told him that it was impossible to work with him and he also threatened to ruin his life.
- [4] That resulted in the applicant consulting with his attorney for assistance. The attorneys of both parties started communicating with each other with the aim of procuring a possible settlement for both parties. By then the animosity between the parties was to such an extent that the applicant's access to the business bank account has been stopped by the second respondent. The second respondent had removed all the ambulance equipments from the business premises and

was refusing the applicant with access to them. The parties could not reach any settlement agreement. That resulted in the applicant

launching the present application on urgent basis. The application was struck off the roll due to lack of urgency.

[5] The second respondent in his answering affidavit concedes that the parties were negotiating a settlement, but denies that the parties have reached a deadlock. According to the second respondent, there are other alternative remedies, and it is not just and equitable to liquidate the first respondent.

[6] According to the second respondent, at a meeting of directors, the applicant has threatened him that he will implement certain procedures in operation without his knowledge or consent. The second respondent concede that he did a sim-swap of the applicant's emergency cell phone as the applicant has resigned as an employee of the first respondent and was refusing to return the cell phone. The second respondent further concede that he had blocked the applicant's

business bank card and state that he did so as the applicant was withdrawing the money from the business account without his prior

knowledge. He did so in trying to safeguard the rights of the first respondent. However, he later unblocked the card. The second

respondent has also stated that the applicant is correct to state that he did not trust him anymore. However, he denies that the

negotiations have reached a deadlock, and state that the applicant had only made one offer and abruptly stopped negotiations and

prematurely launched the present application in order to blackmail him into a settlement that is favourable to him (applicant).

[7] The first respondent is a solvent company and the applicant has brought an application that it be wound up in terms of section 81 (1)

(d) of the Act. Section 81 (1) (d) of the Act reads as follows:

“(1) A court may order a solvent company to be wound up if-

(d) the company, one or more directors 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 break the deadlock, and-

(aa) irreparable injury to the company is resulting, or may result, from the deadlock; or

(bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the 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;"

[8] In terms of section 81(1) (d) directors or shareholders of the company may invoke the provisions of this section in instances where there is a deadlock or where it is just and equitable for the company to be wound up. This section will most probably come to the rescue of small businesses which consist mostly of two directors and two shareholders where in it is easy for one director who will also be a shareholder to make the proper running of the company to be impossible.

[9] In *Thunder Cats v Nkonjane Economic Prospecting*[2] Malan JA said:

"Meyer J's conclusion that the just and equitable ground in s 81(1)(d)(iii) should not be interpreted so as to include only matters similar to the other grounds stated in s 81(1) is clearly correct. However, his conclusion that s 81(1)(d)(iii) modified the 'judicially developed deadlock category' is doubtful. Meyer J was dealing with what has been (inappropriately) termed the 'complete deadlock' category and not with the 'deadlock principle'. Indeed he made the winding-up order on what has been referred to as the 'deadlock principle'. This case is also concerned with the 'deadlock principle' or, preferably, the failure of the relationship between the parties. The examples of 'deadlock' given in s 81(1)(d) (i) and (ii), that is, where either the board or the shareholders are deadlocked are examples only, and, it seems to me, are not exhaustive and do not limit s 81(1)(d)(iii). The use of the word 'otherwise' in the subsection does not limit what is meant by 'just and equitable'. On the contrary, it extends the grounds of winding-up to include other cases of deadlock. It is conceivable that it may be just and equitable to liquidate even if the shareholders have been unable to elect successors to directors for less than the stipulated period that includes two consecutive annual general meeting dates, as s 81(1)(d)(ii) requires."

[10] The applicant and the second respondent are making counter allegations of threats against each other. Both parties are in agreement that they do not trust each other to the extent that the second respondent had to block the business bank card of the applicant. The applicant was tasked with the running of the day to day affairs of the first respondent. If the business bank card which he had to use to run the day to day affairs of the first respondent is blocked, how is he expected to manage the first respondent properly. That shows that their relationship has irretrievably broken down to the extent that it is now toxic.

[11] This is a small company where the same directors are the same shareholders and they hold equal powers. Therefore, the smooth and proper running of the first respondent depends on full co-operation, dedication and honesty of the other director/shareholder. In this case both directors/shareholders are on their own missions which in turn will affect the proper management of the first respondent.

[12] In Thunder Cats case supra at para 17 Malan JA said:

“The word ‘deadlock’ is not always given the same meaning. The reference to deadlock in the previous paragraph and also in s 81(1)(d)(i) and (ii) was described as a case of ‘complete deadlock’, but there is no particular advantage in the

introduction of this term. The ‘deadlock principle’, on the other hand, 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.’

[13] The first respondent is in the business of rendering emergency services. After rendering the service an invoice must be issued in the name of the first respondent and payment must be made into the business bank account of the first respondent. The second respondent is accusing the applicant of trying to defraud or steal from the first respondent as the first respondent had rendered services to KZN Trail Running and the invoice was issued on the letterhead of the first respondent but the bank details was that of the applicant. The applicant in his replying affidavit has stated that he had personally rendered the services at the event and his mistake was to invoice the client using the first respondent’s letterhead.

[14] The applicant has offered the same services that is being offered by the first respondent to KZN Trail Running. He was therefore competing with the first respondent whilst he is a director and shareholder. In the first place by rendering the same services offered by the first respondent to KZN Trail Running he was conflicted. Secondly he had a fiduciary duty to act in good faith and to the best interest of the first respondent, but has failed to do so. All these shows that the trust relationship between the two directors/shareholders has irretrievably broken down. Taking into consideration the counter allegations levelled against each other, it will be difficult to restore the trust that has been broken and work with each other in future.

[15] The second respondent denies that the parties are deadlocked, but that the applicant abruptly stopped negotiations unilaterally by launching the present application in order to blackmail him into a settlement that is favourable to the applicant. If indeed the applicant was trying to blackmail the second respondent, that shows that there is no relationship that still exist between the directors/shareholders.

[16] The deadlock in this case is not about how best can they settle the matter, but it relates to how they can properly manage the first respondent. In this case the manner in which the applicant and the second respondent are conducting themselves to each has definitely affected the management of the first respondent. The first respondent will no longer be managed properly if the other director is able to render services in competition with the first respondent and whilst the other director is able to block the business bank card of the other

director which in turn will affect the proper management of the first respondent.

[17] The particular personal relationship of confidence and trust which must exist between the applicant and the second respondent is no longer there. It will therefore be just and equitable if the first respondent Swift-ER (Pty) Ltd be finally wound up.

[18] In the results I make the following order:

18.1. The first respondent Swift-ER (Pty) Ltd is finally wound-up and placed in the hands of the Master.

18.2. The costs of the application are to be costs in the winding-up.

MF. KGANYAGO J

JUDGE OF HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

COUNSEL FOR APPLICANT

: ADV BRESLER

INSTRUCTED BY

: CHM STEYN ATTORNEYS

COUNSEL FOR 1ST AND 2ND RESPONDENTS: JF MOOLMAN

INSTRUCTED BY

: ANTON SMITH ATTORNEYS

DATE OF HEARING

: 20 NOVEMBER 2019

DATE OF JUDGEMENT

: 12TH DECEMBER 2019

[1] Act 71 of 2008

[2] 2014 (5) SA 1 (SCA) at para 14

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