

SOUTH AFRICA / JUDGMENT

Monama N.O v Monama and Sons Electrical Contractors CC and Another (58613/2021) [2024] ZAGPPHC 211 (19 March 2024)

[2024] ZAGPPHC 211**COURT**

North Gauteng High Court, Pretoria

BEFORE

RJ Groenewald

CASE / FILE NUMBER

58613/2021

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: 58613/2021****(1)****REPORTABLE: YES / NO****(2)****OF INTEREST TO OTHER JUDGES: YES / NO****(3)****REVISED: YES / NO****DATE:**

19 March 2024

SIGNATURE

In

the matter between: LERATO
RIA BEVERLY MONAMA
N.O.
Applicant
(in
her official capacity as the Executrix in the estate of the
late
Namanyane Pontsho Monama
Masters
Reference No: 1[...]
and
MONAMA
AND SONS ELECTRICAL CONTRACTORS CC
First Respondent
(Registration
No: CK1997/050560/23)
MPYANE
ROSEBERRY MONAMA
Second Respondent
(Identity
No: 5[...])

Coram: Groenewald, RJ (AJ)
Heard

on: 14 March 2024

Delivered: 19 March 2023 - This judgment was
handed down electronically uploading to Caselines.

JUDGMENT

GROENEWALD AJ

Introduction:

1. This is an application seeking the final winding-up of the First Respondent, being a close corporation. The Second Respondent holds a 50% member's interest in the First Respondent and the remaining 50% was held by the late Namanyane Pontsho Monama.
2. The Applicant, being the Executrix of the estate, is the widow of the late Mr Monama ("the Deceased"). The Second Respondent, being the holder of the other 50% member's interest in the close corporation, is the late Mr Monama's father.
3. It is common cause that the First Respondent was registered on 19 September 1999. The Second Respondent was initially the sole member of the close corporation.

4. The Applicant and the Deceased was married to each other on 22 June 2015. The Deceased was appointed as an equal co-member of the First Respondent on 17 February 2012 and passed away on 15 April 2019.
5. The Applicant was appointed by the Master of the High Court on 21 May 2019 as the Executrix of the Deceased estate.
6. The Deceased passed away intestate and his 50% member's interest in respect of the close corporation forms part of the assets of the Deceased estate.
7. The Applicant claims that she has been excluded from the operations of the close corporation, that there exists a deadlock between the members, and that it would be just and equitable for the First Respondent to be wound-up.

The urgent application:

8. The Applicant's concern in respect of the way in which the affairs of the close corporation was being conducted resulted in the launching of an urgent application to this court on 19 November 2021. In terms of that application the Applicant sought the winding-up of the First Respondent, alternatively a structured order directed at the sale of the Deceased's 50% member's interest to the First Respondent which was intended to be facilitated by way of an appointment of a referee, appointed in accordance with the provisions of section 38 of the Superior Courts Act 10 of 2013.
9. On 7 December 2021, the Applicant and Second Respondent consented to the following order ("the Order") being made:

"1. The Second Respondent is directed to purchase the 50% membership interest of Namanyane Pontsho Monama ("the deceased") in the First Respondent and to take transfer thereof against payment to the Applicant of a purchase consideration in an amount to be determined by the referee, referred to in paragraph 4 infra, being the fair and reasonable value of the deceased's 50% members interest in the First Respondent as at the date on which this order is made.
2. The Applicant is directed, within 5 days after the payment to her in full of the purchase consideration referred to in paragraph 1 supra, to notify the First Respondent in writing that she waives or abandons any right or entitlement in respect of the deceased's 50% members interest in the First Respondent;
3. The Applicant and the Second Respondent ("the parties") are directed to take all steps and to do all things and sign all documents which are necessary to give effect to the provisions referred to and contained in paragraphs 1 and 2 supra, as expeditiously as possible, failing which the Sheriff of this Court or his/her Deputy is hereby authorised and directed to take such steps and to do such things and/or to sign such documents on behalf of the party or parties to do so for such purpose;

4. Mr Johan Ferreira, forensic chartered accountant, is appointed by the parties as referee, in accordance with the provisions of Section 38 of the Superior Courts Act, No 10 of 2013 ("the Act") in order to determine the value of the deceased's 50% members interest in the First Respondent as at the date of the deceased's demise (15 April 2019) and as at the date on which this order is made (7 December 2021);
5. The valuation of the deceased's 50% members interest in the First Respondent is to be determined by the referee, referred to in paragraph 4 supra, shall:
 - 5.1 make no allowance or deduction for the fact that the deceased held 50% members interest in the First Respondent and there should be no discount for that fact, if applicable;
 - 5.2 include the value of any other assets which belong to the First Respondent, including but not limited to stock, claims and/or vehicles;
 - 5.3 be on the basis as if all payments in respect of legal costs, legal fees or related expenses, except taxed costs in respect of this application and the prior application under case no. 64482/2020, made by the First Respondent for legal costs (including all fee deposits) and disbursements up to the date of valuation in respect of this application and the prior application under case no. 64482/2020, only in respect of the aforementioned two matters, had not been paid or borne by the First Respondent, and that the First Respondent's cash and expense possession shall be notionally be adjusted accordingly; and
 - 5.4 take into account any adjustment/s considered necessary to account for any inventory, work in progress, quotations submitted for future projects and other categories of inventory on hand at the First Respondent, as at date hereof.
6. Mr Johan Ferreira's costs are to be paid in the first instance to him by the First Respondent prior to the final determination and allocation of the value of the members interest, as provided for and envisaged in paragraph 4 supra;
7. Mr Johan Ferreira is required to meet with and receive representations from each of the parties and their financial representatives so as to enable him (Mr Johan Ferreira) in carrying out his function and duties or obligations as provided for herein;
8. Mr Johan Ferreira shall have all the powers mutatis mutandis contemplated and provided for in Section 38 of the Act, and shall include the power to assess what he considers to be a fair or reasonable value for inventory in carrying out the valuation of the deceased's 50% members interest in the First Respondent;
9. In evaluating the deceased's 50% members interest in the First Respondent, Mr Johan Ferreira shall have the power to make such adjustments as he may consider fair or reasonable to arrive at what, in his professional expert opinion, would constitute a 'fair price' of the deceased's 50% members interest in the First Respondent, to be acquired by the Second Respondent as set out in paragraph 1 supra;

10. Mr Johan Ferreira's report will serve before this Court *mutatis mutandis* as would a referee's report, as provided for and in accordance with the provisions of Section 38 of the Act, if necessary; and
11. The First Respondent is directed and responsible to pay the Applicant's and the Second Respondent's taxed costs of this application, including the costs consequent (sic) the employment of two counsel (senior counsel and junior counsel), in respect of both the aforementioned parties."

10. In relevant part, section 38 of the Superior Court Act provides as follows:

"(1) The Constitutional Court and, in any civil proceedings, any Division may, with the consent of the parties, refer—

- (a) any matter which requires extensive examination of documents or a scientific, technical or local investigation which in the opinion of the court cannot be conveniently conducted by it; or
- (b) any matter which relates wholly or in part to accounts; or
- (c) any other matter arising in such proceedings,

for enquiry and report to a referee appointed by the parties, and the court may adopt the report of any such referee, either wholly or in part, and either with or without modifications, or may remit such report for further enquiry or report or consideration by such referee, or make such other order in regard thereto as may be necessary or desirable.

- (2) Any such report or any part thereof which is adopted by the court, whether with or without modifications, shall have effect as if it were a finding by the court in the proceedings in question.
- (3) Any such referee shall for the purpose of such enquiry have such powers and must conduct the enquiry in such manner as may be prescribed by a special order of the court or by the rules of the court.
- (4) For the purpose of procuring the attendance of any witness (including any witness detained in custody under any law) and the production of any document or thing before a referee, an enquiry under this section shall be deemed to be civil proceedings.

..."

11. Under 38 (1) of the Act the court may refer a matter for enquiry and report to a referee with the consent of the parties. A referee is required only to make factual findings. In *Wright v Wright and Another* - 2013
- (3) SA 360 (GSJ) (upheld on appeal) the Corut held at 367I (dealing with the similar provision, section 19bis, in the previous Act) that:

“The court is afforded a wide discretion in terms of s19bis of the Act. It may adopt any one of the courses provided for in the section: it may adopt the report of the referee either wholly or in part, and either with or without modifications, or it may remit the report for further inquiry or report or consideration by the referee, or make such other order, in regard to the findings of the referee, as may be necessary or desirable. The power of the court in the latter instance would, in my view, include the power to set aside the report if it is patently unreasonable, irregular or incorrect, or to refer the report or aspects thereof to oral evidence or trial, if a real dispute of fact, as envisaged in Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1 949 (3) SA 1155 (T) at 1163, can be shown to exist. The court may, therefore, adopt any one of the said courses it deems 'necessary or desirable'. The court may, however, only refer the question of whether to adopt the report or not to oral evidence or trial, if a real dispute of fact is shown to exist in relation to findings of the referee.”

The Court further dealt with the purpose of referring a matter to a referee at par 19 of the same judgment:

“As observed by the court in Gasa v Singh NO (KZD case No 13338/2008, 25 June 2009; 2009 JDR 0649) at paras 14 – 15, the purpose of referring a matter to a referee in terms of s 19bis:

'(I)s that either where there are highly technical aspects where the assistance of a neutral expert is required or where the bulk of the documentation is such that a referee can streamline the process, the report of the referee would not only assist the court but help to limit the length of the proceedings by highlighting (through its analysis of the documents or the factual situation relating to the accounts) exactly which aspects or incidents or transactions are in dispute between the parties. The report of the referee does not bind the court but assists it by in essence summarising the results of the referee's investigations... .

In the present matter for instance the referee would be able in her report (as already foreshadowed in the opinion of senior counsel) to pinpoint the incidents or transactions on which she relies for coming to the conclusion that the Trust was or was not the alter ego of the applicant. It is then a straightforward matter for the parties to ascertain which specific areas of the report or which incidents or transactions are in dispute and for a hearing to proceed on those aspects only. Without the report of the referee a great deal of unnecessary evidence may be led as well as extensive discovery having to be made with the consequent exchange of documents before the issues in dispute become clear. The normal Rule 37 procedures in this context are rather cumbersome and would not be of the same assistance in resolving issues and delineating the areas of dispute in relation to the significance or otherwise of particular transactions. Similarly pleadings containing as they do only the factual framework and legal conclusions relied upon are also not of great assistance. The report of the referee however, if properly compiled, will focus on those transactions that are pertinent.”

12. Paragraph 10 of the Order provided specifically that Mr Johan Ferreira's report would serve before this court, mutatis mutandis, as a referee's report, as provided for in accordance with the above quoted section of the Act, if necessary. The court

clearly made provision for further orders to be made pursuant to the receipt of Mr Ferreira's report. That Accords with what the section provides.

13. Section 38 of the Act is not something which is unilaterally imposed by the Court on the parties – it has the prerequisite that the order must be made with the consent of the parties. In the present matter it is common cause that the Order was the result of the agreement between the parties, and they structured the order in its final form. Section 38 implies that the parties should participate on a bona fide fashion with the process facilitated by the referee. It would run contrary to the consent which sparked the referral if a party was to obstruct the referee in his investigations and delay the finalisation thereof. The referee in turn is bound by the strictures of the order and must report on facts.
14. The Order anticipated the bona fide participation by the parties with the provided mechanism. The Second Respondent does not disavow knowledge of the Order and the parties were well-aware of what was to be expected from them. Although, the expert, Mr Ferreira was intended to play an active role in establishing the value of the Deceased's 50% member's interest, it is also so that it was expected and anticipated that the Respondents would render the necessary documentation, and also participate in that process.
15. The founding papers tell a tale of Mr Ferreira's attempts to obtain information from the Second Respondent, the Respondents' attorney, from the Second Respondent's accountant and from the Second Respondent. Mr Ferreira's endeavours was only partially successful insofar as limited information was ultimately obtained by him. Mr Ferreira proceeded to prepare the report which forms part of the founding papers as annexure "E" at Caselines A70.
16. Mr Ferreira details the information which was received as well as the information which he deemed imperative to enable him to conduct the valuation of the member's interest.
17. Under the rubric titled "Analysis Performed" Mr Ferreira concludes that
"Due to the lack of documentation received, I performed an analysis on the bank statements and compared the results thereof to the financial statements, to ascertain whether there is any correlation between the bank statements and the financial statements or certain line items in the financial statements. Based on the results of the analysis, it is my view that the financial statements presented are simply not correct and that various suspicious transactions occur that should be investigated".
18. Mr Ferreira's report contains several serious factual findings which certainly warranted a full and comprehensive response thereto by the Respondents.
19. Ultimately, Mr Ferreira reached the following conclusions:
"5.1 The Respondents refused to co-operate and as a result I cannot continue with or complete my task. I can therefore not comply with the court order."

5.1 It is my respectful submission that it is highly unlikely for the situation to improve and as a result I am currently in stalemate.

5.3 I am led to believe that a second company has operated parallel to Monama and Sons.

5.4 The financial statements do not seem to be a true reflection of the actual affairs of the company.

5.5 Suspicious transactions are incurred through the bank account of Monana and Sons and a recording of these transactions, other than to a loan account, does not seem possible. There is however no loan account recorded in the financial statements.

5.6 In my opinion the only solution is for Monama and Sons to be wound up. The insolvency inquiry would probably ensure that the true facts and value are established.”

20. Insofar as Mr Ferreira’s report includes opinions on non-factual issues, Mr Botes SC on behalf of the Applicant at the onset of his address, and correctly so in my opinion, conceded that such portions of the Report should be disregarded. Paragraph 5.6 of the conclusions is an example thereof and this Court is not bound to the opinion expressed therein by Mr Ferreira. However, there are serious matters raised in the report which warranted a full and comprehensive response thereto by the Second Respondent.

The supplementary affidavit:

21. The present application was set down for hearing on 15 February 2024. The Second Respondent delivered a supplementary affidavit at a late stage, but the Applicant responded thereto. The grounds presented in respect of seeking leave for the admission of the affidavit were somewhat scant, but considering the circumstances the supplementary affidavit was admitted.

22. The Second Respondent stated at paragraph 6 of the supplementary affidavit that the apparent purpose of the affidavit is:

22.1. To reiterate that the Second Respondent remain serious to purchase the 50% member’s interest in the First Respondent;

22.2. To provide facts that indicate he was willing and eager to comply with the court order dated 7 December 2021;

22.3. To maintain and remain confident that there exists no basis in law or fact for the First Respondent to be liquidated;

22.4. To provide facts that after the filing of the answering affidavit the Second Respondent and his daughter attempted unsuccessfully to engage Mr Hawman, ostensibly the previous accountant of the First Respondent, to obtain information and documents from him; and

22.5. That in consequence of the aforesaid, they were forced to consult and appoint Mrs Karien Van der Schyff, an accountant from SBLJ Financial Accountants, to assist in providing detailed ledgers and trial balances from 2017 to December 2021.

23. In paragraph 8 of the further affidavit, it is stated that the facts deposed to in the supplementary affidavit arose after the delivery of the answering affidavit.
24. The purported attempts by the Second Respondent to contact Mr Hawman (the First Respondent's accountant) and the intention, failing a response from Mr Hawman, to appoint a new accountant was not referred to in the answering affidavit. In fact, the contrary impression is created in the Answering Affidavit, that Mr Hawman was ready to assist with such information as may be requested from him – he only waited for instructions to do so from the Second Respondent. The question arises why that instruction was not given by the Second Respondent.
25. The case made in the further affidavit is primary based upon the premise that the Second Respondent has now instructed a new accountant, Ms Van der Schyff, and that the information requested would now be provided. Considering the letter from Ms Van der Schyff attached as annexure “MS2” at Caselines 001-117 she clearly presents several important qualifications relating to the documents which she was and attached

to the supplementary affidavit, namely:

“The source documents available to generate the management statements were bank statements only. I did not have access to any supporting

documents, that is invoices for customers and suppliers.

As a result I was not able to verify any transactions, the management statements were compiled with the information available.

The assistance I can provide for Mr Monana (sic) is thus restricted to the trading figures as implied in the management statements.

I have no information on record regarding non-current or current assets except for the bank balances.”

26. The very pertinent and important qualifications contained in the letter by Ms Van der Schyff is not unimportant. When asked what value can be given to the documents prepared by Ms Van der Schyff in light of the above qualifications counsel on behalf of the Second Respondent could not provide any better answer than stating that he could not take the matter any further. Ms Van der Schyff's summaries therefore do not address the inherent problem in the financial information provided, and perhaps more pertinently the information not provided, as raised in Mr Ferreira's report.

27. The Second Respondent's counsel contended that nothing turns on the findings by Mr Ferreira that there must be a second bank account as reference was made in the initial application to two bank accounts. The submission ignores the email by Mr Ferreira of 2 March 2022 which included a list of information which specifically included "Bank statements from 1 March 2019 to 31 December 2021". It is apparent that only the bank statements relating to one account was provided whilst Mr Ferreira's request clearly related to all bank statements of the First Respondent. The information requested by Mr Ferreira should have been readily available and in existence.
28. Not only does this demonstrate that the Second Respondent was disingenuous in providing selective source information, but also that the complaint about Mr Ferreira's findings is largely without merit. The Second Respondent cannot on the one hand fail to provide central source documents, and then on the other hand complain when Mr Ferreira concludes that there must be a further bank account and therefore further bank statements.
29. The Second Respondent contends that the reason why he did not respond to certain requests for information is because the email was sent to his daughter who left the employ of the First Respondent. Mr Botes SC on behalf of the Applicant pointed out that this statement is clearly false for, among other reasons: the Second Respondent has throughout used a single email address; the Second Respondent responded on at least one occasion to an email sent to that address; and the Second Respondent's daughter also replied using the same email address after the date when she allegedly left the service of the Second Respondent. In any event, Mr Ferreira also emailed the Second Respondent's attorney and his accountant. The purported explanation for the failure to provide the source information appears contrived and is fraught with inherent contradictions.
30. I have already referred to the role of consent in a referral to a referee in terms of section 38 of the Act and that there is an implied duty upon the parties to participate in a bona fide way with the process. The conclusion must be that the Second Respondent was obstructive and ignored requests for information.

The impression from Mr Ferreira's report and the factual findings contained therein justifies a conclusion that the summarised

financial statements provided is unreliable. There is a pattern which arises that demonstrates that the Second Respondent has no intention to allow unfettered access to the First Respondent's financial information. Even in the absence of the Order the other member of the close corporation has a statutory right to the information.

31. The Second Respondent's counsel contended that Mr Ferreira should have proceeded to meet with the parties – even where his requests for documents was not complied with. It does not come as a surprise that Mr Ferreira would want to first do his own investigation and thereafter, when he has considered the objective facts, meet with the parties to discuss any questions which may have arisen. The Second Respondent made this impossible and it is his conduct which has led to the process ending at an impasse.

Is there a deadlock:

32. Section 67 of the Close Corporations Act²⁷ provides that Part G of chapter 2 of the Companies Act, 71 of 2008 also applies to corporations. Section 81(1)(d) of the Companies Act, 71 of 2008 provides for the winding up of a solvent company by the court under certain circumstances, and specifically where:

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

...

- (d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that-
 - (i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and-
 - (aa) irreparable injury to the company is resulting, or may result, from the deadlock; or
 - (bb) the company'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;”
33. The First Respondent is a close corporation. The Second Respondent conceded that the First Respondent was similar to a small family business run by the members of the close corporation akin to a partnership. This being so the members of the close corporation, in contrast to a company run by a board of directors, would be expected to play a role in the day-to-day affairs of the close corporation. The Second Respondent took no step since the appointment of the Applicant to involve her in any of the affairs or decisions of the First Respondent.
34. In *Cilliers NO and Others v Duin & See (Pty) Ltd* 2012 (4) SA 203 (WCC) the Court held at paragraphs 5 and 6 that:

“[5] Jurisprudence concerning the winding up of companies on just and equitable grounds has employed the concept of 'deadlock' in two quite distinguishable senses. Deadlock in the strictly literal sense — what might be termed 'complete deadlock' — applies in the case where, because the directors or shareholders are equally divided, there is an inability to make decisions that are necessary for the company to function. The wider or looser sense of the concept is encountered in the context of the so-called 'deadlock principle', which is applied in respect of the consequences of a breakdown of trust and confidence between members of a company which, because of its peculiar character, is in substance akin to a partnership, and thus amenable — subject to important qualifications — to dissolution as a partnership would be, if relations between the partners became untenable through no fault of the partner claiming the dissolution. The dichotomy between the two concepts of deadlock is highlighted in the difference between the majority and the minority judgments in Re Yenidje Tobacco Co Ltd [1916] 2 Ch 426 (CA); see also Moosa NO v Mavjee Bhawan (Pty) Ltd and Another 1967 (3) SA 131

- [6] Scope for confusion about the relevant import of the judgment in Budge arises from the judge's reference to the 'judicially developed deadlock category' because that might easily be mistaken to include the 'deadlock principle'. On an analysis of the judgment as a whole, however, it is evident that the learned judge's aforementioned observations were intended to pertain only to deadlock understood in the strict or narrow sense of the word. Indeed the winding up orders that were granted in Budge, apparently in terms of s 81(1)(d)(iii) of the 2008 Companies Act, were plainly premised on the application of the deadlock principle; in other words in the context of the use of the term in its aforementioned wide or loose sense.”
35. In Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and Others 2014 (5) SA 1 (SCA) the Court dealt with the deadlock principle within the context of section 81(1)(d) and held in paragraph 14 that:

“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.”

and at par 15 dealing with the discretion of the Court:

“Section 344(h) of the 1973 Act provides that a company may be wound up by the court when it is 'just and equitable' to do so. A 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 came within the phrase. There is no fixed category of circumstances which may provide a basis for a winding-up on the just and equitable ground. In Sweet v Finbain it was said:

'The ground is to be widely construed; it confers a wide judicial discretion, and it is not to be interpreted so as to exclude matters which are not ejusdem generis with the other grounds specified in s 344. The fact that the Courts have evolved certain principles as guides in particular cases, or examples of situations where the discretion to grant a winding-up order will be exercised, does not require or entitle the Court to cut down the generality of the words "just and equitable".'

Section 344(h) gave the court a wide discretion in the exercise of which certain other sections of the Act had to be taken into account."

36. The Applicant does not have to prove a complete deadlock. In Marshall[1] the Court held that:

"But actual deadlock is not an essential to the dissolution of a partnership. Lindley on Partnership, 11th ed., p. 691, says that

'keeping erroneous accounts and not entering receipts, ... continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation, have been held sufficient to justify a dissolution'.

The learned author continues:

'It is not necessary, in order to induce the Court to interfere, to show ... any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it.'

These principles were applied in the case of Armstrong v Wallwork, 1913 CPD 978."[2]

37. The authors of Blackman: Commentary on the Companies Act 2008 (Vol 2, p 2-1343) summarises the legal principle as follows:

"The meaning of 'just and equitable' in this context as a ground for winding-up is therefore important. Previous judicial decisions in this regard, however, are primarily based on a general winding-up discretion, such as that which was afforded to the court in terms of s 344(h) of the 1973 Act. Under that section the court could wind up a company if 'it appears to the Court that it is just and equitable that the company should be wound up'. Accordingly, not all the judicial dicta noted below are of equal force in regard to the new sections and they should be viewed in this context. The courts have held as follows in relation to the 'just and equitable' requirement in this context. Unlike the other grounds for winding-up, this ground postulates not facts, but a broad conclusion of law, justice and equity as a ground for winding-up. The words 'just and equitable' are not to be interpreted ejusdem generis with the situations set out in the other grounds. Instead, these words confer on the court a discretionary power of the

widest character. However, not only is this discretion of a judicial nature, requiring that grounds be given for its exercise which can be examined and justified, but it is also a discretion only in the sense that, since the words 'just and equitable' do not themselves constitute a statement of fact and are not capable of an all-embracing definition, the court is required to exercise its judgement in arriving at the required conclusion of law to be derived from the facts placed before it. To arrive at that conclusion, the court is obliged to examine all the facts placed before it and to determine which of these facts are relevant to an opinion on the question of justice and equity; and, difficult though 'justice and equity are to define, they have to be seen as setting an objective standard that will be the same in every court in the land'.

The justice and equity is that between the competing interests of those concerned and, in reaching its conclusion, the court is obliged to take into account every consideration that is fair and reasonable for those interests.”

38. The court will order the winding-up of a company where, owing to internal disputes, there is a deadlock in its administration which cannot be resolved in terms of its constitution, and which renders the company incapable of carrying on its business. Where the deadlock occurs in the general meeting, or the general meeting cannot or will not act, it will usually be just and equitable that the company be wound up.[3]
39. It is clear from the papers that the Applicant has been locked out of the control of the First Respondent and that the Second Respondent dictates its affairs. The acerbic allegations contained in the answering affidavit speak of the great animosity which exists between the Second Respondent and the Applicant. It is abundantly clear from the affidavits that there is a deadlock between the Second Respondent and the Applicant.
40. The Order gave the opportunity to the parties to finalise the sale of the member's interest in the First Respondent in an orderly, structured, and organised fashion. The Second Respondent frustrated that process to the point where it came to naught. The court is not convinced by the explanation of the Second Respondent that he was blissfully unaware of the requests by Mr Ferreira for information. A pertinent lacuna in his answering affidavit comes in the failure to explain why he did not take any proactive steps to contact Mr Ferreira or instruct his attorneys to contact Mr Ferreira to finalise the process. There is also no explanation from the Second Respondent's attorneys as to why they did not respond to Mr Ferreira's email or whether they raised the email with the Second Respondent.
41. The Second Respondent must have been aware that information would have to be provided to facilitate the valuation by Mr Ferreira. It is not sufficient to adopt an armchair approach which could only result in the failure of the procedure envisioned by the Order.
42. As the matter stands, there is no doubt that the parties are unable to co-operate in respect of the affairs of the First Respondent and in respect of a potential sale of the Deceased's member's interest. Albeit that I accept that the Court has a discretion to refer the matter back to the referee, I doubt whether that would provide an effective solution.

43. It is also clear that the financial information provided in respect of the First Respondent is such that there are good reasons to doubt the veracity thereof. Insofar as the Second Respondent contends that he still wishes to purchase the 50% member's interest in the First Respondent, it is a case of too little too late.
44. It is also in the interest of the estate and the heirs of the estate that this matter be brought to finality. The Second Respondent has been recalcitrant and obstructive. The Second Respondent's conduct is symptomatic of the deadlock which exists.
45. Under these circumstances the court finds, after considering all the relevant facts, that it would be just and equitable to grant a provisional winding-up order.

The order:

46. Accordingly, the following order is made:

IT IS ORDERED

1. The First Respondent is hereby placed under provisional winding-up in the hands of the Master of the High Court, Pretoria.
2. That a rule nisi be issued, with return date on the opposed motion roll of 29 July 2024 at 10:00 or as soon thereafter as the matter may be heard, calling upon all interested parties, to show cause, if any, why the following final order should not be made:-
 - 2.1 a final winding-up order is granted in respect of the First Respondent; and
 - 2.2 the costs of this application are costs in the winding-up of the First Respondent.
3. That service of this order be effected as follows: -
 - 3.1 by the Sheriff:
 - 3.1.1 on the First Respondent at its registered office;
 - 3.1.2 on the employees of the First Respondent; and
 - 3.1.3 on every registered trade union that may be found to represent any of the employees of the First Respondent; and
 - 3.2 on the South African Revenue Service, Pretoria.
 - 3.3 by publication in The Citizen newspaper and in the Government Gazette.
4. The costs will be costs in the liquidation of the First Respondent.

RJ GROENEWALD (AJ)

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 19 March 2024.

For the Applicant: Adv F Botes SC with Adv C Barreiro Instructed by: Arthur Channon Attorneys Inc. For the Respondents: Adv ASL van Wyk Instructed by: Hefferman Attorneys Matter heard on: 14 March 2024 - Court 8F

Judgment

date: 19 March 2024

- [1] Marshall v Marshall (Pty) Ltd and Others - 1954 (3) SA 571 (N) at 579.
- [2] See also: Apco Africa (Pty) Ltd and Another v Apco Worldwide Inc - [2008] ZASCA 64; 2008 (5) SA 615 (SCA) at par 21.
- [3] Blackman I: Commentary on the Companies Act 1973, RS 8, 2011 ch14-p110.

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