

SOUTH AFRICA / JUDGMENT

Kirsten v QCR Computer and Printer Services CC and Others (01/13046)

[2001] ZAGPHC 16 (19 July 2001)

[2001] ZAGPHC 16**COURT**

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

01/13046

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 01/13046

DATE:2001-07-19

In the matter between

KIRSTEN, DAWID STEPHANUS.....Applicant

and

QCR COMPUTER AND PRINTER SERVICES CC

AND OTHERS..... Respondents

JUDGMENT

WILLIS, J:The applicant has sought a rule nisi calling upon all persons to appear and show cause, if any, to this Court why the : respondent should not be placed under a final winding-up order in the hands of the Master of the Supreme Court.

It is common cause that the applicants and the second and third respondents are all members of the first respondent, each having

one-third of the membership. The application is opposed by all three : respondents.

The basis upon which the applicant has sought the winding-up of the first respondent is that it is unable to pay its debts and that it is just and equitable that the respondent be wound up in terms of section 68(d) of the Close Corporations Act No 69 of 1984.

The respondents have contested that the first respondent is unable to pay its debts. On the contrary, they allege that a highly viable and successful business is being operated by the first respondent. They also contend that it would not be just and equitable that the first respondent be wound up.

The respondents have brought a counter-application which was later amended in which they seek the following relief in terms of section 36 of the Close Corporations Act:-

2. directing that the second and third respondents acquire applicant's membership interest in first respondent at an amount to be fixed after a hearing of oral evidence (in regard to what amount [if any] is to be paid by the second and third respondent for applicant's said member's interest in first respondent);
3. that the applicant pay the costs of this application."The respondents have, in their answering affidavit, set out various allegations amounting to unorthodox business methods on the part of the applicant during his management of the affairs of the first respondent. It is unnecessary, in my view, to deal with these in any detail as I shall accept in favour of the respondents that the applicant did indeed adopt business methods that were unorthodox.

It is common cause that the applicant transferred his business into that of the first respondent. The second and third respondents allege that they each made a loan of some R10 000 to the first respondent. As I have already indicated, the respondents claim that a very viable and successful business is now being operated by the first respondent.

It is common cause, and Mr Hollander who appears for the respondents submitted as much, that there was "a clear breakdown between the second and the third respondents on the one hand and the applicant on the other".

In the case of *Emphv v Pacer Properties (Pvt) Ltd* 1979 (3) SA 363 (D) Leon J, when dealing with the deadlock principle, said as follows at 367B:

"The 'deadlock' principle which is founded on the analogy of partnership and is confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exist 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." In terms of section 66 of the Close Corporations Act, the provisions of the Companies Act which relate to the winding-up of a company, including the regulations made thereunder, shall generally apply *mutatis mutandis* and in so far as they can be applied to the liquidation of a corporation in respect of any matter not specifically provided for in this part or in any other

provision of the Close Corporations Act. It is, I believe, in any event trite that the provisions which relate to the winding-up of a company on the grounds that it would be just and equitable to do so also apply in the case of a close corporation.

Accepting, as I do, that the applicant's conduct of the affairs of the first respondent was unorthodox, and accepting, as I do, that the applicant's unorthodox conduct of the affairs of the respondent contributed to the breakdown of the relationship between him and the second and third respondents, I am not satisfied that this would be a basis to deny the applicant any relief. After all, it is clear that he brought an already existing business of his own into that of the first respondent and, moreover, on the respondents' own version of events, a highly successful and viable business is now being conducted by the first respondent. It was the applicant who, on the respondents' own version of events, managed the business of the first respondent for a considerable period of time and it is fair to assume that his management of the business of the first respondent must explain, at least in part, its present viability and success. In my view it would not be just and equitable that the applicant should be expected to walk away empty-handed. Moreover, it would not be just and equitable that the status quo should remain.

As Leon J said in the *Emphy v Pacer Properties (Pty) Ltd* case at 369A:

"What requires to be emphasised is that the Court is concerned with what is just and equitable, not whether there is a deadlock or not". In my view, therefore, the applicant has established a *prima facie* case for the provisional winding-up of the first respondent. The question therefore arises whether some alternative exists by which to avoid the making of such an order. In the case of *De Franca v Exhaust Pro CC (De Franca Intervening)* 1997 (3) SA 878 (SECLD) Nepgen J said at 896D:

"It is my view that it is high probable that by enacting section 36 of the Act one of the purposes of the Legislature was to create a mechanism whereby the inevitability of winding-up can be avoided

where a 'deadlock' situation exists between the members. Even if that was not the specific intention of the Legislature, section 36 of the Act clearly has the result." He went on to note that the relief sought by De Franca in the counter-application clearly fell within the ambit of section 36 of the Act.

As I have already indicated, the counter-application brought by the respondents in this matter, is also clearly intended to fall within the ambit of section 36 of the Close Corporations Act.

relative ease, compute an amount which should be paid to the applicant. Mr Hollander, for the respondents, submitted that the respondents were not able to do so because of the chaotic state of the financial affairs of the first respondent. In other words, he submitted that the financial affairs of the first respondent were in such a shambles that no amount could be suggested by his clients at this stage.

Section 36 of the Close Corporation Act reads as follows:

"(1) On application by any member of a corporation a Court may, on any of the following grounds, order that any member shall cease to be a member of the corporation:-

- (a) ... (these provisions are not relevant to this case)
- (b) that the member has been guilty of such conduct as taking into account the nature of the corporation's business, is likely to have a prejudicial effect on the carrying on of the business;
- (c) that the member so conducts himself in matters relating to the corporation's business that it is not reasonably practical for the other member or members to carry on the business of the corporation with him; or
- (d) that circumstances have arisen which render it just and equitable that such member should cease to be a member of the corporation.

Provided that such application to a Court on any ground mentioned in paragraph

- (a) or (d) may also be made by a member in respect of whom the order shall apply. {2} A Court granting an order in terms of subsection {11 may make further orders as it deems fit in regard to -
- (a) the acquisition of the member's interest concerned by the corporation or by members other than the member concerned; or
- (b) the amounts (if any) to be paid in respect of the member's interest concerned or the claims against the corporation for that matter. The manner and times of such payments and the person to whom it shall be made; or
- (c) any other matters regarding the cessation of membership which the Court deems fit."

Mr Hollander submitted that subsection (2) gave me extremely wide powers, powers which were wide enough to grant the relief sought in the counter-application.

I have my doubts as to whether in a situation where it is clear

that an amount of money should be paid to a member whose membership is to cease, but uncertain as to the quantum of such an amount, that I may, despite the wide wording of subsection (2)(c), make an order of the kind sought by the respondents in their counter-application. Indeed, it would seem that Nepgen J had a similar view in the case of *De Franca v Exhaust Pro CC* (supra) at 896G. He, like myself in this matter, refrained from expressing a definite view on the matter. Nepgen J said at 893G:

"Subsection (1)(d) however gives wide and virtually unlimited scope for the application of section 36 of the Act, the only limitation being the 'just and equitable' requirement. The order that a Court can make in terms of section 36(1) of the Act is circumscribed, namely an order that a member shall cease to be a member of a close corporation. Once a Court decides that an order for such cessation of membership should be made, it has a discretion to make further orders as referred to in section 36(2) of the Act." At 894G he continues:

"The order prayed for by De Franca is in effect one 'for the purchase of the interest' of the applicant by De Franca or by the respondent. I am asked to order that such interest be acquired 'at a fair price'. There is not even a suggestion in the papers as to what would constitute a fair price and De Franca in fact

He continues (at 896F) to say:

"It is, however, my view that I cannot come to De Franca's assistance in terms of section 36 of the Act. For the reasons set out above, when dealing with section 46 of the Act, I find that I would not be able to consider whether or not to make any order in terms of subsection

(2) of section 36. It is clear that this subsection confers a discretion upon a Court to 'make such further orders as it deems fit' in regard to the matters referred to. Even if the discretion conferred upon a Court can be construed to be so wide as to enable a Court to decide to make no order whatsoever other than the one in terms of subsection (1) that a member cease to be a member of a close corporation (about which I have serious doubts), such discretion can only be exercised if there is sufficient information before the Court to enable it to decide whether or not to make any such orders. Having regard to what has already been set out above, I am obviously not in a position to consider this. I therefore cannot decide whether or how the discretion conferred upon me should be exercised."

Nepgen J then proceeded to place the respondents under a provisional winding-up order.

In the case of *Geanev v Portion 117 Kalkheuwel Properties CC and Others* 1998 {1} SA 622 (T) Kirk-Cohen J notes {at 632D-G} that -

Companies Act, 61 of 1973. The Close Corporations Act, however, does not contain a provision such as set out in section 347(2) of the Companies Act. It provides 'where the application is presented by members of the company and it appears to the Court that the applicants are entitled to relief, the Court shall make a winding-up

order unless it is satisfied that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy.' Margo J referred to the subsection in *Wackrill v Sandton International/ Removals {Pty} Ltd and Others* 1984 (1) SA 282 (W) at 292E-F and held:

"The onus of establishing that some other remedy is available and that the applicant is acting unreasonably in not pursuing it, rests on the persons opposing the winding-up application. See Moosa's case (supra) at 152A-C and the Pentamed case (supra) at 181E-G. It is for those persons to specify the other remedy that is alleged to be available and circumstances which make it unreasonable for the applicant not to pursue it. See Moosa's case (supra) at 152C-E.

Furthermore, in my view, where the persons opposing the winding-up seek an order to give effect to the alternative remedy so as to avoid a winding-up, it is necessary for them to set out by way of a notice of motion or in any other appropriate manner the precise relief required."

He goes on to say (at 632C-633A) that:

"The second respondent has not placed any evidence before this Court upon which an order can be made in terms of section 36(2). He has also given various versions of the activities of the first respondent ... Mr Cohen submitted that the whole issue of section 36 should be referred to evidence. When I asked him to define the issues that should be referred, he was unable to do so except to submit that all 'relevant' aspects should be so referred. It became clear from his submission that he was seeking an order that the second respondent could traverse any issue, mostly issues not canvassed on the papers by such a reference. A Court only refers to evidence issues identified on the papers which are in dispute. That is not the case here. The very facts which should have been placed before this Court in order to decide upon an application under section 36 are not contained in the papers. Therefore there are no relevant disputes of fact which, if proved, would justify the order sought. What the second respondent is seeking is a right to go on a fishing expedition to make out a case which he has not even attempted to do on the papers. Faced with this difficulty Mr Cohen then suggested, somewhat tentatively, that the issue of whether section 36 may be invoked should be sent to trial. Assuming that a Court has such powers (I do not so find) it takes the matter no further. At best it would be permitting the second respondent to go on a fishing expedition possibly using different tackle. It is indeed strange that the second respondent now invokes section 36 to compel the applicant to transfer her member's interest when in an action launched against her in August 1996 he claims that she has not paid for her membership, that he has cancelled the underlying contract and is entitled to the transfer of that share without any payment of compensation to her. The financial affairs of the first respondent and the partnership are, as mentioned, in a shambles. Mr Cohen conceded that it would take a lengthy accounting exercise to ascertain what the actual position is and to what amount the applicant and the second respondent are entitled. For that very reason no prima facie case has been made out in the counter-application. I use the words prima facie to refer to facts which, if proved, would enable the Court to make a finding under section 36(2). There are no such facts and the Court is totally in the dark, as are the parties." He continues (at 635F):

"In my view a liquidator par excellence is the person to unravel the complexities of the financial 'shambles' bearing in mind that he has the right Of interrogation. I conclude that the application should succeed and that the

counter-application be dismissed." Interestingly, in that case Kirk-Cohen J did not even grant a provisional order but directly granted a final order liquidating the close corporation.

It seems to me that very similar considerations to those applying in the *De Franca v Exhaust Pro CC* case and the *Geaney v Portion 11 7 Kalkheuwel Properties* case apply here. No facts have been put before me to enable me to make an award of an amount due to the applicant. As I have already indicated, the applicant has certainly made out a prima facie case for the winding-up of the first respondent and the onus is upon the respondents to show that there is a suitable alternative remedy available to avoid the consequences of a winding-up order.

In my view the respondents in this matter have failed to discharged the onus.

The following order is made:

1. The first respondent is hereby placed under provisional winding-up in the hands of the Master of the High Court.
2. All interested persons are to show cause on 4 September 2001 why this provisional order should not be made final.
3. The costs of the application thus far are reserved.

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