

SOUTH AFRICA / JUDGMENT

Malgas v Onega Investment CC and Others (1003/2020) [2021] ZAECHGC 15 (18 February 2021)

[2021] ZAECHGC 15

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J E Smith

CASE / FILE NUMBER

1003/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE DIVISION,
GRAHAMSTOWN

CASE NO:

1003/2020
Matter
heard on: 04/02/2021
Judgment
delivered on: 18/02/2021
In

the matter between:

ZANDISILE
ERNEST MALGAS
Applicant
and
ONEGA INVESTMENTS CC
First Respondent
Registration
number: 2000/081370/23
LUNDI
SYDWELL
TYOBO
Second Respondent
SITHEMBELE
MALGAS
Third Respondent

JUDGMENT

SMITH J:

Introduction

- [1] The applicant seeks confirmation of an order provisionally winding up the first respondent, granted by Roberson J on 29 September 2020. The application is predicated on the provisions of section 81 (1)(d) of the Companies Act, No 71 of 2008, which provide for the winding up of a company, inter alia, where a deadlock has arisen or it would be just and equitable to do so.
- [2] The applicant is a businessman residing at Cathcart. The first respondent is a duly registered close corporation, whose main

business is the “owning of farming property and farming”. The second and third respondents are also businessmen who reside at Msobomvu Location, Butterworth and Nqxababa Village, Duthwa, respectively. The parties are related to each other, the applicant and third respondent being half-brothers and the latter and second respondent being cousins. The applicant, second and third respondents each have a one third interest in the first respondent. The matter is opposed by the third respondent only.

Factual

background

- [3] The parties’ business association commenced during 1999 when they sub-leased agricultural land in Seymour on which to graze their cattle. When the lease terminated towards the end of 1999, they relocated to Cathcart where they again leased land for this purpose.
- [4] They eventually founded the first respondent in 2000, each of them holding a one third member’s interest. Soon after its establishment,

the first respondent purchased a farm in the Cathcart district for R180 000 and thereafter purchased another adjacent piece of land for R130 000. Both properties were purchased with loans obtained from the Land Bank. The properties were consolidated during February 2006 and is the first respondent’s only significant asset. The applicant asserts that they had an informal agreement to the effect that each of them would contribute equally to the servicing of the Land Bank loans.

- [5] The applicant avers that the causes for the breakdown of the relationship between the members of the first respondent hark back to 2008. He alleges that during 2009, he had purchased seven herd of cattle and delivered them to the farm for grazing. At the time the first respondent had employed two casual labourers as herders. When he went to the farm to inspect his cattle, he found that the cattle had wandered onto municipal land. He enquired

from the casual employees why his cattle were not grazing on the farm and was told that they had been instructed by the second and third respondents to remove them from the farm.

- [6] During 2010 or 2011 a meeting took place at the offices of the first respondent's accountants, namely Charteris & Barnes, to discuss the fact that employees were only tending the cattle of the second and third respondents. It was then decided that more herders should be employed to look after the cattle of all three members. That resolution was, however, never implemented.
- [7] The relationship between the parties further deteriorated thereafter. As a result the applicant removed his cattle from the farm, being of the view that he could no longer risk keeping them there since (on instructions from the second and third respondents) they were clearly not being looked after. After he had removed his cattle from the farm, the second and third respondents caused locks to be installed on the gates, thereby denying him access to the farm.
- [8] During 2013 he called an informal meeting of the members, to discuss, inter alia, how the balance of the mortgage bond would be paid and to address the fact that the working relationship between them had broken down completely.
- [9] At that stage there was effectively no communication between them, he had no access to the farm, and was not kept abreast of the affairs of the first respondent. The meeting, however, ended inconclusively.
- [10] He did not pursue these matters again until 2015, when Charteris & Barnes wrote to his attorneys stating, inter alia, that: since the members were unable to work together constructively, they proposed that the second and third respondents must be allowed either to subdivide the land, purchase his membership, or sell the farm and divide the proceeds thereof. They also mentioned the fact that he did not receive any rental income from the farm and was thus financially prejudiced.
- [11] Thereafter, during early 2016, he was summoned to the Charteris & Barnes offices where he was presented with a document purporting to be his resignation from the first respondent and an undated minute of a meeting reflecting his resignation and recording that the second and third respondents would have 50% interest each in the first respondent. He was shocked at the brazenness of this attempt to get rid of him and thus refused to sign the documents.
- [12] On 10 May 2016 his attorneys wrote to the second and third respondents stating that:
 - (a) The members were unable to work together constructively;
 - (b) he did not benefit financially from the operations of the first respondent; and
 - (c) suggesting that they either buy him out, or that the farm be sold and the proceeds thereof divided between the members.

[13] The letter also stated that, failing resolution of these matters, he would launch an application for the liquidation of the first

respondent on the basis that it is operated in a prejudicial and inequitable manner.

[14] His attorneys also wrote to Charteris & Barnes on 13 September 2016, advising them that the problems still persisted and asking for their advice. Charteris & Barnes replied that:

- (a) the members had ongoing disagreements regarding the operations and management of the first respondent;
- (b) all attempts to mediate between them had been unsuccessful;
- (c) they had been instructed by the second and third respondents that he had agreed to resign and they were instructed to draft the documentation necessary to give effect to that agreement; and
- (d) the first respondent was being crippled by the impasse and that it would thus make sense for him to exit.

[15] After he had arranged for the valuation of the farm, his attorneys again wrote to the second and third respondents on 18 September 2018 stating that:

- (a) the farm was worth R3 650 000;
- (b) the 2017 financials indicate that the first respondent owes him R115 870; and
- (c) he suggests that legal advice must be sought on options available to the members to resolve the impasse, failing which he would launch an application for the liquidation of the first respondent.

[16] Their attorneys responded on 29 January 2020 stating that:

- (a) they deny that he is being prevented from using any portion of the farm and blaming him for refusing to co-operate regarding the business of the first respondent;
- (b) they had no intention to sell, sub-divide or liquidate the first respondent;
- (c) that he was free to graze his cattle on the farm as long as it is done within the parameters of the agreement between the parties;
- (d) they deny that he is owed the amount which is reflected in the 2017 financials; and
- (e) the application for liquidation would be defended.

[17] The applicant contends that it is just and equitable for the first respondent to be wound up, since the members cannot work together in an effective or appropriate manner in order to properly manage and conduct the affairs of the first respondent. In this regard, he points to the fact that the first respondent's 2017 financials reflect that a loan had been granted to the third respondent. He did not know about the loan neither did he consent to it.

- [18] Although the financials indicated that he was owed the sum of R155 879 by the first respondent, the second and third respondents have simply denied this. In addition, he did not receive any benefit from the operations of the first respondent since 2013. All the benefits have been allocated solely to the second and third respondents.
- [19] In his answering affidavit the third respondent elected not to traverse the founding affidavit paragraph by paragraph. He has instead given a broad and generalised reply to the issues raised by the applicant in his founding affidavit.
- [20] He admits the allegations regarding the purchase of the farm and says that all three members made equal contributions until the loans had been settled in full. He also admits that casual workers were employed to herd the cattle, but deny that they were employed by the first respondent. He asserts that each of the members had his own employees who were tasked only to look after the cattle of that particular member.
- [21] He asserts that the applicant refused to co-operate with him and the second respondent and refused to contribute to the cost of fencing and repairs to the farmhouse. He alleges that the applicant left the farm in 2011 and thereafter obtained land in the vicinity of the farm. He met the applicant during 2011 when the latter indicated that he wanted to move his cattle back onto the farm because the land was not suitable for grazing. He agreed that the applicant could return his cattle and duly advised the second respondent about this arrangement. The second respondent also gave his approval. The applicant thereafter moved his cattle back onto the farm where they grazed for some time before he removed them again. He thereafter again returned his cattle to the farm without any prior notice to them. On this occasion he noticed that the livestock brought onto the farm by the applicant included cattle of a neighbouring farmer. This was against the rules of the first respondent since only the livestock of members were allowed to graze on the farm.
- [22] He therefore arranged an urgent members' meeting to discuss this problem. The applicant, however, refused to attend the meeting, and instead instructed his employees to remove his livestock from the farm and take them to a neighbouring farm. He noticed, however, that seven head of cattle had remain behind. He instructed his employees to drive the cattle from that camp to another where his and third respondent's cattle were also grazing at the time. He denies that the applicant's cattle were driven onto communal land.
- [23] He denies that the applicant had been refused access to the farm. He asserts that the problem only arose when the applicant wanted to use one of the camps which was not in use at the time.
- [24] He says that the applicant is at liberty to sell his interest if he no longer wishes to be a member of the first respondent. He also contends that it is not possible for the members to deadlock since each member holds a one third share and there would therefore always be a majority in all decisions if the members are not unanimous.

[25] The second respondent filed a confirmatory affidavit supporting the third respondent's opposition, but did not purport to oppose the application. He also annexed a copy of the first respondent's latest financials of in support of his denial that the last financials were those of 2017.

The legal principles

[26] Section 81 (1)(d) of the Companies provides that a company may 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, -

(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.”

[27] In *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting & Investments (Pty) Ltd and Others* 2014(5) SA 1 (SCA) Malan JA, at para. 10, postulated the following definition of “deadlock”:

“The ordinary meaning of ‘deadlock’ is a ‘condition or situation in which no progress or activity is possible; a complete standstill; lack of progress due to irreconcilable disagreement or equal opposing forces”.

[28] And in *APCO Africa (Pty) Ltd v APCO Worldwide Inc.* [2008] ZASCA 64; 2008

(5) SA 615 (SCA), at para 19, the Supreme Court of Appeal held that the deadlock principle 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 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.

[29] Regarding the phrase ‘just and equitable’ Malan JA held in *Thundercats* (supra), at para. 15, that the concept is a recognition of the fact that a limited company is more than a mere judicial entity with a personality of its own and that there is recognition for the fact that “behind it, or amongst it, there are individuals with rights, expectations and obligations inter se which are not necessarily submerged in the company structure”. Thus this ground confers a wide judicial discretion and winding up on this basis:

“...postulates not facts but only a broad conclusion of law, justice and equity as a ground for winding up. The subsection is not confined to cases which were analogous to the grounds mentioned in other parts of the section. Nor can any general rule be laid down as to the nature of the circumstances that had to be considered to ascertain whether a case come within the phrase. There is no fixed category of circumstances which may provide a basis for winding up on the just and equitable ground.”

[30] Although it impossible to define circumstances under which equitable considerations could arise, some of the categories that have been identified are “the disappearance of a company’s substratum; illegality of the objects of the company and fraud

connected in relation to it; a deadlock; oppression; and grounds similar to the dissolution of a partnership. A “deadlock”

which because of a divided voting power at both the board and general meetings, affected the management of the company could also found a liquidation order on this ground.”

(*Thunder Cats* (supra) at para. 16)

[31] In addition, the superimposition of equitable considerations are usually justified where: the association was formed or is being continued on the basis of a personal relationship, involving mutual confidence (often where a pre-existing partnership had been converted into a limited company); an understanding that all of the shareholders (excluding “sleeping partners”) shall participate in the conduct of the business; restriction on the transfer of the members’ interest in the company making it impossible or difficult for him to sell his shares to outsiders.

(*APCO Africa* (supra), at para. 17)

Submissions by counsel

[32] Ms Watt, who appeared for the applicant, submitted that he has made out a case for the winding up of the first respondent. In this regard she referred in particular to fact that the applicant had been excluded from the management and operations of the first respondent for many years and that the second and third respondents have operated the entity for their sole benefit and advantage. In this regard also, she mentioned the fact that the annual financial statements had been prepared without any invitation to the applicant to participate in that process. These annual financial statements reflect unlawful loans to the third respondent and it is thus manifest that only the second and third respondent have been enjoying any benefit, profit or income from the entity.

[33] She argued furthermore that the relationship between the parties has disintegrated, with the only asset of any value being a farming

property, which evidently cannot be managed by all three stakeholders. The relationship has become dysfunctional with no

joint decision making being possible and the current state of affairs cannot be allowed to continue. There is accordingly no longer mutual trust and confidence between the parties and the third respondent's attitude in this application, supported by the second respondent, evinces that the relationship between the members cannot be restored.

[34] Mr Nzuzo, who appeared for the third respondent, submitted that there are material disputes of fact on the papers, in particular, relating to the issue of whose fault it is that the relationship has broken down. He argued that if that issue is resolved on the papers, it must be decided on the basis of the facts put up by the third respondent together with those facts admitted by the applicant.

And he submitted that if the matter is decided on that basis, the applicant cannot succeed because it effectively means that he did not come to court with "clean hands".

[35] He submitted furthermore that since each member holds one third member's interest in the first respondent, it is not possible for any deadlock to arise. The applicant is thus simply a disgruntled member who cannot get his own way and is unwilling to co-operate with the other two members. He argued furthermore that the second and third respondents have agreed that the applicant may exit from the company and sell his interest to an outsider. It can therefore not be said that the applicant "cannot take out his stake and go elsewhere".

Discussion

[36] I am not convinced that the disputes of fact raised by the third respondent in his answering affidavit, if any, are material and

constitute a bar to this matter being decided on the papers.

[37] The fact of the matter is that the following material facts are either common cause or have not been contradicted:

- (a) the consolidated farming property is the only asset of any significance owned by the first respondent;
- (b) the first respondent's accountants have confirmed that the members have been unable to work together constructively, that there has been ongoing disagreement regarding the operations and management of the first respondent, and that it is "being crippled" by their inability to cooperate;
- (c) the applicant is prevented from utilising the farming property and is not receiving any income from the enterprise;

- (d) the second and third respondents disingenuously advised the accountants that the applicant was prepared to resign his membership and transfer his interest to them. This happened without the latter's knowledge;
- (e) the second and third respondents appear to be utilising the first respondent for their sole purposes and benefit;
- (f) the applicant has not been involved in the compilation of the financial statements from 2017 to 2020. He has also not shared in the profit or income for years;
- (g) loans were made to the third respondent without the knowledge, consent or authorisation of the other members;
- (h) the applicant is a creditor of the first respondent and despite the fact that this is reflected in the 2017 financial statements (which have been prepared on the second and third respondents' instructions), they have denied this ; and
- (i) despite the fact that the applicant has on at least two occasions sought agreement with the second and third respondents to resolve the deadlock between them, and has made various proposals in this regard, they have failed to engage meaningfully or even to respond thereto.

[38] In addition, it is common cause that the parties founded the first respondent after their initial business association (which was

conducted on the basis of a partnership), terminated. This new entity also continued on the basis of a relationship involving mutual

confidence and trust. The parties are related to each other and the very nature of the main object and business of the first

respondent requires a functional personal relationship, based on the ability effectively to communicate and cooperate in a bona fide manner.

[39] It is also manifest that even though they may well have been able initially to conduct the business successfully in this manner, the subsequent disagreements compromised their ability to continue on this basis.

[40] It is also significant that the first respondent's only real asset of value is the consolidated farm, which had been purchased for the sole purpose of grazing for the cattle owned by the members. As is evident from the papers, that operation required continuous co-operation and effective communication between the members. It is therefore extremely unlikely that an outsider would purchase the applicant's member interest. He is effectively therefore stuck in an arrangement where his rights as a member are being ignored and without the ability to take his stake and go elsewhere.

[41] I am accordingly satisfied that the applicant has established that the members are deadlocked in the management of the first respondent,

which is resulting in irreparable harm to that business and that it cannot be operated to the benefit of all the members. For the reasons stated above, I am accordingly of the view that it is just and equitable for the first respondent to be wound up.

Costs

[42] Regarding the issue of costs, I take into account that the second and third respondents were cited only as interested parties and given notice that costs orders would be sought against them in the event that they unsuccessfully oppose the application. The third respondent decided to oppose the relief and although he purported to act on behalf of the second respondent, there was no evidence that the latter had in fact become a party to the proceedings. For these reasons, I am of the view that it would be proper for the third respondent to bear the costs of the application.

Order

[43] In the result the following order issues:

- (1) The first respondent be and is hereby placed under final winding up in the hands of the Master of the High Court of South Africa.
- (2) The costs incurred and occasioned by the opposition of the application shall be paid by the third respondent, including the reserved costs of 3 November 2020.
- (3) Any costs not included in paragraph 2 above shall be costs in the winding up of the first respondent.

JUDGE J E SMITH

Judge of the High Court

Counsel for the Applicant : Ms K Watt

Instructed by

: Wheeldon Rushmere & Cole Inc.

119 High Street

Grahamstown

(Ref.: SA/Farenchia/S23058)

For the Third Respondent : Mr S Nzuzo

Instructed by

: N N Dullabh & Co.

5 Bertram Street

(Ref.: Mr Dullabh)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2021/15.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/malgas-v-onega-investment-cc-and-others-unknown-topic-aecghc-2021>

Prepared on 13 October 2026 · Esheria