

SOUTH AFRICA / JUDGMENT

JJP Propco (Pty) Ltd and Another v Jacaranda Haven (Pty) Ltd and Others; JJP Propco (Pty) Ltd and Another v Botha and Others (37063/2018; 45201/2018) [2020] ZAGPPHC 619 (30 October 2020) [2020] ZAGPPHC 619

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

37063/2018; 45201/2018

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HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- (1) REPORTABLE: NO.
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

DATE: 30 OCTOBER 2020

CASE NO: 37063/2018 and 45201/2018

In the matter between:

JJP PROPCO (PTY) LTD

First Applicant

JJP PROPCO MEDICAL (PTY) LTD

Second Applicant

and

JACARANDA HAVEN (PTY) LTD

First Respondent

PIETER HENDRIK STRYDOM N.O.

Second Respondent

MARTHINUS JACOBUS BEKKER N.O.

Third Respondent

AMANDA LINDOKUHLE VILAKAZI N.O.

Fourth Respondent

THE BARBEL FOUNDATION

Intervening Party

JJP PROPCO (PTY) LTD

First Applicant

JJP PROPCO MEDICAL (PTY) LTD

Second Applicant

JAMES RICHARD BOTHA

First Respondent

MARIA HECK

Second Respondent

JACOB PHILIPPUS GROBLER

Third Respondent

J U D G M E N T

DAVIS, J

[1]

Introduction

This is the judgment in an application for the final liquidation of Jacaranda Haven (Pty) Ltd (Jacaranda). A provisional liquidation order was granted by Strijdom AJ on 21 June 2019 and the matter finally came before this court again on 27 July 2020. At the same time, a separate application for certain declaratory and ancillary orders regarding the directorship of Jacaranda, also served before the court.

[2]

Background

In 2016 the JJP group of companies, being JJP Group of Companies (Pty) Ltd and its subsidiaries, were introduced by a certain Dr Richard Botha to the ViaViva group of companies. At that time, the ViaViva group sought to develop an old age home and frailcare facility. For this purpose, Jacaranda was created in order for it to acquire a certain immovable property in Pretoria from the Jacaranda Haven voluntary association, who was then operating an already existing old age home on the property. Jacaranda itself had no funds or assets and required funding to acquire the property and to further develop the existing facilities. The JJP group agreed to finance this purchase and also to finance the development of the facilities. Subsequent shareholding disputes between the JJP group and the ViaViva group and the failure or refusal of repayment, led to the current applications.

[3] The application for final liquidation

3.1 This application is brought on various alternative grounds. In the first place the applicants allege that Jacaranda is factually

insolvent and unable to pay its debts and should therefore be wound-up as contemplated in sec 344 of the Companies Act 61 of 1973

read with item 9 of Schedule 5 to the Companies Act 71 of 2008. Alternatively, the applicants allege that it would be just and equitable under the same statutory provisions that Jacaranda be wound up as it, as a corporate entity, is being “unlawfully manipulated” by the persons in control thereof.

3.2 Should it be found that Jacaranda is not insolvent, the applicants still seek a final liquidation order in terms of section 81 of the Companies Act on the same basis as above that it would be just and equitable to do so.

3.3 In the judgment whereby the provisional liquidation order was granted, it was found that Jacaranda had failed to satisfy the onus to prove that that applicant’s claims are disputed on bona fide and reasonable grounds. This requirement stems from the “Badenhorst principle (after *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) as reaffirmed by *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 98(B). This principle has been described as follows in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) at [145]; “Liquidation proceedings are designed to bring about a concursus of creditors to ensure an equal distribution of the insolvent estate between them and are inappropriate to resolve a dispute as to the existence of a debt. In order to prevent the possible abuse of the liquidation process, the rule was developed to the effect that where there is a genuine and good faith factual dispute concerning an alleged insolvent debtor’s indebtedness to a creditor, the application for provisional liquidation should normally be dismissed”.

3.4 As to the differences of approach between the granting of a provisional liquidation order and the granting of a final liquidation order where there are factual disputes as to the existence of the indebtedness and the grounds for liquidation, the learned authors in Henochsberg on the Companies Act Vol 2 at APPI-94 (2) refer to the following useful summary of the position as set out in *Absa Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd* (23255/2010) [2012] ZAWCHC 43 (15 May 2012):

“At the provisional stage the applicant had to make out only a prima facie case – in the peculiar sense of that term explained in Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 at 976D – 978F. In order to succeed in obtaining a final order the applicant has to prove its case on the evidence as it falls to be assessed in the usual manner in proceedings on motion for final relief. The practical distinction between the two requirements thus arise out of the application of the Plascon-Evans evidentiary rule in opposed proceedings for a final order; cf Export Harness Supplies (Pty) Limited v Pasdec Automotive Technologies (Pty) Limited 2005 JDR 0304 (SCA), at para. 4. The effect has been described in terms which suggest that a higher ‘degree of proof ... on a balance of probabilities’ is required for a final order than for a provisional order (Paarwater v South Sahara Investments (Pty) Ltd

[2005] 4 All SA 185 (SCA), at para.3). While the basis for that description is understandable, I would suggest respectfully that the position might more accurately be described as being that while the applicant must establish its case on the probabilities to obtain either a provisional or a final order, in an opposed application, a different, and more stringent approach to the evidence, consistent

with the Plascon-Evans rule, must be adopted by a court in deciding whether the applicant has made a case for a final order”. See also *Orestisolve (Pty) Ltd t/a Essa Investments v NDFI Investment Holdings (Pty) Ltd* 2015 (4) SA 449 (WCC) at paras 7 – 12.

5.1 The Plascon-Evans-rule dictates that where final relief is claimed in motion proceedings and disputes of fact arise, “relief may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such to raise a real, genuine or bona fide dispute of fact ... there may be exceptions to the general rule as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them on the papers” See: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*

[1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635D and the cases quoted there, including *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5.

[4] The disputed versions of the parties

The disputed versions of the parties start out by their descriptions of their relationship with each other and the envisaged mode of the Jacaranda Haven old-age home and frailcare development:

4.1 On the one hand, the current applicants, being JJP Propco (Pty) Ltd (JJP) and JJP Propco Medical (Pty) Ltd (JJP Medical) aver that the position was as follows: As part of the development, in addition to Jacaranda, being the proposed property-owning company, Jacaranda Haven Operations (Pty) Ltd (Jacaranda Operations) was incorporated. Jacaranda had no funds of its own to acquire or develop the identified old-age home. These would be provided by the applicants. After development, Jacaranda Operations would lease the property from Jacaranda and operate the newly developed facilities. Jacaranda Operations was to hold 10% of Jacaranda's shares while JJP Medical would hold the remaining 90% of the shares. JJP Medical would be a subsidiary in the JJP group while Jacaranda Operations would be a subsidiary in the ViaViva group of companies. Both the JJP group and the ViaViva group would therefore derive benefit from the proposed scheme by way of the rentals payable to Jacaranda from the lease of the improved facilities.

4.2 Jacaranda's version is a bit different. The ViaViva group alleges that, in acquiring and developing facilities such as the one in question, ViaViva Holdings (Pty) Ltd hold shares in two of its subsidiaries, ViaViva Properties (Pty) Ltd (ViaViva Properties) and ViaViva Operations (Pty) Ltd (ViaViva Operations). ViaViva Properties in turn owns shares in property holding companies (described as "special purpose vehicles") such as Jacaranda while ViaViva Operations owns the shares in the companies operating the various facilities developed on those properties, such as, in this case, Jacaranda Operations. The original plan was that the JJP group would advance funds earmarked for the Jacaranda Haven development to the ViaViva group to advance this business model. Jacaranda's deponent concedes, however, that this original plan was "modified", and that is where the current disputes come in. The modified plan, according to Dr Botha of the ViaViva group, entailed the following: JJP Medical would purchase 90% of the shareholding in Jacaranda from ViaViva Properties at 90% of the municipal value of the property, rounded off to R 11,7 million (this was later amended as an alleged typographical error to R 11,8 million). This purchase price had to be paid when Jacaranda took transfer of the property and, only once fully paid, would JJP Medical be "registered"

as the 90% shareholder.

4.3 It appears from the papers that the original plans of the parties suffered from the implementation thereof and the intertwined facts

make it difficult to separate the issues of locus standi, indebtedness and the other considerations relevant to liquidation proceedings as neatly and simply as Mr Louw SC, who appeared for Jacaranda, ex post facto sought to do. Mr Wagener SC, who appeared for the applicants, termed this approach a "reductionalist" approach to the

conspectus of events.

[5] Common cause facts

In order to determine whether the factual disputes raised by the parties' opposing versions are real and genuine and can be resolved on the papers or not, the starting point is the recording of those relevant facts which are not in dispute. On the papers filed of record, these appear to be the following:

5.1 The representative of the JJP Propco group, Mr J J Prinsloo and the representative of the ViaViva group, Dr Botha, met during the latter part of 2016 and discussed the development of Jacaranda Haven as a "sub-acute facility". At that time Jacaranda Haven was operated by a voluntary association as an old age home with limited frailcare facilities. It would continue to be so operated during the course of acquisition of the property and until fully converted and developed.

5.2 On 5 December 2016 the applicants made a first payment in the amount of R150 000.00, followed shortly thereafter by a second payment on 15 December 2016 in the amount of R 255 000.00. These payments were made in order to keep the Jacaranda Haven old age home and frailcare facility operational.

5.3 Jacaranda and Jacaranda Properties were incorporated on 18 January 2017.

5.4 On 20 January 2017, that is shortly after its incorporation, Jacaranda purchased the property concerned from the voluntary association by way of a written agreement of sale. Although the amount of R 2 390 382.00 set out in the voluntary association's 2014 Annual Financial Statements was "utilised" by the parties, the amount payable by Jacaranda in terms of the written agreement was R 1 million per year for ten years to a trust to be created by the voluntary association, with the first R 1 million to be paid upon transfer.

5.5 On 31 January 2017 the applicants made a third payment in the amount of R 206, 000.00, also for the continued operation of the Jacaranda Haven old age home.

5.6 On 22 February 2017 JJP Medical was incorporated (JJJ itself had been previously incorporated as part of the JJP group in 2013).

5.7 On 28 February 2017 a fourth payment was made by the applicants in the amount of R 203 389, 68, still to ensure the continued operation of the Jacaranda Haven old age home.

5.8 On 8 March 2017 Jacaranda Operations was incorporated.

5.9 On 10 May 2017 the applicants made a fifth payment in the amount of R 200, 000. 00, also to ensure the continued operation of the Jacaranda Haven old-age home. On the same day Jacaranda's accounting officer is given instructions by Ms Heck on behalf of the ViaViva group to effect a change of directors of Jacaranda to include one representing the JJP group (Mr Prinsloo's son) and one representing the via Viva group, Ms Heck herself as the two sole directors and also to amend the shareholding of Jacaranda to reflect 90% shareholding to JJP Medical and 10% shareholding to ViaViva Properties.

5.10 On 25 May 2017 payment is made by the applicants in the amount of R 237, 257, 56 directly to the conveyancing attorneys dealing with the transfer of the property together with payment of the R 1 million necessary to effect transfer of the property as required by the sale agreement with the voluntary association.

5.11 Four days later, on 29 May 2017 the applicants made an enquiry regarding the appointment of the directors and the reflection of the shareholding which is answered by the confirmation of the registration of the appointment of Mr Prinsloo (jnr) and Ms Heck as Jacaranda's only directors.

5.12 On 27 June 2017 Dr Botha, confirmed of the transfer of the shares (as contemplated in par 5.8 above) and requests a second payment of R 1 million by the applicants which he claims is necessary to effect transfer of the property. The payment is made by the applicants three days later on which date the property is transferred to Jacaranda.

5.13 On 5 July 2017 Dr Botha via email undertakes to ensure repayment of R 750,000 of the second R1 million which was paid on 30 June 2017 and requests that the remainder operate as a bridging capital loan to the ViaViva group. The applicants consented to this request and directed that the R 750 00,00 be paid into Jacaranda's account.

5.14 On 14 September 2017 a lease agreement is entered into between Jacaranda and Jacaranda Operations.

5.15 On 29 September 2017 the applicants make a further payment of R 200 000.00, again, to ensure the continued operations of Jacaranda Haven old age home.

5.16 In the meantime and in the period from 1 March 2017 the applicants have made numerous payments to various contractors and annexed 28 invoices to their founding affidavit in this regard, totaling R 6 360 014.00 (I shall deal with this aspect and whether all or only some of these payments were in fact common cause more fully in paragraph 6.6 hereunder).

5.17 On 1 November 2017 the applicants found out that the 90% shareholding in Jacaranda was never registered in the name of JJP Medical. Hereafter a flurry of correspondence is exchanged between the parties.

5.18 On 19 December 2017 a bond is registered in favour of a third party, the Barbel Trust, which later became an intervening party in the liquidation proceedings.

5.19 It is further common cause that the applicants have demanded transfer of the 90% shareholding in Jacaranda to the applicants. When this was refused, the applicants demanded their money back. When this was refused, the liquidation application followed.

[6] Evaluation

Before this court as a first-instance court ‘kicks for touch’ (as Cameron J put it in par [93] in Trinity Asset Management (at par 3.3 above), albeit in the context of deciding the question as to whether the Badenhorst-rule applies to legal issues as well as to factual issues), it is necessary to consider and evaluate the factual disputes:

6.1 In the answering affidavit Dr Botha alleged that the terms of the sale of shares agreement alleged to have existed between ViaViva and JJP Medical, were those set out in the closing part of paragraph 4.3 above. It is common cause that no written agreement was ever entered into in this regard. The draft written agreement which had been drafted by the transfer attorneys and on which reliance is placed in support of Jacaranda’s opposition to the liquidation application, had only been sent to Mr Prinsloo and Dr Botha on 29 May 2017. In it, there is no reference to the municipal valuation of the property and the purchase price for the shares was fixed at R11, 8 million. This draft agreement had numerous conditions precedent and warranties and guarantees which were also not addressed in the answering affidavit. The differences between the terms of the agreement which Jacaranda claimed in its answering affidavit to have existed and this draft written agreement were never explained and the agreement remained but an unsigned draft. Its contents were disputed from the outset in the applicants’ founding affidavit and never properly dealt with by Jacaranda.

6.2 If either of the aforementioned agreements (being that set out in the answering affidavit and that contained in the draft written

agreement) were the true agreement between the parties regarding the acquisition of shares in Jacaranda, and reliant on which Dr Botha claims that ViaViva is now still entitled to refuse transfer of the shares, the unanswered questions then arise as to why Ms Heck had given instructions on 25 May 2017 already for the transfer of the shares and why had Dr Botha on 27 June 2017, when he requested payment of a further R 1 million, confirmed via email that the shares had already been transferred?

6.3 There is also a further discrepancy between the demands made by Dr Botha shortly prior to the transfer the property and either or both of these alleged share agreements. In the draft written sale of shares agreement, the purchase price of R 11,8 million for the shares would have been paid as follows: R 1, 3 million “is credited in the form of the amount funded by JJP medical to fund the operations at the JH property prior to the signing of this

agreement,” R 5 million to be paid on the “effective date” (being date of transfer the property) and R 1 million “in respect of the amount payable to the trust to be erected pursuant to the conclusion of the purchase agreement in order to effect transfer” and a further R4,5 million “will be spent on the property” in respect of the first phase of development. However, after having quoted these terms in the answering affidavit, Dr Botha went on to state that he met Mr Prinsloo to “discuss the situation”. He alleges that at this meeting, he demanded payment of R3,6 million before JJP Medical would be registered as a shareholder. He claims in the answering affidavit that Mr Prinsloo had agreed that JJP Medical was indebted to ViaViva Properties in that amount. Dr Botha claims that to this end Mr Prinsloo deposed to an affidavit on the date of transfer. My translation

of the affidavit (on the letterhead of the JJP Group of Companies (Pty) Ltd), however, reads as follows: “The following statement is deposed to, namely that: Johannes Jurie Prinsloo (JJP) has the authority to make undertakings and commitments

regarding the purchase of the Jacaranda Haven property. JJP group has undertaken to pay a total amount of R 7 million to acquire ownership thereof. JJP has already paid R 1 million together with transfer costs in order for the property to be transferred to Jacaranda Haven Pty Ltd JJ P has further undertaken to pay R 6 million together with the registration of a bond over the property. JJP is currently busy arranging such a bond and the expectation is that the bond registration will take place before the end of September 2017. In the meantime JJP will proceed to improve the property according to agreed architects plans. JJP will only be entitled to amend these undertakings on a written agreement basis signed at Pretoria on 30 June 2017 before a Commissioner of oaths”. After having quoted this affidavit, Dr Botha in the answering affidavit, simply concludes that as JJP Medical had not paid the purchase price for the shares to ViaViva Properties, it had no right to be registered as a shareholder.

6.4 It is immediately clear that the terms of the draft written sale of shares agreement, Dr Botha’s demand and the contents of the affidavit furnished by Prinsloo are in direct conflict with each other. What is also clear is that the affidavit, apparently accepted by Dr Botha at the time, although such acceptance was not explained, corroborates the applicants’ version. In my view this is weighty corroboration as it was done long before any dispute was envisaged, let alone any litigation contemplated. The payment of the amounts referred to in paragraphs 5.2, 5.4, 5.6 and 5.8 above in order to keep the Jacaranda Haven old-age home operational prior to transfer the property were not gainsaid by Dr Botha. In fact, in the portions of the answering affidavit where these payments were dealt with, they were not only not disputed, but therein Dr Botha claimed ignorance of the cause thereof and speculated that these may have been “donations” made by the applicants, either unilaterally or by virtue of a separate independent agreement between the applicants and the voluntary association.

6.5 Much is also made of the conduct of Jacaranda and members of the ViaViva group and the directors of its companies regarding the registration of the bond over the property in favour of the Barbel Trust. The applicants claim that this was fraudulently done. How the registration came about was as follows: the transfer attorneys could not locate the title deed in their offices for purposes of the bond registration and the personnel in the conveyancing department established that it had been uplifted from their offices by one of the JJP group’s employees. When the person would have uplifted the title deed on behalf of the JJP group from the conveyancing attorneys’ offices, one Mr Taljaard, was contacted, he stated that he could not remember the upliftment and was not immediately aware of the deed’s whereabouts. When this was via a roundabout way reported to Dr Botha, he instructed the attorneys that the title deed was untraceable whereupon an affidavit was prepared for his signature requesting a lost deed copy from the Deeds Office. Armed with this copy, Jacaranda (and the ViaViva group) passed the bond over the property in favour of the intervening creditor, being the ViaViva group’s new financier. The affidavit of Mr Prinsloo quoted in paragraph 6.3 above however indicates that the JJP group had retained the

uplifted title deed for purposes of registering a bond over the property in its own favour. The allegations explaining the obtaining of the copy of the title deed as a lost document, were, contrary to the argument on behalf of Jacaranda, in cursory fashion and lacked any substantial averments

that, save for the most basic of enquiries, a full and proper search or investigation for the location of the title deed had been

conducted. Had this been undertaken, then surely the JJP group would have been alerted of the reason for such search namely the watering down of their proposed source of security and in fact the burdening of Jacaranda's sole asset by a bond in favour of another party.

6.6 In respect of the applicants' claim of the expenditure of R 6 360 014.00 on the upgrading of the property and development of its facilities, Dr Botha was rather coy in his answers thereto. He alleges that the amount spent by the applicants were a "mystery". He further claimed that he did not know what the amounts were used for, that the detail was vague and that the invoices produced provided no clarity. Dr Botha however failed to deal with the statement in Mr Prinsloo's above translated and quoted affidavit that JJP would continue with the improvement of the property. Clearly, by the time of the affidavit, the applicants have commenced with the first phase of the development and by the time of the affidavit was given it was contemplated that the development and its financing thereof by the applicants would continue. Contrary to Dr Botha's bald denials, he later in his affidavit alleges that the amount spent by JJP Medical in respect of the property, was "no more" than R 4,5 million.

6.7 After the provisional liquidation order had been granted, Dr Botha deposed to a "supplementary affidavit" of some 83 pages which was delivered together with a set of annexures thereto in excess of 200 pages. These were delivered in opposition to the granting of a final liquidation order. In this affidavit Dr Botha listed the "essential matters" as (a) the version of the parties regarding "the transaction", (b) the applicants' locus standi,

(c) the quantification and proof of claims and (d) Jacaranda's insolvency or inability to pay its debts.

6.8 The nature and contents of the supplementary affidavit differ markedly from the answering affidavit. It is almost as if a new witness was traversing the aspects already covered in the answering affidavit. Detail of transactions not previously furnished were now tendered. The attorney who had drafted the draft written sale of shares agreement was drawn into the fray. A deponent to a confirmatory affidavit to the founding affidavit was approached and ended up deposing to three different and conflicting affidavits.

6.9 One of the principal features of the supplementary affidavit was the explanation tendered for the payment obligations of Jacaranda in respect of the purchase of the property. This started out by treating the balance of the R10 million to be paid in annual

installments to the trust created for the beneficiaries of the voluntary association (the “JH Trust”) not as a liability, but as an annual “expense”. The agreement negotiated by Dr Botha with the voluntary association was apparently that the members of the voluntary association would become beneficiaries of the JH Trust, would remain as residents in the old-age home, but would be obliged to pay a “market related” rent to Jacaranda Operations. This would be calculated annually

but would be “subsidized” by Jacaranda by way of the annual R1 million instalments. The calculation was based on an estimate of the value of the members’ previously held “life rights”, the existence of which Dr Botha disputed, but which he valued at R2,8 million. The consequence of the arrangement, was a circle of payments and obligations: Jacaranda Operations would rent the property and facilities from Jacaranda and in turn let it (or portions thereof) to the members who had now become beneficiaries of the JH Trust. Jacaranda Operations would pay the rent due to Jacaranda from the proceeds of its operations and from rental received from the beneficiaries or the JH Trust. Jacaranda would in turn pay the annual R1 million to the JH Trust, who would in turn have to pay Jacaranda Operations again. In the first year, 2017, this circular arrangement allegedly resulted in a shortfall payable by the JH Trust of R1 258 180.00. In 2018 the “actual rental” (or shortfall) was R1 572 725,00 and in 2019 the shortfall increased to R 2 853 600.00. Due to the provisional liquidation order, the Barbel Trust agreed to “provide” these funds. Despite the date of the provisional order, one must remember that the deemed date of commencement of winding-up of an insolvent company is, in terms of section 341 of the “old” Companies Act 61 of 1973 is 25 May 2018. In the event of a final order being granted, transactions involving Jacaranda after that date would be void.

6.10 Regarding the purchase of the property, a new explanation was also tendered: Dr Botha stated that he had proposed to the voluntary association that the “aggregate purchase price” of the property “and all other assets” was R16, 3 million. This amount, however, did not feature in the sale agreement. It was however agreed that only the amount of R2 390 382.00 would be reflected as purchase price (in the end, this amount was only “utilized” as set out in paragraph 5.4 above). Dr Botha was at pains to state that this amount was never payable to the voluntary association. Apart from the annual R 1 million referred to above, the only other amounts which Jacaranda would pay, despite them not being reflected in the sale agreement, were the amounts needed by the voluntary association for operational expenses up to the time that Jacaranda Operations would take over the running of the old-age home on 1 March 2017 (estimated up to a maximum of R 2 million) and some R 1,5 million which was due to the voluntary association’s creditors as at 28 February 2017.

6.11 In dealing with Jacaranda’s financial position at the time of the lodging of the liquidation application, Dr Botha referred to a trial balance of 30 April 2018. Herein the property “including the costs expended by [Jacaranda] to improve the property at the time”, later described in the supplementary affidavit as “the costs of improvements” were reflected as R13 212 664.00. Contrary to this calculated amount, Dr Botha alleged that the value at the time was higher than the R 16,3 million referred to above, but rather in excess of R18 million.

6.12 Regarding the amounts expended by the applicants (and not Jacaranda) in respect of the operations of the voluntary association and the improvement of the property (including the amounts actually paid), there is an extensive affidavit of Mr Grobler (a director of Jacaranda Operations and one of the later directors of Jacaranda, as referred to hereinafter) annexed to the supplementary affidavit. Therein, at the time of the termination of whatever the agreement may have been regarding shareholding, Mr Grobler stated that JJP Medical had at that time paid R3, 7 million. Of this, he alleged that that ViaViva Properties had “provided” R1, 2 million to Jacaranda to pay the first R1 million to the voluntarily association as well as the odd R 200 000.00 transfer fees, and had “advanced” R2,5 million “through series of inter-company loans” to Jacaranda Operations “to conduct its business activities”. As to the amounts expended by the applicants in improving the property, Mr Grobler conceded that this was part of the “in-kind” discharge of the applicants’ obligations, but limited to R4,5 million.

6.13 None of the affidavits put up as part of the set of “supplementary” affidavits addressed the issue raised in par 5.13 or the questions raised in paragraphs 6.2 and 6.3 above either adequately or at all.

6.14 The overall, but very distinct, impression one gets from the affidavits delivered on behalf of Jacaranda, is that the deponents thereto would say whatever was necessary and expedient at the time. Two examples (in addition to the obvious differences and discrepancies apparent from the discussion of the latter affidavit above) illustrate this: in the answering affidavit the amounts paid by the applicants to keep the operations of the voluntary association afloat were scornfully speculated to be “donations” while in the supplementary affidavit, it was conceded that these were paid as part of the applicants’ discharge of their obligations. Similarly, in the answering affidavit a virtual complete ignorance was pleaded as to the amounts expended by the applicants on improving the property, while in the supplementary affidavit, the prime contention was that the amounts had been expended but should be limited and the applicants were accused of “overspending” on the improvements. Another example of expediency is the trial balance of 30 April 2018 relied on: herein, barely a year after takeover of Jacaranda by Jacaranda Operations, a “net loss” of R 1 million is reflected, a “retained income” of R 11, 8 million is reflected and the property is reflected as “Investment property - revaluation R12 880 830, 56”. The “series of inter-company loans” is reflected as “share premium” rather than loans. Dr Botha merely referred to these entries, but failed to explain these accounting gymnastics.

6.15 The huge number of discrepancies, contradictions and different versions contained in different affidavits by the same deponent, constitute sufficient reason to reject such a deponent’s version/s. Based on the above evaluation, I find that the disputes which Dr Botha sought to raise are not “real” disputes as contemplated the case law referred to earlier and that the versions which he sought to put up on behalf of Jacaranda can be rejected as being “untenable”, in the words of Plascon-Evans (above). It follows that the defence which was sought to be raised was not bona fide and that no reasonable grounds for a defence to the applicants’ claims has been established.

6.16 On a balance of probabilities the applicants have expended and/or paid over the amounts referred to in paragraphs 5.2, 5.4, 5.6, 5.8, 5.9, 5.11 and 5.14 above as well as an amount of no less than R 4,5, totaling some R 8 million. These are the amounts which have been paid to or on behalf of Jacaranda which enabled Jacaranda to acquire the property and the business of the voluntary association as a going concern as well as those which had been expended to increase the value of the property. In the alternative, they constitute amounts by which Jacaranda had been enriched at the expense of the applicants.

6.17 Once the existence of these debts to the applicants have been established, it follows that Jacaranda was at all relevant times factually

hopelessly insolvent. In rounded off figures, on the day the liquidation application was launched, Jacaranda really only had the

property as an asset (as valued by its accountant in the draft trial balance sheet) of R 13,2 million. At that time, it had liabilities

totaling R 18,2 million, being the outstanding purchase price of R 9 million (at least as a contingent liability, irrespective of how Dr Botha wanted to structure it for bookkeeping or tax purposes), the amount due to the applicants of R 8 million and the admitted amount then due to the Barbel Trust of R 1,2 million. On the date of the hearing of the application for a final liquidation order, the position had gotten worse: Jacaranda's only asset was still only the property at Jacaranda's expert's valuation of R 14,95 million whilst its liabilities had increased to over R 26 million, being the balance purchase price of R 7 million, the amount due to the applicants of R 8 million and the amount due to the Barbell Trust which, according to its intervention application, had increased to R 11,6 million (plus interest). Even if Dr Botha's best case scenario is considered regarding the valuation of the property at R 18,9 million, Jacaranda remains insolvent.

6.18 In the circumstances of the facts of this case as found above, I agree with the applicant's contention that those in charge of Jacaranda, be it its directors, its current shareholder or the other controlling minds in the ViaViva group have contrived the situation as claimed in Jacaranda's answering affidavit to be in existence, for their own benefit and to the exclusion of the applicants as its initial bona fide financiers. I am fortified in this view by the attitude displayed by Jacaranda and the ViaViva group who persists in claiming a retention of shareholding as initially agreed and promised on the slim contention that the alleged full purchase price, has not been paid (whatever that might actually be). It is clear that the relationship between the parties has irretrievably broken down and in circumstances of this case and in the exercise of the court's discretion, I find that these circumstances make it just and equitable that Jacaranda be finally liquidated. See in this regard: *Moosa NO v Mavjee Bhawan (Pty) Ltd* 1967 (3) SA 131 (T) and *Weare v Ndebele NO*

[2008] ZACC 20; 2009 (1) SA 600 (CC). This finding will apply, even if I am wrong about Jacaranda's insolvency, as contemplated in paragraph 3.2 above.

[7] The application for declaration as delinquent directors

7.1 In a separate application, under case no 45201/2019, Mr C.H. Prinsloo (the son of the Mr Prinsloo mentioned earlier in this judgment) and Jacaranda launched an application seeking a declaration that the dismissal of Mr Prinsloo (jnr) as a director of Jacaranda at a meeting of shareholders on 30 November 2017 was unlawful and invalid. Declarations of delinquency as contemplated in section 162 of the Companies Act, 71 of 2008 against Dr Botha, and/or Ms Heck and/or a Mr Grobler were also applied for.

7.2 The abovementioned application was launched prior to the provisional liquidation order of Jacaranda having been granted. Since then the provisional liquidators (who have, incidentally, been joined in the liquidation application) have not pursued the application.

7.3 The remaining applicant enrolled this application for simultaneous hearing with the liquidation application for obvious reasons: the outcome of the liquidation would have a profound effect on the relief sought in this application, there is a large overlapping of factual averments and costs and time would be saved by a simultaneous hearing.

7.4 The practical consequences of the provisional liquidation order and the divesting thereby of the directors of Jacaranda of their powers (save the residual powers to oppose the liquidation application), temporarily rendered the relied claimed moot. On behalf of the remaining applicant in this application it was submitted in written heads that this situation would change, should the provisional order be discharged. In that case, so the heads read, “the first applicant would again be entitled to have his position as a director of [Jacaranda] restored together with the ancillary relief”.

7.5 In view of the conclusion reached regarding the final liquidation of Jacaranda, the heads of argument submitted that in such an event, the first applicant would then “in any event be entitled to the costs of the application”.

7.6 In circumstance where the merits of a matter has become moot and the only issue is one of costs, a court is generally not obliged to determine the issue in order to determine “who would have won” in order to make a determination on the aspect of costs. See: *Jenkins v S.A Boilermakers, Iron and Steel Workers and Ship Builders Society* 1946 WLD 15. A court is entitled to exercise its discretion in respect of costs “on the material available to it” and to make a costs order which it considers to be fair to both sides. See: *Kruger Bros and Wasserman v Ruskin* 1918 AD 63 at 69 and *Nxumalo and Another v Mavundla and Another* 2000 (4) SA 349 (D).

7.7 The “material” regarding the removal of Prinsloo (jnr) before the court is the following: from 30 May 2017 he and Ms Heck were the only two directors of Jacaranda. His “removal” took place at a purported meeting of shareholders on 30 November 2017. This meeting (and the removal) was unlawful as it was not convened by a board of directors of Jacaranda as contemplated in section 61(1) of the Companies Act 71 of 2008 and neither were the provisions of section 71(2) of the Act complied with prescribing notice of the proposed removal and the opportunity to make representations.

7.8 The deficiencies regarding the abovementioned attempted removal were by implication conceded by the conduct by a second attempt at Mr Prinsloo (jnr)'s removal after the application had been launched.

7.9 Viewed in the context of this case, the removal of Prinsloo played a part of the overall conduct of the ViaViva group. Having regard to the affidavits filed, it appears that Dr Botha, being the first respondent in this application was the driving force. He was however not a director nor a shareholder of Jacaranda. Although Ms Heck as the second respondent and existing director and Mr Grobler, as the third respondent and replacement director, may have participated in the impugned conduct, it is not clear how much of their actions were of their own volition or motivation. By the same token, Jacaranda could just as easily have been cited as the first respondent and not as second applicant, and perhaps should have been, as it was clear that Prinsloo (jnr) could not off his own bat have represented the company.

7.10 Jacaranda is in any event the actual entity about whose control the purported removal turned and whose liquidation resulted in this application not otherwise proceeding. In order to be "fair" to all parties, in the exercise of my discretion, I find that Jacaranda should be the party to carry the costs of this application.

[8] Order:

In the premises, the following orders are made:

In case no 37063/2018

1. The respondent, Jacaranda Haven (Pty) Ltd is hereby finally wound-up and placed in the hands of the Master of the High Court.
2. The costs of the application shall be paid by the respondent.
3. The intervening party shall pay its own costs.

In case no 45201/2018

The costs of the application shall be paid by Jacaranda Haven (Pty) Ltd.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 27 July 2020

Judgment

delivered: 30 October 2020

APPEARANCES:

For the Applicants:

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Attorney for Applicant: Coetzer & Partners, Pretoria

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Adv P F Louw SC

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Prepared on 12 October 2026 · Esheria